

IN THE MATTER OF
STATE PAINT MANUFACTURING COMPANY ET AL.

Docket 8367. Order, July 31, 1964

Order denying petition to reopen, without prejudice to respondents' right to renew same if and when the decision of the Court of Appeals in Docket No. 8290 is affirmed by the Supreme Court.

ORDER DENYING RESPONDENTS' PETITION TO REOPEN

This matter having come before the Commission upon respondents' petition filed July 15, 1964, requesting that this proceeding, Docket No. 8367, be reopened and the order to cease and desist entered February 7, 1964 [64 F.T.C. 660], be vacated; and

The respondents having alleged in support of their petition that the Commission's decision herein, including its order to cease and desist, was based on its decision and order in *Mary Carter Paint Co. et al.*, Docket No. 8290, entered June 28, 1962 [60 F.T.C. 1827]; that on June 19, 1964, the United States Court of Appeals for the Fifth Circuit rendered its decision in *Mary Carter Paint Co. et al. v. Federal Trade Commission*, Case No. 19982, in which the court directed the Commission to enter an order dismissing the complaint in said Docket No. 8290; and that as a result of this ruling by the Court of Appeals conditions of law have so changed since issuance of the order in Docket No. 8367 as to require the relief requested; and

It appearing that the aforesaid decision of the Court of Appeals is subject to review by the Supreme Court of the United States by writ of certiorari if granted upon petition therefor filed within ninety (90) days after entry of judgment by the Court of Appeals implementing its decision, or within such further period of time, not exceeding sixty (60) days, as may be allowed by a justice of the Supreme Court; and

It further appearing that the time within which such petition may be filed in Docket No. 8290 has not yet expired and, thus, that respondents' request in Docket No. 8367 is premature:

It is ordered, That respondents' petition filed July 15, 1964, be, and it hereby is, denied, without prejudice, however, to respondents' right to renew the same if and when the decision of the Court of Appeals in Docket No. 8290 is affirmed by the Supreme Court, or after expiration of the time within which a petition for a writ of certiorari may be filed in that case if no such petition is filed within such time.

Commissioner Elman dissenting.

IN THE MATTER OF
UNIVERSAL-RUNDLE CORPORATION

Docket 8070. Order, Aug. 4, 1964

Order denying respondent's petition for withdrawal of cease and desist order and for entry of order staying its effective date.

ORDER DENYING RESPONDENT'S PETITION

This matter has come before the Commission on a petition filed by respondent on July 20, 1964, requesting that we withdraw the order to cease and desist issued in this proceeding on June 12, 1964 [65 F.T.C. 924], and stay the re-entry of said order and further requesting that we grant a hearing on the petition and stay the order to cease and desist pending decision on the petition. An answer in opposition to this petition has been filed by complaint counsel.

Respondent contends in support of its request for withdrawal of the order to cease and desist that there is an industrywide practice by plumbing supply manufacturers of granting discounts on truckload shipments and that inasmuch as it is prohibited by the order from granting such discounts it will be placed in an adverse competitive position. Respondent has also submitted information to the effect that it has incurred losses in the operation of its business since 1961 and that certain of its competitors have realized profits during that period. It requests therefore that the order be withdrawn until the Commission has taken the necessary steps to correct the practice complained of.

The principal basis for respondent's petition seems to be that the granting of truckload discounts by its competitors is illegal per se under Section 2(a) of the amended Clayton Act. There is nothing in our decision to support this contention, however, nor does the order to cease and desist entered against respondent absolutely prohibit it from granting truckload discounts. While the practice of granting such discounts may under certain circumstances, such as those shown in the record of this proceeding, result in price discriminations having proscribed competitive effects, the practice is not necessarily illegal as indicated in respondent's petition. In this connection, it must be determined in each case whether the discount creates a price difference, whether the recipient of such a discount is competing at the same functional level with a customer paying a higher price, whether the customer buying in less than truckload quantities is able to avail itself of the truckload discount, and whether the differential is sufficient in the competitive conditions shown to exist to have the requisite anti-competitive effects. Moreover, even if a prima facie violation of Section