IN THE MATTER OF

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

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

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

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

Appearances

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

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

COMPLAINT

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

COUNT I

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COUNT II

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

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

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

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

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

COUNT III

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

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

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

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

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

Initial Decision by Harry R. Hinkes, Administrative Law Judge September 24, 1975

Preliminary Statement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Findings of Fact

A. A&P's Identity and Business Nature

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

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

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

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

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

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

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

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

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

B. BORDEN'S IDENTITY AND BUSINESS NATURE

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

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

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

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

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

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

C. COMMERCE

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

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

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

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

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

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

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

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

D. THE NEGOTIATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. GRADE AND QUALITY

60. Respondent A&P admits:

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

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

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

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

F. CONTEMPORANEOUS SALE

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

G. THE DISCRIMINATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. THE CHICAGO AND SUBURBS AREA

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

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

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

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

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

216-969 O-LT - 77 - 63

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

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

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

H. INJURY TO COMPETITION

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

86. As A&P admits, "fluid milk is one of the most important commodities carried in retail grocery stores* * * [I]t is a perishable, high-volume, fast turnover item sold by most food retailers. Milk is also a staple and is purchased [by consumers] more frequently than other products [sold in grocery stores]" (A&P Adm. filed March 1, 1973, Par. III-19, 24). This is confirmed by the testimony of non-favored Borden customers (Minard, Tr. 3149; Kristoff, Tr. 2274; Gintert, Tr. 2456; Barnes, Tr. 3861; Barney, Tr. 3686; Lasorso, Tr. 2650; Cox, Tr. 2951-2952). Consumers are familiar with the retail price of fluid milk products and consequently competing retail grocers price milk competitively (A&P Adm. filed March 1, 1973, Par. III-21; Minard, Tr. 3149; Kristoff, Tr. 2277; Gintert, Tr. 2447-2448; Barnes, Tr. 3861-3862; Barney, Tr. 3690; Lasorso, Tr. 2650; Cox, Tr. 3947-3951). Milk products are sometimes used as **[26]** price leaders which are priced below the normal market price to draw customers to a store where it is hoped the customer will purchase additional products (Minard, Tr. 3153-3154; Kristoff, Tr. 2277-2278; Gintert, Tr. 2458; Barnes, Tr. 3862; Barney, Tr. 3691-3692; Lasorso, Tr. 2652-2653). Selling milk at higher prices than those charged by one's competitors would cause customers to shop at other stores and would hurt business (see foregoing citations).

87. A&P admits that profit margins have been notoriously low in the retail grocery business (A&P Adm. filed March 1, 1973, Par. III-23). This is confirmed by sales and profits summaries of the unfavored competitors of A&P (CX 184, 189, 192, 199A, J-Z, 201, 203). All of the unfavored competitors had pretax net profits of less than 5 percent of sales. Four of them had net profits of 2.3 percent or less and one had a net profit of less than 1 percent (see Appendix IV(*in camera*) submitted in complaint counsel's proposed findings).

88. In view of the consumers' consciousness of fluid milk prices, the importance of milk to the grocery store, and the low level of their profit on sales by grocery stores, the purchase price of fluid milk items has been important to the ability of food retailers to price these items at competitive levels. The unfavored competitors of A&P, had they received a larger discount from Borden on milk products, would have increased their net profits and permitted them to be more competitive. Some of them would have been able to lower the retail price of milk to the consumer, increase advertising or otherwise give better service (Minard, Tr. 3154; Kristoff, Tr. 2273, 2278; Gintert, Tr. 2455-2460; Barnes, Tr. 3860-3861; Barney, Tr. 3688; Lasorso, Tr. 2653-2657; Cox, Tr. 3950-3951). The price discriminations experienced by the unfavored competitors on their purchases of milk and milk products from Borden when compared with A&P's prices on private label was at least several times larger than those stores' level of net pretax profit. In many cases

the percentage of discrimination was as high or higher than the stores' level of gross profit on sales. Consequently A&P enjoyed a competitive advantage. Since it did not reduce the retail price of its private label milk, its lower costs were not passed on to the consumer but resulted in higher gross profits for itself (CX 255B; White, Tr. 2059). [27]

I. A&P'S INDUCEMENT OR RECEIPT OF BORDEN'S PRIVATE LABEL PRICING

89. There can be little doubt that A&P induced Borden into granting the private label prices. Its behavior as outlined in the section of this decision dealing with the negotiations clearly demonstrates that A&P maintained unwavering pressure upon Borden to arrive at the prices finally agreed upon. It solicited a private label arrangement, first only for its Chicago-Calumet area, then later for its outside areas, it hammered down Borden's successive bids and even when it was informed that the bid was at or close to Borden's costs put the matter up for outside bids. It then informed Borden that its bid was not even "in the ball park." Finally, Borden, desperate to retain A&P business for its new Woodstock plant, made a bid which A&P could not refuse and the deal was closed to begin in November 1965 and to last until February 1972.

J. A&P'S KNOWLEDGE THAT BORDEN'S BID WAS NOT COST JUSTIFIED

90. As detailed earlier in the section of this decision entitled Negotiations, A&P was made aware that Borden's price could not be cost justified. Borden repeatedly told A&P that its price was based solely on meeting competition and that it was intended to meet a competitive bid based on incremental costing. Moreover, Borden first offered A&P an $820,000 saving covering 13 private label items with an annual volume of $6.5 million. When A&P insisted that Borden drop its glass gallon feature, Borden revised its bid to cover 11 private label items with an annual volume of only $5.6 million (CX 56B-G, 62, 75F-J; Tarr, Tr. 884-885; Schmidt, Tr. 1777). A&P should have known that the same cost savings applicable to different products with different volumes would not likely be related to Borden's cost savings.

91. The study of Borden's Chicago-Calumet area costs in July 1965 was made by Borden's cost accountant, Malone, and was submitted then to A&P. This showed Borden's cost on gallons, half-gallons and quarts of milk to be higher than the final price per unit to A&P (CX 24D, 62C). Even when these costs were computed in February 1965, the

final prices offered A&P for the two highest volume items, half-gallons and gallons of milk, were lower than Borden's cost (CX 14D).

[28] 92. Borden also told A&P that its cost of serving A&P stores outside of A&P's Chicago-Calumet area were higher than its prices. Borden reported its costs for the major whole milk items as follows:

Half-gallon	$.3167
Gallon	$.6260
Quart	$.1584 (CX 21U)

Borden's final offer was substantially below these costs, particularly for half-gallons and gallons (CX 62D-G). A&P should have known that Borden's costs were higher than the final price quotation. In May 1965 Borden's Mr. Malone spoke with A&P's Mr. Schmidt about Borden's costs and showed Schmidt that Borden's gross profit per quart was less than one mill (CX 19E). At that time Borden's cost for paper half-gallons of milk was $.3162. Borden's final price, averaged, was $.2866 for half-gallons in the outside areas.

93. Mr. Bartels also knew of Borden's costs having been presented with Malone's calculations (Bartels, Tr. 1869; Minkler, Tr. 203; Malone DTR p. 114).

94. It is also of significance that when A&P asked Borden for a letter stating that its private label prices were granted to others on a proportional basis, a statement which would have been in conformity with A&P's policy of obtaining such a written statement from suppliers (Smith, Tr. 1428), Borden replied:

> * * *Our prices are proper under applicable law and we are prepared to defend these prices (CX 263H).

95. A&P's Chicago officials made no effort to determine if Borden's private label prices were to be made available to others (Schmidt, Tr. 1729; Bartels, Tr. 1877).

96. It does not appear that A&P's New York office made any such inquiry (Archer, Tr. 1251). A&P's headquarters buyer for milk and dairy products who reviewed the Borden offer for legality (Smith, Tr. 1347) testified that he understood that Borden's letter did *not* state that Borden's prices were available to others on proportionately equal terms and was *not* the letter of availability that A&P **[29]** had asked for (Smith, Tr. 1406). He further testified, however, that he telephoned Mr. Archer, and held a conference with him about the Borden letter but that Archer assured him that the letter was a letter of availability and even more (Smith, Tr. 1407). Whereupon, he sent the Borden offer,

their letter and a memorandum to A&P's legal department for review and that the legal department responded in writing (Smith, Tr. 1413, 1442). Archer, however, testified that he had no discussions with Smith regarding Borden's final Chicago quotation (Archer, Tr. 1246). Neither Smith's memo to the legal department nor the alleged legal departments' approval were offered in evidence. On balance, I do not credit Smith's version of the actions taken after the receipt of Borden's final offer.

97. A&P's trade experience also should have given it reason to believe that Borden's final price could not be cost justified. It was quite familiar with the dairy industry and methods of doing business in the industry at the time of the private label negotiations. Their officials had discussed private label milk for Chicago, the pricing of private label milk, Borden's pricing in the market, dairy pricing in the Chicago area as compared to pricing in other cities, private label pricing in other markets, competitive conditions, Borden's costs, etc. (Minkler, Tr. 201, 213, 227; Tarr, Tr. 857, 871, 897; Schmidt, Tr. 1684, 1687, 1692; Bartels, Tr. 1865; Smith, Tr. 1350; CX 7D-K, 12, 19, 22, 25B-E, 30, 31, 34, 43). Admittedly, one of its purposes in seeking private label milk for the Chicago area was to cut its cost of milk below the price it paid for Borden label products (Corbus, Tr. 7325; Smith, Tr. 1400). A&P also purchased fluid milk and dairy products in the Chicago area from other dairies in addition to Borden and must have been aware of the price level for these dairies (CX 256). It also knew that Borden's final private label price to A&P was substantially below Borden's advertised label prices to A&P since it was buying both from Borden.

98. Even A&P's costing guide lines indicated that Borden's private label prices had to be below Borden's cost. In 1964, A&P negotiated for the supply of private label milk by Glen & Mohawk Milk Associates for areas in upstate New York and Massachusetts. The president of that dairy told **[30]** A&P how a store customer could estimate a dairy's cost. He said that it could sell milk to A&P stores at a cost of approximately 6 cents per quart above the dairy's cost of raw milk. Two of such 6 cents went for cartons or fillers. Two more cents were attributable to plant costs and profit and the last two cents would cover delivery (Abrams, Tr. 6398-6399). Nevertheless, Glen & Mohawk's prices ranged from .28 cents to .65 cents per quart more than the prices Glen & Mohawk told A&P it might expect (RAPX 137A, 62, 63). Moreover, the 2 cents figure for plant costs would not necessarily apply in New York City because wage rates were higher there than those used in the formula (Abrams, Tr. 6402-6404, 6423). In addition, Glen & Mohawk's offer did not include milk delivery but was a dock pick-up price and did not guarantee delivery costs, the customer taking the risk of delivery

(Abrams, Tr. 6388). Glen & Mohawk's delivery cost estimate would not necessarily apply in areas with different union wage rates and was based on an average per store delivery of at least 40 to 50 cases (Abrams, Tr. 6399-6401, 6425-6426). Finally, delivery costs were for sidewalk drop delivery and not for putting milk into the store (Abrams, Tr. 6396). In sum, the "2-2-2 formula" was merely a reference point from which to work and had to be adjusted for different conditions in different areas. A&P was told that in-plant wage rates in Chicago were substantially higher than in New York (CX 25C, 26). The average A&P store was taking less than 600 points or 25 cases per delivery (RAPX 233, p. 8). Union work rules and Chicago Health Regulations forbade sidewalk drop delivery and Borden, not A&P, took the risks of delivery (CX 23D-E, 62). Nevertheless, the final Borden offer granting prices to A&P for half-gallons and gallons of milk were .6 to .8 cents per point below Glen & Mohawk's prices (RAPX 137).

99. After the commencement of the private label contract, it was obvious to A&P that its private label milk costs were below its Borden label milk costs for which it got an effective discount of only 30 percent and not the 35 percent to 38 percent effective discount available on the A&P label products (CX 255B; RAPX 66). This was so, although Borden's services to A&P in connection with its Borden label sales were the same as those rendered in connection with Borden's private label sales. Products of both labels were delivered in the same trucks and in the same manner. Products of both labels were pre-ordered. Borden did not accept returns of either product after expiration of the code date and Borden did not provide any in-store or promotional services (CX 75A-B, RAPX 66, Supplement C, pp. 238-239). Thus, as of mid-November 1965, and thereafter, A&P should have known that its average [31] store in the Chicago Unit took less than 600 points per delivery (CX 24B, 27, 20H; RAPX 233, p. 8) but it was purchasing Borden label milk at a price of $.3430 per half-gallon and A&P label milk at a price of $.3124 per half-gallon. In January 1966, Borden offered other customers the same limited service option provided to A&P, provided such other customers took 600 points of milk per delivery. Such other customers, however, had a maximum discount of 30 percent off of Borden's list price. Actually, the discount was 26 percent off Borden's list price plus 1 percent additional for advance ordering and limited service plus 1 percent additional for limitation on returns plus an additional 2 percent for those customers which were centrally billed, for a maximum of 30 percent (CX 123, 138; Gose, Tr. 1110). A&P's private label cost was the equivalent of a discount ranging between 35 percent to 38 percent without regard to the volume taken by any of its stores. Borden's services to all were the

same (CX 75A-B, 123, 138). Although Borden's private label contract did not offer salesman's services to handle promotions, its limited service to non-A&P stores also stated that Borden would not provide promotions (CX 123B; Lasorso, Tr. 2699; Barnes, Tr. 3910; Cox, Tr. 3992; Havemeyer, Tr. 9137-9138).

100. It thus is apparent that the only benefit lost by A&P in connection with the private label contract was advertising. But dairy advertising was not a big expense — 2 to 3 mills per point or less (CX 54; Soldwedel, Tr. 3387, 3430). Indeed, Bowman told A&P that it could not justify any price difference between private label and advertised label products (Cannon, Tr. 6136).

101. A&P also knew or should have known that its price preference on private label products was increased in May 1966. Then Borden raised its price by $.0035 (at maximum discount) to cover increased costs of labor, containers and social security costs (Gose, Tr. 1047, 1110; CX 79, 123, 124, 125, 138, 139, 140). A&P refused to accept the price increase except on its Borden label purchases and Borden repeated its request in March and April of 1967. At that time A&P accepted only a $.002 increase (CX 81, 102, 103, 105, 106, 110, 255B; Gose, Tr. 1052-1058; Schmidt, Tr. 1723).

K. THE BOWMAN AND BORDEN COMPETITIVE BIDS

102. As noted earlier, A&P had only two bids under consideration in 1965, the Borden bid and the Bowman bid. It compared the two bids on the basis of their prices on the private label products offered by Borden which was the only factor in which it was interested.

[32] 103. The Bowman bid was based upon a 3.5 percent butterfat content of milk. The Borden offer was based upon a 3.4 percent butterfat content. There is nothing in this record to indicate by what amount Borden would have increased its bid to supply milk with a butterfat content of 3.5 percent instead of 3.4 percent. Similarly, there is nothing in this record to indicate how much Bowman would have reduced its price to supply 3.4 percent butterfat milk instead of 3.5 percent butterfat milk. The two bids are not comparable with respect to butterfat content.

104. The Bowman bid, unlike the final Borden bid, included glass gallons of milk, but any comparison between the two bids based upon glass gallons of milk is improper inasmuch as A&P did not want glass gallons under private label and when Borden attempted to include such product, A&P told Borden to take it out. Glass gallons were therefore not included in Borden's final offer (CX 62, 66; Schmidt, Tr. 1777; Tarr, Tr. 883-884).

105. A&P argues that any comparison of the Bowman and Borden

bids should include by-products which were not offered under private label by either Bowman or Borden. This is also improper inasmuch as A&P was not interested in such items (CX 62; RAPX 50).

106. The Bowman bid was actually inoperative. It was based upon a volume that A&P would not and could not provide. It was based upon an estimated total dollar volume of approximately $1 million per month using Chicago list prices. Bowman's letter to A&P stated:

> A substantial increase or decrease in the size of your order (compared to the assumption of dollar volume set forth above) would affect these prices* * *. (CX 50A; Cannon, Tr. 6149).

A&P's actual purchases using list prices totaled about $754,000 per month (CX 13A, 17B, C, 13H). This calculation is arrived at by taking the unit volume for one week, annualizing such figure and multiplying the result by Bowman's list prices for such units. Taking into consideration the fact that these calculations were for the early part of 1965 and that A&P's purchase volume declined later in 1965 and thereafter, it is reasonable to infer that Bowman's bid was subject to upward revision by reason of such substantial decline in volume (CX 75Z; Schmidt, Tr. 1684, 1731, 1737). This is confirmed by Bowman's table of price [33] adjustments showing that its prices would be about 2.7 percent higher if A&P bought from Bowman's for only 70 percent of its stores and 3.1 percent higher if it bought from Bowman for only 50 percent of its stores (CX 50R; Schmidt, Tr. 1761). The Borden offer was not based upon volume (CX 62).

