

the manner and form in which it has complied with the order to cease and desist.

Commissioner Elman concurring in the result and Commissioner Reilly not participating.

IN THE MATTER OF
THE BORDEN COMPANY

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

Docket 7474. Complaint, Apr. 13, 1959—Decision, Feb. 7, 1964

Order requiring a corporation engaged in purchasing, processing and distributing fluid milk and other dairy products throughout the United States, to cease discriminating in the price of its milk among competing resellers and between purchasers at the same level of trade located in different trade areas, in violation of Sec. 2(a) of the Clayton Act.

COMPLAINT

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

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

PARAGRAPH 1. Respondent named herein is The Borden Company. Respondent is a corporation organized and existing under and by virtue of the laws of the State of New Jersey. Respondent's principal office and place of business is located at 350 Madison Avenue, New York 17, New York.

PAR. 2. Respondent is extensively engaged in the business of purchasing, processing, manufacturing, distributing, and selling fluid milk and other dairy products throughout the United States, and in the District of Columbia. Respondent's net sales for 1957 were \$931,220,662.

PAR. 3. Respondent sells fluid milk and other dairy products of like grade and quality to a large number of purchasers located throughout the United States and in the District of Columbia for use, consumption, or resale therein.

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

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

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

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

All of the matters and things, including the acts, practices, sales, and distribution by respondent of its said fluid milk and other dairy

Complaint

64 F.T.C.

products, as hereinbefore alleged, were performed and done in a constant current of commerce as "commerce" is defined in the Clayton Act.

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

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

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

PAR. 6. In the course and conduct of its business in commerce, respondent has discriminated in price in the sale of fluid milk and other dairy products by selling such products of like grade and quality at different prices to different purchasers at the same level of trade.

Included in, but not limited to, the discriminations in price as above alleged, respondent's distributor in Walkerton, Indiana, was charged by respondent substantially lower prices for respondent's said products than respondent charged its distributors located in Plymouth and La Porte, Indiana, and Niles, Michigan. In South Bend and Valparaiso, Indiana, where respondent's own branches distribute fluid milk and other dairy products to A & P and Kroger Food Stores, and also to independent grocers, there is a systematic discrimination in price by respondent in favor of A & P and Kroger. Respondent has discriminated in price in the sale of its said products to retailers located in Elkhart and Goshen, Indiana, and to retailers located in Sturgis, Michigan, and has discriminated in price between favored retailers located in each of said cities and unfavored retailers located in the other.

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

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

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

(1) Between respondent and its competitors in the processing, manufacture, sale, and distribution of such products.

(2) Between respondent's distributors paying higher prices and competing distributors paying lower prices for respondent's said products.

(3) Between retailers paying higher prices and competing retailers paying lower prices for respondent's said products.

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

Mr. William H. Smith supporting the complaint.

Mr. Stuart S. Ball, Mr. Joseph A. Greaves, Mr. H. Blair White, and Sidley, Austin, Burgess & Smith, Chicago, Ill., for respondent.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

OCTOBER 8, 1962

The Federal Trade Commission issued its complaint against the respondent on April 13, 1959, charging that respondent has violated subsection (a) of Section 2 of the Clayton Act, as amended, by discriminating in price between purchasers located in different areas and between purchasers located in the same areas. Respondent's answer denied the charges and plead certain of the statutory defenses, including the defense that its lower prices were made in good faith to meet equally low prices of competitors.

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

Initial Decision

64 F.T.C.

the entire record herein, makes the following findings of fact, conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

1. Respondent herein is The Borden Company which is a New Jersey corporation with its principal office and place of business located at 350 Madison Avenue, New York 17, New York.

2. Respondent purchases raw milk which it processes into fluid milk and other dairy products which are packaged by respondent and sold to a large number of purchasers located in thirty states of the United States for use, consumption, or resale therein. Respondent owns, maintains, and operates receiving stations, processing and manufacturing plants, and distribution depots located in various states of the United States from which it sells and distributes its said products to purchasers. Its net sales for all products amounted to \$931,220,662 in 1957; \$915,024,172 in 1958; and \$941,326,495 in 1959.

3. Respondent is engaged in interstate commerce in the purchase and sale of milk and other dairy products.

4. Respondent sells its milk and other dairy products to distributors, retailers, and consumers. Distributors who purchase from it resell to retailers and consumers. Some distributors who purchase from respondent act as its agent in making delivery to some of respondent's retailer-customers. Most of respondent's retailer-customers resell to consumers. In the sale of its milk and other dairy products to its various types of customers, respondent is in competition with other sellers of such products. Many of respondent's retailer-customers are in competition with other of its retailer-customers, and in some instances with respondent's distributor-customers.

5. Although the complaint charged price discriminations between purchasers at the same level of trade, including customers in certain named localities, it was agreed between counsel at the close of the presentation of evidence in support of the charges of the complaint that the charges of the complaint relied upon by counsel supporting the complaint are in substance the following: (a) Respondent violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by selling homogenized milk in half-gallon and gallon containers to grocery store customers in different communities at differing prices which had the effect of injuring respondent's competitors in one or more of those communities. The communities involved in this area-price discrimination charge are Dallas, San Antonio and Corpus Christi, Texas; La Union, New Mexico; Texarkana, Arkansas; Vivian, Louisiana; South Bend, Elkhart and Walkerton, Indiana; Sturgis, Michigan; Portsmouth, New Boston

and Ironton, Ohio; and Greenup, King's Addition, South Shore and Russell, Kentucky. Respondent's sales involved in this charge in the above-named communities in Texas, New Mexico, Arkansas, Louisiana, Indiana and Michigan were made during the period January 1, 1957, through September 30, 1959, and in the above-named communities in Ohio and Kentucky were made during the period January 1, 1959, through December 31, 1960; and (b) during January 1, 1959, through December 31, 1960, respondent violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by selling homogenized milk in half-gallon containers to grocery store customers in Portsmouth and New Boston, Ohio, at differing prices which had the effect of injuring respondent's grocery store customers in those communities.

The discriminations considered in this decision are limited to the communities and periods of time specified in this agreement.

6. With respect to the discriminations to purchasers located in Dallas, San Antonio, and Corpus Christi, Texas; La Union, New Mexico; Texarkana, Arkansas; and Vivian, Louisiana, it is only contended by counsel supporting the complaint that the discriminatory low prices in the Dallas, Texas, market adversely affected competition. Since it is not contended that the facts relating to sales in San Antonio and Corpus Christi, Texas; La Union, New Mexico; Texarkana, Arkansas; and Vivian, Louisiana, prove violations of the statute in these areas, as charged in the complaint, it is considered that these sales are not in issue and specific findings of fact regarding these sales are not made.

Discriminations in Dallas, Texas

7. From November 29, 1957, through January 21, 1958, respondent made interstate sales of milk and sold milk which was in interstate commerce at substantially higher prices than it sold milk in Dallas, Texas.

8. Respondent maintained a milk processing plant in Dallas, at which it processed and packaged the milk it sold to store customers in Dallas. This plant processed and sold milk in half-gallon paper cartons during the entire period of January 1957 through September 1959; it did not, however, commence processing and selling milk in gallon jugs until April 26, 1958. The raw milk used by respondent's Dallas plant was produced in Texas, purchased by respondent in Texas, and sold in Texas.

9. Respondent's competitors in the sale of milk to stores in Dallas included Beverly Hills Dairy, Boswell Dairy, Cabell's Inc., Fore-

most Dairies, Inc., Jere Dairy, Inc., Jersey Dairies, Inc., Lamar Creamery, Metzger Dairies, Oak Farms Dairies, Schepps Dairy, Triangle Dairy, and Vandervoort Dairy (herein called Beverly Hills, Boswell, Cabell, Foremost, Jere, Jersey, Lamar, Metzger, Oak Farms, Schepps, Triangle, and Vandervoort).

10. Cabell owned and operated approximately 40 drive-in grocery stores known as Cabell Minit Markets in the Dallas area which sold only Cabell brand milk.

11. Oak Farms owned and operated approximately 80 drive-in grocery stores known as 7-Eleven Stores in the Dallas area which sold only Oak Farms brand milk.

12. Safeway Stores, Incorporated operated 22 to 28 grocery stores in the Dallas area which were supplied fluid milk and related products exclusively by its processing plant in Fort Worth, Texas.

13. Wyatt operated about 22 stores in the Dallas area.

14. During July through November 27, 1957, the prevailing wholesale price for a half gallon of homogenized milk was 44 cents less a 10 percent discount, and the prevailing out-of-store price was 43 cents to 45 cents.

15. During July through November 27, 1957, Beverly Hills and Jere were the only dairies selling milk in gallon jugs. Beverly Hills wholesale price on gallons ranged from 65 cents to 70 cents, and Jere's wholesale price ranged from 64.98 cents to 68.4 cents. In July 1957 the Wyatt stores commenced buying Jere's gallons; Wyatt had been buying Cabell's half gallons for at least six months prior to that time. During July through November 27, 1957, Wyatt stores maintained an out-of-store price of 75 cents for Jere's gallons and 43 cents for Cabell's half gallons. Subsequent to July, Wyatt reduced its purchases of Cabell's half gallons.

16. In September 1957 Cabell ordered the necessary equipment to package milk in gallon jugs, which was installed by November 25. On November 27, Cabell announced that it would commence selling gallons of homogenized milk November 29 and did so at the wholesale price of 59 cents and at the out-of-store price of 69 cents through its Cabell Minit Markets.

17. On November 27, 1957, Oak Farms' 7-Eleven Stores announced a reduction of the out-of-store price of half gallons of homogenized milk. This announcement was reported in a newspaper. The new price, effective November 29, was 38 cents. On November 28, 1957, Jere reduced its wholesale price of gallons of homogenized milk to 59.85 cents. On November 29, 1957, Oak Farms, Metzger, and Foremost reduced the wholesale price of half gallons of homogenized

milk to 32 cents net. As a result of this action other dairies, including respondent and Schepps, made a similar price reduction.

18. Prior to November 29, 1957, respondent had received information indicating that Oak Farms would reduce its wholesale price of homogenized milk in half gallons to 32 cents net. On November 29, 1957, when respondent's wholesale routemen left the Dallas plant between 3:30 a.m. and 6:00 a.m., its wholesale price for a half gallon of homogenized milk was 44 cents less a 10 percent discount. At 5:30 a.m. respondent's routemen commenced telephoning respondent's Dallas plant, advising that Metzger, Oak Farms, and Foremost had reduced their wholesale price of the half gallon to 32 cents net. These reports were based on information the routemen had received from stores and from employees of Metzger, Oak Farms, and Foremost. In some instances the routemen saw sales tickets of these dairies showing sales at this price. Respondent, however, did not reduce its wholesale price to 32 cents net until 8:00 a.m., and in most instances it was unable to inform its wholesale routemen of this change for some time after 8:00 a.m. Respondent made some sales to store customers at the wholesale price of 44 cents less 10 percent on November 29, 1957.

19. The wholesale price lists of Metzger, Oak Farms, and Foremost show that these dairies did reduce their wholesale price to 32 cents net on November 29, 1957, as reported by respondent's wholesale routemen.

20. On November 29, 1957, Jere reduced its wholesale price of homogenized milk in the gallon jug to 54.72 cents. Later that same day Oak Farms announced that effective the following morning its wholesale price of half gallons of homogenized milk would be 30 cents net. Following the Oak Farms announcement, Foremost and Metzger announced the same wholesale price reduction effective November 30, 1957. As a result of the action of Oak Farms, followed by Foremost and Metzger, other dairies, including respondent and Schepps, made a similar price reduction on November 30, 1957.

21. During the afternoon of November 29, 1957, a buyer for a store customer which purchased milk from Oak Farms, Foremost, Metzger, and respondent, advised respondent that Oak Farms had announced that its wholesale price of homogenized milk in the half-gallon paper carton would be 30 cents net on November 30, and later advised respondent that Foremost and Metzger had announced the same wholesale price reduction effective on November 30. Respondent then reduced its wholesale price on this item to 30 cents net effective November 30.

