OPINION OF THE COMMISSION

This matter is before the Commission upon the hearing examiner's order certifying to the Commission respondents' motion for answers to interrogatories, filed June 10, 1965; the respondents' appeal, filed June 16, 1965, from the hearing examiner's order denying deposition subpoenas; the hearing examiner's order certifying to the Commission respondents' application for issuance of subpoenas duces tecum, filed June 21, 1965; and the hearing examiner's order certifying to the Commission respondents' motion to dismiss the complaint or suspend the proceeding, filed June 16, 1965.

The complaint in this proceeding issued July 12, 1960, and the case is therefore governed by the Rules of Practice in effect prior to July 21, 1961, as far as the conduct of evidentiary hearings in this proceeding are concerned. See *Union Bag-Camp Paper Corporation*, Docket No. 7946, Order Ruling on Certified Question (September 23, 1964) [66 F.T.C. 1542]. At this time the case is in suspense, the proceedings before the hearing examiner having been stayed until further order of the Commission.

I

On March 22, 1965, respondents filed a motion for the issuance of subpoenas and for answers to interrogatories. We turn first to respondents' request that appropriate Commission employees be required to answer the interrogatories propounded and to produce the documents requested therein for inspection and copying. Collectively, the interrogatories are a broad and far-ranging request for information, including in some instances a demand for all documents of whatsoever a nature for the years 1945 to date, pertaining to various topics. The examiner's order of June 10, 1965, certifying this question, sets forth these requests in detail and it is sufficient at this point to outline their general scope.[1]

Respondents demand documents pertaining to the organization and interrelationship of Associated Merchandise Corporation (AMC), Aimcee Wholesale Corporation (AWC), and the Associated Merchandising Corporation stores, as well as such records reflecting control exerted by the AMC stores over AWC and AMC. The interrogatories also include a demand for documents reflecting information on the price charged to AMC stores and respondents' knowledge of and control or influence over such transactions. In addition, the interrogatories require documents reflecting extremely detailed information with respect to the operation and competitive position of respondents' competitors and alleged favored and nonfavored cus-

[1] Only the Commission may release information from its confidential files and requests for such data must be certified by the examiner. *Postal Life and Casualty Insurance Company*, 52 F.T.C. 651 (1956).

tomers, as well as on the transactions on which the Commission relies to establish competitive injury prerequisite to a finding of violation under Section 2(a) of the Robinson-Patman Act.

The interrogatories go further. They demand extensive information about the Commission's investigational sources and operations and go so far as to apparently probe the Commission's mental processes leading up to the institution of this proceeding.

For example, item 2 of the interrogatories would require the Commission to:

> Identify by name, address and company affiliation, each person who furnished or transmitted any of the documents in item 1 (a) through 1 (s) above; list the specific documents submitted by each; and state the date and when and the person to whom said documents were furnished or transmitted.

Item 12 of the interrogatories demands that the Commission:

> (a) Identify by name, address and company affiliation, each person interviewed or contacted by an attorney, agent, and/or representative of the commission with respect to any subject hereinabove referred to or with respect to the Graber Manufacturing Company, Inc., or The Graber Company.
>
> (b) Set forth the names of the attorneys, agents or representatives of the commissions who interviewed or contacted each of the persons listed in response to 12 (a) above and state the date of each such occurrence.
>
> (c) State the name of each person listed in 12 (a) above who submitted a written statement to any attorney, agent or representative of the commission.
>
> (d) Submit the original or true copy of the statement given by each of the persons listed in response to 12 (a) above or furnish a true copy of the written report made of any oral statement by any of said persons.

Items 1 (i) and 1 (j) would require the production of all documents evidencing:

> The commission's knowledge, approval, disapproval, inaction and/or acquiescence with respect to the activities, operations, or policies of AWC, AMC and/or the AMC stores.
>
> The commission's knowledge, approval, disapproval, inaction and/or acquiescence with respect to respondents' policies, practices and method of doing business with AWC, AMC and/or the AMC stores.

It is also significant that certain items apparently duplicate information already furnished to the respondents or request information to which they are already entitled as a result of the examiner's prehearing order filed December 11, 1964.[2]

The hearing examiner, as a result of an evidently careful consideration of respondents' request for interrogatories, recommends the motion be denied. The examiner properly recognizes that a crucial consideration in deciding this request is the fact that the

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[2] See item 13 of respondents' interrogatories, requiring identification of each witness intended to be called to support the allegations of the complaint and a brief description of the subject of his intended testimony. Disclosure of this nature is already required by the hearing examiner's prehearing conference order filed December 11, 1964.

evidentiary hearings in this proceeding are governed by the rules in effect prior to July 21, 1961, and that this case is being tried at intervals under the old procedures. As a result, there is a lesser need to afford respondents pretrial discovery than under the current procedures. See *L. G. Balfour Co.*, Docket No. 8435, Order Directing Disclosure of Documents (May 10, 1963) [62 F.T.C. 1541].[3]

The examiner's recommendation took cognizance of respondents' contention that their discovery requests in the form of interrogatories are essential (1) to effectively implement respondents' right to a fair hearing, (2) to enable respondents to prepare adequately to cross-examine the Commission's witnesses, and (3) to obtain evidence to support respondents' meeting of competition defense.

The examiner states that he is not now in a position to determine what information is essential to a fair cross-examination, citing *Joseph A. Kaplan & Sons, Inc.*, Docket No. 7813, 57 F.T.C. 1537 (1960), *modified*, 347 F. 2d 785 (D.C. Cir. 1965). He further states that as far as respondents' need for the information outlined in the interrogatories for preparation of their affirmative defense is concerned, such necessity cannot be fully determined at this stage of the proceeding. We agree with the examiner that the necessity of additional data for the purposes of cross-examination over and above that already required by the prehearing order may appropriately be determined at the time the witnesses testify. As to the scope of the information required by respondents to prepare their defenses, since this case is being tried under the old procedures we feel that we should heed the advice of the examiner, who is closer to the situation than we—that such determination should await the close of the Government's case-in-chief.

The examiner, in making his recommendation to the Commission, also took into consideration the fact, and properly so, that much of the information sought was probably obtained from respondents' competitors and customers, that such data is sensitive and should be protected insofar as such protection is consistent with the public interest. See *Kaplan*, *supra*, 57 F.T.C. at 1538. The examiner made it evident that if the hearings in the course of the trial demonstrate that such information is necessary and proper for the resolution of

[3] As respondents themselves recognized in their motion filed November 13, 1961:

"Ordinarily, the procedures observed in Commission practice [under the old rules] facilitate respondents' advance preparation for cross-examination and defense presentation. The former is obtained through liberal adjournments coupled with a willingness to recall witnesses for cross-examination after counsel has had time to prepare therefor; the latter by providing an hiatus between the close of the case-in-chief and the defense.

"In effect such procedures function as respondents' depositions, discovery and inspection during the hearings themselves.

"That should be the case here. The complaint having issued prior to the effective date of the new Rules of Practice the former rules govern * * *."

the issues before him, then he will weigh the interest of the third parties in keeping their business records confidential against countervailing considerations. At the present time we agree there has been no showing of necessity for the respondents to have such extensive access to the business secrets of their competitors and customers as they now seek.

It is significant, as the examiner points out, that the nature, outline and substance of the evidence upon which the Government intends to rely will be fully disclosed to the respondents prior to the hearings as a result of the prehearing order. We have reviewed that order and we are confident that it gives respondents ample opportunity to prepare themselves for the trial of this case. Under the circumstances, there is no danger that respondents will be taken by surprise by complaint counsel's evidence or that they will be unable to prepare their evidence at the close of the Commission's case-in-chief.

Furthermore, certain of respondents' interrogatories on their face appear to go beyond what is either required for the preparation of cross-examination or to prepare for their defense. For example, items 2 and 12 (a) would apparently require the Commission to identify each informant contacted in the course of the investigation. The public interest requires that such information be kept confidential. In this connection the courts have held:

> * * * The doctrine of privilege is based upon the principle that the confidential relationship between the Government and those who impart information to the Government regarding law violations should be safeguarded in order that such information will be freely given and will continue to be given in the future. * * * *United States* v. *Deere & Co.*, 9 F.R.D. 523, 527 (D. Minn. 1949).[4]

Certain of the data required in respondents' request for interrogatories (for example, item 12 (d)), constitutes a demand for the work product of Commission attorneys preparing this case for litigation. Respondents have made no showing that the dictates of fairness require that the work product of the Commission's attorneys be laid bare. Documents coming within that category will not be released without a strong showing of special circumstances, good cause or necessity. The mere hope that such documents might prove useful does not constitute such a showing. *Carpenter-Trant Drilling Company* v. *Magnolia Petroleum Corp.*, 23 F.R.D. 257 (D. Neb. 1959); *Hickman* v. *Taylor*, 329 U.S. 495, 509 (1947); *Transmirra Products Corp.* v. *Monsanto Chemical Co.*, 26 F.R.D. 572, 578

[4] Similarly, the courts have ruled: "* * * the public interest demands that the trust and confidence of those who have supplied information to Government investigators be protected * * *." *United States* v. *Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 463 (E.D. Mich. 1954).

