

Complaint

79 F.T.C.

IN THE MATTER OF

BORDEN, INC.

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

Docket 8809. Complaint, Mar. 9, 1970—Decision, July 13, 1971

Order adopting the initial decision of the hearing examiner which dismissed a complaint against a New York City seller of ice cream and other frozen desserts in the Little Rock, Ark., area which charged price discrimination between competing retailers. Newly discovered evidence revealed that respondent had omitted certain basic pricing information from the material furnished on the Commission's investigational request.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Borden, Inc., has violated the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C., Title 15, Section 13) as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint charging as follows:

PARAGRAPH 1. Respondent Borden, Inc., formerly The Borden Co. and hereinafter referred to as "Borden," is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 350 Madison Avenue, New York, New York.

PAR. 2. Respondent Borden is a holding and operating company having on December 31, 1967, a 100 percent voting power in approximately 22 subsidiary corporations.

Respondent Borden has approximately 200 plants in the United States and Canada that are managed by five operating divisions. A diversified dairy business, including virtually all branches thereof, is conducted by Borden's Dairy and Services Division (formerly the Milk and Ice Cream Division). For this division, Borden's chief trade name is "Borden." Borden also uses several other labels, including "Glacier Club."

Respondent Borden owns, maintains and operates a large number of receiving stations, processing and manufacturing plants and distribution depots located in various States of the United States from which it sells and distributes its said products to purchasers.

Borden's net sales amounted to \$1,669,405,399 in 1968, \$1,588,426,036 in 1967 and \$1,545,509,820 in 1966.

PAR. 3. Respondent Borden sells ice cream and other frozen dessert products of like grade and quality to a large number of purchasers located throughout the States of the United States, including the States of Arkansas and Texas, for use, consumption or resale therein.

PAR. 4. In the course and conduct of its business, respondent Borden is now, and for many years past has been, transporting raw milk, or causing the same to be transported, from dairy farms and other points of origin to said respondent's receiving stations, processing and manufacturing plants and distribution depots located in states other than the state of origin.

Respondent Borden is now, and for many years past has been, transporting ice cream and other frozen dessert products, or causing the same to be transported, from the State or States where such products are manufactured or stored in anticipation of sale or shipment to purchasers located in other States of the United States.

Respondent Borden also sells and distributes its said ice cream and other frozen dessert products to purchasers located in the same states and places where such products are manufactured or stored in anticipation of sale.

All of the matters and things, including the acts, practices, sales and distribution by respondent Borden of its said ice cream and other frozen dessert products, as hereinbefore alleged, were and are performed and done in a constant current of commerce, as "commerce" is defined in the Clayton Act.

PAR. 5. Respondent Borden sells its ice cream and other frozen dessert products to retailers. Borden's retailer-purchasers resell to consumers. Many of said respondent's retailer-purchasers are in competition with other retailer-purchasers of Borden.

PAR. 6. In the course and conduct of its business in commerce, respondent Borden has discriminated in price in the sale of ice cream and other frozen dessert products by selling such products of like grade and quality at different prices to different retailer-purchasers.

Beginning on or about May 4, 1964, Borden has discriminated in price in the sale of said products by charging many retailer-purchasers, who were and are in competition with the retail stores of The Kroger Co.'s Little Rock division (approximately 37 Kroger stores located in the States of Arkansas and Texas), higher prices than it charged Kroger's said retail stores. For example, such differences in price often ranged in excess of 10 cents per half gallon unit of ice cream, resulting in discriminations ranging as high as 23 per-

cent and more off the price paid by the competitors of the Kroger retail stores.

PAR. 7. The effect of such discriminations in price by respondent Borden in the sale of ice cream and other frozen dessert products has been or may be substantially to lessen competition or tend to create a monopoly in the sale of said products or to injure, destroy or prevent competition between retailers that paid higher prices and competing Kroger stores that paid lower prices for Borden's said products.

PAR. 8. The discriminations in price, as herein alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

Mr. F. P. Favarella, Mr. John J. Mathias, Mr. Rafe H. Cloe and Mr. John Ohanian supporting the complaint.

Mr. H. Blair White and Mr. William G. Schaefer, Jr., Sidley & Austin, Chicago, Ill., Mr. Walter W. Koche, Borden, Inc., New York, N.Y., attorneys for Borden, Inc.

