

IN THE MATTER OF
NATIONAL PARTS WAREHOUSE ET AL.

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

Docket 8039. Complaint, July 12, 1960—Decision, Dec. 16, 1963

Order requiring a limited partnership—organized in 1956 by its manager and the auto parts jobber stockholders in two membership corporations which had been operated as bookkeeping devices to obtain lower prices from auto parts suppliers and which it took over—along with its manager and 55 auto parts jobber members, to cease discriminating in price in violation of Sec. 2(f) of the Clayton Act by knowingly inducing or accepting from seller suppliers a lower net price than that at which the suppliers sold to the jobber members' competitors; and maintaining respondent warehouse as an instrumentality for inducing or receiving from suppliers discounts which resulted in a net price below that which the suppliers charged their competitors.

COMPLAINT *

The Federal Trade Commission, having reason to believe that the party respondents named in the caption hereof, and hereinafter more

* Reported as amended by Hearing Examiner's order of June 11, 1962.

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particularly designated and described, have violated and are now violating the provisions of subsection (f) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, Sec. 13), hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent National Parts Warehouse, hereinafter sometimes referred to as respondent N.P.W., is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office and place of business located at 308 Whitehall Street, S.W., Atlanta, Georgia.

Respondent N.P.W., although utilizing partnership form, is a membership organization, organized, maintained, managed, controlled, and operated by and for its members. The membership of respondent N.P.W. is composed of corporations, partnerships, and individuals whose business consists of the jobbing of automotive products and supplies.

Respondent N.P.W., as constituted and operated, is known and referred to in the trade as a buying group.

Respondent Bryant M. Smith, Sr., is the manager and general partner of respondent N.P.W. with his office and principal place of business located at 308 Whitehall Street, S.W., Atlanta, Georgia.

PAR. 2. The following respondent corporations and individuals, sometimes hereinafter referred to as respondent jobbers, in association with respondent Bryant M. Smith, Sr., constitute respondent N.P.W.:

Respondent Auto Machine and Parts Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office and place of business located at 301 East Bay Street, Savannah, Georgia.

Respondent Arnau Tire and Accessory Co., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office and place of business located at 222 South Jefferson Street, Dublin, Georgia.

Respondent Appalachian Auto Parts Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located at 1902 University Avenue, N.W., Knoxville, Tennessee.

Respondent Mrs. George H. Ridgeway is a sole proprietor doing business under the firm name and style of Madison Auto Supply Co., with her principal office and place of business located at Madison, Georgia.

Respondent Moyer Auto Parts, Inc., a corporation, with its principal place of business located at 212 W. Broad Street, Griffin, Georgia;

Respondent Auto Parts Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee with its principal office and place of business located at Market and Island Streets, Kingsport, Tennessee.

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Respondent Auto Parts and Service Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located at 116-118 S. College Street, Lebanon, Tennessee.

Respondent Brunswick Auto Parts Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office and place of business located at 1217 Newcastle Street, Brunswick, Georgia.

Respondent Bessemer Auto Parts, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its principal office and place of business located at 630 North 20th Street, Bessemer, Alabama.

Respondent Buchanan-Lyon Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kentucky, with its principal office and place of business located at Cambellsville, Kentucky.

Respondent Barnes Motor and Parts Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located at 315 East Barnes Street, Wilson, North Carolina.

Respondent Battery and Electric Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of South Carolina, with its principal office and place of business located at 300 Buncombe Street, Greenville, South Carolina.

Respondents L. R. Wells, and W. F. Wells, are copartners doing business under the firm name and style of Cairo Auto Supply Co., with their principal office and place of business located at Cairo, Georgia.

Respondent Cains' Parts and Service Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at Lake Wales, Florida.

Respondent Condrey Motor Parts, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its principal office and place of business located at 3300 W. Clay Street, Richmond, Virginia.

Respondent Cottle's Auto Supply, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its principal office and place of business located at Tallassee, Alabama.

Respondents A. Macina and J. Follo, are copartners doing business under the firm name and style of Court Square Auto Parts, with their principal office and place of business located at 640 Court Street, Clearwater, Florida.

Respondent Bluefield Supply Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of West Virginia, doing business under the firm name and style of Counts Automotive Supply Company, with its principal office and place of business located at 229 Bluefield Avenue, Bluefield, West Virginia.

Respondent E'town Distributing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kentucky, with its principal office and place of business located at 712 East Dixie Avenue, Elizabethtown, Kentucky.

Respondent Dickson Auto Supply, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of North

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Carolina, with its principal office and place of business located at 316 East Marion Street, Shelby, North Carolina.

Respondent I. N. Kohorn is a sole proprietor doing business under the firm name and style of Dixie Auto Parts Co., with his principal office and place of business located at 109 N. Warren Street, Mobile, Alabama.

Respondent The Fergerson Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kentucky, with its principal office and place of business located at 1000 Broadway, Paducah, Kentucky.

Respondents George M. Greer, Barney Nation and Mrs. George M. Greer, are copartners doing business under the firm name and style of Greer Auto Supply Company, with their principal office and place of business located at 524 Main Street, Cedartown, Georgia.

Respondent Genuine Auto Parts Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its principal office and place of business located at 230 Molton Street, Montgomery, Alabama.

Respondent Gadsden Auto Parts, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its principal offices and place of business located at 111-117 East Broad Street, East Gadsden, Alabama.

Respondent General Auto Supplies, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 219 East Market Street, New Albany, Indiana.

Respondent Jordan Auto Parts, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kentucky, with its principal office and place of business located at 226 E. Third Street, Lexington, Kentucky.

Respondent Lakeland Battery and Auto Supply, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 107 West Main Street, Lakeland, Florida.

Respondent George O. Franklin, III, a sole proprietor doing business under the firm name and style of Metter Auto Supply Co., with his principal office and place of business located at Metter, Georgia.

Respondents A. J. Whiddon, Sr., A. J. Whiddon, Jr., Johnny O. Whiddon, and Miriam Grey Bowling are copartners doing business under the firm name and style of Motor Bearings and Supply Co., with their principal office and place of business located at 116 S. St. Andrews Street, Dothan, Alabama.

Respondent Morgan Supply Co., Inc., a corporation, with its principal place of business located at 780 Gordon Street, S. W., Atlanta, Georgia;

Respondent B. H. Fenn, is a sole proprietor doing business under the firm name and style of Millville Auto Parts, with his principal office and place of business located at 2708 E. 5th Street, Panama City, Florida.

Respondent The Megahee-Speight Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office and place of business located at 336 West Jackson Street, Thomasville, Georgia.

Respondent Motor Supply Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of South

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Carolina, with its principal office and place of business located at 918-24 Gervais Street, Columbia, South Carolina.

Respondent McLean Auto Supply Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located at 114 Roper Street, Laurinburg, North Carolina.

Respondent T. Felton Millians, is a sole proprietor doing business under the firm name and style of Newman Auto Supply, with his principal office and place of business located at 21 East Washington Street, Newman, Georgia.

Respondent, Pensacola Automotive Supply Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 212 West Intendencia, Pensacola, Florida.

Respondent Piston Ring and Supply Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 1511 Tampa Street, Tampa, Florida.

Respondent Parts Supply Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of South Carolina, with its principal office and place of business located at Orangeburg, South Carolina.

Respondent Barney R. Riner, is a sole proprietor doing business under the firm name and style of Riner Radiator and Battery Co., with his principal office and place of business located at 116 Jernigan Street, Sandersville, Georgia.

Respondents George Stuckey, James Stuckey and Dexter Stuckey, are copartners doing business under the firm name and style of Stuckey Brothers Parts Co., with their principal office and place of business located at Hemingway, South Carolina.

Respondent Guy Fumbanks, is a sole proprietor doing business under the firm name and style of Standard Auto Supply, with his main office and place of business located at McKenzie, Tennessee.

Respondents R. S. Woodham and W. P. Woodham, are copartners doing business under the firm name and style of Tallahassee Auto Parts Company, with their principal office and place of business located at 1441 South Monroe Street, Tallahassee, Florida.

Respondent Tanner Auto Parts, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 2550 Anderson Avenue, Fort Myers, Florida.

Respondent White Stores, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, doing business under the firm name and style of White Electric and Battery Service, with its principal office and place of business located at 118 N. W., 8th Avenue, Gainesville, Florida.

Respondents Calhoun H. Young, and Ruth C. Young, are copartners doing business under the firm name and style of Young Parts and Supply Co., with their principal office and place of business located at 834 N. W., 10th Terrace, Fort Lauderdale, Florida.

Respondent MacGregor Flanders is a sole proprietor doing business under the firm name and style of Flanders Parts Company, with his principal office and place of business located at 303 Maple Street, Carrollton, Georgia.

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Respondent M. S. Church Auto Parts Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located at 322 N. Second Street, Pulaski, Tennessee.

Respondents A. C. Craig and J. A. Craig, are copartners doing business under the firm name and style of Craig Supply Co., with their principal office and place of business located at 103 University Avenue, Tuscaloosa, Alabama.

Respondent Hyatt Parts and Supply Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office and place of business located at 439 S. Green Street, Gainesville, Georgia.

Respondent Marianna Auto Parts & Supply Co., a corporation with its principal place of business located at 502 East Lafayette Street, Marianna, Florida.

Respondents Wendell Frazier, Norris Frazier and Winston C. Nunn, are copartners doing business under the firm name and style of Nunn Auto Supply Co., with their principal office and place of business located at 121 East Main Street, Glasgow, Kentucky.

Respondent Thompson Auto Supply Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Mississippi, with its principal office and place of business located at 122 Hardy Street, Hattiesburg, Mississippi.

Respondent Wood's Automotive, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Mississippi, with its principal office and place of business located at Wall and Franklin Streets, Natchez, Mississippi.

Respondent Huggins Motor Parts, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 15-5th Street, N., St. Petersburg, Florida.

PAR. 3. The respondent jobbers set forth in Paragraph Two have purchased and now purchase in commerce from suppliers engaged in commerce numerous automotive products and suppliers for use, consumption, or resale within the United States. Respondent Jobbers and said suppliers cause the products and supplies so purchased to be shipped and transported among and between the several states of the United States from the respective state or states of location of said suppliers to the respective different state or states of location of the said respondent jobbers. Respondent jobbers and said suppliers are therefore engaged in commerce, as "commerce" is defined in the Clayton Act.

PAR. 4. In the purchase and the resale of said automotive products and supplies, respondent jobbers are in active competition with independent jobbers not affiliated with respondent N.P.W.; and the suppliers selling to respondent jobbers and to their independent competitors are in active competition with other suppliers of similar automotive products and supplies.

PAR. 5. Respondent N.P.W. since its formation in 1956, has been, and is now, maintained, managed and operated by its general partner and manager, respondent Bryant M. Smith, Sr., for the respondent jobbers set forth in Paragraph Two and each respondent has participated in, approved, furthered, or cooperated with the other respondents in the carrying out of the procedures and activities hereinafter described.

In practice and effect, respondent N.P.W. has been, and is now, serving as the medium or instrumentality by, through, or in conjunction with, which said respondent jobbers exert the influence of their combined bargaining power on the competitive suppliers hereinbefore described. As a part of their operating procedure, said respondent jobbers direct the attention of said suppliers to their aggregate purchasing power as a buying group and, by reason of such, have knowingly demanded and received, upon their individual purchases, discriminatory prices, discounts, allowances, rebates, and terms and conditions of sale. Suppliers not acceding to such demands are usually replaced as sources of supply for the commodities concerned and such market is closed to them in favor of such suppliers as can be, and are, induced to afford the discriminatory prices, discounts, allowances, rebates, and terms and conditions of sale so demanded.

Respondent jobbers demand that those suppliers who sell their products pursuant to a quantity discount schedule shall consider their severel purchases in the aggregate as if made by one purchaser and grant quantity discounts, allowances, or rebates on the resultant combined purchase volume in accordance with said suppliers' schedules. This procedure effects a discrimination in price on goods of like grade and quality between respondent jobbers and competing independent jobbers whose quantity discounts, allowances, or rebates from such suppliers are based upon only their individual purchase volumes. From other suppliers the respondent jobbers demand the payment or allowance of trade discounts, allowances, or rebates which such suppliers do not ordinarily pay or allow to jobber customers. This procedure effects a discrimination in price on goods of like grade and quality between respondent jobbers and competing independent jobbers who are not afforded such trade discounts, allowances, or rebates.

When and if a demand is acceded to by a particular supplier, the subsequent purchase transactions between said supplier and the individual jobber respondents have been and are billed to, and paid for through, the aforesaid organizational device of respondent N.P.W. Under such circumstances said organization thus purports to be the purchaser when in truth and in fact it has been, and is now, serving

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as an agent for the several respondent jobbers and as a means for facilitating the inducement and receipt by the aforescribed respondent jobbers of the price discriminations concerned.

PAR. 6. Respondents have induced or received from their suppliers, in the manner afore-described, favorable prices, discounts, allowances, rebates, terms and conditions of sale which they knew or should have known constituted discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

PAR. 7. The effect of the knowing inducement or receipt by respondents of the discriminations in price, as above alleged, has been, and may be, substantially to lessen, injure, destroy, or prevent competition between suppliers of automotive products and supplies granting such discriminations and other suppliers of such products and supplies, who do not grant or allow such discriminations, and also between respondent jobbers and competing independent jobbers not receiving or securing such discriminations.

PAR. 8. The foregoing alleged acts and practices of respondents in knowingly inducing or receiving discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, are in violation of subsection (f) of Section 2 of said Act.

Mr. Richard B. Mathias, Mr. John Perry, and Mr. Eldon P. Schrup supporting the complaint.

Mellitz & Frank, St Louis, Mo., by Mr. Bernard Mellitz and Mr. Malcolm I. Frank, for the respondents.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

JUNE 12, 1962

The Federal Trade Commission issued its complaint against the respondents on July 12, 1960, charging that respondents have induced or received from their suppliers favorable prices, discounts, allowances, rebates, terms and conditions of sale which they knew, or should have known, constituted discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act, as amended; and that such acts and practices of respondents were in violation of subsection (f) of Section 2 of said Act. Respondents' answers denied generally the allegations of the complaint, although some factual allegations were admitted.

This proceeding is before the hearing examiner for final consideration upon the complaint, answers, testimony and other evidence, and

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proposed findings of fact and conclusions filed by counsel for respondents 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

1. Respondent National Parts Warehouse, hereinafter sometimes referred to as N.P.W., is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office and place of business located at 1260 Kennedy Road, Forrest Park, Georgia.

2. The limited partners of respondent N.P.W. are corporations, individuals doing business as copartners, and other individuals whose business consists of the jobbing of automotive products and supplies, and the general partner is a former automotive jobber. N.P.W. is a successor organization to a corporation, Automotive Parts Distributors, Inc., which was a bookkeeping organization, buying in its name for the benefit of its stockholders and doing no warehousing. At the time of the formation of N.P.W., the partners were the former stockholders of Automotive Parts Distributors, Inc., and the partnership acquired the assets and liabilities of the corporation and took over its operation.

3. At the time of the issuance of the complaint in this proceeding the partners of N.P.W. were:

Respondent Bryant M. Smith, Sr., the manager and general partner of respondent National Parts Warehouse, with his office and principal place of business located at 1260 Kennedy Road, Forrest Park, Georgia.

