

that the Commission should issue its Findings of Fact, Conclusions and Order consistent with said Opinion.

Now therefore, it is hereby ordered, That the initial decision and proposed order of the hearing examiner be and they hereby are set aside in their entirety;

And it is further ordered, That the attached Findings of Fact, Conclusions and Order be and they hereby are entered and issued by the Commission in final disposition of this proceeding.

IN THE MATTER OF
SURPRISE BRASSIERE CO., INC., ET AL.
ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SECTION 2 (d) OF THE CLAYTON ACT

Docket 8584. Complaint, June 28, 1963—Decision, June 15, 1967.

Order requiring a New York City manufacturer of brassieres, girdles and corselettes to cease discriminating among its customers in the payment of promotional allowances in violation of Section 2(d) of the Clayton Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Surprise Brassiere Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 102 Madison Avenue, New York City, New York.

Samuel Dosik, an individual, is president of the above corporation and Eugene Newman, an individual, is secretary-treasurer of the same corporation. These individuals formulate, direct and control the policies, acts and practices of the above named corporate respondent.

PAR. 2. Respondents are now, and for many years past have been, engaged in the manufacture, sale and distribution of women's brassieres, girdles and corselettes with an annual gross

sales volume of approximately \$5,000,000. Respondents have factories located in Woodside and Germantown, New York and in Wharton, New Jersey. Respondents also have a warehouse located at Wharton, New Jersey, from which they make all shipments of their products. The respondents sell these products for resale at retail to many customers, such as department stores, women's specialty shops and dress shops, with places of business located in various cities throughout the United States.

PAR. 3. In the course and conduct of their business, respondents engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, having shipped their products or caused them to be transported from their principal places of business in the States of New York and New Jersey to customers located in the same and in other States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of their business in commerce, respondents paid, or contracted for the payment of something of value to or for the benefit of some of their customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with the handling, offering for sale or sale of products sold to them by said respondents, and such payments, sometimes hereinafter referred to as promotional allowances, were not available on proportionally equal terms to all other customers competing in the distribution of their products.

PAR. 5. During 1961, and for some time prior thereto, respondents offered to their customers a cooperative advertising plan under which they agreed to pay fifty percent of the cost of newspaper advertising which featured their merchandise not to exceed 5% of the customer's total purchases for a year, and the payments were to be made only if the customer conformed to certain conditions specified by respondents.

PAR. 6. Payments made by respondents pursuant to the cooperative advertising plan referred to in Paragraph Five were not made on proportionally equal terms to all of their customers competing in the resale and distribution of respondents' products because the terms and conditions of the agreement were such as to preclude some customers from accepting and enjoying the benefits to be derived from the plan.

Furthermore, payments made by respondents were not made on proportionally equal terms to all respondents' customers competing in the resale and distribution of their products because while the payment of advertising allowances to some customers

was made in accordance with the terms of the agreement, other competing customers were provided allowances above and beyond those provided for in the agreement.

PAR. 7. The acts and practices of the respondents, as alleged above, violate subsection (d) of Section 2 of the aforesaid Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Section 13).

Mr. Austin H. Forkner and *Mr. Francis A. O'Brien* supporting the complaint.

Mr. Maxwell E. Lopin, New York, N.Y., for respondents (*Mr. Norman H. Grutman*, New York, N.Y., associated as trial counsel, and *Mr. Herman L. Wasserman*, New York, N.Y., on the briefs).¹

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER

MAY 27, 1966

CONTENTS

	<i>Page</i>
PRELIMINARY STATEMENT	871
FINDINGS OF FACT:	
I. Introduction	875
II. Respondents and Their Business	876
III. The Challenged Practices	877
IV. Surprise's Cooperative Advertising Program:	
The Published Plan	878
Advertising Allowances	878
Advertising Materials Furnished by Surprise	881
Publication to Customers	882
Special 100 Percent Allowances	883
V. The Surprise Program in Operation:	
The Actualities of Customer Participation	883
New Haven, Connecticut	884
Bridgeport, Connecticut	888
Newark, New Jersey	888
Philadelphia, Pennsylvania	889
Special 100 Percent Allowances	892
Other Deviations from Program	894
Limitation on Allowances	894
Maximum Size of Ads	896
VI. Legal Analysis of the Surprise Program:	
Availability	898
Notification of Customers	899
Practical Availability:	
1. Introduction	903

¹ Initially, respondents' counsel was the firm of Lopin & Jacobson, by Milton Jacobson, but Mr. Jacobson died in October 1964 (Tr. 849).

FINDINGS OF FACT—Continued

	<i>Page</i>
2. Limitation to Newspaper Advertising.....	904
3. No Minimum—Purchase Requirement	908
4. Exclusionary Aspects	910
5. Other Sales Promotion Aids	911
6. Proportionalization	914
7. Conclusionary Finding	916
Special 100 Percent Allowances	916
Competition Among Customers	917
VII. Meeting Competition Defense:	
Introduction	918
Competitive Offers at Department Stores:	
New Haven, Connecticut	920
Bridgeport, Connecticut	923
Newark, New Jersey	925
Philadelphia, Pennsylvania	930
Summary Findings and Conclusions:	
Preliminary Statement	939
1. Legal Standards	940
2. Outline of Defensive Facts	941
3. Evaluation of Evidence	942
The Actualities of Competition	947
Ex Post Facto Rationalization	947
“Competitive Necessity”	949
1. The Competition Being Met	949
2. Threat of Loss or Damage	951
Prior Awareness of Individual Competitive Situations...	952
“Meeting” or “Beating” Competition	954
Lawfulness of Competitive Offers	954
Special 100 Percent Allowances	955
CONCLUSIONS OF LAW	956
ORDER	958

PRELIMINARY STATEMENT

The complaint in this proceeding was issued by the Federal Trade Commission on June 28, 1963, and was duly served on respondents. By answer filed on August 5, 1963, counsel for respondents noted the death of respondent Samuel Dosik. Pursuant to a stipulation of counsel (Prehearing Conference, December 12, 1963, Tr. 10-11), the complaint was dismissed as to Samuel Dosik by Hearing Examiner Laughlin in an order filed January 29, 1964. Accordingly, unless otherwise indicated, the term “respondents,” as used herein, will not include respondent Samuel Dosik, now deceased.

The complaint charges respondents with violation of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman

Act, 15 U.S.C. § 13(d).² In substance, the complaint alleges that respondents have failed to make advertising allowances available to all competing customers on proportionally equal terms because (1) the terms and conditions of respondents' cooperative advertising plans precluded some customers from receiving allowances and (2) the advertising allowances granted by respondents to some customers were "above and beyond" the terms of these plans.

Respondents filed answer through counsel on August 5, 1963, admitting certain factual allegations of the complaint, denying any violation of law, and affirmatively alleging (1) that advertising allowances were available to all customers on proportionally equal terms and (2) that the challenged practices "were performed in good faith to meet competition * * *."

After the prehearing conference on December 12, 1963, hearings for the reception of testimony and other evidence in support of the complaint were held in New York, New York, from June 16 to 19, 1964, and in Philadelphia, Pennsylvania, from June 22 to 24, 1964. Because of various exigencies, the hearings were recessed on June 24, 1964. The proceeding remained in suspense for more than a year because of the illness and death of respondents' original attorney (Mr. Jacobson) and the illness of Hearing Examiner Laughlin.

By order of the Director, Hearing Examiners, dated October 27, 1965, the present hearing examiner was designated to complete the proceeding. A conference in the nature of a further prehearing conference was held in Washington, D.C., on November 1, 1965.

Although respondents conceded, in effect, that the original hearing examiner was "unavailable" within the meaning of Section 5(c) of the Administrative Procedure Act (5 U.S.C. § 1004(c)) and Rule 3.21(c) of the Commission's Rules of Practice for Adjudicative Proceedings (Tr. 849-51), they orally presented a motion to void and commence the proceedings *de novo* (Tr. 851-58). Respondents filed a written motion to the same effect on November 5, 1965, and complaint counsel filed answer in opposition on November 12, 1965. For reasons stated on the rec-

² Section 2(d) provides "That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

ord on November 18, 1965 (Tr. 1351-68), the examiner denied the motion "without prejudice to the rights of the respondents to request the recall of specific witnesses for such further cross examination or other examination as may be appropriate" (Tr. 1365-66). On December 15, 1965, the respondents withdrew their motion for a trial *de novo*, stating that they were "content for the determination of this case to be made by the Hearing Examiner on the basis of the evidence which he has heard before him by witnesses viva voce, as well as such information or such conclusions as he may derive from an examination of the testimony which was taken before the Hearing Examiner undertook the further processing of this matter" (Tr. 2562).

Meanwhile, hearings were resumed in New York, New York, on November 15, 1965, and the case-in-chief in support of the complaint was rested on November 17, 1965 (Tr. 1155). Defense hearings were then held in New York, New York, November 17-19, 1965; November 29-December 3, 1965; December 6-9, 1965; and on December 15, 1965. Rebuttal hearings followed in New York, New York, on December 16, 1965, and in Philadelphia, Pennsylvania, on December 17, 1965, and the record was closed for the reception of evidence.

In support of their case-in-chief, complaint counsel offered the testimony of two officials of the corporate respondent (Eugene Newman, vice president and secretary, and Cecile Cohen, director of publicity, public relations, and advertising) and of representatives of 19 of respondents' customers located in New Haven and Bridgeport, Connecticut; Newark, New Jersey; and Philadelphia, Pennsylvania, encompassing some 1,142 pages of transcript. In addition, complaint counsel offered 969 exhibits, principally invoices and advertising claims.

In their defense, respondents offered the testimony of five sales representatives or sales officials, together with the testimony of seven competitors, encompassing some 1,315 pages of transcript (Tr. 1251-2566). In addition, respondents offered 32 documentary exhibits.

In rebuttal, complaint counsel offered the testimony of four of respondents' customers, encompassing some 294 pages of transcript (Tr. 2567-2861). Thus, there were 23 days of hearings, resulting in a transcript of 2,861 pages, and approximately 1,000 documentary exhibits.

The holding of hearings in New York and Philadelphia was authorized by Commission order dated March 13, 1964.

At the hearings, testimony and other evidence were offered in

support of and in opposition to the allegations of the complaint. Such testimony and evidence were duly recorded and filed in the office of the Commission.

The parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues.

After the presentation of evidence, proposed findings of fact and conclusions of law and a proposed form of order, accompanied by supporting briefs, were filed by counsel supporting the complaint and counsel for respondents. Replies or exceptions also were filed by counsel for both parties.

Proposed findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

After carefully reviewing the entire record in this proceeding, together with the proposed findings, conclusions, and order filed by both parties, as well as their respective replies, the hearing examiner finds that this proceeding is in the interest of the public and, on the basis of such review and his observation of those witnesses who testified after he was assigned to the case, makes findings of fact, enters his resulting conclusions, and issues an appropriate order.

By order dated January 4, 1966, the Commission extended to April 18, 1966, the time for filing this initial decision. In essence, that action took account of an extension of time granted the parties, at respondents' request, for filing their proposed findings and related submittals. Initially, the parties were granted until February 17, 1966, for filing their proposals and briefs, with exceptions or replies due on February 28, 1966. Subsequently, on motion of respondents and without objection by complaint counsel, the time for filing proposed findings and supporting briefs was extended to March 3, 1966, and the time for filing reply briefs to March 23, 1966. The additional time was sought by respondents' counsel because of difficulties occasioned by the transit strike in New York City during January 1966, and also personal problems resulting from the illness of his wife. Because of the additional time thus granted the parties, the examiner requested, and was granted by Commission order dated April 14, 1966, an additional extension of time to May 18, 1966, for filing this initial decision. This was later extended to May 27, 1966.

As required by Section 3.21(b)(1) of the Commission's Rules of Practice, the findings of fact include references to principal

supporting items in the record. Such references to testimony and exhibits are thus intended to comply with that Rule and to serve as convenient guides to the principal items of evidence supporting the findings of fact, but those record references do not necessarily represent complete summaries of the evidence considered in arriving at such findings. Where reference is made to proposed findings submitted by the parties, such references are intended to include their citations to the record.

References to the record are made in parentheses, and certain abbreviations are used:

CB	Memorandum of Law (Brief) filed by Complaint Counsel. ³
CPF	Proposed Findings, etc., of Complaint Counsel. ³
CR	Complaint Counsel's Answer (Reply) to Respondents' Proposed Findings, etc. ³
CX	Commission exhibits.
Guides	Guides For Advertising Allowances and Other Merchandising Payments and Services (May 19, 1960).
p.	page.
pp.	pages.
Par.	Paragraph.
RB	Respondents' Brief. ⁴
RPF	Respondents' Proposed Findings, etc. ⁴
RR	Respondents' Reply to Complaint Counsel's Proposed Findings, etc. ⁴
RX	Respondents' exhibits.
Tr.	Transcript. ⁵

Counsel supporting the complaint may be variously referred to as complaint counsel, Government counsel, or the Government, and witnesses called by Government counsel may be referred to as Government witnesses.

FINDINGS OF FACT

I. INTRODUCTION

Before setting forth the findings regarding Surprise Brassiere Co., Inc., and its practices, brief reference should be made to the time period involved in this proceeding.

³ References to the submittals of complaint counsel are to *page* numbers—for example, CPF 21.

⁴ References to the submittals of respondents' counsel are to *page* numbers—for example, RPF 21.

⁵ Sometimes, references to testimony cite the name of the witness and the transcript *page* number without the abbreviation Tr.—for example, Newman 16.

Paragraph Four of the complaint charges generally that Surprise Brassiere Co., Inc. (usually referred to herein as "Surprise"), failed to make allowances available to all competing customers on proportionally equal terms. Paragraph Five specifically refers to the Surprise cooperative advertising plan in effect during 1961 "and for some time prior thereto * * *." Paragraph Six then challenges the cooperative advertising plan in effect during that period.

Counsel for Surprise interpreted the complaint as dealing only with practices engaged in through 1961 and objected to the reception of evidence relating to any subsequent period (Tr. 101); but Hearing Examiner Laughlin overruled the objection (Tr. 102), and received evidence dealing with practices in 1962 and 1963.

Thus, even though, technically, the complaint might have been construed as embracing practices only through 1961, it now is deemed amended to include practices engaged in during 1962 and 1963. (Sec. 3.7, Rules of Practice for Adjudicative Proceedings (August 1963); see *Henry Rosenfeld, Inc.*, 52 F.T.C. 1535, 1548 (1956).)

In ruling that occurrences subsequent to 1961 were within the scope of the proceeding, Examiner Laughlin granted a request by respondents that their Answer be deemed amended to deny any violations during 1962 and 1963 (Tr. 102-03).

II. RESPONDENTS AND THEIR BUSINESS ⁶

Respondent Surprise Brassiere Co., Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business at 102 Madison Avenue, New York, New York.

Respondent Samuel Dosik, until his death, was president of respondent Surprise Brassiere Co., Inc. As president, he formulated, directed, and controlled the policies, acts, and practices of Surprise (Cohen 976).

Respondent Eugene Newman was secretary-treasurer of Surprise from at least 1960 to about June 1963, when he became vice president and secretary (Tr. 16). His responsibilities have extended only to purchasing and production (Tr. 788). There is no evidence that he participated in the formulation, direction, or control of cooperative advertising policies or practices, and com-

⁶ Most of the basic facts about respondents and their business are essentially undisputed. Unless otherwise indicated, the findings in this Section II are based on admissions in respondents' Answer.

plaint counsel have proposed no finding of individual liability on the part of Newman (CPF 4). Accordingly, the complaint against him in his individual capacity is being dismissed but he will be bound in whatever official capacity he may act on behalf of Surprise. Unless otherwise indicated, the term "respondent" refers hereafter only to Surprise.

Surprise has been, and is now, engaged in the manufacture, sale, and distribution of women's brassieres, girdles, and corselets. These products have been, and are, sold, for resale at retail, to many customers, such as department stores, women's specialty shops, and dress shops, with places of business located in various states of the United States.

The business of Surprise has been and is substantial, with annual gross sales approximating \$4 million (Gold 1256).

Surprise owns a factory in Woodside, New York, and ships merchandise from that factory and from factories (not owned by Surprise) located in Germantown, New York, and Wharton, New Jersey, to customers in other States of the United States.

In the course and conduct of its business, Surprise has been, and is now, engaged in commerce, as "commerce" is defined in the Clayton Act, as amended. It has shipped its products or caused them to be transported from its principal place of business and from factories in the States of New York and New Jersey to customers located in other States of the United States and in the District of Columbia.

III. THE CHALLENGED PRACTICES

In the course and conduct of its business in commerce during the period 1960-63, Surprise engaged in cooperative advertising in a manner alleged to violate Section 2(d) of the Clayton Act, as amended.

The practices of respondent Surprise are attacked on the following grounds (Complaint; CPF 1, 3; CB 2-4):

1. Its advertising allowance program⁷ has not been "available" to all competing customers because it has not been made known to all such customers.

2. The program has not been "available" to some customers because its terms and conditions have precluded them from receiving allowances, and they have not been offered suitable alternatives or substitutes on proportionally equal terms.

⁷ For purposes of this discussion, it is considered that Surprise had basically the same program from 1960 to 1963, although the allowance rate was modified in mid-1962 (see *infra*, pp. 878-879, 882).

3. Surprise has deviated from its program by granting some customers allowances "above and beyond" its announced terms.

Surprise's position (RPF 5-9; RB 10-12, 18-20) is (1) that its program has been "available" to all competing customers; (2) that suitable alternative or substitute promotional assistance has been offered to customers who did not receive advertising allowances; and (3) that deviations from the program—that is, allowances "above and beyond" its terms—were the result of meeting in good faith the advertising allowance payments and offers of competitors.

The findings that follow in Section IV outline the Surprise program and its manner of publication. Thereafter Section V describes the program in operation, shows the deviations from its terms, and develops the facts respecting alternative promotional assistance. Section VI analyzes the program and its operation in the light of the applicable law. And, finally, Section VII considers Surprise's "meeting competition" defense.

IV. SURPRISE'S COOPERATIVE ADVERTISING PROGRAM

The Published Plan

There is no dispute that under its published cooperative advertising programs in the period 1960-63, Surprise offered to its customers promotional assistance of two types:

(1) Payment of a stated percentage of the customer's local newspaper advertising; and

(2) Furnishing of in-store or point-of-sale advertising material, together with statement enclosures or "stuffers" designed primarily for mailing to customers or prospective customers of the store.⁸

Advertising Allowances

During the years 1960, 1961 and the first half of 1962, the plan called for Surprise to pay 50 percent of a customer's cost of advertising its products in local newspapers, provided the

⁸ In addition, Surprise offered to all customers free mats. This constitutes a service that does not clearly fit into either of the categories set forth above, but it is basically auxiliary to the newspaper advertising allowance. A mat is a cardboard-like (papier-mache) cast of an actual ad, which is used by newspapers to cast the plate from which the ad is printed (Cohen 1009, 1013). These mats could be used by customers for newspaper advertising without any additional art or production cost. Generally, they were used only by the smaller stores which engaged in newspaper advertising. Large stores, with their own art and production departments, ordinarily did not make direct use of the mats. They did, however, frequently use the mat proofs for copy and layout ideas (Cohen 1009, 1085). It does not appear that the offer or furnishing of advertising mats is in issue here, but see *infra*, p. 880.

total annual payment did not exceed 5 percent of the customer's yearly purchases (Respondents' Answer, Par. 5; Cohen 94-5, 97-8; CXs 1 and 2).⁹ (The record establishes, however, that from 1960 to mid-1962, some customers were granted allowances of 75 percent (*infra*, p. 883).

The 50 percent plan remained in effect until the middle of 1962, when it was modified to provide for 75 percent allowances, with the annual total again limited to 5 percent of the customer's yearly purchases (Cohen 99-100; CX 16; Respondents' Answer (Par. 5) dates the change in 1961, but this evidently was a typographical error).

Since about June 1962, Surprise has required customers, to be eligible for 75 percent allowances, to execute cooperative advertising agreements that scheduled in advance the date and size of ads, the newspapers in which they are to appear, and the garments to be advertised (Cohen 988-89, Rubin 1694; for example, CXs 7, 8, 12, 187, 188). Despite respondent's denial (RPF 33, RR 3), there is evidence that if a customer ran an unscheduled ad, the 75 percent allowance was not available and the customer was allowed only 50 percent (Velardi 237, Rubin 1694).

As far as the record shows, such a contract requirement did not exist before mid-1962 (Cohen 988-89).¹⁰

In the cooperative advertising agreements used subsequently to the mid-1962 change of rate, Surprise agreed to pay "75% of actual space devoted to SURPRISE garments in accredited newspapers, (based on the store's lowest earned rate), up to an amount *not to exceed 5% of annual purchases.*" The agreement further specified that it

is limited to advertising in accredited newspapers only, (shown in Standard Rate & Data). It does not cover shopping newspapers, neighborhood publications, souvenir programs, radio, television, circulars, billboards, theatre programs, special editions, supplements, catalogues or other non-eligible media. (CXs 7, 8, 12, 187, 188.)

It appears that the media limitation spelled out in such contracts was in effect prior to 1962 (Cohen 988-89).

No evidence was adduced concerning the contents of the Stand-

⁹ The limitation to 5 percent of annual purchases was not included in the statement published in the 1960-61 and 1961-62 price lists (CXs 1 and 2) and quoted *infra*, p. 882, but there appears to be no dispute that Surprise had such a policy—a policy that was not, however, always followed (p. 894, *infra*).

¹⁰ It may be only coincidental that some of the customers who were granted 75 percent allowances before that became the uniform percentage had scheduled ads in advance pursuant to agreement (CXs 3-6, 9-11, 13 A, 14 A, 15 A, 186).

ard Rate & Data publication referred to in the contracts. It is inferred that it provides information regarding circulation, advertising rates, etc. But the record is silent as to what newspapers are included or excluded.

Surprise did not require ads to be of any minimum size to be eligible for allowances, and the size of the ad depended largely on the amount of money the customer had to spend on advertising, as well as the amount of purchases from Surprise. For small retailers who did not have their own art and production departments, Surprise provided ad mats that measured 21 column inches, or approximately 300 lines. (Cohen 96, 994-95; CPF 6.)

Despite their recognition that the program imposed no minimum size requirement for cooperative advertising (CPF 6), complaint counsel have assumed that it was necessary for smaller customers to utilize the Surprise mats in order to receive payment (CPF 27; CR 17). Since the smallest mat measured 21 inches, complaint counsel contend that Surprise, in effect, imposed a minimum lineage requirement (CR 17).

The examiner recognizes that there is testimony subject to that interpretation (Cohen 96-97, 994-95). But when read in context, it does not support a finding that Surprise mats had to be used, and it specifically recognizes that the ad size might be smaller than the mat. The fact that one customer did not understand that he could reduce the size of the ad (Katsoff 180-81, 200-01) does not prove that Surprise required the mats to be used without reduction.

Agreements used during and since 1962 have purported to limit the size of ads to 600 lines or 42 inches (CXs 3-12, 13 A, 14 A, 15 A, 186-88; but see *infra*, p. 896).

The advertising allowances available under the Surprise cooperative advertising plans were not predicated upon the purchase of any specific style or line of Surprise products, or upon any minimum order—except to the extent that the limitation of allowances to 5 percent of annual purchases required purchases in such volume as to make advertising money realistically available.

In the usual case, the customer and the Surprise salesman mutually agreed on those Surprise garments that would be advertised (Cohen 1022; see also Velardi 236, Knopp 363-64, Connors 559-60, Feir 582, Spitzer 799-800).

Advertising allowance payments have been made by allowing customers to take deductions from merchandise invoices (Cohen 1000).

Advertising Materials Furnished by Surprise

The in-store or point-of-sale materials offered under the Surprise program (Cohen 1007-14) included:

Glossies, or glossy print photographs of garments, about 8½ x 11 inches in size, which are intended for display in the windows or fitting rooms of stores.

Window cards, window streamers or banners, and counter cards, which depict Surprise garments and show the style numbers and suggested retail prices.

Bra, girdle, and corselet forms, commonly known as bust forms, intended for use in displaying the garments in store windows or in the store itself.¹¹

In a somewhat different category are so-called statement enclosures, imprinted with the store name. These enclosures depict the Surprise garments and indicate the size range and prices. Retailers either hand them out or mail them to customers or prospective customers.

The layout and copy ideas referred to in the cooperative advertising plan are proofs of the advertising mats prepared by Surprise and may be used by any customer as suggestions for advertising formats and textual material.

The record establishes that the in-store or point-of-sale materials were furnished to customers free of charge.

The cost to Surprise for these various materials was listed as follows:

Statement enclosures—\$5-\$6 per thousand;

Bust forms—\$5 to \$20 each, depending on length; and

Mats—approximately \$2 each. (Cohen 1086, 1088, 1099, 1100.)

Neither in theory nor in practice, as far as the record shows, was there any minimum purchase requirement as a prerequisite to the furnishing of display materials, nor was there any limitation on the amount of such materials to be furnished to any customer. Although it was indicated that there might be some restrictions on the distribution of bust forms because of their cost (Sanders 1548; *cf.* Cohen 1089), the record discloses no instance where a customer was refused bust forms in any quantity requested.

Like the advertising mats, the in-store displays were available to all customers—those who advertised and those who did not (Cohen 1008-12; Popkave 1812, 1851; Rubin 1691-92; James

¹¹ Bust forms were not specifically mentioned in the published program but might be considered embraced in the term "displays." See *infra*, p. 882.

2592-93). But the record as a whole indicates that the in-store displays were used primarily by smaller, non-advertising stores and were only minimally used by the department stores (CPF 44-45; cf. RPF 8, RR 25-28). Respondent takes a somewhat anomalous position regarding the bust forms, contending that because they were not specifically mentioned in the published program, they constituted true alternatives available to non-advertising customers.

