

IN THE MATTER OF
LLOYD A. FRY ROOFING COMPANY ET AL.

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

Docket 7908. Complaint, May 20, 1960—Decision, July 23, 1965

Order requiring the nation's largest producer of asphalt roofing products located in Summit, Ill., to cease discriminating in price among its customers of asphalt saturated felt and asphalt strip shingles in violation of Sec. 2(a) of the Clayton Act by using anticompetitive territorial price cuts to discipline small independent local competitors; the Commission dismissed the charge that respondent had sold said products at below cost prices with the intent of injuring competition in violation of Sec 5 of the Federal Trade Commission Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have violated, and are now violating, the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. § 13), and the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45), and it appearing to the Commission that a proceeding by it in respect thereof would be to the interest of the public, hereby issues its complaint stating its charges with respect thereto as follows:

COUNT I

Charging violation of subsection (a) of Section 2 of the Clayton Act, as amended, the Commission alleges:

PARAGRAPH 1. Respondent Lloyd A. Fry Roofing Company (sometimes hereinafter referred to as Fry or respondent corporation) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its prin-

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principal office and place of business located at 5818 Archer Road, Summit, Illinois.

PAR. 2. Respondents Lloyd A. Fry, Sr., chairman of the board of respondent corporation, and Lloyd A. Fry, Jr., president of respondent corporation, are individuals and the majority stockholders in Lloyd A. Fry Roofing Company. They formulate, direct and control the acts, policies and practices of respondent corporation, and have their offices and principal place of business at 5818 Archer Road, Summit, Illinois. They are, personally and officially, primarily responsible for the adoption and use of the acts and practices herein alleged to be unlawful, and the methods, acts, and practices hereinafter alleged with respect to respondent corporation are also alleged as to said individuals.

PAR. 3. The respondent corporation, Fry, is now, and for many years has been, engaged in the manufacture, distribution and sale of asphalt roofing products and dry felt. It sells these products for use, consumption or resale within the various States of the United States.

Fry's products are sold and distributed under the brand names "Invincible" and "Genasco." Fry also manufactures asphalt roofing products under the private labels of some of its wholesale distributors and other customers, such as Sears, Roebuck & Co.

Fry's sales are and have been substantial. Its net sales during the fiscal year ended October 31, 1958, were \$50,823,413.

PAR. 4. Fry is the largest asphalt roofing manufacturer in the United States, owning and operating nineteen plants in fifteen States of the United States. In addition, dry felt is manufactured in fourteen plants in eleven States by Fry's Volney Felt Mills Division.

PAR. 5. In the course and conduct of its business, Fry has been, and is now, engaged in commerce, as "commerce" is defined in the Clayton Act. It transports or causes to be transported its roofing products from the State of manufacture to purchasers located in other States. There is and has been a constant stream of trade and commerce in these products between and among the various States of the United States.

PAR. 6. In the course and conduct of its business in commerce, Fry is now, and has been, in substantial competition with other corporations, individuals, partnerships and firms engaged in the manufacture, sale and distribution of asphalt roofing products.

PAR. 7. In the course and conduct of its business in commerce, and particularly during and since 1956, Fry has discriminated in

price between and among different purchasers of its asphalt roofing products of like grade and quality. This it has done by selling to some purchasers at prices higher than those charged other purchasers.

Among and typical of the discriminations alleged are transactions relating to 15-pound and 30-pound asphalt saturated felt, in 60-pound rolls (sometimes hereinafter referred to as asphalt felt), and 210-pound asphalt shingles (12-inch standard 3-tab strip shingles, sometimes hereinafter referred to as shingles). These products Fry has sold to customers in certain geographical areas of the United States at prices substantially higher than those charged others of its customers outside such geographical areas.

In the sale of the aforesaid products, particularly during and since 1956, Fry has adopted and used a pricing system and pattern resulting in lower prices in the Southeastern and Southwestern areas of the United States than in other areas. This it has accomplished through a series of price lists and price bulletins establishing various systems of area and zone pricing, and though the application of varying discounts to an ostensibly uniform price.

For example, from August to October 1956, Fry charged certain customers in Illinois \$6.40 per square for shingles while, for products of like grade and quality, it charged certain customers in Arkansas \$5.50 per square. On asphalt felt, during the same period, certain customers in Illinois were charged \$2.43 per roll, while, for products of like grade and quality, certain customers in Mississippi were charged \$2.07 per roll.

Similarly, in September and October 1958, certain customers in Arkansas and Tennessee were charged \$1.78 per roll for asphalt felt, while, for products of like grade and quality, certain customers in Wisconsin were charged \$2.34 per roll. In the sale of shingles during the same period, certain customers in Arkansas were charged \$5.30 per square, while, for products of like grade and quality, certain customers in Wisconsin were charged \$6.60 per square.

These examples are illustrative of the pricing practices of respondents, and other price lists and bulletins, and sales made pursuant thereto, during the period 1956 to date reflect a similar pattern of discrimination.

PAR. 8. The effect of these discriminations in price, as alleged in Paragraph Seven of this complaint, has been or may be to divert to Fry, or to Fry's customers, substantial business from competitors; and such discriminations are and have been sufficient to divert substantial business from competitors to Fry, or to Fry's customers, in the future.

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Where business has not been actually diverted, competitors have been required to meet, directly or indirectly, the discriminatory prices of Fry, with the result, actual or potential, of substantially impairing their profits and consequently lessening their ability to compete.

Thus, the effect of the aforesaid discriminations in price, as alleged in Paragraph Seven of this complaint, has been or may be substantially to lessen competition or to tend to create a monopoly in the lines of commerce in which Fry, its customers and its competitors are engaged, or to injure, destroy, or prevent competition with respondent Fry or its customers.

PAR. 9. The foregoing discriminations in price by respondents are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

COUNT II

Charging violation of Section 5 of the Federal Trade Commission Act, the Commission alleges:

PAR. 10. Paragraphs One through Six of Count I hereof are incorporated herein by reference and made a part of this Count as fully and with the same effect as if set forth herein verbatim, except that the reference to the Clayton Act in Paragraph Five of Count I is eliminated herein, and reference to the Federal Trade Commission Act is substituted therefor.

PAR. 11. In the course and conduct of its business in commerce, and particularly since 1956, respondent Lloyd A. Fry Roofing Company has sold or offered to sell and is selling or offering to sell asphalt roofing products at below cost prices or at unreasonably low prices with the intent, purpose and effect of injuring, restraining, suppressing, and destroying competition in the sale of such products in the Southeastern and Southwestern areas of the country.

For example, in the sale of 15-pound and 30-pound asphalt saturated felt, during and subsequent to March 1958, Fry sold to certain customers in Mississippi, Tennessee and Arkansas at delivered prices of \$1.63 per roll. It is alleged that such price was an unreasonably low price or was below Fry's cost of manufacture, sale and delivery, and that sales at such price were made for the purpose and with the intent and effect aforesaid.

PAR. 12. The effect and result of the pricing practices of respondent, as alleged in Paragraph Eleven hereof, have been or may be substantially to lessen competition in the distribution and sale of asphalt roofing products, to the injury and prejudice of the public,

and to the injury and prejudice of Fry's competitors, as aforesaid; and such pricing practices constitute unfair methods of competition and unfair acts or practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Bernard M. Williamson, Mr. Bernard Turiel, and Mr. Allan Finkel for the Commission.

Mr. Burton Y. Weitzenfeld, Mr. James R. Fruchterman, Mr. James T. Dougherty, and Mr. Herbert I. Rothbart, Attorneys for the respondents, Kahn, Adsit & Arnstein, 120 South La Salle Street, Chicago 3, Ill.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

APRIL 1, 1964

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SUPPORTING REFERENCES

"Tr." refers to the official transcript.

CX refers to Commission Exhibits.

RX refers to Respondents' Exhibits.

The references are placed at the end of each paragraph in the order in which the particular statements which they support are made in the paragraph.

I. The Complaint

1. The complaint in this proceeding, issued on May 20, 1960, charges in Count I that the respondents named above, in the course and conduct of their business in commerce, during and since 1956, discriminated geographically in the price charged different purchasers of their asphalt roofing products of like grade and quality, in violation of Section 2 of the Clayton Act, as amended. The pertinent parts of that Act invoked by the complaint are as follows:

Sec. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *.

2. The complaint further alleges in Count II that respondents have sold or offered to sell asphalt roofing products at below cost prices or at unreasonably low prices with the intent, purpose, and effect of injuring, restraining, suppressing, and destroying competition in the sale of such products in the southeastern and southwestern areas of the United States, in violation of Section 5 of the Federal Trade Commission Act. Section 5 of the Act just referred to provides, in part, that: "Unfair methods of competition in commerce, * * * are hereby declared unlawful."

II. The Answer

3. Respondents' answer, filed August 1, 1960, admits the corporate existence and business operations of the respondents and certain geographic price differences, but denies any predatory intent, and denied that any of their prices or policies have violated Section 2(a) of the Clayton Act, as amended, or Section 5 of the Federal Trade Commission Act as alleged in the complaint.

III. Hearings

4. Hearings were held in Washington, D.C., New York, New York, Chicago, Illinois, Atlanta, Georgia, Dayton, Ohio and Knoxville, Tennessee. The record consists of 2,480 pages of transcript and numerous exhibits.

IV. Proposed Findings

5. Opposing counsel submitted proposed findings as to facts, proposed conclusions and a proposed order. In addition, they submitted replies to the opposition's proposals. All proposals have been considered by the hearing examiner, and those not incorporated in this initial decision, either verbatim or in substance, are hereby rejected.

V. Identity and Business of Respondents

6. Respondent Lloyd A. Fry Roofing Company, hereinafter sometimes referred to as Fry Roofing, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 5818 Archer Road, Summit, Illinois (Answer).

7. Fry Roofing is now and for many years has been engaged in the manufacture, distribution, and sale of asphalt roofing products and dry felt. It sells such products under the brand names of "invincible" and "Genasco" for use, consumption and resale within the various states of the United States. It also manufactures asphalt roofing products under private labels for some of its wholesale distributors and other customers, particularly Sears, Roebuck and Company (Answer).

8. Respondents Lloyd A. Fry, Senior, and Lloyd A. Fry, Junior, are individuals and majority stockholders in the Fry Roofing Corporation and are respectively the chairman of the board of the respondent corporation and president of that corporation. Together they formulate, direct and control the acts, policies and practices of the respondent corporation. Their offices and principal place of business is the same as that of the Fry Corporation, 5818 Archer Road, Summit, Illinois (Answer).

9. Fry Roofing operated 19 strategically located asphalt roofing plants throughout the United States during the period of 1956 through 1960 as follows:

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Summit, Illinois	Brookville, Indiana
Kearny, New Jersey	Houston, Texas
Compton, California	Stroud, Oklahoma
Memphis, Tennessee	San Leandro, California
Detroit, Michigan	York, Pennsylvania
Waltham, Massachusetts	Morehead City, North Carolina
Portland, Oregon	Jacksonville, Florida
Minneapolis, Minnesota	Irving, Texas
Robertson, Missouri	Fort Lauderdale, Florida
N. Kansas City, Missouri	

10. Since 1960, Fry Roofing has expanded its operation by opening new plants in Atlanta, Georgia, Lubbock, Texas, and Oklahoma City, Oklahoma. As of July 1962, Fry Roofing had a new plant under construction in Meridian, Ohio (Tr. 2446, 2447, CX 1454A-F, CX 1455B).

11. Fry Roofing, although not the largest corporation engaging in the manufacture of asphalt roofing products, operates the largest number of such plants in the industry and is the largest producer of asphalt roofing products. In 1958, Fry Roofing's share of the market in the sale of asphalt saturated felt amounted to 14.20%. For the same year, Fry's market share in the sale of other asphalt roofing products amounted to 10.81% (Tr. 275-76, CX 1458 and 1387A-T).

12. Although there are about 34 companies engaged in the manufacture of asphalt roofing products, the major national manufacturers of that product, in addition to Fry Roofing, together with the number of plants which they were operating in June 1961, are as follows:

<i>Name of Company</i>	<i>No. of Plants</i>
The Ruberoid Co.	11
Certain-teed Products Corporation	8
Johns-Manville Corporation	7
The Flintkote Company	6
Allied Chemical Corporation, Barrett Division	6
The Philip Carey Manufacturing Co.	5
Bird & Son, Inc.	4
State Gypsum	Not Shown
Logan-Long	" "

(Tr. 276-78, 49, CX 1513A and B)

VI. The Products

13. The basic materials used in the manufacture of asphalt roofing products are felt, asphalt and mineral granulars. In the making of asphalt saturated felt dry felt is first processed into

saturated felt by dipping in liquid asphalt, a product derived from petroleum. After saturation, the product is cooled and re-rolled. In the manufacture of shingles the felt is heavier and the coating of the saturant has a higher viscosity and higher melting point than that used in the making of saturated felt. From the coating vat the product moves to a drum where granulars of slate rock are pressed into the coating as the product is wrapped around a large drum. Finally, the sheet is cut into shingles. More machinery and more processes are involved in the making of shingles than in the making of the simpler saturated felt product (Tr. 15, 2004-24).

14. There are, generally, two major classifications of asphalt saturated felt. Commercially, the 15-pound saturated felt product has 432 square feet per roll, and the 30-pound saturated felt has 216 square feet per roll. Both of these products are sold in 60-pound rolls (Tr. 15). Asphalt saturated felt and shingles are the principal products sold by Fry Roofing and by the other companies in the asphalt roofing industry. The evidence in this proceeding is confined principally to asphalt saturated felt and to a lesser extent to asphalt shingles. The largest volume of shingles produced and sold by Fry and the largest volume sold in the industry is what is commonly referred to as the 12-inch standard strip shingle. This shingle is sold in bundles which cover 108 square feet. (Tr. 16, 39-40, CX 5).

