

days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF
SHREVEPORT MACARONI MANUFACTURING COMPANY,
INC.

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

Docket 7719. Complaint, Jan. 5, 1960—Decision, Jan. 24, 1962

Order requiring a Shreveport, La., manufacturer of a wide variety of noodles, spaghetti, macaroni, and related items sold to retail chains, independent grocery stores and wholesalers, many doing business in neighboring States, to cease discriminating in price in violation of Sec. 2(d) of the Clayton Act by such practices as paying as compensation for advertising its products \$1883 in 1958 and \$1130 in 1959, to Childs Big Chain, a division of the Kroger Co., and \$212 in 1958 and \$214 in 1959 to J. Weingarten, Inc., chain stores—in both cases, though making deliveries only to Louisiana locations, doing business across state lines—while not making proportional payments available to competitors of the favored customers.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly described, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Shreveport Macaroni Manufacturing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana, with its office and principal place of business located at 102 Common Street, Shreveport, La.

PAR. 2. Respondent is now and has been engaged in the business of manufacturing and selling a wide variety of noodles, spaghetti, macaroni and related items to retail chain store organizations, independent grocery stores, and wholesalers in the States of Louisiana, Texas, Arkansas, Mississippi, Tennessee and Oklahoma. Respondent's sales are substantial and exceeded \$240,000 during the year 1958.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its products to be transported from the respondent's principal place of business, located in Louisiana, to customers located in other states of the United States.

PAR. 4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

PAR. 5. For example, during the year 1958 respondent contracted to pay and did pay to Childs Big Chain of Shreveport, Louisiana, a division of The Kroger Company, \$1,900 as compensation or as an allowance for advertising or other services or facilities furnished by or through Childs Big Chain in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with Childs Big Chain in the sale and distribution of products of like grade and quality purchased from respondent.

Initial Decision

60 F.T.C.

PAR. 6. The acts and practices of respondent, as alleged above, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. Andrew C. Goodhope for the Commission.

Mr. Robert G. Pugh and *Mr. John L. Schober, Jr.*, of *Pugh & Schober*, of Shreveport, La., for respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

In the complaint, the respondent is charged with having made discriminatory payments to some of its customers in violation of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13).

The case of the Commission was put in at a one-day hearing held at Washington, D.C., and subsequent thereto the hearing examiner denied a motion of the respondent to dismiss the complaint. The respondent elected not to put in any testimony and the proceeding was closed for the receipt of evidence.

The hearing examiner has given consideration to the proposed findings filed by the parties hereto, and all findings of fact and conclusions not hereinafter specifically found or concluded are herewith rejected.

Upon consideration of the entire record herein, the hearing examiner makes the following findings of fact:

Respondent, Shreveport Macaroni Manufacturing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana, with its office and principal place of business located at 104 Common Street, Shreveport, La.

Respondent is now and has been engaged in the business of manufacturing and selling a wide variety of noodles, spaghetti, macaroni and related items to retail chain store organizations, independent grocery stores, and wholesalers in the States of Louisiana, Texas, Arkansas, Mississippi, Tennessee and Oklahoma. Respondent's sales are substantial and exceeded \$240,000 during the year 1958. All of its products are sold under the brand name "Banquet."

In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its products to be transported from the respondent's principal place of business, located in Louisiana, to customers located in other states of the United States.

In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in considera-

tion for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

Childs Big Chain, a division of the Kroger Company, operates 33 stores located in 12 cities in Texas, four cities in Louisiana, two cities in Arkansas and Texarkana which it lists as U.S.A. (Texarkana—twin cities on Arkansas-Texas border.) Its general office is located at Shreveport, Louisiana. Effective as of January 1, 1958, and until further notice, respondent, by letter, agreed to pay Childs an advertising allowance of 10¢ a case on certain of its products based on yearly purchases of 9,000 cases or more. The letter recites that "This offer is available to all similiar buyers of Banquet Brand, who purchase 9,000 cases or more annually," but one of respondent's officials testified that respondent did not have any customers, other than Childs, in Shreveport, Lake Charles, Houston, Beaumont, Galveston or any of those areas, who buy 9,000 cases or more a year of their products. Pursuant to the agreement respondent paid to Childs the sum of \$996.10 in 1958 and \$649.70 in 1959. The record shows that an additional \$176.10 is due Childs by reason of purchases made by it from October 1 to December 31, 1959. In 1958, the respondent paid to Childs the sum of \$887 for its participation in an anniversary sale conducted by Childs and in 1959 made four payments of \$120.00 each, or a total of \$480.00, in connection with a "Television Package Deal." Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with Childs Big Chain in the sale and distribution of products of like grade and quality purchased from respondents.

