

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 order to cease and desist set forth herein.

Commissioner Anderson concurring in the result, Commissioner Elman dissenting, Commissioner McIntyre not participating, and Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF
ROBERT A. JOHNSTON COMPANY

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

Docket 7739. Complaint, Jan. 12, 1960—Decision, Feb. 7, 1964

Consent order requiring Milwaukee manufacturers of biscuit products to cease discriminating in price in violation of Sec. 2(a) of the Clayton Act by use of a discount schedule based on the classification of its retailer customers into three categories: (1) independents operating one retail outlet, (2) chains, and (3) voluntary groups of independent stores banded together for buying and advertising, and permitting the purchases of all stores of a group to be combined for the purpose of computing the percentage bracket of the schedule to be granted; and by granting to chain stores taking delivery at their own warehouses a discount of 16 percent below the prices they charged other retailer purchasers receiving no discounts.

COMPLAINT

The Federal Trade Commission, having reason to believe that Robert A. Johnston Company, a corporation, has violated and is now violating the provisions of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13), hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Robert A. Johnston Company, hereinafter sometimes referred to as respondent, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin with its headquarters and principal place of business located at 4023 National Avenue, Milwaukee, 1, Wisconsin.

PAR. 2. Respondent is now, and for many years last past has been, a manufacturer, seller and distributor of food products including biscuit products. Respondent's biscuit products which consist for the most part of cookies and crackers are manufactured at its plant in Milwaukee, Wisconsin.

PAR. 3. Respondent sells and distributes its biscuit products of like grade and quality to a large number of purchasers located throughout many States of the United States, for use, consumption and resale therein.

In the course and conduct of its said business, respondent is now, and for many years last past has been, shipping its biscuit products from the state in which they are manufactured to purchasers located in other states, in a constant current of commerce, as "commerce" is defined in the aforesaid Clayton Act.

PAR. 4. Respondent sells the vast bulk of its biscuit products to retail food dealers who, in turn, resell these products to the consuming public. Respondent classifies its retail food dealer purchasers into three categories. These categories are independents, chains and voluntary groups.

In the independent dealer category are those purchasers who own and operate one retail outlet. The chain category consists of those purchasers who own and operate more than one retail outlet. Voluntary groups are organizations comprised of a number of independently owned stores who band together for purposes of buying merchandise and advertising.

With regard to said chain and voluntary group purchasers, respondent in many instances makes deliveries in its own trucks directly to each separate store or outlet belonging to the chain or voluntary group. In other instances, respondent delivers its biscuit products to warehouses owned and operated by its chain category purchasers.

PAR. 5. In the course and conduct of its said business in commerce, respondent is now discriminating, and for several years last past has discriminated, in price in the sale of its biscuit products, in selling such products of like grade and quality to different and competing purchasers.

Illustrative of such sales at discriminatory prices are the following practices of said respondent:

(1) In those instances wherein respondent delivers its biscuit products directly to the stores or outlets of its retail food dealer purchasers, respondent is now using, and for several years last past has used, the following discount schedule in pricing its biscuit products of like grade and quality to such purchasers based on the quarterly volume of purchases of each such purchaser:

<i>Quarterly purchases</i>	<i>Percent of discount</i>
Less than \$60.....	0
\$60 to \$104.99.....	2
\$105 to \$224.99.....	3
\$225 to \$299.99.....	4
\$300 and over.....	5

Respondent makes the above stated discount schedule available to each category of its retail food dealer purchasers. However, in the case of its chain and voluntary group category purchasers respondent permits the purchases of all stores or retail outlets comprising such chain or voluntary group to be combined for the purpose of computing the percentage bracket of the above stated schedule that such purchasers are to be granted. As a result each of these chain and voluntary group purchasers is consistently granted the maximum discount of the above stated schedule even though in many instances the purchases of individual stores or retail outlets belonging to such chain or voluntary group standing alone would not be sufficiently large to qualify for that percentage bracket.

(2) In those instances wherein respondent delivers its biscuit products or causes its biscuit products to be delivered to warehouses belonging to retail food dealers within its chain category, respondent does not employ the discount schedule set out above but is now granting, and at least for one year last past has granted, such purchasers a discount of approximately 16 percent below the prices paid by its retail food dealer purchasers receiving no discounts on their purchases of respondent's biscuit products.

PAR. 6. Competition in the resale at retail of respondent's biscuit products now exists, and for several years last past has existed, between retail food dealer purchasers of respondent's biscuit products receiving no quarterly discounts from respondent and other retail food dealer purchasers receiving such discounts.

Competition in the resale at retail of respondent's biscuit products now exists, and for several years last past has existed, between retail food dealer purchasers of respondent's biscuit products receiving quarterly discounts from respondent computed under the higher brackets of respondents above stated discount schedule and retail food dealer purchasers receiving quarterly discounts computed under the lower brackets of respondent's same discount schedule.

Competition in the resale at retail of respondent's biscuit products now exists, and for at least one year last past has existed, between chain category purchasers of respondent's biscuit products receiving warehouse delivery of respondent's biscuit products and other retail food dealer purchasers of respondent's biscuit products receiving delivery of respondent's biscuit products at such purchasers' stores.

PAR. 7. The effect of the said discrimination in price by respondent in the sale of its biscuit products has been or may be substantially to lessen, injure, destroy or prevent competition:

(a) Between retail food dealer purchasers of respondent's products who receive discounts computed under the above stated schedule and competing retail food dealer purchasers who receive no discount;

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(b) Between retail food dealer purchasers of respondent's products who receive discounts computed under the higher brackets of respondent's above stated discount schedule and competing retail food dealer purchasers who receive discounts computed under the lower brackets of respondent's same discount schedule;

(c) Between chain category purchasers receiving delivery of respondent's biscuit products at such purchasers' warehouses and competing retail food dealer purchasers receiving delivery of respondent's biscuit products at such purchasers' stores.

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

Mr. Ernest D. Oakland supporting the complaint.

Mr. Edwin P. Wiley, and *Mr. David E. Beckwith* of Milwaukee, Wis., for respondent.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above named respondent on January 12, 1960, charging price discrimination in violation of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13).

On August 24, 1961, the parties filed with the Secretary of the Commission a notice advising him that they wished to avail themselves of the privilege of disposing of this proceeding by a consent order.

An agreement dated September 15, 1961, duly executed by the respondent, its counsel, and counsel supporting the complaint was, on October 2, 1961, referred to the undersigned because of proceedings in the matter theretofore had before him. Said agreement provides for the entry without further notice of a consent order and was duly approved by the Director of the Bureau of Restraint of Trade and by the Chief of the Robinson-Patman Act Division.

The hearing examiner finds that said agreement includes all of the provisions required by Section 3.25(b) of the Rules of the Commission, that is:

A. An admission by the respondent of jurisdictional facts;

B. Provisions that:

1) The complaint may be used in construing the terms of the order;

2) The order shall have the same force and effect as if entered after a full hearing;

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3) The agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission;

4) The entire record on which any cease and desist order may be based shall consist solely of the complaint and the agreement;

5) The order may be altered, modified, or set aside in the manner provided by statute for other orders;

C. Waivers of:

1) The requirement that the decision must contain a statement of findings of fact and conclusions of law;

2) Further procedural steps before the Hearing Examiner and the Commission;

3) Any right to challenge or contest the validity of the order entered in accordance with the agreement.

D. In addition the agreement contains the following provision: A statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

Having considered said agreement, including the proposed order, and being of the opinion that it provides an appropriate basis for settlement and disposition of this proceeding; the Hearing Examiner hereby accepts the agreement but orders that it shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

The following jurisdictional findings are made and the following order issued:

1. Respondent Robert A. Johnston Company is a corporation existing and doing business under and by virtue of the laws of the State of Wisconsin, with its headquarters and principal place of business located at 4023 National Avenue, Milwaukee 1, Wisconsin.

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

ORDER

It is ordered, That respondent, Robert A. Johnston Company, a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of biscuit products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Discriminating, directly or indirectly in the price of such products of like grade and quality, by selling to any purchaser at net

prices higher than the net prices charged any other purchaser who in fact competes with such unfavored purchaser in the resale and distribution of such products. "Net price" as used in this order shall mean the ultimate net cost to the purchaser.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The Commission, on December 7, 1961, having stayed the effective date of the initial decision filed by the hearing examiner in this proceeding on October 19, 1961, which decision was based upon an agreement containing a consent order to cease and desist executed by respondent and counsel supporting the complaint pursuant to the Commission's Rules of Practice published May 6, 1955, as amended, and the Commission now having determined that the aforesaid decision should become the decision of the Commission:

It is ordered, That the initial decision of the hearing examiner, filed October 19, 1961, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent, Robert A. Johnston Company, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form 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

UNITED BISCUIT COMPANY OF AMERICA

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

Docket 7817. Complaint, Mar. 10, 1960—Decision, Feb. 7, 1964

Order requiring a manufacturer of biscuit products with headquarters in Melrose Park, Ill., to cease violating Sec. 2(a) of the Clayton Act by selling its products to some purchasers at higher net prices, arrived at through the use of volume discount schedules, than it charged others competing in the resale of the products with those so favored; and

Simultaneous consent order requiring said manufacturer to cease violating Sec. 2(d) of the Clayton Act by making payments to certain customers for advertising and promotional activities in connection with the handling of its products unless such payments were offered on proportionally equal terms to all other customers competing in the distribution or resale of the products.

COMPLAINT

The Federal Trade Commission, having reason to believe that United Biscuit Company of America, a corporation, has violated and is now violating the provisions of subsection (a) and subsection (d) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I

Charging a violation of subsection (a) of Section 2 of the aforesaid Clayton Act, as amended, the Federal Trade Commission alleges:

PARAGRAPH 1. United Biscuit Company of America, hereinafter sometimes referred to as respondent, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 25th and West North Avenue, Melrose Park, Illinois.

PAR. 2. Respondent is, and for the last several years has been, engaged in the manufacture, sale and distribution of cookies and crackers (hereinafter referred to as biscuit products). It sells its biscuit products under its own brand name through its various divisions, one of which is the Sawyer Biscuit Company, located in Melrose Park, Illinois. Respondent does not employ jobbers or distributors but sells and distributes its products through its own sales force. Respondent delivers its biscuit products directly to the stores of its retail grocery customers in its own trucks.

Respondent classifies its retail grocery customers into four categories. These categories are corporate chain concerns, supermarket concerns, voluntary chain concerns, and independent grocery concerns. The corporate chain category includes those retail grocery concerns wherein there is central buying and control. The voluntary chain category includes those individually owned retail grocery concerns which utilize central buying facilities without control of the individual stores. The supermarket category includes those individually owned retail grocery concerns which operate more than one retail grocery store. The independent grocery category includes those individually owned retail grocery concerns which usually operate only one retail grocery store.

Respondent's net sales for 1958 were in excess of \$135,000,000. A substantial part of that business consisted of sales of biscuit products.

Respondent manufactures, sells and distributes its biscuit products to retail grocery concerns and restaurants located throughout most of the United States, including Indiana and Wisconsin.

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PAR. 3. In the course and conduct of its business, as aforesaid, respondent is, and for the last several years has been, distributing and selling its biscuit products to buyers located in the several States of the United States, and has transported or caused such products, when sold, to be transported from its place of business, or warehouses, to buyers located in various other states. There is, and has been at all times mentioned herein, a continuous course of trade in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, in said biscuit products across state boundaries between respondent and buyers of said products. Said biscuit products are, and were, sold for use, consumption, or resale within the United States.

PAR. 4. In the course and conduct of its business, as aforesaid, respondent has, since July 1, 1958, and continuing to the present, discriminated in price between different purchasers of its biscuit products of like grade and quality by selling said products to some of its customers at lower prices than to other of its customers. The aforesaid discriminations in price have been effectuated through the use of respondent's cumulative volume discount systems based on the dollar volume of the customer's monthly purchases.

More particularly, during the period July 1, 1958, to June 30, 1959, the following cumulative volume discount schedule was utilized:

<i>Monthly purchases</i>	<i>Discount (percent)</i>
0 to \$24.99-----	No discount
\$25 to \$39.99-----	2
\$40 to \$69.99-----	3
\$70 to \$99.99-----	4
\$100 to \$124.99-----	5
\$125 and over-----	6

The cumulative volume discount schedule utilized from July 1, 1959, to the present is as follows:

<i>Monthly purchases</i>	<i>Discount (percent)</i>
0 to \$24.99-----	0
\$25 to \$44.99-----	1½
\$45 to \$59.99-----	2
\$60 to \$74.99-----	2½
\$75 to \$89.99-----	3
\$90 to \$109.99-----	3½
\$110 to \$129.99-----	4
\$130 to \$149.99-----	5
\$150 and over-----	6

These discounts or rebates are usually distributed by respondent to those customers qualifying therefor on a quarterly basis. However, some of respondent's major customers receive discount payments on a monthly basis.

In determining the amount of discount or rebate the customer is to receive, respondent allows corporate chain concerns and supermarket concerns to combine the purchases of their various outlets. As a result of this practice many of the individual stores of the chains and supermarkets receive larger discounts for their monthly purchases than they would otherwise receive if they were not allowed to aggregate their purchases with their other outlets.

