

name or names of similar import or meaning or representing in any other manner that any account not referred to an independent organization engaged in the collection of past due accounts has been so referred.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF
FOREMOST DAIRIES, INC.

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

Docket 7475. Complaint, Apr. 13, 1959—Decision, May 23, 1963

Order requiring a large national dairy, operating 59 processing plants in 24 States, and 182 distribution facilities in those and 5 additional States, to cease discriminating in price among competing purchasers in the sale of fluid milk by such practices as giving a 5 percent discount to an Albuquerque, N.M., grocery chain but not to retailers in competition with the chain.

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 (a) of Section 2 of the Clayton Act (U.S.C.A. Title 15, Sec. 13) as amended by the Robinson-Patman Act approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent named herein is Foremost Dairies, Inc. Respondent is a corporation organized and existing under and by virtue of the laws of the State of New York. Respondent's principal office and place of business is located at 2903 College Street, Jacksonville, Fla.

PAR. 2. Respondent is extensively engaged in the business of purchasing, processing, manufacturing, distributing, and selling fluid milk and other dairy products throughout the United States and in other places under the jurisdiction of the United States. Respondent's net sales for 1957 were \$415,141,110.

PAR. 3. Respondent sells fluid milk and other dairy products of like grade and quality to a large number of purchasers located

throughout the United States and in other places under the jurisdiction of the United States for use, consumption, or resale therein.

Respondent owns, maintains, and operates a large number of receiving stations, processing, and manufacturing plants and distribution depots located in various States of the United States and in other places under the jurisdiction of the United States from which it sells and distributes its said products to purchasers.

PAR. 4. In the course and conduct of its business respondent is now, and for many years past has been, transporting fluid milk and other dairy products, or causing the same to be transported from dairy farms and other points of origin to respondent's receiving stations, processing, and manufacturing plants and distribution depots located in other States of the United States and in other places under the jurisdiction of the United States.

Respondent is now, and for many years past has been, transporting fluid milk and other dairy products, or causing the same to be transported from the State or States where such products are processed, manufactured, or stored in anticipation of sale or shipment, to purchasers located in other States of the United States and in other places under the jurisdiction of the United States.

Respondent also sells and distributes its said fluid milk and other dairy products to purchasers located in the same States and places where such products are processed, manufactured, or stored in anticipation of sale.

All of the matters and things, including the acts, practices, sales, and distribution by respondent of its said fluid milk and other dairy products, as hereinbefore alleged, were performed and done in a constant current of commerce, as "commerce" is defined in the Clayton Act.

PAR. 5. Respondent sells its fluid milk and other dairy products to distributors, retailers, and consumers.

Respondent's distributors resell to retailers and consumers to the extent that such purchasers do not buy directly from respondent. In many instances respondent's distributors act as its agent in making deliveries to some of respondent's retailer-purchasers. Respondent's retailer-purchasers resell to consumers. Many of respondent's distributor and retailer-purchasers are respectively in competition with other distributor and retailer-purchasers of respondent.

Respondent, in the sale of its fluid milk and other dairy products to distributors, retailers and consumers is in substantial competition with other manufacturers, processors, distributors and sellers of said products.

PAR. 6. In the course and conduct of its business in commerce, re-

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spondent has discriminated in price in the sale of fluid milk and other dairy products by selling such products of like grade and quality at different prices to different purchasers at the same level of trade.

Included in, but not limited to, the discriminations in price, as above alleged, respondent has discriminated in price in the sale of its said products to retailers located in Dallas, Waco, Fort Worth, Houston, Corpus Christi and in other cities, towns and places in the State of Texas, and between favored retailers located in each of said cities, towns, and places and unfavored retailers located in each of the others.

Respondent has further discriminated in price in the sale of its said products to consumers located in Dallas, Waco, Fort Worth, Houston, Corpus Christi and other cities, towns, and places in the State of Texas, and between favored consumers located in each of said cities, towns, and places and unfavored consumers located in each of the others.

PAR. 7. The effect of such discriminations in price by respondent in the sale of fluid milk and other dairy products has been or may be substantially to lessen, injure, destroy, or prevent competition:

1. Between respondent and its competitors in the processing, manufacture, sale and distribution of such products.
2. Between retailers paying higher prices and competing retailers paying lower prices for respondent's said products.

PAR. 8. The discriminations in price, as herein alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

Mr. William H. Smith supporting the complaint.

White & Case, New York, N.Y., by *Mr. Edgar Barton*, *Mr. Macdonald Flinn*, and *Mr. Thomas B. Leary*; and

Milam, LeMaistre, Ramsey & Martin, Jacksonville, Fla., by *Mr. George Milam*, for respondent.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

AUGUST 30, 1962

The Federal Trade Commission issued its complaint against the respondent on April 13, 1959, charging that respondent has violated subsection (a) of Section 2 of the Clayton Act, as amended, by discriminating in price between purchasers located in different areas and between purchasers located in the same areas. The answer denied that its sales were in commerce, denied that it had discriminated in price, and denied that the requisite injury to competition had occurred or was reasonably probable. The answer pleaded that any differences in price to customers in competition with each other represented a good faith meeting of competition and were cost justified. The

answer further pleaded that any order premised on the allegations of the complaint would seriously injure Foremost since its competitors would not be so bound.

This proceeding is before the hearing examiner for final consideration upon the complaint, answer, testimony and other evidence, and proposed findings of fact and conclusions filed by counsel for respondent and by counsel supporting the complaint and oral argument thereon. Consideration has been given to the proposed findings of fact and conclusions submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected, and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

Respondent Foremost Dairies, Inc., is a New York corporation with its executive offices located at 2903 College Street, Jacksonville, Florida, and its administrative operating offices at San Francisco, California.

