

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

Docket 7604. Complaint, Oct. 1, 1959—Decision, Aug. 5, 1964

Order requiring a Dayton, Ohio, manufacturer of rubber and other products,
including automotive replacement parts made from rubber, to cease discrimi-

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nating in price in violation of Sec. 2(a) of the Clayton Act by selling its products at net prices higher than the net prices charged other direct purchasers who in fact compete in the resale of such products with purchasers paying the higher price; and also to cease violating the Federal Trade Commission Act by putting into effect any merchandising plan entered into with resellers of its products which has the effect of fixing the prices at which such products may be resold.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption thereof and hereinafter more particularly designated and described has violated and is now violating the provisions of subsection (a), Section 2, of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, Section 13), and Section 5 of the Federal Trade Commission Act (U.S.C., Title 15, Section 45), hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT ONE

PARAGRAPH 1. Respondent, The Dayton Rubber Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 2342 West Riverview, Dayton 1, Ohio.

PAR. 2. Respondent is now, and for many years last past has been, engaged in the manufacture, sale and distribution of a line of rubber and other products, including automotive products such as fan and other belts, radiator and other hose and tubing, mats and rugs, electrical tape, and merchandising aids such as cabinets and display racks.

Respondent's total sales of all products for the year 1957 were approximately \$84,000,000, and of automotive products, approximately \$4,300,000.

PAR. 3. Respondent manufactures its products at its factory located in Dayton, Ohio, from which point such products are, when sold, transported either directly or through field warehouses to several hundred franchised wholesalers located throughout the United States, some of said franchised wholesalers being mere bookkeeping devices by means of which groups of purchasers in effect purchase directly from respondent. Such wholesalers in turn resell such products to dealers and to jobber wholesalers for resale to dealers. Respondent exercises such a degree of control over sales by said franchised wholesalers to said jobber wholesalers as to render such sales in all essential respects

sales by respondent. Said dealers either use such products or resell them to consumers.

There is and has been at all times mentioned herein a continuous current of trade and commerce in said products across state lines between their point of origin and respondent's customers. Said products are sold and distributed for use, consumption and resale within various states of the United States and the District of Columbia. Thus respondent is engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, respondent is now and during the times herein mentioned has been in substantial competition with other corporations, partnerships, individuals and firms engaged in the manufacture, sale and distribution of automotive products.

Respondent's franchised wholesalers are competitively engaged with each other, with their customers, and with each other's customers in the resale of said products within the various trading areas in which they are engaged in business.

PAR. 5. Respondent, in the course and conduct of its business, as above described, has been for many years last past, and now is, discriminating in price, directly or indirectly, between different purchasers of automotive products, who are in competition with each other, by selling said products of like grade and quality to some of such purchasers at substantially higher prices than to other of such purchasers.

PAR. 6. Among the methods by which respondent discriminates between said purchasers are the following:

(a) Granting rebates and allowances of up to 20% off its wholesaler price schedule to some of its direct wholesaler purchasers while denying such rebates and allowances to other such wholesaler purchasers; and

(b) Charging its indirect wholesaler purchasers prices which are up to approximately 25% higher than the prices it charges its direct wholesaler purchasers.

PAR. 7. The effect of such discriminations in price as alleged herein may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and its customers are respectively engaged; or to injure, destroy or prevent competition with respondent or with purchasers therefrom who receive the benefit of such discriminations.

PAR. 8. The aforesaid acts and practices of respondent constitute

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violations of the provisions of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, Sec. 13).

COUNT TWO

PAR. 9. The allegations of Paragraphs One through Four, inclusive, of Count I of this complaint are hereby adopted, and incorporated herein by reference and made a part of this Count II as if they were repeated herein verbatim.

PAR. 10. In the course and conduct of its business, respondent has required, and does require, its customers, both direct and indirect, to enter into, and they have entered into, agreements or understandings with respondent to resell such products at prices fixed by respondent.

PAR. 11. In the course and conduct of its business, respondent likewise has required, and does require: (1) its direct customers to enter into, and they have entered into, agreements or understandings with respondent to resell said products only to such purchasers as are approved by respondent; (2) its indirect customers to enter into, and they have entered into, agreements or understandings with respondent to purchase said products only from certain direct customers; and (3) some of its direct customers to enter into, and they have entered into, agreements or understandings with respondent to resell said products only to wholesalers.

PAR. 12. Respondent has enforced, or attempted to enforce, the foregoing agreements or understandings through, and by means of, various acts and practices. The specific results or effects thereof have been or may be:

(1) To eliminate or severely restrict price competition between respondent's customers, both direct and indirect;

(2) To prevent respondent's direct customers from exercising their free choice in selecting their customers;

(3) To restrain competition, including price competition, in the sale of respondent's products between said direct customers;

(4) To prevent respondent's indirect customers from exercising their free choice in selecting their suppliers; and

(5) To restrain competition, including price competition, between, on the one hand, respondent's direct customers and, on the other hand, other sellers of respondent's products and sellers of similar products produced by other manufacturers.

PAR. 13. In the manner above described, and otherwise, respondent has entered into and maintained agreements and understandings with

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its customers, both direct and indirect, which have had and do have a tendency of unduly hindering and restraining competition, including price competition, and trade in the sale and distribution of said products.

PAR. 14. Said agreements and understandings and the acts and practices, performed thereunder or pursuant thereto, as alleged, are to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Brockman Horne for the Commission.

Pickrel, Schaeffer and Ebeling, Dayton, Ohio, by *Mr. Norman L. Schwartz* and *Mr. Gordon H. Savage*, for the respondent.

INITIAL DECISION BY WILMER L. TINLEY, HEARING EXAMINER

JUNE 11, 1963

The Federal Trade Commission, on October 1, 1959, issued and subsequently served its complaint charging The Dayton Rubber Company with price discriminations in violation of subsection (a) of Section 2 of the Clayton Act, as amended; and with requiring its customers to enter into agreements with it which restrained competition, including price competition, in the resale of its products, in violation of Section 5 of the Federal Trade Commission Act. On May 2, 1960, after various motions and extensions of time, answer was filed on behalf of Dayco Corporation (the present name of respondent corporation), denying the violations alleged in the complaint.

Pursuant to notice filed by counsel for the parties, an order was filed on September 8, 1961 by the Director, Hearing Examiners, transmitting the proceeding to the Secretary of the Commission for reference to the Office of Consent Orders. Thereafter the proceeding was returned to the Director, Hearing Examiners, and on November 16, 1961 the present hearing examiner was designated in the place and stead of the hearing examiner originally designated.

On March 8 and 9, 1962, a prehearing conference was held in Washington, D.C., the transcript of which, by agreement of counsel, was made a part of the public record herein. Hearings were thereafter held in support of the complaint in Dayton, Ohio, on April 9, 10, and 11, 1962. On motion by counsel supporting the complaint, over the opposition of counsel for respondent, the hearing examiner, on June 14, 1962, entered an order taking official notice of certain facts, and granting the parties opportunity, in the regular course of presenting evi-

dence, to disprove such facts, or to prove that they have other or special meanings or applications for the purposes of this proceeding. Without further hearings, counsel supporting the complaint then rested his case-in-chief on July 20, 1962.

On August 9, 1962, counsel for respondent filed a motion to dismiss the complaint, supported by a memorandum filed on August 30, 1962, which was opposed by counsel supporting the complaint in an answer filed September 19, 1962. On October 9, 1962, the hearing examiner entered an order denying the motion to dismiss the complaint. Defense hearings, previously postponed on motion by counsel for respondent, were held in Dayton, Ohio, on January 22, 1963. At the request of counsel for respondent, a continuance was allowed pending the outcome of an appeal from the hearing examiner's denial of an application for issuance of a subpoena duces tecum to the Secretary of the Commission. The Commission's order denying said appeal was served on March 6, 1963, and no application for further hearings having been filed, the record was closed for the reception of evidence as of March 13, 1963.

Only two witnesses testified in this proceeding, the sales manager of the Automotive Wholesalers Department, Dayco Corporation, and the senior member of the law firm representing respondent. The transcript of testimony, including the prehearing conference, covers 423 pages. The evidence includes stipulations by counsel, the testimony of two witnesses, extensive documentary evidence, and facts which were officially noticed. Proposals and replies thereto have been timely filed by the parties.

After having carefully considered the entire record in this proceeding and the proposals and contentions of the parties, the hearing examiner issues this initial decision. The limited specific citations to the transcript of testimony (abbreviated Tr.) and to the exhibits (abbreviated CX or RX) are intended to be convenient guides to certain of the evidentiary support of particular findings, and do not represent complete summaries of the evidence which was considered. Findings proposed by the parties, which are not adopted herein, either in the form proposed or in substance, are rejected as not being supported by the record or as involving immaterial matters.

FINDINGS OF FACT

1. Respondent Dayco Corporation (formerly known as The Dayton Rubber Company) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 333 West First Street,

Dayton, Ohio. The name of the respondent was changed from The Dayton Rubber Company to Dayco Corporation after the complaint was issued, but before the answer thereto was filed. For convenience and consistency, respondent will be referred to herein as Dayco, including references to the period before its name was changed.

2. Dayco is now and for many years has been engaged in the sale and distribution of a line of rubber and other products, including automotive products. The total sales of all products by Dayco for the year 1957 were approximately \$84,000,000, and of automotive products, approximately \$4,300,000. Besides automotive products, the products sold by Dayco include heavy duty belting, industrial hose, foam rubber, plastics and aircraft seating.

3. The Automotive Wholesalers Department (formerly known as the Mechanical Goods Division) of the Rubber Products Division of Dayco sells automotive fan and other belts, automotive radiator and other hose and tubing, fractional horsepower belts, automotive mats and rugs, electrical tape, and merchandising aids such as cabinets and display racks. Its sales of automotive products are for replacement purposes, and not for original equipment. The great bulk of its total sales is represented by belts and hoses (Tr. 282, 353-4), and its line of products consists of items of only one grade and quality (Tr. 64). The products sold by this department will be referred to herein generally as automotive products.

4. The gross sales of the Automotive Wholesalers Department for the respective years ending October 31st were \$7,061,533.58 in 1958; \$5,316,401.24 in 1959; \$5,315,543.77 in 1960; and \$5,379,188.85 in 1961 (CX 28). At the present time the sales of the Automotive Wholesalers Department represent approximately 8% to 9% of the total sales of all products by Dayco (Tr. 399). The operations of that department have not been very profitable in the past several years, an actual loss having occurred in 1960, which was described as a "disastrous year" (Tr. 281-2).

5. Prior to 1950, Dayco had 15, and it now has 6 warehousing points located throughout the United States, from which its automotive products are distributed. From factories located in Springfield, Missouri, and Waynesville, North Carolina, and from other locations, Dayco ships automotive products either directly to its customers located in the various States of the United States, or to its warehousing points, from which it then ships said products to its customers.

6. There is, and has been at all times mentioned herein, a continuous current of trade and commerce in said products across State lines between their point of origin and Dayco's customers. Said prod-

ucts are sold and distributed for use, consumption and resale within the various States of the United States and the District of Columbia. Dayco is engaged in commerce as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act.

7. In the course and conduct of its business, Dayco is now, and during the times herein mentioned has been, in substantial competition with other corporations, partnerships, individuals and firms engaged in the manufacture, sale and distribution of automotive products. Dayco's customers are competitively engaged with each other, with their customers, and with the customers of each other in the resale of said products within the various trade areas in which they are engaged in business.

8. Dayco's principal competitor accounts for approximately 60% to 65% of the total sales volume of the market in which the Automotive Wholesalers Department of Dayco competes. Dayco's Automotive Wholesalers Department is second in that market with approximately 15% of the sales volume. The balance of that market is represented by several smaller competitors (Tr. 396).

9. The evidence herein with respect to the acts and practices of Dayco relates only to the operations of the Automotive Wholesalers Department of its Rubber Products Division. The personnel in that department who determine questions of prices and distribution have nothing to do with such matters in other departments of the company. The products sold by that department and the customers to which it sells are also different from the products and customers of the other divisions and departments of Dayco (Tr. 399-400). The issues herein, accordingly, relate only to the activities of the Automotive Wholesalers Department, and, unless otherwise specifically indicated, further references herein to Dayco are intended to refer only to its Automotive Wholesalers Department.

10. For a substantial period of time prior to September, 1958, Dayco sold its automotive products directly to jobbers or distributors (CX 27). Some of its direct customers resold the products only to other jobbers who, in turn, resold to dealers, such as gasoline stations and garages, who supply the products to consumers. Others of its direct customers sold only to dealers, and still others sold both to other jobbers and to dealers. Dayco did not make any sales directly to dealers. Sales by Dayco to its direct customers were made at the same list prices with no variation based on quantity, but with certain discounts or rebates, referred to herein as service credits, on products resold to other jobbers.

11. Dayco's direct customers, classified as "AA Jobbers," received a service credit on most items of 15% on sales which they made to other jobbers, classified as "A Jobbers," at prices not more than 5% above their list prices from Dayco. The service credit was only 10% on some items such as car rugs, but, since the great bulk of Dayco's sales is represented by the items to which the 15% service credit applied (Tr. 87-8, 351-4), the discussion herein will relate only to that credit. No service credit was allowed by Dayco on sales by its direct customers to dealers.

12. In order to obtain the service credit, Dayco's direct customers were required to make periodic reports to Dayco showing their sales to other jobbers, which reports showed the jobbers to whom, and the prices at which, such sales were made. If the sales were made at prices more than 5% above Dayco's list prices to its direct customers, the service credit was not allowed because the higher price indicated sales to a dealer and not to a jobber. If the sales were made at lower prices, the service credit was allowed, but Dayco discouraged such sales by pointing out to its direct customers in those instances that the lower price was causing their profit to disappear.

