

Complaint

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IN THE MATTER OF

AMERICAN RADIATOR AND STANDARD SANITARY
CORPORATIONORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT*Docket 7835. Complaint, Mar. 21, 1960—Decision, Oct. 5, 1962*

Order dismissing, as not sustained by the evidence, complaint charging a manufacturer of heating, cooling, plumbing, and kitchen products, among others, with violating Section 5 of the Federal Trade Commission Act through the wrongful inducement of discriminatory allowances from its suppliers.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Sec. 45), and it appearing to the Commission that a proceeding by it would be to the interest of the public, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. American Radiator and Standard Sanitary Corporation is a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal office and place of business located at 40 West 40th Street, New York, N.Y.

PAR. 2. Respondent is now, and for many years last past has been, engaged in the manufacture, sale and distribution of many diversified products, including heating, cooling, plumbing and kitchen products. Respondent sells and distributes said products for use and resale both through independent wholesalers and through its own Amstan Supply Division. Said Amstan Supply Division, operating through approximately seventy-five wholesaling branches, sells and distributes both respondent's said products and similar and related products purchased from other manufacturers, hereinafter referred to as respondent's "suppliers". Through said Amstan Supply Division, respondent is in substantial competition with many other corporations, persons, firms, and partnerships in the purchase, sale and distribution of heating, cooling, plumbing and kitchen products and similar and related products.

Respondent's sales are substantial, being approximately \$500,000,000 annually.

PAR. 3. In the course and conduct of its said business, respondent has caused and now causes its said products to be shipped and transported from the state or states of location of its various manufacturing plants, warehouses and places of business to purchasers thereof located in states other than the state or states of the United States wherein said shipment or transportation originated. In the sale of its said products respondent at all times relevant herein has been and now is engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its said business, in such commerce, respondent has knowingly induced or received from many of its suppliers payment to it, or for its benefit, of money or other things of value as compensation, or in consideration, for services and facilities furnished by, or through respondent, in connection with the sale or offering for sale of products sold to it by said suppliers. But such payments were not made available by such suppliers on proportionally equal terms to all their other customers competing with respondent in the sale and distribution of products of like grade and quality purchased from such suppliers.

PAR. 5. For example, as a result of solicitations by respondent, many of respondent's suppliers have made payments to respondent to assist respondent in defraying the cost of television programs known variously as "Builders Showcase" and "Showcase of Homes" and sponsored by respondent in New Orleans, Louisiana; St. Louis, Missouri; Pittsburgh, Pennsylvania; and Dallas, Texas. In consideration of such payments, respondent has undertaken to promote the sale of such suppliers' products, by its Amstan Supply Division, to the builders of the homes featured on said television programs and to the subcontractors of such builders. In fact, the purchase of certain products from said Amstan Supply Division by said builders and subcontractors is the condition upon which respondent will permit the featuring of said homes upon said programs.

PAR. 6. In the period 1957 to 1959, inclusive, some of respondent's suppliers made such payments to respondent. Said payments aggregated more than \$15,000.

Among and typical of the suppliers who made such payments, to or for the benefit of respondent, were Bridgeport Brass Company, Inc., Bridgeport, Connecticut and Grabler Manufacturing Company, Cleveland, Ohio.

PAR. 7. Respondent's suppliers making such payments, including those expressly named in paragraph 6 hereof, did not offer or otherwise make available to all their customers, competing with respondent

ent in the sale and distribution of their respective products of like grade and quality, any similar payments as compensation, or consideration, for advertising or other services or facilities, on terms proportionally equal to those granted respondent.

When it induced or received from these suppliers the payments or allowances described in paragraphs 5 and 6 hereof, respondent knew, or should have known, that they constituted payments or allowances which such suppliers were not offering or otherwise making available on proportionally equal terms to their other customers competing with respondent in the sale and distribution of the products of such suppliers.

PAR. 8. In knowingly inducing or receiving such special payments from suppliers, which were not available on proportionally equal terms to its competitors, respondent has engaged in acts and practices which were all to the prejudice and injury of its competitors and of the public, which have the tendency and effect of obstructing, hindering, lessening and preventing competition in the sale and distribution of the aforementioned products, and which, accordingly, constitute unfair methods of competition in commerce and unfair acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Lynn C. Paulson and *Mr. Alan R. Lyness* supporting the complaint.

Mr. William E. Willis of *Sullivan & Cromwell*, of New York, N.Y., for respondent.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

This proceeding was brought under Section 5 of the Federal Trade Commission Act by the issuance of a complaint dated March 21, 1960. Counsel supporting the complaint seeks among other things to test the propriety of respondent manufacturer of building supplies, who also does its own wholesaling in part, soliciting its suppliers to engage cooperatively in an advertising program designed to sell homes on condition that the builders of the homes, so advertised, will cause plumbing, heating, and air conditioning contractors on such homes to use the products of respondent and its cooperating suppliers and to purchase them through the wholesaling subsidiary of respondent.