107. The Bowman bid was also inoperative with respect to deliveries. The Bowman bid was based upon three-day-per-week deliveries in the Gary-Hammond area of Indiana (CX 50L). Actually, it delivered milk six days per week in the Gary-Hammond area and could not reduce the days of service because of its union contract (Kalchbrenner, Tr. 9295; Banaski, Tr. 9534; CX 23D, 27, 31A; RAPX 246A). Although the Route Foreman for Borden testified that the union contracts permitted a 4-day delivery, he stated that the practice was 6-day delivery (Szczepaniak, Tr. 1287-1288). The 1965 contract provided that no change shall be made in days of route operation (CX 299i) and the 1967 contract states: "The present delivery system of 6-day operation shall *continue* in effect" (CX 300k, emphasis supplied). It is clear that 6-day delivery was the union practice and the requirement here.

108. In connection with the Bowman bid, A&P admits that it did not ask for and did not receive a letter or statement from Bowman stating that its prices were legal or proportionately available to others (Schmidt, Tr. 1848-1849).

L. COST JUSTIFICATION

109. Joseph Malone, Borden's cost accountant, made several studies to determine Borden's direct costs of serving A&P with private label products. Reference has heretofore been made to CX 24D made in July 1965, in which Borden's direct cost for half-gallons, gallons and quarts of milk is shown to be higher than the final price per unit in CX 62C. CX 87 was prepared in June 1966 after the commencement of the private label program. It shows that while Borden was making a profit on Borden label sales, it was losing from $2,200 to $4,870 per week on the A&P private label business. CX 206 analyzes Borden's Chicago area sales for the 12 months of 1965 and the first eight months of 1966 and shows that Borden's *overall* profits in the Chicago metropolitan area fell precipitously in November 1965 and remained at almost a break even point in 1966, but it did [34] not segregate private label sales which represented more than 25 percent of Borden's Chicago area sales from Borden label sales (CX 42D).

110. Considering that the unfavored customers competing with A&P purchased as much as, if not more than, the A&P store purchased from Borden, that the cost of processing A&P's private label products was no less than its cost of processing the equivalent Borden label product (RAPX 232 Attachment II) and that, except for advertising, no differences in service or delivery terms existed between the labels, but that advertising expense was insufficient to relate meaningfully to the difference in prices Borden charged A&P compared to competing retailers, no price discrimination can be justified under the Robinson-Patman Act. There is no difference "in the cost of manufacture, sale or delivery resulting from differing methods or quantities in which such commodities are sold or delivered." Indeed, Malone's calculations demonstrate the necessary resultant difference in net income because of the unjustified price differentials.

A&P's Factual and Legal Contentions

A. COUNT I

111. A&P contends that it made no misrepresentations to Borden during its private label negotiations. It notes the testimony of Borden witnesses to the effect that A&P's Schmidt asked Borden to eliminate glass gallons from its bid because other bidders did *not* bid on glass gallons (Tarr, Tr. 883-884; Minkler, Tr. 245-246). Although Bowman, the "other bidder" *had* offered a price on glass gallons, A&P contends that there was no misrepresentation to Borden. A&P contends that Schmidt was referring to a comparison he was preparing between the

Borden and Bowman bids which was based on the earlier Borden bid and which did not include glass gallons. The testimony of Mr. Schmidt, however, is not persuasive. He admits that "my recollection is hazy * * * I believe I recall that I was at that time reflecting the opinion of the Chicago unit, members on my level of management, that we did not want to carry glass private label milk because of the problems at the store level" (Schmidt, Tr. 1777-1778). On balance, I find the testimony of Tarr and Minkler more persuasive. A&P further contends that the reason for not desiring glass was irrelevant [35] because it would not have resulted in the slightest change in Borden's thinking or calculations. But that is not the point. A&P rejected Borden's bid to meet competition on a ground that was baseless, that is, for the reason that Borden's bid included glass gallons, an item which A&P falsely represented to be excluded from the alleged competitor's (Bowman's) bid.

112. A&P also contends that the bid was not induced or altered by a "sharpen your pencil" comment, arguing that it is doubtful that this comment was made at all and, if it was made, it almost certainly was made at a stage in the negotiations when it did not affect Borden's final quotation. This ignores the credited testimony of Mr. Tarr who said:

> This thing that I say about sharpening the pencil was just toward the very end of the thing. It was after all these things had been talked about and *before* we brought over the final papers. (Emphasis supplied, Tr. 985).

113. A&P further contends that there was no misrepresentation by it even if it conveyed the impression to Borden that Borden's bid merely met Bowman's bid rather than actually beating it. It argues that, even if the Borden bid was lower by some $82,000, the difference was less than 1.5 percent of the total business involved and that therefore comments by A&P like "in the ball park" and "substantially met the other quotes" would appear to be quite accurate. The difference in savings between the Bowman and Borden bids amounted to approximately $145,000. With the adjustment for the increase in raw milk costs, Borden's bid offered A&P a savings of some $820,000 while the Bowman bid's savings amounted to some $737,000. The difference in these two savings amounted to some $82,000 or 11 percent of the Bowman bid savings which is not a *de minimis* amount, particularly in the grocery or dairy business. Even a comparison of the differential in savings to the total business involved, the 1.5 percent referred to by A&P, would not necessarily be *de minimis* in the grocery store industry where net profits of some retailers did not exceed such percentage figures. Here 1.5 percent represented about

one-third or more of the unfavored competitors' pre-tax net profits (See Finding 87, *supra).*

[36] 114. Perhaps the most meaningful misrepresentation by A&P was that it had a competitive offer with which it could compare the Borden offer. The Bowman bid, unlike the Borden bid, was conditioned upon a certain minimum dollars' worth of sales to A&P. Moreover, the Bowman bid was based upon its assumption that it could deliver three days a week in the Gary-Hammond area of Indiana, but this was incorrect. Bowman delivered milk to stores in this area six days per week and could not reduce its days of service because of the union practice and requirement that milk be delivered six days per week to stores (See Finding 107, *supra*). It follows, therefore, that A&P actually did not have a competitive bid from Bowman to compare to the Borden bid. Although A&P attempts to minimize these differences and to explain them away, the fact remains that Borden was asked to meet an unrelated bid which was therefore not competitive. A&P's calculations to arrive at a price Bowman would have bid if conditions were identical are conjectural and not factual. They cannot be accepted.

115. There can be no doubt that when A&P accepted Borden's offer it understood that Borden had granted a substantially lower price than that offered by Bowman, the only other competitive bidder if, indeed, there was an offer which could be compared with Borden's (See Finding 55, *supra*). When it told Borden that its offer was being accepted after Borden had told A&P that it was submitted only to meet competition, it misrepresented the situation to Borden.

116. A&P argues that complaint counsel seek to enact "a rule requiring all buyers to tell all sellers who indicate that they are bidding against competitors what the competitors' price is," citing *Beatrice Foods Co.* v. *Kroger Co., Inc.*, 76 F.T.C. 719, *aff'd* 438 F.2d 1372, *cert. denied,* 404 U.S. 871 (1971), as well as *Forster Manufacturing Co.* v. *FTC,* 335 F.2d 47 (1964). This is just not so. As the court held in *Beatrice:*

> The controlling point here is not the "hard bargaining" nor the price levels but the *misrepresentation* of the Broughton bid, in order to induce a discriminatory price (438 F.2d at 1378; emphasis in original).

[37] Here, A&P misrepresented the situation to Borden. It knew or should have known that there was no operative bid from Bowman. Nevertheless, it told Borden that it had such a bid and when Borden made it quite clear that it was submitting its bid to meet the competitive offer A&P made no effort to disabuse Borden of that belief, although it understood that Borden had beat that bid. There was no obligation upon A&P to divulge the name of the competitor or the actual price offered by a competitor. It was sufficient if it had informed Borden that the meeting competition defense was not available. In failing to do so it misrepresented the situation to Borden and it was this misrepresentation that was a violation of Section 5 of the Federal Trade Commission Act. As the Commission concluded in the Health Hazards Statement (29 F.R. 8354-8355 (1964)):

> In the last analysis, the Commission's responsibility in this area is to enforce a sense of basic fairness in business conduct.

A&P failed to meet that standard. As the Health Hazards Statement further points out:

> No enumeration of examples can define the outer limits of the Commission's authority to proscribe unfair acts or practices, but the example should help to indicate the breadth and flexibility of the concept of unfair acts or practices and to suggest the factors that determine whether a particular act or practice should be forbidden on this ground. These factors are as follows: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise — whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen). If *all* three factors are present, the challenged conduct will *surely* violate Section 5 even if there is no specific precedent for proscribing it. The wide variety of decisions interpreting the elusive concept of unfairness at least makes clear that a method of selling violates Section 5 if it is [38] exploitive or inequitable and if, in addition to being morally objectionable, it is seriously detrimental to consumers or other.

A&P's misrepresentation was within an established concept of unfairness (see *Beatrice, supra*); it was unethical and it did cause substantial injury to Borden as well as to A&P's competitors (See Findings 59, 62-88, *supra*).

117. A&P contends that its conduct caused no injury to Borden or to Borden's employees arguing that Borden's merger of its Chicago Central district with the Midwest District in Columbus, Ohio, was a normal part of Borden's operations in order to improve efficiency levels. This disregards the testimony of Mr. Minkler (Tr. 279-280) which attributed the reorganization to the loss of Borden's income occasioned by the private label contract. That the reorganization had other justification referred to by A&P to improve efficiency does not necessarily invalidate the fact that I have found *supra* (Finding 59), that at least in part the reorganization was prompted by the reduction in income caused by the private label contract. Nor does Borden's 1966 annual report making no reference to the loss of income from the private label contract necessarily invalidate such a finding inasmuch as

a company might not regard an annual report to be the most auspicious place to speak of income losses due to a private label contract.

B. COUNT II

Count II of the complaint charges A&P with knowingly inducing or receiving price discriminations in violation of subsection (f) of Section 2 of the Clayton Act, as amended.

I. *The Discrimination*

118. A&P attacks the calculations made by complaint counsel for the prices paid by non-A&P store customers to Borden for products purchased by A&P under its private label program, arguing that complaint counsel has failed to properly authenticate the underlying Borden rebate information relied upon. It states that the rebate checks relied upon by complaint counsel were incomplete, citing three instances. In Burger's Supermarkets, A&P notes that a second check from Borden was never included in complaint counsel's calculations. The amount of this second check was $207.63. Even were it to be included, [39] it would scarcely diminish the discrimination suffered by Burger's Supermarket which experienced thousands of dollars in higher costs incurred. A similar inconsequential discrepancy is mentioned in connection with Model Food Center where the rebate check does not tally exactly with the method of calculation. This rebate check amounted to $79.36 and should have amounted perhaps to $8.00 more. A&P also objects to complaint counsel's failure to include certain payments by Borden to Wilco and Tittle. These appear to be checks for interest payments with no relation to the volume of purchases by these companies and would have insignificant impact upon the price discrimination calculations.

119. In addition, A&P contends that the documents relied upon by complaint counsel were incomplete. But the subpoena for this information to Borden required all documentation necessary to show the net price to customers and it appears that such was provided. Moreover, the rebate checks used by the Commission's accountant tallied almost exactly with Borden's worksheets. Under these circumstances it appears that the data used by complaint counsel were authenticated sufficiently.

120. A&P also attacks complaint counsel's calculations for non-A&P customers in Illinois, arguing that discounts greater than those shown on Borden's discount schedule were offered on a customer-by-customer basis. Although complaint counsel's accountant was not able to reconcile the price book amounts with the price lists in some of his

spotchecks, it was apparently due to such things as the illegibility of entries and the inclusion of butter which was not on the price list and did not necessarily indicate that these customers were not charged these prices (Bitting, Tr. 4882). Moreover, such additional discounts were apparently given on small volume by-product items and would not substantially alter the overall pricing pattern (CX 288 D,R,S; Bitting, Tr. 4225-4231, 4234-4236; Soldwedel, Tr. 3421).

II. *The Representativeness of the Stores*

121. A&P further contends that while complaint counsel may have shown that A&P's discriminatory price caused injury to those Borden customers discussed by complaint counsel, this showing is not sufficient because these stores were not "representative" of all purchasers from Borden. It is doubtful that complaint counsel has such a burden.

[40] In *Beatrice, supra,* the Commission said:

> The Robinson-Patman Act requires consideration of secondary line injury on a location-by-location basis. Each local competitive area, each Kroger store location, becomes the competitive environment within which the potential effect on competition with Kroger must be examined. (76 F.T.C. at 805).

The Commission noted that in *Foremost Dairies, Inc.* v. *Federal Trade Commission,* 348 F.2d 674 (5th Cir. 1965), *cert. denied,* 382 U.S. 959 (1965), 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. Here, local competitive areas were examined. In the Gary-Hammond area of Indiana, A&P's five largest independent grocery competitors paid substantially more than the A&P stores in that area during the six month period from October 1966 through March 1967 and the later ten month period from June 1969 through March 1970. Similarly, the Tittle store in Valparaiso paid substantially more than its competitor A&P store. On the O'Hare route Borden's cash store customers purchasing $800 or more of milk per month paid substantially more than A&P for fluid milk products sold under private label (See Findings 62 through 77 *supra;* also CX 183). These price discriminations have been found to be meaningful and productive of injury to such non-favored competitors of A&P. In a secondary line competition case, the Supreme Court has said that it is

> self evident* * *there is "a reasonable possibility," that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the

competitors of these customers (*Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

As the Commission stated:

> It seemed self evident that where a producer is selling a homogeneous product, such as salt, automotive parts, or gasoline, where competition is extremely keen among retailers, and where margins of profit or markups are small, a lower **[41]** price to one or some of the competing retailers not only "may" but must have the effect of substantially lessening competition (*Sun Oil Co.* 55 F.T.C. 955, 962 (1959)).

Although the Seventh Circuit seemed to inject a necessity to make "realistic appraisals of competitive impact" in its decision in *American Oil Co.* v. *Federal Trade Commission*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964) even that court assumed competitive injury upon a showing of different prices charged competing customers where the differential was "substantial and sustained" (*Bargain Car Wash, Inc.*, v. *Standard Oil Co., (Ind.)*, 466 F.2d 1163, 1174 (1972)). Assuming nevertheless, that the representativeness of the non-favored stores selected by complaint counsel here must be shown, I find that burden to have been met. The discriminations and injuries shown here involved local competitive areas of Gary-Hammond, Indiana, where A&P's five largest independent grocery competitors' costs were compared with the A&P stores' costs in the same area. In the Valparaiso, Indiana, area the Tittle store was compared with its competitor A&P store. In the Chicago and suburbs area Borden cash store customers were compared with A&P stores. In the Indiana area the purchases of the unfavored competitors represented more than two-thirds of all of Borden's non-A&P store wholesale sales in the area (RAPX 234, p. 19; CX 182). In the Chicago and suburbs area, the unfavored competitors chosen represented more than 40 percent of Borden's total sales on its O'Hare wholesale routes, which in turn represented a major part of Borden's total sales in the Chicago area (Compare RAPX 233, p. 69 Col. (1), with p. 8, 1, 6, Cols. 7, 13; RAPX 76; Bitting, Tr. 4788-4789, 4815-4816; CX 211D; Gose, Tr. 1072).

122. A&P contends that the cost comparisons are defective because they do not compare all of the allegedly injured competitors' dairy purchases from Borden against all of A&P's purchases but only against A&P's private label purchases. In the *Beatrice* case, respondent Kroger raised the same argument. There, however, Kroger, in addition to its private label purchases, was an unfavored purchaser of Beatrice labeled products and argued that its purchases of both lines should be considered in assessing injury. (The situation here is even stronger in that there is no claim that A&P was an unfavored customer in its purchases of Borden label products.) The Commission held:

> We think the proper inquiry is whether Kroger by obtaining cheap milk under its own label was given a competitive advantage which it used to potential injury of its competitors (at 806).

[42] The Commission went on to hold that only the Kroger purchases of private label products were the correct measure of competitive injury and discrimination since Kroger's purpose in purchasing private label products was to obtain an overall advantage over its competitors since it used the private label milk "for the benefit of its entire grocery business and not merely to sell against name brand milk in the stores of its competitors." In that case Kroger, as did A&P, purchased private label milk at a cheaper price but sold it at the higher price of brand label milk, thereby reaping higher profits. It did not pass any of its cost savings on to the consumer. Moreover, Kroger continued throughout the period of discrimination to purchase the various items under both private label and brand label. A&P, however, carried the products in question under both labels for only a short introductory period. From October 1966 on, it purchased little or no Borden label milk products, so that it enjoyed a preferential price on all its milk purchases. Thus, except for a few months, whether or not A&P's Borden label purchases were aggregated with its A&P label purchases would make little difference in the calculation of A&P dollar advantage over its competitors.