Respondent Auto Machine and Parts Co., Inc., a Georgia corporation, with its principal office and place of business located at 301 East Bay Street, Savannah, Georgia.

Respondent Arnau Tire and Accessory Co., a Georgia corporation, with its principal office and place of business located at 222 South Jefferson Street, Dublin, Georgia.

Respondent Appalachian Auto Parts Co., Inc., a Tennessee corporation, with its principal office and place of business located at 1902 University Avenue, N.W., Knoxville, Tennessee.

Respondent Mrs. George H. Ridgeway, a sole proprietor doing business under the firm name and style of Madison Auto Supply Co., with her principal office and place of business located at Madison, Georgia.

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Respondent Moyer Auto Parts, Inc., a corporation, with its principal place of business located at 212 W. Broad Street, Griffin, Georgia, which was erroneously identified in the complaint as a partnership composed of Robert A. Moyer, Mrs. Helen F. Moyer, and Harry D. Baker, copartners doing business under the firm name and style of Auto Parts and Supply Company, with their principal office and place of business located at 212 W. Broad Street, Griffin, Georgia.

Respondent Auto Parts Company, Inc., a Tennessee corporation, with its principal office and place of business located at Market and Island Streets, Kingsport, Tennessee.

Respondent Auto Parts and Service Company, Inc., a Tennessee corporation, with its principal office and place of business located at 116-118 S. College Street, Lebanon, Tennessee.

Respondent Brunswick Auto Parts Company, a Georgia corporation, with its principal office and place of business located at 1217 Newcastle Street, Brunswick, Georgia.

Respondent Bessemer Auto Parts, Inc., an Alabama corporation, with its principal office and place of business located at 630 North 20th Street, Bessemer, Alabama.

Respondent Buchanan-Lyon Company, a Kentucky corporation, with its principal office and place of business located at Campbellsville, Kentucky.

Respondent Barnes Motor and Parts Co., Inc., a North Carolina corporation, with its principal office and place of business located at 315 East Barnes Street, Wilson, North Carolina.

Respondent Battery and Electric Co., Inc., a South Carolina corporation, with its principal office and place of business located at 300 Buncombe Street, Greenville, South Carolina.

Respondents L. R. Wells and W. F. Wells, copartners doing business under the firm name and style of Cairo Auto Supply Co., with their principal office and place of business located at Cairo, Georgia.

Respondent Cains' Parts and Service Co., a Florida corporation, with its principal office and place of business located at Lake Wales, Florida.

Respondent Condrey Motor Parts, Inc., a Virginia corporation, with its principal office and place of business located at 3300 W. Clay Street, Richmond, Virginia.

Respondent Cottle's Auto Supply, Inc., an Alabama corporation, with its principal office and place of business located at Tallassee, Alabama.

Respondents A. Macina and J. Follo, copartners doing business under the firm name and style of Court Square Auto Parts, with their principal office and place of business located at 640 Court Street, Clearwater, Florida.

Respondent Bluefield Supply Company, a West Virginia corporation, doing business under the firm name and style of Counts Automotive Supply Company, with its principal office and place of business located at 229 Bluefield Avenue, Bluefield, West Virginia.

Respondent E'town Distributing Company, Inc., a Kentucky corporation, with its principal office and place of business located at 712 East Dixie Avenue, Elizabethtown, Kentucky.

Respondent Dickson Auto Supply, Inc., a North Carolina corporation, with its principal office and place of business located at 316 East Marion Street, Shelby, North Carolina.

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Respondent I. N. Kohorn, a sole proprietor doing business under the firm name and style of Dixie Auto Parts Co., with his principal office and place of business located at 109 N. Warren Street, Mobile, Alabama.

Respondent The Fergerson Company, Inc., a Kentucky corporation, with its principal office and place of business located at 1000 Broadway, Paducah, Kentucky.

Respondents George M. Greer, Barney Nation and Mrs. George M. Greer, copartners doing business under the firm name and style of Greer Auto Supply Company, with their principal office and place of business located at 524 Main Street, Cedartown, Georgia.

Respondent Genuine Auto Parts Co., Inc., an Alabama corporation, with its principal office and place of business located at 230 Molton Street, Montgomery, Alabama.

Respondent Gadsden Auto Parts, Inc., an Alabama corporation, with its principal office and place of business located at 111-117 East Broad Street, East Gadsden, Alabama.

Respondent General Auto Supplies, Inc., and Indiana corporation, with its principal office and place of business located at 219 East Market Street, New Albany, Indiana.

Respondent Jordan Auto Parts, Inc., a Kentucky corporation, with its principal office and place of business located at 226 E. Third Street, Lexington, Kentucky.

Respondent Lakeland Battery and Auto Supply, Inc., a Florida corporation, with its principal office and place of business located at 107 West Main Street, Lakeland, Florida.

Respondent George O. Franklin, III, a sole proprietor doing business under the firm name and style of Metter Auto Supply Co., with his principal office and place of business located at Metter, Georgia, which firm was identified in the complaint as respondent Mrs. Katherine B. Franklin, Executrix of the estate of George O. Franklin, Jr., a sole proprietor doing business under the firm name and style of Matter Auto Supply Co., with her principal office and place of business located at Metter, Georgia.

Respondents A. J. Whiddon, Sr., A. J. Whiddon, Jr., Johnny O. Whiddon, and Miriam Grey Bowling, copartners doing business under the firm name and style of Motor Bearings and Supply Co., with their principal office and place of business located at 116 S. St. Andrews Street, Dothan, Alabama.

Respondent Morgan Supply Co., Inc., a corporation with its principal place of business located at 780 Gordon Street, S.W., Atlanta, Georgia, which was identified in the complaint as Dewey M. Morgan, a sole proprietor doing business under the firm name and style of Morgan Supply Co., with his principal office and place of business located at 780 Gordon Street, S.W., Atlanta, Georgia.

Respondent B. H. Fenn, a sole proprietor doing business under the firm name and style of Millville Auto Parts, with his principal office and place of business located at 2708 E. 5th Street, Panama City, Florida.

Respondent The Megahee-Speight Co., a Georgia corporation, with its principal office and place of business located at 336 West Jackson Street, Thomasville, Georgia.

Respondent Motor Supply Company, Inc., a South Carolina corporation, with its principal office and place of business located at 918-24 Gervais Street, Columbia, South Carolina.

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Respondent McLean Auto Supply Company, a North Carolina corporation, with its principal office and place of business located at 114 Roper Street, Laurinburg, North Carolina.

Respondent T. Felton Millians, a sole proprietor doing business under the firm name and style of Newnan Auto Supply, with his principal office and place of business located at 21 East Washington Street, Newnan, Georgia.

Respondent Pensacola Automotive Supply Co., a Florida corporation, with its principal office and place of business located at 212 West Intendencia, Pensacola, Florida.

Respondent Piston Ring and Supply Co., Inc., a Florida corporation, with its principal office and place of business located at 1511 Tampa Street, Tampa, Florida.

Respondent Parts Supply Company, a South Carolina corporation, with its principal office and place of business located at Orangeburg, South Carolina.

Respondent Barney R. Riner, a sole proprietor doing business under the firm name and style of Riner Radiator and Battery Co., with his principal office and place of business located at 116 Jernigan Street, Sandersville, Georgia.

Respondents George Stuckey, James Stuckey and Dexter Stuckey, copartners doing business under the firm name and style of Stuckey Brothers Parts Co., with their principal office and place of business located at Hemingway, South Carolina.

Respondent Guy Fumbanks, a sole proprietor doing business under the firm name and style of Standard Auto Supply, with his main office and place of business located at McKenzie, Tennessee.

Respondents R. S. Woodham and W. P. Woodham, copartners doing business under the firm name and style of Tallahassee Auto Parts Company, with their principal office and place of business located at 1441 South Monroe Street, Tallahassee, Florida.

Respondent Tanner Auto Parts, Inc., a Florida corporation, with its principal office and place of business located at 2550 Anderson Avenue, Fort Myers, Florida.

Respondent White Stores, Inc., a Florida corporation, doing business under the firm name and style of White Electric and Battery Service, with its principal office and place of business located at 118 N.W., 8th Avenue, Gainesville, Florida.

Respondents Calhoun H. Young and Ruth C. Young, copartners doing business under the firm name and style of Young Parts and Supply Co., with their principal office and place of business located at 834 N.W., 10th Terrace, Fort Lauderdale, Florida.

Respondent MacGregor Flanders, a sole proprietor doing business under the firm name and style of Flanders Parts Company, with his principal office and place of business located at 303 Maple Street, Carrollton, Georgia.

Respondent M. S. Church Auto Parts Company, a Tennessee corporation, with its principal office and place of business located at 322 N. Second Street, Pulaski, Tennessee.

Respondents A. C. Craig and J. A. Craig, copartners doing business under the firm name and style of Craig Supply Co., with their principal office and place of business located at 103 University Avenue, Tuscaloosa, Alabama.

Respondent Hyatt Parts and Supply Co., a Georgia corporation, with its

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principal office and place of business located at 439 S. Green Street, Gainesville, Georgia.

Respondent Marianna Auto Parts & Supply Co., a corporation with its principal place of business located at 502 East Lafayette Street, Marianna, Florida, which was erroneously identified in the complaint as Mary D. Henson, a sole proprietor doing business under the firm name and style of Marianna Auto Parts and Supply Co., with her principal office and place of business located at 502 East Lafayette Street, Marianna, Florida.

Respondents Wendell Frazier, Norris Frazier and Winston C. Nunn, co-partners doing business under the firm name and style of Nunn Auto Supply Co., with their principal office and place of business located at 121 East Main Street, Glasgow, Kentucky.

Respondent Thompson Auto Supply Co., Inc., a Mississippi corporation with its principal office and place of business located at 122 Hardy Street, Hattiesburg, Mississippi.

Respondent Wood's Automotive, Inc., a Mississippi corporation, with its principal office and place of business located at Wall and Franklin Streets, Natchez, Mississippi.

Respondent Huggins Motor Parts, Inc., a Florida corporation, with its principal office and place of business located at 15 - 5th Street, N., St. Petersburg, Florida.

There are currently approximately 67 partners of N.P.W.

4. The respondent jobbers, directly and through respondent N.P.W., have purchased and now purchase in commerce from suppliers engaged in commerce numerous automotive products and supplies for use, consumption, or resale within the United States. Respondent jobbers and said suppliers cause the products and supplies so purchased to be shipped and transported among and between the several states of the United States from the respective state or states of location of said suppliers to the respective different state or states of location of the said respondent jobbers and to the warehouse of respondent N.P.W. Respondent jobbers and said suppliers are therefore engaged in commerce, as "commerce" is defined in the Clayton Act.

5. In the purchase and the resale of said automotive products and supplies, respondent jobbers are in active competition with independent jobbers not affiliated with respondent N.P.W.; and the suppliers selling to respondent jobbers and to their independent competitors are in active competition with other suppliers of similar automotive products and supplies.

6. Respondent N.P.W. since its formation in 1956 has been, and is now, managed and operated by its general partner and manager, respondent Bryant M. Smith, Sr., for the respondent jobbers described in paragraph 3, and each respondent has participated in, approved, furthered, and cooperated with the other respondents in the carrying out of the procedures and activities hereinafter found.

Such cooperation includes serving on the Advisory Committee, whose membership is selected from various areas, which studied various aspects of the operation of N.P.W. and made recommendations to respondent Bryant M. Smith, Sr., which were usually followed.

In accordance with the partnership agreement, however, the general partner does manage the business of the partnership and has made the final decisions regarding the lines which are bought as well as all other management decisions. It is necessary in making these decisions that he follow the desires of the partners in order to perpetuate the partnership.

7. Respondent N.P.W. has been, and is now, serving as a means or instrumentality by or through which respondent jobbers make known their aggregate purchasing power to suppliers in various ways, including general meetings of the partners and the suppliers' sales representatives. Many, if not all, of the suppliers are familiar with the size and nature of the business of N.P.W. and of its jobber partners. The respondents through the agency of N.P.W. and their general partner have induced their suppliers to grant to them the suppliers' normal warehouse distributor discount which is usually about 20 percent of the jobber price, and have induced the sellers that sell in accordance with a quantity-discount schedule to consider them to be one purchaser and to grant quantity discounts, allowances, or rebates on their combined purchase volume in accordance with the suppliers' schedules. The jobber partners order their N.P.W. lines directly from suppliers of the N.P.W. warehouse and from the N.P.W. warehouse by using a standard form of N.P.W. order blank. When agreements are reached by which suppliers sell to respondents, it is agreed that in most cases orders may be placed with the suppliers either directly or by N.P.W., and that N.P.W. will be billed for all purchases regardless of the manner of ordering. Currently the sellers allow a warehouse distributor discount, and only a few continue to grant additional discounts, allowances or rebates based upon the quantity of purchases.

8. The jobber partners are billed by N.P.W. at the manufacturer's suggested jobber prices, and the partners settle with N.P.W. monthly on this basis. N.P.W. settles its account with suppliers on a monthly basis and receives discounts and allowances from the suppliers in accordance with its arrangements with them. In accordance with the terms of their partnership agreement, respondent N.P.W. each year distributes to the partners all discounts and rebates received, less operating expenses, in proportion to the amount of each partner's purchases. The discounts and other allowances realized on sales to jobbers who are not partners are distributed equally to the jobber part-

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ners on an annual basis. Sales to non-partners have ranged from about 1 percent of total N.P.W. sales in 1956 to approximately 6 percent in 1961.

9. Many suppliers ship directly to the partners and the quantities shipped directly vary between the partners and from time to time. Direct shipments, also called drop shipments, were approximately 70 percent of the total billed to N.P.W. in 1956 and had decreased to approximately 20 percent in 1961.

10. When a seller's line was accepted by N.P.W., or when new conditions or terms were agreed upon, notice was sent to the jobber partners giving full information regarding the contract terms. In one recent year each jobber partner was supplied with a so-called "Buyers Guide" showing N.P.W.'s arrangements with each supplier. N.P.W. also distributed catalogs, price sheets and other material to its partners which were furnished to N.P.W. by suppliers, although some suppliers distributed such material directly to the partners.

There are approximately 150 suppliers selling to N.P.W.

The dollar amount of purchases of N.P.W. has been substantial, as have been the discounts and allowances received from suppliers on these purchases and passed on to the partners after deducting expense of operation. For the years 1956 through 1960 they were:

Year	N.P.W. purchases	Discounts and allowances, less expenses, passed on to partners
1956.....	\$2,950,978	\$259,749
1957.....	3,723,720	355,013
1958.....	4,664,921	444,052
1959.....	5,606,555	575,613
1960.....	5,588,862	534,073

11. The respondent jobbers knew they were receiving discriminatory discounts, allowances, and rebates from their suppliers. They knew that the quantity rebates allowed them were not based on the quantities or other factors involved in a particular sale and were not based upon quantities sold by them to other jobbers, but rather on the combined dollar amount of all sales to them because of their partnership in N.P.W. without regard to the actual cost of production, sale, and delivery to them.

