IN THE MATTER OF

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., ET AL.

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

Docket 8866. Complaint, Oct. 8, 1971—Final Order, April 29, 1976

Order requiring a New York City operator of a large chain of retail grocery stores, among other things to cease knowingly inducing, accepting or receiving net prices below that of its competitors in the purchase of milk and other dairy products.

Appearances

For the Commission: *John J. Mathias, Edwin R. Soeffing,* and *Andrew G. Stone.*

For the respondents: *Denis McInerney, Raymond L. Falls, Jr., Thomas F. Curnin, Joseph P. Foley* and *Ira J. Dembrow, Cahill, Gordon, Sonnett, Reindel & Ohl,* New York City, for The Great Atlantic & Pacific Tea Company, Inc. *H. Blair White, Theodore N. Miller* and *Nathan P. Eimer, Sidley & Austin,* Chicago, Ill. and *Walter W. Kocher,* Columbus, Ohio, for Borden, Inc.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent The Great Atlantic & Pacific Tea Company, Inc. (hereinafter referred to as A&P), has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) and the provisions of subsection (f) of Section 2 of the Clayton Act (15 U.S.C. §13f) as amended by the Robinson-Patman Act, approved June 19, 1936, and that respondent Borden, Inc. (hereinafter referred to as Borden), has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45), and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint charging as follows:

COUNT I

PARAGRAPH 1. Respondent A & P is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its principal office and place of business located at 420 Lexington Ave., New York, New York.

PAR. 2. Respondent A&P is now, and for many years has been engaged in the operation of a large chain of retail grocery stores. There are presently more than 4500 stores operated by respondent in 34 States of the United States, the District of Columbia and in Canada. Respondent A&P also operates a number of plants for the manufacture and processing of food and other products handled in its stores, including plants which process and manufacture milk and other dairy products. A & P's annual sales for the fiscal year ended February 22, 1969, totalled over $5,436,325,000 and for the fiscal year ended February 28, 1970, they totalled $5,753,692,000.

Included among A&P's retail grocery chain stores are approximately 260 or more stores located in the States of Illinois (including the Chicago metropolitan area), Indiana and Iowa, which stores comprise the Chicago Division of A&P. This division was formerly identified as the Chicago Unit of A&P's Middle Western Division.

PAR. 3. In the course and conduct of its business, respondent A&P has been and is now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and the amended Clayton Act. In the course of that commerce A&P has been purchasing grocery and household products, including milk and other dairy products, for resale within the United States, from sellers also engaged in "commerce," as commerce is defined in the Federal Trade Commission Act and the amended Clayton Act.

In connection with such transactions, A&P is now, and has been, in active competition with other corporations, partnerships, firms and individuals also engaged in the purchase for resale and resale of grocery and household products, including milk and other dairy products, of like grade and quality which are purchased from the same or competitive sellers.

The aforesaid sellers are located in the various States of the United States, and respondent A&P and such sellers cause the products when purchased by said respondent, to be transported from the place of processing, manufacture or purchase, to A&P's retail stores and warehouses located in the same State and various other States of the United States. Further, in many instances the sellers must purchase or obtain raw materials, supplies and finished products from States other than the State in which such products are processed, manufactured or purchased as aforesaid, in order to fulfill the obligations of said sellers in their commitments to supply respondent A&P.

PAR. 4. Respondent Borden (formerly The Borden Co.) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 350 Madison Ave., New York, New York.

PAR. 5. Respondent Borden is a holding and operating company having on December 31, 1969, a 100 percent voting power in approximately 22 subsidiary corporations.

Respondent Borden has approximately 200 plants in the United States and Canada that are managed by four operating divisions. A diversified dairy business, including virtually all branches thereof, is conducted by Borden's Dairy and Services Division (formerly the Milk and Ice Cream Division). For this division, Borden's chief trade name is "Borden."

Respondent Borden owns, maintains and operates a large number of receiving stations, processing and manufacturing plants and distribution depots located in various States of the United States from which it sells and distributes its said products to purchasers.

Borden's net sales amounted to approximately $1,740,184,687 in 1969 and approximately $1,827,341,000 in 1970.

PAR. 6. Respondent Borden sells milk and other dairy products of like grade and quality to a large number of purchasers located throughout the States of the United States, including the States of Illinois, Indiana and Iowa, for use, consumption or resale therein.

PAR. 7. In the course and conduct of its business, respondent Borden is now, and for many years past has been, transporting raw milk, or causing the same to be transported, from dairy farms and other points of origin to said respondent's receiving stations, processing and manufacturing plants and distribution depots located in States other than the State of origin.

Respondent Borden is now, and for many years past has been, transporting milk and other dairy products, or causing the same to be transported, from the State or States where such products are processed, manufactured or stored in anticipation of sale or shipment to purchasers located in other States of the United States.

Respondent Borden also sells and distributes its said milk and other dairy products to purchasers located in the same States and places where such products are manufactured or stored in anticipation of sale.

All of the matters and things, including the acts, practices, sales and distribution by respondent Borden of its said milk and other dairy products, as hereinbefore alleged, were and are performed and done in a constant current of commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 8. Respondent Borden sells its milk and other dairy products to retailers. Borden's retailer-purchasers resell to consumers. Many of said respondent's retailer-purchasers are in competition with other retailer-purchasers of Borden.

PAR. 9. In the course and conduct of its business in commerce, respondent A&P has entered into an agreement with respondent Borden for the supply of milk and other dairy products, packaged under A&P's own private label, to the majority of the stores of A&P's Chicago Division (Chicago Unit at the time of initiation of the agreement). At the time Borden tendered its final offer to A&P, the offer which was accepted to form the said agreement, Borden informed respondent A&P that the offer was being granted for the purpose of meeting competition in the form of an existing offer or offers which A&P then had in its possession. A&P accepted the said offer of Borden with knowledge that Borden had granted a substantially lower price than that offered by the only other competitive bidder and without notifying Borden of this fact.

By the term private label, it is meant that such products were packaged under labels bearing brand names owned by A&P or peculiar to the retail operations of A&P, its divisions and subsidiaries, rather than under labels displaying brand names owned by Borden or peculiar to the operations of Borden.

PAR. 10. The aforegoing act and practice of respondent A&P violates the policy of Section 2 of the Clayton Act, as amended, is to the prejudice of the public and constitutes an unfair method of competition in commerce and an unfair act or practice in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act. (15 U.S.C. §45).

COUNT II

PAR. 11. Paragraphs One through Ten of Count I hereof are hereby set forth by reference and made a part of this count as fully and with the same effect as if quoted herein verbatim.

PAR. 12. In the course and conduct of its business in commerce, respondent A&P has knowingly induced or received discriminations in price which are prohibited by subsection (a) of Section 2 of the Clayton Act, as amended.

Respondent A&P, in its negotiations with respondent Borden, before and after November 1, 1965, for the supply of milk and other dairy products under private label to the stores of A&P's Chicago Unit (now Division), knowingly induced prices which were and are discriminatory under the provisions of Section 2 of the amended Clayton Act. Further, respondent A&P has knowingly induced or received prices from Borden in the purchase of such products for said stores which said prices were and are discriminatory under the provisions of Section 2 of the amended Clayton Act.

