

Opinion

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## IN THE MATTER OF

FOOD FAIR STORES, INC., ET AL.,  
GIANT FOOD SHOPPING CENTER, INC.*Dockets 6458, 6459. Order and opinion, Apr. 25, 1956*

Order denying respondents' appeal from hearing examiner's denial of their motion for consolidation of hearings in cases involving charges of knowing acceptance of illegal payments from suppliers by food retailers in violation of Sec. 5 of the FTC Act with hearings in cases charging suppliers with granting promotional allowances to said food retailers in violation of Sec. 2 (d) of the Clayton Act.

Before *Mr. Frank Hier*, hearing examiner.

*Mr. Andrew C. Goodhope* and *Mr. Frederic T. Suss* for the Commission.

*Stein, Stein & Engel*, of Jersey City, N. J., and *Gravelle, Whitlock & Markey* and *Howrey & Simon*, of Washington, D. C., for Food Fair Stores, Inc.

*Danzansky & Dickey*, of Washington, D. C., for Giant Food Shopping Center, Inc.

## ORDER RULING ON RESPONDENTS' INTERLOCUTORY APPEALS

The respondents having filed appeals from the hearing examiner's order denying their motions for consolidation of certain hearings in this and other pending proceedings designated in the motions; and

The matter having been heard on the appeals and the answer in opposition thereto, and the Commission having determined, for reasons stated in its accompanying opinion, that the appeals should be denied:

*It is ordered*, That the respondents' appeals be, and they hereby are, denied.

## OPINION OF THE COMMISSION

Per Curiam:

The respondents in the above-captioned proceedings have separately filed interlocutory appeals from orders by the hearing examiner denying their respective motions to consolidate the hearings therein with those in other pending proceedings designated in their motions.

According to the pleadings, the respondents, Food Fair Stores, Inc., and Giant Food Shopping Center, Inc., each engage in operating a chain of retail stores reselling all types of grocery products. The complaints in which each is named as the party respondent

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charge them with knowing inducement and receipt of allegedly illegal payments from suppliers or manufacturers of grocery products there named, and from other unnamed suppliers as well, in violation of Section 5 of the Federal Trade Commission Act; and the complaints in eleven other proceedings instituted by the Commission charge that the respective manufacturers and suppliers named have granted promotional allowances on their purchases to one or both of the aforesaid food retailers in violation of Section 2 (d) of the Clayton Act. These eleven complaints additionally charge that such allowances were not offered or made available on proportionally equal terms to other customers of the respective suppliers and manufacturers competitively engaged with Food Fair Stores, Inc., or with Giant Food Shopping Center, Inc., in the resale of those products.

In the motion before the hearing examiner, the respondent, Food Fair Stores, Inc., requested that hearings in all thirteen proceedings be consolidated. Under the appeal, however, it alternatively requests that hearings in its case be combined with those in the nine wherein the suppliers are charged with having granted discriminatory payments to it. The appeal of Giant Food Shopping Center, Inc., similarly requests that the hearings in its case be consolidated with those in seven proceedings involving suppliers specifically charged with having granted discriminatory payments to it.

Appellants state that common questions of law and fact are presented in these proceedings and contend that consolidation of hearings will save expense, promote the convenience of the parties, and expedite the hearings and thereby better serve the interests of justice. The proceedings naming the sellers were instituted under the Clayton Act and those involving the buyer-retailers under the Federal Trade Commission Act. Thus, actual identity of legal and evidentiary principles controlling to all the cases does not prevail, even though some common questions of law and fact may be presented therein. In any event, consolidation would be warranted only upon due showing that the interests of justice would be better served thereby.

