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

ORDER

It is ordered, That respondent The American Rolex Watch Corporation, a corporation, and its officers, directors, employees, agents, and representatives, directly or through any corporate or other device, in, or in connection with, the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Clayton Act, as amended, of watches, watch bracelets, watch accessories and other products, do forthwith cease and desist from:

> Paying or contracting for the payment of anything of value to or for the benefit of any customer as compensation or in consideration for any services or facilities consisting of advertising or other publicity in a catalog, newspaper, broadcast, or telecast or in any other advertising medium, furnished or distributed, directly or through any corporate or other device, by such customer, in connection with the processing, handling, sale, or offering for sale of any products manufactured, imported, sold, or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

It is further ordered, That the respondent herein 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 this order.

IN THE MATTER OF

FORSTER MFG. CO., INC., ET AL.

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

Docket 7207. Complaint, July 23, 1958—Decision, July 23, 1965

Order, pursuant to remand by the Court of Appeals, First Circuit, dated July 29, 1964, 335 F. 2d 47, 7 S.&D. 943, modifying an earlier order, dated March 18, 1963, 62 F.T.C. 852, which prohibited a Farmington, Maine, manufacturer of woodenware products from discriminating in price between its competing customers selling at retail by specifically enumerat-

ing the items incuded in "woodenware products" as "woodenware skewers, clothespins, ice cream spoons, and other wooden products sold by respondents."

OPINION ON REMAND

On January 3, 1963, this Commission, with one member dissenting, concluded that respondents had engaged in discriminatory pricing in violation of Section 2(a) of the amended Clayton Act, 15 U.S.C. 13(a), and issued a proposed order to cease and desist.[1] On March 18, 1963, the Commission rejected respondents' objections to that proposed order for the reasons set forth in an accompanying opinion,[2] and issued its final order.

It was found that respondents had violated Section 2(a) in their discriminatory pricing of three separate woodenware products, wooden meat skewers, wooden clothespins, and wooden ice cream spoons. In the sale of their skewers, respondents were found to have unlawfully discriminated in favor of three customers, Armour, MCA, and Hantover. In the sale of their clothespins, respondents were found to have unlawfully discriminated in favor of 17 customers, all located in the Pittsburgh area. In the sale of their wooden ice cream spoons, respondents were found to have unlawfully discriminated in favor of two buyers, Pet and Sealtest.

On July 29, 1964, the Court of Appeals for the First Circuit handed down its opinion and order remanding the matter to the Commission for further proceedings in regard to respondents' proffered defense that, in some of the discriminatory transactions, they were discriminating "to meet the equally low price of a competitor" as provided in Section 2(b) of the Act, 15 U.S.C. 13(b), and for possible clarification or modification of the order to cease and desist. *Forster Mfg. Co.* v. *Federal Trade Commission*, 335 F. 2d 47 (1st Cir. 1964).

On August 25, 1964, respondents petitioned the court for a rehearing, their principal contentions being that the court "appears not to have recognized the differing standards of proof which have been firmly established by the courts in 'primary-line' and 'secondary-line' cases," and that the court had allegedly overlooked several of respondents' contentions in regard to their discriminatory sales of one of the products, wooden ice cream spoons. This petition for rehearing was denied on September 1, 1964. On March 1, 1965, the Supreme Court denied respondents' petition for certiorari. Thereafter, respondents petitioned the Commission for leave to brief

[1] *In the Matter of Forster Mfg. Co., Inc.*, 62 F.T.C. 852, CCH Trade Reg. Rep. (1961-1963 Transfer Binder) Par. 16,243.

[2] CCH Trade Reg. Rep. (1961-1963 Transfer Binder) Par. 16,342 [62 F.T.C. 852,924].

one of the issues remanded by the court of appeals (the meeting competition question). This was granted, together with leave to brief the other remand issue (clarification and modification of the order), and such briefs have now been received.

The principal issue remanded to us by the court involves the question of "meeting competition" under Section 2(b). Specifically, the court has sent the case back "for application to the evidence of the standard of the 'reasonable and prudent person' in the situation of the respondents with respect to their sales of skewers to Armour & Co. and their sales of clothespins in the Pittsburgh area." 335 F. 2d at 56. There is thus no further issue as to the illegality of respondents' discriminatory sales of ice cream spoons to Pet and Sealtest[3] nor as to the illegality of respondents' discriminatory sales of skewers to two other customers, MCA and Hantover.[4] It is thus settled that respondents have violated the statute in their discriminatory sales of two different products involving four different customers.