Respondent jobbers knew or should have known that the warehouse distributor discount which they received did not represent savings in like amount to the sellers because (1) some of respondent jobbers had previously bought comparable quantities from the same suppliers at jobber prices; (2) they knew that the warehouse distributor

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discount resulted in profits to warehouse distributors after warehousing and sales expenses were incurred; (3) they knew that although some suppliers charged certain penalties when shipments were made directly to them rather than to the N.P.W. warehouse and that certain other "service" lines were handled on which there was little or no profit, the gross income in 1960 of N.P.W. was 17.71 percent of the purchases, and that more than half of this was returned to them after expenses of N.P.W. were paid; and (4) the penalty for drop shipments was frequently 5 percent and they knew or should have known that these suppliers considered this amount to approximate their difference in cost between selling and delivering to jobbers and warehouse distributors.

12. The automotive parts business is a highly competitive business involving small net margins of profit. The net margin of profit of a number of jobber witnesses, was between 1 percent and 5 percent after taxes. The importance of the discounts granted by the various suppliers and received by respondents, is shown by the testimony of jobbers who attached significance to the smaller 2 percent cash discount which is normally allowed all buyers by their suppliers. This small discount was considered important by them in determining their profit margins and in the successful operation of their businesses.

13. The amount of the competitive advantage which the respondent jobbers have over competing jobbers is calculated by the auditor's reports of N.P.W. which show net rebates to the partners after paying all expenses of N.P.W. on lines purchased during the years shown.

Year:	Average net rebate (percent)
1956-----	8.92
1957-----	9.70
1958-----	9.78
1959-----	10.73
1960-----	10.11

14. Respondents contend that the partnership is a functional and useful business, that it has grown over the years because of its fine management devoted to the concept of availability and service. The partnership is undoubtedly efficiently managed and does provide a degree of availability and service to its partners who are located generally in the Southeastern States. Except for the few located in the Atlanta trading area, most of them are much further from the N.P.W. warehouse than jobbers are usually located from their distributors. Their locations extend from southern Indiana to southern Florida, with the most distant being more than 600 miles from Atlanta.

Although fast service to a jobber from a warehouse distributor is of great importance, it appears that it is not as important to these respondent jobbers as is extra profit. With efficient inventory control these jobbers can usually anticipate their needs and rely on deliveries from Atlanta and some drop shipments from the suppliers' factories or branch warehouses. Although the distances involved are handicaps and require additional time and delivery costs, it is evident that they are considered to be overcome by lower prices. The freight from Atlanta to the partners is paid by the partnership, but is ultimately borne by the partners since it is deducted along with other partnership expenses before rebates are returned to the partners.

N.P.W. does perform several of the functions of an automotive warehouse distributor, such as warehousing, billing, and collecting. In its effort to more fully perform the warehouse distributor function, it also makes some sales to non-partner jobbers. It has one salesman who calls on such jobbers and these sales have grown, as herein before found, to approximately 6 percent of N.P.W.'s billing. The one paramount function of a warehouse distributor is to sell, and this N.P.W. does not do, except to these non-partner jobbers.

15. Respondents' second principal contention is that the partnership is a bona fide business entity created under a state law and that this entity cannot be ignored. It is contended that since the partnership is not a mere shell, but is managed and controlled by the general partner rather than the jobber partners, it cannot be pierced in order to conclude that sales made to the partnership were, in fact, sales to the partners. The limited partners do not manage the partnership and have no day-to-day control over its acts, but since they have the right to withdraw and the ultimate power to dissolve the partnership, they have absolute control. They also order directly from suppliers in the name of the partnership. Additionally, the limited partners are stockholders in and control the corporation which owns the warehouse which, except for the stock in the warehouse owned by the partnership, constitutes the assets owned or used by the partnership. Control of the organization, however, is not an essential element in this case. What the respondents have done is to join together to obtain a warehouse distributor discount on their purchases whether purchased jointly or separately. The purpose of the organization of the partnership and the reason for its continued existence is the collection of the warehouse distributor discount and such quantity discounts that were and are available. Some of the suppliers have required them to warehouse all of the products bought, others have required them to warehouse a part of the products, and still others have no warehousing

requirement. Whether it was because of the policies of some sellers or because of respondents' recognition that they must adopt some of the characteristics of a legitimate warehouse distributor to avoid a Clayton Act charge, they did in changing their organization, which was merely a bookkeeping device, form a partnership in which the management was placed in the hands of a single general partner and they undertook a warehousing operation. If an organization of buyers could be devised whereby control of the organization was completely divorced from the buyers, there would still be a violation of the statute if all the required elements were present.

The element of control over an intermediary is only one factor to be considered in determining whether the earnings returned to a member of the intermediary organization are, in fact, price discriminations. If the intermediary is controlled by the buying member of the organization it is easy to see that such intermediary was acting for the buying member at all times. But even if it be considered that the intermediary was not acting for the buying member at every stage of its operations but did return profits to the member, and if the profits can be calculated as a percentage of the purchase price invoiced to the buying member, such profits constitute in a very real sense a reduction in price which is indirectly received by the jobber from the manufacturer.

16. Since the partnership was formed and has been maintained to obtain warehouse distributor prices for jobbers and to buy almost entirely for them, the fact that purchases are made in the name of the partnership and through the agency of the partnership should not defeat the conclusion that in practicality the real buyers are the jobber partners.

The legal fiction of the separate entity of a statutory limited partnership can and should be disregarded in this case just as the fiction of a separate corporate entity has been disregarded in other cases where the real buyers were stockholders in a corporation buying for their benefit. A failure to disregard the partnership entity would permit a circumvention of the Clayton Act.

N.P.W. performs some of the services usually performed by a warehouse distributor, but the prime question is not what functions are performed or who controls the operations of the partnership, but whether the respondent jobbers receive the price discriminations. The profits of the buyer organization are returned to the buyers in proportion to their purchases and this is, in practical effect, a reduction in price. Through the lower cost of merchandise the respondent jobbers obtained a competitive advantage over their competitor jobbers who

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sell the same or comparable merchandise in the same trade areas and who receive discounts and rebates based only on their own purchases as jobbers.

CONCLUSIONS

1. Respondents have induced and received from their suppliers, as herein found, discriminatory prices, discounts, allowances, rebates, and terms and conditions of sale which they knew or should have known constituted price discriminations prohibited by Section 2(a) of the amended Clayton Act.

2. The acts and practices of the respondent jobbers is knowingly inducing and receiving discriminations in price prohibited by Section 2(a) of the amended Clayton Act through respondents Bryant M. Smith, Sr., and National Parts Warehouse, as herein found, are in violation of Section 2(f) of the amended Clayton Act.

ORDER

It is ordered, That respondents National Parts Warehouse, a limited partnership; Bryant M. Smith, Sr., individually and as manager and general partner of National Parts Warehouse; Auto Machine and Parts Co., Inc., a corporation; Arnau Tire and Accessory Co., a corporation; Appalachian Auto Parts Co., Inc., a corporation; Mrs. George H. Ridgeway, doing business under the firm name and style of Madison Auto Supply Co., a sole proprietorship; Moyer Auto Parts, Inc., a corporation; Auto Parts Company, Inc., a corporation; Auto Parts and Service Company, Inc., a corporation; Brunswick Auto Parts Company, a corporation; Bessemer Auto Parts, Inc., a corporation; Buchanan-Lyon Company, a corporation; Barnes Motor and Parts Co., Inc., a corporation; Battery and Electric Co., Inc., a corporation; L. R. Wells, and W. F. Wells, copartners doing business under the firm name and style of Cairo Auto Supply Co.; Cains' Parts and Service Co., a corporation; Condrey Motor Parts, Inc., a corporation; Cottle's Auto Supply, Inc., a corporation; A. Macina and J. Follo, copartners doing business under the firm name and style of Court Square Auto Parts; Bluefield Supply Company, a corporation, doing business under the firm name and style of Counts Automotive Supply Company; E'town Distributing Company, Inc., a corporation; Dickson Auto Supply, Inc., a corporation; I. N. Kohorn, doing business under the firm name and style of Dixie Auto Parts Co., a sole proprietorship; The Fergerson Company, Inc., a corporation; George M. Greer, Barney Nation, and Mrs. George M. Greer, copartners doing business under the firm name and style of Greer

Auto Supply Company; Genuine Auto Parts Co., Inc., a corporation; Gadsden Auto Parts, Inc., a corporation; General Auto Supplies, Inc., a corporation; Jordan Auto Parts, Inc., a corporation; Lakeland Battery and Auto Supply, Inc., a corporation; George O. Franklin, III, doing business under the firm name and style of Metter Auto Supply Co., a sole proprietorship; A. J. Whiddon, Sr., A. J. Whiddon, Jr., Johnny O. Whiddon and Miriam Grey Bowling, copartners, doing business under the firm name and style of Motor Bearings and Supply Co.; Morgan Supply Co., Inc., a corporation; B. H. Fenn, doing business under the firm name and style of Millville Auto Parts, a sole proprietorship; The Megahee-Speight Co., a corporation; Motor Supply Company, Inc., a corporation; McLean Auto Supply Company, a corporation; T. Felton Millians, doing business under the firm name and style of Newnan Auto Supply, a sole proprietorship; Pensacola Automotive Supply Co., a corporation; Piston Ring and Supply Co., Inc., a corporation; Parts Supply Company, a corporation; Barney R. Riner, doing business under the firm name and style of Riner Radiator and Battery Co., a sole proprietorship; George Stuckey, James Stuckey and Dexter Stuckey, copartners doing business under the firm name and style of Stuckey Brothers Parts Co.; Guy Fumbanks, doing business under the firm name and style of Standard Auto Supply, a sole proprietorship; R. S. Woodham and W. P. Woodham, copartners doing business under the firm name and style of Tallahassee Auto Parts Company; Tanner Auto Parts, Inc., a corporation; White Stores, Inc., a corporation, doing business under the firm name and style of White Electric and Battery Service; Calhoun H. Young and Ruth C. Young, copartners, doing business under the firm name and style of Young Parts and Supply Co.; MacGregor Flanders, doing business under the firm name and style of Flanders Parts Company, a sole proprietorship; M. S. Church Auto Parts Company, a corporation; A. C. Craig and J. A. Craig, copartners doing business under the firm name and style of Craig Supply Co.; Hyatt Parts and Supply Co., a corporation; Marianna Auto Parts & Supply Co., a corporation; Wendell Frazier, Norris Frazier and Winston C. Nunn, copartners doing business under the firm name and style of Nunn Auto Supply Co.; Thompson Auto Supply Co., Inc., a corporation; Wood's Automotive, Inc., a corporation; Huggins Motor Parts, Inc., a corporation, limited partners in National Parts Warehouse, and their respective officers, agents, representatives and employees, in connection with the offering to purchase or purchase of any automotive parts, accessories or supplies or

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other similar products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

(1) Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products, accessories and supplies by directly or indirectly inducing, receiving or accepting from any seller a net price known by respondents to be below the net price at which said products, accessories and supplies of like grade and quality are being sold by such seller to other customers, where the seller is competing with any other seller for respondents' business, or where respondents are competing with other customers of the seller.

(2) Maintaining, operating, or utilizing respondent National Parts Warehouse or any other organization as a means or instrumentality to knowingly induce or receive discounts or rebates, which result in net prices lower than competing jobbers receive from the same seller, for products which respondents sell to customers other than jobbers. The provisions of this paragraph (2) are not applicable to respondent National Parts Warehouse or respondent Bryant M. Smith, Sr.

For the purpose of determining the "net price" under the terms of this order, there should be taken into account discounts, rebates, allowances, deductions, or other terms and conditions of sale by which net prices are effected.

OPINION OF THE COMMISSION

DECEMBER 16, 1963

By DIXON, *Commissioner*:

The complaint herein charges respondents with violating Section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13).¹ The hearing examiner in his initial decision held that the allegations had been sustained by the evidence and ordered respondents to cease and desist from the practices found to be unlawful. Respondents have filed exceptions to this decision, and the matter is now before us for consideration.

Respondents herein are National Parts Warehouse (hereinafter sometimes referred to as NPW), a limited partnership, Bryant M. Smith, Sr., the manager and general partner of NPW, and 55 limited partners of NPW, various corporations, partnerships and individuals

¹ Section 2(f) provides:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

engaged in the business of jobbing automotive parts and supplies in the 10 states comprising the southeast quarter of the nation and in Indiana.

The following facts are not in dispute. NPW was organized in 1956 by respondent Smith and a group of some 45 auto parts jobbers who were then stockholders in two membership corporations, Automotive Parts Distributors, Inc., and Southeastern Auto Parts Warehouse Co., Inc., which had been operated as bookkeeping devices for the purpose of obtaining for their members lower prices from auto parts suppliers. The member jobbers were advised by counsel at that time that their operation of these corporations was in violation of Section 2(f) of the Clayton Act. They were further advised that they could legally form a limited partnership to engage in warehouse distribution of auto parts provided the partnership actually performed all warehousing functions and was managed and controlled by a general partner who was not an auto parts jobber. Pursuant to this advice, the limited partnership was formed on February 14, 1956, and began operations on March 1, 1956, by acquiring all the assets and liabilities and taking over all the operations of the aforementioned membership corporations. The amount of the capital contribution made by each of the limited partners was \$6,500.² According to the partnership agreement, the business of the partnership was to be "that of buying, selling, leasing, exchanging, manufacturing automotive parts and all other types of personal property and real estate as well as operating warehouses, and otherwise dealing in all types of automotive parts and other personal property and real estate." This agreement also contained the following provision with respect to the distribution of income:

The general partner shall receive 1% of the gross sales of the partnership as compensation for his services to the partnership, which 1% shall be included as an expense in calculating net income of the partnership for distribution to partners. All expense of operating the partnership, including rent, salaries, office supplies, taxes, traveling expense of the general partner, and all other expenses shall be included as an expense in calculating net income of the partnership for distribution to the partners. The net income of the partnership shall be allocated to the partners on the basis of the proportion that their purchase from the partnership caused the partnership to receive.

The record also shows that NPW has engaged in a warehouse operation since its inception, and, at the present time, occupies a modern warehouse of 65,000 square feet, employing over 50 persons and maintaining an inventory in excess of \$800,000. In 1961 it

² This contribution was later increased to amounts ranging from \$10,000 to \$25,000.

carried 150 lines of merchandise upon which it obtained the normal warehouse distributor's discount ranging up to 20 percent of the jobbers' price. Ninety-four percent of its sales in 1961 were made to the limited partners, the remaining sales being made to nonpartners. NPW performs many of the functions that a warehouse distributor normally performs, purchasing for its own account, warehousing merchandise, billing its jobber customers at the manufacturer's suggested jobber prices, and settling its account with suppliers on a monthly basis, receiving discounts and allowances from the suppliers in accordance with its arrangements with them. It employs only one salesman, however, and his duties are restricted to sales to nonpartners. Smith, the general partner, spends an average of two days a week in the field calling on the jobber partners.

