

MONROE AUTO EQUIPMENT COMPANY

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

Docket 8543. Complaint, Nov. 5, 1962—Decision, July 28, 1964

Order requiring a Monroe, Mich., manufacturer of automotive products—consisting of shock absorbers, sway bars, load levelers, power steering components and related products to cease discriminating in the price of such products of like grade and quality by granting warehouse distributors and certain jobbers owned or controlled by such warehouse distributors discounts of 20 percent on products of the respondent when such favored jobbers are in competition with other automotive jobbers not affiliated with warehouse distributors.

COMPLAINT

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

PARAGRAPH 1. Respondent Monroe Auto Equipment Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its principal office and place of business located at 1426 East First Street, Monroe, Michigan.

PAR. 2. Respondent has been and is now engaged in the manufacture, sale and distribution of a line of automotive products, consisting of shock absorbers, sway bars, load levelers, power steering components, and related products. Respondent sells its said products to a large number of purchasers for use or resale within various States of the United States and the District of Columbia. Respondent's sales of its products are substantial, exceeding \$28,000,000 annually.

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

PAR. 4. Respondent sells its automotive products in the so-called "aftermarket". "Aftermarket" purchasers of respondent's automotive products are classified by respondent generally within two separate classifications, namely, "warehouse distributors" and "jobbers." Respondent sells directly only to those customers classified as warehouse distributors. Respondent extends and sets terms and conditions of sale for each such classification as follows.

Warehouse Distributors: A purchaser classified as a warehouse distributor normally resells only to jobbers. A warehouse distributor purchases respondent's automotive products at prices set forth in respondent's published "Suggested Net Jobber Cost Sheet." Warehouse distributors sell respondent's automotive products to jobbers at the same prices set forth in respondent's published "Suggested Net Jobber Cost Sheet." Warehouse distributors receive an allowance amounting to 20% of the value of all such sales reported to respondent. According to the terms of respondent's "Warehouse Distributor Agree-

ment," respondent grants such an allowance to warehouse distributors only on sales made to jobbers who are signed to contracts which are approved by respondent and only on sales made at prices set forth in respondent's published "Suggested Net Jobber Cost Sheet."

Respondent sells to approximately 300 customers classified as warehouse distributors located throughout the United States.

Jobbers: A purchaser classified as a jobber is normally engaged in reselling automotive products to vehicle fleets, garages, gasoline service stations, and others in the automotive trade serving the general public. Jobbers purchase from respondent's warehouse distributors at prices set forth in respondent's published "Suggested Net Jobber Cost Sheet."

Such jobber purchasers are signed to "Monroe Auto Equipment Company Jobber Agreements" with a warehouse distributor. Such agreements are approved and signed by a manufacturer's representative of respondent and an official of respondent. Respondent exercises such a degree of control over sales by its warehouse distributor customers to its jobber customers as to make such sales in all essential respects sales by the respondent. There are approximately 11,000 such jobber purchasers located throughout the United States.

PAR. 5. In the course and conduct of its business in commerce, respondent has been, and is now, discriminating in price between different purchasers of its automotive products of like grade and quality by selling said products to some purchasers at higher and less favorable prices than the same products are sold to other purchasers who are in competition with the purchasers paying the higher prices.

PAR. 6. For example, among respondent's purchasers are certain warehouse distributors who own, or control, jobber establishments which have been classified and approved by respondent as jobber accounts of the warehouse distributors. Respondent also allows such warehouse distributors a 20% allowance on so-called "sales" to said jobber establishments which are owned, or controlled, by said warehouse distributors. Many such owned, or controlled, jobber establishments are in competition with other automotive jobbers who are not affiliated with, or associated with, a warehouse distributor, and who purchase respondent's products at respondent's regular jobber prices.

In other instances, respondent classified as warehouse distributors certain so-called "buying groups" which are organizations owned, or controlled, by automotive jobbers which have been classified and approved by respondent as jobber customers of such group-buying organizations. Such organizations in reality merely function as a buying agent for the jobber members thereof. On so-called "sales"

by the buying group to its jobber members, or owners, respondent grants, or allows, the 20% warehouse distributor discount. Many of the jobber members, or owners, of such buying-groups are in active and substantial competition with other automotive jobbers who are not affiliated with, or associated with, a warehouse distributor, and who purchase respondent's products at respondent's regular jobber prices.

Respondent's approval of and granting of the 20% warehouse distributor's allowance on so-called "sales" to jobber establishments which are owned, or controlled, by a warehouse distributor, and to jobber establishments which are members, or owners, of buying groups or other organizations classified as warehouse distributors, results in the granting of higher and more favorable price discounts to said jobber purchasers than are granted to other jobber purchasers who are in competition with said favored jobber purchasers, and who purchase respondent's products at respondent's regular jobber prices and do not receive the discounts available to respondent's aforementioned favored purchasers.

PAR. 7. The effect of such discriminations in price made by respondent in the sale of its products, as hereinbefore set forth, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which the favored purchasers from respondent are engaged, or to injure, destroy or prevent competition with said favored purchasers.

PAR. 8. The discriminations in price made by respondent in the sale of its products, as hereinbefore alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. Richard B. Mathias and Mr. R. C. Palmer, Jr., supporting the complaint.

Halfpenny, Hahn & Ryan, Chicago, Ill., by *Mr. Harold T. Halfpenny and Mr. James F. Flanagan* for respondent.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

JANUARY 6, 1964

The Federal Trade Commission issued its complaint against the respondent on November 5, 1962, charging it with violating subsection (a) of Section 2 of the Clayton Act, as amended, by discriminating in price between different purchasers of its automotive products. Respondent's answer admitted certain of the allegations of the com-

plaint, but denied discriminating in price between competing purchasers and denied any violation of the Clayton Act as alleged, and further stated that if any price differentials existed that such price differentials were cost justified or were made in good faith to meet equally low prices of competitors.

A short hearing was held at which many facts were agreed to in a stipulation which appears in the record beginning at page 3. One witness was called to implement the stipulation in support of the charges of the complaint and ten exhibits were received in evidence. The respondent offered no evidence. The record was closed, proposed findings of fact were filed by the parties, and thereafter the record was reopened upon the hearing examiner's own motion and order. Thereafter, additional evidence was offered in support of the complaint and the record was again closed and additional findings of fact were filed by both parties.

This proceeding is before the hearing examiner for final consideration upon the record as hereinabove described, and the proposed findings of fact and conclusions filed by both parties. Consideration has been given to the proposed findings of fact and conclusions and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected, and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

Monroe Auto Equipment Company (hereinafter sometimes referred to as Monroe) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its principal office and place of business located at 1426 East First Street, Monroe, Michigan. (Tr. 4)

Monroe has been and is now engaged in the manufacture, sale and distribution of a line of automotive products, consisting of shock absorbers, sway bars, load levelers, power steering components and related products. Monroe sells its said products to a large number of purchasers for use or resale within various states of the United States and the District of Columbia. Monroe's sales of its products are substantial, exceeding \$28,000,000 annually. (Tr. 4)

Monroe sells and causes its products to be transported from its principal place of business in the State of Michigan to purchasers located in other states of the United States, and in the District of Columbia. There has been at all times mentioned herein a continuous

course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended. (Tr. 4)

Monroe sells its products to "warehouse distributors" in the automotive aftermarket, pursuant to the terms and provisions of a "Warehouse Distributor Agreement." (CX 1) A warehouse distributor purchases Monroe Automotive products at prices set forth in Monroe's published "Suggested Net Jobber Cost Sheet." (CX 2) Monroe sells to approximately 300 customers classified as warehouse distributors located throughout the United States. A warehouse distributor normally resells only to jobbers. (Tr. 4-5)

A jobber is normally engaged in reselling automotive products to vehicle fleets, garages, gasoline service stations, and others in the automotive trade servicing the general public. Jobbers purchase Monroe products from Monroe's warehouse distributors at prices set forth in Monroe's published "Suggested Net Jobber Cost Sheet." (Tr. 5)

Monroe grants to the warehouse distributors to which it sells an allowance of 20 percent of the sales price on all sales made by the warehouse distributors to jobbers who are signed to "Monroe Auto Equipment Company Jobber Agreements" (CX 3) with the warehouse distributor. These agreements are approved and signed by a manufacturer's representative of Monroe and an official of Monroe. There are approximately 11,000 such jobbers located throughout the United States. (Tr. 5-6)

Among Monroe's purchasers are certain warehouse distributors who own, or control, jobber establishments which have been classified and approved by Monroe as jobber accounts of the warehouse distributors. Monroe allows such warehouse distributors its regular 20 percent allowance on sales to said jobber establishments. Many such owned or controlled jobber establishments are in active and substantial competition in the resale of Monroe products with other automotive jobbers who are not affiliated with, or associated with, a warehouse distributor, and who purchase Monroe products at Monroe's regular jobber prices. (Tr. 6, 194-232, 234-299)

Monroe has entered into its "Warehouse Distributor Agreement" (CX 1) with certain organizations which are owned or controlled by automotive jobbers. These warehouse distributors have in turn entered into Monroe contracts (CX 3), which have been approved and signed by a representative and an official of Monroe, with their jobber owners. On sales by the distributor to the jobber owners, Monroe grants the 20 percent warehouse distributor discount. Many of these jobbers are in active and substantial competition in the resale of Monroe products with other automotive jobbers who are not in control of, or owners of,

a warehouse distributor, and who purchase Monroe products at Monroe's regular jobber prices. (Tr. 6, 97-194, 300-331)

The sales to, resales by, and competition between, the various jobber purchasers of Monroe products, referred to hereinabove, involve substantial quantities and dollars amounts of Monroe products of like grade and quality, involving commodities of the same product lines and often identical items within the several product lines involved. (Tr. 7)

The automotive parts jobbing business is highly competitive, involving small net margins of profit. The net margin of profit of automotive parts jobbers is usually between 1 percent and 5 percent, averaging less than 4 percent after taxes. Automotive parts jobbers consider the 2 percent cash discount, normally allowed by their suppliers, important in determining their profit margins and in the successful operation of their businesses. (Tr. 7)

The principal issue of fact and law to be decided in this proceeding is whether or not an indirect purchaser relationship (within the meaning of subsection (a) of Section 2 of the Clayton Act, as amended) existed between respondent and the jobber purchasers of respondent's products. Respondent appeared to concede that this was the only issue remaining in the case, but in its proposed findings of fact and conclusions it contends that the discriminations here involved were not proved to have resulted in injury to competition.