The Pleadings

Very briefly, the charge contained in the complaint is that the respondent induced suppliers for its building supply distribution division (Amstan) to contribute to a television program on which builders

exhibited homes which they had built. These supplier contributions, it was charged, were not made available on proportionally equal terms to the suppliers' other customers. Respondent knew or should have known about this discrimination. The concluding paragraph of the complaint charges:

In knowingly inducing or receiving such special payments from suppliers, which were not available on proportionally equal terms to its competitors, respondent has engaged in acts and practices which were all to the prejudice and injury of its competitors and of the public, which have the tendency and effect of obstructing, hindering, lessening and preventing competition in the sale and distribution of the aforementioned products, and which, accordingly, constitute unfair methods of competition in commerce and unfair acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Paragraph 5 which commences "For example," after describing payments to respondent for particular television programs, continues as follows:

. . . In consideration of such payments, respondent has undertaken to promote the sale of such suppliers' products, by its Amstan Supply Division, to the builders of the homes featured on said television programs and to the subcontractors of such builders. In fact, the purchase of certain products from said Amstan Supply Division by said builders and subcontractors is the condition upon which respondent will permit the featuring of said homes upon said programs.

In its answer, respondent admitted that payments for the program were made by Amstan's suppliers but denied that the suppliers had not made such allowances to others or that it knew or should have known of any such discrimination. Respondent also denied that builders were required to use the products of the contributing suppliers and it claimed that the matter was moot because the program had been experimental, had been voluntarily discontinued and there was no likelihood of its being resumed.

Prehearing Proceedings and Motions

Authority to hear this matter was transferred to the undersigned on April 4, 1961, from another hearing examiner and there have been several changes in counsel supporting the complaint.

A prehearing conference was held April 21, 1961, at which the issues were discussed and a procedure for notification of each party by the other of the names of witnesses and the documents to be used was established. It was also provided that objections to documents noticed must be made in advance. There was no discussion at the prehearing conference indicating that the quoted section of paragraph 5 would be relied upon solely to establish the violation of Section 5 of the

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Federal Trade Commission Act. The hearing examiner was informed by counsel supporting the complaint that witnesses would be required to establish the violation, that a stipulation proposed by counsel for respondent would not be acceptable to him and that the initial hearing should be held at Dallas, Texas. After an opportunity was afforded counsel to discuss settlement, it was arranged that a form of order would be submitted by counsel and that a hearing would commence in Dallas on July 25, 1961. An order embodying the results of the conference was issued July 10, 1961.

Between the date of the prehearing conference and the issuance of the pretrial order, respondent moved to dismiss the complaint on the ground of mootness and to postpone the hearings, or in the alternative, to certify as a question to the Commission whether or not the continued prosecution of the proceeding was in the public interest. This motion was denied by order dated July 5, 1961, after hearing oral argument and examining extensive briefs. The order stated the basis of the decision and indicated that the motion was denied without prejudice to a renewal thereof at the close of the taking of evidence.

On July 11, 1961, counsel supporting the complaint requested that the last two days of the hearings scheduled for Dallas, Texas be set for New Orleans. An order to that effect was issued July 12, 1961. On July 13, 1961, counsel for respondent protested informally, by letter, that counsel supporting the complaint had not sent him the names of witnesses. He sought an adjournment on that ground. The hearing examiner denied this application, by letter, and suggested that should counsel for respondent find that counsel supporting the complaint was attempting to take improper advantage, he might make an application for deferred cross-examination or for action under Rule 3.29(e). Copies of both letters were addressed to counsel supporting the complaint. Counsel for respondent denied vigorously that he was making any charge of impropriety which would make action under Rule 3.29(e) appropriate.

Nature of the Proof

At the opening of the hearing in Dallas on July 25, 1961, counsel supporting the complaint announced that he had determined not to call witnesses but intended to make the case a documentary one. Hence, there was no violation of the pretrial order. At the Dallas hearing, counsel supporting the complaint offered 27 exhibits, several of which consisted of a number of pages. These, for the most part, had been authenticated by counsel for respondent in compliance with the pretrial order of July 10, 1961. However, as to a few, additional concessions were required before they could be received in evidence.

Counsel for respondent undertook to consider such requests for concessions and was given until August 7, 1961, to respond. Thereupon, counsel supporting the complaint indicated that he would rest the Commission's case if the concessions sought were made and if the exhibits, the admissibility of which depended on such concessions, were received in evidence. Since it appeared to the hearing examiner that the proof offered failed to establish either that respondent's suppliers had violated Section 2(d) by giving discriminatory allowances or that there was any evidence that respondent had reason to believe that such suppliers had discriminated, he suggested that counsel supporting the complaint amend the pleadings to conform to the proof which gave some indication that respondent had agreed with its suppliers that it would make it a condition of the inclusion of a particular builder's home on television, that the builder utilize supplier's products in such buildings. This was a subject of strenuous objection by respondent's counsel who claimed that respondent was entitled to know with precision the charge made against his client. Counsel supporting the complaint argued that the proof was clearly within the pleadings without amendment. He, however, made the suggested motion which was granted.