Initial Decision

64 F.T.C.

22. The wholesale price lists of Oak Farms, Foremost, and Metzger show that these dairies did reduce their wholesale price to 30 cents net on November 30, as reported by the buyer for the store customer, and when respondent's wholesale routemen commenced delivery on the morning of November 30, they found that Cabell, Oak Farms, Foremost, and Metzger were charging a wholesale price of 30 cents.

23. On November 30, 1957, the 7-Eleven Stores commenced selling Oak Farms' half gallons at the out-of-store price of 35 cents.

24. On December 2, 1957, Wyatt and at least one other store sold Jere's homogenized milk in the gallon jug at 63 cents, and on the same day Cabell reduced its wholesale price of gallons to 53 cents and reduced Cabell Minit Market's out-of-store price on this item to 63 cents.

25. On December 4, 1957, Oak Farms reduced its wholesale price on a half gallon of homogenized milk to 26 cents net. Schepps, Metzger, Foremost, and Cabell then reduced their wholesale price to 26 cents net. As a result of the action of Oak Farms, followed by Schepps, Metzger, Foremost, and Cabell, other dairies, including respondent, made a similar price reduction.

26. On December 4, 1957, respondent's wholesale routemen commenced making deliveries to store customers at the wholesale price of 30 cents net for homogenized milk in the half-gallon paper carton. At 6:30 a.m. one of the wholesale routemen secured a copy of an Oak Farms' wholesale price list which showed a wholesale price on this item of 26 cents. This Oak Farms wholesale price list was delivered to the manager of respondent's Dallas plant. At 8:00 a.m. other wholesale routemen of respondent commenced telephoning its Dallas plant, advising that Schepps, Metzger, Foremost, Oak Farms, and Cabell had reduced their wholesale price on this item to 26 cents net. These reports by routemen were based on information they received from store customers and employees of Schepps, Metzger, Foremost, Oak Farms, and Cabell. In some instances they saw sales tickets of these dairies showing sales at this price.

27. Respondent, however, did not reduce its wholesale price to 26 cents net until 8:40 a.m. and in most instances it was unable to inform its wholesale routemen of this change for some time after 8:40 a.m. Respondent made some sales to store customers in Dallas at the wholesale price of 30 cents net on December 4, 1957.

28. The wholesale price lists of Oak Farms, Schepps, Metzger, Foremost, and Cabell show that these dairies did reduce their wholesale price to 26 cents net on December 4, 1957, as reported by respondent's wholesale routemen.

29. On December 5, 1957, Jere reduced its wholesale price of homogenized milk in the gallon jug to 46.17 cents, and Cabell reduced its wholesale price on this item to 50 cents. On December 9, 1957, Cabell further reduced its wholesale price to 45 cents. Respondent did not change its wholesale price of homogenized milk during the period December 5 through 16, 1957.

30. On December 17, 1957, respondent, Cabell, and Foremost increased their wholesale prices of homogenized milk in the half-gallon paper carton to 32 cents net. Schepps and Metzger followed on December 18. Oak Farms raised its wholesale price on December 19.

31. On December 19, 1957, Foremost announced that on December 23 it would increase its wholesale price of homogenized milk in the half-gallon paper carton to 36 cents net, which it in fact did on that day. Respondent, Cabell, and Schepps also raised their wholesale prices to 36 cents net on December 23. Oak Farms followed on December 24, and Metzger raised its wholesale price on December 25.

32. On January 20, 1958, Foremost, Oak Farms, and Schepps increased their wholesale prices of homogenized milk in the half-gallon paper carton to 46 cents less a 10 percent discount. Respondent increased its wholesale price on this item to the same level on January 21, 1958.

33. It is concluded and found that respondent has shown that its lower prices in Dallas, Texas, were made in good faith to meet an equally low price of a competitor. Since respondent has established a defense to the charge of price discrimination in this market it appears unnecessary to make further findings regarding this market.

Ohio and Kentucky Communities

34. There is no evidence and it is not contended that discriminations between the communities in Ohio and Kentucky or between any of these communities and any other area may have had an adverse effect on competition in Ohio or Kentucky.

35. The evidence shows price discriminations between competing customers in Portsmouth and New Boston, Ohio, from January 1959 through December 1960. Several of respondent's larger customers received a 12 percent discount from list price. One customer, Schaefer Supermarkets with three stores in Portsmouth, who received a 10 percent discount from January 1959 through March 1960 and a 12 percent discount from April 1960 through December 1960, was shown to compete with other stores who received either no discount, a 5 percent discount, or an 8 percent discount.

36. The evidence shows that milk is a low-profit item in the grocery stores in Portsmouth and carries about a 10 percent gross profit

above list price. One dealer testified that his profit on milk would not cover his overhead, and others testified that their net profit on milk was 1 percent or $\frac{1}{2}$ percent.

37. The milk sold in the stores in Portsmouth and New Boston, Ohio, was produced, processed, and sold in Ohio, and no interstate commerce was involved in the transactions. Under the terms of the agreement limiting contentions of counsel supporting the complaint, referred to in Finding 5, the only discriminations between competitors which are involved in this proceeding are those in Portsmouth and New Boston, Ohio.

38. It is concluded and found that the discriminations in price between competing customers in Portsmouth and New Boston, Ohio, were not made in interstate commerce, did not involve milk which was in interstate commerce, and were not violations of the statute as charged in the complaint.

Discriminations Between South Bend, Walkerton, and Elkhart, Indiana, Sturgis, Michigan, and other areas

39. In the course and conduct of its business in interstate commerce, respondent engaged in area price discrimination in the sale of milk of like grade and quality by selling such milk at different prices to different wholesale purchasers located in South Bend, Walkerton, and Elkhart, Indiana, and in Sturgis, Michigan, as more specifically found hereinbelow.

During the period January 10 through January 16, 1958, respondent sold milk in half-gallon containers to the A & P store at Walkerton, Indiana, for 22.2 cents and to other grocery stores located in South Bend, Indiana for 35 cents.

During the period January 16 through January 23, 1958, respondent sold milk in half-gallon containers to the A & P store at Walkerton, Indiana, for 9.2 cents (which price was substantially below respondent's cost of raw milk) and to other grocery stores in South Bend, Indiana, for 35 cents.

During the period June 26 through June 28, 1958, respondent sold milk in half-gallon containers to the Kroger store at Sturgis, Michigan, for 30 cents to grocery stores in South Bend, Indiana, for 39 cents and to A & P stores at South Bend for 35.1 cents.

During the period June 30 through July 9, 1958, respondent sold milk in its half-gallon containers to the A & P and Kroger stores at Sturgis, Michigan, for 30 cents, to grocery stores in South Bend, Indiana, for 39 cents, and to A & P stores at South Bend for 35.1 cents.

During the period July 16 through July 23, 1958, respondent sold milk in its half-gallon containers to the A & P and Kroger stores at Sturgis, Michigan, for 26.3 cents, to the A & P stores in South Bend at 35.1 cents and 29.6 cents, and to other grocery stores in South Bend for 39 cents.

During the period August 20 through August 22, 1958, respondent sold milk in its half-gallon containers to the A & P and Kroger stores at Sturgis, Michigan, for 32.9 cents, to the A & P stores at South Bend for 24.9 cents, and to other grocery stores at South Bend for 28 cents.

During the period August 22 through September 3, 1958, respondent sold milk in its half-gallon containers to the A & P and Kroger Stores at Sturgis, Michigan, for 32.9 cents, to the A & P stores at Elkhart, Indiana, for 32.3 cents, to the A & P stores at South Bend for 22.2 cents, and to other grocery stores at South Bend for 25 cents.

During all of the times listed in this paragraph respondent's prices of milk from its Hammond, Indiana, plant to some grocery stores in states other than those named were substantially higher than the prices referred to above.

40. Respondent's discriminations in price, as set forth in Finding 39 herein, involved sales made in interstate commerce to customers A & P and Kroger and were sales of milk that was in interstate commerce as more specifically found hereinbelow.

41. The milk sold by respondent and its distributors in South Bend, Walkerton, and Elkhart, Indiana, and in Sturgis, Michigan, was processed at respondent's Hammond, Indiana, plant. Respondent maintains a sales branch at South Bend to which point respondent's milk is transported via tractor-trailer from Hammond and reloaded into refrigerated wholesale trucks. The A & P stores at South Bend, Walkerton, and Elkhart, Indiana, and the A & P and Kroger stores at Sturgis, Michigan, are the customers of respondent. All A & P and other of respondent's customers in the South Bend area are served by respondent's own wholesale trucks. The Walkerton A & P store was served by Quality Dairy acting as respondent's agent. The A & P store at Elkhart was served by M & M Dairy Service, as respondent's agent; and the A & P and Kroger stores at Sturgis, Michigan, were served by respondent's distributor at Niles, Michigan, acting as respondent's agent. All milk loaded on a distributor's or agent's truck destined for A & P and Kroger stores remained the property of respondent until delivered to the A & P and Kroger stores. Distributors haul milk on contract with respondent which is

to be delivered to A & P and Kroger stores and are compensated by respondent for this service.

42. A & P and Kroger stores to which respondent's milk is delivered by respondent's own wholesale trucks and by its agent-distributors do not pay for respondent's milk and milk products delivered to them. Bills are computed weekly by respondent's Hammond office and sent to A & P and Kroger headquarters for payment. Milk products delivered to all A & P stores located in South Bend, Walkerton, and Elkhart, Indiana, are billed weekly by respondent's Hammond, Indiana, plant to the A & P central office in Chicago, Illinois, for payment. Statements for milk products delivered by respondent to the A & P store in Sturgis, Michigan, are sent by respondent's Hammond, Indiana, plant to the A & P office at Grand Rapids, Michigan, and to Toledo, Ohio, for payment. All bills for a store that is within the jurisdiction of the A & P office are sent to that A & P office on a central billing arrangement. Since no negotiations or sales contracts, whether relating to price or otherwise were made with individual A & P and Kroger stores, the conclusion is impelled that all sales arrangements with both A & P and Kroger were made by respondent with out-of-state sales offices of the A & P and Kroger organizations; and, therefore, such sales and purchases were in interstate commerce.

43. Respondent's central division headquarters in Chicago, Illinois, has jurisdiction over all of respondent's milk processing and distribution facilities located in the States of Wisconsin, Iowa, Indiana, Illinois, and Michigan. Respondent's Hammond, Indiana, processing plant receives daily about 40 percent of its raw milk requirements from the Pure Milk Assn. in Chicago, Illinois, which is processed daily, five days a week, and then loaded into trucks for delivery. During January 1958 respondent's Hammond, Indiana, plant caused a substantial amount of raw milk to be transported to it from Pontiac, Illinois.

Effect of Discriminations in Indiana and Michigan

44. The primary question for determination is the effect of respondent's discriminations in these communities in Indiana and Michigan. Were the circumstances such as to make it reasonably likely that competition would be lessened or injured by such discriminations? The statute declares discriminations to be unlawful which may adversely affect competition in a substantial manner and does not require proof that competition has actually been lessened or injured as a result of the discriminations. Respondent contends that the evidence does not show injury to competition and that at most

the evidence of loss of sales and loss of profit by certain competitors in these communities shows only an effect upon competitors.

The record shows that a few of respondent's competitors lost volume of business and lost profits during the periods of respondent's price cuts. It also shows that factors other than respondent's prices contributed to these losses, but it is concluded that respondent's prices contributed in a material way to these losses.

It is not essential that intent of a discriminator be shown, but, as the court said in *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F. 2d, "a predatory intent might tend to render injury probable." The most drastic price cut shown here was in Walkerton where respondent's price was cut to 9.2 cents and 10 cents per half gallon, of which 7 cents was paid to its distributor-agent. It is apparent that respondent was willing and able to get business regardless of its losses.