Several customers testified that the display materials and statement enclosures were not offered as, and in their opinion did not constitute, substitutes for advertising or alternatives "in lieu of" newspaper advertising. (See, for example, H. Katsoff 158; I. Katsoff 207-08; Tyson 254-58; Rechtman 569, 571; Toll 643, 649-51; Gilbert 677-78.)

Publication to Customers

The plan in effect from 1960 to mid-1962 was published in price lists as follows:

Cooperative advertising—we pay 50% of retailer's local newspaper advertising and provide stores with attractive FREE mats, glossies, displays, window banners, statement enclosures, layout and copy ideas.

That legend appeared on the inside front cover of the price lists for 1960-61 and 1961-62 (CXs 1 and 2).

In the 1962-63 price list (CX 16), the policy and the statement were modified as follows:

Cooperative advertising—we pay 75% of retailer's local newspaper advertising (limited to 5% of annual purchases) and provide stores with attractive FREE mats, glossies, displays, window banners, statement enclosures, layout, and copy ideas.

The price lists in effect during 1960-63 were mailed or otherwise supplied to all active accounts (Cohen 94, 983-84, 1080-83, 1095, 1098; Sanders 1374-76, 1545-46; Rubin 1606-07, 1615, 1619-21, 1624, 1687-89; Popkave 1809-10, 1847), and most of the customers who testified did receive them. The record contains testimony indicating that two customers did not receive the 1960-61 price list. (Katsoff 157, 166, 168, 170, 174, 186; Toll 642, 647-48; see also Paskow 331-32; but cf. Rubin 1606-08; Popkave 1809-10, 1847-49.)

On the basis of the record as a whole, it is found that receipt by customers of the Surprise price lists did not necessarily result in actual knowledge on their part of the advertising allowance plan published in such price lists. Many customers, both

large and small, were not aware that the plan was so published and relied on salesmen for such information. It is further found that Surprise salesmen aggressively promoted the advertising allowance program in dealing with department stores. But despite a more casual approach in dealing with proprietors of smaller stores and, perhaps, occasional failure to mention the subject at all, it cannot be said there was any concealment. (CPF 41-43 and CR 22-26; cf. RPF 8-9.)

Special 100 Percent Allowances

In addition to the advertising allowances specified in the cooperative advertising plans published in CXs 1, 2, and 16, it also was the practice of Surprise during 1960-63 to grant 100 percent allowances (1) in special promotions featuring garments new to the Surprise line; (2) on request to customers opening a new store or a new foundation garment department; and (3) to match the participation of others in omnibus advertisements (involving the participation of two or more manufacturers) (Cohen 991-92).

Surprise customers were not advised in writing that such allowances were available, but respondent contends that customers were apprised of it by salesmen (Cohen 1028-29).

The subject of 100 percent allowances is treated in more detail *infra*, pp. 892-894, 955-956; see also pp. 916-917.

V. THE SURPRISE PROGRAM IN OPERATION

The Actualities of Customer Participation

It is undisputed that during the period 1960 to mid-1962, when Surprise's announced allowance was 50 percent, department store customers received 75 percent while competing customers received only 50 percent.¹² Accordingly, there is no necessity for detailed findings regarding the 75 percent allowances, except to determine whether those discriminations are excused under the "meeting competition" defense provided by Section 2(b) of the Clayton Act, as amended. For findings on that subject, see *infra*, p. 918.

¹² Complaint counsel have shown in tabular form the allowances actually granted by Surprise during 1960-63 to customers in four cities (CPF 9-22). Surprise does not dispute the accuracy of the tabulations except to the extent that the tabulations omit some department store allowances that respondent contends, without adequate record support, were at the 50 percent rate. This contention relates to the meeting competition defense and is discussed under that heading, *infra*, p. 918. Unless otherwise indicated, those proposed findings are adopted, but in view of the lack of any real dispute on the subject, no useful purpose would be served by reproducing them here. The examiner has simply summarized the tabulations and added certain supplementary and explanatory material.

In this section of the decision, therefore, only brief reference is made to the 75 percent allowances.

Emphasis is placed, instead, on the treatment of other customers, so as to provide a factual basis for answers to the following questions:

(1) Was the Surprise program "available" to them in the sense that it was or could have been known by them?

(2) Did its terms and conditions preclude some customers from receiving allowances?

(3) If so, were they offered suitable alternatives or substitutes on proportionally equal terms?

Findings are here made also as to the existence of competition between favored and non-favored customers.

Findings relating to each of four cities follow:

New Haven, Connecticut

1. Department Stores

In New Haven, Connecticut, two customers consistently received from Surprise advertising allowances of 75 percent beginning in 1960, while three others received only 50 percent—two of them receiving only 50 percent even after Surprise raised the rate to 75 percent in mid-1962.

The Edw. Malley Co.—One of the favored customers was The Edw. Malley Co., a downtown department store. From March 25, 1960, to May 15, 1963, it received allowances of 75 percent, with one exception. The exception was for an omnibus ad of June 1, 1960, of which Surprise paid 50 percent.¹³ (CPF 9; CXs 19-32.)

Shartenberg's—The other favored customer was Shartenberg's, another downtown department store, which went out of business, apparently in mid-1962 (CX 166 E).¹⁴ Shartenberg's had received two 75 percent allowances in 1960 and one in 1961 (CPF 10; CXs 34-36).¹⁵

2. Other Advertising Customers

The Outlet Millinery Company—Among the unfavored customers was The Outlet Millinery Company.¹⁶ It received only 50

¹³ For discussion of the significance apparently attached to this exception by Surprise, as well as the claim of another 50 percent allowance on June 2, 1960 (RPF 10, RR 4), see *infra*, pp. 920-921. Malley also received a 100 percent allowance subsequent to May 1963 (see *infra*, p. 892).

¹⁴ Testimony that Shartenberg's went out of business in 1963 (Rubin 1632) apparently is in error (see RPF 24).

¹⁵ For discussion of Surprise's claim of 50 percent allowances in 1960-62, see *infra*, pp. 921-922.

¹⁶ Outlet had stores in New Haven and Bridgeport, as well as in Hartford and New Britain. The evidence relates only to the New Haven and Bridgeport stores.

percent until Surprise raised the rate generally to 75 percent (CPF 11; CXs 52, 54, 56, 58, 59; RXs 1-3).

Other unfavored customers included Vee Bee Corset Shop, a downtown specialty store, which received two 50 percent allowances in 1961 and one 50 percent allowance in 1963 (CPF 10; CXs 39 A-40 B, 213-14, 217 A-B, 220-21, 223); and The Hosiery & Lingerie Shop, Inc., a small downtown shop, which received a 50 percent allowance in May 1963 (CPF 10; CX 41). Further findings as to these last two customers are as follows:

Vee Bee Corset Shop—There is evidence that Vee Bee Corset Shop received at least one 75 percent allowance after the rate change in 1962 (Velardi 236, Rubin 1615-16, 1693, 1713).¹⁷

The fact that Vee Bee received 75 percent in 1962 is significant in determining whether the 50 percent allowance it received in 1963 (after Surprise began offering 75 percent generally) was a further actionable discrimination. All of the circumstances (Velardi 235-37; Rubin 1615-16, 1693-96, 1713-16) suggest that the 1963 allowance of 50 percent was pursuant to the advance-arrangements policy (*supra*, p. 879). This requirement of advance scheduling on the basis of a contract was not published and, as far as the record shows, was not uniformly enforced. The existence of such a policy is denied (RR 3-4), leaving Surprise with no explanation of the discriminatory 50 percent payment to Vee Bee in 1963 other than the untenable suggestion that the store elected to take 50 percent rather than 75 percent.

When this discrimination is coupled with similar instances in the case of The Hosiery & Lingerie Shop, Inc. (*infra*), and Harriet's Corsetry (*infra*, pp. 890-891), the excuse of mistake or misunderstanding does not ring true.

The Hosiery & Lingerie Shop, Inc.—From 1959 through 1963, the purchases of this store entitled it to advertising allowances from Surprise ranging between \$19 and \$48 (CX 163 A-E), but it did not cooperatively advertise with Surprise until 1963. Until the rate was changed to 75 percent, it never was offered more than 50 percent. And although David Tyson, the coproprietor, was sure that he had received the 1962-63 price list (as well as earlier ones) and knew that the cooperative advertising plan was contained in it (Tr. 247-48), he had accepted without objection a 50 percent payment for an ad run in May 1963 (CX 41; Tr. 249-50; Rubin 1623).

¹⁷ Surprise's contention (RPF 32, RR 4) that the allowances of \$49.50 on September 2, 1962, and October 28, 1962, shown by CX 165 H were at the 75 percent rate, is not supported by the record.

Tyson had failed to note the rate change to 75 percent in the 1962-63 price list (Tr. 251), and despite the testimony of the salesman Rubin that he told Tyson about it (Tr. 1621), Tyson understood the rate was still 50 percent. He did not recall that the Surprise salesman ever offered more than 50 percent (Tr. 248-50).

Rubin's explanation that this account got only 50 percent because the volume of purchases did not permit a higher payment (Tr. 1696-97, 1734), is unfounded. Whether the 5 percent limitation is applied to 1962 or 1963 purchases, Hosiery & Lingerie was entitled in 1963 to an advertising allowance of \$47 or \$48 (CX 163 E), which would have covered 75 percent of the ad cost of \$59.40 (CX 41).

Tyson did not understand when he was asked whether Surprise ever offered any alternatives to cooperative advertising; but when he was asked whether substitutes were offered, he stated that the store got statement enclosures on request and also advertising mats, counter cards, glossies, and bust forms (Tr. 254-55; see also Rubin 1622-23, 1691).

The witness said that counter cards and glossies were not a substitute for cooperative advertising but that the store wanted them.

The store advertises its major lines, but Surprise has never been a major line (Tr. 255, 246-47).

3. Non-Advertising Customers

Two other New Haven customers, Kay's Corset Shop and Figure Fashions, received no advertising allowances from Surprise. Their proprietors explained, in substance, that the nature of their operations was such that they could not economically afford to engage in cooperative newspaper advertising (Tr. 157-58, H. Katsoff 178, 180-81; I. Katsoff 207; see also Rubin 1611, 1699-1700). They testified that they never had been offered an allowance greater than 50 percent (Tr. 182-83, 185, 190, 206-07, 210, 212). Although both had received the 1962-63 price list, neither was aware that it specified a 75 percent allowance (Tr. 184-85, 205, 210-11), but the Kay's witness knew that the Surprise cooperative advertising plan was in the 1961-62 price list (Tr. 162).

Other findings concerning these two accounts follow:

Kay's Corset Shop—During 1959-61, Kay's purchases from Surprise would have entitled it to advertising allowances of \$12 or \$13. On the basis of 1962 purchases, its 1962 allowance could have been \$23 (CX 164 A-B). The advertising rate of the New

Haven Register was \$3.60 per column inch (Tr. 158). Thus, a small advertisement was not out of the question, particularly with Surprise paying 75 percent of the cost. However, the proprietor, Harold Katsoff, commented that an ad so small as to be inconsequential on the page would be a waste of money; if it was under a certain size, it would not pay him to run the ad (Tr. 199), but he failed to specify any minimum size.

Katsoff said he did not use cooperative advertising in New Haven because it was "too expensive," even with a 50 percent reimbursement (Tr. 158). He could not afford to pay \$50 to advertise Surprise brassieres in New Haven (Tr. 198).

Katsoff assumed that he would have to use the mat furnished by Surprise. Since he could not afford to pay for an ad that size, and since he understood from the salesman Rubin that he might not be reimbursed if he cut the mat down, he did not advertise with Surprise at all (Tr. 180-81, 200-01). Rubin denied that he had made such a statement (Tr. 1610).

The salesman Rubin agreed in effect that Kay's was so small that it was not worthwhile for it to run an ad (Tr. 1611).

Katsoff said he was never offered anything as an alternative to cooperative advertising in the newspapers (Tr. 158). This exiguous testimony does not necessarily contradict Rubin's testimony that Kay's was offered, and it accepted, bust forms, glossies, window banners, and possibly stuffers (Tr. 1611-12, 1690).¹⁸

Figure Fashions—On the basis of purchases in 1959 and 1960, Figure Fashions would have been entitled to advertising allowances of \$10 to \$14. When purchases from Surprise dwindled to less than \$100 for each of the years 1961 and 1962, the entitlement would have been \$3 to \$5 (CX 162 A-B). The store went out of business in February 1963 (Tr. 203).

This account purchased some Surprise products but not the entire line. Its volume with Surprise was not high enough to warrant advertising Surprise products. It might have advertised if a higher percentage than 50 percent had been offered. The store *did* advertise in the New Haven Register weekly, but it was primarily concerned with products stocked to a greater extent than was the Surprise line (Tr. 203, 207). Compared to other lines, the Surprise line was not "enticing" to the proprietor, Irving Katsoff. It "didn't mean too much" to Katsoff (Tr. 215), and he agreed that his volume with Surprise was "inconsequential" (Tr. 220; see also Rubin 1612-16).

¹⁸ The testimony of Katsoff and Rubin, however, conflicts on various other points. (Compare Tr. 157, 174 with Tr. 1606-08; Tr. 181, 184-85 with Tr. 1610-11.)

Initial Decision

71 F.T.C.

Irving Katsoff was "never aware of any alternative" to newspaper advertising (Tr. 206-07). He did get counter cards and glossies from Surprise (Tr. 208, 212), but he did not consider this an alternative to advertising (Tr. 208).

4. Competition

Surprise customers in New Haven were in competition with one another (James 141-42, 150-51; H. Katsoff 159; I. Katsoff 207-08, 212, 215; Velardi 239-40; Tyson 255-56; see also CPF 29, 34).

Bridgeport, Connecticut

1. The Howland Dry Goods Co. and The Outlet Millinery Company

In Bridgeport, Connecticut, The Howland Dry Goods Co. consistently received advertising allowances of 75 percent from 1960 to 1963 (CPF 12; CXs 42, 44, 46-50; Tr. 1153),¹⁹ while The Outlet Millinery Company received only 50 percent until the latter part of 1962 when it too began receiving 75 percent (CPF 12-13; CXs 52, 53, 56, 57, 59; RXs 1, 2, 4).

2. Competition

Outlet and Howland were competitors (Knopp 365-68, Ciro 1154; see also CPF 35).

Newark, New Jersey

1. L. Bamberger & Co.

In the Newark, New Jersey, area, L. Bamberger & Co., a large downtown department store with seven suburban branches, received from Surprise advertising allowances of 75 percent or 100 percent during 1960-62 (CPF 14-15; CXs 64, 72, 73 A-81 B).

2. Other Customers

During the same period, another department store, Hahne & Co., and the Helen Hirsh Specialty Shop were offered no more than 50 percent until the policy change in mid-1962.

Hahne & Co.—It is not clear whether the fact that Hahne & Co. did not engage in cooperative advertising with Surprise was due to disinterest or to a lack of knowledge concerning its availability. The store received all the Surprise price lists, but the

¹⁹ Surprise contends that Howland also received some 50 percent allowances during this period; see *infra*, pp. 923-924.

foundation garments buyer simply was not aware that the cooperative advertising policy was there set forth (Drury 1119-20). The Surprise salesman Jack Brown testified that he offered the 50 percent arrangement to the store in 1960 and also may have offered statement enclosures (Tr. 1775-77).

Evidence respecting Hahne is significant only in establishing that no 75 percent offer was made to this account until the general policy change of mid-1962.

Helen Hirsh—The same finding is made as to Helen Hirsh (Tr. 331, 342, 356), despite complaint counsel's apparent reliance (CPF 41-43) on the testimony of its proprietor, Allen Paskow, to establish that the Surprise cooperative advertising plan was not available to this store. Paskow, who took over the business in June 1961, had received at least the 1962-63 price list but was not sure about the 1961-62 price list (Tr. 331-32). Until contacted as a witness, he had not been aware that the cooperative advertising plan was contained in the price list (Tr. 333).

Paskow further suggested that the Surprise salesman had failed to offer cooperative advertising. The fact is, however, that the store had cooperatively advertised with Surprise in 1960 and 1961, receiving 50 percent (CXs 83-85 B; CPF 15), and it had received 75 percent for a Surprise ad in 1963 (Tr. 342-44, 354-55; CX 181 H). The salesman, Jack Brown, testified that the Hirsh Shop also was furnished mats, bust forms, streamers, and window cards (Tr. 1775, 1778).

3. Competition

Hirsh and Hahne both competed in the resale of Surprise products with Bamberger's (Paskow 330, 333; Drury 1119, 1123; see also CPF 30, 36).

Philadelphia, Pennsylvania

1. Department Stores

In Philadelphia, Pennsylvania, Surprise granted four department stores advertising allowances of at least 75 percent and sometimes 100 percent. These customers are:

Lit Brothers (CXs 86-93, 95-99, 358 A-B);

Gimbels (CXs 100-13, 115-18);

Strawbridge & Clothier (CXs 119-22; Tr. 459, 462, 465-69, 491); and

Snellenburgs (CXs 13-15, 17-18; RX 25 A-H).

(See generally CPF 16-20.)

2. Other Customers

During the same period that these department stores were receiving advertising allowances of 75 percent or better from Surprise, other competing customers in Philadelphia received or were offered advertising allowances of only 50 percent. These customers included:

Jean Spitzer Corsetiere, 3 ads in 1960; 1 in 1961 (CXs 125-28);

Besser's Corset Shop, 2 ads in 1960 (CX 133);

Harriet's Corsetry, 2 ads in 1962 (CXs 134 A-135 C);²⁰

Jean Rose Corset Shop, 1 ad in 1960 (CX 136);

Goodman's Corset Shop, 1 ad in 1960; 3 in 1961; 2 in 1962 (CXs 137-42, 182 A-H; Tr. 726-30, 732-38);²¹ and

Mary Anne Corset Shop, 4 ads in 1960; 2 in 1961; 1 in 1962 at 50 percent; and 3 in 1962 at 75 percent (CXs 144-52 B; RXs 5 A-6 C). (See generally CPF 20-22.)²²

For lack of adequate evidentiary basis, the examiner has disregarded transactions with Madam Rosalie Shop (CX 175 A-C; CPF 25, 30-31; RPF 116)²³ and the Ort Shoppe (CX 177 A-B; compare CPF 25, 30-31 with Tr. 761, 763-72; see RPF 117-18).

Three other Philadelphia accounts require further findings, as follows:

Harriet's Corsetry—This account, also known as Harriet's Hosiery, is cited by complaint counsel in support of the allegation that some customers were not offered advertising allowances or were not informed of modifications in the Surprise advertising plan (CPF 26, 32). But the proprietor, Mrs. Harriet A. Gilbert, received the price lists announcing the cooperative advertising allowance plans in effect during 1960-63. She simply failed to take note of them. She relied on the salesman, but he made no offers in 1960 or 1961 (Tr. 668-71). According to the salesman Popkave, he offered Mrs. Gilbert cooperative advertising in 1961 (Tr. 1856).

Moreover, despite Mrs. Gilbert's initial statement that she didn't know the advertising plan was contained in the price lists (Tr. 669-70), cross-examination developed that she may have read the cooperative advertising statement at least by 1961 (Tr. 704-05),

²⁰ One ad was dated November 30, 1962, but the allowance was only 50 percent despite the change in rate to 75 percent.

²¹ Apparently the Goodman shop received at least one 75 percent allowance in 1963 (Goodman 745-48).

²² Respondent doubted that CX 133, relating to Besser's, and CX 136, relating to Jean Rose, were in evidence (RPF 119), but see Tr. 773.

²³ Except with regard to the 5 percent limitation; see *infra*, p. 896.

and that she had knowledge of Surprise advertising allowances from conversations with a salesman prior to 1960 (Tr. 709-10).

Nevertheless, there is no doubt that this shop was discriminated against, since it received only 50 percent allowances while its department store competitors received 75 percent. Oddly enough, this was true even after Surprise began offering 75 percent generally to its customers. For an ad published in November 1962, Harriet's asked and received only 50 percent (CX 134 A-B; Tr. 671, 675, 705-06). When she discovered she was entitled to 75 percent in the fall of 1963, she then deducted the additional 25 percent from an invoice (Tr. 671-74), and there has been no question raised concerning the deduction (Tr. 685, 712). The salesman Popkave had only a hazy memory of this incident, but dismissed it as a mistake or oversight involving some question about the submittal of tear sheets of the ad (Tr. 1825-28, 1856-61, 1864-65).

Mrs. Gilbert said that Surprise salesmen never offered her any alternatives or substitutes for cooperative advertising but did furnish display material (Tr. 677). This material was never offered "in lieu of" cooperative advertising (Tr. 678). She always found Surprise very cooperative in all sorts of displays (Tr. 718).

Francine's Foundations—This account did no cooperative advertising with Surprise in 1959-61 (CX 183 A-D; Tr. 641-42), but did receive \$66 in 1962, representing 75 percent of the cost of two ads in the Jewish Exponent (CX 183 A-E; Tr. 646-47). The Surprise purchases of this shop in 1959-61 entitled it to advertising allowances ranging from \$26 to \$37 (CX 183 A-E).

Mrs. Ada A. Toll, owner of Francine's, received Surprise price lists for 1961-62 and 1962-63, but she could not remember whether she received the 1960-61 price list (Tr. 642, 647-48).

It is evident from her testimony, however, that she was on notice concerning the availability of cooperative advertising from Surprise, and a 50 percent offer was made to her in 1961 (Tr. 655). She was not interested in cooperative advertising in 1960 but decided to take advantage of it in 1962 (Tr. 648). She said she believes in advertising "If you have enough money" and "if you do it enough" (Tr. 652).

Although Mrs. Toll first said that the Surprise salesmen did not offer her anything as an alternative to cooperative newspaper advertising (Tr. 642), she indicated on cross-examination some confusion as to what the question had meant (Tr. 646). She then acknowledged that the Surprise salesman discussed with her throwaways, bust forms, glossies, window displays, and possibly

streamers and inserts (Tr. 649-51; see also Popkave 1818-21, 1855-56). But Mrs. Toll indicated that the display materials were not represented to her by the salesman as alternatives to newspaper advertising (Tr. 657).

Gertrude Rechtman—Miss Rechtman who operates a Philadelphia store selling foundation garments, including the Surprise line, was not sure whether she had been offered cooperative advertising by Surprise. No inquiry was made concerning her receipt of price lists. She does no cooperative advertising and hence pays no attention to it (Tr. 568-69; see also Popkave 1816, 1853-54). Although she first said that Surprise had never offered her anything as an alternative to cooperative advertising in newspapers (Tr. 569), further questioning developed that she meant Surprise had never offered her money for other types of advertising, such as the direct mail advertising in which she engages. Surprise never offered to participate in the cost of her direct mailing, and she never asked them to (Tr. 571-72). She knew that Surprise had advertising inserts for letters, but she did not want them because she sends cards, not letters. She had been offered streamers, counter cards, and bust forms, but she was doubtful that they constituted advertising (Tr. 572; see also Popkave 1815-16, 1853-54).

Miss Rechtman's purchases from Surprise increased steadily from 1959 to 1962, so that her advertising allowance entitlement ranged from \$43 in 1959 to \$114 in 1962 (CX 176 A-F). Thus, it is obvious that she could have engaged in some newspaper advertising had she desired to do so. It also is true that she could have used the advertising allowance money for her direct mail advertising.

3. Competition

The customers of Surprise in the Philadelphia area were in competition with one another in the resale of Surprise products (Bierman 476, 499; Connors 557-58; Rechtman 570; Feir 608-09; Toll 644; Gilbert 680-81, 713-14, 717-18; Goodman 744-45; Spitzer 804-07; Carr 820; see also CPF 32-33, 37).

Special 100 Percent Allowances

Concerning 100 percent allowances (*supra*, p. 883), the record demonstrates that the only recipients were department stores:

Malley's, New Haven (James 138-40, 2594, 2596-97; Rubin 1603).

Bamberger's, Newark (CXs 64, 68, 71, 78; George 427-29; Brown 1764-66, 1787-88).²⁴

Gimbels, Philadelphia (CXs 101, 110, 116; Feir 584-86, 597-98, 605, 635, 2814, 2817).

Lit Brothers, Philadelphia (CXs 88 A-C, 98 A-B; Connors 557).

Snellenburgs, Philadelphia (CX 17 B-C; RX 25 A-H).

(See generally CPF 14-19, 38-41; RPF 6-7; RR 18-22.)

These 100 percent allowances were primarily for the promotion of new merchandise, but some involved the opening of new stores or new departments, and also omnibus ads.

Despite testimony that these 100 percent allowances were offered uniformly to all accounts (Cohen 992, 1028-29; Sanders 1424-26, 1541-43; see also Rubin 1603, 1682-85, 1711-12), there is no evidence that Surprise paid such an allowance to any customers other than the five department stores listed.

Except for Malley's buyer, there was no testimony by any retailer-witness in New Haven specifically relating to 100 percent allowances, but there is basis for an inference that no such offers were made to the stores competing with Malley's. The testimony of the salesman, Rubin, regarding such offers (Tr. 1682-85, 1711-12, 1730-31) is not convincing, and it does not establish that such offers were made on proportionally equal terms.

In Newark, neither Hirsh nor Hahne received any 100 percent allowances, and the record contains no evidence that they were ever offered such an allowance (*cf.* Brown 1775-77, 1792-95, 1797-99).

Similarly, in Philadelphia, not a single customer competing with Gimbels, Lit Brothers and Snellenburgs received any 100 percent allowances, and all indications point to a failure on the part of Surprise to make such an offer.

Francine's Foundations, for example, moved in May 1960, but it received no 100 percent allowance for a new store opening or for any other promotional purpose (Toll 638-39). Moreover, there is specific testimony that Surprise never offered 100 percent allowances to Harriet's Corsetry (Gilbert 675-76, 688, 700-01) or to Jean Spitzer (Spitzer 804).

