Order denying motion to rescind order of April 5, 1962.

By motion filed April 23, 1962, the respondents have requested the Commission to reconsider and to rescind, set aside or vacate its order of April 5, 1962. The Commission in said order directed that this proceeding be reopened; that the order to cease and desist theretofore entered herein be vacated; that the complaint be amended; and

that the case be remanded to the hearing examiner for further appropriate proceedings under the complaint as amended. The ground for the motion is that the Commission was without authority to issue the order of April 5 and that such order is void and of no effect, for the stated reason that the respondents were not afforded an "opportunity for hearing."

Acting under the authority of Section 5(b) of the Federal Trade Commission Act, the Commission, on January 19, 1962, had issued and had thereafter served upon the respondents, an order in which it had recited that the then outstanding order to cease and desist was deficient in that it failed to provide clear and definite guidance to the respondents or to adequately protect the public. The order further informed the respondents of the Commission's tentative conclusion that in the circumstances the order to cease and desist should be vacated and additional proceedings conducted. And finally, the order provided that the respondents, within thirty (30) days after service thereof (which time was subsequently extended at the respondents' request to March 26), might file with the Commission a memorandum showing cause why the public interest did not require the proposed actions.

In response to this invitation, the respondents, on March 26, 1962, did file with the Commission a memorandum, twenty-three pages in length, supported by affidavits executed by respondents Carrol F. Chatham and Georges Ipekdjian and by Edward G. Coyne, an employee of the respondent corporations, and twenty-four exhibits and attachments. In these documents the respondents discussed in some detail the nature and characteristics of their product, reviewed the history of this proceeding, set forth their argument that the advertising under attack in the proposed complaint does not have the tendency or capacity to mislead or deceive prospective purchasers, and expressed the conclusion that the public interest does not require further action by the Commission.

The Commission, on April 5, 1962, after having fully considered the material submitted, determined that the public interest does require the actions proposed in its order of January 19, and, accordingly, entered the order complained of.

Section 5(b) of the Federal Trade Commission Act provides, in part, that after expiration of the time allowed for the filing in a United States Court of Appeals of a petition for review of an order of the Commission issued under said section, the Commission may at any time, "after notice and opportunity for hearing," reopen and alter, modify, or set aside, in whole or in part any such order, whenever in the opinion of the Commission conditions of fact or of law

have so changed as to require such action or if the public interest shall so require.

In light of all of the foregoing, the Commission has concluded (1) that its authority to issue its order of April 5, 1962, is clear and specific; (2) that all of the statutory requirements preliminary to the issuance of said order, including the provision for "notice and opportunity for hearing," were fully complied with; and (3) that the respondents' motion to rescind the order is without merit.

Accordingly, it is ordered, That said motion be, and it hereby is, denied.

Commissioner Elman dissenting.

UNITED BISCUIT COMPANY OF AMERICA

Docket 7817. Order and opinion, June 28, 1962

Order vacating initial decision and remanding proceeding to hearing examiner.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner:*

This matter is before the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision as to Count I, filed November 13, 1961, dismissing the complaint as to Count I. The hearing examiner in the aforementioned initial decision sustained the respondent's motion of April 28, 1961, made at the close of the case in chief in support of the complaint, to dismiss Count I, stating that the ground for his action was the failure of the evidence to prove the competitive injury required to be shown under Section 2(a) of the amended Clayton Act.[1]

Counsel in support of the complaint appeals, averring (1) that the examiner erred in failing specifically to find that respondent discriminated in price between competing customers, and (2) that he erred in failing to find that the price discriminations charged had the adverse effects proscribed by the statute and that a *prima facie* case had been proved. Said counsel requests that the initial decision be reversed and the case be remanded.

