
IN THE MATTER OF
WILLIAM H. RORER, INC.

ORDER , OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 2 (a) OF THE CLAYTON ACT

*Docket 8599. Complaint, September 30, 1963—Decision, May 9, 1966**

Order requiring a Fort Washington, Pa., drug manufacturer to cease discriminating in price between purchasers who compete in the resale

* Modified on Aug. 21, 1967, pursuant to a decision of the Court of Appeals, 374 F. 2d 622, (1966), by limiting the application of the prohibition against price discrimination to competing retail customers.

Complaint

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of its pharmaceutical products, and if respondent does set up a price differential based on claimed cost saving, that it notify the Commission and submit price schedules with supporting data, and that it publicize to all customers that its prices to some are higher than to others together with supporting reasons and details.

COMPLAINT

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

PARAGRAPH 1. Respondent William H. Rorer, Inc., hereinafter referred to as respondent Rorer, is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at 500 Virginia Drive, Fort Washington, Pennsylvania.

PAR. 2. Respondent Rorer is now and has been engaged in the manufacture, distribution and sale of prescription and non-prescription pharmaceutical products. Its products are sold to drug wholesalers, retailers, hospitals, doctors, nursing homes, federal, state and municipal agencies and institutions, and industrial plants throughout the United States. Respondent's net sales for the year 1960 were approximately \$11,395,000.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent Rorer has sold and distributed and is now selling and distributing its products in commerce, as "commerce" is defined in the amended Clayton Act, to purchasers located in the several States of the United States other than the Commonwealth of Pennsylvania in which respondent is located. Respondent causes its products to be transported from its manufacturing plant in Pennsylvania and its warehouses in Hammond, Indiana, and Oakland, California, to purchasers thereof located in various other States of the United States and the District of Columbia. Respondent Rorer has maintained, and does now maintain, a continuous course of trade in commerce in said products between itself and purchasers thereof located as aforesaid.

PAR. 4. In the course and conduct of its business in commerce, respondent is competitively engaged with other corporations, individuals, partnerships and firms in the manufacture, distribution

and sale of its products. Some of respondent's purchasers are competitively engaged with each other in the resale of respondent's products within the various trading areas in which they are engaged in business.

PAR. 5. In the course and conduct of its business in commerce, respondent Rorer is discriminating in price between different purchasers of its pharmaceutical products of like grade and quality by selling to some purchasers at higher and less favorable prices than it sells to other purchasers competitively engaged in the resale of said products with the nonfavored purchasers.

Respondent Rorer has designated a substantial number of its products as "specialities." These products account for the largest percentage of respondent's total sales. Additional discounts on specialty products are granted to certain customer classifications.

A trade discount of 40%, deductible from list price, is allowed to all of respondent's customers. Further, some customers receive additional discounts. For example, respondent Rorer classifies certain of its customers for pricing purposes as (a) drug wholesalers, (b) chain drugstores, (c) independent druggists, and (d) physician supply companies. Additional discounts from list price are granted to these classifications of customers as follows:

Category (a) customers, drug wholesalers, are granted discounts of 16-2/3% on regular items and 20% on specialities.

Category (b) customers, chain drugstores, are also granted discounts of 16-2/3% on regular items and 20% on specialities.

Category (c) and (d) customers, independent druggists and physician supply companies, are granted 15% discounts on purchase orders of \$100 or more.

Chain drugstores, Category (b) customers, are defined by respondent Rorer as five or more registered pharmacies under single ownership having a buying office and a warehouse, although for these pricing purposes an individual unit of the chain may be considered an office, a warehouse, or both. Thus, members of this customer class may receive, and do in fact receive, a lower price than (c) and (d) category customers, some of whom purchase an equal or greater volume of respondent's products, and who compete in the resale of respondent's products with the favored customer class.

PAR. 6. The effect of respondent's discriminations in price, as hereinbefore alleged, may be substantially to lessen, injure, destroy or prevent competition between purchasers of respondent's products or customers of said purchasers, or tend to create a

monopoly in the lines of commerce in which said purchasers are engaged.

PAR. 7. The foregoing acts and practices of the respondent, as alleged, violate subsection (a) of Section 2 of the Clayton Act, as amended.

Mr. Ernest G. Barnes and Mr. Thomas Athridge supporting the complaint.

Mr. Harry L. Shniderman and Mr. William Malone, of Covington and Burling, Washington, D.C., for respondents.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER
JUNE 1, 1965

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The complaint herein, issued September 30, 1963, charges a violation of § 2(a) of the Clayton Act, as amended, also referred to herein as § 2(a) of the Robinson-Patman Act.

Preliminary Statement

Much time was lost in proceeding herein, for which no blame is attached, by reason of respondent's demanding that it be permitted to see a staff counsel memorandum in response to a so-called Petition to Reconsider Proposed Complaint, filed prior to the examiner's designation herein. On January 3, 1964, respondent filed a motion requesting the examiner in effect to order production of the memorandum, on due process and other grounds. The examiner denied the motion, and the Commission thereafter denied respondent's request to file an interlocutory appeal. On March 16, 1964, respondent filed in the United States District Court for the District of Columbia its complaint for an injunction

and other relief, based on the Commission's denial. By order of May 13, 1964, the District Court granted the Commission's motion to dismiss.

A prehearing conference was held herein on December 1, 1963, and there was a further prehearing conference on September 1, 1964, after the termination of the injunction action. Prehearing procedures resulted in the furnishing of a list of witnesses and documents, various documents themselves, certain stipulations, and limitation of issues. There are a number of prehearing conference orders.

On complaint counsels' request for hearings in five cities, the Commission, on the examiner's recommendation, authorized hearings in two cities plus Washington, D.C., the respondent at its election to call its witnesses either in each of the two cities or in Washington at the end of complaint counsels' case.

By prehearing conference order of June 17, 1964, the discrimination in price in this case was limited essentially to an extra 5% discount granted favored customers. Proof of alleged discriminatory sales was limited to the year 1962.

On July 1, 1964, complain counsel elected to try the case in Atlanta and Jacksonville, in addition to Washington. In line with preconference understanding and determination, complaint counsels' proof relates to the following six market areas:

Wheeling, W. Va.
Atlanta, Ga.
Rome, Ga.
Louisville, Ky.
Memphis, Tenn.
Jacksonville, Fla.

By order of the examiner, proposed exhibits as to the New Orleans area were stricken from complaint counsels' exhibit list.

Pursuant to direction, the hearing commenced in Washington, D.C., *i.e.*, to deal with the Wheeling area and preliminary matters. It then continued in Atlanta and Jacksonville as to the other areas. It concluded in Washington, D.C., largely for the presentation of the respondent's case.

The bulk of the testimony during complaint counsels' case revolved around the issue of competitive injury, which respondent was determined to make all-important. Respondent had served ample notice that it would explore thoroughly, on this issue, the question of profitability of the retail drug businesses of complaint

counsels' witnesses, and would expect to have available adequate financial statements, income tax returns, and the like. Respondent probed into this issue by vigorous cross-examination of the witnesses, based on financial returns and statements produced by most of them.

To preserve confidentiality, the financial statements and income tax returns were, in most instances, marked as exhibits *in camera*. In addition it was ordered that blanks be left in the public transcript wherever financial data of retail witnesses appeared. Copies of the pages (with the figures included) for each witness were then designated as exhibits *in camera*. The reporter in Atlanta accomplished this by a different method than the reporter in Jacksonville.

Complaint counsel called favored and unfavored witnesses for each of the six areas, with the notable exception that they called no favored witness for Wheeling. They also called respondent's vice president for sales. In rebuttal they called a Commission investigator and a Commission accountant.

Respondent's own evidence was directed toward establishing its defenses of discontinuance and cost justification. It presented an elaborate cost study, which was received in evidence. It called Mr. Rorer, president of the company, and Mr. Moyer, an officer, who prepared the cost study, both testifying in Washington. It also, in Jacksonville, called a sales representative.

There are about 1,000 exhibits in the case. Some 280 exhibits were offered by complaint counsel, and 660 by respondent. The authenticity of most exhibits was stipulated by counsel.

The transcript of testimony, including prehearing, consisted of 2412 pages. The hearing commenced on September 17, 1964, and concluded on October 15, 1964. Due to the *in camera* exhibits and confidential transcript portions, requiring much manipulation and arrangement, and to necessary rulings on proposed corrections of the record—all involving repeated conferences or talks between the examiner, Mr. Malone for respondent, and the reporter, and requiring orders by the examiner—it was several months before full filing was completed.

In order to accommodate Mr. Shniderman, who tried the case for respondent, assisted by Mr. Malone, and who at the close of the hearing was immediately going into trial of the *Hood* case in Boston (criminal docket, United States District Court), the Commission, on due request by him and the examiner, extended the time for the examiner to file his decision herein, first

Initial Decision

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to not later than March 15, 1965, and then to May 1, 1965. This enabled the examiner to fix an ultimate filing date for proposed findings, briefs, etc., of March 15, 1965. On or about this date both sides duly filed their voluminous submissions.

In addition, both sides having expressed a desire to file reply briefs, the examiner gave them until March 31, 1965, to do so, which they did.

Finally, on April 6, 1965, complaint counsel asked for additional time to submit a supplemental memorandum addressed to the cost study. By authorization of an order of the examiner, they filed such memorandum on or about April 16, 1965, and respondent filed a reply thereto on or about April 26, 1965.

Citing the request for leave to make supplemental submission and also the prior voluminous papers in the case, the examiner filed a request, on April 6, 1965, asking for additional time to file his initial decision, this time for his own convenience. By order of April 14, 1965, the Commission extended his time 30 days, to June 1, 1965.

FINDINGS OF FACT

Re Complaint, Pars. One, Two, Three

1. Respondent William H. Rorer, Inc., hereinafter referred to as respondent Rorer, is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at 500 Virginia Drive, Fort Washington, Pennsylvania. (Admitted in Answer.)

2. Respondent Rorer is now and has been engaged in the manufacture, distribution, and sale of prescription and non-prescription pharmaceutical products. Its products are sold to drug wholesalers, retailers, hospitals, doctors, nursing homes, federal, state, and municipal agencies and institutions, and industrial plants throughout the United States. Respondent's net sales for the year 1960 were approximately \$11,395,000. (Admitted in Answer.) Respondent's net sales for the year 1962 were approximately \$19,866,000. (CX 24a.)

3. In the course and conduct of its business, as aforesaid, respondent Rorer has sold and distributed, and is now selling and distributing, its products in commerce, as "commerce" is defined in the amended Clayton Act, to purchasers located in the several States of the United States, other than the Commonwealth of Pennsylvania, in which respondent is located. Respondent causes

its products to be transported from its manufacturing plant in Pennsylvania and its warehouses in Hammond, Indiana, and Oakland, California, to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent Rorer has maintained, and now does maintain, a continuous course of trade in commerce in said products between itself and purchasers thereof located as aforesaid.

Re Complaint, Par. Four

4. In the course and conduct of its business in commerce, respondent is competitively engaged with other corporations, individuals, partnerships and firms, in the manufacture, distribution and sale of its products. Some of respondent's purchasers are competitively engaged with each other in the resale of respondent's products within the various trading areas in which they are engaged in commerce.

5. There is no dispute that this has been true in the past, particularly the year 1962, for which year the complaint counsel undertook to prove their case.

6. Complaint counsel also undertook to prove their case in respect to the following six specific trade areas, selected from the various trade areas above referred to:

Wheeling, West Virginia
Atlanta, Georgia
Rome, Georgia
Memphis, Tennessee
Louisville, Kentucky
Jacksonville, Florida

(These six areas are treated separately in the Addendum to this decision.)

Re Complaint, Par. Five

7. In the course and conduct of its business in commerce, respondent Rorer, commencing in 1955 and including 1962 (TR 186, 192, 1972), discriminated in price between the different purchasers of its pharmaceutical products of like grade and quality by selling to some purchasers at higher and less favorable prices than it sold to other purchasers competitively engaged in the resale of said products with the nonfavored purchasers. (This is a rephrasing of the corresponding allegation in the complaint so as to use the past instead of present tense, and is not in dispute, al-

though it is subject to respondent's "defense" of payment for distribution services allegedly rendered by favored customers.)

8. The discrimination, by way of different prices, was on a national scale and took place in the aforementioned six trading areas, among others. (This is similarly not in dispute.)

9. Respondent Rorer has designated a substantial number of its products as "specialties." (Admitted in Answer) These products account for the largest percentage of respondent's total sales. (Admitted in Answer.)

10. By far the most outstanding in volume, dollar sales and importance, of these "specialties" has been the product Maalox, an ulcer remedy, and almost all of this has been Maalox Suspension, which is the specific product involved herein, although it will be referred to here simply as Maalox. (There is no dispute as to these facts.)

11. Commencing 1955, and including 1962, an extra 5% discount was accorded by respondent on the sale of "specialties," and therefore Maalox. This gave "chain drug stores" the same price on such specialties as "drug wholesalers." Contrariwise, "independent druggists" (and also "physician supply companies") did not receive the extra 5% discount. The difference between the price charged "chain drug stores" and "independent druggists," not receiving the extra 5% discount, is the discrimination in price at issue in this case. (These facts are not in dispute. See CX 5.)

12. This extra 5% discount was accomplished by giving the "chain drug stores" a discount of 20% on specialties, including Maalox, and giving the "independent druggists" one of only 15%—both after a 40% discount from list price. (The independents, however, did not receive the 15%, and entitlement to purchase from Rorer directly instead of from a wholesaler, unless they gave a purchase order for "specialties" of at least \$100, or \$85 net.)—(The foregoing facts are not in dispute.)

13. Respondent's formal definition of "chain drug stores," for discount purposes, was five or more registered pharmacies under a single ownership, having a buying office and a warehouse. (This is not contested. See CX 5d.) However, the examiner finds that the evidence clearly indicates that an individual unit of the chain might be considered a buying office, a warehouse, or both.¹ The essential was that the chain stores, otherwise qualified, buy cen-

¹ This also follows the wording of the formal definition; see Finding 92, *infra*, quoting the definition (CX 5d).

trally and receive the merchandise centrally, *i.e.*, at one shipping point (Rorer, TR 1987; see CX 5d). Facilities at shipping or delivery point might and did vary substantially between one chain and another. Respondent did not require the chains to maintain, and in fact they did not maintain, in stock, a full line of its products, nor did the chains solicit, sell or redistribute to retailers other than their own outlets (TR 466-68, 747, 1335-36, 1346-47). Respondent imposed no conditions as to time of redistribution (Rorer, TR 1988).

This buying office and "warehouse" feature, as so found, will be referred to in this decision as central ordering and central delivery, *i.e.*, acceptance of central delivery. The entire definition of chains, which for all practical purposes states a formula for allowing the extra 5% discount, will be referred to herein as the 5% discount formula.

14. As appears from said definition or formula, there is no provision or condition whatever, that in order to receive the 5% discount, a chain (five or more units under common ownership) must order any specified amount or that the amount ordered must, say, exceed the amount ordered or normally ordered by a competing independent. As further appears from said definition or formula, there is no provision or condition favoring a high amount independent, and there is no provision or condition whatever relating thereto. The examiner regards this as crucial in this case.

15. Thus, "drug store chains" could receive a lower price than competing independents who purchased a greater amount at or about the same time. In Wheeling, the unfavored customer, Griest, purchased from respondent five times as much as the favored chain (CX 25s). Incidentally, Griest had four stores and a "warehouse" (TR 302-03), apparently not qualifying as a favored customer because it was shy one store. Nor, under the common ownership provision could five independents pool their orders.