The dollar amount of purchases by NPW during the years 1956 through 1960 and the discounts and allowances received from suppliers and distributed to the jobber partners during this period are as follows:

Year	NPW purchases	Discounts and allowances, less expenses, passed on to partners
1956.....	\$2,950,978.00	\$259,749.00
1957.....	3,723,720.00	355,013.00
1958.....	4,664,921.00	444,052.00
1959.....	5,606,555.00	575,613.00
1960.....	5,588,862.00	534,073.00

The average net rebates made to the partners on the various lines handled by NPW during the same period are as follows:

Year:	Average net rebate (percent)
1956.....	8.92
1957.....	9.70
1958.....	9.78
1959.....	10.73
1960.....	10.11

The hearing examiner has held in substance that NPW has served as a means or instrumentality through which the jobber partners have induced auto parts suppliers to grant to them the supplier's normal warehouse distributor's discount;³ that discounts obtained by NPW,

³ The examiner also found that the respondent jobbers have induced and received quantity discounts on the basis of their combined purchases but that at the present time most suppliers have discontinued giving this form of discount.

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less operating expenses, are distributed to the respondent jobbers in proportion to the amount of the purchases of each; and that the practical effect of this distribution of discounts is to reduce the price of auto parts purchased by the respondent jobbers. The examiner also held that respondent jobbers thus received more favorable prices than other jobbers with whom they were competing in the resale of like merchandise purchased from the same supplier and that the probable effect of such price differences was to injure, destroy or prevent competition in the resale of such products. He further held that respondents were aware of these price differences and of the probable anticompetitive effects thereof and that they also knew that the discounts which they received did not represent savings in like amount to the suppliers from whom the goods were obtained. He concluded, therefore, that respondents had knowingly induced and received price discriminations prohibited by Section 2(a) of the Clayton Act, as amended.

I

Respondents' principal contention on this appeal is that, notwithstanding the physical fact that NPW, at the end of each year, passes on to its individual jobber partners "patronage rebate" checks amounting to more than 10% of the price paid by competing jobbers, there has been no "discrimination" in price within the meaning of the amended Clayton Act. They express this proposition as follows:

One of the elements in a 2(f) case is that under 2(a) in order to receive discriminatory prices from a supplier, there must be a purchaser. Under the law in order to be a purchaser from a supplier under 2(a) the supplier must deal directly with the limited partner and control the terms and price of the purchase * * *. The limited partners bought from NPW, not from the supplier, nor did they deal directly with suppliers, nor did suppliers control the prices they paid NPW or the terms of the sale by NPW. Therefore, they cannot be held to have received discriminatory prices. * * * [I]n order to find a limited partner receiving discriminatory prices, it must be found he is the actual purchaser and to do this, it must be found he has control of management of the organization that does the buying and from whom he buys.⁴

In other words, respondents contend that there is no *seller-purchaser relationship* between the discriminating manufacturers of auto parts and NPW's 55 individual jobber partners. In their view, NPW is the "purchaser" of the manufacturers. The jobber partners, according to respondents, are "purchasers" of NPW itself.

⁴ Respondents' brief, pp. 31-32.

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, provides in part that it shall be unlawful for any person, "either directly or *indirectly*, to discriminate in price between different *purchasers*," where the effect of such discrimination may be to injure competition (emphasis added). Section 2(f) of the statute "is a corollary to § 2(a), making it unlawful 'knowingly to induce or receive' a price discrimination barred by the latter." *Federal Trade Commission v. Simplicity Pattern Co., Inc.*, 360 U.S. 55, 65, n. 6 (1959). Thus the "discrimination" that Section 2(f) prohibits buyers from inducing or receiving is the "discrimination" that Section 2(a) prohibits sellers from giving, plus one additional element—"knowledge," on the buyer's part, that there is little likelihood of a defense for his seller. *Automatic Canteen Co. v. Federal Trade Commission*, 346, U.S. 61 (1953).

Before there can be a "discrimination" within the meaning of either section it must be shown, of course, that the same seller has sold to two different "purchasers" at different prices. Here, the examiner found, as noted, that numerous manufacturers of auto parts, while charging their nonaffiliated jobber purchasers their regular, published jobber price, sold to respondent jobbers, through their agent, NPW, at substantially less than that price (generally 20% less).

Respondents insist, however, that NPW is not a mere agent of its jobber partners. They contend that it is an independent "middleman," a "purchaser" in its own right. In support of this, they argue, as noted, that the jobber partners have no "control of [NPW's] management" and that they do not "deal directly" with the manufacturers.

This emphasis upon the matter of "control" over what purports to be an intermediary between buyer and seller arises out of what is known as the "indirect purchaser" doctrine, i.e., the statutory prohibition of all discrimination, whether accomplished "directly or *indirectly*" (emphasis added). Under it, "there *need not be privity of contract* between seller and ultimate buyer to establish the buyer as a 'customer' or 'purchaser.' If the manufacturer deals with a retailer through the *intermediary* of wholesalers, dealers, or jobbers, the retailer may nevertheless be a 'customer' or 'purchaser' of the manufacturer if the latter *deals directly* with the retailers and *controls the terms* upon which he buys * * *; otherwise the requirement of the statute could be easily avoided by the use of a 'dummy' wholesaler." *American News Co. v. Federal Trade Commission*, 300 F. 2d 104, 109-110 (2d Cir. 1962) (emphasis added), *cert. denied*, 371 U.S. 824

(1962). See also *K. S. Corp. v. Chemstrand Corp.*, 198 F. Supp. 310 (S.D.N.Y. 1961).

This rule, as the court explained in *American News, supra*, stems "from a fundamental aim of the Robinson-Patman Act to protect buyers' competitors from the evil effects of" price discrimination, and is designed to accomplish that objective by making the seller's responsibilities under the statute coextensive with his power or control:

The "customer" or "purchaser" requirement marks one of the outer limits of the seller's responsibility not to discriminate. As long as he exercises control over the terms of a transaction he is held to this duty; otherwise the requirement of the statute could be easily avoided by the use of a "dummy" wholesaler. If there is no control the duty naturally ends, for the manufacturer has no power to protect the buyer's competitors. 300 F. 2d at 109-110.

It should be noted here that the "control" contemplated by the indirect purchaser doctrine is not, as respondents contend, "management" control. The statute has no concern with management, as such; it is interested only in the giving and receipt of discriminatory concessions that may injure the competitive environment. Hence, it is not control over the middleman's business as a whole that is to be considered, but merely control over the precise thing that forms the *res* of the litigation, *e.g.*, the discriminatory price concession. In the instant case, for example, where respondents claim that NPW is an independent "warehouse distributor" reselling to its equally independent jobber partners who, in turn, resell to retail dealers (garages, service stations, etc.), any one of these *manufacturers* could certainly make one of those *retailers* its "purchaser" by contacting it directly and giving it a rebate of, say, 10% on its purchases of the manufacturer's products, even if the intervening middlemen (the jobber from whom the retailer bought directly, and the warehouse distributor from whom that jobber had bought) were completely unaware of that discriminatory concession from their supplier to their customer. (That manufacturer could also make that retailer his own "purchaser" by having those two intermediaries pass such a concession on to the favored retailer.) The independence of those intermediaries in the general "management" of their businesses would not alter the fact that the manufacturer had, by reaching down through its distribution system and undertaking to favor one of its remote ("indirect") purchasers over another, exercised the very power or "control"—control over the *discriminatory* terms of sale—that is the object of the statute's concern.

The buyer corollary of this rule is that the seller-purchaser relationship is similarly established if a purported middleman, instead of

being under the "control" of the seller, is "controlled" by the *buyer* himself. Since the very purpose of the statute is "to protect *buyers'* competitors," *American News, supra*, there is even more reason for its application where it is the buyer, rather than the seller, that controls the intermediary. It would be a strange result indeed to hold that seller-controlled intermediaries must be pierced in order to protect buyer's competitors, but refuse to permit such piercing where it is the favored purchaser himself who has devised a "middleman" to procure for him discriminatory advantages over his competitors. This precise point was settled in *American Motor Specialties, Inc. v. Federal Trade Commission*, 278 F. 2d 225 (2d Cir. 1960), *cert. denied*, 364 U.S. 884 (1960), and *Mid-South Distributors, Inc. v. Federal Trade Commission*, 287 F. 2d 512 (5th Cir. 1961), *cert. denied*, 368 U.S. 838 (1961). These two cases, like the one before us now, involved "buying group" organizations formed by jobbers in the auto parts industry for the purpose of procuring discriminatory price concessions. The courts found that the individual members of those organizations were "purchasers" of the auto manufacturers; that the organizations themselves were merely agents created by the jobbers for the purpose of procuring lower prices and passing them through to their individual members in the very form involved here—"patronage rebates"; and that those jobbers had thus knowingly induced and received discriminatory prices in violation of Section 2(f).

The respondents in the instant case were aware of the illegality of such operations when they created NPW in February of 1956. In fact, many of NPW's present jobber partners were then "members" of two such organizations, using them to receive price concessions they now concede were unlawful. NPW's present general partner, Smith, was running one of them. On the advice of counsel, those two organizations were dissolved,⁵ and NPW was formed to accomplish the same objectives but in a manner, respondents tell us, that Section 2(f) cannot reach.

NPW, in respondents' view, is distinguishable from the "buying groups" of the past in two principal particulars: (1) those condemned organizations were *corporations* and thus subject to the "control" of the individual jobber stockholders (through the power of the stockholders to elect the board of directors), whereas NPW, as a

⁵ CX 80, a letter from NPW's general partner to his new "limited" partners a few days after the dissolution of the old organizations and the formation of NPW, summarizes this transition from the old to the new.

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limited partnership, is subject to no management control by its jobber owners ("limited" partners); and (2) those earlier buying groups, since most of their sales were of the "drop-shipment" variety, were merely "bookkeeping devices" performing no real intermediary functions, whereas some 80% of the merchandise handled by NPW goes through a warehouse it owns and operates.

Respondents' first argument is really the heart of their defense in this case. They conceded, at least in oral argument before us, that their present operation would be illegal *if NPW were a corporation* (or even a "general" partnership), rather than a limited partnership.⁶ Their theory is that, because the state statute under which NPW was created (and under what they describe as "elementary" principles of partnership law) vests all "management" control, and all responsibility for partnership debts, in their "general" partner,⁷ the individual jobber partners that own NPW and receive all of its profits cannot be held to "control" it, or held responsible for its act of inducing price concessions and passing them on to its owners. In other words, respondents contend that, by selecting the limited partnership form of business association for their "buying group" organization, they have divested themselves of all *responsibility* for its acts, retaining only the power to receive the *benefits* that flow from them.

The argument is ingenious but unsound. There is no legal magic in the limited partnership. It is hornbook law that, if a partnership is formed "for the prosecution of an illegal business or for the conduct of a lawful business in an illegal manner, the courts will refuse to recognize its existence,"⁸ and that a "limited partnership may be unlawful by virtue of general provisions of law applicable to all forms of business association."⁹ It would be a strange result indeed if a state statute designed to permit the carrying on of lawful business enterprises should be held to insulate the members of an organization from responsibility for carrying on activities they concede would be in violation of federal law if attempted through the corporate form of business association.

While we think these 55 individual jobber partners have in fact exercised considerable "management" control over their creature,

⁶ Transcript of Oral Argument Before the Commission, 6-7.

⁷ Georgia Limited Partnership Act, Ga. Code Annotated, Sec. 75-408, 411(2) (Supp. 1961).

⁸ 68 C.J.S. 410, Sec. 7 (Partnership).

⁹ 2 Rowley & Sive, *Rowley on Partnerships* 548 (2d ed. 1960).

NPW,¹⁰ that is not, as noted above, the kind of "control" with which the statute is concerned. The question is whether they had "control" of the precise transactions that have caused the competitive injury; if they had the power to prevent that injury, then they are responsible for not having done so.

Here there can be no serious doubt that the price advantages accorded to these 55 jobber partners of NPW over their competitors have at all times been within the "control" of the manufacturers that gave them and the respondent jobbers that received them. First, resale prices of auto parts at each of the several levels of distribution are determined by the manufacturers themselves, not by their intermediary resellers.¹¹ Thus NPW, when it invoices its individual jobber partners at the end of each month, simply follows the jobber prices published to the trade by the manufacturers. And respondents themselves emphasize the fact that NPW, when it "buys" from the manufacturers, pays the same price (*i.e.*, receives the same discount from the published jobber price) those manufacturers charge all "other" warehouse distributors. It is established, therefore, that

¹⁰ One of the more significant of the partnership's "decisions" was the making, from time to time, of the choice between "lines" of auto parts, that is, between the offerings of competing manufacturers. Respondents contend that this was committed solely to the discretion of Smith, the general partner, and that, at most, he merely secured the "advice" of the jobber partners. The facts are otherwise. The partnership agreement itself provided for an "Advisory Committee" to aid the general partner in "making decisions." CX 1, Article XIII. Subsequently, a "Lines Committee" was formed to aid him in selecting the supplier lines to be handled by the partnership. Under the formal partnership agreement, members of the Advisory Committee were to be "appointed" by Smith. But in his writings to his partners, he reminds them of the names of the persons they have "elected" to membership in that Committee. CX 33-A (emphasis added). And he reported to them that they had "voted to purchase the Felt Products Company line of Gaskets," and that they had "approved for six month's trial the line of Wesco Universal Joints and Kits." CX 33-A (emphasis added). Indeed, it appears that Smith "decides" on lines to be handled by sending out *post cards* on which each partner indicates his *vote*: "Dear Partners: According to the letter that was sent out and the cards returned, it is certainly evident that you want to remain" with "Herbrand Tools — and ViChrome Tools. In connection with the Herbrand Tools, we had only eight votes that were outstanding against the Herbrand Tool line and wanted the other line." CX 36-A (emphasis added). See also CX 122 and 127.

The real measure of Smith's "independence" is illustrated by the testimony of one jobber partner who explained that the Advisory Committee met only "if something came up that was *important*," such as "if we were contemplating on new lines or * * * something like that * * *." Tr. 633-634 (emphasis added).

Finally, of course, there is the fact, noted by the examiner, that the jobber partners at all times possessed the ultimate power over NPW—they could withdraw, pull out their money, and hence kill it. Thus, Smith, the "general" partner, wrote to his "limited" partners as follows: "Bear in mind that you *voted* in your meeting Saturday that you would *continue your investment* in National Parts Warehouse." CX 33-A (emphasis added).

¹¹ For example, one manufacturer's representative testified flatly that "if we caught them [warehouse distributors] cutting the price, we would certainly cut them off. That is my authority to do whenever I want to. If I'm selling you and you're going out and cutting the price, I can cut you off tomorrow." Tr. 1536. General adherence to the manufacturers' published price sheets is established in this record, as will be discussed below.

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NPW has no "control" over either the price that it "pays" or the price that it "charges."

But this invoice "price," however, is not the actual price paid by the jobber partners, since it does not reflect the year-end "patronage rebates" each of them subsequently receives on his individual purchases.¹² A simple illustration will show the real price paid by those jobber partners. Assume an order by Partner A, to NPW, for \$100 worth of auto parts produced by Manufacturer X, a supplier that allows its warehouse distributors (which NPW claims to be) a 20% discount from its regular jobber price list. On this \$100 order, NPW will gross \$20 (20% of \$100). NPW's *expenses*—including all costs incurred in warehousing, customer delivery, etc.—are approximately 8% of its (jobber) sales prices.¹³ Therefore, NPW has realized a *net profit* of \$12 (gross of \$20, less \$8 expenses), a sum it retains until the end of the year. At that time, however, NPW is legally bound, by the express terms of its partnership agreement with its jobber partners, to return to *each* of them *all profits* it has earned on their *individual purchases*: "The *net income* of the partnership shall be allocated to the partners [the 55 individual jobber partners] on the basis of the *proportion that their [individual] purchase from the partnership caused the partnership to receive.*"¹⁴ Therefore, Partner A's \$100 order "caused the partnership to receive" a "net profit" of \$12, and he is legally entitled to have it returned to him at the end of the year. Deducting that \$12 rebate from the \$100 "price" that he initially "paid" NPW earlier in the year, there can be no denying the physical fact that the merchandise ultimately cost him only \$88. (In the meantime, of course, his competitors—the nonaffiliated jobbers that must buy this same product direct from Manufacturer X—are paying the full \$100 jobber price, sans any "rebates.") Further, Manufacturer X can raise or lower Partner A's ultimate purchase price by simply increasing or decreasing the "discount" to NPW. For example, in the illustration given above, an increase of the discount from 20% to 25% would automatically reduce Partner A's actual purchase price from \$88 to \$83. (NPW would then gross \$25 on the \$100 order. After deducting its \$8 for expenses—which would

¹² That jobber price is, however, the actual price NPW charges to its nonpartner jobber customers. As noted, some 6% of NPW's total "sales" are genuine warehouse distributor sales to jobbers that are not affiliated with NPW in any manner. They are invoiced by NPW at the same jobber price NPW "charges" its own jobber partners. However, these third-party jobbers receive no year-end "patronage rebates." Accordingly, the jobber price is the *actual* price insofar as these sales by NPW are concerned.

¹³ Tr. 1372.

¹⁴ CX 1, Partnership Agreement, Article IX ("Distribution of Income") (emphasis added).

not be affected by the change in discount—it would have \$17, rather than \$12, to “rebate” to Partner A.)

We conclude that NPW’s “control” over the prices it “charges” its own jobber partners is, figuratively speaking, roughly comparable to that exercised by a sieve over water being poured through it. The jobber partners, in reserving to themselves the absolute legal right to receive all of their creature’s profits, have made themselves responsible for the acts by which it “earns” those profits. Everything that NPW does is done not for itself, but for those who receive its profits. It is, therefore, their agent.

Turning to respondents’ “warehouse” argument—the contention that NPW’s ownership and operation of a warehouse shows that it actually performs the “warehouse distributor” *function* and thus establishes its right to receive the warehouse distributor *price*—we note at the outset that this argument is not applicable to the approximately 20% of NPW’s “sales” that admittedly never go through its warehouse. In these “drop-ship” transactions, NPW is acting as a mere “bookkeeping device” for the collection of price concessions, and its jobber partners (not NPW) are plainly the “purchasers” of the drop-shipping manufacturers. *Alhambra Motor Parts v. Federal Trade Commission*, 309 F. 2d 213, 216 (9th Cir. 1962).

As to the remaining 80% of NPW’s “sales,” it may be true that NPW actually performs the same *warehousing* function that “other” warehouse distributors perform. But we do not see how that affects the question of whether NPW is a “purchaser” in its own right, or a mere agent of its owner jobbers. The mere ownership and operation of physical facilities cannot convert an agent into a principal. It is the fact that these jobber partners of NPW own it outright, and “control” the flow of its income from the partnership coffers to their own pockets, that establishes the principal-agent relationship, and makes them responsible for its acts. The clothing of their creature with the trappings of a “warehouse distributor” does not cause the parties to cease being principal and agent, and become, instead, “seller” and “buyer.”

II

Respondents’ contention that the individual jobber partners of NPW had no way of “knowing” they were receiving lower prices than their nonaffiliated jobber competitors is particularly lacking in merit. Putting aside their frivolous argument that the “patronage rebate” checks they received at the end of each year were merely “returns on investment” instead of price reductions, the question is simply whether those individual jobber partners knew that their

agent, NPW, was "buying" at a lower price than the nonaffiliated jobbers with whom they competed.

In the first place, the very existence of NPW is predicated upon its ability to buy at a lower price than that at which the jobber partners, acting in their respective individual capacities, could themselves purchase. This is illustrated by the fact that NPW, the organization, refuses to deal with any manufacturer that charges NPW itself the same price that it offers to NPW's individual partners.¹⁵ Indeed, it is the difference between the price NPW pays and the price the individual jobber partners would themselves have to pay that constitutes the "profits" they divide up at the end of each year. If there was no difference between the two prices, there would obviously be no "profits."

And, notwithstanding their denial of any knowledge of the "warehouse distributor" price—the price their own partnership, NPW, pays its suppliers—the jobber partners are fully informed as to both of these prices, and thus as to the difference between them. In view of the fact that the partnership agreement itself expressly provides that an "accurate and complete set of records shall be kept" and that "each limited partner shall have *complete access* to such records at all times,"¹⁶ which, of course, includes the invoices NPW receives from its manufacturer suppliers, the partners certainly could have known as much as they desired about the prices NPW paid. In fact, however, there was no necessity for the partners to examine NPW's records: the organization informed them of the price it paid, in writing. It sent them a "Buyer's Guide"¹⁷ or catalog containing a full description of the "deal" then in effect between NPW and each of its suppliers. Because this "deal book" was likely to have been seen by third-party visitors in the partners' own jobbing establishments, the prices were coded.¹⁸ Thus, one manufacturer's agreement with NPW was explained to the partners in part as follows:

Contract Terms: NPW Cost—Distributor [Jobber] Sheet less "OY"%
[20%]¹⁹

Partner Cost—Distributor Green Sheet

Patronage Earnings: Held by NPW "OY"% [20%]²⁰

¹⁵ Tr. 927, 937, 943-944.

¹⁶ CX 1, Article XII ("Records") (emphasis added).

¹⁷ CX 88.

¹⁸ The code employed the ten-letter word "worksteady," with each letter representing, successively, the numbers 1 through 0, as follows:

W O R K S T E A D Y
1 2 3 4 5 6 7 8 9 0

By way of illustration, a discount of 20% would be expressed as "OY%." Tr. 277.

¹⁹ *Ibid.*

²⁰ CX 88, p. 3.

In other words, NPW paid 20% less than the manufacturer's published jobber price list, invoiced its partners at the full jobber price,²¹ and "held" the 20% differential until the end of the year, when each member, after the deduction of his share of NPW's expenses of operation, received the remainder of the 20% held for him by NPW on his own individual purchases.

Respondents would have us believe that they had no way of knowing whether their manufacturer suppliers actually followed the "jobber" prices that they published and disseminated to the trade. Yet NPW itself, as noted above, sold some 6% of its total 1960 volume to third-party, independent jobbers. And it was able to secure the full jobber price on all of those sales.²² Each and every one of the individual jobber partners of NPW has full knowledge of this fact for the simple reason that, at the end of the year, they each received a share of NPW's "profits" on those sales—the difference between the low price paid by NPW, and the higher jobber price it charged those outsiders.²³ If NPW itself had *paid* the full jobber price, its resale at that price would have resulted in a net loss, not in a profit to be divided up.

Moreover, each of the jobber partners, prior to joining NPW, bought from these same suppliers and paid, in those earlier days, the full jobber price, sans any discounts not published to the trade.²⁴ And, even today, the jobber partners buy a very substantial part of their requirements direct from manufacturers, paying, in all such cases, the full jobber price. This is illustrated by the following letter from NPW's general partner, Smith, to each of the jobber partners:

Dear Partners:

Please keep the following discounts in your mind in purchasing Bay Lifts. I have recently been informed that some of the Partners have been purchasing them on their regular forms and not on the NPW form. It will *cost you money* to purchase on your own form when they have given to your warehouse the following discount * * *.

Please check with your buyer on this as I understand that some of the

²¹ NPW's partners pay NPW on a monthly basis, at the full jobber price. NPW pays its own manufacturer supplies monthly, keeping the 20% difference between the price it paid and the "price" it "charged." It is this differential, less expenses, that NPW distributes at the end of each year as "patronage rebates," proportionalizing it according to each partner's own purchases.

²² NPW's salesman serving nonpartners testified that "we only have one price. * * * I never quote prices other than to say whatever the manufacturers jobbers printed prices are, will be your price at all times." Tr. 1691.

²³ The partners divide the profits received from this phase of NPW's operation on an equal basis, that is, the same sum of money to each partner, regardless of his size, the volume of his purchases from NPW, or the amount of his "capital investment" in NPW.

²⁴ Tr. 1316-1317.

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Partners have been ordering on their own form and *losing this discount*.²⁵

In addition to all this, the individual jobber partners of NPW called on regularly by manufacturers' salesmen, and individually attend NPW's annual "display" or "exhibit" meetings at which the various manufacturers, represented by their sales managers and executives, display their wares for the partners' benefit. Prices are discussed freely at those meetings.²⁶ In fact, the jobber partners, in their own testimony, made it plain that they regarded it as a matter of common knowledge that all auto parts manufacturers charge all jobbers the same price—the price published to the trade.²⁷ And they clearly understand their year-end "patronage rebate" checks to be, in effect, a "reduction in the cost of merchandise,"²⁸ as, indeed, NPW itself advised them to treat it for tax purposes.²⁹

Turning from the question of respondents' "knowledge" of the prices paid by their competitors to the facts of the matter, representatives of the various auto parts manufacturers testified that they charge all jobbers the full, published jobber price,³⁰ and the competing jobbers testified that they not only paid that price,³¹ but considered it common knowledge that every other jobber did likewise.³²

III

Respondents' contention that they have no reason to believe the price concessions they have received might cause competitive injury to the jobbers with whom they compete is even more unrealistic than their asserted ignorance of prevailing prices in the trade. We would have supposed that, after the extensive litigation of this very point

²⁵ CX 171 (emphasis added).

See also CX 166, a letter from NPW to a supplier that wanted to give NPW its 20% discount off the face of the invoices, rather than by deferred rebates or credit memos: "We are afraid that deducting same from the face of the invoice that someone might misconstrue same that it was your policy to *give that to everybody*." (Emphasis added.)

²⁶ One manufacturer's representative stated:

"Most of the partners don't ask for a price discussion. All they want to know is the dealer price and the jobber price. Any further price information, *they seem to have it*." Tr. 1598-1599 (emphasis added).

²⁷ As one of them put it, "we are all pretty familiar with our prices that we've been paying, because *it's the price that I think everybody else pays*." Tr. 482 (emphasis added).

Another, asked if he knew the prices paid by competing jobbers, stated: "I would say they buy from the jobber's price sheet." Tr. 406.

²⁸ Tr. 398.

²⁹ NPW's "audits" or financial statements presented to the partners at the end of each year carried, until recently, the following statement: "The amount shown as Patronage Rebates should be used as a reduction in your Cost of Goods Sold Section." See e.g., CX 7 (1959 audit), p. 22.

³⁰ "We've got one price to our warehouses, and our warehouses sell at our jobbers blue sheet. * * * This price that we have is one price to all jobbers." Any warehouse that cut the jobber price "would certainly" be cut off. Tr. 1534-1535.

³¹ See, e.g., tr. 433, 522, 557, 611, 712-715, 735, 760, 810, 828, 840.

³² "We buy at the jobber prices. I am sure all jobbers do." Tr. 785. See also tr. 799, 800.

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in the various "automotive parts" cases,³³ this industry above all others would be quite clear that a price advantage several times greater than the average jobber's total net profit margin cannot fail to injure competition in the end. Yet we are once again urged to find that such a price concession is harmless.

As noted above, the discounts induced and received by these respondents range as high as 20% of the prices paid by competing jobbers for the same products. Out of this, the individual jobber partner receives, in addition to the many "services" NPW performs for him, cash rebates that average more than 10% of the price paid by competing jobbers. In the context of the auto parts industry, such advantages are substantial indeed. The number of jobbers has been increasing rapidly in recent years, and competition is very keen.³⁴ While the jobbers generally follow the manufacturers' suggested resale prices and thus realize a gross markup of some 30% on their sales to the dealer trade, their *net* profit margin, after taxes, generally ranges from 2% to 5%, seldom exceeding 3%.³⁵ Respondents' counsel thought this was too low, offering the logical *tour de force* that the reason their profits were so low was that their costs were too high! The argument suffered a great deal, however, from the fact that NPW's own jobber partners testified that they, too, had a similar profit picture.³⁶

Respondents point out that these net profit margins omit the vital factor of "turnover." Thus, a jobber may make only 2% net profit on each \$1.00 of sales, but he may "turnover" his entire stock of mer-

³³ See, e.g., the seller-liability cases cited by the court in *Mid-South Distributors, supra*, 287 F. 2d at 514, n. 1.

³⁴ One of NPW's jobber partners estimated that there were now about 100 jobbers of auto parts in Atlanta. He added: "I guess [I] would be [in competition] with all of them." Tr. 709.

And an NPW jobber partner located in McKenzie, Tennessee, explained the competitive situation this way:

A. Well, you go to a town, there's from one to four or five [jobbers] in each town within a radius of ten miles around us competing for the same business; yes, sir. There are three in our town of 2700. Ten miles away there are two. Eighteen miles north there's four, and twenty miles on the other side there are two. In thirty miles there's five or six. There are plenty of jobbers.

Q. In other words, competition is very keen, isn't it, in your trade area?

A. Very keen; yes, sir. Tr. 1826.

³⁵ Tr. 435 ("3 to 4 percent"); 456 (5%); 525 (3% to 5%); 560 (2% to 3½%); 599 (less than 1% in 1960); 717 (not over 1½%); 740 (5%); 766 (ranges from net losses to 2½% profit); 811 (4% to 5%); 825 (1%); 845 (1% to 2%). One jobber mentioned the figure 20% (tr. 473), but his "turnover" explanation (tr. 477) indicates that he was referring to return on inventory investment.

³⁶ One of NPW's jobber partners testified that his net profit margin was about 5% (tr. 690); another, 4% (tr. 495); another, 1% to 2% (tr. 648); another, 2%:

Q. What was your net profit after taxes for 1961?

A. Less than 2 percent.

Q. For 1960, what was it?

A. Less than 2 per cent. Tr. 1765.

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chandise as many as 8 or 9 times in the course of a year's business. This, of course, measures net return on his investment in inventory. For example, one of the jobbers in question, with an inventory of \$40,758.67, had sales in 1960 of approximately \$400,000.00³⁷ or an 8 or 9 times turnover. While this means the jobber netted some 16% to 18% return on the money invested in his inventory (8 or 9 times 2% net profit on sales), it does not disturb the fact that his entire year's operation could not have yielded more than \$8,000.00 in net profits (total sales of \$400,000.00 times 2% net profit on each dollar of sales).

Moreover, while the nonfavored jobbers are "turning over" their inventory for a profit of 2% to 3% on each dollar of sales, NPW's jobber partners are busily "turning over" for themselves not merely this same 2% or 3%, but the *additional* 10% or more they have already "earned" through NPW before the goods reach their shelves! For example, at the end of 1959, Smith, NPW's general partner, reported to his jobber partners with understandable pride that their respective, individual "returns" on their "capital investments" in NPW had ranged from a "low" of 50% to a high of 300%!