J. Weingarten, Inc., operates a large chain of retail grocery stores located in the States of Texas, Louisiana, and Tennessee and its principal place of business is in Houston, Texas. During the year 1958 respondent paid the total sum of \$212.02, and in 1959 the total of \$213.52, as compensation or as an allowance for advertising or other services or facilities furnished by or through J. Weingarten, Inc., in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with J. Weingarten, Inc., in the sale and distribution of products of like grade and quality purchased from respondent.

It is urged by respondent that there is no showing that respondent granted any allowances or benefits in commerce to any customer who was in competition with any other customer.

The complaint is based upon subsection (d) of Section 2 of the Clayton Act, as amended, which reads:

(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities. (U.S.C. Title 15, Sec. 13(d).)

This statute in part requires the person charged with a violation thereof to be one "engaged in commerce" and then such person pay something of value "to or for the benefit of a customer of such person in the *course of such commerce*." (Italics supplied.)

There is no dispute as to the respondent being engaged in commerce, but the principal issue in this proceeding is whether or not the payments made by the respondent were in the course of such commerce. The hearing examiner finds they were.

The circumstances surrounding the payments to Childs Big Chain which confirm such a conclusion will be discussed. Childs by letter dated March 3, 1958, solicited the respondent to participate in its "Anniversary Sale" starting May 1, 1958. Suppliers were given the opportunity to select one of five proposals ranging in cost from \$76.00 to \$887.00. Respondent, at a cost of \$887.00, elected to participate in Proposal No. 5 which reads:

Proposal No. 5

This is a special all-out promotion.

On 7 successive days we will run a 4-Column Inch Ad in all 7 major papers May 1st through May 9th. We will feature your product on 4 Radio Spots every day for 7 consecutive days and Feature your Product on one of our major Television Shows. This plus a display in all 33 stores.

Cost of Proposal No. 5—\$887.00.

The Secretary-Treasurer of the respondent corporation who was subpoenaed by counsel in support of the complaint testified that for the \$887.00 they got all that Childs proposed to give them. The "special all-out promotion" included advertisements of respondent's products in seven major newspapers, four of which were in the State of Louisiana, two in Texas, and one in Texarkana. Respondent's products were to be displayed in 33 stores of Childs located in the

States of Texas, Louisiana, and Arkansas. The record does not show the names or location of the radio and television stations on which respondent's products were to be featured.

The invoices and supporting affidavits attached thereto which were submitted by Childs to the respondent for four payments of \$120.00 each in the year 1959 in connection with the "Television Package Deal" show that respondent's products were advertised on certain programs sponsored by Childs during the months of September, October, and November 1959 over station KLTV, Channel 7, located at Tyler, Texas.

The conclusion that the payments made by the respondent to J. Weingarten, Inc., were "in the course of such commerce" is established by the following facts in the record.

By letter which originated in Houston, Texas, and was sent to respondent at Shreveport, Louisiana, J. Weingarten, Inc., invited respondent to participate in its 57th Anniversary Sale in which "thirty-nine great big units are taking part." Attached to the letter was a sheet setting forth the different prices for participation in five sections in the States of Texas and Louisiana. Enclosed was a postal card addressed to Weingarten at Houston, Texas, for respondent to indicate its intentions. Respondent sent the postal card noting participation in "Section in Shreveport Times-Journal." J. Weingarten, Inc., from Houston, Texas, submitted its invoice dated March 4, 1958, to respondent at Shreveport, Louisiana, "For Your Participation in Our 57th Anniversary Sale—106.01." Respondent remitted payment on March 22, 1958.

The same general procedures were used in connection with respondent's participation in Weingarten's "20th Texas Products Sale" for which respondent remitted \$106.01 on December 1, 1958; the "58th Anniversary Sale" for which it paid \$106.01 on April 3, 1959, and the "21st Louisiana Products Sale" in the sum of \$107.51 paid on November 10, 1959.

