

IN THE MATTER OF
BEATRICE FOODS CO., INC., ET AL.

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

Docket 7599. Complaint, Sept. 28, 1959—Decision, July 29, 1965

Order adopting in part the findings of fact in the initial decision of the hearing examiner and dismissing the complaint which charged a major dairy products company with headquarters in Chicago, Ill., with granting discriminatory discounts to certain retail grocery stores and discriminatory promotional allowances to others.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents Beatrice Foods Co., Inc., and Eskay Dairy Company, Inc., have violated and are now violating the provisions of subsections (a) and (d) of Section 2 of the Clayton Act, as amended (15 U.S.C., Sec. 13), hereby issues its complaint, charging as follows:

COUNT I

PARAGRAPH 1. Respondent Beatrice Foods Co., Inc., hereinafter referred to as "Beatrice," is a corporation organized and existing under the laws of the State of Delaware with its principal office

and place of business located at 120 South LaSalle Street, Chicago, Illinois.

PAR. 2. Respondent Eskay Dairy Company, Inc., hereinafter referred to as "Eskay," is a corporation organized and existing under the laws of the State of Indiana with its principal office and place of business located at 1501 Fairfield Street, Fort Wayne, Indiana.

PAR. 3. Respondent Beatrice is a holding and operating company having on April 1, 1958, a 100% voting power in approximately twenty-eight subsidiary corporations. Beatrice conducts a diversified dairy business, including virtually all branches thereof. In their respective trading areas, said respondent conducts its business by and through its subsidiaries. Its principal divisions are creamery butter, ice cream, milk, produce, cold storage, and frozen food. Beatrice's chief trade name is "Meadow Gold."

Respondent Beatrice has 115 plants for the manufacturing and processing of butter, ice cream, ice cream mixes, dried butter milk, powdered milk, and fluid milk, located in thirty States and the District of Columbia. Sales branches are maintained by Beatrice at its manufacturing plants and in addition Beatrice has 200 selling branches in thirty-one States.

Beatrice's consolidated net sales for the fiscal year ending February 28, 1959, were \$385,449,644.

PAR. 4. Respondent Eskay became a wholly owned subsidiary of respondent Beatrice on or about April 22, 1955. By agreement entered into on that date by and between the holders and owners of all of the capital shares of Eskay and respondent Beatrice, all of the capital shares of Eskay were exchanged for a specified number of the capital shares of Beatrice; and, thereafter, upon the exchange of such shares respondent Beatrice obtained complete control over the operations of respondent Eskay.

Respondent Eskay prior to the above exchange of all of its capital shares for Beatrice shares, and at the present time, is engaged in the manufacturing, processing and sale of fluid milk and other dairy products at Fort Wayne, Indiana, and in other cities, towns and places located in the State of Indiana.

The sales and other activities of respondent Eskay, including the acts and practices hereinafter to be alleged, were and are under the direction, supervision and control of respondent Beatrice; and both said corporations are jointly and severally named as respondents herein.

PAR. 5. In addition to the manufacturing and sales activities of respondent Beatrice which it carries on through its wholly owned

subsidiary Eskay in the Fort Wayne, Indiana, trading area, respondent Beatrice owns, maintains and operates a plant for the manufacturing, processing and sale of fluid milk and other dairy products at New Castle, Indiana, with branches in several cities in Indiana, including Richmond, Indiana. Respondent Beatrice also owns, maintains, and operates plants at New Bremen, Ohio, with branches in St. Marys, Ohio, and in other cities and places in the State of Ohio.

Respondents Beatrice and Eskay sell fluid milk and other dairy products of like grade and quality to a large number of purchasers located in the States of Indiana and Ohio for use, consumption, or resale therein. Respondent Beatrice, and through its subsidiaries, sells fluid milk and other dairy products of like grade and quality to a large number of purchasers located in many other States of the United States and in the District of Columbia for use, consumption or resale therein.

PAR. 6. In the course and conduct of their business, respondents Beatrice and Eskay are now and for many years last past have been transporting fluid milk and other dairy products, or causing the same to be transported, from dairy farms and other points of origin to respondents' processing and manufacturing plants located in other States of the United States and in other places under the jurisdiction of the United States, including the District of Columbia.

Respondents are now and for many years past have been transporting fluid milk and other dairy products or causing the same to be transported from the State or States where such products are processed, manufactured or stored in anticipation of sale or shipment to purchasers located in other States of the United States and in other places under the jurisdiction of the United States, including the District of Columbia.

Respondents also sell and distribute their said fluid milk and other dairy products to purchasers located in the same States where such products are processed, manufactured or stored in anticipation of sale.

Among other things, respondent Eskay acquires substantial quantities of raw milk from dairy farms located in the State of Ohio which it processes and sells to purchasers in Indiana. Said respondent also receives dairy products through inter-company transfer and shipment from plants and facilities owned by respondent Beatrice in States other than Indiana which it resells to purchasers in Indiana. Respondent Beatrice's New Bremen, Ohio, plant receives substantial quantities of raw milk from dairy farms located in the State of Indiana which said respondent processes

at its New Bremen plant and transports, or causes the same to be transported, to respondent Beatrice's New Castle, Indiana, plant for the purpose of sale to purchasers located in Indiana. Respondent Beatrice receives substantial quantities of processed bottled milk at its plant in New Bremen, Ohio, which is transported from its New Castle, Indiana, plant for sale in Ohio. Also respondent Beatrice's New Bremen, Ohio, plant transports or causes to be transported substantial quantities of fluid milk processed from raw milk obtained from dairy farms in Indiana to respondent's St. Marys, Ohio, branch for resale to purchasers buying from said branch.

Respondent Beatrice and all of its subsidiaries are engaged in interstate commerce. All of the matters and things, including the acts and practices, sales and distribution by respondents of their said fluid milk and other dairy products, as hereinbefore alleged, were performed and done in a constant current of commerce, as "commerce" is defined in the Clayton Act.

PAR. 7. Respondents Beatrice and Eskay sell fluid milk and other dairy products to distributors, retailers and consumers.

Respondents' distributors resell to retailers and consumers to the extent that such purchasers do not buy directly from respondents. In many instances respondents' distributors act as their agents in making sales and deliveries to retailer-purchasers to the extent that such distributors pay or allow discounts and rebates on sales to such customers on behalf of respondents for which said distributors are reimbursed by respondents.

Many of respondents' retailer-purchasers located in Indiana, in Ohio, and in other States and places where respondent Beatrice, and through its subsidiaries, does business were and are in substantial competition with one another.

Respondents Beatrice and Eskay, in the sale of fluid milk and other dairy products to retailers and consumers, were and are in substantial competition with other manufacturers, processors, distributors and sellers of said products in the States of Indiana and Ohio. Respondent Beatrice and its other subsidiaries are in like competition in other states and areas where they do business.

PAR. 8. In the course and conduct of their business in commerce, respondents have discriminated in price in the sale of fluid milk and other dairy products by selling such products of like grade and quality at different prices to different purchasers at the same level of trade.

Included in, but not limited to, the discriminations in price, as above alleged, respondents Beatrice and Eskay have discriminated in price in the sale of said products to retailers located in Fort

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Wayne, New Castle, and Richmond, Indiana, and in other cities, towns and places in the State of Indiana served by respondents' plants located in Fort Wayne and New Castle, Indiana, by charging many retailer-purchasers of respondents' said products substantially higher prices than other retailer-purchasers of respondents buying said products of like grade and quality, many of whom are competing purchasers.

Respondent Beatrice has discriminated in price in the sale of fluid milk and other dairy products in New Bremen and St. Marys, Ohio, and in other cities, towns and places served by said plants by charging many of its retailer-purchasers higher prices for respondent's said products than respondent charged to other retailer-purchasers in said area, many of whom are competing purchasers.

Respondent Beatrice and respondent Eskay have discriminated in price in the sale of said products to retailer-purchasers located in Fort Wayne, New Castle, and Richmond, Indiana, and in other cities, towns, and places in the State of Indiana and to retailers located in New Bremen and St. Marys, Ohio, and in other cities, towns, and places in the State of Ohio, and between favored retailers located in each of the said cities, towns and places and unfavored retailers located in each of the others.

PAR. 9. The effect of such discriminations in price by respondents Beatrice and Eskay in the sale of fluid milk and other dairy products has been or may be substantially to lessen, injure, destroy or prevent competition:

1. Between respondents and their competitors in the manufacturing, processing, sale and distribution of such products.
2. Between retailers paying higher prices and competing retailers paying lower prices for respondents' said products.

PAR. 10. The discriminations in price, as herein alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

COUNT II

PAR. 11. Paragraphs One through Seven of Count I are hereby set forth by reference and made a part of this Count as fully and with the same effect as if quoted herein verbatim.

PAR. 12. In the course and conduct of its business in commerce, as aforesaid, respondent Beatrice has paid, or contracted for the payment of, money, goods, or other things of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities, including advertising services or facilities, furnished or agreed to be furnished by or through such

customers in connection with the handling, sale, or offering for sale of respondent's milk and other dairy products and respondent has not made or contracted to make such payments, allowances, or considerations available on proportionally equal terms to all of its other customers competing in the sale and distribution of such products.

Included in, but not limited to, the practices, as herein above alleged, respondent Beatrice paid for the newspaper advertising of its said products by some of its retailer-customers located in St. Marys, Ohio, and said respondent did not offer or make available on proportionally equal terms such payments and allowances to all other competing customers of respondent doing business in St. Marys, Ohio.

PAR. 13. The acts and practices alleged in Paragraphs Eleven and Twelve are in violation of subsection (d) of Section 2 of the aforesaid Clayton Act, as amended.

Mr. William H. Smith for the Commission.

Winston, Strawn, Smith & Patterson, by *Mr. Thomas A. Reynolds* and *Mr. Edward L. Foote*, and *Mr. John P. Fox*, Chicago, Ill. for respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

SEPTEMBER 15, 1964

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PRELIMINARY CONSIDERATIONS

The complaint herein issued on September 28, 1959, charges violations of section 2(a) and (d) of the Clayton Act involving the granting of discriminatory discounts and the granting of discriminatory advertising allowances in the sale of respondents' products, inclusive of fluid milk and other dairy items or by-products.

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The respondent Eskay Dairy Company, Inc., in the within matter, is included as a wholly owned subsidiary of respondent Beatrice Foods Co., Inc. The former, however, was dissolved on or about February 28, 1959, prior to the date the complaint was filed, and has not been in existence as a corporation or legal entity since that date. Complaint counsel, however, asserts that the respondent Beatrice Foods Co., Inc., is entirely responsible for the acts of Eskay because of the corporate relationship therewith followed by the integration of Eskay into Beatrice as a division thereof. (Tr. 934-35.)

Following the initial termination of complaint counsel's prima facie case, respondents on August 13, 1962, made motions to dismiss claiming an insufficiency of evidence and also to strike certain evidence which did not appear to be relevant to the actual charges being pressed by complaint counsel. Since there seemed to be some question concerning what charges complaint counsel was pressing, the hearing examiner issued an order on June 25, 1963, directing counsel in support of the complaint to submit a categorical allocation¹ of the evidence relied upon by complaint counsel to prove the competitive effect (prohibited by the statute) resulting from the discriminations in price by respondents as shown by the record. On September 4, 1963, complaint counsel complied with the hearing examiner's order by filing a document entitled "Response of Counsel in Support of Complaint to Order of Hearing Examiner of June 25, 1963."

Specifically, complaint counsel's allocation identifying exhibits and other evidence relied upon, which he proposes to have incorporated by reference into the findings² is as follows:

In compliance with the directive of the Hearing Examiner, above stated, counsel in support of the complaint herewith submits an allocation of the evidence together with such other facts and circumstances as in complaint counsel's opinion support the allegations of price discrimination as alleged in the complaint and the adverse competitive effects of such discrimination as follows:

I

Respondent discriminated in price between competing wholesale customers in the sale of fluid and milk products:

A. By selling such products of like grade and quality to Marsh Food Liners, Inc. of Yorktown, Indiana, at substantially lower prices than to competing wholesale customers in St. Marys, Ohio.

¹ See complaint counsel's categorical allocation of evidence at pp. 292-300 hereof.

² This allocation is included in the initial decision for the reasons hereinafter set forth. It is, however, not included in the initial decision as a finding.

The effect of such discrimination in price substantially lessened competition and tended to injure, destroy, and prevent competition between such other wholesale products in St. Marys, Ohio and the Marsh Food Liners Store at St. Marys, Ohio more particularly described as follows:

Marsh Food Liners, Inc. is a chain grocery store organization. (Tr. 995, 1056, 1063) Marsh purchases fluid milk and other dairy products from respondent. Marsh's fluid milk purchases are made from respondent's plants at New Bremen, Ohio and Fort Wayne, Indiana. This milk is bottled and packaged by respondent under Marsh's private label. (Tr. 993, 994)

Respondent's New Bremen, Ohio plant bottles milk for Marsh in glass gallon jugs and transports about 2400 gallons a week to Marsh's warehouse in Yorktown, Indiana, a distance of 86 miles. (Tr. 1063, 1064, 1071) This milk is sold by respondent to Marsh on contract, based on raw milk costs computed as follows: (Tr. 1071, 1078)

Indianapolis Class I price per hundred wt.	\$4.40
Add	1.25
Add 2¢ per gallon transportation charges from New Bremen to Yorktown, (each hundred wt. contains 11¼ gallons Tr. 1029)	.2250
Total Price per hundred wt.	\$5.8750
Price per gallon: $\$5.8750 \div 11\frac{1}{4} =$	52.22¢

Respondent's Eskay Division at Fort Wayne, Indiana sells milk in paper cartons to Marsh's warehouse in Yorktown, Indiana "on a dock delivery." (Tr. 1111, 1113, 1115, 1116) These sales include half gallons of homogenized milk. (Tr. 1113) Respondent's price to Marsh is based on the Class I Fort Wayne Federal Market order per hundred wt. for 3.5 butter fat milk to which is added certain charges. (Tr. 1113, 1114) The price to Marsh for a half gallon of homogenized milk (22½ half gals. per hundred wt.) is computed as follows:

Class I Market Order	\$4.072
Federal Market Charge	.04
Health Dept. Charge	.01
Add	1.45
Total price to Marsh per hundred weight.	\$5.572
Price of half gallon: $\$5.572 \div 22\frac{1}{2} =$	24.76¢

The private label milk sold to Marsh by respondent's New Bremen and Fort Wayne plants is substantially the same product as milk sold by respondent under its Meadow Gold Brand. (Tr. 1012, 1013, 1085, 1086)

Marsh Food Liners, Inc. owns and operates a grocery store at St. Marys, Ohio (Tr. 1068) which has been in business since about November 1958. (Tr. 1201) Gallon jugs of fluid milk sold by respondent's New Bremen, Ohio plant to Marsh and delivered to Marsh's warehouse at Yorktown, Indiana, are transported from that point by Marsh to its stores for sale at retail as a part of "the Marsh Food Liners chain of delivery". (Tr. 1070) Some of respondent's milk bottled in gallon jugs is shipped by Marsh from its warehouse a distance of 86 miles to Marsh's store in St. Marys, Ohio. (Tr. 1071) Half gallons of fluid milk packaged by respondent's Fort Wayne, Indiana plant and sold to Marsh's warehouse are transported in Marsh trucks to Marsh's St. Marys Store. (Tr. 1187, 1201)

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Respondent operates wholesale routes from its New Bremen, Ohio plant on which respondent sells its milk and milk products to wholesale customers in St. Marys, Ohio. (Tr. 1055, 1056) The Marsh Store at St. Marys is supplied with respondent's by-products, such as cream and chocolate milk, by respondent's trucks operating on these routes. (Tr. 1068)

Respondent's trucks operating on its wholesale routes from New Bremen, Ohio sell respondent's fluid milk and dairy products under respondent's Meadow Gold label to competing stores with the Marsh Store in St. Marys, Ohio. (Tr. 1055, 1956)

Earl Wesner operates a retail grocery and meat store at St. Marys. (Tr. 1141) Wesner buys Meadow Gold milk (known locally as White Mountain) from respondent. He buys and sells this milk in glass gallon and half gallon jugs and in half gallon paper containers. (Tr. 1142) Respondent allows Wesner a discount of 5%. (Tr. 1142, 1143) The Marsh Store in St. Marys is one of Wesner's competitors in the sale of respondent's milk and dairy products. (Tr. 1143) Wesner pays respondent 70¢ for gallon jugs and 39¢ for half gallons of Meadow Gold milk less 5% discount, or net prices of 66.50¢ and 37.05¢, respectively. (Tr. 1144) Wesner resells the gallon jugs for 73¢ (Tr. 1145) and half gallons for 40¢. (Tr. 1149) Wesner saw advertisements in newspapers showing that Marsh was selling half gallons at 3 for \$1.00. (Tr. 1148, 1151) Wesner's price of 40¢ for the half gallon was approximately his cost. (Tr. 1155) A comparison of Wesner's net prices with Marsh's net prices paid for respondent's fluid milk of like grade and quality discloses the following differences in price:

<i>Wesner's price</i>	<i>Marsh's price</i>	<i>Difference</i>
Gal. jug 66.50¢	52.22¢	14.28¢
Half gal. 37.05¢	24.76¢	12.29¢

Robert L. Fortman, Manager of a retail grocery and meat store at St. Marys, sells Meadow Gold milk. (Tr. 1176) He receives a 2% discount off a 39¢ list price for half gallons in paper (Tr. 1177) which he is presently paying, making a net of 38.22¢ (Tr. 1178) which he resells at 45¢. (Tr. 1178) Fortman's Store competes with Marsh in the sale of respondent's milk and milk products. (Tr. 1177)

Bernard A. Fortman, grocery and meat market owner. St. Marys, sells Meadow Gold milk in his store in gallon jugs, and half gallons in paper and glass jugs. He receives a 2% discount from respondent. He pays respondent 39¢ less the 2% discount for half gallons or a net of 38.22¢ which he resells for 42¢. (Tr. 1188, 1189) The Marsh Store at St. Marys is one of his competitors. (Tr. 1188, 1189) Marsh has advertised milk in half gallon containers at 3 for \$1.00 plus bonus stamps. (Tr. 1189, 1190) By reason of this Fortman "began to lose business and my customers." (Tr. 1190, 1191) Fortman reduced his price but still lost customers. He put in half gallons in glass which he resold at cost, which was 35¢. (Tr. 1193) He knows what his competitor's prices are by seeing their ads in the paper and by driving by their stores seeing ads sticking on their windows. (Tr. 1200) Fortman buys respondent's Meadow Gold milk in gallon jugs at 70¢ which he resells at 70¢ in his store. (Tr. 1204)

B. By selling such products of like grade and quality to Miller's Supermarkets, Inc. of Denver, Colorado at substantially lower prices than to competing wholesale customers in metropolitan Denver, Colorado.

The effect of such discriminations in price substantially lessened competition and tended to injure, destroy, and prevent competition between such other wholesale purchasers of respondent's said products in metropolitan Denver, Colorado and Miller's Supermarkets, Inc.'s Stores in metropolitan Denver, Colorado more particularly described as follows:

Miller's Supermarkets, Inc. will hereinafter be referred to as Miller's. Miller's is a supermarket chain with 38 stores in Colorado and Wyoming. Twenty-nine stores are in the Denver market area; four stores are in Colorado Springs; one store in Greeley; and two stores in Cheyenne, Wyoming. (Tr. 380, 1443) Miller's sells Meadow Gold dairy products in all their stores. Meadow Gold milk in half gallon containers is sold exclusively in the Miller's Stores in the Denver area. (Tr. 1444)

In 1959 Miller's received discounts of 10% and 12% from respondent on purchases of fluid milk from respondent. (Tr. 1445) On respondent's Meadow Gold Brand milk products the discount to Miller's was 10% and on Miller's private brand of fluid milk "Top Taste", packaged for Miller's by respondent, the discount to Miller's was 12%. (Tr. 1445, 1524) Respondent's Meadow Gold Brand and Miller's private brand "Top Taste" milk are of the same grade and quality, the only difference being the carton and the label. (Tr. 1445)

The 29 Miller's Stores in the Denver metropolitan area are scattered throughout this area, and these stores compete with other grocers in the Denver metropolitan area. Miller's Stores cover generally the entire metropolitan Denver area and advertise in newspapers. (Tr. 1453)

Respondent ranks first among its competitors in wholesale milk sales in Denver. (Tr. 319) Miller's is respondent's largest wholesale milk customer in Denver. (Tr. 319) Respondent's fluid milk sales to Miller's amount to about \$29,000.00 weekly. (Tr. 320)

Except during a price war in October, 1958 and another beginning on or about June 25, 1959 and continuing through July, respondent's wholesale price of its Meadow Gold Brand milk in half gallon cartons was 43½¢. (CX 116A) During the 1959 price war the wholesale price was reduced to 36¢ less the discounts to Miller's of 10% and 12%. (CX 116C; Tr. 328) Prior to the price war respondent's net price for half gallons to Miller's was 39.15¢ for respondent's Meadow Gold Brand and 38.28¢ for Miller's private brand "Top Taste". During the price war of 1959 respondent's net price to Miller's for its half gallon Meadow Gold Brand was 32.4¢ and for Miller's private brand 31.68¢.

