

IN THE MATTER OF

DAN DEE PRETZEL & POTATO CHIP CO. ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SECS. 2(a), 2(d), AND 2(e) OF THE CLAYTON ACT

Docket 6919. Complaint, Oct. 17, 1957—Decision, June 25, 1958

Consent order requiring a manufacturer and its sales corporation to cease discriminating in price in the sale of their pretzels, potato chips, and corn chips: specifically to cease violating section 2(a) of the Clayton Act by giving certain large retail customers a 5 percent or 5 percent plus 2 percent discount from the published wholesale prices charged other customers, and granting certain jobbers a 25 percent discount from such wholesale prices while their nonfavored competitors received only 20 percent; violating section 2(d) of the same act by granting to some customers but not to their competitors special advertising allowances amounting to 3 percent of purchases; and violating section 2(e) by furnishing some stores, but not their competitors, with demonstrators who gave coupons to customers entitling them to a 10 percent price reduction for which they reimbursed the stores.

Mr. Kent P. Kratz for the Commission.

Mr. Guy J. Mauro, of Salem, Ohio, and *Baker, Hosteller & Patterson*, by *Mr. Richard F. Stevens*, of Cleveland, Ohio, for respondents.

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 subsections (a), (d) and (e) 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:

COUNT I

PARAGRAPH 1. Respondent Dan Dee Pretzel & Potato Chip Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio with its principal office and place of business located at 2901 East 65th Street, Cleveland, Ohio.

Respondent Dan Dee Northern Ohio Corp. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio with its principal office and place of business also located at 2901 East 65th Street, Cleveland, Ohio.

Complaint

Dan Dee West Virginia Corp. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of West Virginia with its principal office and place of business located at 2301 Warwood Avenue, Warwood, W. Va.

PAR. 2. Respondent Dan Dee Pretzel & Potato Chip Co. is now and for several years last past has been engaged primarily in the business of manufacturing and selling pretzels, potato chips, and corn chips. Almost all sales are and have been made to Dan Dee Central Ohio Corp., Dan Dee Eastern Ohio Corp, respondent Dan Dee Northern Ohio Corp., and respondent Dan Dee West Virginia Corp. These corporations, hereinafter referred to as the four sales corporations, in turn sell and have sold said products to retailers and jobbers.

PAR. 3. The officers and directors of the respondent corporations and the Dan Dee Central Ohio Corp. and the Dan Dee Eastern Ohio Corp. are as follows:

Dan Dee Pretzel & Potato Chip Co.: President and chairman of the board, Harry A. Orr; vice president and director, Gerald L. Pike; treasurer and director, Truman J. Fisher; secretary and director, Charles L. Pike; office manager and director, Sol Perelman; auditor and director, Daniel S. Lopatt.

Dan Dee Northern Ohio Corp.: President and chairman of the board, Harry A. Orr; vice president and director, Charles L. Pike; secretary and director, Daniel S. Lopatt; treasurer and director, Truman J. Fisher; director, Emil Talamo; director, Gerald Pike.

Dan Dee West Virginia Corp., Dan Dee Eastern Ohio Corp., and Dan Dee Central Ohio Corp. all have the same officers and directors, as follows: President and chairman of the board, Harry A. Orr; treasurer and director, Charles L. Pike; secretary and director, Daniel S. Lopatt; director, Gerald Pike.

The books of accounts and other records of the four sales corporations are and have been maintained in the general offices in Cleveland, Ohio, of respondent corporation Dan Dee Pretzel & Potato Chip Co. Also, Mr. Emil Talamo is and has been general sales manager for respondent Dan Dee Pretzel & Potato Chip Co. and for each of the four sales corporations and has had supervisory control over all the salesmen and personnel connected with each of the four sales corporations. All sales policies for all corporations are and have been the responsibility of Mr. Talamo and are not and have not been made by any of the four sales corporations.

PAR. 4. Respondents for several years have been and now are selling and distributing the aforesaid products in commerce between and among various States of the United States to different purchasers for

use, consumption, or resale, and preliminary to or resulting from such sales, have caused and now cause the shipment and transportation of said products to said purchasers from States of the United States other than the States wherein said purchasers are located. There is and has been during all times mentioned herein a continuous flow of trade in commerce, as "commerce" is defined in the Clayton Act, in said products across State lines between respondents and said purchasers.