In support of the arguments on lessening parties' litigation burdens, it is urged that if each case proceeds separately to hearings, full participation by each of the respondent suppliers will be required not only in his own case, but also in those of the respondent retailers to whom his allegedly unlawful payments were furnished. This asserted result of multiple participation does not follow, however. Although representatives of the respondent sup-

pliers may be called upon to testify or furnish documentary evidence in one or both of the two buyer proceedings, each would remain a party litigant in but one proceeding. On the other hand, consolidation would in effect make every supplier a party in interest in all combined hearings applicable to his case under the order of consolidation. If this course were adopted, each might feel impelled to be represented in interest at all combined hearings, applicable under such order to his case, even though only a part of the evidence submitted might be relevant and material to the issues in his case. In these circumstances, we must conclude that no showing has been made in support of the appeals that parties' convenience would be promoted by the requested consolidation or that a lessening of trial burden or expense would result.

Nor can it be concluded that the course of hearings would be expedited. The scheduling of hearings under procedures for combined hearings would entail reconciling of or other due regard for the convenience of a large number of parties and their counsel when designating times and places therefor, which circumstance would tend to retard rather than expedite the general course of hearings. It also appears from the answers filed by counsel supporting the complaint in opposition to the appeals that hearings for the reception of evidence already have been held in two of the thirteen proceedings and hearings are scheduled for the near future in certain others. The probabilities of delay which would attend the rescheduling of matters heretofore set for hearing are obvious.

In the circumstances here, it is apparent that more expeditious and orderly disposition of the proceedings will be afforded if these cases separately proceed to hearings and the Commission is of the further view that granting of the respondents' requests for consolidation would less serve the interests of justice.

We, accordingly, have determined that the motions to consolidate the hearings were not well taken and the appeals are being denied. Inasmuch as adoption of the requested program for consolidated hearings in these cases would be unwarranted, we note no error in the hearing officer's failure to grant the additional request of respondent, Food Fair Stores, Inc., that he direct a pre-hearing conference of the parties for identifying common issues and simplifying the issues in the interests of conducting such consolidated hearings. Because the questions presented under the appeals are procedural in nature and informed determinations in respect thereto can be made from the moving papers, answers and orders below, the respondents' requests for the privilege of oral argument on their appeals likewise are denied.

## Decision

IN THE MATTER OF  
P. & D. MANUFACTURING CO., INC.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION  
OF SEC. 2 (a) OF THE CLAYTON ACT

*Docket 5913. Complaint, Aug. 9, 1951—Decision, Apr. 26, 1956*

Order requiring a manufacturer of automotive products in Long Island City, N. Y., to cease discriminating in price through allowing certain purchasers rebates or discounts off its jobber price lists (1) of 5% to 15% based on total monthly purchases, in lieu of the usual 2% cash discount granted all its customers; (2) of 20% and 2% on all purchases without regard to size of monthly purchases; or (3) of 20% and 2% on the aggregate group purchases to jobber manufacturers of two group buying organizations regardless of the value of purchases made by each individual; which practice resulted in eight different buying prices on sales of its ignition line and four different buying prices on sales of its fuel pump line.

*Mr. Eldon P. Schrup and Mr. Francis C. Mayer* for the Commission.

*Halfpenny & Hahn*, of Chicago, Ill., for respondent.

## INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is before the undersigned Hearing Examiner for final consideration upon the complaint, answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel.

The complaint in this proceeding was issued August 9, 1951, charging the respondent, P. & D. Manufacturing Co., Inc., a corporation, with having violated the provisions of subsection (a) of the Clayton Act as amended.

Testimony and other evidence in support of the allegations of the complaint were introduced before Webster Ballinger, a duly designated hearing examiner of the Commission. At the close of the testimony in support of the complaint the respondent made a motion to dismiss the complaint for failure to establish a prima facie case, which motion was denied by the Hearing Examiner, Webster Ballinger, on the record on April 5, 1954. It then appearing that said Hearing Examiner Webster Ballinger would become unavailable to the Commission by reason of his retirement from Government service on May 31, 1954, counsel for the respondent advised that he would not be in a position to complete the respondent's defense within that time and agreed to the appointment of a substitute hearing examiner to go forward with the case and

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hear the full defense offered by the respondent and make a decision on the whole record just as though he had heard the whole case. Subsequent thereto, on April 12, 1954, the Commission issued its order designating Earl J. Kolb as Hearing Examiner in this proceeding to take testimony and receive evidence in the place and stead of Hearing Examiner Webster Ballinger. Thereafter, counsel for respondent made certain motions before the undersigned Hearing Examiner renewing his motions to dismiss and to strike certain testimony. These motions having been denied, the case for the respondent was closed without the introduction of any testimony in opposition to the charges of the complaint.

