

Syllabus

1. Discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who competes with the purchaser paying the higher price;

2. 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 furnished by or through such customer, in connection with the offering for sale, sale or distribution of any of the products in the Sealtest product line, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products with the favored customer.

It is further ordered, That the initial decision of the hearing examiner, as modified, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent, National Dairy Products Corporation, 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 the order to cease and desist set forth herein.

Commissioner Elman dissented and has filed a dissenting opinion. Commissioners MacIntyre and Jones did not participate. Commissioner Reilly concurred and has filed a concurring opinion.

IN THE MATTER OF

TRI-VALLEY PACKING ASSOCIATION

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

*Dockets 7225 and 7496. Complaints, Aug. 6, 1958, and May 15, 1959—
Decision, July 28, 1966*

Order modifying, pursuant to a decision and remand of the case by the U.S. Court of Appeals, Ninth Circuit, dated March 18, 1964, 329 F. 2d 694 (7 S.&D. 859), an order of May 10, 1962, 60 F.T.C. 1134, which prohibited a San Francisco, Calif., canner of fruits and vegetables to cease discrim-

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inating in price and paying promotional allowances among its competing customers, by adducing additional evidence in support of the charges against respondent association.

Mr. Jerome Garfinkel for the Commission.

Mr. Ricardo J. Hecht, Mr. Francis Kerner, San Francisco, Calif., and Mr. Melville Ehrlich, Washington, D.C., for respondent.

INITIAL DECISION ON REMAND BY EDGAR A. BUTTLE, HEARING EXAMINER

APRIL 15, 1965

The above-entitled matter¹ was remanded for further proceedings by the United States Court of Appeals (9th Circuit) in connection with certain Clayton Act section 2(a) and (d) issues hereinafter discussed. Incident thereto, the Commission's cease and desist order entered on May 10, 1962 [60 F.T.C. 1134], was set aside by the court's order of remand dated March 18, 1964 [7 S. & D. 859]. In remanding the case the court invites the attention of the Commission to certain omissions of evidence which it believes, if available, could better resolve some of the issues. In setting aside the Commission findings and conclusions as to the section 2(d) charges, and order as to both section 2(a) and (d) charges the court seems to imply that a completely revised reissuance thereof might be appropriate based upon the evidence adduced initially in relation to the additional evidence adduced upon remand in accordance with the court's suggestions.² The findings, therefore, hereinafter cited, relate to all of the evidence in the case, including the evidence adduced before and after remand to the Commission, and by the Commission to the hearing examiner, within the meaning of the 9th Circuit disposition consistent with the law of the case thereby established.

With regard to the section 2(a) charges, the court appears to be of the view that there may not be anything in the record to in-

¹ Respondent, Tri-Valley Packing Association, incorrectly named in the complaint in Docket No. 7225 as Tri-Valley Packing Association, Inc.

The name of respondent has been changed on June 1, 1963, from Tri-Valley Packing Association to Tri-Valley Growers. It was stipulated that the complaint be amended to incorporate this change (Tr. 1297-1298).

By stipulation between the parties, Dockets 7225 and 7496 were consolidated under Docket 7225 (Tr. 1107-1108).

² Since the section 2(a) order has been set aside, more complete findings consistent with the law of the case enunciated by the court on the issue of relief as well as findings re deficiencies in evidence enumerated by the court are essential. Furthermore, there is a relationship between the new findings on matters resolved by the court and evidentiary deficiencies cited by the court. See Conclusions for full discussion.

dicates that there was or is any obstacle which prevented or prevents nonfavored purchasers from buying Tri-Valley products in the so-called "California Street" market in San Francisco where they would have been obtained at the same low prices as offered to favored purchasers in that market. As pointed out by the court, disposition of this question is dependent upon the facts pertaining to the availability to nonfavored purchasers of the low prices for Tri-Valley products on the "California Street" market and the application of the law to these facts. In other words, are the lower prices discriminatory if available on "California Street" to all competitors although not elsewhere in the same market area.