Respondent is engaged in the business of purchasing, processing, manufacturing, distributing, and selling fluid milk and other dairy products throughout the United States and in other places under the jurisdiction of the United States. Respondent's net sales were \$415,141,110 in 1957; \$416,447,923 in 1958; \$440,090,281 in 1959; and \$437,706,220 in 1960.

Respondent sells fluid milk and other dairy products of like grade and quality to a large number of purchasers located throughout the United States and in other places under the jurisdiction of the United States for use, consumption, or resale therein.

As of June 30, 1959, respondent owned and operated 59 processing plants located in 24 States of the United States. These are the States of Alabama, Florida, Georgia, Virginia, West Virginia, North Carolina, South Carolina, Tennessee, California, Pennsylvania, Michigan, New York, New Jersey, Minnesota, North Dakota, South Dakota, Washington, Kansas, Missouri, Arkansas, New Mexico, Texas, Louisiana, and Hawaii. In addition respondent owned and operated 182 sales, receiving, and distribution facilities located in the States just named and in the States of Kentucky, Delaware, Maryland, Iowa, and Oklahoma from which it distributes and sells its said products to purchasers.

Many of respondent's business operations, including its intrastate sales of fluid milk and other dairy products, were in the course of interstate commerce.

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Respondent sells its fluid milk and other dairy products to distributors, retailers, and consumers. Respondent's distributors resell to retailers and consumers to the extent that such purchasers do not buy directly from respondent. Respondent's retailer-purchasers resell to consumers. Many of respondent's retailer-purchasers in the States of Texas and New Mexico are in competition with other retailer-purchasers of respondent.

Respondent, in the sale of its fluid milk and other dairy products to distributors, retailers, and consumers is in substantial competition with other manufacturers, processors, distributors, and sellers of said products.

Respondent sells fluid milk of like grade and quality to its various wholesale customers at various places, including those located in Dallas, Fort Worth, Waco, San Antonio, Corpus Christi, Abilene, Lubbock, Midland, Odessa, El Paso, and in other cities, towns and places in the State of Texas; and in Albuquerque, New Mexico.

The Dallas processing plant purchases the bulk of its milk from the North Texas Producers Association and from the Producers Creamery Division of the Missouri Farmers Association. The North Texas Producers Association has some member producers located in the State of Oklahoma. A substantial portion of the milk processed in Dallas by Foremost originates out-of-state. When milk arrives at the Dallas processing plant it is sampled and pumped into storage tanks. After it is placed in the tanks it is tested and standardized to a uniform butterfat content. The milk is then pasturized and bottled. After bottling it may be loaded directly onto trucks or stored in a vault until it is needed. There was a constant flow of milk originating outside the State of Texas which was processed by the Dallas plant and which was in interstate commerce from its point of origin until delivered by respondent to its wholesale customers in Dallas and elsewhere.

A substantial portion of the milk processed in Santa Fe, New Mexico, originated outside the State of New Mexico, and there was a constant flow of such milk processed by the Santa Fe, New Mexico, plant which was in interstate commerce from its point of origin until delivered by respondent to its wholesale customers in Albuquerque and elsewhere.

The mixing of this out-of-state milk with local milk at Dallas and at Santa Fe, and its pasteurization or heating, did not change its interstate character or change it from milk into something other than milk.

There were also sales of milk which was flowing in interstate commerce to and from other plants of respondent in San Antonio and

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Fort Worth, Texas, and to and from respondent's Santa Fe, New Mexico, plant into Texas which was sold at prices substantially higher than the Dallas price.

Many of the respondent's business operations, including the sales of fluid milk referred to above, were in the course of interstate commerce.

All of the milk processed in the Dallas plant is sold to customers within the State of Texas.

In the course and conduct of its business in interstate commerce, respondent, during a milk price war in Dallas and Fort Worth, Texas, beginning on or about November 29, 1957, and ending on or about December 23, 1957, and subsequently, beginning May 22, 1959, discriminated in price in the sale of fluid milk of like grade and quality by selling fluid milk to wholesale purchasers in Dallas and Fort Worth at prices below respondent's cost; and during the same period of time, and at the same times, respondent sold fluid milk at substantially higher prices to other wholesale purchasers located in other areas, cities and towns in the States of Texas and New Mexico.

The following are the changes in the wholesale list prices for the regular one-half gallon paper container of Foremost milk in Dallas, Texas, from November 5, 1956, through June 8, 1959:

<i>Price list date</i>	<i>½ gal. list price</i>
Nov. 5, 1956.....	\$0. 50
Mar. 4, 1957.....	. 44
Nov. 29, 1957.....	. 32
Nov. 30, 1957.....	. 30
Dec. 4, 1957.....	. 26
Dec. 17, 1957.....	. 32
Dec. 23, 1957.....	. 36
Jan. 20, 1958.....	. 46
Sept. 15, 1958.....	. 48
Mar. 2, 1959.....	. 46

All of the above listed prices, except those of November 29, 1957, November 30, 1957, December 4, 1957, December 17, 1957, and December 23, 1957, were subject to a 10 percent trade discount and an additional 5 percent discount to certain customers. (This additional discount appears theoretically to be an unlawful discrimination between competitors, but the record does not show sufficient details of its use to warrant a finding that it was unlawful.)

Jere Dairy commenced business and began to sell milk only in glass gallon jugs in the Dallas market on April 26, 1957, at a net price of 68.4 cents to wholesale customers. At the time the only other gallon-jug supplier in the market was the Beverly Hills Dairy which sold

to wholesale customers at a price of 70 cents. Beverly Hills cut its jug price to 65 cents in May 1957.

On June 27, 1957, Jere adopted a quantity discount ranging up to 5 percent, and the wholesale price to the largest volume customer dropped to 64.98 cents. After adopting this discount, Jere first began to sell to the Wyatt stores, a large chain in Dallas. Jere milk, selling out of the Wyatt stores at 75 cents a gallon, made deep inroads in the sales of Wyatt's other suppliers, Cabell's and Borden, whose milk sold out of the store for 86 to 90 cents for two half-gallon cartons.