13. The direct customers of Dayco who sold only to other jobbers, normally received a service credit on all of their sales of Dayco's automotive products. In May, 1958, Dayco eliminated reports of sales to other jobbers by such customers, and started billing them at net prices which reflected deduction of the 15% service credit (CX 6A-L; Tr. 89-91, 384-5). The direct customers of Dayco, who sold only to dealers, did not receive the service credit on any of their sales of Dayco's automotive products. The direct customers of Dayco, who sold both to jobbers and to dealers, normally received the service credit only on sales of Dayco's automotive products which they made to other jobbers as shown by their period reports to Dayco.

14. It is apparent, therefore, that all of Dayco's direct customers purchased its products at the same prices for resale to other jobbers; and that indirect jobbers, that is, jobbers who purchased from Dayco's direct customers, normally paid a price 5% higher for Dayco products than the jobbers who purchased directly from Dayco.

15. In September, 1958, Dayco made changes in its system of distribution and prices which have continued in effect since that time. Under the system then adopted Dayco classified as warehouse distributors its direct customers who sell its products only to wholesalers and who make no sales of such products to dealers; and it classified as wholesalers its direct customers who sell its products only to

dealers or both to dealers and to other wholesalers, referred to as non-direct wholesalers (CX 26).

16. Warehouse distributors make all of their purchases from Dayco at the warehouse net price schedule, which contains prices approximately 20% lower than Dayco's prices to wholesalers. Since Dayco is satisfied that they sell only to wholesalers, it does not require them to make reports showing that all of their sales of its products are made to wholesalers. When direct wholesalers report sales of Dayco products to non-direct wholesalers, Dayco grants them a service credit of 20% on such sales.

17. It is apparent, therefore, that in selling to non-direct wholesalers, warehouse distributors and direct wholesalers purchase Dayco products at the same prices; and that in selling to dealers, direct and non-direct wholesalers purchase Dayco products at the same prices. The major effects of the changes made in September, 1958, were to increase the service credit for resales to other jobbers from 15% to 20%, and to eliminate the 5% price differential between indirect jobbers and Dayco's direct customers who resold its products to dealers.

Price Differential Between Direct and Indirect Jobbers

18. Counsel supporting the complaint contends that the 5% price differential on Dayco products between direct and indirect jobbers who competed with each other in selling such products to dealers constituted price discrimination by Dayco in violation of Section 2(a) of the Clayton Act.

19. Counsel for respondent contend that there is a failure of proof on this issue because: (a) the record does not show contemporaneous sales to competing direct and indirect jobbers; (b) the record does not show the proscribed effects of the 5% differential; and (c) the indirect jobber cannot be considered a customer of Dayco, since the record establishes that Dayco did not control the terms upon which indirect jobbers purchased from direct jobbers. Counsel for respondent also contend that this 5% differential is not relevant to this proceeding because it was discontinued in September, 1958, and has not been resumed.

20. During the period before September, 1958, Dayco had about 4,000 direct customers. About 150 of its direct customers sold only to jobbers, and the others sold only to dealers, or both to other jobbers and to dealers (Tr. 92-3, 96).

21. From the evidence as a whole, it is clear that each of the direct customers of Dayco who sold both to jobbers and to dealers, operated in a particular trading area, frequently embracing a city or metropolitan

area, or cities and towns in geographic proximity, and that in many instances the trading areas of two or more of them coincided or overlapped. The testimony discloses that such direct customers were selling to other jobbers and to dealers at the same time (Tr. 94), and that the line of Dayco products which they sold consisted of items of only one grade and quality (Tr. 64). It must necessarily be inferred that both the indirect jobbers and the dealers to whom each such direct customer of Dayco sold were located throughout the particular trading areas involved.

22. It was officially noticed that "Automotive parts jobbers located in the same cities and metropolitan areas, and in cities and towns in geographic proximity, are in competition with each other" (Section 3(a), Official Notice Order, 6/14/62, abbreviated ON 3(a)). Direct customers of Dayco who sold both to jobbers and to dealers were, therefore, in competition with their jobber customers in selling Dayco products of the same grade and quality to dealers. Such direct customers of Dayco received 5% lower prices on such products than the indirect jobbers with whom they competed in selling to dealers.

23. The evidence does not show contemporaneous sales of specific items of the Dayco line to competing direct and indirect jobbers. From the evidence as a whole, however, it is clear that both the direct and indirect jobbers were being supplied with Dayco products on a prompt, efficient and continuing basis as needed, and that they were not required to purchase in any particular quantities or to carry large inventories. In such circumstances, it necessarily follows that contemporaneous sales of Dayco products were regularly made to competing direct and indirect jobbers. Such sales involved a line of products, primarily belts and hoses, consisting of items of only one grade and quality, and constitute contemporaneous sales of products of like grade and quality. (*Moog Industries, Inc. v. F.T.C.*, 238 F. 2d 43, decided 1956.)

24. It was officially noticed that the automotive parts industry is a highly competitive business involving small margins of profit; that typically automotive parts jobbers realize a net profit after taxes of less than 5%; and that discounts as small as 2% are of the utmost economic importance to such jobbers' competitive existence (ON 3(b)). In the absence of countervailing evidence, such officially noticed facts establish that the effect of the 5% differential herein question may be substantially to lessen competition between competing direct and indirect jobbers of Dayco products.

25. Counsel for respondent argue, however, that "Jobbers who purchased at the higher price could, in effect, have a lower net cost of acquisition due to not having to purchase directly from Dayco" (CR

proposal #25). This contention is based upon testimony to that effect by Dayco's sales manager, who discussed in some detail his opinion concerning the advantages and economies to jobbers of buying indirectly rather than directly from Dayco.

26. These advantages were pointed out by Dayco to direct jobbers in an effort to persuade them to buy from other jobbers rather than directly from Dayco, and thus to reduce the number of Dayco's direct customers. The Dayco official testified that at one time the company had 4,000 direct customers, and that it was able to convince all but 1,000 to become indirect jobbers and to buy their goods locally (Tr. 368-9). He also testified, however, that just prior to the elimination of the 5% differential in September, 1958, Dayco was selling to approximately 4,000 direct customers, of which 150 sold only to jobbers (Tr. 92-3, 96). It is apparent, therefore, that it was not until after the 5% differential was eliminated that the dramatic reduction in the number of Dayco's direct customers occurred.

27. The record does not contain cost studies or other reliable data to show that by buying Dayco products indirectly jobbers effected economies which eliminated the competitive disadvantages of the 5% higher price which they paid. The contention with respect to such economies is based entirely upon the opinion testimony of an official of Dayco. This, of course, cannot be accepted as a reliable analysis or appraisal of economies which may have been effected by Dayco's customers.

28. The only reasonable inference which can be drawn from the evidence in the record is that many of Dayco's direct jobbers were unwilling to become indirect jobbers until the price disadvantage of indirect jobbers was eliminated. Thereafter, there was a substantial reduction in the number of Dayco's direct customers and presumably a substantial increase in the number of indirect jobbers. These circumstances support the showing that the effect of the 5% differential may be substantially to lessen competition between competing direct and indirect jobbers of Dayco products.

29. Dayco granted a 15% service credit to its direct customers on their sales to jobbers at prices not more than 5% above their list prices from Dayco. This service credit effectively prevented sales by Dayco's direct customers to indirect jobbers at prices higher than 5% above Dayco's list prices to its direct customers.

30. By agreement with both the direct and indirect jobbers, Dayco established the prices at which its products would be sold to, and purchased by, the indirect jobbers; and by correspondence and consultation it actively discouraged its direct jobbers from selling to indirect

jobbers at lower prices. Although Dayco did not disallow the service credit or discontinue selling to direct jobbers who sold at lower prices, it was in relatively few instances that direct jobbers continued to sell to indirect jobbers at prices lower than the 5% differential after being discouraged from doing so by Dayco (Tr. 383-4, 406-10).

31. The record establishes, therefore, that Dayco effectively controlled the prices at which indirect jobbers purchased from its direct customers. As will appear in a later section of this decision, Dayco also participated in soliciting the business of, and in negotiating with, indirect jobber accounts, and in assisting its direct customers in selling to them. The indirect jobbers were, accordingly, indirect customers of Dayco, and were "purchasers" within the meaning of Section 2(a) of the Clayton Act. (*American News Co., et al. v. F.T.C.*, 300 F. 2d 104, February 7, 1962, and the cases there cited.)

32. The 5% differential on Dayco products between direct and indirect jobber customers of Dayco who competed with each other in selling such products to dealers, constituted price discrimination by Dayco between different purchasers in violation of Section 2(a) of the Clayton Act.

33. Counsel for respondent contend, in effect, that the price differential between direct and indirect jobbers has been discontinued and is not likely to be renewed. They urge that the changes in Dayco's sales and pricing policies in September, 1958, which, among other things, eliminated the 5% price differential between direct and indirect jobbers, were made prior to any knowledge by Dayco that it was being investigated by the Federal Trade Commission; that the record indicates "that there would be no inclination, desire, or intention of Dayco to return to those practices which have been discontinued"; and that an order based on such practices would not be in the public interest (CR proposals, p. 4).

34. The record indicates that the first contact by a representative of the Commission with Dayco in the investigation which resulted in this proceeding was on September 8, 1958 (CX 24 and 25), and, so far as the record discloses, this is the first knowledge respondent had that its sales and pricing policies were being questioned by the Commission. The changes in Dayco's pricing and marketing system were made effective on September 17, 1958, and it is apparent that such changes had been under discussion at least a week before that date (CX 13 and 14).

35. Counsel supporting the complaint points to certain very persuasive considerations tending to indicate that Dayco did not decide to make the changes until after it had knowledge that its sales and

pricing practices were being questioned by the Commission (CSC proposals, pp. 38-41). These are, however, circumstantial considerations, and there is no direct evidence that Dayco did not decide to change such practices until after it was aware of the Commission's investigation.

36. In a letter dated September 17, 1958, the senior member of the law firm representing Dayco advised the attorney of the Commission who made the inquiry that "a new plan has been adopted prior to any inquiry from the Federal Trade Commission" (CX 24A). On the same date, Dayco's attorney also wrote to a member of the Commission, stating in part: "Now it so happens that prior to the knowledge of our client to such investigation, it had changed its entire method of distribution and was now following an entirely new and different pattern altogether" (CX 25B). The same attorney of Dayco testified as a defense witness in this proceeding, but he was not questioned concerning the foregoing statements in his letters to the Commissioner and the Commission's attorney.

37. In direct contradiction of the circumstantial considerations discussed by counsel supporting the complaint, a reputable and responsible attorney representing Dayco, in reply to an official inquiry by the Commission, made definite statements to the effect that the changes in question had been adopted prior to Dayco's knowledge of the Commission's investigation. Certainly he was in position to know whether or not those statements were accurate, they were made in a context which disclosed that he considered them to be material and important, and no question has been raised concerning his honesty. In such circumstances, the statements made by Dayco's attorney during the early stages of the Commission's investigation, which were put in evidence by counsel supporting the complaint, must be accorded greater weight and probative value than the circumstantial considerations to the contrary.

38. The record shows, therefore, that Dayco was in the process of changing its sales and pricing policies and practices, and that it had decided to eliminate the 5% price differential between its competing direct and indirect jobbers, prior to its knowledge of an investigation of its practices by the Commission. The record does not show that the 5% differential was eliminated because Dayco considered it to be unlawful or otherwise improper, but the nature and extent of the changes made at that time make it improbable that such differential will be renewed in the same form in future. There is nothing to indicate, however, that changes which may be made in the sales and pricing policies of Dayco at some future time, will not result in similar price differences between competing purchasers of its products.

Buying Groups

39. Counsel supporting the complaint contends, in effect that Dayco has discriminated in price among jobbers who compete in selling its products to dealers by selling to what are commonly known as buying groups of jobbers at prices 15% to 20% lower than to other jobbers who sell such products to dealers.

40. One such buying group of jobbers was Automotive Jobbers, Inc., Dallas, Texas (sometimes herein referred to as AJI), a membership organization formed in 1954 and operated by and for its jobber members (ON 1(d)). It was operated for the purpose of inducing the granting or allowance of lower and more favorable prices by manufacturers and sellers of automotive products and supplies, and it served only jobber members. Participation of said jobber members in the net income of AJI was based on a percentage of their individual purchases through the group organization (ON 1(e)).

41. In actual practice, members of the group purchased and sold most of the particular manufacturers' lines accepted and handled by the group (ON 1(f)). Purchase transactions between the supplier and the individual jobber members were billed to and paid for through AJI, but it served only as agent for the several jobber members, and as a bookkeeping device for facilitating the inducement and receipt by the jobber members of the prices, discounts and rebates concerned (ON 1(g)).

42. When a jobber member purchased products from a line stocked in the group warehouse an order was sent to AJI, which either procured the merchandise from the supplier or filled the order from its own warehouse stock. Sometimes a jobber member would receive a so-called "slot" shipment, that is, merchandise shipped by the supplier to the AJI warehouse, and immediately shipped by AJI to the jobber member in the same package. Many suppliers also "drop shipped" directly to the jobber members. The jobber members of AJI were charged a warehouse fee of 5% on purchases made from the group warehouse, and 2% on "slot" shipments, to help offset the cost of operating the warehouse (ON 1(k)).

43. The jobber members of AJI demanded to be classified as a warehouse distributor (ON 1(l)). The warehouse distributor's discount was a discount paid to distributors on automotive products resold to other jobbers. The warehouse distributor's discount or rebate on the aggregate purchases of said jobber members was paid to AJI which, in turn, distributed the net after deduction of operating expenses to the jobber members in proportion to their individual purchases (ON 1(m)).

44. Dayco began dealing with AJI on August 9, 1954, and continued to do so until February 1, 1962, when AJI combined with another buying group to become Alto Warehouse, Dallas, Texas (CX 33). The record shows the total sales of Dayco to AJI in each of the years 1957 through 1960, such sales amounting in 1957 to over \$57,000, and in each of the other three years to approximately \$40,000. In 1957 and 1958, all of Dayco's sales to AJI were shipped directly to the several members. In 1959 its shipments directly to the members amounted to \$12,018, and to the AJI warehouse, \$27,778; and in 1960, its shipments directly to the members amounted to \$21,784, and to the warehouse, \$19,149 (CX 34A; Tr. 200-02).