Monroe closely supervises the resale of Monroe products by its warehouse distributors. By the terms of its "Warehouse Distributor Agreement," Monroe's warehouse distributors purchase at Monroe's suggested jobber prices set forth on Monroe's price lists (CX 2), employ as many roadmen and salesmen as Monroe deems necessary in the warehouse distributors' area, train their salesmen to work with Monroe salesmen in selling Monroe products to jobbers, appoint jobbers approved by Monroe in such numbers and at such places as (in the opinion of Monroe) may be necessary, sell Monroe products to jobbers at prices and on terms and conditions set by Monroe, receive 20 percent of the cost to warehouse distributors of such products purchased from Monroe at jobbers' prices and resold to approved Monroe jobbers at jobbers' prices. Shipments of Monroe products were made by Monroe to warehouse distributors who make all deliveries to the jobbers approved by Monroe. (Tr. 18)

The Monroe Auto Equipment Company Jobber Agreement entered into between Monroe's warehouse distributors and jobbers, must be approved and signed by two representatives of Monroe, and further provides that the warehouse distributor will sell to jobbers and jobbers

will buy Monroe products at jobber prices set forth in price lists issued by Monroe. (CX 63)

The warehouse distributor reports sales of Monroe products to such jobbers to Monroe on a "Report of Sales to Contracted Monroe Jobbers" form (CX 4) to claim the 20 percent warehouse distributor allowance. Monroe periodically audits the sales by its warehouse distributors. During such audit Monroe representatives examine invoices of sales by warehouse distributors to jobbers to verify such sales have been to approved jobbers, and the dollar amounts of such sales, together with the prices for which Monroe products are sold. (Tr. 21, 61) Monroe maintains records of purchases of Monroe products by jobbers (Tr. 29); holds contests for jobbers and establishes purchase quotas which jobbers must exceed to win such contests. (Tr. 69)

Monroe's sales personnel regularly contact jobbers purchasing Monroe products from warehouse distributors. Monroe's district and division managers deal directly with jobbers and dealers. (Tr. 22) Their dealings with jobbers include the following: attempting to sell Monroe products; taking orders for Monroe products; supplying advertising and promotional material; checking inventories; and arranging sales meetings with jobbers and dealers. (Tr. 23, 24) Monroe district and division managers make regular reports to Monroe of their activities and dealings with jobbers. (CX 7) Monroe sales engineers perform similar duties. They make calls with warehouse distributor salesmen and jobber salesmen and take orders for Monroe products. (Tr. 24, 63) They also assist warehouse distributor personnel in the signing of prospective jobber accounts to Monroe Jobber Agreements. (Tr. 27, 62) Monroe sales engineers make daily reports to Monroe of their calls on jobbers and other purchasers of Monroe products, indicating their activities and the results of such calls. (CXs 5, 6)

Monroe can and sometimes does cancel a Monroe Jobber Agreement existing between a warehouse distributor and a jobber and notifies the jobber of his cancellation in such cases. (CX 8, 9) After a jobber has been cancelled the warehouse distributor does not receive the 20 percent warehouse distributor allowance for subsequent sales to that jobber. (Tr. 65) Since the warehouse distributor buys Monroe products at Monroe's suggested jobber prices and only receives the 20 percent warehouse distributor allowance for sales to jobbers approved by Monroe, the warehouse distributor cannot sell Monroe products to unapproved or cancelled jobbers at Monroe's suggested jobber prices and realize any profit. (Tr. 54, 65) Such sales would in fact result in a financial loss of the expenses involved in handling the product and making such a sale.

Respondent's approval of and granting of the 20 percent warehouse distributor allowance on so-called "sales" to jobber establishments which are owned, or controlled, by warehouse distributors, and indirectly to jobber establishments which are members or owners of organizations classified as warehouse distributors, as hereinabove described, results in the granting of higher and more favorable price discounts to said jobber purchasers than are granted to other jobber purchasers who are in competition with said favored jobber purchasers, and who purchase respondent's products at respondent's regular jobber prices and do not receive the discounts available to respondent's aforementioned favored purchasers. The amount of such discrimination is several times the amount of the average net profit usually earned by automotive parts jobbers and is therefore of such magnitude that it necessarily enhances the competitive opportunities of the recipient as opposed to his competitor who does not receive the discount.

The effect of such discriminations in price made by respondent in the sale of its products to competing purchasers, as hereinabove found, may be substantially to lessen competition, or to injure, destroy, or prevent competition with said favored purchasers.

Respondent contends that it did not deal directly with jobbers and is therefore outside the indirect purchaser doctrine of *American News Company v. F.T.C.* 300 F. 2d 104 (1962). As found above, respondent did deal directly with these jobbers, although usually its representatives were accompanied by warehouse distributor representatives, and fixed the terms upon which the jobbers bought, thus falling squarely within the rationale and holding of that case.

Except for relationships between certain jobbers and distributors there would be no unlawful discrimination shown in this record. There are situations shown in which distributors own and control jobbers with the result that in practical effect the jobbers are sold at the distributor's price, and there are other situations shown in which jobbers own and control distributors with the same result.

It is true that the distributors and jobbers are separate corporate entities, but the effect of the relationships between them is that the jobbers get the benefit of the distributor price which is lower than the price paid by competing jobbers who are indirect customers of respondent. Recently In the Matter of *Joseph A. Kaplan & Sons, Inc.*, Docket No. 7813 [63 F.T.C. 1308, 1339], the Commission in dealing with a similar situation said:

It is contended by respondent that AWC was a distinct corporate entity operating as a wholesaler. However, the purpose or effect of purchasing respondent's products through AWC was clearly to provide special prices to the retailers

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owning the corporation. The corporate entity may be disregarded when the failure to do so would enable the corporate device to be used to circumvent a statute.

It would appear that in this case the corporate entities should be disregarded because a failure to do so would enable the corporate device to be used to enable certain of respondent's customers to obtain a price advantage over their competitors which would clearly violate the statute if the corporate device were absent.

CONCLUSIONS

Monroe deals directly with jobbers, and fixes the prices, terms, and conditions of sale upon which the jobbers buy by means of its contractual relationship with the jobbers and by means of its contracts with the warehouse distributors. Although jobbers obtain respondent's products from warehouse distributors, respondent has entered into a course of dealing with warehouse distributors and jobbers which has resulted in the establishment of an indirect purchaser relationship between respondent and jobbers purchasing respondent's products. The discriminations in price made by respondent in the sale of its products, as hereinbefore found, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That respondent Monroe Auto Equipment Company, a corporation, and its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of automotive products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from discriminating in the price of such products of like grade and quality:

By selling such products to any purchaser at net prices higher than the net prices charged any other purchaser who competes in the resale or distribution of such products with the purchaser paying the higher price.

OPINION OF THE COMMISSION

JULY 28, 1964

By REILLY, *Commissioner*:

I

This matter is before us on appeal by respondent from the hearing examiner's decision sustaining the complaint, which charged a viola-

tion of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a). A stipulation of facts was entered into and three (3) days of hearings were held.

Holding that "except for relationships between certain jobbers and distributors there would be no unlawful discrimination shown in this record * * *" the examiner concluded:

It would appear that in this case the corporate entities should be disregarded because a failure to do so would enable the corporate device to be used to enable certain of respondent's customers to obtain a price advantage over their competitors which would clearly violate the statute if the corporate device were absent.

He therefore ordered respondent to "cease and desist * * * selling such products to any purchaser at net prices higher than the net prices charged any other purchaser who competes in the resale or distribution of such products with the purchaser paying the higher price."

II

Monroe, a manufacturer of auto parts,¹ distributes the majority of its products to warehouse distributors (hereinafter referred to as "WD's"). The WD's in turn sell to jobbers, with the jobbers selling to filling stations, garages, etc.

Monroe signs a "Warehouse Distributor" agreement with each WD, providing inter alia:

In consideration of the services to be performed by WD hereunder, MONROE shall pay to WD compensation in an amount equal to 20 per cent of the cost to WD of such products purchased from MONROE at Jobbers' prices and resold to approved MONROE Jobbers at Jobbers' prices * * *.²

The WD in turn contracts with jobbers to sell Monroe products.³ This contract must be approved by Monroe before Monroe will pay the 20% rebate to the WD, on its sales to approved jobbers.⁴

This case concerns itself with organizations purchasing goods at the WD level, and the jobber level. For purposes of our analysis the horizontal composition of that WD level consists of the following:

(1) WD's who resell only to jobbers with whom the WD's have no connection except that of the arms' length relationship between seller and buyer.

(2) Entities comprised of several corporations, one corporation allegedly functioning as a WD and the remaining corporations allegedly

¹ Monroe stipulated that it sells " * * * shock absorbers, swing bars, load levellers, power steering components and related products." (R.4)

² CX 1B.

³ CX 11A and 11B.

⁴ CX 11B.

functioning as jobbers. These entities receive a 20% rebate on reported sales to approved independent jobbers and the approved intra-enterprise jobbers.

Commission counsel argue that the independent jobbers (the group described in (1) above), are discriminated against in favor of the jobbing arm of the group described in (2). They urge that the independent jobbers are indirect purchasers from Monroe; and that the independent jobbers merely purchase at jobber list price, receiving no part of the 20% discount given to the WD's who supply them.

We have carefully examined the contracts between the WD's and Monroe, the contract between the WD's and jobbers, and the testimony in the record with respect to these agreements. The preponderance of reliable, substantial and probative evidence indicates to us that independent jobbers are in fact indirect purchasers from Monroe. The prices, terms and conditions of sale used by both the WD and the jobber are fixed by the manufacturer or are subject to its approval. See *American News Co. v. Federal Trade Commission*, 300 F. 2d 104 (2d Cir. 1962) *cert. denied*, 371 U.S. 824 (1962). Under such circumstances it is clear to us that the "indirect purchaser" doctrine applies and that the independent jobbers here fall within that category. See *In the Matter of Purolator Products, Inc.*, Docket 7850 (Commission Opinion, p. 15).