The record includes copies of three invoices issued by respondent at Shreveport, Louisiana, during the month of February 1958 for its products "Sold To: J. Weingarten, Inc., Houston, Texas." for delivery to Weingarten's stores at Shreveport, Louisiana.

The respondent further urges as a defense the "de minimus" rule. The hearing examiner does not regard the payments made by the respondent or the sales made by it in interstate commerce as negligible or inconsequential, and therefore finds there is no merit to such defense.

Opinion

60 F.T.C.

CONCLUSIONS

The evidence of record supports the following conclusions:

(a) The respondent in 1958 and 1959 paid to two of its customers something of value as compensation or in consideration for services furnished by such customers in connection with their offering for sale or sale of products sold to them by respondent and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of products purchased from respondent.

(b) The acts and practices of respondent as proved are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That respondent, Shreveport Macaroni Manufacturing Company, Inc., a corporation, its officers, employees, agents or representatives, directly or through any corporate or other device in or in connection with the sale in commerce, as "commerce" is defined in the Clayton Act, as amended, of noodle, spaghetti, macaroni or other food products, do forthwith cease and desist from:

Making or contracting to make to or for the benefit of J. Weingarten, Inc., or Childs Big Chain, or any other customer, any payment of anything of value as compensation or in consideration for advertising or other services or facilities furnished by or through such customer in connection with the handling, offering for resale, or resale, of respondent's products unless such payment is made available on proportionally equal terms to all other customers competing in the distribution or resale of such products.

OPINION OF THE COMMISSION

By MACINTYRE, *Commissioner*:

Respondent has appealed from the hearing examiner's initial decision of August 23, 1961, in which decision the examiner found that respondent had engaged in practices in violation of Section 2(d) of the Clayton Act, as amended, and ordered the discontinuance of such practices. Respondent raises two main issues: (1) whether the payments made involved interstate commerce within the meaning of Section 2(d), and (2) whether the matter falls within the rule of "*de minimis*".

Shreveport Macaroni Manufacturing Company, Inc., the respondent herein, is a Louisiana Corporation with offices at 102 Common Street, Shreveport, Louisiana. It is engaged in the business of manu-

facturing and selling a wide variety of noodles, spaghetti, macaroni, and related items to retail chain organizations, independent grocery stores, and wholesalers in Louisiana, Texas, Arkansas, Mississippi, Tennessee and Oklahoma. Its sales in 1958 exceeded \$240,000.

Payments for advertising or other services or facilities were made by respondents to two chain organizations in 1958 and 1959, as follows: Childs Big Chain, a division of Kroger Company (referred to hereafter as Childs Big Chain), 1958—\$1,883.10; 1959—\$1,129.70 or more; J. Weingarten, Inc. (referred to hereafter as Weingarten), 1958—\$212.02; 1959—\$213.52. Such payments or allowances were not made available on proportionally equal terms to all other customers competing with the favored chains in the distribution of respondent's products of like grade and quality.

Respondent is engaged in interstate commerce. It so admits in its answer. This is also clear from the record. Among other things, respondent has made sales and shipped its products to customers located in Texas and other states, and it has contracted and paid for promotions of its products conducted in states other than Louisiana. Accordingly, we need only inquire whether the alleged discriminatory payments made by respondent were made "in the course of such commerce", as required under Section 2(d).

Weingarten, one of the favored chain stores, is engaged in business in three states. In September 1959, it operated 42 retail outlets. The principal offices of this organization are located in Houston, Texas, and while deliveries of respondent's products were made only to its locations in Louisiana, it otherwise did business with respondent from the Houston offices. For instance, the record shows that purchases were invoiced to J. Weingarten, Inc., Houston, Texas, and solicitations to engage in promotions and billings for such services came from Houston.

Childs Big Chain, the other favored customer, even apart from its significant status as a division of the Kroger Company, is a large chain organization extending over a number of states. It has thirty-three stores in Texas, Louisiana and Arkansas. Childs Big Chain received direct delivery of respondent's products only in the State of Louisiana.

Moreover, these large chain store organizations, as favored customers of the respondent, are constantly in direct general competition with respondent's smaller non-favored customers in Louisiana and Texas.