123. A&P also contends that complaint counsel's proof of injury was insufficient, arguing that Borden's discrimination in favor of A&P lasted only briefly. This ignores the evidence of record that the discrimination lasted for years. A&P also cites evidence to the effect that the unfavored competitors could purchase milk at prices below those charged by Borden. There is no evidence, however, that such competitors were offered prices which even came close to A&P's substantial discount at the times in question (Gintert, Tr. 2492-2496; Minard, Tr. 3256-3258; Kristoff, Tr. 2329).

III. *Knowledge*

124. A&P also argues the issue of knowledge. I have already found that Borden's Minkler told A&P that the Borden bid was to meet a competitive bid only and that A&P's Schmidt said that he understood (Findings Nos. 51, 52, 53, *supra*). Moreover, I have found that A&P's officials understood that Borden's bid was "substantially better" than the Bowman offer (Finding No. 54, *supra*). Nor did A&P have any reason to distrust the representations of Borden since it admittedly had a high regard for Borden's cost accounting and legal **[43]** departments (Finding 22, *supra*). A&P's Schmidt admitted that he considered Tarr, Minkler and Malone of Borden "honest and forth-

right" (Schmidt, Tr. 1843). A&P's argument also ignores the fact that it knew Borden's cost savings were made without spreading it to individual products and that when it did make such a spread, it changed the products covered and the prices without changing the savings which could hardly be the result of cost differences attributable to differing methods of sale or different quantities sold. Moreover, A&P realized that Borden removed the statement "these prices are available to all on a proportionally equal basis" from its private label price change tables. Since it was A&P's policy to require such statements A&P should have known or surely been put on notice that Borden's new private label prices were not available to others.

125. A&P also attacks the reliability of Borden's cost studies arguing that they do not reflect savings Borden could expect from the introduction of the private label program. It attacks the Malone studies which show Borden's direct costs to be higher than the final price agreed upon to A&P, arguing that certain inconsistencies and irregularities make these studies unreliable. This position, however, is difficult to reconcile with the testimony of A&P's witnesses who considered Mr. Malone to be expert, forthright and honest. If so, A&P then must have known at that time that the price it had wrested from Borden was below Malone's calculations of cost.

126. A&P relies on Smith's testimony that he was assured by Borden's Archer that Borden's letter was a letter of availability and even more, which testimony I have not credited, preferring to believe Borden's Archer who denied such conversation. A&P contends that Archer must have seen Borden's letter and lied when he said he didn't see it, because, as A&P contends, Archer had all the other materials sent to New York on the negotiations. The evidence shows, however, that Minkler forwarded two sets of Borden's final proposal to Mr. Pentz in New York (CX 64A). Minkler forwarded one copy of the legal letter to Pentz but this transmittal contains a penciled note which does not indicate that Archer was sent a copy of that document (RAPZ 3). Moreover, since Archer had been promoted Executive Vice President of Borden earlier and would not have been as deeply involved in the affairs of the milk division as previously, it is not likely that he would have reviewed the legal letter from Borden. A&P also notes that in 1967 with reference to another bid [**44**] by Borden it asked Borden what was meant by language similar to that on Borden's legal letter here. On that occasion Borden replied that it meant the price would be available to others. No explanation is offered, however, why similar inquiry was not made by A&P at this time. The fact that Borden gave it such a meaning at another time, later, cannot relate back to an earlier period of time without supporting evidence.

127. A&P disputes that its trade experience would have led it to believe that Borden's final prices could not have been cost justified. I have found, however, that A&P was quite knowledgeable about the dairy industry (See Findings Nos. 97, 98, *supra*). A&P argues also that Borden expected reduced costs as a result of its new Woodstock plant. But we are here concerned with differences in the costs, not expectations which may or may not be realized. Nor is it relevant that A&P could get better prices on private label in other parts of the country. We are here not concerned with other parts of the country. Nor is A&P's reliance upon the costing guidelines of the 2-2-2 formula appropriate where, as I have found, this formula was a mere reference point and was subject to adjustments for local differences which would make it inapplicable to the Chicago area.

IV. *Meeting Competition*

128. As respects the issue of meeting competition A&P argues that although its officials thought the Borden bid was "substantially better" than the Bowman bid in 1965 its review in 1973 shows that in fact the Bowman bid was better. I have found, however, that the Bowman bid was not comparable to the Borden bid. Unlike the Borden bid it was based upon a certain anticipated volume of sales with a higher cost if the volume declined, which it did. It was also based upon a certain delivery schedule which was impossible of performance due to union practice and requirements. Although A&P attempts to develop the change in the Bowman bid with a corrected delivery schedule, the correction is A&P's estimate and not Bowman's. A&P also adjusts both the Bowman and Borden bids to reflect the same butterfat content of the milk, inasmuch as the Bowman bid allegedly specified a 3.5 percent butterfat content compared to the Borden milk which was 3.4 percent butterfat. Again, this is a correction by A&P and not by either Borden or Bowman. But it doesn't appear that A&P was interested particularly in the butterfat content as long as it met the legal minimum requirements (Schmidt, Tr. 1727-1729). [45] A&P uses Borden calculations to raise Borden's price for 3.5 percent butterfat milk using Borden's adjustment of its raw milk cost. This does not necessarily mean that Borden's price would be similarly adjusted *by Borden* had A&P asked for a different butterfat level. In addition, since the Borden butterfat level was about 3.45 percent anyway (Walker, Tr. 5513) and Borden was desperate to keep the A&P business, Borden would not necessarily make any adjustment in its prices to raise the butterfat content to 3.5 percent (CX 62X; Havemeyer, Tr. 6779; RAPF 130, p. 134).

129. Above and beyond the foregoing obstacles to an adjustment of

the Borden bid to conform to what was felt to be the Bowman bid, that is, 3.5 percent butterfat content, there appears to be serious doubt that the Bowman bid actually called for 3.5 percent butterfat content. Such was not the impression of the negotiating individuals in 1965 but was only the result of second thoughts generated by a review of the bids at the request of A&P counsel in 1973. The testimony of the witnesses, however, indicates that the Bowman bid was based upon a 3.5 percent butterfat content of the Class I raw milk and not the butterfat content of the processed milk (Smith, Tr. 1415-1417, 1445-1450; Schmidt, Tr. 1815; Bartels, Tr. 1897). Indeed, a Bowman official, Mr. Cannon, testified that the Bowman offer did not contain any specifications compelling Bowman to supply at any particular butterfat level (Cannon, Tr. 6187–6188). This was confirmed by the Commission's expert dairy economist (Walker, Tr. 5450-5453). In fact, this expert found that Bowman's butterfat level in 1965 was actually lower than Borden's butterfat level judging from the handler's reports which he examined (Walker, Tr. 5461).

V. *Cost Justification*

a. Attacks upon Malone's calculations

130. With respect to cost justification, A&P first attacks the computations by Malone as erroneous and unreliable. Specifically, CX 54 purporting to show Borden's cost to permit Borden to make an additional savings proposal to A&P is attacked because Malone allocated the costs on a point basis rather on the individual packages involved. But higher priced and lesser volume byproducts are more costly to handle so that a cost computation by the number of units could not clearly reflect actual cost whereas a cost computation by points in which these higher priced and lower volume byproducts are given higher point values would be more nearly accurate (See CX 7A). Moreover, since [46] Malone was seeking to ascertain the direct costs of A&P's business it was sufficient for his purposes apparently to ascertain overall costs and relate them to the A&P volume. That Malone was familiar with costs can hardly be disputed and Malone did consider A&P's volume of business (Malone, DTR pp. 148-151). A&P also attacks CX 54 because the costs therein are higher than CX 4, a Borden calculation of costs pertaining to Borden's operations in Wisconsin in August 1964. But CX 54 relates to Chicago and to 1965. A cost study which is neither contemporary nor based on the same market areas is hardly relevant and cannot be the basis for discrediting CX 54 which was prepared for the correct time period and locality, particularly when it appears that the highest labor rates are in Chicago

as against all other dairy rates in the United States (Schaub, Tr. 3305) and where costs were increasing during 1964-1965 (See Resp. A&P's Proposed Findings, pp. 380-381).

131. CX 54 is supported by CX 87, another calculation prepared by Malone some 10 months after CX 54. In CX 87, Malone calculated costs experienced selling to A&P by two different accounting methods and in each case found that Borden was selling private label to A&P at a loss. Although A&P argues that CX 87 does not relate specifically to Borden's cost of serving A&P, citing Malone, DTR p. 240, it appears that Malone was speaking of another exhibit, CX 13, at that point. With respect to CX 87, Malone testified:

> The three documents representing 87A, B and C were developed in an attempt to reconcile our position as to which would be the best course to follow. Number one, we had the experience with the A&P private label operation and we wanted to see on a general basis, on a general application of the elements of cost, what our position would be, either lose or gain, and relate to where we would be if we lose all of the business. (Malone DTR 184-185).

132. A&P also argues that CX 87 be disregarded because "the data used to determine the Borden costs shown on that exhibit were unavailable to A&P at the time of trial." This objection is now being raised for the first time in connection with CX 87. A&P's motion to strike CX 87 on November 30, 1973, objected to the admissibility of that document on the ground that it was neither past recollection recorded nor a business record. These objections were overruled (see my order of March 5, 1974). It ill becomes A&P to show concern for the [47] absence of underlying data to CX 87 literally years after such objection would have been timely and appropriate, that is, when Malone gave his deposition (Malone DTR pp. 229-250), or at least on November 30, 1973, when it moved to strike CX 87.

133. A&P also disputes CX 87 in that it compares the prices of the products sold to A&P on the O'Hare branch. Inasmuch as the O'Hare branch is the highest price area covered by the Borden A&P contract (CX 62) whereas Malone used an average price for all A&P stores including stores with lower prices than those from the O'Hare branch it necessarily follows that the average price arrived at for all will be lower than that at the O'Hare branch.

b. Burden of Proof

134. A&P contends that complaint counsel have not proven that the price discriminations were not actually cost justified and that they have not carried the burden of proof required under Section 2(f) of the amended Clayton Act, citing *Automatic Canteen Co.* v. *FTC*, 346 U.S.

61 (1953). Complaint counsel must come forward with evidence which proves both that the prices paid by the respondent buyer were not in fact cost justified and that the buyer knew or should have known this fact. Where, however, the buyer knows he is receiving a substantially lower price although the quantities in which he buys and the manner and amount of exertion with which he is served by a seller is the same as for his competitors

> * * * the Commission need only show, to establish its *prima facie* case, that the buyer knew that the methods by which he was served and the quantities in which he purchased were the same as in the case of his competitors (346 U.S. at 80).

Even under *Canteen*, complaint counsel have met their burden here. The competitors were charged a higher price for Borden's milk products despite the fact that they took at least as much and often more than the individual A&P store with which they were competing. Further, although their service requirements were in some cases greater than that required for A&P they could have had the identical services but still at a higher cost than A&P was paying. Thus, with all differences in quantity and service eliminated there were no cost differences with the possible exception of advertising which I have found to be negligible in this particular situation.

[48] 135. Nor can it be denied that A&P knew or should have known that the methods of service and the quantities it purchased were the same as its competitors. A&P, not a novice in the dairy retailing business, certainly knew that Borden's prices were set according to its price lists and discount schedules. Moreover, it appears that A&P was purchasing Borden label products at the same prices that were charged its competitors. A&P officials and Borden officials discussed pricing patterns in the Chicago area as compared to pricing in other cities and even if A&P did not see Borden price lists it certainly knew the general contents and could have solicited further information (Tarr, Tr. 857-859; CX 12B, 19). Under these circumstances and in view of A&P's other knowledge of Borden's prices and costs A&P clearly had the duty to inquire to determine whether its prices were legal. In *Fred Meyer, Inc.* v. *Federal Trade Commission,* 359 F.2d 351, 365-366 (9th Cir. 1966), it was held that "Meyer had a knowledge of at least sufficient facts to create a reasonable suspicion that the payments it received were probably illegal* * *the duty to inquire [thus] arises."

The Commission has held:

> Where a buyer knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer the Commission need only show to establish its *prima facie* case that the buyer knew that the methods by which he was served and the quantities in which he purchased

were the same as in the case of his competitor* * *. However, assuming the matter to involve different methods or quantities 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 to him, they would have met their initial burden (*Suburban Propane Gas, Corp.* 71 F.T.C. 1695, 1698-1699, n. 2 (1967)).

[49] A comparison with the *Beatrice* case is also appropriate. In that case complaint counsel were held to have met their burden of proof, relying upon Kroger's market knowledge, the fact that it did not seek evidence of cost justification from the various bidders, and the fact that Beatrice's pricing to Kroger was on a cost-plus basis, whereas Beatrice was selling to competitors on a list-price-minus-discount basis which was not based on actual costs (*supra* at pp. 820, 821). In that case there was no communication between the parties concerning cost justification. Here, however, Borden submitted detailed cost data and informed A&P that its bid could only be justified on a meeting of competition. By any approach, therefore, complaint counsel have met their burden of proof to demonstrate that Borden's price to A&P was not cost justified and that A&P knew or certainly should have known that such was the case.

c. Havemeyer's Cost Studies

136. In rebuttal to the contemporaneous Malone Studies (CX 54B, CX 87A-B) and other cost data (CX 21U, CX 23-25A, CX 206), A&P submitted three basic cost calculations, RAPX 232, 233 and 234. RAPX 232 purports to demonstrate that Borden could have expected to earn a profit on its private label price proposal to A&P. This exhibit purports to calculate the total cost of processing, transportation to branches and delivery to the store, of A&P private label items based on costs of Borden for May 1965 or for other periods in determining some of these costs. It compares such cost to the private label price granted to A&P in September of 1965 to arrive at a calculated weighted margin per point for Borden in its sales of private label dairy products to A&P. It breaks down the total cost into seven categories: Direct material costs; processing costs; trailer loading; hauling to branches; truck loading at branches; delivery; and indirect marketing general and administrative costs. RAPX 233 compares Borden's cost of serving A&P stores with that of 28 competitors on Borden's O'Hare routes in March 1966. RAPX 234 compares Borden's cost of serving A&P stores with that of five competing purchasers in eight store locations in Hammond and Valparaiso, Indiana, in October 1969.

137. These studies were prepared by Mr. Robert G. Havemeyer

(Havemeyer), called as a witness by respondent A&P. Havemeyer is a management consultant and a partner in the management [50] consulting firm of Case & Co., and has been with that company and its predecessor firm, Stephenson, Jordan & Harrison, since 1953. His professional career has been very largely devoted to cost accounting in the dairy industry (Havemeyer, Tr. 6770-6775). He did not, however, base his studies upon any personal observations of Borden's operations and based his study upon only a portion of Borden's records which portion had been selected by someone else (Daube, Tr. 6704-6705). He did not partake in the process of selection or even review all of the available documentation to determine the completeness and representativeness of the selection (Tr. 7520). His experience included only one other Robinson-Patman cost justification study presented in a litigated case (*U.S.* v. *Borden* (Bowman), 370 U.S. 471 (1962)). (Tr. 6769-6775, 9131-9132).

i. Delivery Costs

138. Of critical importance is his calculation of delivery costs, being the most important and largest expense item with the exception of direct material costs. Havemeyer originally calculated them using Case & Company's wholesale milk delivery time standards. Complaint counsel objected to the admission in evidence of such time standards on various grounds. By order dated September 11, 1974, I overruled complaint counsel's objections insofar as they were based upon alleged unreliability, immateriality or irrelevance. However, by order of September 16, 1974, I sustained complaint counsel's objections to Havemeyer's studies insofar as they were based upon Case & Company's time standards because data underlying the conclusions reached on these studies were not produced (RAPX 232, pp. 89, 76; RAPX 233, pp. 39-66; RAPX 234, pp. 3-10). Consequently, the ultimate conclusions of Havemeyer for the cost of this function have been excluded and no meaningful comparison is possible between his studies and the cost calculations prepared by Malone. (See my order dated November 20, 1974).

139. A&P nevertheless contends "there is ample evidence in the record to calculate the costs that the Borden Company could have anticipated if A&P accepted the significantly reduced delivery service which was an explicit condition of the private label price proposal." It argues that delivery costs can be calculated using the official Wisconsin Manual. It contends that Wisconsin is within the same region of the Borden Company as the Chicago Metropolitan area and that operating conditions within the region will be roughly comparable.