VII. Classification of Fry Roofing Customers

15. Mr. Lloyd A. Fry, Jr. testified that a wholesale distributor of Fry Roofing products was a business entity which bought from Fry Roofing and which in turn sold to retail lumber dealers, roofing contractors, and roofing applicators. A retail dealer he described as a business entity which carried an inventory of roofing products for sale to the general buying public. He admitted that there was some competition between a dealer and a wholesaler. He testified that Sears, Roebuck and Company was a retail outlet for Fry Roofing products, but that it purchased its roofing material at a wholesale price. The annual purchases of asphalt roofing products from Fry Roofing by Sears, Roebuck and Company have been approximately \$5 million for each of the years 1956 through 1960 (Tr. 2412-13, CX 1356-60).

16. An officer of C. M. McClung and Company of Knoxville, Tennessee, which is one of Fry Roofing's major purchasers in the Knoxville area, testified that his company sells asphalt roofing products to applicators, building contractors and industrial ac-

counts. These are the type of accounts to which retail dealers would normally sell asphalt products (Tr. 1627-28, 1635, 2412, 2413).

VIII. The Pricing System Employed by Fry Roofing

17. We begin our consideration of the pricing system employed by Fry Roofing during the period from 1956 through 1960 with the admitted fact that prior to February 1956 Fry Roofing sold its line of asphalt roofing products at prices which were 5% to 7% below the published prices of other major national manufacturers of asphalt roofing products. Mr. Fry, Sr. defended such practices with the explanation that Fry Roofing did not employ salesmen as did the other major manufacturers and consequently Fry could pass on the savings thus obtained to its distributors. Furthermore, he stated, and testimony throughout the record support his statement, that published prices are frequently not the real price charged—that published prices are varied to meet competitive needs (Tr. 280-81, 696-97).

18. In the discussion of Fry Roofing's pricing system, two types of products are used for illustrative purposes, namely, 15 and 30-pound asphalt saturated felt and 12-inch standard strip shingles. Asphalt saturated felt is sold in rolls weighing 60 pounds, standard strip shingles are sold in bundles which cover 108 square feet (CX 5).

A. Introduction by Fry Roofing of the Zone Delivery Pricing System of February 19, 1956

19. In February 1956, Fry Roofing issued an announcement stating that, effective February 19, 1956, it would employ a revised schedule of prices involving the use of a zone delivery system which system would apply to all the territory of the United States east of the Rocky Mountains (CX 2A).

20. The new merchandising plan of February 19, 1956, assigned to each county in each state a zone number. The zone numbers ranged from 1 to 20 with zone 1 being the lowest price zone and the other zones progressively higher in price, with zone 20 having the highest price. All counties where an asphalt roofing plant was operated, regardless of the ownership of the plant, were designated as zone 1. Zones 2 through 20 were counties in which there was no roofing plant. A particular number assigned to an individual county depended upon a freight factor representing an average freight cost from the nearest asphalt roofing plant to the county seat of the county in question regardless of the ownership of such plant.

21. The delivery price under this Fry Roofing zoning system appears to have been computed by taking a predetermined base price for each product sold and adding to that base price a freight factor of ten cents per hundredweight in order to arrive at the delivery price for zone 1. The freight factor employed was not an actual freight charge but an estimated average of a freight charge. This basis for determining the price of zone 1 was established, in part, as a competitive factor despite the fact that Fry Roofing did not operate a roofing plant in all of the counties which were assigned the zone 1 price.

22. The assigning of zone numbers and prices to zones 2 through 20 was determined by adding a freight factor to the basic price based upon an average of the lowest transportation rate from any factory point to the county seat of the county in question regardless of the ownership of the particular asphalt roofing plant (Tr. 113-18). Typical of the range of Fry Roofing prices under this new system were the prices in various zones for 12-inch standard strip shingles and for the 15- and 30-pound asphalt saturated felt in 60-pound rolls, as follows:

<i>Zone No.</i>	<i>Shingles</i>	<i>Asphalt Felt</i>
1.....	\$6.50	\$2.55
2.....	6.55	2.57
3.....	6.61	2.58
4.....	6.66	2.60
5.....	6.71	2.61
10.....	7.17	2.74
15.....	8.12	3.01
20.....	9.76	3.48

For a pictorial explanation of this pricing system, see CX 1389.

23. To the already complicated pricing system described was added other complicating factors. Purchasers were divided by Fry Roofing into two categories, namely, "purchasers for resale to customers" and "approved distributors." Purchasers for resale to customers included buyers, such as, wholesalers, retail dealers, roofing contractors, reserve supply companies, mail order houses, and manufacturers of prefabricated houses, who purchased and carried a stock of Fry Roofing products for resale. Approved distributors included individuals, corporations, or other business entities engaged in the distribution of Fry Roofing products to retail dealers and roofing contractors. Approved distributors were required to maintain a sales organization to actively serve the trade within their area. Furthermore, they were required to maintain adequate warehouse stock of Fry Roofing products (CX 2E).

24. Purchasers for resale to consumers purchasing in minimum truckload or carload quantities received their purchases less a 10% trade discount. Approved distributors who purchased in minimum truckload or carload quantities assigned to the approved distributor's warehouse also received the same 10% trade discount. In addition, an approved distributor would qualify for an additional 6% so-called functional discount if such purchases involved truckload or carload shipments consigned to customers of the distributors who were purchasers for resale to consumers. This additional 6% functional discount was not available to a distributor if the purchased material was shipped directly to the distributor's warehouse (CX 2F). Fry Roofing's pricing plan provided that the 6% functional discount would not be reflected on Fry Roofing's invoices but would be accumulated and paid to the approved distributors at the end of each month (CX 2F). In order for a distributor to qualify for the functional discount he had to make a statement at the end of each month with regard to purchases consigned to the distributor's customer as follows:

I certify that this shipment has been sold to a purchaser for resale in accordance with your definition. (CX 2L)

Under this Fry Roofing plan an allowance of ten cents per hundredweight was also granted to purchasers, purchasing a minimum of 20,000 pounds of roofing material, who received delivery at Fry Roofing manufacturing plant (Tr. 120).

25. Illustrative of the competitive character of the Fry Roofing pricing system is the fact that Knox County, Tenn., Lauderdale County, Miss., Pulaski County, Ark., and Ouachita County, Ark., and each of the counties wherein any plant of a major roofing manufacturer was located, were all assigned as zone 1 counties. Fry Roofing did not operate a roofing plant in any one of the counties named. Thus it appears that this lowest zone price was designed to compete with the other manufacturers of asphalt roofing which did operate in those counties and in the other counties designated as zone 1. The names of the companies which operated in the counties listed above are as follows:

<i>Name of Company</i>	<i>City & State</i>	<i>County</i>
Volasco Products Co.	Knoxville, Tenn.	Knox
Leopard Roofing Manufacturing Co.	Meridian, Miss.	Lauderdale
Southern Asphalt Roofing Corp.	Little Rock, Ark.	Pulaski
Bear Brand Roofing, Inc.	Bearden, Ark.	Ouachita
Elk Roofing Manufacturing Co.	Stephens, Ark.	Ouachita
Marvel Roofing Products, Inc.	Albuquerque, N.M.	Bernalillo

(CX 2L-Z)

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B. Meetings of the Major Manufacturers Prior to
Their Adoption of the Fry Roofing Price Plan
of February 19, 1956

26. Prior to the promulgation of the Fry Roofing zone delivery price system of February 19, 1956, officials of the major manufacturers of asphalt roofing products met at the Westchester Country Club late in 1955 or early 1956. Some of the social functions of this meeting were attended by Mr. Fry, Jr. Subsequently, but prior to February 19, 1956, a second meeting was held by the same group of officials in the Blackstone Hotel in Chicago. Executive officials of the Ruberoid Company, The Flintkote Company, Certain-teed Products Corporation, The Celotex Corporation and other companies were in attendance. Again, Mr. Fry, Jr. attended some of the social functions of the meeting but did not attend any of the other meetings of the organization. Fry Roofing was not a member of the organization of roofing manufacturers (Tr. 2416-19).

27. Immediately prior to the February 19, 1956, price change, Mr. Fry, Jr. held a meeting with his various plant managers in a Chicago hotel. Among those present at this meeting was Mr. John Musico, manager of Fry Roofing's plant in Brookfield, Indiana. In addition to the plant managers of Fry Roofing, executive officials of two or three other manufacturing companies were present, including representatives of Ford Roofing Company and Midix Asphalt Corporation. The two or three companies who had representatives present were all in fact customers of Fry Roofing. Copies of the new merchandising plan were distributed to the Fry Roofing plant managers but not to the officials of the other corporations present. It is a circumstance, but without major significance, that the same printer who prepared the price list for Fry Roofing also prepared the price schedules for the corporations whose representatives attended the meeting in question (Tr 2412, 2421-24).

28. Mr. John Musico, previously referred to as one of the Fry Roofing managers present at the Chicago meeting, wrote a letter to C. M. McClung and Company, Inc. in which he stated:

I know by this time that you have the new merchandise plan which I understand the entire Industry has adopted and it is with my very honest opinion that this will clean up all this mess and I am sure will be somewhat embarrassing to someone to fill all the orders that they may have and extend payment until April 10th.

I readily agree with you that your salesman should be furnished an answer to this type thing and is certainly entitled to it.

In view of the merchandise plan I do not think any further investigation is necessary, I am of the firm opinion that the Roofing Industry's House

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should be, and will be clean, for the first time, as certainly there is no room for any such chiseling. (CX 1505)

29. In a merchandising bulletin dated February 17, 1956, which was distributed by the Johns-Manville Company to its various plants, that company announced that effective February 20, 1956, it would be employing a new pricing system. This bulletin stated, in part, as follows:

It is our feeling that this completely new concept of merchandising Asphalt Roofing Products, which has been established by several of the largest producers in this Industry, has a great deal of merit.

In a subsequent bulletin to the trade dated February 20, 1956, Johns-Manville Company announced the adoption of a system of pricing which was a replica of the Fry Roofing system. Attached to that bulletin was the new pricing plan and the price list schedule (CX 1909A, 1509D-Q).

30. Similar action to that taken by Johns-Manville was taken by Bird & Son, Inc. on February 20, 1956 (CX 1510A-M). Allied Chemical Corporation issued the same merchandising plan and price schedule to become effective on February 25, 1956. Certain-teed Products Corporation also sent a bulletin to its customers dated February 20, 1956, with an announcement to the same effect. The Ruberoid Company also adopted the same plan effective as of February 20, 1956 (CX 1510A-M, CX 1511A-M, 1512A, 1491A-H).

31. Another circumstance tending to show that Fry Roofing was the price leader in the establishing of the pricing system of February 19, 1956, was the fact that in Fry Roofing's announcement of February 19, 1956, Blount County, Tennessee (which is adjacent to Knox County, a zone 1 county), was apparently through error established as a zone 7 county; and this same error was made in the price lists issued by Ruberoid, Flintkote, Johns-Manville, Barrett Division of Allied Chemical, and Certain-teed Products (CX 2W, CX 1491G, Tr. 1166-68, CX 1508A-J, CX 1509K, CX 1509D, CX 1510, CX 1512G).

32. Thereafter, on April 9, 1956, Fry Roofing issued a revised price list which changed the classification of Blount County, Tenn. from zone 7 to zone 2. A few days later, on April 13, 1956, Mr. Musico, a Fry Roofing plant manager, wrote to House-Hassen Hardware Co. as follows:

I refer to your letter of April 9th and no doubt by this time you have received our new schedule and changes in our County Zone Outline.

You will note that Blount County is now Zone 2 which puts it in line and I am sure you will find all other manufacturers quoting on this same basis.

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If you find anything quite to the contrary please try to pick up some tangible evidence and we will handle same. (CX 1507)

33. During the same month of April 1956, Mr. Fry, Jr., president of the respondent corporation, wrote a letter to Mr. I. B. Bryant, Poaslee-Coulbert Corporation, a substantial purchaser, which revealed a purpose of controlling the competitive activities of a number of small asphalt roofing products manufacturers in the southwest United States. The letter stated, in part, as follows:

This will acknowledge receipt of your letter dated April 24th regarding the letter you have received from Erst Long with respect to certain prices being quoted on Asphalt Felt by Bear Brand at Bearden, Arkansas.

I am well aware of the activities of these small Arkansas manufacturers and I assure you that we are watching them very closely. As usual, they are taking advantage temporarily of an attempt to stabilize an industry which is long overdue for some stabilization from the viewpoint of the wholesalers, dealers, and roofers. These people are opportunists and are much like the backwood saw mill operator who hauls a load of lumber into any given market and announces that he is a dealer.

Nevertheless, I agree that they are a thorn in the side and in due time will be dealt with.

Please advise Mr. Long that I would appreciate his patience and support of the new Merchandising Plan and Price Plan for a bit longer because there is a great deal of low-price materials in the territory which was purchased prior to the increase. The market will continue to be unsettled until those inventories have turned. I believe that this will be accomplished within thirty days. At that time, if the menagerie is not changed there, we will take corrective action. (CX 1506).

Mr. Fry, Jr. testified that his reference in the above letter to taking "corrective action * * * if the menagerie is not changed" was his way of saying that he would meet competition (Tr. 2459).

34. The term "animals" and the term "menagerie" were employed by Fry Roofing and the roofing industry to refer to certain manufacturers of asphalt roofing products who used the names of animals in the trade names of their products, such as Bear Brand, Elk Roofing, and Leopard Roofing (Tr. 709-10).

35. On June 15, 1956, Fry Roofing modified its pricing schedule to the prejudice of the "menagerie," the small manufacturers of asphalt roofing in the Southwest. This change in price to the prejudice of the southwest section of the United States was effected by subdividing the area east of the Rocky Mountains into areas A and B. In area A the price of asphalt roofing products was increased by approximately 3 to 5%. In area B, however, the former lower price was maintained. Area B comprised the States and parts of States in the Southwest, namely, New Mexico, Oklahoma,

Texas, Louisiana, Arkansas, Missouri, Kansas, and Colorado; whereas the remaining section of the United States east of the Rocky Mountains was classified as area A. The result of this division of the area east of the Rockies into areas A and B was that zone A-1 had a list price for asphalt saturated felt of \$2.62 per roll, whereas zone B-1 had a delivered price for the same product of \$2.55 a roll (CX 1390).