45. During the years 1957 through 1960, all sales by Dayco were made to AJI at the prices applicable to Dayco's direct customers for resale to other jobbers, sometimes referred to as the warehouse distributor's price. On the great bulk of its sales, these prices prior to September, 1958 were 15% less than Dayco's prices to its direct jobbers for resale to dealers, and approximately 20% less than the prices paid by its indirect jobbers; and after September, 1958, these prices were 20% less than Dayco's prices to its direct and indirect jobbers for resale to dealers (Tr. 215-19). The record shows in detail for the years 1958, 1959 and 1960 the amount of Dayco's total sales to AJI, the service credit or net prices applicable to such sales, and the amount of Dayco's direct shipments to each of the several members of AJI (CX 35A-B; Tr. 202-20).

46. In 1958, all of Dayco's sales to AJI were shipped directly to its members, but in 1959 over two-thirds, and in 1960 approximately half of its sales to AJI were shipped to the AJI warehouse (CX 34A; Tr. 200-02). In 1958, therefore, the total purchases of Dayco products by each member of AJI are shown in the direct shipments on CX 35A, but in 1959 and 1960 some or all of the members purchased Dayco products in addition to the direct shipments to them shown on CX 35A.

47. It is clear from the record that many jobber members of AJI purchased Dayco products in 1958, 1959 and 1960, and that on all such purchases they received substantially lower prices than other direct or indirect jobbers who did not receive the service credits, or equivalent net prices, on Dayco products. Such price advantages on the bulk of Dayco products were from 15% to 20% before September, 1958, and 20% thereafter, less such warehouse and "slot" shipment fees and operating expenses as were deducted by AJI. The extent of these deductions is not specifically shown, but, in view of the purposes of AJI, and the scope and nature of its operations, it must be inferred

that the net price advantages of its jobber members on Dayco products were substantial.

48. Thirteen automotive parts jobbers were officially noticed as members of AJI "In September, 1959, and for a substantial period of time since its organization, * * *." (ON 1(c)). Counsel for respondent objects that such official notice departs from the initial decision on which it is based by referring to the time of membership of such jobbers as September, 1959 "and," instead of "or," for a substantial period of time since its organization (CR proposals, p. 19). This departure from the initial decision on which it was based was intentionally made in the official notice order because it appeared correctly to reflect the meaning of the initial decision insofar as it was relevant to this proceeding. Counsel for respondent offered no evidence to show that such officially noticed facts were not accurate.

49. Counsel supporting the complaint contends, on the other hand, that two additional jobbers should have been officially noticed as members of AJI (CSC proposals, fn. p. 20). The reasons for not doing so are set out in the hearing examiner's order of October 9, 1962.

50. Upon a more critical examination of the record herein, it is apparent that the membership of AJI during all or part of the period 1958 through 1960 included at least seven jobbers in addition to those officially noticed. It was officially noticed that AJI "is a membership corporation serving only jobber members" (ON 1(e)). CX 35A contains "a list of accounts serviced by Automotive Jobbers, Inc., and direct shipments made to such accounts for the years 1958 through '60" (Tr. 203). That is a list of twenty accounts, including the thirteen officially noticed members of AJI and the two additional jobbers referred to by counsel supporting the complaint. Since AJI served only jobber members, the record establishes that all of the accounts listed on CX 35A were jobber members of AJI when they received direct shipments from Dayco in 1958, 1959 and 1960.

51. CX 35A discloses that in one or more of the years 1958, 1959 and 1960 five members of AJI were located in Dallas, and one was located in each of the cities or towns of Garland, Fort Worth, Lubbock, Hillsboro, and San Angelo, Texas, and Shreveport, Louisiana. It also discloses that members of AJI were located in other places not here relevant.

52. CX 35C discloses that in 1958 two direct customers of Dayco who made substantial sales of its products to dealers, and who were not members of AJI, were located in Dallas, one was located in Fort Worth and two were located in Lubbock, and that those customers

also made some sales to jobbers. CX 35C also discloses that in 1959 six direct customers of Dayco who made substantial sales of its products only to jobbers, and who were not members of AJI, were located in Dallas, two were located in Fort Worth, and two were located in Lubbock; and that in 1960 seven such direct customers were located in Dallas, three in Fort Worth, and two in Lubbock.

53. CX 35D discloses that three direct customers of Dayco who made substantial sales of its products to dealers in one or more of the years 1958, 1959 and 1960, and who were not members of AJI, were located in Dallas, two were located in Fort Worth, one was located in Slaton, and one in Cleburne, Texas, and one was located in Shreveport, Louisiana.

54. Undoubtedly the direct customers of Dayco shown on CX 35C and D who sold Dayco products to other jobbers, made a substantial part of such sales to jobbers in the same trading areas (Tr. 209), and at prices substantially higher than the prices paid by members of AJI for such products.

55. The members of AJI located in Dallas and Garland, Texas, who purchased Dayco products, resold such products to dealers in competition with the direct and indirect jobbers of Dayco located in Dallas. The member of AJI located in Fort Worth, Texas, who purchased Dayco products, resold such products to dealers in competition with the direct and indirect jobbers of Dayco located in Fort Worth; such member located in Lubbock resold in competition with such jobbers located in Lubbock and Slaton, Texas; such member located in Hillsboro resold in competition with the direct jobber located in Cleburne, Texas; and such member located in Shreveport, Louisiana, resold in competition with the direct jobber located in Shreveport (ON 3(a) (1)-(7)).

56. Counsel supporting the complaint also contends that the AJI member located in San Angelo, Texas, competed with an indirect jobber in San Angelo, Moore Parts, shown on CX 43B (CSC proposals, pp. 19-21). The contract with the direct jobber, Duncan & Company, Fort Worth, Texas, who sold to Moore Parts, is dated February 21, 1952, however, and there is no showing or sound basis for an inference that Dayco products were sold to Moore Parts by Duncan in 1958, 1959 or 1960 (CX 43A and B; Tr. 175-6, 418-19).

57. The record discloses, therefore, that during the years 1958, 1959 and 1960 members of AJI, who sold Dayco products to dealers, were in substantial competition with direct and indirect jobbers who also sold Dayco products to dealers. AJI members received from Dayco net prices on Dayco products which were substantially lower than the

prices received directly or indirectly from Dayco by the jobbers with whom they competed in selling such products to dealers.

58. The automotive parts industry is a highly competitive business involving small margins of profit, and discounts as small as 2% are of the utmost economic importance to the competitive existence of automotive parts jobbers (ON 3(b)). The effect of Dayco's price discriminations in favor of members of AJI, therefore, may be substantially to lessen competition between such members and other direct and indirect jobbers of Dayco products. Such price discriminations, accordingly, constituted violations of Section 2(a) of the Clayton Act.

59. Counsel for respondent contend, in effect, that Dayco dealt with AJI as principal, and not as an undisclosed agent for its members, and that Dayco should not be charged with knowledge of the relationship between AJI and its jobber members (CR proposals, p. 24). Counsel and the record make it clear, however, that Dayco has long been aware of the "buying group problem," and that Dayco has endeavored to determine how it could deal with buying groups without violating the law (CR proposals, p. 26; Tr. 310-13, 336-49).

60. The Dayco official who testified displayed considerable familiarity with the buying groups of jobbers and how they operate. He was aware that Dayco sold to so-called buying groups, he was able to name several of its accounts which he understood to be buying groups, including AJI, and to the best of his knowledge and belief the sixteen accounts of Dayco listed on CX 33 were buying groups (Tr. 190-200, 389-92). While he was not familiar with the details of their internal organizations, he had a general familiarity with their purposes and methods of operation.

61. The essential thrust of the argument by counsel for respondent is not that Dayco is unable to identify buying groups with reasonable confidence, but that it must be a "vigorous competitor," and that it cannot compete "backing up." It is argued that "Mere suspicions cannot realistically serve as the criteria for Dayco to make judgments which may determine whether they shall survive in this fiercely competitive market," and it is urged that Dayco has been unable to ascertain "criteria by which to judge the Commission's view as to the legality of concerns who want to buy Dayco's products" (CR proposals, pp. 26-27).

62. It is argued, in effect, that Dayco must sell to buying groups on their terms, or not sell to them. The dilemma thus confronted by Dayco is undoubtedly a serious one. It was estimated that 20% to 25% of its sales are made to the buying groups listed on CX 33; that, if Dayco did not sell to these groups at prices applicable to products for

resale to jobbers, its competitors would do so; and that in such event Dayco would be eliminated as a competitor in the sale of automotive products (Tr. 310-13, 395-7). The dilemma confronted by Dayco, however, cannot be resolved by permitting it to continue to violate the law because its competitors may be doing so.

63. In dealing with AJI, Dayco was aware that it was a buying group of jobbers, and that serious questions had been raised as to whether or not the granting of quantity and warehouse discounts to such groups constituted unlawful price discriminations. It clearly had reason to believe that its prices to AJI may be unlawful.

64. Insofar as suppliers continue to grant discounts in such circumstances, and buying groups continue to induce and receive them, the legality of the prices involved in particular situations must be determined on a case-by-case basis. This proceeding involves such a situation, and it has established that the prices granted by Dayco to AJI are unlawfully discriminatory. An appropriate order terminating the violations is, therefore, required.

65. Counsel supporting the complaint persuasively argues that the record also shows that Dayco sold its products to fifteen other buying groups at the same prices and under the same terms and conditions as to AJI, and with similar competitive effects (CSC proposals, pp. 6-9). The record does not contain any reliable evidence, however, showing the internal organizations and methods of operation of such other buying groups. The testimony and other evidence provide a basis for suspecting that the other buying groups operate in much the same fashion as AJI; and that, in selling to them at prices applicable to products for resale to jobbers, Dayco granted similar price advantages to their members with similar competitive effects. But the record does not, either directly or by sound inference, establish such suspicions as facts. Accordingly, it cannot be concluded on this record that Dayco has granted unlawful price discriminations to other buying groups or their members.

Count II

66. Count II of the complaint charges that Dayco required its direct and indirect customers to enter into agreements or understandings with it to resell its products at prices fixed by Dayco; that it required its direct customers to enter into agreements or understandings with it to resell such products only to purchasers approved by Dayco; that it required its indirect customers to enter into agreements or understandings with it to purchase such products only from certain direct customers; and that it required some of its direct customers to enter

into agreements or understanding with it too sell such products only to wholesalers. It also charges that Dayco enforced or attempted to enforce such agreements or understandings by various acts and practices; that the effects have been or may be to restrain competition in several ways; and that such agreements and understandings and the various acts and practices pursuant thereto violate Section 5 of the Federal Trade Commission Act.

67. Prior to September, 1958, Dayco entered into agreements with its direct customers, appointing them as its representatives and granting them the right to buy and sell Dayco automotive products (CX 9). With its direct customers who resold such products only to jobbers, designated as 100% redistributors, this agreement was supplemented with a letter agreement (CX 10A-B; Tr. 107-8) which, in effect, provided, among other things, that the customer would distribute Dayco products only to outlets approved by Dayco; that salesmen of Dayco and of the customer would participate and assist in obtaining such outlets and in closing agreements with them; that the forms for such agreements would be supplied by Dayco; that sales to such outlets would be made at the Dayco recommended schedule of prices in effect at the time of the sale; that a quarterly report would be made to Dayco indicating the dollar value of sales of Dayco products to each outlet; and that Dayco have authority to check the records of the customer.

68. During the same period, Dayco supplied agreement forms to its direct customers to be entered into with other jobbers to whom they sold Dayco products (CX 11; Tr. 100-06, 255-62, 361-7). These agreements were used by all of Dayco's direct customers who sold its products to other jobbers, including those who sold both to jobbers and dealers, referred to as partial redistributors, as well as those who sold only to jobbers, referred to as 100% redistributors. Dayco's direct customers were designated as "AA Jobbers," and the jobbers to whom they resold Dayco products were designated "A Jobbers."

69. The agreements entered into with "A Jobbers" (CX 11) provided, among other things:

4. The Jobber agrees to purchase his requirements of Dayton Automotive Products through sources of supply as designated. In consideration of this agreement, the Jobber is entitled to prices in effect for "A" Jobbers at time of shipment. It is mutually agreed, however, that The Dayton Rubber Company reserves the right to change its prices or terms at any time without notice.

5. The Jobber shall designate one or two sources of supply and confine his purchases of Dayton Automotive Products to the suppliers named. No change in these suppliers shall be made until The Dayton Rubber Company, Dayton, Ohio, is notified by the Jobber and acknowledgement is made accepting the change.

70. Dayco allowed its "AA Jobbers" a service credit of 15% on their sales of Dayco products to "A Jobbers." In order to obtain this credit, the "AA Jobbers," both 100% redistributors and partial redistributors, were required to file reports of their sales to "A Jobbers," together with copies of their invoices covering such sales (Tr. 356; CX 10B and 20). Whether copies or lists of such invoices were actually filed (Tr. 357), it is clear that Dayco required proof of sales to "A Jobbers," and the prices at which they were made, as a basis for allowance of the service credit. In May, 1958, Dayco eliminated reports of sales to "A Jobbers" by its 100% redistributors, and started billing them at net prices which reflected deduction of the service credit (CX 6A-L; Tr. 89-91, 384-5).

71. If the reports or other information obtained by Dayco disclosed that sales to "A Jobbers" were made at prices more than 5% above Dayco's list prices to its "AA Jobbers," the service credit was not allowed. If sales were made at lower prices, the service credit was allowed, but Dayco discouraged such sales by pointing out to its direct customers in those instances that the lower prices were causing their profits to disappear (Tr. 358-61).

72. Refusal by Dayco to grant the service credit on such sales effectively prevented sales to "A Jobbers" at prices higher than 5% above Dayco's list prices to "AA Jobbers"; and by its agreements and active discouragement, Dayco effectively prevented sales to "A Jobbers" at lower prices in all but a relatively few instances (Tr. 383-4, 406-10). Dayco did not disallow service credits because of sales below its suggested prices to jobbers, and it did not discontinue dealing with "AA Jobbers" because of such sales; but by the reports of its own representatives and others in the trade, and by the periodic reports of its direct customers, it kept in close touch with the prices at which "AA Jobbers" sold to "A Jobbers" and actively discouraged sales at prices lower than its suggested schedule of prices (Tr. 372-6, 380).