In regard to the WD-Jobber entities described in number (2) above, the respondent stipulated as follows:

Among Monroe's purchasers are certain warehouse distributors who own, or control jobber establishments which have been classified and approved by Monroe as Monroe jobber accounts of the warehouse distributors. Monroe allows such warehouse distributor its regular 20% allowance on sales [to said jobber establishments]. [Many such owned or controlled jobber] establishments are in active and substantial competition in the resale of Monroe products with other automotive jobbers who are not affiliated with, or associated with a warehouse distributor, and who purchase Monroe's products at Monroe's regular jobber prices. (R.6)

Despite this stipulation, the hearing examiner concluded that further testimony was needed so that he could decide whether "* * * the particular jobber establishments owned or controlled by warehouse distributors were or were not purchasers from respondent."

Complaint counsel declared at the first day of hearings held for the above purpose that: "the sole remaining issue of fact or law involved in this matter is the question of whether or not an *indirect purchaser* relationship exists between the Monroe Auto Equipment Company and the jobber-purchaser of these products * * *." (R. 12) (Emphasis added.)

With respect to the independent jobber, we agree with this position and hold that the independent jobbers are indirect purchasers. To the extent that counsel's statement was intended to comprehend the owned or controlled jobbers as indirect purchasers, we reject it. In our view, the entity composed of WD and jobber is a direct purchaser. Respondent has admitted that the jobber arms of the WD-jobber entity compete with independent jobbers; and, therefore, we feel that the sole remaining question is whether there is sufficient identification of the WD with the jobber to give rise to the conclusion that a discount given to one will inure to the benefit of the other. To resolve the issue of identity, we have examined the testimony and we find the following:

A. Hart's Automotive Parts Company, Inc.

R. Henry Hart, Jr., testified that he is the president and controlling stockholder of Hart's Automotive Parts Company and that the firm was founded as a corporation in 1929. He also testified that in 1946, another company, Auto Parts Warehouse Company was incorporated and a few years later, Hart's Automotive Parts Company was merged into Auto Parts Warehouse Company which then took the name "Hart's Automotive Parts Company, Inc." In the physical plant of Hart's Automotive Parts Company, Inc. in Chattanooga is a counter where a jobber can purchase—as from a WD. There is also a counter where a garage man can purchase as from a jobber. (R. 113)

Within Chattanooga there are three other locations which operate under the name "Hart's Automotive Parts Company." These are not separate corporations; Hart's Automotive Parts Company, Inc. operates all these firms as jobbers. Referring to Hart's Automotive Parts Company, Inc. located in Chattanooga, complaint counsel asked:

Q. Does it also sell to the dealer trade which would include gas stations, garages, fleet accounts?

A. Yes. Hart's Automotive Parts Company as a corporation does. (R. 111)

Later Hart was questioned on this point:

Q. Do each of these outlets [the unincorporated branches in Chattanooga] function at these various levels?

A. No. They do not have any warehouse business or business sales to jobbers whatsoever. (R. 123)

* * * * *

A. They sell only to what we call the dealer trade, including the filling stations, etc. (R. 123)

So within Chattanooga, there is no question that one organization—Hart's Automotive Parts Company, Inc.—functions both as a WD and a jobber.

The evidence also indicates that Hart's Automotive Parts Company, Inc. has signed, and Monroe has approved, jobber agreements with each of these "locations", which are also designated "Hart's Automotive Parts Company". Therefore, Hart's Automotive Parts, Inc., selling as a WD under the name "Auto Parts Warehouse Company, a division of Hart's Automotive Parts Company", and as a jobber under the name Hart's Automotive Parts Company or Hart's Automotive Parts Company, Inc., admittedly competing with other jobbers, received a 20% discount which goes into the corporate treasury of Hart's Automotive Parts Company, Inc., located in Chattanooga, Tennessee. These facts conclusively prove that Hart's Automotive Parts Company, Inc., in Chattanooga is one entity functioning as a WD and jobber. Respondent has introduced no evidence to the contrary.

Outside Chattanooga there are, according to Mr. Hart, four separate corporations, all called Hart's Automotive Parts Company. Each of these firms functions solely as a jobber; each of them was signed by Hart's in Chattanooga to a Monroe approved jobber contract. Thus for sales to each of them, Hart's Automotive Parts Company, Inc. in Chattanooga receives a 20% rebate.

Respondent discusses Mr. Hart's testimony at pp. 1 and 2 of its "Additional Findings of Fact and Conclusions of Law" addressed to the hearing examiner. It states that the four branches outside Chattanooga buy all their lines from Hart's Automotive Company. According to respondent, "each company employs a salesman, maintains its own bank balance, borrows money, has its own officer and stockholders meetings and maintains its own inventory. The profits, if any, are paid in dividends to the stockholders. Each company completely manages its own affairs."

However, there is other evidence in the record as follows:

(1) Mr. Hart is President, Chairman of the Board of all the corporations.

(2) He is the controlling stockholder of each corporation but one.

(3) The Chattanooga general manager of the Hart's Automotive Parts Company, Inc.:

Is responsible for the operation of the other Hart's Automotive Parts Companies. This general manager is an officer of all the companies and a stockholder in all the other companies.

Makes "the arrangements to buy a product."

Controls whether the branches must buy an item through Chattanooga.

Supervises the credit operations of the branches.

Makes up the bills for the branches.

(4) Some person from the Chattanooga operation must cosign all checks issued by the out of town corporation.

(5) The Chattanooga operation makes up all the monthly statements for the out of town branches.

(6) No commissions are given for "sales" to the branch operations.

(7) The same individuals are purchasing agent and sales manager for all corporations. They are paid by the Chattanooga operation.

(8) A consolidated profit and loss statement reflecting the financial position of this entire operation is maintained.

On balance, we can only conclude that for all purposes, relevant to the Robinson-Patman Act, the many seemingly separate corporations here are one entity.

The evidence with respect to the WD-jobber entities, R. T. Clapp Company and TVK Automotive Warehouse, both of which receive 20% discounts for sales to their owned jobbing arms, is as strong if not stronger.

B. R. T. Clapp Company

(1) This organization operates in Knoxville as a "Central warehouse distributor of automotive parts * * *." (R. 195) It operates two incorporated jobbing branches under the same name, one in Asheville, North Carolina, the other in Oak Ridge, Tennessee. Both these firms are approved jobbers and Clapp gets a rebate of 20% on sales to them. The same individual, A. Dewey Moody, who testified concerning Clapp's operations, is "the boss of the whole show * * *" including the branches. Salesmen who call on the branches receive a reduced commission—because "it is more or less of a captive market."

(2) The general manager expects all orders to come from the branches to the Knoxville headquarters.

(3) The branches put off paying Knoxville until all other creditors have been paid. And when in fact the branches pay Knoxville, the general manager of Knoxville may, and has, written out checks in payment of said debts.

(4) The accounts payable are maintained at Knoxville and Knoxville pays the bills for the branches.

(5) Knoxville is owed about \$100,000 by the branches—this "debt" is not secured in any way.

C. TVK Automotive Warehouse, Inc.

(1) Joseph Black, who is its President, General Manager and Sales Manager, testified on behalf of this firm. The organization receives a 20% discount from Monroe for sales to its Monroe approved jobber branches which are technically separate corporations. The headquarters

is in Knoxville with jobbing branches in Knoxville itself, Sweetwater, Tennessee, Loudon, Tennessee, and Fountain City, Tennessee (the jobbing branch at Fountain City is unincorporated and does business under the name of Broadway Automotive Supply”).

(2) The jobber branches buy all their requirements, including Monroe products from TVK. Indeed, the local manager of one branch was fired because of failure to comply with this policy.

(3) The books of the branches are maintained at TVK's headquarters in Knoxville.

(4) TVK's office force in Knoxville pays all bills for the branches.

(5) TVK's office in Knoxville posts the daily invoices of the branch locations and sends a monthly billing statement to the customers of the branch locations.

(6) None of the managers of the branches have any authority to sign checks. Even for petty cash purposes they must receive a check from TVK in Knoxville.

(7) TVK is the last “creditor” paid by the branches.

(8) In Knoxville, TVK has not bothered to incorporate its jobber outlets. It operates as a jobber out of its own warehouse and also has another location on “Broadway” in Knoxville where it simply sells as a jobber, no effort having been made to incorporate its jobbing activities at this address.

III

From all the above evidence, we conclude that Monroe has sold to purchasers who function at both the WD and the jobber level. It has paid the 20% rebate to such purchasers. The evidence also established that for all practical purposes these organizations operate as a single unit so that any benefit conferred on one would in the light of the business realities shown on this record, result in a direct benefit to the other. Complaint counsel has established these facts and in our view they amount to a prima facie showing of price discrimination among competing customers. Respondent on its part, has introduced evidence to rebut the unity which complaint counsel has proven. We conclude that such rebuttal evidence has fallen short of the mark.

Moreover, the enforcement of a statute such as the Robinson-Patman Act cannot pivot solely on the existence or non-existence of particular forms of business organization. Accord, *National Parts Warehouse, et al.*, Docket No. 8039 (Commission Opinion December 1963) [63 F.T.C. 1692, 1712]. And to “pierce the corporate veil” as we have done here, is no more than has been done in innumerable cases before administrative agencies. Thus, “The existence of a separate corporate

entity should not be permitted to frustrate the purpose of a federal regulatory statute * * * *Corn Products Refining Co. v. Benson, Secretary of Agriculture*, 232 F.2d 554, 565 (2d Cir. 1956).

Under these circumstances, we are bound by the Supreme Court's language in *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 475 (1952):

* * * there was ample evidence that Ruberoid's classification of its customers did not follow real functional differences. Thus some purchasers which Ruberoid designated as "wholesalers" and to which Ruberoid allowed extra discounts in fact competed with other purchasers as applicators. And the Commission found that some purchasers operated as both wholesalers and applicators. So finding the Commission disregarded these ambiguous labels, which might be used to cloak discriminatory discounts to favored customers * * *.