On November 28, 1957, Jere dropped the price of its milk to 59.85 cents a gallon. On the next day Jere dropped the price to 54 cents a gallon. On December 5, Jere's price was dropped again to 46 cents a gallon. Beverly Hills, however, never sold its gallon jugs for less than 65 cents and its home delivery retail business held firm, but it temporarily lost almost all of its wholesale business and, as a result, lost money.

At least 12 dairies were selling in the Dallas market at the time of the hearing. Two of them (Jere and Vandervoorts) had entered the market within the previous three years; one of them (Beverly Hills) had only recently expanded into the wholesale business.

Foremost did not lower its prices in Dallas because of the competition of gallon-jug operators. Between March 4 and November 29, 1957, the price of Foremost half gallons remained the same despite the fact that Jere entered the market with a lower priced jug in April. Beverly Hills cut its price in May, and Jere further cut its price and sold a major store chain in July. Gallon jugs had been sold in the neighboring Fort Worth market for several years without affecting Foremost's prices.

On November 27, 1957, Mr. Earl Whitten, purchasing agent for the A & P stores in Dallas, told Mr. Lindsley Waters, then Foremost's division sales manager, that Cabell's, Metzger, Oak Farms and Borden had advised him their prices would be 32 cents a half gallon. He asked what price Foremost was going to quote to the A & P stores it was then supplying. Later on in the day Mr. Waters heard of reports on the radio that prices had been reduced in approximately 100 "7-11" stores served by Oak Farms. The following morning the Dallas Times Herald stated that the new price out of the "7-11" stores was 38 cents a half gallon. Foremost then notified the A & P stores and its other customers that it would offer the 32-cent price effective November 29.

On November 29, Mr. Waters was notified by the A & P stores, and the Dallas plant manager was notified by other customers, that Metzger, Oak Farms, Borden and Cabell's were offering half gallons

at 30 cents for delivery on the 30th. Again Foremost met the price which had been reported to it. On November 30, the Dallas Morning News carried an advertisement by the Wyatt chain offering two half-gallon cartons of Borden's or Cabell's milk for 69 cents.

On Tuesday, December 3, Mr. Waters was told by his Dallas plant manager and sales personnel that customers were reporting offers of 26 cents a half gallon from Metzger Dairy. Later in the day the Foremost plant manager reported to Mr. Waters that the A & P's store supervisor had notified him that Oak Farms and Borden had met the Metzger price. On the basis of this information, Foremost reduced its price as of December 4 to 26 cents for a half gallon.

On December 13, Foremost took the initiative and announced to all customers that prices would be increased to 32 cents a half gallon, effective December 17. On December 17, two or three competitors posted the same higher price and by December 19 all of the milk companies had moved prices up.

Foremost, on December 19, announced an increase to 36 cents a half gallon effective December 23. This price went into effect on December 23, and, within a day or two, the other companies followed.

The price level was still below that prevailing before the price war, and in the meantime raw milk prices had increased. While Mr. Waters and the then division manager, Mr. Hughes, were discussing a further price increase, a newspaper reporter called and said he had been informed that effective January 20, 1958, Schepps was raising its price to 46 cents a half gallon with a 10 percent trade discount. On its price list of January 20, Foremost raised its price to 46 cents which was comparable to its prices in other areas in Texas.

Competition was not adversely affected by the low prices of respondent in Dallas. Respondent joined other dairies selling in Dallas in demoralizing the market which caused some, if not all of them, to lose money until respondent took the lead in raising prices toward their former level. The gallon-jug sellers, whose prices were the cause of the general price reductions, have continued their operations, and one of them, Jere Dairy, has increased its business substantially. Instead of continuing to fight the gallon-jug sellers with low prices, several of the larger competitors, including respondent, commenced marketing gallon jugs.

Price wars of long duration and recurring price wars, during which sales are made at or below cost, adversely affect competitors who must rely upon profits in that area to remain in business. Their ability to compete can be reduced, but the extent that this has occurred in Dallas cannot be traced to respondent who endeavored to restore profitable price levels.

It appears from all the evidence that respondent did not initiate any of the price reductions in this market during this period but believed it was meeting prices other dairies were quoting. Price reductions were frequent and were made by the dairies generally to all buyers in this market. In this situation respondent concluded, on the basis of the information received from some of its customers, that its competitors were making these reductions to all customers in the market. The evidence shows that respondent believed its price reductions were defensive, but it cannot be found that it was meeting an equally low price of a competitor because its competitors' prices were not established by competent evidence. Although the prices of the dairies selling gallon jugs were shown, respondent does not contend that it was meeting those prices but rather that it was meeting the prices of those dairies selling half gallons, and those prices were not shown.

There is evidence of price reductions in Corpus Christi, Texas, but it is not contended, and cannot be found, that these reductions constituted unlawful price discriminations as charged in the complaint.

It is concluded and found that the record herein does not establish that the effect of respondent's discriminations in price between the Dallas, Texas, market and other markets, as hereinabove found, has been or may be substantially to lessen, injure, destroy or prevent competition.

Discriminations in Albuquerque

In the course and conduct of its business in interstate commerce, respondent discriminated in price in the sale of fluid milk of like grade and quality by selling fluid milk at different prices to different competing wholesale purchasers located in Albuquerque, New Mexico.

Foremost operates a distributing branch in the Albuquerque, New Mexico, market which supplies customers in the City of Albuquerque, in a contiguous area to the south just outside the city limits, and in the Town of Los Lunas, which is 21 road miles south of Albuquerque. The Albuquerque branch does not supply any customers outside of the State of New Mexico.