73. Dayco salesmen worked with the salesmen of the "AA Jobbers" in locating, soliciting and signing agreements with "A Jobbers" (Tr. 103-6). Each such agreement typically would be signed by the "A Jobber" and by one or two "AA Jobbers." The "AA Jobbers" signing the agreement were the designated sources of supply of Dayco products for the "A Jobber." The agreement would also be signed and submitted to Dayco by its local district manager or salesman, and would be "accepted" by Dayco through the signature of its sales manager.

74. It is Dayco's position that its representatives' signatures to these agreements did not constitute Dayco as a party to the agreements, but that they constituted recognition by Dayco only that the "A Job-

bers" were legitimate jobbing houses (Tr. 105-6, 361-3). We are not here concerned primarily with the legal significance of the agreements, but with the nature, extent and practical effect of Dayco's participation in preparing and negotiating them, and their influence upon the competitive activities of the participating parties.

75. The agreements with "A Jobbers" promise that the "A Jobber" is "entitled to prices in effect for 'A' Jobbers at time of shipment." Both the "AA Jobber" and Dayco participated in the negotiation and execution of these agreements. In view of Dayco's active discouragement of sales at lower prices, such agreements clearly constituted agreements or understandings by the "AA Jobbers" with Dayco, as well as with the "A Jobbers," that they would sell Dayco products to the "A Jobbers" at Dayco's recommended schedule of prices applicable to such jobbers. Although the record does not disclose a specific agreement such as CX 10A-B between Dayco and its direct customers who are partial redistributors, it is clear that such partial redistributors also entered into understandings with Dayco that they would sell its products to their jobber customers at Dayco's recommended schedule of prices.

76. The number of Dayco "AA Jobbers" operating in the same trading area varied widely in different cities and territories (Tr. 253-4, 308-9). Dayco's representatives were active in calling upon and helping the "AA Jobbers" generally in distributing its products and in working with them not only in signing agreements, but also in selling to "A Jobbers" and in seeing that their business was channeled to their designated sources of supply (Tr. 127-32, 252, 298, 380-2). A great deal of sales effort was also put in by the Dayco representatives at the dealer level in order to create a demand for its products, which demand moved up to the "A Jobber" and, in turn, to the "AA Jobber" (Tr. 252-3). The Dayco salesman was paid commissions only on the basis of the orders of the "AA Jobbers" in his territory, and was not compensated on the basis of business done by "A Jobbers" (Tr. 254-5, 380).

77. Dayco considered the agreement with the "A Jobber" to be a "selling tool" to make the indirect jobber feel closer to Dayco, to ask him to do business with the direct jobber who had found the account, and to establish that he was a legitimate jobber and not simply a dealer (Tr. 255-8). It was used to encourage a direct jobber to sign up additional indirect jobbers so that he could feel they were his accounts, and it provided an indirect jobber an easy way to reject competitive salesmen by saying he was already signed up with another direct jobber (Tr. 260-1, 363-6).

78. As a matter of practice, the orders of indirect jobbers almost always went to the direct jobbers designated in their agreements. "They didn't indiscriminately change around" (Tr. 297, 366-7). Although Dayco did not enforce the provision in the agreements with "A Jobbers" that they would confine their purchases of its products to the designated "AA Jobbers," it is apparent that, except in rare instances, the provision was effective in accomplishing its stated requirement.

79. The record discloses, therefore, that Dayco required its direct jobbers, including 100% redistributors and partial redistributors, to enter into agreements or understandings with it to resell Dayco products to other jobbers at prices fixed by Dayco; and that it required its indirect jobbers to enter into agreements or understandings with it and with one or two direct jobbers to purchase such products only from the direct jobbers who signed the agreements at prices fixed by Dayco. The requirement that indirect jobbers would purchase Dayco products only from the designated direct jobbers sharply limited the sources of supply available to indirect jobbers, and limited competition among direct jobbers in selling to them. It also made more effective the requirement fixing the prices at which Dayco products would be resold by direct to indirect jobbers.

80. Compliance with these agreements was actively encouraged by Dayco, and they were generally adhered to by the participating jobbers. These agreements, and Dayco's activities in furtherance of them, resulted in substantially restraining competition, including price competition, among its direct customers in selling Dayco products to other jobbers.

81. The agreements referred to in the foregoing discussion were used by Dayco prior to September, 1958. At that time Dayco adopted a new form of agreement with its direct customers who sold only to jobbers, and changed the designation of such customers from "AA Jobbers" to warehouse distributors (CX 30). It also adopted a new form of agreement with its direct and indirect customers who sold only to dealers or both to dealers and jobbers, and designated such customers as wholesalers (CX 31). These new forms of agreements did not contain provisions of the earlier agreements with respect to requiring sales to indirect jobbers at prices fixed by Dayco, and requiring indirect jobbers to purchase Dayco products from designated sources of supply. Dayco now sells to approximately 300 warehouse distributors and approximately 700 wholesalers (Tr. 96).

82. When new direct or indirect accounts were signed by Dayco after September, 1958, the new forms of agreements were used.

Dayco made no concerted attempt, however, to sign direct or indirect customers to the new agreements, and many of the agreements used prior to the change continued in effect (CR proposal #37; Tr. 111, 155). Even under the new agreements, warehouse distributors and direct wholesalers continue to sell to non-direct wholesalers or sub-wholesalers at prices suggested by Dayco (Tr. 386); and direct wholesalers who sell to non-direct wholesalers continue to report such sales and prices to Dayco for service credit (Tr. 134-5, 156, 220).

83. It is apparent, therefore, that when Dayco made changes in its system of distribution and prices in September, 1958, it did not effectively eliminate essential features of its former system which substantially restrained price and other competition among its direct customers. Dayco's agreements in restraint of competition, and its activities in furtherance thereof, which have continued in effect to a substantial extent, constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

84. Before September, 1958, Dayco's agreements with its 100% redistributors provided that they would distribute Dayco products only to outlets approved by Dayco (CX 10A); and since then its agreement with warehouse distributors provides that they will sell only to franchised wholesalers approved by Dayco and only to the wholesale level of distribution (CX 30). Dayco granted a service credit, formerly 15%, and now 20%, on all sales of its products by these accounts because all such sales were to other jobbers.

85. The limitations in the agreements with these accounts that they would sell Dayco products only to outlets or wholesalers approved by Dayco, although consistent with the restrictive provisions discussed above, were primarily for the purpose of assuring Dayco that the service credit on all of the purchases of these accounts was granted only on sales to legitimate jobbers, and not on sales to dealers. Any of Dayco's direct customers who desired to do so could sell both to dealers and to jobbers. Those who elected to sell to dealers and jobbers were formerly classified as partial redistributors, and presently as wholesalers, and were allowed a service credit on their sales to jobbers on the basis of their reports of such sales to Dayco.

86. In such circumstances, it appears that these provisions in the agreements did not materially restrict the freedom of these direct accounts to sell Dayco products to customers of their own choice. Dayco's approval of outlets or wholesalers was conditioned only upon the fact that such outlets or wholesalers were legitimate jobbers. Dayco's direct customers were free to choose whether they would sell only to jobbers or both to jobbers and dealers, and in either case they

purchased from Dayco at the same prices all of its products which they sold to jobbers. The difference was essentially in form and procedure, rather than in competitive freedom.

87. The record does not disclose, therefore, that the provisions in Dayco's agreements with its direct customers who sold only to jobbers, that they would resell its products only to "outlets" or "wholesalers" approved by Dayco, or that they would resell its products only to wholesalers, substantially restrained competition.

88. Counsel supporting the complaint seeks a conclusion, based on inference, that Dayco also required its direct and indirect jobbers to agree to resell its products to dealers at prices fixed by Dayco (CSC proposals, pp. 32-5). The record discloses that Dayco supplied its jobbers with price lists which it suggested be followed in sale to dealers. There is no evidence, however, that it required such jobbers to agree to adhere to the suggested dealer prices or that it took any other action to see that they did so. This contention by counsel supporting the complaint, accordingly, is not supported by the evidence.

CONCLUSIONS

1. For a substantial period of time before September, 1958, indirect jobbers purchased Dayco products at prices 5% higher than jobbers who purchased such products directly from Dayco. Dayco effectively controlled the prices at which indirect jobbers purchased from its direct customers, and it participated in negotiating with indirect jobbers and in assisting its direct customers in selling to them. The indirect jobbers were, accordingly, indirect customers of Dayco, and were "purchasers" within the meaning of Section 2(a) of the Clayton Act.

2. Dayco products are a line of automotive products, primarily belts and hoses, consisting of items of only one grade and quality. Contemporaneous sales of such products were made to direct and indirect jobber customers of Dayco who competed with each other in reselling them to dealers. The sale of automotive products is a highly competitive business, involving small margins of profit; and the effect of the 5% price differential between competing direct and indirect jobber customers of Dayco may be substantially to lessen competition between such customers in the sale of Dayco products to dealers.

3. The 5% price differential between direct and indirect jobber customers of Dayco who competed with each other in selling Dayco products to dealers constituted price discrimination by Dayco between different purchasers in violation of Section 2(a) of the Clayton Act. That differential was discontinued in September, 1958, and it is

improbable that it will be renewed in the same form; but there is no assurance that future changes which may be made in the sales and pricing policies of Dayco will not result in similar price differences between competing purchasers of its products. An order prohibiting such price discriminations is warranted.

4. During the years 1957 through 1960, Dayco made substantial sales of its products to Automotive Jobbers, Inc. (AJI), a buying group of jobbers, and through it to many of its members. Such sales were made at net prices which, prior to September, 1958, were 15% less than Dayco's prices to its direct jobber customers for resale to dealers, and approximately 20% less than the prices paid by its indirect jobber customers for resale to dealers; and which, after September, 1958, were 20% less than Dayco's prices to its direct and indirect jobber customers for resale to dealers. AJI purchased such products on behalf of its jobber members, and after deduction of operating expenses certain warehouse and shipping fees, distributed the discounts which it received to the jobber members in proportion to their individual purchases.

5. During the years 1958, 1959 and 1960, certain jobber members of AJI were in substantial competition with direct and indirect jobber customers of Dayco in selling Dayco products to dealers. The net prices received from Dayco by such jobber members of AJI were substantially lower than the prices on such products received directly or indirectly from Dayco by the jobbers with whom they competed in selling such products to dealers. The effect of the price advantages received by such AJI members may be substantially to lessen competition between them and other direct and indirect jobber customers of Dayco in selling such products to dealers. The price advantages on Dayco products received by jobber members of AJI over competing jobbers, accordingly, constituted price discrimination by Dayco in violation of Section 2(a) of the Clayton Act.

6. In dealing with AJI, Dayco was aware that it was a buying group of jobbers, and that serious questions were involved concerning the legality of warehouse discounts to such groups. While the record does not disclose that it had detailed knowledge of the internal organization of AJI, Dayco was sufficiently familiar with the method of operation of AJI generally to have reason to believe that its prices to AJI may be unlawful.

7. For a substantial period of time prior to September, 1958, Dayco required its direct jobber customers to enter into agreements or understandings with it to resell its products to other jobbers at prices fixed by Dayco; and required its indirect jobber customers to enter

into agreements or understandings with it to purchase Dayco products only from certain direct customers. Compliance with these agreements was actively encouraged by Dayco, and they were generally adhered to by the participating jobbers. These agreements, and Dayco's activities in furtherance of them, resulted in substantially restraining competition, including price competition, among Dayco's direct customers in the sale of Dayco products to other jobbers.

8. In September, 1958, Dayco adopted new forms of agreements which did not contain the foregoing requirements. Thereafter, when new direct or indirect jobber customers were acquired by Dayco, the new forms of agreements were used. Dayco made no concerted attempt, however, to sign direct or indirect jobber customers to the new agreements, and many of the old agreements continued in effect. Even under the new agreements, although not specifically required to do so, Dayco's direct customers generally continued to sell to indirect jobbers at prices suggested by Dayco.

9. When Dayco made changes in its system of distribution and prices in September, 1958, it did not effectively eliminate essential features of its former system which substantially restrained price and other competition among its direct customers. Dayco's agreements in restraint of competition and its activities in furtherance thereof, which have continued in effect to a substantial extent, constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

10. The provisions in Dayco's agreements with its direct customers who sold only to jobbers that they would sell its products only to purchasers or wholesalers approved by Dayco, or only at the wholesale level of distribution, although consistent with the restrictive provisions referred to above, were primarily for the purpose of assuring Dayco that the service credit on all of the purchases of these accounts was granted only on sales to legitimate jobbers. Any of Dayco's direct customers who desired to do so were free, upon entering into appropriate agreements, to sell both to dealers and to jobbers and to receive the service credit on their sales to jobbers. These provisions in the agreements, therefore, did not materially restrict the freedom of these direct accounts to sell Dayco products to customers of their own choice, and did not substantially restrain competition.

11. Dayco supplied its jobbers with price lists which it suggested be followed in sales to dealers. The evidence, however, does not sustain the contention that Dayco required such jobbers to agree to adhere to the suggested prices in reselling to dealers, or that it took any other action to see that they did so.

12. The respondent named in the complaint herein, is The Dayton Rubber Company, a corporation. Subsequent to the issuance of the complaint, however, the name of that corporation was changed to Dayco Corporation. The order to cease and desist should, accordingly, identify the respondent by its present name, Dayco Corporation.

ORDER

It is ordered, That respondent, Dayco Corporation, a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device in, or in connection with, the sale or distribution of automotive parts and related products in commerce, as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act, do forth with cease and desist from:

1. Discriminating, directly or indirectly, in the price of such products of like grade and quality, by selling such products to any direct or indirect purchaser at net prices higher than the net prices charged any other purchaser, direct or indirect, who in fact competes in the resale and distribution of such products with the purchaser paying the higher price.