Re Complaint, Par. Six

16. As to all six trading areas named above, except Wheeling (since the favored customer did not cut its price at all), the examiner finds that the effect of respondent's discrimination in price in 1962, as hereinbefore set forth, may be substantially to lessen, injure, destroy or prevent competition between purchasers of respondent's products or customers of said purchasers, or tend to create a monopoly in the lines of commerce in which said purchasers are engaged. More particularly, the examiner finds that

said effect may be substantially to lessen, injure, destroy or prevent competition between purchasers of respondent's products. However, this competitive effect is found by the examiner only in instances where the competing favored and unfavored customers both were selling Maalox at retail "discount" prices—that is, at low markups, if not at a loss by either the favored or unfavored customer. At this level, the examiner finds that the extra 5% discount (actually amounting to about five cents a bottle, as repeatedly pointed out by respondent) was meaningful in the legal sense pertinent here, if only because it might force the unfavored customer to sell below cost to it or to stop competing, in respect to price of Maalox. At this level there is keen area-wide advertising, placing all advertising customers, particularly chains, in competition with all others.

17. Thus as to all trade areas above referred, except Wheeling, W. Va., the examiner finds requisite competitive effect, but finds it only in relation to customers selling Maalox at low markups, not all customers. As to the Wheeling trade area, the examiner finds no competitive effect because the favored customer, an old-fashioned outfit (TR 380-84), did not sell Maalox at low markups but sold at so-called list (Runner,² TR 300, 349-50, 351a).

18. At this retail discount, or small markup level, and its almost inevitable keen competition, the examiner finds the requisite competitive injury, including impairment of vigor to compete, without proof of actual loss of sales. Moreover, he finds requisite competitive injury—without any further showing, and solely on a sufficient showing of potential loss of sales in a keenly competitive market, or market level—on the authority of the *Morton Salt*³ case. [Para. 20 follows.]

20. Moreover, the examiner finds that the conclusion of requisite competitive injury is supported by the fact, hereby found, that the drugstore businesses operated in the period in question on close profit margins, generally less than 5% of gross sales, which, to be sure, are not limited to sales only of Maalox. The independent discounter operating on the very principle of volume selling and small markups, obviously shows the smaller profit percentages. The examiner rejects respondent's contention that salaries paid to officers or principals—themselves often pharmacists, managers or both, and working long hours,⁴ as repeatedly

² The examiner denies respondent's motion to strike Runner's testimony.

³ Citations of cases will be given in the second part of these Findings entitled EXPANDED FACTS AND DISCUSSION.

⁴ See Finding 66, *infra*.

demonstrated by the testimony—should, where deducted as expenses, be added to the net profit shown by income tax statements or financial statements. This finding disposes of the voluminous evidence, much of it *in camera*, on profits of various customers involved herein.

21. The examiner finds that a conclusion of requisite competitive injury is supported by the admittedly preponderant practice of Rorer customers, including favored customers, to take the 2% cash discount. This is because the low profit margins would obviously have been even lower without receipt of the 2% cash discount, which imposes the burden of prompt payment.

22. Contrariwise, the examiner rejects “loss of profits” by not receiving the 5% extra discount, as supporting, by itself, the conclusion, under the authority of the *Automotive Parts* cases, of requisite competitive effect. A typical loss of “profits” to an independent by not receiving the extra 5% on Maalox was about \$40 a year. The examiner regards this as inconsequential in any business sense, such as adequate advertising for quantity low markup sales. The examiner also holds that the loss by not receiving the extra 5% cannot be magnified by hypothetically projecting a 5% discount in respect to all other drug products purchased by unfavored customers.

Defenses

23. In reaching his conclusion herein, as the examiner does, that respondent has violated § 2(a) of the Clayton Act, as alleged, the examiner has rejected certain defenses offered by respondent, including the complete affirmative defense of cost justification.

24. Apart from cost justification, the examiner rejects respondent's defense—challenging complaint counsels' affirmative case—that the extra 5% discount, or a substantial portion thereof, is to be regarded as a payment for “warehouse” and redistribution services performed by favored customers, or as reasonably related to the cost thereof, so as to wipe out or reduce the proved differential in pricing. First, there is no proof of the actual cost of these services to the favored customers except for a cryptic tabulation (RX 663 *in camera*) claimed to show warehouse costs—by totals apparently for the entire country—of one customer, Walgreen's. Secondly, the proof is hardly clear that these services, which actually vary from customer to customer, were not part of the usual course of business of favored customers, adopted by them for

their own convenience. Third, the examiner holds, under the *Mueller* case, that such claimed payment for services, even if otherwise justified, would have to be made available to all competing customers on proportionally equal terms of some kind, on a § 2(d) analogy. This was not done by respondent here, not even to the extent of making the extra 5% available to competing independents ordering the same or greater quantities than the chains.

25. The examiner also rejects respondent's affirmative cost defense, designed to justify the extra 5% discount as a savings in cost to Rorer in dealing with the favored chain customers. The examiner rejects this defense on the sole basis of the extra 5% discount formula, *i.e.*, respondent's definition of chain store in according the 5%. The rejection of respondent's cost defense has therefore been made without considering respondent's elaborate and rather well-constructed cost study—although that too may be challenged as lumping together large quantity independents with small quantity independents and also as lumping together, in particular, independents very dissimilar in other significant respects. (See *Borden, infra*, Findings 112, 113.)

Respondent's definition of "chain drug stores" for allowing the extra 5% discount contains no provision whatever in respect to quantity. Furthermore, the method of delivery relied on, although necessarily dependent on quantity for justification purposes, has no quantity provision to limit or qualify it. The definition or formula, for this and other reasons is an arbitrary one favoring chains at the expense of independents who may deserve equivalent favor on the basis of amount of their orders, or group orders.

26. The examiner also disallows respondent's defense of discontinuance, offered as a bar to a cease and desist order, or in mitigation. The examiner does so even though he finds discontinuance in March 1963, as claimed by respondent, there being no proof offered in opposition by complaint counsel. But the examiner finds that this discontinuance took place only when the Commission's hand was already on respondent's shoulder, namely, after investigation was fully initiated and respondent sufficiently advised. The examiner affirmatively finds, moreover, that the respondent kept the existence of the extra 5% discount close to its chest, so to speak, with the likelihood that one would not find out about it except, possibly, that a four-unit independent, about to become a five-unit concern, might be advised of the existence of the extra discount.

EXPANDED FACTS AND DISCUSSION

5% Extra Discount—Started 1955

27. Prior to 1955 respondent distributed Maalox to the retail trade largely through wholesalers. It was in 1955 that it started the aforescribed system of giving a 5% extra discount to qualified chain stores, by giving them a discount of 20%, the same as wholesalers, and only 15% to independents (Newhart, TR 186, 92; 1972; RX 646).

28. This system meant in effect that the qualified chains, with five or more units, paid respondent approximately 85¢ per bottle for Maalox, whereas independents paid 90¢. The exact figures are 84¢ as opposed to .8925¢ (CX 79a, 121, 125a, 126e, 134), and are correct for 1962, the particular year of concern here. Both prices were subject to a further 2% discount for cash in ten days—a discount usually taken by both large and small purchasers.

29. Prior to 1962 the typical retail price of Maalox—in response to respondent's suggested price and lack of cut-price retail competition—was \$1.49 a bottle. (Maalox also was, and still is, a prescription item, involving a prescription price.)

Advent of Price Cutting or Discounting—1961

30. However, beginning in perhaps 1961, and continuing into 1962 and thereafter, chain stores and vigorous competing independents began to advertise and sell Maalox at much lower prices than \$1.49. The typical reduced pricing which eventuated was in two brackets. First, there was an advertised "special" price of, say, something like 90¢ more or less, often less; but, it should be noted, limited to week-ends or limited days, and limited in quantity, perhaps one to a customer. Maalox would probably be alternated in the advertising with one of a few other so-called "football" items also accorded a low price on a similarly limited "special" basis. Secondly, there was an everyday price of Maalox which was something like 98¢, which was also likely to be advertised; the other "football" items were similarly accorded an everyday price.

Advent of Price Cutting Not Caused by 5% Discount

31. This drastic price cutting, as might be expected, smashed into the more or less uniform \$1.49 retail price for Maalox which had prevailed in the past. But it seems obvious, and the examiner so finds despite complaint counsels' strenuous argument and voluminous presentation to the contrary, that the extra 5% discount

to qualified chains had nothing to do with this advent of drastic price cutting. To this extent, respondent's argument, also voluminously presented, that the resultant nickel difference in price to the retailer did not influence retail prices, is sustained by the examiner.

Some Stores Still Charged Top Prices

32. Moreover, as respondent points out, retail sales at \$1.49, or a reasonable approximation thereto, did not by any means disappear with the advent of price cutting, in the competitive areas involved here.

33. There still were drugstore concerns which simply did not get into the cut-price or discount race. These might be "ethical" or professional pharmacies or so-called prescription shops, which, to be sure, also sold nonprescription goods but at "retail list" or better. They might have chairs for the customers and a professional air. Or they might trade on home deliveries and credit sales. They did no advertising, or very little, and what they did would be strictly institutional. A few chains might show up among them. Examples of such unfavored customers are three concerns in Rome—Henson, Ingram, and Tilley, each of which never went below \$1.49 for Maalox (TR 1208, 993, and 96). A favored chain, such as Hoge-Davis in Wheeling, kept out of the discount race simply, perhaps, because the concern was old-fashioned (Runner, TR 381-84). Jones, a favored chain in Louisville, did the same for "professional image," in line with being "strictly a prescription operation" (Howard, TR 491, 527; TR 555).

34. Then there were the neighborhood drugstores. A neighborhood store got its trade from the residential area surrounding it. It typically did no advertising except by window stickers, localized mail, and magazines in doctors' offices. It might, to be sure, sell some popular items more or less regularly at a reduced price. But its main competitive attraction lay in convenient, highly professionalized service, and in its fountain. It resisted being characterized as a discounter, even though on occasion one or two of them might oblige a complaining customer by reducing its price to meet a not-too-low discount price. These are, of course, variations and resembling types.—Mr. Lubin's five stores (not fully owned by him) in Memphis kept selling Maalox at \$1.49, except that in at least one there was a drop to \$1.29 (TR 795). Ward's, in Atlanta, which does not advertise and held its price at 98¢, would cut the price for complaining customers (TR 1288: 8).

Harry's Cutrate, in Atlanta, would hold its price at "99¢, \$1.09, or \$1.19" but cut it for complaining customers (TR 1238).

35. On the other hand there were the price cutters or discounters. Typically they were located downtown, or in a large shopping center, although chains through their units could be more diversified in location and could in a substantial way be omnipresent by advertising. They regularly advertised a varied and varying assortment of items in newspapers at cut-rate or discount prices. They tended to be substantially self-service and low on prescriptions in comparison with gross volume. Of course, again, there were variations, but most of the price-cutting customers herein pretty well fell into the typical picture.

§ 2(a) Competitive Effect of Respondent's Extra 5% to Chains

36. As between independent discounters and chain discounters or price cutters, in competition, the 5% extra discount to the latter even though only 5% in price, may very well, as the examiner has already stated above, influence retail prices so as to result in loss of sales to the independent discounters.

37. To be sure, complaint counsel offered no specific proof of loss of actual sales. However, such proof is not necessary under § 2(a) of the Act, which speaks only of the effect of a discrimination which "may be" substantially to lessen competition, etc. See *Morton Salt*,⁵ the dissenting opinion of which merely espouses the test of reasonable probability rather than "reasonable possibility." The examiner is inclined to believe that in the present case the test, insofar as concerns competing customers with low markups, is met even by the standard of "reasonable probability."

Sales Below Unfavored Customers' Actual Cost

38. It is the examiner's opinion that the requisite competitive effect of the extra 5% discount is shown by the very imminent possibility that the favored chain, by selling just above its own cost, would compel the unfavored competitor to sell below its cost, or not meet the price of the favored chain. For instance, if the favored chain sold Maalox for 88¢—3¢ above the 85¢ cost to it—the independent discounter, who paid 90¢ for it, would, in order to meet the 88¢, have to sell Maalox 2¢ below its actual cost.

39. As complaint counsel points out, there is a natural reluctance, generally, on the part of even low margin retailers, large or small, to sell an item below what they actually pay for it. This, it

⁵ *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37 (1948).

seems, would be particularly true of small retailers. The examiner believes that the general reluctance to sell below cost must be presumed to be true in the absence of proof to the contrary.⁶ There is no such proof to the contrary, although the record does show, as might be expected of this low markup competition, that occasionally a large chain, and occasionally an independent, did sell below actual cost. Walgreen's, chief favored customer in Memphis, sold as low as 83¢ in 1963 (RX 413-18), 2¢ below its cost. Unfavored Oak Drug in Louisville, in 1963, advertised at 89¢ (RX 284, 287, 300, 305), 1¢ below its cost, and even at 79¢ (RX 294), below cost to favored customers. Other unfavored customers sold below cost to complaining customers (TR 1238, 1288) *i.e.*, Harry's Cutrate and Ward's, Atlanta.

Sales Below Cost Plus Distribution Cost

40. Secondly, this reasoning in connection with forcing, or being in a position to force, the independent to sell below cost or not meet competition at all, applies not only where the cost is figured as the price paid to the supplier, but also where it is figured as the amount of this price plus cost of distribution or overhead. Accordingly, if the chain sells Maalox at even an *everyday* price of 98¢ and its overhead or distribution cost is 10¢, it still has, considering the 85¢ price paid the respondent, a 3¢ profit, *i.e.*, on a total cost of 95¢. Contrariwise, an independent meeting this price of 98¢ will, considering the price of 90¢ paid by it, and assuming the same distribution cost of 10¢, have a loss of 2¢—on a total cost of \$1. There is no evidence in this case, of course, as to the actual overhead or cost of distribution of Maalox borne by the independent or the chain, or even the cost of the same for each.⁷

Any Sales Substantially Below \$1.49

41. Thirdly, even apart from the chain's being able to force the independent, wishing to meet price, to sell below cost, whether below the price to it or below price plus overhead, there still is a sufficiently adverse effect on the unfavored independent. There is the indisputable fact always staring one in the face that the favored chain has an extra 5% discount, amounting to about 5¢ extra per bottle of Maalox, which the chain may pass on to its

⁶ There is also testimony to support it (Kelly, TR 1414-15, 1430; Lubin, TR 796; Howard, TR 500-01; Blumenthal, TR 1171).

⁷ The alleged extra cost to the favored customer (*i.e.*, extra cost added to price) of warehousing and store distribution *by chains* is something else, and will be discussed below.

customers if it desires. The unfavored independent is thus always at a difficulty if it wants to be competitive and not sell in the neighborhood of \$1.49 instead of, say, somewhat near \$1. In other words, the vice of the extra 5% discount is inherent and potential even before any favored chain and unfavored competing independent reach the level of serious competitive price cutting. Respondent, without saying so, seems to be aware of this early potentiality of any adverse effect. It suggests (Brief, pp. 10-11) that the independent may charge his reduced markup on this "football" item, used in part to attract other business, to general publicity. The weakness of this observation is that the reduced markup, whatever it might be charged to by some topflight accountancy theory, is necessary to meet the competition of the favored chain if the chain elects to reduce its price. The extra 5¢ advantage to the favored customer is a club, however innocuous it may seem up to the time that competing prices drop to a low markup level.