The nature of its purchasers' internal operations might at first seem to be a harsh basis on which to hold Monroe. However, Monroe intruded into the WD-Jobber relationship even to the extent of insisting upon the right to approve WD's jobbers. It investigated all WD's and jobbers' credit. Its agents visited these organizations often. Monroe has been dealing with these firms for a substantial period of time. Monroe therefore knew or should have known that these WD's were so identified with their jobbing arms that the discounts paid to these WD's inevitably benefitted the jobbing arms.

From the identity between the WD's and jobbers established by complaint counsel on this record, the conclusion is inescapable that a discount to one arm of the entity must naturally flow to and benefit the other arm of the entity. Obviously, there are varying degrees of control and identity. But on this record the requisite control and identity have been established.

The initial decision is modified to conform with the views expressed in this opinion and, as so modified, will be adopted as the decision of the Commission. The order contained in the initial decision adequately covers the practices engaged in by respondent.

Commissioner Dixon concurred and has filed a concurring opinion.

Commissioner Elman dissented and has filed a dissenting opinion.

CONCURRING OPINION

JULY 28, 1964

By DIXON, *Commissioner*:

Because this case presents a factual situation of almost classic simplicity, today's ruling might be read as proving too much with too

little. In the hope of forestalling such a conclusion, I have set down briefly my own particular views.

To some extent, this Commission's activities in the automotive parts field might be pictured as a classic example of an administrative agency, with small resources and limited manpower, nibbling away at complex economic problems in a vast and rapidly changing industry. But under the Robinson-Patman amendments to Section 2 of the Clayton Act, we were instructed to hit hard at certain trade practices. To a great degree our discretion was limited. Even the early debates on the creation of this agency recognized this inhibiting factor:

* * * [I]f there is any well-known practice upon which there is a fair agreement of opinion that it is an unfair practice, we should by law prohibit that and take it out of the "twilight zone" definition power at the hands of the commission. (51 Cong. Rec. 14259 (1914).)

This specificity is one of the crucial differences between Federal Trade Commission Act and Clayton Act enforcement. And even if we possessed broad discretion to abandon Robinson-Patman Act enforcement—because we believed that law a square peg trying to plug round holes—the present case would still require our attention.

We are not faced here with a hard case which will make bad law. The record does not teeter nervously between proof and failure of proof. Nor is the central issue befogged by a maze of factual contradictions. To the contrary, the record clearly establishes that single business entities competing at both the warehouse distributor and jobber levels received a 20% discount on "sales" to themselves. The seller (respondent here) has not attempted to cost justify the 20% discount. Nor did it argue, as have respondents in prior cases, that its purchasers' cost offset the 20% discount and thereby prevented any inference of probable competitive injury.¹

Thus, it should be emphasized, the majority opinion does not attempt in any way to analyze cost savings attributable to the warehouse distributor-jobber method of business. Instead, it examines the facts of record which show unity and control over the jobbing arm of the warehouse distributor. The recipients of Monroe's 20% discount are not affiliated, yet separately functioning firms; nor are they jobbers who have banded together for the sake of efficiency. These are com-

¹ In *Purulator Products, Inc.*, Docket 7850 (April 3, 1964) [65 F.T.C. 8, 30], this Commission ruled that the purchaser's costs were irrelevant in a 2(a) proceeding:

* * * [W]e conclude that even though respondent's cost studies demonstrate that warehouse distributors spend more in reshipping than respondent granted through its internal redistribution discount for this operation, such fact does not demonstrate an absence of competitive injury.

panies so closely held under such tight common control that we are forced to view them as one.

There is, of course, no question that warehouse distributors and jobbers perform valuable functions in the distribution of automobile parts. But what we have here is a record conclusively showing both functions being performed under "the same roof." The *modus operandi* of these customers of Monroe might or might not represent a true stimulus to competition and an aid to efficient and inexpensive distribution. In the present state of our knowledge, neither this Commission nor the respondent is in a position to proclaim with certainty that either efficiency or inefficiency will be the inevitable result of such multi-level competition. It would appear, in any event, that there is less than universal recognition of its virtues for, as the record shows, a number of automobile parts manufacturers other than Monroe refuse to give a 20% discount on "sales" to these entities for redistribution to their own jobbing arms. Some of the jobbing branches are profitable; others are losing money. And the public pays no less a price because of this method of distribution.

We have, of course, had similar issues before us in past cases.² Recently, in *Mueller Co.*, Docket 7514 (January 12, 1962), *aff'd*, 323 F. 2d 44 (7th Cir. 1963), the full Commission, with no dissent, interpreted its prior stand on functional discounts allegedly justified solely by vertical integration, as follows:

Although the initial decision is not quite clear on this point, it appears that the hearing examiner interpreted the above quoted language [in *Doubleday*] as either holding that a price differential granted as compensation for services performed by a purchaser for the seller will not result in injury to competition or as holding that a price differential granted for this purpose is permissible regardless of injury to competition. There is nothing in the amended Clayton Act or in the applicable case law, however, to support either of these propositions. The latter interpretation would add a defense to a *prima facie* violation of Section 2(a) which is not included in either Section 2(a) or Section 2(b). The other interpretation, that injury will not result from a functional discount "reasonably related to the expenses assumed by the buyer", ignores the fact that the favored buyer can derive substantial benefit to his own business in performing the distributional function paid for by the seller. *Consequently, we disagree with both interpretations and, insofar as the language in Doubleday stands for either of them, it is rejected.* We might add in this connection that the views expressed in *Doubleday* with respect to functional pricing were, in effect, overruled by the Commission in a later decision. In the matter of *General Foods Corporation*, 52 F.T.C. 798 (1956) * * *. (Emphasis added.)

There always has been a substantial sentiment in this country that small local enterprises should be encouraged and that their numbers

² See, e.g., *Doubleday & Company, Inc.*, 52 F.T.C. 169 (1955).

should grow. That emotion was translated into legislation such as the Robinson-Patman amendments to the Clayton Act. To some, our strong enforcement of this Act now seems a childish clinging to a bygone era. And it is, of course, true that today's dissent may in fact be tomorrow's majority view. In some future case this Commission may march in solemn troop to pay unqualified homage to "vertical integration." But the clarion call to form such a dramatic procession is hardly sounded by this unadorned record. I remain unpersuaded that the will of Congress should not be executed in this case.

I note that Monroe's tight control over its warehouse distributors and jobbers might be construed as a separate restraint of trade. But no such charge was made in the complaint, nor was such an issue ever alluded to during the trial. In these circumstances, we could not, without violating fundamental principles of due process, issue an order enjoining respondent from fixing prices.

DISSENTING OPINION

JULY 28, 1964

By ELMAN, *Commissioner*:

I

Respondent is a manufacturer of automotive parts. It sells exclusively, and at a single price (the jobber's price), to some 300 warehouse distributors located throughout the country. The warehouse distributors resell to jobbers, dealers, and even, occasionally, to garages or repair shops. On sales to jobbers (of whom there are some 11,000) who have been approved by respondent and have agreed with the warehouse distributor to purchase at the jobber's price set by respondent, the warehouse distributor receives a rebate from respondent of 20% of the jobber's price. Thus, if the jobber's price of one of respondent's parts is \$1.00, and the warehouse distributor (who must pay respondent the jobber's price to obtain the part) resells to an approved jobber at that price, respondent will rebate 20¢ to the warehouse distributor.

According to the stipulation entered into between complaint counsel and counsel for respondent, some of the warehouse distributors to whom respondent sells own or control or are owned or controlled by jobber establishments that respondent has classified and approved as jobber accounts of the warehouse distributor, and accordingly receive the 20% rebate for redistributing respondent's parts to them. The record contains evidence concerning three such warehouse distributors.

One is a corporation having several jobber subsidiaries. Another has jobber branches that are not separate corporations, and is controlled by an individual who has a controlling interest in several jobber corporations. The third has two jobber subsidiaries (out of the 50 or so approved jobbers with whom it deals), one wholly, the other partly, owned by it.

There is affirmative and uncontradicted evidence that it costs these warehouse distributors as much to redistribute respondent's parts to their jobber affiliates as to independent jobbers, with the possible exception that salesmen's commissions may be reduced or eliminated on such transactions. Each of these warehouse distributors does the majority of his redistributing to independent, rather than affiliated, jobbers.

The rather skimpy record in the present case does not cast much light on the system of distribution in the auto parts industry, but that system should be familiar to the Commission from the large number of Robinson-Patman Act cases that it has brought in this industry, and should provide the background against which to consider respondent's warehouse distributor-jobber setup.

As every car owner knows, most auto repairs are not "deferrable"; one cannot wait weeks to have a broken fanbelt or a burnt-out bearing replaced. Hence, "ready availability" to the ultimate consumer of replacement parts is an essential requirement of the "automotive after-market". Due to the variety of makes and types of motor vehicles sold in this country, and to the speedy obsolescence of many parts, the number of items that must be made readily available in all parts of the country is immense; a single manufacturer of auto parts may produce 100,000 different items. The industry is thus faced with an acute problem of distribution. No individual garage or repair shop can afford to stock the complete lines of a number of manufacturers. On the other hand, it would be prohibitively expensive for an individual manufacturer to maintain a complete nationwide network of local warehouses and sales forces, as would be necessary to sell to, and provide inventory for, a vast number of garages and repair shops.

To bridge the gap has been the function of the warehouse distributor-jobber system. The jobber is a local wholesaler who carries many different manufacturers' lines and deals directly with the garages and repair shops. His scale of operations is too small to justify the maintenance of an extensive inventory. That is the warehouse distributor's principal function, and it is a substantial one, due to the number of parts which must be carried in order to provide ready availability. Thus, a warehouse distributor (who also carries many different manufacturers'

lines) may carry as many as 37,000 different parts in inventory. Since manufacturers do not distribute through exclusive jobber outlets, another important function that the warehouse distributor performs for the manufacturer is to "buy distribution" for the manufacturer's parts by redistributing to as many jobbers as possible. For this purpose, a warehouse distributor must maintain substantial selling, as well as warehousing, facilities.