Two distinct factual situations are involved in the "meeting competition" problem returned to us by the court. One, as noted, involves respondents' sales of their wooden clothespins to 17 customers in the Pittsburgh area at a 10% lower price than they were

[3] The "meeting competition" defense was not asserted as to these transactions, and the court expressly affirmed our finding as to their discriminatory and injurious character.

[4] The only defense really proffered by respondents here was their contention that MCA (a group of meat packers, organized as a "buying group" with headquarters in Chicago) and Hantover, a Kansas City, Missouri, distributor, performed a "function" that automatically justified the 5% lower price they received, irrespective of whether it injured competition, was unjustified by reason of cost savings, and so forth. The court squarely rejected this argument, pointing out that Section 2(a) "does not sanction 'functional' discounts as such," requiring them to meet the same tests as all other discriminatory low prices. Respondents' contention on this point also suffered from the fact that *other* meat packers and distributors did *not* get that 5% lower price.

Respondents made no serious effort to sustain their contention that this discriminatory low price was extended to MCA to "meet competition." It had been given long *before* any of the competitive prices pointed to by respondents. Further, it was a regular and *systematic* discriminaiton, always fixed at 5% and granted without regard to what competing sellers were charging. "But §2(b) does not concern itself with pricing *systems* or even with all the seller's discriminatory prices to buyers. It 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 Mfg. Co.*, 324 U.S. 746, 753 (1945) (emphasis added). See also *Standard Motor Products, Inc.* v. *Federal Trade Commission*, 265 F.2d 674, 677 (2d Cir. 1959): "A lowered price is within §2(b) only if it is made in response to an individual competitive demand, and not as part of the seller's pricing system * * *."

As to respondents' discriminatory sales of skewers to Phil Hantover, the favored distributor in Kansas City, Missouri, respondents conceded even before our hearing examiner that these sales were indefensible under Section 2(b). See Tr. 3394. As a matter of fact, this favored buyer got his regular, systematic 5% discount from respondents' "list" price even after the latter had been plunged below cost. For example, Hantover bought skewers from Forster for *$6.56* on January 8, 1957 (CX 39) when even Armour, buying at respondents' then below-cost list price, was paying $6.90. When asked whether he knew what Forster was referring to when it wrote him about allegedly lower prices from competing sellers, Hantover replied: "I do not." Tr. 1980.

charging other customers located in other geographical areas. The other factual situation involves respondents' sales of skewers to a single large customer, Armour & Co., at the discriminatory and below-cost price of $6.90 per case when other buyers were paying $8.20 per case.

The ultimate legal question is whether respondents have sustained their burden of affirmatively establishing that, when they granted these discriminatory prices to those favored customers and thus caused the adverse competitive effects found by the court, they were acting "in good faith to meet an equally low price of a competitor," as Section 2(b) requires, that is, whether respondents have sustained their burden of showing "the existence of facts which would lead a reasonable and prudent person to believe that the granting of [those] lower price[s] would in fact meet the equally low price of a competitor." *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-760 (1945).

Turning to the Pittsburgh clothespin situation first, the critical facts are these. In May and June of 1957, a small manufacturer of clothespins—Penley Bros. of Paris, Maine—entered the Pittsburgh clothespin market for the first time. Its sales there were handled by a local food and merchandise broker, a Mr. Mander. His Pittsburgh sales force consisted of himself and his son.

Mander, Penley's broker, naturally encountered sales resistance from the Pittsburgh clothespin buyers. "They told me that I had no advantage," that "Forster had as good a deal as I did and they also had merchandise available through a local warehouse."[5] In an obvious effort to get the "advantage" he needed to start getting "some distribution around the area," the Penley broker, in May and June of 1957, made three sales[6] at what was, in effect, an approximately 10% lower price than respondents were then charging: for every 10 cases purchased at the then-current price, one additional case was given to the customer "free." Penley's three sales at this "special" price—each of the three to a different customer, and each made on a different date, namely, May 13, June 4, and June 24, 1957—amounted to 60 cases "sold" and six cases given

[5] Tr. 2964.

[6] Those three sales were: (1) On May 13, 1957, Penley's broker sold 10 cases of clothespins (each case contains 48 retail "boxes," and each box contains 30 individual clothespins, for a total of 1,440 clothespins per case) to Irwin Wholesale Company, of Irwin, Pennsylvania, at Forster's then-current price, but gave the customer one additional case "free." (2) On June 4, 1957, Penley's broker sold 30 cases to Fayette Feed Company, of Charlerois, Pennsylvania, giving the customer an additional three cases "free." (3) On June 24, 1957, the Penley broker sold 20 cases to Caplan Grocery Company, Ambridge, Pennsylvania, giving two additional cases "free."

away "free," the aggregate sales price, for all three sales, being $318.50.