The milk sold through the Albuquerque branch is trucked to Albuquerque from the Foremost processing plant in Santa Fe, New Mexico. The Santa Fe processing plant ships some milk to a Foremost distributing branch in the El Paso, Texas, market for sale to customers there, among them stores of the Furr's chain.

The evidence of discounts in Albuquerque, which is the only area where there is significant evidence of competition between favored and non-favored customers of respondent, is limited to three discounts to grocery stores which were an 11 percent discount to Furr's, and a 5

percent discount to Barber's and to Speedway. There is evidence that restaurant customers in Albuquerque were granted quantity discounts. These customers were not named, although some of them can be identified from a customer list, and the amount of the discounts is not disclosed.

During the period November 1959 through April 25, 1961, total Foremost sales to the eight Barber's stores then located in Albuquerque were \$153,361.16. The bulk of these sales were sales of fluid milk. During the period November 1959 through April 1961, discount checks to these Barber's stores totaled \$7,627.11.

During the week of December 4, 1961, respondent's sales to six Speedway stores were \$706.60 and to nine Barber's stores were \$862.36. The record does not show the length of time during which the discount was granted to Speedway nor the volume purchased during such period of time.

During the period November 1959 through April 1961, total Foremost sales of milk to the Furr's stores then located in Albuquerque was \$63,141.33, and the discounts paid Furr's on these purchases was \$6,562.85. For most of the period indicated only three Furr's stores were located in Albuquerque; the total sales to the fourth store were \$22.20 in the month of April 1961.

During the period December 1959 through April 1961, total Foremost sales of milk to the 38 Furr's stores and 5 cafeterias located in various towns in Texas and New Mexico, including Albuquerque, was \$1,156,952.61, and the total of the discount checks paid Furr's on these purchases was \$164,165.89.

There are five milk companies selling in the Albuquerque market—Creamland, Valley Gold, Foremost, Thatcher and Crusader. Foremost is in third place with approximately 7 percent of the market.

Barber's was first granted a discount after Foremost's Albuquerque sales manager was notified that Foremost was not selling at a competitive price. Foremost was not advised of a specific offer from a competitor, but had good reason to believe that one had been made because it was dropped as one of the suppliers of the Barber's stores. An offer of a 5 percent discount was made by Foremost and accepted, and Foremost regained Barber's as a customer. There are no details shown regarding the granting of the discount to Speedway. It is concluded that respondent has not shown by this evidence, which is all there is on this subject, that the discriminatory discounts granted to Barber's and Speedway were granted in good faith to meet an equally low price of a competitor.

In November 1961 Foremost's Albuquerque branch manager learned through testimony of Valley Gold and Creamland officials that these

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companies had stopped giving discounts to their customers in Albuquerque. Acting under the instructions of the Foremost division manager in New Mexico, he notified all Albuquerque customers who had been receiving discounts, including Barber's, Furr's and Speedway, that discounts would be discontinued, and they were.

Respondent's Dealings with Furr's

Furr's is a regional customer with outlets located in many markets other than Albuquerque. The discount to Furr's, like that of other regional customers, was negotiated by the Foremost division office in Dallas, Texas, and discount checks were forwarded directly from the Dallas office.

Foremost began to serve some Furr's stores when it acquired Tennessee Dairies in September 1952. Tennessee had been supplying the Furr's stores in West Texas since 1946 through a distributor, Mr. Russell Glenn. At that time Tennessee brand milk had a reputation for quality superior to its competition in West Texas and commanded a higher price than competitive brands both into and out of the Furr's stores. This price premium disappeared in time, but the Furr's stores always paid the full list price for Tennessee milk, and continued to pay full list prices for a time after Foremost's acquisition of Tennessee. In the dairy industry it is unusual for one company to have a list price different from its competitors in the same market.

Late in 1954 Russell Glenn, who was then distributing his own Gold Star brand milk, began to supply the Furr's stores in the Midland area. About this time, Mr. Lindsley Waters, then Foremost's division sales manager, was notified by the owner of the Sears' stores in Odessa that he had been given a 15 percent discount from Oak Farms, a Texas company with four plants selling milk throughout most of the state. Foremost lost most of its space in the Sears' stores. Since the Sears' stores were smaller than the Furr's stores in the market, Mr. Waters believed that a similar offer had been made to Furr's, and Mr. Boverie of Furr's later confirmed this.

Almost all of the Foremost space in the Piggly Wiggly stores in Big Spring, Texas, was lost to the Bell milk company of Lubbock, and the general manager of the Piggly Wiggly stores told Mr. Waters that he was getting Bell milk at a lower price. In the Brooks stores of Midland, Texas, Foremost lost all of its space to Cabell's, a Dallas dairy which also operates a chain of its own drive-in stores. The Wooten stores in Abilene, Texas, switched from Foremost to Oak Farms. The Newsom stores in Big Spring replaced most of Foremost's space with Metzger's milk and sold Metzger's at a lower out-of-store price than Foremost. Metzger is a family-owned dairy with plants in Dallas

and San Antonio, Texas. In the United Food Markets in Lubbock, Texas, and the Everybody's Markets in Odessa, Foremost was replaced by Oak Farms. In each case Mr. Waters' local managers reported that they had been told that the changes were the result of lower prices.

After experiencing these losses in West Texas generally, and losses in the Furr's stores specifically, Mr. Waters and the Foremost division manager went to see Mr. Clem Boverie, vice president of Furr's, in Lubbock late in 1954. Mr. Boverie stated that competition had dissipated the stronger public acceptance Foremost once had and that therefore he could not justify paying more for Foremost milk than competitive brands. He stated that he had been offered milk at prices lower than Foremost's price, and he mentioned the 15 percent discount he was receiving from Gold Star which had been offered to all Furr's stores. At this meeting Foremost offered Furr's an 11 percent discount on sales to all the Furr's stores, and Mr. Boverie accepted the offer. After the discount was granted, Foremost milk was sold out of the Furr's stores at the same price as other brands. The discount to Furr's in Albuquerque remained at the 11 percent figure until it was discontinued late in 1961.