2. Putting into effect, continuing or maintaining any merchandising or distribution plan or policy under which agreements or understandings are entered into with resellers of such products which have the purpose or effect of:

(a) Fixing, establishing or maintaining the prices at which such products may be resold; or

(b) Limiting or restricting the persons from whom any purchaser may purchase such products.

OPINION OF THE COMMISSION

AUGUST 5, 1964

By DIXON, *Commissioner*:

This case is before the Commission on respondent's¹ appeal from the hearing examiner's initial decision in which respondent was found to have discriminated in price, in violation of Section 2(a) of the Clayton Act, as amended,² and restrained trade through agreements to fix resale prices and limit customers and sources of supply, in violation of Section 5 of the Federal Trade Commission Act.³ Although

¹ When the complaint was issued, respondent was incorporated as The Dayton Rubber Company. That name has since been changed to "Dayco Corporation."

² 15 U.S.C. 13(a).

³ 15 U.S.C. 45(a)(1).

respondent is engaged in the production of a broad line of rubber and plastic products, this proceeding is concerned solely with the distribution practices of the Automotive Wholesalers Department of its Rubber Products Division. That department, which accounts for approximately 8 to 9 percent of Dayco's total sales, is engaged in the manufacture and sale of various types of automotive replacement parts made from rubber, such as fan belts, rubber hose and tubing, and mats and rugs. At the time of the hearings, Dayco ranked second in national sales in that field with a share of approximately 15 percent of the market.

The facts concerning respondent's marketing system are not in dispute. Prior to September of 1958, all purchasers who acquired products directly from the respondent were termed "AA" jobbers. These "AA" jobbers are broken down into three categories. The "100% redistributor" sold exclusively to other jobbers or wholesalers. The "partial redistributor" sold not only to wholesalers or jobbers, but also made some sales directly to dealers. The third type of "AA" jobber sold exclusively to dealers. The purchaser who acquired respondent's products from "AA" jobbers and resold them to dealers was classified by respondent as an "A" jobber and, by definition, was in competition with the direct purchasing "AA" jobbers who made sales to dealers.

Respondent issued suggested resale price lists for all levels of distribution. The prices which it charged the direct purchasing "AA" jobbers were published on a blue sheet. Those "AA" jobbers who subsequently sold products to "A" jobbers and thus engaged either totally or partially in redistribution reported that fact to the respondent and were granted a redistribution discount of 15% on most items. A pink price sheet suggested the prices which the "AA" jobbers should charge the "A" jobbers. These pink sheet prices were 5% higher than those established by the blue sheet. Thus, an "A" jobber acquiring respondent's products for resale to a dealer purchased the products at the pink sheet prices and paid 5% more for these products than did an "AA" jobber who was able to acquire the same products for resale to a dealer at the blue sheet prices. Both classes of jobbers resold respondent's products to dealers at the same prices.

In September of 1958, the nomenclature of the various jobbers was altered. The "AA" jobber selling exclusively to "A" jobbers became a "warehouse distributor." The remaining "AA" jobbers—those who sold both to "A" jobbers and to dealers, and those who sold only to dealers—were termed "direct wholesalers." The "A" jobbers were re-

named "subwholesalers" or "non-direct wholesalers." In addition, respondent ceased using the pink price list to establish the prices charged the "A" jobbers. Thereafter, the "A" jobbers, now known as non-direct wholesalers, purchased respondent's products from warehouse distributors and direct wholesalers for resale to dealers at the prices established by the blue sheet. Since the direct wholesalers who resold to dealers also purchased at the blue sheet prices, the disparity in the cost of acquisition between competing customers at this point in respondent's distribution system was eliminated. The redistribution discount granted by respondent on products which it sold to warehouse distributors and direct wholesalers for resale to non-direct wholesalers was increased from 15% to 20% of the blue sheet prices. Thereafter, the warehouse distributors were relieved of reporting their subsequent sales to non-direct wholesalers and were invoiced at the net or discounted price. However, the direct wholesalers who sold to non-direct wholesalers were required to continue reporting such sales as a condition precedent to receiving the discount.

Respondent also made sales to several group buying associations, and granted to them the redistribution discount, which, on most items, was 15% prior to September of 1958 and 20% thereafter. Evidence was offered that one of these groups, Automotive Jobbers, Inc., of Dallas, Texas, dealt only with its members and that it was wholly owned, controlled, and operated by these members.

Count I of the complaint charged respondent with price discrimination. The examiner concluded that respondent had discriminated in price in two particulars. First, he found discrimination in price prior to September of 1958 through sales of products to "AA" jobbers for resale to dealers at a price 5% lower than that made available to competing indirect purchasing "A" jobbers. Secondly, the examiner found that respondent's sales to Automotive Jobbers, Inc., the group buying association, permitted its jobber members to acquire products at a net price lower than that available to competing non-affiliated jobbers, and that such sales were unlawful price discriminations.

Count II of the complaint charged respondent with violations of Section 5 of the Federal Trade Commission Act. The examiner concluded that respondent had illegally restrained competition among its direct customers in their sales to non-direct customers through the use of contracts with both classes of customers which set the price at which its products were sold by the direct purchasers to the non-direct purchasers, and which limited the direct purchaser's selection of customers and the non-direct purchaser's selection of sources of supply.

I

During the trial of the case, counsel supporting the complaint filed a written motion requesting that official notice be taken of certain facts and presumptions relative to the price discrimination charges under Count I of the complaint.⁴ Respondent was given the opportunity of filing a written opposition to that motion and did so. The examiner subsequently granted the motion in substantially all of its aspects. Respondent has had ample opportunity to present evidence rebutting the facts officially noticed,⁵ but has attempted to do so in only one regard.⁶ Instead, respondent asserts that official notice under the circumstances of this case is improper. Since the proof of several essential elements of both price discrimination charges hinges upon whether the examiner acted correctly in taking official notice, that question will be discussed before we turn to the other questions raised on this appeal.

On the basis of the Commission's extensive experience in the automotive parts industry, as manifested in numerous past cases,⁷ the examiner took official notice of certain general background facts concerning competition in that industry.⁸ The examiner noticed that competition in the automobile parts industry is keen and that a small profit margin exists. Specifically, he noticed that the typical net profit margin after taxes is less than 5%, and that the 2% cash discount, prevalent in the industry, is considered to be of the utmost economic importance and is carefully taken. The examiner also took notice of the fact that automobile parts jobbers located in the same cities and metropolitan

⁴ The Administrative Procedure Act, 60 Stat. 237, 241 (1946), 5 U.S.C. 1006(d), provides for official notice in Section 7(d) thereof.

"* * * Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary."

The Commission's Rules of Practice, Section 3.14(d), implement in substantially the same words the provisions of the Administrative Procedure Act.

"When any decision of a hearing examiner or of the Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor."

⁵ Formal hearings were begun in this case on April 9, 1962, in Dayton, Ohio, and continued through April 11, 1962. During this period, complaint counsel presented testimony and exhibits in support of the complaint. The motion for taking official notice was filed May 16, 1962, and respondent's opposition thereto was filed June 11, 1962. The examiner granted the motion on June 14, 1962. Respondent thereafter presented its case in defense of the charges on January 22, 1963, in Dayton, Ohio.

⁶ The evidence in rebuttal will be discussed in Sec. III, *infra*.

⁷ The motion was predicated upon twenty cases in the automobile parts field, seven of which had been appealed to the courts and affirmed. All but one of the remaining thirteen were later consent settlements.

⁸ Order Taking Official Notice, June 14, 1962, pars. 2, 3.

areas, and in cities and towns in geographic proximity, are in competition with each other.⁹

Official notice of this type is similar to that approved by the Commission in *Manco Watch Strap Co.*, Docket No. 7785, 60 F.T.C. 495 (March 13, 1962). There, on the basis of numerous past decisions in which the matter had been litigated, the Commission took official notice of a belief on the part of the buying public that a product which was not clearly marked otherwise was made in the United States, and of a preference by buyers for the American-made product. Respondent seeks to distinguish the present situation from *Manco* by pointing out that the Commission's experience in the automobile parts industry is not as extensive as its experience in foreign origin cases, and that the contested automobile parts cases relied upon were litigated in the early and middle 1950's.¹⁰ However, the Commission has been concerned with and considering in detail the manifold problems of this industry for more than a decade. Our investigation and research involving this industry have been continuous and unrelenting over that period. Although we are aware that there have been certain changes in the methods of distribution during this period, the basic facts concerning competition and its intensity have remained unchanged, as has the size of the profit margin. To require a detailed relitigation of these basic facts in each successive case would unduly hamper the Commission in its enforcement of the laws, and would unnecessarily lengthen the proceedings, thus increasing costs for all concerned. We conclude that the facts and propositions above listed have become generally accepted, and the Commission's knowledge concerning them has reached sufficient proportions to permit official notice thereof to be taken in this case. *Cf.*, *Manco Watch Strap Co.*, *supra*. As required by the Administrative Procedure Act, such noticed facts are subject to rebuttal. It should be emphasized that the Commission is not taking official notice of ultimate conclusions from previous cases, but is instead noticing basic facts upon which to predicate the final conclusions which must be made in the present case.

⁹ Extending this latter premise, the examiner noticed that jobbers in certain specific cities competed with each other. These facts could have been inferred from the general premise. Thus, if it was proper to take official notice of the general premise, notice of the fact that jobbers in specific cities compete with each other was also proper.

¹⁰ *Moog Industries, Inc. v. Federal Trade Commission*, 238 F. 2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958); *Whitaker Cable Corp. v. Federal Trade Commission*, 239 F. 2d 253 (7th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957); *E. Edelmann & Co. v. Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958); *C. E. Niehoff & Co. v. Federal Trade Commission*, 241 F. 2d 37 (7th Cir. 1957), *aff'd*, 355 U.S. 411 (1958); *P. & D. Mfg. Co. v. Federal Trade Commission*, 245 F. 2d 281 (7th Cir. 1957), *cert. denied*, 355 U.S. 884 (1957); *P. Sorensen Mfg. Co. v. Federal Trade Commission*, 246 F. 2d 687 (D.C. Cir. 1957); *Standard Motor Products, Inc. v. Federal Trade Commission*, 265 F. 2d 674 (2d Cir. 1959), *cert. denied*, 361 U.S. 826 (1959).

The examiner also took official notice of the organizational structure and purchasing policies of Automotive Jobbers, Inc., a group buying association in Dallas, Texas. Among other things, the examiner noticed that Automotive Jobbers, although incorporated, was a membership organization maintained, managed, controlled, and operated by and for its members with the announced purpose of inducing the granting or allowance of lower and more favorable prices by manufacturers and other sellers of automobile products and supplies. He took official notice of the fact that its membership was composed of particular jobbers located in and near Dallas, Texas, and of the internal procedures used in purchasing automotive products and distributing the discounts and rebates to the member jobbers. In addition, notice was taken of the fact that the net profits of some of the jobber members and of some competing non-affiliated jobbers were between 1 and 4 percent after taxes.¹¹

The basis for these noticed facts was the Commission's decision in *Automotive Jobbers, Inc.*, Docket No. 7590, 60 F.T.C. 19 (January 4, 1962). That was a proceeding under Section 2(f) of the Clayton Act, as amended, in which the examiner held that Automotive Jobbers was merely a bookkeeping device for its jobber members and that the members had induced and received discriminatory prices from suppliers and manufacturers of automotive products through the fiction of the group buying association. The examiner's decision was not appealed to the Commission and on January 4, 1962, that decision was adopted by the Commission as its decision. The instant respondent was not a party to that proceeding, but there was evidence therein that it was one of the suppliers which had made sales to Automotive Jobbers.

Courts have stated in broad terms that they may take judicial notice of their own records. *Bienville Water Supply Co. v. Mobile*, 186 U.S. 212 (1902); *Dimmick v. Thompkins*, 194 U.S. 540 (1904); *Freshman v. Atkins*, 269 U.S. 121 (1925); *National Fire Insurance Co. v. Thompson*, 281 U.S. 331 (1930); *United States v. Pink*, 315 U.S. 203 (1942); *Market Street Railway Co. v. Railroad Commission of Calif.*, 324 U.S. 548 (1945); *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946). However, with but one exception, notice in each of these cases was taken of facts which had been established in previous proceedings involving the same parties.¹² In *United States v. Pink*, the

¹¹ Order Taking Official Notice, June 14, 1962, par. 1.

¹² Where there is a second action between the same parties on a different cause of action, the doctrine of collateral estoppel prevents relitigation of matters which were actually litigated and determined during the first proceeding. *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948). On this basis, judicial notice of facts proved in the first proceeding is obviously permissible.

Supreme Court took judicial notice of crucial background facts in a record in a previous case in which neither of the parties in *Pink* had been involved. The facts in the prior case were parallel to those in *Pink* and the issues were identical. Further, the facts in *Pink* were not contested, and there was no objection to the Court's action in taking judicial notice. The court, after noting that the decision in the previous case was not *res judicata* to the parties in *Pink*, utilized the noticed facts as a basis for certain findings and conclusions.

There do not appear to be any cases in which the courts have explicitly determined whether notice may be taken of facts litigated in prior cases involving other parties, where the parties in the current case contest the facts or the court's action in taking judicial notice. In *Funk v. Commissioner of Internal Revenue*, 163 F. 2d 796 (3d Cir. 1947), this question was raised, but was not expressly decided. There, the facts were contested. The question, as stated by the court of appeals, was "* * * whether the Tax Court may take judicial notice of its records in another case involving the same trusts but not the same taxpayer so as to make a critical fact finding in the instant litigation." This was a proceeding to determine the liability of the wife for taxes on the income of four trusts established by the husband with the wife as trustee. In the proceeding against the wife, the Tax Court took judicial notice of certain facts concerning the husband which had been established in an earlier case against the husband, where the trusts had been a subject. In remanding the case to the Tax Court, the Court of Appeals seemed primarily concerned with the facts that the Tax Court had utilized the earlier findings in its decision without specifically making them a part of the record or granting the wife an opportunity to present rebuttal evidence.

Although there have been statements indicating that official notice on the part of an administrative agency is merely the counterpart of a court's power to take judicial notice, it would appear that an administrative agency, through its recognized ability to accumulate expertise in particular fields, has a somewhat broader power than that of a court to notice facts beyond the record immediately before it. However, in interpreting the official notice provision of the Administrative Procedure Act, the courts have not resolved the precise issue with which we are herein faced.¹³ The question arose, but was not expressly decided in *National Labor Relations Board v. Townsend*, 185 F. 2d 378 (9th Cir. 1950), *cert. denied*, 341 U.S. 909 (1951). There, the National Labor Relations Board took official notice of a prior case involving

¹³ See generally Davis, 2 *Administrative Law Treatise* 338-434; Annotation: "Administrative Official Notice," 3 L. Ed. 2d 1630.

Hudson Sales Corporation, in which Townsend, a Hudson dealer, was not a party to establish that Hudson automobiles were transported into California from other states. Although the Board's rules of practice provided for objection to the receipt of such evidence, Townsend made no objection before the administrative agency, but raised the question for the first time before the Court of Appeals. In ordering enforcement of the Board's order, the court, after recognizing a general power in administrative agencies to take official notice, termed notice under these circumstances "questionable" but held that Townsend's failure to contest the issue before the Board precluded the subsequent objection on appeal.

In *Bakers of Washington, Inc., et al.*, Docket No. S309, 64 F.T.C. 1079 (February 28, 1964), the Commission took official notice of the corporate organization and internal operation of Continental Baking Company, one of the respondents, while the case was on appeal before the Commission. These facts had been litigated in an earlier proceeding by the Commission against Continental¹⁴ and were utilized in *Bakers* to show that Continental's deliveries in the State of Washington of bread baked in that state possessed interstate characteristics. This conclusion was prerequisite to a holding that certain local bakeries engaged solely in intrastate sales were amenable to and had violated Section 5 of the Federal Trade Commission Act by conspiring with Continental to fix prices. Although Continental had the opportunity to meet and attack this evidence in the earlier proceeding, the co-conspirators not parties in the earlier case had not been granted the opportunity of such a direct attack. However, we stated that any of these parties could by appropriate motion, request a hearing to present rebuttal evidence.¹⁵

The notice employed herein is akin to that in *Bakers of Washington, supra*. Notice of facts by an administrative agency under such circumstances is beneficial to the public interest, for it eliminates the necessity of recalling witnesses who have been called in prior cases for the purpose of repeating their testimony and of reintroducing evidence recently utilized in earlier cases until there has been an indication that the issue is genuinely disputed. In essence, it relieves Commission counsel of reproving facts already proved in related cases, unless the respondent seriously desires to contest them. By this procedure, the Commission's effectiveness is greatly increased, while the time and expense consumed by the Commission and respondents are substan-

¹⁴ *Continental Baking Co.*, Docket No. 7630, 63 F.T.C. 2071 (December 31, 1963).

¹⁵ Continental's request to reopen the proceedings for this purpose was granted. *Bakers of Washington, Inc.*, Docket No. S309, Order Reopening Procedure (May 21, 1964) [65 F.T.C. 1308].

tially reduced. A respondent not a party to the proceeding which is the source of the noticed facts is not prejudiced by this procedure, nor is he denied a fair hearing. Such a respondent is specifically informed of the facts to be noticed. If the respondent seriously desires to contest the accuracy of the facts noticed or their applicability in the proceeding in which it is a party, there is the opportunity of presenting evidence rebutting the noticed facts or showing their inapplicability. This procedure does not transfer to the respondent the burden of disproving the charge. To the contrary, it merely shifts to the respondent the initiative of going forward with a portion of the evidence. If, in rebuttal, the respondent introduces evidence which is inconsistent with the noticed facts, thereby casting a reasonable doubt upon their accuracy, or which indicates that they may not be applicable to the proceeding in which they are being employed, it becomes incumbent upon Commission counsel to demonstrate their accuracy or applicability by the introduction of further evidence.

The instant respondent has made no effort to rebut the facts derived from the decision in *Automotive Jobbers, Inc.*, *supra*, although there has been ample opportunity. Moreover, although objecting to the examiner's act in taking official notice, respondent has not taken the position that the facts noticed are incorrect or inapplicable to the present proceeding, nor has there been a showing that if the case were remanded for taking of evidence on these points, the respondent would profit from an opportunity to cross-examine whatever witnesses counsel in support of the complaint might call.¹⁶ To the contrary, the sales manager of respondent's automotive wholesalers department stated that he was aware that Automotive Jobbers was a "buying group" as that term is defined in the trade.¹⁷ Considered in this light, remand for the purpose of adducing testimony or other evidence in place of the facts noticed would be an unnecessary act which would not be particularly beneficial to the respondent, and would unduly lengthen the proceedings.

Respondent further objects to the examiner's notice of the initial decision in the *Automotive Jobbers* case on the ground that said decision is identical with the initial decision in *Ark-La-Tex Warehouse Distributors, Inc.*, Docket No. 7592 [62 F.T.C. 1557], a companion case

¹⁶ In considering whether an administrative agency has improperly noticed facts, the courts require the respondent to demonstrate prejudice as the result of notice before reversal is ordered. *Market Street Railway Co. v. Railroad Commission of Calif.*, *supra*; *United States v. Pierce Auto Freight Lines, Inc.*, *supra*; *Paramount Cap Mfg. Co. v. National Labor Relations Board*, 260 F. 2d 109 (8th Cir. 1958); *cf.*, *National Labor Relations Board v. Johnson*, 310 F. 2d 550 (6th Cir. 1962).

¹⁷ Tr. 193.

in which the proceeding was remanded to the examiner for the introduction of new evidence and the preparation of a new initial decision in the light of the decision of the Court of Appeals in *Alhambra Motor Parts et al. v. Federal Trade Commission*, 309 F. 2d 213 (1962). The thrust of respondent's argument is that if the examiner's findings and decision in *Ark-La-Tex* were insufficient, the identical findings and decision made by the examiner in *Automotive Jobbers*, which were adopted by the Commission prior to the decision of the court in *Alhambra*, suffer from the same defects. The order of remand in *Ark-La-Tex* required the examiner to consider several questions not previously considered, such as whether there were contemporaneous sales of goods of like grade and quality to competing customers and whether the jobber members of the group were the actual purchasers. The purport of the order was that if the record in that case provided a basis for findings on these questions, such findings should be made; if not, new evidence should be received on them. It should be noted that the Commission, in its use of evidence from the *Automotive Jobbers* case, has considered such evidence, insofar as it relates to the instant respondent, in the light of the above questions, and has made its own separate findings and conclusions thereupon. The Commission emphasizes that it is not noticing ultimate findings and conclusions from the *Automotive Jobbers* case, but is instead noticing basic facts from that case which are used in conjunction with other facts from the present record to support our findings upon the above and other questions. Our decision in regard to the legality of respondent's sales to Automotive Jobbers, Inc., is thus not predicated solely upon facts derived from our earlier proceeding against that company, but rests partly on these facts and partly upon other evidence which was not a part of the record in the *Automotive Jobbers* case.

II

The examiner concluded that respondent had discriminated in price prior to September of 1958 by selling its products to the direct purchasing "AA" jobbers for resale to dealers at a price which was 5% less than the price charged the non-direct purchasing "A" jobbers for goods resold to dealers. As previously noted, the "AA" jobbers acquired respondent's products at the blue sheet prices, while the "A" jobbers paid the prices "suggested" by the pink sheet, which were 5% higher than the blue sheet prices. The examiner held that the "A" jobbers, who acquired respondent's products from redistributing "AA" jobbers, were "indirect purchases" from respondent, and that the price difference between these purchasers and the direct buying "AA" job-

bers was a price discrimination which was prohibited by Section 2(a) of the amended Clayton Act.

The examiner also found that respondent had eliminated this price difference after September of 1958 by abolishing the pink sheet and substituting in its place the blue price sheet, so that all jobbers selling to dealers acquired respondent's products at the same prices. In addition, the examiner found that the price differential was discontinued by respondent prior to knowledge of the Commission's investigation into its marketing system, and that there was little probability that the differential would be resumed in the same form. However, the examiner also found that there was nothing in the record to indicate that changes in respondent's pricing policies might not at some future time result in similar price differences between competing purchasers, and on that basis issued the order to cease and desist.

The Commission does not agree with the examiner that an order requiring respondent to cease and desist from discriminating in price between direct and non-direct purchasers is necessary in this case. There is every reason to believe that a resumption of the practice is improbable. While the discrimination existed, there were approximately 4,000 direct purchasing "AA" jobbers. At the same time, there were 1,000 non-direct purchasers acquiring respondent's products at the higher pink sheet prices. Respondent had attempted to persuade some of its direct purchasers to become non-direct purchasers, but had been unsuccessful. When the pricing system was revamped so that both classes of customers could purchase at the same prices, the number of direct purchasers declined to about 1,000 and the number of indirect purchasers increased to 4,000.¹⁸ In view of this material alteration in respondent's distribution system, resumption of a price difference between competing direct and non-direct purchasers is highly improbable. This conclusion is strengthened by the fact that this price difference was abolished some six years ago and has not existed since that time. Since respondent abolished this difference in price prior to learning that the Commission was investigating its activities, we conclude that it has abandoned price differences between its direct and non-direct purchasers. Thus, even if the examiner was correct in his holding that this price difference violated Section 2(a) of the amended Clayton Act, the charge must be dismissed. In view of this conclusion, we find it unnecessary to consider the correctness of the examiner's holding that the price difference which existed between the direct and non-direct purchasers was a statutory price discrimination,

¹⁸ Tr. 93, 96, 168.

or to discuss respondent's objections thereto. Accordingly, those portions of the examiner's initial decision containing findings of fact and conclusions of law in support of the holding of price discrimination between direct and non-direct purchasers are not adopted.¹⁹

III

The examiner concluded that Automotive Jobbers, Inc., the group buying association in Dallas, Texas, was a mere bookkeeping device for its jobber members,²⁰ and that respondent's sale of products to these individual jobbers through the association at a net price which included a redistribution discount was a price discrimination. Prior to September of 1958, the redistribution discount on the majority of items amounted to 15% of the purchase price established by the blue pricing sheet. Thereafter, the discount was 20% of that price.

Several questions arise in respect to this determination. First, the evidence must demonstrate that the members themselves rather than the group were the true purchasers from the respondent. The record reveals that Automotive Jobbers, which deals only with its jobber members, was organized by these members and that they maintained control and participated in operational decisions. Its purpose was to obtain lower and more favorable prices from manufacturers and suppliers of automotive products.²¹ A majority vote by the members was necessary before a seller's line was approved and adopted as a group line.²² When the jobber members purchased from a supplier, orders were made on a standard form, under the association's name. At times, the suppliers "drop shipped" the merchandise directly to the jobber members.²³ During 1957 and 1958, 100% of the merchandise purchased through Automotive Jobbers was "drop shipped."²⁴ In 1959, the percentage of merchandise "drop shipped" decreased to approximately 30%, but in 1960, that amount was slightly in excess of 50%.²⁵ On other occasions, the jobbers received "slot shipments," where the merchandise was shipped to the Automotive Jobbers' warehouse and then immediately reshipped to the jobber member in the same package.²⁶ At all times the suppliers billed the group, which in turn billed the individual members. On "drop shipments," the jobber members were billed in the same manner that the group was billed by the sup-

¹⁹ Initial Decision, Findings of Fact, pars. 18-32; Conclusions, pars. 1-3.

²⁰ Initial Decision, Findings of Fact, par. 41.

²¹ Order Taking Official Notice, pars. 1(b), (e)-(g).

²² *Id.*, par. 1(f).

²³ *Id.*, pars. 1(h), (1).

²⁴ CX 34A; tr. 200, 201.

²⁵ *Ibid.*

²⁶ Order Taking Official Notice, *op. cit.*, par. 1(k).

plier, thus indicating that the members paid the price charged the group. On "slot shipments" the jobber members were assessed a service charge of 2%, and on purchases from the warehouse stock they were charged a 5% fee.²⁷ Any net earnings or surplus accumulated by the group was returned to the individual members in proportion to their purchases through the group.²⁸

Moreover, the contracts and classification system utilized by respondent prior to September of 1958 indicate that the respondent itself considered the members to be direct rather than indirect purchasers. If the group had been the actual buyer, it would appear that the members would have occupied the same status as the indirect purchasing "A" jobbers heretofore discussed, and would have received similar treatment. Such was not the case, however. Normally, indirect purchasers signed contracts designated for "A" jobbers, while customers who purchased directly from respondent signed "AA" jobber contracts. Indirect purchasers were assigned the code classification number 450, while direct purchasers were given the classification number 460.²⁹ However, the jobber members of the group signed "AA" contracts and were given the code classification 460.³⁰ Dayco did not assign individual identifying customer numbers to its indirect purchasers, but its direct purchasers were given such numbers. The jobber members of the group were given such numbers.³¹ When Dayco salesmen called on customers, they were required to fill out a time sheet on which they indicated whether the customer was an "A" jobber or an "AA" jobber. Two such time sheets showing calls on jobbers in the Dallas, Texas, area during July and August of 1957 are a part of the record.³² Several members of the group are classified on these sheets as "AA" jobbers. All of these facts indicate that Dayco considered the jobber members of the group to be "AA" jobbers and thus by its own definition to be direct rather than indirect customers.

These facts are sufficient to support the conclusion that the individual members rather than the group were the actual purchasers from the respondent and we so find. This is obviously true as regards those products "drop shipped" directly to the jobber members, since in those instances AJI served no function other than that of a central billing agency. It is also true for the "slot" shipments, where the merchandise was reshipped to the jobber member in the same package

²⁷ *Ibid.*, par. 1 (k).

²⁸ *Id.*, par. 1 (e).

²⁹ Tr. 109-112; CX 1, 29; CX 15A, B; CX 39, 40.

³⁰ See CX 15A, B; CX 16 A-C; CX 17 A-C.

³¹ Tr. 113, 165.

³² CX 7 B-C.

in which it was received from the supplier. The remainder of the member jobbers' purchases were acquired from the warehouse operated by Automotive Jobbers in much the same manner that non-affiliated jobbers obtained merchandise from independent warehouse distributors. However, we have recently held that although a buying group warehouse may perform essentially the same function as an "independent" warehouse distributor, this fact is not crucial in deciding whether the individual jobber members or the group itself are the true purchasers. Instead, the determinative factors are those of ownership and control of the group by the individual members—factors clearly present in this case. As the Commission stated in *National Parts Warehouse*, Docket No. 8039, 63 F.T.C. 1692, 1722 (December 16, 1963):

* * * [I]t may be true that NPW actually performs the same *warehousing* function that "other" warehouse distributors perform. But we do not see how that affects the question of whether NPW is a "purchaser" in its own right, or a mere agent of its owner jobbers. The mere ownership and operation of physical facilities cannot convert an agent into a principal. It is the fact that these jobber partners of NPW own it outright, and "control" the flow of its income from the partnership coffers to their own pockets, that establishes the principal-agent relationship, and makes them responsible for its acts. The clothing of their creature with the trappings of a "warehouse distributor" does not cause the parties to cease being principal and agent, and become, instead, "seller" and "buyer."

A second problem to be considered is whether respondent's action in granting the redistribution discount to the individual members through the group resulted in a price difference between these members and non-affiliated jobbers. As previously noted, direct purchasing jobbers engaged in redistribution to other jobbers were entitled to the redistribution discount.³³ If the members of the group sold exclusively to other jobbers rather than selling to dealers, such as garages and service stations, they would have been entitled to the redistribution discount in their own right; and respondent's action in granting them that discount through the buying group would not have resulted in a price difference between them and non-affiliated jobbers. On the other hand, if the members made some or all of their sales to dealers, they would not have been entitled to the discount on such sales. The receipt of that discount through the group on these latter sales would thus result in a price difference between the group members and non-affili-

³³ Prior to September of 1958, jobbers purchasing directly from respondent who engaged either totally or partially in redistribution were termed "AA" jobbers. Subsequent thereto, those engaged exclusively in redistribution were labeled "warehouse distributors," while those engaged partially in redistribution were called "direct wholesalers."

ated jobbers who were not granted any discount for their sales to dealers.

The record in the present case reveals that Dayco sold its products to certain jobber members of Automotive Jobbers, Inc., and made direct shipments to these jobbers.³⁴ Relying on the decision in *Automotive Jobbers, Inc., supra*, the examiner took official notice of the fact that the group's membership was composed of "corporations, partnerships, firms, and individuals whose business consists of the jobbing of automotive products and supplies."³⁵ An examination of the transcript in that case reveals that certain jobber members of the buying group who purchased Dayco products both before and after joining the group were engaged partially in redistribution and partially in selling to dealers, such as garages and service stations, thus supporting the noticed fact.³⁶ Prior to joining the group, these individual jobbers could receive the redistribution discount only on those products which were subsequently resold to jobbers. After joining the group, however, the individual members paid the group price and thereby were able to receive the discount on all purchases made by the group, even though

³⁴ CX 35A; tr. 202, 203. Among those listed are Carter Auto Supply of Dallas, Texas; Texas Automotive Supply of Dallas, Texas; Grove Auto Supply of Dallas, Texas; Murphy Autom. Supply of Garland, Texas; and Rex Grove Autom. Supply of Fort Worth, Texas.

³⁵ Order Taking Official Notice, *op. cit.*, par. 1(b).

³⁶ A summary of testimony from the transcript in *Automotive Jobbers, Inc., supra*, indicating such to be the case follows. We hereby take official notice of such testimony. Should respondent desire to present evidence in rebuttal, it may request to do so by appropriate motion.

1. John M. Carter, owner of Carter Auto Supply of Dallas, Texas, testified that he joined Automotive Jobbers, Inc., in 1954. He purchased and sold Dayco products both before and after joining the group. He sells products to automotive garages, service stations, car dealers, and engages in some redistribution to other automotive jobbers. At one time, redistribution accounted for over 50% of his business, but it has subsequently declined to a minor part. In his sales of Dayco products, prior to joining the group, he received the redistribution discount only on those products which he actually sold to other jobbers. He handles a full line of automobile replacement parts, including ignitions, brakes, rubber parts, batteries, and hard parts, such as internal engine and chassis parts. He sells to dealers in the Dallas metropolitan area. *Automotive Jobbers, Inc., supra*, tr. 6-16.

2. Eugene Straach, the sole owner of Grove Auto Supply of Dallas, Texas, estimated his annual sales at \$130,000.00. He is an original member of Automotive Jobbers, Inc., and sells only to garages and service stations. His sales area covers all of southeastern Dallas County. He sells Dayco products, as well as a wide range of bearing and engine parts. *Automotive Jobbers, Inc., supra*, tr. 206-210.

3. Sam H. Murphy, the principal stockholder in The Sam Murphy Company, formerly Murphy Auto Supply of Garland, Texas, makes approximately 90% of his sales to other jobbers, and 10% to dealers. He is a member of Automotive Jobbers and estimates his annual sales at \$400,000.00. In his redistribution, he sells to only 10 jobbers. Mr. Murphy personally owns six of the ten jobbers to which The Sam Murphy Company redistributes. *Automotive Jobbers, Inc., supra*, tr. 731-742.

4. William Rex Grove, president of Rex Grove Auto Supply Corporation, Fort Worth, Texas, sells to garages, jobbers, fleets, service stations, and industrial accounts. Approximately 30% of his sales are made to jobbers. He resells Dayco products to the above categories. He is a member of Automotive Jobbers and estimated his 1959 sales at \$95,000.00. He handles ignition, rubber, and hard parts, and sells these products primarily in the east side of Fort Worth. *Automotive Jobbers, Inc., supra*, tr. 761-784.

some of the products were ultimately sold to dealers. Non-affiliated jobbers received the discount only when they made sales to jobbers and reported that fact to the respondent. Thus, a price difference existed between the affiliated and the non-affiliated jobbers. This price difference extended to all products purchased by both groups for resale to dealers.

In regard to the question of competition between the group members and the non-affiliated jobbers, the record in the present case lists nine "direct wholesalers" of respondent's products who were not members of the buying group. Three of these were located in Dallas and two were located in Fort Worth.³⁷ As previously noted, a "direct wholesaler" purchases directly from Dayco and resells the products either to other jobbers or to dealers, or to both. Since the three direct wholesalers in Dallas and one of those in Fort Worth received no rebates or credits, it may be inferred that they sold exclusively to dealers. The remaining wholesaler in Fort Worth made some sales to jobbers, but in 1960, the majority of his sales were made to dealers.³⁸ These non-affiliated jobbers are accordingly located in the same geographic areas as the previously enumerated members of the group and sell to the same types of customers—primarily dealers. The examiner noticed that jobbers in the same geographic areas competed with one another.³⁹ In addition, the examiner, relying on the decision in *Automotive Jobbers, Inc., supra*, took official notice of the fact that there were competitors of some of the members of Automotive Jobbers in the same trading area "purchasing products of like grade and quality from the same, and other suppliers, and who received no discount as warehouse distributors."⁴⁰ On the basis of this evidence, the Commission therefore finds that there was competition between the previously listed members of Automotive Jobbers, Inc., and the above-stated non-affiliated jobbers in Dallas and Fort Worth.

Moreover, the Commission finds that these competing customers were purchasing goods of like grade and quality manufactured by the respondent at different prices. Respondent's line was composed of products of only one grade and quality.⁴¹ Automotive belts and hose com-

³⁷ CX 35D. Fleet Equipment Co., Dallas, Texas; P-M Auto Parts, Dallas, Texas; Southern Supply Co., Dallas, Texas; Duncan & Company, Fort Worth, Texas; Fleet Equipment Company, Fort Worth, Texas.

³⁸ See CX 35D. In 1958, approximately 66% of Duncan & Company's sales were made to other jobbers. In 1959 and 1960, those percentages were approximately 70% and 40%, respectively.

³⁹ Order Taking Official Notice, par. 3(a).

⁴⁰ *Id.*, par. 1(m).

⁴¹ Tr. 64; see CX 4.

prised a majority of the sales.⁴² The price difference, which occurred through the improper granting of the redistribution discount, was not limited to belts and hose, but extended to all portions of the line.⁴³ It appears that all jobbers, whether independent or affiliated with a group, purchased respondent's products on a continuing basis and were not required to maintain large inventories. As indicated in *Moog Industries, Inc. v. Federal Trade Commission*, 238 F. 2d 43 (8th Cir. 1956), *aff'd on other grounds*, 355 U.S. 411 (1958), the existence of these factors permits an inference that contemporaneous sales of goods of like grade and quality have occurred. There, the court stated in part:

The real and substantive answer is that, while leaf springs, coil action parts or piston rings for a Ford sedan of 1947 may be sufficiently different from those for a Chevrolet coach of 1950 that the former could lawfully be sold for *uniform* higher or lower prices than the latter, the question here is not related to uniform different prices for different items, nor, hence, to the like grade and quality concept, because the price discriminations here did not arise from uniform different prices for particular items, but, rather, they arose solely from the cumulative annual rebate plan, which applied to the aggregate dollar volume of all sales in a particular line to a particular purchaser in the preceding year, and, therefore, necessarily discriminated in price as to all items in the line, whether exactly alike and interchangeable or not. 238 F. 2d at 50.

Respondent seeks to distinguish the present case from *Moog* on the ground that the discrimination occurred there as the result of a quantity discount, whereas in the instant case, no such discount is in issue. We believe that distinction to be immaterial. Here, as in *Moog*, the difference in price occurred on each item in the line. The favored purchasers received the lower price on each belt and hose, regardless of its particular size or the type of motor vehicle for which it was designed, in the same manner that the purchasers in *Moog* received the quantity discount on each item. Thus, we conclude that the reasoning in *Moog* is applicable here.

Respondent takes the position that certain testimony by the sales manager of its Automotive Wholesalers Department rebuts the inference that goods of like grade and quality were sold at different prices and rebuts the noticed fact that jobbers located in the same geographic areas compete. The witness stated that there were several types of jobbers and that each type tended to specialize in the sale of different products. According to his testimony, there are jobbers belonging to the Automotive Electrical Association specializing in the sale of the electrical components; there are truck or fleet jobbers; there are "TBA" jobbers selling primarily tires, batteries and related ac-

⁴² Tr. 282, 353-4; CX 4.

⁴³ See CX 35B, C, D; tr. 87-88.

cessories; and there are "hard parts" jobbers selling the mechanical components of motor vehicles.⁴⁴

It does not follow, however, that the above evidence is sufficient to rebut either the officially noticed fact or the inference that goods of like grade and quality were sold at different prices. In the first place, there is nothing to indicate that the various jobber categories are mutually exclusive insofar as respondent's products are concerned, and that a jobber of one specialty would not carry Dayco products handled by a jobber differently specialized. To the contrary, there was evidence that although specialized jobbers stocked some segments of the line more heavily than others, they carried the entire line.⁴⁵ Secondly, there was evidence that almost every jobber serviced at least one truck fleet.⁴⁶ When viewed with these factors, the evidence on jobber specialization is obviously not sufficient to rebut the inferences above drawn. In any event, the previously listed jobber members of the group located in the Dallas-Fort Worth area handled a wide range of automotive products and do not appear to have been "specialized" jobbers.⁴⁷ Accordingly, they would have competed with both specialized and non-specialized jobbers for the sale of some of the same products. Thus, we conclude that respondent was charging competing customers different prices for goods of like grade and quality.

The final consideration is whether or not there is sufficient evidence to show that the price discrimination may substantially impair competition. Respondent asserts that the transcript is devoid of evidence showing whether any net income remained after the group's expenses were met, and the degree to which any remaining net income is attributable to the group's receipt of functional discounts rather than cumulative quantity discounts. Without such evidence, respondent contends, there is no way of judging the size of the price difference after it has filtered down to the individual jobbers and thus there is no way of determining whether there is any injury to competition.

The evidence in this transcript reveals that after September of 1958, respondent billed its "100% redistributors" at the net price after the redistribution discount had been deducted. Relying on the decision in *Automotive Jobbers, Inc., supra*, the examiner noticed that some suppliers bill the group at the "net price" after deducting the redistribution discount,⁴⁸ and that the group in turn bills its members in the

⁴⁴ Tr. 133, 134, 256-257, 305-309.

⁴⁵ Tr. 307-308.

⁴⁶ Tr. 167.

⁴⁷ See footnote 36, *supra*.

⁴⁸ *Id.*, par. 1(h).

same manner as it is billed, adding a 5% service charge for goods obtained from the warehouse stock and 2% for "slot" shipments.⁴⁹ The transcript in *Automotive Jobbers, Inc., supra*, specifically reveals that the instant respondent sold its products to that group at the net price after subtracting the redistribution discount.⁵⁰ It is thus apparent that after September of 1958, the individual jobber members received

⁴⁹ *Id.*, par. 1(k).

⁵⁰ In the proceeding against Automotive Jobbers, Inc., Mr. J. W. Fooshee, the supervisor or manager of that association, testified on direct examination by complaint counsel to that effect. We hereby take official notice of that testimony and, as before, offer to the respondent the opportunity to present rebuttal evidence should it so desire by making a timely request therefor.

Q. * * * The association deal, that is the arrangement that is made between Automotive Jobbers, Inc., and the Dayton Rubber Company; is that correct?

A. That is correct.

Q. Let me ask you this: On the association deal, which is twenty per cent off jobber price on certain items, and fifteen per cent off jobber price on other items; then under "Freight Policy" there is one drop shipment allowed per member each month.

Now, where the member buys from the association itself, how is he billed?

A. He is billed the cost the association is.

Q. That's what I am trying to understand. In other words, the association buys from the factory at twenty per cent off jobber price on one group of items, and fifteen per cent off jobber price on another group of items?