36. Concerning this price rise which excluded the Southwest, Mr. Fry testified that "It would have been ridiculous to raise the price down there when you were being undersold by as much as Mr. Gassaway indicated to me" (Tr. 2294).

37. Mr. Fry, Jr. testified that it was usual for one manufacturer to follow the lead of another in a price change; and the exhibits show that at least one manufacturer did follow the June 15, 1956, price change (Tr. 2442, CX 1492).

38. Counsel supporting the complaint has requested, upon the basis of the above facts, that we find that Fry Roofing and the other manufacturers of roofing material have conspired to fix and control prices. That we cannot do. Not only is there no issue of conspiracy in this case, but the facts do not show a conspiracy. They show rather that Fry Roofing initiated a pricing system on February 19, 1956, and that a number of roofing companies adopted the same pricing system. The evidence shows also that there is a tendency in the roofing industry for one competitor to adopt the price changes of other competitors. The evidence does not, however, show an agreement either expressed or implied to fix and maintain uniform prices and, in fact, uniform prices were not maintained during the period in question.

IX. Price Changes from 1956 to 1960

A. August 14, 1956—Extension of Extra Discounts on Purchases in the Southwest and Southeast

39. On August 14, 1956, Fry Roofing extended an additional trade discount of 5% to "purchasers for resale to consumers" on straight truckload and carloads of 15 and 30-pound asphalt saturated felt not including perforated felt and on similar quantities of 210 feet strip shingles shipped into the States of Arkansas, Texas, Oklahoma, New Mexico, and those portions of the States of Louisiana, Missouri, and Kentucky which were within area B. The same 5% discount was also extended on the strip shingles shipped in carload lots into the State of Mississippi and one county in Tennessee (CX 5AA). Mr. Fry, Jr. testified that their discount was

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issued to meet the competition of the Ruberoid Company and there appears to be no evidence in the record to contradict Mr. Fry on that point.

B. The 5% Secret Annual Rebate to Slected Customers
as of November 1, 1956

40. Beginning with the fiscal year commencing on November 1, 1956, Fry Roofing instituted a practice of granting a 5% annual secret rebate to selected customers. The favored customers were notified of the rebate verbally by Mr. Fry, Jr. either in person or by telephone. In order further to maintain the secrecy of the rebate, the payments were made by a cashier's check issued from various banks rather than an ordinary check by Fry Roofing (Tr. 101-2, 2444).

41. Among the customers of Fry Roofing who were granted the 5% secret rebate were Sears, Roebuck and Company, and the International Paper Company (Tr. 1244-45, CX 1451 F&D). Moreover, all of Fry Roofing's customers in eastern Tennessee were granted the 5% rebate for the fiscal years ending 1957, 1958, 1959 and 1960. These customers were Hibbler-Bond Company, Holston Builders Supply Company, House-Hassen Hardware Company, C. M. McClung and Company, and Mills and Lupton Supply Company (CX 1451E).

42. Mr. Fry, Jr. explained that the 5% was granted to his distributor accounts because of misclassification by his competitors as a means of combating it and that it remained secret for the rather obvious purpose of keeping the knowledge from Fry's competitors who upon learning of the 5% could have extended it to their retail dealer customers thereby nullifying its functional purpose and for the added reason that some manufacturers had an announced policy of selling 5% below published distributor prices, frequently to retail dealers (Tr. 1029, 968).

C. Basic Price Changes of November 1, 1956

43. Effective as of November 1, 1956, Fry Roofing announced a revision of its zone delivery pricing system. The classification of the area east of the Rocky Mountains, which had been divided into areas A and B as of June 15, 1956, was further divided into four areas designated as areas A, B, C and D. Each area was assigned a separate schedule of list prices for the zones therein, ranging from 1 to 20 (CX 6A-Z2).

44. Under this new system of zoning, area A prices were the highest and applied to the north-most States except those in New

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England. Area-B zone's prices were the next highest and were applicable to the New England States and the mid-tier of States. Area-C zone's prices were the third highest and prevailed in the southeast States. Area-D prices were the lowest and prevailed in the southwest States. (See CX 1391 for a pictorial guide for this system of pricing.)

45. The zone 1 delivered list prices on asphalt saturated felt in each of the four areas were as follows:

Area A—\$2.43 per roll

Area C—\$2.17 per roll

Area B— 2.36 per roll

Area D— 2.13 per roll

The zone 10 delivered list prices of asphalt saturated felt in each of the four areas were as follows:

Area A—\$2.61 per roll

Area C—\$2.35 per roll

Area B— 2.54 per roll

Area D— 2.31 per roll

46. Under this new schedule of pricing, the trade discount was 3%. Approved wholesalers or distributors received a discount of 8% (CX 6C&F).

47. Prior to the November 1, 1956, change in the Fry Roofing merchandising plan, a distributor, in order to qualify for the functional discount, was required to have the goods purchased consigned directly to the distributor's customer. Furthermore, the distributor had to certify that the customer was a purchaser for resale in accordance with Fry Roofing's definition. As of November 1, 1956, no such requirements were imposed. All distributors were given the 8% discount regardless of the destination of the goods purchased, including purchases where shipments were made directly to the warehouse of the distributor (CX 6C).

48. With the November 1, 1956, price change, Fry Roofing amended its policy of granting the functional discount by means of credit memoranda at the end of each month by reflecting the functional discounts on the face of the sales invoices. Commission's Exhibit 1471A-D contains tabulations of invoices showing sales of 12-inch standard strip shingles and 15- and 30-pound asphalt saturated felt by the Lloyd A. Fry Roofing Company in selected areas pursuant to the pricing plan which became effective on November 1, 1956 (CX 6C, Tr. 2425-28).

49. The pricing zone areas as established on November 1, 1956, were of short duration. On December 26, 1956, the plan was again revised and the four different zone areas were reduced to only two areas, designated as A and B, with the discount structure remaining the same (CX 9A-P).

50. Mr. Fry, Jr. testified that the November 1, 1956, price list was not dictated by improper aggressiveness but rather by business considerations. He further testified that it was not directed at the independents such as Velasco and cited in support of such statement the fact that Knoxville was placed in B area, next to the highest area. Also placed in the same category were such remote areas from Knoxville as the New England states and most of the states on the East Coast. The fact that the independents who testified were located in areas C and D, lower priced areas, and that they compete with respondent and other major manufacturers, and contributed to the lower level of prices in those areas tends to show that the November 1 price change was motivated by competitive conditions and does not warrant a finding that the price change was made with a predatory intent (RX 758A-K, Tr. 2308-13).

D. Two Columns in Designated Zones

51. On February 4, 1957, Fry Roofing made a further change in its zone pricing system by the use of two columns in its table of prices for each county. One column showed the basic price for asphalt roofing only whereas the other column showed the prices for other roofing products. By this means many counties in States of the southwest area of the United States were assigned a lower B price for asphalt saturated felt and at the same time a higher A area price for other roofing products. This system was applied in the area covered by Velasco Products Company which produced only asphalt saturated felt. Mr. Fry, Jr. testified that the two column price system was adopted from Certain-teed Company which used that system before Fry Roofing did so (Tr. 2331). An illustration of the two column system is as follows:

Zone No.	Column 1 (Standard Strip Shingles)		Column 2 (Asphalt Saturated Felt Only)	
	Area A	Area B	Area A	Area B
1	\$6.60	\$6.21	\$2.39	\$2.17
2	6.65	6.26	2.40	2.18
3	6.71	6.32	2.42	2.20
4	6.77	6.38	2.44	2.22
5	6.83	6.44	2.45	2.23
10	7.26	6.88	2.58	2.36
14	7.76	7.36	2.78	2.56

(CX 1392 & CX 1393)

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E. Various Additional Price Changes in 1957, 1958,
1959 and 1960

52. During the period including the early part of 1957 to the early part of 1960, Fry Roofing made at least ten changes or supplements to its pricing system (CX 1516, 1519, 1397, CX 35B-M, 73, 77-123, 163-64, 1447-48, 1464B-E, 1445, p. 952). On January 27, 1960, Fry Roofing announced a revision of its merchandising plan under which there would be a freight equalization charge. This charge was to be added as a separate item on the invoice. It would be computed on the basis of the lowest shipping rate from either Fry Roofing's own shipping point or the nearest competitor's factory point to the county wherein the shipment was being consigned. Under this plan transportation charges were prepaid for the purchaser's account (CX 1444, pp. 602-59). Under this system of February 1, 1960, the f.o.b. plant list price for a 60-pound roll of 15 and 30-pound asphalt saturated felt was \$1.95. By deducting the 7% functional discount allowed, the list prices to wholesale distributors became \$1.81. Under this plan a shipment of 4,000 pounds from Memphis, Tennessee to Knox County, Tennessee would entail no freight charge. This result occurred because Velasco products Company operated its plant in Knox County, Tennessee and accordingly Fry Roofing considered Knox County as a shipping point for the purpose of computing the so-called equalization freight charge (CX 1444, pp. 602-59).

53. Without changing the system of pricing described above, Fry Roofing on June 20, 1960, reduced the list prices on asphalt saturated felt to \$1.81 per roll f.o.b. plant (CX 1444, p. 379).

F. Conclusion on Price Changes

54. During the period from 1956 to February 1960, Fry Roofing issued many different price lists and made many changes in its prices and its discounts. On occasion Fry Roofing was undoubtedly the first to make price changes and various witnesses referred to Fry Roofing as the price leader. On a national scale, Fry Roofing may have deserved such a description. Certainly Fry Roofing initiated the territorial price system of February 19, 1960.

55. The evidence does not show, however, that Fry Roofing was responsible for all the price changes in the southeast and southwest sections of the United States during the period in question. Mr. Robert F. Deerfield, an official of the Ruberoid Company, testified that his company published price lists to meet Fry Roofing's prices. He also testified that his company sold at prices below

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those published on its price list (Tr. 1217, 1436-37). Moreover, he testified that in the asphalt roofing industry no one knew from day to day what prices were actually being charged by competitors. The record shows five instances during the years in question when Ruberoid lowered its prices on asphalt roofing before Fry Roofing lowered its prices (Tr. 2303, CX 1495, RX 762I-O, RX 763F, CX 1446, p. 998).

56. Mr. Richard Carter, a wholesaler at Nashville, Tennessee, and a former customer of the Ohio Paper Company, testified that he did not know why roofing companies published price lists—that new prices were in the market place before the ink was dry on the old prices. He stated that he purchased asphalt saturated felt by obtaining quotations from three or four companies and “may the best man win” (Tr. 1587).

57. The record shows that the small so-called independent manufacturers, having less to offer in the way of a variety of products, normally sought to attract business by selling their products at 5% or more below the prices at which the national companies sold the same products (Tr. 1431-34).

58. The record shows that during the years 1957 to 1960 great confusion prevailed in the southeast and southwest sections of the United States in the selling of asphalt roofing products. Approximately 20 companies competed for the business in that area. The evidence concerning prices during that period fails to show that Fry Roofing prices rather than the prices of some of the other 19 companies was responsible for the numerous price changes in that area. Certainly the evidence fails to establish that Fry Roofing's prices had the effect of substantially lessening competition nor did they tend to create a monopoly for Fry Roofing in any line of roofing products.

X. Concerning the Charge that Fry Roofing Sold
Asphalt Roofing Products at Below Cost or
at Unreasonably Low Prices

59. Because of the allegation in the complaint that Fry Roofing sold asphalt roofing products at below cost or at unreasonably low prices with the intent and effect of injuring competition in the sale of such products in the southeastern and southwestern areas of the United States, we must determine whether Fry Roofing did, in fact, so sell its products at such prices with the intent and effect alleged.

60. In an effort to determine the cost to Fry Roofing in producing asphalt saturated felt at its Brookville, Indiana plant for

the year ending October 31, 1958, counsel supporting the complaint presented two cost studies prepared by witness George Krug, president of Velasco Products Company, a small manufacturing company producing asphalt saturated felt in Knoxville, Tennessee. Mr. Krug, at the time he testified in the present proceeding, was engaged in litigating a triple damage suit against the corporate respondent because of its alleged violations of the antitrust provisions of the Clayton Act. We recognize, therefore, that Mr. Krug, by force of those circumstances, was a prejudiced witness. The material upon the basis of which he made his two cost studies was procured from the respondent during the course of the private litigation through the discovery process (Tr. 460-73, CX 1441, 1418).

61. The record shows that Mr. Krug received a BS degree from the University of Wisconsin in 1934. In 1939 he passed the Wisconsin examination for certified public accountants and has held a number of responsible positions in business and with accounting firms (Tr. 330-31).

62. Two cost studies by Mr. Krug were presented by counsel supporting the complaint. The first study purports to show the cost of producing asphalt saturated felt at respondents' Brookville, Indiana plant and of delivering it in Knoxville, Tennessee when produced with other products during the same work shift (CX 1409).

63. The second estimate purported to show the costs of producing asphalt saturated felt when only felt was being manufactured during a work shift. This cost estimate also included a sum of \$.348 for the expense of delivering the product in Knoxville, Tennessee. Under the first estimate the cost was stated as \$2.21 per roll and under the second estimate as \$1.94 per roll (CX 1409-10).

64. Both cost studies contain a number of obvious errors. Both estimates are based upon the assumption that 19 men were employed in the manufacture of asphalt saturated felt whereas the evidence shows, and counsel supporting the complaint recognizes in his proposed findings as to the facts, that no more than seven men were so employed. The evidence shows further that possibly the number should be reduced to five or six. In fact, counsel supporting the complaint in his proposed findings has created a new estimate in which he proceeds on the assumption that the labor cost should be figured on the basis of the labor of seven men instead of 19 men.