King Soopers is a supermarket chain with eleven stores in the Denver area; two in Colorado Springs; one in Pueblo, Colorado. During 1958 and 1959 King Soopers handled respondent's fluid milk under its Meadow Gold Brand (Tr. 1460) which it purchased from respondent. (Tr. 1460, 1461) Respondent's Meadow Gold Brand milk was sold during 1959 in all King Soopers Stores in the Denver area. (Tr. 1461) King Soopers received discounts from respondent as follows:

November, 1956

Discount on all milk products 5%; 4¢ on 2 boxes cottage cheese.
(CX 94B and C)

September 1, 1959

"On dairy items except butter" list price less 7½%. (CX 94A)
Respondent's sales of its Meadow Gold Brand milk to King Soopers

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amounted to about \$7,000.00 a week. (Tr. 322) During the morning of June 25, 1959, respondent reduced its wholesale list price for fluid milk from 43½¢ (CX 116A; Tr. 326) to 36¢ (Tr. 328, 329, 330, 331). During the same morning (June 25, 1959) respondent reduced its wholesale prices on its half gallon cartons of fluid milk to 36¢ less 10% discount to Miller's and 36¢ less 5% discount to King Soopers. (Tr. 328, 329, 1461) All King Soopers Stores are in competition with Miller's Stores in the sale of respondent's milk and milk products. (Tr. 1462)

Busley's Super Market, which is the fourth ranking grocery chain in Denver in size, (Tr. 321, 322) buys fluid milk from respondent under its Meadow Gold Brand in an amount of approximately \$1,000.00 a week. Busley's receives a discount of 5% from respondent on these purchases. (Tr. 364; CX 80B) The Busley's Stores compete with the Miller's Stores. (Tr. 1453)

Furr's is the next supermarket chain in size in the Denver area. Furr's purchases of respondent's fluid milk under its Meadow Gold Brand amount to about \$1,000.00 a week. (Tr. 322) Discounts paid by respondent to Furr's are as follows:

June, 1957

"all dairy products" list price less 5% and 2%. (CX 93A)

There is no evidence of record that these discounts to Furr's were increased by respondent during the year 1959. The Furr's Stores compete with Miller's Stores in the sale of respondent's milk and dairy products. (Tr. 1453)

Bi-Lo is an independent supermarket located in the Englewood area, which is a part of metropolitan Denver. During 1959 Bi-Lo purchased Meadow Gold milk and dairy products from respondent. (Tr. 1475, 1476) Bi-Lo competes with Miller's in the sale of respondent's milk products. (Tr. 1477) During 1959 Bi-Lo was a member of the A-G group. (Tr. 1479) On January 1, 1959, Bi-Lo was allowed a 5% discount by respondent on its milk purchases which was paid by respondent direct and not through the A-G group. (CX 87)

Johnson Food Center is a retail grocery in the Denver area. (Tr. 1483) As of July 23, 1959, Johnson Food Center received a 7% discount from respondent on all milk items purchased except butter. (CX 88; Tr. 1484) The above discount was for the Johnson Food Center Store located at 2020 Youngfield, Lakewood, Colorado. (CX 88)

Johnson Food Center operated three stores in the Denver area. (Tr. 1484) The store located on Youngfield Street was opened in July, 1959. (Tr. 1486) The other two stores did not handle respondent's products. (Tr. 1487, 1495, 1496) The Youngfield Store purchased and sold respondent's milk under the Meadow Gold Brand. (Tr. 1484) Lewis M. Johnson, President, testified that his Youngfield Store competes with Miller's Stores: that "everybody is my competitor." (Tr. 1485) The Youngfield Store sold Meadow Gold milk in 1959 in the half gallon and quart containers. (Tr. 1486)

A number of respondent's Exception Sheets taken from respondent's current files showing the rates of discounts paid by respondent to wholesale milk purchasers (grocery stores) located in the city of Denver or in the Denver area are contained in the record. (CX 87 through CX 100) All of these show discounts paid by respondent on wholesale milk purchases ranging from 4% to 7½%. CX 147A to CX 147D are tabulations of some of respondent's rebate checks in the Denver, Colorado area from May through October

1959 by Mr. William Lemberg, one of the accountants on the commission's Accounting Staff. Among other items shown, these exhibits disclose the 10% and 12% discounts paid by respondent to Miller's and lesser discounts to other competing purchasers of respondent among which may be found discounts to Associated Grocers of Colorado of 5½%. (CX 147A, CX 147B, CX 147C, CX 147D)

Respondent's Meadow Gold Plant in Denver has about 1200 wholesale customers, and all are located in Denver except those customers located on two wholesale routes that run up into the mountains. (Tr. 363) The majority of respondent's wholesale customers are not paid discounts by respondent. (Tr. 365) All of respondent's other wholesale customers located in and around Denver compete with Miller's. (Tr. 366)

C. By selling such products of like grade and quality to Miller's Supermarkets, Inc. for delivery to the two stores owned and operated by Miller's Supermarkets, Inc. in Cheyenne, Wyoming at substantially lower prices than to competing wholesale customers of respondent in Cheyenne, Wyoming.

The effect of such discrimination in price substantially lessened competition and tended to injure, destroy, and prevent competition between such other wholesale purchasers of respondent's said products in Cheyenne, Wyoming and the stores of Miller's Supermarkets, Inc. located in Cheyenne, Wyoming more particularly described as follows:

Respondent owns and operates a milk processing plant in Greeley, Colorado which has three wholesale routes which operate from this plant into Cheyenne, Wyoming. (Tr. 1315) On these routes respondent transports from Greeley to Cheyenne milk products processed and packaged in containers which respondent delivers to the two Miller's Stores in Cheyenne, and also to other wholesale customers located in Cheyenne. (Tr. 1316, 1443) Cheyenne is a city of about 14,000 people. The two Miller's Stores in Cheyenne compete with other grocery stores located in Cheyenne in the sale of respondent's milk and milk products. Miller's advertises in Cheyenne newspapers. (Tr. 1454)

On January 1, 1958, respondent's wholesale price in Cheyenne for a half gallon of homogenized milk in paper was 42¢ and in glass 39¢; the wholesale price of a quart was 21¢. (CX 55) It was stipulated by counsel that CX 55 is the current wholesale price list of respondent effective in Cheyenne, Wyoming. (Tr. 1353) Respondent's Meadow Gold Brand milk was sold at the same list price as Miller's private label "Top Taste". (CX 133) CX 126 shows that in sales by respondent of milk for delivery to the two Cheyenne Miller's Stores from April through October, 1959, respondent's Meadow Gold Brand was sold at a discount of 10% and Miller's "Top Taste" brand at a discount of 12%. This exhibit discloses that Associated Grocers of Colorado, for its Cheyenne Stores, received a discount on purchases of respondent's fluid milk of 5½%. CX 127B dated July 9, 1959, shows drop shipment charges for the month of June, 1959 for fluid milk and dairy products of \$5670.95 delivered to Associated Grocers Cheyenne Stores upon which respondent allowed a discount of 5½%, which discount amounting \$311.90 was included in respondent's check issued to Associated Grocers executed at Cheyenne, Wyoming, dated July 14, 1959 and appearing of record as CX 127A. Also appearing of record as CX 128A is respondent's check executed in Cheyenne, Wyoming on June 30, 1959 to the order of Miller's Supermarkets, Inc. in the amount of \$625.42, which includes 10% discount on purchases of milk

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and dairy products totaling \$1773.01 and deliveries of Miller's private brand "Top Taste" of \$155.40 less a 12% discount. All of these products were delivered by respondent to Miller's Cheyenne Store, number 21, for the period May 25 through June 30, 1959. (CX 128B) On deliveries to Miller's Cheyenne Store, number 24, for the period May 25 through June 20, 1959, Miller's received a discount of 10% on respondent's Meadow Gold Brand milk and dairy products and 12% on Miller's "Top Taste" brand. (CX 128C) The Boulevard Bakery in Cheyenne, during July 1959, purchased half gallons and quarts of respondent's Meadow Gold Brand milk for 42¢ and 21¢, respectively, less a discount of 1¢ on quarts and 2¢ on half gallons or a discount of about 5%. (CX 133) Branens Food Market, during the same month, purchased respondent's half gallons and quarts at the same list price less a discount of 5%. (CX 133) Stop & Shop, Cheyenne, bought respondent's half gallons and quarts at the same list price less a 5% discount. (CX 133) On July 1 and July 2, 1959, other wholesale customers at Cheyenne, Wyoming purchased respondent's half gallons and quarts of Meadow Gold Brand milk at the regular list price of 42¢ and 21¢ less a 5% discount, as follows:

East side Dairy Store	Frontier Dairy Store
Ridgeway Grocery	Star Service
Silver Saddle Store	Silver Saddle Dairy Store
Dane Market	Dan's Market
Sam Bounos	Howard's Market

(See CX 134)

It also appears from this exhibit (CX 134) that some stores in Cheyenne received no discounts.

D. By selling such products of like grade and quality to Miller's Supermarkets, Inc. for delivery to the four stores owned and operated by Miller's Supermarkets, Inc. of Colorado Springs, Colorado at substantially lower prices than to competing wholesale customers of respondent in Colorado Springs, Colorado.

The effect of such discriminations in price substantially lessened competition and tended to injure, destroy, and prevent competition between such other wholesale customers of respondent's said products in Colorado Springs, Colorado and the stores of Miller's Supermarkets, Inc. located in Colorado Springs, Colorado more particularly described as follows:

Respondent owns and operates a plant in Colorado Springs, Colorado which processes fluid milk and dairy products, and ice cream. (Tr. 373) Fluid milk is packaged in gallon jugs, paper half gallon cartons and in paper and glass quart containers which respondent sells at wholesale and retail. (Tr. 375) Prior to June 26, 1959, respondent's wholesale price structure in Colorado Springs was as follows: (Tr. 376, 377)

Half gallons	42¢ and 43¢
Gallons	79¢

Beginning June 26, 1959, there was a price war during which the wholesale price of half gallons was affected. (Tr. 377) On June 26, 1959, the wholesale price of respondent's half gallons of fluid milk (homogenized) were reduced to 39¢; the wholesale price of gallons remained the same. This 39¢ price fluctuated between June 26 and November, 1959. (Tr. 377, 378) The lowest half gallon wholesale price during this period was 32¢. (Tr. 378)

Respondent sold fluid milk and other dairy products to Miller's Supermarkets at Colorado Springs. (Tr. 379) Miller's has four stores in Colorado Springs and received the same discounts from respondent as respondent paid to Miller's Denver operations. (Tr. 380) When the price to Miller's was reduced to 32¢, Miller's still received the 10% discount (Tr. 380) making a net to Miller's for each half gallon of 28.8¢. (Tr. 380)

Respondent also sold its fluid milk and milk products to King Soopers Stores in Colorado Springs who likewise received the same discount as King Soopers Stores received in Denver. (Tr. 380) Respondent sold to the Furr Stores in Colorado Springs (Tr. 380, 381) and to the A-G Stores. Both Furr's and A-G Stores likewise received the same discounts as these stores received from respondent in Denver. (Tr. 381) Respondent's wholesale price for its milk in gallon jugs during 1960 was 77¢. (Tr. 382, 383)

Associated Grocers (A-G group) is a larger customer of respondent than Miller's in Colorado Springs. (Tr. 389) The 28.8¢ net price to Miller's (32¢ less 10%) was the lowest price given by respondent to any wholesale customer in Colorado Springs on the half gallon. (Tr. 389) At this price respondent was selling to Miller's at a loss. (Tr. 390) Respondent's Colorado Springs Manager testified that he gave the A-G group a 32¢ list price less the amount of the Denver discount to this customer. (Tr. 390) The Denver records show that the A-G group received a discount of 5½% from respondent. (CX 86, CX 126, CX 127B, CX 147B) This discount is further shown by respondent's Colorado Springs records. (CX 173A)

Respondent's Colorado Springs plant has about 150 wholesale customers consisting of stores reselling at retail. (Tr. 397) Some of these 150 store customers receive no discounts and these stores compete with other store customers of respondent who do receive discounts. (Tr. 398, 399, 400) The 10% discount granted to Miller's on respondent's Meadow Gold Brand products and also the 12% discount granted to Miller's on its private label milk "Top Taste" originated in Denver through negotiations by and between respondent and Miller's Denver officials. (Tr. 403) Miller's Colorado Springs operation advertises in newspapers. (Tr. 404, 405) This puts the Miller's Stores in competition with all other stores selling respondent's products in Colorado Springs. The population of Colorado Springs is about 100,000. (Tr. 398)

II

Respondent discriminated in price between competing wholesale customers in the sale of ice cream and other frozen products:

A. By selling such products of like grade and quality to Miller's Supermarkets, Inc. for delivery to stores owned and operated by Miller's Supermarkets, Inc. located at Cheyenne, Wyoming, and Denver and Colorado Springs, Colorado, at substantially lower prices than to competing wholesale customers doing business in said respective cities.

The effect of such discriminations in price substantially lessened competition and tended to injure, destroy, and prevent competition between such other wholesale purchasers of respondent's said products located in Cheyenne, Wyoming, and Denver, Colorado and Colorado Springs and the stores of Miller's Supermarkets, Inc. located in said respective cities.

Tabulations of a large number of respondent's invoices to wholesale customers purchasing respondent's ice cream and other frozen food products for the period April through October, 1959 for the cities, Cheyenne, Wyoming,

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and Denver and Colorado Springs, Colorado appear of record as Commission's exhibits 126, 132 through 136B, 147A through E and 173A through E.

As being typical of respondent's discriminations in price in the sale of its ice cream and frozen food products in Colorado, as appear of record, the tabulations made for Colorado Springs, Colorado are referred to: CX 169B shows respondent's list prices for its ice cream and other frozen food products in effect in Colorado Springs during May, 1959. This exhibit also shows the rates of rebates allowed by respondent to Miller's Supermarkets on purchases of respondent's ice cream and other frozen products. It will be observed from this exhibit that from an invoice price of \$1.88 for gallons of ice cream in quarts and pints, respondent granted Miller's Supermarkets a rebate of 48¢ a gallon, which, stated as a percentage, is 25.5%. CX 169A is a copy of respondent's check to Miller's Supermarkets, Colorado Springs, in payment of such discounts. CX 173A through D show that the highest discount or rebate granted by respondent to any other wholesale customer in Colorado Springs on purchases of respondent's ice cream and frozen products was 7½% to Vogel's Supermarket (CX 173D).

Respondent's wholesale list prices in Cheyenne, Wyoming during May, 1959 and through July 1959, for these items were the same as in Colorado Springs, namely \$1.88. (CX 55, CX 132) Respondent also granted to Miller's Supermarkets Stores in Cheyenne a rebate of 48¢ on gallons of pints and quarts of ice cream making a net price to Miller's of \$1.38 per gallon. (CX 132) Associated Grocers, for its stores in Cheyenne, received a discount of 15½% on its private brand ice cream "Taste Treat." (Tr. 1529; CX 126) Other wholesale purchasers received lesser discounts on purchases of respondent's ice cream. (CX 126, 132 through 136B)

The foregoing allocation has been included herein for reference in connection with the findings which in part refer specifically to said allocation and evidence identified therein, thereby abbreviating an otherwise necessary restatement of certain evidence cited in the allocation. This is essential since the hearing examiner in part does not concur with the categorical construction given to the evidence by complaint counsel. These differences are hereinafter discussed in the findings in relation to the evidence cited by the allocation.³

On September 24, 1963, the hearing examiner issued an order denying respondents' motions to dismiss and strike certain evidence on the grounds indicated by the order, which is as follows:

Respondents have made certain motions to dismiss the complaint and to strike certain evidence at the close of respondents' case. The hearing examiner has directed counsel in support of the complaint to submit a categorical allocation of the evidence relative to the issue of competitive effect claimed by complaint counsel to have resulted from alleged discriminations in price by respondents. In compliance with the directive of the hearing examiner, counsel supporting the complaint has not only submitted an allocation of such evidence, but other facts and circumstances as in com-

³ See complaint counsel's categorical allocation of evidence at pp. 292-300 hereof.

plaint counsel's opinion support the allegations of price discrimination as alleged in the complaint. This allocation and the one previously submitted clearly and unequivocally indicates the position of counsel in support of the complaint as to the theory upon which his case is premised and the evidence upon which he relies. Respondents, therefore, have been adequately informed so that they may proceed with their case with a full understanding of what evidence they must meet. Examination of such evidence indicates that respondents' motion to dismiss the complaint should at this time be denied, without prejudice to a renewal thereof at the termination of the case in its entirety, and that the motion to strike certain evidence should be denied since counsel supporting the complaint has specifically indicated the evidence upon which he relies. To go through the record and attempt to delete therefrom specific excerpts thereof upon which Commission's counsel does not particularly rely would be time consuming and serve no practical purpose, accordingly, it is

ORDERED that respondents' motions to dismiss the complaint and to strike certain evidence are herein and hereby denied, subject to a right of renewal thereof at the close of the case.

During the course of these proceedings the hearing examiner permitted complaint counsel to reopen his case for the purpose of adducing any evidence consistent with the categorical allocation⁴ of evidence filed by counsel in support of the complaint as a part of complaint counsel's *prima facie* case. The hearing examiner, however, rejected the offer of such evidence during the course of rebuttal. To receive it then would have resulted in a continuation of the case *ad infinitum*. This would have been impractical since hearings have been scheduled herein for a period of almost 4½ years, including hearings that were scheduled incident to the reopening of the complaint counsel's *prima facie* case.

Accordingly, consideration of complaint counsel's *prima facie* case has been limited to his allocation⁵ of evidence as identified with the legal theories enunciated categorically.

The hearing examiner has carefully considered the proposed findings of fact and conclusions submitted by counsel supporting the complaint and counsel for respondents, supplemented by replies of counsel for respective parties, and such proposed findings and conclusions if not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case the hearing examiner makes the following findings of fact and conclusions.

⁴ See complaint counsel's categorical allocation of evidence at pp. 292-300 hereof.

⁵ *Id.*

No 2(d) theory (involving indirect price discrimination and presumptive competitive effect) was included in complaint counsel's allocation of evidence upon which he relied, and respondents have offered no proof thereon. In any event, there is no probative evidence of the unavailability

FINDINGS OF FACT

A. The Respondents and Their Engagement in Commerce

1. Respondent Beatrice Foods Co., Inc., is a corporation organized and existing under the laws of the State of Delaware with its principal office and place of business located at 120 South LaSalle Street, Chicago, Illinois.⁶

2. The Eskay Dairy Company, Inc., named as a respondent in the complaint and described in Paragraph Two thereof, was dissolved on or about February 28, 1959, prior to the date the complaint was filed, and has not been in existence as a corporation or legal entity since said date. Since on or about February 28, 1959, all the operating activities of Eskay Dairy Company, Inc., were absorbed by respondent Beatrice Foods Co., Inc., and operated as a division of said respondent.⁷ Prior to dissolution Eskay was a wholly-owned subsidiary of Beatrice.⁸

3. Respondent Beatrice Foods Co., Inc., for a long number of years has engaged in a diversified dairy business, which includes the manufacturing or processing of creamery butter, ice cream and milk products, the distribution of frozen foods and the operation of storage warehouses. Respondent also, for a long number of years, has been engaged in a diversified food business which includes the manufacturing or processing of grocery products by respondent's grocery products division. Respondent has approximately 28 wholly-owned subsidiary corporations. It owns and uses the trade-mark "Meadow Gold." It operates approximately 115 plants located in about 35 states of the United States and the District of Columbia. In some of these plants respondent manufactures or processes butter, ice cream, ice cream mixes, dried buttermilk, powdered milk and fluid milk. It makes sales of said products from its manufacturing plants and from approximately 200 storage branches in 35 states of the United States. Respondent's consolidated net sales for the fiscal year ending February 28, 1959, were \$385,449,644.⁹

of advertising or other allowances (contemplated by section 2(d)) on proportionally equal terms to any of respondents' competing customers. If anything, the evidence suggests the contrary, and the hearing examiner so finds. This footnote shall be construed as a part of the findings of fact.

⁶ Ans. par. 1.

⁷ Ans. par. 2; Tr. 934.