It is correct that the record only shows effects on certain competitors, but in each of these communities there were only a few and an effect on even one competitor would be reflected in the strength of competition generally.

45. The discriminations found above were not of long duration, and respondent contends that sporadic discriminations of short duration do not have the potential for causing adverse effects on competition and points out that in most of the litigated primary line cases in which adverse effects were found there were prolonged periods of discrimination. It is true that prolonged discriminations produce results that can be more readily ascertained, however, it is not essential that the evidence show actual effects of discriminations but merely that circumstances be shown from which it can be reasonably concluded that a continuance of the discriminations would be likely to lessen competition. Any other construction of the statute renders meaningless the phrase "may be" in the effects clause of the statute. If it can be said that it is unlikely that discriminations will be repeated, then past, occasional discriminations may not be a threat to competition, but when they are resorted to from time to time to suit the purposes of a seller, their continued use, even intermittently, does constitute a danger to competition. Since the function of the Federal Trade Commission is to prevent future uses of discriminations which may lessen competition, it seems appropriate that discriminations which, by their nature and amount, weaken the competitive strength of local dairies should be prohibited. If the law were otherwise a seller, such as this respondent, marketing over large areas could punish local competitors at intervals and gradually reduce their resources until these competitors disappear from the local markets. Counsel supporting the complaint contends that the

Initial Decision

64 F.T.C.

diversion of business to the retail stores, occasioned by respondent's low prices, from dairies selling and delivering to the homes of consumers should also be considered. Respondent, however, avers that since it had no retail routes in these localities it did not compete for this business and the loss of such business by its competitors who were so engaged cannot be attributed to its lower prices. Respondent further contends that even if it be true that sales were diverted from home delivery by lower prices in the stores that this is a condition caused by a series of price cuts by many dairies and cannot be attributed to respondent. It is correct that this diversion in these communities cannot be attributed solely to respondent's prices, but respondent's prices were responsible for some material, although unmeasurable, portion. The effect of respondent's prices upon this diversion was especially evident in Walkerton. The demand for milk is relatively inelastic yet during the week of the low prices in Walkerton respondent's volume increased from 2,000 half gallons to 11,000 half gallons.

It is believed that low prices of respondent in these communities did have or may have the effect of diverting business from those competitors which were also engaged in retail delivery and that such diversion had or may have substantial effect upon the ability of those competitors to continue to compete with respondent.

46. It is concluded that the effect of respondent's discriminations in price between different wholesale purchasers located in different areas of the States of Indiana and Michigan, as set forth herein, have been or may be substantially to lessen competition and to injure, destroy, and prevent competition between respondent and its competitors.

Meeting Competition Defense
in Indiana and Michigan

47. Respondent contends that it has established the statutory defense of meeting competition in South Bend, Elkhart, and Walkerton, Indiana, and in Sturgis, Michigan.

Respondent has shown that there were many price reductions by competitors in South Bend during the times in question. It has not shown that any of these competitors offered to sell at these reduced prices or at any price to any of its customers. On at least one occasion respondent's price to one customer was lower than any price of any competitor to any customer.

Respondent has shown that some of its competitors reduced prices to their customers in Elkhart, Indiana, at or about the same times respondent reduced its prices to its one customer in Elkhart, but it has not shown that any competitor offered to sell to respondent's cus-

tomer. On at least one occasion respondent's price was lower than any price of any competitor.

In Sturgis, Michigan, there had been some price reductions by retailers prior to respondent's entry into the market, but after this entry there were occasions when respondent's price to its customer was below any of the prices of its competitors.

In Walkerton, Indiana, which has a population of 2,500 and four grocery stores, respondent, during the week of January 16-23, 1958, sold to its customer at 9.2 cents per half gallon which was far below its cost of raw milk, and required its distributor to resell to other stores in Walkerton at 10 cents per half gallon. Respondent's cost of delivery of this milk amounted to 7 cents for each half gallon which respondent paid Quality Dairy who was its agent in delivering to respondent's customer at the 9.2 cent price and who sold for its own account at the 10 cent price. This unusually low price was caused, at least in part, by an offer of respondent's customer's competitor to sell half gallons of milk for 10 cents with each \$5 purchase of groceries by the consumer. This price by respondent enabled its customer to sell milk at an out-of-store price of 10 cents to all consumers, which price was not comparable to the offer of this customer's competitor to sell milk as a premium. There is no showing that respondent's competitors offered any comparable price to any of their customers or that any competitor offered to sell to respondent's customer at any price.

48. Because of the foregoing facts it is concluded that respondent has failed to establish that the price discriminations herein found in South Bend, Elkhart, and Walkerton, Indiana, and in Sturgis, Michigan, were made in good faith to meet an equally low price of a competitor.

CONCLUSIONS

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

The aforesaid acts and practices of the respondent of granting price discriminations in Indiana and Michigan, as herein found, constituted violations of subsection (a) of Section 2 of the Clayton Act.

ORDER

It is ordered, That respondent, The Borden Company, a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the sale or distribution of milk in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discrimin-

Opinion

64 F.T.C.

ating, directly or indirectly, in the price of milk of like grade and quality, by selling milk to any purchaser at a price which is lower than the price charged any other purchaser engaged in the same level of trade; provided, however, that the foregoing shall not be construed to prevent respondent from defending any alleged violation of this order by establishing any of the statutory defenses contained in Section 2 of the Clayton Act.

OPINION

FEBRUARY 7, 1964

By Dixon, *Commissioner*:

The complaint in this matter charges respondent, The Borden Company, with discriminating in price in its sale of fluid milk and other dairy products, in violation of Section 2(a) of the Clayton Act, as amended. It is alleged that respondent sells to distributors, retailers and consumers and that its price discriminations between purchasers at the same level of trade in different communities resulted in injury to competition between respondent and its competitors. The complaint further charges that respondent's price discriminations between distributors and retailers, respectively, in the same community, resulted in injury to competition between the favored and unfavored purchasers at the same level of trade.

At the close of the case-in-chief in support of the complaint, counsel entered into an agreement¹ (hereinafter referred to as a specification of charges) wherein it is recited that as a result of respondent's informal request, counsel advised the hearing examiner that in order to avoid unnecessary extension of the record, and to serve as a guide to the further presentation of the case, they would attempt to clarify the issues raised by the charges in the complaint in light of the evidence received during the presentation of the case in chief. After a series of informal conferences, complaint counsel specified the charges in the complaint upon which he relies to establish a violation. These charges, as set forth in the initial decision, are as follows:

* * * (a) Respondent violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by selling homogenized milk in half gallon and gallon containers to grocery store customers in different communities at differing prices which had the effect of injuring respondent's competitors in one or more of those communities. The communities involved in this area-price discrimination charge are Dallas, San Antonio and Corpus Christi, Texas; La Union, New Mexico; Texarkana, Arkansas; Vivian, Louisiana; South Bend, Elkhart and Walkerton, Indiana; Sturgis, Michigan; Portsmouth, New Boston and Ironton, Ohio; and Greenup, King's Addition, South Shore and Russell,

¹ "Specification Of The Charges Relied On By Counsel Supporting The Complaint," RX 702.

Kentucky. Respondent's sales involved in this charge in the above-named communities in Texas, New Mexico, Arkansas, Louisiana, Indiana and Michigan were made during the period January 1, 1957, through September 30, 1959, and in the above-named communities in Ohio and Kentucky were made during the period January 1, 1959, through December 31, 1960; and (b) during January 1, 1959, through December 31, 1960, respondent violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by selling homogenized milk in half-gallon containers to grocery store customers in Portsmouth and New Boston, Ohio, at differing prices which had the effect of injuring respondent's grocery store customers in those communities.

The hearing examiner in his initial decision limited his consideration of respondent's pricing practices to the communities and periods of time specified by counsel. However, with the exception of Dallas, Texas, he made no findings of fact as to discriminations in the communities in the States of Texas, New Mexico, Arkansas and Louisiana on the grounds that sales in these areas were not in issue since there was no contention by complaint counsel that respondent's pricing practices in those areas adversely affected competition. Although finding that respondent sold milk at lower prices in Dallas than in other areas, the examiner further found that these lower prices were made in good faith to meet an equally low price of a competitor. Having found that respondent had sustained its burden of proof under Section 2(b),² the examiner concluded that the lower Dallas prices did not violate Section 2(a). Counsel supporting the complaint has not appealed from these findings.

As to Portsmouth and New Boston, Ohio, the examiner found that respondent had discriminated in price between competing grocery store customers. However, he found that the milk sold by respondent to stores in these Ohio communities was produced, processed and sold in Ohio. He concluded that the sales in these communities were not made in interstate commerce and therefore a violation of Section 2(a) had not been established.

The examiner further found that respondent had engaged in area price discrimination by selling milk at different prices to grocery store customers located in the areas of South Bend, Walkerton and Elkhart, Indiana, and in Sturgis, Michigan. He held that the purchases involved in these discriminations were in commerce and that the probable effect of the discriminations was to substantially lessen competition between respondent and its competitors in these areas.

² Section 2(b) of the Clayton Act, as amended, provides, in part, "That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

He further ruled that respondent had failed to establish the Section 2(b) defense as to these discriminations and issued his order requiring respondent to cease this pricing practice.

The case is before us on a cross-appeals. Complaint counsel has limited his appeal to the examiner's dismissal of the charge that respondent's differing prices to competing grocery store customers in Portsmouth and New Boston, Ohio, violated Section 2(a). Respondent has appealed from the examiner's ruling sustaining the charges of area price discriminations in Indiana and Michigan.

We turn first to a consideration of the appeal of counsel supporting the complaint from the examiner's holding that the alleged discriminations between respondent's competing grocery store customers in the adjoining communities of Portsmouth and New Boston, Ohio, were not made in interstate commerce. At the outset, it is to be noted that complaint counsel does not take issue with the examiner's finding that milk which is sold by respondent to grocery stores physically located in these communities is produced in Ohio and is processed in and delivered from respondent's Portsmouth plant.

The facts upon which complaint counsel rests his argument are as follows. Schaefer Supermarkets, a chain store organization, has three stores located in Portsmouth and one in Jackson, Ohio, served by Borden's Portsmouth plant. In addition, this chain has one store in Hillsboro and one in Ironton, both communities located in Ohio. There is testimony that both of these latter stores handle "Borden products." However, the evidence further establishes that one of these two stores, not identified, sells Borden milk and ice cream while the other handles only Borden ice cream, a product not covered in complaint counsel's agreed specification of charges. With further reference to the Schaefer stores in Ironton and Hillsboro, there is testimony that one of these stores is served by Borden's Huntington, West Virginia, plant.

Respondent concedes that Schaefer Supermarkets was granted a discount ranging from 10% to 12% from the prices established and published by the Borden Portsmouth plant for sales to grocery store customers from that plant. This discount applied to all six Schaefer stores and was higher than the discounts granted by respondent to its other grocery store customers in Portsmouth and New Boston.

The specification of charges relied upon by complaint counsel provides, in part, that "Respondent discriminated in price in its sales to grocery store customers in Portsmouth, Ohio, and New Boston, Ohio, by its Portsmouth, Ohio, plant as between such grocery store customers." It is complaint counsel's contention that the examiner erred in restricting his findings to the three Schaefer stores located in Portsmouth. He argues that Schaefer Supermarkets, as an or-

ganization embracing all six stores, is a grocery store customer within the meaning of the specified charge. Moreover, it is his contention that the evidence supports a finding that a sales agreement was entered into between the Schaefer representative in Portsmouth and the manager of Borden's Portsmouth plant which established the prices to be paid for milk by all six Schaefer stores. It is his position that the sales agreement "insofar as it involved the transportation of respondent's products from Huntington, West Virginia, to the Schaefer store at Ironton or Jackson, Ohio, were sales to a grocery store customer in Portsmouth, Ohio, made in the course of interstate commerce."³

Complaint counsel's argument fails for several reasons. Although the Schaefer representative testified unqualifiedly that Schaefer dealt directly with respondent's Portsmouth plant with respect to "discounts or prices," he denied on cross examination that Schaefer dealt with respondent's Portsmouth plant with respect to prices paid at Hillsboro and Ironton. This is the only witness who testified as to prices and discounts applicable to the Schaefer stores. The over-all effect of his testimony does not support the finding urged by complaint counsel that a sales agreement with the Schaefer store served by respondent's West Virginia plant was negotiated by the Portsmouth plant. Moreover, although the record contains Borden's Portsmouth plant milk price lists for sales to its grocery store customers, there is no evidence as to prices charged grocery store customers by the Huntington, West Virginia, plant. Thus, even assuming that the Schaefer store in Hillsboro or Ironton obtained milk from the Huntington plant, a fact which is not clearly established, the net price paid by that store is unknown.