Following the hearing and on July 27, 1961, the hearing examiner issued an order directing counsel supporting the complaint to submit a draft of the specific amendments to the language of the complaint by August 10, 1961, in default of which he would be deemed to have withdrawn his motion. Respondent was given until August 7, 1961, to file its statement responding to the requests for concessions and counsel supporting the complaint was required to state whether he rested by August 10, 1961. October 2, 1961, which was the next practicable date, was fixed in the order as the date for the next hearing.

On August 5, 1961, respondent filed its response conceding the facts which were necessary to the authentication of the documents to which it had previously objected, and on August 17, 1961, counsel supporting the complaint filed a statement that he did not desire to submit specific amendments to the complaint and that he would rest the Commission's case if the hearing examiner admitted the questioned exhibits. By order of August 29, 1961, the hearing examiner admitted the additional exhibits held that no amendment to the phraseology of the complaint had been made, that counsel supporting the complaint had rested and that counsel for respondent might move to dismiss the complaint at a hearing to be held October 2, 1961, but should be prepared to present evidence on that date.

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On October 6, 1961, the hearing having been postponed at respondent's request, respondent's counsel stated that he would not move to dismiss until after he had offered his proof. Respondent's proof consisted of the testimony of David A. DeWahl, counsel and secretary to respondent and the offering of three exhibits. This evidence was limited to respondent's affirmative defenses and in no way touched upon the alleged violation. There was no cross-examination.

In rebuttal, counsel supporting the complaint sought to have the hearing examiner infer from the fact that the Commission had issued complaints against the suppliers whose payments to respondent allegedly violated Section 2(d) of the Clayton Act as amended by the Robinson-Patman Act, that such payments were in fact discriminatory in that they were not offered on proportionally equal terms to customers other than respondent. The hearing examiner refused to draw any such inference and ordered that the proposed findings, conclusions and briefs be filed November 9, 1961, with reply briefs by November 20, 1961. On the latter date, a hearing was held and counsel supporting the complaint was permitted to argue in lieu of filing a reply brief.

Basis for Decision

On the basis of the entire record including all of the foregoing, the hearing examiner makes the following findings of fact, conclusions therefrom and order. All findings not found in terms or in substance are rejected as either erroneous or immaterial.

FINDINGS OF FACT

1. Respondent is a corporation organized, existing and doing business under the laws of the State of Delaware and has its principal office and place of business at 40 West 40th Street, New York, New York;
2. Respondent is now, and for many years last past has been engaged in the manufacture, sale and distribution of many diversified products, including heating, cooling, plumbing and kitchen products;
3. Respondent sells and distributes said products for use and resale both through independent wholesalers and through its own Amstan Supply Division (hereinafter sometimes referred to as Amstan);
4. Amstan operates through approximately sixty-three wholesaling branches and sells and distributes both respondent's products and similar and related products purchased from other manufacturers;
5. Respondent's total sales of all products during 1957, 1958 and 1959 were as follows:

1957-----	\$482, 880, 000
1958-----	476, 620, 000
1959-----	517, 413, 000

6. In the course and conduct of its business, respondent has caused and now causes its said products to be shipped and transported from state or states of location of its various manufacturing plants, warehouses and places of business to purchasers thereof located in states other than the state or states of the United States wherein said shipment or transportation originated. In the sale of its said products respondent at all times relevant herein has been and now is engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act;

7. Respondent is in competition with a substantial number of other business entities in the purchase, sale and distribution of heating, cooling, plumbing and kitchen and related products. Among such competitors in the distribution field is a wholesale concern identified in the evidence as "Southland Supply." (CX 16d)¹

8. During the year 1957 respondent urged certain of its suppliers, including Bridgeport Brass Company, Grabler Manufacturing Company and Tyler Pipe and Foundry Company, among others, to assist it in defraying the cost of a series of television presentations in New Orleans, La., St. Louis, Mo., Pittsburgh, Pa., and Dallas, Texas. Edward F. Eddy of Amstan in or about August 1957 made a resume describing the program and its results which reads, in part, as follows:

Purpose

To help new home builders promote the sale of their homes which contain American-Standard products and non-corporate products purchased by the plumbing-heating contractor from Amstan Supply. The basic idea behind the program is to help the builder overcome his sales problem and by so doing give him a definite incentive to want to use our products and to do business with our branch.

Medium

The program is carried out through a half hour television show in color * * * Title of the program is "Builders Showcase" * * *. During the half hour viewers are taken on a tour of nine different homes. The sales features of the important rooms in each house are pointed out. Prospective home buyers, can in a sense, shop for a home in the comfort of their living room and if interested can visit the home that same afternoon.

Sponsorship

Amstan is co-sponsor of "Builders Showcase" with Lone Star Gas Company and MacAtte, Inc., a firm handling builders supplies. Under terms of the con-

¹ A reference preceded by "CX" refers to those exhibits received in evidence at the instance of the Commission. Although Southland Supply's activities are contrasted with Amstan's there is no evidence as to Southland's ownership, management or control.

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tract each co-sponsor is entitled to designate 3 builders per show. Each sponsor is entitled to a one-minute spot.

* * * * *

Cost

Contract calls for \$300 per show or the total of \$10,800 for 36 weeks. Plumbing-Heating Division and Air Conditioning Division both are sharing the cost under terms of their respective cooperative advertising plans.

Results to Date

During May, June and July 35 new homes have been designated by Amstan to appear on "Builders Showcase". 11 homes have been sold as of July 31. The approximate value of these homes was \$422,000. As best as can be determined, we have done \$48,478 worth of business with a gross profit of \$8,540. This program has been instrumental in converting 8 new builders to American-Standard products or to make their purchases through a plumbing-heating contractor friendly to Amstan. * * * (CX 14a, b)

In connection with its one-third contribution to the Builders Show Case program, Amstan secured contributions from other manufacturing divisions of respondent and from other suppliers as shown in the table attached and marked Appendix A.

9. There was no direct proof offered concerning the advertising policy or other advertising allowances, if any, by Bridgeport Brass Company, Grabler Mfg. Company, or any of the suppliers other than respondent's divisions who contributed to said programs.

10. The hearing examiner does not infer from the form of the request or from the form of the contributions on either the first or subsequent programs, that the suppliers did not grant advertising allowances to other customers on a proportionately equal basis or that respondent had reason to believe that they were not affording similar allowances to other customers.

11. Counsel supporting the complaint referred, in part, to the following as supporting the inference refused in Finding 10: (a) the suppliers insistence upon anonymity; (b) two inter-office letters in respondent's files marked "Personal and Confidential", and (c) Grabler Manufacturing Company's letter to Garland of Amstan on May 7, 1957, which stated, "I am sure that this was to be handled through you, and I trust my writing you on the matter is not out of order." These circumstances do not appear sufficient, particularly in light of the ease of proof of the policies of these suppliers, to constitute substantial and reliable evidence that there was discrimination in granting advertising allowances. There are a number of inferences which may be drawn from the suppliers' unwillingness to have their names mentioned on the television program. One of these is that they did not desire to be a target for requests by advertising agencies for

television stations to engage in direct advertising. Other letters dealing with the same subject matter were not marked "Personal and Confidential." Hence, the hearing examiner cannot draw the inferences suggested by counsel supporting the complaint. (CX 6, 9 and 20)

12. In the case of other divisions of respondent, Amstan was required to seek advertising allowances on the basis of application forms which would indicate a policy of supplying cooperative advertising to others as well as to Amstan. (CX 8b, 8c and 10b) In the case of Tyler Pipe and Foundry Company, also, the allowance was made on the basis of tons supplied which suggests, at least, that there was a measure applied which would form a basis for making proportional allowances to others. (CX 21)

13. It was contemplated by respondent's suppliers that respondent's representatives would approach builders who were building homes for sale and urge them to participate in the TV programs by insisting that their building contractors utilize American Standard materials sold through Amstan and also utilize the products of the contributing suppliers—Bridgeport, Tyler and Grabler—in building the homes to be exhibited. (CX 9a, b and c, CX 9) It is also clear that such action was taken and aroused some adverse comment by the contractors. (CX 16b and f, 17a and 22b)

14. There was no proof as to the basis (other than utilizing cooperating suppliers' products in the homes featured) upon which builders were selected to participate in the program. It is clear that both new accounts and existing accounts were solicited for business. (CX 16b) It was not a condition to the participation of a builder that his contractors agree not to use supplies of competitors in their business. The condition sought to be imposed was merely that the contractor in the homes advertised on the TV program utilize the products of respondent and the contributing suppliers. (CX 16c)

15. The results of the program were analyzed in a number of inter-office memoranda. These are colored to an extent by an apparent desire of some of the writers to see that the program was continued. Some of these are discussed in ensuing findings.

16. One Dallas official of Amstan in a report evaluating the program made it clear that "the program cannot and should not be credited with a full amount of this increase [of business], but * * * must share credit with the salesmen, your service policy and other factors." [Brackets supplied.] (CX 25a)

17. The writer of the report discussed in finding 16 stated in the same report that his records indicated an increase in business in excess of \$200,000 over 1957 which at 12 percent would amount to \$24,000 gross profit at a cost of \$1,750. (CX 25a)

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18. Mr. E. F. Eddy in October 1957 made an exhaustive evaluation of the program which was sent to respondent's president. This reported the enthusiasm of the builders and the value of the program to them. It also indicated, however, a lack of enthusiasm on the part of the contractors. "Some [of the contractors] even resented being told by the builder where the material was to be purchased. A few were willing to give Amstan the fixtures but felt their obligation ended there. They wanted to purchase the roughing for the best price." [Brackets supplied] (CX 16b) This same memorandum indicated a substantial increase in gross sales to regular customers and some increase in business in the form of sales to new accounts. It established that Southland (which is presumably another wholesaler) showed a decrease in quality fixtures sold, whereas the previous year they held a substantial lead over Amstan. After some adjustments, the writer concluded that Amstan was "in front by \$115,000." (CX 16d) However, the memorandum also indicated that, in the commercial market, for schools, hospitals, etc. Southland supplied more jobs than Amstan. This tabulation of Southland jobs included jobs outside Dallas.

19. The manager of the Dallas branch told the manager of Marketing: "After evaluating the comments of the builders that I contacted personally and analyzing the reports submitted to me by the other two gentlemen, [who conducted a survey] I am now of the opinion that even though we cannot measure this program in its nth dollar value, I believe in my own mind that it has helped the Dallas Branch's movement of merchandise through this medium of advertising. In conducting this survey, I found that this program is being received by the builders with open arms. At first, all I was receiving from some of the builders were comments about the pressure being applied to them to get them to insist on their plumbing contractors using our products. I now find that the builders are acceptable and realize that they cannot get this type of advertising for themselves without exerting some effort on their part. * * *" [Brackets supplied] (CX 22b)

20. So far as the effect of the TV program on suppliers other than respondent's own manufacturing divisions, the results tabulated in Exhibit 16e evoked the comment presumably by some reader "not good" as there was no trend of increase and with some of these suppliers an actual decrease.

21. Results were reported by Hopkins, an employee of respondent, in his February 11, 1958 letter to the manager of Sales Development of Amstan. (CX 18a, b, c) Hopkins was more enthusiastic. He stated, "The larger accounts listed below probably do some seventy-five percent of the new construction (residential) business in the Dallas

market and therefore represent the greatest potential of increase which could be derived from our television show efforts. We feel that at least 75 percent of the increase reflected in the purchases by these accounts were directly or indirectly derived from the efforts and influence of our T.V. program on the market. It is not our wish to detract from the ability or effectiveness of our sales department, but do feel compelled to give due credit to a tool with which we feel we can dominate our market." Hopkins then lists the names of some contractors and the increases in business received in 1957 over 1956 which total some \$167,906.18. He calculated the 75 per-cent mentioned as \$125,929.63. (CX 18a, b, c)

DISCUSSION

The position of counsel supporting the complaint has had a commendably flexible quality. First, at the prehearing conference it appeared that the charge was like *Grand Union* (Docket 6973) with additional allegations of an evidentiary nature (complaint paragraph 5). At the Dallas hearing, this position seemed to have been abandoned because of the failure to prove that the advertising allowances solicited were discriminatory. Substituted was a charge that the unfair acts and practices committed sounded in Section 3 of the Clayton Act, i.e., a requirement that builders who sought TV time must have the contractors they hire use only respondent's products. On final argument, after the findings were submitted, there was a third shift which seemed to suggest that respondent's alleged unfair tactics were in the nature of a monopolization of the Dallas market in distribution, but the other former contentions were reiterated and hence will be discussed seriatim.

The *Grand Union* type charge, i.e., inducement of discriminatory allowances, failed utterly because it was not shown that the allowances induced were discriminatory. In the case of violations of Section 2(f) of the Robinson-Patman Act, the Commission is required to establish that the prices induced are in fact discriminatory *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61 (1953). This is so because the person inducing such an allowance does not have access to the information required to prove or disprove the discrimination in price. By a parity of reasoning, the same rule should apply in the case of an inducement of discriminatory allowances. Although counsel supporting the complaint made an ingenious argument from the documents in evidence, in the opinion of the writer he failed to establish by substantial or reliable evidence either that the allowances were discriminatory or that respondent had reason to believe that they were.

As to the charge that respondent entered into agreements excluding its competitors from the custom of the plumbing contractors for the builders who were offered TV time by the respondent, the charge is simply not factually substantiated. All that was required by respondent was that, in the houses advertised, the builder require his plumbing contractors to utilize respondent's products and the products of the cooperating advertisers. There was no attempt to require the plumbing contractors to use only respondent's supplies in connection with other buildings and the evidence shows that; in fact, they did not do so. When a case under Section 5 of the Federal Trade Commission Act is founded on such allegations, it stands in the same position as would a case expressly brought under Section 3 of the Clayton Act. *Rural Gas Service, Inc., et al.*, Docket 7065. (Opinion of Commissioner Elman dated October 24, 1961) Clearly a Section 3 case would require that the contract come strictly within the four corners of the language of the statute. *Federal Trade Commission v. Sinclair Refining Company*, 261 U.S. 463 (1923) and, it would, in addition, require extensive proof concerning the structure of the industry and respondents share therein, before an order should issue. *In the Matter of Murray Space Shoe Corporation*, Docket No. 7476 (Opinion of Commissioner Kern, dated October 17, 1961), *Standard Oil Co. v. United States*, 337 U.S. 293 (1949), *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961) cf. *Maico Co.*, Docket No. 5822, 50 F.T.C. 485 (1953), *Mytinger & Casselberry, Inc.*, F.T.C. Docket No. 6962 (1960) Prof. Milton Handler 16 The Record of the Association of the Bar of the City of New York 398.