The court also states counsel for the Commission took the position before the court that a section 2(b) defense contemplated a good faith meeting of competition to each individual competitive demand rather than a good faith meeting of competition in response to a pricing system such as that represented by the "California Street" market. Furthermore, the court seems to be of the view that the Commission should ascertain by evidence whether or not Tri-Valley was engaged in the "California Street" market in meeting "an equally low price of a competitor" within the meaning of section 2(b). If the evidence indicates that Tri-Valley is not so engaged in meeting "California Street" prices, no further consideration need be given to the section 2(b) defense. On the other hand, if the evidence discloses to the contrary, then the Commission must decide as a matter of law whether a section 2(b) response may be directed to a pricing system as well as an individual competitive demand.

As for the section 2(d) issue, the court points out as follows at page 22 [7 S. & D. 859, 878] of its decision:

In our opinion, where a direct customer of a seller, operating solely on a particular functional level such as wholesaling or retailing, receives a promotional allowance not made available to another direct customer operating solely on the same functional level, it is unnecessary to trace the seller's goods of like grade and quality to the shelves of competing outlets of the two in order to establish competition. It is sufficient in that case to prove that one has outlets in such geographical proximity to those of the other as to establish that the two customers are in general competition, and that the two customers purchased goods of the same grade and quality from the seller within approximately the same period of time. Actual competition in the sale of the seller's goods may then be inferred even though one or both of the customers have other outlets which are not in geographical proximity to outlets of the other customer.

Relative to the Boston area, the court suggests the need for evidence that Tri-Valley engaged in a course of direct dealing with the retail outlets of Central Grocers as indirect customers of Tri-Valley since Central Grocers are not in functional competition with wholesalers. It is pointed out by the court that the only way of showing a section 2(d) violation would be to treat Central Grocers' retail outlets as indirect customers of Tri-Valley, but that this may not be done in the absence of a showing that Tri-Valley engaged in a course of direct dealing with those retail outlets.

Relative to the Portland area, the Court of Appeals indicates as follows:

In the Portland area, Meyer, which received an allowance, is a retailer, and Hudson House, which did not receive a proportionally equal allowance, is principally a wholesaler, but may also be a retailer.³ No section 2(d) violation was shown as to the wholesale operation of Hudson House, because that operation was not in functional competition with Meyer, and it was not shown that the independent retailers served by Hudson House were "indirect" customers of Tri-Valley.⁴ No section 2(d) violation was shown as to the retail operation of Hudson House, if there was such an operation, because it was not shown that any Tri-Valley goods were purchased indirectly by those Piggly-Wiggly outlets, during the period in question. This could only have been shown by tracing Tri-Valley goods to the shelves of those stores by means of the best evidence available.

Although the hearing examiner has advised counsel for the complainant and counsel for the respondent that, for purposes of clarity and since the court of appeals has set aside the 2(d) findings and order of the Commission entirely, it is his intention to issue an entirely new initial decision, inclusive of new findings and a new order for the consideration of the Commission, respondent has elected to submit proposed findings which essentially relate only to incomplete evidentiary facts cited by the court in suggesting the adduction of additional evidence or record citations. Respondent's proposed findings are as follows:

1. Subsequent to March 18, 1964, an employee of respondent, without first consulting his superior or respondent's counsel, destroyed certain documents belonging to respondent, produced by

³ If Hudson House does any retailing, it is because of its ownership of several Piggly-Wiggly stores in the Portland area. Each of these is apparently a separate corporate entity and Tri-Valley contends that they are dealt with by Hudson House just as if they were independent retailers. [Footnote No. 22 in court decision.]