The general system of pricing used by the respondent, as developed by the record, and the variations therefrom in the case of group buyers is not disputed by the respondent, but instead the respondent relied upon the contention that counsel in support of the complaint had failed to establish the violation of law alleged in the complaint by reliable, probative and substantial evidence. Evidence in this proceeding, with reference to the charges of the complaint as to primary line injury to competition between respondent and its competitors and tertiary line injury to competition between customers of respondent's purchasers, is not sufficient to warrant any finding, and consideration of this matter must be limited to secondary line injury between competing customers of the respondent. Consequently, the issues to be determined in this proceeding are reduced to the following:

(a) Does the record contain reliable, probative and substantial evidence that respondent's pricing plan constitutes discriminations in price between competing purchasers of its automotive products of like grade and quality?

(b) Does the record contain reliable, probative and substantial evidence that the effect of respondent's pricing plan may be substantially to lessen, injure, destroy, or prevent competition between competing purchasers from the respondent?

## FINDINGS AS TO THE FACTS

1. Respondent P. & D. Manufacturing Co., Inc., is a corporation organized under the laws of the State of New York with its principal office and place of business located at 19-02 Steinway Street, Long Island 5, New York.

2. Respondent is now and for several years last past has been engaged in the business of the manufacture, sale and distribution of automotive products and supplies, principally ignition parts, fuel pump parts, carburetor parts and other related items, in interstate

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commerce in competition with other concerns who were also engaged in the sale and distribution of similar products in interstate commerce.

3. In the course and conduct of its business the respondent has been and is now marketing its automotive products of like grade and quality under its own brand name throughout the United States, maintaining warehouse space in the cities of Los Angeles, California; Kansas City, Missouri; Chicago, Illinois; Atlanta, Georgia; and Dallas, Texas. In offering its products for sale respondent classifies its products generally into two lines—ignition line, including carburetor kits and parts, and fuel pump line and related items. At all times since 1936 respondent has offered and sold an ignition line to its purchasers, adding the fuel pump line in 1950.

4. The respondent, during the time mentioned herein, has sold its products to jobbers who were designated by the respondent as distributors who resold such products to garages, service stations, fleet owners and other jobbers. From time to time respondent issued its jobbers price list on each of these lines which listed the basic prices used by respondent in the sale and distribution of its various automotive parts. Any discounts, allowances or rebates were off said jobbers price list. Respondent also from time to time issued suggested resale price lists for use by distributors and dealers in the resale of respondent's products.

5. The net purchase price paid by distributors for respondent's products is the purchase price paid subject to and following all applicable rebates, discounts and allowances. The automotive products sold and distributed by respondent were all of one grade and quality. Respondent sold such products of like grade and quality to its distributors at varying net prices. Such distributors of respondent were competitively engaged in the resale of respondent's automotive products in the various territories and places where such distributors carried on their businesses.

6. Respondent's pricing plan involved the granting of monthly volume rebates which were incorporated in and made a part of its various distributors franchise and rebate agreements. During the year 1950, respondent distributed its automotive products on the basis of applicable jobbers price lists subject to rebates or discounts provided for in franchise and rebate agreements with its distributors and other customers. The Distributor's Rebate Agreements used by respondent in connection with the sale of its ignition line provided for the following monthly rebates in lieu of the usual 2 percent cash discount granted all its customers:

