

IN THE MATTER OF  
ROYAL CROWN COLA CO.

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

*Docket 8295. Complaint, Mar. 2, 1961—Decision, Dec. 23, 1963*

Order requiring a manufacturer of beverage concentrates which were sold to independent franchised bottlers for processing into beverages for sale to retailers, to cease violating Sec. 2(d) of the Clayton Act by such practices as paying a retail grocery chain with headquarters in Jacksonville, Fla., the sum of \$1,474.80 as compensation for advertising furnished in connection with the sale of respondent's product, while not making comparable allowances available to the chain's competitors.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereafter more particularly designated and described, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Royal Crown Cola Company \* is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business located at Columbus, Georgia.

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\* Respondent's correct name is Royal Crown Cola Co.

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## Initial Decision

PAR. 2. Respondent is now and has been engaged in the manufacture, sale and distribution of carbonated beverages, beverage powders and beverage concentrates. Respondent sells and distributes its products to franchised bottlers, wholesalers and retailers, including retail chain organizations.

PAR. 3. Respondent sells and causes its products to be transported from its principal place of business in the State of Georgia to customers located in other States of the United States. There has been at all times mentioned herein a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionately equal terms to all other customers competing in the sale and distribution of respondent's products.

PAR. 5. For example, in the year 1960, respondent contracted to pay and did pay to Winn-Dixie Stores, Inc., a retail grocery chain with headquarters in Jacksonville, Florida, the amount of \$1,474.30 as compensation or as an allowance for advertising or other services or facilities furnished by or through Winn-Dixie Stores, Inc., in connection with its offering for sale or sale of respondent's products. Such compensation or allowance was not made available on proportionally equal terms to all other customers competing with Winn-Dixie Stores, Inc., in the sale and distribution of respondent's products of like grade and quality.

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

*Mr. Eugene Kaplan* supporting the complaint.

*Mr. Quinn O'Connell* and *Mr. William H. Savage*, attorneys for respondent *Royal Crown Cola Co.*, and *Mr. Willis Battle*, Columbus, Georgia, and *Weaver & Glassie*, Washington, D. C., for respondent.

INITIAL DECISION BY WILLIAM K. JACKSON, HEARING EXAMINER

APRIL 30, 1962

This proceeding was commenced by the issuance of a complaint on March 2, 1961, charging the respondent, Royal Crown Cola Co., (er-

roneously named in the complaint as Royal Crown Cola Company) with violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13) in the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, without making such payments available to all other competing customers on proportionally equal terms. As an example of this practice, the complaint alleges the respondent in 1960 paid Winn-Dixie Stores, Inc., a retail grocery chain, the amount of \$1,474.30 as compensation or as an allowance for advertising furnished by or through Winn-Dixie Stores, Inc., in connection with its offering for sale or sale of respondent's products without proportionally equal payments to all other customers competing with Winn-Dixie Stores, Inc., in the sale and distribution of respondent's products.

Respondent in its answer and amended answer admitted that it contracted to pay and did pay to Winn-Dixie Stores, Inc., the amount of \$1,474.30 alleged in the complaint for the placing of advertisements for bottled Royal Crown Cola in thirty-nine newspapers published in the States of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina and Tennessee, and that no allowance was made available to customers competing with Winn-Dixie Stores, Inc., but that of the sum of \$1,474.30 paid Winn-Dixie Stores, Inc., only approximately \$50 (or other small sum) represented payment for advertising in Columbus, Georgia, newspapers which circulate also in Phenix City, Alabama, to promote the sale of bottled Royal Crown Cola sold from its bottling plant in Columbus, Georgia, to stores in Columbus, Georgia, West Georgia, Phenix City, Alabama, and its environs. Respondent further affirmatively alleged that the balance of said sum of \$1,474.30 was paid for advertisements within areas where respondent makes no sales of bottled beverages to Winn-Dixie Stores and its competitors, but that such payment was made on behalf of, and pursuant to agreement with, the independent Franchised Bottlers of Royal Crown Cola who operate bottling plants in such areas. As an additional defense, respondent alleges that such payment was made from respondent's cooperative advertising fund which it maintains with its Franchised Bottlers, that the affected Bottlers had approved the expenditure, and that respondent does not control the fund. Under these circumstances, respondent alleges that the payment to Winn-Dixie Stores was not an advertising allowance by respondent, but rather an allowance by the Franchised Bottlers of Royal Crown Cola.