The complaint alleges in part that respondent discriminated in price between different purchasers of its biscuit products of like grade and quality and that such discriminations have been effectuated through the use of respondent's cumulative discount systems based on

[1] The hearing examiner refers to the filing of his initial decision as to Count II, under which decision, subject to Commission review, Count II would be disposed of pursuant to §§ 3.21 and 3.25 of the Commission's Rules of Practice, published May 6, 1955.

the dollar volume of the customer's monthly purchases. Respondent's answer does not challenge the fact that its Sawyer Division used in the designated periods the several discount schedules set out in the complaint. These schedules provided graduated discounts up to 6% for varying amounts of monthly purchases. They are as follows:

For the Period July 1, 1958, to June 30, 1959:

Monthly purchases	*Discount percent*
$00.00 to $24.99	0
$25.00 to $39.99	2
$40.00 to $69.99	3
$70.00 to $99.99	4
$100.00 to $124.99	5
$125.00 and over	6

For the Period July 1, 1959, to Date of Issuance of Complaint March 10, 1960:

Monthly purchases	*Discount percent*
$00.00 to $24.99	0
$25.00 to $44.99	1½
$45.00 to $59.99	2
$60.00 to $74.99	2½
$75.00 to $89.99	3
$90.00 to $109.99	3½
$110.00 to $129.99	4
$130.00 to $149.99	5
$150.00 and over	6

In the case of a purchaser with more than one store, such as a corporate chain with multiple retail outlets, the discount to such purchaser under these schedules was calculated on the basis of the aggregated purchases of all the stores operated by the purchaser. The discounts under these schedules will be referred to hereinafter as "volume" discounts.

The hearing examiner failed to make a specific finding that, as a result of such volume discounts, some customers were charged higher prices for like goods than others competing with such customers and that this constituted price discrimination under Section 2(a) of the amended Clayton Act. However, he clearly assumed such to be the fact; otherwise he would not have reached the injury question.

The present record amply supports a finding that respondent did discriminate in price as charged.[2] The evidence, while not limited to a single division of respondent, largely concerns the Sawyer Biscuit Company Division of United Biscuit Company of America (Sawyer

[2] A price discrimination within the meaning of the phrase "discriminate in price" in Section 2(a) is merely a price difference. *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960) [6 S. & D. 817].

Division), and so the following references are generally to the activities of that division. Sawyer Division's net sales for 1959 amounted to $12,215,665. In January of that year, Sawyer Division sold to 21,773 customers operating 23,664 outlets. It should be noted that the number of customers and outlets varies from month to month. During January 1959, 8,057 Sawyer Division customers earned a volume discount, i.e., the amount was credited to them which they also received at that time or later, and 13,716 neither earned nor received such a discount. Of those receiving volume discounts, many received less than 6%. For instance, in January 1959, retail grocery customers of respondent earned and, either then or later, received volume discount payments as follows:

Customers	*Percent*
3,718	2
2,287	3
704	4
310	5
1,038	6

Certain of the customers receiving no volume discount or less than 6% discount were in competition with one or more customers receiving the full 6%. These favored customers included chain store organizations such as The Kroger Company (Kroger), The Great Atlantic & Pacific Tea Co. (A & P), and National Food Stores (National).[3]

The evidence of record includes a showing as to price discriminations between and among competing customers in the trading areas of Gary, Indiana; South Bend, Indiana; and Burlington, Wisconsin. Specific examples for two of the areas will be discussed below.

In Gary, Indiana, one customer paying a higher price for respondent's products was Wally's Fifth Avenue Mart. The record shows that Wally's earned, i.e., it was credited with, and then or later received, the following volume discounts in various months in 1959: 3.0% in January and February, 2.0% in March, 0% in October, 1.5% in November, and 2.0% in December. There is no specific evi-

[3] Counsel supporting the complaint has included with his brief an appendix showing a comparison of purchase volumes and discounts of individual chain stores and independent grocery stores. Respondent apparently does not contest the accuracy of the figures in the appendix although it does contend that the schedule is not complete.

