IN THE MATTER OF

AMERICAN MOTORS CORPORATION ET AL.

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

*Docket 7357. Complaint, Jan. 13, 1959—Decision, July 19, 1965**

Order requiring a major appliance manufacturer and distributor of electric appliances located in Detroit, Mich., to cease discriminating in price among competing customers in violation of Sec. 2(a) of the Clayton Act by granting preferential prices for its household appliances to its merchandising distributors, and from granting preferential prices in the future to any of its customers, unless it satisfies the Commission in advance that all price differentials are cost justified, and notifies all of its customers of such price differentials and its basis.

COMPLAINT

The Federal Trade Commission, having reason to believe that American Motors Corporation and American Motors Sales Corporation have violated, and are now violating, the provisions of subsection (a) Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Section 13), hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent American Motors Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its office and principal place of business located at 14250 Plymouth Road, Detroit 32, Michigan.

PAR. 2. Respondent American Motors Sales Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 14250 Plymouth Road, Detroit 32, Michigan.

PAR. 3. Respondent American Motor Sales Corporation is a wholly owned subsidiary of respondent American Motors Corporation.

PAR. 4. Respondent American Motors Corporation is a major manufacturer and distributor in the United States of electric appliances. Included among these electric appliances are refrigerators, ranges, home freezers, automatic washers, clothes dryers and room coolers, some of which this respondent manufactures at its factories located in Detroit, Michigan, and Grand Rapids, Michi-

*Reported as amended by Commission's order of October 7, 1965.

gan, and some of which this respondent has manufactured for it by other concerns. All these appliances are marketed by said respondent under the trade names "Kelvinator" and "Leonard."

PAR. 5. Respondent American Motors Sales Corporation is engaged in selling the products of respondent American Motors Corporation including those listed in Paragraph Four. In the furtherance of its sales activities respondent American Motors Sales Corporation maintains 16 zone offices located throughout the United States. Said respondent's sales of electric appliances which it acquires from respondent American Motors Corporation for the most part are made to retail dealers who sell to consumers.

The sales activities of respondent American Motors Sales Corporation including the acts and practices hereinafter alleged were and are under the direction, supervision and control of respondent American Motors Corporation. Both said corporations are jointly and severally named as respondents herein.

PAR. 6. In the course and conduct of their business, as aforesaid, respondents American Motors Corporation and American Motors Sales Corporation are now and for many years have been engaged in commerce, as "commerce" is defined in the Clayton Act. Respondents ship or cause to be shipped and transported their electric appliances in a constant current of commerce from the State or States where such products are manufactured, or are temporarily stored in anticipation of sale or shipment, to purchasers located in other States and the District of Columbia for use, consumption, or resale therein.

PAR. 7. In the course and conduct of their business in commerce, as aforesaid, respondents American Motors Corporation and American Motors Sales Corporation have discriminated in price in the sale of electric appliances by selling such products of like grade and quality at different prices to different and competing purchasers.

Included among such sales at discriminatory prices are sales which respondents made to retail dealer-purchasers in which respondents charged substantially lower prices for electric appliances than were charged by respondents to other competing retail dealer-purchasers of such products of like grade and quality.

PAR. 8. As illustrative of the discriminatory pricing practices alleged in Paragraph Seven, respondents during the past several years, including 1956 and 1957, sold electric appliances to certain retail-purchasers including the B. F. Goodrich Company, Akron, Ohio; the Consumers Power Company, Jackson, Michigan; and the Alabama Power Company, Birmingham, Alabama, at prices which

were approximately five percent lower than the prices charged to other retailer-purchasers competing with such favored purchasers in the resale at retail of the respondents' products to the consuming public.

PAR. 9. The effect of said discriminations in price by respondents American Motors Corporation and American Motors Sales Corporation in the sale of electric appliances has been or may be substantially to lessen, injure, destroy, or prevent competition between respondents' retailer-purchasers paying such higher prices and their favored retailer competitors paying such lower prices.

PAR. 10. The discriminations in price as herein alleged are in violation of the provisions of sub-section (a) of Section 2 of the Clayton Act, as amended.

Mr. Thomas A. Muntsinger and *Mr. Hans C. Nolde* for the Commission.

Cross, Wrock, Miller, Vieson & Kelley, Detroit, Mich., by *Mr. Glen R. Miller* and *Mr. Forrest A. Hainline* for the respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

SEPTEMBER 3, 1964

The Commission's complaint, issued January 13, 1959, charges the respondents, American Motors Corporation and American Motors Sales Corporation, with discriminating in price in the sale of certain of their products (electric appliances) in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Section 13). Respondents' principal defense is cost justification. A substantial volume of evidence, both in support of and in opposition to the complaint, has been received. Proposed findings and conclusions have been submitted by the parties and argued orally before the hearing examiner. The case is now before the examiner for final consideration. Any proposed findings or conclusions not included herein have been rejected as not material or as not warranted by the evidence.

The case has been beset by delays and other difficulties almost from the beginning. The hearing examiner to whom the case was originally assigned, the late Frank Hier, died in June 1959 and the present examiner was appointed in his stead. There have been several changes in complaint counsel, some five different attorneys having at various times been in charge of the Commission's case. Each change in complaint counsel necessitated extended delay in

order that newly appointed counsel might familiarize himself with the record, particularly respondents' cost study. In addition, respondents' principal witness, the accountant who prepared the cost study, died after his direct examination and before the hearing at which he would have been cross-examined; and another important witness for respondents, the executive who was most familiar with the facts underlying the cost study, became incapacitated by reason of serious illness during the course of the hearings and was therefore unable to testify.

Respondent American Motors Corporation is a Maryland corporation. It is engaged in the manufacture of, among other products, electric appliances for use in the home, such as refrigerators, freezers, air-conditioners, ranges, washers, and dryers. Respondent American Motors Sales Corporation, which is a wholly owned subsidiary of American Motors Corporation, is a Delaware corporation. It is engaged in the sale of the appliances manufactured by its parent corporation, the sales being made to retail dealers, who in turn sell the appliances to the public. The appliances are marketed under the trade names "Kelvinator" and "Leonard." Both corporations have their principal office and place of business at 14250 Plymouth Road, Detroit, Michigan.

There is no issue over the element of interstate commerce. The appliances are sold by respondents throughout the United States.

The case arises out of the fact that in the sale of the appliances respondents sell to one group or class of dealers at uniformly lower prices than those at which they sell to dealers generally.