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

MAY 25, 1971

STATEMENT OF THE PROCEEDINGS

The Federal Trade Commission on March 9, 1970, issued its complaint charging respondent Borden, Inc., with violation of Section 2(a) of the amended Clayton Act. Answer was filed April 15, 1970. Stenographically reported prehearing conferences were held in Washington, D.C., on May 14, June 17, August 27, October 12 and November 16, 1970. Complaint counsel and counsel for respondent on May 11, 1971, filed Joint Motion to Dismiss the Complaint pursuant to Rule 3.22(e) of the Commission's Rules of Practice for Adjudicative Proceedings.

The joint motion states that an error by respondent Borden in responding to the Commission's investigational request, during the pre-complaint investigation, has resulted in the issuance of complaint herein on an erroneous factual basis. Newly discovered evidence, which came to light following issuance of the complaint, during extensive pre-trial proceedings, now reveals a factual situation materially different from that found in the pre-complaint investigation and alleged in the complaint.

The joint motion requests that the examiner dismiss the complaint, without prejudice to the Commission's right to take such fur-

ther action, in the future, as the public interest may require and further points out that, if the Commission should later decide, on the basis of information which is now available and which may subsequently be obtained, that a new proceeding is warranted, it can issue a new complaint. In that event the new complaint will, of course, contain allegations based upon information which then appears to be accurate and complete, and will not rely upon the inaccurate information which now underlies the present complaint.

FINDINGS OF FACT

1. The complaint in this matter charges respondent Borden with a violation of Section 2(a) of the amended Clayton Act in its sales of ice cream and other frozen desserts to the stores of the Little Rock, Arkansas division of The Kroger Co. (hereafter Kroger) as compared to its sales of such products of like grade and quality to retailer-purchasers who competed with said Kroger stores. As an example, the complaint alleges that "such differences in price often ranged in excess of 10 cents per half-gallon unit of ice cream, resulting in discriminations ranging as high as 23% or more off the price paid by the competitors of the Kroger retail stores." (Complaint, Paragraph Six.)

2. During the course of the pre-complaint investigation herein, respondent Borden mistakenly and against its own interests, omitted certain basic pricing information from its return on the Commission's investigational request. As a result of this error, Commission counsel were materially misled as to the extent of the discrimination between alleged favored (Kroger) and alleged unfavored customers. (See affidavit of Borden's counsel attached.)

3. In Borden's investigatory return, it had supplied volumes of purchases and the prices charged to various retail grocers who competed with Kroger. In doing so, it overlooked certain special prices which were granted to purchasers *other than Kroger* on a monthly basis. These special prices were granted on the principal volume items. Many retail grocers apparently concentrated the bulk of their monthly purchases into the time period each month when these prices were available. Their omission from the investigational return exaggerated the apparent price differences between Kroger and competing purchasers to a very great degree.

4. Borden's error was first discovered in connection with complaint counsel's Request for Admission By Borden Of The Genuineness and Truthfulness of Certain Documents, filed April 16, 1970.

At first it appeared that the special pricing would not have a very great effect and would involve only a few of the customers involved in the proof of the complaint. (Tr. pp. 18 and 19.) However, in the course of subsequent pre-trial proceedings it gradually developed that this was not the case.

5. The discovery of Borden's error required an arduous review of respondent's basic records, including invoices, rebate records and underlying work papers. These records were scribbled and confusing, thus requiring a number of conferences, both on and off the record, between complaint counsel and Borden's counsel, along with their respective accountants, in order to arrive at a correct tabulation of the pricing involved. Most of the 50 charts showing price comparisons between Kroger and competing retailer-purchasers, had to be completely redone.

6. It was apparent very early that three of the largest volume competing purchasers were no longer substantially disfavored. These three customers were then eliminated on the pre-trial record from consideration as "injured competitors." These three competing stores were Crow's Grocery, Gibson and Community Foods. (Tr. 121.) As the records were reviewed and the summary price charts were revised, it became clear that the other customers were similarly affected.

7. Moreover, Borden has very recently completed a cost study of the differences in the cost of service and delivery to Kroger as compared to competing purchasers within the area of Kroger's Little Rock Division. During the course of the investigation, prior to complaint, it was requested that Borden supply copies of any cost studies it had in its possession. However, at that time and up to the issuance of the complaint, no such study existed. In fact, Borden did not undertake such a cost study until late in the pre-trial proceedings. In October 1970, it announced that it would prepare a cost study. (Tr. 165.) In late January 1971, a cost study was completed and forwarded to complaint counsel as part of Borden's pretrial submittal of evidence.