Under the circumstances, complaint counsel's argument must be rejected. We find, however, that the examiner was in error in ruling that Borden's sales from its Portsmouth, Ohio, plant were not in interstate commerce within the meaning of Section 2(a).

Although concluding that the varying prices charged different competing retail store customers in the adjoining Portsmouth and New Boston, Ohio, communities did not constitute a violation of the statute for the reason that the product involved was not shipped across state lines, the examiner made certain findings which are sufficient to establish probable injury to certain of respondent's grocery store customers in these communities as a result of such price differences. The examiner's findings, however, relate to discounts granted

³ Appeal brief of counsel supporting the complaint, p. 5.

to only one of Borden's customers in Portsmouth, Schaefer Supermarkets, and do not reflect the full extent of respondent's discriminatory pricing between competing customers in this area.

Borden's Portsmouth plant publishes price lists which specify the prices at which it sells its products to grocery store customers. These prices are designated as "wholesale" prices and will hereinafter be referred to in that manner. Each time there is a price change, Borden issues a new price list. The record contains the price lists issued by the Portsmouth plant for the years 1959 and 1960, the period covered by the specification of charges. These price lists disclose that during the two-year period, the wholesale price of Borden's homogenized milk in half-gallon quantities ranged from 42 cents to 46 cents.

Four of Borden's largest wholesale customers in Portsmouth are chain store organizations. They are Schaefer Supermarkets, the A & P Tea Company, the Kroger Company and Albers Super Market. The Portsmouth plant serves three Schaefer stores, two Kroger stores, one A & P store and one Albers store, all located in Portsmouth. With the exception of Schaefer's, each of these stores was granted a 12% discount from respondent's list prices on its purchases of fluid milk for the years 1959 and 1960. The three Schaefer stores received a 10% discount from January 1959 through March 1960. This discount was increased to 12% from April through December, 1960.

Applying the discount granted to these chain store customers to Borden's published wholesale prices, it can be seen that these stores purchased Borden milk in half-gallon quantities at about five cents less than the wholesale price, or at prices ranging from about 37 cents to 41 cents per half gallon.

Six owners of local, independent grocery stores located in Portsmouth, testified in support of the complaint. The stores of several of these witnesses are within two or three blocks of a Schaefer store and all six named Schaefer as a competitor. One of these owners who paid Borden's full wholesale prices in this two-year period, specifically named the four favored chain store customers as his competitors. In our view, this latter testimony accurately reflects the competitive situation and we conclude that all grocery stores selling in the Portsmouth city limits are in competition.⁴

Four of the six independent owners received a 5% discount, amounting to about two cents per half gallon, on their purchases of

⁴ A representative of the Schaefer stores testified to that effect (Tr. 1124). A dealer receiving only a 5% discount from Borden stated that people "don't pay much attention to distance" and that people coming into his store tell him what the Albers stores, which, together with Kroger is located about ½ mile away, are charging (Tr. 1175).

Borden milk. Thus the price they paid for Borden milk in half-gallon quantities during this period ranged from 40 cents to 44 cents. The remaining two owners received no discount.

The testimony of these six witnesses establishes that milk carries about a 10% gross profit margin above list price. Therefore, the gross amount which these owners realized on the sale at retail of a half gallon of Borden milk averaged only a little more than four cents.

Two nonfavored purchasers testified that their net profit on milk was about 1½% which amounts to less than one-half cent per half gallon. In commenting on the importance of a discount, one non-favored customer stated that without a discount milk was not a profitable item and that the 5% discount from Borden's wholesale price which he began receiving in September 1959 "puts me just about out to my overhead level."⁵ Another testified that there isn't any profit in the sale of milk at retail and that in fact he sells it at a loss "if you figure refrigeration, the produce rack, what it costs to start with."⁶ Another grocery store owner who received a 5% discount on his purchase of Borden milk stated, in answer to a question as to whether there would be any competitive advantage to an additional 5% discount:

As I told you, we net one and a half percent; and if you got five percent discount on everything, that would increase your net automatically five percent if you sold at a regular going price. And it would be reflected in your selling price, which you could put into your net or you could put into advertising or various other expense items.⁷

In this market characterized by such low profit margins on milk, the retail price at which the favored chain store customers receiving the 12% discount regularly sold milk to the public was two cents less per half gallon than the retail price of Borden's other grocery store customers. The competitive advantage thus accruing as a result of this discriminatory discount is vividly reflected in the testimony of one of Borden's grocery store customers who receives no discount when, in answer to a question as to whether he competes with any of the chain stores, stated "No, we don't—we couldn't, don't try to." A store in the Schaefer chain receiving the 12% discount is located just two blocks from this owner. Upon further questioning, this owner stated that he is in competition in the sense that Schaefer is selling the same merchandise in the same area. We think it clear that the purport of this owner's testimony is that Borden's discriminatory

⁵ William A. Wedebrook, Tr. 1153.

⁶ Louis De Lotell, Tr. 1160.

⁷ Glenwood Sparks, Tr. 1100.

discount effectively prevented him from competing with the favored customer in the sale of milk.

The testimony of the non-favored grocery store owners establishes that although milk is not regarded as a profitable item, it is an item which they must carry to remain in business. Moreover, three of these owners testified to the effect that it was necessary for them to carry *Borden* milk since their customers were used to it.

The evidence in this record establishes that for at least two years, the period of time covered by the specification of charges, respondent had continuously discriminated in price in its sale of milk to competing grocery store customers in Portsmouth. The unfavored purchasers operated on extremely small profit margins and price differentials of small amounts were important to their business. The discriminatory discounts granted by respondent to the favored chain store customers exceeded the gross profit margin of competing customers who received no discounts. Moreover, the price differences resulting from the substantial disparity in discounts granted by respondent enabled the favored purchasers to undersell their less favored competitors by an amount which represented about half of their gross profit margin. In at least one instance, this price difference effectively prevented competition between a favored and an unfavored purchaser. We find on these facts that the reasonable probability of a substantial adverse effect on competition required by Section 2(a) has been clearly established.⁸ Of particular significance with respect to the difference in retail prices resulting from the discriminatory discounts is the holding of the Supreme Court in the *Morton Salt* case.⁹ In that case, respondent sold its table salt to wholesalers and large retailers under a quantity discount system. The price difference as between carload and less than carload purchasers was ten cents per case. In answer to respondent's argument that the evidence was inadequate to support the Commission's findings of injury to competition, the Court stated:

That respondent's quantity discounts did result in price differentials between competing purchasers sufficient to influence their resale price of salt was shown by evidence. This showing in itself is adequate to support the Commission's appropriate findings that the effect of such price discriminations "may be substantially to lessen competition * * * and to injure, destroy and prevent competition." *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 47 (1948).

In the view we hold, these price discriminations are those of the corporate respondent, The Borden Company, in the course of its

⁸ *E. Edelmann & Co. v. Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956); *Mueller Co. v. Federal Trade Commission*, 323 F. 2d 44 (7th Cir. 1963).

⁹ *Federal Trade Commission v. Morton Salt Co.* 334 U.S. 37 (1948).

interstate business in the sale of fluid milk. To require a showing of product movement across a state line to reach this respondent, as did the hearing examiner, evidences a technical approach to the jurisdictional requirements of Section 2(a) which ignores realities. It adds a jurisdictional requirement not provided by the statute which defines "commerce" simply as meaning "trade or commerce among the several states and with foreign nations * * *." In our opinion, sales by the Portsmouth plant as well as all other plants of The Borden Company come within the scope of this commerce requirement of the statute without regard to the question of whether or not milk processed in one of its local plants was shipped from one state to another. We turn, therefore, to a consideration of respondent's business activities as reflected in this record.

As found by the examiner, respondent is a New Jersey corporation, with its principal office located in New York City. It purchases raw milk which it processes into fluid milk and other dairy products which it sells to distributors, some of whom act as its agents in making deliveries, and to retailers and consumers. Its net sales for all products amounted to \$931,220,662 in 1957; \$915,024,172 in 1958; and \$941,326,495 in 1959.

The present business organization of respondent company took place pursuant to a resolution of its board of directors in 1935. Thereunder, the president created supervisory units, referred to as districts, in various States. As of 1957-1958 nine such districts were in existence, the offices of which were strategically located throughout the country in the following cities: San Francisco, California, Chicago, Illinois, New York City, Tampa, Florida, Columbus, Ohio, Newark, New Jersey, Troy, New York, High Point, North Carolina, and Houston, Texas. Fluid milk processing or distribution points were located in twenty-nine States and in metropolitan New York City.

Some of the details of the operation of this interstate complex are stipulated in this record.¹⁰ In summary, the chairman of each district reports to a vice president of the company who is located in the principal office in New York City. This vice president acts as liaison between the district chairmen and the president of the company. He counsels with the chairmen concerning policy problems and advises the president concerning the developments and progress of the various districts.

As further recited in the stipulation, the basic policy underlying Borden's operation of its fluid milk business is that "its management

¹⁰ CX 220.

must be as decentralized as possible, leaving to each Chairman primary responsibility for the conduct of the business in his District. This includes matters pertaining to the day by day operations of the business, *i.e.* prices, products, production, distribution, employment, labor costs and the like." In this regard, it is stipulated that district chairmen delegate broad managerial responsibility to managers in charge of processing and distributing locations, including primary responsibility for prices, although "District offices have participated in negotiations concerning discounts for certain customers."

Each district pays its own operating expenses and is expected to make a profit and cover its expenses by its sales. Capital budgets, covering needs for new equipment, replacement of equipment and building improvements, are prepared by district offices and must be approved by the home office. Moreover, it is stipulated that "The manner in which District bank accounts and funds are handled is decided by the respective District offices. * * * The Districts make their own collections and make their deposits and disburse their funds. Each District has adopted and is following those procedures considered appropriate to most effectively utilize the funds which are required by them for their Districts operation. Funds in excess of the amount necessary for the operation of the Districts are transferred to the New York Office of the Company."

Respondent's position is, in effect, that its Portsmouth plant was merely one of several wholly local competitors engaged, with somewhat similar odds, in a purely intrastate struggle for market.

In determining the validity of this argument, we first consider the characteristics of a purely local transaction. Necessarily, they include supreme authority and responsibility of the plant manager (in his name or in the name of the stockholders of that particular plant) for decisions relevant to pricing and distribution of the product in question; the use of a wholly local war chest and advertising account, rather than the use of interstate resources for those purposes; the purveying of products under brand names of local derivation rather than products linked through a nationally known brand name to a giant interstate organization; and, perhaps, an element of risk connected with the survival of that plant in its competitive arena.

But the operations of Borden's Portsmouth plant do not include any of those characteristics. On the contrary, the Portsmouth plant manager, Mr. Dickson, is accountable to district and national officers of The Borden Company in his pricing decisions. From Mr. Dickson's testimony, we observe his superior, the sales manager of Borden's Midwest district—comprising part or all of eight States—ne-

gotiating between Dickson and the favored customers,¹¹ carrying with him the full weight and reputation of The Borden Company itself. Indeed, the inference is clear that discounts received by two national chains, A & P and Kroger, were determined on the basis of over-all interstate business operations of Borden's Midwest district. In our view, Mr. Dickson's negotiations were "autonomous" only to the extent that they coincided with policies arrived at in Borden's national and district offices, and transmitted through their district representative.