⁸ As used in the findings hereinafter set forth, respondent refers to Beatrice Foods Co., Inc., since Eskay Dairy Company, Inc., a wholly-owned subsidiary of Beatrice, was dissolved precedent to the filing of the complaint in this matter. Eskay, however, for whom Beatrice was responsible as the sole stockholder, is specifically referred to in the complaint, and the alleged charges against Eskay are considered in rendering the findings applicable to Beatrice.

⁹ Ans. par. 3; Tr. 939; CX 1, CX 2, CX 3.

Additionally, the evidence indicates that respondent's method of interstate operations, including price policy control pursuant to which price exceptions are granted incident to allowing discounts to meet competition, is tantamount to a required interstate clearance of local sales. In this connection, it is conceded by the respondent that its organization uniformly adopted a policy whereby exception sheets were used as a part of the pricing policy. This was a means by which the respondent, through interstate channels, formulated national policy whereby special price discounts to meet competition in a particular market area could be established. Thus, this nation-wide policy was in effect an interstate control of every sale which the respondent claims to be intrastate in nature and is, in fact, an interstate transaction requiring interstate clearance. Furthermore, it would appear that the very pricing policies of the respondent Beatrice, whether with regard to discounts, in connection with which charges have been filed or the usual prices, are the result of an interstate plan or policy which must be formulated through interstate contacts and communications as a means of conducting the business of the respondent both nationally and locally. Thus, what has been termed by respondent's counsel as intrastate sales are merely an incidence or step in the process of consummating local sales through the use of interstate media and policy. Such sales are therefore in commerce.¹⁰

4. Included among the various plants and operations previously described, respondent owns, maintains and operates a plant for the manufacturing, processing and sale of fluid milk and related dairy products at New Bremen, Ohio, with company sales routes at St. Marys, Ohio. Respondent sells and transports fluid milk and other dairy products from its New Bremen, Ohio, plant to purchasers located in Indiana and Ohio, for use, consumption or resale.¹¹ Respondent's New Bremen, Ohio, plant receives, and has received, certain quantities of raw milk from dairy farms located in the State of Indiana, which is processed at its New Bremen plant and transported or caused to be transported to wholesale customers located in the State of Indiana. Respondent's New Bremen, Ohio, plant also sells fluid milk and related products to wholesale cus-

¹⁰ See Initial Decision (also Commission Decision of December 31, 1963) re Continental Baking Company, F.T.C. Docket No. 7630, pp. 36-42, citing *U.S. v. South-Eastern Underwriters Assn.*, 1944, 322 U.S. 533; *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, and *Holland Furnace Co. v. F.T.C.*, 269 F. 2d. 203, *cert. den.*, 1960, 361 U.S. 932, to the effect that a nation-wide business is not deprived of its interstate character merely because it is built upon sales contracts which are essentially local, and also to the effect that local sales may be a part of larger interstate transactions which included many interstate intramural contacts and controls.

¹¹ Ans. par. 5; Tr. 1056-1057.

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tomers on its company routes at St. Marys, Ohio, and certain quantities of said fluid milk and dairy products so sold are processed by respondent's New Bremen plant from raw milk obtained from dairy farms in Indiana.¹²

Respondent from January through June 1960, bottled fluid milk in gallon jugs which were transported by respondent to Marsh's warehouse in Yorktown, Indiana. Such gallon jugs were not resold by Marsh in St. Marys, Ohio.

In 1960, respondent packaged at its Fort Wayne plant half-gallon milk in Marsh label containers which were sold to Marsh at respondent's dock in Fort Wayne.

The Marsh trucks hauled the half-gallon milk to its Yorktown warehouse where it was kept separated for distribution into Marsh stores at LaFayette, the Fort Wayne area, Toledo, Ohio, and three stores near Hamilton, Ohio (Tr. 2849, 2879). The half-gallon milk processed by respondent was *not* "co-mingled" with other milk processed by the Indiana Dairy Marketing Association (Tr. 2879).

5. Respondent owns, maintains and operates plants for the manufacture, processing and sale of fluid milk and related products, and ice cream and other frozen food products located at Denver, Colorado Springs, and Greeley, Colorado (Tr. 162, 166, 315, 316-323, 373-375, 1309-1317).

Respondent by and through its plant officials located at Denver, Colorado Springs, and Greeley, Colorado, sold fluid milk and other dairy products, and ice cream and other frozen food products, to Miller's Super Markets, Inc., which said products were delivered by respondent to the stores of Miller's Super Markets, Inc., located in Denver, Greeley, and Colorado Springs, Colorado, and in Cheyenne, Wyoming. Miller's Super Markets, Inc., since 1957, has been a division of National Tea Company, which does business in 18 states of the United States.¹³ Respondent delivered said products to 38 Miller's Super Market stores located in Colorado and Wyoming. Twenty-nine Miller's stores are located in the Denver market area; four in Colorado Springs; one in Greeley; and two in Cheyenne, Wyoming (Tr. 380, 1443). Respondent's Greeley, Colorado, plant maintains a sales and distribution branch at Cheyenne, Wyoming. The two Miller's stores located at Cheyenne, and other wholesale customers of respondent located in Cheyenne, are served with respondent's said products by the Cheyenne branch of respondent's Greeley plant (Tr. 1310, 1311). All products sold

¹² Ans. par. 6.

¹³ CX 225.

or delivered by respondent's Cheyenne, Wyoming, branch are transported in interstate commerce from respondent's plant at Greeley, Colorado (Tr. 1312-1315).

6. Respondent sells fluid milk and other dairy products, and ice cream and other frozen food products to distributors, retailers and consumers. Distributors resell to retailers and consumers; many retailer-purchasers compete with one another in the resale of respondent's said products. In the sale of fluid milk and other dairy products, and ice cream and other frozen food products to distributors, retailers and consumers, respondent is in substantial competition with many other manufacturers, processors, distributors and sellers of said products in Indiana, Ohio, Colorado, Wyoming, and other states.¹⁴

Respondent sold fluid milk and other dairy products, and ice cream and other frozen food products to grocery stores who resell to consumers for off-premise consumption and to other wholesale customers who resell to consumers for consumption on the premises, located in Yorktown, Indiana, St. Marys, Ohio, and Denver, Colorado Springs, Colorado and Cheyenne, Wyoming. Many of such retailer-purchasers compete with one another in the resale of said products to consumers.

7. Respondent has transported and is now transporting raw fluid milk and other dairy products ingredients, or causing them to be transported, from farms and other points of origin in certain states to certain of its processing and manufacturing plants located in other states and the District of Columbia; it has in the past and is now transporting fluid milk and other dairy products, and ice cream and other frozen food products, or causing the same to be transported, from certain states in which such products are processed or manufactured to other states and the District of Columbia; and respondent also sells and distributes such products to purchasers in the same state in which such products are processed, manufactured or store.¹⁵

8. Respondent's entire business operations, including its intrastate sales of its said products, were and are in the course of interstate commerce.

B. Discounts—Generally

9. Respondent has granted numerous discounts involving sales in commerce in certain market areas hereinafter identified.

¹⁴ Ans. par. 7.

¹⁵ Ans. par. 6.

*C. Denver Fluid Milk Discounts*¹⁶

10. Bi Lo Super Market, at 4509 S. Broadway, on or about January 1, 1959, was offered and received a 5% discount on fluid milk products from the respondent.

Commission Exhibit 87 was prepared by respondent's officials and salesman at the time the discount was instituted. At that time respondent knew that this grocer was a member of the Associated Grocers buying organization. Respondent's officials were informed that a competitor, Carlson-Frink, had offered this customer a 7% discount (CX 87). At that time, meaning the fall of 1958, this account purchased fluid milk products from Carlson-Frink, Sealtest (National Dairy) and Burkett as well as respondent (Tr. 2730). In order to remain in this store, respondent introduced the 5% discount.

The facts summarized on respondent's exception sheet (CX 87), prepared at the time the discount was instituted, were correct. Mr. Ralph Snider was employed by the Bi Lo Super Market in the fall of 1958 and testified as follows (Tr. 2729 et seq.): (a) He was the store manager; (b) in September of 1958 there were no discounts on the fluid milk products sold in the store; (c) in the fall prior to December, Carlson-Frink offered a 7% discount to Bi Lo; (d) thereafter Mr. Benoit (the store owner) talked to Mr. Rollie Neff, an employee of respondent who prepared Commission Exhibit 87. After that conversation respondent agreed to a 5% discount to Bi Lo.

11. Johnson Food Center, 2020 Youngfield, Lakewood, Colorado (the Denver Metropolitan Area) received a 7% discount from respondent effective July 23, 1959.

Commission Exhibit 88 was prepared by an employee of respondent at the time the discount was instituted as part of the company's customary business practice concerning discounts in the Denver area. Complaint counsel subpoenaed Commission Exhibit 88 from respondent's files and at that time the document contained a second page which is now in evidence as Respondent Exhibit 9. Respondent Exhibit 9 is a letter from Mr. Johnson, the owner of the store, to Mr. Shaffer, respondent's representative, advising re-

¹⁶ The allocation of evidence as to Denver fluid milk discounts utilizes two sets of exhibits. CX 87-100 are "exception sheets" subpoenaed from respondent's files establishing the institution of discounts as set forth therein at the time stated.

In addition, the allocation of evidence identifies an "adjustment check register" of respondent (CX 80B). The allocation does not specifically contend that CX 80B constitutes proof of discrimination. Complaint counsel's position as to that exhibit is nevertheless somewhat unclear. Therefore, the hearing examiner has assumed that each account listed in CX 80B is used to establish a discrimination.

spondent that competitive offers in the amount of 10% and 12% were made to this grocer. In order to maintain this account, respondent introduced a 7% discount.

Mr. Johnson, the owner of the store, was called as a Commission witness (Tr. 1483 et seq.). Mr. Johnson identified the letter and his signature (Tr. 1490). Mr. Johnson further testified that he received larger discounts with respect to his other stores than those received from Meadow Gold (Tr. 1496). These facts were further confirmed by the witness in answer to questions put to him by the hearing examiner (Tr. 1498 et seq.).

The discount referred to in the allocation of evidence contained on Commission Exhibit 88 with regard to Johnson Food Center was therefore introduced by respondent to meet offers of larger discounts by respondent's competitors.¹⁷

12. Famous Grocery on January 1, 1954, received a 5% discount on dairy products from respondent.

Commission Exhibits 89A and B are documents subpoenaed from respondent summarizing the facts which were known to respondent prior to the agreement to provide the Famous Grocery with a discount. These documents were prepared by respondent's street salesman, Russ Lykins, and approved by the fluid milk sales manager, L. Anjier. Mr. Lykins signed Commission Exhibit 89A (Tr. 2380). On or about the time Mr. Lykins prepared Commission Exhibit 89A, he had a conversation with the owner of the account, Mr. Bill Weinstaf. In this conversation, the owner of the grocery store told Mr. Lykins that Robinson Dairy had offered him a 5% discount. Respondent had been serving this account for a long time.

The statement made by the store owner to respondent was in fact true. The owner of the Robinson Dairy was subpoenaed as a witness (Tr. 2465 et seq.). Respondent Exhibits 59A and B are copies of the original records of the Robinson Dairy for 1953 establishing the discount paid to the Famous Grocery. It was 5% (Tr. 2469).

13. Each Associated Grocer Member Store received from respondent a 5% discount on fluid milk products from January 1954, through the summer of 1959.

Commission Exhibits 90A-B are exception sheets identifying the institution of a discount to stores belonging to the AG buyer organization. While the discount states that respondent paid 5 ½ % to Associated Grocers, the ½ % was retained by the buying

¹⁷ See complaint counsel's categorical allocation of evidence at pp. 292-300 hereof.

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organization in order to perform certain administrative functions normally assumed by respondent, such as billing each individual store member. Each A.G. store selling respondent's fluid milk products received 5% (Tr. 2785).

In 1951, respondent's competition established the 5% discount to each Associated Grocer store. I.X.L. (the largest independent in Colorado Springs) served Associated accounts in Denver and Colorado Springs (Tr. 2395-96). Respondent instituted the 5% discount paid to each store in 1954 after I.X.L. entered the Denver market through a more intensive sales effort generally offering the 5% discount price cut to A.G. Respondent's institution of this early 1950 discount was, therefore, required to meet the competition of I.X.L. (Tr. 2784-86, CX 91A-B). Respondent's managing official was so informed by Associated Grocers in 1954 and at that time the exception sheet now in evidence as Commission Exhibit 90A-B was prepared. The facts concerning the I.X.L. discount that A.G. was receiving was corroborated by the I.X.L. branch manager in Denver, who so testified (Tr. 2395-97).

In any event, thereafter Associated Grocers received regular and repeated offers involving higher discounts from respondent's competitors. Fairmont in the fall of 1957 offered to sell Associated at a flat 7% discount on all fluid milk products. Respondent Exhibit 29A is a copy of a document prepared by Fairmont shown to respondent's agents in the office of Associated Grocers' buyer, Mr. Fishburn (Tr. 2787). Respondent's consumer acceptance and recognized trade name were used to persuade this account to remain with respondent, notwithstanding the larger competitive discount offered (Tr. 2789).

During the time identified by complaint counsel in this case (1959) the principal supplier of Associated Grocers in Cheyenne, Wyoming, and the State of Colorado was Carnation Company. In 1958, Carnation purchased I.X.L. and negotiated a rebate contract with Associated Grocers whereby each store was offered a 10% discount on all fluid milk and ice cream products and a 12% discount in the event that the account would eliminate all competition, including respondent. The success of this uniform arrangement is established of record through the testimony of the Carnation Denver branch manager, who testified that on January 18, 1959, Carnation—inheriting the I.X.L. market position—had one route in Denver. After the Associated Grocer "deal" was instituted (January 19) Carnation had eight routes in Denver, Colorado (Tr. 2397). It is apparent that the 10% discount achieved immediate competitive impact. During the period that the 10%-

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12% discount was in effect (1959) respondent's discount remained at 5%. The record establishes by reliable, probative and substantial evidence that respondent's discount was instituted to meet competition and throughout the period in which the discount was in effect the customer received repeated and, in fact accepted, larger competitive offers.

14. Crossroads Grocery, 7900 E. Mississippi, Denver, Colorado, on or about July 1, 1959, received a 5% discount from respondent.

Commission Exhibit 91 is an exception sheet normally maintained by respondent and subpoenaed from respondent's files by complaint counsel. The document was prepared by Russ Lykins, a salesman for respondent at the time the discount was instituted. The Cowette Dairy supplied this account with fluid milk products at a net price of 68¢ per gallon. The customer advised respondent that a change was contemplated from Cowette (Tr. 2385).

The owner of this account was subpoenaed by respondent to corroborate the testimony of respondent's agent and facts which appear on complaint counsel's exhibit (the exception sheet) (Tr. 2808 et seq.). The witness, Mrs. Koberstein, testified that the Crossroads Grocery was a store owned by her family. In early 1959 they were supplied with milk from the Cowette Dairy. The account had difficulty with the supplier (Tr. 2809). The net price per gallon charged by Cowette was 68¢. Respondent met that price by a 5% discount off its regular list price (Tr. 2810).

15. The Bi-Rite Grocery of 2758 West 32nd Street, Denver, Colorado, received a 5% discount in January of 1959, from respondent.

Commission Exhibit 92 is an exception sheet concerning the above discount prepared by Victor Kuxhaus, employed by respondent as a street salesman. Mr. Kuxhaus, prior to the institution of this discount, was advised by Mr. Jaramello, the owner of the grocery, that he had received a 5% competitive bid from National Dairy, (Sealtest). Commission Exhibit 92 lists these relevant facts. Mr. Kuxhaus appeared as a witness (Tr. 2482 et seq.). He confirmed the fact that Commission Exhibit 92 was prepared by him on or about January 13, 1959, after a conversation with Mr. Jaramello (Tr. 2484). In this conversation Mr. Kuxhaus was advised of the competitive offer of 5% from Sealtest. Thereafter, the discount was instituted.

Mr. Jaramello was subpoenaed to testify by respondent (Tr. 2528). The witness testified (Tr. 2532) that he was offered a discount from Sealtest on or about January 12, 1959. Further,

that he (Jaramello) advised "Vic" (Victor Kuxhaus) of the offer from Sealtest. Thereafter, respondent granted him a 5% discount.

Respondent therefore introduced the discount referred to in Commission Exhibit 92, included by reference in the allocation^{17a} of evidence, in order to meet a competitive price.

16. After July of 1957, the Furr Foods Stores in Colorado, received a 7% discount from respondent on dairy products (CX 93A).

Furr Foods at the time referred to in Commission Exhibit 93A operated five stores in the Denver area. Commission Exhibit 93A was prepared by Horace E. Brown in July of 1957, after a conversation between Mr. Brown and Vernon Andrees, the milk buyer for Furr Foods. The discount was offered to meet competition. Mr. Vernon Andrees was called as a witness by respondent (Tr. 2355 et seq.). In 1957, Mr. Andrees was supervisor for Furr in Denver and Colorado Springs. He purchased dairy products for his company (Tr. 2356). Mr. Andrees testified that he had a conversation in July of 1957, with representatives of respondent, including Mr. Lou Anjier and Mr. Jim Brown (Tr. 2357). At that time Furr purchased fluid milk products from Carlson-Frink, Fairmont and Meadow Gold. At the same time (i.e., July 1, 1957) Carlson-Frink was paying Furr a 10% discount and Fairmont had an existing 12% discount. Mr. Andrees advised respondent's officials that respondent's 5% discount was not large enough (Tr. 2358). Respondent had less space and less favorable position because of the higher net price charged for respondent's products (Tr. 2359). In 1958, Furr received an offer from National Dairy (Sealtest). The record shows that this discount was 12% (RX 67G). After this larger discount from National Dairy, changes were made in the dairy case space to accommodate Sealtest (Tr. 2361). In May of 1958, Fairmont, another of respondent's competitors, increased its discount to 14½% (Tr. 2362). An offer identical to the one stated in Respondent Exhibit 27 was made to Furr and accepted (Tr. 2362; 3277). During the period from July 1957 through the summer of 1959, Carlson-Frink increased its discount from 10% to 12% (Tr. 2362). Respondent instituted its 7% discount in July of 1957. The discount was instituted to meet competition by Carlson-Frink and the other suppliers of Furr. The offers to Furr applied to the Denver and Colorado Springs stores (Tr. 2365). During the period involved in this case respondent's net price to Furr was higher than any of the other suppliers of this grocery

^{17a} See complaint counsel's categorical allocation of evidence at pp. 292-300 hereof.

chain. The record thus clearly reflects that the smaller discount of respondent was instituted to meet competition.

17. On or about September 1, 1959, respondent introduced a 7½ % discount to the King Sooper's, Inc. grocery chain of Denver. Prior to that time the discount had been 5%.

Commission Exhibits 94A and 94B were subpoenaed from respondent's files by complaint counsel. They are exception sheets normally maintained as company records. Commission Exhibit 94A was prepared by Horace E. Brown after a conversation with Mr. Ross McCotter. A congressional hearing concerning milk prices was held in Denver in the summer of 1959 (CX 13-16) and at that time the owner of King Sooper's stated that respondent's discount was 5% and the discount from Sealtest was 10%. Thereafter, respondent was asked to be more competitive and increased the discount effective September 1, 1959, to 7½ % in order to partially meet the competition of National Dairy. These facts are stated in Commission Exhibit 94A, Tr. 2280.

The accuracy of these facts is confirmed by National Dairy's business records, which establish that a 10% discount on fluid milk products was instituted with King Sooper's on January 1, 1959 (RX 68A-B). At that time, (i.e., early 1959), King Sooper's was also a member of the Associated Grocers chain and during the first six months of 1959 was solicited by representatives of the Carnation Company, who offered a 10% discount on fluid milk purchases to all Associated Grocers, including King Sooper's (Tr. 2398; 1465-67).

Furthermore, the Shoenberg Farms Dairy, a former supplier of King Sooper's Inc., in April and May of 1959, repeatedly solicited the business of this account and in a written offer proposed to deliver fluid milk products to King Sooper's at approximately 35 cents per half-gallon. This was a discount off the regular list price used in the market at that time of 20% (Tr. 2205 et seq.).

Respondent's discount of 7½ % offered in September of 1959, was therefore made to meet the competition of Sealtest, Carnation and Shoenberg Farms. The offer was specifically made to be more competitive with Sealtest, but this record indicates without contradiction that during 1959 respondent's discount was the smallest offered to King Sooper's, Inc.