The dealers receiving the lower price are known as "Merchandising Distributors." Each is a multiple-outlet dealer, having numerous retail stores or outlets. So far as the present record discloses, there are four such purchasers: B. F. Goodrich Company, Akron, Ohio; Alabama Power Company, Birmingham, Alabama; Consumers Power Company, Jackson, Michigan; and Sterchi Brothers Stores, Inc., Knoxville, Tennessee.

All purchasers other than these four are classified by respondents as "Regular Dealers." These are usually single-outlet, independently-owned retail appliance stores.

The lower prices accorded merchandising distributors represent a differential of approximately 3.5 percent. Use of the term "approximately" is necessary because the discount is not absolutely uniform on all products. Rather, there is a specific dollar-and-cents price differential on each model of each product. For example, the refrigerator listed as the first item on Commission Exhibit 1F is sold

to merchandising distributors at $144.40 and to regular dealers at $149.45. The price differential of $5.05 is almost exactly 3.5 percent of the lower price and almost exactly 3.38 percent of the higher price. On other items the percentage differential may vary by a few one-hundredths of 1 percent, but for practical purposes it may be assumed that the percentage differential in favor of merchandising distributors is 3.5 percent.

A former exception as to laundry equipment, such as washers and dryers, should be noted. At the time the complaint was issued, in January 1959, the discount on such equipment was approximately 4.5 percent. However, in the summer of 1959 the discount on laundry equipment was reduced to 3.5 percent, making it uniform with that on other products. This change in policy appears to have been motivated by business reasons and to have had no relation to the pendency of the Commission's complaint. Laundry equipment has always represented only a relatively small portion of respondents' sales volume.

Actually, therefore, what we are now concerned with in this proceeding is a price differential of 3.5 percent.

At the first hearing, on May 3, 1960, a written stipulation of facts entered into between counsel was received in evidence (CX 1A-G). A second stipulation (CX 2) provided simply that any orders entered as to American Motors Sales Corporation might in the discretion of the hearing examiner be made to apply to American Motors Corporation as well. Upon reception in evidence of the two stipulations, the case-in-chief in support of the complaint was rested.

Until the filing by the parties of their proposed findings and conclusions, it was assumed by the hearing examiner that all parties regarded the stipulation of facts as having established a prima facie case in support of the complaint. It is now urged by respondents that on one point, that of competitive injury, the stipulation is deficient and fails to establish a prima facie case.

On this issue the stipulation reads:

> All parties to this stipulation further agree that competent and experienced witnesses actively engaged in retailing electric appliances sold to them by respondent corporations, and who are in competition with the retail outlets of the merchandising distributors referred to above, if called upon to testify in this matter would testify substantially as follows:
>
> (a) Twenty-four out of twenty-six of such witnesses would testify that the price differentials referred to in paragraph (12) of this stipulation in many instances exceeded the amount of net profit received by them on sales of such items during the years specified;

(b) That the witnesses have lost sales of electric appliances of like kind to competitors where the amounts of the differentials in the lower retail prices charged by such competitors were equal to the differentials referred to in paragraph (12) of this stipulation.

(CX 1D-E)

Subparagraph (b) above is without probative value on the issue of competitive injury. It says only that the potential witnesses have lost sales to competitors, presumably merchandising distributors. The statement is completely silent as to the number or frequency of such lost sales, whether they number one or two or many.

No case has come to the examiner's attention in which it has been held, either by the Commission or the courts, that mere loss of an occasional sale—diversion of isolated items of business to a competitor—is sufficient to meet the criterion of competitive injury prescribed by the statute. It is injury, and substantial injury, to competition, or the reasonable probability thereof, with which the statute is concerned, not the loss of a few sales.

On the other hand, subparagraph (a) does in the examiner's opinion establish a prima facie case of competitive injury. The stipulation here in substance is that twenty-four regular dealers would testify that the price differentials in question exceeded in many instances the net profit derived by the dealers from the sale of respondents' products. If this does not establish actual injury to competition, it at least warrants an inference that substantial injury is reasonably probable.

It is therefore concluded that a prima facie case in support of the complaint has been established.

This brings us to respondents' principal defense, cost justification. Respondents urge that the price differentials are warranted by differences in the cost of selling to the two classes of customers. Shortly after the complaint issued, respondents retained the services of the late William J. Warmack to prepare a cost study. Mr. Warmack was a certified public accountant with wide background and experience in Robinson-Patman Act cases. From 1929 to 1946 he was a member of the accounting staff of the Commission. In 1946 he resigned his position with the Commission, and from that time until his death was engaged in the private practice of accounting, specializing in problems in cost accounting arising under the Robinson-Patman Act. He testified as an expert witness in a number of Robinson-Patman Act cases, both before the Commission and in the courts.

The cost study prepared by Mr. Warmack in the present case appears in the record as Respondent Exhibit 1, and his testimony

in support of the study extends from pages 15 to 39 of the transcript. A concise yet comprehensive summary by Mr. Warmack of the purpose, scope, and results of the study follows:

The purpose of the study and analysis was to develop factual cost evidence in order to determine whether the company's price differentials on sales to merchandising distributors, Alabama Power Company, Consumers Power Company, B. F. Goodrich Company, and Sterchi Brothers Company, represent differentials which make only due allowance for differences in costs of sale or delivery resulting from the differing methods or quantities in which said products are sold or delivered to said customers. The price differentials (discounts) range up to about 3.4% on sales of refrigerators, electric ranges, home freezers, and air conditioners, and up to about 4.4% on sales of laundry equipment including automatic washers and dryers.

In this engagement our work has been directed principally to an analysis of those differential costs which offer the least resistance to reasonably accurate allocations necessary in establishing factual cost bases for pricing. Such costs usually involve direct selling and they invariably include compensations to indiivduals, expenses incurred in their duties, and other expenses properly assignable to their efforts—and that was found to be true in the instant studies.

Most of the other differential costs of sale and delivery are not included in the analysis for the reason that they are not needed to prove savings on which the company bases its price differentials. The differential costs which are not included, of course, have been reviewed and studied to the extent of determining with reasonable certainty that they would have no over-all adverse effect on the cost picture presented in this report. In fact, if included in the analysis, they would serve to increase the cost savings shown herein.