In many instances respondent's independent grocery or voluntary chain customers, whose individual purchases from respondent are greater than the purchases of the individual outlet of the chain or supermarket with whom they compete, get no discount at all, or at best less than six percent, depending on their volume of purchases. These independent or voluntary chain customers purchase the same grade and quality products from respondent as do the chain and supermarket customers. In many instances the individual corporate chain store or supermarket store and the independently owned or voluntary chain store are located within a few blocks of each other, and are in active competition with each other for the consumer trade.

PAR. 5. In allowing and paying these discounts or rebates by means of its cumulative volume discount system, as hereinabove outlined and described, respondent has been for the past several years, and is now, discriminating in price between favored and non-favored purchasers of its biscuit products of like grade and quality, in commerce. The effects of such discriminations, as set forth herein, may be substantially to lessen competition in the lines of commerce in which the purchasers are engaged, or to injure, destroy or prevent competition between purchasers receiving the benefit of such discriminatory discounts and the purchasers not so benefited.

PAR. 6. The aforesaid discriminations in price by respondent by means of its cumulative quantity discounts or rebates, as hereinabove alleged and described, constitute violations of subsection (a) of Section 2 of the aforesaid Clayton Act, as amended.

COUNT II

Charging a violation of subsection (d) of Section 2 of the aforesaid Clayton Act, as amended, the Commission alleges:

PAR. 7. The allegations set forth in Paragraphs One through Three, inclusive, of Count I of this complaint are hereby incorporated by reference and made a part of this Count as fully and with the same effect as if quoted here verbatim.

PAR. 8. In the course and conduct of its business in commerce, as aforesaid, respondent, during the period from July 1, 1958, to the

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present, has paid or authorized payment of money, goods or other things of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished or agreed to be furnished by or through such customers in connection with the processing, handling, offering for sale or sale of respondent's biscuit products and respondent has not made or offered to make such payments, allowances or consideration available on proportionally equal terms to all of its other customers competing with the customers so favored in the sale or distribution of said products.

PAR. 9. Illustrative of and included among the conduct alleged in Paragraph Eight, above, are the following acts and practices of the respondent:

(1) In accordance with the terms of an advertising plan put into effect by it, respondent has paid to some of its customers advertising allowances in the amount of 1% of the monthly dollar volume of sales to such customers. Under the terms of aforesaid advertising plan a customer must purchase a monthly minimum in the amount of \$500 in order to qualify for any such advertising allowance.

Respondent has many non-preferred customers who compete in the distribution of respondent's biscuit products with customers of respondent who receive preferential payments, or the benefits of such payments, under the terms of aforesaid advertising plan. In many instances respondent has failed to make the terms of its advertising plan known to such non-preferred customers. Additionally, many such non-preferred customers purchase such products in monthly amounts of less than \$500.

(2) In accordance with the terms of a sales promotion plan put into effect by it, respondent has paid to some of its customers promotional allowances in the amount of 1% of the monthly dollar volume of sales to such customers. Under the terms of aforesaid sales promotional plan a customer must purchase a monthly minimum in the amount of \$150 in order to qualify for any such promotional allowance.

Respondent has many non-preferred customers who compete in the distribution of respondent's biscuit products with customers of respondent who receive preferential payments, or the benefits of such payments, under the terms of aforesaid sales promotion plan. In many instances respondent has failed to make the terms of its sales promotion plan known to such non-preferred customers. Additionally, many such non-preferred customers purchase such products in monthly amounts of less than \$150.

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PAR. 10. Respondent's acts and practices, as alleged in Paragraphs Seven, Eight and Nine, above, are in violation of subsection (d) of Section 2 of the aforesaid Clayton Act, as amended.

Ross, McGowan & O'Keefe, by *Mr. Roland D. Whitman* of Chicago, Ill., for respondent.

Mr. Cecil G. Miles, Mr. Brockman Horne and *Mr. Charles D. Gerlinger* supporting the complaint.

INITIAL DECISION AS TO COUNT I BY LEON R. GROSS, HEARING EX-AMINER

FILED JULY 26, 1961

The hearing examiner hereby sustains respondent's motion of April 28, 1961, at the close of the Commission's case-in-chief to dismiss Count I of the complaint.¹ That motion is sustained for failure of the evidence to prove the competitive injury required to be shown under §2(a) of the Clayton Act, as amended (15 U.S.C. §13(a)). The hearing examiner is by separate order of even date disposing of respondent's motion of April 28, 1961, and letter dated July 19, 1961, regarding the possible disposition of the allegations in Count II of the complaint.

Commission counsel completed their case-in-chief on March 7, 1961. On May 19, 1961, respondent filed a brief in support of its motion to dismiss Count I. On June 16, 1961, Commission counsel filed their answering brief, and on July 17, 1961, respondent filed its reply to the Commission's brief. Introduction of evidence in support of the complaint has been completed, but findings of fact and conclusions of law have not been filed. Inasmuch as Count I of the complaint is being dismissed after the conclusion of the Commission's evidence, and respondent has, by its motion of April 28, 1961, and letter of July 19, 1961, indicated its willingness to negotiate a consent cease and desist order as to the practices complained of in Count II, no findings or conclusions other than those in this opinion need be filed by the parties.

The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding, and this proceeding is in the public interest. The complaint filed herein stated a good cause of action against respondent but the evidence adduced in support of the allegations of Count I has failed to prove that the effect of respond-

¹ A late Commission decision setting forth the basis for evaluating the evidence at this stage of the proceeding is in Docket 7090, Consolidated Foods Corporation, Opinion of Commission on Interlocutory Appeal, *CCH Trade Reg. Rep.*, par. 28,821.

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ent's discount schedules "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition * * *" as alleged in the complaint.

Respondent, United Biscuit Company, a Delaware corporation, whose principal office and place of business is at 25th and West North Street, Melrose Park, Illinois, is engaged on a nationwide basis in the manufacture and sale of cookies, crackers, and biscuit products. Its operations are conducted through eight divisions in various geographical areas covering most of the United States. With minor exceptions, each division is exclusively responsible for the manufacture and sale of biscuit products within its respective area. Each division has its own discount policy and sets policies which vary from division to division. For the year ending December 31, 1959, respondent's gross sales were approximately \$138 million, and the sales of its Sawyer Division accounted for approximately \$12 million. The evidence adduced by Commission counsel, with immaterial exceptions, related solely to respondent's Sawyer Division. Different discount schedules were utilized by different divisions. From July 1, 1958, to June 30, 1959, respondent's Sawyer Division granted its customers cumulative volume discounts on their purchases as follows:

<i>Monthly purchases</i>	<i>Discount (percent)</i>
0 to \$24.99-----	0
\$25 to \$39.99-----	2
\$40 to \$69.99-----	3
\$70 to \$99.99-----	4
\$100 to \$124.99-----	5
\$125 and over-----	6

From July 1, 1959 to March 10, 1960 (date of issuance of complaint), it granted discounts as follows:

<i>Monthly purchases</i>	<i>Discount (percent)</i>
0 to \$24.99-----	0
\$25 to \$44.99-----	1½
\$45 to \$59.99-----	2
\$60 to \$74.99-----	2½
\$75 to \$89.99-----	3
\$90 to \$109.99-----	3½
\$110 to \$129.99-----	4
\$130 to \$149.99-----	5
\$150 and over-----	6

In the case of a customer making individual monthly purchases of less than \$500, who is a member of a voluntary buying group, an additional one percent of his monthly sales is payable to the group headquarters if the aggregate monthly purchases by the group are \$500 or more without regard to the amount of said customer's own monthly pur-

chases (Tr. 20, as corrected). Corporate chains such as the Kroger Company and the Great Atlantic & Pacific Tea Company, which operate multiple units but have one common corporate ownership, have their purchases aggregated by area, and the discount is paid to the corporate chain's headquarters, which operationally conducts that chain's business in a particular area.

Respondent's Sawyer Division operates generally in an area composed of the States of Illinois, and portions of Indiana, Kentucky, Missouri, Iowa, Wisconsin, and Michigan. Within the division there are in excess of 20,000 retail grocery customers.

Even though the operational practices and policies may vary from division to division, the corporate respondent, United Biscuit Company, is legally responsible for the pricing practices and policies of each and all of its divisions. If a violation of §2(a) of the Clayton Act had been proven with reference to any of the divisions, the cease and desist order which would issue would as a matter of law have to bind the corporate respondent. Respondent's divisions are not separate legal entities.

Commission counsel called as witnesses officials of respondent who explained its general corporate structure and operations, and explained certain exhibits prepared for the Commission by respondent upon the Commission's request. In addition, the owners of "Ma and Pa" grocery stores (individually owned grocery stores which were not a member of a buying group nor the unit of a corporate chain) in Burlington, Wisconsin, and South Bend and Gary, Indiana, testified concerning the general operations of their stores with particular reference to their business relationships and practices with respondent. Such store owners were: in Burlington, Wisconsin, Donald Rehberg, Paul Spiegelhoff, John Knutowski, and Robert C. Grossman; in Gary, Indiana, Walter Pall, Jack Landsman, Oscar Noak, and Irving Tobe; and in South Bend, Indiana, Dennis Horvath, Earl Walter Plack, Marion Nowicki, and Vincent A. Koziatke. Annual sales for some of these stores were: \$1 million, \$500,000, \$417,000, \$360,000, \$320,000, \$240,000, \$125,000, and \$120,000.

The retail sales of respondent's biscuit products constitute a fractional percentage of the over-all gross sales of these stores. If the retail sales of respondent's biscuit products were deducted from these stores' gross sales, it would not materially reduce the over-all sales figure or lower the net profit to the store owners by any material amount. The profit margin is small for the stores whose owners testified. The net profit margin in the retail grocery business as an industry is generally understood to be low in relation to gross sales.

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The Commission witnesses, the above-named independent grocers, testified that they strived to keep their biscuit products priced at approximately the same level as their competitors'; that chain stores provide strong competition for them; but that uniformly the retail grocery business is highly competitive. The independent owners are unable to match the over-all lower prices of the chains and particularly the special sales prices of these chains. The independents are unable to meet the indirect price reductions implicit in the use and issuance of trading stamps. They cannot advertise as extensively as the chains, and several of them do no advertising except by papers and posters on their premises. Their stores are unable to match the chain's expensive physical plants, air conditioning, parking lots, larger and more attractive display areas, and other physical features which cause the corporate chain stores to be more attractive to customers and to provide more comfortable places to shop. If the chain stores stay open for the same number of hours as the independents, the traditional advantage which staying open longer hours formerly gave the independents clearly disappears. It is obvious from these recitals that there are many complex factors which enter into the ability of the independents to compete successfully. A few dollars per annum difference in the cost of respondent's biscuit products is a relatively remote and unimportant factor. Moreover, the hearing examiner received the distinct impression from the testimony of the store owners that in every instance except one or two their businesses are growing and their annual sales are increasing. If, therefore, these independent owners were produced as examples of businessmen who had been competitively injured by respondent's discount schedules, they failed to demonstrate or to prove any such injury or the possibility thereof. Moreover, one of them testified he featured meats as the means of enticing customers and another store owner that he used fresh green vegetables as a "drawing card" because he was located in a neighborhood where his customers made fresh greens a substantial part of their diet.

The only injury claimed by Commission counsel is to secondary line competition. Commission counsel have neither proffered nor adduced any evidence, nor claimed that United's discount schedules have the capacity to injure competitively other business concerns who compete with United. Counsel supporting the complaint have not made it quite clear whether the competitive injury claim is for the independents vis-a-vis independents, or the independents vis-a-vis the corporate chains. If it is the independent vis-a-vis the corporate chain where the competitive injury is supposed to have occurred, this

record is almost completely lacking in evidence of such injury due to respondent's discount schedules.

The hearing examiner rejects respondent's argument that the Commission's proof is too limited in time or geographical area to support a finding of the competitive injury required by §2(a). Had actual proof of such competitive injury been adduced, it would have supported the cease and desist order against respondent generally.

Of the witnesses who were asked whether their business would be substantially affected or injured by receiving a lesser discount than a competitor on the same amount of purchases of respondent's products, six replied in the negative. One testified that he would be injured only if competitors substantially cut their prices; the answers of three others were inconclusive. One answered in the affirmative.

Respondent's discount schedules may constitute a price discrimination under §2(a) of the Clayton Act according to *Anheuser-Busch v. FTC*, 363 U.S. 536, because a price discrimination within the meaning of §2(a) is merely a price difference. However, at page 550, the Supreme Court pointed out that the statute itself spells out the conditions which make a price difference legal or illegal. The Court remanded *Anheuser-Busch* to the Seventh Circuit for that court to make a determination whether the record would support a finding of the requisite competitive injury. The Seventh Circuit, under date of January 25, 1951, held that the *Anheuser-Busch* record would not support a finding of competitive injury and set aside the cease and desist order, 289 F. 2d 835. The time for filing certiorari to the Supreme Court from the Seventh Circuit's last opinion has expired and such opinion (reported in 289 F. 2d 835) must be deemed to be the ruling law at this time. Although *Anheuser-Busch* involved territorial price discrimination and primary line competition, some of the language of the Seventh Circuit in its last opinion is appropriate to this case in view of this examiner's finding that the evidence in this record will not support a finding of the competitive injury required by the statute. The Seventh Circuit, inter alia, said:

It is true that the effects of AB's [*Anheuser-Busch's*] acts on competition might have been different from what they actually were and that nevertheless it could be held to account under Section 2(a) for what actually happened as well as the reasonable possible effects thereof. But, to prove the *acts* themselves, the Commission was required to adduce evidence of what AB *did* and a finding of a violation cannot rest upon a conjecture as to what it *might do*. Potentiality to commit an act cannot be used as a substitute for proof of the act itself. (Emphasis in original.)

