

to be further ordered, that the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF
PACIFIC MOLASSES COMPANY ET AL.

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

Docket 7462. Complaint, Apr. 1, 1959—Decision, May 21, 1964

Order requiring a San Francisco importer and distributor of "offshore" and domestic molasses throughout the United States, to cease discriminating in price in the sale of "blackstrap" molasses by allowing its favored customer-distributors a discount of $\frac{1}{2}\text{¢}$ to 1¢ per gallon—the latter being a reduction of nearly 10% from the published prices charged other customers—while selling to nonfavored customers at the established market price without any discount, which difference, because of the highly competitive nature of the business, readily determined the loss or retention of resale customers.

Complaint

65 F.T.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Pacific Molasses Company, respondent herein, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 215 Market Street, San Francisco, California. Respondent corporation is a wholly owned subsidiary of the United Molasses Company, London, England.

Respondent James M. Ferguson is president, respondent F. W. Earnhardt is vice president, secretary and treasurer, and Bascom Doyle is branch manager of respondent corporation with their address the same as that of the corporate respondent. Said individual respondents formulate, direct and control the policies, acts and practices of the corporate respondent herein named.

PAR. 2. Respondents are principally engaged in the importation, distribution and sale of "offshore" and domestic molasses throughout the United States. Respondent corporation's total sales in 1955 were approximately \$15,600,000.

Respondents maintain a number of storage terminals at various locations throughout the United States and sell and ship said molasses to customers located in several of the States of the United States. Respondents, in the sale of said molasses, have at all times relevant herein been, and are now, engaged in commerce, as "commerce" is defined in the amended Clayton Act.

PAR. 3. In the course and conduct of their business, the respondents have been and are now in substantial competition in the sale of "blackstrap" molasses with other sellers of such product. In many areas respondents sell their products to two or more molasses distributors who are in substantial competition each with the other in the resale of said product.

PAR. 4. In the course and conduct of their business in commerce, the respondents have been and are now, in each of several trading areas, and in particular in the Houston, Texas, area, discriminating in price in the sale of "blackstrap" molasses of like grade and quality by selling said product to favored distributor-customers at significantly lower prices than they are selling to non-favored distributor-customers

who are competitively engaged, each with the other, in the resale of said product. One or more of the sales involved in such discriminations have been and are now in commerce, and said commodity has been and now is sold for resale within the United States.

Respondents have effected said discriminations between and among their customers in the manner and by the method hereinafter described.

In the course and conduct of their business in commerce, respondents sell "blackstrap" molasses to their favored customers-distributors at the established market price of said product less a specified discount of $\frac{1}{4}\text{¢}$ to $\frac{1}{2}\text{¢}$ or more per gallon while respondents sell their non-favored distributor-customers at the established market price of said product without any discount whatsoever. Because of the highly competitive nature of the particular business, $\frac{1}{4}\text{¢}$ to $\frac{1}{2}\text{¢}$ discount per gallon readily determines the loss or retention of resale customers by the distributor-customers of the respondents.

PAR. 5. The effect of respondents' discrimination in price, as above alleged, may be substantially to lessen, injure, destroy or prevent competition in the line of commerce in which respondents are engaged, and between and among distributor-customers of the respondents.

PAR. 6. The acts and practices of respondents, as above alleged, constitute a violation of the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936.

Mr. Eugene Kaplan, supporting the complaint.

Orrick, Dahlquist, Herrington & Sutcliffe, by *Mr. Christopher M. Jenks*, *Mr. William D. McKee*, and *Mr. Robert A. Keller*, of San Francisco, Calif., and *Mr. John E. Shea*, of Washington, D.C., for respondents.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

DECEMBER 17, 1962

Statement of Proceedings

The Federal Trade Commission issued its complaint against the above-named respondents on April 1, 1959, charging them with having violated the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C., Sec. 13), by discriminating in price between and among their customers in the sale of "blackstrap" molasses. After being duly served with said complaint respondents appeared by counsel and served their answer

in which they denied, in substance, the violations charged and alleged, as affirmative defenses, that any granting of lower prices to certain customers resulted from a good-faith meeting of competition or was in return for different services or functions performed by the customers.

Hearings on the charges were held in abeyance on request of complaint counsel, pending the disposition of a companion proceeding against a competitor of the corporate respondent. On motion of respondents, a prehearing conference was convened in Washington, D.C., on July 14, 1960. By agreement of counsel for the parties the transcript of said conference was made a part of the record of this proceeding. On motion of counsel supporting the complaint, made at the prehearing conference, Paragraph Four of the complaint was amended so as to alleged discrimination in price between and among so-called favored customers, in addition to discrimination between and among favored and non-favored customers.¹ Hearings were tentatively scheduled to begin in November 1960, but were delayed pending disposition of the companion case referred to above, other commitments of counsel and, finally, the death of former senior counsel supporting the complaint.

Pursuant to notice duly given, hearings for the reception of evidence in support of and in opposition to the complaint were commenced on May 28, 1962, in Houston, Texas. At the outset of said hearings respondents moved for a 15-day continuance due to the failure of counsel supporting the complaint to furnish them with a list of witnesses and of the documentary evidence to be offered, 15 days prior to the hearing, as agreed to at the prehearing conference. It appearing that seven of the eight witnesses proposed to be called by counsel supporting the complaint were customers of the corporate respondent (the eighth being respondent Doyle), that complaint counsel had supplied respondents with names of five of such witnesses at least four days prior to the hearing, that the documentary evidence proposed to be offered consisted largely of documents obtained from respondents' files or data submitted by their counsel, that respondents had delayed their motion until the day of hearing at which time all arrangements for the hearings had been completed, and that the nature of the issues and the evidence to be presented was such that there was a minimum possibility of surprise on the part of respondents, the undersigned denied the motion for a continuance and ordered the

¹ In its original form, the complaint alleged that respondents had granted discounts to certain "favored customer-distributors" which were not granted to "their non-favored distributor-customers". As amended, it alleged that respondents had also discriminated in price "between and among the aforesaid favored customer-distributors by granting higher discounts to some of them than are granted to others".

hearings to proceed. However, this ruling was made without prejudice to the right of respondents to request the recall of witnesses for completion of cross-examination in the event of surprise, and to request a recess in the hearings at the close of the case-in-chief in order to prepare for defense. Hearings on the charges thereafter proceeded from May 28 to June 1, 1962, in Houston, Texas.

At the close of the case-in-chief on May 29, 1962, respondents moved for a dismissal of the complaint based on an alleged failure of proof, which motion was denied by the undersigned. Respondents were granted a recess of one day to permit them to subpoena certain witnesses in support of their defense. After the calling of witnesses on May 31 and June 1, 1962, respondents represented that they had been unable to secure all of the witnesses whom they had sought to subpoena during the brief time allotted and requested a continuance in order to complete the presentation of their defense. Said motion was granted by the undersigned and hearings were recessed until July 10, 1962, at which time they were resumed in San Francisco, California, on request of respondents, and continued therein until July 16, 1962, for the reception of further evidence in opposition to the complaint.

All testimony taken in this proceeding was duly recorded and has been filed in the office of the Commission. All parties were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence, bearing on the issues.² At the close of all the evidence, and pursuant to leave granted by the undersigned, proposed findings of fact, conclusions of law and an order, together with supporting briefs, were filed by complaint counsel and respondents on August 30, 1962, and reply memoranda were filed on September 10, 1962.

After having reviewed the entire record in this proceeding, and the proposed findings and conclusions,³ and the supporting briefs and

² Respondents contend that they were denied due process of law because of the examiner's refusal to grant them a continuance of 15 days from the date of the initial hearing. As indicated above, the examiner's denial of respondents' motion reserved to them the right to move to recall witnesses for further cross-examination. Respondents did not request the recall of any of the witnesses, with one exception. In the latter instance, without initially demonstrating surprise or inability to cross-examine the witness, respondents moved that cross-examination be postponed. Said request was denied. However, as indicated above, respondents later received a continuance of 40 days in order to interview additional witnesses and prepare for completion of their defense. Respondents had full opportunity to subpoena any of the witnesses who had been called by complaint counsel but, with one exception, elected not to do so. The record fails to establish that respondents were in any way prejudiced, either in the cross-examination of witnesses or in the presentation of their defense, because of the failure of complaint counsel to furnish them with a list of witnesses and exhibits 15 days prior to the initial hearing.

³ Proposed findings and conclusions not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

memoranda, and based on his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

Identity of Respondents

1. Respondent, Pacific Molasses Company (sometimes referred to herein as Pacific), is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 215 Market Street, San Francisco, California. Said respondent is a wholly owned subsidiary of United Molasses Company Ltd., of London, England.

2. Respondent James M. Ferguson is president, respondent F. W. Earnhardt is a vice president and secretary-treasurer, and respondent Bascom Doyle is a vice president of the corporate respondent. The business address of respondents Ferguson and Earnhardt is the same as that of the corporate respondent, and the address of respondent Doyle is 3036 Chartres Street, New Orleans, Louisiana. Respondent Ferguson, as president of the corporate respondent, formulates, directs and controls the policies, acts and practices of said respondent. The responsibilities of respondent Earnhardt as a vice president and secretary-treasurer relate principally to accounting financial and tax matters. Respondent Bascom Doyle is the corporate respondent's vice president in charge of its Gulf Division and, at the time of the events at issue, was branch manager of its New Orleans branch office having supervision over sales in the Mississippi Valley area.

Business of Pacific

3. Respondent Pacific is principally engaged in the importation and purchase of molasses in bulk quantities, and in the distribution and sale throughout the United States of "offshore" and domestic molasses, including blackstrap molasses. In the operation of its said business, it maintains a number of terminals at various locations throughout the United States where it stores molasses imported from abroad or purchased from domestic sources, and from which it sells and ships molasses to customers located in a number of the states of the United States. Its sales of molasses in 1955 amounted to approximately \$15,600,000.

4. Blackstrap molasses is primarily a by-product of the production of raw sugar, but is also obtained from the production of refined sugar. Its principal uses are as an additive in making livestock feed (where it acts as a flavoring agent and source of energy), and as a raw material for the distillation of industrial alcohol. It is also used for fer-

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Initial Decision

mentation into yeast and vinegar, and for certain pharmaceutical purposes.

5. Molasses as produced at a plantation or refinery contains some water, and its specific gravity may therefore vary. If molasses has too much water, the feed to which it is added will tend to mold. For this reason certain standards have been set up in the industry to define the water and solid content of molasses as sold commercially. These standards are expressed in terms of the "Brix" content of the molasses, which is stated in degrees. Brix refers to the specific gravity of the molasses solution and is a measure of the total solid content in the blend of molasses and water. The standard brix content of commercially sold blackstrap molasses is 79.5°. Price quotations for blackstrap molasses are normally based on a 79.5° brix content. Molasses containing lesser amounts of water and consequently more solids is referred to as having a "heavier brix content" and, where desired by particular customers, is ordinarily sold at a higher price than standard molasses of 79.5° brix.

6. Among the terminals operated by respondent Pacific are those at Houston, Texas, and New Orleans, Louisiana, which are part of its Gulf Division and are under the direct supervision of respondent Bascom Doyle. The molasses stored at these terminals is imported principally from the Caribbean area, including a number of the offshore islands and Mexico, and to a lesser extent is purchased from plantations and sugar refineries in Louisiana. The offshore molasses is shipped to Pacific's terminals in ship cargoes, and that from Mexico is also shipped in rail tank cars. It is then resold, in lesser quantities, to various users and distributors.

7. The issues in this proceeding relate mainly to Pacific's pricing policies at its Houston, Texas terminal. Its customers at such terminal fall into two principal categories: (a) users of blackstrap molasses such as feed mills and feed lot operators, and (b) distributors engaged in the resale or redistribution of blackstrap molasses to the users thereof. The charge of price discrimination involves only the distributor-customers of respondent Pacific. Such customers generally purchase blackstrap molasses f.o.b. Pacific's Houston terminal, where they pick up the molasses in their own trucks or that of a contract carrier and haul it to their own customers located in various States of the United States, including Texas, New Mexico, Oklahoma, Colorado, Kansas, Nebraska, Missouri, and Arkansas. It is charged that respondents have discriminated in price by selling blackstrap molasses at discounts of $\frac{1}{4}\text{¢}$ to $\frac{1}{2}\text{¢}$ or more, per gallon, to certain favored distributor-customers, and by granting higher discounts to certain of such customers than those granted to others.

Evidence of Price Discrimination

8. Pacific's prices to its distributor-customers in the sale of blackstrap molasses are based on its announced prices for molasses of 79.5° brix content, f.o.b. Houston. The price is announced to the trade and may change periodically in accordance with market conditions. Customers are generally notified in writing of such price changes. Prices are announced on both a per gallon and a per ton basis, sales being made on the basis of 171 gallons per ton of molasses. A price differential of $\frac{1}{4}$ ¢ a gallon is equivalent to 43¢ a ton; a differential of $\frac{1}{2}$ ¢ a gallon is equivalent to 85¢ a ton; and a 1¢ per gallon differential is equivalent to \$1.71 a ton.