The promotions conducted by these two favored organizations in which respondent participated were generally of an interstate charac-

ter, and in one instance, at least, the promotion, so far as the record shows, was conducted entirely outside of Louisiana. One of the Weingarten promotions for which respondent made payment was its "57th Anniversary Sale" in which thirty-nine units in several states took part. Other Weingarten promotions in which respondent participated included the "20th Texas Products Sale" and the "Texas Louisiana Products Sale". A Childs Big Chain promotion in 1958 in which respondent participated featured newspaper advertisements in seven major newspapers, four of which were in Louisiana, two in Texas and one in Texarkana, a Texas-Arkansas border city. It also included radio spot commercials, a mention on a television show, and a display in 33 stores located in several states. In 1959, respondent participated with Childs Big Chain in a Television Package Deal promotion in which respondent's products were advertised over television station KLTV, Tyler, Texas.

There is no evidence that respondent shipped any of its products to the favored customers directly to locations outside of the State of Louisiana. However, respondent admits that Childs Big Chain shipped or transferred respondent's products out of its warehouses in Shreveport, Louisiana, to Tyler, Texas. The stream of commerce in such a case would extend to the place the goods came to rest in Texas. The promotion of respondent's products for a number of months by Childs Big Chain over KLTV in Tyler, Texas, suggests that considerable traffic in such merchandise occurred across the border of Louisiana into Texas.

Respondent argues that such facts do not prove a violation of Section 2(d). It contends in part that there is no evidence of a disfavored customer in commerce. We find nothing in the authorities cited which would require such a showing in a Section 2(d) matter. Respondent, moreover, can gain no comfort from *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954). In that case, the Court held that the Clayton Act was violated, in a price discrimination matter, where the victim was a local concern and the beneficiary, an interstate business.

In *J. H. Filbert, Inc.*, 54 F.T.C. 359 (1957), the Commission had the same issue before it as it has in this case, and there held that the discriminatory payments were made in the course of interstate commerce in violation of Section 2(d). The fact that the sales to unfavored customers competing in the distribution of the products with the favored customer in the Baltimore area were in intrastate commerce did not bar the finding of a violation. See also *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, 178 F.2d 150 (2nd Cir. 1949). There the court, in an opinion by Judge Learned Hand, held that it

was an actionable wrong under Section 2(e) of the Act, to deny the plaintiff, whose business was altogether intrastate, a favor which the defendant granted to "agencies" in other states.

In the instant case, as previously indicated, respondent was engaged in interstate commerce involving a number of states. This commerce included the sale and delivery of its products over state lines and the engaging in transactions and promotions conducted over state lines. Included in such commerce were the goods received by Childs Big Chain in Tyler, Texas, and the promotion by Childs Big Chain in which respondent participated of respondent's goods over Station KLTV in Tyler, Texas. It was in the course of such commerce that respondent made the payments here challenged which were not made available on proportionally equal terms to other customers, specifically those located in the area of Shreveport, Louisiana, competing in the distribution of the goods. Accordingly, respondent's arguments on this question of commerce are rejected.

Respondent also contends that the activities here complained of were so insignificant and negligible that the complaint should be dismissed under the rule of "*de minimis*". Two cases are cited: *Skinner v. United States Steel Corporation*, 233 F. 2d 762 (5th Cir. 1956), and *E. Edelmann & Company v. Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956). The facts in the former case, involving private litigation, are so different from those herein that it would not constitute a precedent for this case. As for the *Edelmann* case, the court there held it is implicit in the Act (Section 2(a)) that discriminations which are negligible and which at best have a remote effect on competition are not within its prohibitions. To the extent that this case offers a guide to the discriminations in price which are negligible, and the court there upheld the violation, it can provide little help in this Section 2(d) matter.

We believe the examiner's finding that respondent's challenged activities were not negligible is correct. Respondent made a number of payments in the years covered by the complaint to two large chains which totaled substantial amounts, particularly when compared with the purchases made by these chains. Respondent's contention that this matter comes under the "*de minimis*" rule is, therefore, rejected.

Respondent's appeal is denied and the initial decision is adopted as the decision of the Commission. An appropriate order will be entered.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon

briefs and oral argument in support thereof and in opposition thereto;
and the Commission having rendered its decision denying the appeal
and adopting the initial decision:

It is ordered, That respondent, Shreveport Macaroni Manufactur-