Passing now to the charge sounded in monopolization, while it may be that respondent is dominant in the field of production and distribution of plumbing, heating, air conditioning, and kitchen products, the record is barren of evidence on this subject. Respondent is a very large company with a record of sales of almost a half billion dollars annually. Its size alone is not a reason to restrict its activity in the absence of the possession or exercise of monopoly power unless it be shown to have engaged in practices opposed to good morals because characterized by deception, bad faith, fraud or oppression or practices determined to be against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. *Federal Trade Commission v. Gratz, et al.*, 253 U.S. 421 (1920), *In the Matter of R. H. Macy & Co., Inc.*, Docket 7869 (Initial Decision of Hearing Examiner Creel dated October 17, 1961). No such practices have been established here.

Despite upholding its flexibility, the Supreme Court has pointed out that the Federal Trade Commission Act does not permit the Com-

mission to prohibit every unethical competitive practice regardless of its character or consequences. *Federal Trade Commission v. Keppel* 291 U.S. 304, (1934). The economic impact of any restrictive practice, and hence an element in its reasonableness, will in a measure depend upon the size and position of an accused enterprise in its industry. See *Dictograph Products, Inc. v. Federal Trade Commission*, 217 F. 2d 821 (2d Cir. 1954), *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922), *United Shoe Machinery Corp. v. United States*, 258 U.S. 451 (1922), *International Business Machine Corp. v. United States*, 298 U.S. 131 (1936), *Standard Oil Co. v. United States*, 337 U.S. 293 (1949), and *Tampa Electric Company v. Nashville Coal Co.*, 365 U.S. 320 (1961). Here, however, the only showing of the dominant position of the respondent is its record of sales. There was no comparison made with the sales of its competitors. In fact the record fails to show more than that there are competitors. Counsel supporting the complaint seemed to argue, at the hearing held to discuss the proposed findings and conclusions, that he had established that respondent dominated the distribution of its class of building supplies in the city of Dallas, that that city was a separable market and that he had also shown that Southland Supply, the principal competitor of Amstan in the Dallas market, had been injured. In doing so, he leans heavily on Eddy's report (CX 16) and on Hopkin's letter (CX 18). In the absence of testimony describing the competition in the area, the hearing examiner must look to the evidence as a whole to determine whether the inferences which counsel supporting the complaint would draw are justified by the absence of equally reasonable but contrary inferences. The record indicates that one of the three cosponsors of the Builders Showcase program in Dallas is another building-supply house. It may well compete with both Amstan and Southland Supply. Moreover, Southland clearly dominates one phase of the sale of respondent's products, the commercial building end. It may also be true that other manufacturers of supplies competitive with respondent's such as Crane, Kohler, and Carrier, to mention a few well-known producers, also have supply houses or distribution of their product in the Dallas area. The record tells us nothing about their operations in detail—only competition is mentioned. Eddy's emphasis is on the sale by Southland of *respondent's* products. The record does not indicate whether Southland carries other producers' building supplies and fixtures or not. It is also difficult to understand how the quotation out of context of a single phrase "dominate the market" by an enthusiastic proponent of the TV advertising program can be magni-

fied to support a charge of localized monopoly. All Amstan was dominating—according to the proof—was respondent's own products. Absent conspiracy, respondent could have chosen to sell only through its own distributor. *Naifel & Ronson*, 218 F.2d 205 (10 Cir. 1954).

Another facet of this same contention is that by offering advertising to the builder, respondent was *bribing* him to require the contractors he hired to utilize respondent's materials bought through its distributor Amstan to the detriment of the Amstan's competitor Southland. Amstan's other suppliers are claimed to be conspiring to the same end. Counsel seems to say that because of respondent's size, it is capable of giving larger advertising opportunities to builders than could others and thus it can buy the business just as if it offered money. Such an argument, if sustained, would spell the end of cooperative advertising. Compare *Eastern Railroads Presidents Conference v. Noerr Motor Freight*, 365 U.S. 126 (1961). Whenever a large company offered its retail distributors an opportunity to advertise its product with it on an equal or proportional basis, it could be charged with bribing the retailer to buy its product rather than its competitors'. The label, "bribing", it seems, is entirely inappropriate. Both the manufacturer of building supplies and the builder have an interest in the sale of a home built by the builder provided it incorporates the manufacturer's product. Each has right to utilize advertising, which has recently been described² as a vital lubricant to American business, properly to interest the public in purchasing the house. However, the manufacturer to justify the use of its stockholders' money must see that it is advertising a house containing its product, not the product of someone else.