Merchandising activities for representative geographical trade areas over the country (7 out of the present 19 zones and 40.5% of zone sales) and a representative period of time (6 months) have been covered in the study and analysis for the fiscal year ending September 30, 1959. Three zones, Atlanta, Detroit, and New Orleans, representing about 28% of zone sales were covered for the full fiscal year ending September 30, 1958.

Most of the differential costs are of a joint nature both as to customers served and as to products sold. Hence, it was necessary to develop proper measuring factors on which to base sound separations and allocations of such costs. For this purpose, time studies were conducted over a period of 3 to 4 months of the actual time and effort expended by more than 75 individuals whose compensations and expense represent the principal items of costs covered in this report.

The results of our study and analysis show that, as compared with regular dealers, cost savings realized per dollar of sales in serving the aforementioned merchandising distributors in 1958 and 1959 were as follows:

	Cost Savings on Sales to Merchandising Distributors	
	1958	*1959*
Alabama Power Company		
New Orleans Zone	6.44%	5.68%
Consumers Power Company		
Detroit Zone	7.99%	3.95%
B. F. Goodrich Company		
Three Zones (1958)	7.02%	
Seven Zones (1959)		5.94%
Sterchi Bros. Company		
Two Zones	7.05%	6.04%

The above cost savings may be compared with the company's price differentials (discounts) to merchandising distributors approximating 3.4% on refrigerators, electric ranges, home freezers, air conditioners, etc., and approximating 4.4% on laundry equipment including washers and dryers.

For the three zones covered in the studies for 1958, cost savings and the excess of cost savings over discounts allowed on sales to merchandising distributors, by product classifications, are shown in Schedule 3–58 herein. It will be noted in this connection that the cost savings exceed the discounts in every instance. It will be noted also that the excess of cost savings over discounts range from around 1.9% on sales of laundry equipment in the New Orleans Zone up to around 4.6% on sales of refrigerators, freezers, ranges, etc., in the Detroit Zone.

In this engagement we have endeavored to carry the costing to the refinements customarily required by the Federal Trade Commission in past Robinson-Patman cost cases. Methods and procedures thus employed are spelled out in tabular form herein along with explanatory comments.

(RX 1, pp. 1–3)

Essentially, the validity of respondents' cost study turns on the question whether in selling to regular dealers respondents' employees usually perform certain significant functions which ordinarily they are not called upon to perform for merchandising distributors. On this subject the cost study states:

While sales and deliveries are made directly to the individual outlets of the merchandising distributors the same as to the regular dealers, additional sundry functions performed by the District Managers (salesmen), and to some extent by Zone Managers and Branch Managers, in serving dealers are not required in serving merchandising distributors.

This may be best illustrated by a brief outline of the work program of the District Managers (salesmen) in contacting dealers at their establishments. The functions of the District Managers include the following:

(1) Determining the standing and general reputation of the dealer in the community and his demonstrated merchandising ability in the local trade.

(2) Presentation and demonstration of products, product features and advantages, available and applicable merchandising plans and programs, and the general operating policies and practices of the zone as the "distributor" and the American Motors Corporation as the "manufacturer."

(3) Assisting the dealer in developing sales and merchandising plans applicable to the relative size (sales volume) of the dealership and the economic scale of the area he serves.

(4) Assisting the dealer in the training of retail salesmen through organized training programs or meetings on specific subjects.

(5) Soliciting orders for products in quantities and model assortments consistent with dealer's ability to merchandise and within the extent of his financial responsibility and ability to pay.

(6) Assisting dealer in securing wholesale financing (floor plans) when necessary, and retail financing (time-payment sales); also periodic inventory checks on floor-planned products.

As already stated, many of these functions are not required in serving the merchandising distributors who perform the same or similar services for themselves through their own sales organization. This, of course, accounts largely for the cost savings disclosed by our study and anlysis as shown herein.

(RX 1, pp. 5–6)

In detailing the time periods and sales areas selected for the study, Mr. Warmack stated:

The data set forth in this report represents the results of studies of costs of merchandising in the company's Atlanta, Cleveland, Dallas, Detroit, New Orleans, Pittsburgh, and Seattle Zones for the six-months' period, March 1, 1959, through August 31, 1959; and for the Atlanta, Detroit, and New Orleans Zones for the full fiscal year ending September 30, 1958.

In selecting the zones (geographic areas) covered in these studies, particularly the current studies in 1959, it was a primary requisite that the Detroit Zone be included for the reason that it serves Consumers Power Company. The same was true as to the New Orleans Zone which serves Alabama Power Company. Since Sterchi Brothers Company operates in the New Orleans and Atlanta Zones, the Atlanta Zone was included. The Cleveland and Pittsburgh Zones were included for the reason that the preliminary investigation of the Federal Trade Commission was centered in those areas. For the purposes of rounding out a reasonable representative cost coverage of the company's merchandising activities, the Dallas and Seattle Zones were also included in the studies.

(RX 1, pp. 6–7)

It will be observed that in the foregoing no reference is made to B. F. Goodrich Company. This doubtless is because this company operates in all of respondents' 19 sales zones.

The actual geographic areas embraced within the 7 zones selected include—

* * * all or most of the states of Alabama, Florida, Georgia, Louisiana, Michigan, Mississippi, Ohio, Oregon, Tennessee, Texas, Virginia, and Washington. In addition it includes 22 counties in western Pennsylvania, 16 in West Virginia, 10 in northern Indiana, 10 in western Idaho, 2 in northern California, and 1 county in western Montana.

(RX 1, p. 7)

As already indicated, actual time records were kept covering time expended by certain of respondents' executives and employees in contacting customers. In this connection the cost study states:

Differential costs on which price differences are based by the company, as previously indicated, largely represent compensations to individuals, expenses incurred in their duties, and other expenses properly assignable to their efforts. It was therefore necessary to establish information as to the time and effort expended by personnel engaged primarily in direct selling and related activities in the geographic zones.

In this connection, actual time records were kept and reported daily by Zone Managers, Branch Managers, and District Managers (salesmen) of time expended by them in making customer contacts over a period of 3 to 4 months, viz., the months of June, August, September, and a part of the month of July, 1959, for the 7 zones covered in the study. The time reporting was suspended briefly in the month of July for the reason that zone personnel were primarily engaged during the last half of the month in a program of introducing new 1960 Models. Hence, time records then would not have properly reflected general activities as a whole.