[51] 140. The so-called Wisconsin Studies are RAPX 9. Dr. Solverson testified on behalf of complaint counsel in June 1973. The thrust of his testimony was to the effect that a differential in delivery times per unit for different types of delivery services narrowed as quantities per delivery increased. In cross-examination, counsel for A&P offered several exhibits purporting to contradict Dr. Solverson's testimony and these were received in evidence (RAPX 8 through 15). As I noted in my order dated November 22, 1974, these were received in evidence for impeachment purposes.

141. A&P argues that Dr. Solverson testified that the time requirements for effecting full and limited service deliveries in Chicago would be the same as full service in Milwaukee (Solverson, Tr. 1556). I do not so read his testimony. Rather, it appears that Dr. Solverson was speaking of a pattern or relationship between modified drop and full service in delivery time savings and that it was this pattern of decreasing delivery time savings when volume goes up that is true for a large number of geographical areas. He did not testify that time standards from the Wisconsin Manual or his thesis were applicable anywhere else. Indeed, the Wisconsin Manual and Dr. Solverson's thesis were admitted to show disparities between the two. Moreover, his thesis contained time observations from one additional company not included in the Manual figures (Solverson, Tr. 1601-1602, 1604-1605). There were also differences in the definitions of the various service terms as between this company and those developed in the Wisconsin Manual (Solverson, Tr. 1606). Thus, RAPX 9 shows that one of the functions performed under full service in Wisconsin was stamping merchandise, a service that was not part of full service in Chicago (Pergler, Tr. 5651-5654; RAPX 9, p. 2; RAPX 35).

142. It is, therefore, inappropriate to attempt to establish time standards from RAPX 9. It fails to be precisely applicable to the State of Wisconsin, let alone the Borden experience in the Chicago market area. Even Havemeyer admitted that there were very substantial differences in both the fixed time per stop and the variable time per case as between his New Jersey Study and his Bowman Dairy Study (Havemeyer, Tr. 8183-8187). Thus, even considering RAPX 8 through 15 as not merely admitted for impeachment purposes, they constitute insufficient basis for a determination of Borden's cost in the Chicago area for the periods of time involved in this proceeding.

[52] 143. Nor does it appear appropriate to consider a cost justification defense on the basis of standardized costs. We are involved in actual costs, not what the costs should have been. As Havemeyer reported to the Virginia Milk Commission on a study conducted in that state:

> The cost of the three principal functions — plant processing, distribution and in-store handling — are independent. That is, a low cost processor could be either a low or high cost distributor; so, also, could a high cost processor. The costs of each of these functions are independent of those incurred by the customers (stores) to which merchandise is delivered. (RAPX 245A, p. II-4).

Following this rationale, it is obvious that a particular dairy such as Borden may be a low cost processor but a high cost distributor or vice versa. Standards would arrive at an average or a mean and would not necessarily be descriptive of any particular dairy without some evidence to associate the activities of such a dairy with the average dairy, which evidence is lacking here.

144. Even if Havemeyer's computations re service-times were acceptable, his calculations re delivery costs appear to be unreliable for other reasons. Some of the activities were improperly computed on a time basis. Thus, Havemeyer allocated driver commissions on a time basis rather than to the volume the driver delivers. But commissions were earned and paid on the basis of volume delivered (Pergler, Tr. 5731-5732; Banaski, Tr. 9560; CX 119J-K; CX 298H-J; CX 299H-K; CX 300H-J). Pergler testified:

> The commission that the routemen received was based on their sales not on the time that they put in at an individual store on an entire route.

Banaski testified that wholesale drivers were paid both a salary *and* a commission. The union contracts specified that the salary is determined on a hourly, daily or weekly basis but that the commission is based on the number of points delivered. Havemeyer's calculations result in a higher cost for such activity performed for non-A&P customers and inasmuch as this is apparently incorrect, Borden's cost saving on this function in connection with private label sales [53] to A&P is improper (Lemberg, Tr. 9405, 9408). Similarly, Havemeyer allocated total building expense to the wholesale delivery function and on the basis of the time spent at the store by the deliveryman. In the first place, since all four sales categories were involved — wholesale, bulk wholesale, vendor and retail — only a part of the total building expense should have been allocated to wholesale. Moreover, such expense has no apparent relationship to the time spent at the store by the deliveryman but to the function involved such as loading, storage, etc. (Lemberg, Tr. 9409-9412). Again, Havemeyer allocated the automotive expense of the delivery trucks according to the time spent serving this store by the deliveryman. The proper approach would be to allocate such costs to the products carried since the trucks are used merely to transport the products to the stores (Lemberg, Tr. 9408-9409, 9447, 9451).

ii. Processing Costs

145. But even independent of delivery costs, Havemeyer's calculations are not persuasive. Arguing that Malone's costs as shown on CX 54B are unreliable, Havemeyer calculated Woodstock processing costs by multiplying the unit cost experienced by Borden at its two Wisconsin dairies (the so-called Milwaukee operation) by the units produced at Woodstock, arriving at the total expense that Woodstock would have incurred in producing each product had it experienced Milwaukee unit costs (RAPX 232, pp. 10-12, 21). He then adjusted the costs to reflect the fact that Woodstock's labor costs were higher than Wisconsin's while its non-labor costs were lower (Havemeyer, Tr. 6990, 6998-6999). This approach does not, however, appear to be reliable. We are not here concerned with the processing costs in Wisconsin but in Borden's Woodstock, Illinois plant. Moreover, we are concerned with the period of May 1965 rather than August 1964, the month used by Havemeyer. There is no record substantiation for the propriety of comparing the two. Havemeyer was not shown to be familiar with either of the Wisconsin plants at the time in question and, in fact, was not familiar with the operations of the Woodstock plant. One of the two Wisconsin plants used by Havemeyer was inadequately identified although the calculations of that unidentified plant appeared to be in some respects **[54]** referrable to Woodstock. There was no evidential showing that the Woodstock and the Wisconsin plants had similar product lines, similar labor forces, similar equipment, similar utilization of that equipment, similar management problems, similar volume ratios among the product lines, similar filling machines, similar efficiencies, etc. (Tr. 8100-8111). Moreover, Malone was one of the Borden officials who submitted this study upon which Havemeyer relies. Malone stated, however, that "there is no relationship between the Chicago factors and the Wisconsin factors" (Malone DTR p. 36).

iii. Havemeyer's Unfamiliarity

146. Havemeyer's lack of familiarity with Borden's activities also diminishes the value of his calculations concerning rental costs of the Ex-Cell-O machine, which is a filling machine. The allocation of this cost was originally made in accordance with a formula which, however, was rejected for failure to submit substantiating evidence (Tr. 7397, 7402, 7393). Havemeyer then submitted an alternate method of allocating these costs (RAPX 154; Tr. 8114-9118). He testified, however, that his original method was superior (Tr. 8117) because the alternative was "of an averaging nature." Moreover, since the rental consists of 2 parts — a base rental and a production rental — (Tr. 8131-

8132, 8133) and the base rental was paid on a monthly basis but the production rental may have been on a quarterly basis or some other basis other than monthly, we cannot be sure that all machine rental costs are shown in Havemeyer's calculations. His lack of familiarity with Borden's operations makes it impossible for him to supply such information. Malone's informed allocation of this cost in CX 54B and RAPX 65 must be considered superior to Havemeyer's averaging method.

147. There were a number of other areas in which Havemeyer's calculations of cost would not be as reliable as Malone's calculations when one takes into consideration Havemeyer's lack of familiarity with Borden's operations compared to Malone's intimate knowledge of such operations. Thus, in connection with trailer loading expense, Havemeyer discredits Malone's computation where Malone allocated the same expense to gallon glass containers as he allocated to paper gallons (Tr. 8160-8161). Although there were more paper gallons in a case than there were glass, there were also more cases of glass gallons on a pallet (Pergler, Tr. 5632) and there may have been other economies involved [55] in loading the glass gallon pallets of which Malone was aware but of which Havemeyer could not have been aware.

148. A similar difficulty arises in connection with truck loading expense. There Havemeyer attempted to make a determination of the average points of each product that would be contained in a loaded case relying on his experience of normal practice in the dairy industry (Havemeyer, Tr. 7010-7011). Since, however, he was not familiar with Borden's practices, his computations are not necessarily indicative of Borden's experiences without a determination that such experiences were the normal in the dairy industry. In addition, Havemeyer calculated such costs in contradictory ways. In connection with loading costs in the Chicago area, he included total purchases by the unfavored competitors (the 11 items involved in the A&P private label agreement with Borden and all other Borden dairy products purchased by such stores). In the Indiana study, he considered only the private label items and private label equivalents (RAPX 233, 234). In the latter study, the loading costs were virtually identical. Since this matter involves discrimination on private label items only, the latter study was the only proper approach and would eliminate much, if not all, of the cost differential in this function.

149. Havemeyer's expertise is insufficient to remedy other apparent irregularities of his calculations. Havemeyer attempted to calculate product waste cost but in contradictory ways. He admitted that leakers and product spoiling within date would be product waste

(Tr. 7749). He added, however, that this would be a very small part of the product waste which included a privilege to return out-of-date merchandise that was not defective. Consequently, in his profitability study (RAPX 232) he allocated 5 percent of "other delivery costs" to A&P private label (Tr. 7753). In his studies of O'Hare costs (RAPX 233) and Hammond (RAPX 234) Havemeyer took the position that leakers and product spoiling within date are not product waste but were accounted for in some other manner in Borden's bookkeeping system (Tr. 8490). He was unable, however, to cite any record evidence for that statement or from whom that information was obtained. Moreover, there is serious doubt that leakers and product spoiling within date would be only a small portion of the route returns. Competing retail grocers generally testified that they had very few returns (Minard, Tr. 3258; Kristoff, Tr. 2431; Barney, Tr. 3838; Cox, Tr. 4002-4003). Minard **[56]** testified that what returns his company did have were usually leakers or product spoiling within date. Havemeyer himself indicated that Borden probably experienced a high number of gallon leakers in this period due to the fact that the paper packaging equipment frequently had problems during this period (Tr. 8101).

iv. Indiana Irregularities

150. Another apparent irregularity in Havemeyer's calculations concerns Valparaiso sales where he used RAPX 81 and 87 as the source for cost data on the assumption that Mr. Marquardt, (the independent distributor who delivered in Valparaiso for Borden) picked up his milk at the Hammond dock. He was unable to substantiate his position by documentation (Tr. 8641). Marquardt himself never testified as to where he picked up his milk (Marquardt, Tr. 1315-1331). Record evidence associates Valparaiso more closely to South Bend than to Hammond (CX 17K; CX 62I). There is, therefore, insufficient justification for the use of RAPX 81 and 87. But even if there were, the expenses thereon are Borden's expenses dealing with vendors, not with stores served by vendors who sold on their own terms (Marquardt, Tr. 1323).

151. A&P argues that Havemeyer should be permitted to apply Hammond branch costs for vendors for his analysis in Valparaiso. It bases its argument simply on the additional cost it would have to sustain to make still another study for this single comparison. But that is not the point. A correct study should have been made in the first instance. Havemeyer's cost studies' deficiencies render his conclusion unpersuasive.

152. The Valparaiso study is also misleading. It attempts to calculate Borden's costs in its dealing with Marquardt who was an

independent distributor. Borden's records, therefore, show its expenses of dealing with such independent distributor and not of its dealings with the distributors' customers with whom it had no relationship. Accordingly, if Havemeyer were to apply Valparaiso's expenses to stores served by those vendors, all or part of those expenses would have to be shown as applicable in that way. This has not been done. Some of the expense allocated to the non-A&P store in Valparaiso, (Tittle) is made up of "provision-bad loans." [57] Any bad loans, however, made by Borden to its vendors would not be attributable to the stores to whom these vendors deliver, inasmuch as the Borden customer involved in the vendor account is the vendor and not the vendor's customer, a result reinforced by the fact that Tittle received no loan from Borden (Minard, Tr. 3223-3224). Nor can selling expense be ascribed to the Tittle store inasmuch as Valparaiso is not on a Borden route, Borden salesmen did not visit Tittle's store there (Minard, Tr. 3207-3208) and Tittle was not even a customer of the vendor which delivered to it (Marquardt, Tr. 1317). Similarly, there is no basis for allocating credit and collection costs to the Tittle store for the additional reason that it was not responsible for any credit loss (Minard, Tr. 3157). Tittle did not pay through a distributor (Marquardt, Tr. 1317). Borden's provision for bad accounts with milk distributors could not be applicable to Tittle. Further, since Tittle was never overdue (Minard, Tr. 3157) there could be no interest on overdue accounts.

v. Branch Selling Expense

153. Havemeyer's calculations in connection with branch selling expense — the expense related to the activities of Borden's salesmen — are also questionable. In this connection he estimated the number of points sold to independent stores, thus eliminating A&P sales and sales to schools and other non-store customers from consideration, and arrived at a branch selling expense per independent store point (RAPX 233, pp. 23, 16; Tr. 8492-8494). Such allocation was based on the assumption that the entire time of the salesman was spent in soliciting these particular store accounts and serving these accounts. But Mr. Daube, a Borden executive, testified that the salesmen "contacted new customers. * * * [h]is basic function was to develop and obtain new business for the company" (Daube, Tr. 9226-9227). Such missionary work is part of the selling expense of doing business on the part of Borden and it should be borne equally by all customers, A&P as well, on a volume basis (Lemberg, Tr. 9419-9420). Moreover, there is no record evidence to justify Havemeyer's elimination of non-store customers but only his belief that Borden would have special bulk

wholesale salesmen who would call on bulk customers. He admitted, however, that there is nothing in the Borden expense account that shows that the salesmen do not call on non-store customers who are served by the wholesale routes (Tr. 8496-8497). In addition, the Borden-A&P contract provided that "Borden's salesmen's services will be supplied at the store level only, to follow [58] through on a complaint covering such matters as service, product or container" (CX 62Q). But no time has been computed by Havemeyer for such activities. The absurdity of this conclusion is demonstrated by the amount allocable to Jim's Groceries where Borden's salesmen visited maybe once a week or maybe once a month (Cox, Tr. 3992). But Havemeyer's allocations would run about $165 for March 1966 (RAPX 233, pp. 23, 31). Nor did Havemeyer give any consideration to the fact that Borden incurred some selling expense in connection with the functions of Tarr and the salesmen who assisted him in servicing the A&P account (Tr. 8503). Yet Tarr spent almost all of his time in serving the A&P account (Tarr, Tr. 845-846, 897, 899). Finally, Havemeyer's approach on this function contradicts the treatment in his profitability study where he allocated some selling expense to A&P private label.

vi. Failure of Classification

154. Havemeyer's cost calculations are also flawed by his failure to classify customers in accordance with size, type of store, volume of purchases and other characteristics. In his profitability study he treated all independent stores as having one set of characteristics and A&P stores as having another. Thus, in RAPX 232 p. 89, he established various volume brackets for "other stores" but made no volume analysis for the A&P sales, despite the fact that 10 of the 88 A&P stores listed in the March 1965 breakdown of O'Hare sales took less than 300 points per delivery (RAPX 74). In calculating the number of points per case in May 1965, for all "other stores" Havemeyer examined the route books for 3 out of 17 routes in March 1966 and admitted that "there was not sufficient data to be certain of a variation of the points per case by size of store" (Tr. 7845). While admitting that it was highly unlikely these various size stores purchased the same number of points per case, he explained that "the data was not there unless you went through a tremendous analysis" (Tr. 7850). His resulting figure of 22 points per case for "other stores" is obviously quite arbitrary. Similarly, in connection with RAPX 233 and 234, Havemeyer gave no recognition to different classes of customers with different cost experiences in connection with his allocations of delivery expense, clerical expense, product waste, selling expense, etc.

155. This failure of classification is hard to understand in view of Havemeyer's prior experience. The one [59] prior Robinson-Patman type cost study made by him was for Bowman Dairy in the case of *U.S.* V. *Borden,* 370 U.S. 460 (1962). His study was rejected by the Court at 471:

> In the [Bowman] study the experts charged all independents and no chain store with these costs. Yet it was not shown that all independents received these services daily or even on some lesser basis. Bowman's study indicated only that a large majority of independents took these services on a daily basis. Under such circumstances the use of these cost factors across the board in calculating independent store costs is not a permissible justification for it possibly allocates costs to some independents whose mode of purchasing does not give rise to them. The burden was upon the profferer of the classification to negate this possibility and the burden has not been met here.

There can be no doubt that there are vast differences between the characteristics of the various customers on Borden's routes, differences in physical size, layout of stores, purchase volume, services received and so on. Even the A&P stores had such differences. Havemeyer's studies here merely repeat the error made in his earlier Bowman study.

156. In the O'Hare and Hammond studies Havemeyer determined costs on an average basis for A&P stores and then compared this average with specific competitors. Thus, in his delivery cost analysis in RAPX 232, he proceeded on the basis that A&P was one single customer. This was condemned, however, by the Commission in *National Dairy Products Corp.*, 70 F.T.C. 79, 193-196, 207 (1966). The Commission stated:

> The Hearing Examiner rejected respondent's cost justification defense, in part, for the reason that discounts to multi-unit purchasers must be cost justified on a store-by-store basis. We agree * * * the averaging of purchases has no relationship to the cost actually incurred in dealing with each store (at p. 194). Thus, the largest independent customer respondent has in this area received only a 6 percent discount whereas a competing chain store unit of [60] the same volume receives 12 percent, not by virtue of any savings in cost to the store but solely by reason of its membership in the chain* * *. In practice therefore respondent takes the over-cost justification in delivery to the large stores of a chain and credits this time saved to the smaller stores. In our view this is not a valid costing procedure under the Robinson-Patman Act (at pp. 194-195).

Yet this is exactly what has been done here. A&P stores in the Hammond area range from a low of only 17 plus cases per delivery to a high of 52 plus cases per delivery (RAPX 234, p. 19). Thus, although Burger's Market took more than 78 cases per delivery, the competing A&P store #325 took only 17.68 cases per delivery but this small A&P store was averaged out with larger A&P stores to hide the fact that there was such a hugh disparity in size and purchase volume. Of course, by such averaging out, the fixed costs applicable to this store's operation become much less than they would be had the true volume been known since fixed costs are usually allocated on the basis of volume.

vii. Countervailing Costs

157. Nor did Havemeyer give adequate consideration to countervailing costs — costs necessary for the A&P business but not for other business. Reference has already been made to Havemeyer's failure to consider the expense of Tarr, the Borden employee whose activities were in great measure devoted to the A&P account. But Minkler, Malone, Gose and others in Borden's Chicago office also spent a very great amount of their time in getting and keeping the A&P private label business (Minkler, Tr. 125-279; Tarr, Tr. 849-889; Gose, Tr. 1045-1063; Malone DTR pp. 29-204); some of Borden's home office personnel in New York spent considerable time on that same account (Archer, Tr. 1209-1212, 1228, 1230) but Havemeyer made no special study of these expenses (Tr. 7757-7758, 9699-9710).

158. Moreover, it was often necessary to mix A&P label and Borden label products together on a pallet to make up a full pallet for an A&P store (Pergler, Tr. 5697-5698, 5700, 5702-5704). This mixing had to be done by hand **[61]** which would involve extra effort and expense which was, however, ignored by Havemeyer who stated that the mixing of products on pallets was done equally for everyone. But Havemeyer has not personally observed this procedure (Tr. 7980), and Pergler's testimony relates primarily to the A&P deliveries.

159. There may have been additional costs for A&P stores involved in connection with clerical expense. Thus, there was a daily delivery ticket for each individual store and a summary billing sheet for a number of stores in an area (Tr. 8484-8485). This additional summarization was not considered by Havemeyer (Tr. 8478-8486, 7716-7730). In addition, Borden had to include the retail price and extend the retail value for each product on a total basis at A&P's request (RAPX 170, pp. 87-91; A&P Adm. March 12, 1973, p. 2, second par.). Despite this indication of countervailing costs Havemeyer made no study of the effect without which a true cost difference could not be ascertained (Lemberg, Tr. 9421-9422).

160. Furthermore, Havemeyer determined the clerical expense for A&P private label on the basis of the fact that private label represented 11/38's of the number of lines on a summary billing to A&P (RAPX 233, p. 11; Tr. 8478-8479). This ignores the fact that an A&P billing had 38 lines but the competitor's stores billing had at the most 27, the difference, 11, being the 11 private label items which A&P

was purchasing but not the competitor stores. Thus, it would appear that clerical costs should have been determined by comparing the number of lines on the billings required for the two different stores which would result in a higher clerical cost in this connection for A&P stores than for the competing stores. In effect, A&P's purchases involved clerical expense in connection with the billing of the private label items, an expense which was not incurred by the competing stores which did not buy any private label items.

viii. General Selling and Administrative Costs

161. Havemeyer's calculations concerning general selling and administrative expense is also questionable. He first ascertained the "overhead cost" which he had selected from Borden's central office accounts (RAPX 233, pp. 5, 6). He then took the sum total of all other functional expenses which he had allocated to O'Hare customers, divided this total into the overhead cost, arrived at a resulting percentage figure and applied the percentage figure to the [62] total costs for the other seven functions which he had calculated for the O'Hare customers. These seven branch functions, however, did not include production or transportation costs which, according to Havemeyer, totaled about $270,000 in May 1965 (RAPX 232, pp. 24, 33, 39), whereas the branch expenses in March 1966 were calculated as being about $82,000 (RAPX 233, p. 6). It is only reasonable to assume that the central office would be concerned with the totality of Borden's operation and would spend some time concerning itself with production and transportation costs but none of such costs have been considered in this connection by Havemeyer. Instead, a very substantial amount of the overhead expense is allocated on the basis of the time the driver spends at the individual store since delivery expense is allocated on this basis. Thus, Jim's Groceries was a daily cash basis customer (RAPX 233, p. 69). His monthly purchase volume would be about 10,000 points (RAPX 233, p. 31) and Havemeyer would have this customer credited with having generated about $41 in expense for the Borden home office staff in March 1966 (RAPX 233, p. 41). Yet it is hardly likely that the home office would have any contact with Jim's Groceries. Similar results would apparently be reached for other cash customers (RAPX 233, pp. 60-63, 66, 69).

ix. Credit Loss

162. Still another questionable area with respect to Havemeyer's calculations arises in his treatment of credit loss. Havemeyer estimated the amount related to the wholesale business and allocated it equally

per point among the 17 independent store purchasers on the Hammond wholesale routes. The "milk regular" account by Borden included both wholesale routes and retail home delivery routes (Tr. 8818-8819), Havemeyer allocated 12 percent of the expense to retail home delivery customers and 88 percent to wholesale customers (Tr. 8818), but admitted that if done a volume basis retail sales would account for about 25 percent (Tr. 8819). Havemeyer admits that this is a "bad account" expense record (Tr. 8826-8828; RAPX 234, p. 90) and there are substantial amounts attributed to "legal expense" and "interest overdue accounts." It would appear, therefore, that this account is primarily related to particular customers who are in arrears. With the exception of Wallies, all the independents had been extended credit for a maximum of 4 weeks (comparing the average weekly sales figure with the largest balance shown for each store). This would hardly constitute a bad account nor was it so regarded by Borden who continued to grant rebates to these stores (CX 288-289; CX 188, 191, 194-197, 200, 202). There was then [**63**] no reason to allocate that account's expenses to customers who had not contributed to such expense and if A&P was not so charged there was no reason for charging the independents, some of whom may have been as financially sound, if not more so, than A&P (CX 189, 192, 199, 203, *in camera;* CX 216-219, 221).

x. Advertising Expense

163. Still another area of doubt involves advertising expense. Four products were involved in this advertising (RAPX 90, p. 3) only one of which was involved in the Borden-A&P private label agreement (Bitting, Tr. 9334). Two of the other three products were sold only under the Borden label and the fourth item was not sold to any of the store customers in this area (Bitting, Tr. 9335). The one pertinent item represented only some $3,000 out of a total expenditure for all four of $114,000. Although Havemeyer argues that these advertisements are really advertisements of the entire line of Borden products, not just the named product, it was shown that each of the products involved was a new product which was being introduced and Havemeyer did not know what was said in any of the advertisements (Tr. 9638-9655). Without such information there is no basis for assuming that the advertisements referred to more than the four products named. Even if such advertising represented institutional advertising the expense should be applied to all sales including those of private label since it represented a general expense of doing business and expanding sales (Lemberg, Tr. 9419-9420).

xi. The Availability Argument

164. Finally, A&P contends that complaint counsel seem to argue that even if Borden's prices to A&P were cost justified, A&P does not have a defense unless it can be also shown that those prices were offered on some kind of proportional basis to others. It bases this construction of complaint counsel's arguments on complaint counsel's language to the effect that the cost difference in this case is not due to differing methods or quantities of sale or delivery, which is a requirement under Section 2a of the Robinson-Patman Act, but the difference in availability, *i.e.*, that Borden offered all stores the same type of service spelled out in the Borden-A&P private label contract, but at **[64]** a much higher price (CX 138; CX 62P-Q). Indeed, I have found that virtually the same service was offered by Borden to its non-A&P store customers (provided they had a certain volume of purchases) but at a maximum discount from list prices of not more than 30 percent compared to A&P's effective discount of more than 35 percent. A&P's logic would require competitors to accept the same service program at much less discount in order to preserve their rights under the Robinson-Patman Act, even if this meant compounding their loss or disadvantage by requiring them to incur more in-store service cost as the result of reduced service from Borden, without an adequate discount to compensate them for it. As complaint counsel view this argument

> a buyer may legally discriminate in price if he wraps up the price package in service terms and offers the same service to others at a much higher, unattractive price, which the competitors cannot accept. The difference in service terms will then justify the price difference (complaint counsel's Proposed Findings, Vol. II, p. 299).

Such an obvious flout of the Robinson-Patman Act cannot be tolerated. Non-A&P stores were offered the same service terms enjoyed by A&P but were required to pay more. There was, however, no difference in Borden's cost savings as between the A&P stores and non-A&P stores receiving the same services. It follows, therefore, that no price differences could be justified thereby. It may be argued that the non-A&P stores did not take the limited service that A&P had and that, therefore, Borden actually experienced cost savings in its dealings with A&P that it did not experience in its dealings with the non-A&P stores. But Borden's preferential discounts were not "functionally available" to the non-favored customers who had to meet certain minimum volume purchases which A&P did not (*Morton Salt Co.*, 334 U.S. 37, 42 (1948)). It appears only proper to make cost comparisons in a seller's dealings with competing purchasers where such dealings are comparable and functionally available. The Act recognizes the need for like grade and quality of items sold. Certainly the same conditions of sale must exist before cost comparisons can be made. With the same conditions of sale offered all purchasers, no differences in costs could arise. A&P's inducement of a preferential price under such circumstances would violate the Act, particularly where, as here, the buyer knows that the price its competitors are obliged to pay for their purchases is one which it, the buyer, refused to pay and succeeded in forcing the seller to reduce to that preferential level. **[65]**

xii. Conclusion

165. I conclude, therefore, that A&P's cost justification studies, RAPX 232, 233 and 234, are so defective and inadequate as to furnish no evidentiary basis for justifying A&P's preferential price for private basis for justifying A&P's preferential price for private label items on the basis of Borden's savings in costs.

VI. *The "Borden Defense"*

166. A&P argues that since Borden "admittedly" has a defense to a Section 2(a) charge by reason of meeting competition, and complaint counsel have not charged it with a violation, A&P cannot be guilty of violating Section 2(f). It should be noted, however, that Borden has not been adjudged to have a defense to a Section 2(a) charge by reason of meeting competition. Borden simply has not been charged by the Commission which has such discretion in issuing complaints. It cannot be said with certainty that, had Borden been charged with a 2(a) violation, it would have been able to defend such a charge successfully. It has been held that a seller cannot accept a buyer's story (such as one about a competitive offer) without more (*National Dairy* v. *FTC*, 395 F.2d 517, 528, (1968) where the court distinguished decisions in *Forster Manufacturing Co.* v. *FTC*, 335 F.2d 47, 54 (1964), *Beatrice Food Co., Inc.*, 68 F.T.C. 286, 350 (1965) and *Continental Baking Co.*, 63 F.T.C. 2071, 2164 (1963) in which efforts to verify were found). But even had Borden been able to defend such a charge successfully, the result would nevertheless be insufficient to exonerate A&P under the circumstances. Thus, in the *Kroger* case the supplier, Beatrice, was found to have not violated 2(a) of the Act. Nevertheless, Kroger, the buyer, was found to have violated 2(f) of the Act:

> Kroger [contends] that as a matter of law the discharge of Beatrice requires the acquittal of Kroger because there cannot be a violation of Section 2(f) without there being one under Section 2(a). While ordinarily this may be true — a matter we need not pass upon — it is not true under the peculiar circumstances here,

> where Kroger was found by the Commission to have given "false price information" to Beatrice as to Broughton's competing bid (438 F.2d at 1374).

[66] Here, too, A&P gave false price information to Borden as to Bowman's competing bid. Although A&P argues that Kroger actively misrepresented the other bid but that A&P had a lower bid from Bowman, the fact remains that A&P represented Borden that it had a bid which could be compared to Borden when, as a matter of fact, it did not, in view of the volume conditions and delivery conditions. Even if those differences could be ignored and the two bids compared, A&P represented to Borden that Bowman's bid was lower than Borden's when, as a matter of fact, A&P itself understood Bowman's bid to be higher than Borden's.

VII. *Commerce and By-Products*

167. A&P cites the provisions of the Robinson-Patman Act which make it 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 with such discrimination are in commerce * * *.

It is not sufficient that the parties be engaged in commerce, the purchases involved in such discrimination must be in commerce. A&P's purchases from Borden were under a contract which covered sales and deliveries not only to its stores in Illinois where Borden's Woodstock plant was located but sales and deliveries to its stores in Indiana and elsewhere as well. It was not severable. The contract, therefore, covered purchases in commerce because it was multi-State in nature.

168. Moreover, Borden's supply of raw milk came from outside the State of Illinois and its processing into milk products did not interrupt the interstate flow of milk from farm to retailer. *Foremost Dairies, Inc.* 62 F.T.C. 1344 (1963) *aff'd.* 348 F.2d 674 (5th Cir.), *cert. denied,* 382 U.S. 959 (1965); *Dean Milk Co.* 68 F.T.C. 710 (1965), *aff'd.* 395 F.2d 696 (7th Cir. 1968).

169. A&P argues that certain of the milk products were so processed as to make them separate and distinct commodities, thus breaking the interstate flow. It refers to products such as whipped cream, sour cream, eggnog, and onion dip, which allegedly were so physically, [67] biologically and chemically different from raw milk that the interstate flow of commerce was terminated at Borden's processing plant in Illinois. Nevertheless, those products were a relatively insignificant part of the contract entered into which was not severable. Whole milk constituted the great bulk of the sales under the

contract and did not interrupt the interstate flow from the raw milk supply to the retailer. There is no basis for splitting the contract where the parties have not done so. To allow these insignificant products to control the legality of private label purchases under such an indivisible contract would have the tail wag the dog.

C. COUNT III

170. Count III of the complaint alleges that A&P sold private label milk and other dairy products at the prevailing retail price level for vendor label milk and dairy products in spite of A&P's lower cost for the private label milk, thus maintaining the existing retail prices for milk and other dairy products. Borden for its part failed to pass on at the wholesale level price reductions similar to the reductions granted to A&P to other purchasers who compete with A&P. Respondents' course of conduct, it is alleged, constitutes a combination between respondents which had the tendency or effect of stabilizing and maintaining prices for milk and other dairy products in violation of Section 5 of the Federal Trade Commission Act.

171. The area involved for purposes of proof of this Count is the Chicago Standard Consolidated Area (SCA) consisting of the counties of Cooke, DuPage, Kane, Lake, McHenry and Will in the State of Illinois and the counties of Lake and Porter in Indiana.

172. A&P ranked third in total sales among the retail grocery chains operating in the Chicago area, its sales in 1965 amounting to 203 million dollars (CX 222A). It was a significant factor in the market and its competitors were careful to monitor A&P's prices (Lasorso, Tr. 2646; Cox, Tr. 3947-3948, 3986; Barney, Tr. 3686; Minard, Tr. 3147, 3152, 3153). Had A&P created a price differential on its private label milk, Scott Lad (a competing grocery) would have had to meet the lower price (Schaub, Tr. 3330).

173. Borden ranked either second or third in Class I milk sales among the dairy companies operating in the Chicago area. It was an important market factor (Holin, Tr. 2965-2966, 2982-2987; Soldwedel, Tr. 3373-3374; Hitchner, Tr. 3596). Prior to the private label agreement Borden [68] was A&P's principal milk supplier for its Chicago unit and provided approximately 95 percent of A&P's milk supplies (Schmidt, Tr. 1678).