In that year, the *total* capital investment of all the partners was \$492,500. *Net* income for the year was \$601,437.65³⁸ or approximately 120% return on capital investment.

To illustrate the net results of this "group buying" device, Morgan Supply Co., one of the largest of NPW's "partner customers," received not only a "patronage rebate" of \$37,670.80 but an additional \$5,570.47 in "volume rebates" (which NPW collects from the manufacturers and distributes to the jobber partner who "earned" them). After adjustments relating to the 2% cash discount, Morgan had "earned," in 1959, \$42,440.83 in "discounts and rebates."³⁹ After deducting \$16,066.46 for its "freight" costs and its share of NPW's "expenses" for the year, and adding its share of the "income" from the "commercial accounts" (nonpartner customers)—\$457.70 in amount—Morgan had a "net income" from NPW of \$26,832.07, or 11.43% of the regular jobber price of its total purchases from NPW during the year.⁴⁰ This amounted to a "return" on its \$9,100 "investment" of nearly 300%.

To be sure, there is no evidence in this record that Morgan has used this 11.43% price advantage over its 100-plus Atlanta competitors to cut the resale price and drive them out of business. But it has long

³⁷ Tr. 1644-1647.

³⁸ CX 7, p. 7.

³⁹ CX 7, p. 17.

⁴⁰ *Ibid.*

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been settled that a "passing on" of discriminatory prices in the form of lower resale prices is not necessary to finding of competitive injury. *Corn Products Refining Co. v. Federal Trade Commission*, 324 U.S. 726 (1945); *Moog Industries, Inc. v. Federal Trade Commission*, 238 F. 2d 43 (8th Cir. 1956); *E. Edelmann & Co. v. Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956); *Tri-Valley Packing Assn.*, Dkt. 7225 and 7496 (May 10, 1962) [60 F.T.C. 1134]; *Fred Meyer, Inc.*, Dkt. 7492 (July 9, 1963) [63 F.T.C. 1]. Those who receive price concessions of this magnitude can use the money they pocket in a host of ways, e.g., by the opening of "branch" stores,⁴¹ to gain competitive advantages that cannot fail to make them, in the end, victors over their nonfavored competitors.⁴² The amended Clayton Act, unlike the Sherman Act, looks not merely to results that have already come to pass, but also to those that can be reasonably anticipated in the future. "The statute is designed to reach such discriminations 'in their incipency,' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect." *Corn Products Refining Co. v. Federal Trade Commission*, *supra*, 324 U.S. at 738. See also *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 46 (1948); *Forster Mfg. Co., Inc.*, Dkt. 7207, Opinion of the Commission, 21-22 (January 3, 1963) [62 F.T.C. 852, 888, 904]. We do not see how a price advantage of 11.43% in an industry where net profit margins rarely exceed 3%, could fail to injure competition over a sufficient period of time. Hence the fact that few of respondents' jobber competitors have gone out of business so far, and even the fact that some of those competitors may affirmatively deny that they have been injured,⁴³ does not preclude us from finding "what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay * * * substantially more for their goods than their competitors had to pay." *Morton Salt*, *supra*, 334 U.S. at 46-47; *Whitaker Cable Corp. v. Federal Trade Commission*, 239 F. 2d 253, 255 (7th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957).

⁴¹ Several of NPW's partners have such branch stores. CX 3-A.

⁴² One nonfavored jobber testified that, while the jobber markup was adequate his low volume of sales kept his total profits so low that he was thinking about getting out of the business. Tr. 1675-1676.

⁴³ While some of these unfavored jobbers stated that they were not being hurt by the competition of NPW's jobber partners, others were not so certain:

Q. You couldn't single out those two [two of NPW's Atlanta partners] and say they injured you competitively any more than any other competitor?

A. The men that are the closest to you in my type of business is the man that will hurt you the most in my opinion.

Q. Yes. Are either of one of these close to you?

A. Yes, sir. Tr. 859.

As the court said in *E. Edelmann & Co. v. Federal Trade Commission*, *supra*, 239 F. 2d at 155.

Certain of petitioners' jobbers testified that they knew that the warehouse distributor bought at a lower price than they did and stated that they did not care; that warehouse distributor competition with them had not injured them in any way; and that they knew of no lessening of competition nor of any corraling of business by one or a few of their competitors. In view of the competitive conditions of the market as reflected by the record, the small profit margins on which the participants in this market operated and the size of the discriminations, we believe that the Commission was justified in disregarding this testimony. In addition, petitioner suggested resale prices at all levels of distribution and it was found that these suggested prices were regularly adhered to. This explains, at least in part, why the warehouse distributors did not "corral" the market by taking advantage of the discounts accorded them by cutting prices. It is not necessary that a price advantage be used to lower the resale price and thereby attract business away from the nonfavored competitors. Sales are not the sole indicium that reflects the health of the competitive scene.

Hence the fact that the discriminatory prices induced and received by these respondents are likely to cause competitive injury has been clearly shown. While the testimony as to the keenness of competition in the auto parts jobbing business, and the narrowness of the profit margins in it, consisted principally of the testimony of jobbers located in the Atlanta, Mobile, and Pensacola areas, the record makes it plain that these same conditions prevail in the other areas served by NPW jobber partners. For example, one of them located in McKenzie, Tennessee, gave a particularly graphic description of the sharp competition that exists between him and other jobbers in his area (n. 34, *supra*). The taking of such evidence in each and every one of the separate areas in which NPW's 50-plus jobber partners are located would have resulted in an undue proliferation of the record, and would have been merely cumulative. *Automatic Canteen*, *supra*, 346 U.S. at 65, no. 3. Further, these jobber partners, having induced and received the discriminatory prices through a group device, individually and collectively share the responsibility for the injury caused by the operation of that device in each and every area.

We conclude that each of these respondent jobbers, having been informed by NPW's "audit" reports of the precise price advantage he and his fellow partners enjoyed over their respective nonfavored competitors (e.g., Morgan's 11.43% advantage over his Atlanta competitors), and knowing, from his own experience, that those competitors could have no more than a 2-3% net profit margin, knew only too well that his continued inducement and receipt of those price discriminations could not fail to ultimately injure his competition.

IV

The most serious contention raised by respondents on this appeal is that they have no reason to believe their partnership operation, with its alleged volume purchasing and extensive warehousing, has not effected sufficient "savings," for their manufacturer suppliers, to fully "cost justify," under Section 2(a) of the statute, the full amount of the discounts received by NPW (e.g., 20%). *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61 (1953). We are not unaware of the fact that such operations can frequently enable groups of small merchants to duplicate some of the efficiencies of the larger, single-entity enterprises, and we are certainly not unsympathetic toward the efforts of any organization, "buying groups" or otherwise, to achieve savings of this kind. Yet it is our task to find the facts as they exist, and apply with an even hand the law as Congress has given it to us, rather than condoning violations of law merely because they have been committed by the small businessmen who are otherwise the special wards of the various antitrust and trade regulation laws. *Mid-South Distributors v. Federal Trade Commission*, *supra*, 287 F. 2d at 520. The law's concern for the small businessman is great, but it certainly does not sanction his receipt of discriminatory prices that favor him at the expense of competitors who are as small as, or smaller than, himself. *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505, 518-522 (1963). Price discriminations are forbidden to all if they injure competition and cannot be exonerated under one of the various statutory defenses set forth in the statute itself.

"Cost justification" is one of those defenses. In substance, Section 2(a) provides that a price discrimination shall not be unlawful, notwithstanding either the fact or the gravity of the injury that it is causing in the competitive environment, if it makes "only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such [favored] purchasers sold or delivered."

Neither complaint counsel nor respondents have undertaken a formal "cost study" to determine precisely the costs that these auto parts manufacturers incur in selling to NPW's jobber partners on the one hand, and the nonfavored jobbers on the other. But the record adequately demonstrates that the "differing methods or quantities" in which respondents buy could not have possibly saved those manufacturers the differences between the prices charged for their products to these different classes of purchasers.

Auto parts manufacturers, as discussed above, generally serve their jobber customers either directly, through warehouse distributors, or, in some instances, by both methods. Here, only those jobbers that buy *direct* from the manufacturers are involved. It is the cost of selling and delivering to these direct-buying jobbers on the one hand, and to NPW's jobber partners on the other, that are to be compared.

In selling direct to jobbers, the manufacturers employ salesmen or "manufacturer's representatives" that physically call on each individual jobber at his place of business, take his orders, familiarize him with the manufacturers' products, including new items, assist him in selecting and stocking the parts he needs, and otherwise aid and advise the jobber. The manufacturers compensate their salesmen and representatives on a commission basis.

Orders are received, and shipments made, either by the factory itself, or by a local warehouse owned, leased, or hired by the manufacturer. The presence of such a local warehouse in a given city is, of course, a convenience to jobbers in the area, since ready access to its stock reduces the time required to get delivery, and permits a corresponding reduction in the jobber's own inventory. Not all manufacturers, however, provide such service; many ship directly from their factories.

Freight costs are a fairly substantial factor in the auto parts business, because of the weight of some of the parts, *e.g.*, batteries. The policy of virtually all of the manufacturers is that they pay the freight only on orders that exceed a stated minimum in either quantity or cost, such as orders above 300 pounds, more than 20 cases, more than 225 batteries, or above some stated dollar amount. On smaller shipments, the buyer bears the freight costs.

If the "differing methods or quantities in which" respondents buy have effected for their suppliers any savings in *freight*, they have not been explained to us. The record is clear that, except for the some 20% of its volume that the manufacturers "drop-ship" to its partners direct, NPW at least tries to make each order large enough that the manufacturer will pay the freight to NPW's warehouse. To the extent that it does so, respondents have succeeded in shifting the freight costs from themselves and onto their manufacturers. Hence they have not "saved" the manufacturer anything on freight; they have *increased* his costs in this regard. It is certainly a fair inference that NPW, buying on behalf of over 55 jobbers, succeeds more frequently in getting such freight-free shipments than would each of the 55 ordering separately, or each of their nonaffiliated competitors ordering separately.

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Turning to potential cost savings in the matter of *billing*, there would be no savings to the supplier in regard to the 20% of NPW's volume that is handled by drop-shipment; there, individual shipments, and individual invoices, remain the same in size and number, with NPW, a useless "intermediary," simply duplicating the manufacturer's billing expenses, not relieving him of them. In addition, however, it is not at all apparent from the record that NPW's "central billing" procedures saved any money at all for the manufacturers.⁴⁴ In any event, however, billing is a relatively minor expense, wholly incapable of affecting the issue in question to any significant extent.

There is, however, one item in the auto parts manufacturer's costs that is obviously significant—the expense of *selling*. In order to persuade jobbers to carry his "line" in preference to lines sold by competing manufacturers, he must reach those jobbers either through his own sales representatives or through representatives employed by his middlemen (*e.g.*, warehouse distributors). Since the nonaffiliated, nonfavored jobbers involved here buy directly from the manufacturers themselves, through sales representatives paid on a commission basis by those manufacturers, we are not directly concerned with any sales made by warehouse distributors' salesmen. However, the record, so far as we have been able to determine, does not indicate the costs actually incurred by these manufacturers in selling through their own salesmen. We know that, when both the warehousing and the selling functions are turned over to a warehouse distributor in a given area, the cost to the manufacturer is generally 20% of the regular jobber price. And we know that the going market price or value of the *warehousing* service is 5% of that jobber price. Hence, the "selling" costs cannot exceed 15%.

Respondents, in contending that they perform all of the "functions" generally performed by warehouse distributors, are thus claiming that they have relieved their manufacturer suppliers of this selling expense, and that this "savings" is an allowable item under Section 2(a)'s cost justification proviso.

⁴⁴ One supplier wrote to NPW as follows (CX 167-A):

"Our present billing procedure [sending NPW first an invoice and then a credit memo] has placed an *extra load* on our Bookkeeping Department, to the extent that we are almost unable to handle it, — one of the reasons being that *your organization* operates over a fairly wide territory and perhaps covers as many as three or four of our sales representatives * * *."

"After considerable discussion with our Accounting Department, and also, taking into consideration the fact that *we do not want to place an undue burden on your Accounting Department* [it was decided that the solution was to issue two invoices: one, to be sent to the individual NPW partner, would show the full jobber price; the other, to NPW itself, would show 20% off its face]. This means that it will *not be necessary for you to re-invoice your jobber members* * * *." (Emphasis added.)

We are not persuaded that this is the law. In effect, this means that a buyer can be paid for selling to himself. Here, however, it is not necessary for us to deal with this question. The record shows that respondents have not, in fact, relieved their manufacturers of the expense of "selling" to the jobber partners. While it is claimed that NPW's general partner, Smith, calls on and sells to the jobber partners, this contention was completely discredited by the testimony of the partners themselves. One of them testified that Smith had been in his place of business twice since NPW's formation in 1956.⁴⁵ Another, testifying in March of 1962, stated that no NPW salesman had called on him since he joined NPW in May of 1961. An NPW partner had visited him, all right, but not to "sell me anything."⁴⁶

NPW employs only one salesman. And that salesman's efforts are directed solely at jobbers who are *not* members of NPW (when a particular jobber joins NPW, the latter's commission salesman immediately stops calling on him⁴⁷). This professional salesman, devoting full time to the job of calling on and selling to independent, nonaffiliated jobbers, accounts for only 6% of NPW's total "sales." Respondents would have us believe that Smith, their general partner, personally "sells" the remaining 94% of NPW's more than \$6 million total, accomplishing this impressive feat of salesmanship on a part-time basis, namely, two days out of each week!

The explanation for the general partner's success in singlehandedly "selling" to his jobber partners 94% of the \$6 million worth of goods handled by NPW in two days per week, without bothering to hire a sales force, lies in the fact that salesmen and sales representatives employed and paid *by the manufacturers* (on a commission basis) continue to call on and take orders from NPW's jobber partners just as they did before those jobbers joined NPW (and just as they continue to call on and take orders from nonaffiliated competitors of the jobber partners).⁴⁸ Auto parts manufacturers assign their salesmen to specific geographical territories, and the latter receive their commissions

⁴⁵ Q. Doesn't Mr. Smith call on you?

A. I think he's been in my place of business on two occasions.

Q. Since 1956?

A. Yes, sir.

Q. And do I understand that Mr. Smith does not regularly call on you in an attempt to sell you merchandise?

A. No, sir * * *. Tr. 1784.

⁴⁶ Tr. 1312.

⁴⁷ Tr. 1312, 1607-1699.

⁴⁸ NPW concedes that the manufacturers' salesmen call on and sell to the jobber partners. See, e.g., tr. 188. Representatives of the manufacturers testified to the same effect. See, e.g., tr. 1073, 1141-1142, 1527-1528, 1556, 1857. The jobber partners acknowledged that they are still called on and solicited by manufacturers' salesmen. See e.g., tr. 662, 694.

on all sales of the manufacturers' goods in that assigned territory. Thus, it appears that some manufacturer's salesman or sales representative was paid, *by the manufacturer*, a full commission on every "sale" allegedly made by NPW to its jobber partners. NPW, so far as this record shows, has "saved" its suppliers nothing in the matter of sales expenses.