Significantly, the Surprise salesman who called on the small

²⁴ In objecting to the proposed findings of complaint counsel, respondent explains a 100 percent allowance to Bamberger's in May 1962 (CX 78) as connected with the opening of a new store (RR 21). Although the exhibit bears an unidentified handwritten notation "new store," and the Surprise salesman Brown relied on that notation in so testifying (Tr. 1787; but see Tr. 1765), the buyer for Bamberger's specifically testified that the payment exemplified by CX 78 was not for a new store opening (George 428-29). The record leaves unexplained why Surprise paid only 75 percent for another Bamberger's ad (in a different newspaper) advertising the same item on the same day (CX 81 A).

stores in Philadelphia testified that although some of his customers purchased the same styles on which Gimbels and Lit Brothers received 100 percent allowances for ads, he did not offer the small stores 100 percent allowances (Popkave 1843-44; *cf.* Popkave 1861-62; Sanders 1540-41; Brown 1788, 1792).

In defending its practices regarding 100 percent allowances in the Philadelphia area, Surprise relies (RPF 114) on an ad published at its expense on November 17, 1963 (RX 7) which listed the names of various stores carrying the Surprise line (Popkave 1828-42). But this ad—apparently the only one of its kind (Tr. 1844)—is hardly equivalent to the department store ads for which Surprise paid 100 percent. In fact, the Surprise salesman said it was not “on a cooperative basis” (Popkave 1817). There is no showing of proportional equality.

Small stores listed in the ad include Francine's, Gertrude Rechtman, Mary Anne Corset Shop, and Jean Spitzer Corsetiere. Harriet's Corsetry was not included.

Participation in the ad was contingent on the purchase of a minimum quantity of merchandise, the exact extent of which was not established (Popkave 1837-42; Rubin 1683).

Surprise's explanation that the stores which did not receive 100 percent allowances were unwilling to promote new items in return for such allowances (RR 18-19, 22), is not supported by the record.

Other Deviations from Program

Limitation on Allowances

The record shows that Surprise purported to have a policy of limiting advertising granted in any calendar year to an amount not exceeding 5 percent of purchases (Cohen 995-1000). It was not until the price list of 1962-63 (CX 16), which was issued in mid-1962, that this limitation was published to the trade; but it appears that such a limitation may have been generally known (Cohen 95, 995; Gilbert 702).²⁵ In any event, both parties agree that the allowances granted by Surprise are properly measured against such a limitation.

²⁵ Certain of Surprise's contract forms for cooperative advertising suggest some flexibility with respect to the 5 percent limitation. Thus, the so-called “Two-Ad Agreement” exemplified by CX 3 states that “We reserve the right to limit our share of the expenditure under this agreement to 5% of purchases within the calendar year * * *.” The wording suggests that such a limitation may not have been uniformly applied.

The limitation was more firmly stated in the 1962-63 price list (CX 16), which offered payment of “75% of retailer's local newspaper advertising (limited to 5% of annual purchases) * * *”, and in the “Cooperative Advertising Agreement” form (CX 7) apparently put into use in mid-1962, which specified payments of 75 percent “up to an amount *not to exceed 5% of annual purchases.*”

There is vigorous disagreement, however, concerning (1) the allowances properly included in the annual total and (2) the proper measure of annual purchases to be used as a base for the application of the 5 percent limitation (CPF 23-25, 33-37; CR 14-17; RPF 6-7 and 10-117, *passim*; RR 7-11).

The examiner rejects the contention of Surprise (RPF 6-7) that 100 percent allowances for new store openings, promotion of new products, and omnibus ads should not be included in the total advertising allowances for a given year (see, for example, RPF 68a-c). All the allowances granted are properly subject to the statutory test. The reasoning advanced to support Surprise's contrary thesis is so fallacious as to require no extended comment (see CR 14-15). In addition to deleting numerous 100 percent advertising allowances granted department store customers on its erroneous exclusionary theory, Surprise, in its Proposed Findings, has deleted numerous other allowances in violation of the principle it purports to espouse (see CR 14-17).

As for the base year to be used in computing the limitation, there is no real dispute that until mid-1962, Surprise's policy was to measure its advertising allowances in a given year against 5 percent of the customer's purchases during the prior year (Cohen 996).

Beginning in 1962, Surprise started figuring the 5 percent limitation on a different basis. Since mid-1962, the maximum allowance for the first six months of the calendar year has been computed on the basis of one-half of total purchases during the previous calendar year, and the allowance for the second six months has been figured on the basis of the purchases during the first six months (Cohen 996-1000).

Whichever system Surprise used, it is apparent that the intent was to limit its advertising allowances to 5 percent of current annual sales, with sales during a preceding period used "only as a gauge or guide" (RR 8). A Surprise official testified that if the 5 percent maximum was exceeded, an adjustment was made in the succeeding year (Cohen 1084-85), but the record is barren of any showing of such adjustments (see CR 13-14).

A tabulation by complaint counsel (CPF 23-25) shows the percentage of advertising allowances measured against sales during the previous calendar year. This tabulation demonstrates that some customers received allowances in excess of 5 percent. Surprise complains that the comparison is improper and that the 5 percent computation should be made on the basis of sales during the year contemporaneous with the allowances (RR 7-10). But

when all the allowances are included, a shift in the base year does not change the overall net result. It does, of course, raise the percentage in some instances and lower it in others. The important fact is that under either system of computation, some customers received allowances greater than 5 percent.

A sampling of the alternate tabulations, showing instances in which one system or the other yields an allowance exceeding 5 percent, follows:

Place	Customers	Allowance year	Percent of ad allowances measured against purchases	
			For prior year	For same year
New Haven, Conn.	The Edw. Malley Co.	1961	5.2	4.1
Bridgeport, Conn.	The Howland Dry Goods Co.	1962	6.5	4.8
Newark, N.J.	Helen Hirsh	1960	7.6	3.1
Philadelphia, Pa.	Strawbridge & Clothier	1961	5.5	5.5
		1960	13.7	9.4
	Gimbels	1961	10.0	9.2
		1962	9.7	7.3
	Lit Brothers	1962	5.8	4.9
	Snellenburgs	1961	8.7	9.9
		1962	8.7	11.3
	Madam Rosalie	1962	9.1	10.3
	Francine's Foundations	1962	9.0	5.5
	Harriet's Corsetry	1962	5.8	4.5

(See CPF 23-25 and exhibits there cited; cf. RPF 10, 33, 64, 67-68c, 85-86, 95, 101-2, 113-16; RR 7-11.)

Thus, it is beyond dispute that Surprise failed to adhere to its own terms and discriminated among competing customers in applying or disregarding the 5 percent limitation on annual allowances. It may be noted in passing that this discrimination favored not only department store customers, but also some of Surprise's smaller customers.

Maximum Size of Ads

The published program (CXs 1, 2, 16) imposed no limitation on the size of advertisements, but contract forms specified a maximum size of 600 lines or 42 inches (CXs 3-12, 13 A, 14 A, 15 A, 186-88).

In the face of the contract limitation, the record shows that the maximum was exceeded on several occasions:

Store	Date	Size	CX No.
Malley's	5/1/60	52" ²⁶	CX 20 A-B
Howland's	4/2/62	48"	CX 48
Gimbels	4/28/60	1000 lines	CX 102 A
"	5/13/60	620 lines	CX 103 A
"	5/2/61	620 lines	CX 109 A
"	10/30/61	620 lines	CX 110
"	4/29/62	675 lines	CX 113
"	12/7/62	620 lines	CX 115
Strawbridge & Clothier	3/23/60	620 lines	CX 119 A
"	9/20/61	620 lines	CX 121 A
"	4/9/63	615 lines	CX 122 A
Snellenburgs	4/25/62	654 lines	CX 18 A

No evidence was adduced concerning any customer who was denied an opportunity to exceed the maximum,²⁷ and such a deviation probably is of little or no consequence to small-volume customers (see RR 16). Nevertheless, allowances for advertisements larger than the maximum specified in the contracts are covered squarely by the allegation in the complaint (Par. Six) that "while the payment of advertising allowances to some customers was made in accordance with the terms of the agreement, other competing customers were provided allowances above and beyond those provided for in the agreement."

In defending these deviations, Surprise, in effect, sets up a plea of *de minimis* (RR 14-17). But the examiner rejects the contention that such deviations were "isolated instances" and that the excess lineage was insubstantial (RR 14-15). If all the deviations had amounted to only an inch or two (14 to 28 lines), they might have been disregarded as *de minimis*, but in addition to several ads exceeding the maximum by only that amount, there are others that cannot be so dismissed.

Surprise mistakenly argues that the lineage limitation was not part of its plan before the summer of 1962 (RR 14-15). The fact is that contracts used both before and after that time contained the limitation. And although Surprise correctly notes that the advertisements cited by complaint counsel were published before the summer of 1962, the record reflects at least two instances in which the maximum was exceeded subsequent to that time—December 7, 1962 (Gimbels, CX 115) and April 9, 1963 (Strawbridge & Clothier, CX 122 A). (It must be conceded, of course, that those

²⁶ The ad originally was scheduled to be 784 lines or 56 inches (CX 186).

²⁷ Neither complaint counsel nor counsel for Surprise cite any testimony on the subject, and the examiner has found none.

two instances, standing alone, might be disregarded as *de minimis*.)

The argument that the cost of the 1,000-line ad run by Gimbels in a tabloid on April 28, 1960 (CX 102 A) was less than the cost of a 600-line ad run in other newspapers (RR 15-16) is ingenious but is beside the point.

Finally, the contention that in that instance Surprise was meeting a specific competitive situation (RR 16) is not supported by the record.

VI. LEGAL ANALYSIS OF THE SURPRISE PROGRAM

Availability

Even if Surprise had adhered to its published program, without the deviations described in the preceding section of this initial decision, complaint counsel would still condemn its advertising allowance practices as violative of law. As outlined previously (*supra*, pp. 877-878), two questions that must be resolved are stated by complaint counsel (CB 1) as follows:

Has respondent made advertising allowances "available" to all of its competing customers in the sense that allowances were *offered* to all competing customers?

Has respondent made advertising allowances "available" to all of its competing customers in the sense that allowances were "*attainable*" by all of its competing customers?

To the extent that the second question is answered in the negative, a further question arises: Were customers who found the advertising allowances unattainable offered substitutes or alternatives on proportionally equal terms?

Each of these questions will be considered in turn.

First, however, it must be determined whether the first question—regarding notice—was properly put in issue. The thrust of the complaint is that the payments made by Surprise to some customers "were not available on *proportionally equal* terms" to competing customers (Par. 4; emphasis added). The complaint does not allege that the allowances were not available to some customers on *any* terms.

The general charging paragraph of the complaint (Par. 4) is followed by a description of the Surprise plan in effect during 1961 and previously (Par. 5). Thereafter, Paragraph Six challenges that plan on two grounds:

1. That its terms and conditions "were such as to preclude some

customers from accepting and enjoying the benefits to be derived from the plan"; and

2. That "while the payment of advertising allowances to some customers was made in accordance with the terms of the [plan], other competing customers were provided allowances above and beyond those provided for in the [plan]."

The complaint thus does not specifically charge a failure to offer allowances to some customers at all, and complaint counsel do not mention such a charge in their summary (CPF 1). Nevertheless, the examiner has disregarded this technicality and has determined this question on its merits. He has done this because (1) objection was not raised by respondents on such a ground; (2) the general language of Paragraph Four of the complaint may be liberally construed to embrace the charge; (3) Section 3.7 (a) (2) of the Commission's Rules of Practice may be construed as curing whatever defect there may be in the complaint; and (4) the disposition being made of the matter by the examiner makes the question academic, at least at this stage.

Notification of Customers

Regarding the question whether the Surprise cooperative advertising plan was available in the sense that it was offered to all competing customers, the examiner's answer is yes. He thus rejects complaint counsel's contention that publication of the plan in the Surprise price lists was not adequate notification.

Complaint counsel virtually concede that there was general distribution of the price list to all customers (CPF 43; but see CR 22). Certainly this was Surprise's intent, and nothing in the record suggests that Surprise did not make an honest effort to place its price lists in the hands of all customers. Obviously, it was to the interest of Surprise and its salesmen to furnish price lists to all customers.

At most, the record shows only two isolated instances indicating a possible failure to furnish customers with particular price lists (Kay's Corset Shop, *supra*, pp. 886-887; Francine's Foundations, *supra*, p. 891). No customer testified to any consistent failure by Surprise to furnish price lists.

Complaint counsel dismiss as "self-serving" the positive testimony of Surprise's sales employees concerning the policy of distributing price lists to all customers, and they complain of the lack of any "conclusive evidence" that price lists were, in fact, mailed to all customers. They suggest that Surprise should have introduced in evidence its customer mailing lists or other corrobora-

rative evidence to substantiate the testimony concerning the distribution of price lists (CR 22).

But on this subject, no basis exists for shifting to Surprise either the burden of proof or the burden of going forward, even under the doctrines expounded in *State Wholesale Grocers v. The Great Atlantic & Pacific Tea Co.*, 258 F. 2d 831, 837-38 (7th Cir. 1958),^{27a} and *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, 311 F. 2d 480, 486 (2d Cir. 1962).

Even though it is hereby found that the notice of availability of allowances was delivered to customers by means of the price lists, there remains the further question whether this was adequate to inform customers regarding the program (CPF 41-43; CR 19-26).

The examiner finds that publication of the cooperative advertising plan in the price lists *was* an adequate method of notifying customers concerning the plan. It is true that the record shows that several customers, both large and small, failed to take notice of the cooperative advertising statement. But the statement was not hidden; it was not in "fine print" (*cf.* CPF 43); and the record does not support the suggestion of complaint counsel (CPF 43, n. 60a; CR 23) that it was likely to be covered by supplemental price sheets.

The mere fact that some customers ignored the published statements or relied, instead, on oral communications from Surprise salesmen, does not warrant a condemnation of Surprise for failure to make a reasonable effort to communicate its offers. Neither the statute law nor the case law requires that notification be given in any particular form.

Publication of the plan in the price lists was reasonably calculated to apprise customers of the existence of the plan.

The fact that Surprise salesmen were zealous in undertaking to arrange cooperative advertising with department store customers, while only casually mentioning it, or perhaps not mentioning it at all, in their calls on smaller customers, does not detract from the basic finding of appropriate publication. Failure of customers to read and remember the published cooperative advertising plan does not create any culpability on the part of Surprise. It was not bound to make personalized offers or engage in active solicitation. It had no duty to urge the customer to act on its published offers.

The requirement of availability is satisfied by reasonable notice by the supplier, an *opportunity for awareness* by the customer.

^{27a} *Cert. denied* 358 U.S. 947 (1959).

Here, as in the *Lever Brothers* case, 50 F.T.C. 494, 507-08 (1953), "Every customer knew, or could have easily learned, what payments were being offered and what he must do to get any of them." (Emphasis added.) There was no "concealment" of Surprise's cooperative advertising program. *Kay Windsor Frocks, Inc.*, 51 F.T.C. 89, 95 (1954); see *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, 311 F. 2d 480, 485-86 (2d Cir. 1962); *General Electric Co.*, Docket 8487, Initial Decision, March 1, 1963, pp. 19-22 (dismissed on other grounds February 28, 1964). The distinctions between the *General Electric* practices and those in the instant case (CR 21-22) are matters of degree, not of substance.

Constructive notice is a doctrine long familiar to the law, and there is no reason why it should not be applied here. If, for example, citizens are presumed to have notice of any Federal Government edict published in the Federal Register, whether or not they ever see it, or even know about such a publication, 44 U.S.C. § 307, it is not unreasonable to hold in this case that customers supplied with the Surprise price list had constructive notice of the cooperative advertising plan. The doctrine is particularly applicable in the industry involved here, where the furnishing of advertising allowances is a widespread—almost universal—practice.

The examiner is impelled to find that Surprise openly and actually made known the availability of benefits under its cooperative advertising plan.

The literal language of the recent *House of Lord's* case, Docket 8631 (January 18, 1966) [69 F.T.C. 44], indicating a duty on the seller to *insure actual knowledge* on the part of customers, and thus suggesting a contrary result, must be read in the context of the special facts of that case. In discussing "availability," the majority opinion states that—

the crucial factor is not the particular formalities by which [the customer] acquires it, but the information *actually possessed* by the customer—particularly his knowledge of the seller's *willingness* to grant him the allowance. (First emphasis added.)

It refers to "the seller's duty to *make sure* the competing customers know about the allowances, know of their right to obtain them, and are familiar with the terms (proportionally equal) on which they can be obtained." (*House of Lord's, Inc.*, Majority Opinion, p. 75, n. 6; emphasis added.)

Moreover, commenting on testimony by a customer that the offer "could have" been made, and ruling that "This is not enough,"

the Commission referred to the holding in *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, 311 F. 2d 480, 487 (2d Cir. 1962), that “* * * a seller who has paid a special promotional allowance to some customers and not to others does not avoid the proscription of § 2(d) merely because payment might have been ‘available on proportionally equal terms to all other customers competing in the distribution of such products or commodities’; he avoids it only if such payment ‘is’ available.” The opinion then adds:

And it “is” available to a customer * * * *only if the customer knows about it.* (*House of Lord's Inc.*, Majority Opinion, p. 77; emphasis added.)²⁸

These pronouncements must be read in the factual setting of the *House of Lord's* case. In *House of Lord's*, there was no written or printed notice of the cooperative advertising program, which was made known only through oral offers of the sales staff, and the Commission could find no credible evidence that the non-favored customers were offered promotional allowances of any kind. In the instant case, it has been established that the program was published to customers by means of price lists, and the evidence supports a finding that, with rare exceptions, all customers received copies of the price lists, so that for practical purposes, the offer was made to all customers. Although there were some customers who did not actually know about the Surprise program, because they did not see it in the price lists, this was not the result of any breach of duty on the part of Surprise.

In *House of Lord's*, the Commission simply disbelieved the testimony of respondent's officials and employees that they had informed customers concerning the program. Here, Surprise has documented the steps it took to inform its customers;²⁹ the program had been “reduced to writing and openly distributed.” (*House of Lord's*, Majority Opinion, p. 80, n. 31.)

Finally, as far as notice is concerned, the order in *House of Lord's* simply requires that customers be “informed, in writing” of the promotional program. That requirement already has been met by Surprise.

²⁸ This seeming requirement of actual knowledge is followed by a quotation from *Fred Meyer, Inc.*, Docket 7492 (March 29, 1963) [63 F.T.C. 1, 26], which speaks of a supplier's “failure to inform” which “is tantamount to concealment * * *.”

²⁹ See § 8, Guides for Advertising Allowances and Other Merchandising Services (May 19, 1960).

*Practical Availability**1. Introduction*

The next question—whether the allowances were available in the sense that they were attainable by all competing customers (sometimes referred to in this discussion as “practical availability”)—presents more difficulty.

As previously outlined, the Surprise program involved an offer published to all customers (1) *to pay* a uniform percentage of each customer's newspaper advertising featuring Surprise garments up to 5 percent of annual purchases and (2) *to furnish* without charge promotional material for in-store display and for direct mail advertising.

As far as the basic requirement of the statute is concerned, it is clear that under the published program, Surprise offered to all its customers advertising allowance payments on proportionally equal terms by providing a uniform percentage of reimbursement for newspaper advertising and “by basing the payments * * * on the dollar volume * * * of goods purchased during a specified time.” (*Guides for Advertising Allowances*, May 19, 1960, Par. 7.)

As a matter of fact, the first example of the application of the proportionalization provision of the Guides (Par. 7) outlines a program virtually identical to that offered by Surprise during 1960–62.³⁰

In addition, as part of its comprehensive program, Surprise made available to all customers, including non-advertising customers, “other kinds of promotional activity and benefits,” *Sunbeam Corporation*, Docket 7409 (Opinion accompanying Final Order, January 11, 1965, p. 5) [67 F.T.C. 20, 57].

The Surprise program, both in theory and in operation, meets the “minimum standard of fairness” specified in *House of Lord's*, Docket 8631, January 18, 1966 (Majority Opinion, p. 18) [69 F.T.C. 83], by establishing a promotional plan that has “at least one feature that can be used by each” customer.³¹

The published program of Surprise may be fairly described as “a comprehensive nondiscriminatory program containing reason-

³⁰ The example is as follows: “A seller may properly offer to pay a specified part (say 50%) of the cost of local newspaper advertising up to an amount equal to a set percentage (such as 5%) of the dollar volume of purchases during a specified time.” And see Advisory Opinion Digest No. 26 (April 8, 1966) in which the Commission approved a promotional plan proposing to pay for “local advertisements,” allowances “which amount to 5% of the customer's annual dollar volume * * *.” The Digest contained no caveat concerning customers whose dollar volume of purchases might not make available any realistic advertising allowance. See also Advisory Opinion Digests No. 38 (April 29, 1966) [69 F.T.C. 1218] and No. 39 (April 30, 1966); cf. No. 10 (December 9, 1965) [68 F.T.C. 1271].

³¹ See *Guides*, Par. 6(c); Par. 9.

able alternatives for those small retailers unable to participate in cooperative newspaper advertising," *Exquisite Form Brassiere*, Docket 6966 (Opinion accompanying Final Order, January 20, 1964, 64 F.T.C. 271, 294).³² Although, technically, there are no alternatives stated as such in the plan, the promotional assistance is "uniformly offered in its entirety to all competing retail customers." The program does not "favor the large retailer," and it does "provide for the small retailer some sort of financial aid in methods of advertising economically available to him."

The "vice" the Commission found in the *Exquisite Form* plan—"pronounced favoritism of larger retailers and its affirmative exclusion of smaller ones" (*id.*, p. 290)—is wholly lacking in the Surprise plan. It cannot be said that the Surprise plan is "weighted in favor of the larger retailers and operates affirmatively to exclude from its benefits small retailers" (*id.*, p. 291).

The Surprise program is in no way comparable to the *Exquisite Form* plan which the examiner found "was not designed or intended for use of [its] smaller accounts" (*id.*, p. 283).

Thus, on its face, the Surprise plan appears to accord with the law, as explicated in controlling precedents and in the *Guides*. However, complaint counsel have questioned the validity of the Surprise program on the ground, in substance, that the advertising allowance feature is not "suitable and usable under reasonable terms by all competing customers" and that the plan operates to "eliminate some competing customers." (See *Guides*, Par. 9.)

2. Limitation to Newspaper Advertising

Complaint counsel object that the Surprise program imposes a restriction on the media for which advertising allowances are available. Admittedly, the payment offered by Surprise was for "local newspaper advertising" (CXs 1, 2, and 16).³³ Moreover, it appears that in practice the term "local newspaper advertising" was interpreted to embrace only "accredited newspapers"—those shown in Standard Rate & Data Service (CX 7; Cohen 989, 994). The limitation was designed to exclude "a fly-by-night newspaper" and to include only newspapers with verifiable circulations (Cohen 989). Actually, Surprise customers used a variety of newspapers, some with limited circulations and low advertising rates. There is no evidence that any customer was denied an opportunity to ad-

³² *Affirmed*, 360 F.2d 492 (D.C. Cir. 1965).

³³ Under the Surprise cooperative advertising contract form, exemplified by CX 7, it is made clear that local newspaper advertising does not include "shopping newspapers, neighborhood publications, souvenir programs, radio, television, circulars, billboards, theatre programs, special editions, supplements, catalogues or other non-eligible media."

vertise in a newspaper because of any arbitrary standards imposed by Surprise.

Complaint counsel take the position that Surprise's limitation on the media that may be used, when coupled with its limitation on allowances for advertising (5 percent of annual purchases), deprives small-volume purchasers of the opportunity to receive any advertising allowances. They contend that "some customers, although offered allowances by respondent, were not able to avail themselves of such allowances" (CPF 26); that "cooperative advertising allowances were not functionally available to some of respondent's customers in that, (a) some customers could not afford to advertise in newspapers, the only media for which allowances were granted, (b) some customers were not interested in cooperative newspaper advertising, and (c) some customers' purchases were not large enough to earn enough allowances for newspaper advertising" (CR 17; footnote omitted).

These contentions are literally true. But neither the quantity nor the quality of the evidence cited to support them warrants a finding that the allowances offered by Surprise were not available to all competing purchasers on proportionally equal terms within the intent of the law.

In the four trading areas covered by the evidence, complaint counsel can cite only two customers who indicated that they were unable to take advantage of Surprise's advertising allowances—Kay's Corset Shop and Figure Fashions, both of New Haven.

The record affords no basis for finding that these customers were typical. As a matter of fact, Figure Fashions evidently was a dying business, with its purchases from Surprise dwindling, and its proprietor obviously had no desire to advertise Surprise products, although he did advertise regularly (*supra*, p. 887). As for Kay's, the sometimes confused and confusing testimony of Harold Katsoff does not clearly establish that cooperative advertising actually was beyond his capabilities (*supra*, pp. 886–888).

Other non-recipients of Surprise's advertising allowances—Hahne & Co. in Newark (*supra*, p. 888) and Gertrude Rechtman in Philadelphia (*supra*, p. 892)—had sufficient purchase volume to qualify for usable advertising allowances, but for reasons of their own they elected not to engage in newspaper advertising.

Aside from those four specific instances, the record does establish generally, and Surprise concedes, that some customers were either unable or unwilling to engage in newspaper advertising (RPF 7–8; RB 12–13), but we are left to speculate as to the number or percentage of customers in those categories. The record

affords no basis for calculating the number or percentage of customers whose volume of purchases was such that the 5 percent limitation precluded them from allowances sufficient to finance 50 percent or 75 percent of suitable newspaper advertising. The average dollar volume of purchases from Surprise by the small stores in Philadelphia varied from \$300 to \$6,000 a year (Popkave 1810), but without a further breakdown, these figures are not meaningful.

Although testimony by Surprise salesmen suggests that there may have been numerous small-volume customers who did not engage in cooperative newspaper advertising with Surprise (Popkave 1814, 1821-25, 1852-53;³⁴ Rubin 1699-1700, 1715-16; Sanders 1378, 1550; and see Cohen 1010-11, 1085), the record does not establish with any certitude the reasons for such non-participation. The salesman servicing small stores in Philadelphia referred to a feeling on the part of his customers that advertising rates were "too high" for them (Popkave 1852-53). Similarly, the New England salesman referred to "comparatively high" advertising rates which are "too excessive" for small-volume accounts (Rubin 1699-1700, 1715-16).

However, the record shows that several customers with annual purchases from Surprise of less than \$1,000 did engage in cooperative advertising (CPF 24-25).

Although the record reflects newspaper advertising rates paid by Surprise customers (CPF 9-22), it does not show the full range of rates actually available to small stores.³⁵ And it does not demonstrate the impossibility of newspaper advertising by any customers, except perhaps a few with a volume of purchases so small that their exclusion from the plan might be disregarded as *de minimis*. There is no substantial evidence that any appreciable number of viable customers were "too small" or otherwise unable to engage in any kind of newspaper advertising.³⁶

Despite the deficiencies of the record regarding the actualities of customer exclusion from the advertising allowance program, there is basis for finding that advertising allowances were not

³⁴ Complaint counsel rely (CPF 31) on Popkave's testimony that "most" of his customers in Philadelphia (out of a total of 75 or 100) were "non-cooperative advertising accounts" (Tr. 1809, 1814), essentially ignoring (by citing without quoting) his later testimony explaining that he did not mean to indicate that "most" of his accounts were in that category but only that "a portion" of them were non-advertisers in newspapers (Tr. 1852). Apparently, there were "many" such customers (Tr. 1814).

³⁵ The rates per column inch paid by Surprise customers (CPF 9-22) ranged from \$3.30 to \$4.42 in New Haven; \$1.90 to \$3.08 in Bridgeport; \$1.58 to \$8.97 in Newark; and \$1.54 to \$17.50 in Philadelphia. (See also Carr 825-27; CXs 144-152 B; RXs 5 A-6 C.)

³⁶ The argument of complaint counsel on this point is further weakened by their erroneous assumption that a Surprise ad had to be of a minimum size of 21 inches to qualify for reimbursement under the program (see *supra*, p. 880).

attainable by all competing customers and, hence, were not practically available to all competing customers. Nevertheless, this does not inevitably lead to the legal conclusion advocated by complaint counsel that this means Section 2(d) has been violated.

Even though newspaper advertising was beyond the reach of some customers, does this reflect any unfairness on the part of Surprise? In the examiner's opinion, it does not. The Surprise plan was not tailored to fit the needs of a favored customer or class. The newspaper advertising plan is suitable and usable under reasonable terms by all competing customers, except those buying such an insignificant amount of Surprise merchandise that they have no interest in promoting it (*supra*, p. 887).

Whatever discrimination there may be, it is not the result of any unfair act on the part of Surprise—it merely reflects economic realities. Once this is recognized, the apparent problem disappears. Under the theory embraced by complaint counsel, it would be just as logical to say that the plan is discriminatory because one customer is able to advertise only once or twice a year, whereas his larger competitors advertise once a week. Surprise should not be condemned because of circumstances over which it has no control.

Neither in theory nor in practice is the Surprise plan restricted to large-volume accounts. It does not arbitrarily exclude customers with minimal purchasing volume. To the extent that it does exclude some customers, this discrimination is negligible and competitively insignificant, so that the question arises whether this is a matter for the application of the maximum *de minimis non curat lex*.

As to those customers whose purchase volume may have precluded participation, two comments are in order:

(1) There is no substantial evidence here of the exclusion of any customer who wished to participate in cooperative advertising. Cf. *Sunbeam Corporation* (Opinion accompanying Final Order, January 11, 1965, p. 5) [67 F.T.C. 20, 57]. Neither is there any evidence that any customer, believing it impracticable for him to engage in newspaper advertising, sought and was denied payment for some suitable alternative.

(2) Other promotional assistance was available to non-advertising customers (see *infra*, pp. 911-914).

Realistically, what would be the practical effect of broadening the base so that advertising allowances would include something other than newspaper ads? Granted that this record does not reflect any explanation by Surprise why it limited its payments to newspaper advertising; it is more significant that the record is virtually silent concerning the use to which customers not engaging

in newspaper advertising might put any allowance granted. Neither of the Katsoff brothers (*supra*, pp. 886-888) indicated how they would utilize such an allowance if it were granted. They simply stated that they could not economically advertise Surprise products.

Gertrude Rechtman (*supra*, p. 892) qualified for a sufficiently large allowance to permit newspaper advertising, but she chose not to do so. Her direct mail advertising conceivably might have been subject to partial reimbursement by Surprise, but this remains speculative.

In *House of Lord's* (Majority Opinion, p. 12, n. 30) [69 F.T.C. 79], the principal alternative form of advertising that the Commission said might have been paid for, was direct mail—"envelope stuffers." Here, Surprise offered "stuffers" to all customers. And there is no indication whatever that the "handbills" mentioned in the *Guides* (Par. 9) are suitable or usable in this industry.

3. No Minimum-Purchase Requirement

Since a minimum-purchase requirement for participation in cooperative advertising is not *per se* unlawful, *Sunbeam Corporation*, Docket 7409 (Opinion accompanying Final Order, January 11, 1965, p. 5) [67 F.T.C. 57]; *Atlantic Products Corporation*, Docket 8513 (Opinion accompanying Order, December 13, 1963, p. 2) [63 F.T.C. 2237], it hardly seems reasonable to condemn a plan involving no minimum-purchase requirement at all—except insofar as annual purchases had to be of sufficient magnitude to translate a Surprise contribution of 5 percent of annual purchases into an amount sufficient to pay 50 percent or 75 percent of a newspaper advertisement.

The Surprise arrangement is clearly distinguishable from a number of cases in which the Commission prohibited minimum-purchase requirements as unfairly excluding some competing customers. In *Atlantic Products*, for example, 85 to 90 percent of the seller's customers did not purchase in sufficient amounts (\$1,500 in a six-month period) to qualify for the allowance. The hearing examiner in that case found that "the plan was tailored to the advantage of customers that could indulge in substantial advertising," and was so characterized by respondents (*Atlantic*, Initial Decision, p. 5) [67 F.T.C. 84, 89].

Other cases in which the minimum-purchase requirement was set so high as to freeze out small-volume customers include:

Shreveport Macaroni Manufacturing Co., 60 F.T.C. 196, 199 (1962), 321 F. 2d 404 (5th Cir. 1963), *cert. denied* 375 U.S. 971 (1964)—An advertising allowance was offered to customers purchasing 9,000 cases or more annually, a requirement met by only one chain store.

Ward Baking Co., 55 F.T.C. 1142 (1959)—Consent Order based on complaint challenging a 5 percent promotional allowance to customers whose purchases were more than \$50 weekly.

Jantzen, Inc., 55 F.T.C. 1065 (1959)—Consent Order based on complaint involving advertising allowances that were limited to those customers who placed an initial order of \$5,000 or more.

Bulova Watch Co., 48 F.T.C. 971 (1952)—8,000 customers received no advertising allowances because of a minimum-purchase requirement of \$10,000.

Elgin National Watch Co., 48 F.T.C. 990 (1952)—Minimum-purchase requirement of \$1,500 per year was condemned.

See also *Lambert Pharmacal Co.*, 31 F.T.C. 734 (1940).

Surprise imposed no minimum-purchase requirement. A minimum-purchase requirement imposed by economic realities does not make the Surprise plan vulnerable under Section 2(d).

Support for this view can be found in *Sunbeam*, where the Commission dismissed a complaint that challenged a plan whereby dealers were reimbursed up to 14 percent of purchases, for newspaper, radio, television, or catalog advertising, provided they bought \$440 worth of merchandise in a single purchase. Retailers who purchased less than \$440 worth of merchandise were offered their choice of point-of-sale display material or direct mail advertising material.

The *Sunbeam* plan differed from the Surprise plan in that *Sunbeam* assigned a price to each item of promotional material, based on cost, and the retailer was permitted to select as much of this material as he wished within the 14 percent limit. The purchaser of an order larger than \$440 could choose to receive the promotional materials instead of the cooperative advertising credit, but he could select only one or the other.

In *Sunbeam* (Opinion, pp. 5-6) [67 F.T.C. 57-58], the Commission specifically recognized that "inevitably there will be some retailers whose nature or scale of operation precludes their participation in cooperative advertising," and that "Such retailers will prefer other kinds of promotional activity and benefits." It concluded:

To hold every such plan inherently discriminatory and unlawful merely because not every retailer can or wants to take advantage of the plan would

destroy cooperative advertising and thereby seriously harm the very class, small independent retailers, which Section 2(d) was enacted to protect.

Similarly, although important differences are apparent between Surprise's plan and the cooperative advertising program approved in *Lever Brothers*, 50 F.T.C. 494, 510, 512 (1953), the Commission recognized in that case also that some customers would "not find newspaper advertising practical," and that store displays might constitute a reasonable substitute. It emphasized that the law does not "require that a comprehensive plan must be so tailored that every feature of it will be usable or suitable for every customer." And it rejected any interpretation that would "restrict the payments to some type of service that every single customer could furnish." It identified proportionality as the statutory goal, not uniformity.

4. *Exclusionary Aspects*

Despite the considerations tending to absolve the Surprise plan from any discriminatory taint, the examiner recognizes that there is authority for complaint counsel's condemnation of the plan because it is not "suitable and usable" by all competing customers and thus "eliminate[s]" some competing customers (*Guides*, Par. 9).

In the recent *House of Lord's* case, Docket 8631 (January 18, 1966) [69 F.T.C. 44], for example, the Commission found that by providing payments only for newspaper or magazine advertising, the seller excluded "smaller customers, * * * who had to use more modest forms of promotion." (Majority Opinion, p. 11 [69 F.T.C. 79].) Taking into account the seller's business reasons for such an arrangement, the Commission held that, regardless of "the commercial expediencies of such an exclusionary policy, it is clearly at odds with Section 2(d) of the amended Clayton Act." The opinion explains:

A seller's "offer" to pay 50% of a customer's *newspaper* lineage cost, when the customer is "too small" or otherwise unable to engage in any kind of newspaper advertising, is in fact and in law not an offer at all. (Majority Opinion, p. 12 [69 F.T.C. 79]; footnotes omitted; see also p. 18 [69 F.T.C. 83].)

The Commission quoted approvingly from *State Wholesale Grocers v. The Great Atlantic & Pacific Tea Co.*, 258 F. 2d 831, 839 (7th Cir. 1958), *cert. denied*, 358 U.S. 947 (1959):

In determining the proportionally equal terms upon which a seller shall make available any payment or consideration referred to in § 2(d), the Act

requires a frank recognition of the business limitations of each buyer. An offer to make a service available to one, the economic status of whose business renders him unable to accept the offer, is tantamount to no offer to him.

But these pronouncements were made against the backdrop of a factual setting far different from that existing here. When they are placed in the context of the circumstances that led to findings of 2(d) violations, their applicability to the instant case is blunted.

In *State Wholesale Grocers*, suppliers had paid for advertisements in a store-owned magazine, a facility obviously beyond the capabilities of *all* small stores. The distinction between that situation and the inability of *some* Surprise customers to engage in newspaper advertising may be one of degree, not of substance, but it is nevertheless a distinction of some significance.

The *House of Lord's* decision was predicated on findings that oral "offers of promotional payments were in fact limited to a few selected customers, * * *" (Majority Opinion, p. 15) [69 F.T.C. 81], with no form of participation available to those who could not or did not advertise in newspapers or magazines. The facts in the instant case are clearly distinguishable.

5. Other Sales-Promotion Aids

In the instant case, there was an offer published to all. And those Surprise customers who found newspaper advertising economically impracticable or who otherwise were not interested in newspaper advertising had available to them, along with all other customers, various other sales-promotion aids.

Surprise, in its proposed findings and brief, refers to these other services and facilities as alternatives to or substitutes for the advertising allowance. Strictly speaking, this description is inaccurate. Under the terms of Surprise's published program, advertising allowances and the other promotional aids were available to all customers.³⁷ However, it appears that, in general, the large department stores availed themselves of the advertising allowances but did not use the so-called in-store displays. The record establishes that some of the smaller stores not only engaged in cooperative newspaper advertising with Surprise but also put to use the

³⁷ Respondent undertakes to put bust forms in a special category (RPF 8; RR 25-28). It emphasizes that they were not specifically listed in the published program. On this basis, it argues that, since they were not offered generally and since they were not used by the department stores, they constituted an alternative or substitute especially for non-advertising customers. Although there is some basis for this claim, a major flaw is testimony that bust forms were not reserved exclusively for small non-advertising accounts (Rubin 1961; Cohen 1010-11, 1087; Popkave 1812-13, 1851; Sanders 1547; James 2592-93). At any rate, despite the failure of the plan to offer bust forms, the evidence does indicate that they were freely and generally available to and used by smaller customers, including some who did advertise.

various display materials. With rare exceptions, those customers who did not engage in cooperative newspaper advertising with Surprise did use, in varying degrees, the other forms of advertising and promotional assistance.

The testimony of Surprise's officials and employees demonstrates that the so-called, in-store sales aids were not actually offered by them as alternatives or substitutes for cooperative newspaper advertising (Sanders 1377-78, 1546; Popkave 1811, 1850-51, but see 1821-24; cf. Rubin 1612),³⁸ and most customers did not so consider them. Neither of these facts is controlling if, in actuality and in legal contemplation, such materials did constitute alternatives or substitutes in lieu of advertising allowances.

Although not specifically raised by complaint counsel, there is a threshold question, whether the statutory standard of proportionalization permits the interchangeability of payments for promotional services in a comprehensive plan—that is, whether a seller's program may grant monetary allowances to reimburse some customers for their advertising expenditures and alternatively furnish promotional services or facilities to other customers who do not avail themselves of cooperative advertising allowances. Although the *Elizabeth Arden* case (156 F. 2d 132 (2d Cir. 1946)), may be interpreted as requiring a negative answer, the propriety of such an arrangement now seems to be established: *Sunbeam Corporation*, Docket 7409 (Final Order, January 11, 1965) [67 F.T.C. 20]; *Lever Brothers Co.*, 50 F.T.C. 494 (1953); *Guides*, Par. 9 (Example 2); Trade Practice Rules for the Cosmetic and Toilet Preparation Industry (1951); see also *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, 311 F. 2d 480, 486 (2d Cir. 1962). But cf. *Exquisite Form Brassiere, Inc.*, 57 F.T.C. 1036 (1960) reversed and remanded, 301 F. 2d 499 (1961), cert. denied 369 U.S. 888 (1962), in which the hearing examiner expressly ruled that promotional services could not serve as an alternative to promotional payments, and the Commission, affirming on other grounds, left the question open, 57 F.T.C., at 1042-43, 1050, 1059;³⁹ *House of Lord's*, Docket 8631 (January 18, 1966) [69 F.T.C. 44], in which the order requires that the respondent, in establishing a program of payments for advertising or for promotional services or facilities, must take care of those customers for

³⁸ It is not remarkable that Surprise salesmen did not refer to the display materials as alternatives or substitutes "in lieu of" newspaper advertising. Any law or edict requiring salesmen to talk like Robinson-Patman lawyers would be clearly unconstitutional.

³⁹ See also the same case after remand, Final Order, January 20, 1964 [64 F.T.C. 271]; 301 F.2d 499 (D.C. Cir. 1965), 1965 Trade Cases ¶71,491.

whom it is not economically feasible to furnish such services or facilities, by designating alternative services or facilities that those customers can furnish and can be paid for on proportionally equal terms.

In any event, complaint counsel object to the Surprise plan on the ground that since the display materials and related materials were offered to all customers—those who advertised and those who did not—the furnishing of such promotional aids was not an alternative that a customer could choose instead of the advertising allowance. See *Exquisite Form Brassiere, Inc.*, Docket 6966 (Opinion accompanying Final Order, January 20, 1964, p. 3) [64 F.T.C. at 283], 301 F. 2d 499 (D.C. Cir. 1965), 1965 Trade Cases ¶71,491.

It is true that Surprise does not tell its customers it will either share in the cost of their newspaper advertising or provide in-store displays and other material. Surprise says in its published plan that it will do both. Nevertheless, the customer is still given a choice. He may elect to engage in cooperative newspaper advertising; or he may reject that offer and accept only the in-store promotional displays (some or all); or he may accept the offer of both; or he may reject the entire program.

It is not clear what worthwhile objective would be accomplished if Surprise were required to establish its in-store promotional aids as an alternative to, rather than an addition to, cooperative newspaper advertising. Now, a customer may have either or both; whereas, under the theory espoused by complaint counsel, he would have to choose one or the other.

Thus, just as there was no room for “fine semantic shadings” in the interpretation of the 2(b) defense in *Exquisite Form Brassiere, Inc. v. Federal Trade Commission*, 301 F. 2d 499, 502 (1961), cert. denied, 369 U.S. 888 (1962), so here, the legality of a cooperative advertising program should not depend on the niceties of conjunctive or disjunctive phrasing of the offer of various types of advertising and promotional assistance.

The distinction between *Exquisite Form* and Surprise is that in *Exquisite Form* the advertising allowance plan was tailored to exclude some customers,⁴⁰ so that it was not available to all, whereas the furnishing of display materials was offered, not as an alternative available to only those excluded from the advertising allowance program, but as a service and facility available to

⁴⁰ In *Exquisite Form*, reimbursement was offered only for advertisements of at least 400 lines (about 29 inches), clearly beyond the reach of small customers. In Surprise there is no evidence of any minimum size requirement as to advertisements (see *supra*, p. 880).

all. In Surprise, the advertising allowance plan is not tailored to exclude any customers, even though, realistically, some customers do not find it economically practicable to engage in newspaper advertising. In addition, Surprise offers to furnish to all customers, whether they advertise or not, certain promotional aids. Although not specifically denominated as alternatives, these aids have been so used in practice. Moreover, the published plan gives customers a choice in the manner in which they will participate in promoting the sale of Surprise products.

Even if the Surprise plan were to be viewed narrowly as comparable to the *Exquisite Form* arrangement, there is respectable authority for a good faith "tailoring of services and facilities to meet the different needs of two classes of customers," even though customers may not be given a choice, *Federal Trade Commission v. Simplicity Pattern Co., Inc.*, 360 U.S. 55, 61, n. 4 (1959). In this dictum, the Court spoke approvingly of the Commission's willingness to give a "relatively broad scope to the standard of proportional equality * * *." In this connection, it cited the standard laid down by the Commission in the *Lever Brothers* case.⁴¹

6. Proportionalization

Another deficiency that complaint counsel find in the Surprise plan is its failure to provide any basis of proportionalization for furnishing in-store displays and other promotional aids.

As has been shown, the allowance for newspaper advertising is limited to a stated percentage of the advertising cost and is subject to a further limitation that total allowances may not exceed a stated percentage of the customer's purchases of merchandise from Surprise. On the other hand, the published plan does not place any limits on the amount of display and related materials furnished by Surprise. Such materials are available to whatever extent they can be used by the customer.

Without undertaking to determine whether, in the absence of a charge of violating Section 2(e),⁴² such an objection is properly raised here, the examiner simply notes that on this record, the

⁴¹ Likewise, the *Vanity Fair* decision (*Vanity Fair Paper Mills v. Federal Trade Commission*, 311 F. 2d 480, 486 (2d Cir. 1962)) endorsed a liberal definition of proportional equality unconfined by technical limitations.

⁴² Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(e) reads as follows: "That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

objection seems more theoretical than real. In the absence of any evidence that any customer was denied these promotional aids in any reasonable amount usable by him, it seems to the examiner that no useful purpose would be served if Surprise were required to put a dollar value on each of these services and facilities and then to relate this dollar value to the customer's purchases—that is, to provide that services and facilities will be furnished up to a dollar value equivalent to a stated percentage (such as 5 percent) of the customer's purchase volume.⁴³ This, in effect, might result in a ceiling possibly detrimental to the smaller customers.

The record indicates the monetary cost to Surprise of some of its promotional aids (see *supra*, p. 881), but neither in theory nor in practice was the monetary value related, by percentage or otherwise, to the monetary allowances available for newspaper advertising. The record suggests that salesmen used discretion in furnishing customers with bust forms because of the expense of those items (Sanders 1548; Popkave 1814–15, 1854–55), but there is no evidence that any customer was denied bust forms or, for that matter, any other promotional device listed in the plan, in whatever amount desired.

Undoubtedly, Surprise could compute the monetary value of its various promotional aids and then put a ceiling on its offerings, which would be related proportionally to the limitations on cooperative advertising allowances, so that it might show that its furnishing of promotional material is the dollar equivalent of payments made for newspaper advertising, *Sunbeam Corporation*, Docket 7409 (Opinion accompanying Final Order, January 11, 1965, p. 5) [67 F.T.C. 57]; cf. *Foster Publishing Co., Inc.*, Docket 7698 (Initial Decision, January 24, 1963, pp. 10–11; vacated and complaint dismissed without assignment of reasons, January 7, 1964) [64 F.T.C. 1].

The Surprise plan is sufficiently similar to that approved in *Sunbeam* to warrant its approval as well.

All things considered, the examiner declines to condemn as unlawful the services and facilities section of the Surprise plan because of the absence of any mechanical limitation on the amount to be furnished. The examiner recognizes that, in theory, such an open-end arrangement may be subject to abuse and may be used as a vehicle of discrimination. However, it will be time enough

⁴³ Such a formula applied to the furnishing of services or facilities in the instant case might well be subject to criticism directed at the cooperative advertising program. That is, a small-volume customer, for example, might be entitled to only half a bust form, or to a bust form suitable only for the display of a brassiere when he would prefer to have a larger and more expensive form suitable for displaying a girdle or corselet.

to consider that problem if it arises. No such proof is found in this record; and there is no showing that the present plan is not fair to all customers who compete.

7. Conclusionary Finding

Viewing the published program of Surprise as a comprehensive plan, the examiner cannot find that it unlawfully excludes any customer competing with a customer who has been granted benefits; or that it disproportionately favors large-volume customers over small-volume customers.

On balance, the examiner concludes that the published program of Surprise is "honest in its purpose" and (if adhered to) "fair and reasonable in its application," *Lever Brothers Co.*, 50 F.T.C. 494, 512 (1953).

The Surprise plan, as published, does not involve the arbitrary selection of customers to receive payments; or the restriction of payments to certain classes of customers, such as large-volume purchasers; or the tailoring of a promotional plan to suit the needs of large customers only.

The Surprise plan appears to involve ordinary advertising activities which are not calculated to bring about the disguised discriminatory favoritism that Congress intended to condemn.

Special 100 Percent Allowances

The examiner rejects the generalized and indefinite testimony of Surprise officials and salesmen (*supra*, pp. 892-94) that 100 percent advertising allowances were offered to small accounts as well as large. Such testimony must be discounted because of the following factors:

(1) The failure to publish the offer as part of the advertising allowance program, coupled with the failure to establish that such allowances were standard in the industry (*infra*, pp. 955-56).

(2) The vagueness and lack of specificity in the testimony of the salesmen;

(3) The lack of any corroboration by small customers—plus their denial in some cases—that such offers were made to them; and

(4) The lack of any evidence that any such customer ever accepted such an offer.

This last point is perhaps the most convincing refutation of respondent's claim that such allowances were offered to all customers. It seems reasonable—and the record confirms—that a small-volume customer would welcome an advertisement that

would cost him nothing, yet, aside from RX 7 (*supra*, p. 894), Surprise did not cite one example of any such advertising.

It is conceivable, of course, that a small store, for some reason, might not accept a Surprise offer to pay the entire cost of an ad (Gilbert 710), but it is beyond belief that such an offer would be uniformly rejected.

It is accordingly found that 100 percent allowances were not available to all competing customers on proportionally equal terms.

Competition Among Customers

Surprise's contention that the record fails to establish the existence of competition between favored and non-favored customers (RB 13-14; RR 12) is without substance. In each of four trading areas, the evidence (see *supra*, pp. 888, 889, 892) shows that:

1. Favored and non-favored customers were located in close geographical proximity;
2. The non-favored customers considered the favored customers to be retail competitors, and the converse was shown in many instances; and
3. Non-favored customers purchased Surprise products at or about the same time the same or similar products were purchased and advertised by the favored customers.

Thus, the necessary competitive framework was established, *Federal Trade Commission v. Simplicity Pattern Company*, 360 U.S. 55, 62-63 (1959); *Ace Books, Inc.*, Docket 8557, Opinion accompanying Final Order, June 18, 1965, pp. 14-15 [67 F.T.C. 1073, 1126-27]; *Liggett & Myers Tobacco Co.*, 56 F.T.C. 221, 248 (1959). The cases cited by respondent (RB 13) are largely inapposite. (The case of *Johnny Maddox Motor Co. v. Ford Motor Co.* (RB 13, CR 11) is mis-cited; the reference should be to 202 F. Supp. 103 (W.D. Texas, 1961).)

Even without the affirmative evidence contained in this record regarding the existence of competition among Surprise's customers in each of the four cities, complaint counsel met their burden under the doctrine of *Sunbeam Corporation*, Docket 7409 (Opinion accompanying Final Order, January 11, 1965, p. 3) [67 F.T.C. 55]. The rule of that case is that once it is shown that favored and non-favored customers "were located in the same local trade area," respondent must carry the burden "of producing evidence that such customers were not, in fact, competing * * *."

Respondent produced no evidence whatever to indicate that favored and non-favored customers in geographic proximity were not competing in the distribution of the products on which respondent granted advertising allowances.⁴⁴ The record thus supports the findings of discrimination among competing customers.

