IN THE MATTER OF

ASSOCIATED PEST CONTROL SERVICES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SECTION 2(f) OF THE CLAYTON ACT

Docket C-1638. Complaint, Nov. 26, 1969—Decision, Nov. 26, 1969

Consent order requiring a Memphis, Tenn., association of pest controllers to cease inducing and receiving discriminatory prices for pesticides and related products from suppliers of such products.

COMPLAINT

The Federal Trade Commission having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (f) of 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 Associated Pest Control Services, Inc., hereinafter referred to as "Associated," is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located at 1313 Poplar Avenue, Memphis, Tennessee.

Respondent Associated is an association of pest control organizations which was ostensibly organized to further the interests and development of the members of the association, through the interchange of ideas, the dissemination of scientific information and other services and purposes incidental to the general welfare of its members. Its membership is comprised of persons, partnerships and corporations engaged in the performance of pest control, industrial sanitation and exterminating services. Associated also performs other services for its members, including the negotiation of discounts for its members from distributors of pesticides, application equipment and other necessary supplies.

Respondent Associated had approximately 37 members in October 1967, which members were located in 17 States of the United States, the Dominion of Canada, and the Bahamas. The membership of Associated constitutes a class so numerous and changing as to make it impracticable to specifically name and describe each and all of such members as parties respondent herein.

Respondent Kotler Exterminating Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee with its principal office and place of business located at 1313 Poplar Avenue, Memphis, Tennessee. It is a member of respondent Associated and is fairly representative of the entire membership of Associated. It is named as a respondent herein in its individual capacity and as representative of all members of respondent Associated. All such members not named specifically are therefore made parties respondent herein as though they had been named individually.

Respondent Louis I. Kotler, 1313 Poplar Avenue, Memphis, Tennessee, is an officer of respondent Associated and the president of respondent Kotler Exterminating Co., Inc. He has been responsible, in part, for the direction and control of Associated. He is named as a respondent herein in his individual capacity, as an officer of respondent Associated and as the chief executive officer of respondent Kotler Exterminating Co., Inc.

PAR. 2. The members of respondent Associated have purchased and now purchase in commerce from suppliers engaged in commerce numerous pesticides and other supplies, such as application equipment, for use, consumption or resale within the United States. Said members and said suppliers cause the products and supplies so purchased to be shipped and transported among and between the several States of the United States, the Dominion of Canada, and the Bahamas from the respective State or States of location of said suppliers to the respective locations of said members of Associated. The members of respondent Associated and said suppliers are therefore engaged in commerce, as "commerce" is defined in the Clayton Act.

PAR. 3. In the purchase, use and resale of said pesticides and supplies, the members of respondent Associated are in active competition with independent persons, partnerships and corporations not affiliated with respondent Associated; and the suppliers selling to said members of Associated and their independent competitors are in active competition with other suppliers of similar products and supplies.

PAR. 4. Respondent Associated, since its formation in February 1959, has been and is now, maintained, managed and operated by its secretary-treasuer, respondent Louis I. Kotler, for its membership and each member has participated in, approved, furthered, or cooperated with respondent Louis I. Kotler and the other members of Associated in the carrying out of the procedures and activities hereinafter described.

In practice and effect, respondent Associated has been, and is now, serving as the medium or instrumentality by, through, or in conjunction with, which the said members of Associated exert the influence of their combined bargaining power on the competitive suppliers hereinbefore described. As a part of their operating procedure, said members of respondent Associated direct the attention of said suppliers to their aggregate purchasing power as a buying group and, by reason of such, have knowingly demanded and received, upon their individual purchases, discriminatory prices, discounts, allowances, rebates and terms and conditions of sale. Suppliers not acceding to such demands are usually replaced as sources of supply for the commodities concerned and such market is closed to them, in whole or in substantial part, in favor of such suppliers as can be, and are, induced to afford the discriminatory prices, discounts, allowances, rebates, and terms and conditions of sale so demanded.

This procedure effects a discrimination in price on goods of like grade and quality between the members of respondent Associated and competing independent persons, partnerships and corporations whose discounts, allowances or rebates from such suppliers are based upon only their individual volumes.

PAR. 5. Respondents have induced or received from their suppliers, in the the manner aforedescribed, favorable prices, discounts, allowances, rebates, terms and conditions of sale which they knew or should have known constituted discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

PAR. 6. The effect of knowing inducement or receipt by respondents of the discriminations in price, as above alleged, has been, and may be, substantially to lessen, injure, destroy or prevent competition between suppliers of pesticides and other supplies granting such discriminations and other suppliers of such products and supplies who do not grant or allow such discriminations, and also between respondent members and competing independent customers not receiving or securing such discriminations.

PAR. 7. The foregoing acts and practices of respondents in knowingly inducing or receiving discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, are in violation of subsection (f) of Section 2 of said Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of subsection (f) of Section 2 of the Clayton Act, as amended, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Associated Pest Control Services, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located at 1313 Poplar Avenue, Memphis, Tennessee.

Respondent Kotler Exterminating Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located at 1313 Poplar Avenue, Memphis, Tennessee. It is a member of Associated and is fairly representative of the entire membership of Associated.

Respondent Louis I. Kotler is an officer of Associated and is president of Kotler Exterminating Co., Inc. He has been responsible in part, for the direction and control of Associated. His address is the same as that of said corporations.

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

ORDER

It is ordered, That respondents Associated Pest Control Services, Inc., a corporation, Kotler Exterminating Co., Inc., a corporation, individually and as a member of and as representative of the entire membership of Associated Pest Control Services, Inc., all other members of Associated Pest Control Services, Inc., and Louis I. Kotler, individually and as an officer of respondents Associated Pest Control Services, Inc., and Kotler Exterminating Co., Inc., their respective successors and assigns, officers, agents, representatives, employees and members, directly or through any corporate or other device, in connection with the offering to purchase or purchase of any pesticides and other supplies, such as application equipment, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Directly or indirectly inducing and receiving, receiving or accepting any discrimination in the price of such products by accepting from any seller a net price respondents know or should know is below the net price at which said products of like grade and quality are being sold by such seller to other purchasers where respondents are competing with the purchaser paying the higher price or with a customer of the purchaser paying the higher price.

For the purpose of determining the "net price" under the terms of this order, there shall be taken into account all discounts or other terms and conditions of sale by which net prices are affected.

It is further ordered, That the respondent corporation, Associated Pest Control Services, Inc., shall forwith distribute a copy of this order to each of its members.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation, which may affect compliance obligations arising out of the order.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

KEENEY BROTHERS FARMS, ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-1639. Complaint, Nov. 26, 1969—Decision, Nov. 26, 1969

Consent order requiring a New Freedom, Pa., seller of chinchilla breeding stock to cease making exaggerated earning claims, misrepresenting the quality and fertility of its stock, and misrepresenting its services to purchasers.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Keeney Brothers Farms, a partnership, and Alvin L. Keeney and Elmer H. Keeney, individually and as copartners trading and doing business as Keeney Brothers Farms, and Larry Keeney, individually and as an office manager of said partnership, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Keeney Brothers Farms is a partnership comprised of Alvin L. Keeney and Elmer H. Keeney who formulate, direct and control its acts, policies and practices, including those hereinafter set forth. The principal office and place of business of said partnership is located at Route 2, New Freedom, Pennsylvania.

Respondents Alvin L. Keeney and Elmer H. Keeney are individuals and copartners trading and doing business as Keeney Brothers Farms, with their principal office and place of business at the above-stated address.

Respondent Larry Keeney is an individual and office manager of said partnership. He cooperated in and effectuated the acts, policies and practices of the partnership. His address is the same as that of the partnership.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of chinchilla breeding stock to the public.

PAR. 3. In the course and conduct of their aforesaid business, respondents now cause, and for some time last past have caused, their said chinchillas, when sold, to be shipped from their place of business in the State of Pennsylvania to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of obtaining the names of prospective purchasers and inducing the purchase of said chinchillas, respondents have made, and are now making numerous statements and representations in magazine publications, direct mail advertising and through the oral statements and display of promotional material to prospective purchasers by their salesmen, with respect to the breeding of chinchillas in the home for profit without previous experience, the rate of reproduction of said animals and the expected income from their sale.

Typical and illustrative of the statements and representations contained in said advertising and promotional material, but not all inclusive thereof, are the following:

> * * * Here is a ready made market! The demand for Chinchilla breeding stock is so great authorities estimate that 500,000 animals will be needed for breeding stock alone, before pelting can be seriously considered.
>
> * * * * * * *
>
> * * * The space you will need to raise, breed and sell Chinchillas to start, need be no more than your garage, basement, or even the kitchen or bedroom. * * *
>
> The return is quick and BIG. You can have Chinchillas ready for market in just five or six months. A chinchilla can have up to three litters a year, averaging from 1 to as high as 6 in a litter. The young can bring from $200.00 a pair on up.
>
> YOU CAN MAKE UP TO $800.00 IN ONE YEAR JUST FROM ONE PAIR OF CHINCHILLAS!
>
> Here's how. Supposing you get a real conservative average of 2 young per litter. In a year's time you can have 3 pair from your original pair, plus at least one pair from the first offspring. If you sell your young at $200.00 per pair, you would then have $800.00. By keeping at least one pair for future breeding the next year, you could make from $600.00 to $1800.00. * * *
>
> * * * * * * *
>
> CAN YOU USE $1,000.00 to $5,000.00–$10,000.00 per year?
>
> Of course you can. And by answering our advertisement you have taken a step forward in that direction. * * *
>
> * * * * * * *

Then consider carefully our program: A tremendous National Advertising Campaign (to millions every month all over the United States) specially designed to sell the Chinchillas YOU BREED AT HOME. Yes, you'll agree after digesting this information that we want to work with you as a sort of "YOU BREED 'EM—WE'LL HELP SELL 'EM" team.

* * * * * * *

Is Chinchilla breeding difficult? Absolutely not. Nature takes care of the breeding, as paired animals are left together at all times. * * *

* * * * * * *

WHAT OTHER BUSINESS OFFERS YOU THESE THRILLING ADVANTAGES?

* * * YOU ARE IN PARTNERSHIP WITH NATURE and nature does the work for you. * * *

YOUR HOME, GARAGE, BARN, BASEMENT IS YOUR FACTORY

* * * * * * *

YOU DON'T HAVE TO FIND A MARKET FOR THE CHINCHILLAS YOU BREED, BECAUSE Our National Advertising was originated with the idea of making people interested in raising Chinchillas come to you * * * no matter where you live. YOUR SUCCESS IS OUR SUCCESS. That is why we pay for this large nation-wide advertising campaign to help you. No other type of home business offers you this extra assurance of profits.

* * * * * * *

They have hardy constitutions and with proper care, feed and housing, are relatively free from illness and disease.

* * * * * * *

PAR. 5. By and through the use of said statements and representations made by respondents in their advertising and promotional material, and others of similar import and meaning but not expressly set out herein, and in oral statements and representations made by their salesmen, respondents represent, and have represented, directly or by implication, that:

1. It is commercially feasible to breed and raise chinchillas from breeding stock purchased from respondents in homes, basements, garages, kitchens, bedrooms and that large profits can be made in this manner.

2. The breeding of chinchillas from breeding stock purchased from respondents as a commercially profitable enterprise requires no previous experience in the breeding, raising and caring for such animals.

3. Chinchillas are hardy animals and are free from illness and disease.

4. Each female chinchilla purchased from respondents and each female offspring will produce at least three live offspring per year.

5. Each female chinchilla purchased from respondents and each female offspring will produce several successive litters of from one to six live offspring each year.

6. The offspring referred to in Paragraph Five subparagraph (5) above will sell for at least $200 a pair, a pair being one female and one male.

7. A purchaser starting with one female and one male of respondents' chinchilla breeding stock will have a gross income of at least $600 from the sale-of animals in the second year.

8. There is a great demand for the offspring and for the pelts of the offspring of chinchilla breeding stock purchased from respondents.

9. The purpose of respondents' national advertising is to help purchasers of their chinchilla breeding stock market the chinchillas they raise.

PAR. 6. In truth and in fact:

1. It is not commercially feasible to breed or raise chinchillas from breeding stock purchased from respondents in homes, basements, garages, kitchens, bedrooms and large profits cannot be made in this manner. Such quarters or buildings, unless they have adequate space and the requisite temperature, humidity, ventilation and other necessary environmental conditions are not adaptable to or suitable for the breeding or raising of chinchillas on a commercial basis.

2. The breeding of chinchillas from breeding stock purchased from respondents as a commercially profitable enterprise requires specialized knowledge in the breeding, raising and care of said animals much of which must be acquired through actual experience.

3. Chinchillas are not hardy animals and are not free from illness and disease.

4. Each female chinchilla purchased from respondents and each female offspring will not produce at least three live offspring per year, but generally less than that number.

5. Each female chinchilla purchased from respondents and each female offspring will not produce several successive litters of from one to six each year, but generally less than that number.

6. The offspring referred to in subparagraph (5) Paragraph Five above will not sell for at least $200 a pair but substantially less than that amount.

7. A purchaser starting with one female and one male of respondents' breeding stock will not have a gross income of at least $600 from the sale of animals in the second year but substantially less than that amount.

8. There is not a great demand for the offspring nor for the pelts of the offspring of chinchilla breeding stock purchased from respondents.

9. The purpose of respondents' national advertising is not to help purchasers of their chinchilla breeding stock market the chinchillas they raise but to sell respondents' own breeding stock.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of chinchilla breeding stock.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the tendency and capacity to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' chinchillas by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of the respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Deceptive Practices proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Keeney Brothers Farms is a partnership comprised of Alvin L. Keeney and Elmer H. Keeney who formulate, direct and control its acts, policies and practices. The principal office and place of business of said partnership is located at Route 2, New Freedom, Pennsylvania.

Respondents Alvin L. Keeney and Elmer H. Keeney are individuals trading and doing business as a copartnership under the aforesaid name and style. Their address is the same as that of the partnership.

Respondent Larry Keeney is an individual and office manager of said partnership. He cooperated in and effectuated the acts, policies and practices of the partnership. His address is the same as that of the partnership.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Keeney Brothers Farms, a partnership, and Alvin L. Keeney and Elmer H. Keeney, individually and as copartners trading and doing business as Keeney Brothers Farms, or trading and doing business under any other name or names, and Larry Keeney, individually and as an office manager of said partnership, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of chinchilla breeding stock or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that:

1. It is commercially feasible to breed or raise chinchillas in homes, basements, garages, kitchens or bedrooms, or other quarters or buildings unless in immediate conjunction therewith it is clearly and conspicuously disclosed that the represented quarters or buildings can only be adaptable to and suitable for the breeding and raising of chinchillas on a commercial basis if they have the requisite space, temperature, humidity, ventilation and other environmental conditions.

2. Breeding chinchillas as a commercially profitable enterprise can be achieved without previous knowledge or experience in the breeding, raising and care of such animals.

3. Chinchillas are hardy animals or are free from illness or disease.

4. Each female chinchilla purchased from respondents and each female offspring produce at least three live young per year.

5. The number of live offspring produced per female chinchilla is any number or range of numbers; or representing, in any manner, the past number or range of numbers of live offspring produced per female chinchilla of purchasers of respondents' breeding stock unless, in fact, the past number or range of numbers represented are those of a substantial number of purchasers and accurately reflect the number or range of numbers of live offspring produced per female chinchilla of these purchasers under circumstances similar to those of the purchaser to whom the representation is made.

6. Each female chinchilla purchased from respondents and each female offspring will produce several successive litters of one to six live offspring each year.

7. The number of litters or sizes thereof produced per female chinchilla is any number or range thereof; or representing, in any manner, the past number or range

of numbers of litters or sizes produced per female chinchilla of purchasers of respondents' breeding stock unless, in fact, the past number or range of numbers represented are those of a substantial number of purchasers and accurately reflect the number or range of numbers of litters or sizes thereof produced per female chinchilla of these purchasers under circumstances similar to those of the purchaser to whom the representation is made.

8. The offspirng of respondents' chinchilla breeding stock sell for at least $200 per pair.

9. Chinchilla offspring from respondents' breeding stock will sell for any price, average price, or range of prices; or representing, in any manner, the past price, average price or range of prices of purchasers of respondents' breeding stock unless, in fact, the past price, average price or range of prices represented are those of a substantial number of purchasers and accurately reflect the price, average price or range of prices realized by these purchasers under circumstances similar to those of the purchaser to whom the representation is made.

10. A purchaser starting with one female and one male will have, from the sale of animals, a gross income, earnings or profits of $600 in the second year after purchase.

11. Purchasers of respondents' breeding stock will realize earnings, profits or income in any amount or range of amounts; or representing, in any manner, the past earnings, profits or income of purchasers of respondents' breeding stock unless, in fact, the past earnings, profits or income represented are those of a substantial number of purchasers and accurately reflect the average earnings, profits or income of these purchasers under circumstances similar to those of the purchaser to whom the representation is made.

12. Purchasers of respondents' breeding stock can expect to be able to sell the offspring or the pelts of the offspring of respondents' chinchillas because said chinchillas or pelts are in great demand.

13. The purpose of respondents' national advertising is to help purchasers of their chinchilla breeding stock

market the chinchillas they raise; or misrepresenting, in any manner, the advertising, promotional or sales assistance engaged in by respondents or furnished to purchasers of respondents' products.

B. Misrepresenting, in any manner, the earnings or profits to purchasers or the quality or reproduction capacity of any chinchilla breeding stock.

C. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products or services, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of said order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

KAYE BROTHERS, ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket C-1640. Complaint, Nov. 26, 1969—Decision, Nov. 26, 1969

Consent order requiring a Chicago, Ill., manufacturer of men's and boys' sport jackets to cease misbranding its wool products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Kaye Brothers, a partnership, and Ben Kaye and Edward Kaye, individually and as copartners trading as Kaye Brothers, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Kaye Brothers is a partnership with its office and principal place of business located at 1750 North Wolcott, Chicago, Illinois.

Individual respondents Ben Kaye and Edward Kaye are copartners trading as Kaye Brothers. They formulate, direct and control the policies, acts and practices of said respondent partnership and their address is the same as that of said partnership.

Respondents are manufacturers of men's and boys' sport jackets.

PAR. 2. Respondents, now and for some time last past, have introduced into commerce, manufactured for introduction into commerce, sold, transported, distributed, delivered for shipment, shipped, and offered for sale, in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a) (1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were men's and boys' sport jackets, stamped, tagged, labeled, or otherwise identified as containing a shell fiber content of 100% reprocessed wool, a lining fiber content of all rayon and a knit content of 50% cotton, 50% wool, whereas in truth and in fact, such jackets contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a) (2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products with labels on or affixed thereto which failed to disclose the percentage of total fiber weight of the wool product, exclusive of ornamentation not exceeding five per centum of said total fiber weight, of (1) wool; (2) reprocessed wool; (3)

reused wool; (4) each fiber other than wool when said percentage by weight of such fiber was five per centum or more; and (5) the aggregate of all other fibers.

PAR. 5. The acts and practices of the respondents as set forth above, were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that Complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Kaye Brothers is a partnership with its office and principal place of business located at 1750 North Wolcott, Chicago, Illinois.

Respondents Ben Kaye and Edward Kaye are copartners trading as Kaye Brothers. They formulate, direct and control the policies, acts and practices of the said respondent partnership and their address is the same as that of said partnership.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding an of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Kaye Brothers, partnership, and Ben Kaye and Edward Kaye, individually and as copartners trading as Kaye Brothers, or under any other name or names, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling, or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

2. Failing to securely affix to or place on, each such product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner, each element of information required to be disclosed by Section 4(a) (2) of the Wool Products Labeling Act of 1939.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

S. SCHNEIDERMAN & SONS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-1641. Complaint, Nov. 26, 1969—Decision, Nov. 26, 1969

Consent order requiring a New York City manufacturing furrier to cease falsely invoicing and deceptively guaranteeing its fur products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that S. Schneiderman & Sons, Inc., a corporation, and Joseph Schneiderman and Harry Schneiderman, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent S. Schneiderman & Sons, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondents Joseph Schneiderman and Harry Schneiderman are officers of the corporate respondent. They formulate, direct and control the policies, acts and practices of the said corporate respondent including those hereinafter set forth.

Respondents are manufacturers of fur products with their office and principal place of business located at 150 West 30th Street, New York, New York.

PAR. 2. Respondents are now and for some time last past have been engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b) (1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed to disclose that fur products were bleached, dyed or otherwise artificially colored, when such was the fact.

PAR. 4. Certain of said fur products were falsely and deceptively invoiced in that certain of said fur products were invoiced to show that the fur contained therein was "color altered" when in fact such fur was "dyed," in violation of Section 5(b) (2) of the Fur Products Labeling Act.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced in that said fur products were invoiced to show that the fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Section 5(b) (2) of the Fur Products Labeling Act.

PAR. 6. Respondents furnished false guaranties under Section 10(b) of the Fur Products Labeling Act with respect to certain of their fur products by falsely representing in writing that respondents had a continuing guaranty on file with the Federal Trade Commission when respondents in furnishing such guaranties had reason to believe that the fur products so falsely guarantied would be introduced, sold, transported and distributed in commerce, in violation of Rule 48(c) of said Rules and Regulations under the Fur Products Labeling Act and Section 10(b) of said Act.

PAR. 7. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Fur Products Labeling Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public records for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent S. Schneiderman & Sons, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 150 West 30th Street, New York, New York.

Respondents Joseph Schneiderman and Harry Schneiderman are officers of the said corporation. They formulate, direct and control the policies, acts and practices of said corporation and their address is the same of that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents S. Schneiderman & Sons, Inc., a corporation, and its officers, and Joseph Schneiderman and Harry Schneiderman, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from falsely or deceptively invoicing any fur product by:

1. Failing to furnish an invoice, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b) (1) of the Fur Products Labeling Act.

2. Representing directly or by implication on an invoice that the fur contained in such fur product is "color altered," when such fur is dyed.

3. Representing directly or by implication on an invoice that the fur contained in such fur product is natural when such fur is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

It is further ordered, That respondents S. Schneiderman & Sons, Inc., a corporation, and its officers, and Joseph Schneiderman and Harry Schneiderman, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from furnishing a false guaranty that any fur product is not misbranded, falsely invoiced or falsely advertised when the respondents have reason to believe that such fur product may be introduced, sold, transported, or distributed in commerce.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

BEATRICE FOODS CO. AND THE KROGER CO., INC.

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

Docket 8663. Complaint, July 30, 1965—Decision, Dec. 1, 1969

Order requiring a major food chain store with headquarters in Cincinnati, Ohio, to cease knowingly inducing or receiving discriminatory prices from competing suppliers of fluid milk and other dairy products, and dismissing price discrimination charges against a major dairy products distributor.

COMPLAINT

The Federal Trade Commission having reason to believe that respondent Beatrice Foods Co., has violated and is now violating the provision of subsection (a) of Section 2 of the Clayton Act (U.S.C., Title 15, Section 13) as amended by the Robinson-Patman Act, approved June 19, 1936, and that respondent The Kroger Co., Inc., has violated and is now violating subsection (f) of Section 2 of the Clayton Act (U.S.C., Title 15, Section 13) as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint charging as follows:

COUNT I

PARAGRAPH 1. Respondent Beatrice Foods Co., hereinafter referred to as "Beatrice," is a corporation organized, existing, and doing business under and by virtue of the laws of the State of

Delaware with its principal office and place of business located at 120 South LaSalle Street, Chicago, Illinois.

PAR. 2. Respondent Beatrice is a holding and operating company having on February 28, 1963, a 100% voting power in approximately 15 subsidiary corporations. In addition to these corporations, Beatrice conducts a diversified dairy business including virtually all branches thereof through its operating divisions. Its principal operations are milk, creamery butter, ice cream, produce, cold storage and frozen foods. Beatrice's chief trade name is "Meadow Gold."

Respondent Beatrice has 134 plants for the manufacturing and processing of milk, butter, ice cream, ice cream mixes, dried buttermilk and powdered milk. These plants are located in 33 States. Sales branches are maintained by Beatrice at its manufacturing plants and, in addition, Beatrice has 242 selling branches in 42 States.

Beatrice's gross sales, less returns, for the fiscal year ending February 28, 1964, were $606,157,642.

PAR. 3. Respondent The Kroger Co., Inc., hereinafter referred to as "Kroger," is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio with its principal office and place of business located at 1014 Vine Street, Cincinnati, Ohio.

PAR. 4. Respondent Kroger is now, and for many years has been engaged in the operation of a large chain of retail grocery stores. In the course and conduct of said business, Kroger maintains a highly integrated operation which includes the manufacturing, processing, distributing and retailing of a broad line of merchandise, including fluid milk and other dairy and food products and a variety of nonedible household products. On December 28, 1963, Kroger operated approximately 1,424 retail grocery stores in 24 States of the United States. Kroger's net sales amounted to $2,102,106,248 in 1963, $1,947,570,909 in 1962 and $1,842,342,667 in 1961.

Included among Kroger's retail grocery chain stores are approximately 44 stores located in portions of the States of West Virginia, Ohio and Kentucky comprising the Charleston Division of The Kroger Co., Inc., an operating division of the said respondent Kroger.

PAR. 5. Respondent Beatrice sells fluid milk and other dairy products of like grade and quality to a large number of purchasers located throughout 42 States of the United States, including the States of West Virginia, Ohio and Kentucky for use, consumption or resale therein.

PAR. 6. In the course and conduct of its business, respondent Beatrice is now, and for many years past has been, transporting fluid milk and other dairy products, 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.

Beatrice is now, and for many years past has been transporting fluid 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.

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

All of the matters and things, including the acts, practices, sales and distribution by Beatrice of its said fluid 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 Clayton Act.

PAR. 7. Respondent Beatrice sells its fluid milk and other dairy products to retailers and consumers. Beatrice's retailer-purchasers resell to consumers. Many of said respondent's retailer-purchasers are in competition with other retailer-purchasers of Beatrice.

Respondent Beatrice, in the sale of its fluid milk and other dairy products to retailers and consumers, is in substantial competition with other manufacturers, distributors and sellers of such products.

PAR. 8. In the course and conduct of its business in commerce, respondent Beatrice has discriminated and is now discriminating in price in the sale of fluid milk and other dairy products by selling such products of like grade and quality at different prices to different purchasers at the same level of trade.

Included in, but not limited to, the discriminations in price, as above alleged, beginning on or about June 4, 1962, Beatrice has discriminated in price in the sale of said products by charging many retailer-purchasers, who were and are in competition with the retail stores of Kroger's Charleston Division, higher prices than it charged Kroger's said retail stores. Such differences in price have ranged as high as 32 percent for fluid milk in gallon containers.

PAR. 9. The effect of such discriminations in price by respondent Beatrice in the sale of fluid milk and other dairy products has been or may be substantially to lessen competition or tend to create a monopoly in the purchasing, processing or sale of said products and to injure, destroy or prevent competition:

1. Between Beatrice and its competitors in the manufacture, processing, distribution and sale of such products.

2. Between retailers paying higher prices and competing retailers paying lower prices for Beatrice's said products.

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

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. Respondent Kroger, in the course and conduct of its business, is now, and for many years has been purchasing in commerce from sellers engaged in commerce, as "commerce" is defined in the amended Clayton Act, numerous food and household products, including fluid milk and other dairy products, for use, consumption and resale within the United States.

In connection with such transactions, respondents are now, and have been, in active competition with other corporations, partnerships, firms and individuals also engaged in the purchase for use, consumption and resale of such food and household products, including fluid milk and other dairy products, of like grade and quality from the same or competitive sellers. The aforesaid sellers are located in the various States of the United States, and respondent Kroger and such sellers cause the products when purchased by said respondent, to be transported from the place of manufacture, processing or purchase, to Kroger's warehouses and retail stores located in the same State or the various other States of the United States. Further, in many instances the aforesaid sellers must purchase or obtain raw materials, supplies and finished products from States other than the State in which such food and household products, including fluid milk and other dairy products, are manufactured, processed or purchased as aforesaid, in order to fulfill the obligations of said sellers in their commitments to supply the said respondent.

PAR. 13. Respondent Kroger is, and was at all times mentioned herein a knowledgeable processor, manufacturer and buyer of fluid milk and other dairy products. Kroger owns and operates at least three plants for the processing and manufacture of fluid milk, and other dairy products.

PAR. 14. In the course and conduct of its business in commerce, Kroger has knowingly induced or received discriminations in price which are prohibited by subsection (a) of Section 2 of the Clayton Act, as amended.

For example, respondent Kroger, in its negotiations with respondent Beatrice, before and after June 4, 1962, for the supply of fluid milk and other dairy products under private label to the stores of Kroger's Charleston Division, knowingly induced prices which were and are discriminatory under the provisions of Section 2 of the amended Clayton Act, as set forth in Count I of this complaint. Further, respondent Kroger had and has, since June 4, 1962, knowingly induced or received prices from respondent Beatrice in the purchase of such products for the stores of said Charleston Division which said prices were and are discriminatory under the provisions of Section 2 of the amended Clayton Act, as set forth in Count I hereof.

By the term private label, it is meant that such products were packaged under labels bearing brand names owned by Kroger or peculiar to the retail operations of Kroger, its divisions and subsidiaries, instead of under labels displaying the brand names owned by Beatrice or peculiar to the operations of Beatrice.

PAR. 15. When respondent Kroger knowingly induced or received the discriminatory prices from its supplier, as alleged, Kroger 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. 16. The aforegoing acts and practices of Kroger are in violation of subsection (f) of Section 2 of the Clayton Act, as amended.

Mr. Fiodie P. Favarella, Mr. John J. Mathias, and *Mr. Rafe H. Cloe* supporting the complaint.

Mr. Edward L. Foote of *Winston, Strawn, Smith & Patterson,* 38 South Dearborn St., Chicago, Ill., and *Mr. John P. Fox, Jr.,* and *Mr. Peter J. Marcus,* 120 South LaSalle St., Suite 2200, Chicago, Ill., for respondent Beatrice Foods Co.

Mr. Norman Diamond, Mr. Murray H. Bring, and *Mr. Max H. Crohn, Jr.,* of *Arnold & Porter,* 1229 19th St., NW., Washington, D.C., for respondent The Kroger Co., Inc.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

SEPTEMBER 18, 1967

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I. THE COMPLAINT AND THE STATUTE

The complaint in this proceeding, consisting of two counts, was issued on July 30, 1965.

Count I of the complaint, as modified by the More Definite Statement made by complaint counsel, alleges that the respondent Beatrice Foods Co., beginning in June 1962, violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by discriminating in prices in the sale of fluid milk and other dairy products and by selling those products to The Kroger Co., Inc., the Great Atlantic & Pacific Tea Co., Inc., and Garden Fresh Markets, Inc., at lower prices than Beatrice Foods Co. sells those products of like grade and quality to other retail customers in competition with the companies named above. The provisions of the Clayton Act upon which Count I of the complaint is based provide as follows:

Sec. 2.(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *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: * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Count II of the complaint alleges that respondent The Kroger Co., Inc., in its negotiations with respondent Beatrice Foods Co., "* * * for the supply of fluid milk and other dairy products under private label brands to the stores of Kroger's Charleston Division * * *," before and after June 4, 1962, knowingly induced or received prices "* * * which were and are discriminatory under the provisions * * *" of subsection (f) of Section 2 of the Clayton Act, as amended. The portion of the Clayton Act upon which Count II of the complaint is based provides as follows:

(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

II. THE RESPONDENTS' ANSWERS

On September 15, 1965, respondent Beatrice Foods Co. filed its answer in which it made certain factual admissions, but denied the principal charges alleged in the complaint, and pled a number of affirmative defenses, as follows:

1. The prices charged were not unlawfully discriminatory;
2. Competitors of Beatrice Foods Co. were not injured within the meaning of Section 2(a) of the Clayton Act;
3. Competitors of the alleged favored customers were not injured within the meaning of Section 2(a) of the Clayton Act;
4. Certain of the alleged discriminatory sales were not sales in commerce as defined in Section 2(a) of the Clayton Act;
5. All price differentials, if any, were instituted in good faith to meet competitors' prices; and
6. All price differentials, if any, represented permissible differentials because they made due allowances for differences in the cost of manufacture, sale, or delivery that resulted from differing methods of distribution or differing quantities sold to the alleged favored customers.

Respondent The Kroger Co., Inc., filed its answer on September 27, 1965, in which it made certain factual admissions, but specifically denied that the alleged differentials in price as to sales to The Kroger Co., Inc., violated Section 2(a) of the Clayton Act; and further, it denied that it knowingly induced or received any unlawful price discriminations from Beatrice Foods Co. or that it knew or should have known that the prices of Beatrice Foods Co. constituted discriminations violative of Section 2(a).

III. HEARINGS, PROPOSED FINDINGS, AND ABBREVIATIONS

Hearings for the reception of evidence in support of the case-in-chief, in defense, in rebuttal, and in surrebuttal were concluded on March 21, 1967. Consideration has been given to the entire record herein, including proposed findings as to the facts, proposed conclusions, and written arguments in support thereof. Each of those proposals that has been accepted has been, in substance, incorporated into this initial decision. All proposals not so incorporated are hereby rejected as not supported by the evidence of record or as not deemed necessary to a fair determination of the issues herein.

Citations in this initial decision have been abbreviated as follows:

CX — Commission Exhibit.
Tr. — Page in Transcript.
RBX — Respondent Beatrice's Exhibit.
RKX — Respondent Kroger's Exhibit.
ARA — Respondent Beatrice's Answer to Request to Admit, filed September 23, 1966.

Hereafter, respondent Beatrice Foods Co. will be referred to as "Beatrice"; respondent The Kroger Co., Inc., as "Kroger"; and the Great Atlantic & Pacific Tea Co., Inc., as "A & P."

IV. THE ISSUES

The principal issues arising from the pleadings, the evidence, and the relevant provisions of the Clayton Act are as follows:

A. *Commodity*

What are the products involved in this proceeding?

B. *Time Involved*

During what period of time did the alleged discriminations occur?

C. *Sales in Commerce*

Were the sales by Beatrice to its favored customers made in commerce within the meaning of the Clayton Act?

D. *Discrimination*

Did the discriminations in price, if any, which Beatrice granted to Kroger, to A & P, and to Garden Fresh Markets, Inc., or to any of them, have the effect of substantially lessening competition or tending to create a monopoly in any line of commerce, or injuring, destroying, or preventing competition with any person who either granted or knowingly received the benefit of such discriminations, or with the customers of any of them, or did such discriminations create a reasonable probability of such an effect?

E. *Meeting Competition*

Were the prices for milk and cottage cheese that had been agreed to by Beatrice and Kroger, by Beatrice and A & P, and by Beatrice and Garden Fresh Markets, Inc., agreed to by Beatrice in good faith to meet the equally low prices of a competitor?

F. *Beatrice's Burden as to Cost Justification and Meeting Competition*

Assuming that complaint counsel have established a prima facie case of price discrimination, has Beatrice met its burden of proof by showing either a good-faith meeting of competition or have the price differences favoring Kroger, A & P, and Garden Fresh Markets, Inc., been justified by differences of volume of sale or methods of delivery?

G. *Complaint Counsel's Burden Under Section 2(f) of the Clayton Act*

Assuming that complaint counsel have established a prima facie case of price discrimination by Beatrice that favored Kroger, have complaint counsel proved that Kroger induced or received such prices knowingly or that under such circumstances that Kroger should, in reason, have known that the prices granted to it were not cost justified or that Beatrice was not offering such prices in good faith to meet the equally low price of a competitor?

V. IDENTITY AND BUSINESS OF BEATRICE

Beatrice Foods Co. is a Delaware corporation, with its principal office and place of business located at 120 South LaSalle St., Chicago, Illinois (Complaint and Answer, Count I, Par. 1).

It is also a holding and operating company, and on February 28, 1963, had a 100 percent voting power in approximately 15 subsidiary corporations. In addition to these subsidiary corporations, Beatrice conducts a diversified dairy business. Beatrice's chief trade name is "Meadow Gold." It sells milk and other dairy products, grocery products, and agricultural by-products (Complaint and Answer, Count I, Par. 2; Grantham, Tr. 213–14; CXs 50H–0, 51J–0, 52J, K, N, O, 53J–0).

Beatrice has 134 plants for the manufacturing and processing of milk, butter, ice cream, ice cream mixes, dried buttermilk and powdered milk. These plants are located in 33 States. Also, Beatrice has 242 selling branches in 42 States (Complaint and Answer, Count I, Par. 2).

Beatrice's net sales for the following fiscal years were (CX 53C):

Year ending:	*Net sales*
February 28, 1962	$539,192,494
February 28, 1963	569,487,854
February 29, 1964	606,157,642
February 28, 1965	681,385,124

Beatrice possibly ranks third among the large interstate dairy companies in annual gross sales (Tr. 217).

The parts of the Beatrice organization with which we are principally concerned consist of three plants—one located at Clarksburg, West Virginia, one located at Beckley, West Virginia, and a third, which is a manufacturing facility, located at Sandy Lake, Pennsylvania, where Beatrice manufactures the cottage cheese sold by it in West Virginia (CX 16, 54B, 54U). Each of these plants is operated autonomously and makes basic management decisions in response to local conditions (Tr. 254). The Beckley and Clarksburg divisions manufactured the fluid milk products that were sold principally to wholesale grocers (Tr. 453, 1428).

The Sandy Lake, Pennsylvania, plant prior to 1962 purchased substantial amounts of fluid milk in raw form from farmers located in Western Pennsylvania through a selling agency called DCSA (Dairymen's Co-Operative Sales Association). The Sandy Lake manufacturing facility of Beatrice separated the butterfat content of raw milk for use in the ice cream that was manufactured in Pittsburgh. The by-product—nonfat solids—was reduced to powder and was disposed of as a distress item under government-supported parity (CX 54U; *e.g.*, RBX 121B, D; Tr. 404–06, 435–36, 2468–69).

VI. IDENTITY AND BUSINESS OF KROGER

Respondent Kroger is now, and for many years has been, engaged in the operation of a large chain of retail grocery stores (Complaint and Answer, Count I, Par. 4; CXs 155D–E, J–K, 156D–E, J–K, 158D–E). In terms of sales, Kroger ranks third nationally among the large retail grocery chains (Tr. 932). It is estimated that on December 28, 1963, it operated 1,424 retail grocery stores in more than 24 States. These retail grocery stores sell fluid milk and other dairy products, other food products, and a variety of nonedible household products. Kroger's operations are highly integrated and include manufacturing, processing, distributing, and retailing (Complaint and Answer, Count I, Par. 4; CXs 155E, 156D–E, 157E, 158D–E). Kroger's net sales amounted to:

$1,842,342,667 in 1961
$1,947,570,909 in 1962
$2,102,106,248 in 1963. (Complaint and Answer, Count I, Par. 4.)

Kroger's retail grocery stores are operated through a number of division headquarters. Each of these division headquarters serves from approximately 30 to 100 stores (Tr. 932–33). The commodities sold by the individual stores of the Charleston division are all purchased centrally through the division's purchasing offices. No products are purchased at the store level by the store manager. Some products are, at times, purchased by the division through central purchasing facilities operated by Kroger at a level above the Charleston division. The Charleston division operates central warehousing facilities in Charleston, West Virginia, from which it disperses most of the products sold by the individual stores (Tr. 755–57). In the case of fluid milk and other dairy products, however, during the period covered by the Beatrice-Kroger agreement, delivery was made directly to the individual Kroger stores by the suppliers (Tr. 766–67).

The Kroger stores involved in this proceeding were located in the company's Charleston division (CX 88). During the relevant period, that division included 35 stores in West Virginia, five in eastern Kentucky, and four in eastern Ohio (CX 60; Complaint and Answer, Count I, Par. 4). Proof of the alleged unlawful price discriminations was limited, however, to customers of Beatrice located entirely within the State of West Virginia.

VII. THE PRODUCTS INVOLVED AND THE METHODS OF SALE AND DELIVERY

Although the complaint charges Beatrice with discriminations in the sale of "Fluid milk and other dairy products," the evidence in this proceeding is limited principally to the products of milk and cottage cheese. And the principal charge is concerned with the sale of those products by Beatrice to Kroger under an agreement made on April 9, 1962, whereby Beatrice furnished those products to Kroger marked with Kroger's private label under a "limited" or "stripped" service agreement as distinguished from a full-service agreement (CXs 36, 37, 39, 43, 63). By agreement between counsel, the period of discrimination was limited to June 1962 through October 1963 (Tr. 159).

There is a substantial difference between limited service and full service. Under a full-service agreement, a deliveryman visits a particular store at least once every workday (Tr. 490–91, 715). Upon arriving at a store, the deliveryman goes to the dairy case and rotates the milk in the case so that the older milk is placed in the front. After he decides how much milk and other dairy products are needed, he writes out the order therefor and returns to his truck to procure the particular items on the order. He then goes back into the store and fills the dairy case. He may wait while the store personnel checks the delivery and totals the sales ticket. After that, he waits either for payment or for his sales ticket to be signed (Tr. 716, 847–48, 876, 1428–29, 1607–08). He accepts merchandise returned to him "for any reason," loads it on his truck, and transports it back to his plant (Tr. 716, 876) where he totals his receipts and monies before he turns them in to his office (Tr. 1478).

In contrast, the limited-service agreement between Beatrice and Kroger provided for Kroger to order its needed milk and cottage cheese 2 days in advance of delivery. It also restricted deliveries to once a day for five days a week. The delivered products were placed at the individual Kroger store's dock but no indoor service of any kind was rendered by the deliveryman. In addition, invoices were received at Kroger's central office (CX 90; Tr. 716, 1429–30, 1488, 1490–91). The terms of the agreement placed the responsibility for advertising the Kroger-labeled product upon Kroger. Moreover, Kroger's privilege of returning merchandise that was damaged by the supplying dairy during delivery was restricted; and the loss on any unsold products delivered in accordance with applicable shelf-life conditions was suffered by Kroger (Tr. 509–10, 727, 1430; CX 90).

Under the terms of the contract, Kroger also purchased merchandise from Beatrice bearing Beatrice's own brand names, "Meadow Gold" and "Greenbrier," but Kroger paid the full list price for such merchandise (Tr. 718–19, 729).

VIII. REASONS GIVEN BY KROGER FOR WANTING PRIVATE-LABEL MILK

In November 1961, Mr. Dickinson (now deceased), the grocery merchandiser of Kroger's Charleston division, contacted Mr. Francis X. Casserly, then manager of Kroger's Dayton dairy plant and grocery merchandiser for the Columbus division and since then responsible for Kroger's private-label dairy operations, to inquire about the private-label-milk program that the Columbus division was then operating (Tr. 587–88). As a result of that discussion, a plan was initiated for a private-label-milk program in Kroger's Charleston division.

The interest of Kroger's Charleston division in a private-label-milk program, late in 1961, was prompted by a variety of reasons. The dairy cases in the Kroger stores were described as looking like "a jungle." Each displayed the products of at least four, and sometimes five, different suppliers, including Valley Bell Dairy, Broughton Farm Dairy, The Borden Company, Fairmont Foods Company, and Beatrice (Tr. 685–86, 589). Because each of the various brands had so little space in Kroger's cases, the drivers for the various companies might return several times a day to make sure their products were in supply. Such a practice was described as a "nuisance" to Kroger and "an expense to the companies" (Tr. 715). The private-label agreement was intended to eliminate these conditions (Tr. 715–16).

As an additional problem, some Kroger stores carried brands that were not sold in the majority of the stores in the division (Tr. 784). The large number of suppliers to the stores, together with the absence of a division-wide brand, discouraged Kroger from divisional advertising of dairy products (Tr. 685–86, 778–79, 784–85). Another consideration stated by Kroger's representatives was the fact that the various brands of milk being sold by Kroger were too costly to permit Kroger to compete profitably with the numerous local price cutters who were then active throughout the Charleston division (Tr. 777–78; *e.g.,* RBXs 100–130D, 131–56, 181–83, 185–86, 188–93, 195, 197–99, 202, 206, 209).

In late November 1961, Mr. Casserly met with Mr. Dickinson and Mr. Arnold Scherz, the Kroger vice president in charge of the Charleston division (Tr. 590). Those officials decided that there should be only the Kroger label and one other brand of milk in each store, with the high-volume item, homogenized milk in gallon jugs, available solely under the Kroger label (Tr. 629–30, 685–87, 715). It was also decided that the private-label merchandise should receive preferential space in the dairy cases of each store (Tr. 687).

When Mr. Casserly undertook to develop such a program, the published price lists of the dairy processors who served the geographic area encompassed by Kroger's Charleston division applied only to those brand products that were delivered under the regular- or full-service agreements (CXs 377G, 377L, 377R; RBXs 123A, 123I, 123J). None of those lists contained any references to prices of private-label merchandise or to merchandise furnished under a limited or stripped service; all retailers of milk in the market area of the Charleston division were buying brand-name products and were receiving either full or regular service (CXs 377G, 377L, 377R; RBXs 123A, 123I, 123J; Tr. 782–83, 812, 847–48, 876–77, 896, 913–14). The idea of private-label milk was novel in the territory (Tr. 591–92).

IX. SEQUENCE OF EVENTS LEADING TO THE BEATRICE-KROGER AGREEMENT

A. *The Selection Process and Initial Meeting*

After meeting with the personnel of Kroger's Charleston division in December of 1961, Mr. Casserly, who was the Kroger official responsible for private-label operations, notified Valley Bell Dairy, Broughton Farm Dairy, The Borden Company, and Fairmont Foods Company, all of whom operated in West Virginia, that Kroger was interested in receiving proposals for a private-label-milk program on a stripped-service basis (Tr. 589–91, 715).

Mr. Casserly first contacted Broughton Farm Dairy through its president, Mr. Carl Broughton, and on November 30, 1961, he had a preliminary discussion with Mr. Broughton about supplying private-label milk to Kroger (Tr. 590, 943; CX 100). At that time Broughton was selling its dairy products to 12–14 Kroger stores in the Charleston division and was selling private-label milk to seven Kroger stores in Kroger's Columbus division at 20 percent off list prices under a full-service agreement (Tr. 946–47, 594, 596, 717–18).

Near the same date as stated above, Mr. Casserly or Mr. Dickinson, telephoned Mr. J. William Martin, general manager of the Valley Bell Dairy, and arranged an appointment with him to discuss a private-label proposal (Tr. 590, 889). At that time, Valley

Bell was serving 23 Kroger stores in the Charleston division (CX 135C–D). The following day, Mr. Casserly, along with his plant accountant, Mr. Jack Nicely, met with Mr. Martin and his brother at the Valley Bell plant (Tr. 590, 889; CX 132). At that meeting, Mr. Martin informed Mr. Casserly that he had several reservations regarding the submission of a private-label quotation, although he said that he would like to consider the matter further (Tr. 891; CX 132). Mr. Casserly told Mr. Martin that he would be happy to answer any of Valley Bell's questions (Tr. 891). It is doubtful that Valley Bell was ever seriously interested in the program; but if it was, its interest applied to only 27 of the 44 Kroger stores in the Charleston division (CXs 134–137).

In early December 1961, Mr. Casserly telephoned Mr. Paul R. Dew, the central division manager of Fairmont Foods Company (Tr. 590–91, 801, 803). At that time Fairmont was selling dairy products to some 28–30 Kroger stores (Tr. 817). On December 4, the two men met in Dayton, Ohio, and discussed the possibility of Fairmont's submission of a private-label proposal (CX 116). Mr. Casserly and Mr. Dew met again in Dayton in early January 1962 (Tr. 803).

It was either in December 1961 or early January 1962 that Mr. Casserly invited a proposal from The Borden Company, which was then a supplier of seven Kroger stores (Tr. 591, 600, 857–58, 865).

Although Beatrice was serving 26 Kroger stores in West Virginia at that time, Beatrice was not invited to submit a proposal. Beatrice was not considered by Mr. Casserly as prepared to furnish milk in the type of containers that Kroger desired (CX 29C; Tr. 365–67, 369–71, 487, 591). When Beatrice heard rumors of Kroger's interest in a private-label-milk arrangement, it took the initiative and contacted Kroger (Tr. 365–67, 485–86).

It was late in December 1961 that Mr. Hugh Hutchinson, Beatrice's Appalachian district manager, and Mr. George Stollings, the manager of Beatrice's Beckley plant, contacted Mr. Scherz, vice president of Kroger's Charleston division; and on January 2, 1962, they met with Mr. Scherz in Charleston (Tr. 365–67, 486). Mr. Scherz advised the Beatrice representatives to communicate with Mr. Casserly because Mr. Casserly was in charge of the private-label program (Tr. 486). Mr. Stollings immediately telephoned Mr. Casserly and they agreed to meet on January 12, 1962 (Tr. 368–69, 486; CXs 26, 87). Beatrice, however, was not invited to submit a proposal until after Beatrice's officials had persuaded Mr. Casserly that Beatrice was able to meet Kroger's container requirements (Tr. 371–72, 486–87).

B. *Communications Between Kroger and the Prospective Suppliers During January-February 1962*

After Mr. Casserly had invited proposals for a private-label, stripped-service agreement, the various dairies so invited continued to promote their companies' interests by telephone communications and personal meetings with Mr. Casserly. In the course of the discussions, continuous "fencing" went on among the parties (Tr. 595, 601, 668–70). The dairies were trying to learn more about the limited service which Mr. Casserly wanted, about the volume he required, and about the elimination of promotional activity on their part. They were particularly interested in the identies of competing dairies and the prices they were proposing (Tr. 595, 668–70). Mr. Casserly informed the interested dairies of the names of the other dairies that he was considering, and he also gave them some general information concerning the proposals that he had already received (Tr. 370–71, 487, 595, 702, 715).

On January 6, 1962, Mr. Robert Hurst, vice president and production manager of Broughton Farm Dairy, sent a letter to Mr. Casserly in which he offered discounts approximating 20 percent from its list prices for Kroger's private label products—with regular service to Kroger but without promotional allowances (Tr. 694, 945; CXs 103–104).

Mr. Casserly informed all other dairies of Broughton's proposal of about 20 percent off list price (Tr. 375, 487–88, 595–97, 702–03, 716–17). This was the same discount at which Broughton Farm Dairy was supplying a private-label product on a full-service, nonpromotional basis to Kroger in a nearby area (Tr. 591, 596, 717–18). The other dairies were likewise informed that Kroger expected a lower price than 20 percent off list because of the larger volume of milk Kroger would require, because Kroger would require only a limited service, and because of the deterioration of milk prices in the Charleston market (Tr. 596–97, 602–03, 716–18). Mr. Casserly testified, however, that Kroger had no definite "figure in mind" (Tr. 596) because he did not "know the costs of these particular people who were competing * * *" (Tr. 597). Apart from the initial Broughton offer, Kroger never informed the bidding dairies "what their competitors had bid on the contract * * *" (Tr. 375, 487–88, 595–97, 702–03, 716–17).

On January 12, 1962, when the Beatrice representatives—Messrs. Hutchinson and Stollings—held their first meeting with Mr. Casserly (Tr. 368–69, 486–87), they informed him that they had a Pure-Pak machine at their plant in Paintsville, Kentucky, which was not in use, and that it could easily be transferred to Beckley to pack Kroger's private-label milk (Tr. 371–72, 487). Mr. Casserly then indicated that he would be willing to receive a proposal from Beatrice (Tr. 487).

In the course of the meeting, the Beatrice representatives learned that Fairmont Foods Company and Broughton Farm Dairy had previously met with Mr. Casserly; that Broughton was furnishing private-label milk to Kroger's Columbus division at 20 percent off list; and that Broughton had already made a similar proposal for the Charleston division (Tr. 375, 495, 595–96, 702–03, 716–17). The Beatrice representatives had come to the meeting prepared to offer Kroger 15 percent off list, but when they learned of Broughton's proposal, they did not make the offer (Tr. 488). However they did obtain an indication of the sales volume that could be expected under a private-label agreement for the Charleston division (Tr. 489), and this led them to begin evaluating their contemplated proposal in terms of limited service (Tr. 489–90).

The deteriorating wholesale prices of milk in Charleston disturbed Messrs. Hutchinson and Stollings (Tr. 490–91) so that following the January 12, 1962, meeting with Mr. Casserly, they began thinking in terms of a formula proposal based upon manufacturing and distributing costs, plus profit (Tr. 379, 490–91). Because of the large volume of milk that Kroger would require, they wanted to make sure that this anticipated increased business could be handled at a profit "* * * regardless of what happened in the market place * * *" (Tr. 488–91). Having conceived this idea, they then decided to schedule another meeting with Mr. Casserly in the near future to discuss it with him (Tr. 379, 490).

On January 18, 1962, Mr. Casserly formally invited proposals on private "Kroger label fluid milk and cottage cheese" from Valley Bell, Borden, Broughton, Fairmont, and Beatrice and simultaneously furnished them with a written estimate of the volume of business involved, stating that Kroger's sales of those products had exceeded $2,000,000 during the preceding year (CXs 88, 105, 117). The dairies were reminded that Kroger itself would perform the servicing functions for their merchandise (CXs 88, 105, 107).

On January 25, 1962, Messrs. Hutchinson and Stollings of Beatrice again conferred with Mr. Casserly (Tr. 379, 490). The discussion covered the limited service that Kroger desired; the preordering procedure Kroger would follow; Kroger's curtailment of the customary number of delivery days; and a plan for a centralized billing procedure (Tr. 491). In the course of that meeting the Beatrice representatives proposed a $0.21 per pound price on cottage cheese, to which Mr. Casserly responded that they were not "in the ballpark" on that basis (Tr. 380–81, 491–92). No other prices were mentioned at the meeting (Tr. 380–84, 491–92). They did discuss, however, Beatrice's preference for quotations based upon a cost-plus formula built up from raw-milk prices (Tr. 490–91). To the surprise of the Beatrice representatives, this suggestion was attractive to Mr. Casserly (Tr. 490–91). Mr. Casserly preferred a cost-plus formula because he stated that an "off list" basis placed too much control in the hands of the suppliers, who could set their list prices to serve their own purposes (Tr. 606, 628).

A third meeting between Mr. Casserly and Mr. Dew, the representative for Fairmont Foods Company, was held in early February 1962 (Tr. 803). During the course of that meeting, Mr. Dew made no proposal (Tr. 803). Instead, he reviewed the types of bids that might be acceptable to Kroger and emphasized the cost-justification procedures that would have to be utilized to arrive at a lawful bid (Tr. 803).

Shortly thereafter, Mr. Dew sent Mr. Casserly two memorandums prepared by Fairmont's counsel (CX 118). Those documents discussed the necessity for cost justification, and other features of the contemplated bid to Kroger, from the standpoint of insuring Fairmont's compliance with the Robinson-Patman Act (CX 118). One of the memorandum also discussed various types of savings that might be realized by including in a private-label agreement provisions that would relieve Fairmont of expenses for advertising, billing, servicing, and delivering. Because of these savings, Fairmont stated that its prices could be cost justified (CX 1181–K).

The Beatrice executives next met with Mr. Casserly on February 9, 1962 (Tr. 386–88, 494). On that occasion, they gave him a promotional brochure that contained all the elements of a proposal to supply private-label products to the Charleston division except that no prices were filled in on the attached price sheet (CXs 89, 386–389; Tr. 386, 494, 663–64, 669). The brochure informed Mr. Casserly that Beatrice had successfully supplied private-label milk in other areas; that the merchandising and advertising of the Kroger label was to be entirely in Kroger's hands and at its cost; that the Beatrice quality-control laboratory, which checked both the raw-milk supply and the finished products, was the only dairy-plant laboratory to be certified as a government approved laboratory in the State of West Virginia; that only one additional route would have to be added to serve the entire division; that there would be only five delivery days each week; and that there would be central billing through Kroger headquarters (CX 89A–D). In addition to the brochure, they suggested a price of $0.71 for a gallon jug of milk. Mr. Casserly at once replied that if they could not do better than that, they "might as well go back home" (Tr. 388–89, 495, 668–69, 702–03, 716–17). He again referred to his previous advice that he had already received a quotation from Broughton Farm Dairy in the neighborhood of 20 percent off list (Tr. 495, 668–69, 702–03, 716–17). No other prices were quoted by Mr. Casserly (Tr. 389, 495–96). The Beatrice officials indicated that they wanted to reevaluate their proposal and would return at a latter date (Tr. 495–96).

C. *Proposals in February 1962*

On February 12, 1962, Broughton Farm Dairy submitted another offer to Mr. Casserly (Tr. 602–04; CX 106). Unlike the previous proposal, which reflected a discount from list prices, this offer was based upon the fluctuating cost of raw milk, plus a fixed differential for processing, packaging, delivery, and profit (CX 106A–B). It was the first formula quotation received by Mr. Casserly.

On February 22 or 23, 1962, Fairmont Foods Company submitted its first formal proposal to Kroger (Tr. 803–04, 620–22; CXs 119–122, 125, 126). This proposal consisted of various parts, including the following:

(1) A document entitled "Why Fairmont," which set forth some 15 reasons why Fairmont should be awarded the contract, including "Quality Control, Standard Cost System & I.B.M. Accounting," experience in supplying private-label-milk products, the availability of "full time merchandising and advertising assistance," and the like.

(2) The Annual Report of Fairmont for the fiscal year ended February 28, 1961.

(3) A map locating the processing plants and sales and distri-

bution branches of Fairmont and the Kroger stores in the Charleston division.

(4) A price list for each of 15 Kroger stores, embodying list-price discounts ranging up to 22.5 percent for fluid milk and 26.5 percent for cottage cheese.

(5) A summary and analysis based upon the assumption that Fairmont could serve 75 percent of Kroger's milk needs.

This proposal advised Kroger that if a responsible supplier offered lower prices, Fairmont would meet such an offer on the same terms, provided it could make at least a 5 percent profit (CX 125B).

On February 22, 1962, Valley Bell Dairy purportedly offered to serve 29 stores in the Charleston division (CXs 136, 137). The Valley Bell offer was not responsive to Mr. Casserly's invitation for proposals based upon limited service (Tr. 659). It was an offer to furnish its products to Kroger on the same basis and at the same prices then prevailing with respect to the same products sold under the Valley Bell label (Tr. 893; CX 137). Among the five dairies invited to submit proposals for Kroger's private-label program, only Valley Bell—in declining to do so—asserted that there was no cost justification for any reduction from the prices for its branded products (CX 137A–B). Mr. Casserly, according to his testimony, was advised that Valley Bell's actual difficulty was that its accounting system did not permit either cost allocation or the ascertainment of unit costs (Tr. 659, 914–15).

D. *Proposals in March 1962*

At its meeting with Mr. Casserly in late February, Fairmont Foods Company indicated that it was considering the submission of cost-plus quotations related to raw-milk costs; and on or about March 5, 1962, it submitted such a proposal (Tr. 622–23, 626–28, 650, 804; CXs 123, 124, 127, 128). This repeated its earlier off-list offer and, in addition, offered an alternative cost-plus proposal, labeled "Custom Processing and Delivery," under which Fairmont's prices would vary with fluctuations in raw-milk costs (Tr. 650, 804–06, 845–47; CXs 123, 124). This alternative specified six different milk and cottage cheese prices spread among different market areas; a seventh price, applicable only to the Huntington area, was subsequently inserted apparently because a mistake had been made in computing the Huntington price (Tr. 634–35; CXs 123, 177).

These cost-plus prices were substantially lower than the previous discount-off-list proposal submitted by Fairmont (CX 123, columns 4 and 5). On the basis of this offer, which included a guaranteed profit, Fairmont expected to be selected as the private-label supplier of the Charleston division (Tr. 805, 846, 849).

Mr. Casserly's understanding of Fairmont's "Custom Processing and Delivery" proposal was expressed, as follows:

> * * * it is built up upon the anticipated volume and the anticipated volume and the anticipated savings in delivery and merchandising expenses and advertising which the Fairmont Food Company would experience and this was then reflected in what they call the custom net cost for Kroger label products (Tr. 654).

Mr. Casserly testified also that besides its previous cost-justification assurances (Tr. 628–29, 630–31), Fairmont at that time had given him a comprehensive cost study "* * * in order to justify the price they were offering" (Tr. 634, 641–42, 654).

On or about March 9, 1962, Broughton Farm Dairy tendered another proposal (CXs 112, 113; Tr. 602, 604–05). This was based upon lower raw-milk costs and reflected substantially lower prices than Broughton's February offer (Tr. 602, 604–05; CXs 106, 112, 113).

The Borden Company submitted a three-part bid on March 9, 1962 (CX 97). Pricing Plan No. 1 offered prices well below list for both the Kroger and Borden brands, provided the products were picked up at Borden's Huntington, West Virginia, plant and delivered to Kroger stores by Kroger's own trucks (CX 97C). Pricing Plan No. 2 prescribed somewhat higher prices than Plan No. 1, with Borden assuming full delivery responsibility, but providing limited service (Tr. 876–77; CX 97D–J, M). Pricing Plan No. 3 provided for complete store delivery service of Kroger's private-label dairy products and Borden's dairy products with discounts.

Mr. Casserly was advised that the prices in Borden's Plan No. 2 reflected savings attributable to the limited service involved (Tr. 877). The Borden witness, Mr. Robert F. Moore, was able to estimate the savings that could be passed on to Kroger by virtue of his extensive experience in the dairy industry (Tr. 880). He testified as follows (Tr. 880):

> Q. Mr. Moore, in your capacity as District Manager for the Midwestern District, you have had some experience with limited or stripped service sales, have you not?
>
> A. Yes. I have had experience with most phases of our business.
>
> Q. Was it based upon that experience that you were able to estimate what cost savings could be passed along to Kroger?

A. Correct.
Q. Under Plan 2?
A. Correct.

Messrs. Hutchinson and Stollings of Beatrice again met with Mr. Casserly on March 14, 1962, and submitted another proposal to him (Tr. 411–12, 496). By this date, Mr. Casserly had already received the revised proposals of the other dairies (Tr. 700–02, 706). At the outset of the meeting, one of the Beatrice representatives mentioned a $0.68 gallon-jug price—equivalent to a 20 percent discount off prevailing list (Tr. 411–12, 496–97). In the course of the succeeding discussion, Mr. Casserly reminded the Beatrice executives that he knew the milk market was collapsing in Charleston (Tr. 497). He also referred specifically to the interim submission of two quotations from Fairmont Foods Company—one proposed a series of discounts and the other based prices upon a build-up of raw milk costs—but he did not specify the prices actually bid (Tr. 496–97).

Realizing that the award of the contract might hinge on the gallon-jug price—since the "gallon jug was the big volume item" —the Beatrice officials "fenced" with Mr. Casserly about the price Beatrice would have to meet if its bid for the Kroger contract was to be successful. At this point in the record of the conference there is a conflict in the testimony as to who suggested a lower price of $0.66 for a gallon jug of milk. On the one hand, Mr. Hutchinson testified that Mr. Casserly, independent of any statement either by himself or by Mr. Stollings, wrote that price on the blank price sheet attached to the brochure that had been given to Mr. Casserly on Feburary 9, 1962 (Tr. 411–3). On the other hand, Mr. Stollings testified that he (Stollings) "* * * quoted the $0.66 price * * *" (Tr. 498). Since Mr. Casserly's testimony on this point accords with Mr. Stollings', we conclude that Mr. Hutchinson was simply mistaken as to how the final price was first introduced (Tr. 720). As they quoted their prices to Mr. Casserly, he copied them down on the blank price list (Tr. 496–99, 719–20; CX 89N). Based on these prices, Mr. Casserly advised the Beatrice representatives that Beatrice was competitive with other bidders, and he perhaps mentioned Fairmont (Tr. 497–98, 740). During the same meeting, Mr. Casserly and Mr. Stollings, with the aid of a calculator, worked out a formula for computing the fixed differential to be added to the raw-milk cost for milk in gallon jugs and for the other milk products in the line based on the prices that Beatrice had quoted (Tr. 498–99).

The formula arrived at was a cost build-up price, as was Fairmont's, with the prices agreed upon fluctuating with the cost of raw milk (Tr. 497–99; CX 89N).

The cottage cheese prices quoted by the Beatrice representatives were $0.35 for a 2-pound package, $0.175 for a 1-pound container, and $0.14 for a 12-ounce carton (CX 89M; Tr. 496). Before proposing those prices, Beatrice had acquired information about the terms of Fairmont's milk procurement arrangements. In addition, it had ascertained from public records that Fairmont had sold cottage cheese to institutional accounts for $0.1615 to $0.18 for the 1-pound size, and $0.1211 and $0.135 for the 12-ounce size (Tr. 381, 392–94, 493). To meet Fairmont's price, Beatrice arranged for the procurement of skim milk in Pennsylvania on purchase terms which would enable it to sell cottage cheese at a price between $0.16 and $0.17 per pound (Tr. 403–06, 2468, 2472–77).

Beatrice's bid, based on "stripped" service, was left by the Beatrice representatives with Mr. Casserly with the distinct understanding that it was not a binding proposal, but was subject to review and approval by Beatrice's legal department (Tr. 502).

Following the March 14 meeting, Mr. Stollings went to Chicago and spent two days reviewing the proposal with Beatrice's counsel and an accounting specialist to determine whether the prices quoted could be cost-justified (Tr. 251–52, 504–05, 2255–56). At the conclusion of this review, Beatrice's counsel decided that the prices quoted to Kroger on March 14, 1962, would be profitable for Beatrice and would be justified in view of the related cost-savings. The submission of the proposal was accordingly approved by Beatrice's counsel (Tr. 2256–65, 2278; RBX 135F). A draft of the proposal and various cost analyses were then prepared by Beatrice's experts in Chicago (RBX 135A–G; Tr. 2256–2265) but none of those documents were ever exhibited to anyone at Kroger (Tr. 2265). On April 9, 1962, Kroger accepted Beatrice's bid (Tr. 511).

E. *Beatrice's Bid Compared to Fairmont's*

After receiving a proposal from each of the dairies contacted, except Valley Bell, Mr. Casserly believed that of all the proposals made in March 1962 the proposals by Fairmont and Beatrice were the most desirable (Tr. 720–22). It was difficult to compare those two proposals (Tr. 635–36, 720–22). Fairmont's proposal contained seven different prices that were based on the March

1961 milk costs in three areas under a Federal Milk Marketing Order, plus milk costs in Charleston, which were not then under a Federal Milk Marketing Order (CXs 123, 124, 128; Tr. 639–40). The Beatrice proposal was based upon average raw milk prices during 1961 in a single Federal Milk Marketing Order and contained uniform prices for all Kroger stores in West Virginia (CX 89M–N). Mr. Casserly turned the proposals over to his accountant for a comparative evaluation (Tr. 635–36, 647, 720–22). Based upon projected volumes and upon the then prevailing raw-milk costs, the accountant reported that the proposals were equivalent in price on fluid-milk items, which were by far the most important products (Tr. 721–22, 843). The only price difference that he could discern between the proposals of the two dairies was in the cottage-cheese item (Tr. 721–22, 843). In contrast to the Fairmont proposal, the Beatrice cottage-cheese proposal was constant and did not fluctuate with milk costs (CX 89N; Tr. 647, 650, 805–06). Mr. Casserly believed that Beatrice's cottage-cheese proposal was lower; and primarily because of that belief, he decided to award the contract to Beatrice (Tr. 721–22, 843). Mr. Casserly was also impressed by the fact that Beatrice had the only certified laboratory in West Virginia, and he felt that Beatrice could give the Kroger stores in Kentucky better service than Fairmont (CXs 90A, 96A; Tr. 707–08). Mr. Casserly's assumption that Beatrice's bid on cottage cheese was lower than Fairmont's appears to have been in error because of the decline in milk prices (RBX 132A). Actually, Fairmont's price for cottage cheese, during the period covered by the alleged discriminations, would have been substantially under Beatrice's price (RBX 132H).

On April 9, 1962, after Mr. Stollings had obtained assurances from his company's legal and accounting experts that the prices quoted Kroger in March were cost-justified, he met with Mr. Casserly and formally submitted his March offer in the form of a written agreement (CXs 28, 90; Tr. 504–06, 512, 671). And it was at that meeting that Mr. Casserly informed Mr. Stollings that Beatrice was the successful bidder (Tr. 511).

On April 24, 1962, Mr. Casserly inspected the Beatrice facility at Beckley, and this reinforced his conclusion that Beatrice would be able to produce the quality and quantity of products desired by Kroger's Charleston division (CXs 93B, 96A).

On May 14, 1962, Fairmont amended its March 1962 proposal by an offer to reduce its quotations, upon satisfactory proof that such reduction was necessary to meet a pricing formula proposed by another competing supplier (CX 130; Tr. 632, 855). Kroger, however, did not accept the offer (CX 131).

On May 21, 1962, Mr. Casserly informed Fairmont Foods Company, The Borden Company, and Broughton Farm Dairy that their proposals had not been accepted (CX 131).

Service under the agreement with Beatrice began the first or second week in June 1962, with deliveries to stores located in the Charleston city area (Tr. 674). By the end of that month, Kroger-label products had been distributed throughout the division (Tr. 674).

F. *The Formula for Pricing Milk*

The formula for pricing milk was based upon the average annual Class I price under the Federal Milk Marketing Order for the year 1961. Federal Milk Marketing Orders, which are promulgated by the United States Department of Agriculture, establish the minimum prices that dairy processors pay to dairy farmers in a specified geographic area (Tr. 377). The prices that the processors pay depend on the use they make of the milk. A Class I price is paid by the processors to the dairy farmers for all milk that the processors use as fluid milk (Tr. 2465; CXs 27L–M, 90M–N; Tr. 671–72, 418–20, 422–23, 428, 503, 512–14).

The quoted prices were:

Homogenized V.D. Milk	Gal. jug	.66 plus, .25 jug dep.
Homogenized V.D. Milk	½ gals.	.378
Homogenized V.D. Milk	Qts.	.22

G. *Cottage Cheese Prices*

Cottage-cheese prices were not determined by the formula. These prices under the Beatrice-Kroger agreement were constant. They were (CXs 27L, 90M):

Cottage cheese	12 oz.	.14
Cottage cheese	1 lb.	.175
Cottage cheese	2 lb.	.35

X. DISCOUNT PRICES TO A & P

In September 1962, Mr. Russell Pace, a store supervisor for the Columbus, Ohio, unit of A & P, who lived in Beckley, West Virginia, called on Mr. Stollings at his Beatrice office in Beckley (Tr. 1618). Mr. Pace advised Mr. Stollings that he had just returned from a company meeting in Columbus where he and other officials of A & P had discussed a new pricing method that involved three things—a formula, a limited service, and a reduce price that was being offered to A & P by the Borden Company (Tr. 1618–19). Mr. Pace informed Mr. Stollings that A & P was going to accept Borden's offer for Ohio and that he believed The Borden Company would quote the same prices for Huntington, West Virginia, and probably the other parts of southern West Virginia (Tr. 1619). "He [Mr. Pace] indicated that I [Mr. Stollings] should contact their buyer * * * if I was interested in coming up with this type of a pricing arrangement and at the same time I was interested in protecting my business" (Tr. 1623–24). Beatrice at that time was selling milk to A & P in West Virginia.

In response to the above suggestion, Mr. Stollings called upon Mr. Hand, an A & P buyer, and discussed prices with him (Tr. 1624). Mr. Stollings received a copy of Borden's pricing offer to A & P that one of his salesmen had acquired in the field. Thereafter, before submitting a formal bid to A & P, Mr. Stollings, using Borden's competitive price list as a guide, prepared his own formal offer, which he then tendered to A & P (RBX 13OF; CX 7). A comparison of the Borden offer, as represented by the price list considered by Mr. Stollings, with Beatrice's price list, as prepared by Mr. Stollings, shows Borden's prices and Beatrice's prices as follows:

	Borden		*Beatrice*	
Gallons	.6844		.6827	
½ Gallons	.3774		.3942	
Quarts	.2312		.2312	
2-lb. cottage cheese	.4980		.4150	
12-oz. cottage cheese	.2324	(RBX 130F)	.1900	(CX 7)

It is apparent from the above-quoted prices that the bid of Beatrice to A & P was substantially the same as that of Borden. We conclude that the reliable, substantial, and probative evidence shows that the prices offered by Beatrice to A & P in the fall of 1962 were made in good faith to meet an equally low price of a competitor; namely, The Borden Company.

XI. DISCOUNT PRICES TO GARDEN FRESH MARKETS

Complaint counsel asked for no findings of fact relating to Beatrice's sales to Garden Fresh Markets; furthermore, the uncontradicted evidence shows that the officials of Garden Fresh Markets represented to Beatrice on several occasions that Garden Fresh

Markets had been offered milk and dairy products at lower prices than Beatrice had been charging. In view of these facts, we find no unlawful price discrimination by Beatrice in its sales to Garden Fresh Markets (Tr. 1581–82, 1585–86; RBX 134B, E–F).

XII. LIKE GRADE AND QUALITY

The uncontradicted evidence shows that there was no difference between the milk and other dairy products packaged under Beatrice's "Greenbrier" and "Meadow Gold" labels and that packaged under Kroger's private label (Tr. 394–95, 446–48). Moreover, counsel for all parties stipulated that the milk and dairy products packaged by Beatrice and sold to Kroger under Kroger's private label and the milk and dairy products packaged by Beatrice and sold to other customers under its own brand names were from the same plants and were of like grade and quality (Stipulation, Tr. 451).

XIII. COMMERCE IN SALES TO KROGER AND A & P

A. *Price to Each Kroger Store Dependent Upon Cost of Serving Entire Division in a Three-State Area*

As previously stated, Kroger's Charleston division consisted of approximately 44 stores located in a three-State area, which included portions of the States of West Virginia, Ohio, and Kentucky. Nine out of the 44 stores were located in the States of Ohio and Kentucky (CXs 60A–D, 141). The agreement between respondents Beatrice and Kroger provided that the pricing was to be based " * * * upon a unit cost at our [Beatrice's] dock at our Clarksburg and Beckley plants, plus an average cost per unit to deliver these products on our trucks to the store door of each of the forty-four stores * * * " in Kroger's Charleston division (CXs 28C, 90C; Tr. 507–09, 673–74). Thus, every sale that was made by Beatrice to a Kroger store under this agreement was made in interstate commerce because the price to each store was dependent upon the average cost of serving all of the stores of the Charleston division, some of which were located outside the State of West Virginia where the Beatrice plants serving them were located.

B. *All Cottage Cheese Was Transported Across State Lines*

All of the cottage cheese Beatrice sold to Kroger under its private label, as well as all other cottage cheese sold by Beatrice's

Beckley and Clarksburg, West Virginia, plants, was manufactured at Beatrice's plant at Sandy Lake, Pennsylvania (ARA, Fact No. 10, p. 21). Thus, all of the cottage cheese was transported from Pennsylvania into West Virginia for delivery throughout the area of Kroger's Charleston division. The amount of such sales to Kroger was substantial (ARA, Fact No. 10, p. 21; CX 48A–W; RBXs 132A–J, 121A–D, 122A–B; CXs 361A–L, 362A–C, 364–75, with subparts).

C. *A Substantial Portion of Beatrice's Raw-milk Supplies Was Transported Across State Lines*

Beatrice's Greenbrier plant in Beckley, West Virginia, supplied the majority of Kroger stores involved in this proceeding (ARA, Fact No. 1, p. 2; CXs 90B, M, 29A–E; Tr. 432–34, 522). In the year 1962, 37.5 percent of the raw-milk supply for this plant came from out-of-State sources (CXs 49A, 47B(A. 10); Tr. 443–44). In the year 1963, 24 percent of its raw-milk supply came from out-of-State sources (CXs 49B, 47B(A. 10); Tr. 443–44).

The Clarksburg plant of Beatrice, which supplied the five Kroger stores (Tr. 522), purchased some raw milk from out-of-State sources after the Beatrice-Kroger agreement on a private-label program. This was a temporary emergency supply required because of the private-label program with Kroger (Tr. 527–28).

D. *Negotiations for and Execution of the Beatrice-Kroger Agreement Occurred at an Interstate Level*

The fluid milk and cottage cheese sold by Beatrice to A & P were from the same general sources as the milk and cottage cheese supplied to Kroger; and, as previously shown, a substantial part of that supply crossed State lines. Furthermore, as previously shown, the negotiations between Beatrice and A & P were at an interstate level.

E. *Sales Under the Beatrice-Kroger Agreement Involved the Interstate Operations of Both Parties*

Finally, the Beatrice-Kroger agreement involved the integration of activities and the combined operations of respondent Beatrice's processing, manufacturing, and distributing systems over a four-state area, including parts of West Virginia, Kentucky, Ohio, and Pennsylvania. Cottage cheese was manufactured in Pennsylvania and transported to Clarksburg and Beckley, West Virginia. The combined operations of the Clarksburg and Beckley plants, as well as the manufacturing facilities of the Sandy Lake, Pennsylvania, plant, were necessary to supply all the Kroger stores in the Charleston division with cottage cheese. This combined operation resulted in a distribution system covering the entire tri-State area of Kroger's Charleston division (ARA, Fact No. 10, p. 21).

For Kroger's part, one of the principal reasons for its entering into this private-label agreement was to enable it to set up a division-wide, promotional-sales program for milk and cottage cheese throughout the tri-State area of its Charleston division (Tr. 779). For this reason, Kroger considered it important to have a single supplier who could serve it on a division-wide basis (Tr. 780).

XIV. DURATION OF AGREEMENT AND AREAS INVOLVED

A. *Duration of Agreement*

Under the formula in the agreement, the prices for milk applied to all Kroger stores of the Charleston division, with the exception of five stores in the State of Kentucky. The prices to the Kentucky stores differed from the prices to the West Virginia stores because milk in Kentucky was sold under a local pricing law (CX 90N; Tr. 508).

The same pricing formula remained in effect throughout the term of the agreement, that is, from June 4, 1962, until approximately January 1966, when the agreement terminated (Tr. 438, 512). (As previously observed, however, the discriminations were limited to the period from June 1962 through October 1963.) The prices of cottage cheese were increased at a later date, but not until after October 1963 (CXs 27L–M, 90N–O; Tr. 513–14, Stipulation Tr. 73, 117–18; RBX 132A–F).

B. *Market Areas Affected*

The major dairies—Beatrice, Fairmont Foods Company, Valley Bell Dairy, Broughton Farm Dairy, The Borden Company, and National Dairy Products Corporation—offered identical list prices to their customers from 1961 through 1965 within the Ohio, West Virginia, and Kentucky area covered by Kroger's Charleston division (Stipulation Tr. 1395). There were, however, variations in these identical list prices among the various market areas. There are at least seven identifiable market areas within

Kroger's "Charleston division," but we are concerned with only five of them, as follows:

1. Beckley
2. Charleston
3. Clarksburg
4. Lewisburg
5. Logan (Tr. 508; CX 90N).

C. *Customers of Beatrice in Competition with Kroger*

Many customers of respondent Beatrice, other than Kroger, were located in the same market areas as the stores of Kroger's Charleston division (RBX 107A–Z–43; CX 37A–I; ARA, Facts No. 4–5, pp. 7–13; ARA, Facts No. 7–9, pp. 16–20; Tr. 439). The evidence shows that a substantial number of these other customers competed with Kroger in the resale of fluid milk and other dairy products to consumers (Tr. 235–37, 751, 757–60, 974–76, 1021–23, 1041, 1067, 1100–01, 1105–06, 1109–10, 1119, 1142, 1144, 1181–82, 1194–96, 1233, 1255, 1288, 1307, 1335, 1341, 1363, 1392, 1394; CX 234G).

D. *Competing Customers Charged the List Price or List Price Less Discounts*

Beatrice's customers, other than Kroger, in the five market areas in West Virginia were either charged the list prices for fluid milk and other dairy products or the list prices less discounts that ranged from 5 to 15 percent (CX 37A–I; ARA, Facts No. 4, 8–9, pp. 7–13, 19–20). As an exception to this rule the A & P stores in the Clarksburg market area, beginning in October 1962, were granted special prices geared to raw-milk prices.

XV. INJURY TO COMPETING DAIRIES—PRIMARY LINE

Following Kroger's award to Beatrice of its private-label business, the four dairies that had bid unsuccessfully continued to supply their brands to Kroger, but their sales were substantially lower (Tr. 840, 865–66, 902, 947). There is no evidence of record, however, that any of them were financially crippled as a result of losing the bid for Kroger's private-label milk, nor is there any showing that their market share or the market share of any competitor was reduced or that the total volume of milk and dairy products that they sold was lessened or that their profit or the profit of any competitor was lessened. In 1966, Kroger opened its own dairy plant at Springdale, Ohio, and thereafter Beatrice ceased to supply Kroger with private-label milk (Tr. 566–67).

The record shows that Beatrice does not now sell to any of the principal grocery chains in West Virginia. The important market factor is that now Beatrice's competitors supply the milk and dairy products to the major chain grocery stores that Beatrice formerly served: Fairmont now sells to A & P (Tr. 3091); Broughton now sells a private-label milk to Evans, a chain of grocery stores operating throughout Charleston and the Point Pleasant area (Tr. 2331); and the Sealtest Division of National Dairy Products Corporation has acquired the business of Garden Fresh Markets from Beatrice (Tr. 2332). Of the five competing dairies that bid for Kroger's private-label business in 1962, Beatrice's business in West Virginia seems to have decreased the most in the past few years.

There is no evidence of record of primary-line injury by reason of Beatrice's sales to A & P.

In view of the state of the record, we must conclude that there is no substantial, reliable, and probative evidence that the Beatrice-Kroger agreement either lessened competition or injured a competitor. In addition, there is no evidence that such agreement tended either to injure competition or to create a monopoly in the primary line of commerce herein involved. And finally, there does not seem to be a reasonable probability that such injury may occur in the future.

XVI. INJURY TO RETAILERS—SECONDARY LINE

In an attempt to show injury to competition in the secondary line of commerce resulting from the Beatrice-Kroger agreement, complaint counsel presented a number of witnesses, principally the proprietors of small stores, whose testimony concerning the crucial question of injury may be summarized as follows:

1. Mr. Lonnie R. Norvell, president of Nitro Supermarket of Nitro, West Virginia, testified that, after the introduction of the Kroger brand of milk in the West Virginia market, he thought that his sales of milk increased (Tr. 972, 1008–10).

2. Mr. Michael M. Collias of Charleston, West Virginia, the co-owner of Swan Superette, a grocery store, testified that he did not believe he competed with Kroger during the period of the alleged discrimination (Tr. 1020–29, 1031).

3. Mr. Maurice Stokeley of Logan, West Virginia, testified that he operated a small grocery store in Logan, West Virginia (Tr. 1039). Commission Exhibit No. 36 shows that the sales of Greenbrier milk to Mr. Stokeley (he only used Greenbrier milk) increased substantially after June 1962.

4. Mr. Samuel W. Taylor, who operated a small grocery store in Charleston, West Virginia in 1962 and 1963, testified that after the Kroger private-label milk came on the market he " * * * enjoyed some of the biggest volume I have ever had in the milk business" (Tr. 1066–67, 1078).

5. Mr. Frank Annie of St. Albans, West Virginia, testified that he was part owner of Annie's Food Market in St. Albans and that the Kroger store nearest his store " * * * helped me out" (Tr. 1112).

6. Mr. Thomas Lee Cuni of Man, West Virginia, testified that he operated a Piggly Wiggly store in Man, and that after the introduction of the Kroger private-label milk into the market, he saw no change in his milk business (Tr. 1124).

7. Mr. Raymond M. Kohl, who was manager of the Evans Supermarket chain in 1962 and 1963, testified that after the Kroger private-label milk came upon the market, he became much more conscious of milk; and he stated that " * * * I would agree our milk sales did increase" (Tr. 1170).

8. Mr. Frank McGinley testified that he was affiliated with Star Supermarket in Bell, West Virginia, and that subsequent to the introduction of Kroger's private-label milk in West Virginia, his sales of milk increased (Tr. 1187–88).

9. Mr. Veon C. Cox testified that he was in the retail grocery and meat business in East Rainell, West Virginia, and that after the introduction of the Kroger private-label milk in his community, his sales of milk remained the same (Tr. 1216, 1228).

10. Mr. H. B. Atkinson, Jr., of Beckley, West Virginia, testified that he was a grocery store manager and that subsequent to the introduction of the Kroger private-label milk in his community, his sales of milk had steadily increased in volume (Tr. 1232, 1246).

The testimony of the above witnesses shows the opposite of secondary line injury in the sale of milk in the West Virginia market. Furthermore, the attorneys herein entered into a stipulation that the prospective witnesses complaint counsel had expected to call from Clarksburg, West Virginia, would testify that "the fluid milk and dairy products sales of the retail grocery business with which they are associated were not affected by the introduction of Kroger private label milk and dairy products" (Tr. 3081). From the above testimony, we must conclude that there is no reliable, substantial, and probative evidence of injury to competition in the secondary line and that the alleged discrimination has not lessened competition and has not tended to create a monopoly in the secondary line of commerce in West Virginia; and the evidence shows no reasonable probability that such injury will occur in the future.

XVII. DETERMINING THE EXTENT OF DISCRIMINATIONS

All parties to this proceeding agree that the Beatrice-Kroger agreement of April 9, 1962, resulted in discriminations in prices between Kroger and Kroger's competitors. Both of the respondents contend, however, that the discriminations were justified by differences in cost, delivery, and service. Determination of the extent of the discriminations, therefore, presents a difficult and important problem. In resolving this problem, we must consider the charges set forth in the complaint, the type and scope of the agreement between Beatrice and Kroger, the products in question, the effect or potential effect of the agreement upon commerce, and the views of opposing counsel that are irreconcilable.

Paragraph Eight of Count I of the complaint charges that:

> In the course and conduct of its business in commerce, respondent Beatrice has discriminated and is now discriminating in price in the sale of fluid milk and other dairy products by selling such products of like grade and quality at different prices to different purchasers at the same level of trade.

In the subparagraph of Paragraph Eight, it is alleged that:

> * * * Beatrice has discriminated in price in the sale of said products by charging many retailer-purchasers, who were and are in competition with the retail stores of Kroger's Charleston Division, higher prices than it charged Kroger's said retail stores. Such differences in price have ranged as high as 32 percent for fluid milk in gallon containers.

It appears from the above-quoted language that the discrimination complained of was not Beatrice's selling a private-label milk to Kroger, but Beatrice's selling milk to Kroger at prices lower than the prices at which it was selling milk of like grade and quality to other retail purchasers who were, and are, in competition with Kroger.

As we have previously observed, the agreement between Beatrice and Kroger provided not only for the sale by Beatrice to Kroger of a private-label milk at a formula price, but also for the sale of Beatrice to Kroger of its Greenbrier and Meadow Gold brands of milk at regular list prices (Tr. 719). As we have previously observed, the various brands of milk sold by Beatrice were of "like grade and quality." Under the contract with Beatrice, Kroger was simply paying a lower price for one quantity of milk purchased from Beatrice and a higher price for another quantity so purchased.

Although complaint counsel did concede that a substantial quantity of Beatrice's branded milk was sold to Kroger at list prices during the alleged discriminatory period, they did not include in either their tabulations or their proposed findings the amount of milk sold by Beatrice to Kroger under the Greenbrier-Meadow Gold brands.

Complaint counsel, on one hand, contend that only Kroger's private-label brand of milk purchased by the formula price can properly be considered when calculating the discriminations favoring Kroger. But, on the other hand, Beatrice's counsel contend that the amount of the discriminations favoring Kroger is the difference in the amount Kroger paid to Beatrice for all milk, as compared to the amount Kroger's competitors paid to Beatrice for the same quantity of milk of the same grade and quality.

If the amount of Kroger's purchases from Beatrice of its private-label milk was large and its purchases of Beatrice's branded milk was small, then the effect of including the smaller amount of the purchases with larger amount to determine the extent of the favored prices to Kroger might be of little consequence. If, however, a large amount of Kroger's purchases from Beatrice had been Beatrice's branded milk, then the inclusion of this amount in figuring the extent of the favored prices to Kroger would, of course, be substantial.

After we consider: first, that the complaint charged discrimination in the sale of milk, not private-branded milk; second, that all of the milk purchased by Kroger from Beatrice was of like grade and quality; third, that the most important factor in our inquiry was the determination of the total advantage to be gained by Kroger by its agreement with Beatrice; and fourth, that such advantage was substantially lessened or reduced because Kroger was required to pay the list price to Beatrice for Beatrice's branded milk, we are compelled to conclude that realism, fairness, and simple justice require the discriminations in this proceeding to be determined by comparing the average unit price with Kroger paid to Beatrice with the average unit price Beatrice charged Kroger's competitors for an equal amount of milk of like grade and quality.

William R. Lemberg, complaint counsel's only expert witness, is an accountant and an employee of the Commission. He used basic material supplied by Beatrice's accountants in preparing Commission Exhibit No. 390. This exhibit shows in some detail the percentage of discrimination granted to 27 Kroger stores in three different areas. This tabulation, which includes the prices paid by Kroger for Beatrice's branded milk as well as Kroger's private-label milk, was adopted by Beatrice during surrebuttal. It is a much more conservative estimate of the discriminations granted to Kroger than complaint counsel's discount tabulation that includes only Kroger's private-label milk. This discount tabulation shows that the discriminations in the three geographic areas varied from 9.7 to 30.8 percent and that the average discount granted the 27 stores in three areas, listed by numbers, was 16.0 percent. We believe that this factual conclusion approximates the actual discrimination favoring Kroger and, accordingly, we adopt it as a factual finding.

XVIII. KNOWLEDGE CHARGEABLE TO KROGER

The record shows that Mr. Casserly, who represented Kroger in the negotiations with officials of the five dairies bidding for Kroger's private-label business, had extensive experience in, and knowledge of, the dairy industry (Tr. 705). He admitted that, in general, he was familiar with the trade discounts and pricing practices prevailing in the area involved in this proceeding (Tr. 694). Mr. Casserly knew he was seeking a price below the price that prevailed in the West Virginia market (Tr. 489). He knew that he had rejected a bid from Broughton Farm Dairy that was based upon a discount of approximately 20 percent below list price (Tr. 595, 567, 602–03). He knew that Kroger probably had the greatest purchasing power of any of the chain grocery stores in West Virginia and that its purchases since 1959 had exceeded $2 million a year (Tr. 760). He also knew that the officials of two of the bidding dairies had expressed concern about their bids in relationship with the requirements of the Robinson-Patman Act (Tr. 658; CX 118A-R as to Kroger only; CXs 132A-B, 135).

What Mr. Casserly did not know, and he so testified, were the various costs of the different dairies bidding for the contract. We accept his assertion as true. Mr. Casserly knew that Kroger, in seeking a price advantage for milk to be sold under its own private label, was willing to accept a limited service by the supplying dairy, as distinguished from the full service that had heretofore prevailed in West Virginia; that Kroger was willing to assume any expense involving advertising; and that Kroger was willing to provide for a central billing service. Thus, to get the price advantage it sought, Kroger was willing to relieve the successfully bidding dairy of all these expenses. Beatrice gave Mr. Casserly practical assurance that its lawyers and accountants regarded Beatrice's bid as a lawful one. Previously, Mr. Casserly had been advised by Fairmont Foods Company that it regarded its bid with the limited service provisions as cost justified. These facts and others similar thereto must be considered in the light of controlling legal principles.

In *Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61, 71 (1953), the Supreme Court expressly recognized that the seller's "meeting competition" defense is within the compass of the buyer's protection under the "knowledge" specification of Section 2(f):

> * * * §2(f), which speaks of prohibited discriminations, cannot be read as declaring out of bounds price differentials within one or more of the "defenses" available to sellers, such as that the price differentials reflect cost differences, fluctuating market conditions, or bona fide attempts to meet competition, as those defenses are set out in the provisos of §§2(a) and 2(b).
>
> * * * * * * *
>
> [T]he inquiry must be into the buyer's knowledge of the illegality.
>
> * * * * * * *
>
> [A] buyer is not liable under §2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses. (346 U.S. at 71, 73, 74.)

The Supreme Court has declared and has restated that Section 2(f) does not preclude a buyer from engaging "in price bargaining." In *Automatic Canteen, supra,* the Court stated:

> [W]e are unable, in the light of the congressional policy as expressed in other antitrust legislation, to read this ambiguous language as putting the buyer at his peril whenever he engages in price bargaining. Such a reading must be rejected in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated. (346 U.S. at 73–74.)

In *F.T.C.* v. *Standard Oil Company*, 355 U.S. 396 (1958), the Court expressly ruled that the "meeting competition" defense validated the lower prices granted to a buyer after protracted price "haggling," by stating:

> The findings as to Ned's, the only one of the "jobbers" initially to receive the tank-car price *post* Robinson-Patman, are highly significant. After a prolonged period of haggling, during which Ned's pressured Standard with information as to numerous more attractive price offers made by other suppliers, Standard responded to an ultimatum from Ned's in 1936 with a half-cent-per-gallon reduction from the tank-wagon price. The Commission concedes that this first reduction occurred at a time when Ned's did not meet the criteria normally insisted upon by Standard before giving any reduction.

Two years later, after a still further period of haggling and another Ned's ultimatum, Standard gave a second reduction of still another cent.

In determining that Standard's prices to these four "jobbers" were reduced as a response to individual competitive situations rather than pursuant to a pricing system, the Court of Appeals considered the factors just mentioned, all of which weigh heavily against the Commission's position. (355 U.S. at 403–04.)

In the light of the above facts and principles of law applicable thereto, we must conclude that there is no substantial, reliable, or probative evidence that Kroger knew that the prices offered to it by Beatrice were not, in fact, cost justified; and complaint counsel have also failed to prove by substantial, reliable, and probative evidence that Kroger had any reasonable basis to believe that the prices offered to it by Beatrice were not, in fact, cost justified. Accordingly, regardless of the decision concerning the legality of the bid tendered to Kroger by Beatrice, the acceptance of that bid by Kroger has not been shown to be in violation of the Robinson-Patman Act; and the complaint as to Kroger must be dismissed.

XIX. GOOD FAITH IN MEETING COMPETITION

In order to reach a just conclusion, the findings as to the facts set forth in this initial decision that relate to meeting competition in good faith must be viewed in the light of court and Commission decisions.

Two specific standards for evaluating the legality of lower prices under the "meeting competition" defense have been definitively established by the Supreme Court. First, the *Standard Oil* decision, *supra*, allows that defense if the lower prices are "reduced as a response to individual competitive situations rather than pursuant to a pricing system * * *" (355 U.S. at 404). This was a reaffirmation of the view expressed earlier by the Supreme Court in *F.T.C.* v. *A. E. Staley Manufacturing Co.*, 324 U.S. 746, 753 (1945). In that decision the Court stated, in rejecting an attempted defense of a discriminatory pricing system:

But §2(b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's "lower" price and of that only to the extent that it is made "in good faith to meet an equally low price of a competitor." The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition.

Second, in the *Staley* case, the Supreme Court emphasized that Section 2(b) does not establish an arithmetical requirement that the competing prices be equal; rather, the Court was careful to point out that Section 2(b) authorizes the lower prices that the seller extends in the reasonable and prudent belief he would thereby meet "the equally low price of a competitor." As stated in the *Staley* decision (324 U.S. at 759–60):

[T]he statute does not place an impossible burden on sellers * * *.

Section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price. * * * We agree with the Commission that the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.

The courts and the Commission have, of course, respected this view. In *Callaway Mills Co.* v. *F.T.C.*, 362 F. 2d 435, 443–44 (5th Cir. 1966), the court held:

* * * CC need not show its prices were *in fact* equal to those of competitors, but must only show facts which would lead a "reasonable and prudent person" to believe that the granting of lower prices would in fact meet the equally low price of a competitor. *F.T.C.* v. *A. E. Staley Mfg. Co., supra.*

(The Commission did not seek review of this decision.)

The Commission has repeatedly reiterated the foregoing teaching of the *Staley* case. In the Federal Trade Commission's opinion in *National Dairy Products Corporation,* Docket No. 7018 (July 28, 1966) at page 20 [70 F.T.C. 79, 200], it recognizes that "* * * it is true that a seller claiming the meeting competition defense is not required to prove that its prices were in fact equal to those of its competitors.* * *" In its opinion in *Knoll Associates, Inc.,* Docket No. 8549 (August 2, 1966) at pages 9 and 10 [70 F.T.C. 311, 414], the Commission declared:

In *F.T.C.* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, the Supreme Court held that "Section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price. But it does place on the seller the burden of showing that the price was made in good faith to meet a competitor's." And we have defined the standard of good faith as "simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity." *In the Matter of Continental Baking Company,* Docket 7630 (December 31, 1963) [63 F.T.C. 2071].

The Commission in *Forster Mfg. Co., Inc.,* Docket No. 7207 (Remand Decision, July 23, 1965), at page 14 [68 F.T.C. 191, 202], stated that:

The ultimate legal issue, however, is not whether respondents were in fact meeting competition, but whether they have shown, under the standard laid down in *Staley, supra,* 324 U.S. at 759–760, "the existence of facts which would lead a reasonable and prudent person to *believe*" the granting of that discriminatory price "would in fact meet the equally low price of a competitor." (Emphasis added.)

In other opinions, the Commission has expressed its views of the standard of conduct comprehended "by the reasonable and prudent" standard of conduct for purposes of Section 2(b). In its opinion on remand in *Tri-Valley Packing Association*, Docket No. 7225 (July 28, 1966) at page 16 [70 F.T.C. 223, 285], the Commission stated that this standard contemplated the seller's use of "reasonable diligence in verifying the existence of a lower price of a competitor and that the discrimination was made in good faith for the purpose of meeting such lower price."

The "flexible and pragmatic" characteristics of the Section 2(b) standards were acknowledged by the Commission in its opinion in *Continental Baking Co.*, Docket No. 7630 (December 31, 1963) at page 2 [63 F.T.C. 2071, 2163]:

At the heart of Section 2(b) is the concept of "good faith." This is a flexible and pragmatic, not technical or doctrinaire, concept. The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity. *F.T.C.* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759–60; see *Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231, 249–50. Such a standard, whether it be considered "subjective" or "objective," is inherently *ad hoc*. Rigid rules and inflexible absolutes are especially inappropriate in dealing with the 2(b) defense; the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application.

The record shows that the five dairies interested in procuring the contract to supply Kroger with its private-label milk, endeavored by various means, during the latter part of 1961 and the early part of 1962, to ascertain who their competitors were and what prices they were offering to Kroger. Each of the five dairies was, during that period, a supplier of milk to some of the Kroger stores, and the officials of each dairy knew that their dairies would lose some of their business if they failed to procure the important Kroger contract.

The evidence shows that in the final stages of that competitive race the officials of Beatrice realized that they were in a "* * * situation of competitive necessity.* * *" The evidence shows, nevertheless, that Beatrice's officials proceeded with caution and business acumen and that they made their winning bid in the belief that they were bidding in good faith to meet a competitive bid of Fairmont Foods Company. The precedent decisions cited above sanction the competitive conduct of Beatrice, "[a]nd [the

Commissioners] have defined the standard of good faith as 'simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity.' " *Knoll Associates, Inc., supra.*

The facts show that Beatrice's officials conformed to that standard. Consequently, we are compelled to conclude that Beatrice did not violate Section 2(a) of the Robinson-Patman Act by securing the Beatrice-Kroger contract of April 9, 1962. Accordingly, the complaint herein must be dismissed both as to Beatrice and as to Kroger.

XX. THE COST-JUSTIFICATION DEFENSE

A. *Reason for Evaluating Cost-justification Defense*

The prior conclusions of the hearing examiner were that the complaint herein must be dismissed; an evaluation of the cost-justification defense is, therefore, unnecessary to this decision except for the desirability of presenting to the Commission the hearing examiner's views on all important evidentiary problems of record.

B. *Cost Study Not Admissible as to Kroger*

The cost study that was presented by Beatrice was received in evidence as to Beatrice and the Commission, but was not received as to Kroger. This ruling was based upon the fact that the documents in the cost study came entirely from the records of Beatrice, none of which were shown to the officials of Kroger or were made available to them at the time of the negotiations for the Beatrice-Kroger agreement in 1962. We must remember that the issue as to Kroger and cost justification is not whether Beatrice's prices were, in fact, cost justified, but whether Kroger at the time of the agreement in 1962 knew, or in reason should have known, that the prices were not cost justified. Accordingly, the motion made by complaint counsel to receive the cost study against Kroger is denied.

C. *Identity and Qualifications of Authors of Cost Study*

The cost study was prepared by Mr. James E. Clayton, president of the Edward B. McClain Co., Inc., of Memphis, Tennessee. Mr. Clayton has been associated with that firm for 11 years (Tr. 1800). In the past, Mr. Clayton's firm has served 75 to 100 dairies as a cost-accounting consultant. These dairies have had from 10 to 500 dairy routes with the average size dairy having about 40 routes (Tr. 1801, 1861). Mr. Clayton's firm has also conducted cost studies for milk commissions of various States to aid them in establishing dairy prices (Tr. 1807, 1862). In addition, Mr. Clayton's firm has been under contract with the U.S. Department of Agriculture to furnish that Department with cost information that it has collected from its customers. The Department of Agriculture has used this collected data to compile a booklet, published quarterly, about distributors' milk costs and margins (Tr. 1813). It appears, however, that neither Mr. Clayton nor his firm has ever prepared a cost study that involved the same problems as those that are involved in the present case (Tr. 1874). The record is silent as to Mr. Clayton's formal education, either in general or as an accountant.

Mr. Clayton was assisted in the planning of the cost study by Dr. Charles E. French, an agricultural economist of Purdue University (Tr. 2194, 2221). Dr. French evaluated Mr. Clayton's procedures, but he did not participate in the detailed preparation of the cost study (Tr. 2211, 2225).

D. *The Theory of the Cost-justification Defense*

The cost study was designed to show that the discount that Beatrice allowed to Kroger, as distinguished from the discount it allowed to Kroger's competitors, was justified because of differences in the quantity of the product sold to Kroger and also because of the differences in the methods of sales and delivery.

All of the allocations of cost in the cost study were based upon a concept of so-called platform or dock costs. Under this concept, Beatrice determined the dock costs of milk by eliminating from the total sales receipts all distribution expenses (Tr. 1809, 1819).

After Mr. Clayton had described the above method of arriving at the dock costs of milk, he was asked:

Q. And, in addition to that, did you perform any other platform costs on a product basis?

A. Yes, we did. We actually took all units from the gallon all the way down to the half pint, including all products, and actually arrived at a platform cost based upon cost only. We did not include any administrative expense or profit. (Tr. 1819).

After determining the platform costs, the distribution costs of servicing the three classes of customers, *infra*, were added thereto (RBXs 108–111). The dock costs in terms of percentage for the quarter ending May 31, 1962 (the base period Beatrice determined for Mr. Clayton's computation of dock and distribution expenses) were about 69 or 70 percent of the total receipts at Beatrice's Beckley plant (Tr. 1902). In his cost exhibits, however, Mr. Clayton varied that factor between 70 and 75 percent of the regular price of milk and he explained that he used 74 percent to be "a little conservative" (Tr. 1902).

E. *Three Classes of Customers*

For the purposes of the cost study, Beatrice's customers other than Kroger were divided into three classes based upon their similarity or sameness, as follows:

1. Class I included all customers who purchased milk or milk and other dairy products in amounts between zero and $16 per day. These stores were small stores purchasing on a cash basis (Tr. 1822, 1885, 1887–89, 1897–98, 1914–15).

2. Class II included all customers who purchased milk or milk and other dairy products in amounts between $16 and $28 per day (Tr. 1832; RBX 117).

3. Class III included those customers who purchased milk or milk and other dairy products in amounts between $28 and $54 per day (Tr. 1828, 2181–82).

In addition to the three classes of customers, there were a number of customers whose purchases of milk or milk and other dairy products exceeded $54 per day, but these customers were not included in the three classifications (CXs 396–399). Dr. French in his testimony stated that this small group of customers whose purchases of milk or milk and other dairy products exceeded $54 a day would not materially affect the computation of the much larger group of Class III customers (Tr. 2215). In our opinion, this omission of the larger stores is a defect or deficiency to the discredit of the cost study.

F. *Determining Distribution Cost*

Beatrice's distribution expenses were determined solely from the records of its Beckley, West Virginia, plant (Tr. 1852; RBX 106A). After the records for this plant were studied for the three-month period ending May 31, 1962, certain expenditures were selected as representing wholesale delivery and selling costs (RBX 106A). These expenditures were then included in the delivery expenses allocated to customers (Tr. 1851–52). The delivery costs for the quarter ending May 31, 1962, are enumerated as follows (RBX 106A):

Commissions, salaries and wages	$103,122
Operating supplies	411
Repairs	116
Taxes	6,641
Insurance	4,480
Depreciation	437
Services purchased	5,136
Advertising	6,999
General expenses	8,492
Truck costs	51,552
Transport to branches	12,668
Total	200,054

The distribution expenses were allocated to Kroger and to Kroger's competitors by five methods (RBXs 108A–B, 106F–H, 110A–B). These methods included a flat charge, a volume charge, and a stop-time charge. A flat charge is one applied equally to all customers on a daily or per-stop basis, regardless of the volume provided; a volume charge is a charge applied equally to each gallon or unit delivered to each store; and the stop-time charge is one based upon the time the driver spends at each store (Tr. 1942–46). The allocations were as follows:

1. Stop-time was designated at $0.1832 per minute (RBX 108A–B).
2. An allocation of a flat charge was made at $24.05 per delivery day; volume charge—3 percent; and stop-time charge—$0.1283 per minute (RBX 106F).
3. Allocation of a flat charge—$28.45 per delivery day; volume charge—3.41 percent; and stop-time charge—$0.1195 per minute (RBX 106G).
4. Allocation of flat charge of $0.15 per day; volume charge—3 percent; and stop-time charge—$0.1308 per minute (RBX 106H).
5. Allocation of flat charge of $0.13 per day; volume charge—1.12 percent; and stop-time charge—$0.1557 per minute (RBX 110A–B).

Of the five methods of allocation listed above, only three applied to both the Kroger stores and the competing retail stores. The fourth method of allocation listed, including a flat charge of $0.15 per day; a volume charge of 3 percent; and a stop-time charge of $0.1308 per minute, applied only to competing purchasers in Class I and Class III (RBXs 116A, 113B). The fifth method listed, including a flat charge of $0.13 per day; a volume charge of 1.12 percent; and a stop-time charge of $0.1557 per minute, applied only to Kroger stores (RBX 110A–B). Since the latter two methods of allocation were not used for both Kroger and its competitors, the results found in the exhibits based upon these methods of allocation have no comparable counterparts by which we can compare costs to Kroger with those of its competitors.

In computing the stop-time under the first four methods of allocation listed above, Beatrice divided the total service time required by its drivers for January 1965 into the sum total of expenditures under the first four methods being allocated (RBXs 108A–B, 106F–8; Tr. 1906–07, 1945). The expenses were then allocated to the quarter ending May 31, 1962 (Tr. 1947–48).

G. *Delivery Times*

Delivery times for individual customers were developed from: (1) stop cards, (2) account cards, and (3) a time-motion study.

Stop cards, as used and defined by Beatrice, were questionnaires filled out by Beatrice's deliverymen of the Beckley plant and its Charleston, Logan, and Lewisburg branches (Tr. 2112, 1431). These cards were filled out by the driver without assistance or supervision, except for written instructions (Tr. 2111). Each of these stop cards described the number of services performed by the driver, including estimates of the time required to service each store he visited during the month of October 1962 (Tr. 2110–12). These cards were prepared in September or October 1964, approximately two years following the period described by the drivers (Tr. 2113, 2118–19). It appears from a comparison of Beatrice's lists of routes (RBX 107) with the stop cards (RBXs 3, 5–29) that not all of the routes served by the Beckley plant and its branches were included in this part of the study.

Account cards, as used and defined by Beatrice, were questionnaires filled out by Beatrice's deliverymen on all routes out of the Beckley and Clarksburg plants and their branches (Tr. 2113–14). On each of these cards were recorded the answers to various questions, including an estimate of the time required to service each customer during the month of January 1965. A separate card for each customer was filled out in July 1965 (RBXs 4, 30–103). In the preparation of these cards, the deliverymen were given general instructions and were assisted by Mr. Clayton and Dr. French (Tr. 2113). Each driver was told that the cards were to be filled out because of a federal investigation and for general accounting purposes (Tr. 2120). The cards referred to private-label milk.

The time-motion study consisted of a 1-day study in which each deliveryman was checked as to his time of arrival at a store, the time he spent in the store, and the time of his departure from the store (Tr. 1973). The time-motion study was conducted in October 1966 on one-third of the routes served by the Beckley plant and its Charleston, Logan, and Lewisburg branches (Tr. 1975–76). Mr. Clayton admitted that there had been "* * * quite a change of the operation of the Greenbrier dairy by October 1966" (Tr. 1976). The report of this study (identified as RBX 19) was not offered in evidence. In view of its limitations, we conclude that the time-motion study does not materially aid the cost-justification defense.

H. *Computation of Earned Discounts*

As previously observed, after Beatrice had determined the total cost of a product, that sum was compared with the regular list price for that product and the difference represented the discount that each customer other than Kroger had earned. Beatrice assumed that all of these customers were charged the full list or regular price, less their earned discount (RBXs 113A–D, 115A–D, 120A–B). In the case of Kroger stores, however, Beatrice (with the exception of one Kroger store) computed an estimated price based upon the theory that the total sales of each Kroger store represent sales at a discount ranging between 20 and 26 percent off list price (RBXs 108A–B, 110A–B; Tr. 2083–84).

I. *Platform Costs*

Beatrice made no study of the possible differences of platform costs but considered that such costs were the same for all customers—Kroger and competing retail purchasers alike (Tr. 2163–64, 2166–70). Consequently, the only possible difference between the costs of serving the individual Kroger store as compared to the costs of serving one of Kroger's competitors was the difference in distribution costs.

J. *Errors in Estimates*

Beatrice's cost computations were, of course, dependent upon the accuracy of its component parts. Except for the sales figures used, the basic factors of the cost study were generally estimated figures.

The platform costs referred to above were estimates based upon Beatrice's experience in its Beckley plant during the period of March through May 1962. Beatrice in its calculations had not limited itself to determining the differences between the distribution costs to the individual Kroger store and the distribution costs to competing individual retail purchasers; instead, it added the distribution costs to the platform costs for each product and compared the total cost figures to the so-called list or regular prices in order to determine the earned discounts of each of its customers other than Kroger (RBXs 108A–B, 109A–B, 110A–B, 111A, 113A–D, 116A–D, 117, 120A–B). If the platform costs and the list prices were uniform throughout all of respondent's calculations then this would allow for a comparison between the discounts earned by individual Kroger stores and those earned by individual competing retail purchasers (Tr. 2964–65). Beatrice has, however, varied both the platform costs and the regular prices in its computations of Kroger's earned discounts so that a comparison between Kroger's earned discounts and those discounts earned by competitors becomes confusing and the results become doubtful (Tr. 2964–65).

In only one of the Kroger computations did Beatrice apply platform costs of 74 percent to a Kroger store (RBX 108A). In all other cost exhibits referring to Kroger stores, where common methods of allocation were used, Beatrice applied either 70 or 71 percent platform costs (RBXs 108A–B, 109A–B, 111).

The result of these variations in platform costs was that any possible savings in sales to individual Kroger stores were distorted. For example, if the distribution costs to a particular Kroger store were 10 percent of regular price, and if the distribution costs to a competing retail purchaser were 20 percent of the same regular price, there would be a 10 percent difference in costs in serving the two stores. But under Beatrice's method of comparison, one would add the 10 percent Kroger distribution costs to the 70 or 71 percent platform costs and compare these totals with the regular or list prices to obtain Kroger's earned discount. Then, add the 20 percent costs of servicing the competing purchaser to the 74 or 75 percent platform costs for Kroger and compare these totals with the regular prices to obtain the earned discount of the competing purchaser. The obvious result is that one total has been inflated because the 10 percent difference in costs in servicing Kroger's stores has been increased to a 13 or 15 percent differential on Kroger's so-called earned discount (RBXs 108B, 109A–B, 110A–B, 113A–B, 116A–B).

The stop-card estimates for October 1962 were not considered very reliable by Mr. Clayton (Tr. 1111–12). He explained that when one has a driver fill out a form, the driver is likely to overstate his time "because he wants his boss to know that he is putting in a full day's work" (Tr. 1811–12). Also, Mr. Clayton admitted that the farther away in time the driver got from the period he was describing, the less reliable were his answers (Tr. 2117). The stop-card questionnaires were filled out two years after the events recorded (Tr. 2132, 2118–19). In the 1-day time study, Mr. Clayton was of the opinion that if one time a particular driver, the driver would tend to be more efficient and the time he reported would be shorter (Tr. 1811). This opinion was corroborated by the testimony of a Beatrice driver, Bill Darby (Tr. 1486–87). Further, in connection with the 1-day time-motion study of October 1966, Mr. Clayton admitted that conditions had changed substantially on the routes studied since the 1962–1963 period of discrimination involved herein (Tr. 1976).

Complaint counsel's expert witness, Mr. Lemberg, pointed out that many drivers reported estimated service times on their stop cards that he considered to be unbelievable (Tr. 2708–09). Referring to the IBM cards that summarized the information from the stop cards, Mr. Lemberg picked out three samples to illustrate his point. In two instances the daily sales average was $2.50, and the driver required 25 minutes per day for both deliveries; in the third instance, the daily sale was $1.60 and the driver estimated 20 minutes for delivery (Tr. 2713). Mr. Lemberg observed that Commission Exhibit 396A–T revealed other instances of exaggerated estimates that were similar to these (Tr. 2713).

The account cards, which are similar to the stop cards, are of doubtful reliability. The questionnaires for the account cards were filled out a considerable time after the period described (Tr. 2116). Mr. Lemberg testified that the account cards contained estimated service times that were unbelievable (Tr. 2116). As examples, he cited several instances from just one page of Commission Exhibit 397 in which the estimated service times appeared to be exaggerated. Among the samples cited were estimated service times for two stores in which the drivers' reports claimed delivery times of 30 and 35 minutes for average sales of only $6.30 and $7.24 respectively.

K. *Conclusions on Cost-justification Defense*

Because of the various inaccuracies and estimates in the cost justification documents and the doubtful validity of Beatrice's cost study, we conclude that the cost study is not of sufficient reliability to be accepted as a cost defense. In making this conclusion, we do not find that Beatrice's prices to Kroger during the period of alleged discriminations herein were not cost justified, rather we find that the cost study in evidence fails to furnish satisfactory proof of cost justification.

XXI. CONCLUSIONS

In summation, the facts herein found and the law applicable thereto require the following ultimate conclusions in this proceeding:

1. The Federal Trade Commission has jurisdiction over the Beatrice Foods Co., a corporation, The Kroger Co., a corporation, and the subject matter of this proceeding.

2. Although the commodities involved are milk and other dairy products, the evidence is limited primarily to milk and cottage cheese.

3. The time of the alleged discriminations is limited by agreement between counsel to the period from June 1962 through October 1963.

4. The sales by Beatrice to its favored customers involved in this proceeding were made in commerce within the meaning of "commerce" as defined by the Clayton Act, as amended by the Robinson-Patman Act.

5. The discriminations in price that Beatrice granted to Kroger, to A & P, and to Garden Fresh Markets have not substantially lessened competition, tended to create a monopoly in any line of commerce, or injured, destroyed, or prevented competition with any person who either granted or knowingly received the benefit of such discriminations, or with the customers of any of them, nor have such discriminations created a reasonable probability of such an effect. Accordingly, Beatrice has not violated Section 2(a) of the Clayton Act and the complaint herein against Beatrice and Kroger must be dismissed.

6. The prices that Beatrice granted to Kroger, to A & P, and to Garden Fresh Markets were granted by Beatrice in good faith to meet an equally low price of a competitor. Accordingly, Beatrice has not violated Section 2(a) of the Clayton Act as alleged

and the complaint herein against both Beatrice and Kroger must be dismissed.

7. The evidence of cost justification is not of sufficient accuracy and reliability to constitute a defense to a finding of unlawful discriminations in price within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

8. Regardless of findings and conclusions herein as to Beatrice, there is no reliable, probative, or substantial evidence that Kroger knowingly induced or received unlawful discriminatory prices from Beatrice; there is no reliable, probative, or substantial evidence that Kroger knew, or should have known, that the prices granted to it by Beatrice under the terms of the agreement were not, in fact, cost justified; and there is no reliable, probative, or substantial evidence that Beatrice was not offering such prices in good faith to meet an equally low price of a competitor. Accordingly, Kroger has not violated Section 2(f) of the Clayton Act, as alleged, and the complaint as to Kroger must be dismissed.

XXII. THE ORDER

For the reasons herein stated,

It is ordered, That the complaint herein against Beatice Foods Co., a corporation, and against The Kroger Co., Inc., a corporation, be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

DECEMBER 1, 1969

BY JONES, *Commissioner:*

I

This case is before the Commission on appeal by complaint counsel from the hearing examiner's initial decision dismissing the complaint. Count I of the complaint alleges that Beatrice Foods Co., beginning in June 1962, violated § 2(a) of the Robinson-Patman Act by discriminating in prices in the sale of fluid milk and other dairy products to the Kroger Company, Inc., the Great Atlantic & Pacific Tea Co. and certain other customers at lower prices than it sold products of like grade and quality to other retail customers. Count 2 of the complaint alleges that Kroger violated § 2(f) of the Robinson-Patman Act in negotiating with Beatrice for a supply of fluid milk and other dairy products under private label brand to stores of Kroger's Charleston, West Virginia, Division by knowingly inducing and receiving illegal discriminatory prices. By stipulation the parties agreed that the time period within which the discriminations to Kroger are claimed to have occurred is limited to June 1962 through October 1963. The discriminations to A & P are claimed to have occurred between October 1962 and October 1963.

After a lengthly trial and compilation of a voluminous record the hearing examiner dismissed all charges. As against Beatrice he found no proof of injury at either the primary or secondary levels of competition. He found further that Beatrice had established a good faith meeting of competition defense under § 2(b) of the Robinson-Patman Act. While stating that it was unnecessary to his decision, the hearing examiner went on to find that an elaborate cost study introduced in evidence by Beatrice was not sufficiently reliable to be accepted as a cost defense.

As against Kroger the hearing examiner dismissed the complaint because of the asserted failure of proof of the charges against Beatrice, and on the further ground that there was no evidence that Kroger knew or had any reasonable basis to believe that the prices offered to it by Beatrice were not in fact cost justified or were not offered in good faith to meet an equally low price of a competitor.

On the appeal complaint counsel challenges all of the hearing examiner's findings in support of dismissal. In addition complaint counsel urges that the examiner should have made further findings as to the unreliability of Beatrice's cost study. Beatrice affirmatively raises the latter issue by urging that its cost study was valid and sufficient to support a cost justification defense.

The charges in this complaint are bottomed on an agreement between Beatrice and Kroger under which Beatrice supplied Kroger with private brand fluid milk and other dairy products in certain areas of West Virginia, Ohio and Kentucky, serviced by Kroger's "Charleston Division." This contract, which was negotiated in the early months of 1962 and which went into effect in June of that year, provided for sales of private label dairy products at prices determined by application of a formula to raw milk costs reflected by a Federal Milk Marketing Order covering Huntington, West Virginia. The prices finally arrived at in the course of the negotiations were stated in terms of specific dollar amounts, but, unlike prices charged by Beatrice to other customers, which were based on a list price less a percent discount, the prices to Kroger were intended by the parties to vary from month to month in accordance with the Federal Milk Marketing Order.

Also, unlike Beatrice's sales to others, sales to Kroger were to be made on a "stripped service" basis whereby Kroger personnel performed all of the functions in the nature of in-store services that Beatrice's route salesmen otherwise performed. The claimed saving to Beatrice of the expense of these services lies at the base of the attempted cost justification defense.

The case presents important Robinson-Patman questions, particularly with respect to the meeting competition defense and cost justification, in the context of a negotiated private label agreement between a major interstate supplier of dairy products and a large grocery store chain.

The specific issues to be decided here are: (1) whether the prices resulting from the application of the terms of the Beatrice-Kroger agreement were sufficiently different from prices paid by other customers of Beatrice to amount to unlawful discriminations; (2) whether the evidence shows the requisite degree of primary or secondary line injury; (3) whether lower prices to Kroger were offered by Beatrice in good faith to meet competition; (4) whether any price differential which did exist has been successfully cost justified and (5) whether Kroger knowingly induced or received unlawful discriminations. Certain additional questions, including whether Beatrice granted unlawful discriminations to A & P, are also to be decided.

II

1. The Respondents

Beatrice is the third largest dairy company in the country in terms of gross annual sales. Beatrice's sales were $539,192,494 in fiscal 1962 and $569,487,854 in fiscal 1963. The headquarters of the company is in Chicago. Through its operating dairy divisions it operates 134 plants in 33 States which manufacture and process fluid milk, products processed from fluid milk (such as whipping cream and half and half) and products manufactured from milk (including cottage cheese, which plays some part in this case). The basic ingredient in all of these products is raw milk, which is procured at the plant level by Beatrice from the producers and purchased in cans or tank truck lots. After processing and manufacturing, the dairy products are either distributed by route trucks operating directly out of the Beatrice plants or moved by trailer truck to distribution branches and then loaded on route trucks and delivered to customers.

Beatrice sells directly to a diversity of customers including restaurants, institutions, the Government, and the consumer by home delivery. But for purposes of this case the significant class of customers is retail grocery stores, consisting of all sizes of independent grocery stores as well as supermarkets and chain stores.

Nationally, Beatrice's primary brand name is "Meadow Gold" but in some local areas Beatrice has continued the use of brand names of dairies formerly acquired by it. Thus Beatrice used the brand "Greenbrier" in the area served by its Greenbrier Dairy plant in Beckley, West Virginia.

Each Beatrice plant operates with a degree of autonomy and makes basic management decisions in response to local conditions. However, the various operating plants and outlets are organized on district and regional levels, and certain activities, including the negotiation and formalization of major contracts, are supervised above the district level or at the national level.

This case involves three Beatrice plants, all of which lay within Beatrice's Appalachian District. Two of these, plants at Beckley and Clarksburg, West Virginia, produced the fluid milk products involved in this case. A third plant at Sandy Lake, Pennsylvania, manufactured cottage cheese which was shipped to the West Virginia plants for distribution to the Kroger stores.

Kroger operates a chain of retail grocery stores which sell a variety of products to the consuming public, including fluid milk and other dairy products. In 1963, Kroger had over 1,400 grocery stores in at least 19 States. Its national sales exceeded $2 billion. These grocery stores were operated through a number of divisions. Each division was the primary purchasing entity for the 30–100 stores served by it. Kroger's Charleston Division, which is the one primarily involved here, included a total of 44 Kroger stores located in central West Virginia around Clarksburg (the "Clarksburg area"), stores on both sides of the Ohio River in Ohio and West Virginia between Huntington, West Virginia, and Marietta, Ohio (the "River area"), stores in eastern Kentucky along the Kentucky-West Virginia border (the "Kentucky area"), and stores in four roughly contiguous areas of southwestern West Virginia centering around the cities of Logan (the "Logan area"), Charleston (the "Charleston area"), Beckley (the "Beckley area"), and Lewisburg (the "Lewisburg area"). Kroger's annual sales in these areas were estimated at $67 or $68 million in the period 1962–3 (Tr. 773). Kroger's dairy product sales in these areas amounted to approximately $2,000,000 annually (CX 88).

2. The Nature of the Market And Competition Therein

The hearing examiner properly found that each of the seven market areas in Ohio, Kentucky and West Virginia comprising Kroger's Charleston Division was identifiable and therefore an appropriate market within which to determine the consequences of price discriminations. The hearing examiner also properly found that only the five West Virginia areas centered around Beckley, Charleston, Clarksburg, Lewisburg, and Logan need be considered here in terms of the existence or consequences of price discriminations. The River area is excluded, at least as to secondary line competition, because Beatrice had no customers there other than Kroger. The Kentucky area is excluded since Kentucky purchases by Kroger were regulated under local milk pricing law.

Of the five West Virginia areas by far the most important was Charleston, which contained 11 of the total of 44 Kroger stores with more than a third of the annual volume of the entire Charleston Division (see CX 141, 88C, 90M).

In 1962 and prior thereto, Beatrice was one of several dairies serving the various areas within Kroger's Charleston Division. Beatrice itself was selling its brand name products in all areas with the exception of the River area, but had the potential to supply the Kroger stores in that area also. Two of Beatrice's competitors, Fairmont Foods Company, and Broughton's Farm Dairy, Inc., had distribution systems capable of supplying all the stores in the Charleston Division. In addition, The Borden Company sold in certain of the areas and had the potential to serve a major portion of Kroger's needs from its plant in Huntington, West Virginia. A fifth company, Valley Bell Dairy, had the potential of serving at least a majority of the stores in the Charleston Division and, for a time was considered to be a potential competitor for the Kroger business.

Looking at the nature of the market on the buyer level, there were numerous submarkets in Kroger's Charleston Division within which Kroger stores competed with other large grocery chains (such as A & P and Garden Fresh Markets), smaller regional chains, and independent supermarkets and local groceries of various sizes.

Overall, Kroger was the largest marketer in its Charleston Division and a significant factor in each submarket area where it had stores.

Prior to 1962, at which time the discriminations here involved started, private label dairy products were not sold in the market areas involved here. Many of the supermarkets and chains carried two or more of the name brands of the various dairies serving an area. In many of the Kroger stores, for example, four or five such brands were displayed in the dairy cases, attended by a similar number of route men from the dairies making deliveries and serving the stores. In this period most customers in this market received what was referred to as the "full service" method of milk distribution whereby it was the responsibility of the route man for each dairy to move the milk from his truck into the dairy case of the customer, to rotate the old milk to the front of the case and to fill the case with new milk. In addition, the route man was frequently required to devote time to matters of ordering, invoicing and billing. In the case of Kroger, testimony showed that route men sometimes had to return to the stores several times a day just to be sure that the dairy cases were kept supplied with a full line of products (Tr. 715).

Prices of dairy products to retailers had tended to be based on fairly stabilized list prices with generally recognized discounts, including volume discounts to large purchasers. The list prices and actual prices varied from area to area with lower prices predominating in the western areas of West Virginia near the Ohio River and higher prices appearing in the more mountainous areas to the south and east.[1] In the Clarksburg area in the central part of the State prices tended to be between the extremes in other areas.

By early 1962 a certain amount of price cutting by local dairies, particularly in the Charleston area, had begun to erode the traditional price structure (Tr. 377–8, 778). In addition, starting in 1962 innovative delivery and service techniques began to appear in the market. The larger buyers, led by Kroger, began to demand and get formula prices based on the fluctuating cost of raw milk, instead of discounts from list price, in exchange for limited or no in-store service on the part of the selling dairies. This was accompanied by private branding of dairy products in supermarkets and chains, and finally, vertical expansion of at least one major chain, Kroger, which built its own dairy in Springfield,

[1] For Beatrice, adherence to the traditional list price meant that milk products produced at the Greenbrier plant in Beckley were sold at higher prices in the adjacent mountainous areas than in, for example, Charleston which was 50 miles to the north and west of Beckley. This pricing anomaly will become particularly significant upon consideration of the possibility of cost justification of the differentials between prices charged by Beatrice to Kroger and competitors of Kroger.

Ohio and began to supply its own label needs in 1966 (Tr. 566–7).

Thus this case involves alleged price discriminations against a background of a changing market and "modernization" of the distribution of dairy products. The food chains were the prime movers in this change, not the dairies. Certainly in the case of Kroger's private branding, it was the buyer who initiated this important market change by importing a technqiue, already used in divisions of the company in other areas of the country, into the area served by Kroger's Charleston Division.

3. Kroger's Plans for Private Label Dairy Products

In November 1961, the grocery merchandiser of Kroger's Charleston Division contacted Mr. Francis X. Casserly, Manager of Kroger's Dayton, Ohio, dairy plant and grocery merchandiser for Kroger's Columbus Division, to inquire about the private label milk program that the Columbus Division was then operating with Broughton Dairy in Ohio. As a result of that discussion, a plan was developed for private label milk in the Charleston Division. Mr. Casserly, due to his prior experience with such matters, was designated to negotiate with the various dairies having the potential of serving the Charleston Division. It is these negotiations, and the conduct of the parties to them, which gives rise to the good faith meeting of competition defense in this case and also to Kroger's asserted violation of § 2(f) in inducing unlawful discriminations.

Kroger was prompted to make this move in part because of its desire to avoid what is regarded as the "nuisance" involved in the traditional route men's servicing of the retail dairy outlets (Tr. 715; *supra*, p. 774). In addition, some Kroger stores carried brands that were not sold in a majority of the stores in the Charleston Division. The large number of suppliers, together with the absence of a division-wide brand, discouraged Kroger from effective advertising of dairy products. Finally, Kroger representatives testified that the prices which Kroger had to pay under this system were too high to permit it to compete profitably with local price cutters who had become active in certain areas of the Charleston Division (Tr. 685–6, 715–16, 778–9, 784–5).

The Kroger officials decided that the system should be revised so that Kroger carried only the new Kroger label and one other brand of milk in each store, with the high-volume item, homogenized milk in gallon jugs, available solely under the Kroger label and with Kroger label merchandise being given preferential space in the dairy cases of each store (Tr. 629–30, 685–7, 715).

At the outset Kroger had only a general idea as to the type of arrangement it wanted. The details were not spelled out in advance but were evolved through negotiation and became incorporated in the various proposals made as time went on.

4. The Preliminary Negotiations

In late 1961, Mr. Casserly notified Valley Bell, Broughton, Borden, and Fairmont that Kroger was interested in receiving proposals for "bottling Kroger label milk" (Tr. 590–1; CX 100, 116, 133). He did not even approach Beatrice at this stage, although Beatrice was serving 26 Kroger stores in West Virginia with its own label dairy products, because it was known by Mr. Casserly that Beatrice milk was packaged in a certain type of container which was not satisfactory to him (Tr. 365–7, 369–71, 487, 591).

Mr. Casserly's first contact was with Broughton, which was selling its own label dairy products to a number of Kroger stores in the Charleston Division and was also the supplier of private label milk to stores in the Columbus Division with which Mr. Casserly was already familiar (Tr. 590, 596, 943–6). Broughton, consequently being somewhat familiar with the prospective needs of Kroger, came forward with an early proposal. The proposal, dated January 6, 1962, was in the form of a tabulation (CX 103) showing proposed prices for Kroger label products to Kroger stores in various areas of the Charleston Division as compared with the prices which Kroger was then charging in those stores. The prices varied widely depending upon the store location. The covering letter stated that Broughton's proposed prices were based upon the "prevailing market discount plus an additional 7%," with certain exceptions.

Mr. Casserly in testimony characterized these prices as amounting to a discount of "an average 20 percent . . . a little above on some, a little below on others" (Tr. 694). In later negotiations he rejected price offers by other dairies, including Beatrice, stating to the dairy companies that he already had a proposal for prices of 20 percent off list on the strength of the Broughton proposal (Tr. 375, 487–8, 595–7, 702–3, 717–18).

This was not true.

The Broughton discount offer may have been as low as 20 percent off list for some items, but for the all important gallon jug of homogenized milk the resulting prices were substantially above the 20 percent off list level.

The Broughton offer was in the form of tabulations covering each Kroger store location and showing the existing retail price out of each store, the "prevailing wholsesale price in the market," the proposed price for Kroger label products and a percentage figure for Kroger's gross profit. The prices in the five West Virginia areas stated by Broughton for gallon jugs of homogenized milk, together with the stated "prevailing wholesale price" and the resulting discount as calculated by complaint counsel are as follows:

	Broughton quote	Wholesale price	Discount (percent)
Clarksburg	.7321	.83	11.8
Charleston	.7497	.85	11.8
Logan	.7914	.85	6.9
Beckley	.8163	.98	16.7
Lewisburg	.8163	.98	16.7

(See p. 3 of Complaint counsel's reply brief to Kroger.)

Complaint counsel's calculations show an average discount on gallons for all Kroger locations as stated by Broughton of a little less than 11%.[2]

As previously noted, Mr. Casserly did not initially contact Beatrice at all. That contact came about in early January 1962 because Beatrice officials had heard rumors that Kroger was seeking private label milk. On January 2, 1962, Mr. G. C. Stollings, general manager of the Greenbrier Dairy Division of Beatrice located at Beckley, West Virginia, telephoned Mr. Casserly to arrange an appointment with the latter. Mr. Stollings, together

[2] The figures shown by Broughton for gross profit to Kroger are somewhat different and could have been what Mr. Casserly referred to when he testified that Broughton "indicated discount off list price on this bid of up to 20 percent" (Tr. 603), but by no stretch of the imagination would the 20 percent figure have represented a fair statement of the gross profit shown to Kroger on gallons. The gross profit figures for the five West Virginia areas as stated by Broughton were:

	Percent
Clarksburg	16.81
Charleston	11.80
Logan	20.86
Beckley	17.55
Lewisburg	17.55

(CX 103)

with Mr. Hugh F. Hutchinson, district manager for Beatrice's Appalachian District, met with Mr. Casserly in Dayton on January 12, 1962. At that meeting Mr. Casserly explained that he had not contacted Beatrice because, upon visiting the market areas involved, he had observed that the containers used by Beatrice were not of the type which he wished to be used for Kroger label milk. The Beatrice representatives indicated that they had machinery available which could be moved to the Beckley plant to package milk in the type of containers desired by Mr. Casserly and that they were able and anxious to submit a proposal (Tr. 369–74, 486–8).

Prices as such did not play a significant role in the discussion at this first meeting. The Beatrice representatives were more interested in finding out about such matters as the volume of business of each Kroger store, the number of stores, the areas to be served and how they might be served by Beatrice's facilities (Tr. 372–3). The Beatrice representatives testified that they did have in mind a tentative offer of a 15 percent discount. Mr. Casserly stated, however, referring to the Broughton proposal, that he already had an offer of a 20 percent discount (Tr. 375, 487–8).

The Beatrice representatives also testified that they were concerned and disturbed to learn that a 20 percent discount had been offered (Tr. 375–6, 488) since such a discount was substantially in excess of what they had encountered previously, despite some local price cutting and despite the fact that list prices had been subject to some erosion in certain areas (Tr. 488–9). They determined that, if they were to pursue the matter further, they would have to find some means of cutting costs. They also considered the possibility of exploring a formula method of pricing —one which would be geared to their cost of milk rather than a discount from list price (Tr. 376–7, 489–90).

The possible use of formula pricing had certain advantages to both parties. From the point of view of the buyer a discount from list price left too much control in the hands of the seller who could vary the list price at will (Tr. 606, 628); from the point of view of the seller prices based on a formula geared to the cost of raw milk meant that the differential between such costs and selling price would be constant and predictable, whatever might happen to list prices as the result of localized price cutting (Tr. 490–1).

During December 1961 and early January 1962 Mr. Casserly also had preliminary discussions with each of the other dairies, as a result of which the nature of a specific proposal began to take shape. On January 18, 1962, he wrote to each of the dairy companies to report on the results of a study which he had made of the volume requirements of dairy products for the Charleston Division. He estimated that yearly sales of fluid milk products and cottage cheese for all of the Kroger stores in the territory would be slightly in excess of $2,000,000 (CX 88, 105, 117).

Mr. Casserly's letter of January 18, 1962, also indicates that he, as were the Beatrice representatives, was thinking in terms of a form of reduced service which would cut distribution costs of the winning dairy. Mr. Casserly proposed that,

> * * * these products at the present time would be delivered to each Kroger store on your transportation equipment. Merchandising and marketing functions are to be performed by Kroger personnel. Product specifications, billing and other details will be discussed at a later time.

The type of delivery proposed by Mr. Casserly was described as "stripped service." Under this method of operation the responsibilities of the dairy company's route men are limited to drop off delivery to each store. From that point on the operation, including stocking and maintaining the dairy cases, is entirely handled by the store's personnel. In addition, simplified ordering and billing procedures can be used and the usual liberal return privilege modified to suit the needs of the store.

Mr. Casserly's letter also showed that he had begun to think in terms of a formula price. The letter stated:

> If your price is based on the Class I price of milk, please include at least a two year experience of the Class I price upon which you are basing your price.[3]

The Beatrice representatives met again with Mr. Casserly on January 25, 1962, in order primarily to discuss questions relating to a formula type of pricing and to define the terms of a limited service arrangement which would cut down on the in-store service performed for Kroger and reduce the cost of distribution (Tr. 379–83, 490–2).

At this meeting the discussion was primarily about matters other than price. The Beatrice representatives did, however, mention a price of 21 cents per pound for cottage cheese. Mr. Cas-

[3] A price based on the Class I price of milk would be based upon the cost of milk under Federal Milk Marketing Orders representing the minimum price which dairy processors have to pay dairy farmers. These orders are promulgated by the U.S. Department of Agriculture on a monthly basis and vary from time to time and from place to place. The prices which dairy processors must pay depend on the use which they make of the milk. A Class I price, the highest price milk usage, is received for all milk that is used for fluid milk purposes (Tr. 377 2465).

serly had previously expressed particular interest in that product. He had indicated that he would like to improve sales of that product in the Charleston Division. According to Mr. Hutchinson, at the mention of the 21 cents per pound price Mr. Casserly "threw up his hands and said, you're out of sight" (Tr. 380; see also Tr. 491–2).

5. The Formal Proposals

In February and March, the negotiations bore fruit in the form of specific written proposals by Beatrice, Fairmont, and Borden, and a new written proposal from Broughton. Valley Bell, which was in the running up to this point, although it could not have supplied more than 29 of the 44 stores, formally withdrew, stating by letter that it was unable even to attempt a "cost justification" in the face of rising costs in its own operations. Valley Bell merely offered to continue selling to Kroger at the existing prices and expressed the hope for a continued relationship. The letter was not a bid for the private label business of Kroger (CX 137).

(a) *Beatrice's First Proposal*

The first formal proposal by Beatrice to Kroger consisted of a letter dated February 5, 1962, outlining the type of service to be provided and containing a price schedule (CX 27, 89). This proposal was presented personally by Mr. Stollings and Mr. Hutchinson to Mr. Casserly with a *blank* price list at a meeting in Dayton, Ohio, on February 9, 1962 (Tr. 386–9; 494–6; 668–9). Prior to the meeting the Beatrice representatives had inserted some prices on another copy of the price schedule, which was blank in the version furnished to Mr. Casserly. Mr. Hutchinson had this piece of paper in his pocket when he went into the meeting. The first price shown on that paper was a price of 71 cents for a gallon of homogenized milk, with prices for other products being derived from that 71 cents.

The Beatrice representatives testified as to how they arrived at the 71 cent figure. They said that by this point they had come to believe that their primary competition was not Broughton but Fairmont and that they understood Fairmont was offering or planning to offer a series of discounts from list price. This is what Mr. Hutchinson testified:

We knew from what Mr. Casserly told us previously that the Fairmont bid was a series of discounts beginning with what Kroger was then getting in a place or on an average of what they were getting in all places. We didn't know specifically which. And then we knew that a discount had been added for volume, private label, and things of that character, and we estimated that to be around 17 or 18 percent, but on top of that we were well aware of a cash payment by Fairmont to Kroger to support and pay for a television show which was then running in West Virginia, Charleston, I think it was and Mr. Stollings and I, being well aware of that, knew that that cost was probably five percent of the business that was being done with Kroger. So I knew in my own mind, Mr. Stollings knew in his own mind, that in addition to the discounts Kroger might then have been getting, together with the private label discount, the volume discount added, that there was another four or five percent that had to be added somewhere along the line to cover the cost of this TV show (Tr. 390).

Mr. Hutchinson also testified:

> * * * we had arrived at that 71 cent price by taking the average of the gallon jug price from the extreme western end of this area to the extreme eastern end of it and the extreme northern portion of the area and arrived at some sort of an average price for the gallon jug and applied a discount of 17 or 18 percent, I don't remember the exact figure, to what we took to be the sort of mean average (Tr. 389).

Mr. Stollings testified:

> * * * we arrived at that [the 71 cent price] by taking a real low price clear over on the western side of this area where you would run into normally low pricing, working back to the southeastern end of the territory where you are getting away from the dairy country and getting into higher pricing. Through this area, through here, it was pretty much then wound up to be an average price of 85 cents.
>
> We knew from talking with Mr. Casserly that Fairmont was thinking in terms of quoting from a list price down. We knew that there were trade discounts in the area that were generally ten percent, some of them as high as fifteen percent.
>
> We further knew that there would be something incorporated for private label and volume discount in this. We further knew of a cooperative advertising arrangement between Fairmont and Kroger Company, but we felt that Fairmont would maybe quote somewhere in the neighborhood of 16 or 17 percent, so we deducted that 16 or 17 percent from an 85 cent jug price and came up with the 71 cents (Tr. 494–5).

During the course of the meeting the discussion turned to prices and Mr. Hutchinson pulled out the copy of the price schedule which he had in his pocket. He stated that Beatrice was thinking in terms of 71 cents for gallons. Mr. Casserly summarily rejected the price. Mr. Hutchinson testified:

> * * * I said, well, now, Mr. Casserly, on the gallon jug, which was the first item on the proposal, I said, we are thinking in terms of 71 cents, and he just shook his head and said, if that is all you have got to offer, you might as well go back home (Tr. 389).

Mr. Stollings testified:

> Mr. Casserly told us right quick that the price was high and again reminded us of our first meeting where, when we had asked him if he had any—if he would give us some idea as to where this pricing would be, and he told us of the 20 percent Broughton price and he said, you don't have to be a very good mathematician to take an 85-cent average jug price and 20 percent will show you that 71 cents is high (Tr. 495).

Mr. Casserly himself testified as to the price quoted by the Beatrice representatives at this meeting:

> * * * this price was somewhere in the neighborhood of 70 or 71 cents and I, with the Broughton bid that I had back in January, figured I already had the price of 71 cents and I indicated * * * we just were not interested in a price of 71 cents (Tr. 669).

Mr. Casserly had not received any quotations at less than 71 cents per gallon for the West Virginia areas at this time. Indeed his testimony shows that his rejection of the 71 cent price was based on the early Broughton proposal which contained actual prices per gallon of slightly over 73 cents to more than 81 cents per gallon in the five West Virginia areas, as tabulated above.[4]

Although the Beatrice representatives mentioned only a single price figure of 71 cents, which they calculated and discussed with Mr. Casserly in terms of a discount from list price, the proposal which they presented to Mr. Casserly showed that the ultimate prices to Kroger would vary according to a formula based on raw milk costs. The proposal stated:

> This price is based upon the average annual Class I price established by Federal Order Number 5, Huntington Section, Year 1961. Your monthly price would raise or lower in an exact amount with the increase or decrease of the prices determined by the orders under which milk for your private label would be purchased (CX 89D).

It is clear that at the February 9, 1962, meeting the Beatrice representatives were trying to find the price level necessary to obtain the Kroger business using what information they had available to them. It is also clear that Mr. Casserly's summary rejection of the 71 cent price was not based on any true appraisal of that price as compared with the earlier Broughton offer. He simply thought he could get a better price (Tr. 669).

In part at least Mr. Casserly's hope for lower prices was based on market conditions in the Charleston area. The Beatrice representatives testified that surplus milk was being brought in from

[4] The Broughton quote did contain prices in the area of 66 to 68 for several towns in the Ohio River area (CX 103B, C, G) but the Kroger stores in those towns had less than 10% of the expected volume of dairy products for the entire Charleston Division (CX 88C).

Kentucky by one local distributor and sold at low prices in Charleston (Tr. 378, 488, 497). Mr. Casserly knew of this local price cutting (Tr. 668). In addition there were rumors afloat that the Charleston market, which had not been subject to regulation, would soon come under a Federal Milk Marketing Order (Tr. 659, 668, 2804–5; CX 137A).[5]

Subsequent to the Beatrice submission on Feburary 9, 1962, Mr. Casserly received formal bids from Broughton, Fairmont, and Borden.

(b) *Broughton's Proposals*

The second Broughton proposal, dated February 12, 1962, stated formula prices depending upon whether delivery would be made out of Broughton's Marietta Ohio, or Charleston West Virginia, plant (CX 106). The Marietta prices were geared to the Federal Milk Marketing Order applicable to that area using a stated constant figure to cover processing, bottling, delivery and profit. Based on information for the month of January 1962, Broughton stated a price of \$.7077 for a gallon for Marietta milk. The Charleston prices, not being under Federal regulation at that time, were based on the non-regulated Charleston Producer Price, resulting in a Broughton quote for a gallon of homogenized milk, based on that price for January 1962, of \$.7224.

In early March Broughton submitted revised schedules for this same cost-plus proposal which, for the most part, merely reflected use of March 1962 raw milk prices. These showed for gallons delivered out of Broughton's Marietta Ohio plant a price of \$.6586 and out of its Charleston West Virginia plant a price of \$.6879 (CX 112).[6]

(c) *The Fairmont Proposals*

On about February 22, 1962, Fairmont made its first formal proposal to Kroger (Tr. 621–2; CX 119–22, 125 & 126). The prices stated were based on a series of discounts[7] from list prices

[5] The latter factor created a degree of uncertainty for the dairies such as Fairmont, Valley Bell and Broughton, which drew at least part of their milk supplies from the Charleston area (See CX 106, 137; Tr. 2798–9). Beatrice, however, since it drew its milk supply from the area around Beckley, was already regulated under the Huntington, West Virginia order (Tr. 401–2).

[6] The reduction in gallon prices from Broughton's prior proposal was entirely due to use of lower raw milk costs for March 1962 and not to any change in the "constant figure." Some of the prices on processed and manufactured products, however, appeared to reflect other reductions.

[7] These discounts were stated in terms of a local trade discount of 5 or 10 percent, depending upon the area, plus a "cost differential" of 5½ percent on milk and 9½ percent on cottage cheese. The Fairmont proposal stated that this cost differential was based "on nine months actual experience" and could be "passed on to Private Label purchasers" (CX 125).

applicable in the various areas and included a 2 percent cooperative advertising allowance on private label products similar to the allowance which Fairmont had been giving on its own label products. The prices for gallons ran as low as $.6205 in Parkersburg, West Virginia, to $.8613 in some parts of Kentucky. In the five West Virginia areas primarily involved in this case the prices quoted by Fairmont were—

Clarksburg	.7302
Charleston	.6585
Logan	.7987
Beckley	.8168
Lewisburg	.8168

(CX 125D, E, F, K)

In addition, Fairmont advised Kroger that if a responsible supplier offered lower prices, Fairmont would meet such prices on the same terms provided that it could make at least a 5 percent profit (CX 125B).

After meeting with Mr. Casserly in late February Fairmont revised its proposal. Its second submission in early March 1962 repeated the offer of the same series of discounts off list price but there was added what Fairmont characterized as a "custom processing and delivery" alternative based on fluctuations in the cost of raw milk (Tr. 662; CX 123, 124, 127, 128). The prices shown for the latter were, in general, substantially lower than prices under the discount schedule. Fairmont stated that the cost of milk used was "the Market Administrator's forecast of the paying price for March, 1962" (CX 124A). On this basis Fairmont quoted prices as low as $.6007 per gallon in the River area. Prices for the five West Virginia areas were:

Clarksburg	.7255
Charleston	.6526
Logan	.6533
Beckley	.6526
Lewisburg	.6526 [8]

(CX 123)

Fairmont stated that its figures were built up by adding to raw milk costs: production costs, transportation costs from plant to distributing branches, costs of receiving, storing and shipping

[8] Fairmont did not state a separate price for Lewisburg but its prior submission indicated that it considered Lewisburg to be part of the Beckley area (CX 122, 125E).

for each plant and distributing branch, distributing expenses and a "surcharge" (CX 124B).[9]

It is clear that Fairmont hoped to take advantage of the cost justification defense to justify its low prices to Kroger. The record even contains memoranda of law which Fairmont had prepared by its attorneys discussing the question of cost justification (CX 118). Copies of these memoranda were submitted to Mr. Casserly by Fairmont in early February and the cost justification question discussed with him by Fairmont representatives[10] (Tr. 628–9, 630–1, 634, 641–2, 803).

(d) *The Borden Proposal*

One other offer was received by Mr. Casserly prior to the final negotiations with Beatrice. Under date of March 9, 1962, Borden submitted three alternative plans (CX 97). The first plan envisioned pickup by Kroger of both Kroger brand and Borden brand products from Borden's Huntington, West Virginia, plant. The prices stated were substantially below those offered to Kroger by any other dairy, but, of course, would have entailed additional expenses to Kroger to handle its own distribution as well as its in-store service.

The second plan offered by Borden was on a cost-plus basis for drop delivery by Borden at 28 Kroger stores. Different prices were stated for four specified areas. All the prices were based on the Huntington, West Virginia, Federal Milk Marketing Order using the March, 1962 price and were designed to fluctuate in accordance with that price. To this price Borden added its calculated costs of delivery to the various areas which it proposed to serve.

The third Borden plan contemplated "store-door delivery" which included full in-store service. Borden offered merely to give Kroger its highest volume discount under this plan.

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[9] The surcharge was stated at 2 cents per gallon for processing and 1 cent per gallon for delivery of milk, and 1 cent per pound for processing and ½ cent per pound for delivery of cottage cheese.

[10] The Fairmont proposal was stated in terms of a service contract whereby Fairmont would process and package *Kroger* owned milk and deliver it to Kroger stores. The hearing examiner, on the other hand, treated the Fairmont proposal as a proposal for an ordinary contract of sale. Fairmont obviously wished to state its offer in terms of a service contract for the argument that it would have in the event of a Robinson-Patman challenge. All the evidence is clear that Fairmont was trying very hard to protect itself against Robinson-Patman problems. Whether it could do so merely by the device of having title to the raw milk taken by Kroger instead of Fairmont, we need not decide since, in any event, Fairmont was not selected as the supplier to Kroger. Whatever the nature of the Fairmont proposal, however, Beatrice was entitled to avail itself of the good faith meeting of competition defense to try and meet that offer. As subsequent events show, this is what Beatrice tried to do, without knowing the precise nature of the Fairmont offer.

The Borden plans are not comparable with any of the other bids considered by Mr. Casserly since Borden basically offered the alternatives of serving only a limited number of stores [11] or having Kroger perform all delivery functions by picking up the products at the Borden plant in Huntington, West Virginia.

(e) *The Second Beatrice Proposal*

We now come to the crucial negotiations between Kroger and Beatrice on which must ultimately depend Beatrice's good faith meeting of competition defense and the liability of Kroger for inducing unlawful price discriminations.

On March 14, 1962, Mr. Stollings and Mr. Hutchinson again met with Mr. Casserly. Mr. Casserly still had before him the Beatrice proposal which had previously been submitted in February with a blank price sheet. He had not received any specific price offers from Beatrice on fluid milk except the verbal offer of 71 cents per gallon made at the February meetings which he had rejected out of hand.

The Beatrice representatives, however, came armed with a price schedule based on a 68 cent per gallon price. This price was exactly a 20 percent discount from their computed "average" list price of 85 cents. Both representatives testified that this figure was selected because Mr. Casserly had indicated many weeks before that he had received an offer of approximately a 20 percent discount from Broughton (Tr. 411, 497).

At the meeting Mr. Casserly immediately indicated that he did not consider the 68 cent price to be good enough. According to Mr. Stollings, he mentioned that he had received a bid from Fairmont which was better than this price and also mentioned the fact that prices were deteriorating in the Charleston market (Tr. 497).

At this point the testimony of the participants in the meeting becomes conflicting. Mr. Hutchinson testified that Mr. Casserly, independent of anything said by himself or Mr. Stollings, inserted a price of 66 cents on the blank price sheet attached to the submission of February 9 (Tr. 412–13). Mr. Stollings and Mr. Casserly testified that Mr. Stollings, after some conversation, quoted the 66 cent price (Tr. 497, 720). Whoever first mentioned the the 66 cent price, the testimony is undisputed that Mr. Casserly

[11] The second and third Borden plans did not include delivery to any Kroger stores in the Clarksburg, Beckley or Lewisburg areas. Borden's drop delivery price based on the March 1962, Huntington Order for Charleston was $.6515 for gallons of Kroger label milk and for Logan was $.7340.

took that figure and, on the spot, with the aid of a calculator converted that figure to a formula based on raw milk cost. The resulting computation was typed up and attached to the Beatrice proposal (Tr. 412–13, 498–9, 733–4; CX 89N). It shows that, in accordance with the terms of the proposal, actual prices paid by Kroger were to be based upon the average Huntington, West Virginia, raw milk cost for the year 1961. Using this figure, plus other fixed costs, Mr. Casserly calculated a "permanent differential" to arrive at a price of 66 cents per gallon. This permanent differential would then be added to the costs determined in accordance with the applicable monthly raw milk price to determine the actual price to Kroger for any given month. The prices for cottage cheese products, however, were not subject to the formula.[12]

The cottage cheese items, although not of significant volume compared to the fluid milk products which Kroger was seeking, presented problems for Beatrice.[13] After Mr. Casserly had indicated some interest in January in these products, but had rejected out of hand the 21 cents per pound price mentioned by the Beatrice representatives, Mr. Stollings conducted a specific investigation of cottage cheese prices. He found that Fairmont had sold cottage cheese to West Virginia institutional accounts in small volume for as little as 16 cents a pound. He also realized that because of Fairmont's purchasing procedures, which permitted Fairmont to purchase under non-regulated formulas whereby the purchaser paid for butterfat content of raw milk and effectively paid nothing for skim milk from which cottage cheese is

[12] The following reproduces the calculation sheet in its entirety:

"To determine milk cost take the Huntington Class I price and adjust to 3.6%. Add 1% for plant loss and .04% cwt. market administration fees. Divide by 11.6 to get cost per gallon.

"*Example*—

Average 1961 Class I (3.6%)		$4.938
(Avg. Cl I 3.5%	$4.865)	
(Diff.	.073)	
	($4.938)	
1% Plant Loss		.05
Administrators Fee		.04
		$5.028

Divide by 11.6 43.35¢ cost per gal.

"To determine differential for gallon jug, subtract 43.35 from 66. equals 22.65¢ (permanent differential).

"To determine differential on half gallon homo subtract 21.67 from 37.8 equals 16.13¢ (permanent differential).

"Cheese price does not change from month to month."

(CX 89N.)

[13] Annual sales of cottage cheese by Beatrice to Kroger were about $40,000 (RBX 132H).

made, Fairmont had a distinct advantage over Beatrice, which purchased milk in the West Virginia area under a formula based on the price of raw milk (*i.e.*, including the skim milk) (Tr. 380–1, 391–4, 401–3, 491–3).

By drawing on the resources of the Beatrice plant at Sandy Lake, Pennsylvania, Mr. Hutchinson was able to arrange to procure skim milk at a very favorable price to be manufactured into cottage cheese for distribution in West Virginia (Tr. 403–6). This investigation had been made prior to the first written submission to Mr. Casserly in February. At that time the Beatrice representatives stated cottage cheese prices based on 17.5 cents per pound (Tr. 407). When the parties met on March 14, 1962, that price remained the same and the formula computation drawn up by Mr. Casserly indicated that the price of cottage cheese was to be constant and would not fluctuate according to the formula (CX 89N).

The proposal was not considered to be final by either party at the March 14, 1962, meeting. Mr. Casserly merely stated to the Beatrice representatives, after the calculations had been made on the basis of the 66 cent price, that he considered the proposal to be "competitive" with others that he had received (Tr. 497–8, 740). The Beatrice representatives made it clear that the proposal would have to be submitted to the company's Chicago office for review by counsel (Tr. 502). Accordingly, in early April Mr. Stollings went to Chicago and spent two days reviewing the proposal with Beatrice's house counsel and an accounting specialist (Tr. 251–2, 504–5, 2255–6).[14]

In the meantime, on March 26, 1962, Mr. Casserly addressed a letter to each of the four dairies that had submitted written proposals stating that a final decision had not been made (CX 91, 99, 110, 129). He noted "the milk pricing situation has been in a very fluid condition in Charleston, and the recent revisions of practically all of the bids we received are requiring some time to evaluate totally the program." Mr. Casserly also noted that Kroger was considering bids based upon various milk cost formulas or a

[14] Mr. Stollings testified that during the course of this review the accountant was asked to "cost justify" the prices quoted to Mr. Casserly (Tr. 504). It is apparent, however, that no attempt was made at that time to cost justify the *differentials* which could be anticipated between the Kroger prices and the prices then being paid by other customers of Beatrice who were in competition with Kroger. That type of analysis, which will be discussed below, was not undertaken by Beatrice until late 1963 under the impetus of the Federal Trade Commission proceeding in this case (Tr. 1818; CX 25). The study which was made in Chicago in late March 1962 was for the purpose of determining the minimum profit to Beatrice to be expected from the proposed private label arrangement with Kroger (Tr. 2256–61; RBX 135F & G).

program allowing reductions from the established wholesale price with provision for promotional allowances.

The final negotiations with Mr. Casserly were conducted on the part of Beatrice by Mr. Stollings alone. Mr. Hutchinson did not participate because of illness. On April 9, 1962, Mr. Stollings met with Mr. Casserly and delivered to him a revision of the Beatrice proposal dated April 5, 1962, which had been approved by Chicago counsel (Tr. 2278; CX 28, 90). With respect to Kroger store locations in Ohio and West Virginia, the prices stated in the revision were the same as those discussed between the parties in March. That is to say the prices were based on 66 cents per gallon, upon which a permanent differential was calculated under the formula established by Mr. Casserly (for each item except cottage cheese) in terms of the Huntington, West Virginia Federal Milk Marketing Order average price for the year 1961. The precise language of the pricing provision in the revised version of the proposal is, in pertinent part, as follows:

> * * * Our proposal is based upon a unit cost at our dock at our Clarksburg and Beckley plants plus an average cost per unit to deliver these products on our trucks to the store door of each of the forty-four stores in the West Virginia District on a four day per week basis.
>
> The raw milk price is based upon the average annual Class I price established by Federal Order Number 5, Huntington Section, Year 1961. Your monthly price would raise or lower in an exact amount with the increase or decrease of the prices determined by this Order under which milk for your private label would be purchased (CX 90C).

The price for cottage cheese, as in the previous proposal, was constant and not subject to the formula.

Kroger accepted the proposal and the companies begain to operate under it in June 1962. Prior to that, in May, Fairmont amended its March proposal by offering to reduce its quotations upon satisfactory proof that such reduction was necessary to meet a pricing schedule proposed by a competing supplier (CX 130). Kroger did not accept that offer. Shortly after that Mr. Casserly informed Fairmont, Borden and Broughton that their proposals had not been accepted (CX 131).

III

1. Comparison of the Proposals

Much effort has been expended by the parties and by the hearing examiner to show, on the basis of a record which is sadly deficient on the subject, that the Beatrice proposal was or was not more favorable to Kroger than the other proposals, particularly the Fairmont "custom processing" offer which Mr. Casserly supposedly weighed with the Beatrice proposal in the last analysis.

We find that a meaningful comparison of the offers is difficult and cannot be made with indisputable accuracy. We find, however, the more persuasive and objective view is that the Beatrice offer was in fact lower in price, and that Beatrice, at least technically, did "beat" the competition. In any event, it is clear that the offer was accepted by Kroger because Kroger considered it, upon total evaluation, including price factors, to be more favorable than the Fairmont "custom processing" or any other offer.

The analysis is made difficult and rendered imprecise by a number of factors:

First, the proposals covered a diversity of products to be provided over an undetermined time and in indefinite quantities. All of the proposals covered a variety of products including various types of fluid milk in different size containers, processed products and manufactured products. Although the gallon jug of homogenized milk was clearly considered to be the big item, there was no necessary or fixed relationship between the prices for gallons and for other products among the various proposals. In addition the price for cottage cheese was constant under the Beatrice proposal but would have fluctuated with raw milk prices under the Fairmont proposal (Tr. 740).

Second, the bases on which the proposals were made were dissimilar. Some were based on discounts from a list price, which was already subject to a greater or lesser degree of erosion depending upon the local area involved, and which bore no guarantee of permanence or stability; others were geared to various costs of raw milk which were continually changing and beyond the control of the bidders. Specifically, the Fairmont "custom processing" proposal was stated in terms of seven different prices based on forecast milk costs for March 1962 under three different Federal Milk Marketing Orders, plus unregulated milk costs in Charleston (CX 123, 124, 128; Tr. 639–40). The Beatrice proposal was based upon *average* raw milk prices during 1961 under a single Federal Milk Marketing Order and contained *uniform* prices to all Kroger stores in West Virginia.

Third, a static comparison of proposals, which by their nature were designed to vary over time and from place to place, cannot be made with precision without the benefit of hindsight. The mere fact that the Beatrice offer was based on an average while the Fairmont custom processing offer resulted in prices varying by as much as 12 ½ cents per gallon in different areas of West Virginia means that any precise comparison would have to await future sales results, and, as of March–April 1962, would have had to be based in part on projections of sales in the various areas. Furthermore, there would be no way of predicting with any degree of certainty whether fluctuations in the various Federal Milk Marketing Orders might make the uniform price offered by Beatrice on the basis of the Huntington, West Virginia Order end up by being more or less attractive to Kroger than the prices offered by Fairmont based on three different Orders.[15]

In order to make any meaningful comparison between prices governed by diverse raw milk costs it is necessary to convert them to a common denominator. Complaint counsel has performed this task by recomputing the Beatrice price in terms of the March 1962 Huntington Order using the "permanent differential" calculated by Mr. Casserly. On this basis the Beatrice price for gallons would have been $.6120 (see fn. 22 at p. 59 of complaint counsel's appeal brief). This price is obviously much more favorable to Kroger than any of the prices stated in Fairmont's "custom processing" bid except for Fairmont's price of $.6007 in the River area. Beatrice, however, maintains that the Fairmont bid price for Charleston should be reduced from the figure of $.6526 per gallon stated in Fairmont's final submission because just after the bid was submitted Charleston milk became subject to the Huntington Federal Order with a resultant reduction in prices paid to producers for raw milk in the Charleston area. Complaint counsel, on the other hand, vehemently argues that the Fairmont bid anticipated the lower cost of milk to Fairmont. Unfortunately, the record does not clearly establish which view, if either, is correct. Nor does it establish for the Fairmont bid a formula for computing the same kind of "permanent differential" that Mr. Casserly calculated for the Beatrice offer. The only precise method of comparison would be to compare such differentials (Tr. 724).

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[15] We perceive another difficulty in making a meaningful comparison. These offers were made at different times in an inconstant market and the only one as to which the detail was ever filled in, as far as the record shows, was the final Beatrice offer. For example, the last Broughton and Fairmont offers included prices in the Kentucky areas which were far *higher* than the prices stated by the Beatrice representatives on March 14 as uniform throughout the Charleston Division. Yet the final Beatrice proposal reflected Kentucky prices *higher* than those proposed by Broughton and Fairmont because subsequent to March 14 Beatrice realized that its Kentucky prices would be subject to local regulation and thus not controlled by the negotiations. Thus comparison of the Broughton and Fairmont Kentucky prices based on either the 66 cent offer of Beatrice on March 14 or the final Beatrice Kentucky prices, which ranged from 65 cents to 93 cents and which were not subject to the formula, is meaningless.

If we had to decide the matter precisely we would be inclined to accept complaint counsel's view that the prices stated in the Fairmont proposal did anticipate the lower cost of milk in Charleston under the new Federal Orders. Fairmont procured all of its milk in southern West Virginia under the unregulated Charleston Producers Price prior to March 1962 and could not have been ignorant of the competitive significance to it of an impending switch to the Federal Order, since it knew that the other bidders, including Beatrice, were already procuring raw milk under the more advantageous prices established by Federal orders. Fairmont representatives participated in a meeting on March 6, 1962 at which the question of bringing the Charleston milk producers under the Federal Order was discussed (Tr. 2807). As a result of that meeting the Federal Order was put into effect as of March 12, 1962 (Tr. 2805). The Fairmont "custom processing" proposal was submitted at about this time, although the precise date is not established by the record. Nevertheless Fairmont did not make any move to change its offer after the switch to the Federal Order actually occurred in the Charleston area. Fairmont would surely have submitted new figures if its original figures had not allowed for reduced raw milk costs and, in fact, did submit changed figures covering only the Huntington West Virginia area by letter dated March 14, 1962 (CX 177; Tr. 634–5). Furthermore, Mr. Casserly by letter dated March 26, 1962, informed all bidders that he was considering changes in the various proposals occasioned by "a very fluid condition in Charleston" with respect to milk pricing (CX 129). Thus Fairmont had ample knowledge of the cost changes and ample opportunity to change its prices. It certainly had incentive to do so; yet it did not. The only sensible conclusion is that the prices submitted in the Fairmont proposal were intended by Fairmont, and understood by Kroger, to constitute Fairmont's final bid.

Complaint counsel suggests that an exhibit which was excluded by the hearing examiner, CX 140, should have been admitted at least for the purpose of establishing that Kroger had reason to believe that the Beatrice proposal actually resulted in lower milk prices. The document (which we have not looked at) is said by counsel to show the results of calculations made by Mr. Casserly's accountant who purportedly recomputed the Fairmont bid in terms of an average price for the year 1961 (presumably to show the Fairmont bid on the same basis as the Beatrice bid) (Tr. 636, 651). It appears from the record that Mr. Casserly, at the time, was provided with information as to the actual costs upon which the Fairmont prices were based but that that information was no longer in Mr. Casserly's possession at the time of the trial and was not otherwise available to be put into the record (Tr. 642–3).

The hearing examiner excluded CX 140 because the underlying documents showing raw milk costs and processing and delivery costs to Fairmont were not available (Tr. 652). Complaint counsel subsequently made an oral motion that the document be admitted for the purpose of showing Kroger's state of mind at the time of its acceptance of the Beatrice proposal. We believe that the document could have been admitted for that purpose, but we do not propose to reverse the hearing examiner on this point, since the facts on the record before us establish to our satisfaction that, for reasons including price factors, Mr. Casserly considered the Beatrice offer to be the best, and therefore he accepted it.[16]

Mr. Casserly testified that he did not make any immediate comparison of the bids because they were "quite complicated." He turned them over to his accountant who reported that there was very little difference between the Fairmont and Beatrice bids; that they were so close it was impossible on the basis of price of fluid milk to distinguish between them, and the only significant difference was with respect to the bids on cottage cheese (Tr. 635–6, 721–2).[17] On that item Mr. Casserly stated that he considered the constant price offered by Beatrice as more favorable than Fairmont's fluctuating price. He did so despite the comparative insignificance of the dollar volume of cottage cheese.[18]

[16] Mr. Casserly actually testified that Beatrice "was the lowest and best bidder on this contract" (Tr. 739). The statement was made on cross-examination of Mr. Casserly by Beatrice's counsel, who moved that it be stricken as unresponsive to the question asked. The hearing examiner granted the motion. We think that the answer should have been allowed to stand, if for no other reason to show Mr. Casserly's state of mind, but find that in any event the record without the testimony amply supports our finding that Kroger accepted the Beatrice bid because it considered it to be the best bid.

[17] Mr. Casserly also testified that there were non-price factors which inclined him toward Beatrice rather than Fairmont. Beatrice had the only certified testing laboratory in West Virginia and Mr. Casserly stated that he considered that Beatrice was a quality operation. He also thought that Beatrice was better organized to serve Kroger in the Kentucky area (Tr. 706–8).

[18] Ironically subsequent events proved that Mr. Casserly was wrong. Because of a decline in raw milk prices, Kroger's cost for cottage cheese during the period covered by the alleged discriminations would have been lower under the Fairmont price than under the Beatrice price (RX 132).

2. Kroger's Conduct of the Negotiations

Certain significant elements emerge with respect to Kroger's attitude and conduct of the negotiations.

First, Kroger's size and buying power put it at a distinct advantage over both its competitors and its suppliers. It was the largest purchaser of dairy products in the area to be served. Its annual volume of such products was over $2,000,000, of which the potential private lable sales representated a very large part. The dairy companies that became involved in the bidding, on the other hand, were competing against each other for the existing business in a market which was deteriorating in some areas and where a cost squeeze already existed. They were each faced with the prospect of an all or nothing bid. The successful dairy would enjoy greatly increased sales to Kroger; the unsuccessful dairies stood to lose at least a major portion of the sales to Kroger that they previously enjoyed.

Second, Kroger brought in a special negotiator, Mr. Casserly, who was well experienced in private label operations while the officials representing the other dairies, except for Broughton, had no such prior experience.

Third, Mr. Casserly initially told each of the other dairies that he had a 20 percent discount offer from Broughton, which was a substantial distortion of the truth, and that he expected a better deal for the Charleston Division.

Fourth, Mr. Casserly, by his own testimony, was extremely uncommunicative about what other dairies were doing or thinking of doing, and even about what he himself wanted. He was clear, in his own mind, however, that he was out to get the best price he could. He testified as to his approach at the outset:

> * * * what I was looking for wasn't really clear in my own mind and I think to this extent I may have confused the bidders to a certain extent. I felt that there was a net price somewhere, and I don't know what the net price was because I don't know the costs of these particular people who were competing, but I felt there was a net price which would represent a savings to the Kroger Company and a savings to the dairies who were competing because of the large volume of business that we were offering to them (Tr. 597).

He testified as to how he conducted the negotiations:

> Now, when I talked to each of the other companies, you had to spend a great deal of time explaining exactly what you had in mind. This idea of private label was—it seemed to be pretty new with them (Tr. 591–2).
>
> Well, these were really a strange series of meetings. They would come in and there was a considerable amount of fencing going on and I know in my mind that I was convinced that they were trying to find out from me what

other dairies were proposing or what prices they had come up with, if they had come up with prices.

Now, one thing that I did indicate to them, and what I say for one dairy actually applies to all dairies because I tried as far as possible to say the same thing to everybody that I talked to, was that we had one bid based upon our experience in Columbus which was in the neighborhood of 20 percent off list, and that I did not consider this adequate, that I believed that the discount, if the discount was read off list, should be greater than 20 percent (Tr. 595–6).

* * * * * * *

Now, it is a strange thing, these people have ways of reading things into what you say and somebody may say that I communicated more, but as far as I was—from my end of the desk I wasn't giving out any information (Tr. 596–7).

* * * * * * *

Well, generally what happened at these meetings, there were so many meetings it is hard to be specific about any one particular meeting, but these people were coming back and they were looking for more information about what we were talking about, about the type of, what we wanted, the type of products we wanted, and so on (Tr. 601).

* * * * * * *

I told them [Broughton] that I didn't think the discounts were adequate in consideration of the amount of business that we were talking about, and they agreed that they would go back and they would submit another bid, * * * (Tr. 603).

* * * * * * *

And I told them [Broughton] that again that I didn't think it was a true reflection of the cost savings that they were going to receive in consideration of this amount of business (Tr. 604).

* * * * * * *

* * * again as in all these meetings, there is a great deal of fencing, who is in, who has got their proposal in, and all these sorts of things, and trying to pick up as much information as they possibly can, * * * (Tr. 627).

* * * * * * *

* * * I had so many meetings it made my head spin. These people wanted to come in every day and they would have been in every day had you let them (Tr. 630).

* * * * * * *

Well, in all these meetings, Mr. Mathias, there was always a tremendous lot of fencing going on. The people that—and this is not only Greenbrier. This is everybody else that you talked to. The people who you were talking to were trying to learn more about the limited service that we were asking relevant to this private label bid. They were trying to learn more about the amount of volume that we were talking about. They were trying to learn more about the lack of promotional activity that they would be indulging in. They were trying to learn who was their competition in the bidding and who was—what price area the price competition was in (Tr. 668).

* * * * * * *

In my estimation they [the Beatrice representatives] were putting in time and they were just looking for as much information as they could obtain (Tr. 669).

When Mr. Casserly was asked what role he played in these "fencing" matches he said:

I was attempting to get the lowest price for my company that I possibly could without doing anything injurious to the companies or anything illegal. But I was trying to act as a good buyer could act (Tr. 670).

The picture is clear. Mr. Casserly, by his own testimony, set out to get the lowest possible prices and he did not stop until he thought he had done so. At the outset he exaggerated the discount of the first offer he received and told all the companies that he expected lower prices because of the potential volume. Later on he took advantage of price instability in the Charleston area, and an impending reduction of costs upon introduction of regulated raw milk prices in that area, to urge even lower prices (Tr. 668–9). He gave out *no* accurate price information for the possible guidance of the bidders but urged them repeatedly to lower prices in view of cost savings. He specifically gave out *false* price information to the Beatrice representatives when he rejected the 71 cent price suggested by them in February on the ground that he had already received a better price under a 20 percent discount offer from Broughton.

According to the Beatrice representatives Mr. Casserly rejected out of hand a 68 cent price offered by them in March. He then made the necessary calculations to connect a 66 cent price to a formula and informed the Beatrice representatives that they were "competitive" (Tr. 413, 498, 740). He did all of this despite admitting that the various proposals were complicated and that he had not evaluated them but turned them over to his accountant after all the bids were in (Tr. 721).[19]

III

The issues which must be determined on the basis of these facts are whether the Beatrice prices to Kroger for private label dairy products were discriminatory, whether any competitive injury resulted from such price discrimination as did occur, and whether Beatrice acted in good faith in attempting to meet com-

[19] Mr. Casserly testified that the Beatrice proposal "was quite complicated and actually in the short time, the short time being a matter of hours, that these people were in the office, we were in no position to evaluate the proposal" (Tr. 632).

petition or in fact went beyond the permissible bounds of the meeting competition defense and "beat" competition. We will discuss each of these points seriatim.

1. The Extent of the Discriminations to Kroger

No one denies that the Beatrice-Kroger arrangement contemplated and resulted in different prices charged by Beatrice to Kroger and to Kroger's competitors on some products in some market areas and at some times.

Complaint counsel has tabulated differentials for specific customers of Beatrice who competed with Kroger over the period June 1962 to October 1963. These tabulations show that, in accordance with the formula in the Beatrice-Kroger agreement, the following prices were charged by Beatrice on gallons of milk in *all* areas of the Charleston Division for the months indicated:

June 1962	.5999
July 1962	.6078
Aug. 1962	.6133
Sept. 1962	.6930
Oct. 1962	.6956
Nov. 1962	.6974
Dec. 1962	.6938
Jan. 1963	.6680
Feb. 1963	.6560
Mar. 1963	.6526
April 1963	.6629
May 1963	.6096
June 1963	.6104
July 1963	.6130
Aug. 1963	.6216
Sept. 1963	.6320
Oct. 1963	.7072

(See Appendix IV to complaint counsel's appeal brief.)

The tabulations then show, by way of specific examples, that during at least a part of the period Beatrice charged Acme Market in Beckley, West Virginia 88.2 cents per gallon (June 1962-mid February 1963). The same is true of Carolina Supermarket in Beckley. In Charleston Beatrice charged Annie's Market 71.1 cents per gallon from June to July 1962, and charged 80.1 cents per gallon until the middle of February 1963. The pattern is the same for Evans Supermarket in St. Albans near Charleston. In Clarksburg, in central West Virginia, Beatrice charged Thorofare Market and Allman Brothers 78.85 cents per gallon from June 1962 until October 1963. Beatrice charged Garden Fresh Markets in Clarksburg about 76 cents per gallon during the same period.

In the Lewisburg area Beatrice charged City Market, a very small customer in Rainelle, West Virginia, the full list price of 98 cents per gallon up to September 1963. (See Appendix VI to complaint counsel's proposed findings.)

In the Logan area Beatrice was charging a local supermarket chain, West Virginia Supermarkets, which did not purchase gallons, prices on other milk products as high as 27 percent above those charged to Kroger. Price differentials on cottage cheese ranged as high as 41 percent to many of Beatrice's customers at various times (*id.*).

Complaint counsel has also tabulated purchases by specific competitors of Kroger in the various areas and computed the prices which those competitors would have paid had they been afforded the Kroger prices. This tabulation shows that had Acme Market in Beckley purchased at the Kroger prices it would have saved $6,900.47 on purchases of $39,403.05. Carolina Supermarket in the same area would have saved $6,489.15 on total purchases of $38,014.49. In Clarksburg, Garden Fresh Markets, a West Virginia chain, would have saved $18,000 on total purchases of slightly over $175,000. The tiny City Market in East Rainelle, West Virginia, would have saved over $1,000 on purchases of approximately $3,700, or over 28%. (See Appendix VI to complaint counsel's appeal brief.)

These are but examples of the existence and extent of the differences between prices paid by Kroger for its private label products under the Beatrice-Kroger arrangement and prices paid by competitors of Kroger.

Respondents contend, however, and the hearing examiner agreed, that these figures do not indicate the true "extent of the price discriminations" involved in the case because they do not reflect the true competitive advantages to Kroger. Among other matters, they emphasize that Beatrice was also supplying its *own label* products to certain Kroger stores at the usual list price less discount. Respondents also assert that the "extent of the price discriminations" cannot be determined because Kroger necessarily incurred added expenses by performing all in-store services itself, both with respect to private and Beatrice brand products.

The analysis is erroneous. These, and other such matters relied on by respondents, do not detract from complaint counsel's convincing and largely undisputed evidence as to the *existence* and *extent* of the price differentials discussed above. Respondents' contentions are more properly considered, not in diminution of the discriminations, but in terms of whether the discriminations established of record caused the type of competitive injury condemned by the Robinson-Patman Act. In short all of these matters go to the extent of the injury, not to the extent of the price discriminations.

The use of the term "discrimination" in Section 2(a) of the Robinson-Patman Act is inexact. In the words of the Supreme Court in *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960), "a price discrimination within the meaning of [Section 2(a)] is merely a price difference." Thus the existence and extent of the price "discriminations" (in the sense of price differences) are indisputably established by complaint counsel's tabulations, based on the differences between prices actually charged to Kroger for private label products and prices actually charged to Kroger's competitors for goods of like grade and quality.[20]

2. Injury to Competition—Primary Line

We find no injury to competition on the primary level. In recently affirming the Commission's decision in *National Dairy Products Corp.*, FTC Docket No. 8548 (June 28, 1967), the Seventh Circuit Court of Appeals emphasized that a finding of primary line injury might be based either on proof of predatory intent or on a market analysis, sufficient under the circumstances of the case to raise a reasonable probability of injury to competition. *National Dairy Products Corp.* v. *FTC,* 412 F. 2d 605, 612–13 (7th Cir. 1969). In the present case there is neither a showing of predatory intent nor a sufficient market analysis to support a finding of competitive injury.

We do not agree with complaint counsel that the hearing examiner erred in failing properly to apply the Supreme Court's opinion in *Utah Pie Co.* v. *Continental Baking Co.,* 386 U.S. 685 (1967). Utah Pie claimed that it had been injured by the discriminatory tactics of major companies in invading the frozen pie market in the Salt Lake City area. The Supreme Court held essentially that the evidence presented was sufficient to go to the jury on the issue of predatory intent. That evidence consisted of a full study of the market including growth of total sales, of the percentage of total market controlled by Utah Pie and its competitors, the dollar sales and earnings of Utah Pie and the various prices charged. The evidence also showed that sales were made below cost under a continuing program of aggressive efforts to

[20] We discuss below at pp. 804-09, in the context of injury, the significance of each item urged by respondents in diminution of the differentials established by complaint counsel.

obtain business involving repeated deep price cuts. In addition, the case contained specific evidence of predatory activities including the fact that one of the major companies had sent an "industrial spy" into Utah Pie's plant. Nothing of this sort appears in the present case. The Supreme Court's holding in *Utah Pie* is not applicable.

No attempt was made by complaint counsel here to establish through an appropriate market analysis that, even in the absence of proof of predatory intent, the price cuts by Beatrice were so deep and so aggressive as to raise a reasonable probability of injury to primary line competition. Instead complaint counsel relied upon evidence of what happened after the initiation of the Kroger-Beatrice private label arrangement to the various dairies which had been in the running for the Kroger business. That evidence shows that each of these companies suffered some loss of business with the Kroger stores. Mere loss of business, however, is not a sufficient showing of injury to competition. As was appropriately stated in *Anheuser-Busch, Inc.* v. *F.T.C.* 289 F. 2d 835 (7th Cir. 1961), the Robinson-Patman Act

is not concerned with mere shifts of business between competitors. It is concerned with the substantial impairment of the vigor or health of the contest for business, regardless of which competitor wins or loses (289 F. 2d at 840).

Counsel also points to facts showing a general deterioration over the period following the initiation of the private label arrangement in June 1962 in the dairy business within the Charleston Division. It appears, for example, that Fairmont closed its Charleston dairy plant in 1964 and discontinued a distribution point in Huntington, West Virginia. Borden closed a distribution point in Logan, West Virginia. Such facts may be a reflection of changing conditions in the dairy industry in the market area. They do not by themselves prove any causal relationship between the price concessions made to Kroger and the subsequent fortunes of either Beatrice or its competitors.

The Beatrice-Kroger arrangement was merely a part of a pattern of changing conditions. Subsequent to the initiation of Kroger's private label sales other chains responded by seeking lower prices. Beatrice itself began to sell A & P, first in Clarksburg and then in western West Virginia at special prices in response to competitive pressures. In February 1963 there was a major price reduction in the Charleston and Beckley areas upon the institution of a limited form of "tailgate" service available to all customers. Responding to competitive moves by other dairies, Beatrice reduced its list prices in those areas from a level of approximately 75 cents per gallon to 68 cents per gallon in exchange for the performance of certain in-store services by its customers. Within a matter of days, however, Beatrice (again responding to moves of its competitors) was forced to reinstitute full in-store services, but at the reduced price level.

Eventually several chains in addition to Kroger instituted private label programs of their own, in each case with the supplier being a company other than Beatrice. Finally Kroger itself, in 1966, terminated the arrangement with Beatrice and began supplying its own needs for private label products from a dairy plant which it had built in the meantime in Ohio. Thereafter Beatrice had none of the principal chain stores in West Virginia as its customers. Ironically, then, Beatrice far from reaping the supposed ill-gotten rewards of a predatory pricer may have suffered more than some of its competitors in the changing conditions of the West Virginia dairy market. In short, Beatrice's price discriminations to Kroger appear to be much more a symptom of the changes, rather than their cause.

In any event, on this record it is not possible to find, as complaint counsel urges us to, that Beatrice's price discriminations caused or were likely to cause the requisite competitive injury to the primary line which the statute commands us to find in order to establish violation of Section 2. We hold that the facts in the record demonstrate neither predatory intent nor a probability of competitive injury sufficient to establish primary line injury here.

3. Injury to Competition—Secondary Line

Turning to the question of secondary line injury, it is clear that the mere existence of substantial differentials between competing purchasers in a price sensitive atmosphere is sufficient to give rise to an inference of reasonable probability of injury to competition. *United Biscuit Co. of America* v. *F.T.C.*, 350 F. 2d 615 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966); *Foremost Dairies, Inc.* v. *F.T.C.*, 348 F. 2d 674 (5th Cir. 1965), *cert. denied*, 382 U.S. 959 (1965).

As discussed above, the record amply demonstrates that the differentials between the prices paid by Kroger and the prices paid by Kroger's competitors were substantial. To be sure they varied from time to time and from place to place and were not constant even as to different customers competing with Kroger in the same geographic areas. Nevertheless during many periods and in many places these differentials amounted to as much as 10 or 20, or even 30 cents or more per gallon. On cottage cheese the differentials frequently ran as high as 40 percent. Complaint counsel's tabulations, discussed above, showing the amounts which various customers of Beatrice would have paid had they been able to purchase at the Kroger prices over the entire period from June 1962 to October 1963, are particularly revealing, since they show the total dollar detriment to such customers of having to pay the higher prices.

The record establishes that there was substantial competition, both in the sale of milk and dairy products and in the sale of the full line of grocery products, between Kroger and various types of stores, independent supermarkets and groceries, and stores of the smaller type which may carry limited lines of grocery products including milk items.[21]

The record also reflects, what we know from numerous cases involving the dairy and retail food industries, that the grocery store atmosphere is highly price sensitive. Fluid milk is an important, high volume, fast turnover product. It is one of the most important commodities carried in retail grocery stores. It has to be purchased frequently by the consumer because of its perishable nature. The record contains ample evidence that milk is frequently used as a leader and advertised at special prices. Kroger itself on occasion used milk to promote weekend sales by advertising it at low prices.

Furthermore, profit margins are notoriously low in the retail grocery business. The record shows that retailers take advantage of all available discounts and rebates in order to minimize cost and that differences in cost of a few pennies paid by the retailer for a major grocery item can have a substantial effect on gross and net profits.

In view of the foregoing, a finding of secondary line injury based on the size of the differentials established by complaint

[21] Testimony, relied upon by the hearing examiner, given by certain proprietors and employees of grocery stores located in the same areas as Kroger stores, to the effect that they did not consider themselves either to be in competition with Kroger or to have been injured by Kroger's receipt of lower prices, is neither controlling nor particularly relevant. The Robinson-Patman Act protects *competition* not *competitors*. Actual injury need not be shown; nor is it even significant that competitors actually prospered. *Tri-Valley Packing Assn.* v. *F.T.C.*, 329 F. 2d 694 (9th Cir. 1964); *Standard Motor Products, Inc.* v. *F.T.C.*, 265 F. 2d 674 (2nd Cir. 1959), *cert. denied*, 361 U.S. 826 (1959); *Whitaker Cable Corp.* v. *F.T.C.*, 239 F. 2d 253 (7th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957); *E. Edelmann & Co.* v. *F.T.C.*, 239 F. 2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958). Specifically, the courts have recognized that the incipient harm to competition that may result from price discrimination "is not to be determined solely by the opinions of the store owners." *United Biscuit Co. of America* v. *F.T.C.*, 350 F. 2d 615, 622 (7th Cir. 1965).

counsel here is compelled by the facts and amply supported by prior authorities. In *Foremost Dairies, Inc.* v. *FTC, supra,* a Commission finding of such injury was upheld on the basis of a 5 percent rebate differential in the sale of fluid milk to a small chain of eight stores in Albuquerque, New Mexico. The rebates amounted to less than $8000 over a 17 month period. The court recognized that it was dealing with an industry in which competition in the secondary line was keen and profit margins were low. It stated:

> * * * where the record indicates a price differential substantial enough to cut into the purchaser's profit margin and discloses a reduction which would afford the favored buyer a significant aggregate saving that, if reflected in a resale price cut, would have a noticeable effect on the decisions of customers in the retail market, an inference of injury may properly be indulged. It is unnecessary that there be evidence that the favored customer actually undersold his rivals; a substantial price advantage can afford a favored buyer a material capital advantage by enlarging his profit margin in a highly competitive field or it can enable him to offer customer-attracting services which will give him a substantial advantage over his competition (348 F. 2d at 680).

United Biscuit Company, supra, is particularly apt. That case involved discriminations of a maximum of 6 percent in sales of cookies and crackers to grocery stores. The monthly dollar volume which was required to entitle the purchaser to the full 6 percent maximum was comparatively small, being less than $150. The discount was graduated below this figure down to zero for very small purchases. Despite this, the court sustained the Commission's finding that there was sufficient evidence of a likelihood of substantial competitive injury. It did so despite the very small size of the dollar discounts earned by those customers granted even the maximum amount. The court noted evidence (strikingly similar to that in the present case) to the effect that the retail food business was highly competitive; that net profits were low; that cash discounts and other allowances were important, and that price was a very important, if not the most important factor, in enabling retail food stores to compete.

If maximum discounts of 5 or 6 percent on the small dollar volume involved in *United Biscuit* and *Foremost* were substantial, the price differentials which have been established here are even more so.

This case, however, differs from *Foremost* and *United Biscuit* in raising additional factual questions as to the economic advantages which the price differentials afforded to Kroger. In those cases the differentials were the obvious true measure of the favored buyer's advantage. In this case, respondents at least claim that they are not.

As distilled from their brief, respondents claim that Kroger did not really achieve any competitive advantage by its private label program because,

(a) Kroger's purchases of private label products should be aggregated with its purchases at full list price of Beatrice brand products which were sold to eleven Kroger stores subsequent to the initiation of the private label program;

(b) Any significant price discriminations were so short-lived and so localized that Kroger gained no competitive advantages from them;

(c) Kroger necessarily incurred additional costs, which reduced its competitive advantage, by providing its own in-store services with respect to both private label and Beatrice brand label products under the "stripped service" arrangement;

(d) The anticompetitive effect of Kroger's purchases of private label products must be considered (in accordance with the *Borden* private brand case, *F.T.C.* v. *The Borden Co.,* 383 U.S. 637 (1966)), in terms of the "value" of premium brands over private brands.

We deal with each of these contentions in order.

(a) *Beatrice Brand Sales*

After initiation of the private label program in June 1962 Beatrice continued to sell to certain Kroger stores its own label products for which it charged the list price less the normal competitive discounts.[22] This came about because Kroger, in addition to wanting to institute a private label program emphasizing its own label products, also wished to eliminate the confusion in its dairy cases resulting from the fact that many of its stores carried a multiplicity of brand name products. Mr. Casserly made this known to each of the potential suppliers and many of them, including Beatrice, included in their written proposals offers with respect to their own brand products. The Beatrice proposal stated merely "Prices on our label will remain competitive."

In the spring of 1962, and in anticipation of the beginning of its private label program, Kroger conducted a survey in each of its stores to determine which brand name of dairy products was

[22] To some degree Kroger actually received less favorable treatment on these sales than other customers of Beatrice since, despite receiving no more than normal trade discounts, Kroger performed all in-store services with respect to Beatrice's brand products.

most popular with the customers at that store. That brand was then selected as the second label to be carried in each such store along with the new Kroger label. As a result of this survey Beatrice became the only brand name supplier to eleven stores in certain of the West Virginia areas. Other Kroger stores, some of which previously had carried Beatrice brands along with those of other dairies, thereafter were supplied by Beatrice only with private label dairy products.

The hearing examiner agreed with respondents' contentions that the private brand sales should be aggregated with the Beatrice brand sales to determine the extent of the discrimination. He also found that the agreement between Beatrice and Kroger covered Beatrice brand products and that such products were "of like grade and quality" with the Kroger label products. He then concluded that "realism, fairness, and simple justice require the discriminations in this proceeding to be determined by comparing the average unit price which Kroger paid to Beatrice with the average unit price Beatrice charged Kroger's competitors for an equal amount of milk of like grade and quality" (ID., 754).

We disagree. In the first place, the Robinson-Patman Act requires consideration of secondary line injury on a location by location basis. Each local competitive area, indeed each Kroger store location, becomes the competitive environment within which the potential effect on competition with Kroger must be examined.[23]

In both the important Charleston market and in many other towns where Kroger stores were located, such as Logan, West Virginia, no sales of Beatrice brand products were made to Kroger. In those places the full competitive impact of the differentials which have been discussed above would, in any event, be undiminished by sales of Beatrice brand products.

Even in the areas where Beatrice sold both its own label and private label products to Kroger, however, the discounts resulting from aggregating such sales were frequently substantial. The hearing examiner adopted as a finding an exhibit prepared by complaint counsel's accountant, on the basis of detail furnished by Beatrice, purportedly showing the percentage of discriminations granted to 27 Kroger stores in three West Virgina locations

[23] The evidence here is far stronger, on this score, than in the *Foremost* case. In that case the only competitive environment examined was the city of Albuquerque, New Mexico, in which were located some eight stores in a small chain which received favored prices. Only one of these stores was located in proximity with an unfavored Foremost customer.

based on actual sales of both private and Beatrice brand milk. The discount figures shown vary from 9.7 percent to 30.8 percent and average 16 percent. According to the previously discussed authorities even these figures would amply support an inference of secondary line injury (CX 390; ID. 755).

Moreover, respondent's basic assumption that sales of private and Beatrice brand products should be lumped together because they are "goods of like grade and quality" under the *Borden* doctrine is erroneous. In *Borden* (*F.T.C.* v. *The Borden Company,* 383 U.S. 637 (1966)) the Supreme Court agreed with the Commission that the quoted phrase covers identical goods packaged under different labels so that charges of price discrimination are not avoided simply because the cheaper product is packaged differently. This does not mean, however, that for all purposes brand and non-brand sales have to be treated as one to determine either the existence or effect of discriminatory charges for private label products. We are familiar with the use in many industries of "fighting brands," being identical products sold at lower prices in local markets for the purpose of protecting national brand products from potential inroads of local competition. The *Borden* decision specifically emphasized the potential competitive advantage that a seller who is able to offer both name brand and non-brand products has over his competitors who can offer only the name brand (383 U.S. at 644). We think the proper inquiry here is whether Kroger, by obtaining cheap milk under its own label was given a competitive advantage which it used to the potential injury of its competitors. On this point the record leaves no doubt that Kroger's entire purpose in contracting for private label dairy products was to obtain an overall advantage over its competitors in the Charleston Division. Kroger used the private brand milk for the benefit of its entire grocery business and not merely to sell against name brand milk in the stores of its competitors.

Kroger merchandised its private label milk in a significantly different manner than it merchandised the vendor labeled milk which remained in its stores after the initiation of the private label program. Kroger intended to, and did, put its emphasis on the private label milk. It gave it preferred shelf space; it carried gallons, the high volume item, only in the private label and it advertised and promoted only the private label milk, including promotion of weekend sales at reduced prices.

The *Borden* case, therefore, does not support respondents' contentions that sales of brand and non-brand items have to be aggregated to determine the existence of an unlawful discrimination.[24]

(b) *Discriminations Were Local and Short-Lived*

Respondents attempt to diminish the significance of the price discriminations by pointing out that they were of a local nature and comparatively short-lived. They suggest that it is necessary to view the discriminations over a period of at least a year in order to determine their effect. Again we disagree, on the ground that secondary line injury must be determined on a location by location basis. As to the short duration, moreover, we point out that the widest differentials existed during the period June 1962 to February 1963. This in itself is a significant length of time and removes the case from the rule of *American Oil Co.* v. *F.T.C.*, 325 F. 2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964), in which the court reversed the Commission on the ground that concessions granted for a 17-day period in the heat of a gasoline price war were *de minimis*.

As previously noted prices to purchasers other than Kroger were substantially reduced in the Charleston and Beckley areas in February 1963 as the result of the introduction by the dairies of "tailgate" service which promptly became full service at lower prices. The result was that subsequently the differentials between Kroger's private brand products and Beatrice brand products were significantly reduced. They were not, however, eliminated. In any event these events do not detract from the existence of substantial differentials throughout the prior period from June 1962 to February 1963 from which secondary line injury is properly inferred.

(c) *Kroger's Additional Costs*

Respondents insist that additional costs to Kroger resulting from the performance of all in-store services with respect to both private and name brand products should be taken into account in determining both the size and effect of the price discriminations.

[24] Nor does the Commission's decision in *Admiral Corp.*, Docket No. 7094 (April 7, 1965) [67 F.T.C. 375], support respondents' position. In *Admiral* we held that the record failed to disclose the extent of discriminations because it did not show the relative importance of discriminations on different products in the line to various buyers in such a manner as to permit determination that one buyer was favored over another. Here, however, complaint counsel has established the relative overall importance of the discriminations by tabulating the amounts which unfavored customers would have paid had they been afforded the Kroger prices with respect to their actual purchases.

In this contention, respondents misread Section 2(a) of the Robinson-Patman Act. It is no defense in a price discrimination case that the favored purchaser may have incurred additional costs; it is only a defense if the seller can justify his favorable price by showing *his* cost savings.

Moreover, the record contains no evidence as to the amount of the additional costs incurred by Kroger. Certainly they cannot be equated with the supposed cost savings to Beatrice. Indeed one can assume that the incremental cost to a large chain store of moving milk from its delivery platform to the dairy cases and maintaining those cases would be comparatively insignificant. Kroger's use of centralized billing and long-range order procedures, on the other hand, would probably result in cost savings *to it* rather than in additional expenses.

In any event, if respondents wished to rely on additional costs to Kroger as reducing the likelihood of competitive injury on the secondary line they should have presented evidence of such savings geared to specific store locations.

Complaint counsel, having established a *prima facie* case, cannot be required to destroy his own case by producing such evidence. It is clearly the proper burden of complaint counsel to establish both the existence of price discriminations and the requisite likelihood of competitive injury. In that connection (if the case is of such a nature) complaint counsel must establish that injury to secondary line competition can appropriately be inferred from the substantiality of the price discriminations. At that point the burden must shift. If the discriminating seller or the favored buyer can present evidence that the inference should not be drawn by showing that the favored buyer received no competitive advantage, he should do so.

(d) *The "Value" of Name Brand Products*

Beatrice relies upon the Supreme Court's decision in *F.T.C.* v. *Borden Co.*, 383 U.S. 637 (1966) and on the Fifth Circuit's decision on remand in that case, *Borden Co.* v. *F.T.C.*, 381 F.2d 175 (5th Cir. 1967), for the proposition that name brand dairy products have a "value" in excess of private label products, even though the latter be "of like grade and quality." Assuming that this proposition is correct, it may well be that some differential between name brand and private brand products is to be tolerated under the Robinson-Patman Act, and that, in a proper case, a differential between private and name brand should be taken into account in determining secondary line injury. In this case, however, the record establishes that no such justification for the differential existed.

Kroger did not market its private label products in the same way as its brand name products. It used them as a competitive tool, giving preferred space to its private label and promoting those products in order to obtain an overall competitive advantage. It did not cut prices on private label products. Indeed during much of the period in question it sold private label products at the same prices as name brand products. When it encountered difficulty in obtaining acceptance for its own label products, particularly in the early stages of the private label program, it started promoting them aggressively, and at one point gave out free sampls in the Charleston market to get the program going. Beatrice shared the expense of demonstrators in the free sample program. Thus Kroger, by its own action sought to deny the value of any differential between name brand and private brand products.

For these reasons we hold that respondents cannot excuse discriminations of the size shown here in reliance on the *Borden* case.

4. Good Faith Meeting of Competition

The heart of the good faith defense is the subjective attitude of the seller and his reasonable belief that his price offer is no lower than is required under the circumstances. *F.T.C.* v. *A. E. Staley Mfg. Co.,* 324 U.S. 746 (1945). We have discussed above the difficulties of making an exact comparison of the final bids to Kroger arising both from the inadequacy of the record and the diverse and uncertain nature of the bids themselves. We stated our conviction that in any event the Beatrice bid was considered to be the best bid by Kroger and was accepted by it on that basis. In that sense at least, the Beatrice bid "beat" the opposition and we are squarely faced with the question as to whether in those circumstances the meeting competition defense is unavailable to a successful bidder.

The record clearly establishes the other subjective elements of good faith required under the prior cases. The Beatrice representatives did everything in their power to find the right price level in a cautious and prudent manner; they made specific investigations, tested rumors and tried by legitimate means to find out what their competitors were doing; they tried, with only slight success, to get as much information for their guidance as possible out of Mr. Casserly. If Mr. Casserly was less than fully communicative or truthful, the Beatrice representatives are not to blame and the record reveals that they had no reason to disbelieve the information which Mr. Casserly did give them. To be sure the Beatrice representatives responded to pressure from Mr. Casserly to come in with lower prices and virtually let themselves be talked into the 66 cent price per gallon that became the basis of their final offer. But if any one failed to discharge his Robinson-Patman obligations here, it was Mr. Casserly, and not the Beatrice representatives. If businessmen are not to be prohibited entirely from bargaining in such a situation, the burden of not exceeding Robinson-Patman bounds should, at some point, fall on the buyer who plays the cards so close to his vest as to persuade the seller to come down just a little more, and not on the seller who has tried by every proper means to feel out the opposition.

What precisely did the Beatrice representatives know or reasonably believe at the time of the negotiations on March 14, 1962? They had been told by Mr. Casserly that Broughton, back in January, had offered 20 percent off list price and that Mr. Casserly expected a better price based on the high volume anticipated in the Charleston Division. In February they had determined an average list price of 85 cents per gallon and had tried a tentative suggestion of 71 cents per gallon based on a discount of approximately 16 to 17 percent off that averages. They realized at the time that this price would not be good enough and Mr. Casserly so informed them in no uncertain terms, specifically pointing out that 20 percent off a list price of 85 cents would be less than 71 cents. They knew further that list prices, particularly in the Charleston area, had been subject to further erosion and that that area would shortly come under, or had come under, a Federal Milk Marketing Order which would further erode prices. They knew, whether from Mr. Casserly or some other source, that Fairmont was the most likely contender for the Kroger private label business and that Fairmont had offered a series of discounts from list price which, in addition to a special discount for private label, probably took into account allowances for a Kroger television program in Charleston that Fairmont was paying for. From this they reasonably guessed that Fairmont was already in the 20 percent area. They also knew that Fairmont, at Mr. Casserly's urging, and perhaps some of the other bidders, would be coming in with prices derived from a formula based on the cost of raw milk. Since they knew that Mr. Casserly was particularly interested in this type of pricing, they could appropriately assume that these offers would be more attractive to him. Finally they knew that Fairmont had sold cottage cheese to West Virginia institutions at 16 cents per pound and had determined that the lowest Beatrice could go on that item was 17.5 cents per pound based on a special arrangement to procure skim milk for processing in Pennsylvania.

With this information the Beatrice representative came to the March 14, 1962, meeting with an offer based on a price of 68 cents per gallon. This was exactly 20 percent off the average list price of 85 cents per gallon which they had previously computed and which they then had reason to believe was going down. They came to the meeting hoping that the 68 cent price would be good enough, but were prepared to bargain further. Under these circumstances we cannot say that the Beatrice representatives knew or had any reason to know that their final offer based on 66 cents was in fact significantly below the competition. Indeed they were not told at the March 14, 1962, meeting that this was the case, or that they had won, but were told merely that they were "competitive."

We have previously indicated that an objective view of the evidence of record seems to establish that the Beatrice bid was lower than any other offer to Kroger on an overall price basis. The matter is not entirely free from doubt because of the inherent incomparability of the bids and inadequacies of the record. Nevertheless, we think that this case must be decided on the premise that Beatrice did, at least technically, "beat" the competition. We hold, however, that a reasonable interpretation of Section 2(b) of the Robinson-Patman Act does not require denying the good faith defense to Beatrice on this ground under the circumstances of this case.

Precisely meeting the exact prices of competitive bids can have no realistic meaning in the context of this case. Here there was no question of meeting competitive offers to maintain or obtain a share of the market. This was a winner-take-all bidding situation. Kroger asked for bids to supply the entire requirements of its Charleston Division. As far as Beatrice was concerned the winner of the auction would be the sole supplier of Kroger's private label; the losers would be out of the Kroger stores, or at least out of Kroger's private label business entirely. The obvious objective of the Beatrice representatives was to make an offer, which would be sufficiently more acceptable than any other offer to tip the scales in their favor. Furthermore, exact comparability of price would have been impossible to achieve given the circumstances of the bidding procedure used here and prices which were subject to variation over time beyond the control of the parties and which were not predictable.

To require that Beatrice adhere to a precise "Meet but not beat" criterion under these circumstances, where the Beatrice representatives otherwise exhibited every element of good faith, is not reasonable. To hold otherwise would be effectively to outlaw such bidding situations by insisting upon an artifical and rigid test. We think that protection of competition under the Robinson-Patman Act can be accomplished in such cases by focusing on other questions (such as the responsibility of the buyer not to exceed the permissible bounds of bargaining) and that the language of the Act is not so inflexible as to require a finding against Beatrice on this ground.[25]

IV

Having concluded Beatrice acted in good faith, it is unnecessary to consider Beatrice's cost justification defense in connection with the charges against Beatrice. The question of cost justification, and to some extent the validity of the Beatrice cost study, must, however, be considered in connection with the charges against Kroger.

Any cost justification defense in this case suffers from a fundamental conceptual defect which no amount of statistical analysis can change. Given the nature of the market, the existing price structure in it and the structure of the pricing arrangements betwen Beatrice and Kroger, it is quite likely that circumstances would arise in which a cost justification defense would fail. This is exactly what happened when it turned out that raw milk costs

[25] Both the courts and the Commission have recognized that there is a need for flexibility in applying Section 2(b) of the Act in various situations. As the Commission stated in *Continental Baking Co.*, 63 F.T.C. 2071 at 2163 (1963):

"This is a flexible and pragmatic, not technical or doctrinaire concept. The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity. * * *

"Rigid rules and inflexible absolutes are especially inappropriate in dealing with the 2(b) defense; the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application."

The Fifth Circuit Court of Appeals emphasized such realistic criteria when it reversed the Commission's decision in *Calloway Mills* and held that a quantity discount system employed in the sale of carpeting which did not precisely meet competitive systems was nevertheless permissible because of qualitative differences in the way carpeting was sold by industry members. *Calloway Mills Co.* v. *F.T.C.*, 362 F. 2d 435 (5th Cir. 1966).

were relatively low in the early period of the private label arrangements.

Kroger and Beatrice chose to use a pricing system in which prices were ultimately determined by the cost of raw milk plus a fixed differential to cover distribution expense and profit. Competitors of Kroger, on the other hand, continued to purchase under the normal list-price-less-discount structure which bore no necessary relationship to the cost-plus formula but which was governed by local competitive conditions. Also, instead of being related to increments representing actual costs of distribution by Beatrice to the various Kroger stores, prices under the private label arrangement between them were ultimately based on *average* distribution cost which bore no necessary relationship to the actual costs to Beatrice of distribution in the specific submarkets. This meant that the Beatrice prices to Kroger were uniform throughout the Charleston Division, despite the fact that Beatrice's actual cost of supplying the various Kroger stores could not have been uniform.

Furthermore, because the Beatrice plant was located in Beckley in the high priced milk area, Beatrice necessarily incurred greater costs in distributing its milk products to Kroger's competitors in the lower priced Charleston area. An example will illustrate. In October 1962 Beatrice was selling milk to the A & P in Beckley, where the Beatrice plant was located, at $.931 per gallon; it was selling milk processed at the same plant to A & P for $.801 per gallon in Charleston, 50 miles away. At the same time it was selling milk to Kroger in both locations at $.6956. The price differences which Beatrice was called upon the justify, therefore, on the basis of supposed cost savings in selling to Kroger were over 23 cents in its home town, Beckley, and less than 11 cents in Charleston, 50 miles away. Unless Beatrice's cost study showed that the Charleston price difference was *overjustified* by *more than twice* that difference, could not hope to justify the Beckley difference.

The problem faced by Beatrice in attempting cost justification was compounded by these anomalies in the pricing structure. Normally a cost justification is attempted only to justify an *additional* discount from a standard price structure. This was successfully undertaken in part by the respondent in the *National Dairy* case on which Beatrice purports to rely (*National Dairy Products Corp.*, Dkt. 7018 (July 28, 1966) [70 F.T.C. 79]). In such a case the different prices charged various customers bear a necessary relationship to each other governed by the amount of the additional discount. Conceptually that discount may be equated with a specific measurable cost saving, such as lower distribution costs on delivery to large customers, as in the *National Dairy* case. Here, however, it is conceptually difficult to see how the differentials with respect to prices that bear no necessary or constant relationship to each other can ever be made the subject of a simular equation, no matter how accurately the cost savings as to particular sales may be determined. If raw milk costs were relatively low and list prices less discount relatively high (as they were at various times) there would be large price differentials between prices paid by competing customers which would be unrelated to costs. Furthermore, because of the inverse relationship between prices charged by Beatrice on its discount sales and its costs of distribution, those differentials would not reflect relative cost savings when examined on a customer by customer basis.

