
IN THE MATTER OF
SWIFT & COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT

Docket 8304. Complaint, Mar. 6, 1961—Decision, July 20, 1962

Order dismissing—following the dismissal of a group of related cases by orders
issued May 23, 1962, and determination that it would be equitable and in the

public interest to conduct further proceedings on an industry-wide basis—complaint charging a large manufacturer with offering costly and unfair inducements to retailers to handle its ice cream and other frozen products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the corporation listed above in the caption hereof and more particularly described and referred to hereinafter as respondent, has violated the provisions of Section 5 of the said Act (U.S. Title 15, Sec. 45) and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Swift & Company is an Illinois Corporation with its principal office and place of business at 4115 S. Packers Street, Chicago, Ill. Respondent is one of the Nation's large corporations. Its sales for the year 1958 totaled \$2,647,925,000 and its working capital for that year was \$212,316,000.

PAR. 2. Respondent is engaged in several lines of commerce including that of producing, purchasing, processing, manufacturing, selling and distributing, at wholesale, dairy and related food products among which are ice cream, ice milk, mellorine, sherbets and other similar frozen products hereinafter collectively referred to as frozen products. Respondent maintains and operates approximately 40 frozen products processing plants in various states of the United States. It sells and distributes its frozen products to retailers and dealers who sell frozen products at retail such as drug, grocery and confectionery stores, restaurants, hotels, filling stations, ice cream parlors and institutions, and, is in competition with other firms, partnerships, corporations and individuals in this manufacturer-wholesaler line of commerce.

PAR. 3. Respondent in connection with its frozen products business is engaged in commerce within the meaning of the Federal Trade Commission Act (15 USC 41, et seq.) in that it purchases and produces ingredients which are used in the manufacture of frozen products and causes some of such ingredients to be shipped across state lines to the states of manufacture of such frozen products; it sells and distributes frozen products across state lines, and, in connection therewith, supplies facilities and sells, leases, and loans facilities, sends and receives orders, information, signs, advertising material, and other material and equipment, relating to respondent's frozen products business. Respondent's frozen products business is conducted as an

entity or whole on an interstate basis. Essential elements of the business such as financing and management are centralized in corporate officials at company headquarters, only a limited control over local operational matters being delegated to plant managers within particular states.

PAR. 4. Since World War II the United States has consumed upwards of 500 million gallons of frozen products per year. The great bulk of this whole is produced and sold by manufacturer-wholesalers who sell to retail outlets. Over 50% of this wholesale market volume is done by 10 manufacturer-wholesalers of which the respondent herein is one. These ten operate on a nation-wide basis. In addition to these ten manufacturer-wholesalers, who operate on a "nation-wide" basis, there are a number of intermediate size manufacturer-wholesalers in interstate commerce in frozen products who operate upon what may be termed as a "regional" basis. This group varies in number in accordance with the definition given to the word "regional". A third group of manufacturer-wholesalers exists which consists of those who might be termed "local" or "home-town" manufacturer-wholesalers. In 1947 this latter group consisted of some 3000 to 3500 companies. By 1959 there were less than 1500 such enterprises. In 1947 the combined market share of this latter group and intermediate or "regional" group was between 55% and 60% of the total wholesale market. The first group, of which the respondent is one, did the remainder or from 40% to 45% of the whole. By 1959 the respondent and others in the "nation-wide" group were doing from 55% to 60% of the total volume in the manufacturer-wholesalers line of commerce and the other two groups had the remainder. This increase in concentration in the hands of the respondent and other large manufacturer-wholesalers has resulted in part from the impact of the use of the methods of competition and acts and practices by respondent as described hereinafter in paragraph 6. Small business entities in this industry have been and are forced to attempt to meet respondent's methods, acts and practices, but because of lack of capital, many have had to sell out to larger corporations including respondent Swift & Company, while others have been forced to discontinue operations.

PAR. 5. Because of the nature of frozen products, it is necessary for retailers and dealers to have a cabinet or refrigeration unit of some sort designed and manufactured for use in connection with the storage, display, and sale of frozen products to the purchasing public. Such equipment is hereinafter referred to as facilities. The cost of facilities needed by retailers and other handlers ranges from approximately \$500 to \$5,000.