174. A&P and Borden competed with one another in the sale of milk and milk products at retail but the record in this proceeding does not establish clearly the dates of such retail deliveries by Borden nor the extent. Witnesses referred to Borden's retail sales as having lessened and ceased somewhere between 1963 and 1968. Thus, Borden's Gose testified that Borden had "some" retail routes when he left

Borden's employ in 1968, but he added "I don't remember exactly, but we had considerably less* * *." (Tr. 1041). Later, however, Gose said that retail home deliveries were phased out "somewhere" between 1963 and 1968 (Tr. 1113). The President of Wanzer Dairy testified that Borden "could have had 21 or 22 routes* * *which means nothing in retail" (Soldwedel, Tr. 3406). The record does not establish with any degree of certainty that meaningful horizontal competition between A&P and Borden at the retail level existed at the time critical to this proceeding, 1965-1968.

175. Borden competed indirectly with A&P at retail by selling at wholesale its Borden brand milk to non-A&P stores competing with A&P at retail (Kuhlman, Tr. 5273). If A&P were to reduce its retail price competing retailers might be forced to lower their price of the Borden label products and seek cost reductions from Borden.

176. A&P had strong motivation to stabilize and maintain prices on milk and milk products. As noted earlier, as the result of its private label agreement with Borden there was an expectation on the part of A&P to realize an estimated annual saving of approximately 820 thousand dollars. This saving could be realized only if A&P's profit margin was protected by the maintenance of the retail price (Kuhlman, Tr. 5230). A reduction of A&P's retail price would necessarily lower its net savings unless Borden reduced its price to A&P even further. This A&P could not expect. It had no better competitive bids and there was always the realization that there was some point beyond which Borden could not possibly recede despite its need for volume. A&P was also anxious that Borden not grant others the same lower price A&P enjoyed since if this were done, the A&P competitor might lower his retail out-of-store price and A&P might have been obliged to meet such lower price by reducing its retail price, thus losing some of the expected savings.

[69] 177. Borden similarly had strong motivation to maintain milk prices. Its newly completed processing plant at Woodstock, Illinois, had a very large capacity and A&P's Chicago Metropolitan Region alone accounted for over 55 percent of Borden's wholesale sales volume (CX 42D). If Borden was to maintain an efficient level of production at Woodstock it had to retain the A&P business (Minkler, Tr. 217; Kuhlman, Tr. 5230). A break in milk prices if A&P would reduce its out-of-store private label prices would harm Borden seriously:

> We have said all this before many times, but, we do hope A&P will price this private label and the advertised brand label the same, certainly to begin with. If private label out-of-store is dropped to reflect this 1¢ per point, this market will rock immediately, we think. We believe such a move on their part would destroy the present price level for advertised brands and would add explosive fuel to a war over the differential question.

We know some competitors will be strongly opposed to a difference in price for a private label. One big decision we have to make has to do with how low we will go to force acceptance of a differential. We folded up in Wisconsin because of a "no sales below cost" stipulation in the Wisconsin Law. We have no such "out" in Illinois.

This is not exclusively a matter in our interest. We believe retailer's margins would eventually get caught in whatever upheaval takes place. With such a move on A&P's part — instead of an improvement in their overall margin, one point I am making is that their dairy department spread could collapse. If that should happen, they will not have gained anything by bringing in private label and, certainly, we will have been knocked to our knees. (CX 7B)

[70] 178. In the Wisconsin situation referred to above, Borden was supplying milk to the Kroger stores both under the Borden brand and two secondary labels but at a lower price to Kroger for the milk products under the secondary labels. Kroger then lowered the retail price on these secondary labels which resulted in a chain reaction of price breaks in the prices of other dairies and chains forcing Borden to lower both its wholesale and retail prices on Borden label (Soberg, Tr. 2753-2756, 2759). A&P was also involved in this price war (Soberg, Tr. 2764-2765).

I. *Complaint Counsel's Contentions*

179. Complaint counsel contend that to stabilize and maintain the price of milk in Chicago

> all that was necessary in light of the market structure was for each party to agree or to arrange to assure the other that neither would do anything which would tend to disrupt the Chicago market or any milk prices therein. The agreement and/or arrangement of mutual assurances were comprised of and/or were supported by, *inter alia*, respondents' communications with one another, their exchanges of information, and their market knowledge and market conduct. (Complaint Counsel's Proposed Findings, Vol. I, p. 225).

180. With respect to respondents' communications with one another, complaint counsel cite record evidence indicating some discussion of market sensitivity between them. Thus, on February 9, 1965, Borden's Minkler wrote to Borden's Pentz about a conversation between A&P's Schmidt and Borden's Tarr:

> [W]hen Schmidt talked to Tarr yesterday he made it very plain that we had to be right. He said he very much appreciated the sensitiveness of this market and that he did not want to put this private label out for bids (CX 12).

Nor did Borden want this business put out for bids. As noted earlier in Minkler's internal letter (CX 7A, B) Borden was concerned about a "market upheaval" as result of private label bids and believed that "retailers' margins would eventually get caught in whatever upheaval takes place* * *their dairy department spread could collapse* * *we will be knocked to our knees."

[71] 181. Complaint counsel also cite the meeting between A&P and Borden officials on or about May 26, 1965. Schmidt expressed a hope that the private label program might be productive of 500 thousand dollars annually. CX 19F states:

> In this regard, it was stressed that this type of product contribution could only result from the continuance of present out-of-store margins on fluid milk products

and referred to the Wisconsin price war. Complaint counsel contend that this comment, taken together with the discussion which took place concerning Borden's narrow profit margins, "was clear warning that A&P should not reduce the retail price on private label milk" (Complaint Counsel's Proposed Findings, Vol. I, p. 227). It should be noted, however, that CX 19F does not indicate whether it was Borden or A&P which "stressed" the continuation of present margins.

182. Complaint counsel also cite the language of Borden in its price quotation to A&P in May 1965 (CX 18P). In it Borden says:

> In certain areas the primary basic price has recognized the depressed competitive situation prevailing in such markets. Such situations must eventually be corrected. It is considered that any economic improvement that occurs subsequently will be mutually recognized in accordance with the situations.

Complaint counsel's economic expert, Dr. Kuhlman, contends that the parties were discussing prices in the retail market (Kuhlman, Tr. 5232-5233, 5308-5309). According to Dr. Kuhlman:

> This constitutes in my mind a very clear and very explicit correspondence regarding the price of milk, and the fact that one of these companies is a supplier of milk to the other one can in no way be used to explain that this is not price fixing (Tr. 5233).

183. Complaint counsel also argue that Borden's right to terminate the private label agreement at any time helped [72] insure that A&P would not choose to alienate Borden as its supplier by reducing the retail price (Kuhlman, Tr. 5234).

184. Complaint counsel also cite the fact that the 820 thousand dollar annual saving offered by Borden to A&P under the private label agreement was not made on any straight discount basis but spread across eleven different product lines and argue that Borden influenced A&P's retail price because Borden determined how much of the savings A&P should realize on any individual product (Kuhlman, Tr. 5233-5234).

185. Complaint counsel also argue that A&P must have known that Borden was not prepared to give the same deal to competitors of A&P

inasmuch as it had a constant flow of information regarding Borden's costs in connection with the private label pricing (Kuhlman, Tr. 5231). Similarly Borden knew about A&P's retail prices since A&P generally supplied Borden with its retail prices (A&P Adm. dated March 12, 1973, II D, p. 2).

186. Complaint counsel also cite the fact that when the private label program began and thereafter, A&P sold private label milk and dairy products at the prevailing retail price level for vendor label milk and dairy products. Similarly, Borden failed to pass on at the wholesale level price reductions similar to the reductions granted A&P to other purchasers who compete with A&P in the Chicago area, at least for two or three years after the commencement of the private label agreement with A&P (Gose, Tr. 1095-1099).

187. Finally, complaint counsel cite the testimony of Dr. Kuhlman, its expert economic witness, who found a combination between the respondents to stabilize the price of milk (Kuhlman, Tr. 5229-5235). The evidence consisted of "mutual assurances," their post-contract behavior, their spreading of the savings across eleven different product lines and the fact that the agreement was terminable at will.

II. *Respondents' Reply*

188. It appears, however, that Borden's failure to offer the private label prices it granted to A&P to other customers immediately was because its Chicago sales manager, Gose, was instructed by Borden's law department that Borden could not make such offers to others and still rely on the meeting competition defense of the Robinson-Patman Act (Gose, Tr. 1076). Later, however, when it appeared that [73] Borden's competitors were selling at prices comparable to its private label prices to A&P, Borden solicited business at such prices (Dischner, Tr. 7165).

189. Respondents also cite the fact that John White was sales manager of A&P's Chicago unit at the time and that it was he who established the out-of-store prices without consultation with Schmidt, Bartels or Smith, whose authority was limited to purchasing the products. White did not know of the Wisconsin experience nor had he had discussions with Minkler, Tarr or Malone and was not involved in the private label negotiations (White, Tr. 2058-2063).

190. With respect to the internal Borden letter of December 28, 1964 (CX 7), Borden notes that Minkler spoke of the effect of an out-of-store differential between private and brand labels but notes that it neither called for nor requested any action and that neither the letter nor its contents were disclosed to A&P.

191. With respect to the "sensitivity of the market" which was

brought up during the February 1965 meeting between Tarr and Schmidt, Borden argues that it reflected Tarr's fear that competitors might disregard overhead costs in bidding for A&P's business (Tarr, Tr. 872). Minkler also mentioned this to A&P's Bartels later (Minkler, Tr. 213-214).

192. With respect to the notation in Borden's May 1965 price quotation to the effect that "the primary basic price has recognized the depressed competitive situation prevailing" and "any economic improvement that occurs subsequently will be mutually recognized", Borden contends that this does not refer to prices in the retail market but to the fact that in some areas the prices bid by Borden were not based on Borden's costs due to competitive wholesale situations then existing and would have to be adjusted later to a cost basis. Even if the so-called depressed competitive situation referred to prices in the retail market the critical question is whether the "mutual recognition" to be given to any economic improvement thereafter does not necessarily refer to A&P's out-of-store prices but to acceptance of a higher price from Borden by A&P based upon cost rather than competitive situations. In any event, Schmidt told Tarr thereafter that A&P did not want the depressed market in the outside areas to be given special consideration in the bids but that all prices should be based on costs (RAPX 132A-C).

[74] 193. With reference to the May 26, 1965 meeting between A&P and Borden officials where A&P expressed its hope for a saving in the amount of 500 thousand dollars using the private label agreement and it was stressed that that amount could result only from the continuance of present out-of-store margins on fluid milk products (CX 19F), Borden rejects complaint counsel's interpretation of this language as a "clear warning" that A&P should not reduce its retail price. Borden's Malone testified that the statement was made to disabuse A&P of any possible belief that Borden would guarantee those savings and support A&P in a price war (Malone DTR pp.217-218). See also Smith's testimony on rejecting Borden's July bid:

> [W]e didn't have any protection in case of a price war. If a price war broke out and we had to meet competitive retails for some period of time, that would be our expense instead of Borden's expense (Tr. 1361).

194. With respect to the spread of the savings over 11 different private label items, Borden notes that each item was ordered separately on a demand basis and that a single price for one year's purchases of all 11 items could not therefore be quoted.

195. Borden also disputes complaint counsel's conclusions on the terminable-at-will provisions of the private label agreement, arguing

that such contracts are pro-competitive. It notes that the National Stores shifted from Dean Dairy to Hawthorn-Mellody, A&P from Bowman to Borden, Jewel from Borden to Dean, Hillman from Capitol to Wanzer, Wieboldt from Bowman to Wanzer, K-Mart from Beatrice to Borden and Eagle to Borden (Schaub, Tr. 3109; Soldwedel, Tr. 3392; Dischner, Tr. 7170-7175; Douglas, Tr. 3508-3510; Schmidt, Tr. 1765-1766; Gose, Tr. 1102). It also cites Borden's attempt to secure Kroger's milk business in 1965, 1966 and 1968 as well as its proposal to supply Consolidated Food, K-Mart, White Hen, National and Eagle (Gose, Tr. 1089-1102, 1131, 1170; Malone DTR p. 224-226; Markham, Tr. 7041). Moreover, Borden notes the inconsistency in complaint counsel's argument that Borden was dependent on A&P's business for the efficient operation of its Woodstock plant and Borden's situation was so precarious that it was compelled to grant whatever concessions A&P demanded, while at the same time complaint counsel argue that Borden was independent enough to use the terminable-at-will provisions of the contract with A&P to terminate the contract immediately if A&P lowered its retail price on private label milk. [75]

III. *Conclusion*

196. It is well settled that all combinations having any tendency or effect to tamper with price structure are unlawful. *U.S.* v. *Container Corp.*, 393 U.S. 333 (1969); *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); *U.S.* v. *Parke-Davis & Co.*, 363 U.S. 29 (1960). The essence of a combination is the existence of concerted action between the parties, *U.S.* v. *Container Corp.*, *supra*. The test is not so much the manner in which the parties combine as that there be a "collaborative element present" *Pearl Brewing Co.* v. *Anheuser-Busch, Inc.*, 339 F.Supp. 945, 951 (S.D. Texas 1972).

197. Complaint counsel cite the decision in *Sunny Hill Farms Dairy Co.* v. *Kraftco Corp.* 381 F.Supp. 845 (E.D. Mo. 1974), arguing that the facts there were remarkably similar to this situation. Complaint counsel argue that *Sunny Hill* was a case in which the supplier, Sealtest, was asked to provide the buyer, Malone & Hyde, with private label milk at a lower cost than Sealtest sold its own brand label to it. Subsequently Sealtest and Malone & Hyde engaged in discussions concerning price wars, depressed markets and limited retail price differentials; the court found an agreement between the defendants to fix prices at both the vertical and horizontal levels. Complaint counsel cite the testimony of one of the witnesses to the effect that Sealtest advised the buyer to guard against getting into a price war by lowering the price of milk. They also cite testimony in the *Sunny Hill* case to the effect that there was conversation between the

defendants about the out-of-store price. Counsel for A&P, however, point out that by order dated July 19, 1974, the judge in the *Sunny Hill* case withdrew and vacated his memorandum and dismissed the complaint. Nevertheless, complaint counsel urge the logic of that decision. A&P points out, however, that in *Sunny Hill* the court found that the defendants were independent and *competing* suppliers of milk to certain grocery stores which followed the recommendations of Malone & Hyde. Thus, Malone & Hyde had certain limited control over the marketing programs of such stores. The court then found that the "record is replete with evidence indicating that Sealtest and Malone & Hyde *agreed* upon the into-store prices of their competitive products" and found illegal horizontal price fixing in such agreement *between competing milk suppliers*, Sealtest and Malone & Hyde. As respects the fixing of out-of-store prices, [76] the court found that Section 1 of the Sherman Act was violated by a "*commitment* to a common scheme or to some type of joint action * * * stated in another fashion the quintessential yardstick for conduct deemed violative Section 1 is whether or not there is a collaborative element present." The court added:

> An agreement to fix the maximum resale price is also proscribed because "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." * * * the eclectic criteria that can be gleaned from these cases for the ascertainment of a violation is whether the agreement or conduct interferes with the freedom of sellers or traders in such a manner as to *prohibit or restrain their ability to sell in accordance with their own judgment*, and not what particular effect the agreement or conduct has on the actual prices (Emphasis added). The court then noted that Malone & Hyde sought a price differential in the two different labels of milk whereas Sealtest was desirous that the two labels be priced the same. The parties, however, finally agreed to a price differential. Thereafter, the court found that there was the necessary implementation to effectuate actual retail price maintenance by Malone & Hyde's control over its affiliates saying "there is direct evidence that *Malone & Hyde dictated the out-of-store price* to its affiliates." The court found in *Sunny Hill* that there was "more than a mere non-biding resale price recommendation but a subtle mode of dictating resale price."

198. Thus, aside from the fact that the judge in *Sunny Hill* withdrew his memorandum and vacated it, the logic of his earlier position is apparently inapplicable here. Unlike *Sunny Hill*, there was no express or explicit agreement between A&P and Borden concerning A&P's price differential for private label milk. The agreement, instead, was limited to the Borden price to A&P for such private [77] label milk and the differential in such cost compared to the Borden label cost to A&P. Although there was some discussion of price both in this case as well as in *Sunny Hill*, there is no reason to assume that the court in *Sunny Hill* would have reached the same conclusion absent a finding

of an express agreement between the parties concerning a price differential on resale.

