

(60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

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IN THE MATTER OF  
NEW ENGLAND CONFECTIONERY CO.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(a)  
OF THE CLAYTON ACT

*Docket 7732. Complaint, Jan. 6, 1960—Decision, Nov 7, 1961*

Consent order requiring a Cambridge, Mass., confectioner to cease charging its "Price Class 2" customers—composed of "Special Retailers" such as drug chains and grocers, grocery co-ops, and department stores—10% less on purchases of its "Candy Cupboard" products than their competitors in the "Price Class 1" category, which include "Regular Retailers" such as independent retail drug and specialty stores and ice cream parlors.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated and is now violating Section 2(a) and Section 2(d) of the amended Clayton Act (U.S.C. Title 15, Section 13), hereby issues its complaint as follows:

COUNT 1

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts with its principal office and place of business located at 254 Massachusetts Avenue, Cambridge, Massachusetts.

PAR. 2. Respondent is engaged in the business of manufacturing, distributing and selling candy and confectionery products. Respondent's total sales for the year 1958 were approximately \$17,000,000.

PAR. 3. These candy and confectionery products were sold by respondent for use, consumption, or resale within the United States and respondent causes them to be shipped and transported from the state of location of its principal place of business to purchasers located in states other than the state in which the shipment or transportation originated.

PAR. 4. Respondent maintains a course of trade in commerce, as "commerce" is defined in the amended Clayton Act, in such products described, among and between the States of the United States.

Respondent maintains and operates a manufacturing plant in Cambridge, Massachusetts. From this plant it ships and sells throughout the United States to various purchasers located in the several States of the United States including New York.

PAR. 5. In the course and conduct of its business in commerce, respondent is discriminating in price between different purchasers of its products of like grade and quality by selling to some purchasers at higher and less favorable prices than it sells to other purchasers competitively engaged in the resale of its products with the non-favored purchasers.

For example, for many years respondent has classified its retail customers in two categories. "Price Class 1" includes the "Regular Retailers" such as independent retail drug stores, specialty stores, and ice cream parlors, which purchase respondent's "Candy Cupboard" products. "Price Class 2" includes the "Special Retailers" such as chain drugs, chain grocers, grocery co-ops, and department stores. "Price Class 2" accounts receive a special price list which is consistently 10% less on "Candy Cupboard" products than the prices quoted for those accounts in "Price Class 1". This 10% price differential is reflected in the prices of all "Candy Cupboard" candies, which comprise the substantial volume of respondent's candy business.

PAR. 6. In the course and conduct of its business in commerce, respondent is competitively engaged with other corporations, individuals, partnerships, and firms in the manufacture, distribution, and sale of its products.

PAR. 7. The effect of respondent's discriminations in price, as alleged, may be substantially to lessen, injure, destroy or prevent such competition as alleged or tend to create a monopoly in the lines of commerce in which respondent and its purchasers are engaged.

PAR. 8. The foregoing acts and practices of the respondent, as alleged, violate Section 2(a) of the amended Clayton Act (U.S.C. Title 15, Section 13).

## COUNT 2

PAR. 9. Each of the allegations contained in Paragraphs One through Four are hereby realleged and made part of this Count as fully and with the same effect as though set out in full.

PAR. 10. In the course and conduct of its business in commerce, respondent has been paying advertising and promotion allowances to certain favored customers without making the allowances available on proportionally equal terms to all other customers competing in the distribution and sale of its products.

For example, respondent extends a cooperative advertising allowance amounting to three percent of the previous year's purchases to its customers. In practice, this offer has been made only to accounts such as department stores and selected drug accounts.

Such allowances were not offered or made available on proportionally equal terms by respondent to other customers competing in the resale of respondent's products of like grade and quality with those customers receiving the allowances.

PAR. 11. The acts and practices of respondent, as alleged, violate Section 2(d) of the amended Clayton Act (U.S.C. Title 15, Section 13).