(S.D.N.Y. 1960); *Walsh* v. *Reynolds Metal Co.*, 15 F.R.D. 376 (D.N.J. 1954). More recently we held that documents in the work product category "are the essence of the internal administrative process, and they are ordinarily privileged against disclosure in an adjudicative proceeding." *R. H. Macy & Co., Inc.*, Docket No. 8650, Order Ruling on Questions Certified and Denying Motion To Strike Certification (September 30, 1965) [pp. 1179, 1195 herein].

Items 1 (i) and (j) are an obvious attempt to intrude upon the Commission's mental processes leading up to this proceeding. This is not a proper subject for inquiry in the course of a discovery proceeding. As in the case of judicial proceedings, preservation of the integrity of the administrative process precludes such inquiry. *Walled Lake Door Company* v. *United States*, 31 F.R.D. 258, 260 (E.D. Mich. S.D. 1962). In the case of these items, it is not clear what useful defensive purposes they would serve either in the preparation for cross-examination or in the preparation of respondents' defenses. At best, one may infer therefrom that respondents seek information that the Commission failed to proceed against other suppliers involved in practices similar to those which are the subject of this proceeding. This request should be denied. Mere suspicion is not a license for extended fishing expeditions in the files of an administrative agency. *Coro, Inc.* v. *Federal Trade Commission*, 338 F. 2d 149, 153 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965). See also *R. H. Macy & Co., Inc.*, Docket No. 8650, *supra*.

In summary, at this point we are satisfied that the examiner, through his prehearing order, safeguarded respondents' right to obtain adequate notice of complaint counsel's case-in-chief and thus assured them of a fair trial. The determination that respondents' interrogatories are premature is precisely the sort of question which the hearing examiner is best qualified to resolve and the Commission, on review of the examiner's recommendation, is persuaded that respondents' request for interrogatories should be denied.

II

The Commission also has before it respondents' appeal, filed June 16, 1965, from the hearing examiner's order of June 9, 1965, denying issuance of deposition subpoenas.

As in the case of the request for interrogatories, respondents assert the relief sought by their motion for deposition subpoenas is essential (1) to effectively implement their right to a fair hearing, (2) to enable them to prepare adequately for cross-examination of Commission witnesses, and (3) to obtain evidence to support respondents' meeting of competition defense.

Respondents state the purpose of the subpoenas is designed to elicit the following information:

1. *Attachment 1A and 1B* are directed to respondents' twelve major competitors to:

a) determine the potentiality, actuality, extent of or absence of competitive injury at the primary level of competition resulting from respondents' alleged price discrimination;

b) determine the prices offered or charged by said competitors, which respondents allege in their affirmative defense they sought to meet in good faith.

2. *Attachments 2A and 2B* are directed to the allegedly "favored" purchasers, to determine the actual, structural and operational relationships between Associated Merchandising Corporation (AMC), Aimcee Wholesale Corporation (AWC), and the AMC stores.

3. *Attachments 3A and 3B* are requested to be issued to allegedly "non-favored" purchasers of respondents' merchandise, to appraise alleged injury to secondary line competition.

Relying on Sections 6 and 12 of the Administrative Procedure Act, respondents assert, as they do in connection with their motion for interrogatories, that under the provisions of this statute they are entitled to all privileges relating to evidence or procedures applicable to the Federal Trade Commission and that this includes the Commission's investigatory procedures. Respondents argue in effect there is no demarcation between the Commission's investigatory and discovery procedures.

We do not agree. The Administrative Procedure Act itself distinguishes between investigational and adjudicative procedures. In this connection, see also *Union Bag-Camp Paper Corp.* v. *Federal Trade Commission,* 233 F. Supp. 660 (S.D.N.Y. 1964), denying respondents' assertion in that proceeding that they were entitled to Section 6(b) reports as a matter of right. The court in that case held that for plaintiff to prevail it had to demonstrate that it "was denied the right to present its evidence and summon the witnesses of its choice." The Commission's Rules of Practice are designed to ensure that right to respondents and to guarantee that they and Commission counsel in an adjudicative proceeding will have the same opportunity to adduce evidence. In fact, the Commission has already ruled in a previous case in connection with a similar argument invoking Section 12 of the Administrative Procedure Act that:

> In compliance with the quoted portion of the Administrative Procedure Act, both respondent and counsel supporting the complaint are afforded identical treatment during the course of hearings before the hearing examiner and this Commission. Both have equal subpoena rights to procure the attendance of witnesses or the production of documents. The proper exercise of the subpoena power is left to the sound discretion of the hearing examiner who has "* * * the duty to conduct fair and impartial hearings * * *." *Joseph Kaplan & Sons, Inc., supra,* 57 F.T.C. at 1538.

To equate respondents' right to adduce evidence in an adjudicative proceeding with the Commission's general investigatory powers would necessarily strip the examiner and the Commission of all power, as a practical matter, to direct the course of the proceedings before them by precluding them from requiring that the resort to compulsory process in an adjudicative proceeding be justified by relevance to the issues tried or a showing of necessity or good cause. The contention of respondents on this point must therefore be rejected.

The examiner advised further that in his view it is reasonable to anticipate that much of the evidence sought by respondents by way of these subpoenas will be presented by Government counsel and that respondents will not only have the full right of cross-examination but also an opportunity to rebut it once the Government rests its case. In this connection, the examiner stated the defensive material required by respondents depends on the scope and nature of the proof presented in support of the complaint. He concludes that although it is possible to anticipate to a certain degree the proof which Government counsel will adduce, the details remain conjectural. With respect to the issues of cross-examination, the examiner advises at this time he is not able to determine what information is essential to a fair cross-examination and that this issue can be best resolved at the time the witnesses testify. As the examiner states, the prehearing order he entered does provide the degree of discovery specifically contemplated by the current rules, namely, § 3.8 (a) (6), providing for notice of the witnesses to be called and the documentary evidence to be offered.

In short, the examiner denied respondents' motion for deposition subpoenas as premature. The denial, however, was without prejudice to respondents' right to renew the motion at the close of the Government's case-in-chief. Clearly, respondents have not been prejudiced by this ruling.

Respondents' request for deposition subpoenas also represents an attempt to make a far-ranging investigation into the competitive position of respondents' customers and competitors, covering a number of sensitive topics. Under the circumstances, since this case is being tried under the old rules, the examiner will be in a better position to accommodate the interests of all the parties concerned, including the third party witnesses, at the close of the case-in-chief of counsel in support of the complaint. Significantly, the request for deposition subpoenas has also been made largely academic by the hearing examiner's order certifying to the Commission respondents' application for issuance of subpoenas duces tecum, filed June 21, 1965, which will be considered next. Accordingly, respondents' appeal

from the hearing examiner's order denying issuance of deposition subpoenas, filed June 9, 1965, will be denied.

III

On June 16, 1965, respondents filed an application with the hearing examiner for the issuance of subpoenas duces tecum, directed to witnesses who were to testify in support of the complaint at hearings scheduled to commence on June 23, 1965. This list of witnesses was received by respondents from complaint counsel pursuant to the examiner's prehearing order.

The examiner, in his order of June 21, 1965, certifying the application to the Commission, recommended that the application for subpoenas be granted in part and denied in part. He certified this question since the proceedings had been stayed by Commission order of June 18, 1965, and the application raised issues related to other questions also before the Commission at this time.

Respondents state in their application that the documents sought through the subpoenas are clearly relevant since they relate soley to determining the effect upon secondary line competition of the practices under consideration and that this is the purpose for which the witnesses are being called upon to testify.

The examiner recommends the issuance of subpoenas duces tecum requiring production of the following:

1. The originals or true copies of all books, records, and other documents, or in the alternative, tabulations or summaries thereof, for the years 1958 through 1964 which reflect or relate to the annual dollar volume of purchases of drapery hardware from all manufacturers and distributors, other than Graber Manufacturing Company, Inc. or The Graber Company.

2. The originals or true copies of all books, records, and other documents, or in the alternative tabulations or summaries thereof, which reflect or relate to the description, retail selling prices and annual dollar volume of sales of Graber drapery hardware for the years 1958 through 1964.

3. The originals or true copies of records for the years 1958 through 1964 reflecting (a) the gross margin of profit on the sale of Graber drapery hardware, and (b) the gross margin of profit on the sale of drapery hardware of other manufacturers.

4. The originals or true copies of records for the years 1958 through 1964 reflecting (a) the margin of percentage of net profit from the sale of Graber drapery hardware, and (b) the margin or percentage of net profit from the sale of drapery hardware of other manufacturers.

The examiner further recommends that the subpoenas be quali-

fied to provide that although the witnesses in question must produce the documents specified they need not be made available to respondents "pending further order of the examiner in the light of the direct examination of the witness." This seems to be a reasonable provision safeguarding the interests both of the witnesses under subpoena as well as those of respondents.

The examiner recommends that subpoenas not be issued requiring such witnesses to produce documents reflecting or relating to the cost and retail selling prices and annual dollar volume of sales of drapery hardware of manufacturers other than Graber for the years 1958 through 1964. The examiner further recommends that these witnesses be not required to disclose the gross margin of profit on the sale of merchandise other than drapery hardware in the drapery department, the gross margin of profit on the sale of all merchandise sold by the firm, as well as similar information with respect to net profits on Graber drapery hardware and other merchandise.