Prior to September of 1959, respondent used a 5% discount in the King Sooper's stores, which had been put into effect in November of 1956, in order to meet the competition of Sealtest, which at that time had acquired a company known as "Garden Farms." These facts are specifically reviewed in the exception

sheet put in evidence by complaint counsel as Commission Exhibit 94B and C. Sealtest's manager, Mr. Dunlap, had also managed the predecessor company, Garden Farms. He appeared as a witness in this proceeding and testified concerning these matters (Tr. 2193 et seq.). Garden Farms had a discount of 5% with King Sooper's as early as 1954 (Tr. 2194). Thereafter, in 1955 or 1956, the discount was increased to 7½%. Mr. Lloyd King, the owner of King Sooper's, had received a competitive bid from Carlson-Frink which Mr. Dunlap stated was shown to him and Garden Farms met that price (Tr. 2195-2196). The list prices of all companies were identical (ibid.). Mr. Dunlap therefore confirmed the facts stated in Commission Exhibit 94B and established the truth of the statements contained therein. Respondent instituted its 5% discount to meet competition.

18. The Mountain R & W Grocery Store at 5535 West Colfax (Denver) was allowed a discount by respondent on September 1, 1954, in the amount of 5%.

Commission Exhibit 95 bears the signature of L. J. Anjier, the fluid milk sales manager of respondent at that time. The discount was instituted after the store owner had received a competitive bid stated on Commission Exhibit 95. Mr. Anjier testified that this store was owned by a gentleman named Fred Metzler (Tr. 2779). Mr. Anjier had a conversation with Mr. Metzler prior to instituting the discount referred to on Commission Exhibit 95.

Respondent had sold fluid milk products to this account in competition with Carlson-Frink and Garden Farms. Respondent "had the opportunity to meet their discount or lose out." Thereafter, respondent introduced the 5% discount (Tr. 2780).

Mr. Fred Metzler, the store owner, was subpoenaed as a witness (Tr. 2693 et seq.). He testified that in July of 1954, he bought the store located at 5535 West Colfax. His fluid milk suppliers were Carlson-Frink, Sealtest and Meadow Gold. Sealtest and Carlson-Frink were giving him discounts. Thereafter, in September of 1954, respondent introduced a discount. These facts corroborate the statements which appear on Commission Exhibit 95.

19. The Mills Grocery at 3911 High Street, Denver, Colorado, received a discount from respondent in the amount of 3% which became effective in December of 1956.

This discount was introduced in order to meet competition of Garden Farms (National Dairy). Commission Exhibit 96, respondent's exception sheet concerning the introduction of this discount, was prepared by Russ Lykins on or about the time the discount was instituted. Mr. Frank Mills, the owner of this grocery

store, testified concerning these facts (Tr. 2539 et seq.). In December of 1956, he was offered a discount on milk products from either Sealtest or Borden (Tr. 2540). The discount amounted to 3% of his sales (Tr. 2541). Mr. Mills advised Mr. Lykins of that fact, and that he would change to Sealtest if he did not get the same discount from respondent. Thereafter, respondent introduced the 3% discount which appears on Commission Exhibit 96.

20. The Helfrich Grocery of 1820 South Holly, Denver, Colorado, received a 7% discount from respondent effective October 1, 1959.

Commission Exhibit 97 was prepared by Mr. Rollie Neff in October of 1959, after a conversation with Mr. Helfrich. The document was subpoenaed from respondent's files by complaint counsel. This document, as a regularly maintained exception sheet of the company, not only establishes the existence of the discount but also the circumstances which required respondent to introduce it. Fairmont served this account with respondent and offered Helfrich a 7% discount to obtain the business exclusively. Respondent "met the deal to keep the account" (CX 97; Tr. 2416-17).

Mr. Helfrich also appeared as a witness and confirmed the facts which appear in Commission Exhibit 97 prepared by respondent's official. Mr. Helfrich testified that he opened the store in July 1959, supplied with dairy products from Meadow Gold and Fairmont (Tr. 2423); also, that Mr. Al Lane, of Fairmont, offered a 7% discount to the customer. That offer was communicated to Mr. Rollie Neff, respondent's representative (Tr. 2424). Thereafter, Mr. Neff met the Fairmont offer with a similar offer and the account continued to purchase Meadow Gold products (Tr. 2425).

21. The Straits Grocery on Morrison Road, Denver, Colorado received a 7% discount from respondent which began in February of 1959.

Commission Exhibit 98 is another exception sheet maintained by respondent in the ordinary course of its business activities and subpoenaed from respondent's files by complaint counsel. The exhibit establishes the 7% discount and also establishes the facts known to respondent at the time the discount was granted. Mr. Victor Kuxhaus prepared the document after a conversation with Mr. Abe Bellstock, the store owner, who advised that it would be necessary to meet competition of Carlson-Frink and the Carnation Company. The document states on its face "We had to give him 7% or we would have no space in dairy case."

Mr. Kuxhaus confirmed the facts stated on the document in his testimony (Tr. 2482 et seq.). This account was a member of

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Associated Grocers. It was owned by Abe Bellstock (Tr. 2482). The store owner discussed competitive bids with Mr. Kuxhaus on or about February 19, 1959, and identified Carnation and Carlson-Frink as the two competitors. Carlson-Frink had offered a 7% discount and Carnation offered "a higher discount." Thereafter the witness prepared Commission Exhibit 98 and to meet competition offered a 7% discount, which was accepted (Tr. 2486-2487).

The documents prepared by respondent's officials and the testimony of Mr. Kuxhaus was corroborated by other witnesses in this case. Mr. Bellstock was subpoenaed and testified concerning fluid milk prices (Tr. 2562, et seq.). He first identified his grocery store as "Straits Grocery" located on Morrison Road. Mr. Bellstock stated that he received an offer in early 1959 from Carnation which was "better than the offer we had at the present" (Tr. 2563).

Mr. Everett Elliott was Carnation's agent in Denver and testified that Carnation had an arrangement with the Associated Grocery stores covering Cheyenne, Wyoming, Colorado Springs, and the State of Colorado generally (Tr. 2397). Mr. Elliott offered a 10% discount in early 1959, to the Associated Grocery stores for both fluid milk and ice cream products (Tr. 2398). This testimony and that of Mr. Bellstock confirms respondent's exception sheet Respondent Exhibit 98 and the testimony of Mr. Kuxhaus. Respondent introduced a 7% discount to meet competition. There are no contrary facts of record.

22. On April 1, 1959, respondent put into effect a 7% discount at Browning's Food Store, an AG account in Denver.

Commission Exhibit 99 is another exception sheet maintained in the ordinary course of business activity of respondent in its operations in Colorado. The document was prepared by Mr. Kuxhaus and establishes a 7% discount and also the fact that the discount was instituted "to meet competition," and further that this account was "an AG store."

Mr. Kuxhaus was called as a witness and confirmed under oath the facts in evidence from Commission Exhibit 99. The witness remembers this particular account, Browning's Food Store, and that he had a conversation with the owner in March of 1959. At that time Browning's was served by Carnation, Sealtest and Robinson. The owner advised Mr. Kuxhaus that "he was offered higher discounts and I would have to match them." (Tr. 2487.) Thereafter the witness prepared Commission Exhibit 99 and granted a 7% discount to this customer.

Browning's was an Associated Grocery store and was offered a 10% discount from Carnation on fluid milk and ice cream products

(Tr. 2398). Every store connected with the Associated Grocery chain received this offer according to the testimony of the person who was in charge of Carnation's AG arrangement (Tr. 2397-2399). That testimony by Mr. Elliott, Carnation's branch manager, therefore corroborates the facts stated by Mr. Kuxhaus at the time respondent instituted the 7% discount.

23. Respondent introduced a 7% discount in February of 1959, to the Thriftway Associated Grocery Store, 1004 South Gaylord.

Commission Exhibit 100 is another exception sheet maintained by respondent as a regular, ordinary business record from the date of its preparation, February 9, 1959. The document was prepared and signed by Rollie Neff, respondent's street salesman in the area in which the Thriftway AG Store was located. The document not only establishes the discount, but also states that the discount was instituted "to meet IXL and Frink." IXL was the company acquired in the fall of 1958 by Carnation which had the 10% discount with all Associated Grocery stores. On January 19, Carnation began distributing to the AG stores in Denver and offering 10% discount on fluid milk and ice cream products. Thriftway as an Associated Grocery account, therefore, received this offer and respondent's 7% discount was instituted to meet it.

Mr. Cecil Meecham, the owner of the store, was called as a witness. He testified that in January and February of 1959, he was supplied with fluid milk products from Meadow Gold, Sealtest, Carlson-Frink and IXL (Tr. 2739-40). He was first offered a discount by "IXL." Thereafter he talked to respondent's agent, Rollie Neff, and after the conversation "they (Meadow Gold) made that 7% offer" (Tr. 2740).

Mr. Ken West was also subpoenaed as a witness. During the period involved in this proceeding Mr. West was the representative of the Country Charm Dairy (Tr. 2553). In February of 1959, Mr. West sold fluid milk products to the same store, Cecil's Thriftway, on South Gaylord. His price was 34¢ per half gallon (Tr. 2555). Since the other dairies in Denver were selling at 42¢ a half gallon, less a discount, the Country Charm price was approximately a 20% discount.

Respondent therefore instituted a 7% discount to meet competition, primarily that of Carnation. In any event, the lowest price in the store was that of the independent dairy, Country Charm. The record corroborates without contradiction the facts set forth in respondent's exception sheet Commission Exhibit 100.

24. In 1959, respondent had in effect a fluid milk discount with

the Miller's Super Market chain; 10% on Meadow Gold fluid milk products and 12% on Miller's private label fluid milk products.

Complaint counsel subpoenaed from respondent's files check vouchers and supporting invoices establishing the above discount (CX 85, CX 169A; Tr. 2319). This discount, which appears in the allocation of evidence, applies to Miller's Super Market stores primarily located in the Denver metropolitan area. It also covers several stores of Miller's operated in 1959 in Cheyenne, Wyoming, and Colorado Springs.¹⁸

As the principal supplier for Miller's Super Market, respondent repeatedly was required to review competitive offers regularly submitted to Miller's (RX 19A, B; RX 69A-C; (Tr. 2205-6).

As early as 1957, National Dairy Products Corporation submitted a written proposal to Miller's Super Markets offering a 7% discount for all stores served by this chain. The specific discount "discovered" by an examination of respondent's records (submitted in response to a subpoena) established in this docket that in 1959 a 10% discount was paid to Miller's for all stores on Meadow Gold products and a 12% discount on private label products. That discount was established in the summer of 1958.

Respondent Exhibit 28 is the exception sheet maintained by respondent explaining the facts which required the institution of the discount. The document was prepared by L. J. Anjier, the fluid milk manager of respondent's Denver plant. The exception sheet was also signed and approved by Mr. Brown W. Cannon, the regional vice president of respondent in charge of operations in the western part of the United States. The exception sheet (RX 28) states the facts which respondent knew at the time the discount was instituted. Respondent was told by the customer that Mr. Thorpe, of Fairmont Foods, had offered 14½% discount on Fairmont label products and 14½%, plus 2¢ per unit, on private label products. The quotation from Fairmont in May of 1958 caused respondent to institute the 10% and 12% discounts established of record by complaint counsel.

The facts stated on the company record (RX 28) were confirmed by Mr. L. J. Anjier who testified with regard to this competitive price (Tr. 2314 et seq.). His testimony establishes the following facts:

(a) In May or June 1958, Mr. Anjier talked to Ralph DeJidio of Miller's concerning competitive milk prices (Tr. 2315). The conversation took place in Mr. DeJidio's office where Mr. Anjier

¹⁸ See complaint counsel's categorical allocation of evidence at pp. 292-300 hereof.

was shown Respondent Exhibit 27. Respondent Exhibit 27 purports to be a letter from Mr. Thorpe, the Fairmont manager, to the Miller's Super Markets offering to supply fluid milk products at a 14½ % discount (Tr. 2316). Mr. Anjier advised Mr. DeJidio that he thought the prices ridiculous, that he would get in touch with him later.

Mr. Anjier did have another conversation with the Miller's agent and to meet the competition of Fairmont offered the prices stated on Respondent Exhibit 28, which prices were first placed in the record through complaint counsel's subpoena of the other company records. Mr. Anjier reviewed this proposal with Mr. Brown W. Cannon, the regional vice president, who also executed Respondent Exhibit 28. Commission Exhibit 85 is respondent's office record of a refund to Miller's Super Markets in April and May 1959, based upon the discount instituted in June of 1958, to meet Fairmont competition (Tr. 2318-2319).

Mr. Brown W. Cannon testified to substantially the same facts (Tr. 2781 et seq.). In May of 1958, Mr. Cannon had a conversation with E. E. Miller concerning the discount offer contained in Respondent Exhibit 27 (Tr. 2781). Mr. Miller produced the document in this conversation. At that time there were 25 Miller stores in Denver, 2 in Cheyenne, 1 in Greeley, and 4 in Colorado Springs (Tr. 2782). Mr. Miller advised Mr. Cannon that the Fairmont offer pertained to all Miller stores in Colorado and Wyoming (Tr. 2782). Further, that the offer applied to both Fairmont branded products and the Miller private label fluid milk thereby removing respondent from the Miller account (Tr. 2783). Thereafter, Mr. Cannon reviewed with Mr. Anjier the Fairmont quotation and approved a new competitive price, representing a 10% discount on Meadow Gold products and a 12% discount on private label products (Tr. 2784). Mr. Cannon and Mr. Anjier saw Respondent Exhibit 27, the competitive bid from Fairmont, in Miller's offices.

To corroborate such testimony, respondent subpoenaed the author of the document, Mr. Thorpe (Tr. 2332-34). Mr. Thorpe is now employed by Fairmont Foods in Dodge City, Kansas. He testified that Respondent Exhibit 27 was in fact prepared by him and bears his signature. This record, therefore, establishes without contradiction that the competitive bid in the amount of 14½ % discount was made by Fairmont and based upon that bid respondent instituted the discount now of record.

25. Commission Exhibit 80B identifies other fluid milk customers in the Denver metropolitan area receiving discounts in August 1959.

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Commission Exhibit 80B is identified in the allocation¹⁹ of evidence as another document supporting complaint counsel's case. That document is entitled "Adjustment Check Register." It does not purport to establish any percentage discount, but instead identifies payments based on checks issued to each grocer listed therein. The document therefore in the absence of evidence identifying the purpose of the payments does not constitute reliable, substantive or probative evidence establishing a discrimination under the Robinson-Patman Act. Furthermore, it is possible that every grocery store in Denver received a discount. The amount of the discount is not of record and therefore no discrimination in pricing between grocers is established through Commission Exhibit 80B.

26. Commission Exhibit 80B, line 3, identifies a payment to Blair from respondent.

Respondent Exhibit 65 was prepared by Victor Kuxhaus and is an exception sheet identifying a 5% discount granted to the Blair Poultry & Egg Co., effective August 15, 1958. The exception sheet not only identifies the discount, but the fact that the payment was made to meet competitive offers of Sealtest and Shoenberg Farms, among other dairies.

Mr. Kuxhaus confirmed the facts stated on Respondent Exhibit 65 in his testimony (Tr. 2491-2493). The discount was instituted first after a conversation with the owner identifying the competitive bids and second after a conversation with the witness's general sales manager, Mr. Anjier. After obtaining Mr. Anjier's approval, Mr. Kuxhaus prepared Respondent Exhibit 65, which has been maintained by the company since that date as a business record.

To corroborate respondent's record and the testimony of Mr. Kuxhaus, respondent subpoenaed Mr. Blair, the store owner. Mr. Blair testified that he was the owner of the Blair Poultry & Egg Co. (Tr. 2524); that respondent's list price at that time was 42¢ per half gallon (Tr. 2526); that "Eddy Tepper (Shoenberg Farms representative) had offered him 39¢ a half gallon" (Tr. 2527). Thereafter, according to Mr. Blair, respondent offered a 5% discount, which was accepted (Tr. 2527). The resulting net price (42¢—5%) was higher than Shoenberg's 39¢ price. The record establishes without contradiction that the 5% discount was offered to meet the quotation from Shoenberg Farms.

27. Commission Exhibit 80B, line 4, identifies a payment to Bob's Super Market from respondent.

¹⁹ See complaint counsel's categorical allocation of evidence at pp. 292-300 hereof.

Respondent Exhibit 63 is the relevant exception sheet prepared in May of 1959, establishing the institution of a 5% discount and also the fact that the special price was instituted because "This is an AG Store. Wants rebate direct." Respondent Exhibit 63 was prepared by Rollie Neff, respondent's street salesman for the area in which this account was located. The account was owned by Mrs. Draper (Tr. 2480). The owner as a member of Associated Grocers was receiving a discount through Associated Grocers from Carnation (Tr. 2481). The witness (Mr. Neff) had a conversation with the store owner, the substance of which was that she wanted a direct discount from respondent. Thereafter Respondent Exhibit 63 was prepared and the discount instituted to meet competition.²⁰

28. Commission Exhibit 80B, line 5, establishes that respondent made payments in July of 1959 to Bolden's Grocery.

Respondent Exhibit 60 was also prepared by Mr. Neff and is another exception sheet relating to a discount instituted in January of 1958, in order to meet competition of United Dairy. There is no contrary evidence of record. Mr. Neff confirmed the facts contained on Respondent Exhibit 60. On or about January 1, 1958, he had a conversation with Mr. Bolden, the store owner (Tr. 2470-71). At that time respondent's agent was advised that United Dairy had offered the account a 5% discount. Thereafter respondent met United's offer and instituted a 5% discount (Tr. 2472). The facts contained on Respondent Exhibit 60 and testified to by Mr. Neff were again corroborated by independent evidence. In this instance the grocer Mr. Bolden, was available and respondent subpoenaed him (Tr. 2536 et seq.). Mr. Bolen testified that he has owned the grocery store for many years and that in 1956 and 1957 he was buying milk products from Meadow Gold and Roll-Star (also known as United Dairy) Tr. 2536-37). The first company to offer Mr. Bolden a discount was Avalon in 1953 (ibid.). The discount was 5% in 1959 (ibid.). "I told Mr. Neff that I was getting the discount from one of them, and I didn't see why I couldn't get it from them" (Tr. 2538). Thereafter, Meadow Gold gave him a discount also. On cross-examination, the witness stated that he did not get a discount from Meadow Gold "until after I got it from the other one" (ibid.).

Respondent's 5% discount was therefore instituted to meet known and existing competition as established in Respondent Exhibit 60 and corroborated by independent evidence of record.

29. Commission Exhibit 80B, line 7, establishes check payments

²⁰ On January 19 and thereafter in 1959 had a 10% discount with the A. G. stores (Tr. 2398).

from respondent during the month of August 1959, to Brown's Grocery.

Respondent Exhibit 64 is the exception sheet prepared at the time a 5% discount was instituted to Brown's Grocery. The document also states as follows: "AG warehouse executives called on Mrs. Brown and insisted she put in Carnation. She refused and asked us to give her a rebate direct." Mr. Kuxhaus prepared and signed Respondent Exhibit 64 in January of 1959. The document has been in respondent's permanent files since that date (Tr. 2489-90). The document was prepared after a conversation with Mrs. Brown, the grocery store owner.

The facts stated on Respondent Exhibit 64 and the testimony of Mr. Kuxhaus was again corroborated in this record by the testimony of the Carnation branch manager who offered a 10% discount in early 1959 to all AG Stores in Denver. There is no contrary evidence of record.

30. Commission Exhibit 80B establishes that Brentwood Food received a payment in August of 1959 from respondent.

Complaint counsel's exhibit does not establish the existence of a discount or the reason for the payment disclosed on Commission Exhibit 82B. Respondent nevertheless offered in evidence Respondent Exhibit 61 which is the company exception sheet prepared at the time a 5% discount was instituted concerning fluid milk products in early 1958. The document was prepared and signed by Mr. Neff, respondent's agent, and establishes that the 5% discount was made to meet the competition of Garden Farms (Sealtest) who had offered such discount to this customer.

Mr. Neff testified to the same effect (Tr. 2473 et seq.). He recalled the location of the store and the fact that the store was owned by a Japanese named Nadahoki. On or about February 15, 1958, the owner advised Mr. Neff of the 5% discount from Sealtest which respondent would have to meet to obtain any space in the account (Tr. 2473-2474). Thereafter, the matter was discussed with the wholesale manager, Mr. Anjier, who also signed Respondent Exhibit 61. Subsequent to the preparation of Respondent Exhibit 61, the account was offered a 5% discount.