9. The evidence of the prices charged by Pacific to its customer-distributors involves principally the year 1955, and discloses that at various times during the year Pacific charged some customers prices below its quoted f.o.b. Houston price. The departures from the announced prices took three principal forms. One involved the granting of a fixed discount or price below the quoted Houston price. Such discounts generally varied from $\frac{1}{4}$ ¢ to $\frac{1}{2}$ ¢ per gallon below the Houston price, but at times ran as high as 1¢ below the announced Houston price. One customer consistently received a discount of between $\frac{1}{2}$ ¢ and 1¢ from January to October 1955, while several other customers received intermittent discounts of between $\frac{1}{4}$ ¢ to $\frac{1}{2}$ ¢. The second form of price deviation arose out of contracts for future delivery or, as they were referred to in the record, "forward booking" contracts, under which various customers received a guaranteed ceiling price for deliveries made over a specified period of time. Under this arrangement the guaranteed ceiling price was periodically below Pacific's quoted price at the time of delivery, the amount of the differential generally being between $\frac{1}{4}$ ¢ to $\frac{1}{2}$ ¢ per gallon. A third form of price deviation involved the granting of so-called "price protection" to certain customers who had previously made sales to their own customers on the basis of Pacific's lower quoted price prior to a price change.

10. The purchases of various of Pacific's distributor-customers, the prices paid by them, and the extent of the deviations from Pacific's quoted Houston prices during 1955 are set forth in tabular form at the end of this decision, as Table 1. As appears from Table 1, the principal beneficiary of such price deviations was Fort Worth Molasses Company (sometimes referred to herein as Fort Worth). The price concessions received by Fort Worth were based mainly on a letter-agreement between it and Pacific, dated January 13, 1955, which provided that in consideration of Fort Worth's purchasing all of its molasses requirements from Pacific for the year 1955 (estimated at 30/40,000 short tons), Pacific would supply it with blackstrap molasses "on the

basis of our prevailing New Orleans price in effect at the time of each delivery". Historically, the New Orleans price is lower than the Houston price. This differential is usually at least $\frac{1}{2}\text{¢}$ a gallon but, as appears from Table 1, at times is as much as 1¢ per gallon (which is the equivalent of \$1.71 a ton). On September 26, 1955, the arrangement between Pacific and Fort Worth was modified and it was agreed that effective that date, on sales made f.o.b. Pacific's Houston terminal, the molasses "will be priced to you at $\frac{1}{2}\text{¢}$ per gallon below our prevailing Houston price". This arrangement continued for a brief period until October 1, 1955, following which Fort Worth ceased purchasing its blackstrap molasses from Pacific and began buying from Pacific's competitor, Southwestern Sugar & Molasses Company. Fort Worth resumed purchases from Pacific in 1956, but the nature of the price arrangement does not appear from the record.

11. As appears from Table 1, during the period from January 17 to October 1, 1955, the total amount of the price concessions received by Fort Worth from Pacific was \$24,487.70. Except for half of the allowances made on March 1 and from March 19-31, 1955 (which respondents contend were granted either as price protection or pursuant to a forward contract), substantially all of this amount was admittedly granted by Pacific as discounts from its regular Houston quoted price, involving either the receipt by Fort Worth of the benefit of Pacific's lower New Orleans price or, at the end, a flat $\frac{1}{2}\text{¢}$ reduction from the Houston price.⁴

While, as indicated in Table 1, some of the other customers did receive periodic price concessions, these concessions were granted for relatively brief periods and were, with a few exceptions, not as large as those received by Fort Worth. Thus, Marco Chemical Company (sometimes referred to herein as Marco) received total price concessions of \$791.59, of which all but \$86.37 was received during the same period as those received by Fort Worth.⁵ Of the total amount of the price concessions received by Marco, \$546.09 is accounted for by discounts of $\frac{1}{4}\text{¢}$ a gallon, which were received during the period between March 19 and July 28, 1955. The balance of the differentials received by Marco consisted of price reductions resulting from forward-booking or price-protection arrangements. Whether such arrangements also reflect dis-

⁴ According to respondents' computations (appearing in Table B of their proposed findings) the total amount of the discounts received by Fort Worth was \$29,189.68, not including savings due to forward contracts or price protection. The total amount of the discounts according to the computations of complaint counsel is \$24,316.63. It is immaterial to the conclusions reached herein which set of figures is used since, on any basis, it is apparent that the total amount of the discounts was substantial.

⁵ The record contains price information beginning January 1, 1955. However, Table 1 does not reflect any price information prior to January 17, 1955, since that is the date of the first purchase by Fort Worth. The \$86.37 saving referred to above occurred after October 1, 1955, when purchases by Fort Worth had ceased.

criminatory pricing as contended by counsel supporting the complaint, or are nondiscriminatory as contended by respondents, will be hereafter discussed. Despite the fact that Marco did receive price concessions totaling almost \$800, the price concessions received by Fort Worth during a large part of the period at issue were even greater, ranging from $\frac{1}{4}\text{¢}$ to 1¢ in excess of those received by Marco. Based on the quantity which it purchased between January 17 and October 1, 1955, Marco would have received an additional saving of \$3,677.09 if it had paid the same prices as Fort Worth.

As indicated in Table 1, C. & R. Molasses Company (sometimes referred to herein as C. & R.), received total price reductions of \$947.50 between January 17 and October 1, 1955. Substantially all of this amount is accounted for by reductions resulting from forward-booking contracts, and did not involve the granting of discounts as such. Despite the savings realized by C. & R., Fort Worth had a price advantage of between $\frac{1}{4}\text{¢}$ and $\frac{1}{2}\text{¢}$ during substantial portions of this period, except during the period from April 1 to May 2, when C. & R. had a price advantage of $\frac{1}{4}\text{¢}$ a gallon on 320 tons purchased by it. Based on the total amount of its purchases between January 17 and October 1, 1955, C. & R. would have received an additional \$1,593.35 in savings if it had received the benefit of the discounts granted to Fort Worth.

Parris Molasses & Feed Company (sometimes referred to herein as Parris) is another distributor-customer which received some price concessions from Pacific. As indicated in Table 1, the total amount of the concessions received by Parris during the period at issue was \$943.60. Approximately 40% of the savings realized by Parris was due to periodic discounts of $\frac{1}{4}\text{¢}$ per gallon, and the balance was the result of forward-booking contracts. Despite such savings by Parris, Fort Worth had a price advantage of between $\frac{1}{4}\text{¢}$ to $\frac{1}{2}\text{¢}$ per gallon during most of the period, except between March 2 and April 15 when Parris had a price advantage of $\frac{1}{4}\text{¢}$ a gallon on 373 tons. Based on the quantity which it purchased between January 17 and October 1, 1955, Parris' net price disadvantage compared to Fort Worth amounted to \$484.08, after making due allowance for substantial savings realized by Parris on forward-booking contracts.

The only other distributor-customer to receive any price concessions during the period at issue was B. G. Thompson. Thompson received a saving of \$12.30 based on a differential of $\frac{1}{2}\text{¢}$ a gallon on the purchase of 14 tons on March 1, 1955, which was granted as price protection against Pacific's price change occurring February 28, 1955. On the basis of the total amount which Thompson purchased between

January 17 and October 1, 1955, his net price disadvantage vis-a-vis Fort Worth was \$1,611.65.

As indicated in Table 1, three other distributor-customers received no price concessions from Pacific during the period at issue. W. L. Hunt's price disadvantage vis-a-vis Fort Worth was between $\frac{1}{2}$ ¢ and 1¢ per gallon, and amounted to \$681.66 on the total amount which he purchased between July 6 and October 1, 1955. J. C. Barnes had a similar price disadvantage in comparison with Fort Worth, the total amount thereof being \$624.53 on his purchases between January 17 and October 1, 1955. Yoakum Grain & Feed Company likewise had a disadvantage of between $\frac{1}{2}$ ¢ to 1¢ a gallon compared to the prices paid by Fort Worth, which amounted to \$121.06 from January 15 to September 12, 1955, on Yoakum's total purchases.

In addition to the distributor-customers as to which there is evidence of prices charged and quantities sold, as reflected in Table 1, the record also reveals that there were a number of other distributors to which Pacific sold molasses out of its Houston terminal.⁶ Among these was Houston Molasses Company, which purchased 243 tons of molasses from Pacific in 1955 on none of which, according to credited testimony of its principal owner, did it receive any discount. In addition, Pacific sold to at least eight other distributors during 1955 in amounts varying from 347 tons to over 4,000 tons. So far as appears from the record, none of these distributors received a discount.

Differences Resulting from Forward-Booking Contracts

12. Complaint counsel makes no distinction between price differences which took the form of outright discounts from Pacific's quoted price, f.o.b. its Houston terminal, and those which resulted from forward-booking contracts or price-protection arrangements. While respondents apparently concede that some of the straight discounts were discriminatory (albeit claiming they were nonsubstantial in amount and without the required statutory effect), they contend that the other forms of price concession which were received by various of Pacific's customers were made available to substantially all of them on a nondiscriminatory basis.

13. As already indicated, Pacific did periodically enter into so-called forward-booking contracts with various of its distributor-customers. Such contracts provided for the delivery of specified quantities of

⁶ Table 1 is based on CX 1 to 8, which were prepared by respondents for counsel supporting the complaint and purport to show in detail the prices charged, the quantities sold and the dates of sales to a number of Pacific's customers. In addition, the record contains evidence of total sales made by Pacific to all its distributor-customers during 1955 (RX 71 and 20).

blackstrap molasses⁷ over some future time period, which might vary from 30 to 90 days. The pricing arrangement usually provided for a specified ceiling price and, in the alternative, for the seller's regular quoted price on the date of shipment (referred to as the s.p.d.s. price), if lower than the specified ceiling price. Under such a contract the customer could receive a price advantage if Pacific's quoted price at the time of delivery had risen above the ceiling price specified in the contract. Such contracts, in effect, gave the customer the guarantee that he would not have to pay any more than the ceiling price specified in the contract even though Pacific's quoted price had risen at the time of delivery, while at the same time giving the customer the opportunity of receiving a lower price in the event Pacific's quoted price had declined at the time of delivery. The contracts usually reserved to Pacific the option of cancelling as to "any unshipped portion of this contract not withdrawn according to schedule".

14. Pacific's practice of entering into forward-booking contracts generally involved periods of contemplated oversupply of blackstrap molasses when Pacific was, in effect, an "anxious seller" eager to enter into contracts with customers calling for substantial future deliveries. It was its usual practice, on such occasions, to contact its distributor-customers, either by telegram or telephone, advising them of its offer to enter into forward-booking contracts. Thus, for example, in January 1955 it made an offer, which was subject to acceptance between January 5 and February 27, to deliver molasses through the month of March at a ceiling price of 10½¢ per gallon, f.o.b. Houston, or its price on the date of delivery if lower. Its quoted price, f.o.b. Houston, between January 5 and February 27 was 10½¢ per gallon (the ceiling price in the offer), but rose to 11¢ between February 28 and March 18, and to 11½¢ between March 19 and May 2. Thus, a customer who had accepted Pacific's offer would have received a price advantage of ½¢ on deliveries between March 1 and March 18, and 1¢ on deliveries between March 19 and March 31.

15. During 1955 Pacific made five general offerings to customers to enter into forward-booking contracts. So far as appears from the record, the offers were identical as to the period each offer was in effect, the period when delivery was to be made under it, and the pricing formula (*i.e.*, the specified ceiling price or, in the alternative, the s.p.d.s. price if lower). Likewise, so far as appears from the record, it was the usual practice of Pacific in making offers for forward-booking contracts to make them to all or substantially all of its distributor-

⁷ The quantities were usually specified in the contracts in approximate amounts, such as: "Forty (40) Tank Truckloads—Approx. 20 Tons Each" (CX 29).

customers.⁸ To the extent that it did so, and to the extent that it entered into contracts which conformed to the terms of its offers, it is the opinion and finding of the examiner that Pacific's practice in this regard was nondiscriminatory. However, the record does reveal that in at least two instances, involving forward-booking contracts with Parris Molasses, the contracts provided for an additional $\frac{1}{4}\text{¢}$ discount from the ceiling and s.p.d.s. price which had been generally offered.⁹ To the extent that the price provisions of the contracts deviated from the price offered to other customers, the contracts were obviously discriminatory.