In at least one way, NPW has *increased* the "selling" expenses of its manufacturer suppliers. As previously mentioned, it stages an annual "exhibit" or "trade show" affair, generally in July or August, at various summer resort cities. These yearly events are, in effect, a private showing of the manufacturers' wares in an effort to woo a special group of particularly demanding buyers—NPW's jobber partners. As Smith explained it, "these shows are for the purpose of giving the manufacturer or the supplier an opportunity to sell to that man [the individual jobber partner of NPW] his product or sell to that man his service."⁴⁹ At these "shows," the manufacturers, represented not only by their salesmen and sales managers but by their "executives" as well, exhibit their offerings on tables set up in the usual trade-show manner. The partners "go from one table to the other,"⁵⁰ frequently placing orders on the spot with the manufacturers' representatives. These orders are naturally placed in NPW's name, with NPW receiving its usual (*e.g.*, 20%) "warehouse" discount on the sales. As one manufacturer's representative put it: "*We try to sell merchandise for him [NPW's general partner, Smith].*"⁵¹ These factory salesmen, representatives, and executives, many of whom bring their families along,⁵² naturally find that "it is expensive"⁵³ to attend NPW's annual "shows." But they explain that it is a "profitable expense item."⁵⁴

"Profitable" or not, however, these are extra items of expense that these manufacturers do not incur at all in selling to respondents' competitors. We think it plain that respondents' operation of NPW, far from lessening their suppliers' costs of selling to and servicing the 55 jobber partners, has actually *increased* these particular cost items for the manufacturers.

Finally, it should be noted that NPW's *total expenses*, including the costs incurred in operating its warehouse and in performing all of the other "services" it renders to its jobber partners, averages only

⁴⁹ Tr. 299.

⁵⁰ Tr. 355-357.

⁵¹ Tr. 1549 (emphasis added).

⁵² Tr. 1532.

⁵³ Tr. 1598.

⁵⁴ *Ibid.*

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8% of the jobber price of the merchandise it sells. Its bookkeeper testified as follows:

Q. What does it cost National Parts Warehouse to do business?

A. Let me get the audit and check it.

Q. Approximately.

A. Approximately *eight percent*.

* * * * *

HEARING EXAMINER CREEL: That includes warehouse cost; does it not?
THE WITNESS: That includes all expenses.⁵⁵

It is clear, however, that a substantial part of this 8% is spent by NPW in rendering services to its jobber partners that the manufacturers in question do not perform for their nonfavored customers, and that cannot, therefore, be considered a "cost saving" to those manufacturers. For example, a stipulation between counsel supporting the complaint and counsel for respondents states that all of NPW's jobber partners, if called as witnesses (several had already been called), would have testified that, since becoming partners in NPW, "they operate their businesses in substantially the same manner as they did before becoming partners in National Parts Warehouse, *except* that they *maintain smaller stocks* at their business establishments, [and] that they *order frequently* from National Parts Warehouse and warehouse distributors *in smaller quantities* than they previously did when dealing directly with manufacturers."⁵⁶ The manufacturers, even when they have local warehouses, will not bear the expense of making these small, frequent shipments to their jobber customers. As one manufacturer's representative put it: "They [NPW] can ship a jobber, I guess, every day, maybe two or three times a day out of their warehouse whereas we wouldn't offer such a service *ourselves*."⁵⁷

⁵⁵ Tr. 1372 (emphasis added). NPW's total sales and total expenses are set forth in detail at CX 5, p. 8 (1956); CX 6, p. 8 (1957); CX 4, p. 8 (1958); CX 7, p. 8 (1959); and CX 8, p. 4 (1960).

While the record does not indicate exactly how much of this 8% total is spent by NPW in the operation of its warehouse, it has been clearly established that this item could not have exceeded 5% of the jobber price. (The manufacturers can, and do, hire "commercial warehousemen" to perform the full warehousing service for a fee of only 5% of that jobber price. Tr. 992. See also tr. 41, 43, 1065, 1606-1620. This going price for the warehousing service is corroborated by the fact that the manufacturers frequently cut a warehouse distributor's "discount" by 5%, *e.g.*, from 20% to 15%, when the latter, instead of warehousing the goods, asks the manufacturer to "drop-ship" direct to the warehouse distributor's jobber customer. See tr. 991, 1112, 1120, 1141, 1144, CX 239, p. 1, caption, and CX 240, p. 1.) Therefore, even if we accepted the contention that a buyer's warehousing of its own goods can give rise to cognizable cost savings, there would still remain a 15% differential between the price paid by respondents and the price paid by their competitors that cannot be cost justified.

⁵⁶ Tr. 1882-1883 (emphasis added).

⁵⁷ Tr. 1214.

NPW, in giving its partners this extra service, enables the individual jobber partner "to reduce the amount of inventory he must carry,"⁵⁸ and thus free a substantial part of his capital for expansion or other uses. But in doing so NPW "pads" its "expenses" with an item that, since it is not incurred by the manufacturers in dealing with their direct-buying, independent jobber customers, cannot represent a "cost saving" to those manufacturers in selling or delivering to respondents (as compared with the cost of selling or delivering to respondents' competitors). In other words, this is a "service" that respondents have performed for themselves, not for their manufacturer suppliers. As such, its cost is not an allowable item of "cost justification."

NPW's jobber partners, as "experienced automotive parts jobbers,"⁵⁹ cannot be heard to deny knowledge of things that "trade experience" alone should have taught them. *Automatic Canteen, supra*, 346 U.S. at 79-80. Each of them knew that the manufacturers themselves, not NPW, were paying the commissions of the salesmen that called on him and took his orders. Each of them knew that NPW's total expenses, including the warehousing expense, was only 8%. Each knew that he personally received "services" from the manufacturers (*e.g.*, extra attention from salesmen, special "exhibitions" at the NPW "trade shows") and from NPW itself (*e.g.*, more frequent deliveries, and in smaller quantities) that were not accorded by those manufacturers to his competitors. Each knew that, in addition to all those extra "services," he was receiving and pocketing, as a "patronage rebate," the difference between the 8% that NPW expended on his behalf (including the extra services) and the 20% "discount" NPW received from the manufacturers.

We conclude that the cost savings, if any, effected by NPW for its suppliers were so "very small compared with the price differential" that these jobber partners "could not reasonably have * * * thought" them sufficient "to justify the price difference * * *." *Automatic Canteen, supra*, 346 U.S. at 80.

V

Respondents' contention that complaint counsel has failed to prove the discriminatory prices they have induced and received were not given by their suppliers in an effort to meet equally low prices of competing sellers misconceives the burden of proof on this issue. In

⁵⁸ *Ibid.*

⁵⁹ See Stipulation, tr. 1882-1883.

Automatic Canteen, supra, the Court did not pass on this question, but observed:

Our view that § 2(b) permits consideration of conventional rules of fairness and convenience of course requires application of those rules to the particular evidence in question. Evidence, for example, that the seller's price was made to meet a competing seller's offer to a buyer charged under § 2(f) might be available to a buyer more readily even than to a seller. 346 U.S. at 79, n. 23.

As we said in *Fred Meyer, Inc.*, Dkt. 7492 (July 9, 1963): "If a discriminating seller gives a lower price * * * to a particular buyer in response to a similar offer to that buyer from other sellers, the buyer himself, from the nature of the case, would be expected to know more about it than the discriminating seller. After all, a buyer who receives a discriminatory concession should know what offers it has itself received from other sellers. * * * If [respondents have received such offers], we think it is their burden to come forward with such evidence." Opinion of the Commission [p. 66 herein].

But even if proof on this point were a part of the affirmative case, we think that burden has been met. The situation here is the same as the one that was involved in *D & N Auto Parts Co., Inc.*, 55 F.T.C. 1279 (1959):⁶⁰

The respondents also knew, or should have known, that the various sellers could not have defended the price discriminations on the basis of the proviso contained in Section 2(b). The respondents knew that the defense of cost justification was unavailable to the sellers for the reasons stated in the preceding paragraphs, and for the same reasons knew that such a defense would not be available to any competing sellers granting such prices on the same basis. Knowing, therefore, of the illegality of the pricing systems involved, the respondents knew that the sellers could not defend such prices on the basis of meeting in good faith the equally low prices of competitors for the reason that the prices so met would not be lawful prices. 55 F.T.C. at 1301-1302.

VI

Respondents also contend that the order to cease and desist contained in the initial decision is too general, and is vague, too broad in its coverage, and burdensome. We think it should be modified in several respects. First, it prohibits respondents not only from knowingly inducing and receiving discriminatory prices in connection with the "purchase" of automotive supplies, but also in connection with the "offering to purchase" of such products. The latter phrase will

⁶⁰ *Aff'd., Mid-South Distributors, Inc. v. Federal Trade Commission*, 287 F.2d 512 (5th Cir. 1961), cert. denied, 368 U.S. 838 (1961).

be stricken. Secondly, the examiner's order would prohibit respondents from knowingly inducing and receiving such discriminatory prices not only in the situation where respondents themselves are competing with other customers of those sellers, but also in the situation where "the seller is competing with any other seller for respondents' business." This, of course, is a primary line provision, whereas the record shows only a probability of secondary line injury. *Fred Meyer, Inc.*, Dkt. 7492 (July 9, 1963), Opinion of the Commission, [p. 73 herein]

Finally, in the interests of clarity, we think the order should make it plain that it is not directed against respondents' "buying group" organization as such, but against their use of it as a device to secure unlawful, discriminatory prices, an end that is forbidden by the statute to all "persons" (whether acting as individuals, or through an organization) both large and small. Hence our order will disregard all "ambiguous [functional] labels, which might be used to cloak discriminatory discounts," and simply prohibit respondents from inducing or receiving prices they know or should know are lower than those being paid by other purchasers "who *in fact* compete with [respondents] in the resale or distribution of such products." *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 472, 475 (1952) (emphasis added).

This order will not preclude respondents from continuing to own and operate NPW or any other "group buying" organization. First, it will not even touch that part of NPW's business which involves sales to independent, third-party jobbers. As to these, respondents may continue to receive a 20% lower price since their competitors for that *jobber* patronage will be either other warehouse distributors who have similarly received the 20% discount, or the manufacturers themselves, and respondents, therefore, will not have received a lower price than other customers "who in fact compete" with them for that business.

Nor will the order preclude these respondent jobbers from receiving, on their purchases for resale in their own respective jobbing businesses, lower prices that "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to [respondents] sold or delivered." This "cost justification" proviso is "implicit in every order issued under the authority of the Act, just as if the order set [it] out *in extenso*." *Ruberoid Co.*, *supra*, 343 U.S. at 476. Respondents may not be paid by their suppliers, however, for "services" performed for themselves.

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Respondents' exceptions are denied and the initial decision, modified to conform to the views expressed in this opinion, will be adopted as the decision of the Commission.

Commissioner Elman does not concur and has filed a separate opinion.

Commissioner Higginbotham concurred.

SEPARATE OPINION

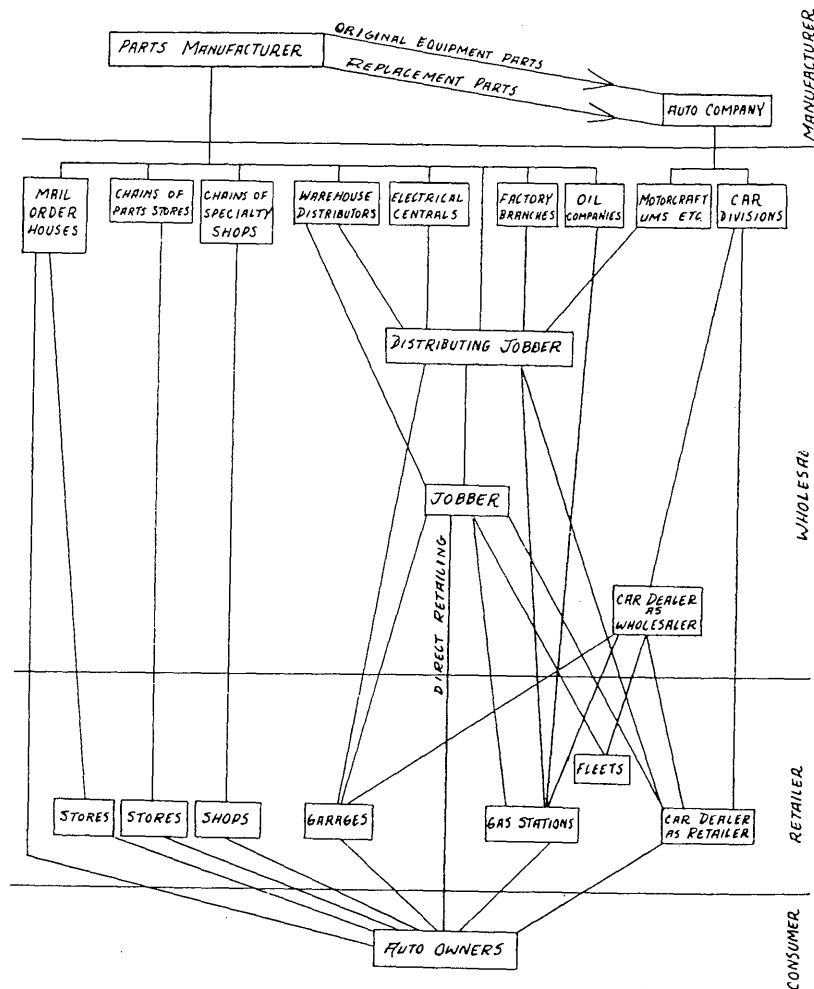
DECEMBER 16, 1963

By ELMAN, *Commissioner*:

As the attached diagram (p. 1740) vividly demonstrates, the distribution of automotive parts is not accomplished, as the Commission opinion seems to assume, by a simple flow of products from manufacturer to warehouse distributor to jobber to retailer. Instead, the industry is characterized by a confusing series of inter-relationships between companies at the various levels of distribution. Such a complicated industry structure should warn against easy generalizations concerning the competitive effects of specific methods of distribution. But this much, at least, is true of the industry: it is going through a period of rapid and radical change. "Traditional" methods of distribution are becoming outmoded. What used to be the regular and usual channel of distribution of automotive parts, i.e., through independent distributors, jobbers and garages, is no longer inevitably followed. Other and competing methods of distribution have evolved. Automobile manufacturers sell parts through their franchised dealers; oil companies sell parts through their gasoline stations; mail order houses sell parts both directly and through their retail stores; chains of specialty shops, such as those in the tire industry, and chains of general parts stores, have also come into the picture. In this complex structure the independent jobbers would seem to be, competitively, the weakest—not the strongest—members.

It would seem unwise for the Commission, on the basis of a simplistic view of the law and of the distributional structure of the automotive parts industry, and without having examined and determined the actual competitive significance of the respondents' practices, to condemn out of hand what may be a legitimate, and indeed beneficial, competitive device. We should hesitate to prevent the independent jobbers from adopting a new marketing method which, by eliminating one step in their channel of distribution, would increase their competitive strength vis-à-vis that of their more fully integrated

Flow of Parts to Consumer



Source: Automotive News,
May 15, 1961.

competitors, at least in the absence of facts showing that such an effort by the independents to meet competition is, itself, anti-competitive in its results. There are no such facts here.