PAR. 13. When respondent A&P knowingly induced or received the discriminatory prices from its supplier, as alleged, A&P knew or should have known that such prices constituted discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

PAR. 14. The aforegoing acts and practices of A&P are in violation of subsection (f) of Section 2 of the Clayton Act, as amended.

COUNT III

PAR. 15. Paragraphs One through Thirteen of Counts I and II hereof are hereby set forth by reference and made a part of this count as fully and with the same effect as if quoted herein verbatim.

PAR. 16. During the negotiations and dealings between respondents, before and after November 1, 1965, there developed a course of conduct to be followed by respondents. Pursuant thereto, A&P, for its part, introduced and sold private label milk and other dairy products at the prevailing retail price level for vendor label milk and dairy products, in spite of the fact that it was paying as much as 11 cents per gallon less for private label milk than it was paying for vendor (Borden) label milk. Thus, for its part in said course of conduct, A&P sustained and maintained existing retail prices for milk and other dairy products, and did not pass on to the consuming public any of the substantial price savings on private label milk and other dairy products which it received by reason of the wholesale price given it by Borden.

Further, pursuant to said course of conduct, Borden, for its part, failed to pass on, at the wholesale level, price reductions, similar to the reductions granted to A&P, to other purchasers who compete with A&P in the market areas covered by A&P's Chicago Unit (now Division).

The foregoing course of conduct constitutes a combination between respondents which had the tendency or effect of stabilizing and maintaining prices for milk and other dairy products. Said combination had the further effect of permitting A&P to retain the substantial monetary and competitive benefits of the discriminatory price advantage which it had obtained as a result of its private label agreement with Borden.

PAR. 17. The aforegoing acts and practices of respondents A & P and Borden are to the prejudice of the public and constitute unfair methods of competition in commerce and unfair acts or practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act. (15 U.S.C. §45).

INITIAL DECISION BY HARRY R. HINKES, ADMINISTRATIVE LAW JUDGE SEPTEMBER 24, 1975

PRELIMINARY STATEMENT

[1] This proceeding began with the issuance of a complaint by the Federal Trade Commission on October 8, 1971, against The Great Atlantic & Pacific Tea Company, Inc., (hereafter A&P) and Borden, Inc., (hereafter Borden). The complaint contains three counts. Count I of the complaint charges that A&P violated Section 5 of the Federal Trade Commission Act as well as the policy of Section 2 of the Clayton Act as amended, in the manner and method by which it negotiated [2] its price on private label milk.[1] The complaint charges that when Borden tendered its final offer to A&P it informed A&P that the offer was being granted for the purpose of meeting competition but that A&P accepted the offer with knowledge that Borden had granted a substantially lower price than that offered by the only other bidder and without notifying Borden of this fact.

Count II of the complaint charges A&P with a violation of subsection (f) of Section 2 of the Clayton Act as amended by knowingly inducing or receiving discriminations in price which are prohibited by subsection (a) of Section 2 of the Clayton Act as amended, from its supplier Borden.

Count III of the complaint charges both Borden and A&P with a violation of Section 5 of the Federal Trade Commission Act by a course of conduct constituting a combination between them which had the tendency or effect of stabilizing and maintaining prices for milk and other dairy products.

All of the violations alleged in the complaint center about the private label supply agreement entered into between respondents A&P and Borden under which Borden began private label sales to A&P's Chicago Unit's stores on or about November 1, 1965. Such sales continued under the agreement until February 1972. The agreement covered sales of milk and dairy products to more than 200 A&P stores located in a multistate area including portions of Illinois and Indiana.

The illegal conduct described in Count I is alleged to have occurred during A&P's course of dealings with Borden leading up to the agreement, which dealings took place from late 1964 up until November 1, 1965. The illegal conduct described in Count II is alleged to have occurred during the same period and also during a later time period when the agreement was in force. In connection with the illegal combination alleged in Count III, complaint counsel limited their main

[1] Prehearing conference of May 15, 1973 (Tr. p. 5).

period of proof to include November 1, 1964 through December 31, 1968.

[3] After a number of prehearing conferences, hearings commenced on June 11, 1973 and continued with short interruptions until March 27, 1975 when the record was closed for further evidence.

Not only is this case one of great complexity but its dimensions as well are extraordinary. In addition to the more than 110 hearing days expended, the scores of witnesses heard, the stipulations received, the hundreds of exhibits aggregating about 10,000 pages received, and the more than 11,000 transcript pages of testimony and argument, counsel for the parties have submitted for my consideration briefs totaling more than 2,000 pages which, considering the limited time given for such endeavor, are most commendable.

Any motions not heretofore or herein specifically ruled upon, either directly or by necessary effect of the conclusions in this initial decision, are hereby denied.

The proposed findings, conclusions and briefs as submitted by the parties have been given careful consideration and to the extent not adopted by this decision in the form proposed or in substance are rejected as not supported by the evidence or as immaterial.

References to the record are made in parenthesis using the following abbreviations:

> CX - Commission's Exhibit; RAPX - A&P's Exhibit; Ans. - Answer; Tr. - Transcript of the Testimony; DTR - Malone Deposition Transcript, CX 262; Comp. -Complaint; Adm. - Admission.

Having reviewed the record in this proceeding and having considered the demeanor of the witnesses as they testified, together with the proposed findings, conclusions and briefs submitted by the parties, I make the following:

Findings of Fact

A. A&P's Identity and Business Nature

1. Respondent A&P is a corporation organized, existing and doing business under and by virtue of the laws of the [4] State of Maryland, with its principal office and place of business located at 420 Lexington Ave., New York, New York (Comp. Par. 1; Ans. Par. 1).

2. Respondent A&P is now and for many years has been engaged in the operation of a large chain of grocery stores. During the middle 1960's A&P ranked first nationally in terms of sales among retail grocery chains (CX 218G; Smith, Tr. 1340). It operates approximately

4,329 stores in 36 States of the United States, the District of Columbia and Canada. It also operates a number of plants for the manufacture and processing of food and other products handled in its stores including plants which process and manufacture milk and other dairy products. Its annual sales for the fiscal year ending February 22, 1969 totaled over 5.4 billion dollars and, for the fiscal year ending February 1970, totaled over 5.7 billion dollars (Comp. Par. 2; Ans. Par. 1). A&P stores carry a full range of grocery and related products, many of which are purchased by A&P from other national sellers of goods and are shipped to A&P across State boundaries (CX 218E, F; Smith, Tr. 1387-1388; Schmidt, Tr. 1677-1678). A&P also manufactures and sells many private label products in its stores and did so even before 1965 (Smith, Tr. 1380-1381). It was A&P policy to promote private label products where feasible because their sale usually resulted in larger gross profit, greater attraction of the public to A&P stores and more flexibility for A&P in its dealing with suppliers (Corbus, Tr. 7325).

3. At the time of the private label agreement which is involved in this case, A&P's Chicago Unit encompassed the States of Iowa, Indiana and Illinois (including the Chicago metropolitan area). It operated approximately 260 stores. In 1969, the Unit became a Division which was comprised of 236 stores (Comp. Par. 2; Ans. Par. 1; Schmidt, Tr. 1675; Bartels, Tr. 1853-1854).

4. Products sold through A&P's Chicago Unit stores were procured under the supervision and control of the Head Buyer located in Chicago who, for most of the 1964-1969 period, was Mr. Elmer Schmidt (Schmidt). He was also personally responsible for the Unit's purchases of dairy products [5] except for cheese (Schmidt, Tr. 1667-1669). During the middle 1960's Borden was the principal supplier of dairy products to A&P's Chicago Unit and supplied about 95 percent of that Unit's requirements (Schmidt, Tr. 1678). Sales of dairy products by Borden to A&P's Chicago Unit amounted to millions of dollars annually with purchases of eleven of the most important items amounting yearly to somewhere between 5 and 6 million dollars (CX 263B; Schmidt, Tr. 1679).

5. It was A&P's Chicago Unit which was involved in the private label agreement with Borden here at issue. And although A&P Headquarters in New York gave final approval to that private label agreement, and reviewed the reliability of the supplier chosen (Smith, Tr. 1347), the private label negotiations themselves were handled primarily at the Unit level (Smith, Tr. 1355-1356; Archer, Tr. 1232-1233). Indeed, it was A&P's Unit Buyer, Schmidt, who was the principal company official involved for A&P in the Chicago private label negotiations (Bartels, Tr. 1865). Schmidt undertook these

negotiations as part of a planned move toward private label originating at A&P's New York Headquarters (Bartels, Tr. 1862-1863; Smith, Tr. 1351-1352).

6. The A&P Chicago Unit was one of four Units comprising the A&P Middle Western Division which included among other areas Milwaukee, Wisconsin (Smith, Tr. 1344; Bartels, Tr. 1857). Mr. Ira Bartels (Bartels) was A&P's Director of Purchases for the Middle Western Division from 1964 until 1969 and supervised the activities of Schmidt (Bartels, Tr. 1853-1854, 1858; Schmidt, Tr. 1673-1674).

7. During the middle 1960's A&P was composed of between five and seven divisions consisting in all of 32 Units. In charge of purchases of each Unit was the Unit Buyer such as Schmidt of the Chicago Unit. The Unit Buyer reported directly to the Divisional Purchasing Director, such as Bartels of the Middle Western Division, who in turn reported to the Division President and to the National Purchasing Director located in New York City headquarters. Similarly, the Unit Sales Manager reported directly to the Divisional Sales Director who in turn reported to the Division President and to the National Director of Sales located in the New York City Headquarters (Smith, Tr. 1336-1337; CX 258). In 1969 the Unit-Division setup was abolished and A&P created 32 Operating Divisions so that the Chicago Unit became a Division. Bartels was designated Purchasing Manager when the Chicago Unit became a Chicago Division and Schmidt was designated as Buyer and [6] later as Administrative Assistant (Bartels, Tr. 1853-1854; Schmidt, Tr. 1663-1664). When Bartels left the employment of A&P in 1970, Mr. Edmund Bayma (Bayma) became Purchasing Director of the Chicago Division (Bayma, Tr. 5918).

B. BORDEN'S IDENTITY AND BUSINESS NATURE

8. Respondent Borden (formerly The Borden Co.) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 277 Park Avenue, New York, New York (Comp. Par. 4; Ans. Par. 15-4).

9. Respondent Borden does business throughout the United States and in Canada (Minkler, Tr. 88; Archer, Tr. 1203). As of December 31, 1969 Borden held a 100 percent voting power in about 22 subsidiary corporations and possessed about 200 plants that were managed by four Operating Divisions (Comp. Par. 5; Ans. Par. 15-5). Its Dairy and Services Division conducts a dairy business in which the chief trade name is Borden. Borden's net sales in 1969 as well as in 1970 amounted to over 1.8 billion dollars (Comp. Par. 5; Ans. Par. 15-5).

10. In the course of its business Borden owns, maintains and

operates receiving stations, processing and manufacturing plants and distribution depots located in various States from which it sells and distributes its products. Borden sells its milk and other dairy products to various purchasers including retailers. Most of its retailer-customers resell to consumers and certain of its retailer-customers are in competition with other of its retailer-customers (Comp. Par. 8; Ans. Par. 15-8). A&P, whom Borden served in the Chicago and Northwest Indiana area during all of the time involved in this case, is now and has been in active competition with certain other corporations, partnerships, firms and individuals also engaged in the purchase for resale and resale of grocery and household products including milk and certain other dairy products (Comp. Par. 3; Ans. Par. 15-3; A&P's Adm. dated March 12, 1973, p. 4, 5; Gintert, Tr. 2442; Barney, Tr. 3688).

11. From the early 1960's through the end of 1966 Borden managed certain of its dairy operations through its Chicago Central District or Division which included Chicago, Illinois, the northern part of Illinois, part of Iowa, part of Minnesota, most of Wisconsin, part of Michigan and the [7] northwestern corner of Indiana (Minkler, Tr. 88). The Chicago Central District Management Group consisted in part of Mr. Ralph Minkler, President (Minkler); Mr. Joseph Malone (Malone), Vice President, Regulatory Controls (and formerly Comptroller); Mr. Gordon Tarr (Tarr), Sales Manager for Chain Stores; and Mr. Orville Gose (Gose), Regional General Manager (Minkler, Tr. 88, 111-113; Tarr, Tr. 843; Gose, Tr. 1037). After 1966, Borden's Chicago Central District was merged into its Midwest District in Columbus, Ohio. Minkler retired in December 1966 but Malone, Tarr and Gose remained (Minkler, Tr. 87, 279, 331; CX 262 Malone, DTR. 6, 7; Tarr, Tr. 842; Gose, Tr. 1067).

12. Minkler reported to the President of Borden's Milk and Ice Cream Division in Borden's New York Headquarters. That post was first filled by Mr. Harry Archer (Archer) who was succeeded in the middle 1960's by Mr. Pentz (Minkler, Tr. 98, 126; Archer, Tr. 1203-1205, 1207-1208; CX 292 p. 2). After Chicago Central District's merger into the Midwest Division, Borden's Chicago personnel reported to Mr. Patterson, President of Borden's Midwest District in Columbus, Ohio, who in turn reported to Borden's New York City headquarters (Gose, Tr. 1059).

C. COMMERCE

13. A&P admits that it has been and is now engaged in "commerce" as that term is defined in the Federal Trade Commission Act and amended Clayton Act (Ans. Par. 2; Adm. dated September 27, 1972, p. 7, Sec. III, 1-2). A&P also admits transporting across State lines goods

which it had produced or processed in one State for sale through its stores in other States. Its Chicago Unit included stores in the States of Illinois, Indiana and Iowa (Schmidt, Tr. 1665,1674) and advertised in newspapers distributed in both Illinois and Indiana.

14. Borden also admits that it has been and is now engaged in "commerce" as that term is defined in the Federal Trade Commission Act (Adm. filed March 19, 1973, p. 11 Sec. III-3). It also admits that it regularly transported raw milk from one State to another and that its plants received in excess of 10 percent of their raw milk supply from dairy farms in States other than those in which the plants are located (Adm. filed May 5, 1972, p. 4, 5). Borden advertises nationally (CX 212M; CX 214E). Its Woodstock, Illinois, plant obtains much of its raw milk from Wisconsin (Minkler, Tr. 104). After processing, the milk [8] and dairy products are shipped outside the State and outside the Federal Milk Marketing Order areas. The same Woodstock, Illinois, plant produced substantially all of the private label products sold to A&P under the private label agreement involved here, a great many of which products were then distributed to A&P stores in Indiana (CX 62; CX 263; Adm. filed May 5, 1972, p. 5). In addition to the Woodstock, Illinois, plant, Borden's Chicago Central District operated milk plants in Indiana, Iowa and Wisconsin (Minkler, Tr. 88).

15. A&P, pursuant to the private label agreement, purchased milk and dairy products from Borden for its grocery stores both within and without the State of Illinois (CX 62; CX 182; CX 187; CX 263). Borden, to fulfill the private label agreement, obtained part of its milk from out-of-State and processed certain milk and dairy products in its plant at Woodstock, Illinois (Adm. filed May 5, 1972, pp. 4-5). Borden then shipped said products across State lines to be delivered to A&P's out-of-State stores.

16. Woodstock, which opened in 1964 and was in full production by 1965 or early 1966, received its raw milk from the Chicago Milk Shed which extends through Wisconsin, Illinois and Indiana (Minkler, Tr. 104-105, 110; Adm. filed September 29, 1972, p. 8, Par. III-5; CX 211B, D, G; Minkler, Tr. 99-100).

17. Borden's practice in connection with its Woodstock operations was to purchase raw milk as needed for the expected demands of its customers, process it and deliver it to its customers as quickly as possible. Milk was not stored at Borden's Woodstock plant more than approximately 24 hours during this process (Borden Adm. dated March 15, 1973, III-28; Minkler, Tr. 108-109). At the processing plant milk was inspected, cooled, standardized and in some cases fortified, pasteurized and homogenized (Minkler, Tr. 107-109; Tise, Tr. 5834-5837). Processing of the major fluid milk items — milks and creams which accounted for

over 70 percent of Borden's sales (RAPX 75) — is a nearly instantaneous mechanical procedure which does not alter the product's chemical composition (Tise, Tr. 5834-5837; Graham, Tr. 7078-7079; Minkler, Tr. 107-108). Pasteurization is required before milk can be shipped in interstate commerce (Tise, Tr. 5829-5830; Graham, Tr. 7072). Borden sells milk to a wide range of customers including retail stores. Such customers are also [9] located in States other than the State of Illinois in which Woodstock is located (Minkler, Tr. 114; Malone DTR. 23-24). A substantial amount of the milk and dairy products processed at Woodstock was distributed through the Hammond, Indiana, Distribution Depot (Minkler, Tr. 102-103; Malone DTR. 26-28). The Hammond Depot primarily served customers in the State of Indiana (Minkler, Tr. 103). Among Borden's customers in this area were a number of A&P stores.

18. All of the acts and practices described above are and were performed in a constant current of commerce with raw milk flowing across State lines into Woodstock and processed milk and dairy products flowing across State lines to Borden's various customers including its largest chain store customer in the area, the retailer A&P.

D. THE NEGOTIATIONS

19. In late 1964 A&P decided to explore the possibility of selling private label milk and dairy products in the stores of its various divisions. Mr. Herschel Smith (Smith), A&P's Headquarters Dairy Buyer, held a meeting in New York City at which he explained A&P's new New York private label milk program and instructed the company's divisional purchasing managers to discuss with Unit Buyers the possibility of instituting similar private label programs in their various areas (Smith, Tr. 1350-1352; Bartels, Tr. 1862-1864). A&P's Middle Western Division Purchasing Director, Bartels, attended this meeting. Shortly thereafter and pursuant to these instructions he instructed A&P's Chicago Head Buyer, Schmidt, to initiate negotiations with Borden for private label milk (Bartels, Tr. 1862-1865).

20. Schmidt, A&P's Head Buyer for its Chicago Unit, was in charge and conducted the ensuing negotiations. Bartels, A&P's Middle Western Division Purchasing Director, supervised and was kept informed of Schmidt's over-all activities (Schmidt, Tr. 1668-1669, 1683; Bartels, Tr. 1865-1866; CX 12A).

21. Minkler, the President of Borden's Central District, was in charge of the ensuing negotiations for Borden. Minkler made all the decisions as to what to offer A&P and how to proceed. He communicated with Schmidt or Bartels on important occasions

(Minkler, Tr. 123-125, 201-203, 225-228, 247-248; CX 7; Tarr, Tr. 885-887).

[10] 22. Minkler was assisted during the negotiations by Malone, Borden's Central District Vice President for Government Controls and Borden's expert cost accountant. Malone was very knowledgeable concerning all aspects of Borden's production and distribution expenses in the Chicago area and counseled Minkler concerning Borden's costs of serving A&P during the entire course of the negotiations (CX 262, Malone DTR. 6-8, 10-15, 29-32, 39; Minkler, Tr. 111-113, 309-310; CX 42, 54). Malone prepared all of Borden's costs analyses and most of Borden's private label proposals to A&P (CX 14, 18, 21, 23-28, 36, 42, 54, 62, 87). He was extremely well respected and was relied upon by both Borden and A&P officials (Minkler, Tr. 309-310). A&P's Bartels testified: "The Borden company* * *had* * *very sophisticated cost accounting and legal departments" (Bartels, Tr. 1894A).

23. Tarr was Borden's Central District Chain Store Sales Manager and handled most of the line contact with A&P during the negotiations. Tarr spent about 80 percent of his time servicing the A&P account (Tarr, Tr. 845-846, 848-850, 876-878).

24. Around November 1964, A&P asked Borden to submit a private label offer for Chicago. Minkler and Malone immediately prepared a Borden proposal which granted A&P a one cent discount per half gallon of private label milk provided A&P would accept drop delivery and limited service, that is, store door delivery with no in-store service, no special deliveries, and no returns except for inferior or defective products (CX 5, 6; Minkler, Tr. 133-134; CX 262; Malone, Tr. 32-33). The offer was transmitted to Borden's New York office in late November 1964 and turned over to A&P in New York on December 2, 1964. A&P refused this offer (CX 5, 6, 7F, 12; Minkler, Tr. 133-137, 140-142; Archer, Tr. 1209-1212).

25. Although Borden's profit margin in the Chicago area might be cut by a reduction in its price on private label products it could not refuse to make such a reduction because it was dependent on continuing to serve A&P (CX 7D-F).

26. Borden was also concerned with A&P's possible retailing plans for private label milk. A&P was in the **[11]** initial stages of implementing a nationwide plan to install private label milk in its stores (Smith, Tr. 1350-1353). In some areas, including Columbus, Ohio, Dayton, Ohio, and Dallas, Texas, A&P had introduced private label milk at a lower out-of-store price than advertised label milk (CX 8G-I; Miller, Tr. 5975-5976, 5978). Smith of A&P had discussed at least some of the cities with Archer in connection with A&P's private label plans for Chicago (CX 7F). Borden felt that if A&P followed this policy and

introduced private label milk at such a differential in Chicago a price war would follow and its profits would be destroyed (CX 7D-F; Minkler, Tr. 154-157).

27. Minkler prepared a new private label offer to A&P which granted a 2-cent per-one-gallon price reduction which Borden tendered to A&P in late January but which was also refused (CX 7G-I, 9, 11, 12).

28. On February 5, 1965, Smith of A&P requested A&P's Chicago Office to take over the negotiations. Bartels turned the matter over to Schmidt and he in turn called Tarr of Borden to request an offer (CX 11; Schmidt, Tr. 1688; Tarr, Tr. 849-851).

29. Schmidt told Borden that "he very much appreciated the sensitiveness of this market." He added that Borden "had to be right" if A&P was not to put its private label business out for bids (CX 12).

30. Borden thereupon prepared a full and complete offer to sell private label milk and dairy products in the Chicago-Calumet area of Illinois and Indiana (CX 14). The Chicago-Calumet area encompassed the A&P stores in the Chicago area, its immediate Illinois suburbs and the Calumet area of Indiana, including Gary and Hammond, Indiana. This area was served by a number of Borden distribution branches including Borden's O'Hare Branch at Irving Park, Illinois, and Borden's Hammond Branch at Hammond, Indiana (CX 262, Malone DTR. 72; Gose, Tr. 1072-1073; RAPX 68). Tarr delivered the offer to Schmidt on February 9, 1965 and discussed it with him (Tr. 850-852). Borden's new offer granted A&P a discount of 2.55 cents per-half-gallon off its then current price and commensurate reductions of the other five main items taken by A&P which products accounted for 70 percent of A&P's total sales of milk in the Chicago-Calumet area. Borden also quoted a private label price on five by-products. This offer indicated that Borden would realize only .45 cents per-quart gross profit on sales of the main homogenized Vitamin D milk products (CX 14D).

[12] 31. In May, Schmidt asked that Borden come up with a private label program for areas outside of A&P's Chicago-Calumet area. Such outside areas extended north to the Wisconsin State line, west into Iowa, south almost as far as Peoria, Illinois and east beyond South Bend, Indiana to Goshen, Indiana (Tarr, Tr. 856-857; CX 18C, E, G, L). Borden prepared such an offer setting different prices for each zone of A&P's outside areas for each product offered under private label for Chicago (CX 18, 17B, C).

32. A&P was not interested in having only some of its stores in Illinois or Indiana supplied with private label milk. Later, when Bowman was invited to bid, a list of all the A&P stores in Indiana, Iowa and Illinois was given it (Cannon, Tr. 6126-6127). The Dean Dairy

was rejected when it bid only on Indiana stores (Schmidt, Tr. 1711). It is thus clear that the private label arrangement of A&P with its supplier was unavoidably interstate in character and that sales of milk to A&P stores in Illinois would be made only if A&P stores in Indiana were also served by the supplier.

33. Borden's May offer (CX 18-O) shows that the dairy expected to lose money on its sales of gallon containers of milk and that its gross profit on half gallons to be only .11 cents. Its total gross profit from sales of the higher volume containers (gallons, half-gallons and quarts) would be only $76.89 per week. The gross profit referred to takes into account only the cost of raw milk, containers, production, route delivery expense and other distribution expense.

34. A&P's business represented more than 55 percent of Borden's wholesale route business in the Chicago area and 25 percent of its Woodstock plant production. Borden could not, therefore, afford to lose the A&P business by refusing to lower its prices to A&P (CX 7F, 42 A-D). At the same time Borden feared that A&P might cut its out-of-store price for private label milk below the market price for advertised label milk (CX 7-D, E; Minkler, Tr. 155-157). Actually, A&P was selling private label milk at a reduced out-of-store price in two out of the three areas studied (CX 8 G-J) and had introduced private label milk at a reduced price in Dayton, Ohio in February 1965 (Miller, Tr. 5975-5976). Consequently, Borden believed that if A&P created such a differential the market price for advertised label milk would break and a price war would result (CX 7E). Such a price war had been experienced by Minkler and Malone in Wisconsin a year earlier and in **[13]** Chicago during the 1950's (Minkler, Tr. 155-156; Malone DTR 97-99; Soberg, Tr. 2753, 2754-2764). Such a price war would not only reduce profits of all dairies in the area but Borden particularly, because of its investment in the new Woodstock plant which cost over five million dollars (CX 13J). Many of the other dairies in this area were older and fully depreciated and thus had substantially lower fixed costs (Schaub, Tr. 3110-3111). Thus, if Borden reduced its price and A&P followed suit at retail level for private label milk, a price war might ensue and reduce Borden's profit. If Borden refused A&P's request for lower prices Borden would lose A&P's business and the volume necessary to operate Woodstock efficiently. Neither position was desired.

35. On May 25, 1965, Tarr and Malone delivered Borden's offer for the outside areas to A&P and discussed Borden's position with Schmidt (CX 19A). Borden pointed out that it expected almost no profit from the A&P contract but that it was presenting such a bid because A&P's business was vital to Borden's efficient use of its Woodstock plant.

Schmidt pointed out that A&P's goal in its private label program was to increase its gross margin on milk. The Borden representatives, however, warned that this could not be accomplished if A&P reduced the price on private label milk, citing a price war that had occurred in Wisconsin as the result of private label pricing (CX 19E, F; CX 262, Malone DTR 97-98).

36. In July 1965 A&P asked Borden to revise its May quotations for the outside areas to take account of possible savings in delivery costs. On July 26, Tarr delivered the revised quotation to Schmidt (Tarr, Tr. 863-865; CX 21).

37. On July 26, 1965, Bartels of A&P met with Minkler to discuss Borden's costs and to push for lower prices. Bartels wanted to know why Borden's Chicago costs were higher than its New York costs and Minkler agreed to review the matter (Tarr, Tr. 863-869; CX 21, CX 22A-D, CX 25B).

38. Malone prepared a written response to Bartels' questions (CX 23-25A). This response indicated that the primary reason for Borden's higher costs in Chicago was that Borden's Chicago delivery costs were higher in that the Chicago dairy drivers were paid substantially more than their New York counterparts; that union limitations on types of delivery and stricter health regulations limited efficiencies in delivery in Chicago; that A&P stores in New York made larger average purchases; and that there was a greater density [14] of A&P stores in New York. Malone concluded that Borden's gross margin per quart would be .36 cents not .45 cents as previously calculated and pointed out that this margin figure did not include anything for either overhead or burden (CX 23C-G, 24D). This cost study was submitted by Minkler and Malone to Bartels on August 6, 1965, and discussed with him (Minkler, Tr. 202-203; CX 262, Malone DTR 114).

39. Again, in August, A&P requested Borden to lower its offering price on some of the by-products. On August 13, Tarr presented Schmidt with a new revised bid for both the Chicago-Calumet area and A&P's outside areas (CX 31, 36, 37). The new bid focused on A&P's profit as a result of the private label contract indicating that A&P's costs would be reduced some $410,000 (CX 37A-F, CX 36; Tarr, Tr. 869-871).

40. Nevertheless, Schmidt told Tarr that A&P was not satisfied and had decided to put the matter out for bids (Tarr, Tr. 871-873). Tarr had told Schmidt at various times that some dairies in the area might bid under their cost to get A&P's business (Tarr, Tr. 872). On August 18, 1965, Minkler told Bartels that other dairies might submit bids which included only out of pocket or direct costs leaving out all fixed charges, on the theory that these costs were already covered by their

present business (Minkler, Tr. 213-214). Nevertheless, Bartels indicated that he was proceeding to get other bids.

41. Malone calculated that if Borden lost A&P business Borden's gross profit would be reduced more than 1.6 million dollars per year compared to the private label price reduction of some 400 thousand dollars (CX 42A-D, CX 262, Malone DTR 122-123).

42. During the latter half of August A&P asked Bowman Dairy, Dean Milk Co. and Sidney Wanzer & Sons to submit bids for A&P's business. Wanzer was not interested and the Dean Milk Co. submitted a bid for a part of Northern Indiana only, an area which A&P did not want served separately from Chicago (CX 45, 51A-C; Schmidt, Tr. 1711).

43. Bowman Dairy submitted an offer to A&P (CX 50). Schmidt immediately telephoned Tarr and told him that Borden's bid was "so far out of line that it is not even funny. You are not even in the ball park* * *this bid is so far different from yours that there isn't any comparison" (Tarr, Tr. 873-874). Schmidt added that even if Borden's promotions and other assistance were valued at $50,000 per year "this would not be a drop in the bucket" (Tarr, Tr. 874).

[15] 44. The next day, September 1, 1965, Schmidt met with Tarr and told him that the new development was "terrible" and that Borden's bid was "nowhere near," to which Tarr replied that some bids might "be screwy" and that he didn't see how anyone can sell any cheaper than Borden (Tarr, Tr. 873-874).

45. Malone had computed what a bid based upon direct costs only would be. Borden also knew that losing the A&P account would cost it about 1.6 million dollars per year. As Minkler explained (at Tr. 225-226):

> This became not a matter of logic in many respects. It was a matter of struggling to try to guess again what might have been put in there by a competitor. I must tell you that it was just largely [pure] guess. We had the $410,000 [bid] in, we were clearly told that an additional $50,000 wouldn't begin to cover the difference, there are [the] facts that we had to consider.
>
> In addition to that, we had this figure of one million six hundred some thousand dollars that it would cost us if we lost the business. We had to weigh that, and at some point, I said that it seemed to me that we had to consider doubling this $410,000 figure, and you could ask me all night how I arrived at that, and I wouldn't be able to tell you except that we were just determined that we had to save this volume for this brand-new plant that we were just bringing on stream.
>
> We were really desperate and by that time, we were pretty well convinced that the approach by the competitor had been on an anyhow accounting basis, they were going to get it and correct their problem later on, we rationalized, so I again got New York on the phone and got their clearance if I thought this was all that could be done to go ahead.
>
> I was told, save the business* * *.

46. On September 8, 1965, Minkler and Tarr met with Schmidt to discuss a further Borden bid (CX 55E). Schmidt **[16]** "reiterated the conversations almost verbatim that he had with [Tarr], that [Borden's offer] wasn't even in the ball park, and how shocked and surprised he was at our company trying to go along with such a low bid when someone else was bidding and* * *the whole thing" (Tarr, Tr. 876-887; Minkler, Tr. 226). Minkler offered to submit a new quotation which would yield A&P a saving of $820,000 per year, double the saving of Borden's then current bid. Minkler stated that this offer was made "on the basis of meeting competition" (Minkler, Tr. 227-228). Minkler also stated his belief that the bid submitted by Borden's competitors probably took only direct costs into account and were based upon "anyhow accounting" but that Borden could not lose A&P's business (Minkler, Tr. 227-228, 237-238, 376-377). Schmidt said "now you are in the ball park" and asked Minkler and Tarr to go back, spread the new savings figure to Borden's product line and write up a form of service (Minkler, Tr. 243-244; Tarr, Tr. 878-879).

47. During the following week Borden worked up a formal quotation including the 11 items previously offered under private label as well as glass gallons of homogenized Vitamin D milk and 2 percent milk. Tarr told Schmidt of this change in the offer and Schmidt said such change would be fine (Tarr, Tr. 880-882; Minkler, Tr. 244-245). The new bid was submitted to Schmidt's assistant by Minkler and Tarr on September 17, 1965 (CX 56, 57, 58; Tarr, Tr. 883; Minkler, Tr. 245).

48. Shortly thereafter, Schmidt called Tarr to reject the offer telling Tarr that Borden's bid was not fair to the other bidders who "did not bid on glass gallons" (Tarr, Tr. 883-884; Minkler, Tr. 245). However, the Bowman Dairy offer *had* specified glass gallons of milk (CX 50). Actually, A&P did not want to sell private label milk in glass containers (Schmidt, Tr. 1777-1780). Schmidt also told Tarr that Borden should "sharpen your pencil a little bit because you are not quite there" as a result of which Borden reduced its price somewhat (Tarr, Tr. 884-885, 963-965).

49. The Bowman bid was apparently based upon volume and A&P did not ascertain how a different volume would affect that Bowman bid except to determine that if Bowman sold less volume to fewer stores its prices would go up (Schmidt, Tr. 1760-1761). The Bowman bid also assumed certain possible days of delivery in the Gary-Hammond area. A&P did not ascertain how a change in such assumption would affect this offer.

[17] 50. Borden prepared a corrected bid spreading the 820 thousand dollars to the original 11 item private label product line (CX 62). Using the raw milk prices as of the first half of 1965, the savings to A&P

would have been over 880 thousand dollars but since the raw milk prices had risen in the meantime the actual savings would be about 820 thousand dollars (CX 66B). The new bid reduced Borden's price for a half gallon of milk by 5.75 cents below its then current advertised label price to A&P and by about 3.2 cents below Borden's July 26 prices, the last price Borden had made any effort to cost justify (CX 62, CX 21).

51. Minkler and Tarr presented Borden's final bid on September 21, 1965. Minkler told Schmidt:

> * * * I said, "Elmer, there is certainly something here that I want you to very definitely understand." I said, "This price is given to you by us on the feeling and belief that *we are meeting a competitive bid. We know of no other way to justify this. You have to accept it on that basis.* You must make that clear to your superiors and to your legal people. I don't know what may come of this in the future, but I want you to understand this [:] we are going to say always that we felt we were meeting a competitive offer that you had received from someone else." And he said to me, words to the effect, "Ralph, you don't need to worry. I read you loud and clear. I understand what you are saying. My superiors and our legal department will understand it." And he says, "Just don't worry about it." (Minkler, Tr. 247-248; emphasis supplied).

52. Mr. Tarr, a witness to the meeting, testified to the same effect:

> At the last of it Mr. Minkler said, and I can't give you his exact words, but in effect he said, "Now, Elmer, look, we have met a competitive situation here on this bid, on this quote. You know that. This is right, isn't it," and Elmer said "Yes." (Tarr, Tr. 886; also see Tr. 1020).

[18] 53. Minkler also told Schmidt that the new bid was based upon "anyhow accounting" (CX 63A-D). Schmidt admitted that Borden told him on this occasion and in many other conversations that the final bid was based upon "meeting competition" (Schmidt, Tr. 1782-1801).

54. Schmidt requested a letter from Borden stating that its prices were proportionally available to others (CX 66). Instead, Borden supplied a letter which stated only that Borden felt its prices were legal and that it was prepared to defend them (RAPX 2). This letter was not in Borden's usual form relating to offers which were available to others (Archer, Tr. 1254-1255, 1258). Herschel Smith, A&P's Headquarters Dairy Buyer, understood that Borden's letter did *not* say its prices were available to others (Smith, Tr. 1427-1429, 1438-1440).

55. Schmidt submitted Borden's new bid and Bowman's bid to Bartels noting that Borden's bid offered a savings of 820 thousand dollars while Bowman's savings amounted to some 737 thousand dollars. Schmidt recommended retention of Borden as did Bartels who forwarded it to Smith in New York (CX 66A-B, CX 65A-C; Schmidt, Tr. 1713-1716; CX 263). Smith noted that Borden's offer was "substantially better" than the one from Bowman and approved Borden on October 14, 1965 (Smith, Tr. 1369, 1413-1414; CX 263, 70).

Borden commenced serving A&P in its Chicago area in November 1965 (CX 75A-J, 255B).

56. During mid-November 1965 Borden brought its service and delivery terms to A&P on Borden label products in line with those granted on A&P label products but at a substantially lower discount (RAPX 66). Thus, during 1966 and thereafter Borden's maximum discount to A&P taking the same service on Borden label products was 30 percent while A&P's private label discount was 35 to 38 percent.

57. On May 24, 1966, Borden increased its Borden label list price by .5 cents per point[2] to reflect its increased container, labor and social security costs. At Borden's maximum discount of 30 percent this increase raised Borden's prices by .35 cents per point (CX 124, 125, 139, 140, 123, 138; Gose, Tr. 1110). Borden informed A&P of the price increase [19] and asked that A&P accept a commensurate increase on A&P label products (CX 79; Gose, Tr. 1050-1054; CX 262, Malone DTR 178-180). A&P accepted the increase on Borden label products but refused to accept it on private label products (CX 81; Gose, Tr. 1053-1054; CX 255B). The contract on private label provided that prices were to be subject to change to reflect increased container and labor costs (CX 62H-J, M).

58. Again, in March 1967, Borden asked A&P to accept the price increase to reflect cost passed on to Borden's other customers in 1966 pointing out that all of its other customers had accepted the price increase (Gose, Tr. 1056-1062; CX 102-103, 105, 106). A&P refused to accept more than a .2-cent per-point price increase on private label products (CX 102B, 106C, 110, 225B; Gose, Tr. 1058).

59. After the institution of the private label agreement with A&P, Borden reorganized its Chicago Central District merging it with another district. Minkler explained that this was necessary because of the reduction in income occasioned by the lowering of its price to A&P on private label products by some 800 thousand dollars (Minkler, Tr. 276-280). Job positions involving almost all facets of the Borden operation were eliminated within the Chicago region following the beginning of the Borden-A&P private label arrangement due, at least in part, to that new arrangement (Gose, Tr. 1069-1070).

E. GRADE AND QUALITY

60. Respondent A&P admits:

[S]ubstantially all of the fluid milk products Borden supplied under A&P's private label to A&P stores [in the area of complaint counsel's proof] during the period November 1965-1970 were physically and chemically identical to the equivalent products

[2] A point is equivalent to a quart of whole milk. Thus a gallon is measured as four points and a half gallon as two points. Some other dairy products have different point values.

contemporaneously sold under the Borden label to these A&P stores and to other stores in the "Chicago and suburbs," Gary, Hammond and Valparaiso areas (A&P's Adm. Filed March 12, 1973, Par. III-6).

Borden admits substantially the same thing (Borden Adm. filed September 29, 1972, Par. III-10; Minkler, Tr. 250; Schmidt, Tr. 1727-1729).

F. CONTEMPORANEOUS SALE

61. Respondent A&P admits that the fluid milk and dairy products sold by Borden under private label to A&P stores [20] in the area in question and contemporaneously under Borden label to competing retailer-purchasers, were commodities sold for use, consumption or resale within the United States (Comp. and Ans. Pars. 8, 9; A&P Adm. Par. III-6).

G. THE DISCRIMINATION

I. *The Gary-Hammond and Valparaiso Areas of Indiana*

62. Burger's Super Markets, Inc., operated a supermarket in Hammond, Indiana, which competed with the A&P stores in Hammond, Indiana (A&P's Adm. Par. III-9(a)-(e); White, Tr. 2064-2065; Kristoff, Tr. 2285-2286). Burger's store purchased about two to five times as much milk from Borden as its A&P store competitors (CX 182; RAPX 234 p. 19) and was substantially larger than its A&P store competitors in Hammond (Kristoff, Tr. 2270-2271, 2381, 2385).

63. Model Food Center, Inc., operated a supermarket in Hammond, Indiana, also. A&P admits that the Model Food Center in Hammond, Indiana, competed with its A&P store #306 in the Hammond suburb of Munster, Indiana (A&P Adm. Par. III-9(a)-(e)). Model Food Center purchases of fluid milk products from Borden were commensurate with the A&P stores in the Gary-Hammond area with which it competed (CX 182; Barney, Tr. 3682-3688).

64. Wallies Market in Hammond, Indiana, purchased fluid milk and dairy products from Borden from 1966 until December 1, 1969. A&P admits that Wallies Super Market competed with one of its stores (A&P's Adm. Par. III-9(a)-(e)). Wallies bought approximately the same amount of milk from Borden as its A&P competitors during the period 1966-1969 (CX 182).

65. Wilco Food Center is a supermarket in Gary, Indiana. A&P admits that during the period 1964-1970 Wilco Food Center competed with one of its stores in Gary (A&P's Adm. Par. III-9(a)-(e)). Wilco bought substantially more than twice as much milk from Borden as the average A&P store in the Gary-Hammond, Indiana area (CX 182).

66. Joseph Tittle & Sons, Inc. (Tittle) operates and has operated a chain of supermarkets in Northwestern Indiana for many years. Between October 1966 and March 1967 Tittle owned and operated five supermarkets in this area, two in Gary, Indiana (Lake Street and Village Court), one in Hammond (Hohman), one in a suburb of Hammond (Highland), and one in Valparaiso, Indiana. Between 1967 and 1969 [21] Tittle sold its Hohman store and moved its Village Court store to another location. Consequently, between 1969 and 1970 Tittle had two stores in Gary, one in Highland and one in Valparaiso. A&P admits that the Tittle stores competed with its A&P stores in such areas (A&P Adm. Par. III-9(a)-(e); Minard, Tr. 3136-3138, 3141-3148). The Tittle stores in Gary bought approximately the same volume of milk from Borden as the A&P stores in the area. In Hammond the volume of the Tittle stores was lower than the volume of some A&P stores but higher than others. In Valparaiso the Tittle store's volume was at least three times more than that of the A&P store (CX 182).

67. Burger's Market bought slightly more than 28 thousand dollars worth of milk products from Borden between October 1966 and March 1967. Had it been charged A&P's prices under A&P's private label agreement with Borden, Burger's Market would have paid $3,468.77 less. It, therefore, sustained a price discrimination of 14 percent. Between June 1969 and March 1970 it bought over 84 thousand dollars of milk products from Borden but would have paid $11,506.15 less had it been charged A&P's prices under the private label agreement, sustaining a 15.7 percent price discrimination (CX 187, 188A).

68. During the same two periods Model Food Center was charged $12,496 in the earlier period and $29,519 in the later period. Had Model been charged A&P prices under its private label agreement with Borden, Model would have saved $2,297 in the early period and $4,138 in the later period, thus experiencing a price discrimination of 22.5 percent in the early period and 16.3 percent in the later period (CX 191A, 187).

69. Wallies Market bought more than $14,000 worth in the early period and a similar amount in the later period. Had it been charged A&P prices under the private label arrangement it would have saved $2,193 in the earlier period and $2,203 in the later period reflecting a price discrimination of 17.5 percent for the early period and 17.6 percent for the later period (CX 200A, 187).