We see throughout the record an established practice in Borden's nationwide operations of reassignment from plant to plant and state to state of plant supervisory personnel.¹² Thus was the interstate homogeneity of Borden's practices and policies reinforced, and the integral relationship of the various Borden plants to the national office maintained. The Portsmouth plant could not have escaped this homogenizing influence; one can hardly imagine Mr. Dickson retaining his appointment very long, had he traveled a different road from that of the Borden central office, and the other Borden plant managers.

We find in Borden's Portsmouth operations a well-established practice of selling concurrently under the same label milk and related milk products—many of which, such as cottage cheese and butter, customarily were produced and transported in a vast interstate network—such that the latter supplemented and enhanced the sales of the former.¹³ Such distribution of nationally known brand name milk products would be especially valuable in helping to subsidize large price concessions for milk, as would be necessary in order to undercut and drive out competition from truly local milk producers.

The Portsmouth plant distributed products under nationally advertised brand names, such as "Borden" and "Elsie,"¹⁴ for which advertising expenses were covered in whole or in part by district or national treasury. Throughout the two-year period of the price discriminations involved in this case, the Portsmouth plant distributed some of its milk across State lines into Kentucky—where, inciden-

¹¹ Mr. Dickson's reply concerning negotiations resulting in the 12% discount granted A & P indicate his minimal role:

"Q. You yourself took part in arriving at this discount which was allowed A and P on its fluid milk purchases; is that correct?

"A. To some extent."

¹² For example, the General Manager of the San Antonio plant was previously assigned to Borden plants in Corpus Christi, Oklahoma City, Biloxi, Waco, and Baton Rouge. Tr. 302. The Assistant General Manager of the Hammond, Indiana, plant was previously assigned to a Borden plant in Danville, Illinois, and before that in Hammond. Tr. 607.

¹³ For example, cottage cheese produced in Chicago and butter produced in Iowa moved into plants located in other states within the Midwest district, which also supervised the Portsmouth plant. Tr. 610.

¹⁴ Tr. 1016.

tally, prices remained higher than those paid by the plant's favored customers in Ohio,¹⁵ thus adding to the treasury of profits from six other States which enabled Mr. Dickson and his district manager to grant the especially large discounts (on an already low-profit item) in favor of certain large chains and in prejudice of less powerful customers.

Finally, the Portsmouth plant was in a position of financial security far superior to the resources of the plant itself, capable of drawing upon the interstate credits of The Borden Company to sustain itself over a period of loss sufficient to break strictly local competition.

None of these elements of commerce would have been available, over the sustained period of the Portsmouth plant's discounts, to a truly autonomous operation, one independent of an interstate network. It was *because* of, not in spite of, the Portsmouth plant's filial relationship to the family of Borden establishments that Mr. Dickson and his district supervisor were able to negotiate on an interstate basis with A & P and Kroger, and it was because of this relationship that the plant was able to underwrite the exceptional concessions advanced to their five favored customers in order to gain advantage in those chains.

But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies, are kept high while the local prices are lowered. * * * The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. The profits made in interstate activities would underwrite the losses of local price-cutting campaigns. *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 119 (1954).

This is the way price wars are fought nowadays. This is how a company, through one of its plants, gains leverage with large and powerful chain stores such as A & P and Kroger. This is how concentration is built. We find here precisely the sort of commercial warfare which the Supreme Court condemned in the *Moore* case.

It is precisely this sort of commercial warfare which, indeed, the Robinson-Patman Act was designed to prevent. When that Bill was before the House, its intended prohibition against the very sort of price discrimination which this case now brings before us was described by its floor manager, Representative Utterback:

Where, however, a manufacturer sells to customers both within the State and beyond the State, he may not favor either to the disadvantage of the other;

¹⁵ CX 210-213.

he may not use the privilege of interstate commerce to the injury of his local trade, nor may he favor his local trade to the injury of his interstate trade. The Federal power to regulate interstate commerce is the power both to limit its employment to the injury of business within the State, and to protect interstate commerce itself from injury by influences within the State. 80 *Cong. Rec.* 9417.

Respondent's apparent belief that the Portsmouth plant ought not be considered an integral part of a vast interstate system of distribution responsible ultimately to one central office, management, and group of stockholders, simply because one of the products it delivers to five of its many customers was not delivered to them across state lines is entirely unrealistic, based upon a technical interpretation—or misinterpretation—out of phase with the realities of modern enterprise.

The courts have indicated that the words "in commerce" should not be so limited by construction as to defeat the purpose of Congress, but should be interpreted in a manner consistent with their practical meaning and effect in the particular situation.¹⁶ In our opinion, respondent would indeed defeat the purpose of Congress with its apparent view that an establishment of an interstate corporation which is horizontally integrated somehow accumulates thereby a degree of independence further than or different from that possessed by an establishment of an interstate corporation which is vertically integrated. The fact is that neither structure of integration necessarily achieves greater autonomy for its units than the other. The choice of structure is largely a function of the type of product handled, rather than the degree of independence desired.

Where the cost of transporting raw materials is a significant element of finished product cost, and especially where perishability is a considerable factor, food processors often find horizontal integration—i.e., widely spread, small, full processing plants servicing relatively confined areas—to be the most economical means of production and distribution. Such a system requires somewhat greater responsibility on the part of the unit managers, in view of the wider range of production functions and of local considerations involved. But this does not imply any greater detachment of such an operating unit from the parent corporation.

¹⁶ "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business * * *." *Swift and Co. v. United States*, 196 U.S. 375 (1905).

As far back as 1824, Chief Justice Marshall, in rejecting an argument that commerce is limited to "buying and selling or the interchange of commodities" stated: "Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *Gibbons v. Ogden*, 22 U.S. 1 (1824).

Cf. Federal Trade Commission v. Cement Institute, 333 U.S. 683, 696 (1948).

When The Borden Company decided in 1935 to process and distribute milk on a decentralized basis, it did so out of the necessities imposed by the nature of the product upon managerial flexibility and efficiency and the means of achieving it. To do otherwise in such a product situation would be to foreclose the possibility of a giant multistate enterprise in the field of milk processing. Obviously, however, the company did not intend thereby to delegate essential attributes of control, finance, policy, and product identification. On the contrary, since that time each individual plant has striven alongside the others and alongside the head office to create in the public mind an image of one particular group of products, traveling under a nationally promoted brand name; products which, as far as members of the public are concerned, look the same and taste the same in Wampum, Pennsylvania, and Eureka, California, as they do in Portsmouth, Ohio. Together they have sought and they have succeeded in achieving an identity between the Borden products, distributed coast to coast, and each plant of the Borden matrix which produces them. These are not the products of each individual plant, but the products of the entire enterprise.

To become preoccupied with the physical aspects of a single series of transactions within such a large and powerful organization as The Borden Company is to miss the point entirely.¹⁷ Recognition of the economic characteristics of the large, modern enterprise requires reorientation of our views concerning the commerce question. The attributes of the modern corporation are imparted to the products sold by it. In modern markets a product may become inseparable from the firm producing it.

As we have already seen, The Borden Company's organizational structure is similar to that of many large, multistate enterprises. Decentralization of decision making authority may be an imperative of successful large-scale business. To do otherwise is to invite managerial inflexibility and inefficiency. But such decentralization does not change the fundamental fact that ultimate decision making authority rests with top management, that decisions of particular units must conform or be consistent with the broad policy objectives of central management, that a particular unit's financial, managerial, technological, advertising, and other merchandising activities and capabilities are expanded or constrained by its affiliation with an organization composed of a large number of units. Simply put, each product sold by such a company takes on added market dimensions

¹⁷ "In short, a nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce." *United States v. Southeastern Underwriters Assn.*, 322 U.S. 533 (1944).

because it is an integral part of the whole company. As a result, products sold by the large concern are truly products of the entire enterprise, not just the product of each local plant which happens to manufacture and distribute it. These economic characteristics of the large, modern, multistate corporation make archaic reliance on purely physical concepts when determining whether a product is in commerce. A product is in commerce when the forces establishing its price structure or distributional policy cross state lines. Since it is impossible to divorce The Borden Company and its products, if The Borden Company is in commerce so must be all of its products. Recognizing these facts of modern economic life makes it unrealistic to rely on a purely physical conception of commerce.

Applying these principles to the facts before us, we hold that sales of fluid milk by the Portsmouth plant to competing grocery store customers in Portsmouth were sales by The Borden Company in interstate commerce within the meaning of Section 2(a) of the Clayton Act, as amended. Accordingly, the hearing examiner's ruling on this issue will be set aside. Our order will prohibit respondent from the future use of discriminatory pricing practices in its sales to competing purchasers.

In reaching this decision, we are not unmindful of the decision by the court of appeals in the *Willard Dairy* case.¹⁸ However, from a close scrutiny of the court's opinion in that case, we find no indication that the court in reaching its decision had before it such information as is present in this record, including, among other things, the details of the organizational structure of the corporate respondent and the fact that the discriminatory discounts were not the result of independent action by the manager of a local plant but were determined through negotiations with the chairman of an eight state region who had primary responsibility for pricing.¹⁹

¹⁸ *Willard Dairy Corp. v. National Dairy Products Corp.*, 309 F. 2d 943 (6th Cir. 1962), cert. denied, 373 U.S. 934. In this case, petitioner with a local plant in Ohio sued for treble damages under Section 2(a), charging that respondent cut the price of milk in petitioner's area in sales from Shelby, Ohio, while not cutting prices elsewhere in Ohio. The District Court's action in sustaining respondent's motion for summary judgment was affirmed by the Circuit Court on the grounds that respondent's sales from its Shelby plant "were purely intrastate transactions, not interstate in character, as is necessary to impose liability under the Robinson-Patman Act."

¹⁹ Aside from these differences, we do not regard the Supreme Court's denial of certiorari in the *Willard Dairy* case as having any substantive significance. As stated in a memorandum of Mr. Justice Frankfurter, joined in by Mr. Justice Harlan, in *Elgin, Joliet & Eastern Railway Co. v. Gibson*, 355 U.S. 897 (1957):

"Although the Court has definitively decided that a denial of a petition for certiorari carries no legal significance, *Brown v. Allen*, 344 U.S. 433, 489-497, the bar, in briefs, and lower courts, in their opinions, continue to note such denials by way of reinforcing the authority of cited lower court decisions. It has therefore seemed to me appropriate from time to time to emphasize through concrete illustrations that a denial of certiorari does not imply approval of the decision for which review is sought or of its supporting opinion."

We next consider respondent's appeal from the examiner's ruling that it had engaged in area price discriminations as among grocery store customers in four communities in Indiana and Michigan, resulting in injury to competition between respondent and its competitors. Respondent's principal arguments are that the price differentials found by the examiner did not have the required anticompetitive effect and that it reduced its prices in three of these communities (South Bend and Elkhart, Indiana and Sturgis, Michigan) in good faith to meet the equally low prices of its competitors.

We agree with respondent that the evidence is not sufficient to support the examiner's finding that the effect of its lower prices in South Bend, Elkhart and Sturgis may be substantially to lessen competition and to injure, destroy or prevent competition between respondent and its competitors in those areas.

The examiner's finding of a violation is based on respondent's lower prices in sales to grocery store customers for periods of two, seven and nine days in Sturgis, fourteen days in South Bend and twelve days in Elkhart, all occurring in the year 1958. The evidence in support of the alleged anticompetitive effect of these lower prices consists principally of the profit and loss statements of two of respondent's competitors in South Bend, two in Sturgis and one competitor in Elkhart, for the year in which these lower prices occurred. These statements show losses in 1958 for the two competitors in South Bend and the two in Sturgis and a profit for the competitor in Elkhart.