Substantiality of 5% in Retail Discount Market

42. Respondent urges that a nickel, or perhaps a dime, is not enough to make a consumer switch from one drug concern to another. Respondent cites the testimony of an independent (Lillard, Memphis, 2 stores) on this, but Lillard is only one person. Moreover, at the most he was talking only about his 99¢ special price as against Walgreen's 90¢ special, and the relative inability of the public to know whether the latter was in effect on any particular day (TR 896).

43. It is the examiner's opinion and finding that at this level of low markup, where the item sold quite typically for under a dollar, 5¢ is money to the bargain hunter, whether it lures him to the chain because it sells Maalox regularly, say, at 98¢, or because it has advertised it as a special, say, at 90¢, although on limited days thus requiring reading the advertisements.

44. Accordingly, in contrast to the finding that a nickel, or the 5% extra discount, was of no competitive consequence—at least not immediately—in respect to Maalox selling at \$1.49 or thereabouts, the examiner finds, against the respondent, that it is indeed of consequence in respect to Maalox when selling competitively at the low markup level. He finds that the extra 5¢ as a discrimination in price is substantial, *i.e.*, substantial enough to have the requisite effect on competition and competitive vitality of unfavored customers.

5% Substantial by Impairing Discount Image

45. The examiner finds, as contended by complaint counsel, that the extra 5% discount has an adverse competitive effect, in that its effect may be not only that the unfavored retailer will lose sales but also, as a further result, that its image as a discounter or low-price retailer will be impaired, an important matter in connection with requisite ability and vigor to compete at a low markup level.

5% Substantial Compared to 2% Cash Discount

46. The examiner also finds that the extra 5% discount can be found to be substantial by comparing it to the 2% cash discount accorded by respondent to all customers, and which most customers took. Whatever annual percentage gain for use of money the 2% cash discount is, as respondent contends, a 5% (or even 2%) outright discount, should be a greater boon. (Of course, respondent claims that the 5% discount is largely, or at least partly, in payment for services rendered by favored customers, but this contention is not proved. See below, commencing Finding 75.)

Morton Salt—Potential Resales Impairment

47. As to this cut-rate level of Maalox merchandising—in which the independent, if it wishes to continue to compete, may be forced to sell below its cost, or to make a gesture of competing and preserving discounter image, by selling at only a nickel more than a chain—it would seem that a finding is justified here, within classical doctrine announced by *Morton Salt*, *supra*, pp. 46–47, as follows:

Here the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay.

The language just quoted should no doubt be read in connection with the court's further statement (p. 47):

That respondent's quantity discounts did result in price differentials between competing purchasers sufficient to influence their resale prices of salt was shown by evidence. This showing in itself is adequate to support the Commission's appropriate findings . . . [as to competitive effect].

48. The Supreme Court's opinion in *Morton Salt* is, of course, predicated on competitive injury caused by loss of resales, not loss of profit as such. Apparently, the Court thought that once it

is shown that price discrimination may result in loss of customers it is enough, and that nothing is more obvious than that the vitality of competition and competitors is impaired if customers and resales may be lost by reason of price discrimination. The examiner so holds here, although he by no means holds that *Morton Salt* is to be used as a magic formula to solve the issue of competitive injury in all § 2(a) cases. *Morton Salt* sanctions a Commission finding on such evidence, it does not compel it.

Loss of Profits Inconsequential
(Automotive Parts Cases)

49. Actually, if effect on profits, without reference to potential loss of resales, is to decide the issue here of effect on competition and resort is had to the *Automotive Parts* and related cases,⁸ the examiner finds, as contended by respondent, that the loss or gain in dollars by reason of the extra 5% discount is so meager that complaint counsels' proof fails.

50. The fact that an independent did not receive the extra 5% discount meant a loss to him, typically, of no more than \$40 or \$50 for the entire year, often less. A thousand dollars worth represents a lot of Maalox, and 5% of this is just \$50. CX 25(g-s) lists totals purchased from respondent in 1962 by unfavored (and favored) customers.

A firm like Halliday's (Moore), with four stores, Jacksonville, turns up with purchases of only \$705.51, and Attwood & Rogers, with four (literally five) stores, Jacksonville, turns up with \$960.63. Henson, with one store, in Rome, turns up with \$298.95, and Lillard, with two stores, in Memphis, with \$602.99.—These firms present a picture of loss of profit maybe from \$25 to less than \$75 a year, and proportionally less in the multi-unit stores if divided by number of units.

51. Even large volume unfavored purchasers like Griest, of Wheeling, and O'Steen's, of Jacksonville, each purchasing over \$3000 in 1962 lost less than \$200 each by not receiving the 5% extra discount—which sum might be divided by four, the number of stores each had.

The examiner finds the potential profit loss so small in this case

⁸ *Standard Motor Products, Inc. v. F.T.C.*, 265 F. 2d 674 (2d Cir. 1959), cert. denied, 361 U.S. 826 (1959). *P. Sorenson Manufacturing Co. v. F.T.C.*, 246 F. 2d 687 (D.C. Cir. 1957). *P. & D. Manufacturing Co. v. F.T.C.*, 245 F. 2d 281 (7th Cir. 1957), cert. denied, 355 U.S. 884 (1957). *E. Edelmann & Co. v. F.T.C.*, 239 F. 2d 152 (7th Cir. 1956), cert. denied, 355 U.S. 941 (1958). And others.

that evidence of keen competition herein cannot alter the finding of no competitive injury resulting from profit loss.

Improper to Project 5% to Other Products

52. Complaint counsel have a complete awareness of the puny dimensions of these figures. Accordingly, they have argued that the 5% extra discount would be shown in its true or potential significance if such a 5% extra discount were allowed by suppliers on all items purchased by the drugstores concerned. They have submitted an elaborate tabulation illustrating this. The examiner feels that he must reject this argument by projection. It is not sanctioned by the language of *Morton Salt* and the Commission so held in *Bronner*.⁹

53. The amounts lost by the independents, based on not receiving the extra 5% discount, are, in the examiner's opinion, inconsequential to constitute by themselves proof of requisite competitive effect. They are insignificant for any practical advertising budget, for instance, so common to the discount level of drugstores which this decision particularly stresses. In the examiner's opinion they are similarly inconsequential for anything else in this small markup level. It seems obvious that if an independent claims injury to vitality to compete by reason of the loss of profits of about a dollar a week, it is in a bad way indeed, entirely apart from the dollars lost by not having the 5% discount.

54. Actually the non-chain witnesses did not, with perhaps two exceptions, testify that the 5% was important as a loss of profits item. Runner (TR 446) agreed it was "money." Fine (TR 569) said 5% would affect him "on any item." Rouben (TR 663) said "five per cent would be important in anybody's business." Lefkoff (TR 1237) said "it would have been additional income." Moore (TR 1827) and O'Steen (TR 1667) testified that "any discount" is important.

Contrariwise, Lubin (TR 797) testified that it would give "opportunity to advertise," but on cross-examination showed that his stores did not advertise as a group (TR 810); and Tilley (TR 960) said it was "definitely" important.

Also, asked if he received any complaints when the 5% chain discount was discontinued, i.e., in March 1963, Mr. Rorer answered, "Oh, boy, yes." But it is understandable that the chains would complain, since nobody likes to lose anything. Moreover,

⁹ *Matter of Fred Bronner Corporation*, 57 F.T.C. 771, 783 (1958, D. 7068).

Hermex, for one, thought it was "earning the 5% discount" (Lewitt, TR 1563).

55. It is believed that the examiner has fully disposed of the question of competitive injury solely by reason of loss of profits, which is decided against complaint counsel, as contrasted with the question of competitive injury by reason of potential loss of customers, which has been decided in favor of complaint counsel, although limited to the discount or low markup level of the retail market.

*Supplementary Factors
(Including Loss of Profit)*

56. The examiner will now address himself to supplementary factors which, in recent years particularly, are generally considered in deciding whether there is requisite competitive injury, especially where there is proof of loss or potential loss of sales under *Morton Salt* doctrine. The factors now to be considered are small retail profit margins of drugstores (compare grocery stores in *Morton Salt*), and also the practice of taking the 2% cash discount.

Of course, loss of profits may also be considered as such a supplementary factor. Even though small, as found here, loss of profits may have some effect in respect to low markup customers who may well feel impelled to watch for every possible dollar on the plus side.

*Low Profit Margins
Particularly at Small Markup Level*

57. It should come as no surprise to anybody that net profit margins, as percentages of gross sales, are not very high in the retail drug industry. More importantly here, it can come as no surprise that net profit percentages for volume sellers at low markup prices tend to be very low to the extent that they reflect such selling.

58. This low net profit percentage must particularly apply to the avowed discount concerns which sold Maalox and other drug products at cut-rate prices in downtown stores, operating on a self-service basis, and without too many trimmings. This is not to detract from its application to all low markup sellers of the drugs. There is obviously an inherent interrelationship between small markups and small profit percentages.

59. The perspective in this case prior to hearing, and during hearing, was not limited to any preoccupation with low markup

customers. Complaint counsel claimed competitive effect on a very broad basis, and nothing was said about measuring any such effect differently for a high markup customer selling at high prices than a low markup customer selling at low prices. As already noted, respondent's counsel prior to hearing gave adequate notice of his intention to cross-examine incisively as to the profits of all customers, in an attempt to defeat complaint counsel on the issue of competitive injury, *i.e.*, as applying to all customers, and served notice that they expected adequate documentary proof of profit and loss in respect to all customers who would be called as witnesses by complaint counsel. The examiner went along with respondent's counsel on this.

60. Accordingly, almost all the customer witnesses called by complaint counsel came prepared with financial statements, income tax returns, or both. Confidential figures in the testimony were placed *in camera*, and the documentation became exhibits *in camera*. Counsel on both sides, as instructed, treated the subject in separate confidential appendices to their proposed findings.

61. The examiner does not propose to write a confidential appendix or a separate *in camera* decision. It is, of course, not desirable that he should do so. Moreover, it is not necessary. First, there is the obvious correlation between low markups and low profit percentages, particularly at the low markup level referred to above. Second, there is actual evidence supporting this low profit margin picture by actual figures for individual drug concerns, which, although confidential, can be summarized in a general way. Complaint counsel has submitted Tables 1 through 6 in the confidential Appendix to his Proposed Findings. These were prepared from the financial statements, and in many cases the income tax returns, of the unfavored and favored customers. These said Tables show what the documentation shows, attested to by sworn testimony.

62. It appears from them that hardly any customers show a profit percentage as high as 5%. It is the examiner's opinion that the percentages shown may well be contrasted, with substantial although not absolute relevancy, with the 5% accorded as extra discount to the favored customers herein. In other words, the narrowness of a profit margin of less than 5% becomes apparent in relationship to the 5% discount offered only to some customers. To use the vernacular, it is adding insult to injury to give a 5% discount on a popular item to some customers and not to others,

in a type of business in which the profit margin on all sales is less than 5%.

63. Furthermore, complaint counsels' Tables show for most customers a 3%, 2%, or even small percentage as margin of profit, and for some even a percentage loss.

64. In respect to a situation where the percentage of the discount exceeds the percentage of net profit, reference is made to the following cases:

Joseph A. Kaplan & Sons, Inc., F.T.C. Docket 7813 (November 15, 1963), Com. Op. p. 10 [63 F.T.C. 1308, 1343].

Pacific Molasses Company, F.T.C. Docket 7462 (May 21, 1964), Com. Op. p. 1 [65 F.T.C. 675, 718].

Puralator Products, Inc., F.T.C. Docket 7850 (April 3, 1964), Com. Op. pp. 8-11 [65 F.T.C. 21, 27-29].

65. The general low profit percentage in the retail drug industry, as represented in this case, is, as earlier indicated herein, no surprise. Moreover, as also indicated above, there can be no surprise that high volume independents seem to be in the lower bracket of the low profit percentages, and that in addition high volume chains are also represented in this lower bracket. It seems safe to assume that most of these high volume customers are low markup sellers.

66. Respondent's confidential Appendix to Proposed Findings represents largely a rewriting of the documentation summarized in complaint counsels' confidential Tables, so as consistently to allocate salaries of the real owners and principals of the concerns as part of the profits and to strike them wherever listed as business expenses. However, the examiner finds that the testimony is amply clear and consistent that these owners or principals were often, if not always, pharmacists, managers, or both. Moreover, the testimony shows that they worked long hours, far beyond any eight-hour schedule—at least in the independent or nonfavored concerns, as opposed to the chains of five units or more.

Take Mr. Lillard, of Memphis for instance, who had two stores. He managed one and carried a shift in the other in the first six months of 1962, during which period he worked an average of between 80 and 85 hours a week. He worked seven days a week. He was a registered pharmacist and served as such at both stores. See transcript (TR 872). A similar situation prevailed as to other independents, such as Wood's Pharmacy (Kelly, one store), Jacksonville (TR 1410:19;¹⁰ 1419).

¹⁰ TR 1410:19 means transcript, page 1410, line 19.

67. Accordingly, the examiner cannot accept respondent's general adjustment, in respect to salaries, of the financial documentation presented and attested to in this case. Other objections or adjustments suggested by respondent are not substantial enough to affect the total picture, if not deficient by any reasonable method of judicial determination. This is particularly true as to low markup customers, whose low profit status and percentages are pretty well substantiated by their low markup method of doing business, as observed above.

Low Profit Even With 2% Cash Discount

68. However low the profit margins were, they would well have been still lower had not the customers taken the 2% offered to all. Not taking the 2% discount would have obviously been particularly disastrous for a low markup customer with a profit of no more than 2%.—Thus, for low profit customers, the taking of the 2% cash discount meets the test quoted by respondent in its Brief, *i.e.*, “an important element insofar as their ability to compete is concerned . . .” (*Universal-Rundle Corp.*, F.T.C. Docket 8070, p. 12; June 12, 1964) [65 F.T.C. 924, 961].

69. In the examiner's opinion, paying cash, or virtually cash, is a burden and handicap to the retailer in the important sense that it deprives it of free choice in dealing with business income as it sees fit and as may be most advantageous. This factor would seem to bear most heavily on low markup, low profit customers.

70. Moreover, in the examiner's opinion, it is irrelevant or meaningless certainly in respect to low markup and low profit margin customers, to compute, as respondent does, an alleged 36% hypothetical annual percentage (Moyer, TR 2097-99, 2103), the customer supposedly earns by paying ahead of time for only a limited number of days. The actual gain to the customer, and particularly the low markup and low profit margin customer, is reflected in its profit margin, *i.e.*, in the fact that it is no smaller than it is.

71. Nor is the result altered by reason of the consideration, urged by respondent, that the taking of the 2% cash discount seems to be traditional in the retail drug industry and perhaps—despite the present liberal credit era—still a matter of “pride” on the part of some customers (Kupper, TR 610-11). Whether traditional or not, it is something else again if, without taking it, low margin profit customers might have no profit at all.

72. The undisputed fact is that respondent made the cash dis-

count available to all customers, and without discrimination. The terms of this discount were 2% for payment within 10 days, net 30 (Newhart, TR 207; see also TR 74, 2100). Most of respondent's customers took the cash discount in 1962. Cash discounts were taken on 89% of respondent's 1962 volume (Moyer, TR 2106; Newhart, TR 210-11). All of the retail witnesses testified that their firms took the 2% discount, as the examiner recollects, except that the testimony as to one or two of the unfavored customers is that they took the discount when they could.

73. Actually, moreover, the whole drift of the testimony—and respondent impliedly goes along with this—is that the customers took the cash discount not only from respondent but from all drug suppliers. Kupper (Shilbey Drug, Louisville, one store), as part of a quotation set forth in respondent's submission, declared (TR 610-11):

I have never missed a discount with Rorer or any other Company.