VII. MEETING COMPETITION DEFENSE

Introduction

Surprise's principal defense to the admitted discriminations is that "* * * the acts and practices alleged in the complaint were performed in good faith to meet competition * * *." (Respondents' Answer, Par. 6; RPF 9, 121-23; RB 15-23; RR 29-46.)

Surprise contends (1) that the 75 percent allowances granted to department store customers were made in good faith to meet equally high or higher allowances paid or offered to those customers by competitors and (2) that 100 percent allowances for new store openings, new product promotions, and omnibus ads were paid to such customers in good faith in response to general industry-wide practices.

Surprise has failed to meet its burden of proof as to both contentions. In addition, its contention relating to 100 percent allowances must also fail as a matter of law.

The record establishes that in each of four trade areas, during 1960, 1961, and the first half of 1962, respondent consistently favored its larger department store customers with 75 percent and 100 percent allowances, while at the same time it granted competing customers 50 percent allowances or no allowances at all.

The findings that follow will deal with Surprise's contention (RPF 9) that "every deviation" from its published program "was a 'good faith' response, required to meet specific competition * * *" and that Surprise "had prior knowledge of the advertising allowances then being offered by * * * competitors."

The competitors involved are listed below, together with their abbreviated names used in the interest of brevity:

⁴⁴ Respondent's somewhat obscure complaint regarding "scrambling" of the facts respecting the purchases made and the advertising allowance received by the Philadelphia department stores (RB 14; RPF 67-8, 87, 102) does not detract from the basic showing made. Whatever the facts may be regarding shipment of some Surprise merchandise to suburban branches of the Philadelphia department stores, the competitive picture remains clear. The record shows that the advertising allowances Surprise granted to the Philadelphia department stores were used to advertise Surprise garments in the major Philadelphia newspapers, all of which circulated throughout the entire metropolitan area.

Bali Brassiere Co., Inc	Bali
Bien Jolie, Inc	Bien Jolie
Carnival Creations, Inc	Carnival
Contessa di Roma, Inc	Contessa
Corde de Parie	Corde
Exquisite Form Brassiere, Inc	Exquisite Form
Formaid Co., Inc	Formaid
Formfit Co	Formfit
The H.W. Gossard Co., Inc	Gossard
Lady Marlene Brassiere Corp	Lady Marlene
Lily of France, Inc	Lily of France
Lilyette Brassiere Co	Lilyette
Maidenform, Inc	Maidenform
Peter Pan Foundations, Inc	Peter Pan
Poirette Corsets, Inc	Poirette
Sarong, Inc	Sarong
Treo Co., Inc	Treo
Wonder Bra Co., Inc	Wonder Bra
Youthcraft Creations, Inc	Youthcraft

However, Surprise basically relies on eight competitors as providing allowances that necessitated its 75 percent offers. It presented evidence concerning their advertising allowance programs during 1960-63 in substance as follows:

Contessa di Roma—(1) 75 percent allowances for space cost, plus production; (2) 100 percent allowances during special merchandising and advertising campaigns; and (3) beginning in 1961, Contessa provided a special package merchandising program which included 100 percent allowances for cooperative advertising, a consumer prize of a trip to Rome, parties for sales girls, furnishing stylists, and the payment of "push money" (Steiner 2040-42, 2075-77). The special package program was designed as an introductory offer, and 100 percent allowances were "isolated," "rare," and "infrequent" during 1960-63 (Steiner 2080, 2175-77; but cf. Gold 1252-1347, 1432-1500, *passim*).

Corde de Parie—As to this company, the record contains only generalized statements by Gold that it made 100 percent offers in 1958-59 (*e.g.*, Tr. 1279).

Formaid Co., Inc.—75 percent allowances for major department stores and 50 percent for small stores (Braff 2513-16, 2537-39).

The H. W. Gossard Co., Inc.—50 percent allowances between July 1959 and February 1963; 75 percent thereafter (CXs 968, 969; Wells 2329-30).

Lady Marlene Brassiere Corp.—75 percent allowances, including production costs (Fox 1915-16, 1921, 1944; Jaffe 2480, 2491).

Lilyette Brassiere Co.—50 percent or $66\frac{2}{3}$ percent allowances until February 15, 1962; and 75 percent after February 15, 1962 (Kaufman 2221-23, 2413-14).

Poirette Corsets, Inc.—50 percent or 75 percent allowances, plus production costs, the rate depending on the products or combination of products advertised (RX 27; Gros 2253).

Treo Co., Inc.—(1) 50 percent allowances for space cost, plus production cost allowances, for separate advertisements of either the Treo or the Cheers line; (2) $66\frac{2}{3}$ percent allowances for space cost, plus production cost allowances, for combination ads (RXs 8 A-B, 9; Poulson 1879).

Competitive Offers at Department Stores

New Haven, Connecticut

1. The Edw. Malley Co.

The testimony of Malley's buyer, Mrs. Jean Swan James, indicated that she understood from the salesman, Howard Rubin, that the Surprise program provided for payments of 75 percent of advertising costs (Tr. 135-36). Although she had received the Surprise price lists, she was unaware that from 1960 until mid-1962, the published program had provided for payment of only 50 percent allowances (Tr. 136-38).

Mrs. James's testimony is basically inconsistent with Rubin's testimony that in 1960 he initially offered 50 percent but raised it to 75 percent when she told him she was being offered more by competitors (Tr. 1592) and that she rejected his subsequent offers of 50 percent (Tr. 1662-64), indicating that Surprise's business with Malley's might suffer unless she received a better rate (Tr. 1678).⁴⁵ But she was not specifically asked about Rubin's testimony, so there was no occasion for her to deny it or confirm it.

The suggestion that payment of a 50 percent allowance for the omnibus ad of June 1, 1960 (CX 21 A-B), confirms Rubin's testimony is untenable (James 146, 150, 2582-84, 2599-2600, Rubin 1604; see CR 34, n. 42).⁴⁶

⁴⁵ Rubin's vivid recollection of the details of his conversation with Mrs. James contrasts sharply with his memory as to other transactions, some much more recent. For example, although Rubin said he remembered "quite vividly" (Tr. 1712) the 100 percent promotion of the Sparklette bandeaux in 1963, he was not even sure of the date (Tr. 1681-83).

⁴⁶ Respondent's claim (RPF 10; RR 3) of another 50 percent ad on June 2, 1960, is not borne out by the record. CX 161 C shows a credit of \$7.48 for an advertisement apparently dated June 2, 1960, but there is no record basis for determining the percentage of cost represented by that figure. The testimony cited (Cohen 112-13) refers only to the advertisement of June 1, 1960 (see also Rubin 1605). Respondent has cited no other record basis for its contention. In any event, it would make no significant change in the basic picture.

Actually, the transaction suggests that Lilyette was paying only 50 percent at the time, since it participated in the ad (CX 21 B), and the record indicates that the percentage contribution of participants in omnibus ads is uniform (James 2599). If Lilyette were paying more than 50 percent, Mrs. James, under respondent's theory, presumably would have insisted that Surprise match the higher rate.

According to Rubin, when Mrs. James told him she was being offered more by others, he indicated to her that he knew that allowances of 75 percent or 100 percent were being offered by Youthcraft, Formaid, Lilyette, and Contessa; she "more or less acquiesced * * *"; and he accordingly offered 75 percent (Tr. 1592). He knew that the four companies mentioned were offering more than 50 percent on the basis of conversations with other salesmen, but he was hazy as to the source of his information regarding the Youthcraft offer (Tr. 1665-67).

Rubin knew that Malley's was not carrying the Contessa line but took the position that Contessa's 100 percent offer created a competitive situation (Tr. 1668, 1737).⁴⁷

Malley's did engage in cooperative advertising with Lilyette in 1960-63, but there is no specific evidence of the percentage of contribution on the part of Lilyette. The indications are that the allowance was 50 percent, possibly 66⅔ percent. (Kaufman 2222-25, 2229, 2232, 2364-71, 2413-14, 2422-24.) Formaid also dealt with Malley's and offered it 75 percent allowances during 1960-63 (Braff 2513-15, 2522, 2539-40). However, Malley's did not stock either the Lilyette line or the Formaid line until late in 1960, possibly in September 1960 (James 2586, 2603-04; cf. Rubin 1669). Mrs. James testified that neither Formaid nor Lilyette offered 100 percent allowances (Tr. 2594, 2606).

Gold unsuccessfully solicited Malley's in 1958-59 for Corde (Gold 1333-35, 1339, 1484-87; James 2574-75), but the company was not mentioned by Rubin in connection with Malley's.

The record contains no corroboration of Rubin's testimony regarding Youthcraft.

2. Shartenberg's

Although the only documentary evidence in the record (CXs 34-36) shows that Shartenberg's got 75 percent from Surprise,

⁴⁷ Mrs. James did not recall the advertising allowance offer made by Contessa; she wasn't even sure she was solicited. At any rate, her comment that she "wouldn't buy advertising as such" (Tr. 2578-79) negates the competitive impact referred to by Rubin. Actually, there is considerable doubt that any 100 percent offer was made by Contessa in 1960, or that Gold solicited Malley's (compare Gold 1334-35, 1339 with Steiner 2037-41, 2052-53, 2074, 2078).

beginning in March 1960, the salesman, Rubin, testified that Surprise allowed this account 50 percent in early 1960 but that he got permission to raise the allowance to 75 percent after the buyer told him she was getting larger allowances from competitors. He believed she mentioned Bali and Formaid, and he already knew that they were giving more than 50 percent. He did not recall whether she mentioned any other competitors. (Tr. 1627-28.)

According to Rubin, he was able to revert to the 50 percent policy between May 1961 and February 1962 because the buyer didn't put any pressure on him (Tr. 1629, 1703, 1717). There is no documentary corroboration of any such 50 percent payments, nor of the earlier 50 percent allowance he mentioned.

However, Surprise contends (RPF 24; RR 4) that payments for ads of February 3, 1960, August 16, 1961, and February 28, 1962, were at the 50 percent rate. This contention is based on Surprise records (CX 166 A, E) that show the allowances granted for such ads, but they do not reflect the rate of participation. The vague, generalized testimony of Rubin (Tr. 1627-29) is not the best evidence, and the failure of Surprise to document this matter by evidence within its knowledge and control does not permit the inference of a 50 percent rate, *Vanity Fair Paper Mills v. Federal Trade Commission*, 311 F. 2d 480, 485-86 (2d Cir. 1962). (The record contains no explanation by either side why those transactions were not documented.)

Concerning the competitive situation at Shartenberg's, Rubin testified that the buyer did not state specifically what Bali and Formaid were offering, but that he already "knew" that they were giving more than Surprise. He "knew" that Bali was giving 66 $\frac{2}{3}$ percent, but he quickly explained that the 75 percent he offered was "Not to meet the Bali allowance specifically," but because of a 100 percent offer from Formaid. He could not state that Shartenberg's was getting such allowances, but he "knew" that Bali and Formaid were giving higher allowances generally. Rubin stated that Shartenberg's was carrying the Bali line, but he did not remember whether Formaid was being stocked. (Tr. 1700-02, 1710.)

Respondent presented no further proof regarding the Bali offer.⁴⁸

The president of Formaid failed to confirm that it made a 100

⁴⁸ Bali offered only 50 percent allowances to Strawbridge & Clothier in Philadelphia during 1960 (Bierman 494-95).

percent offer to this account. However, his testimony establishes that Formaid offered 75 percent to Shartenberg's during 1960-63, but not that Shartenberg's accepted the offer. During 1960-63, Formaid was led to believe that Surprise was paying 75 percent, and Formaid offered 75 percent to meet the competition of all firms, including Surprise. (Braff 2513, 2522-23, 2537, 2548-49.)

Despite Rubin's failure to list Contessa among the competition he was meeting at Shartenberg's, there is evidence that Contessa offered its cooperative advertising program to this customer at some unspecified time during 1960-63, but did not succeed in making a sale (Steiner 2053).

The buyer from Shartenberg's was not called as a witness.

Bridgeport, Connecticut

The Howland Dry Goods Co.

As in the case of Shartenberg's, Surprise assumes—and asks the examiner to do so too—that allowances of 50 percent were granted to Howland's for certain ads in 1960-63 (RPF 34; RR 6). Again, the purpose is to bolster the contention that Surprise adhered to its 50 percent policy except when it was pressured by buyers to meet competitive offers. But the record (CX 167 A, D, G, J) merely shows payments of advertising allowances for April 11, 1960; March 29, 1961; June 13, 1962; and April 5, 1963, without any clue to the percentage of advertising cost they represent. Since the documentary proof of such facts was within Surprise's knowledge and control, and since it failed to produce it or to explain its absence, the examiner declines to draw the inference requested—that Surprise made some 50 percent payments to this customer—(see *supra*, pp. 921-922).

Aside from a self-serving, catch-all declaration responsive to a leading question (Tr. 1718), the salesman, Rubin, did not even suggest any such variation in the allowances granted to Howland's. As a matter of fact, he testified to a continuing necessity to pay 75 percent (Tr. 1631-32). Beyond that, the stipulated testimony of Howland's buyer is to the effect that Surprise regularly paid 75 percent for cooperative advertising (Ciro 1153).⁴⁹

Regarding the 75 percent allowances granted Howland's beginning in March 1960, Rubin explained that the buyer told him

⁴⁹ Respondent's assumption also leads it into the untenable position of having paid Howland's only 50 percent after the policy was changed to 75 percent. This comment is based on the allowances shown for June 13, 1962, and April 5, 1963.

she was getting advertising allowances greater than 50 percent from Youthcraft and Bali, and that she wanted Surprise to do better than 50 percent. He did not remember that she named any other competitors, but he said she led him to believe that he would lose substantial business unless he offered a greater allowance. Rubin added that Surprise continued to grant 75 percent to this account because "it was the same story" every time advertising was planned; the buyer "pressured" him for an allowance higher than 50 percent; and knowing that competitors "had continued their policy," he had to meet that competition (Tr. 1630-32, 1641, 1651).

The reliability of Rubin's testimony is open to question in view of his initial mis-identification of the Howland buyer with whom he dealt in 1960 and his inability to recall which buyer originally pressured him for higher allowances (Tr. 1634-39, 1649-51). His specific recollection is questionable on the basis of his own explanation (Tr. 1637-38, 1654).

Although Rubin had specifically identified Youthcraft and Bali as the competitors named by Howland's buyer, his memory failed him on cross-examination a few minutes later and he could remember only Bali. Even when he was asked specifically about Youthcraft, his ultimate answer was that it was "possible" that Youthcraft was the other company (Tr. 1630-31, 1641-42, 1644).

Rubin testified that he knew Bali was giving 66⅔ percent, but he quickly denied that it was on the basis of the Bali offer that he offered 75 percent. His 75 percent offer was on the basis of another firm's giving 100 percent. This presumably was the firm (Youthcraft) to which he referred in his earlier testimony, but he then identified the offeror of 100 percent as Formaid. The buyer did not tell him that Formaid was offering 100 percent, but he "knew" of Formaid's practices. He first stated definitely that the Formaid line was in the store, but he later retreated to a statement that that was his "belief" (Tr. 1642-43, 1653-54).

The stipulated testimony of Howland's buyer neither confirms nor denies Rubin's statements regarding pressure for higher allowances on the basis that competitors were offering more than Surprise. But not only does this testimony confirm that Howland regularly was paid 75 percent by Surprise during 1961-63; it also makes clear that Rubin was mistaken when he identified Vera Ciro as Howland's buyer in 1960 (Tr. 1152).

In the course of rebuttal, counsel stipulated that Howland's

buyer would testify that there were no Formaid garments in inventory in August 1961 and that no Formaid garments were purchased for Howland's subsequent to that date (Tr. 2855-57).

The record does not definitely establish that during 1960-63, Howland's bought from Formaid or participated with it in cooperative advertising; if it did, "it was just one ad" during 1960-63. Any Formaid offer of cooperative advertising to Howland's would have been on the basis of 75 percent (Braff 2528, 2541, 2544-45).

Surprise offered no corroborating evidence regarding the Youthrowcraft and Bali offers to Howland's about which Rubin testified.

Although Rubin did not mention that either Contessa or Corde was among the competitors he was meeting at Howland's, there is testimony that both companies unsuccessfully sought to sell to Howland's during 1960 or 1961, offering 75 percent or perhaps 100 percent (Gold 1333-35, 1339; Steiner 2037-40, 2052).⁵⁰

Newark, New Jersey

Bamberger & Co.

The testimony of the Surprise salesman, Jack Brown, regarding the competitive situation at Bamberger's is not persuasive, particularly when it is considered in connection with the documentary exhibits and weighed against the testimony of the buyer, Mrs. Irene George. Among other things, Brown's emphasis on the Surprise offer of 75 percent in 1960 (Tr. 1743-48, 1751-53, 1758-59; cf. 1760-61) has a hollow ring in view of the fact that the only Surprise allowance made to Bamberger's in 1960 was in the fall, and the rate was 100 percent (CX 64). Surprise does not even contend that this allowance was granted to meet competition but characterizes it as being in accordance with the company's standard policy of offering 100 percent advertising for new store openings (Tr. 1759-60, 1789; RPF 45). Yet, according to Brown, the only time that the buyer identified competitors who exceeded the Surprise offer was during a discussion in early 1960. At that time, he said, Mrs. George named three or four companies making offers that exceeded 50 percent. (Tr. 1743-44, 1747, 1766-71.)⁵¹

This testimony—that Bamberger's buyer identified for Brown

⁵⁰ But see footnote 47, *supra*, p. 921.

⁵¹ Note the inconsistency, however, between Tr. 1767, 1769, and 1771 and Tr. 1762 and 1766.

those competitors who were offering greater allowances than Surprise—was flatly contradicted by Mrs. George (Tr. 438, 2613–16, 2620–25). The weight of Brown's testimony in this regard also must be discounted because of his refusal, on objection by Surprise's counsel, to specify the names supposedly furnished by the buyer. The examiner sustained the objection,⁵² but he pointed out to counsel that such a restriction on cross-examination would have to be taken into account in assessing the testimony. (Tr. 1784–86.)

It is interesting to note that, according to Brown, the buyer told *him* which competitors were offering a greater percentage than Surprise, but she declined to make such a revelation to *Surprise's president* (Samuel Dosik), who, after all, under the defense theory, was the one who had to make the decision whether to deviate from the announced advertising allowance percentage (Tr. 1753; see also George 2627–28).

Brown first stated that aside from the information furnished by the buyer, he had no direct knowledge—just “an inkling”—of the advertising allowance of any specific manufacturer (Tr. 1747–48). But in answer to a leading question, he said that when Surprise offered 75 percent to Bamberger's for the first time, he and Surprise were aware that a specific competitor had offered as much as 75 percent (Tr. 1756). This specific competitor was never identified, nor was the date fixed except in general terms.

Certain other inconsistencies in Brown's testimony likewise affect its weight. For example, whereas Brown said on direct examination that he never tried to have Bamberger's revert to the 50 percent plan after the initial 75 percent offer in early 1960 (Tr. 1755–56), he stated on cross-examination that when he tried to get the buyer to revert to the 50 percent rate, she “shrugged her shoulders” and told him other manufacturers were offering more (Tr. 1769–71).

Brown listed as suppliers to Bamberger's in 1960–63 Form-aid, Lilyette, Lady Marlene, Peter Pan, Exquisite Form, Contessa, Corde, Treo, and Bali (Tr. 1749–50, 1762–64), but he later indicated that he did not know whether Contessa was actually being stocked by Bamberger's at that time (Tr. 1764, 1780).⁵³ He said that among those companies were competitors offering more than 50 percent (Tr. 1750; see also Tr. 1755),

⁵² In hindsight, the examiner confesses error; but see Tr. 1563–66, 1723–29.

⁵³ It was not (George 2629–30; Steiner 2116).

but he never specified them. He knew from talking to Ralph Gold in early 1959 about the offer being made to Bamberger's on behalf of Corde (Tr. 1750-51), but his memory concerning this conversation was not as keen as he first professed it to be (Tr. 1778-80).

Brown's memory, concerning his dealings with Bamberger's—so vivid when he was being examined by Surprise counsel (frequently in response to leading questions)—became quite vague on cross-examination. He believed Surprise paid Bamberger's 75 percent in 1960 in connection with perhaps two ads (Tr. 1758-59), and could make no explanation regarding the lone advertising payment made in that year at 100 percent (CX 64; Tr. 1759-60). Initially, he was at a loss to explain the 100 percent payments exemplified by CXs 68, 71, and 78 (Tr. 1764-66), but later he was able to explain them in the course of redirect examination by Surprise's counsel (Tr. 1787-89, 1796-97).

The testimony of Mrs. George, Bamberger's buyer, was in direct conflict with the testimony of Brown regarding the whole course of dealing with Surprise.

Her testimony was in substance as follows:

Although she had no clear recollection of what Surprise's advertising allowance program was in 1960-61 (Tr. 400-02, 2612), she denied that she had been told the rate was 50 percent or that she had told Brown he would have to offer 75 percent. She characterized as "absolutely untrue" Brown's testimony (Tr. 1743) that she told him what allowances other manufacturers were granting. (Tr. 2613-14; see also Tr. 438, 2626, 2656, 2677-78.)

All of the Surprise ads run by Bamberger's were omnibus ads (Tr. 430). There was no standard percentage rate for participation in such omnibus ads (Tr. 437-46; cf. James 2599).

Surprise usually approached Mrs. George regarding advertising; she did not take the initiative or pressure Surprise regarding cooperative advertising; Surprise was "making the pitch for the ad." (Tr. 409, 418, 2610.)

In determining whether to stock any given line, the advertising allowance rate is not a material factor (Tr. 415-16). The store does not buy advertising but buys merchandise (Tr. 2617-18).

She might have taken a 50 percent allowance from Surprise if such an offer had been made. Bamberger's had plenty of advertising money; there was no need to pressure for higher rates

(Tr. 2642-43). She might have accepted 50 percent even though she had previously been getting 75 percent (Tr. 2643-44).

Mrs. George rarely made "a pitch for an ad."⁵⁴ There were too many salesmen knocking on her door; everybody wants to do business with Bamberger's. She did not have to go out and look for advertising. (Tr. 418-19, 1071, 2636-37.)

Various advertising allowance offers were made to Mrs. George. Whether she took the best offer or the worst offer depended on the item and the name of the manufacturer. She never told a salesman, "Why should I take yours; someone else is giving me so much better?" (Tr. 419-20, 1071.)

Although cooperative advertising is a competitive item among suppliers (Tr. 1071), the percentage of contribution by a manufacturer to the cost of a cooperative ad does not determine what merchandise Bamberger's advertises. The store has plenty of money for advertising, so whatever offer is made by the manufacturer—whether 50 percent or 75 percent—is accepted without bargaining or haggling. Mrs. George has not pressured salesmen to offer higher rates of payment by telling them of competitors' offers. (Tr. 423-25, 2677-78.)

Many pages of the transcript of Mrs. George's testimony as a Government rebuttal witness are taken up with details of her dealings with Brown and Dosik. There are inconsistencies in Mrs. George's testimony regarding this matter, perhaps because of memory problems occasioned by the lapse of time—possibly because of indignation over Brown's testimony that she had pressured him. These lapses, however, do not discredit the substance of her testimony.

Surprise would have the examiner draw the inference that Dosik personally handled the advertising allowance negotiations at Bamberger's because it was necessary to deviate from the standard program (RPF 56). But other inferences are just as plausible, particularly in view of the authority of salesmen other than Brown to go to 75 percent after checking with Dosik by phone. The record affords a basis for a finding that Dosik dealt with Mrs. George because of the importance of the account to Surprise (George 2636-37; Brown 1745-46, 1774), coupled with Bamberger's view of Surprise as "a very fringe resource" (George 2635, 2653; see Sanders 1402-03); the fact that Surprise's sales to Bamberger's were declining (George 414-15;

⁵⁴ Mrs. George does solicit advertising for new store openings. "Everybody" offers 100 percent for these, but she has taken less on occasion. (Tr. 2655-56; 425-26.)

CX 159 A-Z-15; see CPF 24); the proximity of Newark to Surprise's office in New York; and a degree of arrogance on the part of Mrs. George, reflected in part by her attitude toward Brown. For example, Mrs. George explained why Dosik was trying to advertise cooperatively with her store:

Well, we are Bamberger's, we are big. You don't sell Bamberger's. You really were unique. You don't sell the State of New Jersey. Our expansion has been fabulous, and our business has been just terrific. Everyone would love to get in on something like this. You can't do business with everyone. That is why you have buyers and you have to be a little selective. (Tr. 2636-37.)

Regarding Brown, she said:

* * * Mr. Brown is just a salesman and a counter. He takes inventory counts of stocks in some of my stores. All advertising was handled by Mr. Dosik * * *. (Tr. 2625; see also Tr. 2615-17, 2644, 2676.)

When viewed in this light, the numerous apparent discrepancies between Mrs. George's testimony and Brown's version of their dealings become unimportant, except insofar as they suggest that Brown, in testifying, inflated *his* role in view of the evidentiary void left by Dosik's death.

Regarding the competitors listed by Brown in connection with the Bamberger account,⁵⁵ the record reflects the following:

Corde de Parie—According to the witness, Gold, he was successful in selling Corde merchandise to Bamberger's in 1958 and 1959, and he offered 100 percent advertising allowances (Tr. 1308-09). The record contains no corroboration, however, that Bamberger's actually ran Corde advertising for 100 percent reimbursement.⁵⁶ Despite this competition from Corde in 1958-59, Brown said the question of paying more than 50 percent at Bamberger's did not arise until 1960 (Tr. 1767).

Contessa di Roma—This company solicited Bamberger's during 1960 and 1961 but was unsuccessful, although it offered allowances of 75 percent or better (Gold 1302-08, 1464-65; George 2629-32; Steiner 2071-74, 2078).⁵⁷

Lady Marlene—This company sold to Bamberger's during 1960-63 and offered 75 percent allowances during that period (Fox 1914; Jaffe 2487).