It is established in this record that price wars occurred in the sale of milk at wholesale throughout 1958 in all three of these communities. In Sturgis, these price wars were taking place prior to respondent's entry into the market in June 1958. Respondent's competitors in these communities, including those whose profit and loss statements were introduced, had all participated in these price wars, raising and lowering their wholesale prices as the market changed. The examiner, after finding that factors other than respondent's prices contributed to the losses of the competitors who testified, concluded that respondent's prices contributed in a material way to these losses. On this basis, he ruled that a violation had been established. We cannot agree. The losses of these competitors took place over an extended period of time whereas respondent's lower prices were for only a few days' duration. We agree with the examiner that circumstances may be shown from which it can be reasonably concluded that sporadic price discriminations of short duration would be likely to lessen competition. However, the circumstances of losses

of profit by a few competitors for a year in which respondent's discriminations lasted only a few days is not sufficient basis to predicate a finding of probable substantial injury to competition required by the statute.

Although we reject the examiner's finding of a violation as a result of Borden's discrimination in prices as in favor of grocery store customers located in South Bend, Sturgis and Elkhart, we are of the opinion that the proof fully supports his finding of a violation as a result of respondent's lower prices in the Walkerton area.

The examiner found that respondent sold milk in half-gallon containers from its Hammond, Indiana, plant to the A & P store in Walkerton during the period January 10 through January 16, 1958, for 22.2 cents and that its price to this customer was 9.2 cents per half gallon for the period January 16 through January 23, 1958. With respect to these sales, he found that the Hammond plant billed the A & P central office in Chicago, Illinois, for payment. Since no negotiations or sales contracts were entered into between the local Walkerton A & P store and respondent, the examiner concluded that all sales arrangements were made with the out-of-state sales office of A & P. He found therefore, that sales and purchases between respondent and the Walkerton A & P store were in interstate commerce. Respondent raises no objection to this finding in its appeal.²⁰

The facts with reference to respondent's price discriminations in Walkerton are as follows. Quality Dairy, located in Walkerton, was owned by Samuel Frame and his son. They did no processing but purchased fluid milk from Borden's Hammond plant and from Reliable Dairy of South Bend, Indiana. The milk purchased from Reliable Dairy was packaged under the "Quality" label. Quality Dairy resold both Borden and "Quality" brand milk at wholesale to grocery stores and at retail to home delivery customers at prices which it established. In addition, Quality Dairy acted as respondent's agent in delivering milk to the A & P store in Walkerton, for which service it was paid by respondent.

On January 9, 1958, Nick's Super Market, a large locally owned and independent grocery store in Walkerton, reduced its price on "Dean" and "Quality" brands of milk from 29 cents to 25 cents per

²⁰ With further reference to the jurisdictional issue, the examiner also correctly found that respondent's Hammond plant receives daily about 40% of its raw milk from the Pure Milk Assn. in Chicago, Illinois, and that, during January 1958, it also obtained a substantial amount of raw milk from Pontiac, Illinois. This milk is processed daily and then delivered to customers. Although the examiner reached no conclusion with respect to these findings, we hold that these facts alone are sufficient to establish that sales by the Hammond plant were in commerce within the meaning of the Robinson-Patman Act. *Foremost Dairies, Inc.*, Docket No. 7475, 1963 [62 F.T.C. 1344].

half gallon, this price to be effective until January 15. At this same time, Quality Dairy was selling its "Quality" brand to Nick's at 37 cents per half gallon. Thus, Nick's was receiving no price support from Quality Dairy in reducing the price of "Quality" brand milk to the public. Samuel Frame testified that it was his duty to notify Borden's Hammond plant when there was a change in the out-of-store price of milk in Walkerton. He notified the Hammond plant of Nick's price reduction to 25 cents and on January 10, 1958, Borden reduced its price to the A & P store in Walkerton from 32.3 cents to 22.2 cents per half gallon.

On January 16, 1958, Nick's advertised half gallons of milk at 10 cents with each \$5 purchase of groceries. Frame again notified the Hammond plant. This time, he was visited by three representatives from the plant. Frame testified that he was told by these representatives that "they [Borden] had to keep the A & P competitive" and that the Hammond plant would sell to the A & P store at a price which would permit A & P to sell at 10 cents per half gallon. Moreover, these Borden representatives told Frame that he would have to resell half gallons of Borden milk at a price of 10 cents to his own grocery store customers. The Frames objected to these prices on the grounds that "we had retail routes and we had other wholesale routes outside of town a few miles that would have been affected by that. We didn't like to tear up our retail routes because we knew if we lost customers that we would never get them back."²¹ The Borden representatives met this objection by telling Frame that if Quality Dairy would not resell Borden milk to its grocery store customers at the 10 cent price, Borden itself would sell to Quality's customers at that price. Frame then agreed to and did sell Borden milk to all of his grocery store customers except Nick's at a price of 10 cents per half gallon. Frame testified that Nick's had previously purchased Borden milk from him but had discontinued because "of the way that A & P was manipulating the price."

On January 16, 1958, when Nick's first offered half gallons of "Quality" brand milk to the public at 10 cents and Quality Dairy began selling Borden half gallons to its grocery store customers at that price, respondent reduced its 22.2 cents per half-gallon price to the Walkerton A & P store to 9.2 cents. This 9.2 cent price lasted for seven days and was concededly below respondent's cost. During this seven day period, respondent paid Quality Dairy, as its agent, 7 cents per half gallon for delivering Borden milk to the A & P store.

²¹ Tr. 981.

Throughout the period from January 9, 1958, to January 23, 1958, Borden's Hammond plant which was selling half gallons of milk to the Walkerton A & P store at prices of 22.2 cents and 9.2 cents, was selling half gallons to independent grocery store customers in South Bend, Indiana, at 33.5 cents.²² At no time in this period did Quality Dairy reduce its one half-gallon price of 37 cents on "Quality" brand milk to its grocery store customers in Walkerton, including Nick's Supermarket, which was thus unaided in its special sales offers.

These facts clearly establish that respondent discriminated in price in its sales of milk to the A & P store in Walkerton. The issue, however, as presented by respondent, is whether the hearing examiner erred in his conclusion that this discrimination had the required adverse effect on competition between respondent and its competitors.

Frame testified that in the weeks previous to January 16, 1958, Quality Dairy had been averaging 2,000 half gallons per week of its "Quality" brand and Borden's milk. During the week of the 10 cent price, Quality Dairy's sales increased to 11,000 half gallons. All of these sales were of Borden's milk, Frame testifying that he sold none of his "Quality" brand during that time. The week prior to its 22.2 cent price to the Walkerton A & P store, respondent sold that customer 392 half gallons of Borden milk. This increased to 1,691 half gallons during the period of the 22.2 cent price and to 2,196 half gallons during the week of the below cost price of 9.2 cents.

As noted, for the week of respondent's below cost price, Quality Dairy lost its entire wholesale business in the sale of "Quality" milk. At the time of the hearing, in August 1960, Quality Dairy had no wholesale business. In response to a question as to whether there was any connection between the fact that he no longer sold to grocery store customers and the price war in January 1958, Frame stated:

Well, people became so price conscious and stores thought that they had to have specials all of the time and they put pressure on the wholesalers to keep the price down. We could not compete with the prevalent wholesale prices there in town and make any money.²³

In addition to losing his wholesale business, Frame stated that during the week of Borden's 9.2 cent price, Quality Dairy lost about one-third of its door-to-door customers. He stated that some of these home delivery customers became "price conscious," started buying at stores and "never came back."

²² CX 181 (*in camera*).

²³ Tr. 986. Respondent contends that purchasers become price conscious only as a result of general competitive conditions over a long period of time. This is directly contrary to the testimony of Frame who related this price consciousness to the January prices. Moreover the evidence is not sufficient to determine competitive conditions in the sale of milk in Walkerton prior to January 1958.

In support of its contention that its pricing practices in Walkerton did not have the anticompetitive effect required by the statute, respondent argues that there is no evidence to suggest a permanent increase in respondent's market share or a decrease in the market shares of its competitors whom it names as Quality Dairy, Glen Cook who was a distributor for Dean Milk Company, and New Paris Creamery, Inc. This latter concern was owned by an individual who also owned a number of dairy stores under the name of Burger Dairy Stores, one of which opened in Walkerton in November 1957. The only customer of New Paris Creamery in Walkerton was the Burger Dairy Store.

As previously set forth herein, the evidence clearly establishes a total loss in Quality Dairy's wholesale market share in the sale of milk in Walkerton as a result of respondent's below cost price supported by its requirement that Quality Dairy resell Borden milk in half-gallon quantities for 10 cents. Also, as will be discussed in more detail, it appears that the Dean Milk Company's distributor lost practically his entire wholesale business during this period. Respondent's contention, however, that a market share loss must be permanent to establish anticompetitive effects contemplated by the statute is rejected. As we pointed out in answer to a similar argument by the respondent in *Forster Mfg. Co., Inc.*,²⁴ such a test "would necessarily look only to results that have already come to pass, and thus could never be satisfied until the damage had already been done." That evidence of such permanent injury to competition is not required to establish a violation of Section 2(a) was made clear by the Supreme Court in its holding in the *Corn Products* case²⁵ that:

It is to be observed that § 2(a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition. 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.

A continuation of the price discrimination here present, involving sales below cost, most assuredly would effect a permanent decrease in the market shares of respondent's competitors.

Respondent next argues that losses of sales or profits by particular competitors do not establish the prohibited injury to competition. In support thereof it cites the court's statement in *Atlas Building Products Co.* that "Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise."²⁶

²⁴ *Forster Mfg. Co., Inc.*, Docket No. 7207, January 3, 1963 [62 F.T.C. 852, 888].

²⁵ *Corn Products Refining Co. v. Federal Trade Commission*, 324 U.S. 726, 766 (1945).

²⁶ *Atlas Building Products Co. v. Diamond Block and Gravel Co.*, 269 F. 2d 950 (10th Cir. 1959).

The facts establish that, in addition to New Paris Creamery which sold only to the Burger Dairy Store, respondent had two principal competitors in the sale of fluid milk to grocery stores in Walkerton, namely, Quality Dairy and Dean Milk Co. (through its distributor, Cook). Particularly appropriate to this market, therefore, is the examiner's conclusion that where there are a few competitors, an effect on one would be reflected in the strength of competition generally. Such a market condition falls squarely within the further language of the court in the *Atlas* case when it commented "For, surely there is no more effective means of lessening competition or creating monopolies than the debilitation of a competitor."

We have previously noted that Quality Dairy sold none of its "Quality" brand milk during the week of respondent's 9.2 cent price. With respect to this week, Frame testified that Dean Milk Company did not change its price and did not sell any milk. Although raising no objection to this testimony at the time it was given, respondent contends that this was hearsay testimony, with nothing to indicate any factual basis for the statements. However, in a market of this size, with four grocery stores and a dairy store, we believe that it can reasonably be inferred that any dairy would have knowledge of its competitors' activities. Moreover, Quality Dairy's sales to grocery stores increased from about 2,000 half gallons to 11,000 half gallons of Borden's milk exclusively in this one week. In a town with a population of about 2,500 there is little doubt that the only other competitor serving these stores, if not completely shut off, certainly suffered a tremendous decrease in sales. In our view, Frame's testimony supports a finding of a substantial diversion of sales of Dean Milk Company as a result of respondent's discriminatory price.²⁷

Respondent also contends that sporadic and temporary price reductions cannot cause the type of injury to competition which Section 2(a) seeks to prevent. The short answer to this is that the effect of respondent's price discrimination in Walkerton went beyond the requirements of the Act and resulted in actual injury to competition. Quality Dairy, one of only three competitors (including New Paris Creamery) had not recovered any of its wholesale business two years after respondent's discriminatory prices. Moreover, Frame's fears, voiced to respondent's representatives, that Quality Dairy would lose

²⁷ "In proceedings before the [National Labor Relations] Board, such hearsay testimony, where it is the kind 'on which reasonable men are accustomed to rely in serious affairs,' is admissible and may be the basis of valid findings and valid orders made by the Board; for 'it is only convincing, not lawyers' evidence which is required,' evidence 'such as a reasonable mind might accept, though other like minds might not do so.'" *National Labor Relations Board v. Remington Rand, Inc.*, 130 F. 2d 919, 930 (2d Cir. 1942).

home delivery customers as a result of respondent's lower price were realized. One-third of these customers were lost permanently.