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## Findings

A Pre-Hearing Conference was held in this matter on November 16, 1961, at which time, among other things, a tentative stipulation of facts was drafted which subsequently with modifications was entered into at the initial hearing held in this matter on January 31, 1962. At the hearing on January 31, 1962, additional testimony and other evidence were offered in support of the complaint and in opposition to the allegations set forth therein. Proposed findings of fact, conclusions of law, briefs and reply briefs were filed by counsel supporting the complaint and by counsel for respondent.

Consideration has been given to the proposed findings of fact, conclusions of law and briefs submitted by the parties, and all proposed findings of fact not hereinafter specifically adopted are rejected. Based upon the entire record and his observation of the witness, the Hearing Examiner makes the following findings as to facts, conclusions drawn therefrom and order.

## FINDINGS OF FACT

1. Respondent, Royal Crown Cola Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Columbus, Georgia.

2. Respondent is now and has been engaged in the manufacture, sale and distribution of carbonated beverages, beverage powders and beverage concentrates. Respondent sells and distributes its products to franchised bottlers, wholesalers and retailers, including retail chain organizations as hereinafter discussed.

3. Respondent has engaged and is now engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its products to be transported from its principal place of business in the State of Georgia to customers located in other States of the United States.

4. Respondent, *inter alia*, owns and operates a bottling plant located at Columbus, Georgia. Said plant produces bottled Royal Crown Cola and Royal Crown Cola syrup. Respondent also has a plant at Columbus, Georgia manufacturing Royal Crown Cola in cans. Bottled and canned Royal Crown Cola is sold to approximately 2,500 retailers in Columbus, Georgia, Phenix City, Alabama, and the territories immediately surrounding these cities. During 1960 total sales from the Columbus, Georgia bottling plant amounted to \$1,452,082.90.

5. Winn-Dixie Stores, Inc. (operating in some areas as "Kwik-Chek"), and its subsidiaries constitute a retail grocery chain doing

business in Southeastern United States with its principal place of business at 5050 Edgewood Court, Jacksonville 3, Florida.

6. In 1960, respondent, Royal Crown Cola Co., paid amounts totaling \$1,474.30 to Winn-Dixie Stores, Inc. and its subsidiaries in connection with the latter's Anniversary Sale, which was held from February 29, 1960 through March 12, 1960. The request for participation was made in the form of brochures sent directly by Winn-Dixie Stores, Inc., Jacksonville, Florida to respondent at Columbus, Georgia, inviting the recipient to participate in newspaper advertising to be carried throughout the Southeastern United States and enclosed forms to be filled out. After securing the approval of its Franchised Bottlers in the areas concerned, respondent completed and returned these forms to Winn-Dixie Stores, Inc., Jacksonville, Florida or one of that company's division headquarters' offices located throughout the Southeast. In addition to indicating the number of column inches desired, the form requested a list of the items to be featured. The only item respondent requested to be featured was "R. C. Cola". Winn-Dixie Stores, Inc., billed respondent from its Jacksonville, Florida; Greenville, South Carolina; Raleigh, North Carolina, as well as other division offices and respondent made payment by checks issued from its Columbus, Georgia office to Winn-Dixie Stores, Inc., Greenville, South Carolina; Winn-Dixie Montgomery, Inc., Montgomery Alabama; Winn-Dixie Stores, Inc., Raleigh, North Carolina, and Winn-Dixie Stores, Inc., Jacksonville, Florida.

7. The cities in which the newspaper advertisements appeared and the subsidiary sales divisions of Winn-Dixie in such areas are as follows:

Winn-Dixie Stores, Inc. (Jacksonville Division) 5050 Edgewood Court, Jacksonville 3, Florida:

Orlando, Florida  
Jacksonville, Florida  
Gainesville, Florida  
Sanford, Florida  
Tallahassee, Florida

Winn-Dixie Montgomery, Inc., Montgomery, Alabama:

Anniston, Alabama  
Huntsville, Alabama  
Montgomery, Alabama  
Columbus, Georgia

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Meridan, Mississippi  
Pensacola, Florida  
Panama City, Florida  
Atlanta, Georgia

Winn-Dixie Stores, Inc. (Raleigh Division) P.O. Box 5487,  
Raleigh, North Carolina:

Raleigh, North Carolina  
Salisbury, North Carolina  
Albermarle, North Carolina  
Durham, North Carolina  
Fayetteville, North Carolina  
Greensboro, North Carolina  
Goldsboro, North Carolina  
Henderson, North Carolina  
Winston-Salem, North Carolina  
Greensville, North Carolina  
Florence, South Carolina

Winn-Dixie Greenville, Inc., P.O. Box 840, Greenville, South  
Carolina:

Anderson, South Carolina  
Charleston, South Carolina  
Columbia, South Carolina  
Greenville, South Carolina  
Orangeburg, South Carolina  
Rock Hill, South Carolina  
Spartanburg, South Carolina  
Laurens, South Carolina  
Sumter, South Carolina  
Asheville, North Carolina  
Hickory, North Carolina  
Shelby, North Carolina  
Augusta, Georgia  
Johnson City, Tennessee  
Gainesville, Georgia

Respondent was supplied with tear sheets of the aforesaid advertisements and was advised that the same or similar advertisements were carried in the named cities throughout that territory. The Columbus, Georgia newspaper which carried the advertisement is also circulated in Phenix City, Alabama.

8. Respondent sells Royal Crown Cola, Nehi, Upper Ten, and Par-T-Pak to the following Winn-Dixie stores in Columbus, Georgia

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and Phenix City, Alabama, from its Columbus, Georgia bottling plant:

- 1001 Broadway, Columbus, Ga.—No. 481
- 2611 Lumpkin Road, Columbus, Ga.—No. 488
- Cross Country Shopping Center, Columbus, Ga.—No. 484
- 1210 Broad Street, Phenix City, Ala.—No. 413

Sales to these four stores for the year 1960 amounted to 9,865 cases of Royal Crown Cola in bottles and cans totalling approximately \$10,500 in dollar volume. During the same period of the Winn-Dixie Anniversary Sale, respondent sold Royal Crown Cola in bottles and cans to competitors of the above-listed stores in both cities and surrounding territory. Competitors of each of the respective stores existed throughout the entire area. Such competitors were not offered payments or given any benefits or anything in lieu thereof proportionally equal to those benefits paid Winn-Dixie Stores in connection with its Anniversary Sale.

9. Respondent sells from its Columbus, Georgia bottling and canning plants Royal Crown Cola in cans and bottles to Buddy's Food Center and Edmond's Grocery located in Phenix City, Alabama. During the year 1960, respondent entered into the following promotions:

(a) For the period September 1-3, 1960, respondent refunded Buddy's Food Center the sum of 6¢ for each carton of Royal Crown Cola sold during said period. The total amount paid Buddy's Food Center by respondent was \$85.14 by check for the promotion of Royal Crown Cola.

(b) During the period December 9-10, 1960, respondent agreed with Edmond's Grocery to supply, and did supply, each customer with one quart bottle of Royal Crown Cola for each carton of six bottles of 10 oz. Royal Crown Cola purchased at said store. For the promotion of Royal Crown Cola respondent paid Edmond's Grocery a total of \$21 in the form of cases of quart size bottles of Royal Crown Cola.

10. During these same periods, respondent sold Royal Crown Cola in bottles and cans from its plants in Columbus, Georgia, to competitors of Buddy's Food Center and Edmond's Grocery in Phenix City, Alabama. Such competitors were not offered payments or given any benefits or anything in lieu thereof proportionally equal to the benefits given these two customers.