Moreover, a witness for a rather large chain testified (TR 496:1):

We have never missed a discount since 1879.

This was in response to a question, which is fairly typical of questions asked other customers by complaint counsel, as follows (TR 495:24):

Does ——— Drugstores have a policy in regard to taking discounts that are offered by pharmaceutical manufacturers?

74. The importance of the 2% discount in relation to low profit margins was put into rather specific words—incidentally without any restriction as to confidentiality—as follows (TR 496:2):

Q. Is two percent important to your company?

A. It is. Some years we don't make two percent.

This testimony was on behalf of a chain which sold Maalox at low prices, but not below 98¢ (TR 493-95, 502, 515).

The 5% Discount
As Alleged Payment for Services

75. The above findings, and discussion, are subject to respondent's claim, which the examiner disallows, that the 5% extra discount was proper in that it was in payment for services performed by the chains, with five or more outlets, in distributing the Maalox to their outlets, including ordering centrally and ac-

cepting central delivery instead of delivery to each store by providing a warehouse or other receiving place at the central delivery point.

Services Regular Part of Chain's Business

76. First of all, there is the question as to whether the furnishing of such services by the chain is simply a regular part of its business operations, as complaint counsel contends, entitled to no special compensation, or the like, from the seller. In other words, it may very well be that a chain will, as a matter of efficiency and inventory control, choose to have central delivery with central ordering system, even including, as conditions warrant, a separate warehouse, and it may choose to redeliver to its units.

77. It is hard to believe that Congress intended that what would otherwise be a price discrimination could, by reason of any existing distribution or warehouse mechanisms, turn out not to be one. Certainly, no such result was intended if the existing mechanisms were, say, simple mechanical facilities or machinery used in connection with the handling and distribution of purchased goods. In the present case, four-unit chains, disfavored, took central delivery, with central ordering, for their own convenience—Griest (Wheeling), Attwood & Rogers (Atlanta), Halliday's (Atlanta).¹¹ Moreover, complaint counsel adduced ample testimony that respondent did not actually require the favored customer to hold its purchases at central delivery, or to warehouse for any particular length of time (Rorer, TR 1988-89).

78. The examiner is inclined to hold that respondent, as proponent of the factual proposition, has not sustained its burden, under § 3.14(a) of the Rules of the Commission, to establish that the claimed extra services by favored customers are services furnished for the respondent, *i.e.*, that they do not represent part of their expense of doing business as drug retailers in their own way. On this holding, respondent's position would have no foundation to sustain it. However, the examiner will go into the question in more detail, inasmuch as respondent relies heavily in its Brief on its point of alleged payment for services.

No Proof of Cost of Alleged Services

79. There is the important consideration in this case that there is no proof of the cost to the favored customer of the services in question, to wit, those services involved in central ordering and central delivery, including a separate warehouse where there is

¹¹ See also Oak of Louisville and Lubin of Memphis (Addendum, *infra*). Attwood & Rogers and Lubin each represent actually five stores.

one. Actually, such cost presumably would vary from one favored customer to another, depending on whether or not it had what could be called a warehouse in a true sense, and whether or not it was separately located; and whether, with or without a warehouse, it warehoused in any realistic sense the goods purchased or more or less immediately redistributed them. Such cost would also presumably vary in respect to what distribution services, including warehousing, were or were not, in the case of any particular favored customer, part of its regular way of doing business, and on a number of other factors.

To be sure, there is an accounting summary (RX 663, *in camera*), one small page, received in evidence by stipulation, purporting to show that the warehousing cost (not including allocable general and administrative expenses) of Walgreen's was in excess of 5%. It is doubtful if this proves with any reliability much about the cost of warehousing and redelivering Maalox by Walgreen's; the evidence is too skimpy and terms are not defined. It is certain that it proves nothing much about the cost of warehousing of other favored firms accepting central delivery, some with warehouses, or whatever dimensions or formality, and some without. Even as to Walgreen's, it may simply mean that this concern has an inexplicably high warehouse cost, as compared with the cost of central delivery generally. It may even explain why, as respondent heavily emphasizes in arguing as to the value of central delivery and redistribution, Walgreen's, for over half of its purchases, waived its favored customer status and instead took separate delivery from respondent for each of its units, or was entitled to do so.

No Proportional Equal Treatment—Mueller

80. Respondent points out that under the *Mueller*¹² case the law permits, even by means of "lower price" discount, a seller to pay for services furnished in the resale of goods.

81. However, as respondent also points out, *Mueller* itself declares that if permitted to do this, the seller must abide by the principles of § 2(d) of the Act that the compensation for such services be available on proportionally equal terms to all other competing customers.

82. Respondent, to be sure, challenges *Mueller* insofar as it applies § 2(d) principles to a § 2(a) case. This position, of course, flies squarely in the face of the decision. Moreover, entirely apart from this, it is clear from the very wording of § 2(d) that Con-

¹² *Mueller v. F.T.C.*, 323 F. 2d 44 (7th Cir. 1963), cert. denied, 377 U.S. 923 (1964).

gress had clearly in mind, in regulating on price discriminations, the possibility of contentions by suppliers that a differential in price might be accounted for by alleged services furnished by favored customers. It is also clear from the wording of § 2(d) that Congress explicitly provided for such a differential only on the strictest conditions, including, incidentally, not only proportionally equal treatment, but the lack of a requirement that competitive effect be proved as against the supplier or favored customer. It is difficult to see how such a strong pronouncement in § 2(d), as to services rendered by customers, can be ignored in construing § 2(a). Somewhat applicable is the statement in the Commission's Opinion in *General Foods Corporation*,¹³ p. 825:

To hold that the rendering of special services ipso facto gives him [the customer] a separate functional classification would be to read Section 2(d) out of the Act.

5% Terms Flout Proportionally Equal Treatment

83. First, the extra 5% discount was given only to a chain of five or more units under *common ownership*, with central ordering and delivery. It was not, under respondent's plan, given to a group of five stores not under common ownership, or to five independent or semi-independent stores which might agree to central ordering and delivery.

84. Second, the 5% extra discount was given only to a chain having *five stores*, and not even given to one having four stores having central ordering and delivery. This was so, under the 5% discount terms, even though the four stores might buy in larger quantity than the competing favored customer, as was the case with Griest and its four stores in Wheeling, W. Va.

85. Third, somewhat correlative to Second, there was no attempt to proportionalize the benefit, by varying the benefit according to relative *amount of sales*, a conventional method of proportionalizing, *i.e.*, irrespective of number of stores, whether five, four, three, or even less. There was not even a provision for according the same extra 5% to an independent concern purchasing at least the same amount as a competing favored concern.

86. Fourth, it may even be that there is inequality of treatment by allowing the 5% for distribution and "warehouse" services to a five-unit chain and allowing nothing at all to a two-unit or even a one-unit outfit performing the distribution services, more lim-

¹³ *In the Matter of General Foods Corporation*, 52 F.T.C. 798 (D. 6018; 1956).

ited ordinarily, required for the smaller type of enterprise. This consideration may be a variation of Second and Third, *supra*.

87. Fifth, as already shown, there was *no proof of the value* of the claimed services of favored customers, except for the limited proof referred to above as to Walgreen's. For that matter, there was no proof of the value of such services—even if more limited in most cases—of unfavored customers, as respondents have failed to supply proof as to cost basis on which to predicate proportional equality; actually, of course, respondent does not claim that it was engaged in according any such proportional equality.

88. Sixth, the existence of the 5% extra discount and the conditions of its availability were *not made generally known* (see below), so that its availability, particularly on exceptions, such as five stores not being required to be literally under single ownership, was not known or able to be tested by inquiry.

89. However, despite all the above enumerated considerations, the examiner is content to find inherent proportional inequality by reason of the consideration that under the terms of the extra 5% discount a drugstore business, with central ordering and delivery, including even a warehouse, and ordering even a *greater amount than a competing chain*, did not receive the extra 5% discount if it were not comprised of five or more units under common ownership.

Incidentally, as will appear immediately below, most of the above enumerated considerations invalidating proportional equality also, in the examiner's opinion, invalidate the very terms of the 5% discount as possibly supporting a cost justification defense.

Cost Defense Vitiating
By Terms of 5% Discount
5% Discount Terms Not "Due Allowance"

90. The extra 5% discount is not, in the examiner's opinion, such as makes only "due allowance," under § 2(d) of the Act, for differences in cost of sale or delivery resulting from differing methods in which commodities were sold or delivered to different competing purchasers.

91. The word "due" as used in "due allowance," may be understood by referring to the dictionary meaning, "Becoming, fit, or appropriate; as, *due* respect; a *due* penalty . . . ; also regular; lawful; as *due* process of law." (Webster's New Collegiate)—Particularly if, as respondent contends and the examiner agrees,

cost differences of a nationally sold product like Maalox sold to many customers, need not be justified on an individual transaction basis which would result in many different cost-reflecting prices,¹⁴ the word "due" implies some kind of objective standard or rule applicable with substantial evenness to all customers.

92. Thus, once it is found, as the examiner does find, that the 5% extra discount system is, on its face and by its provisions or terms, not a "due allowance," the issue of the cost defense is decided against respondent. It would make no necessary difference if respondent's cost of sale or delivery to one, or even more, favored customers should turn out to be 5% less than the cost of sale and delivery to competing unfavored customers, *i.e.*, if, as here found, the 5% discount was given customers irrespective of savings of cost, that is, by a loose, if not arbitrary, formula invalidating the discount as a "due" allowance.

The "formula," according to respondent's own policy statement (CX 5d) is:

Definition: A retail store is defined as five or more registered pharmacies under single ownership. A chain must have a buying office and a warehouse, though an individual unit of the chain may be considered either or both.

Common Ownership Provision Violates "Due Allowance"

93. Suppose five stores qualify except that they are not under common ownership. Suppose, also, that they have exactly the same central ordering and delivery system (even including exactly the same kind of warehouse) as five stores under common chain ownership. Respondent's 5% discount, under this supposition, is concededly unavailable to them, even though respondent's cost of sale and delivery would presumably be the same for them as the five stores under common chain ownership. Accordingly, it would seem that the 5% discount is not a "due allowance" when made to the chain all of the units of which are under common ownership. It is true that the record shows that respondent in one instance¹⁵ allowed the 5% discount to a chain not precisely under common ownership but substantially so; however, this does not change the result, but merely shows that respondent violated to a limited extent its own rules or provisions.

94. There is no example in the record of a setup of five drug-stores denied the 5% discount because not under common owner-

¹⁴ *U.S. v. Borden Company*, 370 U.S. 460, 468 (1962)

¹⁵ Hermax, in Jacksonville, was a group of six stores, as to each of which an individual was majority stockholder (Lewitt, TR 1555-57).

ship.¹⁶ But it is reasonable to suppose that if the 5% discount had been available to five-store setups not under common ownership, and such availability known in the trade, there would be a fair number of examples of such setups not under common ownership.

95. It is the examiner's considered opinion and finding that the provision requiring common ownership in itself destroys the legality of the 5% discount as "due allowance." Instead of being a due allowance reflecting the seller's differing costs with different customers, it can readily be an arbitrary allowance, irrespective of cost. It turns out to be a method which results, in part, in giving an advantage to a chain of five or more drugstores under common ownership, having central ordering and delivery, not available to a group of five independent stores, not under common ownership, which might be willing to buy centrally with central delivery. It would seem to be quite anomalous if a provision of the Robinson-Patman Act which in substantial measure was directed against chains, could be twisted by such discount terms into favoring chains.

Lack of Quantity Provision Violates "Due Allowance"

96. Suppose there are four stores which do not qualify since less than five, although they otherwise would qualify since they have central ordering and delivery. More importantly, suppose the purchases of Maalox by these four stores are greater, even far greater, than those of the favored chain customer having five or more units. Under this supposed example, respondent's 5% discount would obviously not be available to the four stores. Indeed, Griest, the unfavored customer in Wheeling, which even had a warehouse, so to speak, purchased far more in amount than Hoge-Davis, the favored five-unit chain (CX 25s; TR 301-02, 337).

97. It is the examiner's considered opinion and finding that the absence of an appropriate quantity provision in according the 5% discount is itself fatal in this case to the possibility of regarding a discount to chains of five or more units, with central ordering and delivery, as "due allowance" under § 2(a) of the Act. Without an appropriate quantity provision, four drugstores, such as Griest, or an informal group—or even less than four—may purchase, or be willing to purchase, more than five or more, and respondent's cost of sale and delivery to them may be no greater than

¹⁶ However, Lubin of Memphis had five stores in each of which he had some substantial interest, and as to which there was some modicum of central delivery (TR 792-93).

to the favored chain, and may well be less. As for differing "methods" of sale or delivery, the alternative specified in § 2(a) to differing "quantities," there are no differing methods having any legal consequence, in the absence of a quantity provision, as will be demonstrated here later.

Five-Unit Provision Violates "Due Allowance"

98. It may also well be that the provision of the 5% discount formula requiring the chain to be of five or more units, rather than a lesser number, in itself is contrary to "due allowance," as specified in § 2(a), for the purposes of cost justification. This conclusion has some support, at least in the absence of a quantity provision, in language used in the *Chemway*¹⁷ case, affirmed by the Commission without opinion, to wit:

Also, respondent's requirements that a retailer purchaser must have three or more outlets to qualify for the lower price would defeat a cost justification in situations where purchasers with one or two outlets ordered for delivery to a single point, in as high- or higher-volumes orders than purchasers with three or more outlets.

No "Differing Methods or Quantities"

99. Respondent's 5% extra discount may be challenged not only on the ground, as above found by the examiner, that it is not one which makes only "due allowance," under the cost proviso of § 2(a), but because, as complaint counsel strongly urge, it does not reflect reduced cost resulting from "differing methods or quantities" within the meaning of the cost proviso.

No "Differing . . . Quantities"

100. The examiner has no difficulty, of course, in agreeing with complaint counsel as to differing "quantities," i.e., that the 5% discount formula does not reflect reduced cost resulting from differing quantities. As already fully stated and expounded, the discount formula, by its terms, is applicable irrespective of quantities sold and delivered. Any excess of quantities purchased by a chain of five units or more, including most importantly the amount of such excess, is a matter for speculation as compared with those of a competing independent purchaser.

101. As already pointed out, the competing independent may purchase more than the chain. The consideration that an aggregate of chains, as a general matter, may purchase more than inde-

¹⁷ *Matter of Chemway Corporation*, 59 F.T.C. 1333, 1338-39 (D. 7815; 1961). Opinion of Examiner Creel.

pendent competitors should not change the legal result, reading the cost proviso in the context of §2(a) as a whole and in the light of its purposes. This is so, as already stated, even though cost justification need not be on each competitive situation, despite complaint counsels' contention to the contrary, and may perhaps even be on a national basis.

102. The wording in the cost proviso of §2(a) as to differences resulting from different quantities (or methods) cannot be given a meaning construing respondent's 5% discount as a quantity provision, on some presumption that favored customers purchase larger quantities, when it is obvious that the 5% discount simply squelches an independent purchasing in large quantities, or a group of independents desiring to do so. This is not requiring cost justification to be on each competitive situation; it is simply requiring that it have requisite relationship to "quantities," as specified in the cost proviso.—It is believed that this conclusion can be reached even without relying on the preceding words "due allowance," in the cost proviso, although these words of course strengthen the conclusion.