*Mr. Franklin A. Snyder* for the Commission.

*Hicks, Kuhlthau & Nagle*, by *Mr. Douglas M. Hicks*, New Brunswick, N.J., for respondent.

## INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

On January 6, 1960, the Federal Trade Commission issued its complaint against the above-named respondent charging it with violating the provisions of subsections (a) and (d) of section 2 of the Clayton Act, as amended, in connection with the manufacturing, distributing and selling of candy and confectionery products. On August 16, 1961, the respondent and counsel supporting the complaint entered into an agreement containing a consent order to cease and desist in accordance with section 3.25(a) of the Rules of Practice and Procedure of the Commission.

Under the foregoing agreement, the respondent admits the jurisdictional facts alleged in the complaint and agrees among other things, that the cease and desist order there set forth may be entered without further notice and shall have the same force and effect as if entered after a full hearing. The agreement includes a waiver by the respondent of all rights to challenge or contest the validity of the order issuing in accordance therewith; and recites that the said agreement shall not become a part of the official record unless and until it be-

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## Order

comes a part of the decision of the Commission, and that it is for settlement purposes only, does not constitute an admission by the respondent that it has violated the law as alleged in the complaint, and that said complaint may be used in construing the terms of the order. The hearing examiner finds that the content of the said agreement meets all the requirements of section 3.25(b) of the Rules of Practice.

The agreement provides the complaint allegation of "primary line injury", namely, to substantially lessen competition or tend to create a monopoly in the line of commerce in which the respondent is engaged, may be dismissed on the grounds that the evidence in the light of subsequent developments is insufficient to substantiate the allegation. This appears to be an appropriate basis for dismissal.

The agreement further provides that the complaint be dismissed as to Count II of the complaint, involving charged violations of section 2(d) of the Clayton Act, as amended, for the reasons set forth in said agreement, which also appear to be appropriate.

This proceeding having now come on for final consideration by the hearing examiner on the complaint and the aforesaid agreement for consent order, and it appearing that said agreement provides for an appropriate disposition of this proceeding, the aforesaid agreement is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with section 3.21 of the Rules of Practice; and in consonance with the terms of said agreement, the hearing examiner makes the following jurisdictional findings and order:

1. Respondent, New England Confectionery Co., is a corporation existing and doing business under and by virtue of the laws of the State of Massachusetts, with its office and principal place of business located at 254 Massachusetts Avenue, in the City of Cambridge, State of Massachusetts.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent hereinabove named. The complaint states a cause of action against said respondent under subsections (a) and (d) of section 2 of the Clayton Act, as amended.

## ORDER

*It is ordered,* That respondent, New England Confectionery Co., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale of candy products of like grade and quality in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who in fact competes in the resale and distribution of the respondent's products with the purchaser paying the higher price.

*It is further ordered*, That the allegation of substantial lessening of competition or tendency toward monopoly in the line of commerce in which respondent is engaged, be dismissed.

*It is further ordered*, That Count II of the complaint should be, and hereby is, dismissed.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The Commission having considered the initial decision of the hearing examiner filed September 25, 1961, wherein he accepted an agreement containing a consent order to cease and desist theretofore executed by respondent and counsel in support of the complaint; and

It appearing that the word "forthwith" contained in the sixth line of the first paragraph of the order in the aforesaid agreement has been omitted from the order contained in the said initial decision, and that this departure from the agreement of the parties should be corrected:

*It is ordered*, That the initial decision of the hearing examiner filed September 25, 1961, be, and it hereby is, modified by inserting the word "forthwith" after the word "do" in the sixth line of the first paragraph of the order therein.

*It is further ordered*, That the initial decision filed September 25, 1961, as so modified, shall, on the 7th day of November 1961, become the decision of the Commission.

*It is further ordered*, That respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

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IN THE MATTER OF

INTERNATIONAL STAPLE & MACHINE COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 3 OF THE CLAYTON ACT