Most retailers and other handlers have limited floor space for facilities in their places of business. Accordingly, by placing its equipment in dealers' places of business, respondent monopolizes outlets or markets. The placement by a frozen products manufacturer of facilities on the premises of a retailer or handler with or without an agreement, condition, or understanding that only the frozen products of said manufacturer shall be stored therein or sold therefrom, is tantamount to an exclusive requirements contract.

PAR. 6. For more than two years last past and continuing up to the present time, Respondent, in carrying on its business of manufacturing, selling and attempting to sell frozen products, has attempted to induce and has induced retail dealers and prospective retail dealers and other handlers of frozen products to handle, store and sell Respondent's products by doing, engaging in, and carrying out various acts, methods and practices including the following:

1. Respondent supplies dealers with facilities at its expense.
2. Respondent finances dealers in several ways, (a) by loans of money, (b) by financing and assisting in the financing of the purchase of facilities, (c) by advancing sums of money to be earned later as discounts for quantity purchases, (d) by transferring cash to dealers directly or under one guise or another such as in the form of an advertising allowance, and (e) by investing capital in dealers' places of business or prospective places of business.
3. Respondent offers dealers miscellaneous inducements, (a) in the form of services of value and gratuities, e.g., it services dealer-owned equipment—soda fountains and refrigerated cases—used for other products, (b) moves and arranges store equipment, (c) assists dealers to obtain equipment at reduced prices, (d) supplies signs or parts of signs not in the normal range of standard advertising practice, and (e) makes gifts to dealers of things of value, e.g., clocks, back bars, bains-marie and other items.
4. Respondent sells "off list," i.e., it sells to some purchasers at prices below its current published prices which are in effect at the time as to other purchasers.
5. Respondent sells and delivers some of its frozen products as "fighting", "traffic" or "competitive" brands, or as private label products, at prices below the cost to the respondent of manufacturing, selling, shipping and delivering said products.

PAR. 7. The effect and result of the use of the aforesaid acts, practices and methods by respondent have been and now are to unduly and substantially injure, restrain and suppress competition between respondent and its competitors. The use of these acts, practices and

methods by respondent contributes to the monopolization of the frozen products industry in the hands of a few. It is prejudicial to small business concerns with limited resources. It tends to destroy the freedom of retailers and other handlers of frozen products to select frozen products pursuant to customer demands or by their own free will. It is prejudicial to the growth and development of the frozen products industry from the standpoint of competition and from the standpoint of the public interest in products of high quality at fair prices. The use by respondent of the aforesaid acts, practices and methods tends to put a premium upon the availability of capital in the competitive race in the frozen products industry and to detract from the importance of the ability to compete on price, quality and service. It focuses competition on cabinets and other gifts and gratuities and reduces the competitive importance of price, quality and service. Said acts, practices and methods are all to the prejudice and injury of the public. They are adverse to the public interest and constitute unfair methods of competition and unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

DISSENTING OPINION

By MacIntyre, *Commissioner*:

The Commission issued its complaint in this matter on March 6, 1961. In that complaint it was alleged that respondent is engaging in certain acts and practices in connection with its sale of ice cream in interstate commerce. In paragraph 7 of the complaint it was alleged that:

"The effect and result of the use of the aforesaid acts, practices and methods by respondent have been and now are to unduly and substantially injure, restrain and suppress competition between respondent and its competitors. The use of these acts, practices and methods by respondent contributes to the monopolization of the frozen products industry in the hands of a few. It is prejudicial to small business concerns with limited resources. It tends to destroy the freedom of retailers and other handlers of frozen products to select frozen products pursuant to customer demands or by their own free will. It is prejudicial to the growth and development of the frozen products industry from the standpoint of competition and from the standpoint of the public interest in products of high quality at fair prices. The use by respondent of the aforesaid acts, practices and methods tends to put a premium upon the availability of capital in the competitive race in the frozen products industry and to detract from the importance of the ability to compete on price, quality and service." * * *