Foremost, which does sell to Piggly Wiggly in Lubbock, has never been able to sell these stores in Albuquerque, even after offering the same discount as that granted to Furr's.

Mr. Russell Glenn, who later worked for the Crusader Dairy in Albuquerque, offered to sell Crusader milk to Furr's at a better price than they were receiving from any other supplier, but the offer was not accepted.

In 1960, Oak Farms began to sell to the Furr's stores in the Midland-Odessa area at a 17½ percent discount, which adversely affected Foremost's volume of sales to Furr's in the area. Foremost was notified of this discount, and raised its discount in this area to 13 percent and later to 17½ percent.

In 1962, the two largest Foremost customers in the Midland-Odessa area, Furr's and Food Fair, received a 17½ percent discount; all other customers received a 15 percent discount.

In the Lubbock market Oak Farms was also giving a 17½ percent discount. Carnation was offering a 15 percent discount and was being sold in the market at a lower out-of-store price than Furr's was retailing Foremost. Mr. Boverie notified Mr. Waters that Furr's was reluctant to change suppliers but would feel compelled to do so unless Foremost offered a lower price. Foremost first granted a 13 percent discount and later a 15 percent discount on sales to Furr's in the Lubbock market.

In El Paso the principal Foremost customers were Furr's and Food

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Mart. In 1960, Foremost was put out of the Food Mart stores and was notified that the reason was a 15 percent discount from Price's Creamery. The Furr's people stated that they had gotten the same offer. Foremost granted Furr's a 15 percent discount and retained its space in the Furr's stores. Later the discounts to all customers in El Paso moved to 15 percent, then to 18 percent, and finally to 21 percent.

It is concluded that the respondent's discriminations in favor of Furr's in all areas referred to in this record were made in good faith to meet an equally low price of one or more competitors and were not unlawful as charged in the complaint herein.

Competitive Effects in Albuquerque

Milk is a staple, highly standardized food item sold by virtually all food retailers, and the grocery stores in Albuquerque which received discounts from respondent competed to some degree with stores which did not receive any discount. Profits made by Albuquerque grocers on milk are low. At least one grocer grossed 4 cents, or 8.16 percent, per half-gallon profit; the list price was 45 cents and later 43 cents and a 5 percent discount was therefore significant. Competition is keen among retailers, and margins of profit and mark-ups are small. A lower price to some but not all competing retail stores in this city would normally be expected to hinder competition between them. At least two of the chains shown to have been favored did not resell milk below their competitors' prices, but the discounts were sufficiently large to give them a competitive advantage. As found above, the discounts to Barber's totaled more than \$7,000 from November 1959 to April 1961, and the dollar amount of the discounts to Speedway was not disclosed. It is therefore found that the effect of the 5 percent discount respondent granted to Barber's and Speedway may have been substantially to lessen competition in the retailing of fluid milk in Albuquerque or to injure, destroy or prevent competition with these favored purchasers.

Respondent's Cost Study

Respondent contends that the discounts granted in Albuquerque are justified on the basis of the cost saving of delivering larger quantities at one stop and that these cost differences more than justify the discounts that were granted.

In computing its costs, certain costs were allocated to produce "units" and others were allocated to what was designated as "route day" costs. The costs allocated to "units" were the same for each "unit" regardless of the volume of delivery at a stop, and those allo-

cated to "route day" costs were computed for each minute of delivery time. The "route day" costs were then determined on the basis of time required for each size delivery.

Respondent has grouped purchasers into certain average, delivery-volume brackets, and while it may be reasonable to permit grouping or averaging of groups by delivery-volume size when there is a great disparity in volume between all of those averaged and the volume of the favored purchaser, where, as here, the volume, per delivery, of some purchasers exceeds the volume of the favored purchaser to be compared and the volume of the majority of those averaged is far smaller, such averaging cannot be done to justify price differences between the favored purchaser and the non-favored purchasers. Although the respondent's cost study was prepared primarily in an effort to show a justification for the 11 percent discount to Furr's, it has assumed that it would also justify a 5 percent discount to Barber's. Since the 11 percent discount to Furr's has been found herein to have been made in good faith to meet the equally low price of a competitor, the cost defense evidence is only considered to determine whether the 5 percent discount to Barber's and Speedway can be justified by it. Since several of respondent's customers in Albuquerque took deliveries in larger quantities than did Barber's, and in about the same quantities as Speedway, the discount granted Barber's cannot be justified on the basis of this evidence which shows respondent's costs to be less in serving those customers than in serving Barber's and about the same as that of serving Speedway.

In a cost analysis of this type each store or volume class of store should be considered separately. The fact that some stores are units of a chain does not justify their being considered collectively with their volume, per delivery, averaged. This single ownership would be a consideration if a cost saving were claimed in billing and collecting from one source rather than several sources, but is not a valid consideration in an analysis of time spent for each delivery.

Counsel supporting the complaint has urged that respondent's cost defense is invalid for a number of reasons: it is insisted that while there is not agreement that the manual which was prepared by respondent, entitled "Wholesale Delivery Costs and Pricing Procedures" (RX 12), properly describes procedures for conducting the cost study; nevertheless, such procedures are preferable to what respondent has actually done, and points out that if the manual had been followed the results would have been considerably different. The principal area in which respondent failed to follow the manual is that the item of "Delivery Labor" was not prorated on a per "unit" basis which the manual prescribed. In Albuquerque, "Delivery

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Labor" was paid a flat 6 percent commission, and it appears that it should have been prorated on a per "unit" basis because the costs to respondent were the same for each "unit".