70. The Wilco Food Center paid more than $35,000 for milk products in the same earlier period and more than $71,000 in the later period. Had it been charged the A&P prices under the private label agreement with Borden it would have [22] saved $4,550 in the earlier period and $4,433 in the later period. The price discrimination

amounted to 14.5 percent in the earlier period and 6.6 percent in the later period (CX 202A, 187).

71. Tittle's Lake Street store paid more than $13,000 for milk products in the earlier period and more than $32,000 in the later period. Had it been charged the A&P prices under the private label agreement with Borden it would have saved $1,571 in the earlier period and $1,939 in the later period. The price discrimination was 12.9 percent for the early period and 6.4 percent for the later period (CX 196A, 187).

72. Tittle's Village Court store paid Borden more than $12,000 for fluid milk products in the earlier period and more than $38,000 during the later period. Had it been charged the A&P prices under the private label agreement with Borden, it would have saved more than $1400 in the earlier period and more than $1800 in the later period, sustaining a discrimination of 12.5 percent in the earlier period and 5 percent in the later period (CX 197A, 187).

73. Tittle's Supermarket on Hohman Avenue in Hammond, Indiana, paid more than $15,000 to Borden for fluid milk products during October 1966-March 1967. Had it been charged A&P's private label prices from Borden, it would have paid more than $1800 less, reflecting a 13 percent discrimination during that period (CX 195A, 187).

74. Tittle's Supermarket in Highland paid more than $12,000 for fluid milk products bought from Borden during the early period or almost $1400 more than it would have paid had it been charged A&P's private label prices from Borden. This amounted to a 12.4 percent discrimination. During the later period of proof this store paid more than $23,000 for fluid milk products but would have paid $1,335 less had it been charged A&P's private label prices from Borden, thus experiencing a 5.9 percent discrimination (CX 194A, 187).

75. Tittle's Supermarket in Valparaiso bought approximately three and one-half times as much milk from Borden as the competing A&P store (CX 182). Nevertheless, during the first period it paid more than $51,000 for fluid milk products bought from Borden which was $7,603 or 17.5 percent more [23] than it would have paid had it been charged A&P's private label prices from Borden. During the second period of proof, it paid more than $111,000 for such products or $6,984 or 6.7 percent more than it would have paid had Borden charged it A&P's private label prices (CX 198A, 187).

76. Combined, the Tittle stores paid $13,804 during the earlier period in excess of what it would have paid had it been charged A&P's private label prices from Borden. This was an average of 15 percent more. During the later period the Tittle stores paid $12,104 more or 6.3 percent more than it would have paid had it been charged A&P's private label prices (CX 187).

77. The unfavored competitors described above purchased from Borden at lower discounts and at higher prices than enjoyed by A&P as a result of Borden's formula for pricing A&P private label products. This situation commenced with the institution of the private label program in 1965 and continued until it ended in February 1972 (RAPX 66; CX 187, 120-136, 288, 289; Bayma, Tr. 5932-5933; Kristoff, Tr. 2279; Barnes, Tr. 3852, 3914; Minard, Tr. 3155-3156).

II. THE CHICAGO AND SUBURBS AREA

78. A&P sold fluid milk and dairy products in all of its stores of the Chicago area as did all of Borden's other store customers in that area (CX 256, 183). Two of such other Borden's store customers were Mayfair Foods and Jim's Groceries, who competed with A&P stores in that area during February and March 1966.

79. A&P admits that its store No. 137 located approximately two blocks from Mayfair Foods drew customers from the area served by this independent food store (A&P's Adm. filed March 12, 1973, Par. III-11). This was corroborated by the store manager (Lasorso, Tr. 2644, 2646, 2686) who testified that he regularly compared his prices with the prices charged by A&P, and adjusted his prices in response to those of A&P. Customers of Mayfair and A&P shopped both stores.

80. Jim's Groceries was a member of Central Grocers Cooperative and was also known as Centrella store. It was located in Oak Park, Illinois, where it competed with A&P for the sale of fluid milk and dairy products during 1965 [24] and 1966 (A&P Adm. Par. III-11). This is confirmed by the owner of Jim's Groceries (Cox, Tr. 3946-3948) who testified that he checked A&P's prices in setting his own prices and that A&P was a competitor.

81. Borden's price to A&P on A&P label products in the Chicago and suburbs area in February and March 1966 was equivalent to a discount from list price of about 36.6 percent (CX 183). In May 1966 Borden imposed a price increase on Borden label products but A&P refused to accept it on the private label products (Gose, Tr. 1052-1054) and thus A&P's effective discounts from Borden's list prices rose to 37.8 percent as of August 1966 (CX 180). This continued until April 1967 when A&P accepted a partial price increase.

82. Borden's discount schedule in January 1966 established a maximum discount on Borden label products of 30 percent off of list (CX 138) which discount was available only to customers taking 600 points or more per delivery and the same service as granted to A&P. Although CX 138 states Borden's maximum discount to be 28 percent for such customers, Borden also offered an additional 2 percent discount if the store was centrally billed (Gose, Tr. 1110).

83. During February 1966 Mayfair Foods purchased milk and dairy products from Borden in the amount of $2,736 and received a rebate of $818 or 29.9 percent of the list price. During March 1966 Mayfair Foods purchased $3,056 of such products and received a rebate of $915 or 30 percent of the list price. During the same two months the A&P store with which Mayfair competed paid a net price which reflected a discount of about 36.6 percent of its private label purchases or 6.6 percent additional discount above and beyond that granted to Mayfair Foods (CX 183).

84. Jim's Groceries' purchases of milk and dairy products in February and March 1966 totaled $2,269 and $2,661, respectively. Borden's rebates totaled $522 and $607 or 23 percent and 22.8 percent respectively for those months (CX 183), which was in accordance with Borden's published discount schedule since Jim's Groceries took only about 400 points per delivery and did not take limited service or central billing (RAPX 173, pp. 82, 84). The A&P stores in Oak Park paid a net price which reflected an effective [25] discount of about 36.6 percent during this period. These A&P stores were about the same size or smaller than Jim's Groceries, taking about 251 points and 419 points for each of the two stores (RAPX 173, pp. 109, 116, 118). Even if the A&P stores qualified for an extra 2 percent discount for limited service and another 2 percent for central billing, these stores should have been receiving discounts of only 23 and 28 percent, respectively, not the maximum 30 percent discounts set out on Borden's discount schedule or 36.6 percent they actually received. The discrimination thus experienced by Jim's Groceries exceeded 10.4 percent.

85. The five highest volume items under the private label contract were homogenized milk quarts, homogenized milk half gallons, homogenized milk gallons, 2 percent milk half gallons and skim milk half gallons. These items accounted for 80 percent of Borden's expected sales to A&P pursuant to the private label contract (CX 65). As will be seen from the attached Appendix, Borden's discriminations in favor of A&P on these items ranged from a low of 8.3 percent for quarts of milk to 18 percent or more on half gallons of skim milk. Borden's discrimination on half gallons and gallons of milk which accounted for more than 55 percent of Borden's sales to A&P range from 9.7 percent to 14 percent.

H. INJURY TO COMPETITION

The attempt to discern the competitive effect of price discrimination has been said to be "roughly akin to explaining how to avoid harm in a snake pit" (Keck, Lawful Price Discrimination, 8 AntiTrust Bull. 381 (1963)). Here, however, the task is simplified.