65. The cost estimate also contains an allowance of \$.348 to provide for the cost of transporting the felt from the Brookville plant to Knoxville, Tennessee. We fail to find, however, any evidence in the record to substantiate the alleged accuracy of such an estimate. Counsel supporting the complaint recognized this deficiency when the estimates were offered in evidence and promised to supply the particular deficiency later by proof that the figure for transportation of \$.348 was correct. Such deficiency has not, however, been supplied.

66. We should observe that the two cost estimates were based upon a payroll of the Brookville plant dated July 19, 1960. We are left to speculate as to whether the cost of labor was the same in 1958 as it was in 1960.

67. Mr. Krug made his two cost estimates from respondents' records and without having visited the Brookville plant or any of respondents' plants and without any personal knowledge of the type of machinery used by Fry Roofing and without personal knowledge of the overall operational details of the Fry Roofing plant. Mr. Stephen Finney, a partner in the firm of Touche, Ross, Bailey & Smart of Chicago, studied Mr. Krug's cost estimates and the exhibits upon which they are based and testified that in his opinion the two cost studies were inaccurate.

68. Because of the various deficiencies in Mr. Krug's cost studies and aside from any question of his lack of objectivity or prejudice, we cannot accept them as reasonably accurate estimates of Fry Roofing's cost of producing and delivering saturated felt in Knoxville, Tennessee in the year 1958. Counsel supporting the complaint apparently foresaw such a conclusion because they have, as we have already stated, substituted a cost study of their own in which the labor figure used by Mr. Krug is eliminated and estimates which they state are more accurate substituted. These remade estimates contain, however, other errors and cannot be accepted as reasonably accurate cost estimates.

69. As a supplement to the cost study prepared by Mr. Krug, counsel supporting the complaint has directed our attention to a number of letters and statements in the record for the purpose of showing that Fry Roofing was selling their products at an unreasonably low price or below cost during 1957 and 1958.

70. In a letter dated May 9, 1957, Lloyd A. Fry, Jr. wrote to Mr. E. E. Mance of the Ford Roofing Products Company and stated in part as follows:

This competition in the southwest has forced us to go to cost, and in my opinion, further developments will probably occur that will force the market

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down further. Please be advised that until further notice we will be unable to grant your company the affiliated manufacturers discount on shipments consigned to Oklahoma, New Mexico, Texas, Arkansas, Louisiana, Mississippi, and Shelby County, Tennessee. (CX 1423)

71. In this letter, Fry, Jr. further indicated that with regard to the southeastern states the "manufacturer's discount" of 10% which was being extended to Ford Roofing would be reduced to 5%. Consequently, the manufacturer's discount given to Ford Roofing was eliminated on shipments into the Southwest and was reduced from 10% to 5% on shipments into the Southeast.

72. On August 22, 1957, E. E. Mance wrote to Fry, Sr. asking for the reinstatement of the 10% manufacturer's discount (CX 1424). On August 26, 1957, Fry, Jr. responded to this letter stating that he had reviewed the financial figures and was able to reinstate the full 10% manufacturer's discount in all areas on shipments made after August 1, 1957 (CX 1425).

73. On March 5, 1958, Mr. Fry, Jr. wrote to Mr. Mance stating as follows:

Based on the revised schedules, I am sure you realize that there will be no opportunity for profit, and dependent on tonnage, most likely a substantial loss will result. (CX 1426A)

In this letter it is stated that the manufacturer's discount was being reduced to 5%.

74. Sometime in March 1958, Mr. Mance met with Mr. Fry, Jr. and Sr. and discussed with them the problem of discounts. Concerning this matter, he testified as follows:

I was advised by them at that time that they again were invoking the second paragraph of our contract, that they were down to cost or lower, and that I was lucky to get even the 5 percent that they were allowing me.

Well, ultimately they reestablished the manufacturer's discount, effective September 1, 1958, when they had a change in their price policy, pricing.

Mr. Fry, Jr. testified that he did not tell Mr. Mance that Fry Roofing was selling below cost (Tr. 2399, 703).

75. All of the above quoted letters and statements must be considered in the light of the particular problem which confront the declarant at the time the statement was made. In most instances the Frys were seeking to justify their prices or their refusal to give the requested discount. We think, therefore, that we should not accept those statements as admissions that Fry Roofing was selling at below cost or at unreasonably low prices during 1958. Moreover, all of the statements reflect the pressure of competition

but they do not reflect an intent on the part of Fry Roofing to attempt to destroy a competitor or competition.

76. As an additional support for their contention that Fry Roofing sold roofing products at below cost or at unreasonably low prices, counsel supporting the complaint cited the profit and loss statements of the Fry Roofing division for that year asserting a loss of \$191,001 before taxes and a loss of \$700,001 after taxes.

77. The record shows that Fry Roofing has the Fry Roofing Division which manufactures and sells roofing products and the Volney Felt Mills Division which manufactures and sells felt, about 90% of which it sells to the Roofing Division. The remaining 10% is sold to outside consumers of felt (Tr. 8-9, 22-29).

78. Respondents maintain profit and loss statements for each division. The statement for the Roofing Division reflects a cost for dry felt and the statement for the Volney Felt Mills Division shows the profits for the sale of that product. In order to reflect the true facts of whether Fry Roofing made a profit or a loss, the profit and loss statements of the two divisions must be considered together. When they are so considered the corporate respondent is shown to have made a profit before taxes in 1958 of \$970,767 (CX 1356-60, 1366-70).

79. In view of the above facts, we must conclude that the evidence fails to show that Fry Roofing, during the period in question, sold its products or asphalt saturated felt at a loss or at an unreasonably low price. Moreover, the evidence fails to show that any of those sales were made with the predatory intent of injuring competition or a competitor.

XI. Companies Complaining of Fry Roofing's Prices

A. Volasco Products Company

80. Volasco Products Company, hereinafter referred to as Volasco, was organized by Mr. George C. Krug, its president, in May 1955 for the purpose of manufacturing and selling a general line of asphalt roofing products. Mr. Krug studied the market areas and concluded that Knoxville, Tennessee was a desirable location for an asphalt roofing manufacturing plant because it would have a radius of 200 miles in which there were no existing competing roofing plants. In addition, Knoxville offered transportation by river, by rail, and by good highways (Tr. 334-53).

81. Also, prior to entering into the asphalt roofing business, Mr. Krug testified that he made a study of the prices at which asphalt saturated felt and other roofing products were being sold

by the national or major manufacturers of such products; and as a result of that study, Mr. Krug found that during the year 1955, prior to Volasco's sale of asphalt saturated felt, that asphalt saturated felt was sold in the Knoxville area for approximately \$2.44 per roll (Tr. 353-55). When Volasco entered the business of manufacturing and selling asphalt felt Mr. Krug explained that he expected that Fry Roofing and the other major manufacturers of roofing products would meet the price which Volasco would ask for its products. He was surprised, however, with the territorial price plan introduced by Fry Roofing in February 1956 whereby Fry Roofing's prices and the prices of the other national manufacturers selling in the Knoxville area were substantially lower than the price that Volasco was charging for its products (Tr. 426-27).

82. In March of 1958 the delivered price established by Fry Roofing for the Knoxville area was \$1.63 per roll of asphalt saturated felt. This price was exclusive of the cash discount made available to Fry Roofing's purchasers and the additional annual secret rebate of 5%. Taking these two factors into consideration, the net price that Fry's purchasers were paying for a roll of asphalt saturated felt as of March 3, 1958, was \$1.52 per roll of asphalt saturated felt (CX 76, 112, 1451).

83. That Volasco's volume of sales decreased during the years 1956, 1957 and 1958 is not disputed by the respondents. The crucial question, however, is whether Fry Roofing was responsible for its losses. Although Mr. Krug imputes such responsibility to Fry Roofing, he does not testify that particular customers quit Volasco and transferred their business to the respondent corporation. Moreover, counsel supporting the complaint did not present a single witness who testified that he ceased buying from Volasco in order to buy from Fry Roofing. Respondents did, however, present a number of witnesses who gave their reasons for withdrawing their business from Volasco.

84. Two witnesses testified that they had purchased asphalt saturated felt from Volasco but ceased purchasing from that company because of the inferior quality of its felt. They had not, however, transferred their business to Fry Roofing. Mr. R. Frank Berry, the independent sales representative of Volasco, testified that he had received complaints about the quality of Volasco's felt and that the defects in the Volasco product was one reason for a drop in Volasco's sales volume after 1957 (Tr. 1542, 1551, 1612, 1726, 1651-67).

85. Also contributing to Volasco's loss of sales was its entry into the roof application business in the fall of 1958. Two witnesses, Mr. David L. Johnson and Mr. Foy Gilliland, who had previously purchased felt from Volasco, testified that Volasco's entry into the application business in competition with them was their reason for terminating their purchases from Volasco. Mr. Berry also testified that Volasco received complaints from roofers who objected to Volasco's competition with them and retaliated by refusing to buy from Volasco (Tr. 409, 1578, 1726, 1662).

86. Volasco not only competed with its roofer trade by going into the application business but also alienated wholesalers by selling directly to their customers. Mr. Honeycutt of Dealers Supply Company, a wholesaler, advanced that reason for his discontinuance of purchases from Volasco (Tr. 1686).

87. Another factor contributing to Volasco's problems was the lack of an adequate bond guaranteeing built-up roofs made with Volasco's felt. Such bonds are required under some construction contracts. Volasco had no bond till 1958 and then its bond was not issued by an insurance company and was not generally acceptable within the roofing trade. Mr. Berry testified that the inability to provide a satisfactory and acceptable bond was a significant impediment, affecting his ability to sell Volasco felt (Tr. 558, 1611, 1613, 1663).

88. Still another reason for the loss of business by Volasco was the refusal of Mr. Krug to absorb the expense of preparing a private label for C. M. McClung and Company (Tr. 1789-90).

89. The record fails to disclose the market share of the respondent corporation and its competitors in the area in question. It fails also to show diversion of sales or customers of Volasco to Fry Roofing but shows rather such diversion to companies other than Fry Roofing. In view of those facts, and of all the facts of the record, we conclude that Volasco's difficulties and loss of sales have not been shown to have been due to Fry Roofing's prices, but rather to its own internal problems and to vigorous competition in general.

B. The Ohio Paper Company

90. The Ohio Paper Company with its manufacturing plant located at Miamisburg, Ohio, has been engaged for many years in the manufacture of dry felt and asphalt saturated felt. The dry felt it sells to other manufacturers of asphalt roofing products whereas it sells the asphalt saturated felt to wholesalers and retail building supply companies. Its present market includes Kentucky,

Missouri, Illinois, Indiana, Ohio and parts of Pennsylvania. Mr. Clifton S. Jackson, vice president and general sales manager of the Ohio Paper Company, explained that formerly his company sold a considerable amount of asphalt saturated felt in Tennessee, Georgia, North and South Carolina, and some in Virginia (Tr. 714, 727).

91. He also explained that because his company was small and did not sell a general line of roofing products it was necessary, in order to attract business, to sell asphalt saturated felt at a price 5% below that of the major companies (Tr. 718-19).

92. Sales of asphalt saturated felt by Ohio Paper in the Atlanta area in Georgia amounted to 26,106 rolls in 1955 (Tr. 857). In 1956 sales were reduced to 24,094 rolls and by 1957 sales were down to 3,350 rolls. In 1958 Ohio Paper made no sales in the Atlanta area (CX 1428A).

93. Sales in Virginia by Ohio Paper in 1955 were in excess of 2,100 rolls of asphalt saturated felt. In 1956 and 1957 sales were reduced to 1,400 rolls for each of those years. In 1958 all sales were lost (CX 1428A).

94. In South Carolina sales of asphalt saturated felt in 1956 were in excess of 2,000 rolls; by 1958 sales were down to 1,400 rolls and in 1959 Ohio Paper showed no sales of asphalt saturated felt in South Carolina (CX 1428A).

95. In 1955, Tennessee sales by Ohio Paper of asphalt saturated felt amounted to 42,065 rolls (CX 1428, Tr. 858). For 1956 sales went down to 19,280 rolls. In 1957 sales amounted to 24,592 rolls. In 1958, when prices were drastically reduced by Fry Roofing, virtually all sales of asphalt saturated felt in the State of Tennessee were lost. Only 2,925 rolls of asphalt saturated felt were sold by Ohio Paper in Tennessee. In 1959 no sales whatsoever were made by Ohio Paper in the State of Tennessee (CX 1428A, B & C).

96. The vice president and sales manager of Ohio Paper Company testified that the company withdrew from selling in the territories of eastern Tennessee, Virginia, North Carolina, and the Atlanta, Georgia area because Fry Roofing was responsible for bringing down prices to extremely low levels in these territories. He further testified that sales in these territories by Ohio Paper would have meant substantial losses to the company (Tr. 736).

97. The above facts relating to the Ohio Paper Company show that there was relentless competition in the area served by that company during 1956 to 1958, of which respondents were active participants. The facts show further that the small, so-called inde-

pendent, companies, as well as the large, national companies, were engaged in that vigorous competition. Although Fry Roofing was undoubtedly a chief factor in the competitive struggle in the area served by the Ohio Paper Company, the evidence does not warrant the conclusion that Fry Roofing was, during the period in question, a consistent price leader. Furthermore, the evidence shows that Fry Roofing did not gain a substantial number of customers from the Ohio Paper Company. Furthermore, evidence does not warrant the conclusion that Fry Roofing's prices were made with the intent to injure the Ohio Paper Company as distinct from the intent to preserve for itself a substantial share of the market.