199. Here Borden as well as A&P had the same objectives in mind: The maintenance of the Borden label level of prices for the private label products. For Borden this was preferable because it avoided the likelihood of a price war in which retailers would seek financial help from Borden, their supplier. For A&P this was also preferable because it maximized their profits on dairy items by lowering the costs of some of them. Under such circumstances had the parties then agreed to the maintenance of such level of prices there would of course, have been a violation of law. There is, however, no evidence in this record which would suggest that Borden ever spoke to A&P about A&P's resale prices on private label items except to note that a differential might create problems. A&P never gave Borden any assurances that it would not create such a differential. The "mutual assurances" on which complaint counsel rests Count III of the complaint are not found in this record. It must be borne in mind that A&P approached Borden about private label milk in an effort to maximize its profits in dairy products by securing the private label at a lower cost. It was only natural, therefore, for A&P as well as for Borden to note the mathematical fact that if A&P lowered its price on private label milk it would not realize the increase in profit that it sought since the demand was inelastic and lowering the price would not increase sales (Markham, Tr. 7038). This realization constitutes no assurance from either party. Similarly, it was an open secret that Borden needed the A&P business or something its equivalent for the efficient operation of its new Woodstock plant. Consequently Borden would go to great lengths to avoid losing such a customer including a reduction in price to a level it felt its competitors might offer in an effort to lure the A&P business away from Borden, that is, to a level which barely covered, if at all, the mere direct costs. Borden's failure to offer similar savings to other chain stores immediately thereafter has been explained and there appears nothing unreasonable in this point of view. In short, [78] the behavior of the respondents in pricing the private label items was the behavior that one would expect of any rational businessman independently pursuing only his self-interest in markets such as those found in this case. The circumstantial evidence of agreement is equally consistent with a finding of independent action.

To sustain a finding of fact the circumstances proven must lead to the conclusion with reasonable certainty and must be of such probative force as to create the basis for a legal inference and not mere suspicion. Circumstantial evidence, even in a civil case, is not sufficient to establish a conclusion where the circumstances are merely consistent with such conclusion or where they give equal support to inconsistent conclusions (*Pevely Dairy Co.* v. *United States,* 178 F.2d 393 (9th Cir. 1949), *cert. denied,* 339 U.S. 942 (1950).

See also *Virginia-Carolina Peanut Association,* 51 F.T.C. 1156, 1188 (1955).

200. A&P's failure to pass on to the consumer its savings on private label milk are not necessarily indicative of any collusion. As complaint counsel's witness Kuhlman put it:

> The non-collusive oligopolist in an industry having a relatively inelastic demand will be unlikely to pass the benefits of cost reduction programs on to the consumer (Kuhlman, Tr. 5312).

201. I conclude, therefore, that complaint counsel have not met their burden of proof to show that the respondents herein have combined to effect a stabilization and maintenance of prices for milk and other dairy products in violation of Section 5 of the Federal Trade Commission Act.

D. THE DENIAL OF DUE PROCESS

I. *A&P's Contentions*

202. A&P contends that it has been denied procedural due process in the presentation of its defenses and in its ability to cross-examine complaint counsel's witnesses due [79] to the loss of witnesses and documentary evidence that would have been available but for the Commission's delay in issuing the complaint. The Commission ruled on January 19, 1973 [82 F.T.C. 213 at 216]:

> * * *the time taken to conduct the investigation leading to the issuance of the complaint herein is neither atypical nor inordinate, particularly in view of the complexity of the investigation and the limited manpower available to the Commission for conducting investigations in connection with its varied and broad statutory responsibilities. Moreover, it seems clear from the pleadings and affidavits before us that respondents were timely alerted to the fact that the Commission was interested in the private label arrangement between them in the Chicago trading area from the standpoint of possible violations of the amended Clayton Act and Section 5 of the Federal Trade Commission Act. And there is no indication that either A&P or Borden was ever advised that the Commission had abandoned its investigation. On the contrary, the papers before us clearly indicate that attempts to pursue and complete the investigation were made by Commission's staff on a continuing and regular basis during the period March 1967-December 1969.* * *

The Commission went on, however, to note that

> * * *the question of alleged unfair prejudice to A&P by possible denial of adequate opportunity to defend is one which cannot be answered now, but only at the conclusion of hearings.

a. The Unavailability of Documents

203. A&P contends that its defense in this case was hampered because its subpoenas proved unfruitful and that the lack of response thereto was occasioned by loss or destruction of documents due to the passage of time. In this connection, it offered RAPX 135 and 136, being summaries of the subpoenas directed to retail stores and dairies, respectively. In these exhibits there are repeated references by the deponents of the subpoenas involved that "no documents are available" in response to [80] certain specifications of the subpoenas. It does not appear, however, that the unavailability of the documents was necessarily due to the passage of time. Thus, at page 7283 of the transcript Mr. Dembrow, an attorney for A&P, was asked why documents not produced were "not available." The following testimony then took place:

THE WITNESS: No, I would have no other information as to why they did not supply us with the documents. All I know is we never received any documents that were responsive in whole or in part to the specifications in question.

JUDGE HINKES: And that we are not to assume from that type of a response that the documents ever existed or were destroyed earlier or were simply not found by the Respondents or any other reason for their non-response?

THE WITNESS: Well, I think in general, Your Honor, that is correct* * *.

* * * * * * *

JUDGE HINKES: All I am saying is do we have any evidence—I don't want the assumptions now. Does this document contain reasons for the non-response in evidence?

THE WITNESS: No, the reason for non-response is not indicated except in those few instances where I think Complaint counsel pointed to one that was not in the Chicago metropolitan area. Something like that or one that was not selling to wholesale stores.

JUDGE HINKES: I am only speaking now of the responses where nothing was said except "No documents available" and was signed by the dairy.

[81] THE WITNESS: That simply means that we physically * * *by "we" I mean the respondents— cannot receive documents or information in letter form that pertained to specific items in our subpoenas.

JUDGE HINKES: And this exhibit contains no explanation for that failure, is that correct?

THE WITNESS: That would be correct, Your Honor.

204. In many instances the records sought were never kept or, if kept, were only so maintained for a brief period of time and then discarded. See, for example, the affidavit of Bruce Spear, an attorney for A&P, constituting an attachment to A&P's motion of October 13, 1972, to dismiss the complaint. In it, Mr. Spear relates his interviews with certain retail store operators. Some of them spoke of discarding records after maintaining them for only two to six months. Others discarded records after their replacement by more current schedules.

216-969 O-LT - 77 - 66

Still others discarded them after completion of the tax audit. Another said that he doubted that records were kept other than on a current basis.

205. It is thus clear that even had the complaint been issued within a reasonably short period of time following the commencement of the investigation such records would have been unavailable even then and their unavailability to A&P when the complaint was issued years later cannot be the result of the passage of such time.

b. The Unavailability of Witnesses

206. A&P also contends that as a result of the delay by the Commission in instituting this proceeding the testimony of certain individuals who died in the interim became unavailable. Thus, Joseph Malone, Borden's vice president, regulatory controls, and formerly comptroller, died prior to the start of hearings in this matter. His deposition, however, had been taken by complaint counsel and it was received in evidence (CX 262). A&P contends, however, that it had not yet begun its program of discovery when the deposition was taken nor had it begun its cost study of the private label [82] prices received by A&P. Consequently, "detailed probing examination of Malone which was essential to the proper resolution of the various issues surrounding Borden's cost of serving A&P and the cost of serving its non-A&P customers* * *was not possible."

207. Complaint counsel filed their application for taking the deposition of Mr. Malone on November 4, 1971. Said application was granted by the administrative law judge by order dated November 8, 1971, in which the judge noted:

> The application states the complaint to involve a private label milk arrangement between respondents A&P and Borden beginning in 1965 and continuing to date. The negotiations giving rise to the agreement are stated to extend back to 1964 with the three principal negotiators for Borden during 1964 and 1965 to be now retired from said company. * * * The three negotiators are described as now being elderly and their testimony to be of importance to proof of the charges of the complaint. [One of the three negotiators was identified as Joseph Malone.]

The order went on to describe the nature of the expected testimony in considerable detail, specifically referring to "Borden's relationships and dealings with A&P and competing retail grocery purchasers in the Chicago area* * * . The witnesses' own roles in the dealings with A&P concerning the Chicago area private label arrangement* * *the pricing and sales practices of Borden in connection with its sales to A&P and competing purchasers in the Chicago area, etc." Pursuant to said order Malone first took the stand on December 3, 1971. Counsel for each of the parties attended said appearance but due to a dispute regarding Malone's request for immunity his testimony was then postponed until February 9, 1972. At that time Malone was examined by complaint counsel and cross-examined by counsel for both Borden and A&P.

208. Considering that A&P was on notice of Malone's testimony as early as November 8, 1971, attended Malone's first appearance on December 3, 1971, as well as his actual testimony on February 9 and 10, 1972, at which time it participated in the examination of the witness; considering [83] also that A&P under the Commission's Rules was also entitled to take the deposition of Mr. Malone at any time either for discovery purposes or to preserve evidence but failed to do so; and considering also that A&P was able to use Mr. Daube who worked for Borden in the Chicago central district from 1958 until 1966 as chief accountant and assistant district controller and then became assistant to the district controller when the Chicago central district was merged with the midwest district in Columbus, Ohio (Daube, Tr. 5864-5870), I conclude that A&P's failure to examine Mr. Malone prior to his death is attributable to its neglect or failure to take advantage of the opportunities and rights it had as a party to this proceeding and in any event, was not prevented by any delay in the institution of this proceeding.

209. A&P also claims prejudice to its case resulting from the unavailability of David Parmalee, Bowman's senior cost accountant, who died prior to the start of hearings. It appears, however, that A&P interviewed Mr. Parmalee after the complaint was filed and it is only reasonable to assume that if Mr. Parmalee's testimony would be helpful, A&P would have followed complaint counsel's example with Mr. Malone and taken his deposition as well (affidavit of Denis McInerney, October 13, 1972, page 13). Moreover, A&P admits that Parmalee's testimony would have merely supplemented Cannon's testimony who did appear and testify (A&P Proposed Findings, Volume 1, p. 508). Here, too, therefore, A&P's failure to have Parmalee's testimony is due to its own oversight rather than any delay in the institution of this proceeding.

210. A&P also cites the unavailability of the testimony of L. Edward Hart, an attorney who worked very closely with Bowman's management in connection with a court order prohibiting discriminatory prices by Bowman. Mr. Hart died prior to the start of the hearings but it is doubtful that his testimony would be received in evidence inasmuch as a claim of privilege in connection with his work as an attorney for Bowman could be expected. Moreover, the testimony of Mr. Hart, like that of Mr. Parmalee, would have been only supplemen-

tary to that of Mr. Cannon who did testify (A&P Proposed Findings, Vol. 1, p. 508).

211. A&P notes that testimony of two other witnesses was unavailable due to their deaths prior to the start of hearings. One of these was Walter Roney, Chief Executive Officer for High-Low Foods. His death, however, occurred in 1969 (A&P Proposed Findings, Vol. 1, p. 501). The [84] unavailability of his testimony, therefore, can hardly be attributed to any unreasonable delay in the institution of this proceeding. The other witness referred to by A&P is Fred Nonnamaker, a former Bowman Company employee who died prior to the filing of the complaint. It was his death that prompted complaint counsel to seek the depositions of Messrs. Malone, Minkler and Tarr on November 4, 1971. Presumably, complaint counsel was seeking testimony which could be used against A&P and this could explain A&P's failure to seek Nonnamaker's deposition any earlier. In any event, his unavailability is a loss to all of the parties in this proceeding. A&P has failed to demonstrate any particular prejudice to it as a result of his death prior to the start of hearings.

212. The record in this proceeding makes it clear that both A&P and Borden were aware, even before service began under their contract, that their private label arrangement would probably result in litigation (Smith, Tr. 1429). Certainly, the Commission's investigation of this case was brought to the attention of Borden and A&P as early as February 1967 when an attorney-examiner for the Commission contacted both respondents requesting certain data and supporting interviews with company personnel concerning the private label agreement between the respondent and possible violations of the Clayton Act and the Federal Trade Commission Act. All of this has already been called to the attention of the Commission in connection with A&P's motion to dismiss the complaint filed on October 13, 1972, and complaint counsel's answer thereto filed on October 20, 1972. If, indeed, A&P failed to prepare itself for its defense to the complaint that was issued later, its failure must be deemed the result of its own oversight and neglect, having been repeatedly put on notice and having obviously realized even before the commencement of the private label agreement that some litigation was likely in connection therewith. The Commission took steps to prepare for such litigation although it, too, experienced the loss of some witnesses and data. For example, potential witness Nonnamaker died before his deposition could be taken. He had testified in the Dean-Bowman case, Dkt. 8674 to the effect that Bowman's relationship with A&P was such that it could not expect to obtain any A&P business under any circumstances (Dkt. 8674, Tr. 2207-2208). ("Bowman couldn't get [the A&P account]

if the Lord Himself were their solicitor"). Such testimony in this proceeding would have demonstrated that the Bowman offer to A&P was a sham and could not be used legitimately by A&P for a meeting competition defense.

[85] 213. I conclude, therefore, that there has not been an unjustifiable delay in the filing of the complaint considering the difficulty the Commission experienced in marshalling its evidence from the respondents. As the Commission noted in its order of January 19, 1973 [supra],

> * * * the time taken to conduct the investigation leading to the issuance of the complaint herein is neither atypical nor inordinate, particularly in view of the complexity of the investigation and the limited manpower available to the Commission.

In addition, any prejudice experienced by the respondents herein by the passage of time between the commencement of the investigation and the issuance of the complaint herein, appears to be minimal and the result of the respondents' indifference to the likelihood of litigation resulting from their private label agreement which they themselves anticipated and which was brought to their attention by the activities of the Commission as early as February 1967.

Conclusions of Law

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents The Great Atlantic & Pacific Tea Company, Inc., (hereinafter A&P) and Borden, Inc. (hereinafter Borden).

2. The complaint herein states a cause of action and this proceeding is in the public interest.

3. Respondent A&P in the course and conduct of its business in commerce has acted unfairly and deceptively in purchasing milk and dairy products from Borden in that it accepted a price offer from Borden tendered on a meeting competition basis when in fact such meeting competition defense was not available and without informing Borden of this fact in violation of the policy of Section 2 of the amended Clayton Act and in violation of Section 5 of the Federal Trade Commission Act.

4. Respondent A&P in the course and conduct of its business in commerce has knowingly induced or received a discrimination in price in the purchase of fluid milk and other dairy products in violation of subsection (f) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

[86] 5. Complaint counsel have not satisfied their burden of proof to

show that respondents A&P and Borden in the course and conduct of their business in commerce entered into a combination which had a tendency or effect of stabilizing and maintaining prices for milk and other dairy products in violation of Section 5 of the Federal Trade Commission Act.

The Remedy

As a result of the failure of proof in connection with Count III of the complaint, a dismissal of said Count will be ordered.

As respects Count I of the complaint, complaint counsel propose that A&P be directed to inform prospective suppliers who submit prices on a meeting competition basis if the price offered beats existing competitive offers. It is contended that such requirement does no more than obligate A&P to comply with its statutory duties. The order proposed, however, would cover not only milk and other dairy products but any product. Moreover, if A&P informs a supplier that a competitive offer has been made to A&P and a supplier makes an offer based on the meeting of the competitive offer, A&P would be required under the proposed order to notify the supplier that the price being offered is below the existing competitive offer to A&P if such be the case.

With respect to Count II of the complaint, complaint counsel's proposed order would direct A&P not to violate Section 2(f) of the Robinson-Patman Act again in any product line rather than merely in milk and other dairy products. Moreover, the proposed order would prohibit A&P's inducement, receipt or/and acceptance of a net price which it 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 purchasers competing with A&P unless A&P *shows* that it knew or had reason to believe that the price difference in its favor was cost justified on the basis of differing methods or quantities or said price was granted to meet a lawful equally low price of a competitor.

With respect to the proposed coverage of all products in both Count I and Count II of the complaint, complaint counsel contend that A&P's violation was "not an isolated incident relating to milk. Rather it was an action in the context of A&P's entire business;" and that without such coverage "A&P could easily evade the order simply by turning its attention to other areas in its diverse product line where similar anticompetitive practices would be equally fruitful."