None of the several theories of the case are established by substantial evidence quite apart from the fact that only the first theory should properly be considered under the pleadings. Hence, it becomes unnecessary to consider the respondent's affirmative defense that it ceased the practices complained of long before the issuance of the complaint and has so educated its personnel that no unlawful activity will occur in the future.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of respondent and of the subject matter of this proceeding. The findings of fact are based on the entire record and on reliable and substantial evidence.

² Address of Hon. Paul Rand Dixon, November 14, 1961, Chicago Better Business Bureau, Inc., entitled "Why Depreciate the Advertising Dollar."

2. Counsel supporting the complaint failed to establish the following by substantial or reliable proof:

a. The right of builders to specify the type of building materials to be utilized by contractors employed in their building operations.

b. The structure of the industry involved, the existence of separable markets or the line of commerce allegedly affected.

c. The advertising policies of the suppliers of Amstan, other than respondent, to establish whether or not the contribution to the TV cooperative advertising Builders Showcase Program was discriminatory.

d. The effect of the Builders Showcase Program, as distinguished from other factors involved, in the increase in business of respondent's Amstan division or the decrease of Southland Supply.

e. Respondent's knowledge of the advertising policies of the suppliers of Amstan who contributed to the Builders Showcase program.

f. Any agreement on the part of builders or contractors not to use the goods of a competitor, except in connection with houses subject of the cooperative advertising effort.

3. Read as a whole, the complaint charges a violation of Section 5 of the Federal Trade Commission Act through the wrongful inducement of discriminatory allowances from respondent's suppliers.

4. To establish such a wrongful inducement, counsel supporting the complaint has the burden of proving both that there was an illegal discrimination in the allowances and that respondent knew of the discrimination. This burden has not been met.

5. Construed, as last contended, by counsel supporting the complaint, the complaint charges some injury to competition because of an agreement among builders, other suppliers of respondent and respondent that such builders would require contractors employed in their building operations to use only the supplies manufactured by respondent and the cooperating suppliers in homes to be exhibited on the Builders Showcase Program.

6. To establish such a violation of Section 5 of the Federal Trade Commission Act, counsel supporting the complaint would have the burden among other things, of establishing that the acts and practices were inherently illegal or unfair, or were unreasonable and had a dangerous tendency to substantially lessen competition or to create a monopoly. This burden has not been met.

7. There is nothing inherently illegal, unfair, or unreasonable, in a manufacturer's advertising cooperatively buildings containing its products or in insisting that its products be used in buildings so advertised as a condition of eligibility for free advertising. Even if it had been established that respondent's business increased because of such

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advertising, such success would not constitute a legal injury to competition nor a result contrary to the public interest.

8. The complaint herein not having been sustained by substantial and reliable evidence, it is unnecessary to consider respondent's affirmative defense. The complaint should be dismissed.

ORDER

It is ordered, That the complaint herein be dismissed.

APPENDIX A

Analysis of Contributions in Dollars to Amstan from Suppliers¹

	Dallas shows			St. Louis shows 4-27-58 to 10-19-58	New Orleans shows			Pitts- burgh shows (dates not given)
	5-26-57 to 1-26-58	2-2-58 to 7-27-58	8-3-58 to 1-25-59		11-1-58 to 6-29-58	7-6-58 to 12-14-58	12-21-58 to 6-14-59	
Respondent's other divisions	4,534	4,790	3,704	4,040	3,110	2,930	5,660	9,750
Bridgeport Brass Co.	600	600	600	600	600	600	600	750
Grabler Manufacturing Co.	600	None	300	1,000	300	300	300	900
Tyler Pipe & Foundry Co.	600	500	300	None	None	None	None	None
Nibco ²	None	None	None	None	600	600	600	750
Anniston ³	None	None	None	None	600	600	600	750

¹ Source 27 (a) through (g).

² Not identified.

³ Not identified.

OPINION OF THE COMMISSION

By Kern, *Commissioner*:

Respondent in this proceeding is charged with violating Section 5 of the Federal Trade Commission Act by knowingly inducing and receiving payments from suppliers for services and facilities furnished by or through respondent, in connection with the sale or offering for sale of goods not available to all of their competitors on proportionally equal terms.¹

Counsel supporting the complaint proved that allowances for respondent's TV program were, in fact, solicited and received. He neglected, however, to develop whether or not such payments were, in fact, discriminatory, nor did he prove the identity of respondent's competitors victimized by the alleged discriminations with any degree

¹ Counsel supporting the complaint has also taken the position in the course of this proceeding that the complaint in addition charges respondent with unfairly seeking preference for the products of its wholesaling division from builders benefiting from the TV program supported in part by the payments induced from its suppliers. It is obvious, however, from an examination of the complaint as a whole that respondent is charged with inducing discriminatory payments which were not available on proportionally equal terms to its competitors and that no other allegations of unfair trade practices are contained therein independent of that charge.

of clarity. The hearing examiner refused to infer from the documentary evidence in the record proving the solicitation and receipt of payments for the support of respondent's TV program that the allowances were discriminatory or that respondent had reason to believe that the allowances were not available to their competitors on proportionally equal terms.