Penley made no further sales at this special price. On July 29, 1957—just over two months after its first sale in the Pittsburgh market—Penley wrote a letter to its broker, Mander, flatly refusing to fill a fourth order except at the full price, sans any concessions.[7] During the rest of 1957, Penley sold a total of 55 cases in the Pittsburgh area. The next year, 1958, it sold 59 cases there.

Respondent Forster had been the dominant factor in the Pittsburgh clothspin market for many years. Its Pittsburgh broker, a Mr. Fisher of National Brokerage Company, testified that, while it would be "a pretty broad statement" to say Forster had 90% of the Pittsburgh clothespin market, "perhaps we have 70 percent of the business."[8] His sales force of 15 to 20 salesmen called on the area's roughly 125 clothespin buyers approximately once in every two-week period, and Fisher himself calls on those customers about once a month. The salesmen submit written reports of their calls daily, including in those reports information concerning competitive prices encountered.

This broker of respondents testified that, in the early part of 1957, his salesmen began to report to him that "Penley [was] quoting one free with ten."[9] While the written reports by his salesmen had been destroyed prior to the trial, the broker testified that eight to ten customers had given reports to him and his salesmen "to the effect that Penley was offering one case free with ten."[10]

On the basis of this information, Forster's Pittsburgh broker informed the home office in Maine that Penley was cutting prices in the area.[11] Forster's sales manager, a Mr. Lovejoy, who was going to Pittsburgh for other reasons anyway, went in to investigate. According to the broker, he and Forster's sales manager made a call on one customer from whom they "received an absolute report" that "Penley [was] offering one free with ten."[12] The broker says he then turned the Forster sales manager "over to a salesman and they made several calls."

Discussing the results of their investigation that evening, the broker and the sales manager concluded "that we had to do something."

[7] CX 331.

[8] Tr. 2927.

[9] Tr. 2892.

[10] Tr. 2895.

[11] "Morris Fisher [the Pittsburgh broker] advised me that the competition Penley was offering, one free case of round clothespins with ten in his market, or his territory through the Penley broker, which at that time was the A.R. Manders Co." Tr. 2772.

[12] Tr. 2907-2908.

What they did was this. "We covered the market, the entire market on the basis of one free with ten. We didn't pick out specific customers."[13]

The record shows that 17 Pittsburgh buyers took advantage of respondents' area-wide offer of the 10% lower price. Altogether these discriminatory sales totaled 1,980 cases, or almost $10,000. This amounted to 95,040 retail "boxes" containing 30 clothespins each, a saturation of the Pittsburgh area with 3,136,320 clothespins. The lower price was continued until about August 1, 1957, "until we found evidence that the other [Penley's offer] was withdrawn."

Penley, the small competitor who had provoked this retaliation, was virtually repulsed from the market. As noted, after its third sale at the lower price on June 24, 1957, its sales for the remainder of 1957 amounted to only 55 cases, and its total sales for the following year, 1958, amounted to only 59 cases. For a period of about nine months—September 1957 to May 1958—Penley made no sales in the Pittsburgh area at all. In addition, as discussed in our earlier opinion, respondents' only substantial competitor, Diamond, suffered a decline in its Pittsburgh sales as a result of the "stocking up" by the local buyers during the period of respondents' discriminatory pricing.

As we understand it, respondents' only claim here is that, when they granted the 10% lower price, they entertained a good faith belief that such a price was "generally available" in the Pittsburgh area, not that they believed it had actually been *offered* to those *particular* 17 customers. But assuming such a claim is now made, we find no reasonable basis for it in this record. All we have here is the testimony of respondents' own officials that no more than 10 of the approximately 125 clothespin buyers in the Pittsburgh area "reported" that Penley was "quoting" or "offering" a 10% price concession; nowhere in that testimony do we find a suggestion that any of those 10 "reporting" buyers claimed to have received such a competitive offer *himself*. Since respondents knew they had the burden of proof under the statute, the natural inference from the vague generality of this testimony is that none of those buyers had in fact made such a claim. If so, respondents could have

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[13] *Id.* The broker testified further:

Q. You made the offer regardless of whether or not any particular prospective customer had or had not received any specific offer from Penley or anybody else as to one free case with ten?

A. I said that before.

Q. That's correct?

A. That's correct. Tr. 2936-2937.