⁵⁵ The buyer for Bamberger's was not questioned about the allowances of suppliers other than Contessa.

⁵⁶ Oddly enough, in listing competitive ads posted in the buyer's office at Bamberger's, Brown testified seeing a Corde ad in 1961, but not in 1960 (Tr. 1762-63). By 1961, Surprise had acquired the Corde trade name (Tr. 1471-72).

⁵⁷ There is some doubt regarding Gold's offers to Bamberger's (Steiner 2072, 2074, 2078).

Treo—At some time during 1960–63 (dates unspecified), Treo participated on a 100 percent basis in Bamberger's omnibus advertising (Poulson 1976–79).

Lilyette—This company cooperatively advertised with Bamberger's during 1960–62, presumably on a 50 percent or 66⅔ percent basis (and sometimes 100 percent) until early 1962, when the rate went up to 75 percent (Kaufman 2229–30, 2351, 2424).

Formaid—This company did business with Bamberger's in 1960 and subsequently and granted allowances of 75 percent (Braff 2513–14, 2521–23, 2538).

There was no independent corroboration of any dealings between Bamberger's and the remaining three companies mentioned by Brown—Peter Pan, Exquisite Form, and Bali—or of their advertising allowance programs.

Brown did not mention Poirette or Gossard among Surprise's competitors at Bamberger's, but the record shows that both granted advertising allowances to it during 1960–63. Poirette's rate may have been 50 percent or 75 percent (RX 27; Gros 2247–50, 2265–67, 2271–72); Gossard's was 50 percent (Wells 2297, 2308; CXs 968, 969).

Philadelphia, Pennsylvania

Surprise's principal witness regarding the competitive situation in Philadelphia was Henry Sanders, its national sales manager since January 1961. Sanders, who had been sales promotion manager from 1959 to 1961, also had served as a salesman in Philadelphia during 1960–61 and had made an investigation of competitive problems there before Surprise raised its advertising allowance rate to 75 percent in mid-1962. Consequently, the record is far from clear regarding the dates of many of the matters covered by his testimony.

Ralph Gold also testified about his activities in Philadelphia as a salesman for Surprise, Corde, and Contessa. And Gold, directly or indirectly, was one of Sanders' informants regarding offers made by Corde and Contessa.

The salient facts relevant to Surprise's defense of meeting competition at the four Philadelphia department stores follows:

1. Lit Brothers

Concerning competition in Philadelphia generally, but not with specific reference to Lit Brothers, the salesman, Sanders, listed

(Tr. 1407) the following competitors as offering greater co-operative advertising allowances than Surprise from 1960 to mid-1962:

Bien Jolie	Lilyette
Carnival	Peter Pan
Contessa	Treo
Exquisite Form	Wonder Bra
Formaid	Youthcraft
Formfit	

Sanders said that in 1960 and 1961 he was unable to deal with Lit Brothers on the basis of a 50 percent advertising allowance but found it necessary to offer 75 percent (Tr. 1417-19).⁵⁸

Before 75 percent was granted to Lit Brothers for an ad in May 1960, Sanders said, the buyer, Mrs. Theresa Connors, told him that other companies were offering greater advertising allowances. Specific companies supposedly were mentioned, but Sanders remembered only Contessa. The buyer told him that Contessa was offering 100 percent allowances and other sales promotion aids.⁵⁹ Sanders knew that the Contessa offer was not accepted, but, nevertheless, Surprise paid 75 percent "Because of what she was getting from others * * *." Again, Sanders could not recall who these "others" were (Tr. 1533-36).

Regarding a 75 percent allowance granted to Lit Brothers for an ad in November 1960, Sanders indicated that he was again reminded about the 75 percent the store was getting from other manufacturers, but he did not recall whether specific competitors were mentioned to him at that time (Tr. 1536-37).

The buyer for Lit Brothers, who testified during the course of the Government's case-in-chief, gave no testimony directly relating to Surprise's meeting competition defense. Defense questions on cross-examination relating to dealings with other suppliers were not allowed on the basis that Surprise might recall the witness in the course of defense hearings (Connors 559-61). However, the buyer was not recalled either as a defense witness or as a rebuttal witness for the Government.

⁵⁸ Lit Brothers also received 100 percent allowances for new product promotions (CXs 88 A, 98 A; Connors 557; Sanders 1540-42), but Surprise makes no claim of meeting specific competition in those instances.

⁵⁹ This testimony is highly suspect because Contessa's 100 percent offers were not developed until 1961 (Steiner 2075-78). Incidentally, Sanders was wrong in identifying Mrs. Connors as the buyer at this time; she was then assistant buyer (Connors 549).

The testimony of Ralph Gold was to the effect that he unsuccessfully solicited Lit Brothers on behalf of both Corde and Contessa and made offers of 100 percent cooperative advertising (Tr. 1328-30, 1474-75).

As for Lilyette, its president indicated that his company sold to Lit Brothers in 1962 and had solicited the store before that time. Lilyette may have sold to Lit Brothers "in a small way" in 1960 and 1961 (Kaufman 2422). It was not definitely established that any offers of cooperative advertising were made to Lit Brothers, and it appears that whatever offers may have been made would have been at the rate of 50 percent, or no more than 66⅔ percent. (Kaufman 2228-29, 2419-22, 2413-14.)

Formaid did no business with Lit Brothers during 1960-63, but Formaid's salesmen were calling on this account and presumably were offering 75 percent allowances (Braff 2545, 2523-25).

There was no corroborating evidence regarding offers or grants to Lit Brothers by the other competitors that Sanders listed.

The only other competitive activity at Lit Brothers shown by the record related to Gossard, and evidence presented by Surprise shows that Gossard made 50 percent advertising allowance payments (Wells 2297, 2308-09; CXs 968, 969).

2. Snellenburgs

Sanders testified (Tr. 1407, 1419-20) that beginning in 1960, Snellenburgs was unwilling to advertise cooperatively with Surprise on the basis of 50 percent because competitors were making better offers. He listed the following companies:

Bien Jolie	Lilyette
Carnival	Peter Pan
Contessa	Treo
Exquisite Form	Wonder Bra
Formaid	Youthcraft
Formfit	

But the only specific transactions mentioned by Sanders related to the "big promotion" offered by Contessa involving advertising allowances of 100 percent plus various other promotional aids, including a trip to Rome as a consumer prize (Tr. 1538; see Gold 1228-89).

When Sanders was questioned on cross-examination about cooperative advertising with Snellenburgs in the spring of 1961

for which Surprise paid 75 percent (CX 13 A-C), he explained that the deviation from 50 percent was necessary because of what the buyer⁶⁰ told him regarding the offers of specific competitors ("some" of those listed *supra*)—particularly Contessa. The buyer told Sanders what Contessa was offering and that she had accepted. (Tr. 1538-39.) Snellenburgs had not previously carried the Contessa line (Sanders 1538; Gold 1470-71).

The record is confused regarding the timing of the Contessa offer to Snellenburgs. Ralph Gold first indicated it was at some unspecified time during 1960-61 (Tr. 1288-89, 1313-14), then said it was accepted in the fall of 1960 (Tr. 1466-67). Contessa's national sales manager testified, however, that Snellenburgs accepted the offer for the fall season of 1961 (Steiner 2050-51, 2077).

But whatever the exact time of the Contessa offer, it provides no explanation for Surprise's 75 percent payment to Snellenburgs in March 1960 (CX 17 A).⁶¹ The record leaves to speculation the reason why the Contessa package deal forced Surprise to raise its rate.

Formaid did not sell to Snellenburgs during 1960-63 but did offer 75 percent cooperative advertising during this period (Braff 2523-24, 2545).

To whatever extent Lilyette was doing business with Snellenburgs during 1960 and 1961, the record fails to indicate that the rate offered was any more than the standard 50 percent or 66 $\frac{2}{3}$ percent (Kaufman 2228, 2422).

Regarding the other competitors that Sanders listed (*supra*, p. 932), there is no corroborating testimony or other evidence as to their business with Snellenburgs or the advertising allowances they were offering this store.

Although Sanders did not mention Lady Marlene among the competitors Surprise was meeting at Snellenburgs, the record does indicate that this manufacturer cooperatively advertised with Snellenburgs in the spring of 1961, apparently on a 75 percent basis (RX 19 A-B; Jaffe 2486-88; *cf.* Fox 1913-15, 1938).

Ralph Gold testified also that he had successfully solicited Snellenburgs in 1958-59 on behalf of Corde (Tr. 1313-15), but there is no direct evidence regarding cooperative advertising by this store with Corde. In any event, Corde was not on Sanders' list

⁶⁰ The buyer for Snellenburgs, Miss Ruth Loughney, was not called as a witness by either side.

⁶¹ Gold was not employed by Contessa until May 1960 (Gold 1462; Steiner 2032, 2073-74).

(*supra*, p. 932), although he knew of Gold's activities on behalf of Corde (Tr. 1412, 1559-60).

To round out the competitive picture at Snellenburgs, the record shows allowances of 50 percent offered by Gossard (Wells 2297, 2308-09; CXs 968, 969).

3. *Strawbridge & Clothier*

According to Sanders (Tr. 1407, 1416-17), it was necessary to allow Strawbridge & Clothier more than 75 percent because competitors were offering a higher rate. These competitors, reputedly named by the buyer, Miss Emma Swartz, included the following:

Bien Jolie	Lilyette
Carnival	Peter Pan
Contessa	Treo
Exquisite Form	Wonder Bra
Formaid	Youthcraft
Formfit	

Regarding a 75 percent ad in May 1961 (CX 120 A-B), Sanders could not recall whether Miss Swartz had mentioned at that time the specific competitors who were offering cooperative advertising participation of more than 50 percent (Tr. 1531-33).

Directly contradicting Sanders' story of raising the rate under pressure, two officials of Strawbridge & Clothier testified that Surprise's standard rate for advertising allowances during 1960 and thereafter was 75 percent (Bierman 482-84, 2772; Swartz 2689-91, 2696-97, 2720-22). As a matter of fact, Miss Swartz, the Strawbridge buyer since August 1959, recalled a 75 percent payment in late 1959 (Tr. 2693).

Miss Swartz knew there was a reference in the Surprise price list to a 50 percent cooperative advertising program, but she said that Surprise never adhered to it at Strawbridge (Tr. 2719-22). Neither Sanders nor Gold tried to get her to take 50 percent (Tr. 2689-91, 2696-97, 2728, 2765-66).

Denying Sanders' statements, Miss Swartz was emphatic in declaring that she did not mention to him the names of other suppliers or tell him they were offering higher allowances. Such a practice is contrary to the policy of the store and of Miss Swartz herself (Tr. 2689-92; see Bierman 510, 517-19).

Miss Swartz agreed that cooperative advertising is a competitive matter and that it would be more advantageous to Strawbridge if a supplier paid for 75 percent of cooperative advertising rather than 50 percent (Tr. 2753). But she insisted that she did not

bargain with suppliers for better rates. She never requested any particular percentage; whatever a salesman offered in the way of a cooperative advertising rate was either accepted or rejected without any discussion as to a different rate. (Tr. 2687-88, 2756, 2763-64.) She explained that the advertising budget for the corset department was such that there was no occasion to try to push suppliers into giving better advertising allowance rates (Tr. 2764-65).

Miss Swartz pointed out that most of Strawbridge's business is with Warner Brothers, which pays 50 percent. Strawbridge does more cooperative advertising with Warner than with anyone else (Tr. 2764).

Strawbridge buys foundation garments from some 20 to 30 manufacturers, and the store engages in cooperative advertising with most of them. The rates of participation vary from company to company. Between 1960 and 1963, the rates were 50 percent, 60 percent, 66⅔ percent, and 75 percent, and Strawbridge engaged in cooperative advertising at each of those rates (Tr. 2685-87).

In an effort to offset this testimony, Surprise flagrantly distorts the record by portraying the Strawbridge buyer as dictating the advertising allowance rate "on a take it or leave it basis" (compare RPF 106 with Tr. 2690; see CR 9-10). The inferences Surprise then attempts to build (RPF 106-07) on this distortion of the record must, of course, fall for want of a proper foundation.

Strawbridge's purchases from Surprise since 1960 have been about \$16,000 a year; the account has been fairly stable (Tr. 2695).⁶² Miss Swartz considered Surprise a "fringe house," but said it is important "in its own little way" (Tr. 2767).

Concerning competitors and their offers to Strawbridge, the record shows the following:

Contessa—Ralph Gold may have offered the Contessa line in 1959-60, but it was turned down. Miss Swartz did not recall that Gold offered her the package deal or 100 percent ads (Swartz 2698-99, 2736-38; cf. Gold 1288-89, 1318-20, 1473-74). There is testimony that the 100 percent advertising deal and the trip to Rome were offered to Strawbridge by Contessa (Gold 1473-74; Steiner 2051, 2071), but Gold's claim that this was in 1960 does not appear to be well-founded (Steiner 2075-77).

Exquisite Form—Paid 75 percent to Strawbridge, but in 1960 or 1961, Strawbridge discontinued carrying the Exquisite line in

⁶² Purchases from Surprise in 1959 had been nearly \$22,000 (CX 170 A; see Sanders 1552; CPF 24).

the upstairs department and transferred it to the basement department (Swartz 2728-29, 2761-62; Bierman 494-95).

Lilyette—Not carried by Strawbridge (Swartz 2703), but solicitations were made (Kaufman 2229, 2419).

Formaid—This company has tried unsuccessfully to sell to Strawbridge (Swartz 2701; Braff 2525-26).⁶³

Peter Pan—Paid 75 percent, sometimes 100 percent. (Swartz 2702, 2728-29.) Later reduced its participation from 75 percent to 66⅔ percent, probably in 1962. (Swartz 2702, 2728-29, 2763; see Bierman 500-01.)

Treo—This company engaged in cooperative advertising with Strawbridge during 1960-63 (Swartz 2703-04; Poulson 1902-10, 1957-59, 1969-70, 1980-88). Treo paid 66⅔ percent for Strawbridge ads in March 1960 and March 1963 (RXs 20, 21, 23). Treo granted to Strawbridge a 75 percent allowance in May 1963 (RX 10). There also was cooperative advertising in September 1961 (RX 22), but the percentage of contribution was not shown.

There was no corroborating testimony or other evidence relating to the other competitors Sanders listed (*supra*, p. 934) as having offered allowances higher than Surprise.

However, the record contains evidence regarding some competitors who were not listed by Sanders (*supra*, p. 934), as follows:

Poirette—Granted to Strawbridge 75 percent allowances in October and November 1961, April 1962, September 1962, and October 1962, with other payments in October 1962 at a rate of 50 percent or less (Gros 2250-60, 2267, 2272-73; RXs 27, 29 A-H).

Bali—Offered 50 percent in 1960 (Bierman 493-94).

Corde—Strawbridge carried this line until November 1960, but the annual volume was only about \$6,000 (Swartz 2700). Miss Swartz said the allowance was 75 percent; she did not remember that Ralph Gold offered 100 percent advertising for Corde (Tr. 2730-33), but Gold said he did (Tr. 1318-20).

Gossard—Paid 50 percent (Wells 2297, 2308-09; CXs 968, 969).

Maidenform—Paid 66⅔ percent in 1960 (Bierman 494-95), but paid 75 percent for an omnibus ad in September 1961; other participants were Surprise, Peter Pan, and La Resista (Bierman 500-01).

Sarong—Paid 75 percent, sometimes 100 percent (Swartz 2702, 2728-29).

⁶³ Formaid did sell to the junior department, which was separate from the main corset department (Braff 2525-26).

4. Gimbels

Sanders said that he represented Surprise in transactions with Gimbels during 1960-62. He testified that he first offered 50 percent, but the buyer, Mrs. Annette Feir, made him "aware of what she was getting from other manufacturers—75 percent and even better." Sanders did not specifically identify these manufacturers, but said the names mentioned were "among" the following:

Bien Jolie	Lilyette
Carnival	Peter Pan
Contessa	Treo
Exquisite Form	Wonder Bra
Formaid	Youthcraft
Formfit	

Sanders said he thus could not sell to Gimbels on the basis of 50 percent advertising allowances. (Tr. 1407, 1414-16.)

That was on direct examination. On cross-examination, he said he dealt with Gimbels in 1960 and part of 1961 (Tr. 1513). More important, while he reiterated that the buyer for Gimbels told him other manufacturers were offering 75 percent or better, he could not remember whether she specified any competitors by name (Tr. 1514-15). He did not recall the exact date of his first contact with Mrs. Feir, but he stated the conversation took place prior to March 28, 1960, when Gimbels ran a Surprise ad on the basis of 75 percent participation (CX 100; Tr. 1515-16). He could not be certain whether she named specific competitors in connection with subsequent advertising arrangements (Tr. 1520-28), except that for an omnibus ad on April 24, 1960 (CX 101), involving a 100 percent payment, she would have told him the other manufacturers participating (Tr. 1517-18).

Finally, when questioned about a 75 percent payment for an ad of October 28, 1960 (CX 105 A-B), Sanders retreated to the statement:

We did know the names of the people. She at one time reviewed these names with me.

But he remained unable to fix the date other than to say it was "probably" about the time of his first visit early in 1960 (Tr. 1529-30).

The testimony of Mrs. Feir, both in the course of the Government's case-in-chief and in the course of rebuttal, is in direct conflict with the meeting competition defense of Surprise. According to Mrs. Feir, the allowance that Surprise gave to Gimbels was

a straight 75 percent, except when it was 100 percent (Tr. 591, 2813, 2841-43). This has been true ever since she became buyer at Gimbels in January 1959. From the beginning she understood that the allowance rate was 75 percent, the same rate she had enjoyed as corset buyer at Blauner's, another Philadelphia store (Tr. 2787-92). She flatly denied that either Gold or Sanders had offered her 50 percent in 1960 and 1961 (Tr. 2793-94, 2796-97, 2841-43).

Although familiar with the Surprise price lists for 1960-61 and 1961-62 (CXs 1 and 2), Mrs. Feir was not aware that they called for payment of 50 percent advertising allowances (Tr. 633-34, 2797). Her further testimony was in substance as follows:

Even if the Surprise rate had been 50 percent, she would have continued to buy the Surprise line (Tr. 2794). She did not attempt to bargain with her suppliers for a higher cooperative advertising rate (Tr. 2812). There were suppliers who offered 50 percent in 1960-63, including Warner and Bali; also Maidenform, which later went to 60 percent and then to 66 $\frac{2}{3}$ percent (Tr. 2810-12). She did not tell Sanders that competitors of Surprise were paying higher rates. No supplier was paying more than 75 percent on a regular basis, but a higher rate was offered to introduce new merchandise (Tr. 2813).

A manufacturer's cooperative advertising rate did not determine whether merchandise would be stocked. If the merchandise was desirable, it would be stocked and cooperatively advertised, even if the rate of participation was only 50 percent (Tr. 2827-28, 2851-54). As a matter of fact, Gimbels' biggest supplier, Warner Brothers, grants only a 50 percent participation (Tr. 2830).

Although cooperative advertising is competitive, it is not as "competitive as merchandise is competitive." (Tr. 2837.)

Surprise's efforts to discredit the testimony of Mrs. Feir (RPF 69-81, 85) are unavailing. She was one of the most straightforward witnesses heard by the examiner. The interpretations placed on her testimony by Surprise are, in the examiner's opinion, unwarranted.

The record supports the following findings respecting supplier competition at Gimbels:

Corde—Ralph Gold had sold Gimbeis some Corde merchandise, but the store later dropped the line. Corde offered cooperative advertising at 75 percent or more. (Feir 2798-2800, 2836; Gold 1322-23.) (Sanders did not mention Corde in reference to Gimbels.)

Contessa—Gimbels made limited purchases from Contessa, and

there is evidence of cooperative advertising in November 1960 (RX 24; Steiner 2049, 2071-73, 2078-79, 2117-24; Feir 2803). Contessa offered advertising at 75 percent or better. The 100 percent offer was for an introductory ad only (Gold 1322-23; Feir 2836-37), and Mrs. Feir did not remember the so-called package deal (Tr. 2802-03).

Lady Marlene—This manufacturer was not listed by Sanders among the competitors he encountered at Gimbels, but the record reflects that Lady Marlene paid allowances of 75 percent, beginning in June 1960, with some indications of the same rate of payment earlier in 1960 (RXs 11 A-18 B; Feir 2833, 2847; Fox 1913, 1922-26; Jaffe 2480-86).

Other Suppliers—Other suppliers that were paying 75 percent or better to Gimbels included Gossard⁶⁴ and Exquisite Form (Feir 2833, 2847-48).

Solicitations—Neither Formaid nor Lilyette sold to Gimbels during 1960-62, but each solicited the store and offered cooperative advertising—Formaid at 75 percent and Lilyette presumably at 50 percent or 66⅔ percent (Braff 2523-24, 2545; Kaufman 2228-2418; Feir 2833).

There was no corroborating testimony or other evidence respecting the activities at Gimbels of the other competitors listed by Sanders.

Summary Findings and Conclusions

Preliminary Statement

Although, of course, legal principles must be applied in resolving the issues posed by Surprise's defense, the foregoing findings demonstrate that the dispute concerning the competitive picture is primarily factual. The parties are not really at odds regarding the controlling legal principles, but they do diverge sharply in their interpretation of the record and in their application of these principles thereto.

On the basis of the detailed findings regarding the competitive aspects of Surprise's dealings with each of the department store customers (*supra*, pp. 920-39) and in the light of the applicable law, the examiner here makes summary findings and conclusions regarding the meeting competition defense.

By way of introduction, however, some reference should be

⁶⁴ The witness from Gossard testified to 50 percent payments (Wells 2297, 2307-08; CXs 968, 969) until 1963, when the rate was raised to 75 percent (Wells 2329-30).

made first to the examiner's evaluation of the evidence beyond that already indicated by the detailed findings.

1. Legal Standards

In undertaking to determine whether Surprise was, in fact, meeting competition in good faith, the examiner has heeded the admonition of the Commission that the test is "not technical or doctrinaire," but rather "flexible and pragmatic," *Continental Baking Company*, Docket 7630 (Opinion accompanying Final Order, December 31, 1963, p. 2) [63 F.T.C. 2071, 2163]. The examiner has applied the standard laid down in *Continental*—"the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity."

The principles set forth in *Continental* are circumscribed by the factual basis which gave rise to them. Their apparent breadth must be measured against the facts that led to the decision that discriminatory prices granted by Continental were justified under Section 2(b) of the Clayton Act, as amended.⁶⁵

Continental had refused to grant discriminatory discounts for a substantial period of time although its major competitors had been granting such discounts for many years. As a result, Continental's market position had been impaired and it feared "a further drastic loss of business * * *." (*Id.*, p. 2164.)

Continental also was careful "to ensure the genuineness of the competitive necessity for particular discounts." The opinion noted:

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

* * * In every case, customers' claims that they were receiving discounts from competitors of respondent were adequately verified by respondent's on-the-spot sales representatives. In fact, in every instance of record in which respondent granted a discount, its competitors' discount to the customer in

⁶⁵ Section 2(b) of the Clayton Act, as amended (15 U.S.C. § 13(b)) reads in pertinent part as follows:

"Upon proof being made * * * that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged * * *, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, that nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

question was equal to or larger than respondent's, and the latter's net price to the customer was no lower than its competitors' net prices. (*Id.*, p. 2164.)

The opinion, for the most part, dealt with price discriminations, but the Commission noted that the same facts and circumstances applied equally to Continental's grant of advertising allowances to meet equivalent advertising allowances granted by competitors.

See also *Beatrice Foods Co., Inc.*, Docket 7599 (Order Dismissing Complaint (July 29, 1965)) [68 F.T.C. 286], and *Ponca Wholesale Mercantile Company*, Docket 7864 (February 24, 1964) [64 F.T.C. 937].

Although the defense provided by Section 2(b) is broadly referred to as the "meeting competition defense" (as reflected in the title of this section of the initial decision), such nomenclature represents an oversimplification and may tend to blur the distinction between the original 2(b) defense which excused discriminations "made in good faith to meet competition" and the amended version which limits the defense to discriminations "made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."⁶⁶ This defense has been extended by court interpretation to include the granting of *payments* for services or facilities, *Exquisite Form Brassiere, Inc. v. Federal Trade Commission*, 301 F. 2d 499 (D.C. Cir. 1961), *cert. denied* 369 U.S. 888 (1962).

2. Outline of Defensive Facts

Against that background, we turn to a consideration of the defensive facts adduced by Surprise.

Through its sales staff, Surprise has undertaken to paint a picture of its efforts to adhere to its published advertising allowance program in dealing with the department stores in New Haven, Bridgeport, Newark, and Philadelphia. The salesmen uniformly testified that the department store buyers rejected their initial offers of 50 percent advertising allowances and threatened, directly or indirectly, that purchases from Surprise would be curtailed unless higher allowances were granted.

Defense testimony is to the effect that Surprise's salesmen regularly collected, in a variety of ways, information on the allowances and offers of competitors; that this information was carefully checked and passed on to the president of Surprise, Samuel Dosik; that Dosik had other sources of information; and that the

⁶⁶ Compare 38 Stat. 730 with 49 Stat. 1526 (15 U.S.C. § 13(b)).

subject of competitors' allowances was thoroughly canvassed at periodic sales meetings.

No deviation from the published program was allowed, according to Surprise, until Dosik was satisfied that a higher allowance was required to obtain a cooperative advertising arrangement and thus to insure the exposure of Surprise merchandise to the consuming public, so that such merchandise would enjoy a proper turnover rate and would not remain stagnant on the shelf.

But this picture is painted with too broad a brush; it lacks detail and falls short of reflecting reality.⁶⁷

3. Evaluation of Evidence

The defense largely depends on the weight to be accorded the testimony of four of Surprise's current sales employees—Ralph Gold, Henry Sanders, Howard Rubin, and Jack Brown—when measured against the testimony of department store buyers that contradicts the salesmen in important respects.