8. Although there may be some disagreement between complaint counsel and counsel for Borden concerning the methodology used in Borden's cost study, it is clear that some cost justification exists, especially in the areas of advertising costs¹ and the cost of equipment provided to most of the competing purchasers. The effects of this

¹ The bulk of the sales to Kroger involved in this matter were of private label ice cream and frozen desserts. Borden did not contribute toward the advertising and promotion of the private label products.

cost justification, when compared to the now greatly reduced price differences between Kroger and the competing purchasers, are quite substantial.

9. In light of the above facts, it now appears that substantial price discriminations did not exist in Borden's sales to the stores of Kroger's Little Rock division, as compared to its sales to competing retailer-purchasers during the time period covered by the evidence herein.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and over the respondent.
2. The complaint herein should be dismissed without prejudice.

ORDER

It is ordered, That the complaint herein be, and the same hereby is, dismissed without prejudice.

ATTACHMENT TO INITIAL DECISION

STATE OF ILLINOIS,
County of Cook:

AFFIDAVIT

Now comes H. Blair White, attorney of record for Borden, Inc., respondent in F.T.C. Docket No. 8809, and states under oath as follows:

1. By letter dated May 29, 1969 addressed to affiant, Borden was asked to provide certain information concerning ice cream sales to twenty-two stores in Arkansas for the period July 1, 1968 through March 31, 1969. The letter requested that Borden, among other things:

List the net price per unit charged each store for the ice cream and other frozen dessert products recorded on Attachment II. Net price is hereby defined as the price Borden charged the involved stores minus any discount, rebate or other type of price reduction.

In the course of the collection of this information, certain special price reductions were mistakenly omitted. These price reductions, it was discovered following complaint and during pretrial procedures, were granted on a regular basis to customers other than Kroger and had a material effect on the actual net price paid by Borden customers other than Kroger.

Initial Decision

79 F.T.C.

2. When the May 29, 1969 letter was originally received, copies were sent to the Borden personnel at the locations involved who had participated in collecting documents for the earlier investigation subpoena served on Borden, and they were asked to compile the requested information. These Borden personnel prepared detailed schedules of the information requested by the May 29 letter, including schedules of net pricing to each customer. This information was forwarded to Commission counsel by letter of July 11, 1969.

3. After service of the formal complaint in this proceeding, complaint counsel served a Request for Admission by Borden of the Genuineness and Truthfulness of Certain Documents. The request covered various documents submitted at the 1967 investigational hearing and some of the schedules forwarded with affiant's letter of July 11, 1969. In preparing to respond to the request Borden personnel were asked to verify the accuracy of each of the schedules submitted with affiant's letter of July 11, 1969. In the course of this review it was discovered that the schedules of "net pricing" failed to include special price reductions for specified products. It was determined that these reductions were not given to the Kroger stores.

4. Borden informed complaint counsel of this newly discovered information, and proceeded to collect the individual store delivery tickets and rebate records from which the price on each sale could be determined. As the newly discovered special price reductions were reviewed, it became apparent that the impact of these price reductions was substantial. This resulted from the fact that many of the listed stores bought ice cream products from more than one supplier, and that they apparently brought from Borden primarily the products offered at the reduced prices. Thus the failure to reflect the special pricing in the schedules originally submitted to Commission counsel artificially exaggerated the price differences between the net prices paid by such customers and the Kroger Company.

5. During the hearings held in this proceeding affiant has explained to the Hearing Examiner the background of the confusion created by the failure to include the special pricing in the schedules and apologized to Commission for this misunderstanding.

(s) H. BLAIR WHITE.

Subscribed and sworn to before me this 17th day of March, 1971.

(s) JACQUELINE A. SCHADER,
Notary Public.

54

Complaint

FINAL ORDER

No appeal from the initial decision of the hearing examiner having been filed, and the Commission having determined that the case should not be placed on its own docket for review, pursuant to Section 3.51 of the Commission's Rules of Practice (effective July 1, 1970);

It is ordered, That the initial decision of the hearing examiner shall, on the 13th day of July, 1971, become the decision of the Commission.

IN THE MATTER OF

THE TELEX CORPORATION