Even disregarding this actual injury, we find respondent's argument to be without merit. Respondent's price of 9.2 cents per half gallon was below its cost of raw milk and was specifically intended "to keep the A & P competitive." This price was determined as a result of an offer by a local grocery store, below its cost, of milk at 10 cents a half gallon tied in with the purchase of groceries. Moreover, we think the evidence supports a conclusion that respondent's price was determined with complete disregard for the prices of its competitors. Thus, as we have previously noted, upon being advised by Frame of Nick's 10 cent price, three representatives of Borden's Hammond plant called on Frame. Frame objected to selling Borden milk at the 10 cent price because of the possible effect on his business, until these representatives stated that they would handle it at this price themselves. At that time, Frame's price of its "Quality" brand milk to Nick's and to his other wholesale customers was 37 cents per half gallon. It is inconceivable that Frame, in objecting to Borden's proposal, did not inform Borden's representatives of his price, that he would maintain this price, and that Nick's was receiving no support from him in its special one week offer.

Although the evidence does not support a finding that respondent lowered its price with the intention of putting its competitors out of business, the conclusion is inescapable that respondent's price reduction was made with full knowledge that its competitors would not and, in fact, could not meet that price and remain in business. Coupled with this knowledge is the fact that respondent's discriminatory price cannot be regarded as an isolated instance. Frame was advised by the Borden representatives that it was their intention to keep the A & P in Walkerton competitive with other grocery stores. Obviously to accomplish this purpose, it was Frame's duty to report any change in the out-of-store price of milk in Walkerton to Borden's Hammond plant. In both instances of record in which Frame reported such changes, *i.e.*, Nick's Supermarket's reductions to 25 cents and 10 cents per half gallon, respondent promptly reduced its wholesale price to A & P to 22.2 cents and 9.2 cents, respectively. In our view, these facts evidence a continuing policy on the part of respondent to cut its prices in Walkerton at any time Borden milk was undersold by a competitor of a customer. We fully agree with the examiner's conclusion that "when they [price discriminations] are resorted to from time to time to suit the purposes of a seller, their continued use, even intermittently, does constitute a danger to competition."

Moreover, we think the following language of the Supreme Court in *Sun Oil*²⁸ with respect to competitive effect applies with equal force to the "struggle" between competing sellers here involved:

To allow a supplier to intervene and grant discriminatory price concessions designed to enable its customer to meet the lower price of a retail competitor who is unaided by his supplier would discourage rather than promote competition. So long as the price cutter does not receive a price "break" from his own supplier, his lawful reductions in price are presumably a function of his own superior merit and efficiency. To permit a competitor's supplier to bring his often superior economic power to bear narrowly and discriminatorily to deprive the otherwise resourceful retailer of the very fruits of his efficiency and convert the normal competitive struggle between retailers into an unequal contest between one retailer and the combination of another retailer and his supplier is hardly an element of reasonable and fair competition.

In contrast to the operations of Quality Dairy, which were limited to the local Walkerton area respondent's Hammond plant serviced parts of three States. Its low Walkerton prices were backed not only by proceeds from sales in other areas by the Hammond plant but also by District funds and the corporate treasury. With this economic power, it is obvious that respondent could maintain its low prices for a period of time far beyond that of its local competitors. The effect of this power was recognized by the court in *Atlas Building Products Co.*, *supra*, in its comment that "And, we know that market power is a ready means toward competitive injury." See also *Moore v. Mead's Fine Bread Co.*, *supra*.

The court in *Anheuser-Busch, Inc.*,²⁹ cited by respondent in support of its argument that temporary price reductions cannot have the required adverse competitive effect, held that the application of the incipency doctrine³⁰ required a projection to ascertain the future effect of that company's price reductions. In substance, the court found that Anheuser-Busch was "using its competitive power fairly in the market place and respecting the rights of others" and thus concluded that no forecast of future adverse effects on competition was valid. The facts in this case establish that Borden, through its below cost price, was using its competitive power unfairly and doing so in utter disregard of the rights of others. The forecast is obvious. We are in full accord with the hearing examiner's statement that "Since the function of the Federal Trade Commission is to prevent future uses of discriminations which may lessen competition, it seems appropriate that discriminations which, by their nature and amount,

²⁸ *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505 (1963).

²⁹ *Anheuser-Busch, Inc. v. Federal Trade Commission*, 289 F. 2d 835 (7th Cir. 1961).

³⁰ *Corn Products Refining Co. v. Federal Trade Commission*, *supra*.

weaken the competitive strength of local dairies should be prohibited."

Respondent also objects to the scope of the order entered by the examiner, contending in particular that the order should be limited to the operations of the offending plant. We considered this same situation in the *Foremost* case,³¹ where the violation found resulted from the pricing practices of Foremost in Albuquerque, New Mexico. In extending our order in that case to cover all geographic markets, we pointed out that the record revealed nothing peculiar or unique about Foremost's operations or competitive conditions in Albuquerque which would justify limiting the order to that area. This record is likewise devoid of such evidence as to respondent's operations. In fact, the Hammond plant is but one of a number of plants in respondent's multi-state Central Division. This Division is but a supervisory unit of The Borden Company. To limit the order to the operation of the offending plant under these conditions would be completely unrealistic.

As we stated in *Transogram Company, Inc.*,³² in commenting on the purpose of an order to cease and desist: "It does mean that our objective in drafting orders must be to restrain unlawful acts and practices 'whose commission in the future, unless enjoined, may fairly be anticipated from the [respondent's] conduct in the past.' " From this record, it appears that The Borden Company grants price concessions whenever it has deemed it expedient to do so during a price disturbance. On the evidence before us, it appears probable that respondent would react in any geographical area in the same manner as it did in Walkerton if informed of a price cut by a competitor of its customers.

In our view, the entry of an order preventing injury to competition as between respondent and its competitors in all geographical markets served by respondent is required to fully protect the public interest.³³ However, we believe that certain modifications are required in the hearing examiner's order to more clearly delineate the prac-

³¹ *Foremost Dairies, Inc.*, Docket No. 7475, May 23, 1963 [62 F.T.C. 1344].

³² *Transogram Company, Inc.*, Docket No. 7978, September 19, 1962 [61 F.T.C. 629].

³³ The order prohibiting injury to competition as between respondent's customers will also extend to all of respondent's geographic markets. *Foremost Dairies, Inc.*, *supra*. In this connection, it is to be noted that respondent's price discriminations in favor of chain store customers were not confined to the Portsmouth area. As an example, the price at which respondent was selling in South Bend at the time of its low prices in Walkerton was its price to independent wholesale customers (CX 181-A). Although there is no evidence of competitive injury as a result thereof, the documentary evidence establishes the existence of a lower price to a chain store customer, A & P, in South Bend at the same time (CX 149-B).

tices proscribed. Thus, our order on this issue will modify the examiner's order so as to relate only to price concessions to purchasers for resale in different trading areas. There is no evidence whatsoever with respect to respondent's pricing practices in its sale of fluid milk on home delivery routes. This method of distribution differs substantially from sales to purchasers for resale and, in our view, inclusion thereof in an order to cease and desist is not warranted on this record.

In framing the order, we are aware of the possibility that in a particular area, respondent's competitors may be selling fluid milk of a grade and quality similar to that of respondent's at prices which are lower than respondent is charging its customers in other areas. In order for respondent to be competitive, it must be allowed to sell at prices comparable to that of its competitors in the lower price area. Recognizing this, our order will contain a specific provision under which it will be made clear that respondent will not be prohibited from selling fluid milk to its grocery store customers in any area at a price which is not less than the regularly established prices of its competitors to their grocery store customers in that area.

As to periods of "price disturbances" where competitors vary from their regular prices, there is implicit in our order the Section 2(b) defense. This, of course, will permit respondent to reduce its price to a particular customer when done in good faith to meet the equally low price of a competitor's offer to respondent's customer.

On the basis of the foregoing, the appeal of counsel supporting the complaint is granted and respondent's appeal is granted in part and denied in part. An appropriate order will be entered.

Commissioner Anderson concurred in the result; Commissioner Elman dissented and has filed a dissenting opinion; Commissioner MacIntyre did not participate; and Commissioner Reilly did not participate for the reason that he did not hear oral argument.

DISSENTING OPINION

FEBRUARY 7, 1964

By ELMAN, *Commissioner*, dissenting:

The Commission bases its finding of unlawfulness on only two of the charges made in the complaint. The first involves alleged secondary-line injury resulting from discriminatory sales from respondent's Portsmouth, Ohio, plant; the second involves alleged primary-line injury resulting from discriminatory sales in the town of Walk-

erton, Indiana. The other charges in the complaint are dismissed. Since I disagree that the Portsmouth and Walkerton charges have sustained, and agree that the complaint must be dismissed on the remaining grounds, I am constrained to dissent from entry of a cease and desist order against respondent.

I

With respect to the Portsmouth charge, there is an insuperable jurisdictional objection to entry of an order against respondent. Section 2(a) of the Clayton Act, as amended, states the jurisdictional requirement respecting "commerce" in three separate ways, and each of these variants of the commerce requirement must be satisfied. First, respondent must be "engaged in commerce"; second, the unlawful discrimination must occur "in the course of such commerce"; third, "either or any of the purchases involved in such discriminations" must be "in commerce". See, e.g., *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 287 F. 2d 265 (7th Cir. 1961). (The second of these three requirements appears to add nothing to the first and third, and I shall not discuss it further.) Respondent is, without doubt, "engaged in commerce" within the meaning of the statute. As the Commission's opinion explains, respondent is a vast, sprawling, multi-state concern. It is not a series of discrete local concerns under common ownership, but an integrated, interstate corporation; and it makes interstate sales. However, unless the third commerce requirement of Section 2(a) is to be given no effect whatever, the Commission's burden of establishing jurisdiction cannot be discharged merely by a showing that respondent is an interstate concern or that it makes interstate sales not involved in the challenged discrimination.

It would similarly nullify the third requirement to hold that every sale made by a firm engaged in commerce is, for that reason alone, a sale in commerce. The language and scheme of Section 2(a) make plain that not all transactions by interstate businesses are subject to the statute, and what legislative history there is on the question supports this view.¹

This does not mean that an interstate business may with impunity destroy its local rivals in piecemeal fashion through the "local" operations of its branches or divisions. That is the point made by the

¹ See H.R. Rep. No. 2951, 74th Cong., 2d Sess. 6 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936); H. R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936).

Commission in its opinion. However, while the point is a sound one, it is out of place in this case.

The authorities principally relied on by the Commission in its discussion of the commerce problem² are concerned with a classic instance of territorial price discrimination: that of the powerful seller who cuts prices in one locality while maintaining higher prices elsewhere, in order to coerce or destroy his rivals in the particular locality. In such a case, the essence of the unlawful conduct is the interstate seller's subsidizing his destructively low prices in one locality with profits obtained from the higher prices he is able to maintain elsewhere. Since his price cutting is sustained—"fed"—by his interstate business, it is proper to regard all of his interstate sales as "purchases involved in such discrimination". See Austin, *Price Discrimination* 17 (2d ed. 1959). Thus, if the Portsmouth charge involved injury at the seller's level, I would be inclined to agree with the Commission that *Willard Dairy Corp. v. National Dairy Products Corp.*, 309 F. 2d 943 (6th Cir. 1962), was distinguishable,³ since the court in *Willard* did not direct its attention to whether the defendant's intra-state sales were being supported by its interstate business.