The record shows that of the 43 chain group purchasers listed in Commission Exhibit 120-A, including Kroger, A & P and National, all received 6% volume discounts for 1959 purchases except that for certain months—January, April, May, August, November and December—one corporate chain, not identified, did not receive the full 6% discount. Accordingly, the record will sustain a finding that, for 1959 purchases, all chains so listed in the months other than those mentioned received 6%; for the remaining months all chains so listed other than one received the 6%.

dence as to the other months of 1959, although the owner of the store, Walter Pall, testified, in effect, that Wally's earned only low volume discounts. Other stores in Gary, Indiana, receiving discounts under 6% included Better Foods, Inc. (e.g., 1.5%, earned October 1959), Gene's Super Market (e.g., 3.5%, earned December 1959), and Tobe's Super Market (e.g., 3.5%, earned November 1959). These stores were each competing with one or more of respondent's customers receiving 6% discounts for purchases made at the same time, which favored customers included Kroger and A & P.

In South Bend, Indiana, in 1959, certain independent store customers of the respondent failed to earn any volume discounts or earned and received discounts of less than 6%. Such customers and the volume discounts earned in January 1959, if any, included the following:

	Percent
Horvath's Self Service	3
Vince's Super Saver	3
Food Center	2
A & J Market	0
K & F Food Market	4

Those who earned also received payments. Discounts under 6% or no discounts are also shown for other months in 1959 for these customers. Each competed with one or more customers of respondent receiving 6% volume discounts for purchases made at the same time, which favored customers included Kroger and National.

In many instances, the grocery stores receiving the smaller discounts purchased more goods from respondent in a particular month than did the individual competing chain store outlet receiving 6%. For example, in October 1959, Gene's Super Market in Gary, Indiana, received a 2½% volume discount on biscuit purchases from respondent of $66.63, while A & P received a 6% volume discount on smaller purchases of $26.28 delivered to one of its outlets competing with Gene's. As another example, in October 1959, Food Center in South Bend, Indiana, received no discount on biscuit purchases from respondent of $24.05, while National received a 6% discount on purchases of $3.00 delivered to National Store #44 competing with Food Center. This inequality in payments was due to the fact that the chains were given volume discounts based on the aggregated purchases of their multiple outlets.

As a result of the aforementioned differences in volume discounts, respondent charged some customers a higher price for like goods than it charged a competing customer or competing customers.

The hearing examiner, in his consideration of whether the price discriminations so disclosed resulted in the competitive effect defined in the Act, erred in failing to apply the proper test to make this determination. He first cites *Anheuser-Busch, Inc.* v. *Federal Trade Commission*, 289 F. 2d 835 (7th Cir. 1961) [7 S. & D. 19], and *General Foods Corp.*, 50 F.T.C. 885 (1954), to support his decision, but in light of the specifically applicable judicial authority to be mentioned hereafter, these cases are not controlling for this proceeding. While the hearing examiner refers to *Corn Products Refining Company, et al.* v. *Federal Trade Commission*, 324 U.S. 726 (1945) [4 S. & D. 331], and *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37 (1948) [4 S. & D. 716], as well as *P. Sorensen Mfg. Co., Inc.*, 52 F.T.C. 1659 (1952), *aff'd per curiam, P. Sorensen Mfg. Co., Inc.* v. *Federal Trade Commission*, 246 F. 2d 687 (D.C. Cir. 1957) [6 S. & D. 332], he does not apply the principles set forth in these cases and, in effect, rejects the holdings.