In *General Foods Corp.*, Docket 5675, 50 F.T.C. 885 (1954), in affirming the examiner's decision dismissing a complaint charging

violation of §2(a) for failure of proof of a lessening of competition, the Commission stated (p. 889):

The burden of proof to establish injury to competition is on counsel supporting the complaint. In *A. E. Staley Manufacturing Co. v. Federal Trade Commission*, 135 F. 2d 453, the court held that proof of discrimination in price is not sufficient; that in addition "there must be evidence to support a finding and there must be a finding based on that evidence to show wherein competition is substantially lessened and a monopoly fostered."

While the *General Foods* case involved primary line rather than secondary line discrimination, the Commission expressly disapproved the view expressed by the examiner that the test differed as between those two situations (50 FTC at 887).

Price differentials *per se* are not prohibited by §2(a) of the Act, but only those price differentials having an actual or probable effect on competition. The statute requires, moreover, that this effect be substantial. As the court stated in *Whitaker Cable Corp. v. Federal Trade Commission*, 239 F. 2d 253 (C.A. 7th 1956), at page 256:

Congress has not outlawed price differentials *per se*, unjustified though they may be. The Act was not intended to reach every remote, adverse effect on competition. The effect must be substantial. * * * If the amount of the discrimination is inconsequential or if the size of the discriminator is such that it strains credulity to find the requisite adverse effect on competition, the Commission is powerless under the Act to prohibit such discriminations whether first or second line competition be involved.

The Commission's cease and desist order was affirmed by the court in *Whitaker*.

A cumulative quantity discount was also involved in *Yale and Towne Mfg. Co.*, Docket 6232, 52 F.T.C. 1580 (1956), where the Commission affirmed the examiner's decision dismissing the complaint at the close of the case-in-chief. Although primary line competition was involved, the considerations on which the decision was based are pertinent here. In that case, which involved the sale of industrial trucks, it was not disputed that the discounts granted were substantial and that they resulted in lower net acquisition costs to some of respondent's customers. The Commission concluded, however, that the evidence was insufficient to show that price was a paramount factor in influencing sales. And in reply to the contention of the appellant that the Act does not require actual injury to competition, but only a reasonable probability of such injury, the Commission stated (52 F.T.C. at 1604):

This latter concept, which is sound, does not support the proposition, however, that conclusive inferences may be drawn from isolated evidentiary facts of the case without consideration of those which may be drawn from the entire record. If the particular circumstances attending the discriminations

refute conclusions that the proscribed adverse effects may result, the statutory requirements of proof of injury have not been met. The proponent of the complaint has the burden of meeting these standards in proving competitive injury; and, where the burden has not been sustained in the course of the case-in-chief by counsel supporting the complaint, the proceeding should be dismissed.

In the Matter of *Fred Bronner Corporation*, Docket 7068, the Federal Trade Commission, on September 29, 1960, sustained the hearing examiner's dismissal of a complaint under §2(a). In *Bronner* the Commission gives a definitive opinion of the implications of *Federal Trade Commission v. Morton Salt Company*, 334 U.S. 37 (1948); and *Whitaker*, holding, as to *Morton Salt*:

* * * The court ruled that this competitive handicap could not be minimized by reason of the fact that salt is only a small item in the non-favored purchasers' businesses. In effect, the court held that it was not necessary for the Commission to consider sales in other merchandise categories in determining injury to the purchaser victimized by respondent's price differential. *The contention of counsel supporting the complaint that we project the discount to other merchandise purchased by the favored customers is clearly beyond the holding in the Morton Salt case and must be rejected.* (Emphasis supplied.)

This hearing examiner's finding in this proceeding of no competitive injury by United's discount schedules is not premised solely on the fact that crackers are "only a small item in the non-favored purchasers' businesses." The finding is based upon consideration of all material facts in this record, including the total absence of *proof* of actual or probable competitive injury to any of the independent store owners who testified as the Commission's witnesses.

In *Bronner* the Commission cited with approval the quotation reproduced (page 7) from *Whitaker*. The Commission also held:

Regardless of whether the court in the *Whitaker* case meant the dollar amount or the percentage rate of the discount, it is our view that neither of these factors can be considered separate and apart from the other circumstances of record in determining whether a price discrimination has the proscribed adverse effects. As stated by the court in the *Whitaker* case, "Congress has not outlawed price differentials *per se*, unjustified though they may be." Either of the aforementioned factors must be viewed in the light of the actual competitive situation surrounding the particular pricing practice charged to be illegal. It is clear that this was done by the court in both the *Whitaker* and *Edelmann* [*E. Edelmann & Co. v. FTC*, 239 F.2d 152 (C.A. 7th 1956)] cases. * * *

In view of the finding by this examiner that counsel supporting the complaint has not, in this record, sustained the burden of proof imposed upon him,

It is ordered, That Count I of the complaint against respondent United Biscuit Company of America, a corporation, be and it hereby is dismissed.

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The hearing examiner is, by separate order of even date, acting upon respondent's motion of April 28, 1961, and letter dated July 19, 1961, proposing a manner of disposing of the allegations in Count II of the complaint.

INITIAL DECISION AS TO COUNT I BY LEON R. GROSS, HEARING EX-AMINER

FILED NOVEMBER 13, 1961

This complaint, issued on March 10, 1960, charged respondent in Count I with violation of § 2(a) of the Clayton Act, as amended, and in Count II with violation of § 2(d) of the Act. On August 30, 1961, the Federal Trade Commission vacated and remanded an initial decision of July 20, 1961, which dismissed the charges in Count I of the complaint.

The Commission vacated the aforesaid decision because the hearing examiner had not made a finding under § 3.8(e) of the Commission's Rules that granting respondent's motion to dismiss Count I terminated the proceeding before him. That decision of July 20, 1961, did not terminate the proceedings before the examiner because Count II, which charged a violation of § 2(d) of the Act, was then undisposed. Counsel had agreed prior to July 20, 1961, to attempt to dispose of Count II under §§ 3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, published May 6, 1955, as amended, and the decision so stated.

The hearing examiner is now reissuing this decision as to Count I and is simultaneously issuing a separate decision as to Count II. That disposition of Count II is being made pursuant to §§ 3.21 and 3.25 of the Commission's Rules and pursuant to notice of intention filed by the parties prior to September 1, 1961. The initial decision as to Count II contains a cease-and-desist order which is subject to review and approval by the Federal Trade Commission before it becomes final and effective. However, the issuance of the initial decision as to Count II makes it possible to find, and the examiner hereby finds, that there is nothing further pending before him either as to Count I or as to Count II of this complaint.

Having made such findings, the examiner hereby reissues his initial decision as to Count I of the complaint, with certain minor changes, as follows:

The hearing examiner hereby sustains respondent's motion of April 28, 1961, at the close of the Commission's case-in-chief to dismiss

Count I of the complaint.¹ That motion is sustained for failure of the evidence to prove the competitive injury required to be shown under § 2(a) of the Clayton Act, as amended (15 U.S.C. § 13(a)).

Commission counsel completed their case-in-chief on March 7, 1961. On May 19, 1961, respondent filed a brief in support of its motion to dismiss Count I. On June 16, 1961, Commission counsel filed his answering brief, and on July 17, 1961, respondent filed its reply to the Commission's brief. Introduction of evidence in support of the complaint has been completed, but findings of fact and conclusions of law have not been either ordered or filed.

The hearing examiner finds and concludes from all the evidence:

1. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding, and this proceeding is in the public interest. The complaint filed herein stated a good cause of action against respondent but the evidence adduced in support of the allegations of Count I of the complaint has failed to prove that the effect of respondent's discount schedules "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition" as alleged in the complaint.

2. Respondent, United Biscuit Company of America, a Delaware corporation, whose principal office and place of business is at 25th and West North Avenue, in the city of Melrose Park, State of Illinois, is engaged on a nationwide basis in the manufacture and sale of cookies, crackers, and biscuit products. Its operations are conducted through eight divisions in various geographical areas covering most of the United States. With minor exceptions, each division is exclusively responsible for the manufacture and sale of biscuit products within its respective area. Each division has its own discount policy and sets policies which vary from division to division.

3. For the year ending December 31, 1959, respondent's gross sales were approximately \$138 million, and the sales of its Sawyer Division accounted for approximately \$12 million.

4. The evidence adduced by Commission counsel, with immaterial exceptions, related solely to respondent's Sawyer Division. Different discount schedules were utilized by different divisions. From July 1,

¹ A late Commission decision setting forth the basis for evaluating the evidence at this stage of the proceeding is in Docket 7000, Consolidated Foods Corporation, Opinion of Commission on Interlocutory Appeal [56 F.T.C. 1663], *CCH Trade Reg. Rep.*, par. 28,821.

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1958, to June 30, 1959, respondent's Sawyer Division granted its customers cumulative volume discounts on their purchases as follows:

<i>Monthly purchases</i>	<i>Discount (percent)</i>
0 to \$24.99-----	0
\$25 to \$39.99-----	2
\$40 to \$69.99-----	3
\$70 to \$99.99-----	4
\$100 to \$124.99-----	5
\$125 and over-----	6

From July 1, 1959 to March 10, 1960 (date of issuance of complaint), it is granted discounts as follows:

<i>Monthly purchases</i>	<i>Discount (percent)</i>
0 to \$24.99-----	0
\$25 to \$44.99-----	1½
\$45 to \$59.99-----	2
\$60 to \$74.99-----	2½
\$75 to \$89.99-----	3
\$90 to \$109.99-----	3½
\$110 to \$129.99-----	4
\$130 to \$149.99-----	5
\$150 and over-----	6

In the case of a customer making individual monthly purchases of less than \$500, who is a member of a voluntary buying group, an additional one percent of his monthly sales is payable to the group headquarters if the aggregate monthly purchases by the group are \$500 or more without regard to the amount of said customer's own monthly purchases (Tr. 20, as corrected). Corporate chains such as the Kroger Company and the Great Atlantic & Pacific Tea Company, which operate multiple units but have one common corporate ownership, have their purchases aggregated by area, and the discount is paid to the corporate chain's headquarters, which operationally conducts that chain's business in a particular area.

5. Respondent's Sawyer Division operates generally in an area composed of the States of Illinois, and portions of Indiana, Kentucky, Missouri, Iowa, Wisconsin, and Michigan. Within the division there are in excess of 20,000 retail grocery customers.

6. Even though the operational practices and policies may vary from division to division, the corporate respondent United Biscuit Company, is legally responsible for the pricing practices and policies of each and all of its divisions. If a violation of § 2(a) of the Clayton Act had been proven with reference to any of the divisions, the cease and desist order which would issue would as a matter of law have to bind the corporate respondent. Respondent's divisions are not separate legal entities.

7. Commission counsel called as witnesses officials of respondent who explained its general corporate structure and operations, and explained certain exhibits prepared for the Commission by respondent upon the Commission's request. In addition, the owners of "Ma and Pa" grocery stores (individually owned grocery stores which were not a member of the buying group nor the unit of a corporate chain) in Burlington, Wisconsin, and South Bend and Gary, Indiana, testified concerning the general operations of their stores with particular reference to their business relationships and practices with respondent. Such store owners were: in Burlington, Wisconsin, Donald Rehberg, Paul Spiegelhoff, John Knutowski, and Robert C. Grossman; in Gary, Indiana, Walter Pall, Jack Landsman, Oscar Noak, and Irving Tobe; and in South Bend, Indiana, Dennis Horvath, Earl Walter Plack, Marion Nowicki, and Vincent A. Koziatsek. Annual sales for some of these stores were: \$1 million, \$500,000, \$417,000, \$360,000, \$320,000, \$240,000, \$125,000, and \$120,000.

8. The retail sales of respondent's biscuit products constitute a fractional percentage of the over-all gross sales of these stores. If the retail sales of respondent's biscuit products were deducted from these stores' gross sales, it would not materially reduce the over-all sales figure or lower the net profit to the store owners by any material amount. The profit margin is small for the stores whose owners testified. The net profit margin in the retail grocery business as an industry is generally understood to be low in relation to gross sales. The Commission witnesses, the above-named independent grocers, testified that they endeavored to keep their biscuit products priced at approximately the same level as their competitors'; that chain stores provide strong competition for them; but that uniformly the retail grocery business is highly competitive.

9. The independent owners are unable to match the over-all lower prices of the chains and particularly the special sales prices of the chains. The independents are unable to meet the indirect price reductions implicit in the use and issuance of trading stamps. They cannot advertise as extensively as the chains, and several of them do no advertising except by papers and posters on their premises. Their stores are unable to match the chain's expensive physical plants, air conditioning, parking lots, larger and more attractive display areas, and other physical features which cause the corporate chain stores to be more attractive to customers and to provide more comfortable places to shop. If the chain stores stay open for the same number of hours as the independents, the traditional advantage which staying open longer hours formerly gave the independents clearly disappears.

There are many complex factors which enter into the ability of the independent grocery store operator to compete successfully with the corporate chains and with the members of the buying groups. A few dollars per annum difference in the cost of respondent's biscuit products is a relatively remote and unimportant factor. Moreover, the hearing examiner received the distinct impression from the testimony of the store owners that, except for one or two, their businesses are growing and their annual sales are increasing. If, therefore, these independent owners were produced as examples of businessmen who had been competitively injured by respondent's discount schedules, they failed to prove such injury or the possibility thereof.

10. The competitive injury asserted by Commission counsel is to secondary line competition. Commission counsel have neither proffered nor adduced any evidence, nor claimed that United's discount schedules have the capacity to injure competitively other business concerns who compete with United. It is not clear whether the competitive injury is asserted as having been inflicted upon the independents vis-a-vis independents, or the independents vis-a-vis the corporate chains. If it is the independent vis-a-vis the corporate chain where the competitive injury is supposed to have occurred, this record lacks any evidence of such injury due to respondent's discount schedules.

11. The witnesses were asked whether their business would be substantially affected or injured by receiving a lesser discount than a competitor on the same amount of purchases of respondent's products. Six replied in the negative. One testified that he would be injured only if competitors substantially cut their prices; the answers of three others were inconclusive. One answered in the affirmative.

12. The hearing examiner rejects respondent's argument that the Commission's proof is too limited in time or geographical area to support a finding of the competitive injury required by § 2(a). Had actual proof of such competitive injury been adduced, it would have supported a cease and desist order against respondent generally.

Respondent's discount schedules may constitute a price discrimination under § 2(a) of the Clayton Act according to *Anheuser-Busch v. FTC*, 363 U.S. 536, because a price discrimination within the meaning of § 2(a) is merely a price difference. However, at page 550 in *Anheuser-Busch*, the Supreme Court pointed out that the statute itself spells out the conditions which make a price difference legal or illegal. The Court remanded *Anheuser-Busch* to the Seventh Circuit for that court to make a determination whether the record would support a finding of the requisite competitive injury. The

Seventh Circuit, under date of January 25, 1961, held that the *Anheuser-Busch* record would not support a finding of competitive injury and set aside the cease and desist order, 289 F. 2d 835. The time for filing certiorari to the Supreme Court from the Seventh Circuit's last opinion has expired and such opinion (reported in 289 F. 2d 835) must be deemed to be the ruling law at this time. Although *Anheuser-Busch* involved territorial price discrimination and primary line competition, some of the language of the Seventh Circuit in its last opinion is appropriate to this case in view of this examiner's finding that the evidence in this record will not support a finding of the competitive injury required by the statute. The Seventh Circuit, *inter alia*, said:

It is true that the effects of AB's [Anheuser-Busch's] acts on competition might have been different from what they actually were and that nevertheless it could be held to account under Section 2(a) for what actually happened as well as the reasonable possible effects thereof. But, to prove the acts themselves, the Commission was required to adduce evidence of what AB *did* and a finding of a violation cannot rest upon a conjecture as to what it *might do*. Potentiality to commit an act cannot be used as a substitute for proof of the act itself. (Emphasis in original.)

In *General Foods Corp.*, Docket 5675, 50 F.T.C. 885 (1954), in affirming the examiner's decision dismissing a complaint charging violation of § 2(a) for failure of proof of a lessening of competition, the Commission stated (p. 889):

The burden of proof to establish injury to competition is on counsel supporting the complaint. In *A. E. Staley Manufacturing Co. v. Federal Trade Commission*, 135 F.2d 453, the court held that proof of discrimination in price is not sufficient; that in addition "there must be evidence to support a finding and there must be a finding based on that evidence to show wherein competition is substantially lessened and a monopoly fostered."

The evidence in this record does not show "wherein competition is substantially lessened and a monopoly fostered" by United's discount schedules. While the *General Foods* case involved primary line rather than secondary line discrimination, the Commission expressly disapproved the view expressed by the examiner that the test differed as between those two situations (50 F.T.C. at 887).

Price differentials per se are not prohibited by § 2(a) of the Clayton Act, but only those price differentials having an actual or probable effect on competition. There is a highly respectable and commanding line of opinion to the effect that *Corn Products Refining Company v. FTC*, 324 U.S. 726 (1945); *Morton Salt Company v. FTC*, 334 U.S. 437 (1948); and *P. Sorenson Mfg. Co.*, 52 F.T.C. 1659, *aff'd per curiam*, *P. Sorenson Mfg. Co. v. FTC*, 246 F. 2d 687

(D.C. Cir. 1957) lead but to one conclusion, namely, that price discrimination among competing customers of the seller carries with it a conclusion of competitive injury per se (See Docket No. 7225, *Tri-Valley Packing Assn.*, [60 F.T.C. 1134] opinion dated August 1, 1961, page 18 [1151]) and that this per se principle is especially applicable in a highly competitive business such as the grocery business here involved. With all due respect to this high authority, this examiner respectfully suggests that if the Congress had intended price discrimination among competing customers of the seller to constitute per se violation under § 2(a) it would have phrased § 2(a) accordingly to give effect to that intent. In a footnote in *Sun Oil Co. v. FTC*, 294 F. 2d 465, 476 30 L.W. 2060, 8/1/61 (July 24, 1961, C.A. 5), the court quotes authorities to the effect that the virtue of the Robinson-Patman Act may, like Roman law, "lay in its being neither too plain nor too obscure, but expressed in a sort of middling obscurity." The Seventh Circuit's Second Opinion in *Anheuser-Busch, supra*, quoted, negates the notion that proof of competitive injury under § 2(a) may be found in such "middling obscurity." It cannot be based upon speculation and conjecture.

Section 2(a) requires that the effect on competition be substantial. As the court stated in *Whitaker Cable Corp. v. Federal Trade Commission*, 239 F. 2d 253 (C.A. 7th 1956), at 256:

Congress has not outlawed price differentials *per se*, unjustified though they may be. The Act was not intended to reach every remote, adverse effect on competition. The effect must be substantial. * * * If the amount of the discrimination is inconsequential or if the size of the discriminator is such that it strains credulity to find the requisite adverse effect on competition, the Commission is powerless under the Act to prohibit such discriminations whether first or second line competition be involved.

The Commission's cease and desist order was affirmed by the court in *Whitaker*.

A cumulative quantity discount was also involved in *Yale & Towne Mfg. Co.*, Docket No. 6232, 52 F.T.C. 1580 (1956), where the Commission affirmed the examiner's decision dismissing the complaint at the close of the case-in-chief. Although primary line competition was involved, the considerations on which the decision was based are pertinent here. In that case, which involved the sale of industrial trucks, it was not disputed that the discounts granted were substantial and that they resulted in lower net acquisition costs to some of respondent's customers. The Commission concluded, however, that the evidence was insufficient to show that price was a paramount factor in influencing sales. And in reply to the contention

of the appellant that the Act does not require actual injury to competition, but only a reasonable probability of such injury, the Commission stated (52 F.T.C. at 1604):

This latter concept, which is sound, does not support the proposition, however, that conclusive inferences may be drawn from isolated evidentiary facets of the case without consideration of those which may be drawn from the entire record. If the particular circumstances attending the discriminations refute conclusions that the proscribed adverse effects may result, the statutory requirements of proof of injury have not been met. The proponent of the complaint has the burden of meeting these standards in proving competitive injury; and, where the burden has not been sustained in the course of the case-in-chief by counsel supporting the complaint, the proceeding should be dismissed.

In the *Matter of Fred Bronner Corporation*, Docket 7068, the Federal Trade Commission, on September 29, 1960 [57 F.T.C. 771], sustained the hearing examiner's dismissal of a complaint under § 2(a). In *Bronner* the Commission gives a definitive opinion of the implications of *Federal Trade Commission v. Morton Salt Company*, 334 U.S. 37 (1948); and *Whitaker*, holding, as to *Morton Salt*:

* * * The court ruled that this competitive handicap could not be minimized by reason of the fact that salt is only a small item in the non-favored purchasers' businesses. In effect, the court held that it was not necessary for the Commission to consider sales in other merchandise categories in determining injury to the purchaser victimized by respondent's price differential. *The contention of counsel supporting the complaint that we project the discount to other merchandise purchased by the favored customers is clearly beyond the holding in the Morton Salt case and must be rejected.* (Emphasis supplied.)

This hearing examiner's finding in this proceeding of no competitive injury by United's discount schedules is not premised solely on the fact that respondent's products are "only a small item in the non-favored purchasers' businesses." The finding is based upon consideration of all material facts in this record, including the total absence of *proof* of actual or probable competitive injury to any of the independent store owners who testified as the Commission's witnesses.

In *Bronner* the Commission cited with approval the quotation reproduced (page 8) from *Whitaker*. The Commission also held:

Regardless of whether the court in the *Whitaker* case meant the dollar amount or the percentage rate of the discount, it is our view that neither of these factors can be considered separate and apart from the other circumstances of record in determining whether a price discrimination has the proscribed adverse effects. As stated by the court in the *Whitaker* case, "Congress has not outlawed price differentials *per se*, unjustified though they may be." Either of the aforementioned factors must be viewed in the light of the actual competitive situation surrounding the particular pricing practice charged to be illegal. It is clear that this was done by the court in both the *Whitaker*

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and *Edelmann* [E. Edelmann & Co. v. FTC, 239 F.2d 152 (C.A. 7th 1956)] cases * * * .

In the *Edelmann* case, the court held (page 155) :

* * * Although it has been held that there is no automatic *de minimis* exception in Section 2(a) which requires the Commission to insert a maximum permissible discrimination in its order [citing cases], it is implicit in the Act that discriminations which are negligible and which at best have a remote effect on competition are not within its prohibitions. See our opinion in *Whitaker Cable Co. v. Federal Trade Commission*, 7 Cir., 239 F.2d 253. But it must be remembered that in enacting the Robinson-Patman Act, 49 Stat. 1528 (1936), 15 U.S.C.A. §13, Congress undertook to strengthen this phase of the Clayton Act which it thought had been too restrictive in practice by directing emphasis to individual competitive situations rather than competition in general * * * .

In view of the finding by this examiner that counsel supporting the complaint has not, in this record, sustained the burden of proof of competitive injury imposed upon him by law,

It is ordered, That Count I of the complaint against respondent United Biscuit Company of America, a corporation, be and it hereby is dismissed.

INITIAL DECISION AS TO COUNT II BY LEON R. GROSS, HEARING EXAMINER

FILED NOVEMBER 13, 1961

The complaint, issued March 10, 1960, charges respondent in Count I with violating § 2(a) and in Count II with violation of § 2(d) of the Clayton Act, as amended. During the hearings respondent's counsel stated that respondent had abandoned the practices alleged in Count II to have constituted violation of § 2(d) of the Act, and would seek disposition of those charges in Count II, pursuant to §§ 3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, published May 6, 1955, as amended. At the conclusion of the evidence in support of Count I, respondent moved to dismiss Count I because of a failure of proof. A separate initial decision dismissing Count I is being issued on this date.

Counsel have submitted to the undersigned an agreement dated September 18, 1961, which agreement was received on October 24, 1961, containing a consent cease and desist order, for the purpose of disposing of all of the allegations in Count II. This agreement is signed by counsel for the parties and approved by the Director of the Bureau of Restraint of Trade and the Chief, Robinson-Patman Act Division of that Bureau. Due notice dated July 14, 1961, of intention to dispose of Count II was filed pursuant to the Commission's

Rules of Practice appearing in F.R. 61-6766. The said agreement disposes of all of the proceeding as to all parties, except as to Count I of the complaint; that Count, as aforesaid, is being disposed separately by other proceeding. In the aforesaid agreement of September 18, 1961, respondent admits all the jurisdictional facts alleged in the complaint insofar as they relate to Count II thereof and agrees that the record as to Count II may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. In the said agreement respondent waives (a) any further procedural steps; (b) the requirement that the Commission's decision contains findings of fact and conclusions of law; and (c) all rights to seek judicial review or otherwise challenge or contest the validity of the order entered pursuant to said agreement.

The said agreement provides further: the record on which the decision of the Commission shall be based as to Count II of the complaint shall consist solely of the complaint and the agreement; the agreement shall not become a part of the official record of the proceeding unless and until it is accepted by the Commission; the agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in Count II.

The said agreement also provides that the cease and desist order set forth in the said agreement may be entered in this proceeding by the Commission without further notice to respondent and when so entered, the order shall have the same force and effect and shall become final and may be altered, modified, or set aside in the same manner and within the same time provided by the statute for other orders, and that the complaint may be used in construing the terms of the order.

The undersigned hearing examiner has examined the aforesaid agreement of September 18, 1961, and finds that it adequately disposes of this proceeding as to Count II of the complaint; that it complies with the pertinent rules of the Federal Trade Commission and that its approval and acceptance is in the public interest. Said agreement hereby is approved and accepted. The said agreement, however, shall not become a part of the public record unless and until the cease and desist order provided for therein is approved by the Commission.

The hearing examiner makes the following findings and enters the following order:

1. Respondent United Biscuit Company of America is a corporation existing and doing business under and by virtue of the laws of

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the State of Delaware, with its office and principal place of business located at 25th and West North Avenue, in the city of Melrose Park, State of Illinois.

2. Pursuant to the provisions of subsections (a) and (d) of § 2 of the Clayton Act, as amended, the Federal Trade Commission, on March 10, 1960, issued its complaint in this proceeding, and a true copy was thereafter duly served on respondent. The complaint in Count I alleged a violation of subsection (a) and in Count II alleged a violation of subsection (d).

3. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding and this proceeding is in the public interest.

4. Count I of the complaint is being disposed in a separate initial decision being issued simultaneously with this decision.

It is ordered, That respondent United Biscuit Company of America, a corporation, its officers, agents, representatives and employees, directly or through any corporate or other device, in or in connection with the sale of biscuit products in commerce as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

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

INITIAL DECISION UPON REMAND AS TO COUNT I BY LEON R. GROSS,
HEARING EXAMINER

FILED NOVEMBER 9, 1962

PRELIMINARY STATEMENT

The complaint which issued in this proceeding on March 10, 1960, alleged in Count I that respondent had violated subsection 2(a) of the Clayton Act, as amended, and, in Count II that respondent had violated subsection 2(d) of the Act, the pertinent parts of which Act read as follows:

(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, * * * to discriminate in price between different

purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. * * *

(d) That it shall be unlawful for any person engaged in commerce, * * * to pay * * * anything of value * * * to a customer of such person * * * in consideration for any services or facilities furnished by or through such customer * * * unless such payment * * * is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

While counsel supporting the complaint (hereinafter designated "complaint counsel") was introducing evidence in support of the allegations in Count I, it was represented to the hearing examiner that Count II of the complaint would probably be disposed pursuant to § 3.21 and § 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, published May 6, 1955, as amended, by an agreement containing a consent order to cease and desist. Complaint counsel completed the introduction of evidence in support of his case-in-chief as to Count I. On April 23, 1961, respondent moved to dismiss Count I of the complaint, after complaint counsel had rested his case, on the grounds, among others, that complaint counsel's proof failed to establish the competitive injury or likelihood of competitive injury required to be shown.

On July 26, 1961, the hearing examiner issued an initial decision as to Count I granting respondent's motion to dismiss these proceedings on the grounds that the record did not at that time contain that degree of proof of competitive injury, or likelihood of competitive injury, required under the Statute.

In his July 26, 1961, initial decision as to Count I, the hearing examiner noted that counsel had informed him that they were taking steps to dispose of Count II by entering into an agreement containing a consent order to cease and desist, and the examiner directed counsel to present such agreement to the examiner as provided by § 3.21 and § 3.25 of the Rules as promptly as possible.

On August 23, 1961, counsel for the parties filed with the Secretary of the Federal Trade Commission a notice of their intention to dispose of Count II of this complaint by signing an agreement containing a consent order to cease and desist.

On August 30, 1961, the Federal Trade Commission vacated and set aside the initial decision of July 26, 1961, as to Count I on procedural grounds. On November 6, 1961, this examiner issued two separate initial decisions. The initial decision as to Count I was in substantially the same language as the prior decision of July 26, and

granted respondent's motion to dismiss the alleged violations of § 2(a); the initial decision as to the § 2(d) violations alleged in Count II of the complaint contained a cease and desist order.

On December 11, 1961, the Commission suspended the effective date of the initial decision as to Count II, until further order of the Commission.

On June 28, 1962, the Commission issued an order vacating the initial decision as to Count I and remanded the matter for further proceedings.

On October 1, 1962, a hearing on remand was convened in Washington, D.C., and both parties declined to introduce additional evidence at such hearing. The parties represented that they would not file proposed findings and conclusions as provided by Rule 4.17 but reserved their respective rights to present a form of appropriate order. Such suggested orders have been filed. The parties have fully reserved their respective rights of appeal from any order as may be herein entered.

The posture of the record at this time is that the parties have been accorded in all respects opportunity for a full hearing, and have completed the introduction of evidence.

Since the hearing examiner issued his November 6, 1961, decision in this case, the Federal Trade Commission has spoken authoritatively in its opinions in *Tri-Valley Packing Association*, Dockets 7225 and 7496, Commission's Opinion dated May 10, 1962 [60 F.T.C. 1134, 1168]; *American Oil Company*, Docket No. 8183, Commission's Opinion dated June 27, 1962 [60 F.T.C. 1786, 1804], and its Opinion dated June 28, 1962 [60 F.T.C. 1175], remanding this case.

In *Tri-Valley*, the Commission held (p. 8) [60 F.T.C. 1175]:

* * * In view of our holding that respondent's price discriminations may result in injury to competition regardless of whether there is actual competition in the resale and distribution of the products involved in the discriminations, we believe that the phrase "in the resale and distribution of respondent's products" unduly limits the scope of the order and should be deleted therefrom.

And on page 5 [60 F.T.C. 1171]:

In any case involving the effect of a price discrimination on competition between buyers, the requisite injury may be inferred from a showing that a purchaser paid substantially less than its competitor for goods of like grade and quality sold by the respondent (*Federal Trade Commission v. Morton Salt Company*, *supra*); and it has been held that such an inference is permissible despite testimony by the nonfavored purchaser that he had not been injured by the discrimination. *Moog Industries, Inc. v. Federal Trade Commission*, 238 F. 2d 43 (1956); *E. Edelmann & Co. v. Federal Trade Commission*, 239 F. 2d 152 (1956). * * *

In *American Oil*, the Commission in its opinion (p. 3) [60 F.T.C. 1786, 1806] interpreted *Morton Salt Co.* (334 U.S. 37) (1948) as holding:

* * * in price discrimination cases involving competition between buyers, the requisite injury to such competition may be inferred from a showing that the seller charged one customer a higher price for like goods than he had charged one or more of the purchaser's competitors and that the amount of this discrimination was substantial. * * *

And in its opinion in the instant case, the Commission, in commenting on *Tri-Valley, inter alia*, said (p. 7) [60 F.T.C. 1898]:

* * * we hold that in any case involving the effect of a price discrimination on competition between buyers, the requisite injury may be inferred from a showing that a purchaser paid substantially less than its competitors for goods of like grade and quality sold by the respondent and that the question of substantiality must be determined from the facts in each case. * * *

Based upon the entire record, the evidence, the exhibits, and admissions in briefs heretofore filed by the parties, the hearing examiner makes the following:

FINDINGS OF FACT

1. Respondent United Biscuit Company of America, a Delaware corporation, whose principal office and place of business is at 25th and West North Avenue, Melrose Park, Illinois, is engaged on a nationwide basis in the manufacture and sale under its own brand of cookies and crackers (hereinafter called "biscuit products"). For the year ending December 31, 1959, respondent's gross sales were approximately \$138,000,000.

2. Respondent's operations are conducted through eight divisions in various geographical areas covering most of the United States. With minor exceptions each division is exclusively responsible for the sale of biscuit products within its respective area; determines its sales policy and pricing practices, and the discounts, if any, which are allowed to respondent's customers who resell at retail its biscuit products in competition with each other. Respondent does not employ jobbers or distributors, but sells directly to retailers, and delivers its products in its own trucks to the retailers.

3. Respondent's retail customers may be classified as (a) "corporate chains," (b) "voluntary buying chains," (c) "supermarkets," and (d) "independently owned grocery stores." "Corporate chains" usually include multiple-unit retail grocery stores which utilize central buying and control. A "voluntary buying chain" usually refers to individually-owned retail grocery stores which "pool" their pur-

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chases in order to utilize central buying facilities without control of the day-to-day operation of the individual store members. "Supermarkets" are, roughly, individually-owned retail grocery concerns which operate more than one retail grocery store; an "independent" is an individually-owned retail grocery concern which usually operates only one retail store.

4. Although the evidence adduced by Commission counsel related chiefly to respondent's Sawyer Division, any violation of § 2(a) of the Clayton Act which is proven in this case against any of the eight divisions will sustain a cease-and-desist order against the corporate respondent. United Biscuit is legally responsible for the pricing practices and policies of each and all of its divisions. Its divisions are not separate corporate or legal entities, but are integrated parts of its overall operation.

5. Respondent manufactures, sells and distributes its biscuit products to retail grocery concerns and restaurants located throughout most of the states of the United States including specifically Indiana and Wisconsin, and transports said biscuit products across state boundaries between respondent and its customers.

6. Respondent is engaged in commerce as "commerce" is defined in the Clayton Act, and, in the course and conduct of its business in commerce respondent is, and for several years last past has been, in competition with other business concerns which manufacture and sell biscuit products in the same manner as, or in a manner similar to, that of respondent.

7. Respondent's Sawyer Division operates generally in an area composed of the States of Illinois, and portions of Indiana, Kentucky, Missouri, Iowa, Wisconsin, and Michigan. Within the division there are in excess of 20,000 retail grocery customers.

8. From July 1, 1958 to June 30, 1959, respondent's Sawyer Division granted its customers cumulative volume discounts based upon the dollar volume of the customer's monthly purchases. These schedules provided graduated discounts up to six percent for varying amounts of monthly purchases. Such schedules are:

For the Period July 1, 1958, to June 30, 1959

<i>Monthly purchases</i>	<i>Discount (percent)</i>
0 to \$24.99.....	0
\$25 to \$39.99.....	2
\$40 to \$69.99.....	3
\$70 to \$99.99.....	4
\$100 to \$124.99.....	5
\$125 and over.....	6

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For the Period July 1, 1959, to Date of Issuance of Complaint March 10, 1960

<i>Monthly purchases</i>	<i>Discount Percent</i>
0 to \$24.99-----	0
\$25 to \$44.99-----	1½
\$45 to \$59.99-----	2
\$60 to \$74.99-----	2½
\$75 to \$89.99-----	3
\$90 to \$109.99-----	3½
\$110 to \$124.99-----	4
\$130 to \$149.99-----	5
\$150 and over-----	6

An independent grocery-store owner is allowed a discount based upon the total of his store or stores' purchases of respondent's biscuit products for a particular month. In the case of a customer making individual monthly purchases of less than \$500, who is a member of a voluntary buying group, an additional one percent of his monthly sales is payable to the group headquarters if the aggregate monthly purchases by the group are \$500 or more, without regard to the amount of the customer's own monthly purchases. Corporate chains such as the Kroger Company and the Great Atlantic & Pacific Tea Company, which operate multiple units but have one common corporate ownership, have their purchases aggregated by area, and the discount is paid to the corporate chain's headquarters which operationally conducts that chain's business in a particular area.

9. Sawyer Division's net sales for 1959 amounted to \$12,215,665. In January of that year Sawyer sold to 21,773 customers operating 23,664 outlets. The number of customers and outlets, of course, varies from month to month. During January, 1959, 8,057 Sawyer Division customers earned a volume discount; i.e., the amount was credited to them, and they received the discount either at that time or later. In that period, 13,716 Sawyer customers neither earned nor received such a discount. Of the customers receiving volume discounts, many received less than 6%.

10. In January, 1959, retail grocery customers of respondent earned, and, either then or later, received volume discount payments as follows:

	<i>Percent</i>
3,718 customers-----	2
2,287 customers-----	3
704 customers-----	4
310 customers-----	5
1,038 customers-----	6

Certain of the customers receiving no volume discount, or less than 6% discount, were in competition with one or more customers receiv-

ing the full 6% discount. The favored customers included, *inter alia* chain store organizations such as the Kroger Company, the Great Atlantic & Pacific Tea Company, and National Food Stores.

11. Most of the major retail grocery chain stores with seven or more outlets, purchasing from the Sawyer Division in 1959, and listed on CX 120-A and -B, were allowed a 6% volume discount, although the independent stores which competed with the chain stores were allowed a lesser discount.

12. Owners of individually-owned grocery stores in the cities of Burlington, Wisconsin, and South Bend and Gary, Indiana, who were not members of a buying group nor units of a corporate chain, testified concerning the general operations of their stores, with particular reference to their business relationships and practices with respondent. Such store owners were: In Burlington: Donald Rehberg, Paul Spiegelhoff, John Knutowski, and Robert C. Grossman; in Gary, Indiana; Walter Pall, Jack Landsman, Oscar Noak, and Irving Tobe; in South Bend, Indiana; Dennis Horvath, Earl Walter Plack, Marion Nowicki, and Vincent A. Koziatek. Annual sales for some of these stores were: \$1 million, \$500,000, \$417,000, \$360,000, \$320,000, \$240,000, \$125,000, and \$120,000.

13. Although the retail dollar sales of respondent's biscuit products constitute a fractional percentage of the overall gross sales of some of the stores whose owners testified, the profit margin for the stores is very small. Some of the witnesses testified, and are uncontradicted in this record, that the net profit margin in the retail grocery business as an industry is low in relation to gross sales. Some of the independent store owners testified generally that they endeavor to keep their biscuit products priced at approximately the same level as their competitors, including chain stores but such chains provide especially strong competition for them, and over-all the retail grocery business is highly competitive.