As a result of numerous Commission actions against buying groups through which jobbers of automotive parts have aggregated their

purchases to obtain discriminatory discounts,¹ or against the manufacturers which have granted them such discounts,² some jobber groups have abandoned their simple "order-desk" method of business, whose only function was to combine the separate purchase orders of their members, and have developed warehouse operations which perform the same economic function, and are compensated by parts manufacturers on the same basis, as traditional warehouse distributors.

In *Alhambra Motor Parts v. F.T.C.*, 309 F. 2d 213, 220 (9th Cir. 1962), the court recognized that because, among other things, such a buying organization "performed substantially the same economic function as other warehouse distributors who received the same functional discount", its status was not governed by the earlier cases. As the court pointed out, "the economic and legal significance" of the operation of a jobber-owned warehouse falls within "the area in which the Commission's accumulated experience should provide the helpful guidance which Congress expected the Commission to furnish to the courts."

The difficulty with the present case is that the Commission has not accepted this invitation to use its "accumulated experience" to evaluate the competitive significance of jobber-owned warehouses and to arrive at an economically realistic solution. Although the opinion states, "We are not unaware of the fact that such operations can frequently enable groups of small merchants to duplicate some of the efficiencies of the larger, single-entity enterprises, and we are certainly not unsympathetic toward the efforts of any organization, 'buying groups' or otherwise, to achieve savings of this kind" (p. 1730), the test of legality announced by the opinion, i.e., whether NPW's jobber partners had "control" of the terms on which they obtained parts through NPW (pp. 1719-1721), leaves no opportunity for the lawful operation of such a buying group. Control of the group by its members is inherent in the purpose of the arrangement: to obtain "savings" for the members. If, as the Commission assumes, the existence of such savings establishes competitive injury, a finding of illegality is inevitable in every case.

I find nothing in "the law as Congress has given it to us" (p. 1730) which compels such a rigid and unbending test of illegality. Specifically, the test ignores whether NPW "performed substantially

¹ See, e.g., *Mid-South Distributors v. F.T.C.*, 287 F. 2d 512 (5th Cir. 1961); *American Motor Specialties Co. v. F.T.C.*, 278 F. 2d 225 (2d Cir. 1960).

² See, e.g., *Standard Motor Products v. F.T.C.*, 265 F. 2d 674 (2d Cir. 1959); *E. Edelman & Co. v. F.T.C.*, 239 F. 2d 152 (7th Cir. 1956); *Whitaker Cable Corp. v. F.T.C.*, 239 F. 2d 253 (7th Cir. 1956); *Moog Industries v. F.T.C.*, 238 F. 2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958).

the same economic function as other warehouse distributors who received the same functional discount" (*Alhambra, supra*)—a question the opinion expressly regards as irrelevant (p. 1722)—and, if so, whether the advantage accruing to NPW's jobber partners constitutes the kind of competitive advantage which the Robinson-Patnam Act was intended to forbid.

The answer to these questions requires a closer examination of the economic significance of a jobber-owned warehouse. The success of a manufacturer of automotive parts depends, to a degree found in few other industries, upon the instant availability of his products to automobile owners in every section of the country. "Since the majority of repairs have limited deferability, ready availability of parts is the keynote of this industry." Davisson, *The Marketing of Automotive Parts*, p. 6 (1954). See also Lincoln, *The \$7 Billion Aftermarket Gets an Overhaul*, *Fortune*, March 1962, p. 83. To secure the widest possible availability of their products, parts manufacturers accept different prices from different classes of intermediate distributors, depending upon the function which they perform. The class in which a particular intermediary falls is determined not by the precise method of its operation but by the function which it performs in the manufacturer's scheme of distribution.³

When a manufacturer compensates a warehouse distributor, in the form of a discount, for carrying its line of automotive parts and maintaining the inventory necessary for their ready availability, it is, in effect, "buying distribution". Davisson, *op. cit. supra*, pp. 910-12. If this essential function is performed instead by a jobber cooperative or similar organization, we have an example of vertical integration, i.e., the combining of two otherwise distinct stages in the distributional process.

To be sure, the integrated jobber may, by reason of the discount which he receives in recognition of his distributing function, enjoy a competitive advantage over his non-integrated competitors, but the advantage lies not in any arbitrary or unjustifiable price discrimination but in the fact that he performs both the jobbing and the distributing function and is legitimately compensated for both.

³In the present case, the record indicates that some of the parts sold through NPW were drop-shipped to its members and that salesmen of the manufacturers took orders from such members. There is no showing that the same practices were not employed in selling to jobbers who purchased through independent warehouse distributors; in fact, there is some evidence that these practices were common in selling through such distributors, Tr. 1141-1143, 1528, 1557, 1587-1588. Nor is there any showing that, because NPW and these independent distributors accepted some orders for drop-shipment to jobbers and filled orders which had been placed through manufacturers' salesmen, they thereby forfeited their classification as legitimate warehouse distributors with respect to such transactions.

Assuming that NPW does in fact perform the essential economic function of a warehouse distributor, the problem is one of vertical integration, not price discrimination, and although its competitive implications may deserve attention, the solution is not to be found in the Robinson-Patman Act.

The Robinson-Patman Act, which was designed by Congress to deal only with problems of price discrimination, is for that reason an inappropriate instrument for dealing with the broader and more complex problems of vertical integration, which in many instances is not accompanied by the differences in price which are the prime requisite for application of the Act. Since application of that statute would depend on the existence *vel non* of price differentials, only those cases of vertical integration where there are such differentials could be dealt with under the Robinson-Patman Act; and it could not be invoked in those other cases, perhaps involving more serious competitive evils, where no differences in price existed. Hence, reliance on the Robinson-Patman Act for dealing with problems of vertical integration will inevitably produce uneven and inequitable results. For example, where a fully integrated manufacturer sells both through its own retail outlets and through independent distributors, its competitive advantage over such independent competitors does not derive from differences in price, and the Robinson-Patman Act could not reach the problem. In the automotive parts industry, wholesale and retail functions are often combined in single integrated companies, e.g., mail order houses and chains of specialty shops and parts stores (see diagram, p. 1740). These integrated retailers enjoy an undoubted competitive advantage vis-à-vis independent garages who purchase through the warehouse distributor-jobber chain of distribution. However, so long as manufacturers charge the same prices to both integrated retailers and warehouse distributors, there is no price discrimination.

It would seem to me that a more realistic approach to the possible competitive problems of jobber integration would attempt not to prevent such integration, thus lowering all jobbers to the lowest common denominator of competitive strength, but would look to the removal of any impediments which may prevent jobber organizations from performing the functions, and receiving the benefits, of an integrated warehouse distributor-jobber operation. Thus, if shown to be necessary to prevent competitive injury, the Commission might justifiably require that a warehousing discount be granted to all competing purchasers who perform the same economic function. Cf. *Mueller Co. v. F.T.C.*, 7th Cir., September 6, 1963, where the court, in upholding

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a Commission decision condemning warehousing discounts which had been made available to some, but not others, of the respondent's customers, pointed out: "The Commission, in its brief, referring to the practice of compensating jobbers who perform a warehousing function, states: '* * * this is a perfectly proper procedure, provided it be done in a fair and legal manner.' We approve the order on that basis." Or if membership in a group buying organization were shown to be a competitive necessity for the small jobber, his exclusion on a discriminatory or otherwise unjustifiable basis might be regarded as an unfair method of competition under Section 5 of the Federal Trade Commission Act.⁴ Cf. *U.S. v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912); *Associated Press v. U.S.*, 326 U.S. 1 (1945); *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944).

CONCURRING OPINION

DECEMBER 16, 1963

By HIGGINBOTHAM, Commissioner:

1. About one million dollars worth of the principal respondent's five million dollar annual business represents drop-shipments from the manufacturers direct to the respondent's members, see Initial Decision, Fdgs. 1706. As to these drop-shipment sales, the respondent does not perform any bona fide warehousing function, and it cannot properly be concluded that the respondent is "selling distribution" to the manufacturers from which it has induced a discount or payment.¹ For this reason, I think a § 2(f)-type order is appropriate to suppress what is clearly an unlawfully discriminatory practice. *American Motor Specialities, Inc. v. Federal Trade Commission*, 278 F. 2d 225 (2d Cir. 1960), cert. denied, 364 U.S. 884 (1960); *Mid-South Distributors, Inc. v. Federal Trade Commission*, 287 F. 2d 512 (5th Cir. 1961), cert. denied, 368 U.S. 838 (1961).

2. I also agree with Commissioner Elman that it would be proper to invoke § 5 against a group buying association which unfairly ex-

⁴ Cf. *Ark-La-Tex Warehouse Distributors, Inc.*, Docket 7592, Order Vacating Initial Decision and Remanding Case to Hearing Examiner, June 5, 1963 [62 F.T.C. 1557], where the Commission directed the examiner to consider, *inter alia*, "* * * whether the nonfavored jobbers were able to purchase the same products at the prices charged respondents, either from Ark-La-Tex or as a member of it or a similar group."

¹ Examination of the record does not indicate that independent warehouses were involved in substantial drop-shipments, as in the instant case. Certainly, the record does not indicate that jobber purchasers, who received shipments on orders placed through independent warehouses, enjoyed the benefits of the same discounts as did National Parts Warehouse jobber members.

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cluded some jobbers and acted as a "bottleneck" to competition. Compare *Associated Press v. United States*, 326 U.S. 1 (1945), and *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912), with *Mueller Co. v. Federal Trade Commission*, 323 F. 2d 44 (7th Cir. 1963), and *Alhambra Motors Parts v. Federal Trade Commission*, 309 F. 2d 213, 219-221 (9th Cir. 1962). However, this issue was neither pleaded nor is it presented by the record before us.

FINAL ORDER

This matter having been heard by the Commission on exceptions to the hearing examiner's initial decision filed by respondents and on briefs and oral arguments in support thereof and in opposition thereto; and

The Commission having rendered its decision and having determined that the initial decision should be modified in accordance with the views expressed in the accompanying opinion, and, as so modified, adopted as the decision of the Commission:

It is ordered, That respondents National Parts Warehouse, a limited partnership; Bryant M. Smith, Sr., individually and as manager and general partner of National Parts Warehouse; Auto Machine and Parts Co., Inc., a corporation; Arnau Tire and Accessory Co., a corporation; Appalachian Auto Parts Co., Inc., a corporation; Mrs. George H. Ridgeway, doing business under the firm name and style of Madison Auto Supply Co., a sole proprietorship; Moyer Auto Parts, Inc., a corporation; Auto Parts Company, Inc., a corporation; Auto Parts and Service Company, Inc., a corporation; Brunswick Auto Parts Company, a corporation; Bessemer Auto Parts, Inc., a corporation; Buchanan-Lyon Company, a corporation; Barnes Motor and Parts Co., Inc., a corporation; Battery and Electric Co., Inc., a corporation; L. R. Wells, and W. F. Wells, copartners doing business under the firm name and style of Cairo Auto Supply Co.; Cains' Parts and Service Co., a corporation; Condrey Motor Parts, Inc., a corporation; Cottle's Auto Supply, Inc., a corporation; A. Macina and J. Follo, copartners doing business under the firm name and style of Court Square Auto Parts; Bluefield Supply Company, a corporation, doing business under the firm name and style of Counts Automotive Supply Company; E'town Distributing Company, Inc., a corporation; Dickson Auto Supply, Inc., a corporation; I. N. Kohorn, doing business under the firm name and style of Dixie Auto Parts Co., a sole proprietorship; The Ferguson Company, Inc., a corporation; George M. Greer, Barney Nation, and Mrs. George M. Greer, copartners doing business under the firm name and

style of Greer Auto Supply Company; Genuine Auto Parts Co., Inc., a corporation; Gadsden Auto Parts, Inc., a corporation; General Auto Supplies, Inc., a corporation; Jordan Auto Parts, Inc., a corporation; Lakeland Battery and Auto Supply, Inc., a corporation; George O. Franklin, III, doing business under the firm name and style of Metter Auto Supply Co., a sole proprietorship; A. J. Whiddon, Sr., A. J. Whiddon, Jr., Johnny O. Whiddon and Miriam Grey Bowling, copartners, doing business under the firm name and style of Motor Bearings and Supply Co.; Morgan Supply Co., Inc., a corporation; B. H. Fenn, doing business under the firm name and style of Millville Auto Parts, a sole proprietorship; The Megahie-Speight Co., a corporation; Motor Supply Company, Inc., a corporation; McLean Auto Supply Company, a corporation; T. Felton Millians, doing business under the firm name and style of Newnan Auto Supply, a sole proprietorship; Pensacola Automotive Supply Co., a corporation; Piston Ring and Supply Co., Inc., a corporation; Parts Supply Company, a corporation; Barney R. Riner, doing business under the firm name and style of Riner Radiator and Battery Co., a sole proprietorship; George Stuckey, James Stuckey and Dexter Stuckey, copartners doing business under the firm name and style of Stuckey Brothers Parts Co.; Guy Fumbanks, doing business under the firm name and style of Standard Auto Supply, a sole proprietorship; R. S. Woodham and W. P. Woodham, copartners doing business under the firm name and style of Tallahassee Auto Parts Company; Tanner Auto Parts, Inc., a corporation; White Stores, Inc., a corporation, doing business under the firm name and style of White Electric and Battery Service; Calhoun H. Young and Ruth C. Young, copartners, doing business under the firm name and style of Young Parts and Supply Co.; MacGregor Flanders, doing business under the firm name and style of Flanders Parts Company, a sole proprietorship; M. S. Church Auto Parts Company, a corporation; A. C. Craig and J. A. Craig, copartners doing business under the firm name and style of Craig Supply Co.; Hyatt Parts and Supply Co., a corporation; Marianna Auto Parts & Supply Co., a corporation; Wendell Frazier, Norris Frazier and Winston C. Nunn, copartners doing business under the firm name and style of Nunn Auto Supply Co.; Thompson Auto Supply Co., Inc., a corporation; Wood's Automotive, Inc., a corporation; Huggins Motor Parts, Inc., a corporation, limited partners in National Parts Warehouse, and their respective officers, agents, representatives and employees, in connection with the purchase of any automotive parts, accessories or supplies or other

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similar products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

(1) Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price respondents know or should know is below the net price at which said products of like grade and quality are being sold by such seller to other customers who in fact compete with respondents in the resale and distribution of such products.

(2) Maintaining, operating, or utilizing respondent National Parts Warehouse or any other organization as a means or instrumentality to induce or receive discounts or rebates which result in a net price respondents know or should know is below the net price at which said products of like grade and quality are being sold by such seller to other customers who in fact compete with respondents in the resale and distribution of such products. The provisions of this paragraph (2) are not applicable to respondent National Parts Warehouse or respondent Bryant M. Smith, Sr.

For the purpose of determining the "net price" under the terms of this order, there shall be taken into account all discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

It is further ordered, That the aforesaid respondents 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 the order to cease and desist.

By the Commission, Commissioner Elman not concurring and Commissioner Higginbotham concurring.