Respondents also requested that the subpoenas direct these witnesses to furnish documents showing an example or specimen of each advertisement or promotional material produced or disseminated in the period 1958 through 1964, to promote directly or indirectly the sale of drapery hardware or any other merchandise sold by the firm. This request, too, the examiner recommends be denied.

Respondents request that the subpoenas require such witnesses to furnish copies of all tax returns, federal and state, filed 1958 through 1964, pertinent to their business. The examiner recommends this request be denied.

Finally, respondents request that the subpoenas require these witnesses to submit all documents of whatever nature submitted by the company or its representatives to the Federal Trade Commission with respect to any subject referred to in respondents' specifications or relating to Graber. The examiner recommends denial of this request.

The question of the scope of subpoenas to be directed to third-party witnesses scheduled to appear in forthcoming hearings is more properly a matter for decision by the hearing examiner than the Commission once the other questions pending in this proceeding have been determined by the Commission and the case remanded to the examiner. The Commission therefore will not rule on this question certified by the examiner except to point out that his recommendations seem to constitute a reasonable accommodation of the interests of all the parties, including the third-party witnesses, and designed to expedite this hearing. As the examiner points out, as distinguished from his ruling on respondents' request for deposition subpoenas, filed on June 16, he is in this instance in a better position

to determine to what extent respondents require discovery to prepare for cross-examination since the request involves specified witnesses, the subject matter of whose testimony is generally known as a result of disclosure required by the prehearing order.

Because of the passage of time, the hearings will again have to be rescheduled. At that time the examiner will again be able to pass on respondents' request for subpoenas in the light of complaint counsel's objections that requiring third-party witnesses to produce such documents on short notice may create an undue burden on them. This type of problem is, of course, best resolved by the examiner who, if necessary, can discuss these problems with both sides, as well as the third-party witnesses in question. As we have previously held, the examiner in matters of discovery is granted broad discretion by the Commission's rules. *American Brake Shoe Company,* Docket No. 8622, Order Denying Appeal from Denial of Applications for Depositions and Subpoenas (September 1, 1965) [p. 1169 herein].

IV

Finally, we turn to the hearing examiner's order certifying to the Commission respondents' motion to dismiss the complaint or suspend the proceeding, filed on June 4, 1965. The examiner recommends that the motion be denied. Respondents' motion is similar to an earlier oral motion of August 4, 1964, denied by the Commission after certification by the examiner. Respondents claim reconsideration is warranted on the ground there have been three developments since denial of their first motion which significantly altered their position, namely:

1. The Commission, in Docket No. 8651, issued a complaint against AMC, AWC and the AMC stores involving the factors upon which liability is asserted against the respondents in this case.

2. The examiner has defined and limited the issues in this proceeding to respondents' transactions with AMC, AWC and the AMC stores.

3. The inequity of subjecting respondents' small family business to the debilitation of a big case has become more clearly defined.

Respondents assert that as a result of the limitation of the issues in this case the proceeding in Docket No. 8651 makes this proceeding unnecessary since an order in the *AMC* case necessarily would preclude Graber from further selling to these buyers on the same basis. This seems to be the point most seriously urged by respondents.

The motion will be denied. None of the developments cited by respondents would justify dismissal or suspension of the complaint at this time. An order limited to transactions with the AMC complex would not efficaciously preclude respondents from engaging in the

practices alleged illegal by the complaint with other large volume purchasers. At the present incomplete stage of the record, the Commission is not in a position to decide whether the order should be limited, as respondents apparently suggest. It might be noted at this point that the order on *Joseph Kaplan & Sons, Inc.*, 57 F.T.C. 1537, Docket No. 7813, *modified*, 347 F. 2d 785 (7th Cir. 1965), involving issues similar to those involved in this proceeding, has not been limited in the fashion advocated by respondents in this instance.

As to respondents' claim that it is inequitable to pursue this case further because of respondents' size, the short answer is that businesses, both large and small, are subject to the requirements of the Robinson-Patman Act. The inconveniences of enforcement proceedings under the statutes administered by the Commission are one of the burdens of Government.[5] And the Commission cannot in good conscience refrain from proceeding to enforce the law in a particular instance merely because of the size of the concern allegedly engaged in the practices which the Commission has reason to believe are illegal.

Commissioner Elman dissented and has filed a dissenting statement.

DISSENTING OPINION

BY ELMAN, *Commissioner:*

As a result of the examiner's recent effort to limit and define the matters at issue in the proceeding, it appears that all of the transactions upon which complaint counsel intend to rely in proving the violation of Section 2(a) of the Clayton Act alleged in the complaint are sales to Aimcee Wholesale Corporation, a wholly owned subsidiary of Associated Merchandising Corporation. The Commission on November 24, 1964, issued a complaint against Aimcee Wholesale Corporation, Associated Merchandising Corporation, and some fourteen affiliated department store companies, alleging violation of Section 2(f) of the Clayton Act by reason of their knowing inducement of preferential prices to AMC affiliated stores through the instrumentality of purchases by AWC (Docket No. 8651). The allegations of the complaint have been denied by all of the respondents, and the case is now being actively litigated. It is apparent that the AMC complaint in Docket No. 8651 will involve many of the same issues that would have to be litigated in this case—particularly various questions as to the current organization and functioning of AMC and AWC, which can best be determined in a proceeding in

[5] *Cf. Miles Laboratories, Inc.* v. *Federal Trade Commission*, 50 F. Supp. 434 (D.C. 1943).

which these entities are themselves active litigants. If the Commission should ultimately issue an order similar to the proposed order attached to the complaint in Docket No. 8651, this would effectively provide substantially all the relief being sought in this proceeding. On the other hand, if the Commission should ultimately dismiss the complaint in Docket No. 8651, a question would arise whether the public interest requires further proceedings against these respondents.

The complaint in this proceeding issued more than five years ago. Now that the AMC case is pending, I see no point in continuing with another 2(a) case against a small supplier, one among scores, if not hundreds, of AMC suppliers. It has been almost a year since the resumption of the hearings before the examiner, and the case has scarcely progressed beyond the examination of Graber's president. In relation to the AMC proceeding, *Graber* is no more than an unimportant and time-consuming sideshow.

ORDER RULING ON QUESTIONS CERTIFIED BY THE EXAMINER AND RESPONDENTS' APPEAL FROM HEARING EXAMINER'S RULING

This matter is before the Commission on the hearing examiner's order certifying respondents' motion for answers to interrogatories, filed June 10, 1965, the hearing examiner's order certifying respondents' motion to dismiss the complaint or suspend the proceeding, filed June 16, 1965, the hearing examiner's order certifying respondents' application for issuance of subpoenas duces tecum, filed June 21, 1965, respondents' appeal from the hearing examiner's order denying the issuance of deposition subpoenas, filed June 16, 1965, and complaint counsel's answer to respondents' appeal and motion for interrogatories and for production of documents, filed July 14, 1965. The Commission has determined that respondents' motion for interrogatories and production of documents and their appeal from the hearing examiner's order denying the issuance of deposition subpoenas should be denied. The Commission has further determined that respondents' motion for dismissal of the complaint or suspension of the proceeding should also be denied. In connection with respondents' application for issuance of subpoenas duces tecum, the Commission has determined that the examiner should rule thereon after this proceeding has been remanded to him. Accordingly,

It is ordered, That respondents' motion for answers to interrogatories and for the production of documents be, and it hereby is, denied.

It is further ordered, That respondents' appeal from the hearing examiner's order denying the issuance of deposition subpoenas be, and it hereby is, denied.

It is further denied, That respondents' motion to dismiss the complaint or suspend the proceeding be, and it hereby is, denied.

It is further ordered, That this case be, and it hereby is, remanded to the hearing examiner for further appropriate proceedings.

It is further ordered, That after the remand of this proceeding to him the examiner be, and he hereby is, directed to rule on respondents' application for the issuance of subpoenas duces tecum, which was filed June 16, 1965.

Commissioner Elman dissented and has filed a dissenting statement.

STANDARD MOTOR PRODUCTS, INC.*

Docket 5721. Report, Dec. 20, 1965

Report of the Federal Trade Commission on the issue of whether the respondent's annual volume discount program violates the cease and desist order of December 27, 1957, 54 F.T.C. 814.

REPORT OF THE FEDERAL TRADE COMMISSION UPON ITS INVESTIGATION OF ALLEGED VIOLATIONS OF ITS ORDER TO CEASE AND DESIST

The Proceedings

On February 1, 1963 [62 F.T.C. 1485], the Commission having reason to believe that Standard Motor Products, Inc., may have violated the provisions of the order to cease and desist issued herein on December 27, 1957 [54 F.T.C. 814], directed that an investigational hearing be conducted pursuant to § 1.34[1] and related rules of the Commission's Rules of Practice to ascertain the extent to which such violations may have occurred. A hearing examiner of the Commission was duly designated to preside at hearings to be conducted for that purpose. He was directed to certify the record to the Commission upon completion of the hearings, in lieu of rendering an initial decision.