Much of this testimony dealt with transactions that took place as long ago as 1960 (or earlier) and that were at the time, strictly routine. It is natural that witnesses testifying to such matters would recall them in a light calculated to demonstrate the correctness of their actions on behalf of their employers. This comment is applicable to both the salesmen and the buyers. But when it comes to resolving the conflicts between the testimony of the buyers and the testimony of the Surprise salesmen, the circumstances compel the acceptance in major part of the buyers' versions.

As far as motivation to misrepresent is concerned, it is obvious that the Surprise salesmen are more vulnerable than the department store buyers. The buyers were, for the most part, reluctant witnesses who appeared under the compulsion of Government subpoenas. Neither they nor their employers were parties to this

⁶⁷ The examiner is not unmindful of the difficulties faced by Surprise in undertaking to defend its discriminations, and, in analyzing the defensive material offered, he has not imposed on it an impossible burden.

First, of course, Surprise labored under an obvious handicap as a result of the death of its president just as this litigation was instituted.

Second, from a business standpoint, considerable circumspection had to be exercised in the cross-examination and analysis of the testimony of department store buyers with whom Surprise needs to maintain a satisfactory relationship.

Third, there were obvious difficulties in undertaking to prove certain defensive facts through officials of Surprise's competitors, particularly in instances where those competitors might themselves be vulnerable to charges of unlawful discrimination. Finally, problems arose in obtaining documentary corroboration regarding allowances granted or offered by competitors during 1960-62.

Nevertheless, unfortunately for Surprise, it is a truism that the absence of evidence cannot substitute for evidence, nor can inferences favorable to Surprise be drawn from the absence of evidence relevant to its defense. Inferences based on the absence of evidence are permissible only in special circumstances that are not present here.

proceeding, and they thus had no direct interest in the outcome of the case nor any other cause for bias.

These buyers, long-time employees of substantial and reputable department stores, were forthright and direct. Like the Surprise salesmen, the buyers also had memory trouble, but they were more frank in admitting it than the Surprise salesmen.

The examiner's conclusion in this connection doubtless has been influenced by his consideration of the testimony of Surprise's first witness, Ralph Gold, who furnished the keystone and set the tone of the defense. There is considerable basis for the position of complaint counsel (CPF 52) that Gold's testimony is entitled to little or no weight in resolving the crucial issues involved in this proceeding (see *infra*, pp. 945-946).

All of the Surprise salesmen insisted that they had tried to adhere to the published policy of their company and that they had granted discriminatory allowances only when they were pressured into doing so by department store buyers. Such testimony has been uniformly denied by the department store buyers who were directly questioned about it, and it also is basically inconsistent with the testimony of other buyers.

On balance, the examiner has concluded that Surprise and its salesmen, believing that some competitors were offering advertising allowances of 75 percent or better to department stores, concluded that it was sound business policy to offer a comparable rate on a regular basis to their department store customers. Surprise was meeting what it understood to be the general competitive practices of some competitors. Its 75 percent offers were not made on an *ad hoc* basis to meet specific competitive situations. It engaged in systematic discriminations to meet the general competition of some of its competitors.

Surprise finds incredible the testimony of several of the buyers that their advertising budget was so liberal and that there were so many offers of cooperative advertising allowances that there was no occasion for them to bargain with or to pressure any supplier for a rate higher than its regular published offer. Initially, the examiner was inclined to be incredulous too. But in the context of the industry practices disclosed by this record, he finds such testimony completely credible.⁶⁸

⁶⁸ The examiner is aware that department stores and other large retail outlets frequently sponsor special promotional events and solicit the participation of their suppliers. See, for example, *R. H. Macy & Co., Inc.*, 60 F.T.C. 1249 (1962), *aff'd as modified*, 326 F. 2d 445 (2d Cir. 1964), and *Max Factor and Company*, Docket 7717 (Opinion accompanying Final Order, July 22, 1964, p. 2) [66 F.T.C. 184, 249]. But, in the main, Surprise has not demonstrated any such situation regarding its 75 percent allowances.

By the same token, the examiner rejects the contention of Surprise that the department store buyers testified as they did concerning the lack of any pressure on their part for higher advertising allowances because of the existence of the criminal section of the Robinson-Patman Act.⁶⁹

There is no substantial basis for inferring that the testimony of any buyer was improperly influenced by virtue of this statutory provision—and this is reflected in the hesitant, tentative manner in which Surprise advances such a theory.

Furthermore, the contention is a two-edged sword. For it appears that the department stores would be vulnerable under Section 3 only if they improperly induced Surprise to discriminate, by misrepresenting, for example, the competitive offers being made to them. Surprise's defense is predicated not only on the information supposedly furnished to Surprise by these buyers, but also on the accuracy of such information. Surprise cannot have it both ways.⁷⁰

Actually, the testimony of these buyers that they did not undertake to obtain higher allowances that might have been available may be construed as an admission against interest and, therefore, especially worthy of credence. This is on the theory that management—or at least the cost control branch—might well look with jaundiced eye on the failure of buyers to obtain the maximum subsidization of advertising expenses.

The fact that since 1960 (and earlier, in some instances), Surprise's payments to each of the eight favored department store customers were, with one exception,⁷¹ 75 percent, not 50 percent, constitutes the most convincing refutation of the salesmen's testimony that they varied from the terms of Surprise's published plan in individual instances to meet specific competitive offers, which were thrown in their faces by the buyers. Despite abortive efforts to show the payment of 50 percent allowances in a few instances (*supra*, pp. 920-24), Surprise failed to prove (with the exception noted) that it ever paid allowances to any of the department stores at the 50 percent rate.

⁶⁹ Section 3; 49 Stat. 1528, 15 U.S.C. § 13a. This section of the Act, in pertinent part, makes it unlawful for any person engaged in commerce "to be a party to, or assist in, any transaction * * * which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available * * * to said competitors in respect of a sale of goods of like grade, quality, and quantity * * *."

⁷⁰ Surprise's discovery of Section 3 is somewhat belated. Instead of now citing it as an afterthought, Surprise, under its theory of the case, should have cited it to the buyers.

⁷¹ This exception was an omnibus ad with Malley's on June 1, 1960, when Surprise paid 50 percent (CX 21 A-B; James 2582-83; see *supra*, p. 920).

This strongly tends to corroborate the uniform testimony of the department store buyers who were questioned on the subject that during 1960-62 Surprise's cooperative advertising offer to them was 75 percent.

The scarcity of any substantial documentary corroboration of the salesmen's testimony is another factor to be taken into account.

The examiner finds it strange, for example, that, so far as the record shows, neither Dosik nor any other Surprise official reduced to writing the stringent hold-the-line policy testified to. Likewise, the absence from this record of any contemporaneous salesmen's reports is a factor to be considered in evaluating the oral testimony (see Sanders 1530).

The question is not without difficulty, but, all things considered, including his observation of the witnesses, the examiner finds the testimony of these buyers on the disputed matters more worthy of belief than the testimony of the Surprise salesmen.

The salesman Gold testified in a dual capacity: (1) as an ex-Surprise salesman, 1958-61, who solicited Surprise's customers on behalf of competitors, and (2) as a Surprise salesman from August 1961 to date.⁷²

Gold, at the time he testified, was eastern sales manager for Surprise, a position he had held since August 1961. In November 1958 he had left Surprise to operate successively as sales manager for Corde (November 1958-December 1959), as the West Coast salesman for Lilyette (December 1959-April or May 1960), and as the sales manager for Contessa (May 1960-August 1961). (Gold 1260-61, 1439-40, 1447, 1462-63; CX 966 A-F.)⁷³

Surprise lays considerable stress on Gold's testimony that during his employment by Corde, Lilyette, and Contessa during 1958-61, he kept Dosik regularly informed about the activities of these companies in offering allowances higher than Surprise's (RPF 72). The purpose of this testimony was to establish that Dosik—and thus, Surprise—was acting in good faith when the company granted the higher allowances to the eight department stores.

⁷² Gold also referred to his pre-1958 activities as a Surprise salesman.

⁷³ Although its substantive impact on the case is negligible, Gold's mis-statement regarding the time he was employed by Lilyette must be taken into account in weighing his testimony. In an affidavit filed with the Commission (CX 966 A-F), Gold averred that he had been employed as West Coast salesman for Lilyette for a period of approximately one and one-quarter years. However, the hearing record shows that, in fact, Gold was employed by Lilyette for only a few months (Gold 1447, 1462; Kaufman 2384). Obviously, such a mis-statement may be inadvertently made, but, nevertheless, Gold's careless disregard for the truth in a sworn statement cannot be ignored. Furthermore, his allegations regarding activities by Lilyette must be discounted in view of evidence of a basis for animosity on his part toward Lilyette (Kaufman 2391, 2393-94, 2453-55).

Despite the family relationship—Gold and Dosik were cousins by marriage (Tr. 1453)—the examiner is unable to give full credence to Gold's account of such duplicitous activity on his part.⁷⁴ As noted during the course of hearing (Tr. 1599-1601), the examiner believes it was proper, in fairness to Surprise, to receive testimony concerning the knowledge of Dosik as to the practices of competitors, but testimony concerning conversations with a person who has since died must be cautiously considered in view of the lack of opportunity for verification of the conversations in question.

Whatever Gold may have reported to Dosik, his vivid memory of such conversations, five to eight years previously, is to be contrasted with his memory failure on other subjects.⁷⁵

Moreover, in its reliance on Gold's testimony, Surprise again has wielded a two-edged sword. First, Gold's testimony deals almost entirely with offers that were not accepted, and second, Gold's testimony, together with his affidavit (CX 966 A-F), puts Surprise in the position of having reason to believe, if not actual knowledge, that the competition it supposedly was meeting was unlawful (CPF 82-84; see *infra*, p. 954).

Moreover, even if Gold's account of his offers on behalf of his former employers and of his reports to Dosik concerning them were to be accepted at face value, the examiner must consider other flaws. Aside from Gold's testimony, the record contains no information covering the standing of Corde in the industry other than the fact that Surprise purchased the Corde trade name and patent in 1960 (Tr. 1444-46, 1471).

Contessa was a new company in 1960 (Steiner 2026-28, 2069-70), and in view of its limited activities (Steiner 2072, 2076-78), Surprise cannot validly claim that it was responding to Contessa's offers in early 1960, because Surprise already had furnished 75 percent allowances to most of the eight favored department stores.

⁷⁴In any event, such behavior is a factor to be considered in assessing Gold's credibility. The weight of Gold's testimony must also be discounted for a variety of other reasons. In addition to being subject to bias favoring his employer Surprise, Gold's performance as a witness was marked by glibness, inconsistencies, contradictions, and a convenient memory. Other factors to be taken into account are the lack of any documentary or testimonial corroboration of much of his testimony, plus flat denials on the part of witnesses called by complaint counsel and by Surprise. The examiner does not propose to resolve definitively the collateral questions posed by the conflict between Gold's affidavit (CX 966 A-F) and the testimony of representatives of companies referred to in that affidavit (Kaufman 2377-78, 2380-84; Steiner 2110-14; Braff 2532-34; Wells 2329-30). But the existence of such a conflict cannot be ignored. On the basis of all these factors, as well as the observation by the hearing examiner of the demeanor of the witness on the stand, the examiner has accorded Gold's testimony little or no weight.

⁷⁵Gold testified, for example, that while he was with Surprise before 1958, he offered Annette Feir of Gimbel's 50 percent advertising allowances (Tr. 1322). Mrs. Feir was not even employed by Gimbel's until 1959 (Tr. 577; see also Tr. 2787, 2790).

The salesmen, Sanders, Rubin, and Brown are in a category different from Gold. Nevertheless, their testimony was marked by inconsistencies, by faulty memory, and by some degree of evasion. They were contradicted on substantive matters, not only by the department store buyers called by the Government in rebuttal, but also by witnesses presented by Surprise—albeit, in fairness, it must be noted that such witnesses were competitors of Surprise.

The findings regarding the competitive picture at each of the eight department stores demonstrate shortcomings in the testimony of these three salesmen and need not be repeated. However, some reference should be made here to Rubin's testimony regarding the elaborate formula by which he said he could determine that competitors were granting excessive advertising allowances (Tr. 1597-98). His theory was discredited when put to the test of cross-examination (Tr. 1670-77). (See also Brown 1749.)

The Actualities of Competition

Complaint counsel raise a threshold question concerning the existence of actual competition between Surprise and five of the manufacturers whose cooperative advertising offers Surprise contends that it was meeting (CPF 86-88). They cite testimony indicating that Treo, Lady Marlene, Poirette, Lilyette, and Contessa sold products that either did not compete or only minimally competed with the Surprise line. This testimony deals in the main with differences in the figure-types for which the various garments were intended and with differences in the price ranges of the various lines.

For purposes of this decision, however, a definitive resolution of this dispute is unnecessary. The examiner has assumed that each of the companies was in competition with Surprise during the relevant time period.

Such factors as those listed by complaint counsel have been considered, however, in assessing whether Surprise was acting in good faith when it made discriminatory allowances to department stores reputedly in response to offers of cooperative advertising allowances made by these manufacturers.

Ex Post Facto Rationalization

Surprise's meeting competition defense is essentially an ex post facto rationalization of its discriminations. This is demonstrated by comparing its applications for subpoenas with the evidence it ultimately presented. The sequence of events, coupled with the testimony of its salesmen, lends credence to complaint counsel's

suggestion (CPF 53-56) that Surprise undertook a "fishing expedition" designed to locate, on an ex post facto basis, specific competitors which might have offered or granted comparable allowances to the eight department store customers about the same time that Surprise granted 75 percent allowances to those customers.

Initially, Surprise listed 21 brassiere manufacturers as the competition it was attempting to meet when it granted the discriminatory allowances that formed the basis for the complaint. For various reasons, those subpoenas were quashed. (See orders quashing subpoenas filed by Examiner Laughlin on August 12, 1965.) Thereafter, by a letter dated September 2, 1965 (treated as a motion), Surprise renewed its application for subpoenas and listed one additional manufacturer, for a total of 22 companies whose competition it allegedly was attempting to meet. Of the 22 competitors listed, Surprise actually caused subpoenas to be issued for 14. (See Order Postponing Return Dates of Subpoenas, November 22, 1965.)⁷⁶ Of these 14 companies, only seven (Contessa, Formaid, Gossard, Lady Marlene, Lilyette, Poirrette, and Treo) were represented by witnesses at the hearings, while an eighth competitor, Corde, was represented through the testimony of Ralph Gold.

Of these eight competitors, the record fails to show that any of them actually made sales during 1960-63 to Shartenberg's in New Haven or to Howland's in Bridgeport. Regarding the other six department stores, the evidence is scant as to the nature, extent, and timing of their dealings with these competitors.

Another flaw in the defense evidence is that even in instances where one or more of these eight competitors were doing business at a particular store, the testimony of the salesmen failed to indicate any knowledge of their competitive activities contemporaneous with the granting of the challenged allowances by Surprise.⁷⁷

Not one of the discriminatory 75 percent allowances was shown to bear any real relationship to a specific offer, payment, or advertisement of an identified competitor.

⁷⁶ The order lists only 12 companies because when it was issued, Formaid and Gossard had not been served with subpoenas. Service was later effected, and an officer from each company testified.

⁷⁷ As a matter of fact, the salesman, Rubin, listed only a few of the eight, but added two from the original list—Bali and Youthcraft (*supra*, pp. 920-924). Brown and Sanders were more cautious; while they omitted several of the eight, they added others, so that Brown listed nine and Sanders, eleven (*supra*, pp. 926, 930, 931, 932, 934, 937). But in naming competitors that supposedly were out-bidding Surprise on advertising allowances, they were unable, on an individual store basis, to point to specific competitors as having granted or offered specific allowances that Surprise was undertaking to meet at any specific time.

"Competitive Necessity"

The question whether "competitive necessity" justified Surprise's 75 percent allowances must receive a negative answer because, according to the evidence, (1) the nature of the competition posed no competitive threat to Surprise and (2) the continued acceptance of Surprise merchandise in the department stores was not dependent on its advertising allowance rate. The bases for these two findings may be outlined as follows:

1. The Competition Being Met

When the detailed findings regarding each of the eight department stores (*supra*, pp. 920-939) are summarized, the conclusion is inescapable that Surprise has failed to show any substantial competitive threat on the part of the manufacturers which made offers during 1960-62 that exceeded Surprise's published rate of 50 percent:⁷⁸

Bali—About all that the record discloses regarding Bali is that it offered 66⅔ percent to Shartenberg's and Howland's; that it sold to Bamberger's; and that it offered 50 percent to Gimbels.

Contessa—Although Contessa made 75 percent or 100 percent offers to all eight stores, it made sales to only two of them—Snellenburgs and Gimbels. The scope and timing of Contessa's transactions with these stores fail to justify Surprise's reaction. Moreover, Contessa had not been organized until late 1959, and Surprise had made 75 percent payments before Contessa really got underway.

Corde—Corde's 100 percent offers were specifically mentioned only in connection with Howland's, Bamberger's, Snellenburgs, and Gimbels but such 100 percent offers were for initial ads only. Therefore, Surprise can hardly point to such offers in 1958-59 as prompting its continual payments of 75 percent allowances to the eight favored department stores throughout 1960-62. Furthermore, Corde ceased to be a viable competitor of Surprise in 1960, when Surprise purchased its trade name and patent.

Exquisite Form—All that the record shows concerning this company is that at some unspecified time during 1960-63, it offered 75 percent allowances to Bamberger's, Strawbridge, and Gimbels.

Formaid—Formaid was universally mentioned by the Surprise salesmen as having made offers higher than Surprise's. The Formaid program involved 75 percent offers to department stores, but

⁷⁸ For purposes of this summary, the testimony of the Surprise salesman regarding competitive offers has been accepted, even though there may be some question as to its accuracy.

Formaid made sales only to two—Malley's and Bamberger's.⁷⁹ Moreover, the record indicates that Formaid, in offering 75 percent to department stores, may have been responding to Surprise's already existing program.

Lady Marlene—Lady Marlene's cooperative advertising with Gimbels in 1960 is the only instance in which Surprise has come close to showing 75 percent payments by competitors more or less contemporaneously with its early 75 percent payments. Lady Marlene also paid allowances of 75 percent to Snellenburgs in 1961. Ironically, however, the Surprise salesman did not list Lady Marlene among the manufacturers whose competition Surprise was meeting at those stores. The record also contains passing reference to activities of this company at Bamberger's.

Lilyette—The record indicates allowances or offers of either 50 percent or 66⅔ percent (and possibly 100 percent on occasion) during 1960–62 at Malley's, Bamberger's, Lit Brothers, Snellenburgs, and Gimbels, but no cause-and-effect relationship was established. Lilyette raised its advertising allowance rate to 75 percent in February 1962.

Peter Pan—The record indicates only that Peter Pan offered 75 percent allowances to Bamberger's and Snellenburgs.

Poirette—The record indicates Poirette may have paid allowances of 50 percent or 75 percent to Bamberger's. This firm, however, was not mentioned by the salesman as a manufacturer whose competition Surprise was meeting.

Treo—There is evidence of the granting of 100 percent allowances by this company to Bamberger's and the payment of a 75 percent allowance to Snellenburgs in 1963.

Youthcraft—Youthcraft reportedly offered 100 percent allowances to Malley's and Shartenberg's, but the record is otherwise silent regarding competition by this company.

The evidence presented by Surprise concerning the competition that it was purportedly meeting is comparable to the "vague offer" of a promotional allowance for an "unknown sales volume, for an unknown time, by an unknown competitor, for unknown services" that the Commission rejected in *Carpel Frosted Foods, Inc.*, 48 F.T.C. 581, 597 (1951).

Inconsistent Rationale—Before leaving this aspect of the matter, it may be noted that the rationale of Surprise's defense, in large measure, is inconsistent. Although Surprise has presented

⁷⁹ Formaid sold to Malley's several months after Surprise had paid 75 percent allowances to this store. The scope and timing of Formaid's transactions with Bamberger's are speculative.

evidence purporting to show that it was meeting the specific competition of competitors of substantially the same size as itself, it also has emphasized that its major competitive problem comes from the large manufacturers in the foundation garment industry which are able to afford large-scale, national advertising, thereby "pre-selling" their merchandise to the consumer (RB 2-5; RPF 74, 84, 106). This position was epitomized in the testimony of Surprise's national sales manager:

It is a very highly competitive industry, wherein the bulk of the business is done by a small percentage of the manufacturers. The giants in our industry have tremendous national advertising programs in all the magazines, television, institutional ads on the local level.

Their merchandise is pre-sold to the customers before the consumer even reaches the store. We can't fight that. We are small, compared to them. Actually, they spend more on their advertising than the total amount of business that we do.

Therefore, if we cannot expose our merchandise to the consumer, our merchandise is stagnant in the store. Therefore, cooperative advertising with the store is vital for us to remain alive. (Sanders 1379-80.)

Despite this kind of competition from the so-called giants of the industry, Surprise has not, in the main, alleged that those companies were offering higher cooperative advertising allowances that it had to meet.

Regardless of the sympathy that may be evoked by the competitive problems faced by Surprise, the fact remains that in undertaking to meet them, Surprise discriminated in the granting of advertising allowances, and the circumstances do not afford those discriminations any shelter under the meeting competition defense of Section 2(b).

2. Threat of Loss or Damage

The major premise of Surprise's defense is that the 75 percent allowances had to be given to the eight department stores in order to retain their business and to insure their continued participation in cooperative advertising. But Surprise failed to prove this contention by a fair preponderance of the reliable evidence.

Surprise's argument is that if its merchandise was not advertised by the department stores while its competitors' merchandise was, the turnover of competitive products would exceed the turnover of Surprise's merchandise, and Surprise would become a "fringe line." (Sanders 1402-03.)

As shown by the detailed findings, several of the department store buyers testified that they cooperatively advertised with

different suppliers at varying rates of participation; that their advertising budgets were such that there was no occasion for them to pressure suppliers or to bargain with them for higher cooperative advertising rates; and that if the merchandise was suitable, they promoted it in their advertisements regardless of the supplier's allowance. As a matter of fact, three of the buyers testified that if Surprise had, in fact, offered them 50 percent advertising allowances during 1960-62, they, nevertheless, would have continued to purchase and cooperatively advertise Surprise products.

The record further demonstrates that an offer made by one supplier of a higher rate for cooperative advertising participation than is being paid by another supplier, does not materially influence a store's decision to purchase. A prime example is Contessa, which, despite its extravagant offers, was successful in selling only two of the eight department stores. Although advertising allowance programs are competitive, they are minor factors in a store's consideration of continued business with a particular supplier or of its participation in the supplier's cooperative advertising program.

Despite some generalized, unconvincing, and uncorroborated testimony as to loss of business, actual or threatened, there is no basis in this record for finding that Surprise had substantial reason for believing that it would lose any of the department store accounts or that it would be injured in its business unless it granted to them the discriminating higher allowances to match the offers of some competitors.

Prior Awareness of Individual Competitive Situations

The evidence does not establish prior awareness by Surprise of the allowance (or allowances) that it purportedly was meeting in "individual competitive situations," as required by *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 753, 758-60 (1945).

Although Surprise might have had an awareness that some competitors were offering advertising allowances on more favorable terms than it was, it is questionable whether it knew any facts reasonably leading it to believe that a response was necessary or that the allowance it granted would, in fact, meet the allowance of any specific competitor to any specific customer at any specific time.

The facts developed in the trial show that some competitors were, in fact, offering and granting allowances of 75 percent or

100 percent, but aside, perhaps, from Corde, Contessa, and Formaid, there is little or no basis for finding that Surprise, its president, or its salesmen had foreknowledge of who was doing what.⁸⁰ Neither does the record afford a satisfactory basis for finding that Surprise, through its salesmen or otherwise, showed due diligence in verifying and evaluating reported competitive offers or payments before taking what is now called defensive action.

In the *Staley* case, the Supreme Court held that discriminations were not justified, if "made in response to verbal information received from salesmen, brokers or intending purchasers, without supporting evidence, to the effect that in each case one or more competitors had granted or offered to grant like discriminations." (324 U.S. 746, at 758.) The Court did not consider it "an impossible burden upon sellers" to require evidence of more substantiation than that (*id.*, at 759-60).⁸¹

So here, it must be held that Surprise failed to present adequate proof of prior awareness.

The examiner finds that although Surprise has failed to demonstrate that its discriminatory 75 percent offers were made in response to individual competitive situations, it had reason to believe that some of its competitors had advertising allowance programs involving more generous allowances and terms than its own.

On the basis of such knowledge, Surprise paid 75 percent allowances to the eight department stores but it lacked specific knowledge as to the timing or competitive effect of any such offer or allowance at any specific store.

In effect, Surprise established (as did Formaid) a two-level advertising allowance program, under which 75 percent allowances were furnished to department stores as a matter of course while other customers received or were offered only 50 percent. Both the 75 percent payments and the 100 percent payments were made without reference to any specific competitive situation at any specific store.

⁸⁰ On the subject of prior awareness, Surprise finds itself in an unhappy dilemma. If the defense evidence demonstrates awareness at all, it is with respect to three competitors whose names show up in the testimony regarding almost every department store—Corde, Contessa, and Formaid. But the claim of awareness of the allowances of those firms carries with it also the acknowledgment that Surprise at least had reason to believe that the offers of these competitors were unlawful. (See *infra*, p. 954.)

⁸¹ Similarly, in *Beatrice Foods Co., Inc.*, Docket 7599 (Opinion accompanying Order Dismissing Complaint, July 29, 1965, p. 3) [68 F.T.C. 286, 350], the respondent "made every effort to verify the bona fides of the competitive offer and concluded that unless it lowered its prices * * *, it would lose its largest customer * * *." Surprise's reliance on the *Beatrice* case is misplaced.