The same time-and-effort information was also obtained on the activities of Servicemen and their assistants. Likewise, information as to time and effort expended in connection with credits and collections was compiled. These statistical data were then assembled and used to separate and allocate the cost and expense of the respective individuals for the six-months' period, March 1 to August 31, 1959. They were also used as a basis for separating and allocating the same classes of costs and expenses for the full fiscal year ending September 30, 1958.

(RX 1, pp. 7–8)

The various items or factors accounting for the cost differentials are summarized in the cost study as follows:

Cost Included in Analysis

Differential cost information developed and presented in this report principally represents the cost and expense of direct selling in the field, viz., salaries, bonuses, added compensation (commissions) earned under the company's incentive compensation plan, and related expenses. In addition it includes compensation and expense of servicemen, as well as credits and collection expense, bad debt expense, and a part of the office expense (mostly stenographic) in the 7 zones covered in the studies.

Except for the bad debt expense, differential costs have been separated and allocated between groups of customers on the basis of time and effort expended by individuals in accordance with the statistical time study information previously described herein.

Bad Debt Expense (Losses) sustained over the 3-year period ending September 30, 1959, has been tabulated for the 7 geographical zones covered in the study and analysis. In applying this class of expense, an average amount of loss actually sustained per dollar of sales in the past 3 years is assigned separately to each zone.

(RX 1, pp. 8–9)

Mr. Warmack's testimony in support of the cost study was given at a hearing held on May 3, 1960 (Tr. 15-39). Cross-examination was deferred in order that complaint counsel might have an opportunity to examine the cost study and the underlying data in connection with it. Unfortunately, Mr. Warmack died before the next hearing, which was held on November 29, 1960. Complaint counsel, however, made no point of their inability to cross-examine Mr. Warmack, but proceeded with their case in rebuttal (Tr. 43–45).

Complaint counsel's principal witness in opposition to the cost study was Mr. William S. Opdyke of the Commission's accounting staff. Mr. Opdyke's testimony was devoted almost entirely to pointing out instances of "miscoding" in respondents' time study; that is, instances where on a salesman's report a dealer would be listed as a regular dealer, when in fact he was a merchandising distributor outlet, and vice versa.

Actually, there were relatively few instances of such miscodings. The retail dealer contact reports sent in by respondents' salesmen and executives numbered some 4,700, and as there usually were three or four retailers listed in each report this means that during the fourteen weeks of the time study there were at least 14,000 contacts with retailers (Tr. 806–812; RX 7). Respondents place the number of miscodings at 27. This figure is challenged by complaint counsel, but in any event the number is negligible when compared with the number of contacts.

More importantly, however, calculations as to the effect of the miscodings upon the results of the cost study were made by Mr. Joseph Warmack, son of Mr. William J. Warmack. Mr. Joseph Warmack is also an accountant and assisted his father in the preparation of the cost study. Giving full effect to the miscodings, they reduce the cost differentials by only negligible amounts, a few one-hundredths of 1 percent (Tr. 774-805; 871-889; RXs 4A-C, 5A-B, 6A-B, 11A-C, 12A-C, 13A-B).

An objection to the cost study particularly urged by complaint counsel is that the entire study and Mr. William J. Warmack's testimony in support of it represent nothing more than hearsay. It is argued that Mr. Warmack had no personal knowledge of the facts underlying the study and particularly the classification of customers, and that respondents failed to produce any witness who did have such knowledge.

This contention must be rejected for two reasons. In the first place, the cost study was prepared largely from respondents' books and records kept in the regular course of business.

Aside from this, however, there is substantial testimony from one of respondents' executives in support of the study. The executive in charge of the preparation of the study was Mr. James W. Keuping, who was respondents' manager of sales operations. He was present during the earlier hearings, but in 1961 became seriously ill and at the later hearings could not be used as a witness. Because of his ill health he resigned his position in 1961 and was succeeded by Mr. M. P. Wilson.

Mr. Wilson did testify during the later hearings, being called by both sides. He has long been connected with respondents in various capacities and is familiar with respondents' operations, particularly the sales operations. His testimony supports that of Mr. William J. Warmack, especially on the vital point of classification of customers and the factors accounting for the classification (Tr. 523–597; 706–716).

There is, in fact, no substantial evidence in opposition to the cost study. True, Mr. Opdyke did express the opinion that the validity of the study was "very questionable" (Tr. 267–277). But this opinion was based primarily upon a large number of documents which had previously been rejected as evidence (Tr. 190–210). There is no question as to Mr. Opdyke's competency as an accountant, but the documents which largely formed the basis for the opinion having been excluded, it necessarily follows that the opinion itself must be disregarded as being without probative value.

In this connection, it should be noted that subsequently objections to almost identical opinions by Mr. Opdyke were sustained by the hearing examiner upon the ground stated, that the documents forming the basis for the opinions had been excluded (Tr. 267–277).

Commission counsel also point out that the cost study is "post complaint"; that is, that the study was prepared after the issuance of the complaint and for use in this proceeding. But that is no valid reason for rejecting or seriously discounting the study. If it were, defense of a Robinson-Patman Act case on the ground of cost justification would, as a practical matter, almost always be impossible because usually it is not until the complaint issues that a respondent knows that his pricing practices are being challenged.

It is further urged by complaint counsel that the cost study is invalid because the compensation of respondents' district managers (salesmen), which is the principal factor in the cost differentials, is, in counsel's view, solely on a commission basis, the commission

being based upon the amount of the district manager's sales. Counsel's position is that since the salesmen work on commission based upon the amount of their sales, there is no proper basis for a cost differential premised upon the difference in the amount of time devoted by the salesmen to regular dealers as contrasted to that which they devote to merchandising distributors.

Actually, the plan of compensation appears to be a base salary plus commission plan (CXs 522A–C; 524A–B). If, however, the entire compensation were based upon commission, this, in the examiner's opinion, would offer no reason for excluding allocation of the salesmen's compensation from the cost study. This is because, first, the district managers (salesmen) are employed by respondents for their full time, and, second, their compensation covers not only their work in actually making sales but in performing the other functions detailed above, all of which contribute to sales, either directly or indirectly.

In summary, we have here a case in which the price differential is relatively small—3.5 percent—which is much smaller than the differentials which have usually been involved in other cases before the Commission. We have a cost study prepared by a very competent accountant with broad background and experience in Robinson-Patman Act cases. The classification of customers appears logical and reasonable and is supported by substantial evidence. Unquestionably there are substantial differences in the cost to respondents of serving the two groups. While there are discrepancies in the cost study, they are of a minor nature and do not materially affect the results reached by the study. The hearing examiner sees no reason to question the integrity of the cost study or its essential accuracy.