In its cost study respondent allocated the sum representing the guarantee made to the delivery salesmen to the "route day" costs. This is incorrect because it is an allocation of costs that respondent did not incur. All of the delivery salesmen earned more than the amount guaranteed them. It appears that certain other items in addition to the guarantee should be allocated to the "unit" cost rather than the "route day" cost—they are, selling expense, sales promotion, payroll taxes and insurance, traveling expense, and corporate expense. These items are applicable to all "units" of sales and should be allocated to the "unit".

Barber's average delivery was 65.6 quarts, and Speedway's average delivery was 123 quarts. There were several other customers who appear to be food retailers who received larger deliveries than Barber's: Modern Way, 67 quarts; Larry's Market, 101 quarts; Central Market, 176 quarts; and Conniff's Market, 72 quarts. There is no showing of any cost justification for the discounts granted Barber's and Speedway as opposed to these named customers or any others taking deliveries larger than Barber's.

Respondent has assumed in its argument that the record shows that all dealers taking deliveries of more than 100 "units" received a discount, but the record does not show this. In addition to the discount to Furr's, it shows that Barber's and Speedway received a 5 percent discount and that restaurants, some of which can be identified, received an undisclosed volume discount per delivery.

There were at least 57 other customers with purchases ranging from 41 to over 300 "units"—quarts per serve. In arriving at the "route day" cost, it was necessary for respondent to determine the time of serving the various customers within each volume range, and it determined this by using "standard times" for various delivery operations rather than actual time studies in Albuquerque. These "standard times" are based on time studies conducted by its own personnel and by the University of California in many markets in California. No check was made to compare these "standard times" against actual Foremost operations in Albuquerque, but they were checked against a 1-day study of Lubbock and Abilene and were shown to be reasonably accurate for those cities. It is not shown why there was no check made in Albuquerque. The burden is on the respondent to show that "standard times" are comparable to actual times, and the record does not show that they were comparable. Since the time of the drivers is divided between different types of customers, such as schools, etc., who

buy on a contract basis, restaurants who may buy different products and product sizes, and grocery stores, it is important to respondent's calculations that the time required for delivering each "unit" to each kind of customer be comparable in order for "standard times" to be accepted in lieu of the actual time spent, and it cannot be concluded from this record that such times are comparable. If these deficiencies were corrected, it is believed that the use of "standard times" would be acceptable, because even the actual time required for driving, parking, or delivering would be expected to vary from route-to-route, from day-to-day, and even from driver-to-driver on the same route.

The formula for reducing all products and container sizes to "units" was apparently devised for the purpose of determining the compensation of driver salesmen in some other area or for some purpose other than its use in a cost analysis, because the value and profitability of the product seem to be important factors in the formula. This formula could not be accepted without a further showing of its accuracy.

For the reasons stated above, it is found that respondent has failed to prove that the discriminations in favor of purchasers Barber's and Speedway made only due allowance for differences in the cost of sale and delivery to them.

Milk Products Other Than Fluid Milk

Although the complaint charges discriminations in the sale of fluid milk and other dairy products, the evidence relates principally to fluid milk. The only purchasers who are found herein to have received unlawful discounts are grocers in Albuquerque—Barber's and Speedway; and the only evidence that respondent sold either of them anything other than fluid milk is a stipulation between counsel that the sales to Barber's were "mostly milk". It is therefore concluded that the order herein should apply only to fluid milk sales.

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

The aforesaid acts and practices of the respondent of granting certain discounts, as herein found, constituted violations of subsection (a) of Section 2 of the Clayton Act, as amended.

ORDER

It is ordered, That respondent, Foremost Dairies, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with,

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the sale of fluid milk in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of fluid milk of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who competes with the purchaser paying the higher price.

OPINION OF THE COMMISSION

BY ELMAN, *Commissioner*:

This is an appeal from an initial decision of the hearing examiner that respondent Foremost Dairies, Inc., discriminated in price between competing purchasers of its fluid milk in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (38 Stat. 730, as amended, 49 Stat. 1526, 15 U.S.C. § 13(a)). The complaint, filed in April 1959, charged respondent with discriminating in price (1) between retailers in different localities, resulting in "primary line" injury to competition between respondent and its competitors, and (2) between retailers located in the same community, resulting in "secondary line" injury to competition between such favored and disfavored purchasers. The examiner found that the allegations of "primary line" injury were not established by the record, and complaint counsel does not appeal from this finding.

With respect to the "secondary line" allegations, the examiner found unlawful discounts which had been granted by respondent to two retail food chains, Barber's and Speedway, located in Albuquerque, New Mexico, but not to competing retailers in that city. On the basis of this finding of violation, the examiner included in his initial decision an order prohibiting respondent from further discriminating in the price of its fluid milk sold to competing purchasers.¹

Respondent challenges the examiner's decision on a number of grounds. We agree that the evidence concerning the discounts granted Speedway, which established neither their magnitude nor their duration, was too fragmentary to support a finding of violation. The unlawfulness of the discounts to Barber's, however, is adequately supported by the record.² These 5 percent discounts, during the

¹ In addition to the discounts to Barber's and Speedway, complaint counsel urges that the examiner's order is also supported by unlawful discriminatory discounts granted by respondent to Furr's, a large retail food chain with stores located in a number of cities in Texas and New Mexico. The examiner found that these discounts were made in good faith to meet an equally low price of one or more competitors. Complaint counsel challenges this finding as it applies to discounts granted to Furr's stores in El Paso and Albuquerque. In view, however, of the uncontradicted testimony of a Furr's official that Gold Star Dairy offered to sell his company milk at a 15% discount "wherever we had stores" (Tr. 1396), it appears that the evidence of other competitive offers, which is challenged by complaint counsel, was unnecessary to the examiner's finding.