103. The very absence of a specific quantity provision in the discount formula makes it suspect, considering that the cost proviso of §2(a) specifies "quantities" and that the usual method of justifying differentials is by reason of quantities. Furthermore, it may be appropriate to note that the cost proviso, as an exception to the subject matter of §2(a), which is price discrimination, must, under well-understood rules, be given a strict construction.

No "Differing Methods" of Any Consequence

104. As to "differing methods," referred to in the cost proviso of §2(a), the examiner is inclined to hold, contrary to complaint counsels' contentions, that central delivery is a different method of delivery than unit delivery to purchasers not receiving the 5% discount, and that this also applies to central ordering as compared with unit ordering. However, the examiner holds that it is a differing method which of itself is of no consequence in respect to cost of sale or delivery (or manufacture). In other words, differences in such cost would not be necessarily "resulting" from the different methods.

105. This is so because the method of delivery to one delivery point for the chains, as compared to different delivery points for each of one-unit independents, or for each unit of a multi-unit independent, is in no way tied up, in the discount formula, with

quantity. It is even theoretically possible that a one-unit but vigorous independent would purchase more than a favored but old-fashioned five-unit competitor. And, as we have seen, a four-unit firm in Wheeling did purchase far more than the favored firm; not only that but it did so by central ordering and delivery, the very method relied on by respondent to justify the extra discount to the favored customer.

106. The method of central delivery, with central ordering, to a chain of five or more units is of no consequence and is not meaningful because there is no quantity provision in the 5% discount terms which would give the method the requisite cost effect.

107. Thus, all the reasons heretofore advanced in respect to absence of differing quantities, *i.e.*, invalidating the 5% discount terms for failure to contain any provisions as to quantity, apply equally to these so-called differing methods, *i.e.*, central ordering from and central delivery to favored chains.

108. The examiner's reasoning as to the inadequacy of the claimed different methods of sale and delivery is again without reference to the construction heretofore made by him of the words "due allowance," as used in the cost proviso, although there is a supporting connection between the two.

Conclusion as to 5% Discount Terms

109. Thus, summarizing the reasoning herein, both as to alleged differing quantities (not mentioned in the discount formula), and as to the alleged differing methods (dependent cost-wise on unstated quantities), as well as the prior conclusion as to the meaning of "due allowance," the following may be stated:

110. First, respondent's 5% discount plan is, on its face, merely a system for giving the extra discount to chain stores with central ordering and delivery on the assumption that in the aggregate, or generally, they will purchase greater amounts than the competing independents, thus reducing cost of sale and delivery.

111. Second, and more importantly, said discount plan contains no standards or scales of amounts whatever, and rides roughshod over the possibility that some independents may purchase greater amounts than competing chains, yet be disqualified despite willingness to abide by central ordering and delivery.

112. In the *Borden* case, *supra*, the Supreme Court, speaking to be sure, of the cost justification study in that case, rather than any discount formula as such, stated (pp. 469-70).¹⁸

¹⁸ See also pp. 470-71 as to lumping together disparate independents.

However, such a grouping for cost justification purposes, composed as it is of some independents having volumes comparable to, and in some cases larger than, that of the chain stores, created artificial disparities between the larger independents and the chain stores. It is like averaging one horse and one rabbit.

It cited *Champion Spark Plug Co.*, 50 F.T.C. 30, 43 (1953).

113. Although the Supreme Court was indeed speaking of a cost study it does seem to this examiner that its primary concern was not with cost studies as such, but with the principles and standards of cost justification in connection with price discrimination generally. This concern, at least, is also applicable to a questionable discount formula—even though the *Borden* case is, of course, no direct authority on a discount formula or its possibly invalidating effect on a cost study seeking to justify it.

114. The examiner accordingly holds that the extra 5% discount is neither “due allowance” nor does it embrace “differing methods or quantities” within the meaning of the cost proviso of §2(a) of the Robinson-Patman Act.

This disposes of respondent’s cost defense without considering the actual cost study submitted by respondent to substantiate this defense.

Discontinuance

No Bar to Order

115. Respondent’s discontinuance of the 5% extra discount is no bar to an appropriate order herein. The discontinuance was only after the Commission’s hand was already on its shoulder. Moreover, it had always kept the existence of the 5% discount close to its chest; unfavored customers were told nothing about it except, perhaps, four-unit independents about to qualify as five-unit favored customers.

1961 Order and Questionnaire

116. On August 8, 1961, respondent was served (CX 189) with a Special Report Order, and Questionnaire, addressed to drug manufacturers and sellers (CX 188a–g). The preamble (CX 188a) stated the purpose was:

to determine if any such companies are engaged in violation of Section 2 of the amended Clayton Act or Section 5 of the Federal Trade Commission Act.

117. Part VIII of the Questionnaire (CX 188d–e) requested, among other things:

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3. All classifications and categories for pricing purposes, such as, but not limited to the following:

- (a) independent druggists
- (b) chain stores

* * * * *

4. According to customer classification or category, the price, type of discount (including quantity and annual volume), and rate of amount of discount granted to each classification or category.

* * * * *

118. However, this request was limited by VIII "to each prescription and drug product listed under V"; and V (incorporating IV) is limited to such as "contain any of the following: antibiotics, barbiturates, tranquilizers, hormones, antihistamines, vitamins, narcotics and sulfonamides." Respondent claims that it did not regard this as referring to Maalox because it was not a "legend prescription drug" (Rorer, TR 1977:11). It submitted its response to the questionnaire accordingly. Apparently, it heard nothing further from the Commission until May of the following year.

119. The examiner is not prepared to hold that this incident constitutes an example of the Commission's having its hand on respondent's shoulder. However, he does believe that it shows that the Commission was already breathing down the respondent's back, if not over its chest, to which it was holding so closely the existence of the extra 5% discount, as will be shown here later. How could it have failed to get at least a strong hint—in view of the express references to "independent druggists," "chain stores," and "customer classification or category"—that the Commission was actively moving into practices exactly like its own?

1962 Investigation and Visit to Respondent

120. On May 31, 1962, Mr. Gregory, a young Commission field office attorney, called at respondent's office and spoke to Mr. Gerald F. Rorer, the then president (TR 2285). This was in the course of a Commission investigation. He testified as to this in part as follows (TR 2285-86):

A. Well, initially I summarized the nature of the investigation, advised that on the basis of the reports that had been submitted in response to an interrogatory under section 6 of the Federal Trade Commission that there was reason to believe that certain of their practices with regard to various types of discounts might be in violation of the Robinson-Patman Act and advised as a result an investigation had been requested to determine various things about these discounts * * *. (Emphasis ours.)

Mr. Gregory requested access to documents and records, and permission to interview certain officials. Mr. Rorer put off his answer until the following day (TR 2286).

121. On the following day, June 1, 1962, Mr. Gregory called again and Mr. Rorer was with two attorneys (TR 2286:22). Mr. Gregory's request for access to documents and records, and for permission to interview officials, was denied (TR 2287). They took the position that if the request for the information and documents were made in writing they would consider it (TR 2288). Mr. Gregory subsequently prepared a four-page letter accordingly, and mailed it to respondent. Materials responsive to the letter were sent to him by the respondent by the end of the summer.

122. No further request for information or access was received by respondent from Mr. Gregory or the Commission (Gregory, TR 2285-87, 2338-41, 2346-50; Rorer, TR 1995-2002, 1978-79, 1982-83). Nor did Mr. Gregory, or anybody else in the Commission, advise of any staff reaction, to the response, to the effect that respondent was in violation. Similarly, at least until March 1963, respondent did not indicate in any way the possibility of any violation on its part that it was willing to discuss or adjust (Gregory, TR 2289-90, 2351).

123. It is the examiner's holding that this incident is a clear example of one where the Commission had already put its hand on respondent's shoulder. However naive respondent may have been in this earlier period, as is contended in the memorandum submitted in its behalf—even to the extent of not understanding the price discrimination implications of the 1961 Order and Questionnaire, in at least potential reference to itself—it can hardly be inferred, on the evidence in this case, that it did not understand that Mr. Gregory's 1962 request and letter were directed to its own extra 5% price practice.

Discontinuance March 1963—Not Disputed

124. Respondent discontinued its 5% extra discount by letters dated March 15, 1963, effective March 18, 1963 (Rorer, TR 1971-72; 1980—Newhart, TR 186, 273; RX 646). Complaint counsel expressly state in their legal argument (p. 99, Proposed Findings): "There is no dispute as to the discontinuance," although, it is true, the complaint alleges in effect a continuing violation. Respondent mailed identical letters to all of their customers, favored and unfavored, on March 15, 1963, as aforesated, which was a Friday, so as to reach them after the week-end. The

letters (RX 646) eliminated the discount and the objectionable categories of customers. The Commission was simultaneously advised. (See Rorer, TR 1981; RX 641.)

125. Respondent claims that the discontinuance was *sua sponte* and something done in the normal course of corporate affairs. It particularly attributes the discontinuance to the taking on of new counsel. First, on or about Labor Day 1962, it took on, as house counsel, Allen G. Kirk, II, former assistant dean of the University of Pennsylvania Law School. Second, on Mr. Kirk's suggestion, respondent engaged their present counsel. As Mr. Rorer testified, Kirk "thought our price structure should be examined by experts and [with Rorer's assent] he made an engagement to discuss the facts with Covington and Burling . . . about March 1, 1963." Mr. Rorer added that the discontinuance letters went out 15 days later on their advice. (See Rorer, TR 1979-80, 1971; RX 646.)

126. The examiner agrees that the actions and recommendations of respondent's new counsel were in the best professional tradition, as contended in respondent's memorandum. But no doubt counsel acted not only on the basis of the extra 5% discount itself but, at least in substantial measure, in the light of the Commission's approaches to respondent, both in 1961 and 1962. It may very well be, therefore, much more than normal corporate procedure that Washington counsel recommended and brought about discontinuance within 15 days. The facts were the same before new counsel came on the scene, and, in the examiner's opinion, it would be anomalous if respondent could claim exoneration from an order here merely because it retained new and highly professional lawyers. If the Commission's hand was near, and then on respondent's shoulder, as the hearing examiner has found, the respondent knew, or should have known it without advice of counsel. The two-price system was respondent's own, and, very importantly, as will now be developed, respondent was quite careful to keep it from general public knowledge.

Concealment of Discount

127. The evidence shows that the extra 5% discount was something generally known about only by favored customers, not by unfavored customers. The most that the evidence possibly shows as to knowledge by unfavored customers is that an otherwise unfavored customer, with only four units and about to expand to five, might be advised, by a Rorer salesman assigned to it, of

the 5% extra discount (Stanley, TR 1926-27; Newhart, TR 201, 251). It is doubtful if it shows even that much (see Findings 129, 130-31, *infra*).

128. Rorer's witness Stanley was questioned by respondent in an obvious effort to show wider publicizing, but without success. Cross-examination made clear a picture of minimum publicity. The examiner well remembers Stanley's testifying, and regards him as a witness quite reluctant and uncomfortable about having to give answers which indicated restricted publicity of the discount, although that is exactly what he did.

129. Mr. Newhart, respondent's vice president of sales, testified at the very commencement of the hearing (TR 200:22) :

Q. Mr. Newhart, are the independent retailers, or were the independent retailers in 1962 made aware of the chain store discount?

A. No.

Mr. Rorer himself testified (TR 1986:9) as to why the discount was not publicized, in 1955:

It did not occur to us to publicize it.

130. Actually neither Mr. Rorer's nor Mr. Newhart's testimony supports even the conclusion that otherwise qualified multi-unit concerns likely to become five-unit concerns were advised of the discount. The conclusion is definitely negated by some of the other testimony. Rogers (Jacksonville, five stores) opened his fifth store in June of 1962, and although he took central delivery before and after, he was not informed of the discount and therefore did not ask for it (TR 1719-20, 1733-34). Lubin (Memphis, five stores) was in a similar situation (TR 794, 802), although he did not fully own each of his five stores.

Respondent omitted any mention of the favored discounts in published price lists (Rorer, TR 1985). Sales representatives were advised orally of respondent's pricing policy to favored chains during orientation or refresher training courses; no written instructions were issued to them to solicit chain store accounts (Newhart, TR 249:8; 250).

131. Mr. Stanley testified as follows (TR 1929:17-19) :

Q. Was there any information available to the public generally about Rorer's discount policy for a five-store chain in 1962?

A. I wouldn't say generally, not on a general basis.

He also testified (TR 1929: 20-22):

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Q. Did you ever tell single store operators that you were giving five-store chains an additional 5% discount?

A. Well, I would without hesitation, if they asked me.

He further testified (TR 1926:20-23):

Q. Did you advise Mr. Taylor [Rogers, Jacksonville] whether your company had a more favorable price for five-store qualifying chains?

A. Not that I recall since he was a four-store operation at that time.

Mr. Stanley also testified (TR 1931:18-22):

Q. Well, how do the stores know about the 5% discount?

A. Well, I think, as I said, in my previous testimony as soon as a store would open, the fifth store, the account—I mean an account of mine would open the fifth store, I would, of course inform him of this.

The last two excerpts from Mr. Stanley's testimony, it will be noted, cast doubt on the existence of any policy at all to advise unfavored customers of the 5% discount, irrespective of their immediate potentiality as favored customers. On the other hand, it is clear that sales representatives were instructed to be alert to the eligibility of their accounts for reclassification as chain customers (Stanley, TR 1926, 27; Newhart, TR 201, 251).

Other Factors

132. Mr. Rorer and Mr. Newhart testified that the 5% extra discount was started with a good-faith purpose of compensating chains for warehousing and distribution services on the same basis as wholesalers were compensated (Newhart, TR 192, 264-65, 275; Rorer, TR 1976, 2002, 2004, 2006). The examiner respects this testimony and can understand the genuineness of such a purpose and motivation—even though, irrespective of purpose, a seller should be presumed to know the law, at least to the extent that it can engage in price discrimination or price differences between chains and independent stores only at considerable risk of violating the law.

However, it is the examiner's opinion that any innocence of respondent in entering into the 5% discount practice is dimmed, for the purposes of its discontinuance defense, by reason of the fact that it was not publicized. Whatever the motivation for not publicizing it, the fact that it was not generally made known tends to place the discount in the "under the counter" category. If this discount had been sufficiently well publicized it seems quite probable that complaints from independents, and possible earlier intervention of the Commission, would have brought about discontinuation at a much earlier date.

133. It is also true that respondent has never before been subjected to any government proceeding with respect to any pricing

or antitrust matter (Rorer, TR 1976-80). Moreover, respondent, through its officers, has given assurances that its discount system will not be re-established (Rorer, TR 1973, 1999, 2006-07; Newhart, TR 273), and there is much to suggest that it would not be practical to do so even if respondent so desired (Rorer, TR 1973-74). However, in the examiner's opinion, these factors, and others cited by respondent, do not warrant the withholding of an order in this case directed against respondent, *i.e.*, when considered in the light of a belated discontinuance, the failure to publicize the existence of a discount, and the chain discount formula's inherent discrimination.

134. Basically, the determination as to whether the public interest requires the issuance of an order in cases of discontinuance lies in the sound discretion of the Commission. *Marlene's, Inc. v. Federal Trade Commission*, 216 F. 2d 556, 559-60 (7th Cir. 1954). This discretion will be exercised in view of all the facts and circumstances surrounding the alleged discontinuance. *Eugene Deitzgen Co. v. Federal Trade Commission*, 142 F. 2d 321, 330-31 (7th Cir. 1944), a case cited herein by both sides.—Discontinuance of an illegal practice only after the Commission's hand is already on the respondent's shoulder furnishes no basis for dismissal of the case. *Matter of Bakers of Washington, Inc.*, F.T.C. Docket 8309, Comm. Op. (December 3, 1964), page 13, n. 26 [66 F.T.C. 1222, 1232], citing *Coro, Inc. v. Federal Trade Commission*, 338 F. 2d 149 (1st Cir. 1964).