Cost justification, of course, is an affirmative defense and the burden of establishing the defense rests upon the party who offers it. But this burden should not be made excessive or unreasonable. Otherwise, the practical effect is to nullify the defense.

It is concluded that here the burden has been sustained.

ORDER

It is therefore ordered, That the complaint be, and it hereby is, dismissed.

OPINION OF THE COMMISSION

JULY 19, 1965

BY JONES, *Commissioner:*

The complaint in this matter charges respondents with violating Section 2(a) of the Clayton Act, as amended, in connection with sales to retail dealer-purchasers, some of whom were charged lower prices for electric appliances than the prices charged other competing purchasers of such products of like grade and quality.

After hearings, the hearing examiner filed an initial decision September 3, 1964, in which he found that a *prima facie* case of violation had been made out. He concluded, however, that respondents had successfully established a cost justification defense as provided by the Act, and he entered an order dismissing the complaint. Both sides have appealed. Counsel supporting the complaint appeals from the examiner's finding that the price differences were cost justified. Respondents appeal from the examiner's finding that the price discrimination resulted in probable injury to competition.

I. The Facts

Respondents are American Motors Corporation, a Maryland corporation, and its wholly-owned subsidiary, American Motors Sales Corporation, a Delaware corporation. American Motors Corporation is a major manufacturer and distributor in the United States of electric appliances, including refrigerators, ranges, home freezers, laundry equipment and other appliance items which it sells under the trade names "Kelvinator" and "Leonard." American Motors Corporation sells its appliances directly to retailers through its subsidiary American Motors Sales Corporation and also to "independent distributors" who in turn resell to retailers. The sales involved in the instant discriminations are those made to retailers through American Motors Sales Corporation. Hereafter the term "respondent" will be used in this opinion to refer to both of these companies unless indicated otherwise.

The retailers making the purchases involved in this proceeding are classified by respondent into two categories: merchandising distributors and regular dealers. While the franchise agreements entered into by respondent with its merchandising distributors and regular dealers are identical in their provisions and do not on their face disclose any special classification or price concessions, in fact respondent has sold its goods to its merchandising distributors at uniformly lower prices than those which it charges its regular dealers.

So far as the record indicates, there are four retailer customers whom respondent has classified as merchandising distributors: B. F. Goodrich Company, Alabama Power Company, Consumers Power Company and Sterchi Brothers Stores, Inc. The record is silent on the origin of and reasons for respondent's practice of granting discounts to this category of retailer. The record shows only that the practice dates back at least as early as 1939, when such a discount was granted to Consumers Power Company, a multiple-outlet merchandising utility company located in Michigan. In October 1949, B. F. Goodrich and its automotive accessory outlets located throughout the United States were classified as a merchandising distributor and received the lower prices. Sterchi Brothers, a retail furniture chain with stores located principally in Tennessee, Georgia and Alabama, was franchised as a merchandising distributor by respondent at least since 1954. No information exists respecting the date when Alabama Power Company was franchised as a merchandising distributor. Alabama Power, is also a multiple-outlet merchandising utility company located in Alabama and Georgia. Mr. Warmack, respondent's accountant, testified that respondent's merchandising distributors usually carried respondent's line exclusively or along with the line of one other competitor.

The record discloses that in 1964 respondent had about 6,000 direct purchasing retailers whom respondent referred to as regular dealers. These regular dealers fall roughly into two categories: department stores with appliance divisions, and appliance stores or stores with appliance outlets. Included among these regular dealers are furniture stores, automotive accessory stores, merchandising utility companies, appliance stores, hardware stores, plumbing and heating stores, jewelry and music stores, and farm implement and country stores. Some of these regular dealers have multiple outlets. Some of the outlets of these regular dealers are as large as those of the merchandising distributors, and some are smaller. Some of respondent's regular dealers are establishments doing several millions of dollars annually. Some of respondent's regular dealers also limited their appliance lines either to respondent's line exclusively or carried at most one other competitive line of appliances.

The parties stipulated the principal facts respecting the discriminations charged by the complaint to be illegal. In a substantial number of instances, retail outlets of regular dealers were in direct competition with one or more retail outlets of merchandising dis-

tributors in the resale of respondent's appliances. Price lists applicable to merchandising distributors consistently reflected lower prices on every product and model than those applicable to regular dealers, and the actual prices charged these two groups of customers reflected these price differentials. The differentials on refrigerators selling to regular dealers at prices ranging from $149.45 to $432.35 varied from about $5 to $11. Differentials on freezers ranged from approximately $8 to $11 on net prices of $239.65 to $349.40 charged to regular dealers. Ranges priced from $118.40 to $318.25 for merchandising distributors and from $122.35 to $329.40 for regular dealers reflected price differentials between the favored and non-favored customer classes varying from approximately $4 to $11. The price differentials on respondent's automatic washers, electric dryers and wringer washers, in the price category of about $100 to $200, ranged from approximately $3 to $9.

In the 6-month period of March through August 1959 covered by respondent's cost study, the discounts received by respondent's merchandising distributors within a 7-zone trade area on sales totaling $2,269,874 were as follows:

B. F. Goodrich	$58,768
Consumers Power Company	7,807
Alabama Power Company	9,321
Sterchi Brothers Stores, Inc.	8,032
	$83,928

II. Injury

On the issue of competitive injury, the parties stipulated as follows:

(13) All parties to this stipulation further agree that competent and experienced witnesses actively engaged in retailing electric appliances sold to them by respondent corporations, and who are in competition with the retail outlets of the merchandising distributors referred to above, if called upon to testify in this matter would testify substantially as follows:

(a) Twenty-four out of twenty-six of such witnesses would testify that the price differentials referred to in paragraph (12) of this stipulation in many instances exceeded the amount of net profit received by them on sales of such items during the years specified;

(b) That the witnesses have lost sales of electric appliances of like kind to competitors where the amounts of the differentials in the lower retail prices charged by such competitors were equal to the differentials referred to in paragraph (12) of this stipulation.

The hearing examiner found that paragraph 13(a) of the Stipulation of Facts made out a *prima facie* case of competitive injury. He rejected subparagraph (b) of this paragraph as without pro-

bative value on the issue of competitive injury on the ground that it did not specifically indicate the number or frequency of such lost sales, and that mere loss of an occasional sale is not sufficient to meet the statutory criterion of substantial competitive injury.

