

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

Docket 8069. Complaint, Aug. 4, 1960—Decision, July 31, 1964

Order dismissing—following findings in the companion Section 2(a) case, Universal-Rundle Corp., Docket 8070, 65 F.T.C. 924, that the "Homart" brand fixtures sold to Sears and those sold under the manufacturer's brand name were not of like grade and quality, and consequent dismissal of the charge—

Complaint

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complaint charging the national distributor of a complete line of consumer goods, many under its own brand names, with violating Section 2(f) of the Clayton Act by knowingly inducing and receiving discriminatory prices in the purchase of plumbing fixtures, including bathroom fixtures, which were lower than those paid by its competitors for products of like grade and quality.

COMPLAINT

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

PARAGRAPH 1. Respondent Sears, Roebuck and Co., sometimes referred to as respondent Sears, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 925 South Homan Avenue, Chicago 24, Illinois.

PAR. 2. Respondent Sears is now, and for many years has been, engaged in the sale and distribution at retail of a complete line of consumer goods throughout the United States, by mail order and direct retail store sales. Said respondent operates some 700 retail stores located in various cities throughout the United States. Its total volume of sales from all products for the fiscal year ending January 31, 1958, amounted to approximately \$3,600,000,000.

Said respondent is also the owner of a number of trade or brand names under which a substantial volume of merchandise is marketed.

PAR. 3. Respondent Sears, in the course and conduct of its said business, has been and is now engaged in commerce, as "commerce" is defined in the Clayton Act, in that it has purchased various products for resale from vendors located in various States and causes such products so purchased to be shipped and transported from the States where vendors are located to destinations in other States and in the District of Columbia. There is now and has been a constant course and flow of trade and commerce in such products between respondent and the suppliers of such products throughout the various States of the United States.

PAR. 4. In the course of its said business in commerce, respondent Sears has been in competition with other corporations, partnerships and individuals in the purchase, sale and distribution of the various products handled by it.

PAR. 5. Among the products purchased for resale by said respondent are plumbing fixtures, including but not limited to bathroom

fixtures. For more than three years last past said respondent, in the course of its said business in commerce, has knowingly induced or knowingly received discriminatory prices in the purchase of such plumbing fixtures, including bathroom fixtures, which prices were lower than the prices paid for products of like grade and quality by other purchasers competing with said respondent in the resale of such products.

For example, respondent Sears, for more than three years last past, has purchased plumbing and bathroom fixtures from Universal-Rundle Corporation of New Castle, Pennsylvania, at prices which have been substantially lower than those charged by the same seller to other purchasers, some of whom compete with respondent Sears in the resale of such products. The products sold by Universal-Rundle Corporation to respondent Sears are of like grade and quality as those sold to others who are in competition with respondent Sears.

Said respondent is the owner of approximately 63 percent of the total outstanding capital stock of Universal-Rundle Corporation and purchases its plumbing fixtures, including bathroom fixtures, for resale under its trade-name "Homart."

For the fiscal year ended January 31, 1957, said respondent purchased such plumbing and bathroom fixtures in a substantial amount at prices less than the prices charged by Universal-Rundle Corporation to other competing purchasers, such preferential prices ranging from 5% to 45% less than the prices paid by others who compete with respondent in the resale of such products.

PAR. 6. The effect of said discriminations in price, knowingly induced or received by respondent as herein alleged, may be substantially to lessen competition with or tend to create a monopoly in said respondent in the line of commerce in which it is engaged, or to injure, prevent, or destroy competition between respondent and others engaged in the sale and distribution of said products of like grade and quality.

PAR. 7. The foregoing acts and practices of respondent in knowingly inducing or in knowingly receiving the aforesaid discriminations in price are in violation of the provisions of subsection (f) of Section 2 of the Clayton Act, as amended.

Mr. Lewis F. Depro and *Mr. Stanley M. Lipnick* for the Commission.

Mr. Lawrence L. O'Connor and *Mr. Arthur Medow*, Chicago, Ill., and *Mr. Joseph J. Smith, Jr.* and *Mr. Theodore F. Craver*, Washington, D.C., for respondent.

Initial Decision

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INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

The Federal Trade Commission on August 4, 1960, issued its complaint against the above-named respondent charging it with having violated section 2(f) of the Clayton Act, as amended (U.S.C. Title 15, Section 13). Specifically, the substance of the charges alleged is that for more than three years last past the respondent, in the course of its business, has knowingly induced and knowingly received discriminatory prices in the purchase of plumbing fixtures, including bathroom fixtures, which prices were lower than prices paid for products of like grade and quality of other purchasers competing with said respondent in the resale of such products. Respondent denied the charges alleged in the complaint.