PAR. 5. Respondents for several years have been and are now engaged in active and substantial competition with other corporations, firms, and individuals manufacturing, processing, selling, and distributing similar products between and among the various States of the United States, the District of Columbia and other places under the jurisdiction of the United States for use, consumption, or resale by different purchasers therein. Some of the aforesaid purchasers from respondents are competitively engaged with each other and with such purchasers from respondents' said competitors within their respective trading areas.

PAR. 6. In the course of their business respondents for several years have been and now are directly and indirectly discriminating in price between different purchasers of such products of like grade and quality by selling or causing the sale of these products at higher and less favorable net prices to some purchasers than to other purchasers competitively engaged as aforesaid with each other and with purchasers from respondents' competitors.

For example, among others, respondents have given some of their retailer customers, including certain drug and grocery chain stores, large independent grocery stores and cooperative grocery buying groups, a 5 percent or 5 percent plus 2 percent discount from their published wholesale prices which have been the amounts paid by certain other competing retailer customers who have not received the aforementioned discount. Also, respondents have given certain of their jobber customers a 25 percent discount from said wholesale prices while other competing jobber customers have received only a 20 percent discount.

PAR. 7. The effect of respondents' aforesaid discriminations in price between different purchasers of such products sold and purchased in manner and method and for purposes as aforestated may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which the respondents and the aforesaid favored purchasers are engaged or to injure, destroy, or prevent competition with said respondents, said favored purchasers or with customers of either of them.

PAR. 8. The aforesaid acts and practices of respondents constitute violations of the provisions of subsection (a) 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.

COUNT II

PAR. 9. Each of the allegations contained in paragraphs 1 through 5 of this complaint are now realleged and incorporated in this count as if they were set forth in full.

PAR. 10. Respondents in the course and conduct of their business as aforesaid have been for several years last past and now are paying and contracting for the payment of something of value to and for the benefit of some of their customers as compensation or in consideration for services and facilities furnished by and through such favored customers in connection with the processing, handling, sale, or offering for sale of such products. Said payments and contracts for payment to and for the benefit of such favored customers are not and have not been made available on proportionally equal terms by the respondents to all their customers competing in the distribution of said products.

For example, among others, respondents have given special advertising and promotional allowances to certain of their customers which in some instances amounted to 3 percent of that customer's purchases. Such allowances have not been made available on proportionally equal terms by respondents to all of their other customers, some of whom have been competing in the sale of respondents' products with those receiving such allowances.

PAR. 11. The aforesaid acts and practices of respondents constitute violations of 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.

COUNT III

PAR. 12. Each of the allegations contained in paragraphs 1 through 5 of this complaint are now realleged and incorporated in this count as if they were set forth in full.

PAR. 13. Respondents for several years last past have been and now are discriminating in favor of some purchasers against others, who have bought their products for resale, by contracting to furnish or furnishing or by contributing to the furnishing of services or facilities connected with the processing, handling, sale, or offering for sale of such products so purchased upon terms not accorded to all other competing purchasers on proportionally equal terms.

For example, among others, respondents have furnished and have contracted to furnish certain purchasers the services and facilities of a "demonstrator" who is a sales person employed by respondents to visit the purchaser's store and "push" respondents' products. The "demonstrator" in most instances would give coupons to customers in such stores which when presented to the sales clerk would entitle them to a 10 percent reduction in the retail price of respondents' products. Periodically the stores in which these "demonstrators" appeared would return these coupons and then be reimbursed by respondents.

Respondents have not accorded the same services and facilities on proportionally equal terms to all the purchasers engaged competitively in the resale of their products.

PAR. 14. The aforesaid acts and practices of respondents constitute violations of the provisions of subsection (e) 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.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of subsections (a), (d), and (e) of section 2 of the Clayton Act (U.S.C. Title 15, sec. 13) as amended by the Robinson-Patman Act, the Federal Trade Commission on October 17, 1957, issued and subsequently served its complaint in this proceeding against Dan Dee Pretzel & Potato Chip Co., Dan Dee Northern Ohio Corp., corporations, existing and doing business under and by virtue of the laws of the State of Ohio, and Dan Dee West Virginia Corp., a corporation existing and doing business under and by virtue of the laws of the State of West Virginia.