31. Commission Exhibit 80B further establishes that in August, 1959 respondent made a check payable to Buddy Grocery.

Respondent's Exhibit 10 establishes that the discount of 3% was instituted in this grocery store in July of 1957 in order to meet competition from Carlson-Frink and another independent, Beech Dairy. In order to obtain any business in this account, the owners insisted that respondent meet the existing discount (RX 10). There

is no contrary evidence of record. Respondent Exhibit 10 was prepared and signed by Mr. Frank Krone (Tr. 2148). In November of 1957, Mr. Krone had a conversation with the owner, a Mrs. Harper, the substance of which was that respondent in order to obtain any space would have to meet the existing discounts (Tr. 2149).

Thereafter, the witness prepared the exception sheet (RX 10) and discussed the matter with Mr. Anjier, the wholesale milk sales manager (Tr. 2150). Subsequently, respondent instituted the discount and obtained space in the dairy case.

The testimony of Mr. Krone and the facts stated on Respondent Exhibit 10 were corroborated by Mrs. Harper who was subpoenaed to the Denver hearings by respondent. In the summer of 1957, Mrs. Harper purchased fluid milk products from Carlson-Frink and Beech, which later on became Fairmont (Tr. 2565). Both Fairmont and Carlson-Frink gave the witness the same deal (ibid.). Later on in the winter of 1957, the witness changed to Meadow Gold because she was dissatisfied with Carlson-Frink's service (Tr. 2566-2567). The witness advised Mr. Krone as follows:

I thought I should have a discount the same as I had from Carlson-Frink.

32. Commission Exhibit 80B, line 11, identifies a payment from respondent to the Busley Super Market chain in August of 1959.

Busley Super Market chain later became part of the Red Owl system. The facts regarding respondent's sales of fluid milk to the customer are stated explicitly by Mr. Doyle Smith, the milk buyer for Busley (Tr. 2497, et seq.). The main supplier of Busley during the period 1955 through 1959, was Carlson-Frink. Some merchandise was also purchased from Fairmont and Meadow Gold (Tr. 2499). The dairies provided Busley with discounts. During this period Meadow Gold had a 6% discount. The largest discounts received were from Carlson-Frink and Fairmont (Tr. 2499). Carlson-Frink during this period had a 7% discount in effect with Busley (Tr. 2500). Prior to 1959 Fairmont had a discount which was 7% or possibly 10% with Busley. During early 1958, Fairmont offered a 14½% discount on fluid milk products to Busley. Respondent's Exhibit 27 is a copy of letter identical to that mailed to Mr. Smith from Fairmont (Tr. 2501). After the written offer from Fairmont, the discount was changed to 14½%. During the same period in early 1958, there was no change in Meadow Gold's discount. Mr. Smith did, however, give less space to Meadow Gold and continued his preference for Carlson-Frink in the dairy case and added "heavy preference to Fairmont" (Tr. 2501). As long as

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the quality was satisfactory, Mr. Smith followed the customary practice of the industry in granting more space to the companies "giving the greatest discount" (Tr. 2502). After Fairmont's discount was increased in 1958, Meadow Gold was cut down drastically, still making it available to consumers "but without the effort to sell" (Tr. 2503). Mr. Smith talked to respondent's agents and told them that respondent "should be thrown out because it was not granting discounts equal to other discounts" respondent "knew were being given" (Tr. 2503). Respondent Exhibit 66 is a memorandum dated June 2, 1958, promulgated by Mr. Smith, reducing Meadow Gold's space.

The record establishes with reliable, probative, and substantial evidence that respondent did not even meet the existing larger discounts in the Busley chain.

33. Commission Exhibit 80B, line 21, identifies a payment from respondent in August of 1959 to the C. & R. Grocery.

The exhibit in evidence heretofore considered does not technically establish either a discount or a discriminatory price to this grocer since the only fact of record is that a check in the amount of \$2.24 was made payable to C. & R. Grocery in August of 1959.

The allocation²¹ of evidence does not clarify this point and therefore respondent placed in evidence Respondent Exhibit 11 which establishes that in February of 1958, a 5% discount was instituted with this customer for fluid milk products "to meet competition of Carlson-Frink."

Respondent Exhibit 11 was prepared by Frank Krone on or about March 1, 1958, after a conversation with Mrs. Hurley, the store owner. The document is an exception sheet customarily used by respondent when a price is used other than the list price (Tr. 2152). The store owner told respondent's agent that she had been offered a discount from Carlson-Frink and "she wanted to know if we would meet the discount" (Tr. 2153).

The facts of record through Respondent Exhibit 11 and the testimony of Mr. Krone were corroborated by the store owner, Mrs. Hurley, who was subpoenaed by respondent to the Denver hearings. She testified as follows:

In February of 1958, she owed the C. & R. Grocery and bought fluid milk products from Meadow Gold. An agent of Carlson-Frink named Bob Angel offered her a 5% discount. She advised Meadow Gold, "I was going to change over to Carlson-Frink. I had a better deal." (Tr. 2534-35).

Respondent met that discount. There are no other facts of record.

²¹ See complaint counsel's categorical allocation of evidence at pp. 292-300 hereof.

34. The Ce Buzz Supermarket received payments by check from respondent in August of 1959, according to lines 22 and 23 of Commission Exhibit 80B.

On August 1, 1959, respondent introduced a 10% discount to the Ce Buzz grocery chain in Denver. Respondent Exhibit 62 (which is in evidence without objection Tr. 2479), was prepared by Mr. Rollie Neff, respondent's agent. Mr. Neff executed the document after a conversation with the owner of the Ce Buzz grocery store (Tr. 2477). Mr. Al Lane from Fairmont offered Ce Buzz a 10% discount prior to the preparation of the document. Mr. Neff advised the store owner that he would have to check with his office and, after so checking, prepared Respondent Exhibit 62 and introduced the discount (Tr. 2478-79). The record contained no contrary evidence. This discount was instituted to meet Fairmont's competitive offer. The testimony of record and Respondent Exhibit 62 were corroborated by Mr. Lane who was subpoenaed by respondent. From November of 1958, through July of 1959, Fairmont had a 10% discount in the Ce Buzz chain in Denver on both fluid milk and ice cream products (Tr. 2803).

D. Denver Ice Cream Discounts

35. The Denver ice cream discounts are not, contrary to the allocation, established of record through Commission Exhibits 147A-E.^{21a}

Commission Exhibits 147A-E was prepared by a Commission accountant using check vouchers subpoenaed from respondent's files. The documents do not establish ice cream discounts because the summaries of check payments to various customers do not establish the payments are rebates.

Further, the "payments" made to the customers listed by the Commission economists on Commission Exhibit 147 A through E were made to all customers or at least offered to respondent's customers. The overwhelming number of such "payments" apply to week-end special sales offered uniformly in the market by respondent in order to permit the grocery stores to "retail" ice cream at a featured lower price to increase volume. The payments are therefore a variety of promotional activity. The explanation of the entries on Commission Exhibit 147A through E was made in detail in this record by Mr. Frank Krone, respondent's 1959 ice cream sales manager. Mr. Krone prepared Respondent Exhibits 83A and B (Tr. 2696). Those exhibits were prepared from the petty cash vouchers used by the Commission accountant in preparing Com-

^{21a} See complaint counsel's categorical allocation of evidence at pp. 292-300 hereof.

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mission Exhibits 147A through E (id.). Respondent Exhibits 83A and B identify the particular ice cream products, list price, retail price and price adjustment used in Commission Exhibits 147A through E. The furthest vertical column on Commission Exhibits 147A through E headed "Rate of Rebate" is a figure used by respondent's accounting staff in determining the adjustment to be mailed to each customer participating in the week-end sales special (Tr. 2698). Mr. Krone used the following illustration to identify respondent's bookkeeping procedure in this regard:

1. The ice cream was billed at the list price of \$1.63 per gallon.
2. For a particular week-end promotion, the grocer would retail the ice cream at 79¢ a half gallon.
3. In order to permit the retailer to sell the ice cream at that price, respondent would reduce its net cost per gallon to \$1.47 per gallon. If a customer received a regular 5% discount from the regular price of \$1.63, he would in fact normally be paying a net price of \$1.548 per gallon.
4. In order to provide this account with a net price of \$1.47, a week-end rebate in the amount of \$.078 per gallon was mailed to the account. In other words, if the week-end special involved a \$1.47 net price, every account purchased the ice cream at that price, and those receiving a regular discount were refunded a different adjustment. In the illustrations above, the rebate would be \$.078 per gallon to an account that had a regular 5% discount (Tr. 2698).

Respondent Exhibits 21A and B are the company records establishing this payment. Respondent Exhibit 21A is a check voucher and Respondent Exhibit 21B is the petty cash voucher which details the method of calculation. Respondent Exhibit 83A is a summary of each and every week-end adjusted list price promotion used in Commission Exhibits 147A through E (Tr. 2699). Each of these promotions was offered to all the Denver wholesale customers (ibid.). Respondent Exhibit 83B was also prepared by Mr. Krone. That document is needed to understand the "payments" identified in Respondent Exhibit 83A (Tr. 2700). In respondent's week-end promotions, particular accounts which received a regular discount received a smaller check because everyone was offered the same net price. In order to explain these facts and particularly in order to explain each of the entries on Commission Exhibits 147A through E, it was therefore necessary to first establish of record the regular discounts used with regard to each of the customers listed on Commission Exhibits 147A through E.

Commission Exhibit 147A therefore summarizes few, if any, "discounts."* The first account listed, the Gem Market, supposedly received a "rate of rebate" of ".185." Such is not the case. That was an "adjustment to the list price" (Tr. 2701). In other words, the payment to Gem which the Commission accountant obtained from respondent's check voucher was not a regular discount but an adjustment to the price to give all wholesale customers a regular week-end special price.

Westerkamp Grocery, which is the second account listed on Commission Exhibit 147A, did not receive a discount. The "rebate" supposedly given to this customer reduced the regular price to a net price offered to everybody.

The third entry on Commission Exhibit 147A, Totem Pole Drive-in, is a payment which may relate to damaged merchandise. The check and the voucher supporting the payment do not disclose the reason for the payment. Mr. Krone reviewed every account listed (Tr. 2702 et seq.) on Commission Exhibits 147A-E and established that every payment referred to in the Commission accountant's tabulation was an adjustment to the list price on products offered at a reduced price to all customers except the payments listed therein to Miller's and Associated Grocers. Respondent in introducing these discounts met known and existing competition (See *infra* findings 36 and 37).

36. In 1959 Miller's Super Markets received a discount from respondent on ice cream products pursuant to a discount schedule in evidence at Commission Exhibit 84 and Respondent Exhibits 14A and B.

In the allocation²² of evidence complaint counsel identifies a discount to Miller on ice cream products in effect in 1959 in Cheyenne, Wyoming, Denver, Colorado, and Colorado Springs (CX 59A-C, CX 34, CX 169A-B).

That discount was instituted in the summer of 1958 in order to meet a competitive price submitted to the customer by Swift Ice Cream Company. Respondent's Exhibit 12A is the exception sheet summarizing the terms of the competitive bid. The prices which respondent introduced to meet this competition are set forth in Respondent Exhibits 14A-B.

Respondent Exhibit 12B was prepared by Mr. Brown in the office of Ralph DeJidio of the Miller Super Market chain on July 1, 1958. The information contained on Respondent Exhibit 12B

*As evidenced such discounts were to meet competition.

²² See complaint counsel's categorical allocation of evidence at pp. 292-300 hereof.

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was copied by Mr. Brown from a letter addressed to Mr. DeJidio from Roy Harwell of Swift and Company (Tr. 2283). Respondent's agent was advised by Mr. DeJidio that the prices from Swift were substantially lower than respondent's. Thereafter, Mr. Brown reviewed this matter with Mr. Krone and the prices which appear on Respondent Exhibit 14A were instituted to meet the Swift offer (Tr. 2284).

Mr. Frank Krone confirmed these facts. Mr. Krone became the wholesale ice cream manager in August of 1958 (Tr. 2146). Mr. Krone prepared Respondent Exhibit 12A, which bears his signature, on or about the time he became ice cream manager. Respondent Exhibit 12B was used in preparing the exception sheet (RX 12A). Respondent Exhibits 12A and B have been in the custody and control of Mr. Krone, as ice cream sales manager, since August 1, 1958. They are records customarily maintained as ordinary business documents by respondent.

The ice cream discounts which have been identified by complaint counsel by subpoenaing checks and vouchers from respondent's files relating to 1959 rebates were exactly the same prices instituted in the summer of 1958 to meet the offer from Swift and Company. Swift and Company in 1959 made two other offers to Miller's. These are in evidence as Respondent Exhibits 13A through G and 13H through P. Each of these written offers was reviewed by Miller executives and involved prices considerably below those charged by respondent to the Miller stores. Mr. Krone reviewed these documents in the office of Miller's in May of 1959 (Tr. 2155). Respondent's Exhibit 15C was prepared in the office of Miller's at that time; it summarized the conversation with the ice cream buyer of Millers. Respondent, through Mr. Krone, reviewed these prices and wrote to Miller's in a letter dated June 26, 1959 (RX 16A and B). Respondent was able to persuade Miller's to keep its ice cream business with respondent at higher prices because of the acceptability of respondent's trade name in the Denver market. Respondent did not increase its discount in 1959 notwithstanding substantially lower offers received by Miller's from Swift.

To corroborate and verify the documents prepared by respondent's officials and the testimony of the officials, Mr. Roy Harwell, the Swift manager, was subpoenaed by respondent (Tr. 2456 et seq.). He testified substantially as follows:

On July 1, 1958, Mr. Harwell, on behalf of Swift, called on Mr. E. E. Miller and Mr. Ralph DeJidio, and offered to sell ice cream products on the terms stated on Respondent Exhibit 12D (Tr. 2457). The offer originally was made on a dock delivery basis but

thereafter the same proposal was made based on conventional delivery (Tr. 2458). This offer applied to the Denver stores, the Colorado Springs and Greeley stores, and those in Cheyenne. The offer was not accepted by Miller's. Mr. Harwell also identified Mr. Letford's signature, Swift plant manager, which appears on Respondent Exhibits 13H and 13A. These were the offers submitted to Miller's in 1959, but not accepted by Miller's; those offers did not lead to increased discounts by respondent. Mr. Harwell also identified the promotional offers made to Miller's which are included in the written offer identified in Respondent Exhibit 13A. Similar promotional offers were made in 1958 (Tr. 2458-2459). This record, therefore, establishes without any contradiction or conflict in evidence that the ice cream discount instituted by respondent covering the Miller stores in Denver, Colorado Springs, Greeley and Cheyenne were made to meet a 1958 offer of Swift and Company. Further, other offers and larger discounts were made to Miller's in 1959, which did not require respondent to increase its discount because respondent persuaded Miller to continue the existing price structure and use respondent's better known trade name.

37. The ice cream discount of record payable to Associated Grocers by respondent (CX 101A) was instituted to meet competition.

In May of 1954, respondent's managing agent, Mr. Brown W. Cannon, discussed the Associated Grocers discount with Mr. Fishburn of AG. Commission Exhibit 101B identifies a competitive offer from IXL which was specifically discussed in the Fishburn conversation (Tr. 2784-85). The individual stores of AG were at that time receiving a discount from respondent's competitor—IXL—in the amount of 5%. This competitor had "started distribution in metropolitan Denver." To meet that offer, respondent agreed to a discount schedule which would allow the stores 5%. The $\frac{1}{2}$ % over the 5% was maintained by the warehouse to perform billing and credit services.

Thereafter, in January of 1957, respondent's agent, Mr. Cannon, reviewed a detailed Swift & Co. competitive ice cream offer with Mr. Fishburn (Tr. 2786). A copy of Swift & Co.'s written offer is in evidence as Respondent Exhibits 26A through G (ibid.). Swift offered to manufacture a private label for AG. The Swift offer, with the distribution charges identified on Respondent Exhibit 26E, established a \$1.31 or \$1.34 net price depending upon the point of delivery. Respondent Exhibit 101B prepared by respondent is the exception sheet supporting respondent's competitive offer of \$1.38 net (\$1.63 less $15\frac{1}{2}$ %) (Tr. 2787).

Respondent's 5% discount on regular Meadow Gold label was continued through 1959. The competitive offer of Swift established a net price of \$1.40 or \$1.44 per gallon for the "regular" label, considerably below respondent's Meadow Gold label price. Respondent did not increase its discount, however, because the customer was persuaded that respondent's trade name and customer acceptance compensated for the Swift reduced price.

In 1959 on January 19, Carnation granted to each AG store a 10% discount on Carnation labeled ice cream and a 12% discount if the customer purchased exclusively from Carnation (Tr. 2398). Therefore, during the period selected by complaint counsel—1959—the ice cream discount of respondent (5%) on regular labeled products was approximately *half* the discount offered and received by the same customers from Carnation.

Respondent's ice cream discounts to AG were instituted to meet known and established competitive offers; and throughout the period in which respondent used such discounts, the customer was offered and in fact received substantially larger discounts from respondent's competitors.

E. *Cheyenne Discounts*

38. The allocation²³ identifies payments by respondent to Miller's Supermarket and AG based on Cheyenne, Wyoming, store sales of milk products.

Respondent concedes the allocation²⁴ correctly states the facts. Such discounts were paid to Miller's and AG in 1959 covering Cheyenne milk sales. The payments to AG and Miller's were based on arrangements made in Denver required to meet competitive prices established of record and summarized above under findings numbered 13, 21 and 24.

39. Contrary to the complaint counsel's allocation,²⁵ Commission Exhibit 133 does not establish other discriminations in Cheyenne, Wyoming, based upon discounts paid to other grocers.

Commission Exhibit 133 is a summary of cash tickets submitted to complaint counsel in response to a subpoena. Commission Exhibit 133 was prepared by Mr. Lemberg and purports to establish various discounts. The following accounts which appear on Commission

²³ See complaint counsel's categorical allocation of evidence at pp. 292-300 hereof.

²⁴ *Id.*

²⁵ *Id.*

Exhibit 133 are not located in Cheyenne, Wyoming, and are not in competition with Cheyenne grocers:

Ashbrook & Collins	at Torrington
Chadwick Mercantile	at Carr
Chieftain Cafe	at Wheatland
Diamond Horseshoe	at Wheatland
Johnny's Grocery	at Chugwater

The towns in which the above listed accounts are located are not part of the Cheyenne market and each of the other areas had its own different price structure (Tr. 2572-2576). The customers of Cheyenne grocery stores do not purchase products in the other towns listed and conversely the grocery store customers in Torrington, for example, or Laramie, do not purchase merchandise from Cheyenne grocers (Tr. 2576).

At the times referred to on Commission Exhibit 133 respondent sold wholesale merchandise to two distinct types of customers: (a) cafes or restaurants who purchased milk "in bulk 5 to 6 gallon containers for dispensing on the premises" (Tr. 2577); and (b) grocery store accounts who purchased "quarts and half gallons for resale primarily to housewives and home consumers" (Tr. 2577 et seq.).

The following Cheyenne accounts listed on Commission Exhibit 133 purchased fluid milk products for on-premises use and therefore primarily purchased "bulk" products: (1) Barkalow Brothers, (2) Captain's Ship Cafe, (3) Little Bear Inn, (4) Motor Vue, (5) Peponino's, (6) Remount Ranch, (7) The Veteran's Hospital, (8) The Veterans' Canteen, and (9) Zesto.

40. Each of the above accounts purchased products not sold to Miller's Super Market or other grocery stores (Tr. 2549 et seq.).

Therefore, Commission Exhibit 133 identifies only six accounts buying products also sold to Miller's Super Market (Tr. 2577 to 2581):

- Boulevard Bakery
- Brannon's Market
- Duchess Locker
- Mainliner Food
- Olson's Grocery
- Stop and Shop

Commission Exhibit 133, lines 3, 4, 10, 13, 16 and 20, indicates that the above listed grocery accounts each received a 5% discount. Respondent's agent, Mr. Clark, has been in the Cheyenne area for

ten years (Tr. 2571). Respondent Exhibits 75A through K are copies of the original sales tickets used in preparing the entries on Commission Exhibit 133 (Tr. 2592). These tickets establish the same conclusion, to wit: That each grocery store in Cheyenne listed on Commission Exhibit 133 received the same net price (other than Miller's) (Tr. 2593-94).

Commission Exhibit 133, thus does not establish, apart from Miller's, any favorable discount on fluid milk sales to Cheyenne grocers.

41. Contrary to the allocation,²⁶ Commission Exhibit 134 does not establish fluid milk discriminations in Cheyenne, Wyoming, among grocery store customers.

Purported illegal discounts are reviewed in the allocation²⁷ of evidence where certain listed accounts beginning with the Eastside Dairy store and ending with Howard's Market supposedly received allowances not available to others:

It also appears from this exhibit (CX 134) that some stores in Cheyenne received no discounts.