Counsel supporting the complaint thereupon addressed a motion to the Commission requesting that the matter be remanded to the hearing examiner to receive testimony and records from officials of respondent's suppliers to prove that the payments were discriminatory.

By our order issued February 7, 1962, we thereupon stayed the initial decision and remanded the proceeding to the hearing examiner that he might determine in the first instance in light of the materiality of the new evidence offered by counsel supporting the complaint, fairness to the parties and other relevant considerations, whether the effective and expeditious disposition of this proceeding would best be served by receiving the additional evidence. The examiner, by his order of August 22, 1962, denied the motion for the reception of further evidence. With the whole record before us, including the examiner's order on the motion for the reception of further evidence, we must now determine whether the public interest will best be served by dismissing or reopening this proceeding.

We are of the opinion that the evidence proffered by counsel supporting the complaint was material, and it is further our view, contrary to the position taken by the hearing examiner, in the initial decision and during the course of the remand proceeding, that had counsel supporting the complaint proven that the payments induced were, in fact, not available to respondent's competitors on proportionally equal terms, then the manner in which the funds were solicited as documented by the record might well be sufficient to support the inference that respondent had induced the payments with knowledge of their discriminatory nature. The critical element of knowledge on the part of the buyer as to the nonavailability on proportionally equal terms to competitors of the payments induced, of course, frequently has to be established from indirect circumstantial inferences. As the Fifth Circuit stated under analagous circumstances in a proceeding under Section 2(f) of the Clayton Act as amended by the Robinson-Patman Act, "Rarely will buyers have committed the crudities to permit categorical and direct proof."² The examiner in this instance, however, correctly refused to infer that, in fact, the pay-

² *Mid-South Distributors, et al. v. Federal Trade Commission*, 287 F. 2d 512 (5th Cir. 1961), *cert. denied* 368 U.S. 838 [7 S.&D. 41] (1961).

ments were discriminatory on the basis of merely the evidence available in the record. Where the fact of discrimination is as readily susceptible of direct proof as it was in this instance, neither the examiner nor the Commission should resort to inference.

Administrative agencies generally, and, of course, the Commission, have wide discretion in determining whether a proceeding should be reopened for the reception of further evidence in a matter not yet decided. Administrative agencies are not necessarily restricted by the rules governing motions in courts for new trials based on after-discovered evidence.³ Nor is the public interest to be thwarted merely because of mistake or inadvertence on the part of the Commission or its staff.⁴ There are no hard and fast rules to guide us in this instance, for in determining whether the case should be reopened, we must necessarily strike a balance between the inconvenience to respondent resulting from further hearings and the public interest in the conclusion of this proceeding by a decision on the merits rather than on procedural grounds. On weighing all the factors before us, including the fact that respondent apparently discontinued the practice under consideration herein prior to the inception of the investigation leading up to the complaint, we conclude that the public interest will best be served by concentrating the Commission's limited funds and manpower on more pressing and more current problems, keeping a scrutiny on respondent lest it resume the practice challenged in this proceeding.

FINAL ORDER

The Commission by its order of February 7, 1962, having remanded the proceeding to the hearing examiner for his determination, in the first instance, whether the request of counsel supporting the complaint for leave to adduce further evidence should be granted, and having extended the period within which the initial decision would become effective; and

The hearing examiner having issued his order filed August 22, 1962, denying the motion for the reception of further evidence; and

The matter having come on to be considered by the Commission and the Commission having, for the reasons stated in the accompanying opinion, determined that the case should not be reopened for the reception of further evidence but that the proceeding should be terminated without prejudice:

³ *Deering Milliken, Inc. v. Johnston*, 295 F. 2d 856 (4th Cir. 1961); see also *N.L.R.B. v. Menaged*, 193 F. Supp. 135 (D. Md. 1961).

⁴ *P. Lorillard Co. v. Federal Trade Commission*, 186 F. 2d 52, 55 [5 S.&D. 210, 214] (4th Cir. 1950).

Complaint

It is ordered, That the initial decision be modified by striking therefrom findings numbered 10 through 12, on pages 938 and 939 thereof, and substituting therefor the following finding:

10. Counsel supporting the complaint has not sustained the burden of proving that the payments induced by respondent for its TV program were unavailable on proportionally equal terms to respondent's competitors competing in the resale of goods purchased from suppliers who made such allowances.

It is further ordered, That the findings in the initial decision numbered 13 through 21 be renumbered 11 through 19, respectively.

It is further ordered, That the initial decision be modified by striking therefrom that portion beginning on page 941 with the phrase "The position of counsel supporting the complaint" and ending on page 946 with the phrase "it is unnecessary to consider respondent's affirmative defense."

It is further ordered, That the initial decision as so modified be, and it hereby is, adopted as the decision and order of the Commission.