Note on Proposed Findings

135. The findings of fact herein are those contained in this decision. Proposed findings of fact not found herein are rejected. Rejection of a proposed finding does not mean that the proposed fact has not been proved. A large number of them are rejected because the examiner has not deemed them sufficiently relevant to the low markup level of competition determined by him to be controlling, and also because the cost study as such has not been considered in arriving at this decision.

136. However, particularly since this decision is unfavorable to respondent, it may be only fair to state that respondent's Proposed Findings (eliminating the cost study findings, since not passed on) are on the whole very reliable as a factual presentation, excluding obvious argumentative material and conclusions. The examiner has found very useful the tables on pages 21-47

thereof, tabulating in chronological order, for each trade area, the advertised prices of various customers; thus succinctly summarizing the prices advertised by them as shown in twelve bound exhibit volumes of the advertisements themselves.

Undisposed of Motions

137. Any motions herein not heretofore disposed of are disposed of in result consistently with this decision.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the respondent William H. Rorer, Inc., and the subject matter of this proceeding.

2. The complaint herein states a cause of action under Section 2(a) of the Clayton Act, as amended, and this proceeding is in the public interest.

3. Respondent in the course and conduct of its business in commerce has discriminated in price between different purchasers of its prescription and non-prescription pharmaceutical products of like grade and quality in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

4. Respondent's discrimination in price between different purchasers of its products did not 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 were to such purchasers sold or delivered.

Scope of Order

Complaint counsel submit a proposed broad order patterned on pertinent wording in §2(a) itself. The examiner believes that such an order might be justified, particularly in view of respondent's concealment, over the years, of the discriminatory pricing from unfavored customers. This would be largely on the theory that having systematically concealed in respect to one type of discrimination, here a special discount based on chain store classification, respondent might in the future conceal or fail to publicize in respect to a different type of discrimination. The examiner, however, is not prepared to issue, on this basis, an order as broad as the one proposed by complaint counsel. He prefers to take care of the concealment or publicity feature by tailoring in some way the order issued.

The respondent proposes a narrow order, in effect enjoining

"any price or discount policy based upon a classification of its customers into chain stores or independent stores" (quotation from Solicitor General's Brief, p. 50, in the *Borden* case, supra, proposing that type of order). The examiner is disposed to issue such an order, provided that it can be tailored by adding a provision as to concealment or lack of publicity.

To accomplish his purpose, the examiner issues herein a dual order.

The first part of the order issued herein incorporates respondent's proposal, limited to a price or discount policy based on classifying customers into chains and independent stores.

The second and supplemental part of the examiner's order incorporates complaint counsels' proposal directed against all price discriminations—but with a proviso, to wit:

unless adequately and regularly publicizing to all customers that prices to some are higher than to others, together with reasons and details of the price difference or discounts.

It is the examiner's opinion that inasmuch as the facts here warrant an order without such a proviso, as heretofore stated, and inasmuch as the proviso is altogether reasonable as well as carefully tailored to corporate respondent's past pattern of non-publicity closely related to its violation, this supplemental provision of the order is justifiable and lawful. Such a provision, directed against conduct not in itself violating the law, such as not publicizing price differences or discounts, has support, at least in language used by the Supreme Court in *Ruberoide Co. v. Federal Trade Commission*, 343 U.S. 470, 473 (1952), the case primarily relied on by complaint counsel to sustain their proposed broad order. The Supreme Court said:

If the Commission is to attain the objectives Congress envisioned * * * it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be bi-passed with impunity. * * * Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices.

In quoting from this case, it is stated in Rowe, *Price Discrimination Under The Robinson-Patman Act*, 1962, p. 507:

In principle, the Court sanctioned a wide latitude for the FTC not only to scotch violations but also to block easy evasion.

In not issuing an order exactly as proposed by complaint coun-

Addendum

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sel, the examiner has been influenced by the following cases, among others: *Federal Trade Commission v. Broch and Co.*, 368 U.S. 360, 367, 368 (1962); *Matter of Transogram Co., Inc.*, F.T.C. Docket 7978 (September 19, 1962) [61 F.T.C. 629]; *Swanee Paper Corp. v. Federal Trade Commission*, 291 F. 2d 833, 838 (2d Cir. 1961).

ORDER

It is ordered, That respondent William H. Rorer, Inc., a corporation, and its officers, representatives, agents, and employees, directly, indirectly, or through any corporate or other device, in or in connection with the sale of prescription and nonprescription pharmaceutical products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality by:

(1) classifying retail chain drugstore customers in a different pricing classification from other retail drugstore customers which in fact compete with retail chain drugstore customers in the resale and distribution of respondent's products.

(2) selling to some purchasers at prices higher than the price charged to any other purchaser who, in fact, competes in the resale and distribution of respondent's products with the purchaser paying the higher price—unless adequately and regularly publicizing to all customers that prices to some are higher than to others, together with reasons and details of the price differences or discounts.

*Addendum to Initial Decision**

THE SIX AREAS

Inasmuch as the examiner finds competitive injury on the basis of potential loss of sales by low markup disfavored customers as against competing low markup favored customers, it has seemed unnecessary, except occasionally, to make definite findings as to competing customers in each of the six selected trade areas. How-

Note on Addendum to Initial Decision, immediately following: 1963 prices are included in the Addendum so as to make the picture more complete. However, the examiner is not convinced by respondent's argument that if a favored customer did not increase its price after March 1963, when the 5% discount was discontinued, this proves that the discount had no effect on resale prices after all. Other factors must be considered (Enloe, TR 728, 734; Hyken, TR 1404-05; Fine, TR 598; see also Hyken TR 1349-50; 1380).

*This is non-confidential, as distinguished from the confidential Appendix, to Proposed Findings, submitted by counsel on each side.

ever, by way of supplementary findings, a thumbnail sketch will now be given as to competition in each area.

Wheeling, West Virginia

The one favored customer was *Hoge-Davis*, with five or six units. It sold Maalox at \$1.49, so-called list. It did not advertise (Runner, TR 369). It is an old concern, now run by a 90-year-old descendant on old-fashioned methods (TR 380-83). Since this concern, the only favored customer in Wheeling, did not sell at low markup, the examiner has rejected Wheeling as a trade area in which competitive injury has been specifically proved.

The unfavored customer, for our purposes, was *Griest* (witness, Runner), with four stores (Runner, TR 295-96), and its own "warehouse," as an adjunct to one store (Runner, TR 301-02, 337). Griest generally advertised Maalox in 1962 at \$1.09 (Runner, TR 299-300, 352; RX 422, 423). But it also advertised the product at 99¢, even as early as October 1961 (RX 419), and in 1963 it advertised it at 99¢ and sometimes even 86¢ (RX 444-45), less than cost to it. This it did when engaged in meeting the prices (Runner, TR 299-300, 308, 316, 319) of Walgreen's, which cannot be classified as a favored customer in the Wheeling area. Griest purchased five times as much as Hoge-Davis, from respondent (CX 25s).

Walgreen's had one unit in the Wheeling area (CX 187, p. 14), and although a member of a large chain, the only proof is that Walgreen's in Wheeling purchased its requirements directly from respondent as an unfavored customer. Like Griest, it was a strong advertiser. The evidence seems unclear as to its advertising price for Maalox in 1962, but it may have been \$1.09, the same as Griest. There is definite proof that in 1963 it was advertising at 99¢ (RX 425, 429, 430).

Louisville, Kentucky

The only favored customer, for our purposes, was *Taylor* (witness, Howard), a chain with 26 stores and a warehouse (TR 493). It regularly advertised Maalox for 98¢. It has never advertised for less (TR 493-95, 502, 515).

To be sure, there was another favored customer, *Jones* (witness, Howard), a chain with six stores. But Jones charged \$1.49 for Maalox (TR 663). It did not go below this price and did not advertise (Fine, TR 572); it seeks to create a "professional image," as a "prescription operation" (Howard, TR 491, 527).

Jones is therefore not considered in this decision for the purpose of specifically proving competitive effect.

Oak Drug, etc. (witness, Fine) was an unfavored customer, with four stores—as well as, it should be noted, central ordering and delivery (TR 563). Oak was, already in 1961, regularly advertising Maalox at 97¢ (RX 179, 180, 182–84), beating the favored Taylor by 1¢. In 1963 it was frequently advertising Maalox at 89¢ (RX 284, 287, 300, 305), and at least once at 79¢ (RX 294), way below the 90¢ cost. These low prices were, most likely, for the purpose of meeting or beating Walgreen's.

Walgreen's had nine units in the Louisville area (CX 187, p. 13). However, the only proof of receipt of Maalox by Walgreen's in Louisville consists of sales directly from respondent Rorer, and at the unfavored rate (RX 619–33). Whatever connection Walgreen's in Louisville may have with the Walgreen chain as a whole, insofar as purchases of Maalox were made as a favored customer by the chain at large, it cannot be categorized as a favored customer, on the proof here. However, it may be noted that Walgreen's in Louisville advertised Maalox in 1962 (RX 241, 244, 271) at 97¢, and that in 1963 it frequently advertised it at 83¢ (RX 291, 303, 329, 340).

Shively Drugs (witness, Kupper) was an unfavored customer in the suburbs, having one store. Apparently it sold Maalox for 98¢ (TR 608–09) and did not go below this price. It did no advertising (TR 605). It was a modern store with a lunch counter and fountain as a drawing card. As a business venture it got along quite well (TR 618, 621).

Rouben's Pharmacies (witness Rouben) also was an unfavored customer, with two or three stores. It also sold at 98¢. It got along very well (TR 655) and in a rough way is comparable to Shively Drugs. A service image was more important than price (TR 660–61).

Memphis, Tennessee

The chief favored customer was *Walgreen's* (witness, Noto), with (TR 1778, 1798) eight stores, one downtown, and having a warehouse adjacent to one store (TR 1782). It was also serviced by Walgreen's warehouse in Dallas, Texas (TR 1781–83). Its favored status in this area is undisputed. In this area it was assuming a discount image already in 1961 (Noto, TR 1792). In 1962 it advertised at 99¢ and 98¢ (RX 375, 377, 379). In 1963 it continued to advertise at 99¢ and 98¢, but also advertised at such prices

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as 83¢ (RX 413-18), 87¢ and 89¢ (RX 406-08); these lower prices were most likely to be limited specials.

There was another favored customer, *Pantaze-Plough* (witnesses, Sievers and Taylor), with six stores, all downtown, and a small "warehouse" in the basement of one of the stores (TR 741-43, 746, 766). In 1962 it sold Maalox at an everyday price of \$1.49 (TR 749, 756-58, 767; CX 113a, 114a). However, it might also advertise it at 93¢ (late 1962), say, as a special (CX 380, 382, 402), and frequently did so in 1963 (RX 380, 382, 404, 405).

One unfavored customer consisted of a group of five stores, in each of which a *Mr. Lubin* had some substantial interest, and as to which there was at least some modicum of central delivery (TR 792-93). None of Mr. Lubin's stores seem to have gotten into low markup selling of Maalox. His Whiteway store sold Maalox at \$1.49 (TR 795, 845). The other stores each fixed their own prices fairly independently, but a reduced \$1.29 price (TR 795) at one store, in 1963, may be typical of non-low markups in other than the Whiteway store. Mr. Lubin's stores were also quite profitable. The stores had different names and there was no common advertising (TR 810, 819). Their non-low markup policy as to Maalox excludes them from any basic consideration on the issue of competitive injury.

Lillard was an unfavored customer having two stores (TR 859). By the end of 1962 the Georgian Hills store, which had been adhering to \$1.49, was regularly selling Maalox at 99¢ (TR 863:15), and occasionally it advertised it as a special at 88¢ (TR 863:17). At the Lillard Pharmacy store, the regular price of \$1.49 was maintained, but with specials at \$1.29, 99¢ and 88¢ (Lillard, TR 863, 885, 892-93). Respondent contends that Lillard reduced the price to 88¢ simply to create a price image. But on cross-examination Mr. Lillard testified (TR 867:15):

Q. Why did you offer it for sale at 88¢.

A. To meet competition and create a price image. (Our emphasis.)

He did testify that people might be willing to pay him 98¢ even though they might get it at Walgreen's at 88¢, but that was "partially because of convenience" (TR 896:6), and also because a customer could not know, all the time, whether Walgreen's 88¢ special was in effect (TR 896:2).

Atlanta, Georgia

Jacobs (witnesses, Luther and Hilley) was one of the two favored customers (CX 25i-j), having 16 or 17 stores in the area

(see Hilley, TR 1089)—only one downtown, the rest elsewhere including suburbs (Luther, TR 1053, 1064), and having its own warehouse (TR 1057; see also 1067). Jacobs advertised Maalox in 1962 at 84¢ (CX 146) and 87¢ (CX 147-48)—*i.e.*, as specials (Luther, TR 1063-64), its regular price being referred to in the advertisements as \$1.49.

Reed's (witness, Blumenthal) was a favored customer, having five stores (TR 1160; CX 151) and a warehouse (TR 1167). Even as early as January 1962 it advertised specials of 94¢ (RX 42-43). It also advertised at 94¢ throughout 1962 (RX 46-61, and others), as well as in 1963 (RX 112, 141, 145, 148, 149, etc.). *Reed's* everyday price in 1962 is stated to have been "probably" \$1.29 (Blumenthal, TR 1170:2).

Walgreen's looms up in the Atlanta area too, and so far as the sales proof is concerned, it got its Maalox simply as an unfavored customer, although having six stores (CX 187, p. 13). *Walgreen's* is ranked with Jacobs and *Reed's* as major competition in Atlanta (TR 1283, 1313, 1165, 1056). In 1962 it advertised Maalox at \$1.29 (RX 64, 65) and 87¢ (RX 60, 70).

Harry's Cutrate (witness Lefkoff) was an unfavored customer, having one store. Its owner testified that he thought its price of Maalox in 1962 "would have been 99¢, \$1.09 or \$1.19, and then also on a competitive basis," which he describes as follows (TR 1238:4):

If they—if anybody would say that they could get this price or that price, this product at another place for less money then we would meet this price.

He mentioned "89¢; 94¢; 99¢" (TR 1238:21), as prices advertised by Jacobs in 1962. The concern tries by various devices, including non-special discounts, to create a discount image (TR 1257-59, 1262). It advertises. Asked if its "sales volume has been increasing," its owner answered: "It has." (TR 1271:8, 9)

Ward's (witness, Cohen) was an unfavored customer, with one store. It has tiny space but large volume, which is increasing (Cohen, TR 1323:4-6). As to 1962 prices, its owner testified (Cohen, TR 1288:8):

Our price on Maalox, much to our sorrow, was 98¢. Always—that is until a customer comes in and shows us and tells us it is advertised and they can buy it for 79, 89, or 83, and then we meet that. We have to in order to keep the customer.

Ward's does not advertise (TR 1285:20; see 1288:13-16; 1326-27). It regards its immediate competitors as *Reed's*, Jacobs,

Walgreen's, all within a radius of eight blocks of its store, downtown (TR 1283:11).

