

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

Docket 7975. Complaint, June 24, 1960—Decision, Nov. 27, 1962

Order requiring a Brooklyn, N.Y., manufacturer of games, toys, and hobbies,
to cease violating Sec. 2(d) of the Clayton Act by making promotional pay-

ments to certain jobber customers' toy catalog companies—such as payments of \$500 in both 1958 and 1959 to Individualized Catalogues, Inc., for illustrations and advertisements of its products in the latter's catalog—while not making such payments proportionally available to competing jobber customers.

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 subsection (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, hereby issues this complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Bilnor Corp. is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 300 Morgan Avenue, Brooklyn 11, N.Y.

PAR. 2. Respondent has been engaged, and is presently engaged, in the business of manufacturing and distributing toy products, including children's swimming pools. These products are sold and distributed by respondent to wholesalers and department stores located in various parts of the nation. Respondent's sales in 1959 approximated \$5,000,000.

PAR. 3. Respondent has sold and distributed, and now sells and distributes, its products in substantial quantities in commerce, as "commerce" is defined in the amended Clayton Act, to competing customers located throughout various States of the United States, and in the District of Columbia.

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, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of products sold to them by respondent. Such payments or allowances were not offered or made available on proportionally equal terms to all other customers competing with said favored customers in the distribution of respondent's products.

PAR. 5. As an example of the practices alleged herein, respondent granted, and is presently granting, promotional payments or allowances for the promoting and advertising of its products to certain wholesale customers who publish toy catalogues either in combination with each other through wholesaler associations and groups, or in an

individual capacity. The payments or allowances are granted to said wholesale customers in connection with their advertising respondent's products in their toy catalogues. These catalogues are sold and distributed by said favored wholesale customers to retail outlets for redistribution to the consuming public.

The aforesaid promotional payments or allowances were not offered or granted on proportionally equal terms to all other customers of respondent who compete with said favored customers in the distribution of respondent's products. These unfavored customers include wholesalers who are not members of any toy wholesaler associations or groups. Included among the favored customers are the members of Individualized Catalogues, Inc., New York, New York, an association composed of toy wholesalers which publishes a toy catalogue.

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

Mr. Jerome Garfinkel for the Commission.

Mr. Leon Silverman, of *Strasser, Spiegelberg, Fried & Frank* of New York, N.Y., for respondent.

INITIAL DECISION BY RAYMOND J. LYNCH, HEARING EXAMINER

The complaint charges the respondent, Bilnor Corp., with violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. Sec. 13), in the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for any services or facilities to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of products sold to them by respondent, without making such payments or allowances available to all other competing customers on proportionally equal terms. As an example of this practice, the complaint alleges the respondent made payments to certain wholesale customers for the advertising of its products in the catalogs of these wholesale customers, without proportionally equal payments to the rest of respondent's customers competing with the recipients of the promotional payments.

Respondent's answer to the complaint, dated September 28, 1960, made partial admissions of the allegations of the complaint, in particular catalog advertising, but denied that any of its promotional payments constituted violations of the Act.

On May 18, 1962, a stipulation was executed by the respondent and counsel for both parties, setting forth certain facts and waiving hear-

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Initial Decision

ing. Argument was reserved on the scope of the cease and desist order to be entered. Proposed findings and order were submitted by both parties and, on July 6, 1962, oral argument was allowed thereon.

The hearing examiner has considered the stipulation, the proposed findings of fact and conclusions submitted by counsel representing the parties, and all findings of fact and conclusions of law not hereinafter specifically found or concluded are herewith rejected and the hearing examiner having considered the entire record makes the following findings as to the facts, conclusions drawn therefrom and order.

FINDINGS OF FACT

I

Bilnor Corp. is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 300 Morgan Avenue, Brooklyn 11, New York.

II

Respondent has been engaged, and is presently engaged, in the business of manufacturing toys, games and hobbies such as swimming pools and wading pools (hereinafter called "products"). These products are sold by respondent to jobbers located in various parts of the nation for resale to retailers. Respondent's sales in 1959 approximated \$5,000,000.

III

Respondent has sold, and now sells, its products in commerce, as "commerce" is defined in the amended Clayton Act, to customers located throughout various States of the United States, and in the District of Columbia, some of whom are in competition with other of its customers.

IV

In the course and conduct of its business in commerce respondent, on June 20, 1958, made a \$500 payment to Individualized Catalogues, Inc., for the latter's illustration and advertisement in its 1958 summer catalog of products manufactured by Bilnor Corp. for jobber customers of respondent who owned Individualized Catalogues, Inc. Respondent, on August 10, 1959, made a further \$500 payment to Individualized Catalogues, Inc., for the latter's illustration and advertisement in its 1959 summer catalog of products manufactured by Bilnor Corp. for jobber customers of said respondent who owned Individualized Catalogues, Inc.

