will treat the matter as an application for the release of confidential information under § 1.164 of the Commission's Rules of Practice. Under this rule, confidential information may be released only for good cause shown. Respondent asserts that the documents and information requested are needed for its defense in this proceeding, but no sufficient showing has been made as to their relevancy or materiality. Accordingly, the request should be denied. An appropriate order will be entered.

J. WEINGARTEN, INC.

Docket 7714. Order and Opinion, Mar. 25, 1963

Order setting aside hearing examiner's initial decision and remanding case for certain factual evidence needed by Commission to arrive at a final decision, and to file a new initial decision.

Order Vacating Initial Decision and Remanding Matter to Hearing Examiner

This matter having come on to be heard upon respondent's appeal from the hearing examiner's initial decision holding it in violation of Section 5 of the Federal Trade Commission Act; and

The Commission having determined that the initial decision should be vacated and the matter returned to the hearing examiner for further proceedings;

It is ordered, That this matter be, and it hereby is, remanded to the hearing examiner for further proceedings and consideration in light of the views expressed in the attached opinion.

It is further ordered, That the hearing examiner and the parties make every effort, including postponement, where necessary, of other Commission matters, to complete the reception of evidence within ninety (90) days from service of this order.

Commissioners Anderson and Elman, without joining in the opinion of Commissioners Dixon and MacIntyre, agree that the matter should be remanded to the hearing examiner for the taking of further evidence, and should be promptly disposed of on remand; and Commissioner Higginbotham did not participate by reason of the fact that this matter was argued before the Commission prior to the time when he was sworn into office.

Opinion

By Dixon and McIntyre, *Commissioners:*

This matter is before the Commission for consideration of the respondent's appeal from the hearing examiner's decision holding it in

violation of Section 5 of the Federal Trade Commission Act. The initial decision contains an order to cease and desist which would enjoin respondent from engaging in the practices found to be unlawful.

The respondent, a grocery retail chain, is charged in Paragraph Five of the complaint as follows:

> In the course and conduct of its business in commerce, respondent has knowingly induced or received the payment or contracted for the payment of something of value to respondent or for respondent's benefit as compensation or in consideration for services and facilities furnished by or through respondent in connection with respondent's offering for sale or sale of products sold to respondent by many of its suppliers, and which payments were not made available by such suppliers on proportionally equal terms to all other customers of such suppliers competing with respondent in the sale and distribution of such suppliers' products.

In essence, the practice challenged by the complaint is the knowing inducement or receipt of promotional allowances from suppliers who violated Section 2(d) of the Robinson-Patman Act by granting said allowances. The alternative to an approach of this type is to bring complaints against each supplier suspected of granting a discriminatory promotional allowance to the respondent. This could, of course, result in a myriad number of suits with attendant expense. This case, therefore, is fraught with a great deal of public interest, for its successful prosecution may affect the cessation of a whole series of law violations.

We turn now to a consideration of the questions raised by the respondent's appeal. Two of respondent's exceptions go to the Commission's jurisdiction and logically must be dealt with first. In the first of these challenges, respondent alleges that the Commission does not have jurisdiction to utilize Section 5 of the Federal Trade Commission Act to bring an action based upon an alleged and knowing inducement or receipt of a promotional allowance violative of Section 2(d) of the Robinson-Patman Act. Respondent does not seriously argue this point, for it recognizes that three circuit court opinions have dealt with this same question and have supported the Commission in its views.[1] The disposition of this question in *Giant Foods, Inc.* v. *Federal Trade Commission* is typical of the approach taken by the courts to respondent's plea. In that proceeding Judge Bastian, writing for a unanimous court, stated:

> The Commission's decision in this case cannot be read as if the Commission were attempting to render illegal a practice which was once lawful. The situation is to the contrary: the Commission is merely declaring to be an unfair

[1] *Grand Union Co.* v. *Federal Trade Commission,* 300 F. 2d 92 (2nd Cir. 1962) [7 S.&D. 329]; *American News Co.* v. *Federal Trade Commission,* 300 F. 2d 104 (2nd Cir. 1962) [7 S.&D. 346]; *Giant Foods, Inc.* v. *Federal Trade Commission,* 307 F. 2d 184 (D.C. Cir. 1962) [7 S.&D. 483].

method of competition a practice which is plainly contrary to the policy of the Clayton Act as amended by the Robinson-Patman Act. (307 F. 2d at 186.) [7 S.&D. 486.]

In its second attack on the Commission's jurisdiction, the respondent charges that it is a live poultry dealer within the meaning of Section 218(b) of Title 7, U.S.C., and is therefore subject to the exclusive jurisdiction of the Secretary of Agriculture under the provisions of Section 227 of Title 7, U.S.C. With this appeal, respondent is asking us to reverse our prior ruling of September 9, 1960, denying respondent's interlocutory appeal from the hearing examiner's denial of its motion to dismiss based in part upon this contention. Respondent presents no new facts or legal justification in support of its plea and there is nothing before the Commission to support a conclusion that its prior decision was in any way incorrect.

The most serious charge which respondent levels at the hearing examiner's decision is that the basic allegations of the complaint have not been established by reliable and substantial evidence. Respondent contends that the record is devoid of probative evidence to establish (1) that its suppliers granted it discriminatory promotional allowances, and (2) that it had knowingly received or induced such allowances. Resolution of these questions requires a brief sojourn into the facts which are firmly established and not in dispute.

Respondent is a corporation operating sixty-three retail grocery stores in Texas, Louisiana and Tennessee. In addition to food items, many of respondent's stores make substantial sales of cosmetics and a wide variety of household products. Total sales of the corporation in a recent fiscal year exceeded $137,000,000.

For some years past the respondent has conducted special or feature sales of certain of its goods with attendant extensive promotional activity. Such sales usually have a theme which serves to identify and distinguish them from less exceptional promotions. In this matter, the principal promotions of interest were held in 1957 and 1958, and were labeled: Fifty-Seventh and Fifty-Eighth Anniversary Sales (AS); Twentieth and Twenty-First Texas and Louisiana Products Sales (TLPS); Ninth and Tenth Annual May Health and Beauty Carnivals (AMHBC); and Twelfth and Thirteenth Home Center Birthday Sales (HCBS).

The aim of these promotions is, of course, to increase sales of the products featured and to this end respondent utilizes all advertising media, including radio, television and newspapers. As every business man knows, extensive use of these media costs a good deal of money and respondent's efforts to defer these costs to others led to this complaint.

Prior to each planned promotion, it is respondent's practice to send solicitory letters to a selected group of its suppliers whose prod-

ucts are deemed appropriate for the sale. The letter extends an offer of an "opportunity to participate" and refers to an attachment which lists the costs of "participation". If a supplier agrees to the solicitation, its goods are advertised and specially promoted by the respondent to the extent of the payment made by the supplier.[2] The monies requested were in addition to any which may have been received pursuant to a supplier's standard cooperative advertising program.

Respondent's solicitations of its suppliers have been marked with substantial success, as the following tabulation indicates:

Promotion	Approximate No. Solicited	Participated	Amount
1958			
57th AS	350	90	$23, 538. 37
20th TLPS	325	40	15, 744. 52
12th HCBS	170	71	7, 955. 10
9th AMHBC	37	21	17, 939. 86
1959			
58th AS	300	75	$21, 974. 90
21st TLPS	275	45	12, 271. 93
13th HCBS	250	42	3, 600. 00
10th AMHBC	37	21	20, 791. 45

There is no longer any question that the Federal Trade Commission Act is violated by the knowing inducement and receipt of a promotional allowance which is discriminatory in that its grantor did not affirmatively offer it on proportionally equal terms to persons competing with the recipient of the allowance in the distribution of the grantor's goods (*Giant, Inc.* v. *Federal Trade Commission*, *supra*). The basic factual elements of the violation are:

1. The solicitation and receipt by respondent in commerce of payments for promotional services in connection with the resale of a supplier's product.

2. That at approximately the time of the solicitation and receipt, other customers of the supplier were competing with the recipient in the distribution of the grantor-supplier's goods of like grade and quality.

3. The payments received by respondent were not affirmatively offered by the suppliers to such competing customers on proportionally equal terms.

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[2] The complaint charges that respondent did not utilize all of the money received from its suppliers to pay for advertising the suppliers' goods but devoted substantial amounts of such payments "to its own use". The hearing examiner dismissed this count, holding: "The record herein does not establish that payments received by the respondent were in excess of the value of the services rendered by it." Complaint counsel has not appealed this dismissal and at this juncture the Commission will not decide upon its correctness.

4. That respondent possessed information sufficient to put upon it the duty of making inquiry to ascertain whether the granting suppliers were making such payments available to its competitors on proportionally equal terms.

Respondent does not question that the record contains substantial and adequate proof of the first element.

Proof sufficient to establish the second criteria should not be difficult to adduce, since it involves merely a showing of the exact identity of the products purchased by the respondent from a supplier who granted it an allegedly discriminatory promotional allowance and the same showing for any of respondent's competitors who did not receive the allowance. Yet respondent contends that this meager showing was not made in this record and, upon review of all of the evidence, we must conclude that it is right.

To prove this element of the case, complaint counsel relies upon the testimony of ten witnesses who were employees or officers of retailers or wholesalers distributing goods in one or more of the trade areas served by respondent. These witnesses were probably in command of the facts needed to satisfy this criteria but the examination by counsel failed to elicit them. Perhaps a few examples will illustrate the defects in the evidence.

A witness named Jack Oltman testified that he was the manager of Marine Drug Store, Inc., located at 6602 Canal Street, in Houston, Texas. This store owns another pharmacy located at 209 Milby Street, in Houston. Marine Drug Store, Inc., is presumably a corporation but the witness' position, if any, with respect to the corporation and the other store was not explored. The witness was then asked whether "he" purchased the products of Max Factor & Co. and Shulton, Inc.,[3] during 1958 and 1959. He responded in the affirmative and stated the dollar amounts of purchases made from each company during each of the two years. The only specific product identified in the testimony as purchased from the two suppliers is Shulton's "Desert Flower Creme Deodorant". This, then, is the only product which we know that both Weingarten and the witness purchased and resold in 1958 and 1959. We have no idea how extensive the witness' purchases of this item were; whether it was stocked in both stores; and whether it was stocked and resold at or during the time when the respondent was soliciting and receiving the allegedly discriminatory allowance from Shulton.

[3] These are two suppliers alleged in other Commission proceedings to have granted discriminatory promotional allowances to the respondent. Commission complaints issued charging these two cosmetic companies with violating Section 2(d) in granting promotional allowances to Weingarten. Neither of these 2(d) matters has been finally resolved. The *Max Factor* case (Docket 7717) is still pending before the hearing examiner. The *Shulton* matter (Docket 7721) is currently involved in litigation before the United States Court of Appeals for the Seventh Circuit.

Another witness relied upon is Oliver Thomas Cochrane. This witness was affiliated in some unknown manner with two pharmacies located in Houston. The record does not reveal whether he was an owner, official or employee, nor does it give any indication from which it can be concluded that he was the properly qualified person to testify with respect to the operations of the two pharmacies with which he was affiliated.

Four officials of three grocery chains competing with Weingarten were called as witnesses for the complaint. The record clearly establishes that certain specific stores operated by these competing chains were located in sufficiently close proximity to Weingarten stores that competition between them is a certainty. The record also establishes that these chains purchased specified items from suppliers who participated in one or more of the Weingarten promotions in 1958 and 1959. With one exception, the record shows that these competing chains were not offered allowances proportionally equal to those given to Weingarten. But not all of the stores of any of these chains are in competition with Weingarten and there is no showing in this record that the stores shown to compete with Weingarten were actually stocking and selling an allegedly discriminating supplier's goods at approximately the time when Weingarten induced and received its promotional allowances. There is some evidence in the record from which it can be concluded that certain of the chains definitely do not stock and sell all items in all stores. For example, one of the A & P officials testified that Shreveport Macaroni products are carried in the A & P Shreveport stores but not in all of the other stores. The same witness testified that all of the A & P stores carried Carnation products but he was not asked to identify the specific type of products carried. This witness also stated that he could not testify as a fact that any particular A & P store handled and sold any given item at any of the times pertinent to this inquiry.

Counsel called to the stand three witnesses who were officials of food wholesaling concerns which conducted a substantial part of their business with voluntary groups of cooperating retailers. These cooperative groups were composed of small retailers who trade under the same name and purchase the bulk of their supplies from the wholesalers who testified. Complaint counsel urges that we should consider these groups of retail grocers, together with their sponsoring wholesalers, as a competitive unit and hence in competition with Weingarten in the distribution of goods. Doubtless the record does show that the retailers utilize the services of the wholesaler for a wide variety of functions, including advertising, warehousing and financing. But opposed to this evidence is the showing that the proprietors of the retail stores are free to buy from any source they

choose and are free to carry or reject any item which the sponsoring wholesaler carries. One witness testified that it was quite possible that as many as half of the stores sponsored by his organization might not carry any particular item. Moreover, the wholesalers conduct a substantial amount of business with retailers who are not members of a group and there is no showing as to the group's portion of the wholesalers' purchases from the allegedly discriminating suppliers. While the Commission is sympathetic to the proposition that voluntary cooperative retail groups of the type here involved are entitled to the protection of the Act, we are faced in this instance with a dirth of factual information upon which to predicate a finding that the sponsoring wholesalers and their affiliate groups were, or were not, "customers" of their suppliers. Minimally we must know whether suppliers considered them as a unit and paid promotional allowances to them as a unit. There should also be a more detailed showing as to the operations of the groups, particularly with respect to their dependence upon the participating wholesalers.

We do not view the question of whether a wholesaler and his sponsored cooperative group of retailers can be considered as a customer within the meaning of Section 2(d) of the Robinson-Patman Act or within the ambit of the violations spelled out in this proceeding as firmly decided. It is true that we have heretofore refrained from an affirmative finding on this point,[4] but then, as now, the holding is predicated upon the facts and not upon the law.

The wholesaler testimony adduced in this record is defective in another respect in that it fails to identify the particular stores serviced which are in competition with Weingarten or, in the instance where stores are shown to compete, there is no showing that these stores handled and sold items similar in grade and quality to those purchased by Weingarten from suppliers who granted it an allegedly discriminatory promotional allowance.

There is a good deal more which could be said concerning the evidence adduced to support the element of competition between Weingarten and others in the distribution of items purchased from suppliers who gave Weingarten an allegedly discriminatory promotional allowance, but it is felt that the above brief outline of the principal deficiencies found in this evidence should suffice to inform the parties and the hearing examiner of the Commission's feeling with respect thereto. Antitrust cases and, in particular, Robinson-Patman cases require a meticulous attention to minute details. When dealing with prices, allowances and goods of like grade and quality, the Commission may not indulge in assumptions or presumptions, for these matters are susceptible of exact proof and this is the type of showing

[4] E.g., Giant Foods, Inc., Docket No. 6459, page 3 of the slip opinion.

which must be made. The evidence adduced in this record in support of the element under consideration is, of course, not totally lacking in probative value, for a good deal of reliable and important information was secured from the ten "competitor" witnesses. But the evidence does not quite reach the level of reliability and substantiality necessary for a concrete finding on this particular point.

We turn now to a consideration of the third element necessary to prove the violations charged, that payments proportionally equal to those received by the respondent were not affirmatively offered by its suppliers to customers competing with respondent. While each of the ten "competitor" witnesses testified that they were not offered a proportional promotional allowance by the suppliers who participated in the Weingarten promotion, this evidence has little significance until it is definitely determined that the ten witnesses' companies actually competed with Weingarten in the distribution of the same suppliers' goods of like grade and quality. Thus a definitive finding on this point must await resolution of the prior factual question. The Commission concludes that the same reasoning applies to criteria number four, that of knowledge on the part of Weingarten that the payments made to it were discriminatory.

The remand of the case to the hearing examiner for further proceedings is never lightly ordered, but it is the Commission's decision that remand is the only possible course in these premises. This matter has now been in litigation for slightly more than three years and both the public and the respondent have incurred substantial expense in its trial. As we stated earlier, this case is attended with a great deal of public interest and to now order dismissal for failure of proof without finally deciding the legality or illegality of the respondent's acts would waste all of the money and effort heretofore expended. This would be a disservice both to the respondent and to the public and cannot be seriously contemplated. There is no question but that the public interest cannot be permitted to suffer because of the mistakes of Commission personnel.[5]

This remand does not envision a complete retrial of all of the issues involved in this proceeding. Only evidence pertaining to the questions which this opinion points out cannot be decided upon the present record because of insufficient facts should be received. It is not contemplated that more than five full hearing days for each side will be needed to adequately shore up this record although the Commission sees no need to actually order a limitation on the length of

[5] "It must not be forgotten that the Commission is not a private party, but a body charged with the protection of the public interest; and it is unthinkable that the public interest should be allowed to suffer as a result of inadvertence or mistake on the part of the Commission or its counsel where this can be avoided." *P. Lorillard Co. v. Federal Trade Commission,* 186 F. 2d 52, 55 (4th Cir. 1950) [5 S.&D. 210].

the hearings. However, the Commission does feel that this matter should be concluded with dispatch and will order that the hearing examiner and the parties make every effort to complete the reception of evidence within 90 days.

The deficiencies in this record are not entirely the fault of complaint counsel, for even if the record did contain a complete exposition of all the facts which the Commission needs to arrive at a final decision, this matter would still have to be remanded to the hearing examiner for the preparation of a new initial decision. Both the Administrative Procedure Act and the Commission's Rules require that initail decisions must state the reasons or basis for findings and conclusions upon all material issues of fact, law or discretion presented on the record.[6] The initial decision filed in this matter does not conform to this requirement.

A primary function of an initial decision is to make factual findings based upon the evidence of record. An initial decision which disposes of hundreds of pages of testimony and documentary evidence with a single conclusionary sentence or paragraph is not an adequate initial decision. It does not apprise the parties, the Commission or the public of the disposition which was made of the welter of conflicting contentions made by the two parties. Such a decision forces the reader to guess at what evidence was relied upon and what evidence was rejected. In this initial decision, the testimony of the ten "competitor" witnesses was disposed of with the following sentence:

> Ten witnesses from nine companies competing with the respondent testified with regard to the allowances, if any, received from the eight suppliers heretofore specifically named and their testimony established that the said suppliers did not offer or otherwise make available payments or allowances for advertising or other services or facilities, on terms proportionately equal to those granted by them to respondent to all others of their customers who were competing with respondent in the sale and distribution of their products. (Foonote omitted.)

The quoted sentence is not a factual finding but a factual conclusion of the type which could be made by a high appellate court. Insofar as the facts are concerned, the hearing examiner's position is similar to that of a trial judge. His conclusions must be based upon facts and his decision must point out the facts upon which he relies. Of course this does not mean that an initial decision must delve into and deal at length with all of the conflicting factual evidence adduced in the record or it would approach in length the record itself. All that is required is that the basic factual evidence necessary to an informed decision be pointed out and described. A mere conclusion

[6] Administrative Procedure Act, Section 8(b) (15 U.S.C. § 1007(b)); Federal Trade Commission Rules of Practice, § 4.19(b) (June 1962).

that the record contains such facts will not do. The Commission's responsibility, and hence the hearing examiner's, with respect to findings of fact was prescribed by the Supreme Court in *Automatic Canteen Co.* v. *Federal Trade Commission* (346 U.S. 61, 81 [5 S.&D. 531] (1953)), as follows:

> * * * While this Court ought scrupulously to abstain from requiring of the Commission particularization in its findings so exacting as to make this Court in effect a court of review on the facts, it is no less important, since we are charged with the duty of reviewing the correctness of the standards which the Commission applies and the essential fairness of the mode by which it reaches its conclusions, that the Commission do not shelter behind uncritical generalities or such looseness of expression as to make it essentially impossible for us to determine what really lay behind the conclusions which we are to review.

Thus, at the conclusion of the hearings to be held pursuant to the accompanying order of remand, the hearing examiner is directed to prepare a new initial decision in accordance with the Commission's views here expressed.

One final point requires comment in this opinion. The respondent charges that the order to cease and desist proposed by the hearing examiner is unlawfully vague and broad in scope. Of course, we cannot predict at this stage what the hearing examiner's decision will be and thus the remarks we make here are only appropriate in the event that upon completion of the remand hearings he is still of the view that an order to cease and desist should issue. In such event, the Commission feels that the hearing examiner should examine the evidence adduced in the light of the recent court decisions, including the above-cited *Grand Union Co.* v. *Federal Trade Commission* and *American News Company, et al.* v. *Federal Trade Commission.* In particular, the statements of Judge Clark in the *American News* opinion to the effect that inducement standing alone has never been held to violate Section 5 and that inducement without concomitant receipt of a discriminatory allowance should not be enjoined without some showing as to its necessity.[7] At this juncture, the Commission voices no opinion as to whether this record will support a conclusion that inducement without receipt should be enjoined. We are merely pointing out that the courts have refused to affirm orders with prohibitions of this nature and are asking the hearing examiner to consider this factor in his next initial decision.

An appropriate order remanding this case to the hearing examiner for further proceedings in conformity with the Commission's views expressed above will issue.

Commissioners Anderson and Elman, without joining in this opinion, agree that the matter should be remanded to the hearing exami-

[7] 300 F. 2d at 111 [7 S.&D. 346, 354].