The contractual relationship between respondent and its warehouse distributors is typical of the industry. The warehouse distributor performs a redistribution service for respondent and is compensated for it at a fixed rate (20%) per resale. If the warehouse distributor did not perform the service, respondent would have to perform it itself, which would require the establishment of branch warehouses and elaborate selling facilities. There is no suggestion that the 20% rebate which respondent's warehouse distributors receive for the service of redistributing to the jobbers is at all excessive or unearned.¹

The foregoing description of the structure of distribution in the auto parts industry is vastly oversimplified. Apparently, few manufacturers use so simple—and, from the Commission's standpoint, one might suppose, so innocent—a system as the present respondent, who, unlike most, does no direct dealing with any links in its chain of distribution except the first, the warehouse distributors. The very simplicity of the structure brings into sharp focus the problems raised by the Commission's general approach in this industry.

II

Section 2(a) of the Clayton Act forbids a seller "to discriminate in price between different purchasers * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition * * *." The hearing examiner in his initial decision entered a cease and desist order forbidding respondent to sell its products "to any purchaser at net prices higher than the net prices charged any other purchaser who competes in the resale or distribution of such products with the purchaser paying the higher price." He justified this order on the following reasoning: (1) Independent jobbers purchasing from the warehouse distributors are "purchasers" from respondent within the meaning of the statute because respondent controls the terms and conditions of sale (including price) by warehouse

¹ The 20% warehouse distributor's rebate or discount appears to be standard in the industry. See, e.g., *American Ball Bearing Co.*, 57 F.T.C. 1259, 1262, where the warehouse distributor's function is briefly described.

distributor to jobber; (2) a jobber affiliated with a warehouse distributor receives the "benefit" (not further explained by the examiner) of the warehouse distributor's 20% rebate on resales to it and must, therefore, be deemed to be purchasing from respondent at a price 20% less than that paid by competing independent jobbers.

The Commission, in its decision, adopts the examiner's order and step 1 of his analysis, but modifies step 2. The Commission's test for imputing the warehouse distributor's rebate to the jobber is not whether the two are affiliated (*i.e.*, whether the jobber is owned or controlled by the warehouse distributor or vice versa), but whether the two are "one entity," or "a single unit." In applying its test, the Commission mentions a number of factors (drawn from the testimony concerning the three warehouse distributors with jobber affiliates) that suggest, in the Commission's view, a degree of integration between warehouse distributor and jobber affiliate: whether the jobber's establishment is physically contiguous to the warehouse distributor's; whether the warehouse distributor and jobber are one or separate corporations; whether the officers are the same; whether the jobber obtains all of its requirements of respondent's products from the affiliated warehouse distributor; whether the two have a common set of books; whether the warehouse distributor pays the jobber's bills; whether the warehouse distributor supervises the credit operations of the jobber; whether the warehouse distributor pays sales commissions on redistributions to the jobber; and others. Except for the matter of saved sales commissions, the factors relied on by the Commission seem to go primarily to the managerial and financial, rather than operational, integration of the affiliated warehouse distributors and jobbers.

III

The Commission's disposition of this case raises two initial questions. The first relates to the order. The Supreme Court has held that Commission orders must be, "at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application." *F.T.C. v. Henry Broch & Co.*, 368 U.S. 360, 368. Had the Commission in this case adopted the hearing examiner's rationale, the order would be, at all events, clear and precise in its meaning and application: a jobber would be a "purchaser" from respondent at the warehouse distributor's price (*i.e.*, jobber's price minus 20%) if it was under common ownership or control with a warehouse distributor. Under the Commission's rationale, however, such a jobber is to be deemed the purchaser only if it and its affiliated warehouse distributors are a "single unit" or "entity." These words have no established meaning, so

far as I am aware, in the context of Robinson-Patman Act enforcement. Since they are the critical terms in applying and interpreting the order, the Commission should give some indication of what it intends by them. It has not done so. It has merely enumerated a number of criteria to be used to determine whether or not affiliates are a "single unit," or "entity," without indicating the weight of each enumerated factor or whether the list given is an exclusive one.

For example, the Commission suggests at one point that, if the jobber branches are not separate corporations, the warehouse distributors and the branches are "conclusively" demonstrated to be "one entity." (P. 289.) But such a result would be inconsistent with the Commission's readiness to disregard corporate forms. (P. 291.) The Commission will only say that, "From all the above evidence, we conclude that Monroe has sold to purchasers who function at both the WD and the jobber level." (P. 291.) With all deference, I think the Commission has failed in its duty to provide guidance to respondent with respect to what degree of integration between affiliates makes them, in the Commission's eyes, a "single unit" or "entity."

An additional ambiguity in the order arises from the Commission's understandable concern with the possible unfairness of charging respondent with knowledge of the intimate corporate relations of its warehouse distributor purchasers. The Commission concludes that in view of respondent's contacts with the jobbers, respondent "knew or should have known" of their affiliation with warehouse distributors. (P. 292.) Does this mean that, in a proceeding to enforce the order, respondent has a defense if it can show it neither knew nor had reason to know of a warehouse distributor's relationship with a jobber? The order does not say; but if the defense is not available, great unfairness could result. Suppose that a warehouse distributor and a jobber are separate corporations with different names, but the majority stockholder in each is the same man, and the firms have coordinated their activities to a certain extent—enough to make them an "entity" under the order. Would it be either practical or fair in such a case to charge respondent with notice of the relations between ostensibly independent firms? Must its scrutiny of its 300 warehouse distributors and 11,000 jobbers be so exacting? If so (and the order, read in light of the Commission's opinion, is ambiguous on this score), the order seems unnecessarily harsh and oppressive.

IV

My second point relates to the Commission's application of the so-called "indirect purchaser" doctrine to hold that the independent job-

bers, who purchase from warehouse distributors only, are in reality purchasers from respondent. The Commission reasons that since the terms and conditions of sale on which the warehouse distributors sell to the jobbers are fixed, or subject to approval by, respondent, the doctrine applies. The hearing examiner emphasized, in addition, the close contacts which respondent maintains with the jobbers—advising them on sales strategy, etc.—but the Commission apparently does not rely on such contacts.

Section 2(a) of the Clayton Act forbids discrimination only between a seller's purchasers. If a disfavored purchaser is not a purchaser from the seller charged with violating 2(a), but is at some lower point in the chain of distribution, the Commission is without jurisdiction to enter an order against him. If, in order to evade Section 2(a)'s prohibitions, a seller (or buyer) employs a straw or dummy as an intermediary between him and his intended purchaser (or seller), I have no difficulty with the position that such a sham, evasive transaction does not oust the Commission of jurisdiction. See *American News Co. v. F.T.C.*, 300 F. 2d 104, 109–10 (2d Cir. 1962). At least to that extent, the “indirect purchaser” doctrine is clearly a valid gloss on the statute.

Warehouse distributors in the automotive parts industry are not the straws, dummies, brokers, agents, or creatures of either their manufacturer-suppliers or their jobber-customers. On this record, certainly, the Commission has no basis for so concluding. To be sure, the manufacturer has an active concern with how the jobber fares. The jobber's success in achieving wide distribution of the manufacturer's parts is a very important service which the jobber renders the manufacturer. But the fact that a manufacturer has a stake in the successful functioning of his chain of distribution surely does not make every link in that chain a purchaser from the seller.

That is true even where, as here, the resale price of the intermediary is fixed by his supplier. See *Klein v. Lionel Corp.*, 237 F. 2d 13 (3d Cir. 1956). By virtue of the “fair trade” exemption written into the antitrust laws, many manufacturers may lawfully fix their distributors' resale prices. But it would completely distort the meaning of the word “purchaser” to view purchasers from such distributors as purchasers from the manufacturer himself; and resale price maintenance is not simply a device for evading the prohibitions of Section 2(a) by resort to straw or dummy intermediaries. Since respondent's warehouse distributors are not mere sales agents (compare *Champion Spark Plug Co.*, 50 F.T.C. 30, 44–45), and since the warehouse distributors, rather than respondent, select the jobbers to whom they resell (compare *Whitaker Cable Corp.*, 51 F.T.C. 958, 972–73, aff'd, 239

F. 2d 253 (7th Cir. 1956)), I cannot agree that the "indirect purchaser" doctrine is properly applicable in the present case.

There is another point. The resale price-fixing clause in respondent's contracts is not sheltered by the fair-trade exemption (see R. 64), and would appear to be an outright price-fixing agreement in clear violation of the Sherman and Federal Trade Commission Acts. It seems a curious result to predicate Section 2(a) jurisdiction on respondent's openly violating the Sherman and Trade Commission Acts. In such a case, it would seem, the Commission ought to undertake prompt remedial action to eliminate the violation, even if in so doing it disabled itself from entering an order under Section 2(a). This suggests the futility of the Commission's attempted reliance on the "indirect purchaser" doctrine here. The price-fixing clause is apparently the principal basis on which the Commission relies for applying the doctrine. Therefore, should respondent, either to escape the Commission's order or to bring its conduct into conformity with the Sherman Act, delete that clause from its contracts with warehouse distributors, what would be the Commission's jurisdictional basis for enforcing the order? Even if the Commission's application of the "indirect purchaser" doctrine to the facts of the present case is technically correct, it serves little practical purpose. By relatively minor changes in the forms of its transactions with distributors, respondent can probably render the order ineffectual.

To the extent that the "purchaser" requirement of Section 2(a) might, in a particular situation, prevent the Commission from entering an order under 2(a) to prevent discriminatory, anticompetitive conduct contrary to the policy of the statute, the Commission is not without remedy. Section 5 of the Federal Trade Commission Act authorizes the Commission to prevent, as an unfair method of competition, a practice contrary to the policy of the price-discrimination law even if it is technically not subject to that law. See, e.g., *Grand Union Co. v. F.T.C.*, 300 F. 2d 92 (2d Cir. 1962). Cf. *Fred Meyer, Inc.*, F.T.C. Docket 7492 (decided July 9, 1963) (separate opinion) [63 F.T.C. 1].

v

The central issue of the case is whether respondent has discriminated, in a manner injurious to competition among its customers, by virtue of the affiliation or integration between certain warehouse distributors to which it sells and jobbers. The examiner's reasoning (which the Commission does not adopt) is that where two firms in a chain of distribution are under common ownership or control, the lower price to the firm higher in the chain should be imputed to the

affiliate because the "benefit" of the lower price must, in view of the firms' relationship, enure to the latter. This notion of "benefit" has no factual content; it is merely a restatement of the examiner's conclusion, as an example will show:

W is a warehouse distributor located in Cleveland, Ohio. It redistributes to a number of jobbers in cities throughout the state. All but one of these jobbers—Jobber *J* in Dayton—are completely independent corporations. *J* is a separate corporation from *W*, and none of its operations—managerial, financial or operational—is integrated with *W*'s, but the same person owns 51% of the stock of *W* and 51% of the stock of *J*. The examiner would conclude that the "benefit" of respondent's 20% rebate to *W* enures to *J*. It is obvious, however, that no benefit in fact accrues to *J* in these circumstances, and that there is no discrimination between *J* and his independent jobber competitors when all pay the same price to *W*. Cf. *Nuare Co. v. F.T.C.*, 316 F. 2d 576 (7th Cir. 1963).