This statement is incorrect. The first four accounts listed on Commission Exhibit 134 (College Inn, Garrott Drugs, Bill's Market and Maverick Cafe) are located in Laramie, not Cheyenne (Tr. 2581). The Jack Frost account (line 6), according to Commission Exhibit 134, received a discount based on cash ticket No. 177586; the original ticket now in evidence as Respondent Exhibit 72 (Tr. 2581-82) indicates that Jack Frost also received a 5% discount (Tr. 2583).

The other accounts on Commission Exhibit 134 are divided into two categories: Those accounts from Jack Frost (line 6) through Jolly Rancher (line 18) have no specific entry under the heading "Discount"; all other accounts on the exhibit, except a bakery, received a 5% discount.

Some of the accounts listed on Commission Exhibit 134, lines 6 to 18, are not grocery stores. Jolly Rancher is a cafe purchasing on-premises consumption products, Tasty Freeze is a soft ice cream dispenser and The Veterans' Cafe is also an on-premises restaurant (Tr. 2584). The other accounts on Commission Exhibit 134 from line 6 through line 18 are grocery stores. Respondent Exhibit 72B through I are the original tickets establishing the transactions summarized on Commission Exhibit 134.

These tickets establish that each customer received the 5%

²⁶ See complaint counsel's categorical allocation of evidence at pp. 292-300 hereof.

²⁷ *Id.*

discount offered to all grocery stores in Cheyenne (Tr. 2586, lines 19 through 21).

Commission Exhibit 134, as noted above, further identifies certain accounts which, according to complaint counsel's tabulation, received a 5% discount (lines 19 through 31—Eastside Dairy Store through Howard's Market) (Tr. 2588-89). Respondent Exhibits 73A through M are the original tickets supporting the entries on Commission Exhibit 134 (Tr. 2589). These tickets support the entries on Commission Exhibit 134 establishing the 5% discount. Therefore, every grocery store which appears on Commission Exhibit 134 located in Cheyenne, Wyoming, received a 5% discount and the unsupported assertion contained in the allocation²⁸ of evidence is without any record evidence. Commission Exhibit 134 does not list stores in Cheyenne which received "no discounts."

Cheyenne stores, other than those listed on Commission exhibits, received the same discount. The original tickets for the relevant time period are in evidence as Respondent Exhibits 75A through K (Tr. 2592-94). As Mr. Clark stated, and as fully supported by the documentary evidence, respondent "had at that time in effect with each grocery store" respondent "serviced a 5% discount."

The record, therefore, does not establish by reliable, probative or substantial evidence that any discriminations in fluid milk prices occurred in Cheyenne at the times referred to in the allocation^{28a} other than the Miller's Supermarket discount to meet competition.

42. The allocation²⁹ of evidence (CX 126) identifies ice cream discounts to Associated Grocers and Miller's Supermarkets in Cheyenne.

The record establishes that the Miller's Supermarket stores in Cheyenne and the Associated Grocery stores in Cheyenne received discounts negotiated in Denver on ice cream products. The plant manager of Swift & Company confirmed respondent's evidence that the discount to Miller's was made to meet a Swift offer (see *supra* finding 36). The Associated Grocers discount paid by respondent for stores located in Cheyenne is conclusively proven of record to have also been made to meet a Swift & Company offer (*supra* finding 37).

F. Colorado Springs Discounts

43. The evidence identified by complaint counsel's allocation³⁰

²⁸ See complaint counsel's categorical allocation of evidence at pp. 292-300 hereof.

^{28a} *Id.*

²⁹ *Id.*

³⁰ *Id.*

or otherwise, does not establish ice cream discounts in Colorado Springs which are discriminatory other than Miller's and Furr's.

Complaint counsel's case, allegedly in support of discriminatory ice cream prices in Colorado Springs, is summarized in Commission Exhibits 173A through E. Those documents are not records of respondent, but rather certain sales summaries and alleged rebates prepared by the Commission's staff accountant.

Respondent's 1959 plant manager at Colorado Springs explained Commission Exhibits 173A through E as follows (Tr. 2451-2456):

1. Each of the following accounts listed in the Commission exhibits was Associated Grocery stores: Collins' Market, Farmers' Market, Food King Market, Harter's Grocery, Dytri & Sons, Empire Super Market, Premium Market, 17th Street Grocery, Roswell Grocery, Lake Grocery, Stop and Shop Market, Six Point Grocery, Vogel's Super Market, King Super Market, Hillside Grocery, Thrifty Market, Cecil's Grocery.

2. Each grocery store or supermarket in Colorado Springs in 1959 received a discount (Tr. 2453-54).

3. The other accounts listed on Commission Exhibit 173A through E purchased different kinds of ice cream products not sold in competition with the grocery stores. As in Cheyenne or any other market, certain customers such as drug stores or cafes purchase products for resale to persons using restaurant style facilities. The products sold to such accounts are quite different from products sold to grocery stores. Milk is sold in a large dispenser and ice cream is customarily sold in 2½ or 5 gallon drums so that it can be dipped and served to individual customers. A drug store selling such a product does not compete with a grocery store selling a different product to take home. Commission Exhibit 173A to E lists accounts: Fath Drug Company, Cheyenne Drug Store, Academy Drugs, Skiffington's Ivywild Pharmacy, and Bob's Cafe.

4. The record affirmatively demonstrates that as early as 1950 the Associated Grocery stores in Colorado Springs received a 5% discount from I.X.L. Respondent met that price in 1954 (finding 37). The 5% discount was continued and was in effect at the time the accountant prepared the exhibits now in evidence as Commission Exhibits 173A through E. Each of the accounts as to ice cream products received a 5% discount with but one exception. In any event, respondent's discounts did not exceed those offered by its principal Colorado Springs competitor, I.X.L.

5. In January of 1959, Carnation, having acquired I.X.L. in 1958, affected the market with a higher discount of 10% offered

to every AG store in Colorado Springs, Denver and Cheyenne. It was a multi-state arrangement, which affected the market on January 19, 1959. The success of Carnation's increased discount is apparent. On January 18, they had one route in Denver; on January 19, they had eight routes. There is no record evidence that any grocery stores in Colorado Springs did not receive from respondent an ice cream discount. There is further no record evidence that respondent's discount ever exceeded those of its principal competitors who in each instance first instituted the "higher" discount. There is, for example, no record evidence that a 10% discount on ice cream products was ever offered to an AG store in Colorado Springs by respondent. Complaint counsel particularly selects Vogel's (allocation³¹), and indicates that in the summer of 1959 respondent paid to that account a 7½% ice cream discount. Carnation, in January, had offered that store (and all others) a 10% discount. The record does not support by reliable evidence that even as to that account respondent's alleged discrimination was illegal. At no time did respondent sell below its competitors' prices.

44. The allocation³² of evidence does not identify any fluid milk discounts which are discriminatory in Colorado Springs other than Miller's, King Soopers, Furr's and Associated Grocers.

Each of these discounts was instituted to meet competition as considered in findings 13, 16, 17 and 24 hereof.

The allocation³³ identifying the evidentiary facts at issue suggests that respondent further discriminated among other unnamed customers in the Colorado Springs area, allegedly supporting the assertion with transcript references to pages 397-400. The testimony thereon, premised upon uncertain and conjectural estimates, does not establish by reliable, probative and substantial evidence the existence of even one discount in Colorado Springs which identifies (a) the customer, (b) the amount of discount, and (c) the specific products as to which the discount relates. The testimony (Tr. 397-400) does not establish discriminations at all but restates the established policy of documenting discounts, if any, with an exception sheet (See Tr. 407-408).

Virtually every grocer in the Colorado Springs area was a member of Associated Grocers and therefore participated in the 1950 IXL discount (5%) and the 1959 10-12% discount offered by Carnation to every AG store (Tr. 2396-98, 2452-53).

³¹ See complaint counsel's categorical allocation of evidence at pp. 292-300 hereof.

³² *Id.*

³³ *Id.*

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45. For the same reasons hereinbefore generally set forth and specifically applicable to all market areas, the Colorado Springs and Denver discounts were "purchases * * * in commerce."

Respondent concedes that the Associated Grocers and Miller's Super Markets discounts—negotiated in Denver—covering stores located in both Colorado and Cheyenne comply with the jurisdictional requirements of the Robinson-Patman Act in that the discrimination, if established, involves "different purchasers * * * where either of the purchases involved in such discrimination are in commerce."

The other discounts in Denver or Colorado Springs alleged to be discriminatory satisfy the jurisdictional requirements of section 2(a). Furr Foods, King Soopers or Ce Buzz grocery stores located in Denver or Colorado Springs, for example, purchased milk from either respondent's Denver or Colorado Springs plant. The sales were in Colorado, the result of interstate policy clearances, contacts and management controls.

46. The requisite competitive injury is shown of record assuming that discriminatory prices were established, unassociated with meeting competition in good faith.

The complaint alleges in Count I, Paragraph Nine, that "the effect of such discriminations in price by Beatrice * * * has been or may be substantially to lessen, injure, destroy or prevent competition." The complaint thus alleges a legal conclusion, quoting verbatim the language of section 2(a) of the Robinson-Patman Act. The language of section 2(a) is not ambiguous. Discriminations in price are clearly not illegal *per se*. The record must support by reliable, substantial and probative evidence the ultimate fact that a discrimination, even if admitted, produces the requisite competitive effect: to substantially "lessen competition or tend to create a monopoly or injure, destroy, or prevent competition." Complaint counsel has the burden of proving the competitive impact supported by a preponderance of the evidence. In this record there is evidence to support such a finding if a meeting competition in good faith defense does not prevail.

Since 1950, major national companies have entered the Colorado fluid milk market. Each such entry was immediately followed by increased competition for the grocery store accounts which took the form of ever-increasing discounts off an established list price. This record does not contain one instance in which respondent introduced a discount initially. Every grocer identified in com-

plaint counsel's allocation³⁴ of evidence received a competitive offer larger than respondent's prior to the discount issued by respondent.

On the other hand, if it could be construed from the evidence that respondent did in fact initially introduce the discounts identified by complaint counsel's allocation,^{34a} the evidence also reflects, as in the grocery business, that the sale of milk, a segment of that business is highly competitive and the margin of profit small. From these facts alone probable competitive injury under the facts and circumstances herein may be imputed.³⁵

Respondent Exhibit 88 is a list of the fluid milk retail prices in effect, at the time selected by complaint counsel, in independent grocery stores in the Denver metropolitan area. This evidence has not been contradicted by any contrary testimony or document. Consumers in Denver had available to them every low-priced milk outlet identified on Respondent Exhibit 88.³⁶ Competitive effect may not be measured on this evidence of availability alone, however.

G. *Indiana—Ohio Discounts*

47. Contrary to the evidence, identified by the allocation³⁷ and otherwise, the Marsh Foodliner chain of Yorktown, Indiana, did not distribute private label fluid milk, processed by respondent, into St. Marys, Ohio.

The principal product which respondent processed for Marsh was half-gallon fluid milk packaged at respondent's Fort Wayne, Indiana, plant. Negotiations were completed in early 1960; processing started approximately March 1 (Tr. 2963). Respondent also for approximately 5½ months in 1960 bottled gallon jugs at New Bremen, Ohio, which were transported on respondent's over-the-road van trucks to the Yorktown, Indiana, warehouse of Marsh (Tr. 3082, 2852; RX 91B). Marsh sold gallon jugs only after competition introduced the product at a 59¢ retail price in the Indianapolis area (Tr. 2852-53). Later on, Marsh's competition introduced the gallon jug into Muncie, Indiana, and Marsh was required to sell gallon jugs in that area also (Tr. 2854-55). Marsh "withdrew from the sale of gallon jugs of milk as soon as the competitive situation disappeared" (Tr. 2855).

³⁴ See complaint counsel's categorical allocation of evidence at pp. 292-300 hereof.

^{34a} *Id.*

³⁵ See Tri-Valley Packing Association, Docket Nos. 7225, 7496 (1962) [60 F.T.C. 1134].

³⁶ See complaint counsel's categorical allocation of evidence at pp. 292-300 hereof. Such availability to consumers is not considered as an issue by the 9th Circuit Court of Appeals in reviewing this case as respondent seems to suggest.

³⁷ See complaint counsel's categorical allocation of evidence at pp. 292-300 hereof.

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Moreover, Mr. Crall, the buyer and manager of Marsh's fluid milk and ice cream operation specifically testified that none of the milk delivered to Yorktown, Indiana, by respondent was resold by Marsh in St. Marys, Ohio (Tr. 2832, line 10). Mr. Crall further testified that Marsh as a "distributor" of milk from its Yorktown warehouse was required to obtain permits from the Auglaize County health authorities in order to sell Marsh label milk in St. Marys, Ohio. Those permits for the relevant years are in evidence as Respondent Exhibit 97A, B and C; Respondent Exhibit 98A, B and C. The application on which the permits were based was prepared and signed by the witness, Mr. Fran Crall (Tr. 2825 et seq.; Tr. 2828, lines 6 and 7; Tr. 2836, line 1). Mr. Crall knew and stated on these applications to the county health authorities that the milk to be distributed in St. Marys, Ohio, was packaged by the "Indiana Dairy Marketing Association, Muncie, Indiana" (RX 97B, RX 98B). No permit was obtained to sell Marsh milk processed in respondent's New Bremen or Fort Wayne plants (Tr. 2829, lines 15-20).

Thus, it would appear that fluid milk products packaged or bottled in respondent's Fort Wayne and New Bremen plants and taken to the Yorktown warehouse of Marsh were never redistributed in St. Marys, Ohio. Complaint counsel have the burden of establishing that such distribution was made in order to sustain the position that alleged discriminatory discounts, if any, had a competitive effect in this market area. However, based upon Mr. Crall's testimony and the documentary evidence of record, the contrary has been established.

Further corroborating Mr. Crall's testimony is that of Mr. Mike Johns, Marsh's store manager in St. Marys, Ohio. He was subpoenaed by respondent. Mr. Johns testified on direct examination that during the relevant time period no sales of gallon jugs were made from the St. Marys store of Marsh (Tr. 2894-95, 2897). Commission Exhibit 253, originally marked for identification as Respondent Exhibit 100, is a document signed by Mr. Johns confirming the fact that no gallon jugs were sold during this period out of the Marsh store in St. Marys.

The cross-examination of Mr. Johns attempted to impeach his testimony, and the following questions and answers appear on pages 2898-99:

Q. * * * Now, I will ask you about May 15, 1960. Were you selling gallon jugs of milk on May 15, 1960?

A. No, sir.

Q. How do you know?

A. This is a personal objection of mine to getting into gallon jugs of milk because I do not prefer to handle them and we were able to get by this period when it looked like we might have to. It occurred to me we might get by without ever having to handle it.

Complaint counsel urges a finding that the New Bremen plant of respondent sold and transported fluid milk in gallon jugs to Marsh Foodliner warehouse Yorktown, Indiana, and that the trucks of the Marsh Foodliner retransported milk and gallon jugs from Yorktown to the Marsh store in St. Marys, Ohio, for resale to consumers there. This is premised upon what complaint counsel believes to be an inconsistency in the testimony of Mr. Mussett, manager of respondent's New Bremen, Ohio, plant, which he gave on May 17, 1960 and June 3, 1964 (Tr. 1065-67 and 3084). Careful consideration of this evidence, however, clearly indicates that Mr. Mussett's personal knowledge of whether or not the Marsh Foodliner store at St. Marys, Ohio, sold gallon jugs of milk under Marsh's private label is highly conjectural. Specifically, Mr. Mussett's testimony on May 17, 1960, which complaint counsel claims he has tried to repudiate on June 3, 1964, is as follows:

Q. What is your current price to that Marsh Food Liner store at St. Marys, Ohio, which you testified you sell, on a per gallon jug basis?

A. To the best of my knowledge, we are not supplying gallon jugs to the St. Marys store.

* * * * *

Q. Do they (Marsh) handle it under a private label?

A. Yes.

Q. St. Marys, Ohio?

A. Yes.

Q. Where do they obtain it?

A. I could only guess; ours, or a competitor is supplying them; I wouldn't know.

Q. You don't know whether you are supplying them or not?

The Witness: If I were to go to the warehouse at Yorktown, he might have our milk in there and a competitor's, from Muncie, Indiana. Unless we identified the milk, I couldn't tell whether it was ours or our competitor's.

Findings of fact rendered by the hearing examiner cannot be premised upon conjecture. They must be premised upon what the evidentiary facts disclose regardless of complaint counsel's contention that he was surprised by what he claims to have been a subsequent repudiation by Mr. Mussett of his former testimony. The fact remains that ample opportunity was given by the hearing examiner to complaint counsel to adduce any new evidence he wished in connection with Marsh Foodliner sales of gallon jugs in St. Marys, Ohio, before resting his case. In spite of this opportunity no further evidence was adduced by counsel supporting the

complaint in contradiction to the testimony of Mr. Crall and Mr. Johns heretofore cited.

48. Respondent's price to Marsh Foodliners, Inc., for processing half-gallon fluid milk at Fort Wayne, Indiana, was offered in good faith to meet an existing competitive price.

Respondent's price for half-gallon fluid milk processed in Fort Wayne was based upon the Fort Wayne Federal Milk Market Order which fluctuates each month simply because the Fort Wayne order price—the amounts paid to the farmers—fluctuates. Respondent's competitor, Indiana Dairy Marketing Association, had for a number of years operated under an identical arrangement with Marsh (Tr. 2836-38). Its price was also calculated on the farm payments and each company, respondent and Indiana Dairy Marketing Association, bid on a processing charge over the farm price. Respondent did not distribute half gallon milk to Marsh. Marsh's trucks, Marsh's employees and Marsh's warehouse were used. The milk was picked up at respondent's dock in Fort Wayne and carried away by equipment and personnel of the customer.

The record establishes without any contradiction that respondent's price at the dock in Fort Wayne was approximately 1¢ higher than the competitor's price over the time period involved in this case, and it is in this time period that respondent bid on the business to meet the competition of Indiana Dairy Marketing Association. (RX 99, RX 91A; Tr. 2840, line 13; Tr. 2844, line 17; Tr. 2847, lines 2-5.)

At the time of the bid, respondent knew that Indiana Dairy Marketing Association was the sole half-gallon processor of Marsh private label. Respondent further knew that the price was based upon the farm price. Those are published statistics maintained by the United States Government in every Federal Milk Market Order. Respondent further knew that the manufacturing or processing "fee" which was to be added to the farm price was between \$1.40 and \$1.70 per cwt. (Tr. 3065). Since there are 22 half gallons in every cwt., the price over the fixed farm milk price was somewhere between 6.8¢ and 7.3¢. In other words, respondent could predict the price within ½¢ per half-gallon. Based on those facts, respondent made a bid after careful consideration and obtained a portion of the Marsh Foodliner half-gallon private label business. The specific price and the arrangement itself were required in order to meet the existing competition of Indiana Dairy Marketing Association. Respondent, therefore, in good faith made a bid to meet the arrangement in existence and the price which (within

close limits) was known to respondent (Tr. 2847-48; 3032-34; 3065; 3068-69).

49. The evidence does not establish, however, that the allowance to Marsh for a dock delivery sale was less than the expense to respondent for conventional delivery.

Respondent offered inadequate cost distribution data as foundation evidence for the testimony of its expert, Dr. French. Although there is no doubt that Dr. French himself is a highly qualified expert in dairy accounting, his opinion does not appear to be premised upon a careful examination of the pertinent books and records of the respondent, and a reference thereto in the course of his testimony as to what specific accounting data he particularly relied upon in concluding that respondent's price to Marsh for dock delivery sales could be cost justified.

This cost defense purports to show the savings which would accrue at the New Bremen, Ohio, Beatrice plant if the wholesale distribution system were not used in the operation and in its place milk were picked up at the dock (Tr. 3117). The study covers the operations of the New Bremen plant for the fiscal year ended February 28, 1960, ten months of which cover a period prior to the time deliveries were made under the Marsh contract (Tr. 3118; RX 91B). Dr. French gave as the reason for using this fiscal year rather than the fiscal year ended February 28, 1961, the fact that the manager, in making the decisions, would not have had the record for the year ended February 28, 1961, available. Respondent Exhibit 91B indicates that deliveries to Marsh began about January 1, 1960, so it is obvious that the records for the fiscal year ended February 28, 1960, which were used by Dr. French were also not available to the manager when the Marsh contract was negotiated. Since these records were not relied upon by management, if indeed they relied on any, there appears to be no reason why Dr. French should not have used records for the period during which the Marsh contract was in effect.

Respondent Exhibit 95A sets forth the claimed cost savings of 17.504 cents per gallon and shows the calculations made by Dr. French in arriving at this figure. Savings are claimed in the categories of Routemen's Salaries and Commissions, Other Direct Selling Expenses, Sales Promotions, Advertising and Indirect Selling Labor.