Respondent contests the hearing examiner's finding of competitive injury primarily on the ground that the wording of the stipulation is too ambiguous and vague and that the stipulated facts are too inadequate to support a finding of competitive injury. We disagree that the stipulation is either ambiguous or vague.

Stipulations are favored in law as a means of eliminating time-consuming proof. They should be construed in accordance with their express provisions, as well as reasonable inferences to be drawn therefrom, so as to give effect to the intention of the parties. *United States ex rel. Hoehn* v. *Shaughnessy*, 175 F. 2d 116 (2d Cir. 1949), *cert. denied*, 338 U.S. 872 (1949); *Purolator Products, Inc.*, Docket 7850 (April 3, 1964) [65 F.T.C. 8]; *Burstein* v. *United States*, 232 F. 2d 19 (8th Cir. 1956).

In this case the parties expressly stipulated that "the hearing examiner and the Commission may consider all matters stipulated herein, together with such reasonable inferences which may be drawn therefrom in arriving at a decision in this proceeding."

Moreover, it is clear—and respondent admitted—that it was the intention of the parties to stipulate the essenial facts on the issue of probable injury.

Viewing the stipulation in the light of these established principles of construction, we do not agree with respondent that the facts stipulated fail to establish a *prima facie* case of competitive injury.

Respondent first contends that the price differentials in question, amounting to approximately 3.5% to 4.5%, are *de minimis*, that differentials this small have never supported findings of competitive injury in previous cases before the Commission, and that they do not show injury here.

We do not agree that the discriminations in price here were minimal and incapable of injuring competition. These discriminations were not periodic or occasional but, as the stipulation demonstrates, were in fact regular, established, continuing differentials made pursuant to a dual pricing system which favored one group of respondent's customers classified as merchandising distributors as against another group classified as regular dealers. The stipulation establishes that 24 out of 26 retailer witnesses would testify that the 3.5% and 4.5% differentials exceeded in many instances

their net profit on sales of such items and that they lost sales of like products to competitors whose lower prices were equivalent to these 3.5–4.5% differentials.

Respondent seeks to rebut the impact of this stipulation by arguing that the term "net profit" is meaningless since the stipulation fails to make clear whether "net profit" before or after taxes was intended and whether these net profits refer to particular sales or to the entire business of these witnesses. As the term "net profits" is used in the stipulation, it seems to us that the parties are simply stating that the differentials involved in this case exceeded the margins of profit on which many retail stores operated in their sales of such items.

Respondent also argues—and the hearing examiner agreed—that the parties' stipulation respecting the loss of sales by nonfavored customers to favored competitors was without probative effect on the issue of injury. We do not agree. We believe that this argument that the stipulated testimony respecting lost sales is deficient because there is no evidence that these lost sales were *not* sacrifice or year-end sales, or that they were substantial in number, or that they were attributable to the discounts granted the merchandising distributors, is misplaced. Moreover, construing the term to mean only sacrifice or year-end sales flies in the face of the import of the subparagraph as a whole which clearly was intended to say and, in our view, clearly says that retailers lost sales of like appliances to competitors charging lower prices where the amounts of the lower prices were equal to the amounts of respondent's price discriminations.

We believe that the stipulated testimony respecting loss of sales is directly probative of the issue of competitive injury. It has a direct bearing on the substantiality and the competitive significance of the discounts, since it establishes that the discriminatory price differentials were large enough to lose sales to favored customers. A potential or likelihood of loss of sales is clearly relevant to the issue of whether these discounts could probably injure competition. It is not essential that actual lost sales be shown.

In this connection, it is obvious that it would be almost impossible for a nonfavored customer to demonstrate conclusively that he had in fact lost a sale to a favored competitor as a result of the more favorable price received by that competitor from a respondent. Customers are not likely to report to a store what factors led them to purchase from that store's competitors. Indeed, respondent demonstrates its awareness of the difficulty of proof on loss of sales

by also arguing that a favored customer may not choose to reflect the price differential in his retail prices. He may reflect it in his advertising budget, in incentive compensation to his salesmen, in larger profits or in extending better credit terms to his customers. The list is limitless. Complaint counsel's burden is not and could not be to demonstrate that particular sales were lost to favored dealers as a result of a lower price charged by favored competitors. Complaint counsel's burden is only to demonstrate that the price discriminations were of such a nature that in the industry involved, competitively structured as it is, the price discrimination may have the effect of harming competition.

The cases are clear that the size of the differential alone is not the determinative factor on the issue of competitive injury. In the instant case, there is a clear, deliberate pattern of favoring four individual companies out of respondent's 6,000 regular dealers. The discrimination was regular and continuous. The amount of the discrimination was at least equal to the net profits earned on sales of these products by competitors of the preferred dealers. Sales of like items have been lost by these nonfavored competitors to favored dealers charging lower prices. On these facts we hold that the lower prices charged the favored dealers had the capacity to injure competition and gave rise to the probability that they would do so. We believe that in the instant case complaint counsel has carried its burden and that the examiner was correct in so holding, but that he erred in rejecting subparagraph (b) of the stipulation which we hold was probative of the issue of competitive injury. We hold that complaint counsel have made out their *prima facie* case of violation of Section 2(a) of the Clayton Act, as amended.

III. Cost Justification

Respondent's main defense to the charges in this complaint is that the price differentials shown have been cost justified under the proviso in Section 2(a) of the amended Clayton Act.[1] In presenting its evidence in support of this defense, respondent first made a study of its selling costs which in its view were most directly attributable to its sales to its merchandising distributors and to its direct retail purchasers. These expenses included sales personnel salaries, bonuses, commissions and related expenses, travel time,

[1] The cost justification proviso in Section 2(a) reads as follows: "Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

automobile depreciation and insurance, compensation and expense of servicemen, credit and collection expense, bad debt expense, and a part of respondent's office expense.

These selling costs were segregated for 1958 and for the 6-month period March through August 1959 in a 7-zone area covering basically the 12 States in which the outlets of respondent's merchandising distributors were principally located.[2]

Respondent's sales of household appliances in this 7-zone area for the 6-month period of 1959 totaled $10,409,096, representing about 40% of respondent's total sales through American Motors Sales Corporation. Sales to merchandising distributors in this area represented about 20% of this total.