The Commission attempts to give a factual content to the notion of "benefit" by requiring that a degree of actual integration in the activities of the affiliate firms be shown. However, of the various facts adduced by the Commission to demonstrate a benefit arising from integration, only one is susceptible of any degree of precise measurement on this record: the reduced sales commissions—4% instead of the normal 6%—paid by R. T. Clapp Company on sales to its jobber affiliates.² The Commission makes no attempt to "quantify" the savings, if any, produced by the limited financial and managerial integration shown on this record. However, it seems very unlikely that those savings substantially reduce the cost of redistributing respondent's products to an affiliated jobber. Respondent's warehouse distributors and jobbers handle a number of manufacturers' lines besides respondent's. Hence, any savings derived from the managerial or financial integration of a warehouse distributor and jobber would reduce the cost of redistributing *all* products handled by the affiliated firms, not just respondent's. I would guess that the share of these general savings allocable to respondent's line is quite small, but there is, in any event, no evidence on the point.³

² The record shows that Hart's Automotive Parts Company, on its sales to affiliated jobbers located outside Chattanooga, paid no sales commissions—but the record does not show what the normal commission rate was. TVK Automotive Warehouse, Inc., the third warehouse distributor as to which there is any evidence, paid sales commissions on all of its sales to jobber affiliates.

³ The Commission's present emphasis on bookkeeping savings is in sharp contrast to its earlier position, in the jobber-group cases, that the bookkeeping savings from pooled ordering and billing operations are insignificant. See, e.g., *American Motor Specialties Co.*, 55 F.T.C. 1430, 1446, *aff'd*, 278 F. 2d 225 (2d Cir. 1960).

On this record, then, the 2% saving (which, I assume, means 2% of the jobber price) is the only tangible competitive advantage that an affiliated jobber can be said to derive from his relationship with a warehouse distributor. This saved amount could, presumably, be passed on by the warehouse distributor to his jobber affiliates, to be used by the latter to strengthen their competitive position against the nonaffiliated jobbers. But can the existence of such an advantage justify the order entered by the Commission?

An example will show that the Commission's order, which forbids respondent to grant its warehouse distributors any compensation, however slight, on resales to affiliated jobbers, is supportable under no tenable theory of Robinson-Patman Act liability. Suppose that respondent's jobber price for a spark plug is \$1.00. R. T. Clapp Company, then, would receive a 20¢ rebate for redistributing such a spark plug to its Oak Ridge, Tennessee, jobber subsidiary, and the same rebate for redistribution to independent jobbers competing with the Oak Ridge subsidiary. The Commission does not challenge the uncontroverted evidence that Clapp deals in the same manner with its affiliated as with its 50 unaffiliated jobbers (R. 226; see also R. 232), except, of course, that Clapp saves 2¢ of the sales commission on redistributing to the former. Nor is there any basis in the record to believe that the 20¢ rebate includes more than a normal profit—say 2¢.

Consider the effect of the Commission's order in these circumstances. On spark plugs intended for redistribution to the Oak Ridge subsidiary, Clapp must pay respondent the full \$1.00 jobber's price; it cannot receive any rebate whatever. For Clapp to redistribute spark plugs to its Oak Ridge subsidiary involves out-of-pocket costs of 16¢ (that part of the rebate not represented by Clapp's profit of 2¢ or by the saved sales commission of 2¢). Thus, just to break even Clapp must recover \$1.16 from the Oak Ridge subsidiary, and the Oak Ridge subsidiary must therefore resell respondent's spark plug for at least \$1.16 to avoid incurring a net loss. The competitors of the Oak Ridge subsidiary are nonaffiliated jobbers who pay Clapp (or some other warehouse distributor) only \$1.00 for respondent's spark plug. In view of the low profit margins prevailing in the industry, it is most unlikely that the Oak Ridge subsidiary can compete on those terms. Clapp will be forced to discontinue doing business with it. The Oak Ridge subsidiary must either satisfy its requirements of respondent's products from another warehouse distributor or discontinue carrying respondent's line.

Unless Section 2(a) of the Clayton Act forbids, *per se*, integration between firms at different levels in the structure of distribution, I can-

not agree that the Commission's order is proper. To be sure, it could be argued that since the affiliated jobber derives a 2¢ advantage by virtue of its relationship with a warehouse distributor, and since in the auto parts industry a 2% differential in the price to competitors is likely to have the adverse competitive effects specified in the statute, some order correcting this inequality is justifiable. But that would surely not justify an order, such as the one entered by the Commission, flatly forbidding any rebate, however small, to the warehouse distributor.⁴

Moreover, even if the 2¢ differential may be said to cause competitive injury sufficient to justify an order, that fact cannot justify the Commission's order because the order is not based on any such finding. The Commission's reasoning is not that the 2¢, or any other, benefit of integration is a competitive detriment to non-integrated competitors. It is, rather, that the existence of such a benefit demonstrates that the warehouse distributor and its jobber affiliates are one entity receiving a rebate of 20% that competitors—the nonaffiliated jobbers—do not receive. The source of competitive injury, in the Commission's view, is the rebate, not the much smaller benefit from integration. The benefit is just a device the Commission uses for imputing the warehouse distributor's entire 20% rebate to its jobber affiliates.

The thrust of the Commission's reasoning seems clear from its reliance on *F.T.C. v. Ruberoid Co.*, 343 U.S. 470. Respondent in that case sold its roofing materials directly to wholesalers, retailers, and roofing contractors (known as "applicators"). The Commission found that respondent granted substantial "distribution commissions" and "wholesale discounts" to some but not all of its customers competing in the resale of its products as retailers and as applicators. The Commission did not find that there had been discrimination among wholesalers, but decided that its order should forbid respondent to

⁴ *F.T.C. v. Ruberoid Co.*, 343 U.S. 470, is clearly distinguishable on this point. The Court there rejected respondent's argument "that the order went too far in prohibiting all price differentials between competing purchasers, although only differentials of 5 percent or more were found", stating that "the Commission was not required to limit its prohibition to the specific differential shown to have been adopted in past violations of the statute. In the absence of any indication that a lesser discrimination might not affect competition there was no need to afford an escape clause through which the seller might frustrate the whole purpose of the proceedings and the order by limiting future discrimination to something less than 5 percent." 343 U.S. at 473-74. Here, by contrast, the "indication" referred to by the Court is present. Nothing on this record can justify the Commission in predicting that an 18% or less rebate by respondent on warehouse distributor's sales to jobber affiliates could have an adverse effect on competition. To allow respondent no opportunity under the order to demonstrate that a rebate to warehouse distributors on sales to jobber affiliates merely covers the distributor's out-of-pocket costs of redistribution is completely unsupportable. Even complaint counsel would concede that if the warehouse distributor receives no rebate on sales to its jobber affiliates, it suffers "a financial loss of the cost of any expenses involved in handling the product and making such a sale". Complaint Counsel's Proposed Findings, p. 4.

discriminate between any of its customers, however classified, because "the particular designations given purchasers [by respondent] are not always controlling as indicating the functions actually performed by such purchasers. For example, one purchaser, although engaged primarily as a roofing contractor or applicator, sold quantities of the products to other applicators. And another purchaser, although classified by respondent as a wholesaler, also functioned as an applicator." 46 F.T.C. 386. On these facts, the Court held that the Commission was justified in ignoring respondent's functional classification of its customers, arbitrary and ambiguous as it was, and ordering respondent to treat all alike.

The *Ruberoïd* principle is a sound one, but it has no application to the facts of the present case. This is not a case where a manufacturer arbitrarily designates a jobber or group of jobbers as a "warehouse distributor" in order to mask a price discrimination (as the Commission found to be the case in its recent decision in *National Parts Warehouse*, F.T.C. Docket 8039 (December 16, 1963)) [63 F.T.C. 1692], or where a warehouse distributor sells simultaneously as a jobber (see *Purolator Products, Inc.*, F.T.C. Docket 7850 (decided April 3, 1964)) [65 F.T.C. 8]. The warehouse distributors who have jobber affiliates and to whom respondent granted its normal 20% rebate for redistributing to those affiliates operate, as we have seen, in all essential respects just like unaffiliated distributors; and the affiliated jobbers operate just like unaffiliated jobbers.

In *National Parts Warehouse*, the Commission attempted to bring the respondent (a limited partnership among a group of jobbers formed to obtain for the members the functional discount accorded warehouse distributors) within the *Ruberoïd* principle by adducing evidence that respondent was not a *bona fide* warehouse distributor. The Commission relied, for example, on the fact that the manufacturers did a great deal of drop-shipping to the members, bypassing respondent, and that respondent did not perform the selling function characteristic of warehouse distributors but was merely the agent of the jobber partners. The present record is devoid of any such facts. Respondent does no drop-shipping to the jobber affiliates of its warehouse distributors (see R. 18). The distributors are not merely the agents of their jobber affiliates. On the contrary, most of their business is done with wholly independent jobbers. So also, in view of the very limited integration between the warehouse distributors and affiliated jobbers the Commission cannot properly rely on *Purolator Products*, which involved the performance of more than a single distributional function by a purchaser classified as a warehouse distributor.