The amount allocated to wholesale milk for Routemen's Salaries and Commissions was computed by Dr. French in the following manner: the wholesale commission rate of 7.75% and the retail

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commission rate of 14.25% as shown in the union contract (Tr. 3125) were applied respectively to the net sales at wholesale and the net sales at retail to get the amounts of commissions paid on wholesale and retail sales. The total commissions thus computed were some \$9,000 less than the amount of \$63,180.98 reported on Respondent Exhibit 94E as Routemen's Salaries and Commissions applicable to fluid milk. This \$9,000 was assumed to be the amounts paid to make up the minimum guarantees which were not earned by commissions and was allocated between wholesale and retail on the basis of the number of gallons sold at each level. The total amount allocated to wholesale milk sales for Routemen's Salaries and Commissions by this method was \$28,299.13 and this amount divided by the total gallons sold at wholesale of 387,464 results in the savings of 7.304 cents per gallon as shown on Respondent Exhibit 95A (Tr. 3120-3121).

The allocation of this expense and methodology applied results in considerable conjecture. Dr. French should have examined respondent's payroll records and determined the exact amount of Routemen's Salaries and Commissions applicable to wholesale milk as required by acceptable accounting practices (Tr. 3351). Respondent's expert made no such determination nor did he inquire whether the information was available (Tr. 3214). He did not make inquiries with respect to the number of wholesale routes or drivers (Tr. 3212). Commission accounting expert witness Lemberg testified without contradiction having probative significance that this would be the minimum information required (Tr. 3398-9) in order to ascertain the efficacy of the accounting *modus operandi*.

The next item on Respondent Exhibit 95A, Other Direct Selling Expenses, has been allocated between wholesale and retail on the basis of the net dollar sales (Tr. 3123). Reference to Respondent Exhibit 94E indicates that the major portions of this expense are Delivery Expense of \$17,098.75 and Salesmen's Salaries and Commissions of \$20,385.16. John Hazelton, respondent's district manager for this area, testified that a retail route is more expensive than a wholesale route (Tr. 3038). Commission expert witness Lemberg testified that in view of this it is not proper to allocate these expenses equally per dollar of sales (Tr. 3352, 3400-3408).

The hearing examiner is also persuaded from other testimony of Commission's expert Mr. Lemberg that the alleged cost justification is without merit for the following reasons:

a. Sales Promotion Expense and Advertising Expense were considered to apply 80% to milk and 20% to other products. The

Sales Promotion Expense attributed to milk was allocated between wholesale and retail equally per sales dollar. The Advertising Expense attributed to milk was allocated to wholesale, retail and distributors equally per sales dollar (RX 94A).

b. The Sales Promotions were negotiated individually with stores and customers rather than on a plant-wide basis (Tr. 1010-1012, 1092-1094). The major portion of the Advertising Expense, \$6,194.45 out of a total of \$9,537.95, was for local advertising as indicated in Respondent Exhibit 94B and was not on a plant-wide basis. Witness Lemberg testified that under these conditions it would not be proper to allocate these items equally per dollar of sales (Tr. 3363-4).

c. Indirect Selling Labor was allocated to milk in the ratio of direct selling labor on milk (\$84,678.14) to total labor (\$734,216.81), or 11.53%. The amount attributed to milk was then allocated between retail and wholesale equally per each dollar of Routemen's Salaries and Commissions which had been allocated to these categories (RX 95A).

d. A substantial portion of this expense consists of social security taxes and a payment of \$2.25 per week per employee under Article XVIII of the union contract (Tr. 3214-18; RX 94B, 94Q). The allocation of these items in the ratio of labor dollars is not proper because they are not related to employees' total earnings; the social security payments relate only to the first \$4,800 of annual earnings and the payments under the union contract are totally unrelated to earnings (Tr. 3359-61).

e. Respondent has not been consistent in making his allocations of this item on Respondent Exhibit 95A. The direct selling labor on milk of \$84,678.14 used in computing the percentage of 11.53% which was used to allocate Indirect Selling Labor to milk consists of Routemen's Salaries and Commissions, Salesmen's Salaries and Commissions (less \$1,500) and "Cabinet and Disp. Maint." (Item 7156; RX 94E.) However, when the amount so allocated to milk was allocated between retail and wholesale only Routemen's Salaries and Commissions were used in the computation.

f. Costs should have been determined only for wholesale customers in St. Marys rather than for all wholesale customers of the New Bremen plant because St. Marys was the only area in which price differences were shown (Tr. 3370-3373).

g. Costs should have been developed for wholesale customers in St. Marys who purchased at each price level at which respondent sold in St. Marys (Tr. 3373).

h. The respondent should have developed the cost to it of delivering milk to the Marsh warehouse in Yorktown because to the extent that the cost was more or less than the 2 cents per gallon charged Marsh it would decrease or increase the cost savings (Tr. 3419).

50. The discounts other than Marsh in St. Marys referred to in the allocation³⁸ of evidence were instituted to meet competition.

Apart from Marsh, the allocation³⁹ of evidence of record in the case in chief identifies Wesner and the Fortman Grocery stores in St. Marys as having received discounts (Wesner—5%; Fortman's—2%). The discounts to these stores are not specified as discriminatory acts; they are used to illustrate the extent of respondent's violation of the law in the Marsh arrangement. Wesner's net price, for example, is compared to Marsh's net price and the difference is alleged to establish respondent's discrimination in St. Marys, Ohio.

Respondent has nevertheless established that the Wesner and Fortman discounts were originally instituted to meet competition, thereby avoiding any issue as to the meaning or interpretation of the allocation.⁴⁰

Wesner received a 5% discount (allocation;⁴¹ Tr. 3011). That discount was instituted on May 21, 1957 (ibid.). On that date Page Dairy replaced respondent in this account. Respondent's sales manager was so notified by the route salesman (Tr. 3012). Mr. Wesner told respondent's agent that he had been offered a better price by Page and was going to change suppliers at that price (ibid.). Respondent thereafter met the competitive situation which resulted in the 5% discount identified in the record subpoenaed from respondent in early 1960. The statements made to respondent's agent were corroborated by the other party to the conversation, Mr. Wesner (Tr. 2921 et seq.). Respondent's Exhibit 101 is "a bill for 27 half gallons of milk from the Page Dairy Company," dated May 21, 1957 (Tr. 2922). On that date, Mr. Wesner, as he states, bought his milk from Page because "he offered me a little better price on milk and so I took it" (Tr. 2923). The witness let Meadow Gold back in the account after the competitive offer was met (Tr. 2924).

The specific offer which was made by Page is of record through the testimony of Mr. James Price, Page's agent (Tr. 2929 et seq.).

³⁸ See complaint counsel's categorical allocation of evidence at pp. 292-300 hereof.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

In the year 1957, Page had "a floating discount scale from 3% to 6% in the market." This was in addition to a regular 4% discount (Tr. 2930). The discount was offered in the market in 1955. The sliding discount of Page is of record in Respondent Exhibit 102 (Tr. 2931). Discounts equivalent to those on Respondent Exhibit 102, or higher, were offered by Page from 1955 to 1959 (Tr. 2930-2931). Mr. Price prepared Respondent Exhibit 101, which was the ticket obtained from the Wesner grocery account dated May 21, 1957 (Tr. 2933). The discount offered to Wesner was off a 35¢ half gallon list price (Tr. 2935).

The Fortman Grocery stores in St. Marys received a 2% discount. That discount was instituted in the early summer of 1956 (Tr. 2013). Respondent's agent was advised that a competitive offer had been made from either Page or Pure Seal which respondent met (*ibid.*). Respondent's Exhibit 104 is an original record maintained by Mr. Brown in his personal file since 1957. It identifies the discount offered in the market by another competitor, Pure Seal. The Pure Seal discount was in effect in 1956 (Tr. 3017).

The testimony of respondent's agent concerning the competitive prices of the market was corroborated by Pure Seal's agent, Donald Brown (Tr. 2945 et seq.). Mr. Brown was an independent distributor for Pure Seal in 1956 (Tr. 2946). He covered the St. Marys market (*ibid.*). The particular sliding discount schedule introduced by Pure Seal in 1956 is explained by this witness (Tr. 2947-2950). The sliding scale discount was "offered to all customers that he had and any prospective customers that he might have gotten" (Tr. 2950-2951), including the two Fortman Grocery stores (*ibid.*). There is no contrary evidence of record. The Page Dairy in 1956 also offered to the Fortman Grocers a sliding scale discount (Tr. 2938).

Respondent's 2% discount established of record in the Fortman Grocery stores in St. Marys, Ohio, was therefore instituted to meet the sliding scale discounts offered in 1956 by respondent's competitors.

51. The evidence applicable to the Indiana—Ohio market, identified by complaint counsel's allocation⁴² and otherwise, establishes a relevant sale in commerce for the reasons hereinbefore set forth generally and as to other market areas.

52. The evidence as to the Indiana—Ohio pricing, as identified by complaint counsel's allocation⁴³ and otherwise, establishes the

⁴² See complaint counsel's categorical allocation of evidence at pp. 292-300 hereof.

⁴³ *Id.*

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requisite competitive injury (for the reasons hereinbefore set forth in other market areas) caused by respondent in the absence of a meritorious meeting of competition in good faith defense. In the instant case, as has been heretofore indicated, respondent's defense in this respect has prevailed except that as to the Indiana—Ohio discounts it has been shown, without contradiction, there was no distribution of private label fluid milk processed by respondent into St. Marys, Ohio. With regard to this alleged market segment, a meeting of competition in good faith defense is obviously inapplicable, although applicable to other Indiana—Ohio discounts.

CONCLUSIONS

Section 2(b) of the amended Clayton Act enables a seller to justify a price discrimination by showing that it was made in good faith to meet a competitor's equally low price. The burden of justifying discriminatory conduct in such fashion is on the respondent.

Each discount granted by respondent in the market areas hereinbefore identified involving sales within such markets was instituted in good faith by respondent to meet competition.

Respondent has operated in Denver since the early 1930's. The company has always been the largest fluid milk processor in the state. Prior to the late 1940's, discounts were unknown in Denver (Tr. 2791). As the largest processor operating in Colorado (CX 231, CX 232), respondent's trade-name was well accepted; in such a market framework, it is inconceivable that respondent would introduce the practice of discounting (Tr. 2790-91).

Since 1950, the historical position of respondent has been repeatedly challenged competitively by each major entry into the Denver market. Respondent has resisted such inroads into its established market position by meeting the competition as it appeared. In the early 1950's the strongest Colorado Springs milk processor (I.X.L.) entered the Denver market with a blanket 5% offer to all stores affiliated with the Associated Grocers buying organization (Tr. 2395). In 1955, the National Dairy Products Company (Sealtest) purchased a local processor—Garden Farms. Thereafter, and prior to the time period selected by complaint counsel (1959), Sealtest (1) offered a flat 12% discount to the Furr Food chain, (2) paid a 7% discount on all purchases by King Soopers, and (3) offered a 7% discount to the Miller stores. It is opinioned that Sealtest, after acquiring a local dairy, Garden Farms, attempted to increase its volume by discounts at least in part directed specifically at respondent (Tr. 2193; RX 67G, RX 68, RX 69B; CX 94A, Tr. 2279).

In 1956, another large processor, Fairmont, acquired a second local dairy—Beach. Thereafter, and again prior to the time period selected by complaint counsel, Fairmont attempted to increase its market position—acquired from Beach—by offering a 14½% discount on all fluid milk products to Miller's, King Soopers, the Busley chain and Furr Foods. At the same time discounts ranging from 7½% to 10% were offered to independents, including Helfridge Meat Market and the Piggly-Wiggly buying organization (RX 27; Tr. 2334-35, 2424, 2362, 2501, 2803).

A large Denver independent dairy, Carlson-Frink, attempted to protect its market position by offering discounts prior to the time period identified by complaint counsel through discounts to Furr Foods (10%) and King Soopers (7½%). The 7½% discount to the King chain was made in 1955 and on this record was the largest discount offered to any buyer at that time (Tr. 2358, 2361 et seq.; Tr. 2194-95).

In 1958, the I.X.L. Creamery of Colorado Springs was acquired by Carnation, another large national dairy company. Immediately thereafter Carnation exposed a hidden arrangement which had been made with the Associated Grocer warehouse for all stores in Cheyenne, Wyoming, and the State of Colorado. The discount was an unprecedented 10% offer on fluid milk and ice cream products for all stores irrespective of size or volume purchased. The discount so offered was obviously "legal" because it was made on exactly the same terms to each customer. On January 18, 1959, Carnation having acquired I.X.L. had only one route in Denver. The next day, January 19, Carnation had eight routes in Denver. On January 19, the Associated Grocer arrangement was made public and automatically forced all competitors in the market to increase discounts to remain competitive with this new aggressive competition—Carnation (Tr. 2397-98).

Respondent's customers also received repeated discount offers applied to the ice cream product line. Written detailed proposals from Swift & Company to King Soopers, Miller's and Associated Grocers are of record covering the period from January 1957 through March of 1959. Swift & Company's offers made to the principal buyers in the market were 30 or 40¢ per gallon below the then existing prices. The Swift & Company offers, plus the Carnation offer to all Associated Grocer independents virtually blanketed the state with ice cream discounts considerably larger than had ever theretofore appeared in the market (RX 12, RX 13, RX 26, RX 50; Tr. 2457 et seq.; Tr. 2397-98).

The smaller local dairies competed during the 1950's by offering low net prices to accounts scattered throughout Denver. For three years an independent—Shoenberg Farms—obtained as an exclusive customer the large King supermarket chain. After that account was lost to National Dairy, the independent offered flat net prices to King Soppers and also the Miller's Supermarket chain at 34¢ a half gallon which was 20% off the then list price of 43¢. Country Charm, another independent, regularly solicited during this period accounts in the Denver area at 34¢ or 35¢ a half gallon, another 20% discount off the normal list price used in the market. Burkett an independent from Goodland, Kansas, also entered the market during this period with 67¢ per gallon prices and half-gallon products at 35¢ per unit. Respondent Exhibit 88 is a summary of the "low milk" prices in the grocery stores in the Denver area in early 1959 (RX 19A, B; Tr. 2205; Tr. 2553-56; Tr. 2239, 2250).

It is apparent that the historical price and market position held by traditional Denver milk processors such as Beach, Garden Farms, Carlson-Frink and respondent was completely altered and changed by the entry of Sealtest, Carnation, I.X.L. and Fairmont into this somewhat isolated fluid milk market.

Respondent as the principal fluid milk processor in Colorado resisted the attempts to erode its Denver market position by discounts. It is apparent now that respondent's discounts, in the Denver market in the summer of 1959, were in no way caused or instituted by the respondent. To protect its position in Miller's, respondent offered a 10%—12% discount after Fairmont offered a 14½% discount (RX 27, RX 28; Tr. 2316-17).

During most of 1959, respondent is charged with a discriminatory price in King Soppers amounting to 5% when an independent—Carlson-Frink—is shown of record to have instituted a 7½% discount as early as 1955. National Dairy took the account away from an independent in 1958 with a 7% discount, which was promptly raised to 10% on January 1, 1959. Nevertheless, a discount check payable to King Soppers in the summer of 1959 is claimed to be a discriminatory illegal discount. Such a contention is without merit (RX 68, CX 94A; Tr. 2279, 2194-95).

Respondent is further charged with discriminatory pricing to the Furr Foods chain. That price, a 7% discount, was instituted after each of the following discounts was in effect at Furr's: Fairmont—14½%; Carlson-Frink—10%; Sealtest—12% (Tr. 2356-65).

Finally, respondent is charged with favoring Associated Grocers. Respondent's records show payments to Associated Grocers based on a 5½% discount—5% went to the stores and the ½% was

kept by the Associated Grocer warehouse to perform the billing function (Tr. 2785). At the time of the alleged respondent's discount Carnation was making available to each individual AG store a 10% discount on all fluid milk and ice cream products, plus an additional 2% if the account dealt exclusively with Carnation (Tr. 2397-98).

In 1950, a document called an "exception sheet" became a permanent part of respondent's ordinary business records maintained in Denver, Colorado Springs and Cheyenne. The preparation of an exception sheet is bona fide company policy to limit discounts to meeting competition. It must be prepared by the street man or sales agent who reports a competitive situation to management as part of a request to institute a discount. It must disclose the competitive offer, the statement made by the grocer, and all other relevant market facts. It must be signed by the street man and countersigned by a managing agent. It is then maintained as a permanent office record (Tr. 2790-91; 1564-66; 2147-49). Hundreds of such exception sheets were subpoenaed from respondent's files early in this case. (Item 1 of Schedule A to subpoena duces tecum dated June 16, 1960.) Each of them discloses on its face the competitive situation which required the institution of a discount and collectively they tend to prove respondent's "good faith" in meeting competition in individual situations as required without "blanket" price reductions.

"The discount policy adopted by respondent as a result of the competitive situation it faced was a highly selective one. It permitted a discount to be granted to a particular customer only where an equal or larger discount had been given by a competitor of respondent on a competing product line and respondent would not be able to continue selling to the customer in question without granting such a discount. In other words, discounts by respondent were available only in actual competitive situations."⁴⁴

Care was taken by respondent to ensure the genuineness and extent of the competitive necessity for particular discounts or allowances. In every case, customers' claims that they were receiving discounts or allowances from competitors of respondent were adequately verified by respondent's on-the-spot sales representatives and otherwise corroborated.⁴⁵

It must be concluded that the foregoing facts and circumstances

⁴⁴ See Commissioner Elman's majority opinion *re Continental Baking Company*, Docket No. 7630, 63 F.T.C. 2071 at 2164, which is applicable here.

⁴⁵ *Id.*

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demonstrate respondent's compliance with the good faith meeting of competition standard. Where, as here, a seller has affirmatively shown justification for selective price reductions, as good faith responses to the exigencies of competition, Congress provided the shelter of section 2(b).⁴⁶

For the foregoing reasons dismissal of the complaint appears to be appropriate. Additionally, dismissal of the charges against Eskay Dairy Company, Inc., as a separate corporate entity seems appropriate since its dissolution as a corporation preceded the filing of the complaint. However, this corporation, previously a wholly-owned subsidiary of Beatrice, became an integrated division of Beatrice. The charges against it, therefore, are merged with those against Beatrice. Accordingly, the following order shall issue:

ORDER

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

OPINION OF THE COMMISSION

JULY 29, 1965

BY JONES, *Commissioner*:

This matter is before the Commission on the appeal of counsel supporting the complaint from the hearing examiner's initial decision dismissing the complaint. The complaint in this matter alleged that respondent,¹ a corporation engaged in a diversified dairy business, granted discriminatory discounts in the sale of certain of its products to retail grocery stores, in violation of Section 2(a) of the amended Clayton Act, and that it granted nonproportional advertising allowances to competing customers, in violation of Section 2(d) of the Act. Respondent in its answer denied these allegations and, in addition, alleged meeting of competition in good faith as a complete affirmative defense to the charges. After full evidentiary hearings, the hearing examiner filed an initial decision in which he dismissed the complaint on the ground that respondent had sustained its defense of meeting competition in good faith as to the charge of granting discriminatory discounts. The hearing examiner also dismissed the charge alleging payment by respondent of discriminatory advertising allowances in violation of Section 2(d) on the ground that complaint counsel had waived this charge, and on the further ground that there was no probative

⁴⁶ *Id.*

¹ The complaint named as respondents not only Beatrice Foods Co., but also Eskay Dairy Company, a wholly owned subsidiary of Beatrice. Eskay was dissolved on or about February 28, 1959. Consequently, for the purposes of this opinion we shall consider the two named respondents as one.

evidence of the unavailability of such allowances on proportionally equal terms to any of respondent's competing customers.

The evidence of record in support of complaint counsel's 2(a) charge establishes that during 1958 and 1959 respondent granted discriminatory discounts off list price in the sale of fluid milk and ice cream to Miller's Supermarkets, Inc., of Denver, Colorado. While complaint counsel offered evidence showing only the existence of such discounts in 1959, respondent introduced evidence to show that these discounts had in fact been in effect since 1958. The hearing examiner found that respondent had initiated these discounts in 1958 and that complaint counsel had made out a *prima facie* case of discriminatory payments.

Respondent argued that these lower prices had been granted to Miller's in order to meet even lower discounts being offered to Miller's by fluid milk and ice cream suppliers desirous of obtaining Miller's business. Section 2(b) of the Clayton Act enables a seller to justify a price discrimination by showing that it was made in good faith to meet a competitor's equally low price. The burden of such justification is, of course, on the respondent. After a careful analysis of this record, the hearing examiner concluded, in his Findings 24 and 36, that respondent had met its burden and that the discounts demonstrated to be discriminatory by complaint counsel were granted by respondent in a good faith effort to meet competition and retain its market position. We agree with his conclusion on this point.