16. The contention of complaint counsel that Pacific entered into discriminatory forward-booking contracts is not based on contracts entered into pursuant to general offerings of the type discussed above, but rather on the admitted fact that Pacific has periodically accepted bids from individual customers to enter into forward contracts at times when it had no general invitation outstanding. The record discloses that Pacific does not accept such offers as a matter of routine, but makes its decision based on the current market situation and the reliability of the customer making the offer, *i.e.*, whether the customer has usually fulfilled his contracts. In accepting such offers Pacific does not necessarily accept all the terms offered, but may negotiate different terms, such as price, quantity or time of delivery.

The only example in the record of such a forward contract is one involving Parris Molasses, with which Pacific entered into a contract on July 27, 1955, for 20 tank truckloads of molasses, of approximately 20 tons each, to be delivered between July 27 and September 30, 1955, at 12¢ per gallon. Unlike the usual forward-booking contracts previously discussed, the price was firm and the contract did not provide for

⁸ The record discloses that telegrams containing offers to enter into forward-booking contracts were not sent to all of Pacific's distributor-customers (RX 72A-E). However, respondent Doyle testified that "[w]e would call a lot of the customers by telephone" (R. 895). While Doyle at first suggested that the offers were limited to those customers to whom he thought he "had an opportunity to sell" (R. 895), he later claimed that he sent telegrams or telephoned all distributor-customers concerning offers to enter into forward contracts (R. 898, 899). Respondent Ferguson testified that it was Pacific's policy to make forward offerings to "customers or any potential customer, anyone that is a molasses user. * * * [A]s anxious sellers we attempt to publicize as much as possible the fact that we are interested in making forward contracts" (R. 950). While the matter is not free from doubt, the examiner concludes, in the absence of substantial countervailing evidence, that the offers were made generally available to Pacific's customers.

⁹ On January 17, 1955, Pacific entered into a forward contract with Parris calling for a price of $10\frac{1}{2}\text{¢}$ per gallon or s.p.d.s. if lower, on shipments between January 17 and March 31, 1955 (CX 29). This price conformed to the price in Pacific's general offering (RX 65) and was Pacific's current price at the time of the offer (RX 64). However, on February 15, 1955, the price provision of the contract was modified to read: "10½ cents per gallon less ¼ cent per gallon or seller's price date of shipment whichever lower less ¼ cent per gallon" (RX 60). This ¼¢ reduction was subsequently embodied in a later forward contract calling for deliveries between March 22 to June 30, 1955, which was extended to July 31, 1955 (RX 61-A).

payment of the seller's price on day of delivery if lower. At the time the contract was entered into, Pacific's quoted price was the same as that provided for in the contract and it did not change during the period of delivery so that, in actuality, Parris received no price advantage. The record fails to establish that Pacific has entered into any substantial number of such individually negotiated forward contracts or that it has favored any particular customer or group of customers in entering into such arrangements.

Complaint counsel also cites the requirements contract of January 13, 1955, between Pacific and Fort Worth, as another example of a discriminatory forward-booking contract. This contract, in the opinion of the examiner, is not a forward-booking contract in the sense of a contract in which the buyer receives the benefit of a fixed ceiling price over a given future period. The price provided for in the contract with Fort Worth varied in accordance with changes in the New Orleans price. To the extent that the New Orleans price was always $\frac{1}{2}\text{¢}$ or more below the Houston price, Fort Worth received the equivalent of a discount from the Houston price, a matter which has been heretofore fully discussed. The legality of such discount must stand or fall on its own bottom, separate and apart from any forward-booking aspect.

The record does disclose that Pacific made a separate forward-booking arrangement with Fort Worth on March 4, 1955, guaranteeing it a price of $10\frac{1}{2}\text{¢}$ per gallon or Pacific's New Orleans price if lower, on shipments made during the month of March. Since the same offer was made to Pacific's New Orleans customers generally the contract is not discriminatory as a forward-booking contract. However, to the extent that it gave Fort Worth the benefit of the lower New Orleans prices, which were not made available to Pacific's other Houston customers, it involved a discrimination in price of the same type as that involved in the basic contract of January 13, 1955, between Pacific and Fort Worth.

Price Protection

17. Another form of price concession given by Pacific involves the periodic granting of price protection to individual distributor-customers. The instances thereof appearing in the record occurred during periods when Pacific had announced a general increase in its quoted price, f.o.b. Houston. Such increases were sometimes announced by telegram, effective immediately. When this occurred there might be some customers who had already committed themselves to resell molasses to one of their own customers at a price which was based on Pacific's previous price. Such customers would advise Pacific of their predicament, and ask it to enable them to fill the outstanding order on the basis of its previous price. If, upon investigation, Pacific was satis-

fied as to the bona fides of the customer's claim, it would give him the benefit of its former price for a brief period of a few days in order to fill existing commitments. The record fails to establish that Pacific favored any particular customer or group of customers in the granting of periodic price protection under the circumstances described above.

Discrimination in Sale of High-Brix Molasses

18. Although not specifically alleged in the complaint, counsel supporting the complaint contends that respondents discriminated in favor of Fort Worth and several other customers by selling them molasses of high-brix content (ranging from 85.4° to 89.2° brix). Since such molasses has more solids and less water than standard 79.5° brix the customer, in effect, is able to save approximately 10% in transportation costs by not paying freight on the additional water contained in standard brix. The customer can add the necessary water after the molasses has been received, so as to bring the solution down to 79.5° brix and then resell it to its own customer, thereby receiving the benefit of an approximately 10% saving in transportation costs.

19. The record fails to establish that Pacific engaged in any discrimination in price, as such, in the sale of high-brix molasses. The price at which such molasses is sold to distributor-customers by Pacific is based on an established formula, in which the basic price of 79.5° brix molasses is adjusted upwards in accordance with the additional brix content of the molasses being sold. To the extent that any customer may have received a lower basic price (in terms of the price of standard brix) this would, of course, be reflected in the price of the high brix molasses, but in the absence of any discrimination in the basic price, there is no additional price advantage obtained from the sale of high-brix molasses as such.

20. While it is true that a customer purchasing high-brix molasses does achieve a saving in transportation costs, the record fails to establish that Pacific has discriminated among the customers to whom it sold high-brix molasses. Not every customer can use high-brix molasses since it requires certain storage facilities and other special equipment to add the water, so as to convert high-brix molasses to 79.5° brix, after it has been received by the customer. Many distributors do not have the equipment necessary for this operation and have no interest in purchasing it. The record is lacking in substantial evidence that Pacific failed to offer high-brix molasses to any customer who was equipped to use it or that it refused to sell such molasses to any customer who wished to buy it.

Competition Among Distributor-Customers

21. The complaint charges that the competitive effects of respondents' discriminations extend to both the line of commerce in which

respondents are engaged and that in which their distributor-customers are engaged. However, at the prehearing conference complaint counsel indicated that they were restricting their claims to the line of commerce of the distributor-customers, or to the so-called "secondary" line of commerce. The proposed findings submitted by complaint counsel claim an adverse competitive effect only in the secondary line of commerce. The question which is, therefore, presented is as to the extent to which competition exists between and among Pacific's distributor-customers. Since the complaint, as amended, charges that respondents discriminated in price by granting discounts to some distributors and not to others and by granting higher discounts to some favored customers than to others, the matter of the existence of competition among distributors involves not only a determination of whether competition exists between favored and nonfavored distributors, but also whether it exists between and among favored distributors receiving higher discounts than other favored distributors.

22. As previously noted, the evidence of alleged price discrimination among Pacific's distributor-customers involves customers purchasing molasses from its Houston terminal and reselling such molasses to customers located in Texas and in some of the surrounding states. The distributor-customers concerning which evidence was offered, purporting to show the extent of the discriminations in price and of competition with other distributors, include Fort Worth Molasses, Marco Chemical, C. & R. Molasses, Parris Molasses, B. G. Thompson, W. L. Hunt, J. C. Barnes, Yoakum Grain, and Houston Molasses. These distributors are all located in the East-Texas area. Fort Worth, Marco, Parris, and C. & R. have their headquarters in Fort Worth. Houston Molasses and Barnes are located in Houston. Thompson has his place of business in Madisonville, and Hunt has his in Georgetown, both communities being located between Fort Worth and Houston. Yoakum Grain is located in Yoakum, which is south of Fort Worth and east of Houston.

23. Fort Worth Molasses, the most favored customer pricewise, sells and delivers in most of Texas east of Abilene, and in Oklahoma, Kansas, Arkansas and Missouri. According to the credited testimony of its principal owner, it was in competition in 1955 with Marco Chemical, Parris Molasses and C. & R. Molasses. Marco sells in substantially the same states or areas as Fort Worth Molasses, except that it does not sell in Missouri and, in addition, sells in areas of Colorado, Nebraska and New Mexico where Fort Worth does not sell. Competition between C. & R. and Fort Worth existed mainly in Texas. C. & R. also sold in Colorado where Fort Worth did not sell, but where Marco did. Parris sold both in Texas and Kansas in competition with Fort

Worth, C. & R., and Marco. The credible testimony of other distributor-customers, in addition to Marco, Parris and C. & R., establishes that they also competed with Fort Worth in 1955. Houston Molasses,^{9a} Thompson, Yoakum and Hunt competed with Fort Worth Molasses in various parts of the East-Texas area, while Barnes competed not only in East Texas but in Kansas, Missouri and Arkansas. The record also establishes that some of the nonfavored customers competed with others of the favored cutomers, in addition to competing with Fort Worth. Thus, Hunt, Thompson and Barnes sold in competition with Marco, while Houston Molasses sold in competition with Parris.

24. The complaint alleges, and respondents admit in their answer, that Pacific "sells its products to two or more distributors who were at all times mentioned in the complaint and now are in substantial competition with each other in the resale of molasses." However, respondents now contend that "only in the East Texas area was there any significant competition between Fort Worth and other secondary distributors [and that] there is no showing that such competition was intensive."¹⁰ Contrary to the position which respondents now urge despite the admission in their answer, the record does establish that competition between many of Pacific's distributors was significant, substantial and, indeed, intensive (assuming *arguendo* that a showing of "intensive" competition is necessary).

Respondents' argument concerning the insubstantiality of competition is based, in part, on the fact that some of the distributors did not resell to the same customers as Fort Worth, or that some of them tended to concentrate their sales efforts in different portions of the territory than Fort Worth. In the opinion of the examiner the fact that Fort Worth and some of the other distributors did not, at any particular moment, happen to be selling to the same customers, or that portions of their business were concentrated in somewhat different areas does not negate the existence of substantial competition. Most of the distributors were ready, willing and able to sell to as many customers as possible within the same areas and, despite some differences in areas of concentration, many of the areas in which they sold were located within the same general trade territories.

^{9a} Respondents contend that Houston Molasses cannot be considered a competitor of Fort Worth and other secondary distributors because it imported most of the molasses which it sold. However, to the extent that Houston bought molasses from other importers, such as Pacific, and resold it to ultimate users in competition with secondary distributors, it occupied a dual position, and was in competition with the secondary distributors. In fact, Pacific itself was regarded as a competitor by some of its own distributors, since it sold to ultimate users in competition with them. Several of the distributors also referred to Houston as being among their competitors.

¹⁰ Proposed Findings, page 63.

Respondents also cite the fact that there were only about 34 distributors serving some 3,000 feed mills and feed lots located in Texas and the seven nearby states, as raising "the inference that competition could not have been intensive."¹¹ In the opinion of the examiner no inference as to the level of intensity of competition in an industry can be drawn merely on the basis of the proportion of sellers to buyers in the industry. Additional information, such as the geographic distribution of buyers and sellers, and the relative size and demand of the buyers, would be necessary before an informed judgment could be made that competition was not intense.

Contrary to the position which is now being urged by respondents, in April 1953 respondent Doyle acknowledged to respondent Ferguson that "[w]e * * * find ourselves operating in an extremely competitive market."¹² If anything, competition in the industry had become even more intense in 1955 than it was in 1953. While it is true that Doyle was referring to competition between Pacific and certain distributors who were receiving discounts from Pacific's competitor, Southwestern Sugar & Molasses, it is clear that his statement is also applicable to competition between distributors since the latter compete with the primary importers, such as Pacific and Southwestern, to the extent that both groups sell to users of molasses.

25. Based on the facts discussed above and from the record as a whole, it is concluded and found that there is substantial competition between and among many of Pacific's distributor-customers in the resale of blackstrap molasses purchased from it. Such competition exists both between customers who received favorable price treatment from Pacific and those who were not so favored, and between and among customers who received differing degrees of price favoritism.

Competitive Effect

26. As has previously been found, Pacific granted discounts to certain of its distributor-customers, while selling to others at its quoted Houston price, and granted to certain distributor-customers higher discounts than it granted to others among the favored distributor-customers. The variations in price among its customers, both favored and nonfavored, ranged from $\frac{1}{4}\text{¢}$ to $\frac{1}{2}\text{¢}$ and 1¢ . The complaint charges that because of the highly competitive nature of the molasses business a discount of as little as $\frac{1}{4}\text{¢}$ or $\frac{1}{2}\text{¢}$ "readily determines the loss or retention of resale customers" by respondents' customers, and that the effect of respondents' price discriminations may

¹¹ *Id.*, at page 26.