Individualized Catalogues, Inc., is a toy catalog company owned

and controlled by jobber customers of respondent. The payments to Individualized Catalogues, Inc., were made by respondent as compensation or in consideration for the illustration and description in the catalogs of Individualized Catalogues, Inc., of one or more products sold by respondent to jobber customers who owned and controlled Individualized Catalogues, Inc. Specifically, the products were sold by respondent to Schranz and Bieber, Inc., and Lachman, Rose & Company, two of the four toy jobbers who owned and controlled Individualized Catalogues, Inc. The payments made by respondent to Individualized Catalogues, Inc., were not offered or made available by respondent on proportionally equal terms to all of its other jobber customers who were in competition in the contemporaneous resale of its products of like grade and quality with those jobber customers who owned and controlled Individualized Catalogues, Inc., a toy catalog company, to which the aforesaid advertising payments were made.

V

The jobber customers who owned and controlled Individualized Catalogues, Inc., sold and distributed the toy catalogs of Individualized Catalogues, Inc., to retailers for redistribution to the consuming public.

CONCLUSIONS

The acts and practices of the respondent as herein found were in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C., Sec. 13) in 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 the handling, sale, or offering for sale of products sold to them by respondent, without making such payments or allowances available to all other competing customers on proportionally equal terms.

Based upon the above findings, the public interest requires the issuance of a cease and desist order. The only question before the examiner is a determination of the type order that should issue. Counsel supporting the complaint requests a broad order,¹ while counsel representing respondent argues that the order should be limited to the specific violation admitted by the stipulation.² The examiner is of the opinion that the *Ruberoid* case can be distinguished from the *Swanee Paper Co.* case and that the former sets forth the policy established by the Commission in a number of cases.³

¹ *FTC v. Ruberoid Co.*, 343 U.S. 470 [5 S. & D. 388] (1952).

² *Swanee Paper Co. v. FTC* 291 F. 2d 833; [7 S. & D. 175].

³ (See *In the Matter of Chestnut Farms Chevy Chase Dairy*, Docket No. 6465, 53 FTC 1050, 1062 (1957); *In the Matter of Henry Rosenfeld, Inc., et al.*, Docket 6212, 52 FTC

In addition, the most recent decision by the Supreme Court, January 15, 1962, in *FTC v. Broch*, FTC Docket 6484 [368 U.S. 360, 7 S. & D. 305] although involving a Section 2(c) violation of the Clayton Act follows the reasoning in the Ruberoid case endorsing a broad order and concludes that this type order is necessary to stop the *illegal practice* regardless of the form it takes whether it be a vehicle such as that used in the present case, or any other type, such as radio, television, newspaper or other media. In the *Shulton* decision, Docket No. 7721, dated July 25, 1961 [59 F.T.C. 106], the Commission adopted the position that the specific practice found to be illegal under Section 2(d) was the granting of discriminatory payments to certain customers for services and facilities furnished by such customers. As previously stated, the practice involved is the discriminatory payment to a buyer regardless of the form in which such discrimination takes place. Based upon the above precedents, the examiner concludes a broad order as recommended by Counsel Supporting the Complaint is required in this proceeding.

ORDER

It is ordered, That respondent Bilnor Corp., a corporation, its officers, directors, representatives, agents or employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of toy, game or hobby products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent 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 toy, game or hobby product manufactured, sold or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such toy, game or hobby product.

FINAL ORDER

The Commission on October 5, 1962, having issued its order providing for the filing of objections by the respondent to the proposed final order of the Commission in modification of the order to cease

1535, 1544-1545 (1956) ; *In the Matter of P. Lorillard Company*, Docket No. 6600, Init. Dec., dated Oct. 9, 1957, Init. Dec. adopted by Commission May 7, 1958 [54 FTC 1550] ; *In the Matter of Swanee Paper Corporation*, Docket 6927, Init. Dec. dated August 18, 1959, adopted by Commission March 22, 1960 [56 FTC 1077].

and desist contained in the hearing examiner's initial decision filed August 16, 1962; and

Respondent having been served with said order of October 5, 1962, and not having filed objections to the proposed final order of the Commission within the time granted in said order; and

The Commission having determined that its proposed final order should be adopted and entered as the final order of the Commission:

It is ordered, That the respondent, Bilnor Corporation, and its officers, directors, employees, agents, and representatives, directly or through any corporate or other device, in, or in connection with, the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Clayton Act, as amended, of any toy, game, or hobby products, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to or for the benefit of any customer of such respondent as compensation or in consideration for any services or facilities consisting of advertising or other publicity, furnished by or through such customer, in a toy catalogue, handbill, circular, or any other printed publication serving the purpose of a buying guide, distributed, directly or through any corporate or other device, by such customer, in connection with the processing, handling, sale, or offering for sale of any toy, game, or hobby products manufactured, sold, or offered for sale by such respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

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

By the Commission, Commissioner Higginbotham not participating.

IN THE MATTER OF

SACKS WOOLEN CO., INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS