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Complaint

even though the complaints were issued more than two years ago, the Commission deems the latter procedure, that of withdrawing the complaints rather than issuing amended complaints, more appropriate. In view of the posture of these matters before the hearing examiners, issuance of amended complaints would, in practical effect, be tantamount to issuance of completely new complaints. In these circumstances the more orderly procedure is to withdraw the original complaints, without prejudice to the issuance of new, expanded complaints if found to be warranted. Accordingly,

It is ordered, That the complaints in the above-captioned proceedings be, and they hereby are, withdrawn.

It is further ordered, That the motions of complaint counsel to amend the present complaints be, and they hereby are, dismissed as moot.

IN THE MATTER OF

THE QUAKER OATS COMPANY

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

Docket 8112. Complaint, Sept. 14, 1960—Decision, Nov. 18, 1964

Order setting aside initial decision and dismissing for lack of showing of injury to competition and for failure of proof, respectively, charges of price discrimination and selling below cost on the part of a major producer of oat flour, among other food products.

AMENDED AND SUPPLEMENTAL COMPLAINT

The Federal Trade Commission, having reason to believe that the respondent named in the caption hereof, and more particularly designated and described hereinafter, has violated and is now violating the provisions of Section 2(a) of the Clayton Act (U.S.C., Title 15, Section 13), as amended, and Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its amended and supplemental complaint, stating its charges with respect thereto as follows:

COUNT I

Alleging violation of Section 2(a) of the Clayton Act, as amended:

PARAGRAPH 1. Respondent, The Quaker Oats Company, sometimes hereinafter referred to as respondent Quaker, is a corporation orga-

nized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located in the Merchandise Mart Plaza, Chicago 54, Illinois.

PAR. 2. Respondent Quaker for many years has been and is now engaged in the business of the production and processing, sale and distribution of various food products, including cereals, pancake, bread and cake mixes, macaroni products, corn meal, and flour, including oat flour. Said respondent is also engaged in the production, sale and distribution of chemical products, pet foods, and livestock and poultry feeds.

Respondent Quaker has plants located in some 28 cities in 20 States throughout the United States.

Oat flour is produced by said respondent at its plant in Cedar Rapids, Iowa. Said respondent sells oat flour in bulk quantities to large industrial users for processing into various food products, including cereals and baby foods.

Quaker's sales of rolled oats have, in the past several years, amounted to approximately 75% or more of the total industry sales of such product.

Said respondent's sales of all products have exceeded \$300,000,000 annually since 1957, and its sales of oat flour exceeded \$1,000,000 during 1959.

PAR. 3. Respondent Quaker, in the course and conduct of its said business has been, and is now, engaged in commerce, as "commerce" is defined in the Clayton Act, in that it has sold and distributed, and is now selling and distributing, its products to purchasers thereof located in States other than the State of origin of shipments and has, either directly or indirectly, caused such products, when sold, to be shipped and transported from the State of origin to purchasers located in other States. There is now, and has been, a constant course and flow of trade and commerce in such products between said respondent in the State of origin and purchasers thereof located in other States.

PAR. 4. In the course and conduct of its said business in commerce, respondent Quaker has sold, and now sells, its products to purchasers thereof, some of whom have been and are in competition with each other, and with customers of competitors of respondent, in the resale and distribution of such products.

Respondent Quaker has been and is now in competition with other corporations, partnerships and individuals in the course and conduct of its said business in commerce.

PAR. 5. Respondent Quaker has been, since about 1955, and is now,

discriminating in price between different purchasers of its oat flour by selling such product to some purchasers at prices substantially higher than the prices at which respondent sells such product of like grade and quality to other purchasers, some of whom are in competition with each other in the processing and sale of products containing oat flour, or products composed in substantial part of oat flour.

Said respondent does not maintain a formal list of prices applicable to the sale and offering for sale of oat flour. Instead respondent submits prices to purchasers in response to requests for bids by such purchasers, or respondent solicits business on an offer and acceptance basis.

As illustrative of respondent's discriminatory prices, sales of such product have been made by respondent to some purchasers at prices ranging from 1% to 5% or more higher than those prices allowed to other purchasers, some of whom are in competition with the non-favored purchasers in the processing and resale of such product, or of products containing substantial amounts of said product. Such discriminatory prices have amounted to as much as 24 cents per hundred weight above the prices charged by said respondent to other purchasers of oat flour of the same grade and quality.

Differentials in the price of oat flour in amounts ranging from 5 cents to 10 cents per hundred weight are substantial enough to cause a purchaser to buy from the supplier quoting such lower price or differential.

PAR. 6. The effect of the discriminations in price, as alleged in Paragraph Five herein, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which the respondent and the purchasers receiving the preferential prices are engaged, or to prevent, injure or destroy competition between respondent and its competitors and between and among purchasers of such product from respondent. In addition, such practices have a dangerous tendency to hinder competition or to create or further a monopoly in respondent in the manufacture, sale and distribution of rolled oat products.

PAR. 7. The discriminations in price, as hereinbefore alleged, are in violation of the provisions of Section 2(a) of the Clayton Act, as amended.

COUNT II

Alleging violation of Section 5 of the Federal Trade Commission Act:

PARAGRAPH 1. Paragraphs One through Four of Count I hereof are incorporated by reference and made a part of the allegations of

Count II herein, except that in Paragraph Three of Count I reference to the Clayton Act is eliminated and reference to the Federal Trade Commission Act is substituted therefor.

PAR. 2. In the course and conduct of its business in commerce, respondent has, from time to time since 1956, sold or offered for sale its oat flour to certain customers at prices below cost or otherwise unreasonably low, with the intent, purpose and effect of injuring, restraining, suppressing and lessening competition in the sale of oat flour and rolled oat products.

For example, in March 1956 respondent sold 20,000 hundred weight of oat flour to one customer at a price of approximately 30 cents per hundred weight below cost.

As another example, respondent, in August 1956, sold 600 hundred weight of oat flour to another customer at a price of approximately 10 cents per hundred weight below cost and in July 1957 respondent also sold 600 hundred weight of oat flour to this customer at prices which were approximately 10 cents per hundred weight below cost. There are other instances during the years 1956 and 1957 of sales of oat flour by respondent at prices that were below cost or otherwise unreasonably low.

PAR. 3. The result and effect of the sale of oat flour by respondent to purchasers thereof at prices below cost, or otherwise unreasonably low, has been and is now to suppress, lessen and eliminate competition between respondent and its competitors and between the customers of respondent who are in competition with each other in the resale of products containing substantial quantities of oat flour.

PAR. 4. The acts and practices of respondent, as alleged herein, are to the injury and prejudice of the public, have a tendency to and have actually hindered, suppressed, lessened and eliminated competition in the sale and distribution in commerce of oat flour and products containing substantial quantities of oat flour, and have a tendency to hinder competition or to create or further a monopoly in respondent in the manufacture, sale and distribution of rolled oat products. Said acts and practices constitute unfair methods of competition, or unfair or deceptive acts or practices in commerce within the meaning of Section 5 of the Federal Trade Commission Act.

Mr. Lewis F. Depro and Mr. Benjamin H. Vogler supporting the complaint.

Mr. John T. Chadwell and Mr. Luther C. McKinney of Chadwell, Keck, Kayser, Ruggles & McLaren, Chicago, Ill., for the respondent.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

OCTOBER 21, 1963

PRELIMINARY STATEMENT

This proceeding, among other matters, tests the legality under Section 2(a) of the Robinson-Patman Act of a general industry practice, followed by respondent in submitting differing "competitive" bids for deferred deliveries of oat flour to its customers who use the flour as a raw material for baby foods, cereals and bakery goods. It also presents questions on the scope of the term "like grade and quality." A second count charges a violation of Section 5 of the Federal Trade Commission Act.

The original complaint issued September 11, 1960, charged the Robinson-Patman Act violation. An amended and supplemental complaint was issued by the Commission after the hearings had commenced and as of December 11, 1961. The amended complaint charged, among other things, that respondent's prices had been made unreasonably low or below cost with the intent, purpose and effect of hindering competition in oat flour and tending toward a monopoly in rolled oats.

Pleadings, Facts Admitted and Issues Raised Thereby

The original complaint in the first four paragraphs alleged that respondent is a New Jersey corporation, having its principal place of business in the Merchandise Mart Plaza, Chicago, Illinois (Para. 1); it is engaged in the production and processing, sale and distribution of various food products (which are described) and has plants located in some 28 cities in twenty States; it produces oat flour at Cedar Rapids, Iowa, and sells it to large industrial users for processing into various food products including cereals and baby foods; its sales of rolled oats amounted to approximately 75 per cent of the total industry sales, and its sales of all products in 1959 exceeded \$300,000,000 while its oat flour sales in 1959 exceeded \$1,000,000 (Para. 2); it is engaged in commerce as defined in the Clayton Act (Para. 3); it sells to persons in competition with each other, and it competes with other corporations in commerce (Para. 4).

The foregoing allegations are all admitted by the answer, with the exception of the percentage of rolled oats and the allegation that respondent manufactures one food product—macaroni, which it no longer produces. The admitted allegations are accordingly found as facts.

The critical allegations are contained in Paragraph Five of the complaint which charges that respondent, since about 1955 has been “* * * discriminating in price between different purchasers of its oat flour by selling such product to some purchasers at prices substantially higher than the prices at which respondent sells such product of like grade and quality to other purchasers * * *.” The complaint further charges that respondent does not maintain a formal list of prices but instead submits prices in response to requests to bid. Illustrating, the complaint charges that the discrimination has ranged from one to five per cent or more and as much as 24 cents per cwt., whereas as little as five to ten cents differential will cause a buyer to shift suppliers.

Respondent denies these allegations but admits that it has no price list and alleges that it sells oat flour on a bid basis because of many factors, including the constantly changing market for grain. It further alleges that oat flour is a non-inventory item milled in response to each individual order in conformity with the customer's specifications.

Paragraph Six of the complaint charges, in statutory language, that the acts described have a tendency to lessen competition or create a monopoly in oat flour, and, in addition, “* * * to hinder competition or to create or further a monopoly in respondent in the manufacture, sale and distribution of rolled oat products.”

Paragraph Seven states the conclusion that Section 2(a) has been violated. Respondent denies all the allegations in these paragraphs and asserts that suit is not in the public interest. Respondent asserts also that it is contrary to the purpose of the antitrust laws to restrict in any way the present system of competitive bidding.

The answer interposes, as affirmative defenses, allegations that the differentials (1) were to meet competition, (2) made only due allowances for differences in cost, and (3) were in response to changing conditions affecting the market for or the marketability of the goods concerned. Also, the practices are industry-wide and require industry-wide treatment. Thus, the central issues raised by Count I are:

- (1) The applicability of Section 2(a) to competitive bidding situations,
- (2) The applicability of the term “like grade and quality” to the circumstances here disclosed, and
- (3) The affirmative defenses.

The amended complaint repeats the allegations of the original complaint as Count I and adds, as Count II, the charge of violation of Section 5 of the Federal Trade Commission Act.

After repeating the first four paragraphs of the first count in Paragraph One, Count II alleges, in Paragraph Two, the nub

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Initial Decision

of the charge which is that, "*** from time to time since 1956 [respondent] sold or offered for sale its oat flour to certain customers at prices below cost or otherwise unreasonably low with the intent, purpose and effect of injuring, restraining, suppressing and lessening competition in the sale of oat flour and rolled oat products." It then cites three examples and states there are other instances. The examples are:

Date	Quantity	Amount below cost
March 1956.....	Cwt. 20,000	Per cwt. 30¢
August 1956.....	600	10¢
July 1957.....	600	10¢

Respondent's answer to this paragraph is a simple denial.

Count II, Paragraph Four, alleges that the effect of such sales has been to lessen and eliminate competition in both the primary and secondary lines. The last paragraph alleges in effect that the acts "*** have a tendency to and have actually hindered, suppressed, lessened and eliminated competition in the sale and distribution *** of oat flour *** products containing *** oat flour, and have a tendency to hinder competition or to create or further a monopoly in respondent *** of rolled oat products ***." Said acts are in violation of Section 5 of the Federal Trade Commission Act. Respondent's answer to these paragraphs is also a denial.

Course of Proceedings

A prehearing conference was held December 12, 1960, at which counsel agreed to cooperate in the advance exchange and authentication of exhibits. This resulted in cooperation of a superior order and substantially reduced the time required for the hearings.

Some sixteen hearings thereafter were held at the instance of counsel supporting the complaint in Chicago, Illinois; Minneapolis, Minnesota; St. Louis, Missouri; Pittsburgh, Pennsylvania; New York, New York, and Washington, D.C., commencing May 22, 1961, and continuing with the long intervals permitted under the rules applicable to this case through August 17, 1962.

During the course of the Commission's case, a special hearing was held in Washington, D.C., on July 18, 1961, on a motion to place certain documents *in camera*. The motion was denied in part by order dated August 3, 1961. Petition for an interlocutory appeal was denied August 25, 1961.

Shortly after the *in camera* motion, the motion to amend the com-