On April 12, 1962, counsel in support of the complaint filed a motion to dismiss the complaint against the above-named respondent. The reasons given therefor are as follows:

This case is a companion case In the Matter of *Universal-Rundle Corp.*, Docket No. 8070 [65 F.T.C. 924]. Universal-Rundle was charged, in that matter, with violating section 2(a) of the amended Clayton Act by selling certain products to this respondent at prices lower than those charged for goods of like grade and quality to other purchasers. This respondent is charged with violation of section 2(f) of the amended Clayton Act by knowingly inducing and receiving the benefits of the 2(a) violation charged in Docket No. 8070.

A consent agreement has been executed in Docket No. 8070 which will result in dismissal of that portion of the complaint charging Universal-Rundle with discriminating in favor of this respondent. The reason for such dismissal is the unavailability of proof of probable injury to competition sufficient to meet the requirements of section 2(a) of the statute. For the same reason, it is respectfully submitted, this complaint should be dismissed.

In the absence of opposition to the motion of counsel in support of the complaint, the hearing examiner dismissed the complaint on May 23, 1962.

The trial of the companion case *In the Matter of Universal-Rundle Corp.*, Docket No. 8070, was commenced on October 15, 1962, following the Commission's rejection of the initial decisions dismissing the above-entitled case and dismissing, in part, the aforesaid companion case.¹

¹ The decision in the *Universal-Rundle* case was by consent. The effect of the partial dismissal was to require a dismissal of the Sears, Roebuck case involving a 2(f) violation.

At the completion of the Commission's *prima facie* case *In the Matter of Universal-Rundle Corp.*, Docket No. 8070, respondent orally made a motion to dismiss the charge of illegal price discrimination with respect to the sale of plumbing fixtures sold to Sears, Roebuck & Co., relying primarily on the failure of Commission counsel to prove by substantial evidence that such fixtures and the plumbing fixtures sold under the "Universal-Rundle" brand are of like grade and quality. The hearing examiner reserved decision on respondent's motion pending completion of respondent's defense evidence on this issue.

By order dated April 17, 1963, in the *Universal-Rundle* case, the hearing examiner severed the issue of like grade and quality from all other issues in the proceeding, since it then appeared that a revolving of this issue might eliminate the need for the presentment of extensive proof and a lengthy check of the basic cost data by Commission's attorneys and accountants incident to respondent's cost justification defense which was not completed. Because of the severance order, the completion of respondent's cost evidence and Commission's cross-examination and a check of the cost data was thereby precluded. Therefore, all of the evidence relating to respondent's cost justification defense was stricken as irrelevant to the issue of "like grade and quality" without prejudice to its reinstatement as a part of the record on respondent's or Commission's motion in the event the hearing examiner's decision on the severed issue of like grade and quality is not affirmed.

The hearing examiner, after severing the issue of "like grade and quality" from all other issues in the *Universal-Rundle* proceedings, granted respondent's motion to dismiss the charges pertaining to the sale of "Homart" brand fixtures to Sears Roebuck & Co. upon a finding that such fixtures and the fixtures sold under the Universal-Rundle brand name were not of like grade and quality. Findings and conclusions with respect to this issue were made a part of the initial decision filed October 28, 1963. In this connection, the plumbing fixtures at issue under the severance order are vitreous china and enameled cast-iron bathroom fixtures and cast-iron kitchen sinks set forth in the initial decision of the hearing examiner in the *Universal-Rundle* case.

The only issues to be resolved, therefore, in the above-entitled case have been disposed of by the findings and conclusions in the initial decision of the hearing examiner in the companion case, *i.e.*, *In the Matter of Universal-Rundle Corp.*, Docket No. 8070. Obviously, if the Universal-Rundle Corp. is selling plumbing fixtures to Sears Roebuck & Co. under the brand name Homart at lower prices than plumb-

ing fixtures of grade and quality unlike those sold by respondent under the Universal-Rundle brand name, the respondent herein has not violated section 2(f) of the Clayton Act, as amended (U.S.C. Title 15, Section 13). Under these circumstances, in the absence of a 2(a) violation by the Universal-Rundle Corp., there can be no 2(f) violation by Sears and Roebuck in inducing the sale of the Homart brand products (pursuant to Sears and Roebuck's specifications) which are not comparable with the products otherwise marketed by Universal-Rundle.

Since the issue with regard to like grade and quality in the within case is identical to the issue resolved in the *Universal-Rundle* case and evidence has been completely adduced with regard to this issue in the prior proceeding (*Universal-Rundle Corp.*, Docket No. 8070) followed by a dismissal of that case, no advantage would be served in scheduling hearings for the purpose of reproducing the same evidence in the within case as was adduced in the *Universal-Rundle* case unless the Commission should decide that the hearing examiner has erred in dismissing the complaint in the *Universal-Rundle* case on the issue of like grade and quality. Consideration of respondent's motion to dismiss is therefore appropriate.