Pursuant to and in accordance with the foregoing, hearings were held in New York, New York; Dallas, Texas; and Washington, D.C. On July 17, 1964, the Commission ordered that the hearings in this matter "shall not encompass the question of whether respondent has improperly and unlawfully classified certain purchasers or groups of purchasers as warehouse distributors." The remaining issue in this proceeding is, therefore, whether the respondent's use of its retroactive annual volume rebate program violates the Commission's order to cease and desist. On September 17, 1964, the hearing ex-

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* See *Federal Trade Commission* v. *Standard Motor Products, Inc.*, 371 F. 2d 613 (1967) (8 S.&D. 413). The Commission did not file for certiorari.

[1] 16 C.F.R. Chapter I, Subchapter A (1960). The rule is Section 1.35 of the Commission's current Rules of Practice.

aminer's "Certification of the Record of Compliance Hearings to the Commission" was recorded and filed in the office of the Secretary. The Commission having duly considered the record filed by the hearing examiner and the briefs subsequently submitted, and being now fully advised in the premises, makes this its report upon the investigation of the alleged violation of the order to cease and desist.

The Order

The order to cease and desist issued on December 27, 1957,[2] and was affirmed by the United States Court of Appeals for the Second Circuit on April 15, 1959.[3] On October 12, 1959, the Supreme Court of the United States denied an application for certiorari.[4] The order provides as follows:

IT IS ORDERED that respondent Standard Motor Products, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale, for replacement purposes, of automotive products and supplies in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Discriminating, directly or indirectly, in the price of such products and supplies of like grade and quality:

1. By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale and distribution of respondent's products.

Report on the Facts

PARAGRAPH 1. The respondent, Standard Motor Products, Inc., is a corporation, organized and existing under the laws of the State of New York, with its office and principal place of business located at 37-18 Northern Boulevard, Long Island City, New York (tr. 3). Respondent is now and has, since on or about the year 1919, been engaged in the manufacture, sale and distribution of automotive electrical and fuel system replacement parts, commonly referred to as the "after-market" (tr. 5-6; CX 16). Net sales have grown at an approximate rate of 10 percent per year and in 1962 were approximately $16.3 million (tr. 4-5). There has been no substantial change in the organization of the respondent, its ownership or in its sales and distribution policies since the Commission issued its order to cease and desist in 1957.

PAR. 2. In the proceeding from which our 1957 order evolved, it was found that respondent had granted retroactive volume rebates to certain of its customers since the enactment of the Robinson-Patman Amendment to the Clayton Act on June 19, 1936, and also

[2] 54 F.T.C. 814.
[3] 265 F.2d 674.
[4] 361 U.S. 826.

prior thereto.[5] The Commission's complaint which issued on December 20, 1949, charged that such rebates were illegal price discriminations in violation of Section 2(a) of the Robinson-Patman Act.[6] Respondent raised two defenses: lack of competitive injury and good faith meeting of competition. Both defenses were rejected by the Commission and the appellate court. Respondent did not attempt to justify its prices on the basis of a difference in cost of manufacture, sale or delivery.[7] In an attempt to comply with its cease-and-desist order, respondent modified its annual retroactive volume rebate plan in accordance with a cost study based on the year 1958 (RX 5). On March 8, 1962, the Commission rejected respondent's report of compliance (RX 13), and this investigation resulted. The sole issue of the investigation was whether respondent's annual volume rebate program violated the cease-and-desist order. Although respondent has raised two collateral matters, its primary defense is that its volume rebates are cost justified.

PAR. 3. Respondent's manufacturing plant and main warehouse are located at Long Island City, New York. Respondent maintains its own branch warehouse facilities in Chicago, Los Angeles and Seattle. In addition, it rents commercial warehouse space in Atlanta, Cleveland, Dallas, Detroit, Kansas City, Minneapolis and San Francisco (RX 7, pp. 16-17). Respondent's Canadian subsidiaries do not sell in the United States and, thus, are not involved in this proceeding.

PAR. 4. Respondent's products are divided into two general groupings, "Standard" and "Hygrade." The Standard line is composed of ignition parts and wires and battery cables. A premium brand of the Standard line of products is labeled "Blue Streak." The Hygrade line includes carburetor and speedometer parts. Although both groups are manufactured in the same factory and sold by the same sales force, they are ordered, shipped and invoiced separately, and have different rebate schedules. The products within each line, how-

[5] 54 F.T.C. 814, 816.

[6] Section 2(a), 15 U.S.C. 13(a), provides in pertinent part —

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. * * *"

[7] Section 2(a), 15 U.S.C. 13(a), further provides in pertinent part —

"* * * That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. * * *"

ever, are of like grade and quality. While most of respondent's customers handle both groups, it is not mandatory (RX 7, pp. 1-2).

PAR. 5. There is, and has been at all times mentioned herein, a continuous current of trade and commerce in automotive replacement parts for use, consumption or resale within the United States, manufactured by respondent, across State lines between respondent's manufacturing plant and its branch warehouses, and between its main warehouse located at its manufacturing plant and its direct buying purchasers, and between its branch warehouses and those customers who purchase from such warehouses. Indeed, respondent's sales force of approximately 100 sells in all 50 States (tr. 10-11).

Respondent will prepay freight only on Standard orders in excess of 149 pounds, Hygrade orders in excess of 99 pounds or combined orders in excess of 199 pounds which are shipped from its factory (tr. 88-89).

PAR. 6. Respondent, in the sale and distribution of its products, sells to three classes of customers: warehouse distributors, jobbers and redistributing wholesalers.[8] Warehouse distributors purchase from respondent and resell to jobbers.[9] Some jobbers purchase directly from respondent and, thereby, form the second classification. All jobbers resell to the dealer trade. Such trade is generally composed of independent repair shops, service stations and fleet operators. The third classification—the redistributing wholesaler[10]—resells to both jobbers and dealers, and thus performs the combined function of warehouse distributor and jobber.[11]

Respondent's annual volume rebate plan, the subject of this report, is not available to warehouse distributors. It is only available to jobbers purchasing directly from respondent and to that portion of the redistributing wholesaler's purchases that are resold to the dealer trade. During 1962, approximately one-third of respondent's total sales were to such customers (RX 7, p. 1).

Warehouse distributors and redistributing wholesalers receive a functional discount at the time of purchase for all products resold to jobbers. Since this discount is more than the highest volume rebate bracket (tr. 74-80, CX 6-7), there is no possibility of redistributing wholesalers deliberately misclassifying their sales in order to receive a rebate allowance.

PAR. 7. The record demonstrates that respondent's jobber and redistributing wholesaler customers are competitively engaged in the

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[8] See attached flow chart.

[9] Warehouse distributors are sometimes referred to in the record as "100% warehouse distributors." Jobbers are sometimes referred to as "wholesalers" or "distributors."

[10] Sometimes referred to in the record as a "partial warehouse distributor."

[11] In the automotive parts market, the jobber level of distribution is considered the "wholesale level." The "retail level" is composed of dealers.

resale of respondent's products (tr. 139, 160-61, 184, 198, 212, 226, 238).

PAR. 8. The amount of discounts and the number of brackets in respondent's annual volume rebate plans have varied. The rebate program which respondent sought to justify at the investigational hearing was initiated on October 1, 1961, but was retroactively applied to sales after April 1, 1961 (tr. 67). Rebates have been based on a customer's net amount of annual purchases. In this instance, "net" is defined as being exclusive of any cash discount, freight allowance or merchandise return credit (tr. 61). Rebatable purchases have been computed on the calendar year and rebates paid on approximately February 15 of the following year (CX 8-9). The rebates schedules were as follows:

Standard[12]		*Hygrade*[13]	
Volume group	*Rebate (percent)*	*Volume group*	*Rebate (percent)*
0–$2,999	4	0–$1,499	0
$3,000– 5,999	11	$1,500– 3,499	8
6,000– 9,999	14	3,500– 5,499	10
10,000–24,999	14½	5,500– 8,499	11
25,000–39,999	15	8,500–over	12
40,000–over	17		

Respondent's defense primarily consists of a cost study purporting to justify rebates extended on sales made during the year 1962. "Direct selling," "catalog," "branch warehouse" and "administrative" expenses were chosen to reflect cost differences.[14] Basically, the 1962 study is respondent's rejected 1958 study after updating (tr. 571-73). Respondent concedes that if its 1962 study is improper, so too is its 1958 study (tr. 552).[15]

Respondent, for each volume bracket, compiled and developed statistical data representing the cost in 1962 of each of its four

[12] CX 8.

[13] CX 9.

[14] Each of these types of expenses are related to selling. Respondent has not attempted to demonstrate that its discounts made due allowances for "manufacture" or "delivery" cost differences.

[15] After comparing its 1958 and 1962 studies, respondent believed it necessary to include all Standard line purchasers of $25,000 annually in its highest rebate bracket and to reduce the rebate in the second bracket of its Hygrade schedule by one percent (tr. 688-89). Three additional changes in the Standard schedule were policy decisions, unrelated to an attempt at cost justification, for respondent considered either rebate schedule to be cost justified (tr. 690-93). The schedule changes were instituted on January 1, 1964, as follows:

Standard		*Hygrade*	
Volume group	*Rebate (percent)*	*Volume group*	*Rebate (percent)*
0–$2,999	4	0–$1,499	0
$3,000– 5,999	10	$1,500– 3,499	7
6,000– 9,999	13	3,500– 5,499	10
10,000–24,999	15	5,500– 8,499	11
25,000–over	17	8,500–over	12

chosen cost difference activities attributable to customers entitled to receive rebates. Included in the "direct selling" activity were the costs of the total number of hours respondent's salesmen spent with customers on their premises and in transit, and that portion of home office administration expenses applicable to its sales force operation (RX 7, pp. 7-13). The "catalog" category contained "fixed" catalog and educational literature costs and the salaries of emloyees who prepared such documents (RX 7, pp. 14-16), and the "branch warehouse" item included the cost of operating all of respondent's warehouses, save the one located at its Long Island headquarters (RX 7, pp. 16-19, tr. 756-57). "Administrative" expenses were an itemization of the cost of invoice stripping, mailing and filing; handling of credit and accounts receivable; posting machine rental; tabulating, order entry and billing machines; and sales department personnel salaries (RX 6, Schedule VIII; RX 7, pp. 19-25).

The aggregate cost figures for each category were then divided by the year's volume of rebatable sales to customers within each bracket to show costs in terms of a percentage of volume. For example, the following table shows respondent's cost summary for "direct selling" expenses for its Standard line:[16]

Volume group	*Rebate Volume*	*Cost*	*Cost percent of Rebate Volume*
0–$2,999	$317,537	$49,676	15.64
$3,000– 5,999	744,346	68,772	9.24
6,000– 9,999	1,128,117	86,367	7.66
10,000–24,999	1,726,818	102,427	5.93
25,000–39,999	482,726	22,129	4.58
40,000–over	490,064	25,665	5.24
TOTAL	$4,889,608	$355,036	.....

The complete percentage of volume cost figures computed by respondent for its Standard line are as follows:[17]

Volume group	*Direct Selling*	*Catalog*	*Branch warehouse*	*Administrative*	*Total*	*Cost differential*
0–$2,999	15.64	7.89	2.57	3.41	29.51	13.40
$3,000– 5,999	9.24	2.42	2.65	1.80	16.11	3.22
6,000– 9,999	7.66	1.34	2.48	1.41	12.89	3.48
10,000–24,999	5.93	.70	1.89	.89	9.41	1.83
25,000–39,999	4.58	.37	1.87	.76	7.58	.37
40,000–over	5.24	.16	1.16	.65	7.21	.....

[16] RX 6, Schedule II.
[17] RX 6, Schedule I.

PAR. 9. The Supreme Court in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 43 (1948), set the tone for our inquiry into respondent's challenged rebate pricing:

> The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price.

PAR. 10. Respondent's sole rebate criterion was the purchasing ability of its buyers. Thus, since it substituted volume of purchases for selling costs as the factor determining a customer's rebate, respondent had to justify the action by establishing that in all brackets volume and costs bore a strong concomitant relationship to each other.

Respondent first established its volume brackets and then determined the cost attributable to customers whose purchases placed them within a bracket (tr. 1142-43). While the successful establishment of a cost justification defense does not require the profferer to have put his horse first, one who has casually delimited available rebates must at least demonstrate that a significant majority of those customers relegated to a particular volume group most likely had costs supporting their inclusion in that group.[18] However, information extracted from respondent's own exhibits evidences that in most brackets the vast majority of customers had computed costs which should have found them placed *in another bracket*. The following charts show the large percentage of respondent's customers in each bracket who had costs which were closer to the cost average of a higher or lower bracket:

[18] See *United States* v. *Borden Co.*, 370 U.S. 460, 468-69 (1962).

Volume group	Average cost (percent)	Mean of two average costs (percent)	Number of customers in bracket	Number of customers in bracket with costs above and below mean			Percentage with costs closer to another average
				Above	Below	Total	
			Standard[19]				
0–$2,999.....	29.51		241	....	72	72	29.9 (72/241)
		22.81					
$3,000– 5,999.....	16.11		177	22	74	96	54.2 (96/177)
		14.50					
6,000– 9,999.....	12.89		147	47	56	103	70.1 (103/147)
		11.15					
10,000–24,999.....	9.41		119	30	50	80	67.2 (80/119)
		8.50					
25,000–39,999.....	7.58		17	4	8	12	70.6 (12/17)
		7.40					
40,000–over	7.21		8	3	....	3	37.5 (3/8)
			Hygrade[20]				
0–$1,499.....	22.46		531	....	179	179	33.7 (179/531)
		18.77					
$1,500– 3,499.....	15.07		72	11	38	49	68.1 (49/72)
		12.79					
3,500– 5,499.....	10.51		17	4	10	14	82.4 (14/17)
		9.10					
5,500– 8,499.....	7.69		7	2	3	5	71.4 (5/7)
		7.18					
8,500–over	6.66		5	2	....	2	40.0 (2/5)

Respondent's expert, Professor Taggart, who attested to his familiarity with the cost study and vouched for the accounting techniques followed, apparently considered that deviations from the average of a volume group by individual customers would occur only in "an occasional case" (tr. 844), or as a result of "accidental increases or decreases in costs" (tr. 843). He obviously did not expect the wholesale deviations shown above.[21] We find that they demonstrate the impropriety of respondent's volume rebate system and provide just cause for us to reject the entire cost study.

PAR. 11. Respondent's exhibits also reveal that a large number

[19] Source: RX 6, Schedule I; CX 85, 86.

[20] Source: RX 6, Schedule XI; CX 85, 92.

[21] HEARING EXAMINER GOODHOPE: Well, then, on that total in the second column, you have 16.11. It is not safe to say that customers whose costs came out at the half-way point between 16.11 and 29.51, namely, 22.80, up to half-way between the 16.11 and 12.89, which is 14.61 (sic) — it is not safe to say that all of respondent's customers whose costs totalled out between 22.80 and 14.61 (sic) are included in that group?

THE WITNESS [Professor Taggart]: Not all of them, *but I would expect the majority of them to be.* [Tr. 842 (emphasis added).]

Later in his testimony, Professor Taggart suggested:

The computer of an average does not represent that each member of the class has a numerical weight exactly equal to that of the average. Instead, all he says is that each individual in the class has such characteristics that the numerical designations tend to approach or cluster around the average. [Tr. 1171.]

of its customers whose purchases cast them into a particular volume rebate bracket had costs which were equal to or lower than the average cost computed for the next highest bracket. This was true, for example, of 32.2% of Standard customers in the $3,000-$5,999 bracket, and 47.1% of Hygrade buyers in the $3,500-$5,499 bracket (CX 91, tr. 933; CX 97, tr. 942).

In fact, in many instances there were customers with almost identical cost percentages located in several brackets (CX 86, tr. 913-14; CX 92, tr. 937-38).

Furthermore, it was shown that an average of 39.1% of all Standard customers and 22.0% all Hygrade customers had lower costs than one-fifth of the purchasers included in a higher bracket (CX 90, tr. 927-31; CX 96, tr. 941-42).

The following charts illustrate the vast cost spreads for each volume bracket used by respondent in developing average costs:[22]

Volume group	Average cost (percent)	Actual cost spread (percent)
	Standard	
0–$2,999	29.51	3.2 to 249.2
$3,000– 5,999	16.11	2.8 to 50.9
6,000– 9,999	12.89	4.1 to 35.2
10,000–24,999	9.41	2.2 to 28.3
25,000–39,999	7.58	3.1 to 11.9
40,000–over	7.21	4.6 to 11.6
	Hygrade	
0–$1,499	22.46	5.8 to 234.8
$1,500– 3,499	15.07	6.1 to 48.9
3,500– 5,499	10.51	2.2 to 33.4
5,500– 8,499	7.69	3.8 to 10.7
8,500–over	6.66	3.0 to 12.1

[22] Tr. 912, 935-36; CX 85, 86, 92; RX 6, Schedules I and XI. In the early enforcement days of the Robinson-Patman Act, a distinguished former Commissioner counseled the following pertinent guidelines:

To be lawful, quantity or volume discount must meet, among others, the following tests: Discount classes must not be unduly large and too few in number; the boundaries between classes must be reasonably placed; no class must receive a discount which is excessive as compared with those granted to other classes.

If the discount classes are broad, the costs of serving different customers within the same class will be dissimilar. An average of these costs probably will be unrepresentative of customers at the boundary of the class, and there is likely to be an indefensible discrimination between the largest buyers in one class and the smallest buyers in the next.

Sometimes, for example, a part of the seller's business consists of a very few small purchases which he accepts as a convenience to his customers at very high cost to himself. If, in preparing a quantity discount schedule, he includes in his lowest quantity bracket both these "nuisance" orders and the regular stock orders of his small customers, the effect is to charge these small customers with nearly the entire cost of the "nuisance" business, to raise the apparent cost of serving them, and to appear to justify for the larger customers a discount which is greater than the facts warrant. This is an example of a discount class which is too large. (Freer, "Accounting Problems under the Robinson-Patman Act," 65 *J. Accountancy* 480, 483-84 (1938).)