With regard to respondent's alleged discriminatory discounts granted to Miller's in fluid milk, the record demonstrates that Miller's was respondent's largest customer in the Denver area. Prior to May 1, 1958, respondent had been supplying milk to Miller's on an exclusive basis at discounts off list price amounting to approximately 7%. On that day Fairmont addressed a letter to Miller's offering to supply it with milk at a discount of 14½% on Fairmont label products and 14½% plus two cents per unit on Fairmont's private label milk. Fairmont's offer was expressly conditioned on Miller's giving one-half of its dairy space to the Fairmont label and the other half of this space to Fairmont's private label products.

Officials of respondent testified, and respondent's contemporaneous business records confirm, that respondent was informed of the Fairmont offer by Miller's general manager and of the fact that if it was accepted, they would no longer be serving the Miller account. After considering the Fairmont offer, respondent decided, in order to retain the business, to increase its discount to Miller's

from 7% to 10% on its Meadow Gold brand, and to 12% on its private label milk.

At the time respondent was advised of the Fairmont offer, it made every effort to verify the *bona fides* of the competitive offer and concluded that unless it lowered its prices to Miller's, it would lose its largest customer in the Denver area to Fairmont. One of respondent's plant managers characterized the offer as "quite ridiculous." However, we do not believe that this characterization annuls the purport of respondent's other evidence offered by it demonstrating that at the time it believed that if Fairmont's offer had been accepted, respondent would have been totally excluded as a supplier of Miller's. We cannot speculate on what respondent's plant manager meant by his use of the word "ridiculous," but we cannot hold that because of this characterization, Fairmont's offer was not *bona fide* and respondent's response to it insincere or lacking in good faith. Nor do we believe that respondent, in order to justify its good faith meeting of competition, was required to equal the terms of the Fairmont offer. The record established that respondent's Meadow Gold brand had preferred consumer acceptance in the Denver market and consequently, there was sufficient basis for respondent to be able to retain its customer by simply offering to lower its discount off list price. Presumably, if Miller had not regarded the offer as sufficient, it would have said so or turned to Fairmont. We hold, therefore, that as of June 1958, when its new lower—and discriminatory—prices went into effect, respondent met its burden under Section 2(b) of the Clayton Act, as amended, that it acted in good faith to meet an equally lower price of its competitor.

The issue arises as to whether respondent was equally justified in perpetuating these discriminatory prices for an indefinite period since the record establishes that these discounts were still in effect a year and a half later when hearings in this action were commenced.

Fairmont's competitive offer on its face was clearly not a "one shot" affair. Fairmont sought total and permanent exclusion of respondent from Miller's. Fairmont's lower price was expressly conditioned on Miller's according Fairmont exclusive status as its milk supplier.

The record contains no indication that anything occurred after the Fairmont offer to warrant respondent to reconsider whether its discount was still necessary in order to maintain Miller's business. A year after the discounts were granted, a price war broke out in the Denver area but lasted only two months, after which milk

prices reverted to their former pre-price war levels. The record does not indicate that this price war brought about such a restructuring of the competitive situation in the Denver area that respondent was no longer entitled to continue its lower and avowedly discriminatory price to Miller's. If, after this price war, milk prices had readjusted themselves downward, or if some other change in the competitive situation in Denver had occurred, either as a result of the price war or of some other event, respondent clearly would have been under a duty to inquire or otherwise test out whether the Fairmont offer was still a competitive reality. We hold only that on the facts adduced on this record, nothing that we know of occurred which might or should have put respondent on notice that the Fairmont offer might no longer justify it in continuing its discriminatory price to Miller's. In an ordinary situation, respondent's inaction in not at least testing out by some means whether its lower price was still necessary, might, by the sheer passage of time, vitiate or cancel out the original justification for its good faith meeting of competition defense. However, on the facts of this case, respondent was meeting a lower price offered by Fairmont on condition that it be made the exclusive supplier of Miller's, and we find nothing in the record to suggest that the offer was not a continuing one or had become impractical or was withdrawn. Therefore, we would not be warranted in concluding that, as of the date when these hearings commenced, respondent was no longer justified in continuing its discounts to Miller's in order to maintain its exclusive position as supplier of Miller's milk requirements. We express no opinion, however, as to the validity of continuing these discounts beyond that date.

With respect to respondent's alleged discriminatory discounts on its sales of ice cream, the record establishes that respondent's discounts to Miller's on the sale of both private label and Meadow Gold brand ice cream products were instituted in the summer of 1958. While the precise amount of these discounts is not definitely established by the record, the hearing examiner found, and we agree, that such discounts were higher than those being offered by respondent to Miller's competitors. He also found that they were instituted by respondent in good faith in order to meet a competitive offer by Swift & Company to all of Miller's stores. We believe that the evidence is sufficient to support the examiner's conclusion that the discounts in ice cream offered by respondent to Miller's were made in a good faith effort to meet competition and therefore permissible under the provisions of Section 2(b) of the Clayton Act.

The complaint in this proceeding also charged that respondent had violated Section 2(d) of the Clayton Act by granting discriminatory payments to certain of its customers for advertising and other services without making such compensation available on proportionally equal terms to all of its other customers competing with the customers so favored. Respondent offered no testimony during the hearing on the 2(d) charge and claimed, both in its brief to the hearing examiner and in its appeal to the Commission, that complaint counsel abandoned any 2(d) case that it might have had prior to the commencement of defense hearings, and that respondent's failure to offer evidence on this charge had been in reliance on such abandonment. The hearing examiner disposed of this facet of the case in a footnote, concluding that complaint counsel had waived the 2(d) allegation, and furthermore, that there was no probative evidence to support it.

The facts with respect to complaint counsel's alleged abandonment of the 2(d) count, so far as we can understand them from the record, are as follows. Pursuant to the request of the hearing examiner, complaint counsel at the conclusion of his case filed an "allocation of evidence" encompassing his evidence on both the 2(a) and the 2(d) charge. This was filed in June 1962. At a hearing one year later, the hearing examiner expressed himself as dissatisfied with this allocation of evidence on the issue of competitive injury and requested counsel to file a supplementary allocation, which was duly filed in September 1963. In October 1963, one month later, at the outset of the defense hearings, the hearing examiner sought to ascertain the dimensions of the defense. In this connection, the examiner asked complaint counsel whether he was correct in assuming that the Commission's "position" and "the evidence upon which [it] is relying" was reflected in its memorandum of September 4, 1963. Complaint counsel replied unequivocally that this had been his intention and that the allocation of evidence which he had filed in September 1963 constituted "his case." If the colloquy between the hearing examiner and counsel for the parties had ended there, we would agree that respondent could reasonably have believed that complaint counsel had abandoned his 2(d) case (Tr. 2095-2100). However, respondent's counsel at the same hearing, in the course of further colloquy with the hearing examiner as to the amount of time he estimated he would need in order to put in his defense, expressly referred to the 2(d) charge as still being in the case. In a discussion concerning future hearing dates, respondent's counsel referred to various "loose ends" of the case which must be met, and stated:

By loose ends I mean this, Your Honor. There are—there is 2(d) in this case. There is some ice cream in this case. We just cannot develop everything at once (Tr. 2124).

Commission counsel's assertions were certainly not as expansive and informative as we believe they should have been in the light of the considerable time which had elapsed since they had put in their case and what appears to us to have been the clear intent of the examiner to specify the dimensions of complaint counsel's entire case. Nevertheless, it is quite clear from the quoted statement of respondent's counsel that he was not misled by the colloquy between the examiner and complaint counsel. We hold, therefore, that the record does not contain a reasonable basis for concluding that the 2(d) charge should be dismissed on the ground that it had been abandoned by complaint counsel.

Nevertheless, the problem remains of how we should dispose of this matter in the face of respondent's failure to introduce any evidence in defense of the 2(d) allegation. We have two courses of action open to us: to remand so as to afford respondent an opportunity to put in its evidence, or to dispose of this charge on the record as it now stands.

We, of course, have no way of knowing what type of evidence, if any, respondent might offer should we remand this matter to the hearing examiner in order to afford respondent an opportunity to put in its defense on this point. The allegedly discriminatory allowances date back to 1959. Any evidence which respondent would have to adduce would in all probability not be found in written records but in the memories of witnesses which may have faded by now.

We are not convinced that any useful purpose would be served nor even that due process could be achieved by remanding this case now to a hearing examiner six years after the facts to hear additional evidence. Accordingly, we believe that it is imperative that the case be disposed of on the present record.

Complaint counsel urges that we reverse the hearing examiner and hold that respondent violated Section 2(d) by having failed to offer and make available any advertising allowances to all of its 1200 wholesale customers.

Complaint counsel's claims respecting its 2(d) charge rests principally on the uncontroverted testimony of Louis Anjier, respondent's Denver milk plant manager. The documentary evidence establishes that respondent paid advertising allowances to seven out of its 1200 wholesale customers in the Denver area. Mr. Anjier

testified that respondent had not affirmatively notified its wholesale customers of the availability of such allowances but that its customers were generally aware of the availability of advertising allowances and that its salesmen were instructed to accept all claims for advertising allowances made by its customers. The seven customers who asked for and received advertising allowances consisted of both large chain buyers and small corner retailers. Mr. Anjier considered these allowances to be "uniform" and to consist of payments "based on the lineage used in the ad that they run as a cooperative ad" (Tr. 347). He asserted that such allowances are made available to all of respondent's wholesale customers without any limitations (Tr. 347-8).

When asked if all of the accounts were advised as to the advertising allowances, Mr. Anjier replied:

We don't put out a published notice for the simple reason that there's so many of them, a lot of them are institutions and hospitals and that type of thing that aren't interested in advertising, but any grocery store that wants to run an ad, I am sure that they are aware of the fact that we will grant them or pay them for any space that they want to use to advertise their product (Tr. 370).

Furthermore, the witness stated that accounts are advised of advertising allowances by supervisors and salesmen in the street. These individuals are instructed to accept claims for advertising allowances. However, when asked if they are instructed to initiate offers of such allowances, Mr. Anjier replied:

Well, generally we feel that the customers know it. We don't ballyhoo it every day, but we work with them on this type of thing (Tr. 372).

Complaint counsel, in the course of his examination of two of respondent's customers in Denver, asked if they were aware of the availability of advertising allowances from Beatrice. Both of the witnesses stated that they were unaware of such an allowance (Tr. 1476 and 1485), but one indicated that his brother who actually owned the store might have known of it, but not told the witness (Tr. 1476). However, nothing further was developed on this aspect of the case.

Complaint counsel offered into evidence checks and vouchers, subpoenaed from respondent's files, purportedly representing all of the cooperative advertising allowances paid to respondent's Denver customers during 1959 (Tr. 1542; CX 117-125). An examination of these exhibits demonstrates that payments were made to only six or seven² different customers, which included two large

² CX 125, although identified as a payment for advertising allowances to Radio Pharmacy, states on its face that it is payment for "Reserve for ice cream adjustment." The sum of \$400 is also out of line with the other payments.

supermarkets (Miller's and Associated Grocers), as well as restaurants and drug stores. The amounts ranged from \$10 to approximately \$300 and involved payments for newspaper and radio advertising, handbills and "fountain promotion." The total amount of advertising allowances paid by respondent in the Denver area in 1959 amounted to slightly more than \$500, if the Radio Pharmacy payment is excluded, broken down as follows:

Miller's Supermarkets	\$ 91.56
Associated Grocers	
Newspaper advertising	113.00
Radio advertising, June	99.00
Radio advertising, July	80.00
C. E. Buzz Super Market	10.00
Beefeater Restaurant	50.00
Otto Drug Co.	25.00
Beefburger Express	50.00

The hearing examiner concluded that this evidence failed to establish complaint counsel's *prima facie* case of violation. We are not so convinced that the evidence is as clearcut as the examiner found it to be on this issue.

It is quite clear that respondent would be violating Section 2(d) if it grants advertising allowances to only a few of its customers and makes no effort affirmatively to make it known to competing customers that it has such a policy of offering such allowances where requested.

In view of the current state of the record on this point, the length of time which has elapsed since the occurrence of these allegedly discriminatory advertising allowances, and the circumstances surrounding respondent's failure to offer any rebuttal evidence, we are not convinced that the public interest would be served by entering any order on the merits either in favor of or against respondent on this Section 2(d) charge. We conclude that equity decrees we dismiss the complaint on this charge as well, without making any determination on this record on the merits as to whether or not respondent violated Section 2(d).

However, we are unable to determine from this record whether the practices which were the subject to the 2(d) allegation are presently being continued by respondent. Consequently, we are instituting an investigation to determine whether a new complaint dealing with respondent's current practices is required by the public interest.

Accordingly, the complaint against respondent is dismissed.

Commissioner Dixon dissented and has filed a dissenting opinion.

Commissioner MacIntyre did not participate.

Dissenting Opinion

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DISSENTING OPINION

JULY 29, 1965

BY DIXON, *Commissioner*:

I disagree with the majority's determination that the complaint in this matter should be dismissed.

The majority would uphold the examiner's conclusion that respondent had sustained its burden under Section 2(b) by establishing that its discriminatory discounts in the sale of fluid milk and ice cream to Miller's Supermarkets were made in a good faith effort to meet offers to Miller's by competitors, Fairmont Foods in the case of fluid milk and Swift and Company in the case of ice cream.

In the first place, I do not share the majority's conviction that at the time respondent's discriminatory discounts in the sale of fluid milk were instituted in June, 1958, they were granted to meet the Fairmont offer. I feel constrained to point out that the evidence on this point is just half as strong as the majority suggests. Specifically, I refer to statements in the decision that respondent's officials testified that they were informed by the Miller's representative that if the Fairmont offer was accepted, they would no longer be serving the Miller account. Of the two officials who testified, one expressly stated that there was no inference by the Miller's representative that respondent would either lose the business or any of its volume of business if it didn't meet the Fairmont offer.

Regardless, however, of the situation which existed at the time the Miller's discounts went into effect, the evidence, in my view, falls far short of the burden imposed upon respondent to establish the meeting competition defense. I cannot agree, as the majority seems to hold, that this burden is met simply by a showing that a lower price was instituted to meet a competitor's low price offered at some time in the past.

The prima facie case to which respondent's defense is directed establishes that the 10 percent and 12 percent discriminatory discounts to Miller's extended through 1959 and, in fact, were still in effect at the time respondent's Denver plant manager testified in March 1960. In concluding that respondent was justified in continuing these discounts for that period of time, the majority relies to a great extent on the terms of the Fairmont offer. In fact, the discussion on this issue is prefaced by the statement that the Fairmont offer was not a "one shot" affair but was *expressly conditioned* on Miller's according Fairmont exclusive status as its milk supplier. The only support I can find for this statement is

the sentence in the Fairmont letter of May 1, 1958, that "On the basis of this proposal *we suggest* that $\frac{1}{2}$ your Dairy space be given the Fairmont Label and the other $\frac{1}{2}$ of the space to your private label." (Emphasis added.) Even if this statement can be construed as demanding exclusive status, neither from it nor from any other statement in this letter can it be inferred that Fairmont intended its offer to be a continuing one.

Basically, the majority would approve the continuation of these discounts a year and a half after they were initiated on the grounds that there is nothing in the record to show that they were no longer needed at that time. In my opinion, this holding is wrong both in law and in fact.

As I understand Section 2(b), the burden is upon respondent to establish that it was acting in good faith to meet a competitor's price at any time that a prima facie case of price discrimination has been established. In other words, if the facts establish a price discrimination at a particular time, respondent must prove that *at that time* it was granting its lower price in a good faith effort to meet competition. A respondent cannot continue to grant a discriminatory price without taking any steps to verify the continuance of an equally low price offer of a competitor. To approve such a practice is to write the good faith requirement completely out of the statute. Contrary to the majority's holding, the absence of such verification is a failure of proof on the part of respondent, not grounds for ruling that the Section 2(b) defense has been met.

Turning to the facts, the record discloses that respondent's Denver plant supplied fluid milk to 25 Miller's stores in Denver; that its Colorado Springs' plant supplied four Miller's stores in that city, and that its plant in Greeley, Colorado, supplied one Miller's store in that city and two in Cheyenne, Wyoming. Respondent was the largest seller of fluid milk in Denver and Miller's was its largest customer. Miller's handled respondent's milk exclusively in half gallon containers, it received the highest discounts granted by respondent, its purchases from respondent amounted to about \$20,000 per week and complaint counsel established that for the four-week period from April 26, 1959, through May 23, 1959, Miller's received rebates in the amount of about \$10,000 on its fluid milk purchases from respondent. Respondent's meeting competition defense must be measured against this factual background.

On the same date that Fairmont made its offer to Miller's, it made identically the same offer to four other retail stores in Denver. Three of these stores were customers of respondent and, after Miller's, they were the three largest supermarket chains in Denver.

Dissenting Opinion

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Respondent's sale of fluid milk to one of these, King Sooper, averaged about \$7,000 per week. The highest discount granted by respondent to any of these stores was 7 percent.

Respondent was fully aware of the Fairmont offer of a 14½ percent discount to these three large customers yet did not increase its discount to any of them. It continued to serve all three stores and the testimony of the Fairmont manager establishes that Fairmont gained no business from any of them as a result of its offer. This fact alone is sufficient to place respondent under a duty to test out whether the Fairmont offer to Miller's was still a competitive reality. And respondent's failure to make this test by discontinuing its 10 percent and 12 percent discounts to Miller's when the price war began in 1959, particularly since its net price did not then produce a reasonable profit, evidences a complete lack of good faith in the granting of discriminatory prices.

I note the majority's reference to the fact that the two months price war in Denver did not bring about a restructuring of the competitive situation in that market. While I do not consider such restructuring to be necessary to cause respondent to reconsider its discriminatory discount, it is important to note that Denver is not the only area with Miller's stores in which a price war broke out. On June 26, 1959, a price war began in Colorado Springs—and still was being carried on in March 1960. Respondent's wholesale list price on half gallons of milk dropped from 43 cents to 39 cents, and at one time during this period was as low as 32 cents. Throughout this entire period of unstable market conditions, respondent steadfastly maintained its discriminatory discounts on its volume of sales to the four Miller's stores in Colorado Springs, and defends its action on the grounds that it was still meeting the Fairmont offer.

This record clearly establishes that there is no great burden on respondent to change its discount if it deems such change necessary to *lower* its price. I cannot see how this burden would be any greater if the change involved a price *increase*. Clearly, respondent is under an obligation to return to a nondiscriminatory price when the need for a lower price no longer exists. And that obligation is particularly great when a discriminatory discount favors a large volume buyer in a keenly competitive market. Respondent, of course, could maintain its discounts to Miller's as long as it had reasonable grounds to believe they were necessary. But where, as here, the discounts were shown to extend for over a year and a half, including a period in which wholesale prices were reduced

in a price war, an offer such as that by Fairmont does not alone afford sufficient grounds for that belief.

To uphold the Section 2(b) defense without a showing of the continued existence of the competitive threat which prompted the lower price is equivalent to granting an irrevocable license to violate Section 2(a). Issuance of the license would depend only upon the fortuitous circumstances that the lower price was granted at some time in the past when a competitor extended a low price to the customer. In my view of the record, that is exactly the situation we have here. At best, the evidence shows that respondent seized upon the Fairmont offer to grant its highest discounts to its largest customer in the market and thereafter maintained those discounts without regard to the behavior of its competitors.

Respondent has failed to establish on this record that its lower fluid milk prices to Miller's throughout the period covered in the prima facie case were made in a good faith effort to meet competition. I would reject the Section 2(b) defense.

With regard to ice cream, respondent granted Miller's a discriminatory discount allegedly based on a competitive offer made by Swift and Company in July 1958. The evidence regarding this assertion is so meager that I do not believe the issue can be accurately determined.

As to the remaining issue before us, the facts as discussed by the majority establish a violation of Section 2(d) of the Clayton Act. Moreover, as the majority also points out, respondent was well aware of the existence of this issue throughout the proceeding. The fact that, with this knowledge, it elected not to offer any evidence in defense should not be a bar to the entrance of an order to cease and desist.

ORDER DISMISSING COMPLAINT

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision, and upon the briefs and oral argument in support thereof and in opposition thereto, and the Commission having determined for the reasons stated in the accompanying opinion that the findings contained in the initial decision should be adopted by the Commission in part only, and that the complaint should be dismissed:

It is ordered, That the initial decision be, and it hereby is, adopted as the decision of the Commission to the extent consistent with the accompanying opinion.

Complaint

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It is further ordered, That the complaint be, and it hereby is, dismissed.

Commissioner Dixon dissenting, and Commissioner MacIntyre not participating.