On June 2, 1962 respondent filed a motion seeking postponement of hearings previously postponed to June 11, 1962. It is clear that one of the purposes for the requested postponement was to permit respondent to appeal to the Commission to dismiss the complaint herein. Also, it is clear that respondent would be seeking dismissal of the complaint herein because the Commission, on May 23, 1962, had dismissed complaints in other cases (Federal Trade Commission Dockets 6172-79, 6424) in which respondents in those cases allegedly were using acts and practices in connection with the interstate sale of ice cream in violation of Section 5 of the Federal Trade Commission Act. Although the Commission dismissed the complaints in Federal Trade Commission Dockets 6172-79 and 6424, it does not appear that the Commission absolved the practices challenged in those complaints. Instead, the dismissals were for the stated reason that the records in those cases lacked *proof of injury*.

In this case the action of the majority in dismissing the complaint at this time precludes counsel representing the public interest from presenting evidence from which it could be determined whether the injury alleged in paragraph 7 of the complaint and heretofore quoted in this Opinion actually occurred. It should be emphasized that the majority in dismissing the complaint in this case did so without a record of evidence before the Commission. Instead, the majority in its order of dismissal has stated that this matter was "examined * * * in the light of its disposition of a group of related cases." That was in accordance with the request of the respondent. It had stated that it, in effect, was tried when the Commission tried the other cases. Such contention perplexes me. It is certain that if the Commission had found parties in the other cases guilty it could not have, by virtue of that fact, found respondent guilty in this case.

Moreover, according to the information before us this proceeding was authorized by the Commission subsequent to the initial decision of the hearing examiner in Federal Trade Commission Dockets 6172-79, 6424. Therefore, the Commission in authorizing the complaint in this case was on notice that the hearing examiner in the other cases had determined that there was lack of proof of injury in those cases. Also, when the majority acted to dismiss the complaint in this case, it was on notice that counsel representing the public interest was contending that the evidence to be offered in this proceeding would be substantially different from that offered and received in the records of the Federal Trade Commission Dockets 6172-79, 6424.

The Administrative Procedure Act provides the public interest with no remedy when the Commission acts to dismiss a complaint with no

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record of evidence before it. Appropriately that Act does preclude the Commission from issuing an order to cease and desist against a respondent without a record of evidence.

The order of the majority dismissing the complaint in this case points to its action of May 23, 1962 in dismissing the complaints in other cases and the direction for continuing close scrutiny of acts and practices in the Frozen Dairy Products Industry which may lessen competition or tend towards monopoly. In that connection it was stated that it had been determined it would be in the public interest that any further proceedings by the Commission in regard to such acts and practices should, so far as practicable, be conducted on an industry-wide basis. Perhaps anti-competitive, unlawful and unfair acts and practices are so widespread in the sale and distribution of ice cream in interstate commerce that industry-wide proceedings by this Commission would be in the public interest. Requests from representatives of the industry have been filed and are continuing to be filed with the Commission for such industry-wide proceedings, but they have not been initiated.

In view of the foregoing the majority, with its dismissal of the proceedings in this case, has wiped its slate clean of all proceedings undertaken by it directed against acts and practices in connection with the interstate sale and distribution of ice cream which the Commission has alleged to be to the prejudice of the public. In this latest action it did so in a formal proceeding *without evidence on the record* supporting or disproving allegations made by the Commission on March 6, 1961 that the acts and practices of the respondent are to the prejudice and injury of the public.

From the action of the majority, I dissent.

ORDER DISMISSING COMPLAINT

This matter having been considered by the Commission upon the appeal by the respondent from the hearing examiner's denial of its motion to dismiss the complaint; and

The Commission having examined the matter in the light of its disposition of a group of related cases by orders issued May 23, 1962, dismissing the complaints in those cases and directing that continuing close scrutiny be maintained of acts and practices in the frozen dairy products industry which may lessen competition or tend towards monopoly; and

The Commission having determined that it would be equitable and in the public interest that any further proceedings by the Commission

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in regard to such acts and practices should, so far as practicable, be