PAR. 12. The obvious result of respondent's discriminatory rebate schedule is that a great number of low-cost customers are burdened with part of the expense of higher cost purchasers. As we observed in *Borden*:[23]

The use of broad averages may show an apparent justification on the average, but it levels the extremes and ignores specific markets or transactions where the greater differences may result in the lessening of competition.

PAR. 13. If respondent's arbitrary cost grouping and volume averaging procedure were approved, sellers could, with impunity, grant rebates only to their largest volume customers by merely grouping the costs of all others into a single bracket. For example, respondent could give its 5 top Hygrade customers a rebate of almost 11% and nothing to the remaining 627 (CX 92). This is illustrated as follows:

Volume group	Rebate volume	Direct selling cost, RX 6, schedule XII	Catalog cost, RX 6, schedule XIII	Branch warehouse cost, RX 6, schedule XIV	Administrative cost, RX 6, schedule XVI	Total cost	Cost as a percent of rebate volume
0–$1,499..	$284,422	$28,574	$8,301	$6,811	$20,192	$63,878	.....
$1,500– 3,499..	149,898	12,053	1,067	4,100	5,372	22,592	.....
3,500– 5,499..	74,047	4,670	248	1,286	1,574	7,778	.....
5,500– 8,499..	47,585	2,515	104	534	505	3,658	.....
Total.....	555,952	47,812	9,720	12,731	27,643	97,906	17.61
$8,500–over	50,342	1,994	57	898	402	3,351	6.66

Cost differential between highest volume rebate group and all others: 10.95%

PAR. 14. In view of our findings with respect to respondent's cost study, it is unnecessary for us to reach the question of whether annual volume rebate allowance programs are per se unacceptable. Clearly, however, whenever such programs are employed, the volume rebate groups must be limited to certain types of customers having apparent cost similitude. Before assigning his customers to a particular rebate bracket, the seller should carefully measure their buying characteristics to be certain that those to be bracketed in all probability will have like cost percentages.[24] (Unanticipated, occasional deviations by individual customers would not affect the Commission's evaluation of reasonably constituted brackets.) The factors used in ascertaining probable cost homogenity will of course vary with the nature of each seller's business and distributing practices.

The Commission is not holding that a seller with a large number of purchasers must individually cost them out in each area of ex-

[23] *Borden Co.*, Dkt. 7129, Opinion, p. 19 (1962) [63 F.T.C. 130, 179], *rev'd on other grounds*, 339 F. 2d 133 (5th Cir. 1964), *cert. granted*, 34 U.S.L. Week 3117 (U.S. Oct. 12, 1965) (No. 1127, 1965 Term; renumbered No. 106, 1966 Term).

[24] See *United States* v. *Borden Co.*, *supra* at 470-71.

pense he has selected for his cost justification defense, although a detailed representative study should be readily available if need arises to substantiate universal claims.

PAR. 15. In the case at bar, respondent put into evidence the costs of individual customers used by it to compute the group averages that were the heart of its cost justification defense. However, a close examination of those underlying figures showed that the averages were not representative portrayals of the selling costs of customers in any bracket.

Under respondent's rebate system, there is absolutely no way a customer can receive a higher rebate or lower unit price, other than by increasing his amount of purchases (tr. 794). Costs are not considered even though running cost accounts were maintained.[25] It is clear that respondent would have the Commission sanction its volume discount brackets whether or not there existed a coincidental relationship between price favoritism and costs. Such a stand brings to mind the remark of Mr. Justice Douglas in *Borden* that "the case was argued as if the grant of discounts was a natural right and that the Act should be construed so as to make the granting of them easy."[26]

PAR. 16. The record demonstrates the incongruous effects of respondent's cost allocations in individual trading areas. For example, in the highly competitive Dallas, Texas, market, several purchasers paid higher prices than their competitors who had substantially higher cost percentages.[27]

In the earlier proceeding involving respondent, we adopted the examiner's finding that "the competitive opportunities of certain purchasers were injured when they had to pay substantially more for respondent's products than their competitors had to pay."[28] It

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[25] According to respondent's president:

Every member of our sales force, for a great many years, has been required to file a daily report in the normal course of his work. He tells us whom he has called upon, how many hours he has spent at the location, how many hours he has spent traveling, what sort of work he did, and anything that is especially significant about his work.

These are cleared through our sales manager. They are tabulated for statistical purposes, for purposes of sales management.

* * * * * * *

During the normal course of our business, as we invoice the customers for merchandise, we make what is known as a summary card in IBM which identifies the account by his number, tells the amount of the invoice, the number of lines in the invoice, the rebatable amount of merchandise, and other statistical data.

These become part of our permanent records and are kept by us for several years, as a rule. [Tr. 573-75.]

[26] *United States* v. *Borden Co., supra* at 475 (concurring opinion).

[27] Tr. 379-81; CX 82-83; CX 85, pp. 4, 5, 6, 12, 16, 17, 21, 29, 30, 33, 37, 38, 41, 44. For example, Standard customer number 7089 with a cost percentage of 17.3% received a 4% rebate while customer number 7097 with costs of 18.3% received 11%.

[28] *Standard Motor Products, Inc.*, 54 F.T.C. 814, 823 (1957).

is obvious that the competitive climate among resellers in the automotive after-market industry has not changed[29] and that respondent's price discriminations continue to have substantial anti-competitive effects.

PAR. 17. Sprinkled throughout both the record and respondent's briefs is a persistent reliance upon the Commission's acceptance of "purchase bonus" volume rebate plans in *Thompson Products, Inc.*[30] However, unlike the matter at bar, our action in *Thompson* was not the result of a close scrutiny of the respondent's cost study. Both the Commission's accountant and its counsel had considered Thompson's rebate plans to be cost justified, and the examiner, finding no evidence to the contrary, agreed. Counsel supporting the complaint did not appeal the examiner's ruling. Accordingly, we gave the question no further consideration.

PAR. 18. Respondent determined its catalog and educational literature costs (hereinafter collectively referred to as "catalog"), by first separating "fixed" expenses[31] from the cost of printing quantities. On the theory that its customers should be held equally responsible for preparatory costs, since each had to have a catalog (tr. 752), respondent then computed an average catalog cost per customer.[32] That amount was multiplied by the number of customers in a volume rebate bracket, and the total was divided into their aggregate purchases to obtain a figure representing catalog costs as a percentage of purchases.[33]

Respondent did not allocate non-fixed catalog expenses in its cost study. It was estimated that as a customer's volume of purchases increased, the number of catalogs he received would have increased proportionately,[34] resulting in no percentage variations between brackets.

PAR. 19. We reject respondent's entire catalog allocation, since

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[29] In *Thompson Products, Inc.*, 55 F.T.C. 1252, 1272-73 (1959), we observed:

"The profits of automotive parts wholesalers necessarily are based on an accumulation of small margins of profit. Wholesalers uniformly try to take advantage of the 2% cash discount accorded by their suppliers, their cost of merchandise is reduced thereby, and the material effect of that discount on profit margins is clearly evident from the record."

Respondent's Dallas customers consistently testified to their low profit margins and affirmed that the obtaining of respondent's 2% discount for prompt payment was essential to their respective businesses (tr. 143-44, 165, 181-82, 202-03, 215-16, 229-30).

[30] 55 F.T.C. 1252 (1959).

[31] Those expenses were all preparatory activities which included "type setting, corrections, make-ready, proof-pulling [and] such items as were necessary to get the presses in a condition to run the first copy of any particular piece of literature" (tr. 647). The percentage of fixed expenses to total catalog costs was approximately 35% for both Standard and Hygrade catalogs (tr. 647; RX 6, Schedule IV).

[32] RX 6, Schedule IV.

[33] RX 6, Schedule V. See column labeled "Catalog" on the table set out on p. 1253, *supra*.

[34] As a distributor is larger, he requires more and more catalogs. We presume that the sixty-five percent of our catalog and literature cost not included in this study will vary, generally, in proportion to the size of the customer" (tr. 753). Also see tr. 1108.

it obviously misrepresents the actual cost of distributing the catalogs to particular customers.

Respondent's computations show total catalog and payroll preparatory expenses for the Standard line as $261,687.[35] Total sales of that line were $16,231,461.[36] Yet $25,059[37] or 9.58% of the catalog costs were assigned to customers in the first bracket whose total purchases ($469,049)[38] were but 2.89% of total sales. And while customers in the highest Standard rebate bracket purchased 3.64% of the line ($591,186),[39] a percentage of catalog costs less than one-twelfth of that amount (0.29%) was assigned to them.[40] Catalog allocations for the Hygrade line were equally as disproportionate.[41]

PAR. 20. Respondent's method of calculating catalog costs is most surprising in light of the effort it expended to establish certain other costs. For example, it carefully tabulated both the number of calls its sales force made on each customer and the number of sales hours individually spent with them (tr. 573-74). And it calculated the number of invoices used for each customer and even the number of invoice lines each received (tr. 574-75, 814-16).