² We also find that the record adequately supports the examiner's finding that respondent's sales at discriminatory prices to its Albuquerque customers were in commerce within

period from November 1959 to April 1961, totaled \$7,627.11, and were not terminated until November 1961. The probability of competitive injury resulting from such a substantial and continuous discrimination in the price of a major grocery product is manifest. Although respondent challenges the sufficiency of the evidence of competition between its favored and disfavored customers within the city of Albuquerque, the opening, during the period of the discounts, of a new Barber's store in close proximity to its disfavored competitors, and the testimony that one of these competitors drew its customers "from all over Albuquerque", adequately support the examiner's finding of such competition and establish the likelihood of further injury should the discounts be resumed.

Moreover, the price discriminations in favor of Barber's were not shown to be either cost-justified or made in good faith to meet the equally low price of a competitor. Although respondent sought to establish the latter defense at the hearing before the examiner, it has not been urged on this appeal since, as the record shows, the discounts to Barber's were not granted to meet any specific competitive prices.

As to respondent's claim that its discounts to the Barber's, Speedway and Furr's chains were cost-justified, it is clear that the cost study relied upon fails to meet the basic requirements of an adequate cost

the meaning of the Robinson-Patman Act. Foremost is a large interstate corporation with major offices in Florida and California and with 59 processing plants located in 24 states. Moreover, a substantial portion of the milk processed at respondent's Santa Fe, New Mexico, plant, from which its Albuquerque customers are supplied, originated outside the State of New Mexico.

"[C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift and Company v. United States*, 196 U.S. 375, 398 (1905). As a practical matter, Foremost's Albuquerque sales cannot be separated from its total interstate operations, nor can the fact that milk, shipped from outside the state to meet the day-to-day requirements of Foremost's New Mexico customers, passed briefly through its Santa Fe processing plant negative the interstate character of these transactions, *Pevely Dairy Co. v. United States*, 178 F. 2d 363 (8th Cir. 1949), cert. denied 339 U.S. 942; *United States v. Universal Milk Bottle Service, Inc.*, 85 F. Supp. 622 (S.D. Ohio 1949), aff'd 188 F. 2d 959 (6th Cir. 1951). As the Supreme Court held with respect to sales of gasoline originating outside the state but delivered from local bulk storage stations, "Such sales are well within the jurisdictional requirements of the Act. Any other conclusion would fall short of the recognized purpose of the Robinson-Patman Act to reach the operations of large interstate business in competition with small local concerns." *Standard Oil Company v. Federal Trade Commission*, 340 U.S. 231, 237-38 (1951) [5 S.D. 221, 225-26]. Similarly, the Commission is not deprived of jurisdiction by reason of the fact that out-of-state and in-state milk were commingled prior to delivery, *Quality Bakers of America v. Federal Trade Commission*, 114 F. 2d 393 (1st Cir. 1940) [3 S.D. 287]; cf. *Currin v. Wallace*, 306 U.S. 1 (1939); or that title to the out-of-state milk may have passed to Foremost after it had entered New Mexico. "The Robinson-Patman Act, in speaking about 'purchases' as being in commerce, is not speaking about technical legal passage of title." *Olympia Food Market, Inc. v. Sheffield Farms Company, Inc.*, CCH 1955 Trade Cases, ¶ 68,064 (S.D.N.Y. 1955). Cf. *Deep South Oil Company of Texas v. Federal Power Commission*, 247 F. 2d 882, 887 (5th Cir. 1957), where, in construing a similar statutory requirement of sales "in interstate commerce", it was held that " * * * the particular point at which the title and custody of the gas pass to the purchaser, without arresting its movement to the ultimate interstate destination, does not affect the essential interstate nature of the business."

justification defense. Although the study was based upon purported differences in delivery costs between purchasers within designated average delivery-volume brackets, discounts were not granted to all purchasers within the larger volume brackets, but only to the Furr's, Barber's and Speedway chains. Independents whose delivery volumes approached or equalled those of the chain stores received no discounts. Thus, although respondent asserted that the challenged discounts were cost-justified as against the 70 percent of its Albuquerque customers who fell within its 1-40 quart average delivery bracket, Conniff's Market, an independent whose owner testified that he competed with the Barber's stores, averaged 72 quarts per delivery but received no discount.

This is precisely the defect condemned by the Supreme Court in *United States v. The Borden Company*, 370 U.S. 460, 469-70 (1962). As the Court observed,

* * * such a grouping for cost justification purposes, composed as it is of some independents having volumes comparable to, and in some cases larger than, that of the chain stores, created artificial disparities between the larger independents and the chain stores. It is like averaging one horse and one rabbit.

In view of this obvious defect, there is no need to consider the other asserted deficiencies in respondent's cost justification defense.

Respondent also objects to the order contained in the examiner's initial decision which would prohibit it from discriminating between competing customers in the sale of fluid milk. Respondent contends that the narrow violations found by the examiner—and, *a fortiori*, the even more limited findings of the Commission—together with the asserted fact that the discriminatory discounts granted in Albuquerque were in response to a local competitive situation and were discontinued at its termination, indicate no "pattern of violations" by respondent which require the entry of an order to cease and desist. Complaint counsel, while supporting the examiner's order in his brief, suggested in the oral argument that if the only violation found by the Commission was the discrimination in favor of Barber's, the Commission's order might appropriately be limited to respondent's sales in Albuquerque.

We cannot agree with either of these positions. As pointed out in *Transogram Company, Inc.* (Docket 7978 September 19, 1962) [61 F.T.C. 629, 701]:

The purpose of an order is to prevent statutory violations, the occurrence of which in the future appears likely on the basis of reasonable inference from events that have already taken place. This does not mean that the Commission is so tightly bound to the facts that it must disregard accumulated experience, or that it must draft its prohibitions so narrowly that only the precise acts previously undertaken by a respondent are proscribed for the future. It does

mean that our objective in drafting orders must be to restrain unlawful acts and practices "whose commission in the future, unless enjoined, may fairly be anticipated from the [respondent's] conduct in the past." *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426, 435.