A. Right.

Q. Now, on billing the jobber, you billed him at the same price you paid Dayton Rubber Company?

A. That is correct, sir.

Q. Now, in that connection when you bill the jobber, is there any warehouse fee charged the jobber by the association?

A. There is.

Q. What is that fee?

A. Five per cent.

Q. Now, turning to the freight policy, which allows for the drop shipment. Now, when he orders the drop shipment, is that order direct from the factory or through the association? I mean is it ordered direct through the factory, or through the association?

A. Dayton warehouse on Crampton Street.

Q. Does he receive the twenty per cent off jobber's price, and the fifteen per cent off jobber price on those items?

A. He does.

Q. That is taken right off the invoice by the Dayton Rubber Company?

A. Billed a net price.

Q. That reflects the twenty per cent off jobber price, and fifteen per cent off jobber price?

A. That is correct.

Q. That billing does not go through the association?

A. Yes, sir.

Q. It does go through the association?

A. It is billed to me, and I pay the bill, and bill the member.

Q. I see. In other words, then, when the drop shipment, the Dayton Rubber Company bills you?

A. Right.

Q. You bill the member?

A. Right.

HEARING EXAMINER CREEL. Do you charge the member five per cent fee in that transaction?

The WITNESS. On that shipment, I do not.

Automotive Jobbers, Inc., supra, tr. 229-232.

the benefit of the 20% redistribution discount at the time they purchased goods from the respondent. The price advantage was not dependent upon a subsequent rebate which was later distributed after deducting the jobbers' proportional share of the group's operational expenses. Even when the 5% and 2% service charges were assessed, the member jobbers at the time of purchase were receiving a substantial reduction in price not available to competing non-affiliated jobbers. Since the evidence reveals a measurable price difference occurring at the time of sale, which took into account service charges assessed on the particular items, evidence showing how much additional income was returned to the individual members at some future time or the source of such income is not necessary.

The evidence in this case shows that the average net profit margin in the automobile parts industry is less than 5% after taxes,⁵¹ and that the net profit margins of some of the buying group members and their non-affiliated competitors are between 1 and 4 percent.⁵² The keenness of competition is further demonstrated by evidence of the fact that the 2% cash discount is considered to be of great importance and is carefully taken.⁵³ Against this backdrop, the continuing price differential of 20% on fan belts and radiator hoses and 15% on other items is substantial. Even when the advantage is reduced by the 2% service charge for "slot" shipments and the 5% service charge for deliveries from the warehouse stock, the price advantage is significantly in excess of the average profit margin. A continuing price advantage of this magnitude in an industry characterized by profit margins of less than 5% is capable of substantially lessening competition, and we so find. The Commission thus concludes that respondent discriminated in price in violation of Section 2(a) of the Clayton Act, as amended, by selling its products to the members of Automotive Jobbers, Inc., at a net price which included the redistribution discount, when said members were not engaged in redistribution and competing non-affiliated jobbers were denied such a discount.

Respondent raises several other objections not previously discussed. It is argued that the non-affiliated jobbers could join or form group buying associations of their own and thereby obtain the more favorable prices. As a result, the lower prices were "available" to all, thus obviating any finding of price discrimination, it is urged. We reject this argument. Lower prices are not "available" where a purchaser must alter his purchasing status before he can receive them. Patently,

⁵¹ Order Taking Official Notice, *op. cit.*, par. 3(b).

⁵² *Id.*, par. 1(o).

⁵³ *Id.*, par. 3(b).

a lower price is not "available" to a merchant who must, in order to qualify, purchase more goods within a given time period. The same consideration applies here.

Respondent also asserts that it was not aware that Automotive Jobbers, Inc., was a "buying group," and that any order forbidding sales to such groups should be limited to "knowing" violations. However, the manager of the Dayco department which engaged in the present discrimination stated that he was aware that several of respondent's customers, including Automotive Jobbers, Inc., were "buying groups." In addition, he listed several characteristics by which such groups could be identified. In any event, the respondent has the ultimate responsibility of determining whether its customers are legally eligible for any discounts which it grants. Since there are indicia whereby buying groups may be detected, this task is not an impossible one to perform. In addition, respondent asserts that it will be placed at a great competitive disadvantage unless the order relative to buying groups is suspended until such time as the Commission proceeds against its competitors who grant similar discounts to such groups. However, the Commission is actively proceeding against other group buying associations who have induced discriminatory prices from suppliers.⁵⁴ Accordingly, suspension of the order at this time would not be appropriate.

IV

As charged in Count II of the complaint, the examiner concluded that respondent had entered into contracts and agreements which had the effect of setting the prices at which direct purchasers would resell to indirect purchasers and which limited the direct purchasers' selection of their customers and restricted the indirect purchasers in their sources of supply in violation of Section 5 of the Federal Trade Commission Act. On this appeal, respondent urges that these contracts must not be read literally, but that their purpose and actual effect upon competition must be considered.

The facts, as found by the examiner, are as follows. Prior to September of 1958, the basic contracts between respondent and its direct customers, the "AA" jobbers, contained no reference to resale prices and made no attempt to limit the selection of customers.⁵⁵ However, the examiner found that those "AA" jobbers who sold exclusively to other jobbers were requested to enter into a supplemental contract, which,

⁵⁴ *National Parts Warehouse*, Docket No. 8039, 63 F.T.C. 1692 (December 16, 1963); *Ark-La-Tex Warehouse Distributors, Inc.*, Docket No. 7592.

⁵⁵ See CX 9.

among other things, contained an agreement to resell respondent's products to "A" jobbers at respondent's suggested resale prices and to distribute the products only to jobbers approved by Dayco.⁵⁶

The contracts entered into between respondent and its indirect customers, the "A" jobbers, contained a clause stating that such customers were entitled to purchase respondent's products at the current suggested prices for "A" jobbers and that their source of supply was limited to certain "AA" jobbers who were parties to this contract.⁵⁷ It appears to us, as it did to the examiner, that the signatures of the direct purchasers on the "A" jobber contracts were manifestations of their assent to the terms of the contract, including the pricing stipulation that the indirect purchasers would acquire their products at the prices suggested by the respondent. Considered in this light, respondent, its direct purchasers, and its indirect purchasers have, through this agreement, entered into a conspiracy to fix the price at which the direct purchasers will resell respondent's products to the indirect purchasers.

After September of 1958, respondent adopted new forms of agreement which eliminated the objectionable provisions. However, the examiner found that there had been no attempt to renegotiate the old contracts, and that many of these contracts continued in effect. On this basis, the examiner issued an order requiring respondent to cease and desist from entering into agreements fixing the resale prices of its products and limiting or restricting the persons from whom any purchaser may acquire its products.

Vertical agreements and conspiracies to fix resale prices are illegal *per se*, unless they fall within the exemption carved out by the McGuire Fair Trade Act.⁵⁸ Since not so exempted, the clauses in respondent's supplemental agreements with its direct customers,⁵⁹ in which these direct customers agreed to sell respondent's products to indirect purchasers at the suggested resale prices, as well as the pricing clauses of the "A" jobber contracts,⁶⁰ are illegal even though they have little effect upon the prices which they purport to regulate. Since many of these contracts remain in effect, we agree with the examiner that an order prohibiting respondent from conspiring to restrain price competition by their use is necessary.

⁵⁶ Tr. 107, 108; CX 10 A-B.

⁵⁷ See CX 11.

⁵⁸ *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States v. White Motor Co.*, 194 F. Supp. 562 (1961), *rev'd on other grounds*, *White Motor Co. v. United States*, 372 U.S. 253 (1963); *Simpson v. Union Oil Co.*, — U.S. — (April 20, 1964).

⁵⁹ See CX 10 A-B.

⁶⁰ See CX 11.

Contracts and agreements attempting to allocate customers and territories on a vertical basis are not illegal *per se*. According, we must consider the purpose and the actual effect of the clauses in respondent's contracts which limited the direct purchasers' selection of customers and the indirect purchasers' sources of supply. *White Motor Co. v. United States*, 372 U.S. 253 (1963). There is testimony that the various contracts were utilized to create a sense of "rapport" between respondent and its various customers, and to serve as a guide in keeping records.⁶¹ Further, contrary to the examiner's findings, there is no evidence that any of these agreements actually limited the selection of customers or sources of supply. Direct purchasers were apparently free to resell respondent's products to any recognized Dayco jobber. Indirect purchasers could purchase through any direct purchaser, and there was some evidence that respondent cooperated in placing orders of indirect purchasers through distributors of their choice.⁶² Thus, the Commission concludes that there is no basis in this record for an order requiring respondent to cease and desist from limiting or restricting the persons from whom any purchaser may acquire its products. The examiner's findings and conclusion to the contrary are not adopted.

For the aforementioned reasons, an order will issue requiring the respondent to cease and desist from those practices herein found to be violations of Section 2(a) of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act. For the reasons set forth in Section II of this opinion, the charge of price discrimination between direct and indirect jobbers prior to September of 1958 will be dismissed. In taking this action, the Commission does not express an opinion upon whether or not a violation of law has occurred. Instead, the Commission considers an order unnecessary even if a violation has occurred, since the difference in price between direct and indirect customers was discontinued some six years ago, and a resumption of such a difference is improbable. Should it appear, however, that the Commission is incorrect in its belief that price differences of this nature have been abandoned, and should subsequent developments indicate that respondent is discriminating between direct and indirect customers, the Commission will exercise its right to reconsider this problem, in connection with which it might find it desirable to reopen this proceeding. In such an eventuality, the Commission would utilize the evidence introduced in support of that charge, together with any necessary additional evidence, in reaching its conclusion. But because we are dismissing this charge, at this time, the paragraph of the ac-

⁶¹ Tr. 255, 261.

⁶² Tr. 132, 297, 298.

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companying order relative to price discrimination is predicated solely upon differences in price between jobber members of group buying associations, whom we have held to be direct purchasers from respondent, and other direct purchasers. However, by discriminating among its direct purchasers, respondent has rendered itself amenable to an order prohibiting it from discriminating among direct purchasers of all categories. *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470 (1952). Accordingly, the order will not be limited to discrimination in price between buying group members and other direct purchasers, but will extend to price discrimination between or among all direct customers.

Where the initial decision of the examiner conflicts with our views as expressed in this opinion, it is modified to accord with this opinion, and, as so modified, adopted as the decision of the Commission.

Commissioner Elman dissented and has filed a dissenting opinion.

Commissioner MacIntyre concurred and has filed a concurring statement.

Commissioner Reilly did not participate for the reason that he did not hear oral argument.

DISSENTING OPINION

AUGUST 5, 1964

By ELMAN, *Commissioner*:

I dissent for the reasons stated in my opinions in *National Parts Warehouse*, F.T.C. Docket 8039 (December 16, 1963) [63 F.T.C. 1692, 1739]; *Purolator Products, Inc.*, F.T.C. Docket 7850 (April 3, 1964) [65 F.T.C. 8, 45]; and *Monroe Auto Equipment Co.*, F.T.C. Docket 8543 (July 28, 1964) [p. 276 herein].

I might also point out that the Commission's disposition of the price-discrimination aspect of this case is in conflict with its order of June 5, 1963, remanding *Ark-La-Tex Warehouse Distributors, Inc.*, F.T.C. Docket 7592 [62 F.T.C. 1557], to the hearing examiner in light of the decision of the Court of Appeals for the Ninth Circuit in *Alhambra Motor Parts v. F.T.C.*, 309 F. 2d 213 (1962). *Automotive Jobbers, Inc.*, F.T.C. Docket 7590 [60 F.T.C. 19], was a companion case to *Ark-La-Tex*, having materially the same facts, and tried before the same hearing examiner, who issued initial decisions in both cases on the same day. Respondent in Docket 7590 did not appeal the initial decision, however, and it was routinely adopted by the Commission prior to the Court of Appeals' *Alhambra* decision. If the examiner's findings in *Ark-La-Tex* were deemed insufficient by the Commission to permit

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decision of that case, I fail to see how the same findings, made by the examiner in *Automotive Jobbers*, can, as the Commission in effect holds, support an order against the present respondent.

CONCURRING STATEMENT

AUGUST 5, 1964

By MacINTYRE, *Commissioner*:

With the decision of the Commission in this case I concur. However, I have some doubts about the position regarding "indirect purchasers." It is my view that the word "purchaser" as used in Section 2(a) of the Robinson-Patman Act has the same meaning as the word "Purchaser" as used in Section 2(e). The Supreme Court of the United States in the case of *Corn Products Refining Company, et al. v. Federal Trade Commission* (324 U.S. 726, 743-744) concluded that the word "purchaser" as used in 2(e) should not be defined so narrowly as to include only customers or "direct purchasers." There the Court said:

The statute does not require that the discrimination in favor of one purchaser against another shall be provided for in a purchase contract or be required by it. It is enough if the discrimination be made in favor of one who is a purchaser and denied to another purchaser or other purchasers of the commodity.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, dated June 11, 1963, and upon briefs and argument in support thereof and in opposition thereto; and

The Commission having rendered its decision determining that the initial decision issued by the examiner should be modified in accordance with the views and for the reasons expressed in the accompanying opinion, and, as so modified, adopted as the decision of the Commission:

It is ordered, That the initial decision be modified by striking the order to cease and desist issued by the examiner and substituting therefor the following:

ORDER

It is ordered, That respondent, Dayco Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device in, or in connection with, the sale or distribution of automotive parts and related products

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in commerce, as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Discriminating in the price of such products of like grade and quality, by selling such products to any direct purchaser at net prices higher than the net prices charged any other direct purchaser who in fact competes in the resale and distribution of such products with the purchaser paying the higher price.
2. Putting into effect, continuing or maintaining any merchandising or distribution plan or policy under which agreements or understandings are entered into with resellers of such products which have the purpose or effect of fixing, establishing or maintaining the prices at which such products may be resold.

It is further ordered, That the initial decision, as modified by the accompanying opinion, and as above modified, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondent herein 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 this order.

Commissioner Elman dissenting, Commissioner MacIntyre concurring, and Commissioner Reilly not participating for the reason that he did not hear oral argument.