11. Respondent, in addition to manufacturing and selling Royal Crown Cola to the aforesaid Winn-Dixie stores and others in bottles and cans from its Columbus, Georgia bottling and canning plants,

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also operates several other plants and divisions. Its principal product is a concentrate or flavor ingredient used in the ultimate manufacture of carbonated soft drinks which is sold from its Columbus, Georgia concentrate plant exclusively to its Franchised Bottlers throughout the United States. Respondent also manufactures at three plants located in Florida, Georgia and Illinois a finished carbonated beverage packed in cans which is sold to its Franchised Bottlers. A third division of respondent manufactures at Columbus, Georgia an instant soft drink powder known as Bev-Rich which is sold through brokers to retail outlets including many Winn-Dixie stores throughout the Southeastern United States. Orders for Bev-Rich are filled, shipped and billed directly to such Winn-Dixie stores. Respondent also manufactures in Columbus, Georgia at its canning plant a canned carbonated drink for Winn-Dixie stores under their private label called "Chek". In addition to Royal Crown Cola in bottles and cans, respondent manufactures at its Columbus, Georgia bottling plant beverage products under the registered trade names of "Nehi", a line of flavor beverages; "Upper Ten", a lemon carbonated beverage, and "Par-T-Pak", which are sold to retailers including the aforesaid Winn-Dixie stores in the Columbus, Georgia and Phenix City areas.

12. Respondent's principal business is the manufacture, at Columbus, Georgia, of beverage concentrates or flavor ingredients which are used in the production of bottled soft drinks. The major users of the concentrates are independent bottling plants which purchase such concentrates from respondent pursuant to a "License and Franchise" agreement. Respondent has approximately 450 such Franchised Bottlers. The relationship between respondent and its Franchised Bottlers is governed by the "License and Franchise" agreement which gives the bottler the right to purchase concentrates, to use respondent's trade marks, and to market the products within a restricted and exclusive territory. This agreement also gives respondent the right to insure that the nature and quality of the beverage produced by the Franchised Bottlers conforms to rigid standards of quality set by respondent, that the products sold bear respondent's trade names and use standard bottle caps, bottles, labels and cartons prescribed by respondent, that the Franchised Bottlers actively build and maintain a full volume of patronage for Royal Crown beverages and cooperate with respondent in its plans for building, maintenance and expansion of such sales; and that the Franchised Bottlers shall make a written monthly report of the number of cases of Royal Crown beverages sold and submit annual financial statement covering their plant operations. Respondent may cancel the agreement after notice if the

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production of Royal Crown beverages by the Franchised Bottler is not satisfactory to respondent. In order to insure the nature and quality of the beverages produced by the Franchised Bottlers, respondent has the right to and does through its representatives and employees make frequent inspections of its Franchised Bottlers' plants. The Franchised Bottlers are separate and independent legal and business entities; respondent contributes none of its Franchised Bottlers' capital, nor does it otherwise give them financial aid; Franchised Bottlers purchase their bottling equipment, bottles, caps and raw materials such as sugar from independent manufacturers in which respondent has no interest and for which respondent receives no payment for the privilege of making bottles or caps bearing respondent's trade mark or trade name; and respondent underwrites none of the losses which a Franchised Bottler may incur. Respondent has no control over the prices charged by the Franchised Bottlers, nor over the terms and conditions of their sales. Respondent seldom deals directly with customers of its Franchised Bottlers in promoting the sale of "R. C. Cola".

13. Respondent places its beverage concentrate in various sized containers to which they affix a label containing explicit instructions for mixing. A one-gallon container of concentrate according to respondent's instructions when mixed will yield 230 24-bottle cases of ten-ounce bottles of "R. C. Cola", 192 24-bottle cases of twelve-ounce bottles of "R. C. Cola" and 144 24-bottle cases of sixteen-ounce bottles of "R. C. Cola". Respondent sells the beverage concentrate to the Franchised Bottlers and is paid solely on the basis of the number of gallons sold. However, in view of the strict quality control maintained by respondent over the manufacturing process of its Franchised Bottlers, respondent's sales of beverage concentrate bear a fixed relationship to the sales of bottled "R. C. Cola". Consequently, respondent has a direct pecuniary interest in the promotion and sale of "R. C. Cola" not only by its Franchised Bottlers to retailers but in the sale by such retailers to the consuming public.