C. The Piedmont Company

98. The Piedmont Company was incorporated as a Georgia corporation on December 3, 1957, for the purpose of manufacturing and selling asphalt roofing products, particularly asphalt shingles and asphalt saturated felt. It was located at Douglasville, about 20 miles from Atlanta, Georgia. At the time of its formation the closest manufacturing plant of a major manufacturer of asphalt roofing products was Birmingham, Alabama, where a plant of the Barrett Division of the Allied Chemical Corporation was located. The closest Fry Roofing plant was in Jacksonville, Florida, a distance of approximately 314 miles (Tr. 891, 1026).

99. Before Piedmont began the sale of its asphalt saturated felt in August 1958, Fry Roofing lowered its price on that commodity in the Atlanta area. Fry Roofing's various price changes for asphalt saturated felt during the time Piedmont was in business are as follows:

January 2, 1958	Price reduced from \$1.76 to \$1.60 per roll
March 3, 1958	Further reduction to \$1.52 per roll
September 1, 1958	An increase to \$1.65 per roll
March 24, 1958	Price increase to \$1.83 per roll
June 1, 1959	Price reduced to \$1.75 per roll
February 1, 1960	Increase to \$1.68 per roll, <i>plus freight</i>

100. An official of The Piedmont Company testified that his company delayed the initiation of sales and distribution of asphalt saturated felt in order to perfect its product and also because in 1958 the price was so low there seemed to be no possibility of a profit. He testified as follows:

We could not make any money on felt. The price was so low that we would just be spinning our wheels, and we decided that what we would do was not build up a big business in felt but to keep it to make shingles with, which we thought we had a chance of making some money. (Tr. 985)

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101. Doctor C. B. F. Young, president of The Piedmont Company, testified concerning his company's problems as follows:

We were having our problems at the company and these were being solved. There were differences of opinion among the officers. These were being ironed out. And the price—the price we were getting for our product was getting stronger. In April, we lost very little money; January, February, and March, we didn't do well. April, we lost very little money, but in May we made money. And then—we had not solved all of our problems, but we had a fighting chance. And then the bottom dropped out of prices on us. I believe it went down some 15 percent. And this, in my opinion, was the thing that ruined The Piedmont Company. (Tr. 933-34.)

* * * * *

In my opinion, it was the one thing that ruined the little company. We had a fighting chance up until the instant that the prices were lowered, but, after that, there wasn't any use in us trying to operate. It was hopeless. I think we could have solved the problems that arose in manufacturing; I think we could have solved—and we did pretty well with all our differences among the directors. But when the price dropped 15 percent, there was nothing we could do with it except ride with the winds. (Tr. 934)

102. In June 1959, Piedmont lost approximately \$50,000 in volume and had a net loss of \$16,000 in the month of July 1959. It was completely out of funds and forced to close in August 1959 (Tr. 1032).

103. In September 1959, the creditors met with officials of Piedmont and requested a financial statement; and in 1960 the plant was sold to Elk Roofing Company. Piedmont showed a net loss of \$116,000 for the time it was in operation (CX 1433C).

104. The testimony of the witnesses from The Piedmont Company show that The Piedmont Company was organized by a group of men who had no previous experience in the manufacture and sale of asphalt roofing products. Their venture was uncaptialized and a loan which they procured from the Small Business Administration was used largely to pay off their obligations rather than to advance the program of the company. The testimony shows that there was much bickering among the company officials, that the building erected for the plant was poorly constructed and that one of its walls collapsed during a high wind before operation of the plant began. There was also considerable trouble incurred in putting the machinery into operation. The company was further hampered because of its inability to furnish bond of its products (Tr. 1092). Aside from the opinions expressed by Piedmont officials, there is no substantial evidence correlating Piedmont's difficulties and failure to Fry Roofing's prices.

XII. Summary, Conclusions and Order

105. As previously stated, Count I of the complaint charges that Fry Roofing has discriminated in price between different purchasers of its asphalt roofing products of like grade and quality and that the effect of such discrimination has been or may be substantially to lessen competition or tend to create a monopoly in the lines of commerce involved. In order to sustain that charge counsel supporting the complaint must show proof that Fry Roofing's prices actually caused injury to competition or facts upon which a reasonable conclusion of probable injury to competition may be predicated. The mere fact of selling at "different prices in different markets" is not unlawful (*Anheuser-Busch, Inc. v. Federal Trade Commission*, 289 F. 2d 835 (1961)). Pertinent to our evaluation of the competitive facts in the present case is the statement by the Supreme Court in the case of the *Federal Trade Commission v. The Sun Oil Company*, 371 U.S. 505, 527, wherein the Court, in citing Commissioner Elman's dissenting opinion in the American Oil Company case, states that:

In appraising the effects of any price cut or the corresponding response to it, both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis. In cases in which the economic facts so indicate, carefully drawn area submarkets may be the proper measure of competitive impact among purchasers.

106. The evidence in our present case shows that approximately 15 to 20 different asphalt roofing companies were actively engaged in selling asphalt saturated felt in the area with which we are concerned. The record is silent, however, as to the relative market share of any of the numerous competitors so engaged. The record shows further that at all times with which we are concerned the struggle among the various competitors was intense. The record shows also that at times respondents lowered their prices and that such low prices or even lower ones were occasionally granted by competitors. The record also shows that on other occasions respondents' prices were higher than those of a number of its competitors. On the other hand, the testifying officials of the three companies complaining of Fry Roofing prices failed to point to a specific sale which their companies lost to respondents because of price. Nor were any of them able to point to a specific customer who ceased to do business with them and purchased from respondents because of respondents' pricing tactics.

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107. We conclude that the record presents no proof of actual injury to competition with respondents and that there is no reliable, probative and substantial evidence of a reasonable probability of such injury resulting to competition from respondents' pricing practices.

108. Count II of the complaint charges that the respondents sold asphalt roofing products at below cost or at unreasonably low prices with the intent, purpose and effect of injuring and destroying competition. The evidence fails to establish that Fry Roofing prices were, in fact, below its cost. The evidence also fails to show that its prices were established with the intent of injuring competition or that they had an injurious effect upon such competition.

109. In view of the above findings, it is concluded that the record does not establish by reliable, probative and substantial evidence that respondents have engaged in unlawful discrimination in price in violation of Section 2(a) of the Clayton Act, as amended, or that the respondents have engaged in unlawful methods of competition and unfair acts or practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act. Accordingly,

It is ordered, That the complaint herein be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

JULY 23, 1965

BY REILLY, *Commissioner*:

Respondents have been charged in a complaint issued May 20, 1960, with territorial price discrimination in violation of Section 2(a) of the amended Clayton Act and with selling below cost in violation of Section 5 of the Federal Trade Commission Act. The matter is before the Commission on the appeal of counsel supporting the complaint from an initial decision holding that neither charge had been sustained.

The corporate respondent herein is the largest producer of asphalt roofing products in the United States, owning and operating 19 plants in 15 States during the period relevant to the complaint. The asphalt roofing industry consists of approximately 34 companies, the majority of which are one or two plant operations. Four firms, including respondents' sell their products nationally and five others sell in all areas east of the Rocky Mountains. The principal industry products and the only products involved in this proceeding are asphalt saturated felt and asphalt strip shingles. Asphalt saturated felt, referred to as asphalt felt or felt, resembles tar

paper and is composed of two ingredients, absorbent dry felt and liquid asphalt. Asphalt strip shingles contain asphalt and felt, but the production thereof requires more machinery and processes as well as the use of additional raw materials. The felt is sold in 60 lb. rolls and the shingles in bundles which cover 108 square feet, referred to as a square. Evidence with respect to respondents' pricing practices in the sale of both products was offered in support of the 2(a) charge but evidence in support of the Section 5 count was confined to respondents' sale of the asphalt saturated felt.

Stated briefly, respondents (hereinafter sometimes referred to collectively as Fry) are charged in Count I of the complaint with selling asphalt felt and asphalt shingles in certain geographical areas at lower prices than they sold such products in other areas. And it is further alleged that the effect of such price discriminations "has been or may be to divert to Fry, or to Fry's customers, substantial business from competitors" and "where business has not been actually diverted, competitors have been required to meet directly or indirectly, the discriminatory prices of Fry with the result, actual or potential, of substantially impairing their profits and consequently lessening their ability to compete."

Count II, which is based on substantially the same allegations of fact as set out in Count I, charges respondents with selling roofing products "at below cost prices or at unreasonably low prices with the intent, purpose and effect of injuring, restraining, suppressing, and destroying competition in the sale of such products in the southeastern and southwestern areas of the country." The specific example of this practice given in the complaint was the sale of 15 and 30 lb. asphalt felt (in 60 lb. rolls) in 1958 at the delivered price of \$1.63 per roll in Mississippi, Tennessee, and Arkansas.

Prior to 1956, the major manufacturers of asphalt roofing products, with the exception of Fry, sold their products f.o.b. plant with freight equalized to the point of destination from the nearest asphalt roofing plant. If a competitor's plant was located closer to the customer than the seller's plant, the seller would absorb the difference between his actual freight cost and what that cost would be if shipment was made from the competitor's factory. Beginning in 1949, Fry sold at zone delivered prices¹ and until February 1956 its published prices were consistently 5% to 7% below the published prices of the other major manufacturers.

¹ Fry's pricing system differed from the other majors only in that Fry determined in advance the freight cost to each zone or point of destination instead of computing a delivered price each time a sale was made. Fry also equalized freight from the plant of the nearest competitor.

On February 19, 1956, Fry placed in effect a revised schedule of prices applicable to the territory east of the Rocky Mountains. Continuing to use the zone delivered price system, Fry assigned zone numbers ranging from 1 to 20 to each county in each State throughout this area. The lowest price zone was the basing point or county in which an asphalt roofing plant, either Fry's or a competitor's, was located. The zone number for each county was determined by the freight cost to that county from the basing point. Consequently, the prices in zones 2 through 20 were progressively higher than zone 1, with zone 20 having the highest price. For example, the price of a square of 12 inch shingles and a 60 lb. roll of asphalt felt in zone 1 were \$6.50 and \$2.55 respectively in zone 20, the prices were \$9.76 and \$3.48 respectively.

Fry's customers were separated into two categories, namely, "Purchasers for Resale to Customers" (which included wholesalers, retail dealers, and roofing contractors) and "Approved Distributors." Both classes of customers received a 10% trade discount when purchasing in minimum truckload or carload quantities and the "Approved Distributors" received an additional 6% functional discount on minimum truckload and carload shipments consigned to "Purchasers for Resale to Customers." Another discount or allowance of 10¢ per cwt. was granted under this plan on minimum quantities of 20,000 lbs. to purchasers taking delivery at a Fry plant.

During the period relevant to the complaint (1956-1960) Fry made 22 changes in its prices on asphalt felt and shingles in the southeastern and southwestern parts of the United States. Some represented increases, others decreases. These changes were effected through the publication of price lists and by bulletins which modified or amended the price lists. Except for a secret rebate granted to certain customers, Fry adhered to its published prices. Consequently, it is clear from the record, and this point is not disputed, that Fry sold its asphalt shingles and felt in certain geographic areas at lower prices than it sold such products in other areas. The record further shows that Fry's prices were consistently lower in certain areas than in others, although the amount of the differential varied from time to time.

As stated above, the complaint specifically alleged that respondents' discriminations had the effect of lessening or impairing the ability of other roofing manufacturers to compete with Fry or Fry's customers. There is no allegation of substantial injury to competition generally other than that which would result from

injury to individual competitors. Although evidence was offered by complaint counsel to show that three companies sustained injury as a result of Fry's discriminations, we will consider in this opinion only the evidence relating to the alleged anticompetitive effects of Fry's pricing practices in an area in which two of these companies, Volasco Products Company and The Ohio Paper Company, were doing business.²

Volasco Products Company was organized in May 1955 for the purpose of manufacturing and selling a general line of asphalt roofing products. Its plant, located in Knoxville, Tennessee, was approximately 300 miles from the nearest roofing plant operated by another manufacturer. In September 1955 this firm began producing asphalt saturated felt and made its first sales of this product the following month.³ At this time, Fry, The Ruberoid Company, Johns-Manville Corporation, Certain-teed Products Corporation, The Philip Carey Manufacturing Company, The Flintkote Company, Logan-Long, The Barrett Division of Allied Chemical Corporation, and Bird and Son, all major or multi-plant concerns, and The Ohio Paper Company, an independent, were selling asphalt felt in the Knoxville market area. Fry's products were being sold in eastern Tennessee through five distributors, Hibbler-Bond Company, Holston Builders Supply Company, House-Hassen Hardware Company, C. M. McClung and Company, and Mills and Lupton Supply Company.⁴

When Fry adopted its new pricing plan on February 19, 1956, Knoxville was made a factory point for pricing both felt and shingles although Volasco did not manufacture the latter product. All of the other major roofing companies adopted Fry's merchandising plan and their published delivered prices on asphalt felt were therefore identical to Fry's. The Ohio Paper Company however consistently sold at 5% below the majors' published prices in the Knoxville area.

Both prior to and for some time after Fry's February 1956 price change Volasco was a viable competitor in the production and sale of asphalt felt in and around Knoxville. Because of its natural freight advantage it was able to sell profitably to dealers within a hundred miles of Knoxville in less than carload shipments at prices substantially lower than Fry's delivered prices in similar quantities

² The third firm, The Piedmont Company located in Douglasville, Georgia, was engaged in the manufacture and sale of asphalt roofing products for a period of one year.

³ Volasco did not manufacture asphalt shingles although there is testimony by one of the organizers of the firm that he had originally planned to produce this product.

⁴ Fry also sold to Sears, Roebuck & Co.

in that area. Fry's 1956 pricing plan had the effect of substantially raising the prices at which Fry and the other majors were selling asphalt felt (as well as asphalt shingles) in the Knoxville area. Although Volasco's president, Krug, testified that his firm attempted to adhere to the majors' prices when it entered the market, it is clear from the documentary evidence that Volasco was selling at lower prices in February 1956 and during the months of March and April of that year. Fry at this time was selling felt at \$2.55 a roll subject to a trade discount of 10% on minimum carload and truckload shipments.⁵ Volasco however was selling felt direct to dealers in less than truckload quantities at prices ranging from about \$2.01 to about \$2.14 a roll. In May Volasco increased its prices to about \$2.25 a roll and sold at that level until November. On June 15, 1956, Fry raised its price of asphalt felt in Knoxville by about 3%. On August 14, 1956, however, Fry reduced its price (by extending an additional 7½% trade discount) allegedly in response to lower prices quoted by The Ruberoid Company.