Surprise failed to establish that it "was genuinely responding to some particular action on the part of a competitor." Its defense thus lacks this "integral aspect * * * of good faith responsiveness." See *Exquisite Form Brassiere, Inc.*, Docket 6966 (Opinion accompanying Final Order, January 20, 1964, p. 6) [64 F.T.C. 271, 285], *aff'd*, *Exquisite Form Brassiere, Inc. v. Federal Trade Commission*, 301 F. 2d 499 (D.C. Cir. 1965), 1965 Trade Cases ¶71,491.

The evidence indicates, instead, that Surprise's discriminatory allowances were part of an over-all plan devised by it to combat the plans of competitors (*Exquisite Form* Opinion, pp. 11-16) [64 F.T.C. 271, 289-293]. The Staley⁸² rationale—that the use of a plan or system to meet or combat a plan or system of a competitor cannot be justified under Section 2(b)—is just as applicable here as it was in *Exquisite Form*.

"Meeting" or "Beating" Competition

The evidence presented supports a finding that in two important respects, Surprise was "beating," not "meeting" competition: (1) Its 75 percent allowances exceeded the cooperative advertising offers of some of the competitors it purportedly was undertaking to meet; and (2) even as to competitors who were offering 75 percent or better, Surprise's 75 percent allowances preceded them in point of time or continued after their termination. (See *supra*, pp. 919-939; CPF 88-92; CR 29-33.)

Lawfulness of Competitive Offers

To whatever extent Surprise's discriminatory allowances may have been responsive to the offers or payments made by such companies as Corde, Contessa, or Formaid, Surprise has failed to show that there was no reason to believe that such allowances or offers were unlawful; therefore, the "good faith" requisite is, accordingly, lacking in those transactions, *Standard Oil Company v. Federal Trade Commission*, 340 U.S. 231, 238-46 (1951), 355 U.S. 396 (1958); *Tri-Valley Packing Association*, Dockets 7225, 7496 (May 10, 1962), *reversed and remanded*, 329 F. 2d 694 (9th Cir. 1964); *American Oil Company*, Docket 8183 (June 27, 1962), *reversed on other grounds*, 325 F. 2d 101 (7th Cir. 1963). Actually, the foregoing finding respecting Surprise's good faith is an understatement, since Surprise not only had reason to believe but possessed actual knowledge that the cooperative advertising of

⁸² *Federal Trade Commission v. A. E. Staley Manufacturing Company*, 324 U.S. 746, 753-54 (1945).

those three companies had the indicia of unlawfulness. (See, as to Corde, CX 966 A-F; Gold 1450-52; as to Contessa, CX 966 A-F; Gold 1469-70, 1473 (see also Steiner 2100-08); as to Formaid, CX 966 D; Braff 2513-14, 2538-40; see also CX 967 A-C).

Special 100 Percent Allowances

An additional comment is desirable concerning Surprise's 100 percent allowances for new store and department openings, new product promotions, and omnibus advertisements. In referring to these allowances as having been offered pursuant to its standard "policy and practice" and in accordance with "the general custom in the trade" (RPF 6-7), Surprise disqualified itself from defending its discriminatory 100 percent allowances under the meeting competition defense of Section 2(b) of the Clayton Act (*supra*, p. 954).

Since the examiner has found, contrary to Surprise's contentions, that the 100 percent allowances were not offered to all competing customers, he must further find that Surprise's discriminations in granting them cannot be excused under the 2(b) defense as having been occasioned by individual competitive situations. Under Surprise's own characterization, the discriminatory 100 percent allowances were offered to meet a general system of competition, and the 2(b) defense is not applicable (see *supra*, p. 954).

Surprise failed to demonstrate—and except in the most general terms, does not even claim—that its 100 percent offers were responsive to contemporaneous offers by specific competitors at specific stores.⁸³

Even if it were to be held that the 2(b) defense is somehow applicable here, Surprise has failed to lay the necessary factual predicate for the existence of the industry custom on which it relies.

Although, according to the testimony in this record, the practice of paying advertising allowances of 100 percent is widespread in the industry, there is no uniformity concerning the purposes for which they may be granted.

Representatives of only two companies—Formaid and Treo—testified that their 100 percent offers were comparable to Surprise's, in accordance with industry custom (Braff 2553-56; Poulson 1899-1901, 2007, 1976-78; but *cf.* Swartz 2703-04). Other companies showed variations:

⁸³ Since the 100 percent offers for new-product promotions are necessarily originated by the seller, they can hardly be classified as responsive to specific competitive offers (Cohen 992).

Contessa, for example, offered 100 percent for special promotional campaigns and in opening new sales areas, but not for new store openings (Steiner 2040-41, 2075-77).

Lilyette offered greater allowances (not necessarily 100 percent) in new trade territories and for new store openings. (Kaufman 2342-43, 2425-27.) Its president indicated a "historical" basis for 100 percent ads for store openings (*ibid*).

Lady Marlene now pays 100 percent for store openings and for new product promotions, but its vice-president had no knowledge of previous practices (Fox 1917, 1950).

The department store buyers did not altogether agree on their experiences with 100 percent allowances. Mrs. Irene George of Bamberger's said "Everybody" offers 100 percent for new store openings (Tr. 425-26, 2655),⁸⁴ but Mrs. Annette Feir of Gimbel's reported that some suppliers did and some did not (Tr. 617).

Mrs. Feir also acknowledged that suppliers other than Surprise paid 100 percent for new product promotions (Tr. 2813), but her testimony falls far short of showing an industry custom.⁸⁴

More specifically, Miss Emma Swartz of Strawbridge & Clothier testified that the majority of her suppliers do not make 100 percent offers for promotion of new styles. She could recall only three besides Surprise—Peter Pan, Sarong, and Lily of France (Tr. 2702-03).

Similarly, Mrs. Jean Swan James of Malley's testified that "It is not common" for manufacturers to pay 100 percent cooperative advertising when a new style is introduced. "It is not the usual thing" (Tr. 2594, 2598, 2606).

Neither does the record establish any uniform pattern of 100 percent payments for omnibus ads. For example, although Mrs. James said that in omnibus advertising all suppliers contributed the same amount (Tr. 2599), the example cited (CX 21 A-B) shows that each supplier, including Surprise, had contributed 50 percent rather than 100 percent (Tr. 2582-83, 2599-2600).

A lack of any uniformity respecting omnibus ads was reflected in the testimony of Mrs. Feir (Tr. 2817-18, 2841) and Mrs. George (Tr. 437-46). (*Cf.* Cohen 1029-30.)

Thus, the conclusion must be that Surprise has failed to prove any uniform industry custom respecting 100 percent allowances.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the sub-

⁸⁴ But see Cohen 992, 1092-93; Gold 1326-27 (*cf.* lines 14-21 at Tr. 1326).

ject matter of this proceeding and of respondents Surprise Brassiere Co., Inc., and Eugene Newman.

2. The complaint herein states a cause of action, and this proceeding is in the public interest.

3. In the course and conduct of its business in commerce, respondent Surprise, for many years, and particularly during the years 1960-63, has paid, or contracted for the payment of, something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with the handling, offering for sale, or sale of products sold to them by Surprise. But respondent Surprise failed to make such payment or consideration available on proportionally equal terms to all of its customers competing in the distribution of such products. Specifically, Surprise granted cooperative advertising allowances of 75 percent and 100 percent to some customers while it paid or offered to pay allowances of only 50 percent to customers competing with those customers who were paid the higher allowances. In addition, Surprise granted to some customers allowances above and beyond those granted to competing customers by making payments in excess of its stated limitation of 5 percent of annual purchases and by permitting deviations from stated space limitations on individual advertisements.

4. Respondent Surprise has failed to rebut the prima facie case thus made by showing that its discriminations were made in good faith to meet the advertising allowance payments or offers of competitors in individual competitive situations.

5. The evidence fails to support the allegations of the complaint that Surprise's published advertising allowance plan, *when adhered to*, violates the requirements of Section 2(d) of the Clayton Act, as amended. The benefits offered under such plan were "available" to all competing customers within the meaning of the statute.

6. The acts and practices of respondent Surprise, as found herein, constitute violations of Section 2(d) of the Clayton Act, as amended (15 U.S.C. § 13(d)).

7. This proceeding has abated as to respondent Samuel Dosik by reason of his death.

8. In view of the abandonment, by counsel supporting the complaint, of the allegations respecting respondent Eugene Newman (CPF 4), and because of the failure of proof as to his responsibility for the challenged practices, the complaint against him in his individual capacity must be dismissed.

Opinion

71 F.T.C.

ORDER ⁸⁵

It is ordered, That respondent Surprise Brassiere Co., Inc., a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the manufacture, sale, or distribution of women's wearing apparel, such as brassieres, girdles, corselets, and other related products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent, as compensation for or in consideration for any services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale, or distribution of such products, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution or sale of such products.

It is further ordered, That the complaint be, and it hereby is, dismissed as to Eugene Newman, individually, except to the extent that he is bound by the order against respondent Surprise as an officer, representative, agent, or employee; and, confirming and adopting the order filed January 29, 1964, by Hearing Examiner Loren H. Laughlin,

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondent Samuel Dosik, now deceased.

OPINION OF THE COMMISSION

BY REILLY, *Commissioner*:

This matter is before the Commission on appeal from the hearing examiner's initial decision. Oral argument was waived at the request of the corporate respondent.

Surprise Brassiere Co., Inc., a manufacturer of brassieres, girdles and corselettes, and two of its officers were charged in a complaint, issued June 28, 1963, with violating Section 2(d) of the Clayton Act. The complaint specifically alleged that payments made pursuant to a cooperative advertising plan under which respondents agreed to pay 50 percent of the cost of newspaper advertising (not to exceed 5 percent of the customer's total annual purchases) were not available to competing customers on propor-

⁸⁵ Except for the exclusion of the individual respondents and a few minor editorial changes, the order corresponds to that which the Commission said, in the Notice appended to the complaint, it had reason to believe should issue if the facts were found to be as alleged in the complaint.

tionally equal terms because the terms and conditions of the plan were such as to preclude some customers from receiving the payments. The complaint further alleged that respondents also violated Section 2(d) by deviating from the plan or program by granting some customers allowances "above and beyond" those provided for in the plan.

The hearing examiner found, and this finding is undisputed, that respondents' plan provided for payment of 50 percent of the customer's cost of advertising in local newspapers, with the total payment not to exceed 5 percent of the customer's yearly purchases. The plan also provided for the furnishing of in-store or point-of-sale advertising material, together with statement enclosures or "stuffers" designed primarily for mailing to customers or prospective customers of the store. This promotional or advertising material was *not* furnished as an alternative to the allowance for newspaper advertising but was granted in addition to such allowance. The hearing examiner also found that respondents' plan was offered to all competing customers. This finding is also undisputed.

With respect to the issue of whether all customers could use the allowance for newspaper advertising, the examiner held that although there was some evidence that a few customers could not engage in cooperative newspaper advertising with respondents, counsel supporting the complaint had failed to prove the allegation that allowances for this form of advertising were not functionally available to certain of respondents' customers. He specifically found in this connection that the record "does not demonstrate the impossibility of newspaper advertising by any customers, except perhaps a few with a volume of purchases so small that their * * * exclusion from the plan might be disregarded as *de minimis*. There is no substantial evidence that any appreciable number of viable competitors were 'too small' or otherwise unable to engage in any kind of newspaper advertising." He also concluded that "Neither in theory nor in practice is the Surprise plan restricted to large-volume accounts. It does not arbitrarily exclude customers with minimal purchasing volume. To the extent that it does exclude some customers, this discrimination is negligible and competitively insignificant * * *."

The examiner further held with respect to the legality of the basic advertising plan offered by respondents that even if the allowance for newspaper advertising was not available to all competing customers there would be no violation of Section 2(d) since the in-store promotional material offered by respondents was

usable by all customers and such materials constituted an alternative or substitute in lieu of the allowance.

Although holding that there was no violation of Section 2(d) in the operation of the basic plan, the hearing examiner found that respondents had deviated from the plan by offering large department store customers allowances of 75 percent and 100 percent of the cost of newspaper advertising. He further found that respondents granted to some customers allowances above and beyond those granted to competing customers by making payments in excess of the stated limitation of 5 percent of annual purchases and by permitting deviations from stated space limitations on individual advertisements. He held that these deviations from the basic plan constituted a *prima facie* violation of Section 2(d) and rejected respondents' contentions (1) that the 75 percent allowances granted to department store customers were made in good faith to meet equally high or higher allowances paid or offered to those customers by competitors and (2) that 100 percent allowances which were granted for new store openings, new product promotions, and omnibus ads were paid to such customers in good faith in response to general industry-wide practices.

The examiner dismissed the complaint in its entirety as to one of the persons named therein (now deceased) and dismissed it as to the other person in his capacity as an individual. Only Surprise Brassiere Co., Inc. (hereinafter sometimes referred to as Surprise or as respondent), is named in the hearing examiner's order to cease and desist.

In its appeal from the initial decision Surprise does not contest the finding that its cooperative advertising allowances were not granted to competing customers on proportionally equal terms. It defends these discriminations, however, as good faith attempts to meet competition and the only arguments made in its appeal relate to the examiner's rejection of its Section 2(b) defense. Counsel supporting the complaint did not file an appeal from the initial decision but in their answering brief have taken exception (1) to the examiner's finding concerning the practical availability of respondent's allowance for newspaper advertising and (2) to the examiner's conclusion that it was unnecessary for respondent to offer point-of-sale promotional material as an alternative to the allowance for newspaper advertising. We will consider first respondent's appeal.

In presenting its Section 2(b) defense respondent attempted to establish through the testimony of its salesmen that it had granted discriminatory allowances only as a defensive measure in individ-

ual competitive situations. We note in this connection that respondent requested the examiner to find that "Each and every deviation from the said cooperative advertising plans used by Surprise * * * without exception, was a 'good faith' response, required to meet specific competition and came within the defense provided by Section 2(b) of the Clayton Act, * * *" and "With respect to each and every such deviation, Surprise was in direct competition with manufacturers of merchandise of like grade and quality, and had prior knowledge of the advertising allowances then being offered by such competitors."¹ Respondent also stated that "With respect to each and every deviation, Surprise had been confronted and had verified the existence of immediate, specific competitors which had sold or were offering for sale to its customers merchandise of like grade and quality and the deviation was made necessary and was in direct response to such competition."² We further note that respondent has acknowledged that to sustain the 2(b) defense a seller "should attempt to verify the action of his competitor before reacting to it" and that "the 'good faith' response should be to such individual competitive situation."³

The examiner found that the evidence failed to support respondent's proposed findings and held instead that respondent's deviations from the basic plan were not made on an *ad hoc* basis to meet specific competitive situations but were systematic discriminations made to meet the general competition of other brassiere manufacturers. In rejecting the testimony presented by respondent in support of its meeting competition defense the hearing examiner made the following comment:

The fact that since 1960 (and earlier, in some instances), Surprise's payments to each of the eight favored department store customers were, with one exception, 75 percent, not 50 percent, constitutes the most convincing refutation of the salesmen's testimony that they varied from the terms of Surprise's published plan in individual instances to meet specific competitive offers, which were thrown in their faces by the buyers. Despite abortive efforts to show the payment of 50 percent allowances in a few instances * * * Surprise failed to prove (with the exception noted) that it ever paid allowances to any of the department stores at the 50 percent rate. (Initial Decision, page 944.)

Respondent now contends, contrary to its earlier argument, that the examiner erred as a matter of law in imposing upon it the burden of establishing that its disproportionately higher allow-

¹ Respondents' "Proposed Findings of Fact, Conclusions of Law, and Order Supporting Respondents," Eighth Proposed Finding.

² *Id.* at page 122.

³ Brief for Respondents, filed March 1, 1966, pages 16 and 17.

ances to favored department store customers were granted in response to allowances granted by other sellers in specific competitive situations and not for the purpose of meeting competition generally. We find no error in the examiner's ruling. It is in accord with the position taken by the Commission in *Exquisite Form Brassiere, Inc.*, Dkt. 6966, *aff'd* 360 F. 2d 492 (D.C. Cir.) and more recently *In the Matter of Rabiner & Jontow, Inc.*, Dkt. 8629. Section 2(b) "speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor.' The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition." *Federal Trade Commission v. A. E. Staley Manufacturing Co.*, 324 U.S. 746, 753.

The argument is also made throughout respondent's brief that the examiner erred in placing on respondent the burden of proving that it actually met competitors' allowances. For example, respondent contends on page 22 of its brief that the burden of proof required by the hearing examiner is insurmountable in that "Respondent would have to know both his competitor's cooperative allowance terms, published and unpublished, and the terms of the individual transactions between competitors and retail customers." At page 34 it contends that "It is an unfair and impossible burden to require the Respondent to show that its allowances equalled each and every allowance of a competitor" and that "The Examiner would require the Respondent to demonstrate the promotional allowance program granted by each and every competitor it knew about."

It is difficult to come to grips with this argument since it misconstrues the initial decision. Had the examiner made the above rulings he would have been in error since Section 2(b) does not require a seller to justify a discrimination by showing that in fact it met a competitive offer. As the Supreme Court held in *Staley, supra*, the statute requires a seller "to show the existence of facts which would lead a reasonable and prudent person to believe that a granting of a lower price would meet the equally low price of a competitor." We have reviewed the initial decision, however, and have failed to find any indication that the examiner made the rulings ascribed to him, nor do we find in respondent's brief any indication where these rulings appear in the initial decision. While the examiner held that respondent must prove that its discriminatory allowances were responsive to offers by other sellers in specific competitive situations and that it had reason to believe it was meeting such offers, he did not hold that

it was incumbent upon respondent to show that it knew the exact amount or terms of competitor's offers or that it in fact met such offers. His specific finding on this point is as follows:

The evidence does not establish prior awareness by Surprise of the allowance (or allowances) that it purportedly was meeting in "individual competitive situations," as required by *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 753, 758-60 (1945).

Although Surprise might have had an awareness that some competitors were offering advertising allowances on more favorable terms than it was, it is questionable whether it knew any facts *reasonably leading it to believe* that a response was necessary or that the allowance it granted would, in fact, meet the allowance of any specific competitor to any specific customer at any specific time. (Emphasis added.)⁴

We agree with the hearing examiner that respondent not only failed to establish an awareness of competitive offers but that it failed to show the competitive necessity for its discriminations. The arguments made in support of its appeal are rejected.

Although the hearing examiner held that the evidence failed to sustain the principal allegation of the complaint, *i.e.*, the charge that the payments under respondent's basic advertising plan were not available to competing customers on proportionally equal terms, counsel supporting the complaint, for reasons best known to themselves, did not appeal from the initial decision but chose instead to take exception to the examiner's finding in their answering brief. Respondent contends that because complaint counsel did not file a notice of intention to appeal as required by § 3.22(a) of the Rules of Practice the Commission is without authority to rule on the subject matter of complaint counsel's appeal. We do not agree. Section 3.24 of the Commission's Rules of Practice specifically provides that in rendering its decision on appeal or review the Commission will consider such parts of the record as are cited or as may be necessary to resolve the issues presented and that "in addition will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision."

Counsel supporting complaint argue first of all that the hearing examiner erred in holding that the record failed to establish that any appreciable number of respondent's customers were actually excluded from participation in respondent's cooperative newspaper advertising plan. This argument consists primarily of a review of evidence considered at great length by the examiner and found to be inadequate for the following reason:

⁴ Initial Decision, page 952.

In the four trading areas covered by the evidence, complaint counsel can cite only two customers who indicated that they were unable to take advantage of Surprise's advertising allowances—Kay's Corset Shop and Figure Fashions, both of New Haven.

The record affords no basis for finding that these customers were typical. As a matter of fact, Figure Fashions evidently was a dying business, with its purchases from Surprise dwindling, and its proprietor obviously had no desire to advertise Surprise products, although he did advertise regularly. * * * As for Kay's, the sometimes confused and confusing testimony of Harold Katsoff does not clearly establish that cooperative advertising actually was beyond his capabilities * * *.⁵

We find nothing in complaint counsel's brief to indicate that the above conclusion is erroneous. Their argument is therefore rejected.

Complaint counsel's other exception to the initial decision relates to a ruling by the examiner that a service or facility granted in addition to a promotional allowance may be an alternative or substitute for the allowance even though it is offered to customers who can use the allowance as well as to those who cannot. The following comments were made by the examiner in explanation of this holding:

The testimony of Surprise's officials and employees demonstrates that the so-called, in-store sales aids were not actually offered by them as alternatives or substitutes for cooperative newspaper advertising * * * and most customers did not so consider them. Neither of these facts is controlling if, in actuality and in legal contemplation, such material did constitute alternatives or substitutes in lieu of advertising allowances.

It is true that Surprise does not tell its customers it will either share in the cost of the newspaper advertising *or* provide in-store displays and other material. Surprise says in its published plan that it will do both. Nevertheless, the customer is still given a choice. He may elect to engage in cooperative newspaper advertising; *or* he may reject that offer and accept only the in-store promotional displays (some or all); *or* he may accept the offer of both; *or* he may reject the entire program.

It is not clear what worthwhile objective would be accomplished if Surprise were required to establish its in-store promotional aids as an alternative to, rather than an addition to, cooperative newspaper advertising. Now, a customer may have either or both; whereas, under the theory espoused by complaint counsel, he would have to choose one or the other.⁶

It seems obvious from the examiner's reasoning that the disputed holding is predicated upon the belief that all competing customers could use the allowance for newspaper advertising. Certainly, if a customer "may have either or both" no worthwhile objective would be accomplished by requiring respondent to offer

⁵ Initial Decision, page 905.

⁶ Initial Decision, pages 912-913.

promotional aids as an alternative to the advertising allowance. If, however, the allowance could not be used by some customers entitled to participate in the advertising program it is equally clear that the promotional materials, if available to all customers, could not be considered an alternative to the allowance within the contemplation of § 2(d). This section has been construed as permitting a seller to offer an alternative service or allowance for the purpose of permitting all competing customers to participate in a promotional plan.⁷ But the section requires that all competing customers be granted promotional benefits on proportionally equal terms. It is for this reason that we have held that the alternative offered in lieu of an allowance or service usable by some but not by all competing customers must be of equivalent value to such allowance or service. It is therefore apparent that any advertising program which in practical effect provides one customer with both an allowance and an alternative form of promotion and gives only the latter to his competitor would not meet the standard of proportional equality required by the statute.

In summary, therefore, we agree with the hearing examiner that the allegation that respondent's basic advertising plan violated Section 2(d) must be dismissed for failure of proof. Complaint counsel did not establish that respondent's allowance for newspaper advertising was not functionally available to all competing customers. We disagree with the examiner's holding, however, that respondent's plan would meet the requirements of Section 2(d) even if the allowance could not be used by some customers entitled to participate in the plan. His holding that services offered in addition to an allowance and not as an alternative thereto would be alternative services under Section 2(d) is fundamental error and will be set aside.

Respondent's appeal is denied. The initial decision will be modified to conform with this opinion and, as so modified, will be adopted as the decision of the Commission.

Commissioner Elman dissented and has filed a dissenting statement.

DISSENTING OPINION

BY ELMAN, *Commissioner*:

I do not agree with the Commission's excessively literal application of the meeting competition defense. As the Supreme Court

⁷ See § 9, Guides for Advertising Allowances and Other Merchandising Payments and Services; Compliance with Sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, adopted May 19, 1960.

has pointed out, Section 2(b) "does not place an impossible burden upon sellers." *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 759. The meeting competition defense should be given a common-sense, flexible interpretation enabling sellers to act promptly in response to the needs of competition. Sensitivity to the realities of everyday commercial life, not rigid standards imposing unrealistic and impossible duties of inquiry and prediction on businessmen, is essential if the defense is to have any substance. Pragmatism, not strict logic, must be the keynote to interpretation. As was stated in *Continental Baking Co.*, Docket No. 7630 (December 31, 1963), the standard of "good faith" is "simply the standard of the prudent businessman responding fairly to what he believes is a situation of competitive necessity."

At least two courts of appeals have already rejected the Commission's unrealistic approach to the meeting competition defense. *Forster Mfg. Co. v. Federal Trade Commission*, 335 F. 2d 47, 55-56 (1st Cir. 1964); *Callaway Mills Co. v. Federal Trade Commission*, 362 F. 2d 435 (5th Cir. 1966). My views on this subject have been spelled out in greater detail elsewhere, and need not be repeated here. See dissenting opinions in *Tri-Valley Packing Association*, 60 F.T.C. 1134, 1176 (1962); *Id.*, Docket No. 7225, July 28, 1966 [70 F.T.C. 223, 290]; *National Dairy Products Company*, Docket No. 7018, July 28, 1966 [70 F.T.C. 79, 215]; *Callaway Mills Co.*, Docket No. 7634, February 10, 1964 [64 F.T.C. 732, 743]; *Rabiner & Jontow*, Docket No. 8629, September 19, 1966 [70 F.T.C. 638, 690]; "The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal," 42 Univ. of Wash. Law Review 1, 16-21 (1966).

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent Surprise Brassiere Co., Inc. from the hearing examiner's initial decision, and upon briefs in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and directing modification of the initial decision:

It is ordered, That the initial decision be modified by striking therefrom the last five paragraphs of Section 1 under the heading "Practical Availability", beginning on page 903 with the words "The Surprise Program" and ending on page 904 with the words "(See Guides, Par. 9)."

It is further ordered, That the initial decision be modified by striking therefrom Sections 4 through 7 under the heading "Prac-

tical Availability", beginning on page 910 with the words "Exclusionary Aspects" and ending on page 916 with the words "intended to condemn."

It is further ordered, That the initial decision as modified hereby be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent Surprise Brassiere Co., Inc., shall, within sixty (60) days after service upon it 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.

Commissioner Elman dissenting.