14. As a result of this mutual interest in retail sales and pursuant to the "License and Franchise" agreement expressly providing for cooperation in expanding sales, respondent has established a cooperative advertising fund based on a formula related to the volume of the Franchised Bottlers' concentrate purchases from respondent during the preceding year and to which fund the respondent and the Bottler contribute in equal shares. It is from this fund that respondent made the payments totalling \$1,474.30 to Winn-Dixie Stores, Inc., in connection with the latter's Anniversary Sale. Of this sum, \$78 repre-

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sents the portion allocable to its Columbus, Georgia bottling plant for the advertisements of Winn-Dixie's four stores in that area carried in the Columbus, Georgia newspaper. The remaining \$1,396.30 was apportioned among its respective Franchised Bottlers for advertisements of Winn-Dixie stores in their areas carried in newspapers in approximately 38 cities and was charged to their respective shares of the cooperative advertising fund.

In addition to the above-mentioned cooperative advertising fund, respondent expends considerable sums on other advertising programs in promoting the sale of Royal Crown Cola and its other products.

## CONCLUSIONS

The evidence of record supports the following conclusions:

1. Winn-Dixie Stores, Inc., and its subsidiaries constitute a unitary retail grocery chain doing business throughout Southeastern United States. Several retail outlets of Winn-Dixie Stores, Inc., purchase directly from respondent its products in bottles and cans known as "Royal Crown Cola", "Nehi", "Par-T-Pak", and "Upper Ten". Winn-Dixie Stores, Inc., also purchases directly from respondent "Bev-Rich" and "Chek". Under these circumstances Winn-Dixie Stores, Inc., is a customer of respondent within the meaning of Section 2(d) of the Clayton Act, as amended.

Buddy's Food Center, Phenix City, Alabama, and Edmond's Grocery, Phenix City, Alabama are also customers of respondent.

2. The respondent in 1960 made promotional payments to Winn-Dixie Stores, Inc. totalling \$1,474.30. Respondent is admittedly engaged in interstate commerce. Respondent ships "Royal Crown Cola" and other products in the course of such commerce from its Columbus, Georgia plant to Winn-Dixie's retail outlet in Phenix City, Alabama. It also ships in the course of such commerce "Bev-Rich" and "Chek" from its Columbus, Georgia plants to Winn-Dixie's retail outlets throughout Southeastern United States. The promotional payments were solicited by Winn-Dixie Stores, Inc., from its Florida headquarters office to respondent in Georgia; invoices and payment by check for such promotions were sent from Georgia to Florida and other states. Under these circumstances the promotional payments of \$1,474.30 to Winn-Dixie Stores, Inc., were made by respondent in the course of such commerce as that terminology is used in Section 2(d) of the Clayton Act, as amended. *Matter of Shreveport Macaroni Manufacturing Company, Inc.*, Docket No. 7719, Opinion of the Commission, January 24, 1962 [60 F.T.C. 196, 202].

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The promotional payments of \$85.14 to Buddy's Food Center and \$21 to Edmond's Grocery as set forth above in Finding No. 9 were likewise made in the course of such commerce.

3. Respondent sells its product Royal Crown Cola to competitors of Winn-Dixie Stores, Inc., Buddy's Food Center and Edmond's Grocery. Such competitors were not offered payments or given any benefits or anything in lieu thereof proportionally equal to the benefits given these three customers.

4. Respondent sells "Royal Crown Cola" in bottles and cans manufactured in its Columbus, Georgia plants to four Winn-Dixie retail outlets in the Columbus, Georgia and Phenix City, Alabama areas. "Royal Crown Cola" the product promoted is a product manufactured, sold and offered for sale by respondent. Moreover, "Royal Crown Cola" in bottles is an item universal in nature. It is sold in distinctive and unique bottles prescribed by respondent, the bottle caps bear respondent's trademark, and the beverage itself must rigidly conform to a standard of quality prescribed and controlled by respondent. The beverage concentrate or flavor extract which is manufactured exclusively by respondent is the principal ingredient. The promotional advertising, whether on a cooperative basis with its Franchised Bottlers or by respondent, refers to the same product "Royal Crown Cola". Advertisements in one area directly and indirectly promote sales of that product everywhere due to the universal nature of that product. Increase in the volume of sales of the product "Royal Crown Cola" anywhere has a direct effect on respondent's volume of sales of its beverage concentrate. Under these circumstances "Royal Crown Cola" whether produced in respondent's Columbus, Georgia bottling plant or in its Franchised Bottlers' plants from the beverage concentrate supplied from respondent's Columbus, Georgia plant is a product or commodity manufactured, sold or offered for sale by respondent within the intent and meaning of Section 2(d) of the Clayton Act, as amended.