On November 1, 1956, Fry made a radical change in its pricing format. Under the plan introduced on February 19, a distributor could receive a functional discount only on goods shipped directly to the distributor's customer. As of November 1, all distributors were given an 8% functional discount on all purchases including those where shipment was made directly to their own warehouse.⁶ In addition, Fry not only absorbed freight from its plant in Brookville, Indiana, to Knoxville as it had under its earlier plans, it reduced its base price on felt 7¢ a roll below its price in certain other areas and also granted a 5% secret rebate to selected wholesalers, including those located in the Knoxville area. As a result, Fry's net delivered price in Knoxville was \$2.02 a roll. Prior to November, Volasco's sales of felt had been steadily increasing and for the period July through October, it had averaged about 10,000 rolls per month. In November its sales dropped to 6560 rolls. While this decline may have been caused in part by the normal curtailment of building construction during the winter season, it is noted that Volasco's average monthly sales for the period March through July of the following year were only about 5700 rolls.

For a brief period (February 4 to March 16, 1957) Fry reduced its prices⁷ to \$1.86 a roll in Knoxville, allegedly to meet the lower

⁵ The 6% functional discount was not granted on purchases made by the customer for his own account.

⁶ The record shows that while distributors or wholesalers of roofing products sell to dealers they also compete with dealers in the resale of such products to roofing applicators, building contractors, and others who purchase roofing products for their own use.

⁷ The prices specified herein are net prices reflecting all discounts and the 5% rebate.

price of a competitor. Fry's price was increased to \$1.94 on March 16, reduced to \$1.84 in May, increased to \$1.94 in June and reduced to \$1.89 in July. In January 1958 Fry's price was reduced to \$1.70 and later that month to \$1.61. In March 1958 its price dropped to \$1.52 a roll.⁸

Volasco's president, Krug, testified that Volasco's cost of manufacturing, including administrative costs (but not including selling costs), was \$1.70 to \$1.75 per roll of felt and that felt was selling in Knoxville at Volasco's cost in late 1957. This testimony is uncontradicted. The record further shows that Volasco's sales of felt declined sharply in late 1957. The record also shows that during 1958 Fry consistently undersold Volasco, that when Fry was selling at \$1.52 a roll Volasco sold at \$1.728, sometimes with a 5¢ "pick-up" allowance, and on a few occasions at \$1.62, with the "pick-up" allowance. Krug testified in this connection:

* * * When it [price] got down to the \$1.62 level we of course weren't even interested in selling felt at that price. We would sell to people who had been buying from us. We didn't turn down a customer. We tried to stick with our established customers but we did not solicit new accounts, or work actively to obtain orders at that price level that was below our cost, substantially."

The record further shows that Fry's prices were maintained at or about Volasco's cost throughout the remainder of the period relevant to this complaint.

As stated above, The Ohio Paper Company also sold asphalt felt in eastern Tennessee (as well as in other southeastern states). This company adhered to a policy of quoting a price exactly 5% less than the majors, and the reason for this policy, according to Mr. Jackson, the General Sales Manager, was that "our product is approximately ten percent of the roofing business; and therefore anyone who buys from us must buy solid truckloads of that one item, whereas if they buy it from a roofing manufacturer, they can buy 90 percent of something with ten percent of saturated felt."¹⁰ Mr. Jackson also testified that his firm stopped doing business in Tennessee, Virginia, North Carolina and the Atlanta, Georgia, area in January of 1958 and that it did so because "prices were so low you could do nothing but make a loss."¹¹

In dismissing the Section 2(a) charge, the hearing examiner held in effect that there was no causal connection between Fry's price

⁸ The record shows that at this time Fry's prices for felt ranged up to 40% higher in certain northern States.

⁹ Tr. 424.

¹⁰ Tr. 719.

¹¹ Tr. 736.

discriminations and whatever injury Volasco and The Ohio Paper Company may have sustained, since Fry was not solely responsible for the low prices causing the alleged injury. The issue thus presented on this part of the appeal is whether Fry's price discriminations resulted in competitive injury cognizable under Section 2(a) for, of course, there is nothing inherently or *per se* unlawful in the territorial or area price differences.

Complaint counsel contend that the examiner has made only a superficial analysis of the facts pertaining to Fry's price cuts in the relevant area and to the competitive impact of such reductions. They point out first of all that the examiner discontinues his analysis with the price change of February 4, 1957, and makes only passing references to the price discriminations occurring in late 1957 and 1958 which, according to complaint counsel, were the ones which caused competitive injury.

Apparently the examiner was of the opinion that complaint counsel were relying primarily on evidence relating to the pricing plan introduced by Fry in February 1956 to prove the Section 2(a) charge. It also appears that he was under the impression that when Fry adopted the February 1956 merchandising plan it reduced its prices in the areas in which the injury allegedly occurred. This was an egregious error and casts doubt upon the accuracy of all the examiner's findings with respect to the competitive impact of Fry's price discriminations.

In this connection the examiner has made the following finding:

* * * When Volasco entered the business of manufacturing and selling asphalt felt Mr. Krug explained that he expected that Fry Roofing and the other major manufacturers of roofing products would meet the price which Volasco would ask for its products. *He was surprised, however, with the territorial price plan introduced by Fry Roofing in February 1956 whereby Fry Roofing's prices and the prices of the other national manufacturers selling in the Knoxville area were substantially lower than the price that Volasco was charging for its products.* (Emphasis added.) Initial Decision, par. 81.

While it is true that Krug did testify that he was surprised when Fry and the other major manufacturers undercut his prices, he was referring, not to the February 19, 1956, price change, but to subsequent price reductions, particularly the one initiated by Fry on March 3, 1958. The record is quite clear that Volasco's prices were lower than those of the major manufacturers for a period of time after the February 1956 price change.

Contrary to the hearing examiner's finding, Fry did not cut prices in February 1956; it increased them substantially in eastern Tennessee and in numerous other areas. Moreover, the evidence is

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clear that Fry had no desire to undercut its competitors by this price change but was interested primarily in raising and stabilizing the prices of asphalt roofing products.

During the early 1950's the industry's capacity to produce far exceeded the demand for roofing products. This problem was further complicated by the entry of small independent manufacturers into the industry. These firms, located for the most part in the southeastern and southwestern sections of the country, were able to and did compete vigorously with the majors in those areas where they had a natural freight advantage. Also coming into existence at this time in the South were the cash-and-carry stores, large retail outlets selling building materials, including roofing products, at discount prices. These firms demanded and received in many instances prices lower than those at which other dealers purchased. By 1956 price competition among roofing manufacturers had become intense.

The conditions existing during this period were described as follows by Lloyd A. Fry, Jr., in a "Foreword" to the merchandising plan introduced by Fry in February 1956: "The majority of building materials were marketed in a manner satisfactory to the various classes of trade, with the lone exception of asphalt roofing products, which were subject to violent peaks and valleys with respect to pricing, and frequent changes of policy on the part of manufacturers."¹² He ascribed this condition to "lack of confidence in each other" and further stated in the "Foreword" "With the thought in mind that all channels of distribution are in business to make a profit, for which there is no substitute, unless consolidation is gained by not having to pay taxes, we humbly submit this merchandising plan as our answer to 'Distribution—Everybody's Problem.'"

Apparently the other major manufacturers of asphalt roofing materials were favorably impressed with Fry's "answer" to "Everybody's Problem" since each of them adopted Fry's pricing plan the day after it became effective.¹³ As a result, all of the major producers quoted identical prices in all areas of the country east of the Rocky Mountains. A Fry official optimistically predicted that this collective approach to the problem would have a salutary

¹² CX 2D.

¹³ One of Fry's competitors, in announcing the adoption of the plan, commented "It is our feeling that this completely new concept of merchandising Asphalt Roofing Products, which has been established by several of the largest producers in this Industry, has a great deal of merit." This same competitor also pointed out that "The effect of these changes will be to increase prices substantially * * *." CX 1509A.

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effect on the industry. On February 23, 1956, this official wrote as follows to a Fry customer:

I refer to your letter of February 17th and your salesman, Mr. Ralph Rule's, Letter which I am attaching.

Again we are lilly white, we severed relations with the Moore-Handley Hdwe. Co. about a year ago.

I have heard rumors that they were having a big Spring Festival and were offering fancy prices on all lines.

I know by this time you have the new merchandising plan which I understand the entire Industry has adopted and it is with my very honest opinion that this will clean up all this mess and I am sure will be somewhat embarrassing to someone to fill all the orders that they may have and extend payment until April 10th.

I readily agree with you that your salesman should be furnished an answer to this type thing and is certainly entitled to it.

In view of the new merchandise plan I do not think any further investigation is necessary.

I am of the firm opinion that the Roofing Industry's House should be, and will be clean, for the first time, as certainly there is no room for any such chiseling.¹⁴

The record shows, however, that the Fry representative was wrong in this prediction since he failed to take into consideration the small independent producers' response to the merchandising plan. There is evidence, in this connection, that various independents, especially in the southern part of the country, would not adopt the majors' pricing schedule but continued to sell below the majors' published prices. On April 27, 1956, Fry, Jr., commented on the activities of certain of these small manufacturers in a letter to a distributor, the Peaslee-Gaulbert Corporation of Louisville, Kentucky:

This will acknowledge receipt of your letter dated April 24th regarding the letter you have received from Erst Long with respect to certain prices being quoted on Asphalt Felt by Bear Brand at Beardon, Arkansas.

I am well aware of the activities of these small Arkansas manufacturers and I assure you that we are watching them very closely. As usual, they are taking advantage temporarily, of an attempt to stabilize an industry which is long overdue for some stabilization from the viewpoint of the wholesalers, dealers, and roofers. These people are opportunists and are much like the backwood sawmill operator who hauls a load of lumber into any given market and announces that he is a dealer.

Nevertheless, I agree that they are a thorn in the side and in due time will be dealt with.

Please advise Mr. Long that I would appreciate his patience and support

¹⁴ CX 1505A, 1505B.

of the new Merchandising Plan and Price Plan for a bit longer because there is a great deal of low-price materials in the territory which was purchased prior to the increase. The market will continue to be unsettled until those inventories have turned. I believe that this will be accomplished within 30 days. At that time, if the menagerie is not changed there we will take corrective action.¹⁵

Certainly it cannot be said that the writer of this letter was anxious to cut prices or to engage in price competition. To the contrary, he was hopeful that the independents would raise their prices to match those of the majors and that "corrective action" would be unnecessary.

The record also clearly establishes that the other major producers were willing to follow Fry's price leadership.¹⁶ Of the 9 manufacturers doing business in eastern Tennessee only 2 did not adopt Fry's pricing format. Volasco sold felt at a considerable margin under Fry and the other majors and The Ohio Paper Company continued to sell at 5% below the majors' price. Despite this competition, Fry adhered to its pricing plan and even raised its price in Knoxville in June 1956. Although Fry reduced its prices in August, allegedly to meet competition, it was not until November of 1956 that it took action which might be regarded as "corrective."

There is some dispute as to whether other majors reduced their prices in Knoxville prior to Fry's August price change. One thing is clear however, it was Volasco's presence in Knoxville which directly or indirectly caused the discriminatory price reductions of all the majors in that area and generated the destructive price competition we are concerned with. Each of them had made Knoxville an involuntary basing point for determining delivered prices in order to meet Volasco's competition and there is evidence that the same major concerns maintained considerably higher prices in other areas where they were competing with one another but not with Volasco.¹⁷

As stated above, Fry drastically altered its sales program in the Knoxville area on November 1, 1956, giving a flat 8% discount to distributors on all purchases, absorbing freight from the Brook-

¹⁵ CX 1506. The word "menagerie" was used by Fry, Jr., to refer to certain manufacturers of asphalt roofing products who used the names of animals in the trade names of their products, such as Bear Brand, Elk Roofing, and Leopard Roofing.

¹⁶ It is immaterial, for the purposes of this decision, whether there was collusion among the majors in arriving at identical delivered prices (as contended by complaint counsel). Nor is it necessary to find that the majors individually accepted an invitation by Fry to quote identical prices. What is significant, however, is that the competitive mood of the large manufacturers was such that they were willing individually to match each other's higher prices.

¹⁷ They were also selling at lower prices in other areas but, as in Knoxville, they were faced with price competition from small local concerns.

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ville plant and granting a 5% secret rebate. As a result Fry's net price for a roll of saturated felt dropped to \$2.02. The following tabulation compares Fry's subsequent price behavior in the Knoxville and Chicago markets.

15- and 30-pound SATURATED FELT

Date	Chicago		Knoxville	
	(a) Net Price	(b) Net Price	(a) Net Price	(b) Net Price
11-1-56	\$2.20	\$2.09	\$	\$2.02
12-26-56	2.13	2.02	....	2.02
2-4-57	2.16	2.05	....	1.86
3-16-57	2.23	2.12	....	1.94
5-6-57	2.23	2.12	....	1.84
6-3-57	2.23	2.12	....	1.94
7-18-57	2.22	2.11	....	1.89
8-19-57	2.22	2.11	....	1.89
1-2-58	2.22	2.11	....	1.70
1-27-58	2.22	2.11	....	1.61
3-3-58	1.86	1.77	....	1.52
9-1-58	2.03	1.93	....	1.65
3-24-59	2.10	2.00	....	1.83
6-1-59	1.87	1.78	....	1.75*
8-24-59	1.80	1.71	....	1.75*
9-14-59	1.80	1.71	....	1.66*
10-1-59	1.87	1.78	....	1.66
2-1-60	1.77	1.68	....	1.68

(a) Net Price includes 2% cash discount.