Except for the bad debt expense, for which an average amount of loss per dollar of sales was assigned separately to each zone, respondent allocated its selling expenses between its favored and nonfavored customers for this period in these zones on the basis of the actual time spent by its personnel on sales to these customers. To this end, respondent conducted an actual study of the time spent by its sales personnel with each of its merchandising distributors and with all of the 6,000 nonfavored retailers considered as a single group.

According to respondent's cost study, savings were incurred by it in selling to its merchandising distributors as compared with its regular dealers which exceeded the amount of the price differentials accorded these favored dealers. The cost savings reflected by respondent's study compared to the approximate price differentials were as follows:

	Cost Savings on Sales to Merchandising Distributors		*Approximate Price Differentials to Merchandising Distributors*
	1958	*1959*	*1959*
Alabama Power Company			
New Orleans Zone	6.44%	5.68%	3.5%–4.5%
Consumers Power Company			
Detroit Zone	7.99%	3.95%	3.5%–4.5%
B. F. Goodrich Company			
Three Zones (1958)	7.02%		
Seven Zones (1959)		5.94%	3.5%–4.5%
Sterchi Bros. Company			
Two Zones	7.05%	6.04%	3.5%–4.5%

(Respondents' Exhibit 1, page 2.)

[2] Alabama, Florida, Georgia, Louisiana, Michigan, Mississippi, Ohio, Oregon, Tennessee, Texas, Virginia and Washington, and certain counties in Pennsylvania, West Virginia, Indiana, Idaho, California and Montana.

The hearing examiner found that the discounts granted to the merchandising distributors were justified by the savings shown in respondent's cost study. We disagree for the reason that we believe that respondent failed in its threshold burden to establish a reasonable basis for the classification of its customers on which it rested its cost justification defense. Accordingly, the results of respondent's cost study become meaningless as a guide to whether respondent's price differentials were or were not cost justified.

In order to arrive at a figure by which to allocate its various sales expenses between its favored and nonfavored customers, respondent treated all of its nonfavored retailers as a single group and averaged the total time spent with these 6,000 customers as a whole in order to compare that figure with the time spent on each of its favored customers.

The validity of respondent's study stands or falls, therefore, on the correctness of its use of its average time spent figure. If respondent fails to substantiate the homogeneity and identity of its 6,000 nonfavored customers sufficient to warrant their being treated as a single group, then its entire cost study fails at the threshold.

Respondent makes no claim that there is any significant difference between its two customer classifications based on their relative size, number of outlets, competitive lines handled or manner of delivery. Nor could such claims be made since the record is clear that its nonfavored retailers include multiple-outlet dealers, department stores with multimillion dollar sales volume equal to or greater in size than its merchandising distributors, dealers who receive delivery in the same manner as the merchandising distributors, dealers handling its lines exclusively or semi-exclusively, and dealers whose outlets are both larger and smaller than the outlets of the merchandising distributors.

Respondent maintains, however, that there are basic differences in the functions which its salesmen perform for its merchandising distributors and for its regular dealers which justify their classification into these two separate groups. Respondent also argues that these differences account for the differences in the time, and therefore in the cost, of servicing these two groups of customers. Thus, respondent lists the following six major functions performed by its salesmen in contacting dealers which it claims are usually performed for regular dealers and not always performed for merchandising distributors:

(1) Determining the standing and general reputation of the

dealer in the community and his demonstrated merchandising ability in the local trade.

(2) Presentation and demonstration of products, product features and advantages, available and applicable merchandising plans and programs, and the general operating policies and practices of the zone as the "distributor" and the American Motors Corporation as the "manufacturer."

(3) Assisting the dealer in developing sales and merchandising plans applicable to the relative size (sales volume) of the dealership and the economic scale of the area he serves.

(4) Assisting the dealer in the training of retail salesmen through organized training programs or meetings on specific subjects.

(5) Soliciting orders for products in quantities and model assortments consistent with dealer's ability to merchandise and within the extent of his financial responsibility and ability to pay.

(6) Assisting dealer in securing wholesale financing (floor plans) when necessary, and retail financing (time-payment sales); also periodic inventory checks on floor-planned products.

The record raises serious doubt whether these enumerated functions in fact constituted differentiating factors between respondent's favored and nonfavored customers, *i.e.*, whether there was any real difference between the two groups on these points.

Respondent called as one of its principal witnesses its own Manager of Sales Operations, M. P. Wilson, to testify on the differing functions which respondent's sales personnel performed for its merchandising distributors compared with its regular dealers.

When Mr. Wilson was first asked a general question as to what were the differences between these two classes of customers, he gave a somewhat different description from the enumerated list of what he believed these differences to be. "No. 1," according to Mr. Wilson, was that merchandising distributors consist of several retail outlets organized into headquarters, regional and branch or zone offices. Mr. Wilson then continued with respect to the headquarters, regional and branch staff of the merchandising distributors:

The staff of these individual establishments are * * * qualified appliance personnel in the merchandising and distribution of appliances. They perform in the areas of advertising and sales promotion activities in the areas of sales, training, and devote considerable attention to their outlets. They will further purchase in quantities or at single times from headquarters offices special products which are offered to all dealers, thereby not necessitating indivdual calls on outlets. They perform further central billing functions, thereby not making it necessary for the field personnel * * * to spend time

and effort in the collection of receivables from the indivdual outlets. I think *that in a broad general way sums up the basic differences between a merchandising distributor as against any other regular type dealer* * * * (Emphasis added.)

Throughout his testimony, Mr. Wilson, scrupulously refrained from ever testifying affirmatively or even leaving the impression that respondent's sales personnel never in fact performed all of these functions for its merchandising distributors. When asked specifically about each of these functions, Mr. Wilson generally couched his response in terms of the fact that merchandising distributors had personnel qualified to perform these functions for their own outlets whereas regular dealers generally did not. He conceded that from time to time some of the functions were performed by its salesmen for merchandising distributors.

The cost study itself indicates that on sales promotion for model change-overs (Function 2), merchandising distributors did in fact receive such services. It was for this reason that respondent interrupted the cost study during July of 1959. This was a period of model change-over and respondent stated that the period was omitted from the time study because it was believed that time records for that period "would not have properly reflected general activities as a whole."

Complaint counsel proffered a series of documents consisting of respondent's salesmen's daily contact reports prepared in the regular course of their business prior to the period covered by the cost study to demonstrate that in fact respondent's salesmen calling on merchandising distributors performed at one time or another each of the enumerated functions which respondent now claims were usually performed by its merchandising distributors for themselves. The hearing examiner rejected the documents because they contained no indication of the amount of time spent by the salesmen with these dealers and therefore had no probative value on the only issue which he believed was involved in the cost study, namely, how much time did the salesmen spend with merchandising distributors as compared with regular dealers.