¹² RX 21-A.

be substantially to lessen, injure, destroy or prevent competition between and among respondents' distributor-customers.¹³

27. While not denying, in the answer filed by them, the importance of such discounts in the retention of customers, respondents deny, in both their answer and their proposed findings, that any adverse competitive effect may be anticipated from the discounts which Pacific granted. The question to be determined at this point, therefore, is whether price differentials of the order of magnitude indicated fall within the proscription of the statute, insofar as having the requisite competitive effect. In order to resolve this question, it is necessary to consider whether the differentials are substantial in relation to prices and margins, and whether, as alleged in the complaint, they readily determine the loss or retention of customers. To a consideration of these matters the examiner now turns.

(a). *Pricing Structure and Profit Margins*

28. The price at which distributors sell molasses is determined basically by the price they pay for the molasses and the cost of delivering the molasses to the customer's place of business. Many of Pacific's distributor-customers charge their customers a basic price based on their cost f.o.b. Houston, plus freight to point of destination. Some charge a flat price which does not break out the distributor's cost and the freight charges separately, but even this price is essentially computed on the basis of the Houston price plus freight.¹⁴ To the extent that distributors use the cost-plus-freight method in billing their customers, they base their cost on Pacific's price to them f.o.b. Houston. In the case of those distributors who received a discount or other price differential from Pacific, most passed this on to the customer in the form of a lower basic price, but some pocketed the differential. The distributor's profit is generally made on the freight charges, except to the extent that some distributors do not pass on to the customer the benefit of a lower price received from Pacific. The freight charges are fairly uniform, being based on the published tariffs of the Railroad Commission of Texas, which fixes the shipping rates for molasses in terms of the length of the haul.

29. To the extent that a distributor's profit comes out of his freight charges, the amount of the profit would, of course, depend on his cost of hauling the molasses to his customer's place of business. The

¹³ As previously indicated, the complaint also alleges injury in the primary line of commerce but, in accordance with the statements made by complaint counsel at the prehearing conference, this claim has been dropped.

¹⁴ Among the distributors using the latter method is Marco Chemical. While testifying that his company charged a flat price, rather than cost plus freight, Marco's president stated that "the customer sits down and mentally calculates this is so much over the Houston price, you are too high or too low" (R. 509).

record contains considerable evidence as to the cost-per-mile of hauling molasses. Such costs varied from a low of $16\frac{1}{2}\text{¢}$ (exclusive of administrative costs and depreciation) to a high of 25-28¢ per mile. Since such costs were in many instances not related to any gross return per mile, it is not possible to determine the net return of a number of the distributors. However, in the case of two of the distributors, figures of the gross return per mile do appear in the record, and it is possible to make a reasonable estimate of net return.

The most precise breakdown of costs and net return is that involving Alamo Feed Mills, a distributor selling in the East-Texas area.¹⁵ Alamo's figures, which were introduced into evidence by respondents, reveal that its costs (exclusive of certain administrative costs) were 23.58¢ per mile and that its average return per mile from the sale of molasses was 25.63¢, leaving a net return of 2.05¢ per mile.¹⁶ Based on an average trip of 270 miles from Houston to Fort Worth, the net return on an average truckload of 17 tons would be \$5.54 or 33¢ a ton, which is less than $\frac{1}{4}\text{¢}$ a gallon. Another set of figures in the record is that of C. & R. Molasses, which charged 25¢ a running mile above the cost of the molasses, and whose cost of hauling was estimated at 19.4¢. This would mean a net return of 5.6¢ per mile, which figure is probably high since the estimated cost of 19.4¢ was based on all 161 of C. & R.'s trucks, only three of which hauled molasses and on which costs were somewhat higher than on other types of trucks. In any event, based on an average 270-mile trip from Houston to Fort Worth and a truckload of 17 tons, C. & R.'s net return would be \$15.12 of 89¢ a ton, which is little more than $\frac{1}{2}\text{¢}$ a gallon.

30. In addition to the evidence of costs and return per mile, discussed above, the record also contains evidence of net profits on a per-gallon basis. The president of Marco Chemical called as a witness by respondents, estimated his company's net profit from the sale of molasses at $1\frac{1}{2}\text{¢}$ per gallon. However, Marco also hauls tallow, cottonseed oils and other liquids as a backhaul in its trucks, and the estimated profit of $1\frac{1}{2}\text{¢}$ per gallon on molasses takes into account the saving in cost of having another product to backhaul. To the extent that a distributor does not have a backhaul business and brings his trucks back empty, his net return would be lower. The testimony of other distributors indicates that the net profit on a gallon of molasses is nearer to $\frac{1}{2}\text{¢}$ or even less.

¹⁵ Alamo purchased only 85 tons from Pacific in 1953, but had purchased almost 5,000 tons in 1954 and over 7,500 tons in 1953.

¹⁶ In their proposed findings, respondents (at page 24) refer to Alamo's profit as 2.05¢ per gallon. However, it is clear from the exhibit (RX 70) and the testimony (R. 742) that the return is on a per mile, and not on a per gallon, basis.

(b). *Importance of Discounts*

31. Whatever may be the precise margin of profit of distributors of molasses purchasing from Pacific's Houston terminal, the distributors called by both sides in this proceeding were almost unanimous in their testimony as to the importance of discounts of $\frac{1}{4}\text{¢}$ or $\frac{1}{2}\text{¢}$ per gallon, in their ability to operate at a profit and to retain or obtain customers. Thus, the president of Alamo Feed, called as a witness by respondents, testified that a discount of $\frac{1}{2}\text{¢}$ a gallon was "very important * * * [b]ecause that represents in a small margin approximately all that is made off of molasses".¹⁷ According to Marco's president, also called as respondents' witness, the receipt of a discount of $\frac{1}{2}\text{¢}$ a gallon had enabled him to sell to customers to whom he could not otherwise sell, and he had had to lose certain customers "because people were selling molasses * * * so cheap we felt we could not afford to handle it".¹⁸ The representative of Fort Worth Molasses, the most favored customer and likewise a witness for respondents, left no doubt as to the importance of a $\frac{1}{2}\text{¢}$ discount to his company, testifying that "it meant quite a bit of money" in terms of the volume he was handling. When asked whether "that is rather important", he stated: "And a wee bit more, yes".¹⁹ Both W. L. Hunt and Houston Molasses regarded $\frac{1}{4}\text{¢}$ a gallon as important, and the latter's representative indicated that he had had to cut his price by that amount in order not to lose customers.

32. The record establishes that a discount of $\frac{1}{4}\text{¢}$ or $\frac{1}{2}\text{¢}$ a gallon is not only important in the retention or obtaining of customers, but even to a distributor's survival in business. Thus, it appears that two of the distributors which received no discounts, J. C. Barnes and C. & R. Molasses, went out of the molasses business in the latter part of 1955. Barnes testified that he couldn't compete with other distributors because he "couldn't meet the price" and "just couldn't stay in business any longer".²⁰ C. & R. Molasses decided to sell its molasses trucks because the company was losing money on its molasses operations.²¹

33. Respondents contend that there were approximately 16 other distributors serving the same general area who went out of business during the same period as Barnes and C. & R., and that since 12 of

¹⁷ R. 754-755. The same witness answered in the affirmative when asked: "You are saying a half a cent of it is the terms of your net profit?" (R. 755).

¹⁸ R. 510, 527.

¹⁹ R. 478. When asked whether he had told Pacific a discount of $\frac{1}{2}\text{¢}$ was important to him at the time he discussed the matter of doing business with them, the witness stated: "I don't recall telling them that, because I supposed they knew it was important" (R. 480).

²⁰ R. 134, 139.

²¹ R. 279-280.

them had received discounts (mainly from Pacific's competitor), Pacific's price reductions to some of its own distributors could not have been a factor in the departure from business of some of its non-favored customers. Aside from the fact that the evidence relied upon by respondents to the effect that 12 of the departing distributors had received discounts is unreliable hearsay, the bare fact that such distributors had received some discount is of little probative value in the absence of reliable evidence as to the extent and duration of the discounts received by them in comparison with those who survived.

34. Respondents also point out that there are a number of other factors, in addition to the price of molasses, which may affect the profitability of a distributor's operations or his ability to survive. Among those referred to are, (a) whether the distributor has a backhaul business of other commodities to help defray the cost of operating his trucks, (b) whether the distributor uses a 17-ton or a 20-ton truck (the use of the latter, according to respondents, resulting in a saving of 1¢ per gallon on a trip of 916 miles from Houston to Oklahoma City, which is considerably longer than the distance travelled by many distributors), and (c) whether the distributor uses a gasoline-powered, or diesel-powered, truck (the use of the latter, according to respondents, resulting in a saving of .7¢ per gallon on the same 916-mile trip).

The fact that a nonfavored customer could cut the losses resulting from his lack of price parity with a favored customer by building up a backhaul business or by buying a 20-ton truck or a diesel-powered one is, in the opinion of the examiner, irrelevant on its face. If these facts have any relevance, it is that they attest to the narrowness of the margins in the molasses business, which causes distributors to buy the more expensive rigs required for backhauls, or to buy larger and costlier trucks of other types, in order to defray their truck operating costs and try to save sums as minute as .7¢ on a gallon of molasses hauled. It is also significant that among the distributors who stressed the importance of a discount of $\frac{1}{4}$ ¢ or $\frac{1}{2}$ ¢ a gallon in the operation of their business, a number had a backhaul business or operated 20-ton trucks.²² Despite these supposed advantages, they found it difficult to compete with the favored customer or customers.

35. Respondents' present position, that a $\frac{1}{4}$ ¢ or $\frac{1}{2}$ ¢-a-gallon discount is not important in the competitive picture, hardly squares with the statement made by respondent Doyle to respondent Ferguson in April 1953 (in the letter previously referred to) that as a result of

²² Among those equipped for a backhaul business were Marco, Thompson, Barnes, Yoakum, Parris, and Alamo. At least Parris and Marco had 20-ton trucks, the latter even having some of 25-ton capacity.

Southwestern's granting of a $\frac{1}{2}\text{¢}$ discount to some of its distributors "these firms are able to compete with us" and "[w]e therefore find ourselves operating in an extremely competitive market".²³ If a primary importer finds it difficult to compete with secondary distributors because of a discount of $\frac{1}{2}\text{¢}$ a gallon from a basic price the same as its own, it seems self-evident that secondary distributors buying from Pacific and not receiving such a discount would be at a disadvantage in competing with other distributors who received a discount.

36. Of final significance in determining the importance of discounts of $\frac{1}{4}\text{¢}$ or $\frac{1}{2}\text{¢}$ a gallon is Pacific's own price schedule during the period at issue. Its prices, f.o.b. Houston, between January 1 and October 1, 1955, remained within the narrow range of $10\frac{1}{4}\text{¢}$ to 12¢ per gallon and those f.o.b. New Orleans ranged from $9\frac{3}{4}\text{¢}$ to $11\frac{1}{2}\text{¢}$ per gallon. Such changes as occurred were generally in multiples of $\frac{1}{4}\text{¢}$ or $\frac{1}{2}\text{¢}$ per gallon, upwards or downwards. It seems evident in the light of this price structure that sums as small as $\frac{1}{4}\text{¢}$ to $\frac{1}{2}\text{¢}$ a gallon were significant and important in the industry.

37. Based on the facts discussed above, and from the record as a whole, it is concluded and found that discounts of $\frac{1}{4}\text{¢}$ and $\frac{1}{2}\text{¢}$ are substantial in relation to prices and margins, and are important to distributors selling blackstrap molasses from the Houston terminal area, and that the effect of Pacific's granting discounts of this order of magnitude to certain of its distributor-customers and denying them to others, and of granting discounts of this order of magnitude to some distributor-customers over and above discounts granted to others may be substantially to lessen, injure, destroy or prevent competition between and among Pacific's distributor-customers purchasing blackstrap molasses out of its Houston terminal.

Defense of Meeting Competition

38. Respondents contend that in granting discounts to Fort Worth Molasses during most of 1955, and to a few other distributor-customers at periodic intervals, respondent Pacific did so in good faith in order to meet the equally low prices of its principal competitor, Southwestern Sugar & Molasses Company. They contend that respondent Doyle had received reports during 1953 that Southwestern was granting a discount of $\frac{1}{2}\text{¢}$ a gallon to virtually every trucker in the area, that this situation continued in 1954 and was aggravated by Southwestern's extending the discounts to certain large users and by absorbing the 3% transportation tax, and that Pacific "begin to lose significant amounts of business" and was finally compelled to reduce its prices to some of its customers, including Fort Worth Molasses, in order to meet Southwestern's competition.