(b) Net Price includes 2% cash discount and 5% annual rebate.

*These prices do not reflect the so-called pick-up allowance of 20¢ per cwt. (12¢ per roll of asphalt saturated felt) which was being extended on deliveries to Knoxville, Tennessee, from June 23, 1959, through October 1, 1959. Actually the net delivered prices amounted to \$1.62 and \$1.54 per roll during the period of time in question.

In the circumstances shown to exist, it is not surprising that the examiner was able to find that Volasco had not been injured by Fry's price change of February 19, 1956. It was not until considerably later that Fry began making substantial price reductions.

Complaint counsel have also taken exception to the examiner's holding that Volasco's "difficulties" were caused primarily by "internal problems" rather than by the low prices of its competitors. In this connection, respondents called several of Volasco's former customers to testify that they stopped buying from Volasco because of the inferior quality of that firm's felt or because of Volasco's inability to provide an adequate bond guaranteeing "builtup" roofs

made with its felt. The examiner seems to conclude from this testimony that the quality of Volasco's felt and its failure to provide a bond were such important considerations to purchasers of roofing products that they would not buy felt from Volasco at any price. But this reasoning ignores the fact that the purchasers who testified were willing to buy the same quality felt without a bond from Volasco when that company was selling at a lower price than its competitors.¹⁸ It was not until after Fry and the other majors were selling at or about Volasco's price that the quality of the felt and the failure to provide a bond became significant factors in the purchasers' decision not to buy from Volasco. Consequently we do not agree with the examiner that even the few purchasers called by respondents discontinued buying from Volasco for reasons having nothing to do with price. To the contrary, we believe that the testimony of these witnesses strongly supports the contention of complaint counsel that the product of an independent producer such as Volasco cannot command as high a price as the major brands. See *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234 (1929), wherein the court held that "'Lucky Strikes' was a much more expensive cigarette than appellee's brand, and, if sold at as low or a lower price, it would be practically impossible for a weaker competitor to continue."

The examiner also found that Volasco's "difficulties" and loss of sales were caused by Volasco's entry into the roof application business in the fall of 1958. Various witnesses testified that Volasco's customers objected to Volasco's competition with them and retaliated by refusing to buy from Volasco. The examiner implies that this decision by Volasco to go into the application business was an arbitrary one reflecting poor business judgment. Respondent suggests that Volasco was motivated by "greed" when it made this decision. While we agree with the examiner that Volasco's decision to become a roof applicator may have alienated certain of its customers, we are of the opinion that this decision was one of the effects and not one of the causes of Volasco's problem. After March 3, 1958, Volasco's problem, as we see it, was how to stay in business when the largest producer in the industry was selling felt at about 10% below Volasco's cost. Under the circumstances, becoming an applicator was simply a matter of business survival.

The examiner has also held that complaint counsel failed to show that Volasco lost sales to Fry rather than to the other majors selling

¹⁸ The examiner also ignores the testimony of buyers, including one of Fry's distributors, that Volasco's felt was of a satisfactory quality.

in the Knoxville area and that consequently there is no casual connection between the injury sustained by Volasco and Fry's discriminatory prices.¹⁹ In so holding, the examiner seems to take the position that a price discrimination cannot have the prescribed effect on competition unless there is a showing that trade is diverted from the alleged victim to the discriminator.²⁰ We do not agree. While diversion of trade or loss of customers are factors to be considered in determining whether a discrimination will have the prescribed effect on competition, they cannot be equated with such competitive injury. As the 7th Circuit held in *Anheuser-Busch, Inc. v. F.T.C.*, 289 F. 2d 835 (1961), "§ 2(a) is not concerned with mere shifts of business between competitors." It is concerned with injury to the health or vigor of competition, including injury to a single firm's ability to compete.²¹ *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115; *Atlas Bldg. Products Co. v. Diamond Block & Gravel Co.*, 269 F. 2d 950 (1959); *Maryland Baking Co. v. F.T.C.*, 243 F. 2d 716 (1959); *E. B. Muller & Co. v. F.T.C.*, 142 F. 2d 511 (1944). In *Porto Rican American Tobacco Co.*, *supra*, brought under the original Clayton Act, the court found injury from evidence that the plaintiff was required to sell at a loss in order to meet the defendant's lower discriminatory price.²²

Another reason given by the examiner for dismissing the 2(a) charge was the failure of complaint counsel to prove that Fry was

¹⁹ With respect to the effect of Fry's price cuts on Ohio Paper Company, the examiner held that "In 1958, when prices were drastically reduced by Fry Roofing, virtually all sales of asphalt saturated felt in the State of Tennessee were lost" [by Ohio Paper Company] but that there was no nexus between Fry's price discriminations and Ohio's injury because "Fry Roofing did not gain a substantial number of customers from the Ohio Paper Company" and because "the evidence does not warrant the conclusion that Fry Roofing was, during the period in question, a consistent price leader." Initial Decision, page 245.

²⁰ Certainly, the examiner did not mean that Volasco was not affected by Fry's prices since he found that Fry was "undoubtedly a chief factor in the competitive struggle" in eastern Tennessee. Moreover, the evidence is uncontroverted that there was intense price competition among all roofing manufacturers selling felt in the Knoxville area and that each of them was affected by the others' prices. If this competition did not exist, it would be difficult to account for the pricing systems employed by Fry and the other majors whereby they used the plant locations of small independent manufacturers as involuntary basing points for the purpose of establishing delivered prices.

²¹ As stated in the House Judiciary Committee Report on the Patman bill: "The existing law has in practice been too restrictive in requiring a showing of general injury to competitive conditions in the line of commerce concerned, whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injury can the larger, general injury result." (H. R. Rep. 2287, 74th Cong., 2d Sess.) See also *Forster Mfg. Co., Inc. v. F.T.C.*, 335 F. 2d 47 (1964) wherein it was held that a finding of primary line injury can be made on the basis of evidence that there may be a substantial impairment of the vigor or health of the competitors affected by the price discrimination.

²² The court specifically found in this connection: "There were four manufacturers * * * competing for business in Puerto Rico—three United States firms and the appellee * * *. The appellee's capital was about \$6,000,000. The appellant had an annual income of four times this capital, or \$22,000,000, and a par value capitalization of \$186,000,000. The other United States competitors were also very strong financially. Under

responsible for all the price changes in the Knoxville area which caused Volasco's "difficulties." We do not agree that the evidence fails to show that Fry was responsible for the price reductions in question. The examiner found that Fry reduced its prices on several occasions to meet the lower published prices of its competitors, particularly those of The Ruberoid Company.²³ But the examiner failed to take into consideration the fact that Fry made a price move on November 1, 1956, which had the effect of forcing prices downward and which was designed to permit Fry to consistently undersell its competitors. First of all, Fry deviated from its February 19, 1956, plan by granting a functional discount on all purchases made by "distributors" even though these customers were competing with dealers in the resale of roofing products. Secondly, it granted a secret rebate of 5% to all of its distributors doing business in the Knoxville area. Fry was thus able by this maneuver to undercut its competitors while maintaining the same published prices. This evidence, together with the testimony of competitors that Fry was the price leader and further evidence that Fry initiated the price change of March 3, 1958, which reduced prices to the lowest level reached in the Knoxville area, constitutes, in our opinion, at least a prima facie showing of Fry's responsibility for the price reductions.

We are also of the opinion that the hearing examiner was wrong as a matter of law in holding that Fry's discriminatory price reductions could not have the prescribed effect on competition unless Fry alone was responsible for the low prices prevailing in the Knoxville area. A seller whose price discriminations have injured a rival's ability to compete with him cannot escape liability simply because the rival's ability to compete with other firms has been substantially impaired by similar discriminations. For example, sellers A, B and

appellant's competitive methods, appellee was obliged to reduce his price from 12¢ to 10¢ per package, and to the jobber at 95¢, which was a bare factory cost, making a loss of from \$150,000 to \$180,000 per year * * *. If this competition, resulting in such loss, continued, it is fair to assume that the appellee could not continue in business, and its elimination as a competitor was certain. Thus, the appellant's discrimination will substantially lessen competition."

²³ Even this finding appears to be of doubtful accuracy since the examiner failed to discuss the evidence on this point and may not have considered all of it. For example, the examiner held that Fry reduced its published price to meet Ruberoid's price change of July 18, 1957, even though there is persuasive evidence in the record that Ruberoid made this price change to meet Fry's lower prices. In this connection, an official of Ruberoid testified that this particular price change was made July 25, 1957, retroactive to July 18, 1957, to meet an earlier price reduction by Fry. Also in the record is a Ruberoid bulletin addressed to sales managers, dated July 25, 1957, and captioned "NEW PRICES & MERCHANDISING PLAN—ASPHALT ROOFING PRODUCTS—EFFECTIVE JULY 18, 1957." This bulletin specifically states "By this time, you have had an opportunity to study the new Fry Price List, particularly the County Table Listings." And "To be competitive, we obviously have to adopt the Fry prices and County Table Listings immediately." CX 1494A.

C individually discriminate in price for the purpose of destroying a local competitor, D, and each of them undersells D by the same margin. As a result D is forced out of business. No one of the discriminators would be solely responsible for the low prices in the area in which D was doing business and it may not be possible to show that the discrimination of any single one of them had caused the ultimate injury to D. If we follow the hearing examiner's reasoning in this case there would be no causal connection between A, B or C's price discriminations and D's injury since none of them would be solely responsible for the low prices which caused the injury. But Section 2(a) does not require such a showing. It is sufficient if it is established that competition with any one of the price discriminators may be substantially injured.

It is important to note that respondents claimed in their answer²⁴ that their price discriminations were justified under the 2(b) proviso and introduced evidence to show that their lower prices were made in good faith to meet competition.²⁵ In order to establish this defense it was not necessary for respondents to prove that they in fact met competitive prices. *F.T.C. v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 759. They were required to show only the existence of facts which would lead a reasonable and prudent man to believe that the granting of a lower price would in fact meet the equally low price of a competitor. *Id.* at 760. Respondents however have not only failed to make this showing but have adduced evidence which supports the conclusion that they knew that their lower prices undercut those of their competitors. In this connection, respondents attempted to establish that certain of their competitors issued price lists at various times during the relevant period which had the effect of lowering prices and that Fry revised the quoted prices to meet these reductions. They state in this connection:

Fry's price changes were effected through the publication of price lists. At times Fry published price lists that were followed by other manufacturers. At times other manufacturers published price lists that were followed by Fry. The record, for example, discloses that on five occasions Ruberoid published price lists prior to respondent and that four of these five changes represented price decreases. Other companies that published price lists prior to those

²⁴ The answer avers as an affirmative defense that "In each instance complained of wherein respondents charged customers in one area a lower price than customers in another area, for goods of like grade and quality, the lower price was offered and given in good faith to meet competition."

²⁵ The hearing examiner of course made no ruling on this defense since he held that a prima facie case had not been made out. As stated above however in holding that Fry was not responsible for the low prices in the Knoxville area, he found that Fry had reduced its prices on a number of occasions in response to price cuts by its competitors.

published by respondent include Johns-Manville, Certain-teed and Bird. These, too, represented decreases."

As stated above however, beginning November 1, 1956, and continuing throughout the relevant period, Fry gave a secret 5% rebate to its customers located in the Knoxville area. Consequently, whenever Fry changed its price list to match that of another manufacturer it knew or had reason to believe that it was underselling its competitors by 5%.

Complaint counsel have taken exception to other findings by the hearing examiner concerning respondents' discriminatory pricing practices, but in view of the disposition we propose to make of this phase of the case, we find it unnecessary to rule on them.

We are of the opinion that the examiner erred in holding that a finding of injury attributable to Fry's discriminatory prices cannot be made in the absence of proof that trade was diverted to Fry or that Fry was responsible for all of the price changes in the area in which the discriminations occurred. We believe that the showing that Fry, as the price leader and dominant competitive factor in the sale of roofing products in the area served by Volasco and Ohio Paper Company, has discriminated in price by selling asphalt felt in that area at prices below the price at which these two smaller firms could profitably operate and has maintained its prices at or about this level for more than two years, while selling at substantially higher prices elsewhere, is sufficient to establish a violation of Section 2(a). There is in our opinion a reasonable possibility that the ability of Volasco and Ohio Paper Company to compete with Fry will be substantially impaired as a result of Fry's territorial price discriminations. We also find that Fry's discriminatory price cuts were not made defensively but for the purpose of disciplining small independent concerns who sold below the prices established by Fry and followed by the other major producers. Because of the disparity in size between Fry and these independents and Fry's demonstrated ability to sell for prolonged periods at or below their cost, we believe there is a reasonable possibility that the independents will either be eliminated by Fry's discriminatory practices or so debilitated that they will be unable to provide any meaningful or effective competition in the sale and distribution of asphalt roofing products.

We also find on the basis of this record that the major manufacturers of asphalt roofing products were willing to eliminate price competition among themselves by adopting identical zone delivered pricing systems. The record also shows that after the

adoption of Fry's pricing plan by the majors, price competition in the sale of asphalt felt in the Knoxville area emanated principally, if not exclusively, from Volasco who sold substantially below the majors' delivered prices in this area and from Ohio Paper Company who consistently sold at 5% under the majors. In view of Fry's announced intention of stabilizing prices and the adherence of the other majors to the plan adopted by Fry for this purpose, it is obvious to us that Volasco and Ohio Paper Company represented the only important source of price competition in the sale of roofing products in eastern Tennessee and that the removal of these firms as viable competitors, which we consider to be most likely,²⁶ will certainly have an adverse effect on price competition generally in this market and will substantially injure, destroy or prevent competition with Fry in the marketing of industry products.