In our judgment respondent should have sought to account individually for the number of catalogs distributed to each of its volume rebate customers. The total catalog cost divided by the number printed would have yielded a unit cost which could have been used to secure the accuracy allegedly attained in the areas of direct selling and administration. However, respondent's reluctance to allocate its entire catalog cost in this fashion is understandable. If distribution truly would have varied upward in proportion to volume of purchases, the cost differences between brackets would have been eliminated. Our computations below illustrate this point:

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[35] See RX 6, Schedule IV.

[36] See nn. 42-45, *infra*. All sales figures set out in Paragraphs Nineteen and Twenty herein are "net" as has been defined in Paragraph Eight, p. 1252, *supra*.

[37] RX 6, Schedule V.

[38] See RX 8, Report 1, pp. 1-11, Col. 2.

[39] *Id.*, at p. 30, Col. 2.

[40] See RX 6, Schedule V.

[41] Total expenses assigned to respondent's Hygrade catalog study were $44,546 (see RX 6, Schedule IV). Total Hygrade sales were $3,001,831 (see nn. 47-50, *infra*). The first Hygrade volume group bought 15.03% of the line ($451,198 — RX 9, Report 1, pp. 1-23, Col. 6) and was assigned 18.63% of the Hygrade catalog costs (see RX 6, Schedule XIII). However, the highest volume group with purchases of $115,403 (see RX 9, Report 1, p. 27, Col. 6), or 3.84% of the total (see RX 6, Schedule XIII), was assigned costs of only 0.13% (see RX 6, Schedule XIII).

Volume group	Standard Sales	Percent of total	Catalog cost	Catalog cost as a percent of sales
0–$2,999	$317,537	1.96	$5,129	1.61
$3,000– 5,999	744,346	4.59	12,011	1.61
6,000– 9,999	1,128,117	6.95	18,187	1.61
10,000–24,999	1,726,818	10.64	27,844	1.61
25,000–39,999	482,726	2.97	7,772	1.61
40,000–over	490,064	3.02	7,903	1.61
Total rebate sales volume	[42]4,889,608	.....	.....	.....
Sales to redistributing wholesalers not subject to rebate	[43]1,271,599	7.83	20,490	1.61
Sales to incomplete accounts	[44]172,626	1.06	2,774	1.61
Sales to warehouse distributors	[45]9,897,628	60.98	159,577	1.61
Total sales	16,231,461	100.00	.....	.....
Total catalog, literature, and payroll cost			[46]261,687	.....

Volume group	Hygrade Sales	Percent of total	Catalog cost	Catalog cost as a percent of sales
0–$1,499	$284,422	9.47	$4,219	1.48
$1,500– 3,499	149,898	4.99	2,223	1.48
3,500– 5,499	74,047	2.47	1,100	1.48
5,500– 8,499	47,585	1.59	708	1.48
8,500–over	50,342	1.68	748	1.48
Total rebate sales volume	[47]606,294	.....	.....	.....
Sales to redistributing wholesalers not subject to rebate	[48]315,040	10.50	4,677	1.48
Sales to incomplete accounts	[49]152,922	5.09	2,267	1.48
Sales to warehouse distributors	[50]1,927,575	64.21	28,603	1.48
Total sales	3,001,831	100.00	.....	.....
Total catalog, literature, and payroll cost			[51]44,546	.....

[42] RX 8, Report 1, p. 30, Col. 4.
[43] *Id.*, at Col. 3.
[44] RX 10, Schedule 19S, p. 3, Col. 4.
[45] RX 10, Schedule 20S, p. 3, Col. 4.
[46] See RX 6, Schedule IV.
[47] RX 9, Report 1, p. 27, Col. 8.
[48] *Id.*, at Col. 7.
[49] RX 10, Schedule 19H, p. 7, Col. 4.
[50] RX 10, Schedule 20H, p. 3, Col. 4.
[51] See RX 6, Schedule IV.

With catalog costs removed, respondent's cost study fails in several volume brackets, as follows:

[In percent]

Volume group	Total cost[52]	Catalog cost[53]	Cost excluding catalog cost	Adjusted cost differential	Price differential	Excess or (deficit)
			Standard			
0–$2,999	29.51	7.89	21.62	.....	.....	.....
$3,000– 5,999	16.11	2.42	13.69	7.93	7.00	0.93
6,000– 9,999	12.89	1.34	11.55	2.14	3.00	(0.86)
10,000–24,999	9.41	.70	8.71	2.84	0.50	2.34
25,000–39,999	7.58	.37	7.21	1.50	1.00	0.50
40,000–over	7.21	.16	7.05	.16	2.00	(1.84)
			Hygrade			
0–$1,499	22.46	2.92	19.54	.....	.....	.....
$1,500– 3,499	15.07	.71	14.36	5.18	8.00	(2.82)
3,500– 5,499	10.51	.33	10.18	4.18	2.00	2.18
5,500– 8,499	7.69	.22	7.47	2.71	1.00	1.71
8,500–over	6.66	.12	6.54	.93	1.00	(0.07)

PAR. 21. Even if we had approved respondent's fixed expense method of distributing catalog costs, certain other aspects of its catalog computations make that item of its study unacceptable.

The fixed expense percentages used in the 1962 study had been obtained from respondent's printing suppliers for its 1958 study (tr. 646-47). No effort was made to ascertain whether the percentages changed after the lapse of four years even though the cost of the Standard catalogs was over $125,000[54] more in 1962, and a greater number and variety were printed (tr. 747).

Moreover, respondent allocated catalog preparatory expenses between Hygrade and Standard by their respective assigned proportions of total fixed expenses (tr. 648). The catalogs in evidence do not support the assumption that respondent's personnel spent six times[55] more effort on Standard catalogs than on Hygrade.[56]

In addition, although respondent had well over 10,000 persons on its mailing list who received literature, and distributed a large number of catalogs to nondirect buying customers by mail and at

[52] RX 6, Schedules I and XI.

[53] RX 6, Schedules V and XIII.

[54] This sum was derived from a comparison of fixed expenses listed on RX 5, Schedule XI (showing catalog expenses in terms of 34.86% of the 1958 total cost) with fixed expenses set out on RX 6, Schedule IV.

[55] See RX 6, Schedule IV.

[56] The Standard catalogs in evidence contain a total of 117 pages (CX 1 and 2), whereas the Hygrade catalogs contain 80 (CX 3 and 4).

various trade shows and exhibits (tr. 753-54), it allocated the entire fixed costs to direct buying customers.[57]

PAR. 22. Certain other procedures followed by respondent in determining the aggregate costs of customers in its volume rebate brackets are also questionable. For example, respondent used the total travel expenses of all district managers in computing an average sales call cost. No compromise was made for the fact that those employees spent considerably less travel time per call in the area contiguous to their offices than in outlying areas (tr. 724-27, 885-87; CX 84).

Respondent allocated both warehouse operating and direct selling costs to its Standard and Hygrade studies on the proportion that sales of each line respectively bore to total sales.[58] It also prorated "home office administration expenses" by the same proportions computed for "salesmen's compensation" (tr. 621; RX 6, Schedule III), even though clearly expenses for such items as "telephone and telegraph," "pension fund contributions" and "shows and exhibits" cannot be deemed as having had a proportionate relationship to travel hours or call hours. In addition, except for district managers' field work calls, direct selling costs were allocated to redistributing wholesalers simply by the ratio of their rebatable purchases to total purchases (tr. 629-30; RX 8, Reports 1 and 3; RX 9, Reports 1 and 3). Respondent made no sample cost surveys or studies to show that any of these prorations were accurate. They amounted to nothing more than mere estimations, and, accordingly, are unacceptable for cost justification purposes.[59]

We also cannot approve respondent's use of a national average salary for district managers whose annual pay ranged as much as from $11,000 to $40,000 (tr. 880-81; RX 11, DSH-1). However, respondent recast its study to eliminate this objection and others raised by complaint counsel (tr. 1094-97; 1099-1102; RX 16-18). While the new percentages caused no failures in the original justification study, with the removal of catalog cost figures,[60] justification for the first Standard volume rebate bracket fails and wider, unsupported discriminations appear in several others.

PAR. 23. The first of respondent's two collateral defenses—that the testimony and exhibits of Commission witness John R. McInnis be

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[57] Since a large number of respondent's customers bought both the Standard and the Hygrade lines (compare, *e.g.*, CX 82 with CX 83), the number of individuals who purchased directly was considerably less than the 2,113 total shown on RX 6, Schedule IV.

[58] Tr. 653-54; RX 6, Schedule VI, Item (1); tr. 629, 728-29; RX 6, Schedule III; RX 8, Reports 1 and 3. For example, with respect to selling costs, if a customer's rebatable purchases of Standard and Hygrade products were $9,000 and $1,000, respectively, 90% of the cost of selling him was assigned to the Standard study and 10% to the Hygrade study.

[59] See *The Curtiss Candy Co.*, 44 F.T.C. 237, 267 (1947).