²³ RX 21-A. (See page 692 and fn. 12, *supra*).
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39. Reduced to its legal essentials Pacific's defense is that, (a) so far as it was aware Southwestern's discount of $\frac{1}{2}\text{¢}$ a gallon was being granted to all of its distributor-customers and was therefore a lawful price, (b) Pacific acted defensively by granting discounts to some of its existing customers, and not to acquire new customers, and (c) it merely met Southwestern's equally low price and, in some instances, even granted lesser discounts where it was possible to retain a customer on that basis. It is the opinion and finding of the examiner that the record does not sustain respondents' position since it is by no means clear that Pacific, (a) had reason to believe it was meeting a uniform discount to distributors by Southwestern when it elected to grant some distributors a discount, (b) used discounts solely on a defensive basis in order to retain existing customers and not to obtain new customers, and (c) in all instances limited the amount of its discounts to those granted by Southwestern. To a consideration of the facts which form the basis of these findings the examiner now turns.

40. Pacific entered the Houston market in late 1949 with the purchase of the terminal and storage facilities of Ralston-Purina Company. Its sole competitor at that time was Southwestern Sugar & Molasses Company, which also operated a terminal at Houston. Additional competitors entered the Texas market in 1953 and 1954, when Standard Molasses Company and Molasses Trading Company opened terminals at Beaumont and Corpus Christi, respectively.

41. From late 1949 to the end of 1952 Pacific occupied a relatively minor position in the market served by terminals located in the East-Texas area. However, in late 1952 respondent Doyle went to work for Pacific as sales manager in charge of its Gulf Division, which included the Houston terminal. Doyle undertook an aggressive campaign to increase Pacific's sales out of its Houston terminal. His efforts were marked with considerable success, so that by July 1953, he was able to report to respondent Ferguson that Pacific was "getting approximately one-third of the molasses business in Texas".²⁴ While complaining to Ferguson that Southwestern was cutting prices by granting some distributors and brokers a discount of $\frac{1}{2}\text{¢}$ a gallon Doyle, nevertheless, advised Ferguson that: "The outlook for Pacific under these conditions is to pretty well hold our own, and at the same time continue to pick up a small number of customers from time to time." As late as November 2, 1953, Doyle advised Ferguson that Pacific had acquired four new customers who had previously been buying from Southwestern.²⁵

42. Up to about the middle of 1954 Pacific engaged mainly in direct selling to ultimate users of molasses, such as feed mills and feed lots.

²⁴ RX 22-A.

²⁵ RX 23.

In addition to its terminal in Houston it also had a sales office in Houston and employed several salesmen to contact customers and potential customers. However, Pacific also sold to a few distributor-customers, the principal one being Alamo Products Company, located in San Antonio and serving an area in southeast Texas which Pacific felt could be better served by a distributor rather than on a direct basis. Up to about the middle of 1954 Pacific sold to both ultimate users and distributors on the basis of its Houston quoted price, without any discount. However, in the spring of 1954 it began to give its user-customers, to whom it was selling on a delivered basis, reductions from its freight charges equivalent to $\frac{1}{2}\text{¢}$ a gallon. It also granted Alamo a discount of $\frac{1}{4}\text{¢}$ a gallon from the f.o.b. Houston price. During the summer of 1954 Pacific closed its Houston sales office and began to concentrate on selling to distributors, rather than to ultimate users. The principal distributor-customer acquired by Pacific was Fort Worth Molasses, which became its customer in January 1955. Pacific's sales to distributors increased from approximately 20,000 tons in 1953 to 29,000 in 1954 and 54,000 in 1955. Most of the increase in 1955 was accounted for by sales to Fort Worth, which amounted to approximately 22,750 tons.

43. The record fails to sustain respondents' position that in granting discounts to some distributor-customers Pacific acted in the good faith belief that its competitor, Southwestern, was granting discounts to all of its distributor-customers. The record does disclose that in the middle of 1953 Pacific had received information to the effect that some of Southwestern's larger distributor-customers, including particularly Fort Worth Molasses and Graves Molasses Company (another distributor located in Fort Worth), were receiving a discount of $\frac{1}{2}\text{¢}$ a gallon.²⁶ It also appears that in February 1954 Pacific had reason to believe this discount was being extended to other "secondary distributors";²⁷ and that by the end of March 1954 it suspected that Southwestern was "giving all independent truckers a discount of $\frac{1}{2}\text{¢}$ per gallon".²⁸ However, by May 1954 Pacific had received information indicating that Southwestern had changed to a quantity discount system, under which the customer received no discount if he ordered less than four loads a week, but received a discount of $\frac{1}{4}\text{¢}$ a gallon on orders of four loads, and a discount of $\frac{1}{2}\text{¢}$ a gallon on five loads or more.²⁹ When advised of this system by respondent Doyle, respondent Ferguson replied on June 2, 1954:³⁰

²⁶ RX 21-A, RX 22-A.

²⁷ RX 24.

²⁸ RX 25-A.

²⁹ RX 30.

³⁰ RX 32.

This system of discount, in our opinion, is actually in violation of the Robinson-Patman Act unless Kaplan [Southwestern] can show that a saving is made to warrant the discount, *and we doubt if that is possible.* [Emphasis supplied.]

While there is some reference in the correspondence between Doyle and Ferguson during July and August 1954, to Southwestern's giving a $\frac{1}{2}$ ¢ a gallon discount "to independent truckers and to larger accounts",³¹ it is by no means clear that they understood Southwestern had abandoned the quantity discount system and was then giving a discount to all distributor-customers.

44. With the exception of Alamo Products, Pacific did not grant any discounts to its distributor-customers until January 1955, when it made its contract with Fort Worth Molasses to sell to it at the New Orleans price. Despite the granting of discounts by Southwestern, Pacific was admittedly able to maintain its market position "[u]ntil late 1954".³² While respondents contend that Pacific's market position thereafter deteriorated, thus impelling it to grant discounts to Fort Worth and to others, the examiner is not satisfied from the record that this is so. There is no substantial evidence in the record of any deterioration of Pacific's market position in late 1954. Pacific introduced no figures of its over-all sales during the period, and the record discloses that its sales to distributors increased by over 9,000 tons from 1953 to 1954. On February 9, 1955, at a time when the arrangement with Fort Worth had hardly begun to show any results, respondent Doyle advised his company's president that he was of "the opinion that we have a nice volume at Houston".³³

45. From a careful reading of the correspondence between Doyle and Ferguson and from their testimony as a whole, the examiner is convinced that the granting of discounts to Fort Worth and a few other distributors was not due to any significant decline in Pacific's sales, but to the conviction that its interests would be better served by concentrating more on sales to distributors and less on direct sales to users. Undoubtedly the fact that Southwestern had been granting discounts to some of the major distributors had played a part in this decision since it had placed these distributors in a better position to compete with Pacific in sales to ultimate users. However, Southwestern had also purportedly cut its prices to some of its user-customers. This combination of factors had caused Pacific to cut its freight charges to some of its larger customers, and presumably resulted in some narrowing of its profit margins. Up to that time it had been reluctant to give any discounts to distributors because it did not wish to see their growth encouraged as an intermediary between the large

³¹ RX 34-A, RX 35.

³² Respondents' Proposed Findings, page 46.

³³ RX 37-B.

importers and the users of molasses.³⁴ By the end of 1954 and early 1955 Pacific had come to the realization that the truck distributors were there to stay and that it would serve its interests to do business with them.³⁵

46. In entering into business relations with Fort Worth Molasses, Pacific did not do so as a defensive measure to keep from losing a customer, but to gain a customer and enhance its market position. There is no record basis for the contention, advanced in respondent's findings (page 48), that "at no time did Pacific gain new customers as a result of selective price reductions". It is true that Fort Worth had purchased some molasses from one of Pacific's terminals on the West Coast in the early 1940's. However, Fort Worth had never been a customer of Pacific's Houston terminal from the time operations there were commenced in late 1949 until January 1955. In fact, Fort Worth was actually a competitor of Pacific's in selling to molasses users. Pacific recognized Fort Worth as being Southwestern's customer, and began to make overtures to Fort Worth in the latter part of 1954 to do business with it. These efforts culminated in the January 1955 contract.

47. In offering Fort Worth a discount not only did Pacific not do so for the purpose of retaining a customer, but it gave Fort Worth a better price arrangement than the latter then had with Southwestern, in order to induce Fort Worth to change suppliers. As the testimony of Fort Worth's president indicates, he told respondent Ferguson in January 1955 that "if he could sell me on the same basis that I was buying it [from Southwestern], I would be glad to buy some from him".³⁶ At that time Fort Worth, to Ferguson's knowledge, was getting a discount of $\frac{1}{2}$ ¢ a gallon from Southwestern. Ferguson conceded in his testimony that "it was obvious to us that a half cent was the figure we would have to meet".³⁷ Despite this, Ferguson offered Fort Worth not a half cent discount from the Houston price, but the lower New Orleans price, which was never less than $\frac{1}{2}$ ¢ a gallon below Houston and for substantial periods was 1¢ and more below Houston.³⁸ The reason for this more favorable arrangement was that Ferguson wanted to do more than merely have Fort Worth buy "some" of its molasses from Pacific, as the testimony of the Fort Worth representative indicates. Ferguson sought to offer the Fort Worth official a better

³⁴ On March 30, 1954, Doyle had advised Ferguson (RX 25-B): "Your comment in regards to taking one-half cent off the freight rate is certainly *far better than giving one-half cent to these truckers and encouraging their growth and development*". [Emphasis supplied.]

³⁵ As Doyle advised Ferguson on February 9, 1955, referring to the Fort Worth market: "The independent truckers have almost all this business and are becoming more important factors in the Texas market all the time" (RX 37-A).

³⁶ R. 469.

³⁷ R. 972.

³⁸ During the time the contract between Pacific and Fort Worth was in effect the maximum differential was 1¢. However, later in the year it increased to $1\frac{1}{2}$ ¢ and finally to 2¢.

arrangement than he was then getting from Southwestern in order to tie Fort Worth to a "long-term contract".³⁹ Ferguson accordingly "pointed out to him * * * the advantage of the New Orleans price".⁴⁰

48. Respondents contend that in granting Fort Worth the benefit of the New Orleans price Pacific was really giving the latter the equivalent of a $\frac{1}{2}$ ¢ a gallon discount since the "normal" differential between the Houston and New Orleans terminals was $\frac{1}{2}$ ¢ a gallon. Contrary to respondents' contention, $\frac{1}{2}$ ¢ a gallon was the *minimum* differential between the two cities, and both Pacific and Fort Worth were fully aware that the latter stood to obtain even greater discounts by paying the New Orleans price. The quid pro quo for this more favorable arrangement was Fort Worth's agreement to sign a long-term requirements contract. It may be noted that in September 1955, when Pacific's supplies became short and it was apparently not as anxious to continue the Fort Worth arrangement as it formerly had been, it had no trouble in finding appropriate language to specifically fix Fort Worth's discount "at $\frac{1}{2}$ ¢ per gallon below our prevailing Houston price".⁴¹

49. It is significant that in granting Fort Worth a discount, which at times was over $\frac{1}{2}$ ¢ a gallon, Pacific did so despite indications in the record that it was able to maintain its position by keeping its price within $\frac{1}{4}$ ¢ of Southwestern's. Thus, on March 30, 1954, in advising Ferguson that Southwestern was granting "independent truckers a discount of $\frac{1}{2}$ cent per gallon", Doyle stated: "We have found that we can effectively sell against Southwestern and their truckers if we are no more than $\frac{1}{4}$ ¢ per gallon higher".⁴² The reason for this was that Pacific had convinced some distributors and users that its molasses was of a more uniform brix content than Southwestern's, and that the loading services at its terminal were better. In line with this, Pacific had limited its discounts to Alamo Products in 1954 to $\frac{1}{4}$ ¢ a gallon, and those to Marco and Parris in 1955 to $\frac{1}{4}$ ¢ a gallon. Significantly, these were all existing customers of Pacific and the granting of discounts to them was in line with Pacific's professed policy of offering discounts to meet Southwestern's competition "only in the instances of our established customers".⁴³ Yet in the case of Fort Worth, Pacific not only exceeded its normal $\frac{1}{4}$ ¢ discount, but gave its new customer a somewhat better proposition than it was getting from Southwestern. The reason for this obviously was Fort Worth's substantial volume, and the fact that it was willing to sign a long-term requirements contract.

³⁹ As Ferguson testified (R. 973): "We were admittedly trying to arrange a long-term contract with Fort Worth Molasses Company, and we were trying to present Fort Worth with the best possible offering that we could make".

⁴⁰ R. 973.

⁴¹ RX 66-A.

⁴² RX 25-A.

⁴³ RX 24.

50. Based on the facts discussed above, and from the record as a whole, it is concluded and found that respondent Pacific has failed to establish that the granting of discounts by it was limited to circumstances where it was acting in good faith to meet the equally low prices of a competitor. On the contrary, the record establishes that at least in the case of Fort Worth Molasses respondent acted in other than a defensive manner and exceeded the discounts being granted by its principal competitor, Southwestern Sugar & Molasses Company.