⁴ See *Klein v. Lionel Corp.*, 3 Cir., 237 F. 2d 13; *Rowe*, *supra*, §13.11, pp. 398-399; *contra Krug v. International Tel. & Tel. Corp.*, D.N.J., 142 F.Supp. 230. Examples of direct dealing sufficient to give application to the "indirect" customer concept, are to be found in *American News Co. v. Federal Comm'n.*, 2 Cir., 300 F. 2d 104; *Elizabeth Arden, Inc. v. Federal Trade Comm'n.*, 2 Cir., 156 F. 2d 132; *K. S. Corp. v. Chemstrand Corp.*, S.D.N.Y. 198 F. Supp. 310; *Champion Spark Plug Co.*, 50 F.T.C. 80, 44. [Footnote No. 21 in court decision.]

it for copying and inspection by representatives of the Commission, pursuant to order of the United States District Court. These documents were so inspected beginning on or about October 12, 1959. The court order did not require that these documents be thereafter preserved for any given period of time. The employee destroyed these documents acting under the mistaken belief that the decision of the Court of Appeals, announced on March 18, 1964, had put an end to the proceedings brought against respondent. There are no facts in evidence that would justify the finding that the destruction of said documents was "willful," "intentional," or with "fraudulent design," as those words are used in connection with the presumption relating to the application of the maxim of evidence, "omnia praesumuntur contra spoliatores."

2. There are no facts in evidence showing that there was or is any obstacle which prevented or prevents nonfavored buyers from purchasing respondent's products in the so-called "California Street" market in San Francisco, and there is no causal connection between respondent's discriminatory prices and the competitive injury that its nonfavored buyers may have suffered.

3. Respondent's lower invoice prices to its favored buyers were made *in good faith* to meet the equally low prices of its competitors in the "California Street" market.

4. In 1957 and 1958, respondent paid an allowance of ten (10) cents a case for each case of canned fruits purchased from respondent to Central Grocers of Boston, Massachusetts. Central Grocers operated solely at the wholesale level during this period of time. Respondent did not offer or make available this allowance on proportionally equal terms to any other customer in the Boston area. There is no evidence that respondent during approximately the same period of time sold any good of the same grade and quality as those it sold to Central Grocers to any customer who competed solely at the wholesale level with Central Grocers.

5. In September and October 1957, Meyer, a retailer in the Portland, Oregon area, instituted a coupon book program. Respondent contracted with Meyer to participate in this promotion and to pay \$350 as part of the cost of printing a page in the coupon book and agreed to redeem each such page at the rate of \$0.248. These payments or allowances were made in consideration of the promotion and purchase of large quantities of respondent's peaches packed under Meyer's label during said months of September and October. The only other retailer customer of respondent in that area at that time was Safeway. There is no evidence that respondent

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during approximately the same period of time sold any goods of the same grade and quality as those it sold to Meyer to Safeway.

6. There is no evidence that Central Grocers' retail outlets were indirect customers of respondent.

7. There is no evidence that Hudson House's retail outlets, including the Piggly-Wiggly outlets, were indirect customers of respondent.

It is obvious, however, that new findings must be rendered since the Court of Appeals points out that it is setting aside the Commission's order as to both the section 2(a) and 2(d)^{4a} issues, which order is necessarily premised upon findings which the court considers inadequate to support the order. Furthermore, it is obvious from the opinion of the court that the record may be augmented by additional evidence of discriminatory transactions within the scope of the complaint in order to adequately resolve the questions raised by the court. The rendition of supplemental findings only, because of the many questions raised by the court in its opinion, would only tend to confuse the issues and their disposition. However, the hearing examiner has not only considered the limited proposed findings presented by respondent's counsel incident to the remand, but the prior proposed findings originally submitted. Since the complaint counsel has submitted entirely new proposed findings relating to the evidence taken before, as well as after, remand, the hearing examiner has disregarded the prior proposed findings of complaint counsel.

The hearing examiner has carefully reviewed and considered the proposed findings of counsel in support of the complaint and counsel for respondent as heretofore indicated. Proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case the hearing examiner makes the following:

FINDINGS OF FACT

1. Respondent Tri-Valley Packing Association is a nonprofit, cooperative corporation organized and existing under the laws of the State of California, with its principal office and place of business located at 240 Battery Street, San Francisco, California.⁵

2. Respondent is now and has been engaged in the business of

^{4a} As to the 2(d) charges the court also set aside the findings and conclusions.

⁵ Admitted by answer. See also Tr. 14.