[60] See p. 1262, *supra*.

struck from the record[61]—was raised in a motion filed on September 23, 1964.[62] It is urged that Commission counsel utilized Mr. McInnis as an expert witness, but never qualified him as such, and that this "precluded respondent from cross-examining the witness in depth with respect to his qualifications and experience." On October 5, 1964, we ordered that the matter be held in abeyance until briefs had been filed and reviewed.

On review, we find respondent's contention to be without substance and accordingly deny its motion to strike. Mr. McInnis was properly identified as a certified public accountant and an employee of the Commission (tr. 902). He testified only as to the nature and content of exhibits he prepared from computations put into evidence by respondent. Mr. McInnis did not, as respondent alleges, criticize respondent's cost study. Such terms as "misclassified" and "lower costs" were used by the witness only in explaining the meaning of the figures set out on his exhibits. Criticism of the cost study came from Commission accountant William R. Lemberg, who was qualified as an expert and extensively cross-examined.

Even if it appeared that Mr. McInnis had testified in the capacity of an "expert," we would not have stricken his testimony and exhibits. It is a well-known principle that exclusionary rules of evidence do not bind administrative proceedings as tightly as matters tried before juries.[63] The witness' exhibits and testimony relating to them were spawned entirely from exhibits of respondent which are a part of the record. Thus, we are able to make independent computations to affirm their reliability. Accordingly, it is respondent's own evidence which formed the primary basis for our findings.

PAR. 24. Respondent's second collateral defense, first raised in its reply brief, is that Public Law 86-107,[64] which procedurally amended Section 11 of the Clayton Act, repealed by implication all procedures for the enforcement of cease-and-desist orders entered prior to its passage. Basically, respondent's argument is that, since the statute provided for enforcing future Commission actions and specifically applied the superceded enforcement and review provisions only to matters then pending, Congress impliedly repealed enforcement procedures for all other pre-amendment orders. Respondent's logic relies on the rule of statutory construction that where a form

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[61] Tr. 902-43, 1005-54; CX 85-97.

[62] Respondent's motion, although addressed to the hearing examiner, was dated and filed after the record had been certified to the Commission.

[63] *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 705-06 (1948); 2 *Am. Jur.* 2d, Administrative Law § 378 (1962). One authority has gone so far as to declare that "the technical rule known as 'the opinion rule' does not apply to the administrative process." 2 Davis, *Evidence* 323 (1958), *accord*, *Swift & Co.* v. *United States*, 317 F. 2d 53, 55 (7th Cir. 1963). *Cf.*, *Keller* v. *Federal Trade Commission*, 132 F. 2d 59, 61 (7th Cir. 1942).

[64] 73 Stat. 243 (1959), 15 U.S.C. § 21 (1964).

of conduct is affirmatively or negatively designated by a statute "there is an inference that all omissions were intended by the legislature."[65] This rule of construction, however, is only a general guideline. It does not apply unless the legislature clearly so intended it.[66] And the rule is also inapplicable where an absurdity would be created.[67]

The legislative history of the Section 11 amendment demonstrates that Congress wished to expedite enforcement procedures, not emasculate a substantial proportion of 45 years of Commission work.[68]

Although no court has directly ruled on respondent's argument, several have done so obliquely. In *Sperry Rand Corp.* v. *Federal Trade Commission*,[69] the issue was whether the new enforcement procedure could apply retroactively to pre-amendment cease-and-desist orders. The court responded in the negative and gratuitously observed: "Enforcement due to any violation of the [pre-amendment] consent order which might occur is left to the provisions of the statute as they existed at the time the order was entered."[70] And, the Supreme Court, citing *Sperry Rand*, in reviewing a pre-amendment order of the Commission in *Federal Trade Commission* v. *Henry Broch & Co.*, stated:[71]

> In considering Broch's challenge to paragraph (2) it is necessary to observe that the 1959 amendments to § 11 of the Clayton Act—which substitute for the Clayton Act provisions for enforcement of administrative orders those in § 5 of the Federal Trade Commission Act—do not apply to enforcement of the instant order. In consequence, Broch cannot be subjected to penalties *except for violation of an enforcement order yet to be entered by an appropriate Court of Appeals*, to be predicated upon a determination that some particular practice of Broch violated the Commission's order. Thus Broch is not, by virtue of that order, presently acting under the risk of incurring any penalty *without further administrative and judicial consideration and interpretation*, despite the fact that he has already received determination of his petition for review.

We find that the above pronouncements provide ample authority for us to reject respondent's contention that no procedure remains for enforcing our order against it, and we so do.

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[65] 2 Sutherland, *Statutory Construction* 413-14 (3d ed.) (1943).

[66] *United States* v. *Borden Co.*, 308 U.S. 188, 198-99 (1939); *Lietz* v. *Flemming*, 264 F. 2d 311 (6th Cir.), *cert. denied*, 361 U.S. 820 (1959).

[67] *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543 (1940).

[68] See, *e.g.*, S. Rep. No. 83, 86th Cong., 1st Sess. (1959).

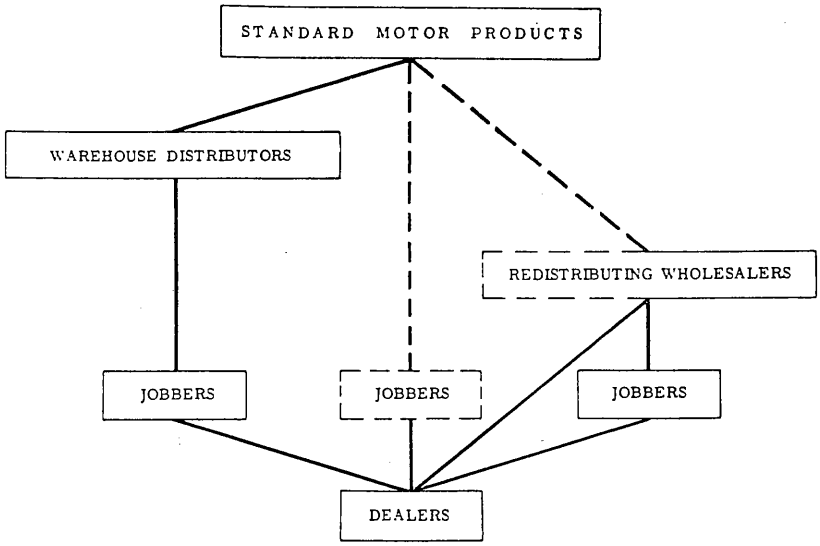
[69] 288 F. 2d 403 (D.C. Cir. 1961).

[70] *Id.*, at 406.

[71] 368 U.S. 360, 364-65 (1962) (emphasis added). Compare final decree, *Federal Trade Commission* v. *Benrus Watch Co.*, 2d Cir. No. 27,752, August 29, 1962, FTC *Statutes & Decisions* 521 (1962 Supp.).

Conclusion

It is our conclusion, after giving due consideration to the acts and practices of the respondent as evidenced by the record of this investigation, that the respondent, Standard Motor Products, Inc., has discriminated in the price of automotive products and supplies of like grade and quality by selling such products to purchasers at net prices higher than the net prices charged other purchasers who, in fact, compete with the purchasers paying the higher price in the resale and distribution of respondent's products in direct violation of the Commission's order to cease and desist issued December 27, 1957 [54 F.T.C. 814], and that such discriminations in price were not cost justified in that they did not make only due allowance for differences in the cost of manufacture, sale or delivery resulting from differing methods or quantities in which such products were sold or delivered to respondent's purchasers.



Note: Dash lines indicate volume rebate customers.

Source: Tr. 12, 582; CX 5.

ADVISORY OPINION DIGESTS*

No. 3. Three-party promotional assistance plans.

The Commission was again requested to express an opinion with respect to the legality of payments by toy manufacturers for advertising in toy catalogs published by a firm which, assertedly, (1) is strictly a publisher and has no connection whatever with any toy jobber or manufacturer, and (2) affirmatively offered the catalogs for sale to all jobbers.

With respect to this request, the Commission repeated its previous opinion which was published October 30, 1964 [66 F.T.C. 1594], as follows:

Payments for advertising in a catalog published by a firm which is not owned or controlled by, or in any way directly or indirectly affiliated with, any customer of the advertiser or group or class of such customers, do not violate Section 2(d) of the Clayton Act where no discriminatory benefit is conferred by such payments on a particular customer, or class or group of customers, over competitors. The Commission notes your statement that your catalogs are available at low cost to all toy jobbers and are not designed to be usable only by particular jobbers, or classes of groups of jobbers; that you make every effort to distribute your catalogs as broadly as possible among toy jobbers; and that you do not limit distribution to any particular jobbers or group or class of jobbers. The Commission is of the opinion that if your catalogs, however titled, are available, in a practical business sense, to all of the jobber customers of a manufacturer, then no objection could be raised to payments by that manufacturer for advertising in the catalogs.

To obviate any possible misunderstanding, the Commission corrected an erroneous statement in the requesting party's communication to the effect that the Commission's previous opinion had ruled that since the catalogs were available in a practical business sense to all jobber customers of the manufacturers the payments would

* In conformity with policy of the Commission, advisory opinions are confidential and are not available to the public, only digests of advisory opinions are of public record. Digests of advisory opinions are currently published in the Federal Register.