Functional Discounts

50. As a further defense, respondents contend that the favored customers of Pacific performed "distinctly different services or functions" than did nonfavored customers, and therefore "had inherently higher costs" than nonfavored customers not performing such functions or services. It points out, in this connection, that both Fort Worth Molasses and Marco Chemical had storage facilities which enabled them to store large quantities of molasses, thereby relieving Pacific's limited storage capacity in Houston. Also cited is the fact that these companies employed salesmen thus, presumably, relieving Pacific of the necessity for putting additional sales effort in the field.

51. The legal sufficiency of these facts as a defense to the granting of discounts will be hereafter discussed. However, it may be noted at this point that the granting of the discounts to these customers was in no way related to, or conditioned on, any special functions or services rendered by them. C. & R. Molasses and Houston Molasses both had storage facilities, and yet no special discount was granted to them. Marco received a discount for only a brief period, although it was capable of performing, and did perform, the same storage of molasses during the entire time that it bought from Pacific. It is clear from the contract between Pacific and Fort Worth that the latter received the benefit of a special price not because of any storage or sales services to be rendered for Pacific, but because it agreed to buy its total requirements of molasses from Pacific. It is concluded and found that the record fails to establish that the discounts granted by Pacific to certain of its distributor-customers were granted in contemplation of any special services or functions performed by them or because of any special cost incurred by them on behalf of Pacific.

CONCLUSIONS

1. The complaint alleges, the answer admits, and the record establishes, that respondent Pacific Molasses Company is engaged in the importation, distribution and sale of "offshore" molasses throughout the United States, and that its sales are substantial. The record also establishes that it imports and sells substantial quantities of blackstrap molasses from its Houston, Texas terminal to customers who are lo-

cated in various other States of the United States or who transport such molasses to various other States of the United States. It is, accordingly, concluded in accordance with the foregoing and with the admissions of respondents, that respondent Pacific Molasses Company, both generally and at its Houston, Tex. terminal, is engaged in commerce, within the meaning of the Clayton Act.

2. The record establishes that the respondent Pacific Molasses Company, at its Houston, Tex. terminal, has charged different prices to different purchasers of blackstrap molasses of like grade and quality, and that one or more of such purchases involved sales or shipments across State lines. It is, accordingly, concluded that respondent Pacific Molasses Company, in the course of commerce, has discriminated in price between different purchasers of blackstrap molasses of like grade and quality, and that one or more of the purchases involved in such discriminations was in commerce.

Respondents concede that under *FTC v. Anheuser-Busch*, 363 U.S. 536, a difference in price ordinarily constitutes a discrimination in price. However, they seek to add a gloss to the holding of the *Anheuser-Busch* case, viz, that the differences in price must involve "reasonably contemporaneous" transactions in order to constitute a discrimination. Respondents cite, in this connection, the holding in *Atalanta v. FTC*, 258 F. 2d 365 (2 Cir., 1958), that "the time interval is a determining factor" in determining whether the granting of the advertising allowances there involved was discriminatory, in violation of Section 2(d) of the Clayton Act. Respondents contend that in the instant case "[m]any of the sales at a discount were not contemporaneous with sales at the published Houston price and hence, cannot be considered discriminatory."

In the opinion of the examiner there is no requirement that sales at different prices must be "contemporaneous" in order to constitute a discrimination. So long as the sales are not so remote in time as to suggest that the prices were determined by different market conditions, the differences in price must be considered discriminatory. Depending on the industry, sales separated by days, weeks or even months may be considered discriminatory, unless it is established by the party arguing to the contrary that such differences in price were the result of different market conditions. In the instant case the record establishes that respondent Pacific Molasses Company's quoted Houston price remained stable for periods as long as several weeks and even several months.⁴⁴ All customers buying from it during any such period were entitled to equality of price treatment, and those not receiving such treatment were being discriminated against, within the meaning of

⁴⁴ The price from March 19 to May 2, 1955, remained stationary at 11½¢ a gallon. From August 2 to November 19, 1955, the price was unchanged at 12¢.

the Robinson-Patman Act. In any event, while respondents contend that "many" of the sales at different prices were not "contemporaneous", they apparently concede that many were. The record contains numerous instances of sales at different prices being made on the same day or within a matter of a few days of one another. Certainly even under respondents' definition, assuming *arguendo* there is such a requirement in the law, such sales would be deemed to be "reasonably contemporaneous".

3. In most instances the differences in price between and among customers were the result of the granting of a specific discount or price below respondent Pacific Molasses Company's quoted price at its Houston terminal. Such differences in price were clearly discriminatory. However, as heretofore found, in some instances such differences resulted from forward-booking contracts involving future deliveries, or from the granting of price protection for brief periods following a price change.

Insofar as forward-booking contracts are concerned, the record establishes the respondent Pacific Molasses Company periodically makes general offerings to its customers to enter into such contracts, on specified terms. So far as appears from the record such offers are extended to all customers. On occasion, the corporate respondent accepts bids from individual customers to enter in contracts for future deliveries, other than pursuant to general offerings made by it. The record fails to establish that said respondent has tended to favor any particular customer or group of customers in periodically accepting such bids. It also appears from the record that said respondent has granted price protection to individual customers, so as to permit them to fill a contract for the resale of molasses based on said respondent's lower price prior to a price change. The record fails to establish that the corporate respondent has tended to favor any particular customer or group of customers in the granting of price protection.

Counsel supporting complaint makes no contention as to the illegality of forward-booking contracts entered into by the corporate respondent pursuant to general offers made to customers. Counsel does, however, question the legality of forward contracts made pursuant to a bid **received from an individual customer**, apparently contending if such an offer is accepted the respondent must offer other customers an opportunity to enter into similar contracts. The examiner notes, in this connection, that in the *Corn Products Refining Co.* case, 34 F.T.C. 850, 877, the Commission specifically exempted from its order prohibiting discriminations in price, sales "for future delivery which do not involve such discriminations in price at the time of actual sale." It is also

noted that the draftsman of the bill which became the Robinson-Patman Act stated, "[o]n the question of futures", that the bill would not prohibit a sale to "a purchaser of futures * * * in May, at one price, for delivery in December, when the price of the market in December for spot purchases would be different" and, further, that "the bill does not affect the relationship between future and spot purchases [because] [t]hey are different things and are based on market conditions at different times or relating to different times. It would require the equal treatment of future buyers of the same goods, buying at the same time and in the same future."⁴⁵

So far as appears from the record in the instant case, distributors purchasing pursuant to general offers to sell on a forward basis received equal treatment, except for one distributor whose contract was amended to add a $\frac{1}{4}\text{¢}$ discount. In the case of forward contracts not made pursuant to general offerings, it is the opinion of the examiner that there is no discrimination involved merely because the seller has not offered similar contracts to its other customer, in the absence of substantial evidence (which does not appear in this record) that the seller has tended to favor a particular customer or group of customers in accepting such offers or has turned down similar bids from other customers made at or about the same time as the one accepted.

Complaint counsel has advanced no separate contention with respect to the corporate respondent's practice of granting price protection, but presumably contends, as in the case of forward contracts, that such arrangements are discriminatory unless made with all distributors. The examiner finds himself in disagreement with this contention. So far as appears from the record, price protection is granted only where the customer has demonstrated that he had already committed himself to resell the merchandise at a lower price based on the corporate respondent's price prior to a price change. To require said respondent to permit other customers, who had made no such commitments, to purchase at its former price would be to give such customers the equivalent of a price advantage. In any event, the corporate respondent's practice of granting price protection to individual customers does not involve amounts of such substantiality as to have any significant effect on competitive relations, since it occurs only sporadically and covers purchases made for only a day or two following a price change. Furthermore, the record fails to establish that respondent has tended to favor any particular customer or group of customers in the periodic granting of price protection.

4. The differentials in price which have heretofore been found to be discriminatory ranged from $\frac{1}{4}\text{¢}$ to 1¢ per gallon. The record estab-

⁴⁵ *Hearings Before House Committee on Judiciary on Bills to Amend Clayton Act*, 74th Cong., 1st Sess. 24 and 36 (1935).

lishes the existence of substantial competition between favored and nonfavored customers, and between and among customers receiving more favorable price treatment than others. It has also been found that profit margins of distributors of blackstrap molasses are very narrow and generally are around $\frac{1}{2}\text{¢}$ per gallon or even less. It has likewise been found that price differentials of as little as $\frac{1}{4}\text{¢}$ or $\frac{1}{2}\text{¢}$ per gallon are important to distributors of blackstrap molasses, and substantially affect their ability to compete and even their ability to survive in business. It is, accordingly, concluded that the discriminations here found to have occurred fall within the proscription of the statute, insofar as having the requisite competitive effect, since the record clearly establishes that the effect of such discriminations may be substantially to lessen, injure, destroy or prevent competition with customers receiving the benefit of such discriminations.

This conclusion is inevitable in the light of the Commission's holdings, based on the Supreme Court's decision in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948) that "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 purchaser 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."⁴⁶ There is abundant evidence in the record for concluding that the amount of the discriminations here involved was substantial. This is clear from the findings previously made that profit margins in the industry are small and that price differentials of as little as $\frac{1}{4}\text{¢}$ or $\frac{1}{2}\text{¢}$ a gallon are important, in that they significantly affect a distributor's ability to retain or gain customers, to operate at a profit and even to survive in business.

Respondents contend that there has been no showing of competitive injury, within the meaning of the *Morton Salt* case, because it has not been established that the differentials in price are substantial "with reference to the number of purchases made from Pacific compared to the number made from others".⁴⁷ Respondent's argument does not properly reflect the holding of the *Morton Salt* case. The Court's reference to substantiality was in terms of the amount of differential, not in terms of the total amount of the purchases. Thus, the Court stated (at page 50) that in a case involving competition between customers of the same seller the statutory test is met by a showing that the seller sells goods "to some customers substantially *cheaper* than they sell like goods to the competitors of these customers" [emphasis supplied]. The Court

⁴⁶*American Oil Company*, Docket 8183, June 27, 1962 [60 F.T.C. 1786]; see also, *United Biscuit Co. of America*, Docket 7817, June 28, 1962 [60 F.T.C. 1893]; *Tri-Valley Packing Association*, Docket 7225, May 10, 1962 [60 F.T.C. 1134]; and *The Borden Company*, Docket 7129, Jan. 30, 1963 [62 F.T.C. 130].

⁴⁷ Respondent's Proposed Findings, page 24.

specifically overruled an argument as to the lack of probability of an **adverse competitive effect** based on the fact that the amounts involved in the sales to nonfavored customers were "very small in comparison with the total volume of its [the seller's] business" and that the item involved in the discrimination was "a small item" in the customers' businesses, the Court stating (at page 49) :

Congress intended to protect a merchant from competitive injury attributable to discriminatory prices * * * *whether the particular goods constituted a major or minor portion of his stock.* [Emphasis supplied.]

In any event, the record here establishes that the discriminations involved were substantial, not only in terms of the differentials in price, but in terms of the total amounts of the purchases of both the favored customer and many of the nonfavored customers.

Respondents further contend that no finding of competitive injury can be made because the record does not establish "the requisite intensive competition between favored and nonfavored customers". Respondents' contention in this respect is lacking in merit. In the first place, there is no requirement under the *Morton Salt* case that competition between customers must be "intensive". It is sufficient, in the opinion of the examiner, that there is substantial competition between them. It may be noted, in this connection, that in the recent *Tri-Valley* case the existence of competition between favored and nonfavored customers in the resale of the goods involved in the discrimination was held to be unnecessary. In the earlier case of *Corn Products Refining Co. v. FTC*, 324 U.S. 726 (1945), there was no competition between purchasers in the resale of the products sold by respondent, since the product was used as an ingredient of another product manufactured by the customers. In that case the Court also held that it was unnecessary that the differential in price be reflected in the price at which the goods were resold by the favored customers, thus suggesting that intensive competition in the resale of the products need not be shown.

In any event, even assuming arguendo that there must be a showing that competition in the resale of blackstrap molasses is "intensive" or "keen" (as respondents also refer to it), the record contains abundant evidence of the existence of such competition. As has already been found, many of the distributors sell in the same general area to the same class or classes of customers. They are in keen competition, not only with one another, but with the primary importers such as respondent Pacific Molasses Company and Southwestern Sugar & Molasses Company, both of which sell to feed mills and feed lot operators as well as to distributors. As previously found, the corporate respondent itself, ante litem motam, acknowledged that it was operating "in an extremely competitive market" in the sale of molasses in com-

petition with favored distributors. It seems self evident that non-favored distributors would find themselves in even greater difficulty in operating such a market.