5. Respondent admittedly made separate, distinct and unrelated payments to three customers: Winn-Dixie Stores, Inc., Buddy's Food Center and Edmond's Grocery of \$1,474.30, \$85.14 and \$21 respectively, as compensation or in consideration for services furnished by such customers in connection with the handling, sale, or offering for sale of products sold to them by respondent, without making such payments or allowances available to all other competing customers on proportionally equal terms. The payments made by respondent are not negligible, inconsequential or unrelated to the public interest.

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## Findings

Assuming arguendo that \$1,396.30 of the \$1,474.30 paid to Winn-Dixie Stores, Inc., was for the promotion of a product not manufactured or sold by respondent but by its Franchised Bottlers<sup>1</sup>; the payments so reduced were not restricted to a single isolated incident or for a particular type of service or facility<sup>2</sup> but were made to three separate customers and consisted of three distinctly different methods of promoting respondent's product. In addition, there is no indication that the three payments were made inadvertently or outside the channels of respondent's regular course of business. In this view of the matter, the Hearing Examiner also comes to the conclusion that the payments even as reduced were not trivial and that this proceeding is in the public interest.<sup>3</sup>

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

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

8. Respondent's request to narrow the scope of the order to bottled "Royal Crown Cola" is not warranted. *Matter of Vanity Fair Paper Mills, Inc.*, Docket No. 7720. Opinion of the Commission, March 21, 1962 [60 F.T.C. 568, 573]. As noted above, respondent's activities were not confined to one customer or one particular type of unlawful payments, but included a payment to one customer for newspaper advertising, a payment to another customer in the form of refunds to cover special promotions and a payment to still another customer to cover the cost of supplying free quart bottles of "Royal Crown Cola" to promote the sale of a carton of respondent's twelve-ounce bottles. Under these circumstances, the Hearing Examiner does not feel that a narrow order would "attain the objectives Congress envisioned" or provide "effectively to close all roads to the prohibited goal, so that its [the Commission's] order may not be by-passed with impunity." The Order, as hereinafter set forth, has a reasonable relationship to the unlawful practices found to exist. *F.T.C. v. Ruberoid Co.*, 343 U.S. 470 (1952); *P. Lorillard Company v. F.T.C.*, 267 F. 2d 439, 445 (CA 3, 1959), *cert. denied* 361 U.S. 923 (1959). In the latter case the court said:

The fact that these cases involved orders issued in the language of Section 2(a) of the amended Clayton Act should give us little pause for Section 2(d) is much narrower in scope and therefore orders framed in its language would be well within the permissible ambit of the Commission's discretion.

<sup>1</sup> A position not taken by the Hearing Examiner.

<sup>2</sup> *Cf. Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

<sup>3</sup> *F.T.C. v. Klesner*, 280 U.S. 19 (1929).

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## ORDER

*It is ordered,* That respondent, Royal Crown Cola Co., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the sale of carbonated beverages or powdered beverages in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to or for the benefit of any customer of respondent as compensation or in consideration for any advertising or other services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of respondent's carbonated beverages or powdered beverages, unless such payment or consideration is offered and otherwise made available on proportionally equal terms to all other customers competing in the distribution or resale of such products.

## OPINION OF THE COMMISSION

DECEMBER 23, 1963

By DIXON, *Commissioner*:

This case is before us on respondent's appeal from the hearing examiner's initial decision finding it to have violated Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, 38 Stat. 730 (1914), as amended, 49 Stat. 1526 (1936), 15 U.S.C. 13(d) (1958). Respondent corporation is engaged in the manufacture and sale of beverage concentrates, beverage powders, and carbonated beverages packaged in both bottles and cans.