The Portsmouth charge involves, however, not injury to the seller's rivals through territorial discriminations, but injury to customers of the seller. In such a case, there is not the same nexus between sales made by a particular local division of the seller and the totality of his interstate business, and so no justification for interpreting the "any purchases" language to embrace such interstate business. While the focus in a primary-line case is on the aggrandizing tactics of the seller, in a secondary-line case it is on powerful buyers' demands for discriminatory price concessions; the seller's liability is based on his yielding to such demands. In a secondary-line case, then, it is in large measure immaterial to the basic purposes of the statute whether the seller is or is not a multi-state concern. The competitive injury is the same whether the seller's activities are predominantly local or predominantly interstate in character. There is accordingly no basis for interpreting "any purchases", in such a case, as including interstate sales not directly involved in the discrimination.

In short, the special character of a primary-line case warrants an expansive reading of the "any purchases" commerce requirement of

² *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115; 80 Cong. Rec. 9417 (1936) (remarks of Congressman Utterback).

³ See p. 563 of the Commission's opinion; see also opinion of Mr. Justice Black, dissenting from denial of certiorari in *Willard*, 373 U.S. 934-36.

Section 2(a), so as to confer jurisdiction in circumstances where a seller uses his interstate business to support and make possible the infliction of injury on local rivals. In a secondary-line case, however, I find no justification for such a reading.

The results required by the foregoing analysis are not inconsistent with the policies behind the Robinson-Patman Act. On the one hand, interstate businesses were to be restrained from driving out their small local competitors by means of discriminatory pricing; this objective will rarely be thwarted by the commerce requirements of Section 2(a), since, as I have tried to show, the "any purchases" language may properly be read broadly in such a case. On the other hand, local sellers were to be exempt from Section 2(a) altogether, which, as a practical matter, means exempt from liability for secondary-line discriminations, since a local seller would rarely be powerful enough to inflict serious primary-line injury. Such "partial" insulation of the intrastate seller should tend to protect and foster small local businesses that must fight for their share of the market against established and dominant national concerns." *Sunshine Biscuits, Inc.*, F.T.C. Docket 7708 (decided Sept. 25, 1961), p. 9 (dissenting opinion) [59 F.T.C. 674,688], rev'd on other grounds, 306 F. 2d 48 (7th Cir. 1962). Congress may well have felt that decentralized interstate concerns, organized in units which sell wholly locally and not interstate, should similarly be exempt: hence the "any purchases" language of 2(a), which, as applied to secondary-line situations, exempts a multi-state concern such as the present respondent.

To be sure, determination of whether a particular sale of a multi-state enterprise should be deemed local or interstate may involve close questions of judgment. In the present case, however, the discriminatory sales from respondent's Portsmouth, Ohio, plant seem clearly local in nature and without significant interstate incidents. The sales were negotiated in Ohio, and the product involved—milk—was produced, processed and delivered in Ohio for resale in Ohio.⁴ To be sure, the manager of respondent's Portsmouth plant was acting pursuant to company policy in negotiating these sales, and respondent's regional manager may have played a part in these negotiations. But to conclude that such remote and tenuous interstate incidents suffice to establish jurisdiction under Section 2(a) would be tantamount to holding that all of the sales of a concern engaged in commerce are, therefore, in commerce—an indefensible result.

⁴ Compare, e.g., *Standard Oil Co. v. F.T.C.*, 340 U.S. 231, 237-38; *Quality Bakers of America v. F.T.C.*, 114 F. 2d 393 (1st Cir. 1940); *Foremost Dairies, Inc.*, F.T.C. Docket 7475 (decided May 23, 1963), pp. 2-3, fn. 2 [62 F.T.C. 1344, 1360].

To sum up my views on the jurisdictional issue, the Commission demonstrates in its opinion that respondent is a large, multi-state concern engaged in, and making sales that are in, interstate commerce, and such a showing might well be sufficient to confer jurisdiction of primary-line allegations. The allegations at issue, however, involve the secondary line, and, consequently, the Commission's failure to demonstrate that other than predominantly local sales were directly involved in the unlawful discrimination is decisive.

II

I turn now to the question of whether the Commission has established that respondent's price discrimination in the Walkerton, Indiana, area caused competitive injury within the meaning of Section 2(a). In my opinion, there is a failure of proof on this issue.

Neither *F.T.C. v. Morton Salt Co.*, 334 U.S. 37, nor any other decision permits the Commission to dispense with proof of competitive injury. The contributions of *Morton Salt*, as I read the Supreme Court's opinion in that case, is that proof of competitive injury for Section 2(a) purposes depends not on the size of the challenged price discrimination (*i.e.*, price differential), but on its character. In *Morton* a relatively small discrimination was granted on a systematic and continuing basis to the detriment of small buyers. It was plain that if the size alone of the discrimination was to be decisive, Section 2(a) would be unworkable, since competition at the buyer's level could be destroyed by the cumulation of continuous, small discriminations on the part of the sellers. Safeguarding competition at that level, the Court recognized, meant protecting the long-run health of competition from the debilitating effects of prolonged price discrimination.

If the size of the discrimination is not decisive, neither is the fact that sales are diverted as a result of it. The concern of Section 2(a) is not to freeze the competitive *status quo* and require complete pricing rigidity, but to preserve the capacity to compete. Price discriminations are therefore unlawful only if they impair that capacity. Neither the size of the discrimination nor its immediate impact upon the sales of the affected firms will ordinarily provide a sufficient answer to the questions of whether their capacity to compete vigorously and effectively has been injured as the result of the discrimination.

The principle applies with equal force in primary-line as in secondary-line situations: it is the character of the challenged discrim-

ination that should control. In determining such character in a primary-line context, a number of factors—going far beyond questions of the dollar amount or percentage size of the discrimination, or its immediate impact on sales—are relevant.⁵

If the proper focus of the competitive-injury requirement of Section 2(a) is as I have described it, then the evidence bearing on the Walkerton incident is clearly insufficient to support a finding of unlawfulness. For a period of one week, respondent, in response to a radical cut in the price of competing milk, to below-cost levels, by the largest grocery store in Walkerton, sold its milk to Walkerton retailers at a substantially reduced—indeed, below-cost—price. At the end of the week, prices returned to normal. It is difficult to see how such a temporary price cut, given in response to the “loss leader” conduct of a retailer selling a rival brand, seriously threatens the kind of long-run injury to the capacity to compete that Section 2(a) is designed to prevent. There is no suggestion that respondent was attempting to destroy or intimidate its rivals or, indeed, was doing anything more than reacting to the fluctuations of the market, and thus engaging in just such competitive conduct that federal anti-trust policy seeks to foster. Standing alone, respondent’s week of below-cost selling surely does not indicate a course of conduct calculated to injure rivals and harm competition generally.

This becomes clear if we consider the impact of such below-cost selling on respondent’s competitors. The only evidence of any injury

⁵ “Several indicia appear in the cases to *dispel* the existence of adverse competitive effects attributed to the seller’s prices:

- (a) Decline in the seller’s own percentage share of the market, notwithstanding his price differentials.
- (b) Minor over-all market position of the seller.
- (c) Growth of the seller’s competitors, in terms of their market shares, their absolute sales volume, or simply by their sales to full capacity.
- (d) Prevalence of comparable price variations on the part of competitors.
- (e) Inroads by sellers on each other’s customers and/or customer switches among sellers.
- (f) Ease of entry by competing sellers into the pertinent market.
- (g) Keeness of competition among the sellers, or over-all dynamism in the market.
- (h) Competition by seller against strongly entrenched regional competitors.
- (i) Aim by seller to improve his deteriorating market position, or temporary price experimentation to this end.

“Conversely, key indicia to *confirm* the existence of probable competitive impairment are:

- (a) Monopoly or overpowering position of the seller in wider markets.
 - (b) Aggressive objectives toward smaller and weaker rivals.
 - (c) Deep, sustained undercutting of rivals’ prices, or elimination of an *established* price spread between a ‘premium’ and a lesser product.
 - (d) Persistent sales below the seller’s ‘cost.’
 - (e) Actual or impending demise of a seller’s sole rival in a particular market.”
- Rowe, Price Discrimination Under the Robinson-Patman Act 160-62 (1962).

to a competitor involves a single one of respondent's rivals, Quality Dairy, owned by the Frames.⁶ Quality was not a milk producer like respondent, but a wholesale distributor, and it distributed respondent's milk as well as the milk of one of respondent's competitors, Reliable Dairy. During the week of respondent's price cutting, Quality sold only respondent's milk; it sold none of Reliable's milk. I find it difficult to see how a distributor is injured by a diversion of sales from one to another of the products it carries. If Quality sold no milk purchased from Reliable during the week in question, it sold much more milk overall than in a normal week's selling, and its profits for the week were apparently greater than normal. Respondent's price-cutting activity stimulated sales of respondent's milk, and thereby benefited Quality Dairy because Quality was a distributor of respondent's milk.

As to the ultimate fate of Quality Dairy subsequent to the week of respondent's below-cost selling, we know very little that is pertinent to the question of competitive injury. We do not know whether Quality went back to selling milk produced by Reliable. We do know that Quality eventually sold its wholesale business to respondent; but the reason that Quality's owner gave for the alleged decline of his wholesale business—that his customers became "price conscious"—does not, by itself, suggest that Quality's capacity to compete was impaired by respondent's conduct. There is some indication, perhaps, that respondent dealt unfairly or oppressively with Quality in Quality's capacity as a Borden distributor. But Section 2(a) is not designed for the protection of distributors from their suppliers, but of sellers (or buyers) from their competitors.

There is, in short, a dearth of evidence that respondent's price-cutting conduct affected the vigor, health or viability of any competitor. What the record should, but does not, contain is evidence respecting the consequences of respondent's price cutting on Reliable and other competing dairies. The Commission is obliged to rely entirely on evidence concerning Quality Dairy, which was not a dairy but a distributor, and was in the peculiar position of being a distributor for respondent as well as for respondent's competitors. As I have suggested, the evidence bearing on Quality's wholesaling activities falls short of demonstrating competitive injury.

⁶ There was also some testimony that another competitor of respondent, Dean Milk Company, sold no milk during the week in question, but this testimony was far too nebulous and sketchy to support any inference as to the nature and extent of the injury, if any, caused to Dean's business by respondent's price cutting (see p. 569) of the Commission's opinion).

Final Order

64 F.T.C.

FINAL ORDER

This matter having been heard by the Commission upon cross-appeals from the hearing examiner's initial decision and upon briefs and oral argument; and

The Commission having determined, for the reasons appearing in the accompanying opinion, that the appeal of counsel supporting the complaint should be granted, that respondent's appeal should be granted in part and denied in part, and that certain of the hearing examiner's findings as to the facts, conclusions and order should be modified to conform to the views expressed in said opinion:

It is ordered, That the hearing examiner's initial decision be modified by striking the findings and conclusions beginning with paragraph 34 on page 543 and ending on page 549 and substituting therefor the findings and conclusions embodied in the accompanying opinion beginning on page 554 with the words "Borden's Portsmouth plant" and ending on page 572 with the words "should be prohibited."

It is further ordered, That the initial decision be modified by striking the order to cease and desist beginning on page 549 and substituting therefor the following:

It is ordered, That respondent, The Borden Company, a corporation, and its officers, representatives, agents and employees, directly or through any corporate device, do forthwith cease and desist from discriminating, directly or indirectly, in the price of fluid milk of like grade and quality:

1. By selling such milk to any purchaser at a net price lower than the net price charged any other purchaser who competes in the resale of such milk with the purchaser paying the lower price.

2. By selling such milk to any purchaser in any trading area where respondent is in competition with another seller, at a price which is lower than the price charged any purchaser at the same level of trade in another trading area; *Provided, however*, That this shall not prohibit respondent from selling fluid milk in any trading area at a price which is not less than the regularly established price of any competitor in that area for fluid milk of comparable grade and quality.

It is further ordered, That the hearing examiner's initial decision, as modified, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent, The Borden Company, a corporation, shall, within sixty (60) days after service upon it of

ROBERT A. JOHNSTON CO.

581

534

Complaint

this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the