14. The independent store owners are unable to match the overall lower prices of the corporate chains on most items. The independents are unable to meet the indirect price reductions implicit in the use and issuance of trading stamps; also, they cannot afford to advertise as extensively as the chains. Several independents testified they do no advertising at all except by signs and posters on their premises. These individual store owners are unable to match the chain stores' expensive plants, air conditioned premises in some instances, ample parking lots, larger and more attractive display areas, and other features, which cause the chains to be more attractive to customers and to provide more comfortable places to shop. If the chain stores stay

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open for the same number of hours as the independents, such advantages as the independents might have enjoyed by staying open longer hours also cease to exist.

15. Many complex factors enter into the ability of an independent grocery-store operator to compete successfully with the corporate chains and the members of the buying groups. One store owner testified: "We have to fight not only for pennies but for fractions." Independent store witnesses testified that the price at which they purchase their merchandise is a very important, if not the most important, factor in determining whether they are able to compete.

16. Although the dollar differences in the amount of the dollar discounts paid to the independents as against the chains and buying groups may not be substantial, the percentage differences in the amount of discount received, and, therefore, initial cost to the independent store owner, may be substantial.

17. A comparison of purchase volumes and discounts of individual chain stores with purchase volumes and discounts of independent grocery stores made by complaint counsel in Appendix A to his brief, and unchallenged by respondent, shows the following:

Comparison of purchase volumes and discounts of individual chain stores with purchase volumes and discounts of independent grocery stores

Comis- sion exhibit No.	Purchaser	Location	Date	Pur- chases	Greater purchases in terms of dollar amount	Dis- count (per- cent)	Greater discounts in terms of per- centage
25-K	Kroger Company 628.....	Gary, Ind.....	Jan. 1959	\$43.42	-----	6.0	100.0
25-D	Wally's Fifth Avenue Mart.....	do.....	Jan. 1959	45.37	\$1.95	3.0	-----
39-K	Kroger Company 628.....	do.....	Feb. 1959	47.28	4.07	6.0	100.0
39-D	Wally's Fifth Avenue Mart.....	do.....	Feb. 1959	43.21	-----	3.0	-----
99-A	A & P.....	do.....	Oct. 1959	26.28	-----	6.0	300.0
99-E	Better Foods.....	do.....	Oct. 1959	28.35	2.07	1.5	-----
99-A	A & P.....	do.....	Oct. 1959	26.28	-----	6.0	140.0
99-B	Gene's Certified Supermart.....	do.....	Oct. 1959	66.83	40.55	2.5	-----
100-A	A & P.....	do.....	Nov. 1959	50.60	-----	6.0	71.4
100-C	Tobe's Super Market.....	do.....	Nov. 1959	99.93	49.33	3.5	-----
101-A	A & P.....	do.....	Dec. 1959	57.33	-----	6.0	200.0
101-D	Wally's Fifth Avenue Mart.....	do.....	Dec. 1959	58.30	.97	2.0	-----
101-A	A & P.....	do.....	Dec. 1959	57.33	-----	6.0	71.4
101-B	Gene's Super Market.....	do.....	Dec. 1959	106.05	48.72	3.5	-----
100-H	Kroger Company 628.....	do.....	Nov. 1959	.56	-----	6.0	300.0
100-E	Better Foods.....	do.....	Nov. 1959	25.02	24.46	1.5	-----
100-H	Kroger Company 628.....	do.....	Nov. 1959	.56	-----	6.0	71.4
100-C	Tobe's Super Market.....	do.....	Nov. 1959	99.93	99.37	3.5	-----
100-H	Kroger Company 628.....	do.....	Nov. 1959	.56	-----	6.0	300.0
100-D	Wally's Fifth Avenue Mart.....	do.....	Nov. 1959	26.64	25.68	1.5	-----
101-H	Kroger Company 628.....	do.....	Dec. 1959	14.86	-----	6.0	71.4
101-B	Gene's Super Market.....	do.....	Dec. 1959	106.05	91.19	3.5	-----
101-H	Kroger Company 628.....	do.....	Dec. 1959	14.86	-----	6.0	200.0
101-D	Wally's Fifth Avenue Mart.....	do.....	Dec. 1959	58.30	43.44	2.0	-----
66-L	Kroger Store F 98.....	South Bend, Ind.....	Jan. 1959	29.44	-----	6.0	50.0
66-B	K & F Food Market.....	do.....	Jan. 1959	72.73	43.29	4.0	-----
66-L	Kroger Store F 98.....	do.....	Jan. 1959	29.44	-----	6.0	100.0
66-B	Horvath's Self Service.....	do.....	Jan. 1959	68.50	39.06	3.0	-----
66-L	Kroger Store F 98.....	do.....	Jan. 1959	29.44	-----	6.0	100.0
66-B	Vince's Super Saver.....	do.....	Jan. 1959	56.08	26.64	3.0	-----
66-L	Kroger Store F 98.....	do.....	Jan. 1959	29.44	.26	6.0	200.0

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Comis- sion exhibit No.	Purchaser	Location	Date	Pur- chases	Greater purchases in terms of dollar amount	Dis- count (per- cent)	Greater discounts in terms of per- centage
66-C	Food Center.....	South Bend, Ind.	Jan. 1959	29.18	-----	2.0	-----
66-L	Kroger Store F 105.....	do	Jan. 1959	22.08	6.48	6.0	-----
66-A	A & J Market.....	do	Jan. 1959	15.60	-----	0	-----
66-L	Kroger Store F 105.....	do	Jan. 1959	22.08	-----	6.0	50.0
66-B	K & F Market.....	do	Jan. 1959	72.73	50.65	4.0	-----
66-L	Kroger Store F 105.....	do	Jan. 1959	22.08	-----	6.0	100.0
66-B	Horvath's Self Service.....	do	Jan. 1959	68.50	46.42	3.0	-----
66-L	Kroger Store F 105.....	do	Jan. 1959	22.08	-----	6.0	100.0
66-B	Vince's Super Saver.....	do	Jan. 1959	56.08	34.00	3.0	-----
66-L	Kroger Store F 105.....	do	Jan. 1959	22.08	-----	6.0	200.0
66-C	Food Center.....	do	Jan. 1959	29.18	7.10	2.0	-----
66-H	National Food Store 44.....	do	Jan. 1959	27.75	-----	4.0	50.0
66-B	K & F Food Market.....	do	Jan. 1959	72.73	44.98	4.0	-----
66-M	National Food Store 44.....	do	Jan. 1959	27.75	-----	6.0	100.0
66-B	Horvath's Self Service.....	do	Jan. 1959	68.50	40.75	3.0	-----
66-M	National Food Store 44.....	do	Jan. 1959	27.75	-----	6.0	100.0
66-B	Vince's Super Saver.....	do	Jan. 1959	56.08	28.33	3.0	-----
66-M	National Food Store 44.....	do	Jan. 1959	27.75	-----	6.0	200.0
66-C	Food Center.....	do	Jan. 1959	29.18	1.43	2.0	-----
67-L	Kroger Store F 98.....	do	Feb. 1959	33.36	10.70	6.0	-----
67-A	A & J Market.....	do	Feb. 1959	22.66	-----	-----	-----
67-L	Kroger Store F 98.....	do	Feb. 1959	33.36	-----	6.0	50.0
67-A	K & F Food Market.....	do	Feb. 1959	85.12	51.76	4.0	-----
67-L	Kroger Store F 98.....	do	Feb. 1959	33.36	-----	6.0	100.0
67-B	Horvath's Self Service.....	do	Feb. 1959	54.91	21.55	3.0	-----
67-L	Kroger Store F 98.....	do	Feb. 1959	33.36	-----	6.0	100.0
67-B	Vince's Super Saver.....	do	Feb. 1959	41.86	8.50	3.0	-----
67-L	Kroger Store F 98.....	do	Feb. 1959	33.36	10.52	6.0	-----
67-C	Food Center.....	do	Feb. 1959	22.84	-----	-----	-----
67-L	Kroger Store F 105.....	do	Feb. 1959	20.52	-----	6.0	-----
67-A	A & J Market.....	do	Feb. 1959	22.66	2.14	-----	-----
67-L	Kroger Store F 105.....	do	Feb. 1959	20.52	-----	6.0	50.0
67-A	K & F Market.....	do	Feb. 1959	85.12	64.60	4.0	-----
67-L	Kroger Store F 105.....	do	Feb. 1959	20.52	-----	6.0	100.0
67-B	Horvath's Self Service.....	do	Feb. 1959	54.91	34.39	3.0	-----
67-L	Kroger Store F 105.....	do	Feb. 1959	20.52	-----	6.0	100.0
67-B	Vince's Super Saver.....	do	Feb. 1959	41.86	21.34	3.0	-----
67-L	Kroger Store F 105.....	do	Feb. 1959	20.52	-----	6.0	-----
67-C	Food Center.....	do	Feb. 1959	22.84	2.32	-----	-----
67-H	National Food Store 44.....	do	Feb. 1959	29.11	6.45	6.0	-----
67-A	A & J Market.....	do	Feb. 1959	22.66	-----	-----	-----
67-M	National Food Store 44.....	do	Feb. 1959	29.11	-----	6.0	50.0
67-A	K & F Food Market.....	do	Feb. 1959	85.12	56.01	4.0	-----
67-M	National Food Store 44.....	do	Feb. 1959	29.11	-----	6.0	100.0
67-B	Horvath's Self Service.....	do	Feb. 1959	54.91	25.80	3.0	-----
67-M	National Food Store 44.....	do	Feb. 1959	29.11	-----	6.0	100.0
67-B	Vince's Super Saver.....	do	Feb. 1959	41.86	12.75	3.0	-----
67-M	National Food Store 44.....	do	Feb. 1959	29.11	6.27	6.0	-----
67-C	Food Center.....	do	Feb. 1959	22.84	-----	-----	-----
68-L	Kroger Store F 98.....	do	Mar. 1959	25.78	-----	6.0	100.0
68-B	Horvath's Self Service.....	do	Mar. 1959	56.09	30.31	3.0	-----
68-L	Kroger Store F 98.....	do	Mar. 1959	25.78	-----	6.0	200.0
68-B	Vince's Super Saver.....	do	Mar. 1959	35.41	9.63	2.0	-----
68-L	Kroger Store F 98.....	do	Mar. 1959	25.78	4.44	6.0	-----
68-C	Food Center.....	do	Mar. 1959	21.34	-----	-----	-----
68-L	Kroger Store F 105.....	do	Mar. 1959	30.21	-----	6.0	100.0
68-B	Horvath's Self Service.....	do	Mar. 1959	56.09	25.88	3.0	-----
68-L	Kroger Store F 105.....	do	Mar. 1959	30.21	-----	6.0	200.0
68-B	Vince's Super Saver.....	do	Mar. 1959	35.41	5.20	2.0	-----
68-L	Kroger Store F 105.....	do	Mar. 1959	30.21	8.87	6.0	-----
68-C	Food Center.....	do	Mar. 1959	21.34	-----	-----	-----
68-M	National Food Store 44.....	do	Mar. 1959	33.87	-----	6.0	100.0
68-B	Horvath's Self Service.....	do	Mar. 1959	56.09	22.22	3.0	-----
68-M	National Food Store 44.....	do	Mar. 1959	33.87	-----	6.0	200.0
68-B	Vince's Super Saver.....	do	Mar. 1959	35.41	1.64	2.0	-----
68-M	National Food Store 44.....	do	Mar. 1959	33.87	12.53	6.0	-----
68-C	Food Center.....	do	Mar. 1959	21.34	-----	-----	-----
106-D	Kroger Store F 98.....	do	Oct. 1959	49.70	3.56	6.0	200.0
106-A	K & F Food Market.....	do	Oct. 1959	46.14	-----	2.0	-----
106-D	Kroger Store F 98.....	do	Oct. 1959	49.70	-----	6.0	140.0
107-A	Horvath's Self Service.....	do	Oct. 1959	71.43	21.73	2.5	-----
106-D	Kroger Store F 98.....	do	Oct. 1959	49.70	-----	6.0	200.0
106-A	Vince's Super Saver.....	do	Oct. 1959	52.63	2.93	2.0	-----
106-D	Kroger Store F 105.....	do	Oct. 1959	47.98	1.84	6.0	200.0
106-A	K & F Food Market.....	do	Oct. 1959	46.14	-----	2.0	-----
106-D	Kroger Store F 105.....	do	Oct. 1959	47.98	-----	6.0	140.0
107-A	Horvath's Self Service.....	do	Oct. 1959	71.43	23.45	2.5	-----