After a short hearing, the hearing examiner filed an initial decision on April 30, 1962, holding that respondent had in fact violated Section 2(d) as charged. The order proposed by the hearing examiner would require the respondent to cease and desist from such violations "\* \* \* in connection with the sale of carbonated beverages or powdered beverages \* \* \* ." Respondent has appealed to the Commission on the sole ground that the order to cease and desist is too broad in its coverage in that no evidence of violation was adduced with respect to beverage powders (inadvertently referred to by the examiner as "powdered beverages").

The principal business of respondent is the manufacture of beverage concentrates which are used in the subsequent production of carbonated soft drinks. The concentrates are sold to independent franchised bottlers, who process them into beverages which they in turn

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sell to retailers. In one area of the country, Columbus, Georgia, respondent operates its own bottling plant. This plant, except for the fact that it is owned and operated by the parent company, operates essentially as do the plants owned and operated by respondent's franchised bottlers. The Columbus bottling plant sells carbonated beverages to the retail trade in Columbus, Georgia, Phenix City, Alabama, and the surrounding territory. This is the only area in which the respondent itself sells canned or bottled carbonated beverages directly to the retail trade. All of the violations occurred in connection with the sale of carbonated beverages by the Columbus, Georgia, plant.

The respondent contends, and the record appears to support, that the beverage powder division of respondent's corporation is operated entirely separately from the respondent's other operations, including the operations of the Columbus bottling plant. This division, which respondent refers to as the Bev-Rich Company, is located in a separate building at an entirely different location from the other divisions of respondent corporation. It is separately operated by its own supervisory personnel. The product is distinctly different from the products manufactured in other divisions of the respondent. It is a soft drink powder to which the ultimate consumer adds water to produce a non-carbonated drink. The powder is marketed under a separate trademark, namely, "Bev-Rich". The method of marketing differs distinctly from that employed by respondent's other divisions. Beverage powder is sold only to retailers through food brokers who handle a general variety of food products for other principals. There was no evidence that the respondent had ever discriminated in the payment of advertising allowances to retailers purchasing its beverage powders. As a matter of fact, the only affirmative evidence on the point indicates that they have always been given on proportionally equal terms to all customers.

Under the above circumstances, where the basic violation was performed by a geographically confined operating division of the company, it does not seem appropriate to include within the scope of the order to cease and desist a widely different product marketed in an entirely different manner and on a national basis. Accordingly, the order of the hearing examiner will be modified, limiting its coverage to carbonated beverages.

While not excepted to by either party, the hearing examiner concluded, at page 1960 of his initial decision, that Royal Crown Cola, whether produced by respondent's Columbus bottling plant or by one of its franchised bottlers with concentrates supplied by respondent, is a product "\* \* \*" sold or offered for sale by respondent

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within the intent and meaning of Section 2(d) of the Clayton Act, as amended." We are not certain of the exact meaning of this finding or conclusion, but, at the oral argument, it became apparent that neither counsel considered it as having the effect of making the order to cease and desist applicable to the sales of Royal Crown Cola to retailers by respondent's local franchised bottlers. Such being the case, we do not deem it appropriate to permit the statement to stand, for it may engender confusion and uncertainty as to the scope of the order to cease and desist.

Insofar as the initial decision is not consistent with what we have said here, it will be modified, and, as so modified, adopted as the decision of the Commission.

## FINAL ORDER

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

The Commission, for the reasons stated in the accompanying opinion, having rendered its decision granting said appeal:

*It is ordered*, That the initial decision of the hearing examiner, excepting the last sentence in conclusion number 4 and the proposed order to cease and desist, which are set aside, be, and it hereby is, adopted as the decision of the Commission.

*It is further ordered*, That in lieu of the order to cease and desist contained in the initial decision, the following be, and it hereby is, entered as the order of the Commission:

## ORDER

*It is ordered*, That respondent, Royal Crown Cola Co., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the sale of carbonated beverages in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to or for the benefit of any customer of respondent as compensation or in consideration for any advertising or other services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of respondent's carbonated beverages, unless such payment or consideration is offered and otherwise made available on proportionally equal

THE PAPERCRAFT CORP.

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