The cost study is based on computation of an "earned discount" for each Kroger store served by Beatrice's Beckley plant. The earned discount was determined by subtracting from a computed "regular" price, which Kroger supposedly would have paid in the absence of any discount, Beatrice's "dock costs" and the incremental costs of distribution to Kroger stores based primarily on "stop time," which was determined by studies of the length of time that the Beatrice route men required to service the Kroger stores. Beatrice then compared the "earned discount" with the percent off list price of prices actually paid by the Kroger stores. This supposedly established that the discounts earned by cost savings were greater than the discounts actually received by Kroger. This, of course, does not establish a cost justification defense, since the question is not whether savings in distribution costs to Kroger were greater than the discounts actually received by Kroger. The differentials between the prices paid by Kroger and prices paid by its competitors must be equated with that cost saving. To do this Beatrice also computed "earned discounts" for other customers. In doing so Beatrice established three classes of customers and averaged the discounts earned within each class. The purpose of this was to show that when these average discounts were compared to the discounts earned by Kroger it appeared that the Kroger earned discounts were greater.

The hearing examiner found that the cost study should not be accepted as a cost defense because of various inaccuracies and unsupported estimates in the figures and assumptions used in the study. We basically agree with the hearing examiner and set out here a brief summary of some of the difficulties which we perceive in the cost study as presented by Beatrice.

Of overall significance is the lack of proof that the data underlying the cost study exhibits is either reliable or representative of the period of the discrimination. For example, distribution expenses for delivery to customers served by the Beckley plant for the base period March through May 1962 (before the private label program began) were used to determine Beatrice's costs of serving all customers served by both the Beckley and Clarksburg plants for the entire discrimination period June 1962–October 1963 (Tr. 1852; RBX 106A). Beatrice furnished no indication as to how or why Beckley costs should be representative of both plants, and why the three months March–May 1962 should yield representative distribution expenses for the seventeen subsequent months.

Further, the reliability of Beatrice's estimates for the number of minutes stopped per day at each store is doubtful. Such "stop time" is the most crucial variable in determining the validity of the attempted cost justification, since it is savings in time stopped at Kroger stores resulting from the limited service arrangements which Beatrice claims justified the extra discounts to Kroger. In some of the cost exhibits (RBX 157, 158A–B), the number of minutes stopped at each store during October 1962 were estimated two years after the stops were made, *i.e.,* in September or October of 1964 (Tr. 2113, 2118–19). In several other exhibits using stop time estimated for January 1965 (RBX 108A & B, 109A & B, 110A & B, 111A, 155 A–C, 156), the estimates were made only a few months after the period in question (RBX 4, 30–103), but these estimates were made for a month long after the discrimination period, with nothing to show that conditions affecting stop time had remained the same. Indeed, there were strong indications that such conditions had changed, since sales per store for a large sample of Kroger stores had increased substantially (CX 384). Moreover, the two resulting estimates of stop time for January 1965 and October 1962 at a given store varied so widely (CX 384) that one must either believe that conditions affecting stop time were completely different during the two periods or that one or both of the estimating methods yielded unreliable results. In this regard, the Beatrice accountant who prepared the cost study did not consider the estimates for October 1962 very reliable (Tr. 2111–12), since they depended on the dim memories of route men as to what they had done two years previously (Tr. 2117–19), and who were likely to overstate time in the interest of convincing their bosses they were putting in a full day's work (Tr. 1811–12). As to the January 1965 estimates, complaint counsel's accountant cited obvious exaggerations of service times (Tr. 2116), for example, 30 and 35 minutes for average daily sales of only $6.36 and $7.24 (CX 397F).

In the case of yet another stop-time estimate, a one-day time and motion study, Beatrice's accountant admitted that conditions had changed substantially on the routes between the period of the claimed discriminations and the time when the one-day study was done in October 1966 (Tr. 1976). The accountant also stated, and was corroborated by a Beatrice driver, that if, as was done in this study, one timed a particular driver, the driver would tend to be more efficient than usual and the time he reported for a given delivery would be shorter than his customary time (Tr. 1811, 1486–87).

In comparing discounts earned by various classes of customers Beatrice also arbitrarily excluded from "Class III" customers a number of customers whose purchases of milk and other dairy products exceeded a $54 per day upper limit. This introduced an unwarranted bias in Beatrice's favor. Complaint counsel presented data to show that, using a set of consistent assumptions for all stores, Beatrice's cost of distribution to customers other than Kroger taking over $54 per day was significantly less as a percent of sales than cost of distribution to customers grouped in Class III who took smaller amounts (CX 391). Another exhibit shows, again on consistent assumptions for each store, that the percentage difference in *earned* discount between Kroger and other customers taking more than $54 per day was significantly less than between Kroger and Class III customers taking under $54 per day (CX 388). Since Beatrice was interested in maximizing the difference between Kroger's earned discount and the earned discount of the non-favored customers so as to show that Kroger earned a substantially larger discount, failure to include in the comparison large non-favored customers constitutes a grave deficiency in the cost analysis.

Another deficiency in many of the cost study exhibits is the inflation in Kroger's favor of differences between Kroger's and non-favored customers' earned discounts resulting from the arbitrary assumption that platform costs for products delivered to Kroger constituted a lower percentage of regular price than did platform costs for products delivered to Kroger's competitors. For the non-favored competitors Beatrice used platform costs equal to 74 or 75 percent of regular price; platform costs used for Kroger, however, were 70 or 71 percent except in one exhibit (RBX 108A & B, 109A & B, 111, 113A–D, 116A–D, 117). This inflated Kroger's earned discount relative to the earned discounts of competitors by 3 to 5 percent. There is no support in the record for this different treatment of platform cost percentages.

Yet another deficiency in many of the cost study exhibits is the artificial and arbitrary inflation by Beatrice of the so-called "regular" price which Kroger would have paid in the absence of discounts as compared with regular prices which would have been paid by Kroger's competitors. This resulted in overstatement of Kroger's earned discounts relative to competitors' earned discounts. In many exhibits Beatrice derived the regular price which Kroger would have paid by assuming that Kroger's actual prices constituted a 20 to 26 percent discount from the regular price (RBX 108A & B, 110A & B, 111A, 155A–C). Kroger's actual discounts were substantially smaller. For competing customers, however, this distortion was not introduced because Beatrice based its computation for them on list price and actual discounts (RBX 113, 115, 116, 117, 159).

In all, nonuniformity and lack of realism or reliability or assumptions about platform costs, regular prices, and most especially, methods of estimating stop time; the failure to establish that the various cost exhibits were reasonably representative of the period of the discrimination; and the failure to take account of large as well as small non-favored customers leads us to find that the Beatrice cost study is totally unreliable.

V

The complaint charged Kroger with knowingly inducing and receiving discriminatory prices for fluid milk and other dairy products in violation of Section 2(f) of the Robinson-Patman Act. The hearing examiner found that the charges should be dismissed on the ground that the charges against Beatrice were not proven and on the further ground that there was no evidence that Kroger knew or had any reason to know that the prices offered to it by Beatrice were not offered in good faith to meet an equally low price of a competitor.

Given the prior disposition of the charges against Beatrice, the issue is raised as to whether Kroger must automatically be found innocent. We hold that such a result does not follow as a matter of law and that, because of the factual situation surrounding the negotiations for private label dairy products, Kroger must be held to have violated Section 2(f) of the Robinson-Patman Act by knowingly inducing and receiving discriminatory prices.

The facts previously set out demonstrate all of the elements necessary to establish unlawful discriminatory prices. They also establish that the discriminatory prices were arrived at as the result of hard bargaining on both sides. We have held that Beatrice did not exceed the bounds of good faith and therefore is to be excused from liability. This does not mean, however, that everyone is to be excused. The discrimination remains and the requisite showing of potential injury to competition has been made. The question is whether Kroger stepped over the bounds of proper negotiation. The facts relating to Mr. Casserly's conduct of the negotiations must provide the answer.

Kroger asserts that the facts show no more than that it engaged in hard bargaining. Were there no more at stake here than the business relationship between Beatrice and Kroger we would agree. But the Robinson-Patman Act is not designed for the protection of either side in a bargaining session; it is designed for the protection and preservation of competition with the bargainers. Thus, in a Section 2(f) case there is no necessity of establishing coercion of the seller. It is enough to satisfy the element of "inducement" that the buyer used its buying power in such a way as to raise the likelihood of injury to its competitors by seeking and obtaining advantages not accorded them. See the Court of Appeals decision in *Fred Meyer Inc.* v. *F.T.C.*, 359 F. 2d 351 (9th Cir. 1966).

We think the summary of the negotiations and Mr. Casserly's conduct of them set out above in this opinion amply demonstrate that Kroger bargained too hard—not because it was able to wring an oppressive contract out of a weak seller, but because it did not have a sufficient regard for its Robinson-Patman obligations. If a buyer chooses to use its bargaining power to get favored treatment from its suppliers, it is permitted to do so under the law. Normally the seller must bear the responsibility for seeing that Robinson-Patman requirements are complied with. At some point, however, if the buyer continues to push, he must become liable if Robinson-Patman bounds are exceeded. And this is so even though the seller had lived up to his Robinson-Patman obligations by maintaining the good faith required for a Section 2(b) defense.

Here, Kroger was in a very powerful bargaining position because of its size and importance to the dairies in the Charleston Division. This being so, Mr. Casserly went beyond the bounds of permissible bargaining when he falsely gave the impression that the original Broughton offer amounted to a 20 percent discount; when he told the Beatrice representatives that their 71 cent offer was too high on that specific ground; when he first rejected their 68 cent offer and then indicated that their 66 cent offer was "competitive" without having made any comparison of the bids; and when he *failed* to convey any *correct* information about the price levels being quoted by others. It is by reason of this conduct that Kroger took on the risk of liability under the Robinson-Patman Act.

Kroger relies on the Supreme Court's basic Section 2(f) decision in *Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61 (1953) first, for proposition that it is entitled to the benefit of any defenses, including good faith, which are available to Beatrice, and second, for the proposition that it could not reasonably have known that Beatrice's discriminations to it were *not* cost justified.

In *Automatic Canteen* the Court stated:

> We therefore conclude that a buyer is not liable under § 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses (346 U.S. at 74).

Kroger asserts that this means it cannot be liable if Beatrice is found to have acted in good faith. We disagree. There may be instances in which a buyer is insulated from liability by the seller's good faith but *Automatic Canteen* does not hold that the buyer is always entitled to avail himself of such a defense, nor does it compel such a result in the present situation. Undoubtedly a buyer can accept an offer made to meet competition which in fact does beat a competing offer if the buyer has done nothing to initiate the price break in the first place, but to hold that a buyer can escape liability merely by inducing and accepting a second discriminatory offer which meets an offer *previously induced by the buyer* would make a mockery of Section 2(f). We find no authority to the contrary and note that in a similar situation involving inducing of non-proportionalized allowances we so held. See *Max Factor & Company*, Docket No. 7717 (July 22, 1964) [66 F.T.C. 184].

Since we have held that the Beatrice cost defense is in fact invalid the only remaining question under *Automatic Canteen* is whether Kroger could reasonably believe that the discriminations in its favor were cost justified. The burden of establishing Kroger's liability on this point is upon complaint counsel. We generally articulated that burden for a situation where a favored buyer purchases in quantities or under methods differing from those of unfavored buyers in *Suburban Propane Gas Corp.*, Docket No. 8672 (May 25, 1967) [71 F.T.C. 1695, n. 2 at 1699], where we said:

> * * * if complaint counsel show such facts and circumstances as would have given the buyer reason to believe, based on the knowledge available to him, including knowledge of the methods of doing business in the particular industry, that the different methods or quantities could not have resulted in cost savings sufficient to justify the differential allegedly accorded him, they would have met their initial burden.

We think that the criterion is appropriate here and that complaint counsel has discharged his burden.

Mr. Casserly, Kroger's negotiator, certainly had a thorough knowledge of the dairy industry and the methods of doing business in it. He was in fact specially designated by the company to negotiate a private label arrangement for the Charleston Division. He acquired specific knowledge of conditions in the Charleston Division by taking a trip through the various areas before the negotiations really got under way and making other trips in the areas during the course of the negotiations including a trip to inspect the Beatrice plant in Beckley. He therefore knew and saw for himself the distribution set-up employed by Beatrice. He also was very familiar with the existing price structure in the various areas and was specifically familiar with, and remarked upon, both in writing and orally, the changing price conditions in the Charleston area.

Mr. Casserly also knew that each bidding dairy was attempting to come up with lower than normal prices in order to win the Kroger patronage. He stated that he did not know the costs of any of the dairies but he told them all that he expected prices below a 20 percent discount off list because of the large number of stores to be served [26] and he specifically told Broughton that its bid was too high and that he thought cost savings would justify further reductions. He saw that each bid entered, except the Beatrice bid, contained different prices for different areas. He also must have

[26] If Mr. Casserly thought that this fact alone would effectively cost justify lower prices, he was, of course, in error as a matter of law. Cost justification based on an aggregate or average saving of serving a number of stores in a chain is not acceptable where it does not take account of varying cost in serving individual stores. *National Dairy Products Corp.*, Docket No. 7018 (July 28, 1966) [70 F.T.C. 79]. Discounts to multi-unit purchasers must be justified on a store-by-store basis.

been aware that the reason that the bids showed different prices was because of varying costs due to the proximity or remoteness from processing and distribution points, which varied among the dairies.

Mr. Casserly was also specifically aware that cost justification might be essential in order that lower prices to Kroger might be legal. Both Valley Bell and Fairmont expressed concern to Mr. Casserly about this, and Fairmont even submitted to Mr. Casserly memoranda of law from its counsel on the subject.

It is apparent, however, that Mr. Casserly did not receive any information from Beatrice or any other bidder that specific differentials between prices offered to Kroger and prices being paid by Kroger's competitors were cost justified. Indeed his testimony indicates that Mr. Casserly only had in mind one half of the cost justification equation and never focused on the need for justifying such differentials, as opposed to mere cost savings resulting from a curtailed form of service to the Kroger stores. Had he done so he should have recognized (what the Beatrice cost study only tends to obscure) that by buying milk from Beatrice at a uniform price based on a cost formula, while competitors continued to purchase on an unrelated list-price-less-discount, it was very unlikely that any cost justification would be successful. Particularly is this so since Mr. Casserly should have known that Beatrice's discount sales had to be unrelated to actual costs because Beatrice sold at higher prices where its distribution costs were lower, due to the location of Beatrice's primary processing plant in the high priced Beckley area.

Accordingly we conclude that Kroger should have known that the Beatrice price discriminations were not cost justified and that Kroger has violated Section 2(f) of the Robinson-Patman Act.

VI

The remaining matter to be dealt with concerns alleged price discriminations to A & P.

In October 1962 Beatrice began to sell its own label products to A & P in the Clarksburg area at special prices. Then, in late 1962, Mr. Stollings negotiated a separate agreement for special prices to A & P stores served by the Beckley plant in the southwestern portion of West Virginia. The latter agreement went into effect in January 1963. The parties apparently are agreed that there were two separate transactions with A & P, although the hearing examiner discusses only the latter one.

The Clarksburg arrangement resulted in price differentials in favor of A & P of between approximately 10 and 16 percent on most items from October 1962 through October 1963. Although the Clarksburg arrangement with A & P involved a limited form of in-store service, no effort has been made by Beatrice to justify this discrimination in any respect. Instead Beatrice relies on the fact that all of the milk sold to A & P in Clarksburg during the period in question was produced within the State of West Virginia and never crossed State lines and argues, therefore, that the commerce requirement for Robinson-Patman illegality is not met. Complaint counsel's response is that the Clarksburg arrangement was negotiated across State lines with the A & P division located at Pittsburgh, Pennsylvania, and that sour cream and cottage cheese products sold to A & P came from outside of West Virginia. Interstate negotiation, however, alone is insufficient to fulfill the commerce requirement of the Robinson-Patman Act and the inconclusive evidence with respect to sour cream and cottage cheese shows that interstate movement of those products was *de minimis* at best, and in no event would support a broad order covering all dairy products. *Foremost Dairies, Inc.* v. *F.T.C.*, 348 F. 2d 674 (5th Cir. 1965), *cert. denied,* 382 U.S. 959 (1965); *Dean Milk Co.* v. *F.T.C.* 395 F. 2d 696 (7th Cir. 1968).

The Beckley arrangement with A & P was negotiated by Mr. Stollings in specific response to information that Borden was instituting a special limited service program with A & P in parts of Ohio and in the area served by Borden's Huntington, West Virginia plant. Borden was not at that time selling in all of the areas served by Beatrice's Beckley plant, but Mr. Stolings testified that he had been unable to find out exactly how far into West Virginia the Borden offer would reach. Mr. Stollings obtained a copy of a Borden price sheet and submitted an offer to A & P based on a 10 percent differential over the Kroger prices. These prices very closely approximated those offered by Borden to A & P. The proposal was accepted by Borden and went into effect in January 1963.

The record reveals the price advantage to A & P resulting from the Beckley arrangement was significant for only a very short period. At the outset the price advantage amounted to as much as 23 percent but in the middle of February 1963, as previously mentioned, Beatrice instituted a new program of "tailgate" service throughout the area covered by its Beckley plant which resulted in sharply reduced prices for all purchasers under the normal discount system. Under the tail-gate service all customers became entitled to the lower prices in exchange for a limited form of in-store service similar to that being given to A & P. The discount structure, as so modified, meant that the prices paid by A & P's competitors in the territory were very close to those being paid by A & P. Mr. Stollings testified that within a week or so Beatrice was forced to reinstitute full in-store service but at the same low tailgate prices. This left A & P's competitors paying only slightly higher prices than A & P but having full in-store service while A & P continued to receive only the equivalent of tailgate service.

Since the record does not establish that the differential resulting from the special price to A & P, as compared with prices to its competitors in the Beckley area, was of sufficient significance subsequent to the middle of February 1963 to warrant a finding of secondary line injury, we dismiss the charge of unlawful discrimination based on sales to A & P. The fact that there was a substantial differential for a period of a little more than a month is *de minimis* under the circumstances of this case, particularly in view of the rapidly changing market conditions which are established of record. See *American Oil Co.* v. *FTC,* 325 F. 2d 101, *supra.*

It also appears that Beatrice has sustained a good faith meeting of competition defense with respect to special prices to A & P in the Beckley area. There is no doubt that Mr. Stollings tried to meet on an overall basis the offer which he found Borden was making in Ohio and apparently threatening to make in parts of West Virginia. The fact that Mr. Stollings may have included A & P stores which were not within the contemplation of Borden as far as the record shows does not warrant denying the defense.

VII

We hold that the record establishes the existence of substantial discriminations between prices charged by Beatrice to Kroger and to Kroger's competitors in the Charleston Division from which substantial injury to secondary line competition must be inferred. We find, however, that the record sustains Beatrice's good faith meeting of competitor defense and accordingly dismiss the charges against Beatrice.

We hold that Kroger knowingly induced and received discriminatory prices for fluid milk and other daily products; that Kroger is not entitled to any benefit of Beatrice's good faith defense; that the discriminations were not cost justified and that Kroger did not reasonably believe them to be so justified; and that, accordingly, Kroger violated Section 2(f) of the Robinson-Patman Act.

Finally, we hold that the record established no unlawful price discriminations by Beatrice in favor of A. & P.

Commissioners Dixon and MacIntyre each dissented in part and concurred in part and filed separate opinions stating their views.

Commissioner Elman filed a dissenting opinion setting forth his reasons why the complaint should be dismissed against both respondents Beatrice and Kroger.

Commissioner Nicholson dissented for the reason that the record does not establish a violation of Section 2(f) of the Clayton Act by respondent Kroger. As to respondent Beatrice, Commissioner Nicholson concurred in the opinion and order dismissing the complaint.

Concurring in Part and Dissenting in Part

DECEMBER 1, 1969

By Dixon, *Commissioner:*

I concur in that part of the opinion which holds that Kroger violated Section 2(f). I dissent from the holding that Beatrice's lower price to Kroger was made in good faith to meet an equally low price of a competitor.

The opinion, as I read it, stands for the proposition that a large buyer can use his purchasing power to induce a supplier to discriminate in price regardless of the anticompetitive consequences of such discriminaton, and that the supplier can with impunity succumb to such inducement under the protection of the Section 2(b) proviso without regard to whether the lower price he is meeting may be unlawful.

The legislative history of the Robinson-Patman Act reveals quite clearly the congressional intent to prohibit large buyers from securing an advantage over their smaller competitors solely because of their quantity purchasing power. In passing the Act, Congress intended to assure "that businessmen at the same functional level would start on equal competitive footing so far as price is concerned." [1] But according to the opinion in this case, there is no violation of law when a powerful buyer is "able to wring an oppressive contract out of a weak seller" and that "If a buyer chooses to use his bargaining power to get favored treatment from its suppliers, it is permitted to do so under the law."

The history of the Act further discloses that Congress was fully aware that "in nearly every case mass buyers receive similar discriminations from competing sellers of the same product." [2] It is equally clear that Congress did not intend that Section 2(b) should be used to permit a large buyer to negotiate lower prices by having suppliers bid against one another for his business without regard to the legality of such discriminatory offers. In referring to the legislative debates concerning this practice, one commentator has written:

> * * * where a seller's price reduction produced competitive repercussions on the customer level, as in the typical price discrimination in favor of the individual "big buyer," the legality of the competitor's price was a focal concern. Here to permit an illegal price cut by one supplier to a particular chain store to be justified under the statute by reference to an illegal price discrimination procured by such a buyer from another supplier could have legalized the very discriminatory pricing in favor of big buyers which the Robinson-Patman Act was designed to check. As Representative Utterback put it, such a device to exonerate illegal discriminations to big buyers by one supplier because of comparable illegal prices by others could "nullify the act entirely at the very inception of its enforcement." [3]

While I do not suggest that a seller invoking the Section 2(b) defense must prove the legality of competitive prices,[4] it should be incumbent upon him, as part of the good faith requirement, to show the existence of circumstances which would lead a reasonable person to believe that the price he was meeting was lawful. When claiming the protection of the Section 2(b) proviso, "The good faith of the discrimination must be shown in the face of the fact that the seller is aware that his discrimination is unlawful, unless good faith is shown, and in circumstances that are peculiarly favorable to price discrimination abuses." [5] And a necessary element of good faith is the showing that despite the seller's

[1] *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 520 (1963).

[2] 80 Cong. Rec. 9418 (1936).

[3] Rowe, *Price Discrimination Under the Robinson-Patman Act*, p. 215.

[4] *Standard Oil Company* v. *Brown*, 238 F. 2d 54 (5th Cir., 1956).

[5] *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759 (1945).

awareness of the probable illegality of his own price, he reasonably believed that the price he was meeting was lawful.[6]

The record in this case reveals also that, in its dealings with Kroger, Beatrice knew that it was engaged in a bidding contest and that Kroger would buy from the *lowest* bidder. Beatrice was therefore fully aware that it was not meeting an equally low price of a competitor. It was *beating* all competitive offers. The opinion states that "the language of the Act is not so inflexible as to require a finding against Beatrice on this basis." I do not agree. While inadvertent underpricing of a rival by a seller who is attempting in good faith to meet a lower price may not necessarily invalidate the defense, neither the language of the Section 2(b) proviso nor any authority supports the majority's position that a seller can justify under that proviso the calculated and deliberate undercutting of a competitor's price.

Beatrice has totally failed to make the required showing under Section 2(b) and its defense should have been rejected.

DISSENTING IN PART AND CONCURRING IN PART

DECEMBER 1, 1969

BY MACINTYRE, *Commissioner*:

I do not concur in the majority's holding that the record establishes on the part of Beatrice the elements of the meeting of competition defense spelled out by judicial precedent. The complaint as to this respondent should not have been dismissed. In my view, the majority opinion errs by failing to adhere to the rule that the burden of establishing the defense rests on the party asserting it. Here Beatrice has failed to carry its burden since the record, in my view, at least, does not demonstrate that respondent displayed the diligence of inquiry into alleged competitors' offers required by the precedents, *e.g.*, see *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945).

The majority erred in dismissing the complaint against respondent Beatrice. I agree that respondent Kroger violated Section 2(f) of the Clayton Act, as amended. I join, therefore, in

[6] "So the net of the law today appears to be this: If a seller's prices merely emulate an actually or inherently illegal pricing system * * * the Section 2(b) proviso can furnish no legal succor. If, on the other hand, the lower price is made in a genuine competitive situation, such as prevailed in the Standard Oil controversy, a Section 2(b) defense is not barred *so long as the seller could have reasonably believed that the price he was meeting was legal.*" (Emphasis added.) Rowe, *Price Discrimination Under the Robinson-Patman Act*, p. 226.

the findings of fact and the reasons stated in support thereof on which the order to cease and desist against respondent Kroger is based.

DISSENTING OPINION
DECEMBER 1, 1969

BY ELMAN, *Commissioner*:

The Commission holds—and I agree—that Beatrice's prices to Kroger did not violate Section 2(a). The examiner's findings in respondents' favor on all the crucial fact issues—discrimination, competitive injury, and meeting competition—are amply supported by the evidence in the record. Moreover, the Commission does not find, because the record would not justify such a finding, that (1) the price offers made to Kroger by Beatrice's competitors were unlawful under Section 2(a), and (2) either Beatrice or Kroger had any reason to believe that the price offers made by the other sellers were unlawful. We are confronted, then, with a commission decision holding Kroger guilty under Section 2(f) of "knowingly" inducing or receiving "a discrimination in price which is prohibited by this section," on a record which fails to show any price discrimination illegal under Section 2.

The majority opinion skirts this difficulty by holding that Kroger violated Section 2(f) because of the manner in which its representative, Mr. Casserly, conducted the negotiations with Beatrice. The Commission finds that Kroger "bargained too hard" because "it did not have a sufficient regard for its Robinson-Patman obligations." "Here, Kroger was in a very powerful bargaining position because of its size and importance to the dairies in the Charleston Division. This being so, Mr. Casserly went beyond the bounds of permissible bargaining when he falsely gave the impression that the original Broughton offer amounted to a 20 percent discount; when he told the Beatrice representatives that their 71 cent offer was too high on that specific ground; when he first rejected their 68 cent offer and then indicated that their 66 cent offer was 'competitive' without having made any comparison of the bids; and when he *failed* to convey any *correct* information about the price levels being quoted by others. It is by reason of this conduct that Kroger took on the risk of liability under the Robinson-Patman Act." (Pp. 818–19.)

It puts too heavy a burden on the Robinson-Patman Act to convert it into a "truth-in bargaining" statute. That Act is aimed at illegal and anticompetitive price discriminations, and nothing else. No one has heretofore conceived of the Robinson-Patman Act as imposing a duty of affirmative disclosure on buyers engaged in price negotiations with sellers, requiring them to convey "correct information" on the prices quoted by other competing sellers. Even when Congress passed the Truth-in-Negotiations Act dealing with defense contracts (P. L. 87–653, 76 Stat. 528, 529, 10 U.S.C. 2306(f)), it did not go so far. Perhaps it would be in the public interest—although I doubt it—that Congress should enact a new law imposing on buyers in all private business transactions an affirmative duty of making full and accurate disclosure to each seller of information bearing on other sellers' price offers. But there is no such law now, and this Commission is not authorized to write one.

In any event, the Robinson-Patman Act, as it was written by Congress, is not violated by a buyer who bargains "too hard" unless there is proof of a knowing inducement or receipt of a price discrimination prohibited by Section 2. In the absence of such proof, we are not authorized to subject a respondent to a boilerplate 2(f) order merely because we think it has bargained "too hard." An order prohibiting the knowing inducement or receipt of illegal price discriminations has nothing to do with a "violation," which consists only of bargaining "too hard."

As submitted to us on the record and arguments, this was a conventional 2(f) case, proceeding on the familiar *Automatic Canteen* theory, *i.e.*, that Beatrice's prices to Kroger were illegal, and that Kroger knowingly induced and received such illegal prices. That theory of violation having been rejected by the Commission because it is unsupported by the record, dismissal of the complaint is required. The novel and extraordinary legal theory on which the Commission now imposes 2(f) liability on Kroger was neither alleged in the complaint, issued July 30, 1965, nor urged by Commission counsel at any stage of these proceedings. This new theory apparently entered the case some time after the oral argument on appeal before the Commission on March 26, 1968. *Cf., Rodale Press, Inc.* v. *Federal Trade Commission,* 407 F. 2d 1252 (D.C. Cir. 1968).

FINAL ORDER

This matter having been heard by the Commission upon the appeal of complaint counsel from the hearing examiner's initial decision and upon briefs in support of and in opposition to said appeal; and

The Commission having determined for the reasons stated in the accompanying opinion that the appeal of counsel supporting the complaint should be granted in part and denied in part,

It is ordered, That respondent The Kroger Co., Inc., a corporation, and its officers, representatives, agents and employees in connection with offering to purchase or purchase in commerce, as "commerce" is defined in the amended Clayton Act, of fluid milk and other dairy products, for resale in outlets operated by respondent, do forthwith cease and desist from:

Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price respondent knows or should know is below the net price at which said products of like grade and quality are being sold by such seller to other customers where respondent is competing with the purchaser paying the higher price or with a customer of the purchaser paying the higher price.

It is further ordered, That the complaint herein against respondent Beatrice Foods Co., be, and it hereby is, dismissed for the reasons stated in the accompanying opinion.

Commissioners, Dixon, Elman, and MacIntyre dissented in part and concurred in part; and Commissioner Nicholson dissented from the order against respondent Kroger and concurred in the dismissal of the complaint as to respondent Beatrice.