The violation which we have found here, although limited in geographic scope, evidences a bland disregard by respondent of the requirements of the Robinson-Patman Act. Respondent's discriminatory discounts to chain stores in Albuquerque were not begun until after the issuance of the complaint in this proceeding. Although there is evidence that these discriminatory prices were made in response to local competitive conditions, the record also indicates that, at least with respect to the discounts granted to Barber's, respondent made no effort to ascertain the precise nature of this competitive challenge or the size of the price reduction which would be required to meet it. Instead, respondent simply instituted a 5 percent discount which, over the period it was in effect, totaled in excess of \$7,500. The record makes clear that respondent's discriminations were finally terminated not because of an awareness of their illegality, resulting from this proceeding or otherwise, but only in response to a change in local competitive conditions. In the course of the oral argument, counsel for respondent suggested that should these conditions recur, so might respondent's discriminatory discounts.

In these circumstances, we believe that the protection of the public interest requires the entry of an order to cease and desist. The examiner determined that the order, while limited to respondent's sales of fluid milk, should extend to all geographic markets. We agree. The record reveals nothing peculiar or unique about respondent's operations or competitive conditions in Albuquerque which would justify the limitation of the order to that market alone.

Accordingly, the Commission will enter an order to cease and desist in the terms contained in the initial decision. The Commission recognizes the "necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application." *Federal Trade Commission v. Henry Broch & Company*, 368 U.S. 360, 368 (1962) [7 S.&D. 305, 310]. However, while respondent objects to the competitive inequities which it asserts would result from subjecting it to a "sweeping" command not to violate Section 2(a), respondent has not suggested any specific remedies to prevent the recurrence of the violations found or any particulars in which the Commission's order should be made more specific or limited.

The Commission's responsibility to insure future compliance by a respondent does not end with the entry of an order to cease and desist. The entry of such an order is only the beginning of a "marriage"

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under which the Commission is obliged to afford the respondent definitive advice as to whether proposed conduct would meet the requirements of the order. As the Court of Appeals for the Second Circuit has pointed out:

The difficulties respondent foresees in determining whether it is complying with the order seem factitious. The order contains the usual provision for the filing of a report of compliance, 16 C.F.R. § 3.26, and it is scarcely likely that if respondent proposes a method of compliance which the Commission accepts, and thereafter follows it, the Commission will subsequently and without notice claim a violation entailing the civil penalties of 15 U.S.C. § 21(1). If at some future time respondent should desire to change to a procedure different from what it originally proposed, it need not proceed at its peril. The Commission's offices will still be open for discussion * * *. *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, 311 F. 2d 480, 488 (2d Cir. 1962) [7 S.&D. 583, 592].

Thus, our order here conforms to the rule of the *Broch* case because the precise duty it imposes on respondent, at the outset, is that of formulating a specific plan and program of compliance to be submitted to the Commission for its approval or disapproval. The submission in good faith of such a compliance report is the first step in a meaningful and effective scheme for enforcement of cease and desist orders. It should also be emphasized that such orders, like court injunctions, may be modified or vacated as changing conditions warrant.³ The essential basis for a cease and desist order is the need for protection of the public against recurrence of the unlawful practices found, and its prime function is to provide the framework and stimulus for a respondent to bring its operations into conformity with the requirements of law. So long as this need exists, an order must be continued in effect. If and when its prophylactic purposes have been accomplished, however, and the need for the order has been removed by changed conditions of fact, law, or public interest, the Commission will take appropriate action.⁴ Nothing in the order we are now entering will preclude respondent from making future application to the Commission for modification of the order, upon the

³ Cf. *Tobin v. Alma Mills*, 192 F. 2d 133 (4th Cir. 1951).

⁴ "If after competition is restored any of the respondents can make a proper showing to the Commission that this prohibition or any other prohibition in the order is no longer necessary or desirable, the Commission will, of course, at that time take such action as may be appropriate in the light of the facts and the law." *National Lead Co., et al.*, 49 F.T.C. 791, 887 (1953); 352 U.S. 419, 424-25 (1957). See also *Chain Institute, Inc., et al.*, 50 F.T.C. 589, 595 (1953) (concurring opinion of Commissioner Mead); *West-Ward, Inc.* (Dkt. 8141, Order Modifying Final Order, March 16, 1962) [60 F.T.C. 563]; *M. S. Distributing Company* (Dkt. 7745, Order Setting Aside Order to Cease and Desist, Dec. 17, 1962). [61 F.T.C. 1345].

Under the statute the Commission's authority to modify an order may be exercised before or after judicial review. "[A]fter a Circuit Court of Appeals has acted upon a petition for review, there is no reason why the Commission should not modify its order, if modification is warranted by the changed conditions contemplated by the statute." *American Chain & Cable Co., Inc. v. FTC*, 142 F. 2d 909, 912 (4th Cir. 1944) [4 S.&D. 186, 190].

basis of such positive and constructive changes in its activities and procedures as will give solid assurance against repetition of the unlawful conduct found here. Unless and until such a showing is made, the public is entitled to the assurance afforded by the order to cease and desist contained in the initial decision.

Commissioner MacIntyre did not participate in the decision of this matter.

FINAL ORDER

This matter having been heard upon respondent's exceptions to the initial decision of the hearing examiner, and upon briefs and oral argument in support of said exceptions and in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having determined that the hearing examiner's initial decision, as modified by the Commission's opinion, should be adopted as the decision of the Commission:

It is ordered, That respondent, Foremost Dairies, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of fluid milk in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of fluid milk of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who competes with the purchaser paying the higher price.

It is further ordered, That respondent, Foremost Dairies, Inc., a corporation, 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 of its compliance with this order, and shall thereafter file such further reports of compliance as the Commission may require.

Commissioner MacIntyre not participating.

IN THE MATTER OF

SEAT COVER CHARLIE, INC., ET AL.