For the purpose of this prognostication it is not necessary that we rely on the finding that Fry acted with predatory intent. The Act speaks of the effect of the discrimination, not the intent of the discriminator. As stated by the court in *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F. 2d 356 (1955), in response to the holding of the district court that intent was necessary to taint a price discrimination with illegality "Of course, intent is not an essential factor to a Section 2(a) violation, although, if the intent to destroy were found to exist, it might tend to render the injury probable." See also *F.T.C. v. Anheuser-Busch, Inc.*, 363 U.S. 536, and *Anheuser-Busch, Inc. v. F.T.C.*, *supra*. In the former decision the Supreme Court commented that predatory intent may be relevant because it "bears upon the likelihood of injury to competition," and in the latter decision the 7th Circuit, in referring to the holding in *Corn Products*²⁷ that Section 2(a) is designed to reach discriminations in their incipency, made the following statement with respect to the relevance of predatory intent:

The application in the case at bar of this language would require a projection to ascertain the future effects of the price reductions made by AB. The reliability of this projection would depend in part upon whether weight is given to the nature of the activity of the party engaged in the alleged discriminatory action * * *. If * * * the projection is based upon predatoriousness or buccaneering, it can reasonably be forecast that an adverse effect on competition *may* occur. In that event, the discriminations in their incipency are such that they *may* have the prescribed effect to establish a violation of Section 2(a). If one engages in the latter type of pricing activity, a reasonable probability may be inferred that its wilful misconduct may substantially lessen, injure, destroy or prevent competition * * *. (Emphasis in original.)

²⁶ Ohio Paper Company has already withdrawn from this area.

²⁷ *Corn Products Refining Co. v. F.T.C.*, 324 U.S. 726.

In the matter presently before us we are not looking at a discrimination in its incipency but at a practice which has continued for a period of several years. Whether or not Fry acted with an unlawful intent, and we believe it did, does not alter in any manner the actual adverse effects of its behavior. See *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 346 F. 2d 661 (1965). Nor is it necessary in the circumstances shown to exist to rely on Fry's motivation to predict the outcome of its discriminatory pricing. Whatever its reason, we have no doubt on the basis of this record that unless inhibited by order Fry will continue to engage in the practice of undercutting its local competitors in any area in which it is doing business regardless of the effect on competition.

Complaint counsel have proposed an order to cease and desist which would prohibit respondents from discriminating directly or indirectly in the net price of roofing products of like grade and quality, by selling such products to any purchaser at a net price which is lower than the price charged any other purchaser. Such an order would in the circumstances of this case be too stringent and would have little relationship to the practice found to be unlawful. By its terms respondents would be forced to sell at one delivered price throughout the country and could risk deviation from that price only in those instances where they are prepared to establish one of the affirmative defenses permitted by Section 2. Moreover, the order would prohibit respondents from compensating any customer for performing a redistribution function although there is no evidence that discounts granted by respondents *solely for that purpose*²⁸ had the anticompetitive effect proscribed by the statute. The discriminatory prices found to be unlawful were those which might cause the debilitation of smaller and weaker competitors and, insofar as possible, the order is directed at territorial price discriminations having this probable effect.

We agree with complaint counsel that the order should encompass respondents' pricing of both asphalt felt and asphalt shingles and that it should include the entire area in which respondents are doing business. Although the evidence upon which our finding of a 2(a) violation is predicated relates only to respondents' sale of felt in the Knoxville, Tennessee, area there is ample evidence in the record to establish that respondents' discriminatory pricing practices are not confined to this product or to a particular geo-

²⁸ Under its February 19, 1956, plan, respondents granted a 6% functional discount to "Approved Distributors" on carload shipments consigned to "Purchasers for Resale to Consumers." In order to obtain this discount the distributor was required to certify that the shipment had been sold to a Purchaser for Resale in accordance with Fry's definition.

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graphic area. The record shows in this connection that respondents have engaged in systematic price discriminations in selected areas in the sale of both asphalt felt and asphalt shingles. Furthermore, the evidence relating to respondents' use of such practices in furtherance of their attempt to "stabilize" prices in the roofing industry is applicable to other areas in which they are confronted with local competition in the sale of both felt and shingles.

Complaint counsel's appeal from the examiner's dismissal of the Section 5 charge is denied. The principal basis for this holding by the examiner was the failure of counsel to prove through cost studies prepared by Krug, president of Volasco, that respondents were in fact selling below cost. We find nothing in complaint counsel's brief or in the record to convince us that the examiner was in error in so ruling.²⁹ Since this essential allegation was not sustained, the charge will be dismissed. The examiner's conclusions as to the purpose and effort of respondents' pricing practices are rejected.

To the extent indicated herein, the appeal of complaint counsel is granted; in all other respects it is denied. Our order providing for appropriate modification of the initial decision is issuing herewith.

Commissioners Dixon and Jones did not participate, the latter for the reason that oral argument was heard prior to her taking the oath of office.

Commissioner Elman concurred and has filed a concurring opinion.

Commissioner MacIntyre's views are set forth in a separate statement.

CONCURRING OPINION

JULY 23, 1965

BY ELMAN, *Commissioner*:

In the antitrust lexicon some practices, like price fixing, are illegal *per se*. These are practices which experience has shown are so likely in the general run of cases to be injurious or destructive that the courts will not permit inquiry into their effect on competition in a particular case. Hence, where a *per se* restraint is charged, the only proof required is that the practice was followed.

²⁹ Our holding that Fry violated Section 2(a) is not based on a finding that Fry sold below cost. As stated by the court in *Volasco Products Company v. Lloyd A. Fry Roofing Company*, *supra*, "It was not necessary that the plaintiff prove that the defendant sold below cost. It was sufficient to show price discrimination in violation of the statute. *F.T.C. v. Anheuser-Busch, Inc.*, 363 U.S. 536, 546-553."

In refreshing contrast to a view that has at times enjoyed support within the Commission, the Commission now acknowledges that, "of course, there is nothing inherently or *per se* unlawful" about area or territorial price differences (Commission opinion, p. 254). The antitrust laws do not compel a national seller, irrespective of competitive circumstances and effects, to charge a single, uniform price in every market throughout the country. Recognizing that competitive conditions may vary from market to market, and not wishing to put national sellers in a strait jacket, Congress in Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, forbade such price "discriminations" only where they damage, or are likely to damage, competition. *F.T.C. v. Anheuser-Busch, Inc.*, 363 U.S. 536. Unlike a *per se* restraint, the effect on competition of an area price difference is not merely relevant, but crucial. To be sure, where it is shown that the intent behind an area price difference is anticompetitive or "predatory"—to cripple, destroy, or discipline weaker competitors—the Commission and the courts may properly dispense with elaborate inquiry into the background, market setting, and probable effects of the practice. But where such intent is absent, the record must, as in any Clayton Act case, contain enough facts as to the condition of the relevant market and the character of the challenged practice to provide a basis for judging its probable competitive impact.

Analysis of area price differences has often foundered on two misconceptions, from which the Commission's opinion in this case is happily free. The first is the erroneous and mischievous notion that the Robinson-Patman Act is not a part of the antitrust laws, but is an anti-antitrust law designed to halt vigorous price competition when it becomes so vigorous as to hurt a competitor—even a solitary, marginal, inefficient one. No court has accepted this reading of Section 2(a). See, e.g., *Borden Co. v. F.T.C.*, 339 F. 2d 953 (7th Cir. 1964); *Anheuser-Busch, Inc. v. F.T.C.*, 289 F. 2d 835 (7th Cir. 1961), and cases cited therein. The Supreme Court has expressly rejected interpretations of the Act that would "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 63. The antitrust laws, including the Robinson-Patman Act, are not designed to shield an inefficient competitor from competition. Their basic purpose is to preserve a competitive system in which the more efficient competitor will win business, and the less efficient will lose. Section 2(a) of the Clayton

Act expressly makes illegality depend on a showing of injury to competition or tendency to monopoly.

There may, to be sure (as the third clause of the competitive-injury proviso of Section 2(a) was intended to make clear), be a statutory violation even though only a single competitor is involved, so long as the "requisite adverse effects on competition" are present. *Quaker Oats Co.*, F.T.C. Docket 8112 (decided November 18, 1964), p. 4 [66 F.T.C. 1131, 1193]. For example, where the seller charged with violation has only one competitor in the relevant market, whom his price tactics are designed to eliminate, or several competitors whom his pricing is designed to pick off one by one, injury to a competitor may properly be equated with injury to competition. See, e.g., *Maryland Baking Co. v. F.T.C.*, 243 F. 2d 716 (4th Cir. 1957); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936).

The second basic misconception is the unverified assumption, explicitly rejected by the Commission here, that area price differences are always an unnatural and sinister form of competition, and therefore should be treated as *prima facie* unlawful wherever encountered. I suspect that in many industries, especially those involving multi-plant sellers, the opposite is true: it is the uniform nationwide price that is abnormal. Suppose that seller X has 100 plants scattered throughout the nation. While all the plants sell the same product, they may have different labor costs, different freight costs, different demands, and different competitors—to name a few of the factors, not necessarily related to abuse of monopoly or market power, that may make for different prices in different geographical areas. In these circumstances, to make the fact of area price difference alone tantamount to proof of illegality, and punish such a seller by entering an order calculated to force it to establish and maintain a single nationwide price for its products, would be economically as well as legally indefensible. This approach the Commission, to its credit, has now emphatically rejected.

Respondent is the nation's largest producer of asphalt roofing products. The remaining producers include large, diversified firms, like Johns-Manville—the majors of the industry—and small one- or two-plant firms like Volasco and Ohio (the competitors allegedly injured by Fry's area pricing)—the independents. Fry and the other majors have assiduously endeavored to stabilize prices in the industry at a high level; the independents have repeatedly spoiled these efforts by underselling the majors. Fry expressed its intent to discipline such pesky competitors, and thereafter com-

menced the round of drastic discriminatory price reductions in the eastern Tennessee area involved in this case. The only independents in eastern Tennessee were Volasco and Ohio; and they were the only firms in the area that had refused to adhere to the industry-wide pricing system introduced by Fry.

The Commission finds both unlawful intent and unlawful effect. In undercutting Volasco and Ohio, Fry acted with the purpose of punishing these firms for having shown competitive independence. Such anticompetitive intent should alone be sufficient to condemn Fry's discriminatory pricing. But there is more. Since the predictable effect of Fry's deep and prolonged undercutting of these small competitors is to destroy or at least to cow them as effective competitors, and since these are the only firms that have shown competitive vigor and independence in the eastern Tennessee region, it is probable that Fry's price tactics, unless stopped, will seriously impair the health and vigor of competition in that region.

The cease and desist order entered by the Commission is designed to prevent recurrence of the unlawful conduct without unduly restricting Fry's ability to compete. The order does not require Fry to establish a uniform nationwide price; nor does it prevent Fry from undercutting competitors in selected local markets. It only prevents Fry from undercutting *all* of its smaller competitors in a particular market, as it did in eastern Tennessee. I think it is fair to assume, in light of the facts developed in this case, that in a market where Fry's price is below that of its lowest-price competitor, its price is likely to represent not the result of superior efficiency but an attempt to discipline an upstart independent. Moreover, it is implicit in the order that it does not preclude Fry from making price reductions in a market where competitors maintain a uniformly high, monopolistic price, or from making temporary promotional price reductions necessary for entry into a concentrated local market. In other words, the order should not, and I believe will not, be read as forbidding area price differences where Fry can show that they promote—and not, as in this case, retard—vigorous and healthy competition.

SEPARATE STATEMENT

JULY 23, 1965

BY MACINTYRE, *Commissioner*:

I have subscribed to and joined in the finding that respondents have violated Section 2(a) of the Clayton Act, as amended. My position in that respect is predicated upon the Commission's find-

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ings as to the facts here which I have approved and adopted. However, I do not concur in the conclusions set forth in the opinion of the majority dealing with the question of whether respondents violated Section 5 of the Federal Trade Commission Act by selling below cost or at unreasonably low prices for the purpose of injuring or destroying competition. Likewise, I do not concur in that part of the Commission's decision denying complaint counsel's appeal from the hearing examiner's dismissal of the Section 5 charge.

It is beyond dispute that respondents utilized discriminatory pricing practices with the result of eliminating a substantial amount of competition in the primary line of commerce in which respondents are engaged. Included among those discriminations are those by which respondents charged substantially higher prices in some areas than respondents charged in other areas where they were seeking to eliminate competition. The order the Commission is issuing will not be effective in preventing such discriminations in the future.

The proposition that price discriminations are *per se* illegal is not involved here. There is need to keep the real issue in focus, namely, when we are faced with discriminations in price destructive of competition, should we effectively enjoin such discriminations? It is my view that the Commission has not faced up to and disposed of that issue through the application of an adequate remedy prohibiting the illegal practices documented in this proceeding. The Commission should formulate an order that, without outlawing any and all price differentials, would offer a prospect of greater effectiveness than the order it is entering here.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision; and the Commission, for the reasons stated in the accompanying opinion, having granted in part and denied in part the aforementioned appeal, and having determined that the initial decision should be in part adopted and in part set aside:

It is ordered, That paragraphs 1 through 25 of the initial decision be, and they hereby are, adopted by the Commission. The remainder of the initial decision is set aside.

It is further ordered, That respondents Lloyd A. Fry Roofing Company, a corporation, Lloyd A. Fry, Sr., and Lloyd A. Fry, Jr.,

individually and as officers of said corporation, and other officers, representatives, agents and employees of said corporation, directly or through any corporate or other device, in connection with the sale of offering for sale of asphalt saturated felt and asphalt strip shingles in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality, by selling such products to any purchaser at a price which is lower than the price charged any other purchaser at the same level of distribution, where such lower price undercuts the lowest price offered to that purchaser by any other seller having a substantially smaller annual volume of sales of asphalt roofing products than respondents' annual volume of sales of those products.

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

Commissioners Dixon and Jones did not participate, the latter for the reason that oral argument was heard prior to her taking the oath of office. Commissioner Elman concurred and has filed a concurring opinion. Commissioner MacIntyre's views are set forth in a separate statement.