In sum, if the record of the present case showed that any of respondent's warehouse distributors in fact was merely a front for a jobber affiliate, or that any distributor was in fact himself selling as a jobber, the Commission's position would derive support from prior decisions. But the record affirmatively shows the contrary. Nothing in the existing law of Section 2(a) justifies what is in effect a *per se* rule barring a warehouse distributor from selling to a jobber with which it is affiliated in the manner shown on this record. Indeed, the Commission, just recently, expressly disavowed any such position. The hearing examiner in *Joseph A. Kaplan & Sons, Inc.*, F.T.C. Docket 7813 (decided by the Commission on November 15, 1963) [63 F.T.C. 1308], in a portion of his initial decision adopted by the Commission, stated:

This is not to say, however, that the buying stores have no right to own stock in a wholesale corporation. Rather, it is the nature of the wholesaling function which controls. Where the sole *raison d'être* of the wholesaling corporation lies in the benefits it can confer upon its own retailer stockholders to whom it makes all, or practically all, of its sales, it can be no longer be [*sic*] called a true wholesaler but becomes a mere dummy or front for such retailer stores. Such is the characteristic that * * * distinguishes this case from * * * those cases [where] the subsidiary or intermediary was not created and doing business solely for the benefit of the parent or supplier but was, apparently, in business for all desirable trade. [Initial decision, May 21, 1962, 63 F.T.C. 1308, 1325.]

VI

The most difficult issue raised by the present case is whether Section 2(a) would authorize the Commission to enter, upon a proper finding of probable injury to competition, an order forbidding respondent to rebate the 2% represented by saved sales commissions. I would conclude not. As explained at greater length in my separate opinions in *National Parts Warehouse, supra*, and *Purolator Products, supra*, the price-discrimination law is designed to deal with price discrimination, rather than with the problems of vertical integration as such. The 2% saving to warehouse distributors having jobber affiliates does not raise a question of price discrimination.

From respondent's standpoint, certainly, there is no discrimination. The service rendered by the warehouse distributor to respondent in exchange for the 20% rebate is no less valuable to respondent merely because on some resales the distributor is able to reduce his costs. It would be different if, as the Commission found in the jobber-group cases, a buyer classified as a "warehouse distributor" and allowed the warehouse distributor's discount did not relieve the seller of having to perform the warehouse distributor's function (particularly warehousing) on sales to the group. In such a case, the effect of the discount (in the absence of cost justification by the seller) would be to reduce, on the particular sale, the seller's normal return. Nothing of that sort

is involved here. Respondent incurs no added expense whatever in selling to warehouse distributors for redistribution to their jobber affiliates.

Thus the question is squarely posed whether Section 2(a) requires respondent to subsidize its less efficient distributors and thereby discriminate against the more efficient. The 2% reduced commission is not a result of market power. The record of this case offers no basis for supposing that the warehouse distributors having jobber affiliates are the kind of powerful buyers at which the Robinson-Patman Act was aimed. The saving is a *bona fide* efficiency created by lawful integration. I cannot agree that the objectives of antitrust policy would be served by an order forcing respondent to deprive its customers of the benefit of whatever efficiencies of distribution they may be able to achieve through integration. Such an order, no less than the more sweeping order entered by the Commission, would be tantamount to a *per se* prohibition of integrated operations in distribution, because it would prevent the integrated distributor from realizing any profit from the efficiencies conferred by integration. Such a result seems to me far beyond the proper reach of the price-discrimination law.

Mr. Justice Holmes cautioned repeatedly against the unfortunate tendency of legal principles to be erected into uncritical absolutes or pushed to unwarranted extremes. See, e.g., *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355. Such a tendency is apparent in the Commission's enforcement of the price-discrimination law in the auto parts industry, culminating in the present case. The earliest cases involved apparently conventional applications of the *Ruberoide* principle to manufacturers using functional discounts to mask price concessions granted powerful buyers.⁵ The Commission then applied the principle to jobber buying groups,⁶ finding that such groups were

⁵ See *Champion Spark Plug Co.*, 50 F.T.C. 30; *General Motors Corp.*, 50 F.T.C. 54; *Electric Auto-Lite Co.*, 50 F.T.C. 73; *Thompson Products, Inc.*, 55 F.T.C. 1252. Cf. *P. Sorensen Mfg. Co.*, 52 F.T.C. 1659, 1668-69, *aff'd per curiam*, 246 F. 2d 687 (D.C. Cir. 1957).

⁶ The genesis and operation of such groups have been described as follows:

"Starting as early as 1936 when the Act was passed but more often some time thereafter, various automotive parts jobbers (wholesalers selling to retailers) gathered into groups to conduct their purchasing on a cooperative basis. Their intention was generally to pool their market power. Price advantages were usually the main initial consideration, but in some instances other benefits may have been primary. Quantity discounts prevailed in the industry, and group aggregation of purchases achieved substantial rewards for member jobbers. Such quantity discounts were most often cumulative in nature and paid in the form of rebates. The buying group, after deducting expenses, paid over such receipts to each member in proportion to his patronage. Purchase orders to sellers could be sent by member jobbers directly or through the group office. Invoicing by the seller was to the group only, which paid the bills and generally eliminated credit and collection problems for the seller. Shipments of parts were usually made by the seller directly to the member jobbers; only to a very limited extent did the group headquarters handle the goods or have warehouse facilities for doing so." Fleming, *Group Buying Under the Robinson-Patman Act: The Automotive Parts Cases*, 7 *Buff. L. Rev.* 231, 232-33 (1958).

merely bookkeeping devices for obtaining discriminatory concessions for the members of the groups.⁷ The Commission may have overlooked some genuine services rendered by the groups to the manufacturer, but it had grounds for its conclusion that they did not perform a warehouse distributor's function and so were not entitled to the warehouse distributor's discount or rebate.

Subsequently, however, the Commission, still relying on the *Ruberoïd* doctrine, challenged "second generation" jobber groups, which had undertaken to perform a warehouse distributor's function on behalf of their members in order legitimately to earn the warehouse distributor's discount.⁸ The Commission's orders in this class of case seem highly questionable. If a jobber group in fact performs for the manufacturer services equivalent to those traditionally performed by warehouse distributors, an order forbidding the manufacturer to compensate it for those services has the effect of insulating the warehouse distributors from competition by the group. Such orders can only discourage legitimate innovations and improvements in distribution and thereby rigidify the channels of distribution, without advancing the basic policy and objectives of the Robinson-Patman Act. The present case represents the most extreme and unjustified application of the *Ruberoïd* principle, for here the warehouse distributors whose discount is challenged are not successors to outlawed jobber groups, and the genuineness of their functional classification cannot be impugned on that ground.

By a process of excessive and uncritical generalization, the *Ruberoïd* principle has been transformed by the Commission into the dogma that the character of the purchaser's selling is the exclusive criterion of whether a functional allowance may lawfully be granted him. No matter what service or function he performs for his seller as a dis-

⁷ *Namsco, Inc.*, 49 F.T.C. 1161; *Moog Industries, Inc.*, 51 F.T.C. 931, aff'd, 238 F. 2d 43 (8th Cir. 1956), aff'd on other grounds, 355 U.S. 411; *Whitaker Cable Corp.*, 51 F.T.C. 958, aff'd, 239 F. 2d 253 (7th Cir. 1956); *E. Edelmann & Co.*, 51 F.T.C. 978, aff'd, 239 F. 2d 152 (7th Cir. 1956); *C. E. Niehoff & Co.*, 51 F.T.C. 1114, modified, 241 F. 2d 37 (7th Cir. 1957), rev'd on other grounds sub nom. *Moog Industries v. F.T.C.*, 355 U.S. 411; *P. & D. Mfg. Co.*, 52 F.T.C. 1155, aff'd, 245 F. 2d 281 (7th Cir. 1957); *P. Sorensen Mfg. Co.*, 52 F.T.C. 1659, aff'd per curiam, 246 F. 2d 687 (D.C. Cir. 1957); *Standard Motor Products, Inc.*, 54 F.T.C. 814, aff'd, 265 F. 2d 674 (2d Cir. 1959); *D & N Auto Parts Co.*, 55 F.T.C. 1279, aff'd sub nom. *Mid-South Distributors v. F.T.C.*, 287 F. 2d 512 (5th Cir. 1961); *American Motor Specialties Co.*, 55 F.T.C. 1430, aff'd, 278 F. 2d 225 (2d Cir. 1960); *Eis Automotive Corp.*, 55 F.T.C. 1473; *American Ball Bearing Co.*, 57 F.T.C. 1259; *Tung-Sol Electric, Inc.*, F.T.C. Docket 8514 (decided Sept. 12, 1963) [63 F.T.C. 632].

⁸ *Alhambra Motor Parts*, 57 F.T.C. 1007, remanded, 309 F. 2d 213 (9th Cir. 1962); *Ark-La-Tex Warehouse Distributors, Inc.*, F.T.C. Docket 7592 (order of June 5, 1963 [62 F.T.C. 1557], remanding to hearing examiner in light of court of appeals' *Alhambra* decision); *Automotive Jobbers, Inc.*, F.T.C. Docket 7590 (decided Jan. 4, 1962) [60 F.T.C. 19]; *National Parts Warehouse, supra*; *Dayton Rubber Co.*, F.T.C. Docket 7604 (appeal pending before Commission). Cf. *Purolator Products, supra*.

tributor, he is entitled to no greater compensation than any other purchaser reselling in competition with him. This result is sometimes explained on the theory that a manufacturer who compensates a class of purchasers for the extra distributional costs they incur is "subsidizing their internal operation" and thus, in effect, insulating the inefficient against the consequences of their "higher internal expenses." *Purolator Products, supra*, p. 11 [65 F.T.C. 8, 29].

I certainly agree that where the effect of a price discrimination is to subsidize the inefficient operations of the purchaser, it is no defense to argue that the discrimination will be offset or neutralized by the favored purchaser's higher internal expenses and hence confer no competitive advantage upon him in the struggle with his more efficient competitors. In such a case, there is injury to competition because the discrimination will assist the inefficient, favored purchaser to hold his own, undeservedly, against the competition of the more efficient—a result patently inconsistent with the policy of competition. Competition, if effective, should promote efficiency by forcing the inefficient to become efficient or to go under if they do not.