We believe the documents were relevant to the validity of that portion of respondent's cost study which was premised on the differing functions performed for the two groups of retailers, and that the examiner erred in rejecting them. Nevertheless, the record is sufficiently adequate on this point to enable us to decide this issue without the proffered documents. The record is clear that the enumerated sales functions were often not performed by mer-

chandising distributors for themselves and that respondent's sales personnel were often not relieved of the need, and the time required, to perform these functions for merchandising distributors.

We believe that respondent also failed to carry its burden of demonstrating that these sales functions (the points that supposedly distinguished the two groups) were substantially performed for all or most of respondent's 6,000 nonfavored dealers, and that therefore it was proper for respondent to average the time spent with these nonfavored dealers.

There is no evidence in the record supporting respondent's treatment of its 6,000 retail dealers as a single group. Respondent offered only the testimony of its Manager of Sales Operations, Mr. Wilson. However, Mr. Wilson did not in fact testify that each of these functions or even a majority of them were performed for all or even most of respondent's 6,000 nonfavored dealers. He testified only that these selling functions or services considered in the cost study were generally required for all dealers.

The record shows that some dealers were given more attention, and thus more of the services under consideration, than others. For instance, Mr. Wilson's testimony indicates that there was no fixed rule as to the number of times a dealer will be contacted, and that in fact the number and length of such contacts will be determined by a variety of factors, one of which was their geographic location. At another place in his testimony, Mr. Wilson in effect admitted that some of the regular dealers can and do perform some of the functions involved because he testified that only "[g]enerally speaking" do the multi-outlet regular dealers not have the staff to perform them.

The evidence shows that respondent's 6,000 nonfavored regular dealers included department stores with special appliance departments which undoubtedly were as well staffed as the merchandising distributors with appliance personnel "qualified in the merchandising and distribution of appliances." It cannot be assumed without some showing by respondent that such stores in fact required respondent's assistance in such things as furnishing advertising and sales promotion and in training personnel for their appliance departments, or in determining the "standing and general reputation of the dealer in the community," "[a]ssisting the dealer in developing sales and merchandising plans applicable to the relative size (sales volume) of the dealership," "[a]ssisting the dealer in the training of retail salesmen" and like sales activities (see enumerated functions quoted above).

Many of respondent's regular dealers had multiple outlets, and respondent failed to offer any testimony or other evidence that such dealers were significantly different in any of the points on which the cost savings claim is based from respondent's favored multiple-outlet dealers. On the contrary, it is probable that these large multi-outlet regular dealers could and did perform many of the enumerated functions for themselves and that respondent's sales personnel devoted no more time to these large regular dealers than they did to the merchandising distributors. For instance, there is nothing in the record to indicate that these multiple-outlet nonfavored dealers did not also perform central billing functions for their outlets, like merchandising distributors, thus obviating the need for respondent's salesmen to collect their accounts receivable from each of its individual outlets.

It is also significant that respondent in its company policy apparently did not regard merchandising distributors as a separate class except for pricing purposes. Its franchise agreements with the two groups of purchasers are identical in form and substantive provisions. Those executed by merchandising distributors nowhere indicate that such purchasers will be treated differently on billing, sales training or promotions, or that these purchasers are in any way obligated to perform these and other functions for themselves. Moreover, respondent did not apparently make its discount policy known to its customers generally. In fact, the regular dealers did not have the option to avail themselves of the merchandising distributors' discount.

It is, of course, the respondent's burden to demonstrate that its 6,000 retail dealers had substantial identity and homogeneity to justify their being treated as a single group for the purpose of averaging the time spent by respondent's sales personnel with them. This respondent has failed to do.

Respondent's cost study purportedly justifying the discounts granted to its merchandising distributors rested entirely on the manner in which respondent allocated its sales expenses between its favored and nonfavored groups. Respondent's time study, based on its treatment of its nonfavored customers as a single group, showed that respondent's sales personnel spent approximately 5% of their time on selling to merchandising distributors and 95% of their time on selling to all other of respondent's direct purchasing retailers. However, this 95% figure cannot be sustained since by averaging the time spent by its personnel on all nonfavored customers treated as a group, respondent effectively eliminated for

separate consideration the cost of selling to individual members of the nonfavored group which may have in fact required the same or even less time to service than its merchandising distributors.

The possibility, indeed the probability, that respondent's cost of selling to at least some of its nonfavored dealers may have equaled its selling costs to its favored dealers leaves respondent's burden of justifying its price discriminations against its nonfavored customers undischarged. According to respondent, contact time was in effect the crux of the alleged savings underlying its lower prices. Yet respondent made no effort by sampling or by any other technique to determine whether the time spent with its regular dealers was in fact similar for each. It sought instead to attempt to lay this foundation by testimony that the sales functions performed for this group were the same. In our view, this evidence failed to substantiate the similarity of regular dealers on the issue of time spent.

The Commission and the Courts, in permitting respondents to average their costs, insist that such averaging can only be done where the members of the group whose costs are being averaged have a sufficient homogeneity so that averaging the cost of dealing with them as a whole will fairly represent the cost of dealing with each member in the group. *Standard Oil*, 41 F.T.C. 263, 276–278 (1945), reversed for other reasons, 355 U.S. 396 (1958). The Supreme Court in *United States* v. *Borden Co.*, 370 U.S. 460 (1962), expressed the test as follows:

> A balance is struck by the use of classes for cost justification which are composed of members of such selfsameness as to make the averaging of the cost of dealing with the group a valid and reasonable indicium of the cost of dealing with any specific group member. High on the list of "musts" in the use of the average cost of customer groupings under the proviso of § 2(a) is a close resemblance of the individual members of each group on the essential point or points which determine the costs considered (footnote omitted).

In the instant case, we hold that respondent has failed to carry its burden that the 6,000 retailers, which it treated as a single group for purposes of comparing its costs of selling to its favored dealers with those of selling to its nonfavored dealers, have the requisite selfsameness on the cost determining points, the enumerated sales functions and resultant time spent in servicing regular dealers which respondent claims serves to constitute them a single group and to differentiate them as a group from the merchandising distributors. In short, respondent has failed to carry its burden