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Comis- sion exhibit No.	Purchaser	Location	Date	Pur- chases	Greater purchases in terms of dollar amount	Dis- count (per- cent)	Greater discounts in terms of per- centage
106-D	Kroger Store F 105.....	South Bend, Ind.	Oct. 1959	47.98	-----	6.0	200.0
106-A	Vince's Super Saver.....	do.	Oct. 1959	52.63	4.65	2.0	-----
106-D	National Food Store 44.....	do.	Oct. 1959	3.00	-----	6.0	-----
106-A	A & J Market.....	do.	Oct. 1959	18.45	15.45	0	-----
106-D	National Food Store 44.....	do.	Oct. 1959	3.00	-----	6.0	200.0
106-A	K & F Food Market.....	do.	Oct. 1959	46.14	43.14	2.0	-----
106-D	National Food Store 44.....	do.	Oct. 1959	3.00	-----	6.0	140.0
107-A	Horvath's Self Service.....	do.	Oct. 1959	71.43	68.43	2.5	-----
106-D	National Food Store 44.....	do.	Oct. 1959	3.00	-----	6.0	200.0
106-A	Vince's Super Saver.....	do.	Oct. 1959	52.63	49.63	2.0	-----
106-D	National Food Store 44.....	do.	Oct. 1959	3.00	-----	6.0	-----
106-B	Food Center.....	do.	Oct. 1959	24.05	21.05	0	-----
108-D	Kroger Store F 105.....	do.	Nov. 1959	39.00	-----	6.0	300.0
108-A	K & F Market.....	do.	Nov. 1959	41.09	2.09	1.5	-----
108-D	Kroger Store F 105.....	do.	Nov. 1959	39.00	4.15	6.0	300.0
109-A	Horvath's Self Service.....	do.	Nov. 1959	34.85	-----	1.5	-----
108-D	Kroger Store F 105.....	do.	Nov. 1959	39.00	-----	6.0	200.0
108-A	Vince's Super Saver.....	do.	Nov. 1959	58.06	19.06	2.0	-----
110-C	Kroger Store F 105.....	do.	Dec. 1959	47.59	-----	6.0	140.0
110-A	K & F Food Market.....	do.	Dec. 1959	63.90	16.31	2.5	-----
110-C	Kroger Store F 105.....	do.	Dec. 1959	47.59	-----	6.0	140.0
111-A	Horvath's Self Service.....	do.	Dec. 1959	67.65	20.06	2.5	-----
110-C	Kroger Store F 105.....	do.	Dec. 1959	47.59	-----	6.0	100.0
110-A	Vince's Super Saver.....	do.	Dec. 1959	77.40	29.81	3.0	-----
77-A	A & P.....	Burlington, Wis.	Jan. 1959	79.93	-----	6.0	50.0
77-A	Grossman Foods.....	do.	Jan. 1959	84.43	4.50	4.0	-----
77-A	A & P.....	do.	Jan. 1959	79.93	-----	6.0	50.0
77-A	Hillside Grocery Co.....	do.	Jan. 1959	90.36	10.43	4.0	-----
86-A	A & P.....	do.	Feb. 1959	77.31	7.64	6.0	100.0
86-A	Grossman Foods.....	do.	Feb. 1959	69.67	-----	3.0	-----
86-A	A & P.....	do.	Feb. 1959	77.31	-----	6.0	50.0
86-A	Hillside Grocery Co.....	do.	Feb. 1959	94.48	17.17	4.0	-----
87-A	A & P.....	do.	Mar. 1959	79.06	28.45	6.0	100.0
87-A	Grossman Foods.....	do.	Mar. 1959	50.61	-----	3.0	-----
87-A	A & P.....	do.	Mar. 1959	79.06	-----	6.0	50.0
87-A	Hillside Grocery Co.....	do.	Mar. 1959	95.81	16.75	4.0	-----
88-A	A & P.....	do.	Oct. 1959	72.06	-----	6.0	71.4
88-A	Grossman Foods.....	do.	Oct. 1959	100.99	28.93	3.5	-----
88-A	A & P.....	do.	Oct. 1959	72.06	-----	6.0	50.0
88-A	Hillside Grocery Co.....	do.	Oct. 1959	124.03	51.97	4.0	-----
89-A	A & P.....	do.	Nov. 1959	75.53	7.55	6.0	140.0
89-A	Grossman Foods.....	do.	Nov. 1959	67.98	-----	2.5	-----
89-A	A & P.....	do.	Nov. 1959	75.53	46.78	6.0	50.0
89-A	Hillside Grocery Co.....	do.	Nov. 1959	122.31	-----	4.0	-----
89-A	A & P.....	do.	Nov. 1959	75.53	-----	6.0	71.4
89-A	Spiegelhoff Super Market.....	do.	Nov. 1959	105.97	30.44	3.5	-----
90-A	A & P.....	do.	Dec. 1959	67.32	-----	6.0	71.4
90-A	Hillside Grocery Co.....	do.	Dec. 1959	96.99	29.67	3.5	-----
90-A	A & P.....	do.	Dec. 1959	67.32	-----	6.0	50.0
90-A	Spiegelhoff Super Market.....	do.	Dec. 1959	111.42	44.10	4.0	-----

18. As a result of the respondent's volume discounts, hereinabove described, some of the respondent's customers were charged higher net prices for respondent's goods of like grade and quality than were other of respondent's customers, competing with such unfavored customers. This constitutes a price discrimination under § 2 (a) of the amended Clayton Act. (*FTC v. Anheuser Busch, Inc.*, 366 U.S. 536 (1960))

19. In Gary, Indiana, Wally's Fifth Avenue Mart earned, was credited with, and either then or later received, the following volume discounts in various months of 1959: 3.0% in January and February; 2.0% in March; 0% in October; 1.5% in November and 2% in Decem-

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ber. Although there is no specific evidence as to the other months of 1959, Walter Pall, the store's owner, testified, in effect, that Wally's earned only lower volume discounts. Other stores in Gary receiving discounts under 6% included: Better Foods, Inc., Gene's Supermarket, and Toby's Supermarket. These stores were each competing with one or more of respondent's customers receiving 6% discount for purchases made at the same time. These favored customers included Kroger and A & P.

20. In South Bend, Indiana, in 1959, certain independent store customers of the respondent failed to earn any volume discounts or earned and received discounts of less than 6%. Such customers and the volume discounts earned in January, 1959, if any, included the following:

	Percent
Horvath's Self Service.....	3
Vince's Super Saver.....	3
Food Center.....	2
A & J Market	0
K & F Food Market.....	4

Those who earned the discounts received the payments indicated. The evidence proves discounts under 6%, or no discounts, were given in 1959 to some or all of these customers. Each competed with one or more customers of respondent receiving 6% volume discounts for purchases made at the same time. These favored customers included Kroger and National.

21. In many instances, the grocery stores receiving the smaller discounts purchased more goods from the respondent in a particular month than did the individual competing chain store outlet receiving 6%. For example, in October 1959, Gene's Supermarket in Gary, Indiana, received a 2½% volume discount on biscuit purchases from respondent of \$66.63, while A & P received a 6% volume discount on smaller purchases of \$26.28 delivered to one of its outlets competing with Gene's. As another example, in October 1959, Food Center in South Bend, Indiana, received no discount on biscuit purchases from respondent of \$24.05, while National received a 6% discount on purchases of \$3 delivered to National Store #44 competing with Food Center. This inequality in payments was due to the fact that the chains were given volume discounts based on the aggregated purchases of their multiple outlets.

22. As a result, *inter alia*, of the aforementioned differences in volume discounts allowed to its customers, respondent charged some of its customers a higher net price for goods of like grade and quality than it charged a competing customer or customers. Thereby the competitive ability of the non-favored customers was injured or destroyed.

23. A preponderance of the reliable, probative and substantial evidence in the record proves, and the hearing examiner hereby finds, that respondent, by engaging in the acts and practices hereinabove described and set forth, has discriminated in price between different purchasers of its commodities of like grade and quality, and the effect thereof may be substantially to lessen competition, tend to create a monopoly, and to injure, destroy and prevent competition between its customers in violation of § 2(a) of the Clayton Act, as amended.

24. The hearing examiner further finds that such price discrimination by respondent was not made in good faith to meet an equally low price of a competitor. The hearing examiner therefore reaches the following:

CONCLUSIONS

The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding, and this proceeding is in the public interest.

In the manufacture and sale of its biscuit products, respondent, United Biscuit Company of America, is engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

In the manufacture and sale of its biscuit products in commerce, respondent, by means of the acts and practices hereinabove found, and by means of its discount schedules, and other acts related above, has discriminated in price between different purchasers of its products of like grade and quality by selling its said products to some of its customers at lower prices than it sells like products to other of its customers competing with the favored customers in the retail sale of such products. Such acts and practices constitute price discrimination in violation of § 2(a) of the Clayton Act, as amended.

The effect of such price discrimination may be substantially to lessen competition, tend to create a monopoly, and to injure, destroy, and prevent competition in violation of § 2(a) of the Clayton Act, as amended.

Now, therefore,

It is ordered, That United Biscuit Company of America, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale and distribution of their products, including cookies and crackers, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other

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purchaser who, in fact, competes with the purchaser paying the higher price.

OPINION OF THE COMMISSION

FEBRUARY 7, 1964

By ANDERSON, *Commissioner*:

This matter is before us upon the exceptions of respondent to the hearing examiner's initial decision as to Count I of the complaint, filed November 9, 1962, holding respondent in violation of Section 2(a) of the Clayton Act, as amended, and ordering it to cease and desist from discriminations in price.¹

The Commission, on June 28, 1962 [60 F.T.C. 1893], vacated a prior initial decision as to Count I, filed November 13, 1961, and remanded the matter to the hearing examiner for further proceedings in conformity with the views expressed by the Commission therein. The Commission held that on the basis of the facts in the record at that time there was sufficient evidence to find that the competitive opportunities of certain purchasers were injured when they had to pay respondent substantially more than their competitors had to pay and that the effect may be substantially to injure, destroy or prevent competition with the purchasers receiving the benefit of such discriminations. The Commission further held that unless such showing is rebutted or justified, the evidence is sufficient to support an order against respondent to cease and desist the discriminations in price charged in the complaint.

No further evidence was presented by either party at the time fixed for hearing on remand, October 1, 1962. The hearing examiner thereafter, on November 9, 1962, filed his initial decision upon remand as to Count I, and it is as to this decision that respondent now files its exceptions.

A brief summary of the facts in this matter follows. Respondent, United Biscuit Company of America, a Delaware corporation with its principal office at 25th and West North Avenue, Melrose Park, Illinois, is engaged on a nationwide basis in the manufacture and sale of cookies and crackers under its own brand name. Respondent's operations are conducted through eight divisions in various geo-

¹ The hearing examiner filed his initial decision as to Count II of the complaint on November 13, 1961, which is an initial decision based on an agreement containing a consent order to cease and desist. The Commission stayed the effective date of this decision on December 7, 1961. The initial decision as to Count II will be adopted as the decision of the Commission by an order to be issued simultaneously with the order disposing of this proceeding as to Count I of the complaint.

graphical areas covering most of the United States. Its net sales in the year ending December 31, 1959, were approximately \$138,000,000.

Respondent, through its Sawyer Biscuit Division (Sawyer Division) during the period covered by the complaint, used discount schedules in connection with its sales which provided graduated or "volume" discounts to purchasers of up to 6 percent for varying amounts of monthly purchases. In the case of a purchaser with more than one store, such as a corporate chain with multiple retail outlets, the discount under these schedules was calculated on the basis of the aggregated purchases of all the stores operated by the purchaser.

Respondent, by reason of the use of the aforementioned discount schedules, discriminated in price between different purchasers of its biscuit products of like grade and quality. The evidence largely concerns the operations of the Sawyer Division which operates generally in the states of Illinois and portions of Indiana, Kentucky, Missouri, Iowa, Wisconsin and Michigan. Sawyer Division's net sales for 1959 amounted to \$12,215,665. In January of that year it sold to 21,773 customers operating 23,664 outlets. The number of customers and outlets, however, varies from month to month. During January 1959, 8,057 Sawyer Division customers earned a volume discount, which amount was credited to them and received either at that time or later. In the same month 13,716 Sawyer Division customers neither earned nor received such a discount.

Of the customers receiving volume discounts, many received less than 6 percent. For instance, in January 1959, retail grocery customers of respondent earned and either then or later received volume discount payments as follows: 3,718 customers—2 percent, 2,287 customers — 3 percent, 704 customers — 4 percent, 310 customers — 5 percent, 1,038 customers — 6 percent. Certain of the customers receiving no volume discount or less than 6 percent were in competition with one or more customers receiving the full 6 percent. These favored customers included chain store organizations such as The Kroger Company (Kroger), The Great Atlantic & Pacific Tea Co. (A & P), and National Food Stores (National). With one exception, all of the major retail grocery chain stores with seven or more outlets purchasing from the Sawyer Division in 1959, including such stores as Kroger, A & P and National, were allowed a 6 percent volume discount.