Rome, Georgia

Enloe was the favored customer, with six stores (Enloe, TR 685, 718), spread over the city, and with an office and warehouse in a separate building (TR 689, 691, 714, 718). Its regular price for Maalox was \$1.49 (Enloe, TR 695). However, it constantly advertised Maalox in 1962 (commencing 1961) at 99¢, as a week-end special (RX 346, 348, 353; CX 159, 161, 162), also at 97¢ (CX 156, 157), and 92¢ (CX 158). See also the testimony (Enloe, TR 695). This pattern was continued in 1963 (RX 356, 357; RX 362, at 93¢). Competition was city-wide (Enloe, TR 680, 690).

Three unfavored customers, *i.e.*, *Henson* (TR 1208), *Ingram* (TR 933) and *Tilly* (TR 961), each with one store, sold Maalox at \$1.49, Ingram perhaps slightly higher. These three concerns are examples of high markup retail drug businesses. Henson had no regular pharmacist but himself (TR 1208); perhaps 25% of his business was by delivery, and 50% of his sales on charge accounts, incidentally with 2.3% credit losses on gross sales (TR 1217, 1219-20, 1209; CX 228e); he did not try to meet advertised prices for Maalox; he received "very few, if any" complaints about his price (TR 1204-05). Ingram, that is, Arrington-Ingram Drug, had a store on the main street, as well as during the day a little prescription shop in a clinic, "almost another cash register really" (TR 926, 931). Ingram also delivered purchases and maintained charge accounts (TR 944-45). Tilly was a professional pharmacy and prescription shop owned by two brothers, both pharmacists, who also operated in the rear a surgical supply company (TR 957-58, 976-77, 969, 972, 962, 1011); Tilly delivers and has charge accounts amounting to 50% of business volume (TR 973, 975). Inasmuch as the three concerns are not in the low markup level in any respect, they are not examples here of injured competitors.

However, there is proof of at least one unfavored customer which was more flexible in price, namely, Keith-Walgreen (witness, Keith), with one store (plus two in Greenwood, S.C., TR 1039). Its regular price of Maalox was, to be sure, \$1.49. However, at different intervals, in 1962, its price was "as low as 98¢" (Keith, TR 1031:19, 22). Moreover, in 1963 advertisements show its price at 98¢, also (RX 358-64). Mr. Keith, who has been a

Rorer stockholder (TR 1045-46), and whose store operates as an agency for Walgreen's (TR 1037), testified that he never noticed the price cutting of Enloe (TR 1032), but the examiner regards this as a lapse of memory.

Walgreen's itself had no outlets in Rome.

Jacksonville, Florida

Respondent had four favored customers in Jacksonville, of which one, Hermax, is relatively unimportant here since it sold Maalox at \$1.49, with only customer-to-customer exceptions.

The three truly competitive favored customers—Pic n' Save, Liggett-Rexall, and Walgreen's—sold substantially below \$1.49 regularly, and advertised about once a month low-price specials, which might include Maalox, at a price something like 93¢, more or less.

Liggett-Rexall (witness, Rach) had six stores (TR 1448, 1478). It had a warehouse and there was also the Atlanta warehouse serving it and over 50 other Liggett-Rexall stores (TR 1451-52; 1484). It had a regular price of \$1.19 and might advertise at 99¢ and as low as 93¢. It already advertised at 99¢ as early as 1961 (RX 467). In 1962 it advertised at 92¢ and 93¢ (RX 477, 480, 484, 486, 490, 499, 500), and 89¢ (RX 498, 507, 511). In 1963 it continued at 89¢ and 87¢ (RX 519, 521, 524, 527, 534, 540, 541, 544, 545).

Pic n' Save (National Drug, witness, Hyken) had six stores, with a warehouse, also serving independents but only to a very small extent (TR 1337-39; 1364). It had a regular price of 99¢ to \$1.19 (TR 1348), with variations from store to store, and it also advertised at 93¢, sometimes at 87¢.—It already advertised at 99¢ throughout 1961 (RX 460, 463, 470-73). In 1962 it advertised at 93¢ (RX 479, 482, 483, 485, 487, 489, 494-95) and 87¢ (RX 509). The 87¢ price continued in 1963 (RX 512, 513, 515, 517, 518).

Walgreen's (witness, Lankford), although having only four stores (TR 529; CX 187, p. 13) in the area, was treated as a favored customer; the stores were served by a company warehouse, supplying company stores in the Southeastern United States (TR 1551). The witness from that company thought it advertised at 87¢ (TR 1534), and advertisements in evidence show 92¢ to 99¢.—Walgreen's already advertised at 99¢ throughout 1961 (RX 459, 461, 465, 469, 475-76). In 1962, according to the advertisements, it advertised at 98¢ and 99¢ (RX 478, 481, 488, 491, 493,

501-02), and sometimes at 92¢ or 93¢ (RX 492, 497). In 1963 it advertised at 86¢ or 87¢ (RX 514, 523, 528, 532, 535, 539, 543), and even 83¢ (RX 546, 550, 553).

Hermox (witness, Lewitt) had six stores, each under a different name, Mr. Lewitt being majority stockholder of each. Hermox had a warehouse which served the six stores (TR 1557-58) and also served some independents, but to a very small extent (TR 1561). As already stated, Hermox sold at \$1.49 (TR 1561), but did meet prices competitively if called to its attention by customers (TR 1559, 62). Most of the stores were neighborhood, ethical-type stores, relying on an image of service (Lewitt, TR 1559).

* * * * *

Atkinson's, an unfavored customer, had four stores. Atkinson's had a policy of meeting advertised specials (TR 1610-11), and cultivated a discount image (TR 1614). It also advertised its own advertised specials (TR 1610-13). In 1962 its prices varied from 87¢ to \$1.49.—The advertisements in evidence show it selling at 99¢ even in 1961 (RX 458, 464, 468, 474), and on occasion at 96¢ (RX 462) and 89¢ (RX 467). In 1962, commencing September, the advertisements showed 94¢ (RX 503) and 87¢ (RX 504, 506). In 1963 they showed 69¢ (RX 520, 522, 525, 526, 530, 531), and 89¢, in December (RX 556).

O'Steen's, also unfavored, had four stores. O'Steen's was reluctant to lower the price from \$1.49, feeling it had a personalized service (TR 1664). But Mr. O'Steen testified he thought its price in 1962 was \$1.29 or \$1.19 (TR 1664, 1667, 1672-73). The price was reduced in 1964 to 98¢ (O'Steen, TR 1697:23-4) and even advertised for awhile, with group stores, at 87¢ (TR 1695, 98).

Allred, unfavored, had one store, modern and downtown (TR 1860, 1870). During most of 1962 it sold Maalox at 99¢, and in 1962 occasionally sold it at 89¢ when so listed in group advertising (TR 1863, 1874). It watched Walgreen's prices (TR 1863-64).

Wood's Pharmacy (Kelly), unfavored, had one store. Its price in 1962 was \$1.49, except that occasionally (TR 1414) it was 99¢ on week-end specials. The concern was interested in the image, not of a discounter, but of an old-line pharmacy with service (TR 1428).

Attwood and Rogers (witness, Rogers), unfavored, had four stores, to which a fifth was added (TR 1719). Three were located in medical buildings and the other two near doctors' offices (TR 1748-52). Rogers is a past president of the American College of

Apothecaries, and his stores operated as professional pharmacies emphasizing prescription drugs and closely related medications (TR 1719, 1721, 1746-47). The concern seldom advertises, and when it does it shows no products (TR 1735).—Its price on Maalox was \$1.49 with no attempt to meet advertised prices (TR 1734, 36). Incidentally, it had central ordering and delivery.

Halliday's (witness, Moore), unfavored, had four stores—Moore being a 60% stockholder (see TR 1817-18, 1829). It did not carry the sundry merchandise such as found in Pic n' Save (TR 1819-20, 1842). Prescription sales were 75-80% of volume; most of Maalox was sold on prescription (TR 1844) at \$1.50 (TR 1825).—Maalox was sold over-the-counter at \$1.49 (TR 1825). Moore testified that "we don't cut prices" (TR 1826). Incidentally, this concern also had central ordering and delivery (TR 1824, 1827-28, 1838).

NOTE ON WALGREEN'S

In view of the fact that Walgreen's, indubitably a truly large chain, appears as an unfavored customer in some of the areas, a summary of its operations, much as proposed by complaint counsel, is in order.

As appears above there were outlets of Walgreen's in five of the trade areas, but none in one area, Rome, Ga. The outlets may be tabulated as follows:

Wheeling, W. Va.	1 outlet	(CX 187, p. 14)
Louisville, Ky.	9 outlets	(CX 187, p. 13)
Memphis, Tenn.	8 outlets	(Noto, TR 1779, CX 187, p. 13)
Atlanta, Ga.	6 outlets	(CX 187, p. 13)
Jacksonville, Fla.	4 outlets	(Lankford, TR 1529; CX 187, p. 13)
Rome, Ga.	0 outlets	

Walgreen's was, on the proof here, a favored customer only in Memphis and Jacksonville. The Walgreen outlets in Memphis, Tenn., and Jacksonville, Fla., were serviced by company warehouses which purchased from respondent at the favored chain discount (CX 133a-133o, CX 118a-118m).

In 1962, Walgreen had 466 stores in 36 States (CX 187, pp. 13-14). There were at least five large company warehouses servicing stores in various parts of the country, with an undetermined number of smaller or sub-warehouses such as that in Memphis (Noto, TR 1781-83). Distribution of products purchased for delivery at Walgreen warehouses is not limited to the immediately surrounding area and the price advantage on shipments of res-

pondent's products to Walgreen warehouse was therefore not confined merely to the Jacksonville area, for instance (CX 187, p. 10; Noto, TR 1782-83). The Jacksonville warehouse services the Southeastern United States (Lankford, TR 1551). Walgreen's extensive warehousing system affords price advantages to its stores, and the company was a favored purchaser on approximately 50% of its purchases from respondent in 1962 (CX 187, p. 10; Moyer, TR 2092-94), although only 30% in the above areas (Moyer, TR 2092).

However, in this connection it must be borne in mind that there apparently were inter-company "service charges" for merchandise received from a distant warehouse, as illustrated by the 6½% inter-company charge on merchandise transferred to Walgreen stores in Jacksonville (Lankford, TR 1533). Contrariwise, this brings up the question whether the percentage warehouse and delivery cost for Walgreen's shown by RX 663 *in camera* is too large, a subject discussed in the body of the decision, and brings up various accounting questions pertinent to a national chain and financial relationships with its area stores, which cannot be decided on this record.

The Walgreen Company's discount or low-margin retail operation (CX 187, p. 10) is characterized by frequent and regular newspaper price advertising in those trade areas in which Walgreen has outlets, including five areas involved in this proceeding. Respondent's product, Maalox, was often featured in such advertising because of its popularity with consumers and ability to create traffic (Noto, TR 1793; Lankford, TR 1535; CX 169, 174-77; RX 64, 65, 68, 70, 241, 244, 253, 271, 371, 372, 373, 374-377, 379, 478, 481, 488, 491-93, 497, 501-02). Walgreen's advertising policy had the effect of intensifying competition between its stores and other retailer customers of respondent in said trading areas.

OPINION OF THE COMMISSION

BY JONES, *Commissioner*:

This matter is before the Commission on the cross-appeals of counsel from the initial decision of the hearing examiner. The Commission issued its complaint in this matter on September 20, 1963, alleging that William H. Rorer, Inc., a manufacturer and distributor of prescription and nonprescription pharmaceutical products, granted discriminatory discounts in the sale of certain

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of its products to certain of its chain drugstore customers in violation of Section 2(a) of the amended Clayton Act. Respondent, while admitting the existence of the discrimination, asserted that it did not have the prescribed statutory effects and raised the defenses of discontinuance and cost justification. After full evidentiary hearings the hearing examiner found that respondent's discrimination violated Section 2(a) in those markets where the favored customers were selling respondent's principal product at "discount" or low markup prices and an appropriate order was proposed.

I

The evidence of record establishes that respondent, William H. Rorer, Inc., is a corporation engaged in the manufacture and distribution of a variety of prescription and nonprescription pharmaceutical products. Its products are sold in commerce to independent retail drugstores, chain retail drugstores, drug wholesalers, hospitals and to physician supply houses. Rorer's net sales in 1962 were approximately \$20,025,860. Respondent classified its drug products as "specialties" and "non-specialties," the principal difference being that its so-called specialty products are actively promoted by respondent. These specialty products account for in excess of 95% of respondent's annual sales. Respondent's principal specialty product, and the one as to which complaint counsel concentrated his evidence of respondent's alleged discriminatory pricing, is Maalox, an ethically promoted antacid which represented approximately 75% of respondent's sales volume in 1962 or about \$15 million.

The basic facts surrounding the price discrimination challenged in this proceeding are substantially uncontested. Commencing in 1955 and continuing into 1963, respondent granted an extra 5% discount on specialty items, including Maalox, to specifically defined "chain drugstores," over the discount granted to independent druggists. Thus, "chain drugstores" were accorded a discount of 20%, the same amount granted by respondent to drug wholesalers, while the independent druggists received a discount of 15% on their purchases of respondent's specialty item.¹

¹ Concentrating its evidence as to the effects of respondent's pricing system on its Maalox sales, complaint counsel demonstrated that respondent's discount system resulted in the favored chain paying 5¼ cents per bottle less for respondent's Maalox than was paid by the independent druggists, as follows:

List price to independent druggists	12-oz bottle \$ 1.05
15% discount (independent druggists and nonqualifying chains)	.8925
20% discount (wholesalers and qualifying chains) (CX 5c-d, 22a)	.84
These prices were subject to a further discount of 2% for cash payment within ten days.	

In order to qualify as a "chain drugstore" under respondent's definition and receive the larger discount, a purchaser was required to have five or more registered pharmacies under a single ownership, a buying office and a warehouse (CX 5d). However, one of the five individual pharmacies constituting the chain could qualify as the required buying office or the warehouse or both. No minimum order was required by respondent on shipments in order to earn the favored discount (Tr. 236-38; 1987-88). Moreover, the favored discount could be earned on any order placed by the chain even if the supplies were retained by only one of the units. There was no requirement that the orders be redistributed to each of the units or that the orders of the individual units of this chain be consolidated. Some 230 retailers were classified by respondent as "chain drugstores" during 1962 (Tr. 205). These chain drugstore customers accounted for approximately 30% of respondent's total sales to retailers (CX 6).

In order to demonstrate that this price discrimination resulted in the proscribed competitive injury, counsel supporting the complaint offered extensive testimonial and documentary evidence on the state of competition, pricing practices and levels of druggist profits in six specific trading areas in which favored and nonfavored retailers competed in the sale of respondent's products. According to this evidence the drugstore business operated on close profit margins, generally less than 5% of gross sales. In 89% of all sales made by respondents, its retail customers availed themselves of the additional 2% discount for cash payment (Tr. 2106). The record also showed that Maalox was a fast-moving popular item and consequently most retailers sought to purchase respondent's Maalox directly from respondent instead of from wholesalers so as to be able to earn the discounts which respondent offered. Thus the availability of respondent's maximum discount on Maalox was of especial significance to the discounting retailer in view of the general popularity of this item. Prior to 1962, Maalox had generally sold at retail at respondent's suggested retail price of \$1.49. Commencing sometime in 1962, however, various retailers started to discount respondent's suggested resale price on Maalox and ultimately the great majority of retailers sold Maalox at prices which were very close to, and sometimes below the retailer's cost.

In reliance upon this evidence the hearing examiner concluded that in this industry of low profit margins and intense competition, respondent's 5% price discrimination was of sufficient sig-

nificance so that the effect of granting such a discriminatory price to some retailers and not to others may be substantially to lessen, injure, destroy or prevent competition between purchasers of respondent's products. However, the hearing examiner limited his finding of injury to those instances where the competing favored and unfavored customers were both selling Maalox at "discount" or low markup prices (I.D. 678). The examiner was of the view that only at this extreme level of competition was the 5% discount meaningful in the legal sense because it might force the non-favored retailer to sell below cost or stop competing.

Respondent, in addition to raising certain affirmative defenses which will be discussed below, has appealed from the decision of the hearing examiner on the grounds that complaint counsel failed to establish that the 5% price differential was significant and had caused or been likely to cause injury to competition. Complaint counsel appealed from that aspect of the examiner's conclusion limiting the finding of injury to discounting retailers.

When considered against the background of industry practices and profits as demonstrated by the record, we are convinced that the hearing examiner was correct in concluding that respondent's 5% discrimination in the price of Maalox was significant and had the proscribed effect on competition which Section 2(a) was enacted to prohibit. We also agree with the examiner that respondent failed to make out its defense of cost justification. However, we are of the view that on the basis of the record in this proceeding the hearing examiner erred in limiting his finding of competitive injury solely to instances where Maalox was being sold at "discount" or low markup prices. We are convinced that the record demonstrates clearly that respondent's discriminatory pricing system injured all nonfavored retailers irrespective of whether they were selling Maalox at discount or at respondent's suggested prices. Accordingly, we adopt the hearing examiner's findings 1 through 16, 18 through 21, 23 through 43, 45 through 48, and 56 through 74, and 115 through 134 as supplemented by the facts and conclusions detailed in this opinion as our findings and conclusions in this case. We specifically reject his findings and conclusions which limited the competitive injury solely to those instances where both the favored and nonfavored retailers sold respondent's specialty items at discount prices, and his discussion of his basis for the rejection of respondent's cost justification defense.

II

Section 2(a) of the Clayton Act as amended, provides that a discrimination in price in the sale of commodities of like grade and quality is unlawful:

... 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. . . .

It is well established that under Section 2(a) a challenged price discrimination is illegal if it may have the prescribed adverse effect on competition. *F.T.C. v. Morton Salt Co.*, 334 U.S. 37 (1948); *Corn Products Refining Co. v. F.T.C.*, 324 U.S. 726 (1945); *Standard Motor Products Co. v. F.T.C.*, 265 F. 2d 674 (2nd Cir. 1959).

The evidence of record demonstrates that there is intense competition in the retail drug industry. This finds support in the fact that profit margins in the industry as a whole are approximately 5% and that the 2% cash discount offered by respondent and other suppliers is considered by the retail trade to be of great importance and is consistently taken.

Respondent disputes the accuracy of the 5% profit margin figure as representing the industrywide picture and argues that the price discrimination of 5% between favored and nonfavored druggists, amounting to only 5¼ cents per bottle of Maalox, was so small and inconsequential as to have negligible effects on competition. We cannot agree.

We are of the view that the record adequately supports the examiner's conclusion respecting the overall 5% profit margins in this industry. The proof was based on the testimony and financial records of some 25 retailer witnesses called by complaint counsel which indicated, according to the hearing examiner, that "hardly any customers show a profit percentage as high as 5%" (I.D. 690). We find that the testimony of the 25 witnesses whose testimony formed part of the basis for this conclusion is representative of the six market areas in which complaint counsel sought to establish injury. We do not agree with respondent that the profit figures cited by their witnesses are "grossly misstated" because of the fact they include as expense items salaries paid to pharmacists who owned their own drugstores, automobiles for the owners' use, life insurance, and other items which should not

properly be considered as expenses and which would therefore raise profits. The largest single item would of course be the salaries of the owner-pharmacists. However, we believe that this may properly be considered as an expense item to the drugstore operation, for if owned by a nonpharmacist the expenses of such professional help would have to be deducted from any profits realized by the operation. Thus, we do not agree that inclusion of this item as an expense distorted the profit figures. While it is possible that certain other expense items may have been improperly included in these financial reports we have not been cited to any which were of such magnitude as to require us to disregard this testimony. It is significant in this respect that while respondent challenges complaint counsel's evidence on this point, it did not offer any proof of its own contradicting this evidence. We conclude that the figure of a 5% profit margin on gross sales is properly representative of the industry as a whole.

We do not agree with respondent that the discrimination here was insignificant. The hearing examiner pointed out that discounting favored retailers often sold Maalox at or close to their cost. With such pricing the nonfavored discounters were forced to sell at or below their costs or reluctantly refrain from meeting their favored competitors' prices. Such a practice would result in nonprofitable or diminished Maalox sales on the part of the nonfavored discounters. Furthermore, the inability of these nonfavored discounters to meet these extremely low prices conceivably damaged their image as a discount drug store. As the Seventh Circuit recognized in *Mueller Co. v. F.T.C.*, 323 F. 2d 44 (1963), a customer "seeing one competitor's lower price on one item will think you are out of line on other items and this has a harmful effect" of significance beyond the effect of the price differential in a given product.

Contrary to the hearing examiner's conclusion, we believe that the nonfavored, nondiscounting retailers were equally injured by respondent's discriminatory discount. While the effects of the discrimination may be more readily discernible where Maalox was being discounted, we believe that under the circumstances of this industry the discriminatory price may have the prohibited effect on competition irrespective of whether the favored retailer sells Maalox at list price or at discount and irrespective of whether he applies the benefits derived from his additional discount to reduce the sales price of Maalox or to some other purpose. Irrespective of the price at which nonfavored retailers sold Maalox and res-

pondent's other specialty items, these retailers were confronted with the competition of the favored retailers who were able to purchase these same products at 5% less.

The record establishes that favored retailers have saved as much as \$6,000 annually by being able to buy Maalox at a higher discount (FX 647c). This is obviously a significant sum in a low profit industry. Where a retailer holds the price on Maalox and consequently does not benefit from being able to sell at a price lower than his nonfavored competitors, his savings on the purchase of Maalox afford him additional profits which can readily be used for advertising or promotions which enable him to offer lower prices on other products. Such sums afford the favored recipients a definite competitive edge over their nonfavored competitors and this advantage exists regardless of whether the recipient sells Maalox at discount or at list prices. Where competition is keen, as it is in the retail drug industry, this edge may be decisive. Furthermore, the fact that certain favored chains did not discount Maalox at the time they were receiving the lower price did not mean that they would not do so in the future had the differential persisted.

The fact that Maalox in no case probably accounted for a major segment of any nonfavored retailer's business does not affect the significance of the injury. As the Supreme Court pointed out in *Morton Salt, supra*:

There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store (at p. 49).

Similarly, the fact that certain favored retailers elected not to engage in discounting Maalox, but rather determined to utilize the gains resulting from their lower cost for Maalox in some other fashion does not prevent our finding the requisite probability of competitive injury. *Moog Industries, Inc. v. F.T.C.* 238 F. 2d 43 (8th Cir. 1956), *aff'd per curiam* 355 U.S. 411 (1958).

We therefore conclude, contrary to respondent's argument, that the amount of the price discrimination was in fact significant in an industry as intensely competitive as this one² where profit

² In *Forster Mfg. Co.*, Docket 7207, Jan. 3, 1963 [62 F.T.C. 852, 903], we pointed out that "... It is a fundamental assumption of economic theory, and a commonplace observation in practice, that the more intense the competition, the lower are prices and profits.

margins averaged about 5% and where the industry's 2% cash discount was regularly taken. Therefore, respondent's discriminatory price was capable of substantially lessening competition and causing competitive injury to all of the nonfavored retailers.

By way of affirmative defense respondent maintains that its discriminatory price to the favored chains was cost-justified and that it was granted to compensate these chains for distribution and other services performed by them. The hearing examiner rejected this defense. We are in agreement. We believe that respondent's formula for determining who would receive the additional discount is so arbitrary as to make any cost study valueless as a defense. Respondent's sole eligibility requirement for receipt of the higher discount is a chain with five or more pharmacies having a buying office and a single warehouse as receiving point. This requirement by itself bears no obvious or automatic relationship to savings in distribution by respondent in the absence of any requirements respecting size of orders. Moreover, if the chain did not wish to perform distribution or warehousing functions, under respondent's formula they could still earn the discount on deliveries to their store designated as their receiving point and at the same time their other pharmacies could place orders at respondent's usual discount for delivery directly to their other units. Thus respondent's favored customers could easily receive the benefit of the discount without performing any service at all for respondent. It is also clear that mere numbers of stores in a chain bear little relationship to cost savings. It is obvious that chains with only four or some lesser number stores, or large independents with only one store might purchase larger quantities of respondent's products than the favored chains, and the record shows that one in fact did (CX 253). While a meaningful cost justification basis for the discount differential might be able to be demonstrated on the basis of numbers of deliveries or bulk packaging or the like, respondent's formula failed to include any quantity requirement for granting the higher discount. Thus, to calculate the

But it seems equally obvious that as profit margins descend—even if the competition that drives them down is fair and lawful—each dollar, whether of profit or loss, becomes increasingly significant. Indeed, the very test of the substantiality of a price discrimination is its size in relation to the profit margins of the parties allegedly affected by it. This is well established where secondary-line injury is involved: 'From substantiality in relation to operating margin, the Commission can infer an effect on profits.' Edwards, *The Price Discrimination Law* 234 (1959). Thus, it has held that even price 'differentials of small amounts were important' where 'purchasers . . . sold in a market where competition was keen' and thus 'operated on small profit margins.' *Edelman & Co. v. Federal Trade Commission*, 239 F. 2d 152, 154, 155 (7th Cir. 1956); *Whitaker Cable Corp. v. Federal Trade Commission*, 239 F. 2d 253 (7th Cir. 1956)."

cost of theoretical services which might be saved by the qualifying chains is a vain act without any showing that such savings were in fact incurred and without showing that similar savings were not incurred on sales to other nonqualifying stores. These factors plus the absence of any quantity requirement render respondent's cost justification defense a nullity.

III

Respondent maintains that even if we should find a violation of the statute, no cease and desist order should issue, since the discriminatory discount system has been permanently abandoned. It is well established that abandonment of an unlawful practice in good faith prior to issuance of the Commission's complaint is not a defense on the merits to our proceeding. Discontinuance of the unlawful conduct does not prevent a finding of illegality or preclude entry of an order, although it may bear on the appropriate remedy for the conduct found to be unlawful. However, if the abandonment of the wrongful practice does not insure a cessation of the practices in the future an order to cease and desist is appropriate. *F.T.C. v. Goodyear Tire & Rubber Co.*, 304 U.S. 257, *Eugene Dietzgen Co. v. F.T.C.*, 142 F. 2d 321 (7 Cir. 1944). In our view the record in this proceeding clearly demonstrates the need for an order to cease and desist.

We do not agree with respondent that the chronology of this investigation so elaborately detailed in the initial decision and in respondent's brief is relevant. However, we point out that as a matter of fact the challenged discriminatory system was instituted by respondent in 1955 and was continued until March 18, 1963. Approximately two years prior to such discontinuance respondent was required to file with the Commission a special report designed to determine if any of the respondent's pricing practices violated Section 2(a). In June of 1962 respondent's principal executive officer was interviewed by a Commission staff attorney and was informed that there was reason to believe that certain of Rorer's pricing practices violated the Robinson-Patman Act, and certain documents and records were requested (Tr. 2285-86). Nine months later respondent determined to halt its discriminatory system. We have little doubt that respondent was fully aware that its discriminatory price program here in suit was under the Commission's scrutiny as part of its investigation or respondent's pricing practices.

It is true that respondent's president has given assurances that its discount system will not be re-established. Nevertheless, res-

pondent has continually maintained that its discount system is completely legal as properly cost justified. In the face of such assertions, when coupled with respondent's discontinuance only after the start of the Commission's investigation, we are convinced and so find that an order is necessary in this case in order to ensure that respondent will not again engage in violations of the statute.

The hearing examiner rejected complaint counsel's request for a broad order patterned on the wording of Section 2(a) prohibiting in general terms all price discriminations between competing customers. The order proposed by the examiner, applicable to respondent's prescription and nonprescription drugs was in two parts. The first part of his order prohibited respondent from engaging in those price discriminations between competing customers by classifying retail chain drugstore customers in a different price classification from other retail drugstore customers. The second part of the examiner's order required respondent to cease and desist from discriminating in price between competing purchasers unless it adequately and regularly publicized to all customers that prices to some are higher than to others, together with the reasons and details of the price differences.

Respondent did not appeal from the product scope of the examiner's order and we believe that it is appropriate. *Niresk Industries, Inc. v. F.T.C.*, 278 F. 2d 337 (7 Cir. 1960), *cert. denied* 364 U.S. 883 (1960).

We are in agreement with complaint counsel, however, that the prohibitory provision of the order as proposed by the hearing examiner is unduly narrow. Respondent's customer classification was an arbitrary and thinly veiled scheme for favoring certain of its retail customers without any regard for whether or not the discounts were in fact cost-justified. Consequently, a broad order which will halt all price discriminations between competing retail customers must be entered in order to reach the essence of respondent's violation as it presents itself on this record.

Since respondent has here sought to effectuate a dual price structure utilizing customer classifications purportedly cost justified, it is also essential that the order in this case go beyond a mere prohibition against price discrimination in the future. Accordingly, we believe it necessary to require that if and when respondent should at some time in the future decide to offer a different price to any person, group or class of its competing customers on the basis that such a price is justified by cost savings to the

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Order

respondent, it must promptly notify the Federal Trade Commission of such price differences and submit to the Commission the data upon which it relies for support of the asserted cost justification. Furthermore, respondent must publicize to all its customers that such price differences exist, together with the reasons therefor. Under such an order the Commission will be able to maintain continuing surveillance of respondent's pricing practices and such practices must be disclosed to all of its customers.

In our judgment these provisions of the order are essential to insure that respondent will not in the future establish other arbitrary classifications of its customers for pricing purposes similar to that which we have found herein to violate Section 2(a) of the Clayton Act as amended.

Accordingly, an appropriate order shall issue.

FINAL ORDER

This matter having been heard by the Commission upon the cross-appeals of respondent and counsel supporting the complaint from the initial decision of the hearing examiner, and upon the briefs and oral argument in support thereof and in opposition thereto; and

The Commission, having rendered its decision determining that the appeal of respondent should be denied and that of counsel supporting complaint be granted, that the initial decision, as supplemented and modified to conform to the views expressed in the accompanying opinion, and, as so modified, adopted as the decision of the Commission:

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

ORDER

It is ordered, That respondent William H. Rorer, Inc., a corporation, and its officers, representatives, agents and employees, directly, indirectly, or through any corporate or other device, in or in connection with the sale of prescription and nonprescription pharmaceutical products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to some purchasers at prices higher than the price charged to any other purchaser who,

in fact, competes in the resale and distribution of respondent's products with the purchaser paying the higher prices.

It is further ordered, That, in addition to and apart from the provisions of the preceding paragraph, if respondent at any time after the effective date of this order institutes a price schedule whereby it charges a different price for its products to any person, group or class of its competing customers on the basis or in the belief that such difference in price is justified by savings to the respondent in the cost of manufacture, sale or delivery to the members of such customer group or class, respondent shall

(a) promptly notify the Federal Trade Commission of the institution of such price schedules and submit to the Commission a written statement with necessary underlying data in support of the cost justification of such price discrimination; and

(b) adequately and regularly publicize to all customers that prices to some are higher than to others, together with reasons and details of the price differences or discounts.

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

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