In view of the foregoing, the hearing examiner with the consent of counsel for the respondent Sears, Roebuck & Co., not a party to the prior *Universal-Rundle* proceedings,² takes official notice of his findings, conclusions and order, supported by the evidence of record, insofar as they relate to the issue of like grade and quality set forth in Part I of the initial decision in the *Universal-Rundle* case, Docket No. 8070. In taking official notice of such prior proceedings on the issue of like grade and quality, the hearing examiner is aware that he is taking cognizance of adjudicative facts in a prior proceeding and that in some cases this has been held to be questionable if any of the parties are prejudiced thereby. However, the resolving of the issue of like grade and quality in the *Universal-Rundle* case represents not only the law of that case, but also the law of the within case. Furthermore, no prejudice to the parties can be involved since respondent herein consents and the Commission was a party to the prior proceeding involving the identical issue to be herein resolved. Additionally, the provisions of this initial decision otherwise preclude any possibility of prejudice. Under these circumstances, particularly where the evidentiary facts do not appear to be materially in dispute,

² See written consent and waiver of further hearings by counsel for respondent dated October 23, 1963, which is made a part of the record herein.

although the conclusions to be drawn therefrom are, it has not been uncommon for the courts to take notice of facts adduced in a prior proceeding and disposition of prior cases. In fact, it is well established that the courts do take judicial notice of the nature of and disposition of prior cases,³ inclusive of findings and conclusions with supportive evidence of record. The Supreme Court has declared in many cases that "we take judicial notice of our own records."⁴ Indeed, in some cases the Supreme Court has quite freely taken judicial notice of evidence and other materials in records of other cases that happened to be immediately at hand.⁵

Logically, if judicial notice properly depends to some extent upon what is already in the court's possession, then official notice should depend to the same extent upon what is already in the agency's possession.⁶

Based on the evidence of record and the findings, conclusions and order, with reasons therefor, in the *Universal-Rundle* case, Docket No. 8070, relating to the severed issue of like grade and quality, of which official notice is taken,⁷ the hearing examiner is compelled to dismiss the complaint in the within case. The purpose of this procedure in the interest of due process is to avoid unnecessary delay in the issuance of the initial decision herein without prejudice, of course, to rights of (or incident to) appeal and the right of adducing any evidence whatsoever on any of the issues raised by the pleadings in the event the hearing examiner's decision is reversed and remanded. The taking of official notice of the prior related proceeding (with respondent's consent and waiver of further hearings under the aforesaid conditions) obviates the need for the adduction of further evidence at this time concerning the matters of which the hearing examiner has taken official notice in the absence of evidence to be adduced herein by the Commission other than that already adduced

³ *United States v. California Cooperative Canneries*, 279 U.S. 553, 555, 49 S. Ct. 423, 424, 73 L. Ed. 838 (1929); *Freshman v. Atkins*, 269 U.S. 121, 124, 46 S. Ct. 41, 42, 70 L. Ed. 193 (1925); *Aspen Mining & Smelting Co. v. Billing*, 150 U.S. 31, 38, 14 S. Ct. 4, 37 L. Ed. 986 (1893).

⁴ *Bienville Water Supply Co. v. Mobile*, 186 U.S. 212, 217, 22 S. Ct. 820, 822, 46 L. Ed. 1132 (1902). See also *Fritzen v. Boatmen's Bank*, 212 U.S. 364, 370, 29 S. Ct. 366, 368, 53 L. Ed. 551 (1909).

⁵ *National Fire Insurance Co. v. Thompson*, 281 U.S. 331, 50 S. Ct. 288, 74 L. Ed. 881 (1930); *United States v. Pink*, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942); see also *Moscow Fire Ins. Co. v. Bank of N.Y. & Trust Co.*, 280 N.Y. 286, 20 N.E. 2d 758 (1939), affirmed 309 U.S. 624, 60 S. Ct. 725, 84 L. Ed. 986 (1940).

⁶ Davis, *Administrative Law Treatise*, Vol. 2, page 384.

⁷ Section 8 of the Administrative Procedure Act requires all decisions to be premised on findings and conclusions, with reasons therefor.

Syllabus

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in the companion case (*i.e.*, *Universal-Rundle Corp.*, Docket No. 8070).^s The case is accordingly closed, and it is

ORDER

Ordered, That the complaint is herein and hereby dismissed.

FINAL ORDER

The hearing examiner having filed his initial decision herein on November 4, 1963, and counsel supporting the complaint having filed notice of intention to appeal from said decision on November 18, 1963, and thereafter having requested that the appeal be placed on suspense; and

The Commission, on December 13, 1963, having issued an order staying the effective date of the initial decision, and now having determined that the case should not be placed on its own docket for review; and

The Commission having considered a motion filed by respondent on July 10, 1964, requesting that the Commission vacate its order staying the effective date of the initial decision and that it adopt the initial decision as the decision of the Commission, and having determined that said request should be granted:

It is ordered, That respondent's motion be, and it hereby is, granted.

It is further ordered, That the initial decision of the hearing examiner, filed November 4, 1963, be, and it hereby is, adopted as the decision of the Commission.

IN THE MATTER OF

METROPOLITAN GOLF BALL, INC., ET AL.