The record shows price discriminations between and among competing customers in the trading areas of Gary, Indiana, South Bend, Indiana, and Burlington, Wisconsin. The Gary, Indiana, market will serve as an illustration. There, one customer paying a higher price

for respondent's products was Wally's Fifth Avenue Mart. Wally's was credited with the following volume discounts in various months in 1959: 3.0 percent in January and February, 2.0 percent in March, 0 percent in October, 1.5 percent in November, and 2.0 percent in December. In other months that year Wally's apparently earned only low volume discounts. Other stores in Gary, Indiana, receiving discounts under 6 percent included Better Foods, Inc. (*e.g.*, 1.5 percent earned October 1959); Gene's Super Market (*e.g.*, 3.5 percent earned December 1959); and Tobe's Super Market (*e.g.*, 3.5 percent earned November 1959). These stores were each competing with one or more of respondent's customers receiving 6 percent discounts for purchases made at the same time, which favored customers included Kroger and A & P. In many instances, the grocery stores receiving the smaller discounts purchased more goods from respondent in a particular month than did the individual competing chain store outlet receiving the 6 percent. This inequality in payments was due to the fact that the chains were given volume discounts based on the aggregated purchases of their multiple outlets.

As a result of the aforementioned differences in volume discounts, respondent charged some customers a higher price for like goods than it charged a competing customer or competing customers.

Independent store owners testified generally as to the highly competitive nature of the retail food business. Net profits are low and cash discounts and other allowances are important. One store owner witness testified " * * * we have to fight not only for pennies but for fractions." There are a number of examples of low net profits shown in the record. Certain of the independent store witnesses testified that price was a very important, if not the most important, factor in enabling them to compete. There is also testimony from such witnesses to the effect that if they could buy cheaper they could sell for less and that customers will, in the over-all picture, buy where the prices are lower.

The examiner, in his initial decision as to Count I, filed November 9, 1962, held that, as a result of respondent's price discriminations, the competitive ability of the non-favored customers was injured or destroyed. He concluded therefore that respondent violated Section 2(a) of the Clayton Act, as amended. This initial decision as to Count I filed November 9, 1962, is the decision before us for review on the appeal of the respondent and it is the "initial decision" hereafter referred to unless otherwise indicated.

Respondent takes exception (1) to certain portions of the initial decision relating to the nature of the price discriminations, (2) to

the examiner's findings and conclusions as to competitive injury, (3) to the finding that respondent's price discriminations were not made in good faith to meet the equally low price of a competitor, and, finally, (4) to the scope of the order.

To begin with, respondent objects to the numbered paragraphs 2, 3, and 9, or parts thereof, on the ground that these contain a finding that discount schedules of respondent's Sawyer Division applied to all its retail customers. We do not interpret the paragraphs cited as making any such finding, and therefore reject the exception so made. To avoid any possible question in the matter, however, we hold that the evidence does not show that the challenged discount schedules were used by any of respondent's divisions except the Sawyer Division.

Respondent next objects to asserted findings in paragraphs numbered 3, 8, and 16 of the initial decision, that customers of respondent's Sawyer Division that are members of voluntary groups pool their purchases from respondent and that they are treated like corporate chains with respect to the aggregation of purchases. Apparently, the main contention here centers around the examiner's statement, in paragraph 8, which reads, "In the case of a customer making individual monthly purchases of less than \$500, who is a member of a voluntary buying group, an additional one percent of his monthly sales is payable to the group headquarters if the aggregate monthly purchases by the group are \$500 or more, without regard to the amount of the customer's own monthly purchases." Such payments were provided for in a schedule adopted July 1, 1960. Complaint counsel takes the position that the evidence in the record does not relate to that more recent schedule, and he urges that the finding contained in the sentence above quoted is not necessary to the decision. Considering all the factors, we conclude that such finding should be stricken. Respondent's exception will be sustained to that extent on this point.

Respondent excepts to the asserted implication, in numbered paragraph 22 and the third paragraph of the conclusions in the initial decision, that it has discriminated in price by acts and practices other than the employment of its volume discount schedules. It contests in effect the use of the term "*inter alia*" in numbered paragraph 22 and the phrase "and other acts related above" in the third paragraph of the conclusions. Complaint counsel answers that any such finding and conclusion may have had reference to the one percent payment to voluntary group headquarters referred to in the finding quoted in the prior paragraph. Such finding is to be stricken and

there is no other evidence to support the broader holding which the examiner apparently has made and which respondent objects to. Accordingly, the initial decision will be modified by striking the aforementioned words.

An exception is next taken to the finding in numbered paragraph 23 and to the conclusion in the initial decision that the effect of respondent's practices may be to "tend to create a monopoly." Complaint counsel does not oppose dropping this holding from the decision, and since the evidence fails to clearly support a finding and conclusion as to a tendency to monopoly, the initial decision will be amended by striking such references.

Respondent's exception to the hearing examiner's failure to find that the price discriminations consisted only of a favoring of corporate chains against independents by permitting chains to combine purchases is disallowed. The reason is that such was not the basis for the finding of unlawful price discriminations. The combining of the purchases of chain store outlets was a contributing factor, but the real illegality here found was due to the differences in net prices as a result of using volume discount schedules. There is a violation shown with or without the evidence of the combining of chain purchases.

Respondent next objects to the findings on the likelihood of competitive injury. The hearing examiner's findings are made in accordance with the Commission's views as set forth in the decision on remand. We see no reason to disturb them. See also the recent decision in *Mueller Co. v. Federal Trade Commission*, 323 F. 2d 44 (7th Cir. 1963).

Respondent further excepts to the omission by the examiner of certain findings, namely, those in numbered paragraphs 8, 9, and 11 of his initial decision as to Count I, filed November 13, 1961, asserting that these negate his present conclusion. In these paragraphs the examiner found, for instance, that sales of respondent's products are a fractional percentage of the gross sales of an independent store, that some of the independent stores might be growing in volume, and that witnesses for some of the independent stores testified they were not injured. Not all of the findings in such paragraphs, including the examples given, would be inconsistent with the holding of a likelihood of competitive injury. Nevertheless, after the examiner had reconsidered the issues in the light of the views expressed by the Commission, he saw fit not to make certain of the same findings appearing in his prior initial decision. We believe that the findings and conclusions he has made in the initial decision now before us are

correct except as noted herein and therefore reject respondent's exceptions made on this question.

The examiner finds in numbered paragraph 24 in the initial decision that respondent's price discriminations were not made in good faith to meet an equally low price of a competitor. To this, respondent takes exception claiming that it did not tender evidence in proof of this defense and that the finding therefore is not within the scope of the proceeding. Since there is no basis in the record for this finding, it will be stricken. Nevertheless, respondent has had the opportunity to raise the good faith meeting of competition defense and has not done so; thus, it is foreclosed from again raising such defense on the same or substantially similar facts. *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 476-477 (1952).

Respondent lastly challenges the scope of the order. It argues that the order should be limited (1) to biscuit products, (2) to retail grocery customers as purchasers, and (3) to price discriminations between chain stores and independents by means of quantity discounts which aggregate the purchases of chain store outlets. Respondent also contends that the order should not prohibit all price discriminations without regard to the likelihood of adverse competitive effect. Counsel supporting the complaint opposes all such limitations, except that as to product coverage, and on this question he believes the order should appropriately encompass "food products" rather than the product coverage in the initial decision, which is "their products, including cookies and crackers." Said counsel also asks that the phrase "in the resale of such products" be inserted at the end of the order.

We agree with the recommendations of complaint counsel for modification of the initial order. Plainly, the Commission's order should be broad enough to prohibit not only the further use of the precise practice found to have existed in the past but also the future use of related and similar practices. *Cf. Niresk Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337 (7th Cir. 1960), *cert. denied*, 364 U.S. 883 (1960); *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, 311 F. 2d 480 (2d Cir. 1962). The proposal of the respondent would limit the scope of the order to such a degree that it would not even cover the whole of the area of illegality found. The price discriminations disclosed in the record consist of all those resulting from the use of volume discount schedules and not just the price differences where the purchases of multiple chain outlets were combined for the purpose of discounts.

Respondent's objection to the order on the ground that it prohibits price discrimination without regard to whether the discrimination

has an adverse effect on competition is rejected because such a qualification has no place in a Commission Section 2(a) order. The likelihood of competitive injury is a fact question for the Commission to determine as basis for the order, and the Commission cannot shift to the courts a responsibility in enforcement proceedings of trying such issues. *Federal Trade Commission v. Morton Salt Company*, 334 U.S. 37, 54 (1948).

In connection with the product coverage of the order, the Commission may frame its order to prohibit the use of the illegal practice in conjunction with respondent's sale of any and all products. *Nivesh Industries, Inc. v. Federal Trade Commission*, *supra*, at page 343; *Mueller Co. v. Federal Trade Commission*, *supra*; *Carter Products, Inc. v. Federal Trade Commission*, 323 F. 2d 523 (5th Cir. 1963). The propriety of such an order, however, depends upon the circumstances in the proceeding. *Carter Products, Inc. v. Federal Trade Commission*, *supra*; cf. *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, *supra*; *The Quaker Oats Co.*, Docket No. 8119, decided April 25, 1962 [60 F.T.C. 798].

In the circumstances of this case, we believe a more limited order is appropriate, namely, an order covering "food products." Respondent urges that the order should be limited to biscuit products, i.e., crackers and cookies, but this would so narrow the order that the same practices engaged in as to any other product, even as to closely related products, would not be covered and would require a whole new proceeding to prohibit violations of law. Complaint counsel urges, and respondent does not dispute, that one of respondent's competitors is presently engaged in the sale of potato chips. If such a product is introduced in a competitor's line, it is not improbable that respondent might similarly expand its line. The Commission's order should at least be broad enough to cope with such related products. Cf. *Hershey Chocolate Corp. v. Federal Trade Commission*, 121 F. 2d 968, 971-972 (3d Cir. 1941); *Moog Industries, Inc. v. Federal Trade Commission*, 238 F. 2d 43, 52-53 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958). An order covering "food products" will be clear and precise as to the products to which it applies and sufficiently comprehensive to cover products related to those for which the violation is found. Yet, it is not so broad as to extend into all possible facets of respondent's business, regardless of the relationship to the practices herein found to be unlawful.

There is an objection by respondent to the inclusion of all purchasers in the order, rather than only retail grocery customers. Respondent, as found by the examiner, sells not only to retail grocery concerns but to restaurants as well. We agree that the qualifying phrase "in the resale of such products" should be added at the end

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of the order. Thus the order will be limited to customers competing in the resale of respondent's products and will not apply to sales to restaurants for their own use. Respondent's exception to the order on this question is granted to the extent indicated but not otherwise.

The exceptions of the respondent are sustained to the extent above indicated and otherwise rejected. The initial decision will be modified in accordance with the views expressed in this opinion and, as modified, will be adopted as the decision of the Commission. An appropriate order will be entered.

Commissioner Elman concurred in the result and Commissioner Reilly did not participate for the reason he did not hear oral argument.

FINAL ORDER AS TO COUNT I *

FEBRUARY 7, 1964

This matter having come on to be heard upon the exceptions of respondent to the hearing examiner's initial decision upon remand as to Count I, filed November 9, 1962, and upon briefs and oral argument in support of and in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having sustained in part and rejected in part the respondent's exceptions, and having directed that the initial decision be modified in accordance with the views therein expressed and as so modified adopted as the decision of the Commission:

It is ordered, That the sentence in the finding numbered 8 in the initial decision, reading "In the case of a customer making individual monthly purchases of less than \$500, who is a member of a voluntary buying group, an additional one percent of his monthly sales is payable to the group headquarters if the aggregate monthly purchases by the group are \$500 or more, without regard to the amount of the customer's own monthly purchases" be, and it hereby is, stricken.

It is further ordered, That the term "*inter alia*" in the first line in the finding numbered 22 in the initial decision be, and it hereby is, stricken.

It is further ordered, That the phrase "and other acts related above," in the third line of the third paragraph in the Conclusions in the initial decision be, and it hereby is, stricken.

It is further ordered, That the phrases "tend to create a monopoly," in the sixth and seventh lines of the finding numbered 23 and the second line of the fourth paragraph in the Conclusions in the initial decision be, and they hereby are, stricken.

* Respondent's motion for reconsideration and stay of this order was denied on April 10, 1964. 65 F.T.C. 1300.

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It is further ordered, That the first sentence in the finding numbered 24 in the initial decision be, and it hereby is, stricken.

It is further ordered, That the order to cease and desist contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That the United Biscuit Company of America, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale and distribution of their food products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale of such products.

It is further ordered, That the initial decision as modified herein be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent, United Biscuit Company of America, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist as set forth in this order.

Commissioner Elman concurring in the result and Commissioner Reilly not participating for the reason he did not hear oral argument.

FINAL ORDER AS TO COUNT II

FEBRUARY 7, 1964

The Commission, on December 7, 1961, having stayed the effective date of the initial decision herein as to Count II, filed November 13, 1961, which decision was based upon an agreement containing a consent order to cease and desist executed by respondent and counsel supporting the complaint pursuant to the Commission's Rules of Practice published May 6, 1955, as amended, and notice filed under Fed. Reg. Document 61-6766, 27 Fed. Reg. 6472-73 (1961), and the Commission now having determined that the aforesaid decision should become the decision of the Commission:

It is ordered, That the initial decision of the hearing examiner as to Count II, filed November 13, 1961, be and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent United Biscuit Company of America, a corporation, its officers, agents, representatives and

employees, directly or through any corporate or other device, in or in connection with the sale of biscuit products in commerce as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

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

It is further ordered, That the respondent, United Biscuit Company of America, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist as set forth in this order.

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