On April 23, 1958, there was submitted to the undersigned hearing examiner an agreement between respondents Dan Dee Pretzel & Potato Chip Co. and Dan Dee West Virginia Corp. and counsel supporting the complaint providing for the entry of a consent order. By the terms of said agreement, respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. By such agreement, respondents waive any further procedural steps before the hearing examiner and the Commission; waive the making of findings of fact and conclusions of law; and waive all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement. Such agreement further provides that it disposes of all of this proceeding as to all parties; that the record on which this initial decision and the decision of the Commission shall be based shall consist solely of the

complaint and this agreement; that the latter shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; and that the following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents, and, when so entered, it shall have the same force and effect as if entered after a full hearing, and may be altered, modified, or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

The hearing examiner having considered the agreement and proposed order, and being of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued.

1. Respondent Dan Dee Pretzel & Potato Chip Co. is a corporation, existing and doing business under the laws of the State of Ohio, with its office and principal place of business located at 2901 East 65th Street, Cleveland, Ohio.

Respondent Dan Dee West Virginia Corp., is a corporation, existing and doing business under the laws of the State of West Virginia, with its office and principal place of business located at the Central Union Building, 14th and Market Streets, Wheeling, W. Va.

Respondent Dan Dee Northern Ohio Corp. (as shown by an affidavit which is attached to such agreement and made a part thereof) is engaged solely in sales in intrastate commerce within the State of Ohio with the exception of sales to two jobbers, one in Erie, Pa., and one in Fort Wayne, Ind. The jobber customers of said respondent do not compete with each other and the retail customers of said jobbers located in the States of Pennsylvania and Indiana do not compete with said respondent's retail customers or with the customers of its only other jobber customer, which is located in Elyria, Ohio. Counsel supporting the complaint does not have presently available evidence to establish that any alleged difference in price between this respondent's jobber customers has had or may have any substantial adverse effect on competition in any line of commerce. The term "respondent" as used herein does not include the Dan Dee Northern Ohio Corp.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

Order

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ORDER

It is ordered, That respondents Dan Dee Pretzel & Potato Chip Co., a corporation, and Dan Dee West Virginia Corp., a corporation, their officers, representatives, agents, and employees, directly or through any corporate or other device in connection with the offering for sale, sale, or distribution of pretzels, potato chips, corn chips, or related products in commerce as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Discriminating in the price of such products of like grade and quality by selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who in fact competes with the purchaser paying the higher price in the resale and distribution of respondents' products.

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

3. Discriminating in favor of any of respondents' purchasers against any of their other purchasers of said products bought for resale 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 products unless such services or facilities are accorded to all of respondents' purchasers on proportionally equal terms.

It is further ordered, That the complaint be, and it hereby is, dismissed without prejudice as to respondent Dan Dee Northern Ohio Corp.

ORDER DENYING MOTION FOR STAY OF EFFECTIVE DATE OF INITIAL
DECISION, AND DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

The hearing examiner, on April 30, 1958, having filed his initial decision accepting an agreement containing a consent order to cease and desist executed by respondents, Dan Dee Pretzel & Potato Chip Co. and Dan Dee West Virginia Corp., and counsel in support of the complaint, service of which upon respondents was completed May 23, 1958; and

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Order

Said respondents, on June 23, 1958, having filed a motion requesting a stay of the effective date of said initial decision for the reason that the pretzel and potato chip industry allegedly is considering a trade practice conference and that entering an order prior to such rules as may be promulgated would be inequitable; and

The Commission being of the opinion that no adequate grounds have been shown for the action requested; and

It appearing that pursuant to the provisions of section 3.21 of the Commission's rules of practice, the aforesaid initial decision on the 25th day of June 1958, did become the decision of the Commission:

It is ordered, That the motion to stay the effective date of the initial decision be, and it hereby is, denied.

It is further ordered, That respondents, Dan Dee Pretzel & Potato Chip Co. and Dan Dee West Virginia Corp., shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