It is a complete perversion of that principle to apply it to legitimate functional classifications. A warehouse distributor having jobber affiliates does not receive a rebate of 20% of the jobber's price from the manufacturer for redistributing to the affiliates because it is inefficient, but because it renders a legitimate and valuable service to the manufacturer which jobbers do not. Indeed, to the extent that there are real efficiencies in redistributing to jobber affiliates, efficiency is penalized if the wholesale distributor is not allowed the regular warehouse distributor's rebate for performing the redistribution function on sales to its jobber affiliates.

In sum, where a functional classification is not arbitrary or unjustified, as it was in *Ruberoide* or, arguably, the jobber-group cases, the *Ruberoide* principle is inapplicable. Any notion that competing distributors must in any and all circumstances pay exactly the same price to the manufacturer, regardless of the different functions they perform, is a completely unwarranted gloss on *Ruberoide* (a case which involved no such question). The Commission itself has so recognized:

In our view, to relate functional discounts solely to the purchaser's method of resale without recognition of his buying function thwarts competition and efficiency in marketing, and inevitably leads to higher consumer prices. It is possible, for example, for a seller to shift to customers a number of distributional functions which the seller himself ordinarily performs. Such functions should, in our opinion, be recognized and reimbursed. Where a businessman performs various wholesale functions, such as providing storage, traveling salesmen and distribution of catalogues, the law should not forbid his supplier

from compensating him for such services. Such a legal disqualification might compel him to render these functions free of charge. The value of the service would then be pocketed by the seller who did not earn it. Such a rule, incorrectly, we think, proclaims as a matter of law that the integrated wholesaler cannot possibly perform the wholesaling function; it forbids the matter to be put to proof.

On the other hand, the Commission should tolerate no subterfuge. Only to the extent that a buyer actually performs certain functions, assuming all the risks and costs involved, should he qualify for a compensating discount. The amount of the discount should be reasonably related to the expenses assumed by the buyer. It should not exceed the cost of that part of the function he actually performs on that part of the goods for which he performs it. [*Doubleday & Co.*, 52 F.T.C. 169, 209.]

The Commission has indicated that it regards the *Doubleday* Principle as overruled. *Mueller Co.*, F.T.C. Docket 7514 (decided Jan. 12, 1962) [60 F.T.C. 120], *aff'd* on other grounds, 323 F. 2d 44 (7th Cir. 1963). In fact, however, the Commission seems to be vacillating in this area. Thus, in its recent order in *Ark-La-Tex*, *supra*, the Commission, in remanding to the examiner, stated that one of the questions to be answered was "Whether respondent Ark-La-Tex was a legitimate wholesale distributor, entitled as such to a wholesale distributor discount, or whether it was merely a sham whose jobber-members should be viewed as the actual purchasers". The Ninth Circuit's *Alhambra* decision strongly suggests that the courts of appeals will not accept the Commission's attempt to equate jobber groups performing genuine and substantial services to the old "order desk" buying groups which the Commission found to be mere bookkeeping devices for the obtaining of discounts for the jobber members. Indeed, in at least two of the old jobber-group cases, the courts of appeals expressly based affirmance of the Commission's order on the fact that no actual efficiencies in distribution from the jobber-group type of operation had been shown. *E. Edelmann & Co. v. F.T.C.*, 239 F. 2d 152, 155 (7th Cir. 1956); *Standard Motor Products, Inc. v. F.T.C.*, 265 F. 2d 674, 676 (2d Cir. 1959). The courts seem increasingly skeptical of strained attempts to use the price-discrimination law as a weapon against integration as such. See *Nuarc Co. v. F.T.C.*, 316 F. 2d 576 (7th Cir. 1963). Cf. *Mueller Co. v. F.T.C.*, 323 F. 2d 44, 47 (7th Cir. 1963). In short, the storm warnings are up. The dogma on which decisions such as that in the present case rest may be less unshakable than is sometimes assumed.

VII

In granting the Federal Trade Commission concurrent jurisdiction to enforce the antitrust laws, Congress never intended that the Commission would expend its resources in the pursuit of every technical

complaint of price discrimination that might come to its attention, however minimal the effect on competition. It was intended that the Commission, utilizing its flexible administrative powers of economic inquiry and investigation, would focus on practices having a real and substantial adverse impact on competitive processes. Certainly, the Commission should not institute a series of lawsuits (whether under Section 2(a) of the Clayton Act or any other antitrust provision) in an industry without first informing itself in depth of the industry's market structure and competitive needs and conditions.

Thus, before the Commission enters an order that, in practical effect, forbids warehouse distributors in the automotive parts industry to resell to their jobber affiliates, the Commission should know more about this industry than it does. What is the relative bargaining power of the various tiers of distributors? How prevalent is vertical integration? What forms does vertical integration take, and what is the competitive significance of these forms? What structural changes would render competition more effective in the industry? What are the long-term trends in industry structure? What firms in the industry, if any, possess substantial market or monopoly power? In the numerous cases which the Commission, over the years, has brought in the automotive parts industry, questions such as these do not seem to have been asked, or answered, or their relevance even perceived. The result has been some striking paradoxes:

(1) Although the industry seems to be permeated by resale price maintenance,⁹ the Commission has taken virtually no remedial action against it¹⁰—perhaps because it is too occupied pursuing scattered instances of alleged price discrimination. If the price-fixing were eliminated, however, the companies allegedly discriminated against would no longer be “indirect purchasers” (see p. 301, *supra*).

(2) The vast majority of the Commission's proceedings in the auto parts industry have been against jobber buying groups (see note 7, *supra*). The primary impetus for cooperative buying by independent jobbers came, apparently, from the pricing systems employed by the manufacturers, which heavily favored large-volume purchasers and warehouse distributors. The Commission, however, has not taken effective action against either the pricing systems as such or the

⁹ See pp. 299–301, *supra*; *Whitaker Cable Corp. v. F.T.C.*, 239 F. 2d 253, 255 (7th Cir. 1956); *E. Edelmann & Co. v. F.T.C.*, 239 F. 2d 152, 155 (7th Cir. 1956); *Standard Motor Products, Inc.*, 54 F.T.C. 814, 828, *aff'd*, 265 F. 2d 674 (2d Cir. 1959); *Thompson Products, Inc.*, 55 F.T.C. 1252, 1272; *P. & D. Mfg. Co.*, 52 F.T.C. 1155, 1173, *aff'd*, 245 F. 2d 281 (7th Cir. 1957); *Purolator Products, Inc.*, F.T.C. Docket 7850 (decided April 3, 1964), p. 20 [65 F.T.C. 8, 36].

¹⁰ But see *Rayco Mfg. Co.*, 57 F.T.C. 96 (consent order); *Dayton Rubber Co.*, F.T.C. Docket 7604 (appeal pending before Commission).

large-volume purchasers and warehouse distributors. It has proceeded primarily against the independent jobbers' efforts to survive by pooling their buying power.

(3) When the independent jobbers attempted to compete with the warehouse distributors, by the formation of jobber cooperatives to perform the warehouse distributor's function, the Commission brought a new series of proceedings directed against this effort at self-protection (e.g., *National Parts Warehouse, supra*). The present case, involving jobbers who have become affiliated with warehouse distributors, seems part of this enforcement pattern.

(4) As everyone connected with the automotive parts industry well knows, the Commission's multitude of proceedings has had only a minimal effect on competitive methods. Jobber buying groups continue to grow and flourish (which suggests that they may be responsive to a real competitive need), while the Commission makes little attempt to enforce its hard-won orders. Since the structure of distribution in the industry has been undergoing continuous change,¹¹ the Commission's old orders are probably even less realistic today than when they were entered.

(5) In the most comprehensive study of the auto parts industry of which I am aware, Professor Charles Davisson of the University of Michigan has concluded that the complex system of distribution that characterizes the industry, involving competition between distributors who perform different functions and accordingly purchase at different prices, has been a force for promoting competition and efficiency at all levels, and that the elimination of this system of "functional pricing"—which the Commission regards as unlawful *per se* under the price-discrimination law—would discourage competition, promote inefficiency, and, in general, prove completely impracticable.¹²

If Professor Davisson is right, the Commission's approach to the problem of price discrimination in this industry is fundamentally wrong, and the Commission should devote its attention not to eliminating functional pricing but to assuring "freedom of access to the favored function."¹³ The trouble is, of course, that the Commission, never having undertaken a study in depth of the auto parts industry, is in no position either to accept or reject Professor Davisson's thesis. On the basis of its present knowledge and experience, the Commission

¹¹ See, e.g., *Wall Street Journal*, May 8, 1963, p. 1, Sept. 10, 1958, p. 1; *Barron's*, Apr. 23, 1962, p. 1.

¹² Davisson, *The Marketing of Automotive Parts* 866, 930-31, 937, 946, 951-54 (1954).

¹³ Dirlam & Kahn, *Fair Competition: The Law and Economics of Antitrust Policy* 251 (1954). See *Mueller Co. v. F.T.C.*, 323 F. 2d 44 (7th Cir. 1963); *Ark-La-Tex Warehouse Distributors, Inc.*, F.T.C. Docket 7592 (order of June 5, 1963) [62 F.T.C. 1557]; *National Parts Warehouse*, F.T.C. Docket 8039 (decided Dec. 16, 1963), pp. 6-7 (separate opinion) [63 F.T.C. 1692, 1743-1744].

cannot fulfill its basic duty of devising the "enforcement policy best calculated to achieve the ends contemplated by Congress" (*Moog Industries v. F.T.C.*, 355 U.S. 411, 413) in the auto parts industry. Before it enters still another cease-and-desist order premised on highly questionable legal and economic assumptions, the Commission should use its administrative powers, as Congress intended it would, to conduct an economic study of the structure of distribution in this industry.

FINAL ORDER

This matter having been heard by the Commission upon exceptions to the initial decision filed by respondent, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission having ruled on said exceptions, and having determined that the initial decision should be modified to conform with the views expressed in the accompanying opinion:

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

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

Commissioner Dixon concurring and Commissioner Elman dissenting.

IN THE MATTER OF

PHILIP SHLANSKY & SONS, INC., ET AL.

CONSENT ORDER, ETC. IN REGARD TO THE ALLEGED VIOLATION