Finally respondents contend that there has been no showing that any of the distributors were injured, and that if a few did suffer any loss of business or profits, it was due to factors other than their failure to receive discounts. Respondents' argument presupposes that a showing of the prescribed competitive effect requires evidence of actual injury to competition. This, however, is unnecessary. As the Supreme Court has pointed out: "The statute is designed to reach such discriminations 'in their incipency' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect." *Corn Products Refining Co. v. FTC*, *supra*, at 738. The effect of price discriminations in any particular case must be looked at prospectively, in terms of what is reasonably to be anticipated, given a price differential of a certain size and certain margins and competitive relationships in the industry. The fact that other factors may lessen the blow of the differentials or that other factors may have played a part in business mortalities are immaterial where, as here, the evidence establishes that the discriminations are reasonably calculated to play a significant role in the ability of competitors to compete with the favored customer or customers. The conclusion here reached, it should be noted, that the statutory test has been met, is not based on any minimal *prima facie* showing under the *Morton Salt* doctrine. Aside from evidence as to the substantiality of the discounts, there is abundant evidence in the record to show that such discriminations are bound to have an adverse competitive effect.

5. Respondent has failed to sustain the burden of establishing that its discriminations in price among its distributor-customers were granted in good faith to meet the equally low price of a competitor, within the meaning of Section 2(b) of the Clayton Act. The essence of the defense under Section 2(b) is that "wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain the customer, may in good faith meet that lower price." *Standard Oil Co. v. FTC*, 340 U.S. 231, 242 (1951). The prerequisites of establishing a Section 2(b) defense thus are, (1) that the seller acted in the good faith belief that the lower price of the competitor which is being met is "lawful", (2) that the discount is granted defensively in order to "retain" a customer, and not aggressively to gain new business, and (3) that the lower price being afforded by the seller is granted to meet its competitors' equally low price.

Insofar as the first requirement is concerned, the record fails to establish that, at the time respondent Pacific Molasses Company began

to grant discounts to Fort Worth Molasses Company, its competitor Southwestern Sugar & Molasses Company was then uniformly granting the same discounts to its distributors. The record indicates that shortly prior thereto Southwestern was granting quantity discounts up to $\frac{1}{2}\text{¢}$ a gallon to some distributors and that the corporate respondent's president had expressed doubt that the price differentials could be cost justified. Thus, said respondent has failed to meet the burden of proving, at least in the case of the discounts granted to Fort Worth Molasses, that it was acting in the good faith belief it was meeting the lawful price of its competitor. Secondly, the record establishes that, at least in the case of Fort Worth Molasses, the most favored customer, the discounts were granted to obtain a new customer, insofar as the corporate respondent's Houston terminal is concerned. Respondents suggest that in view of the Circuit Court's decision in *Sunshine Biscuit Co. v. FTC*, 306 F. 2d 48 (7 Cir., 1962), it is unnecessary to establish that the favored customer is an existing customer. However, in addition to the Supreme Court's holding to the contrary in the *Standard Oil* case, *supra*, the Second Circuit in *Standard Motor Products, Inc. v. FTC*, 265 F. 2d 674, 677, *cert. den.*, 361 U.S. 826 (1959), has likewise held that "it is well settled that a lowered price is within Section 2(b) * * * only if it is used defensively to hold customers rather than to gain new ones."

In any event, even if the distinction between old and new customers is ignored, it is still necessary to establish that the seller's granting of a discriminatory price is a purely defensive move. As the authority whose views are reflected in the *Sunshine Biscuit* case has expressed it:⁴⁸

* * * a Section 2(b) justification should be acceptable if it realistically maintains or restores the seller's market share, losing some accounts while gaining others. * * * Basically, if a seller's lower price to meet competition is genuinely a defensive reaction, the incidental securing of new customers or regaining of lost accounts should not be disqualified under Section 2(b). [Emphasis supplied.]

The record here fails to establish, at least in the case of the discounts granted to Fort Worth Molasses, that respondent Pacific Molasses Company was acting merely to maintain or restore its market share, or that its actions were genuinely a defensive reaction to the discounts being granted to Fort Worth Molasses by its then supplier, Southwestern Sugar & Molasses Company. As has heretofore been found, the record does not disclose any deterioration of respondent's market position prior to the granting of the discount to Fort Worth Molasses. The granting of the discount was part of a policy decision by

⁴⁸ Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962), page 247.

respondent Pacific Molasses Company to extend its business among distributors. This was not due primarily to the fact that Southwestern had granted a discount to Fort Worth Molasses, but was a result of the competition which the respondent was meeting from the prices being charged to user-customers by both distributors and by Southwestern Sugar & Molasses itself. Despite the fact that the corporate respondent had admittedly been able to retain or obtain customers by granting a discount of only $\frac{1}{4}\text{¢}$ it granted Fort Worth a discount in excess of the $\frac{1}{2}\text{¢}$ discount the latter was then getting from Southwestern, and tied it to a long-term exclusive contract. This can hardly be called a genuinely defensive reaction. By its action the corporate respondent did not merely maintain or restore its market share, but almost doubled its sales to distributors. Not only was the respondent's action not purely defensive, but it did more than merely "meet an equally low price" of its competitor, and thus it failed to meet the third requirement of a Section 2(b) defense.

6. As has heretofore been found, respondents have failed to establish that the discounts which Pacific Molasses Company granted to certain customers were given in return for the performance of certain functions or services by such customers for its account. However, even assuming that some of such discounts were granted for this purpose, the fact that discounts are of a functional nature is not recognized as a defense to a charge of price discrimination under Section 2(a) of the Clayton Act. Discriminations in price which fall within the proscription of Section 2(a), and which have the proscribed competitive effect, can be justified only if they fall within the purview of the Section 2(b) defense. The latter section does not include functional discounts within its scope. To the extent that a seller grants functional discounts, he does so at his own risk if the beneficiary of such discounts competes with other customers not so favored, unless the seller can justify such discounts under Section 2(b) or grants them on proportionally equal terms, within the meaning of Section 2(d) of the Clayton Act. *General Foods Corp.*, 52 F.T.C. 798 (1956); *Mueller Co.*, Docket 7514, January 12, 1962 [60 F.T.C. 120].

7. It is concluded that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and that the discriminations in price by respondent Pacific Molasses Company, as hereinabove found, constitute a violation of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

THE REMEDY

1. Two questions have been raised with respect to the scope of the order which should be issued in this proceeding. The first is whether

the order should include respondents Ferguson, Earnhardt and Doyle in their individual capacities. The second is whether the provision of the order prohibiting price discrimination should be the usual broad provision prohibiting all discriminations by respondent in the secondary line of commerce, or whether it should prohibit discrimination only among distributors purchasing from the corporate respondent's Houston terminal. To a consideration of these two questions the examiner now turns.

2. While complaint counsel has proposed to include the three individual respondents in the order, he has advanced no reasons, either in his proposed findings or in his reply memorandum, why they should be so included. Respondents contend that in the event any cease and desist order is issued the three individual respondents should not be included. In the case of the respondent Earnhardt, there is not even a semblance of justification for including him since he had no connection with the events at issue. With respect to respondents Ferguson and Doyle, the record does disclose that they played a prominent role in the events, Doyle as adviser and Ferguson as the man who made the ultimate decisions. However, in all instances they acted within their sphere as officers or employees of the corporate respondent. No reason has been advanced as to why the order should extend to them in their individual capacities. The corporate respondent is a wholly owned subsidiary of United Molasses Company, which is a publicly held corporation. Respondent Ferguson has only a small stock interest in the parent company. The record contains no evidence indicative of any possibility of evasion of the order by the corporate respondent, so as to require that the individual respondents be held. Accordingly, the order to be issued in this case will exclude the other three respondents in their individual capacities.

3. With respect to the scope of the provision prohibiting price discrimination, complaint counsel contends that a broad order should be issued despite the fact that the evidence of price discrimination is largely limited to the Houston terminal, since price discrimination by the corporate respondent cannot otherwise be effectively terminated. Conversely, respondents argue that since the evidence of discrimination involved only the Houston terminal the order should be so limited.

4. In the opinion of the examiner it is not necessary, in order to justify a broad order, to offer evidence of price discrimination in more than one area. Once evidence of a violation of Section 2(a) has been adduced, the burden is on the party asserting that the order should be limited to adduce evidence to justify such a limitation. The record in this proceeding does not contain any evidence from which it can be inferred that conditions at the corporate respondent's other terminals are so materially different from those at Houston, as to justify

excluding its other operations from the order. The examiner is not unmindful of the fact that the order, issued pursuant to consent agreement, against the corporate respondent's competitor, Southwestern Sugar & Molasses Company, is operative on a terminal-by-terminal basis.⁴⁹ However, the facts there before the examiner and the Commission indicated that there was no substantial competition between that respondent's terminals. In the instant case the record indicates that some competition does exist between or among the Houston, New Orleans and El Paso terminals, and is silent as to whether it exists in the case of approximately ten other terminals. Accordingly, it is the opinion of the examiner, that the order to be issued should broadly prohibit price discrimination among competing customers, as is customary in Commission proceedings. To the extent that there is no substantial competition between and among customers of different terminals this would, of course, permit the corporate respondent to maintain a differential among the terminals involved.

ORDER

It is ordered, That respondent Pacific Molasses Company, a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of blackstrap molasses 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 blackstrap molasses by selling said product to any purchaser at a net price which is higher than the net price charged any other purchaser of blackstrap molasses of like grade and quality who, in fact, competes in the resale and distribution of said respondent's blackstrap molasses as such with the purchasers paying the higher price, or who competes in the resale and distribution of said respondent's blackstrap molasses as an ingredient of other products with the purchaser paying the higher price.

The term "net price" as used in this order includes rebates, allowances, commissions, discounts, terms, and conditions of sale and delivery, or other forms of direct or indirect price reductions, by which net prices are effected.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to James M. Ferguson, F. W. Earnhardt and Bascom Doyle in their individual capacities, and is dismissed as to that portion of Paragraph Five as alleges a competitive effect in the line of commerce in which respondents are engaged.

⁴⁹ Docket 7463, order adopting initial decision issued September 12, 1962 [61 F.T.C. 525].
313-121-70-46

Initial Decision

65 F.T.C.

TABLE 1.—Differences from Houston quoted price received by Pacific's distributor-customers and Fort Worth's price advantage over other distributors

Houston quoted price, dollars/ton	Time period—1955	Fort Worth					Marco Chemical				
		Fort Worth's invoice price	Difference from Houston price	Tonnage bought	Total savings over Houston price	Marco's invoice price	Difference from Houston price	Price difference versus Fort Worth	Tonnage bought	Total savings over Houston price	Total savings over Houston price versus Fort Worth
\$17.95	Jan. 17 to Feb. 27	\$17.10	\$0.85	6,815.8	\$5,703.43	\$17.95	None	\$0.85	1,000.1	None	\$857.74
18.81	Feb. 28 to Mar. 18	17.10	1.71	205.9	352.09	17.95	\$0.86	.85	186.2	\$159.13	158.27
		17.95	.86	1,825.4	1,569.84	18.81	None	.86	281.0	None	241.66
					1,921.93						369.93
19.66	Mar. 19 to May 2	17.95	1.71	1,242.7	2,125.10	19.24	\$0.42	.43	425.1	\$178.54	182.79
		18.81	.85	2,029.0	1,724.65						
					3,849.75						
18.81	May 3 to June 28	17.95	.86	3,944.0	3,391.84	18.38	.43	.43	553.3	237.92	237.92
19.66	June 29 to July 20	18.81	.85	1,131.7	961.96	19.24	.42	.43	225.0	94.50	96.75
20.52	July 21 to Oct. 1	18.81	1.71	4,514.1	7,719.11	20.09	.43	1.28	81.7	35.13	104.58
		19.66	.86	988.0	849.68	20.52	None	1.71	1,051.1	None	1,797.38
					8,568.79						
20.52	Oct. 2 to Nov. 22					20.52	None		1,139.9	None	1,901.96
21.37	Nov. 23 to Dec. 7					20.52	\$0.85		27.9	\$57.72	
22.23	Dec. 8 to Dec. 19					21.37	None		272.1	None	
23.08	Dec. 20 to Dec. 31					22.23	None		336.2	None	
						22.23	\$0.85		38.7	\$28.65	
						23.08	None		318.4	None	
	Total for Jan. 17-Dec. 31			22,696.6	24,487.70				5,980.7	\$791.59	3,677.0

¹ \$17.10 price effective on Mar. 1 only.² \$18.81 price began on Apr. 1.³ \$19.66 price was effective between July 26 and July 29, Sept. 26 and Oct. 1. Fort

Worth's last purchase was made Oct. 1.

⁴ Mar. 1-7.⁵ Mar. 7-18.⁶ July 21-28.⁷ July 28-Nov. 22.