Section 2(a) of the amended Clayton Act does not require a finding that price discriminations have in fact had an adverse effect on competition (there is no need, for instance, to show that a competitor has suffered financial losses or has been forced out of business); it is enough that they may have the prescribed effect. *Federal Trade Commission* v. *Morton Salt Company*, *supra*. The "gone out of business" test is not a part of Section 2(a). To insist on any such requirement would be contrary to the purposes and intention of Congress in passing this legislation. A showing in the *Morton Salt* case that certain merchants had to pay the respondent therein substantially more for like goods than their competitors justified a finding of competitive injury within the meaning of the Act. In *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d 43 (8th Cir. 1956) [6 S. & D. 91], the court in considering the question of injury to competition held in part as follows:

> With competition so keen, margins so small and over-all net profits so low, it was clearly open to the Commission to find that rebates denied to some purchasers (well more than half in all lines) but granted to others, ranging up to 19%, may probably result in substantial injury to competition. (Id. 51)

See also *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956) [6 S. & D. 113]; *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253 (7th Cir. 1956) [6 S. & D. 107]; *Standard Motor Products, Inc.* v. *Federal Trade Commission*, 265, F. 2d 674 (2nd Cir. 1959) [6 S. & D. 553]; *P. Sorensen Mfg. Co., Inc.* v. *Federal Trade Commission*, *supra*. Recently in *Tri-Valley Packing Association*, Docket Nos. 7225 and 7496 (1962) [60 F.T.C.

1134], we held that in any case involving the effect of a price discrimination on competition between buyers, the requisite injury may be inferred from a showing that a purchaser paid substantially less than its competitor for goods of like grade and quality sold by the respondent and that the question of substantiality must be determined from the facts in each case.

Fred Bronner Corporation, et al., Docket No. 7068 (1960) [57 F.T.C. 771], a Section 2(a) matter dismissed by the Commission for lack of a showing of competitive injury, differs from the secondary line injury cases cited above because the evidence in that matter was not such as to warrant a finding that the price differential was substantial or competitively significant in the market.

Clearly, the test for competitive injury set forth in *Morton Salt* and applied in the automotive cases above mentioned should govern this proceeding.

We turn now to the facts shown in the present record. The majority of respondent's customers received no volume discount. Independent store owners testified generally as to the highly competitive nature of the retail food business. Net profits are low and cash discounts and other allowances are important. One store owner witness testified: ". . . we have to fight not only for pennies but for fractions." There are a number of examples of low net profits shown in the record, such as 2%, 3 to 5% and 4 to 5%. A number of independent store witnesses testified that price was a very important, if not the most important, factor in enabling them to compete. There is testimony from such witnesses to the effect that if they could buy cheaper they could sell for less, and that customers will, in the over-all picture, buy where the prices are lower. Considering the highly competitive nature of the market and the other factors mentioned, a volume discount of 6%, tantamount to a difference in price of 6%, was clearly substantial. Likewise substantial were the lesser discounts shown ranging up to 6%.

On the basis of these facts, there is in the present record sufficient evidence to find that the competitive opportunities of certain purchasers were injured when they had to pay respondent substantially more than their competitors had to pay and that the effect may be substantially to injure, destroy or prevent competition with the purchasers receiving the benefit of such discriminations. We believe that the examiner's failure to so find was clearly erroneous. Unless the showing in the record is rebutted or justified, the evidence is sufficient to support an order against respondent to cease and desist the price discrimination practice charged.

1881 Order

The appeal of counsel supporting the complaint is granted. It is directed that the initial decision as to Count I be vacated and set aside and that the matter be remanded to the hearing examiner for further proceedings in conformity with the views herein expressed. An appropriate order will be entered.

Commissioner Elman concurred in the result of the decision of this matter.

ORDER VACATING INITIAL DECISION AND REMANDING CASE TO HEARING EXAMINER

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision as to Count I, filed November 13, 1961, and upon the briefs and oral argument in support thereof and in opposition thereto; and

The Commission, for the reasons appearing in the accompanying opinion, having granted the appeal, and having directed that the initial decision as to Count I be vacated and set aside and that the matter be remanded to the hearing examiner for further proceedings in conformity with the views expressed in the opinion:

It is ordered, That the initial decision as to Count I, filed November 13, 1961, be, and it hereby is, vacated and set aside.

It is further ordered, That the matter be, and it hereby is, remanded to the hearing examiner for further proceedings in conformity with the views expressed in the Commission's opinion.

Commissioner Elman concurring in the result.