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Initial Decision

TABLE 1.—Differences from Houston quoted price received by Pacific's distributor-customers and Fort Worth's price advantage over other distributors—Continued

Houston quoted price, dollars/ton	Time period—1955	C. & R.					Parris						
		C. & R.'s invoice price	Difference from Houston price	Price dis- advantage Fort Worth	Tonnage bought	Total sav- ings over Houston price	Total dis- advantage Fort Worth	Parris' invoice price	Difference from Houston price	Price dis- advantage Fort Worth	Tonnage bought	Total sav- ings over Houston price	Total dis- advantage Fort Worth
\$17.95	Jan. 17 to Feb. 27	\$17.95	None	\$0.85	842.4	None	\$716.04	\$17.95 17.53	None \$0.42	\$0.85 .43	184.4 223.6	None \$83.91	\$156.74 96.15
													252.89
18.81	Feb. 28 to Mar. 18	17.95 18.38	\$0.86 .43	.85 .43	19.2 283.1	\$16.51 121.73	16.41 121.73	17.53	1.28	+ .42	209.1	267.63	-87.82
19.66	Mar. 19 to May 2	18.38 18.38	1.28 1.28	.43 +.43	247.6 320.3	316.93 409.98	106.47 -137.73	11 17.53 12 19.24	2.13 .42	+ .42 .43	167.2 86.1	356.14 36.16	-70.22 37.02
18.81	May 3 to June 28	18.38 18.81	.43 None	.43 .86	76.5 324.6	32.90 None	32.90 279.16	18.38	.43	.43	218.1	93.78	93.78
19.66	June 29 to July 20	19.66	None	.85	133.9	None	312.06	19.24	.42	.43	69.7	29.27	29.97
20.52	July 21 to Oct. 1	19.66 20.52	\$0.86 None	.85 .86	57.5 343.8	\$49.45 None	48.88 295.67	19.24 20.52	1.28 None	.43 .86	52.1 239.6	66.69 None	22.40 206.06
20.52	Oct. 2 to Nov. 22	20.52	None	None	55.4	None	344.55	20.52	None	None	154.0	None	228.46
21.37	Nov. 23 to Dec. 7	21.37	None	None	None	None	None	21.37	None	None	68.6	None	None
22.23	Dec. 8 to Dec. 19	22.23	None	None	None	None	None	22.23	None	None	51.5	None	None
23.08	Dec. 20 to Dec. 31	23.08	None	None	None	None	None	23.08	None	None	17.0	None	None
Total for Jan. 17- Dec. 31					2,704.3	\$947.50	1,593.35				1,741.0	\$943.60	484.08

8 Mar. 19-31.

9 Apr. 1-May 2.

10 Last purchase Oct. 7.

11 Mar. 19-Apr. 15.

12 Apr. 16-May 2.

Initial Decision

65 F.T.C.

TABLE 1.—Differences from Houston quoted price received by Pacific's distributor-customers and Fort Worth's price advantage over other distributors—Continued

Houston quoted price, dollars/ton	Time period—1955	B. G. Thompson				W. L. Hunt							
		Thomp- son's invoice price	Difference Houston price	Price dis- advantage Worth	Tonnage Fort bought	Total sav- ings over Houston price	Total dis- advantage Worth	Hunt's invoice price	Difference Houston price	Price dis- advantage Worth	Tonnage Fort bought	Total sav- ings over Houston price	Total dis- advantage Worth
\$17.95	Jan. 17 to Feb. 27	\$17.95	None	\$0.85	279.6	None	\$237.66	(u)					
18.81	Feb. 28 to Mar. 18	17.95 18.81	\$0.86 None	.85 .86	14.3 140.8	\$12.30 None	12.16 121.09	(u)					
							133.25						
19.66	Mar. 19 to May 2	19.66	None	.85	308.5	None	262.23	(u)					
18.81	May 3 to June 28	18.81	None	.86	334.1	None	287.33	(u)					
19.66	June 29 to July 20	19.66	None	.85	52.5	None	44.63	\$19.66	None	\$0.85	160.4	None	\$136.34
20.52	July 21 to Oct. 1	20.52	None	1.71	378.1	None	646.55	20.52	None	1.71	318.9	None	545.32
20.52	Oct. 2 to Nov. 22	20.52	None		148.6	None		20.52	None		275.6	None	
21.37	Nov. 23 to Dec. 7	21.37	None		26.1	None		(u)					
22.23	Dec. 8 to Dec. 19	22.23	None		67.0	None		22.23	None		13.7	None	
23.08	Dec. 20 to Dec. 31	22.23 23.08	\$0.85 None		39.5	\$11.48 None		(u)					
Total for Jan. 17- Dec. 31					1,802.6	\$23.74	1,611.65				708.6		681.66

(u) No sales to Hunt during period.

Initial Decision

TABLE 1.—Differences from Houston quoted price received by Pacific's distributor-customers and Fort Worth's price advantage over other distributors—Continued

Houston quoted price, dollars/ton	Time period—1955	J. C. Barnes				Yoakum							
		Barnes' invoice price	Difference from Houston price	Price dis- advantage versus Fort Worth	Tonnage Fort bought	Total sav- ings over Houston price	Total dis- advantage versus Fort Worth	Yoakum invoice price	Difference from Houston price	Price dis- advantage versus Fort Worth	Tonnage Fort bought	Total sav- ings over Houston price	Total dis- advantage versus Fort Worth
\$17.95	Jan. 17 to Feb. 27	\$17.95	None	\$0.85	51.7	None	\$43.95	\$17.95	None	\$0.85	53.2	None	\$45.22
18.81	Feb. 28 to Mar. 18	18.81	None	.85	31.8	None	27.03	(u)					
19.66	Mar. 19 to May 2	19.66	None	.85	95.9	None	81.51	19.66	None	.85	17.6	None	14.96
18.81	May 3 to June 28	18.81	None	.86	213.8	None	185.59	(u)					
19.66	June 29 to July 20	19.66	None	.85	95.9	None	81.51	(u)					
20.52	July 21 to Oct. 1	20.52	None	1.71	125.7	None	214.94	20.52	None	1.71	35.6	None	60.88
20.32	Oct. 2 to Nov. 22	20.52	None		287.6	None		20.52	None		35.6	None	
21.37	Nov. 23 to Dec. 7	21.37	None		96.6	None		21.37	None		17.9	None	
22.23	Dec. 8 to Dec. 19	22.23	None		63.7	None		22.23	None		17.2	None	
23.08	Dec. 20 to Dec. 31	23.08	None		75.1	None		(u)					
Total for Jan. 17-Dec. 31					1,139.8		634.53				177.4		121.06

u No sales made to Yoakum during period.

Opinion

65 F.T.C.

OPINION OF THE COMMISSION

MAY 21, 1964

By DIXON, *Commissioner*:

The hearing examiner found that respondent Pacific Molasses Company, in the sale of its "blackstrap" molasses in Texas and adjoining States, has discriminated in favor of certain of its customers and against certain others in violation of Section 2(a) of the amended Clayton Act, 15 U.S.C. 13; that respondent's largest and most favored customer received price concessions totaling some \$24,487.70 during the first nine months of 1955; that these concessions ranged from $\frac{1}{2}\text{¢}$ per gallon up to 1¢ per gallon, the latter being a reduction of nearly 10% from the published prices charged other customers; that, among Pacific's other customers, some received concessions of $\frac{1}{2}\text{¢}$ per gallon (roughly 5% off the list price), others $\frac{1}{4}\text{¢}$ (some $2\frac{1}{2}\%$ off the list price), and others no concessions at all; that the business of reselling molasses is highly competitive, with total net profit margins ranging around $\frac{1}{2}\text{¢}$; that, in a market where net profits are only $\frac{1}{2}\text{¢}$ per gallon, price discriminations that put other customers at competitive disadvantages ranging from $\frac{1}{4}\text{¢}$ to 1¢ per gallon are plainly injurious to competition; and that these price discriminations were not, as contended by respondents, made in good faith to meet competitors' prices. The record fully supports these and the examiner's other essential findings.

Nor do we see any denial of due process in the hearing examiner's failure to follow a pre-trial order requiring counsel supporting the complaint to give respondents a list of his witnesses and exhibits 15 days in advance of the hearing. Pre-trial orders of this nature, being discretionary with the hearing examiner in the first place, and subject to modification by the hearing examiner himself at the hearing (Rules, Sec. 3.8; Rule 16, Federal Rules of Civil Procedure; Note, "Federal Pre-Trial Practice: A Study of Modification and Sanctions," 51 Georgetown Law Journal 309 (Winter 1963)), cannot be said to confer constitutional "rights." While it is to be regretted that the order was not followed in this case, there was no bad faith involved (the hearing examiner and complaint counsel inadvertently overlooked the order and were not reminded of its existence until arrangements for the hearing were already under way) and there was no prejudice to respondents; they were given express permission to recall any of complaint counsel's witnesses in the presentation of their own case, with the right to cross-examine them as adverse witnesses, Rules, Sec. 3.16 (c), and were further given a 40-day continuance during the presentation of their own case for additional investigation and preparation.

Whatever "surprise" respondents may have experienced on the first day of the hearing, it is clear that their right to present a full and complete defense was in no way prejudiced. *Giant Food, Inc. v. Federal Trade Commission*, 322 F. 2d 977, 983-984 (D.C. Cir. 1963); *E. B. Muller & Co. v. Federal Trade Commission*, 142 F. 2d 511, 519 (6th Cir. 1944). Under these circumstances, nothing but delay would be accomplished by a remand.

The hearing examiner correctly dismissed the complaint as to one of the corporate officials in his individual capacity. The duties of F. W. Earnhardt, a vice president and secretary-treasurer of the corporate respondent, relate primarily to accounting, financial and tax matters; he neither authorized nor participated in the unlawful acts in question. But James M. Ferguson, president of respondent Pacific Molasses, testified that he personally ordered the discriminatory pricing. And Bascom Doyle, now vice president in charge of respondent Pacific's Gulf Division, formerly manager of its New Orleans branch office and in charge of Houston sales, testified that he executed those orders for the discriminatory pricing. The Clayton Act, like the Sherman Act, should be construed "in its common-sense meaning to apply to all officers who have a responsible share in the proscribed transaction," including the officer who "authorizes, orders, or helps perpetrate the crime—regardless of whether he is acting in a representative capacity." *United States v. Wise*, 370 U.S. 405, 409, 416 (1962) (emphasis added). See also *Coro, Inc.*, Dkt. 8346 (July 9, 1963) [63 F.T.C. 116+], at p. 1204; *Fred Meyer, Inc.*, Dkt. 7492 (March 29, 1963) [63 F.T.C. 1], at pp. 71, 72. While professional managers owning little or no stock in their corporations are generally unlikely or unable to evade an order by dissolving the corporation and using its assets to create another, they not infrequently resign from their posts to take comparable positions in other companies in the same industry, and sometimes resign to start new companies of their own in that same industry. We see no reason why these two corporate officers, having once been found guilty of deliberate and purposeful price discrimination that seriously injured others in the industry, should be left free to give and execute the same kind of unlawful orders on behalf of some other molasses company.

The exceptions filed by respondent Pacific Molasses Company are denied and the initial decision, modified to conform to the views expressed in this opinion, will be adopted as the decision of the Commission.

Commissioner Elman dissented, and Commissioner Reilly did not participate for the reason that he did not hear oral argument.

Final Order

65 F.T.C.

FINAL ORDER

This matter having been heard by the Commission upon exceptions to the initial decision filed by respondent Pacific Molasses Company, upon the Commission's order placing the case on its docket for review as to the individual respondents, and upon briefs and oral arguments in support of and in opposition to the initial decision; and the Commission having ruled on said exceptions, and having determined that the order to cease and desist contained in said initial decision should be supplemented and modified to conform with the views expressed in the accompanying opinion:

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

It is ordered, That respondents Pacific Molasses Company, a corporation, its officers, representatives, agents and employees, and James M. Ferguson and Bascom Doyle, individually and as officers of Pacific Molasses Company, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of blackstrap molasses 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 blackstrap molasses by selling said product to any purchaser at a net price which is higher than the net price charged any other purchaser of blackstrap molasses of like grade and quality who, in fact, competes in the resale and distribution of said respondents' blackstrap molasses as such with the purchasers paying the higher price, or who competes in the resale and distribution of said respondents' blackstrap molasses as an ingredient of other products with the purchaser paying the higher price.

The term "net price" as used in this order includes rebates, allowances, commissions, discounts, terms, and conditions of sale and delivery, or other forms of direct or indirect price reductions, by which net prices are effected.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to F. W. Earnhardt in his individual capacity, and is dismissed as to that portion of Paragraph Five as alleges a competitive effect in the line of commerce in which respondents are engaged.

It is further ordered, That respondent Pacific Molasses Company's exceptions to the initial decision be, and they hereby are, denied, and that the hearing examiner's initial decision, as modified and supple-

mented by this order, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which