[87] It is well settled that the Federal Trade Commission has wide discretion in its choice of the remedy adequate to cope with the unlawful practices disclosed. *FTC* v. *Ruberoid Co.*, 343 U.S. 470 (1952). The validity of the Commission order is gauged by its reasonable

relation to the unlawful practices found to exist. *FTC* v. *Colgate-Palmolive*, 380 U.S. 374 (1965); *National Lead Co.* v. *FTC*, 352 U.S. 419 (1957). A&P points out, however, that the Commission itself has recognized situations where a broad order would not be appropriate, *Quaker Oats Co.*, 60 F.T.C. 798 (1962). In that case the order was limited to "cat food and products related to cat food." Similarly, in *National Dairy Products Corp.* v. *Federal Trade Commission*, 412 F.2d 605 (7th Cir. 1969) the order was limited to the product line of the single division found to have made the unlawful discriminations. See also *American Home Products Corp.* v. *Federal Trade Commission*, 402 F.2d 232 (6th Cir. 1968).

It is particularly noteworthy that complaint counsel have drawn a parallel between this case and the *Kroger* case, 76 F.T.C. 719 (1969). There, as here, the buyer went beyond the bounds of permissible bargaining by misquoting the competitive offer or failing to convey correct information. The order issued in the *Kroger* case was limited to milk and other dairy products despite the fact that Kroger, a national grocery chain, obviously had other products which could be subject to the same abuse. In that case, however, the order was not limited to the Charleston division of Kroger where the discriminations took place but to "outlets operated by respondent." Consequently, the order herein will be limited to fluid milk and other dairy products but will apply to A&P's outlets wherever operated by A&P.

As respects Count II, A&P argues that it cannot comply with the order proposed by complaint counsel because of the burden on A&P. It contends that it would be enjoined from receiving a net price on any product which it knows or should know is below the net price at which the product is being offered to any A&P competitor unless A&P is able to demonstrate that it knew or had reason to believe that the lower price to A&P was cost justified or that the lower price was given to A&P to meet a lawful, equally low price offered to A&P by another supplier. It argues that this would require A&P to cost justify its suppliers' prices, [88] a burden which cannot be properly placed on a buyer who cannot obtain the costing information required (*Automatic Canteen Co.* v. *FTC*, 346 U.S. 61 (1953)).

A&P, however, confuses the burden of proof requirement with the obligation of law. A&P cannot induce or accept a discriminatory price from a supplier where it knows or has reason to know that the lower price to it cannot be cost justified or that the lower price given to it was not to meet a lawful equally low price offered by another supplier. The burden of proof, however, remains with complaint counsel under the doctrine of *Automatic Canteen*. This is not unlike the situation in Count I where A&P is forbidden to engage in misrepresentations but the burden of proving the misrepresentations still rests upon complaint counsel. A&P's objection to the proposed order with respect to Count II, therefore, is reasonable only to the extent that it suggests shifting the burden of proof to A&P. The order herein corrects that error.

A&P also objects to the proposed order arguing that other statutory defenses available to it are excluded by the language of the order since it does not mention such defenses as lack of knowledge of the discrimination or lack of injury to competition. This argument was also raised in the *Ruberoid* case, *supra;*

> [The absence of such provisos] cannot preclude the seller from differentiating in price in a new competitive situation involving different circumstances where it can justify the discrimination in accordance with the statutory provisos.

In that case the order simply prohibited Ruberoid from discriminating in price by selling its products to any purchaser at prices lower than those granted other purchasers who compete with the favored purchaser in the resale of the products. The court found it unnecessary to specify the statutory defenses. Here, too, unmentioned statutory defenses available to A&P have not been negated nor lost to A&P by reason of their omission. [89]

ORDER

It is ordered, That respondent, The Great Atlantic & Pacific Tea Company, Inc., a corporation, and its officers, representatives, agents and employees, directly or through the use of any corporate or other device in or in connection with the offering to purchase or purchase of fluid milk and other dairy products in commerce as "commerce" is defined in the amended Clayton Act, for resale in outlets operated by the respondent, do forthwith cease and desist from:

(a) misleading any supplier of fluid milk or other dairy product by misrepresenting a material fact which could reasonably be expected to affect the suppliers' price to A&P; and

(b) directly or indirectly inducing, receiving or accepting from any seller a net price it 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 purchasers where A&P is competing with the purchaser paying the higher price, unless A&P knew or had reason to believe that the price difference in its favor made only due allowance for cost differences resulting from differing methods or quantities in which such products are sold [90] or delivered to such purchasers or said price was granted to it by the supplier to meet a lawful equally low price of a competitor. 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 effected.

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

It is further ordered, That A&P shall notify the Commission at least thirty 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 its compliance obligations arising out of the order.

It is further ordered, That A&P shall, within sixty (60) days after this order becomes final, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied and will comply with this order.

It is further ordered, That Count III of this complaint be, and the same hereby is, dismissed.

Appendix

PRICES PAID FOR MILK BY A&P COMPARED TO LOWEST PRICE AVAILABLE TO ITS COMPETITORS IN THE "CHICAGO & SUBURBS AREA" 11/65-12/68

HOMO – HALF-GALLONS – PAPER

		Non-A&P Stores		A&P Stores		
Date	Borden List Price[1]	Minimum Price	Maximum Discount From List Price[2]	Private Label Price[3]	Discount From List Price	Percent Overcharge[4]
11/65-1/66	$0.49	$0.3479	29.0%	$0.3124	36.2%	11.4%
1/66-2/66	.49	.3430	30.0%	.3124	36.2%	9.8%
2/66-5/66	.51	.357	30.0%	.3254	36.2%	9.7%
5/66-8/66	.52	.364	30.0%	.3254	37.4%	11.9%
8/66-9/66	.54	.378	30.0%	.3376	37.5%	12.0%
9/66-10/66	.56	.392	30.0%	.3514	37.3%	11.6%
10/66-11/66	.56	.392	30.0%	.3534	36.9%	10.9%
11/66-3/67	.56	.392	30.0%	.3514	37.3%	11.6%
3/67-4/67	.55	.385	30.0%	.3376	38.6%	14.0%
4/67-5/67	.55	.385	30.0%	.3416	37.9%	12.7%
5/67	.57	.399	30.0%	.3502	38.6%	13.9%
5/67-9/67	.57	.399	30.0%	.3534	38.0%	12.9%
9/67-5/68	.59	.413	30.0%	.3664	37.9%	12.7%
5/68-7/68	.61	.427	30.0%	.3762	38.3%	13.5%
7/68-12/68	.62	.434	30.0%	.3828	38.3%	13.4%

1 Source: CX 137, 139-150.

2 Sources: CX 120, 138; Gose Tr. 1110.

3 Source: CX 255B.

4 Calculated by dividing the difference between the minimum price paid by others and the private label price by the private label price paid by A&P.

Appendix

HOMO – GALLONS – PAPER

		Non-A&P Stores		A&P Stores		
Date	Borden List Price	Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price	Percent Overcharge
11/65-1/66	$0.98	$0.6958	29.0%	$0.6248	36.2%	11.4%
1/66-2/66	.98	.686	30.0%	.6248	36.2%	9.8%
2/66-5/66	1.02	.714	30.0%	.6508	36.2%	9.7%
5/66-8/66	1.04	.728	30.0%	.6508	37.4%	11.9%
8/66-9/66	1.08	.756	30.0%	.6752	37.5%	12.0%
9/66-10/66	1.12	.784	30.0%	.7028	37.3%	11.6%
10/66-11/66	1.12	.784	30.0%	.7068	36.9%	10.9%
11/66-3/67	1.12	.784	30.0%	.7028	37.3%	11.6%
3/67-4/67	1.10	.770	30.0%	.6752	38.6%	14.0%
4/67-5/67	1.10	.770	30.0%	.6832	37.9%	12.7%
5/67	1.14	.798	30.0%	.7004	38.6%	13.9%
5/67-9/67	1.14	.798	30.0%	.7068	38.0%	12.9%
9/67-5/68	1.18	.826	30.0%	.7328	37.9%	12.7%
5/68-7/68	1.22	.854	30.0%	.7524	38.3%	13.5%
7/68-12/68	1.24	.868	30.0%	.7656	38.3%	13.4%

Appendix

HOMO – QUARTS – PAPER

		Non-A&P Stores		A&P Stores		
Date	Borden List Price	Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price	Percent Overcharge
11/65-1/66	$0.265	$0.1882	29.0%	$0.1712	35.4%	9.9%
1/66-2/66	.265	.1855	30.0%	.1712	35.4%	8.4%
2/66-5/66	.275	.1925	30.0%	.1777	35.4%	8.3%
5/66-8/66	.28	.1960	30.0%	.1777	36.5%	10.3%
8/66-9/66	.29	.2030	30.0%	.1838	36.6%	10.5%
9/66-10/66	.30	.2100	30.0%	.1907	36.4%	10.1%
10/66-11/66	.30	.2100	30.0%	.1917	36.1%	9.6%
11/66-3/67	.30	.2100	30.0%	.1907	36.4%	10.1%
3/67-4/67	.295	.2065	30.0%	.1838	37.7%	12.4%
4/67-5/67	.295	.2065	30.0%	.1858	37.0%	11.1%
5/67	.305	.2135	30.0%	.1901	37.7%	12.3%
5/67-9/67	.305	.2135	30.0%	.1917	37.2%	11.4%
9/67-4/68	.315	.2205	30.0%	.1982	37.1%	11.3%
4/68-7/68	.325	.2275	30.0%	.2031	37.5%	12.0%
7/68-12/68	.33	.2310	30.0%	.2064	37.5%	11.9%

Appendix

2% MILK – 1/2 GALLON – PAPER

		Non-A&P Stores		A&P Stores		
Date	Borden List Price	Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price	Percent Overcharge
11/65-1/66	$0.46	$0.3266	29.0%	$0.2914	36.7%	12.1%
1/66-2/66	.46	.3220	30.0%	.2914	36.7%	10.5%
2/66-5/66	.48	.3360	30.0%	.3044	36.6%	10.4%
5/66-8/66	.49	.3430	30.0%	.3044	37.9%	12.7%
8/66-9/66	.51	.3570	30.0%	.3166	37.9%	12.8%
9/66-10/66	.53	.3710	30.0%	.3304	37.7%	12.3%
10/66-11/66	.53	.3710	30.0%	.3324	37.3%	11.6%
11/66-3/67	.53	.3710	30.0%	.3304	37.7%	12.3%
3/67-4/67	.52	.3640	30.0%	.3166	39.1%	15.0%
4/67-5/67	.52	.3640	30.0%	.3206	38.4%	13.5%
5/67	.54	.3780	30.0%	.3292	39.0%	14.8%
5/67-9/67	.54	.3780	30.0%	.3324	38.4%	13.7%
9/67-5/68	.56	.3920	30.0%	.3454	38.3%	13.5%
5/68-7/68	.58	.4060	30.0%	.3552	38.8%	14.3%
7/68-12/68	.59	.4130	30.0%	.3618	38.7%	14.2%

Appendix

SKIM MILK – 1/2 GALLON – PAPER

		Non-A&P Stores		A&P Stores		
Date	Borden List Price	Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price	Percent Overcharge
11/65-1/66	$0.46	$0.3266	29.0%	$0.2834	38.4%	15.2%
1/66-2/66	.46	.3220	30.0%	.2834	38.4%	13.6%
2/66-5/66	.48	.3360	30.0%	.2964	38.2%	13.4%
5/66-8/66	.49	.3430	30.0%	.2964	39.5%	15.7%
8/66-9/66	.51	.3570	30.0%	.3086	39.5%	15.7%
9/66-10/66	.53	.3710	30.0%	.3224	39.2%	15.1%
10/66-11/66	.53	.3710	30.0%	.3244	38.8%	14.4%
11/66-3/67	.53	.3710	30.0%	.3224	39.2%	15.1%
3/67-4/67	.52	.3640	30.0%	.3086	40.7%	18.0%
4/67-5/67	.52	.3640	30.0%	.3126	39.9%	16.4%
5/67	.54	.3780	30.0%	.3212	40.5%	17.7%
5/67-9/67	.54	.3780	30.0%	.3244	39.9%	16.5%
9/67-3/68	.56	.3920	30.0%	.3374	39.8%	16.2%
3/68	.56	.3920	30.0%	.3000	46.4%	30.7%
3/68-5/68	.56	.3920	30.0%	.3374	39.8%	16.2%
5/68-7/68	.58	.4060	30.0%	.3472	40.1%	16.9%
7/68-12/68	.59	.4130	30.0%	.3538	40.0%	16.7%

OPINION OF THE COMMISSION

BY NYE, *Commissioner:*

[1] The complaint in this matter was issued on October 8, 1971.[1] Count I of the complaint charged that The Great Atlantic & Pacific Tea Company, Inc. (hereinafter "A&P") violated Section 5 of the Federal Trade Commission Act [2] (hereinafter the "F.T.C. Act;" 15 U.S.C. §45) as well as the policy of Section 2 of the amended Clayton Act (hereinafter the "Robinson-Patman Act"; 15 U.S.C. §13) by misleading Borden, Inc. (hereinafter "Borden") during negotiations concerning the sale by Borden of milk and other dairy products to A&P. The gravamen of the charge is that A&P failed to inform Borden that Borden's offer, purportedly made to meet a competitive bid received by A&P from another potential supplier, was, in fact, substantially lower than that other bid. Count II charged that A&P violated Section 2(f) of the Robinson-Patman Act (15 U.S.C. §13(f)) by knowingly inducing or receiving discriminations in price from Borden, which discriminations are prohibited by Section 2(a) of that Act. Finally, Count III charged that both A&P and Borden violated Section 5 of the F.T.C. Act by combining to stabilize and to maintain the retail and wholesale prices of milk and other dairy products.

Hearings were held before Administrative Law Judge Harry R. Hinkes, and an initial decision was rendered on September 24, 1975. Judge Hinkes found that A&P had violated the law as charged in Counts I and II but dismissed Count III. Judgment was entered accordingly.

A&P has appealed from the decision, asserting that it did not violate the law as charged in Counts I and II. Complaint counsel has appealed from the decision, arguing that A&P and Borden violated the law as charged in Count III. The Commission heard oral arguments on these appeals on February 25, 1976.

[3] The decision of Judge Hinkes is affirmed as to Counts II and III but reversed as to Count I. Except as qualified or altered by this opinion, we adopt his findings and conclusions. We have substituted a new order.

---

[1] For convenience, the following abbreviations are used in this opinion:

I.D.—Initial decision of administrative law judge (Cited by paragraph number).

Tr.—Transcript of testimony (Cited by page number).

CX—Commission exhibit.

RX—Respondent A&P exhibit.

Citations to "Appeal," "Answer," and "Reply" refer to the briefs filed in reference to Counts I and II. Citation to "C.C. Appeal" refers to complaint counsel's appeal brief filed in reference to Count III.

I. FACTUAL BACKGROUND

Although the record in this case is voluminous, exceeding 20,000 pages, the facts are generally not disputed. All of the violations alleged in this action concern the events surrounding a November 1, 1965 agreement between A&P and Borden under which Borden began supplying private label milk and other dairy products to more than 200 A&P stores in an area that included portions of Illinois and Indiana.

From the record, it appears that in November of 1964, Herschel Smith, A&P's headquarters dairy buyer in New York, advised A&P's divisional purchasing directors of the savings that could be realized by switching from advertised brand to private label milk (Tr. 1350-1351, 1862-1863). Soon thereafter, A&P asked Borden to submit an offer to supply, under private label, certain of A&P's milk and other dairy product requirements in the Chicago area, where Borden had served A&P since the late 1950's. From then until August 13, 1965, A&P and Borden engaged in extensive negotiations which culminated in Borden's offer to grant A&P a discount for switching to private label, provided that A&P would accept limited delivery service (CX 36, 37). Borden claimed that this proposal would reduce A&P's costs by $410,000 per annum compared to what A&P had been paying (CX 37; Tr. 869-871). A&P decided that it was not satisfied and solicited offers from other dairies (Tr. 871; *see* Tr. 1361-1362).

[4] Thereafter, on August 31, 1965, A&P received an offer from Bowman Dairy (CX 50) that was lower than Borden's August 13 offer (*See* CX 65A; A&P's Proposed Findings at 121-122).[2] On or about September 1, 1965, Elmer Schmidt, A&P's Chicago unit buyer, telephoned Gordon Tarr, Borden's Chicago chain store sales manager, and stated, "I have a bid in my pocket. You [Borden] people are so far out of line it is not even funny. You are not even in the ball park." (Tr. 873). Although Tarr asked Schmidt for some details, Schmidt said that he could not tell Tarr anything except that a $50,000 improvement in Borden's bid "would not be a drop in the pocket." (Tr. 874-875; *see* CX 53A-B). Contrary to its usual practice, A&P then offered Borden the opportunity to submit another bid (Tr. 1248-1249, 1892-1893).

In consequence, Borden offered to submit a new bid which doubled the savings to A&P from $410,000 to $820,000 (Tr. 227-228). In presenting the offer, Borden emphasized to A&P that Borden needed to keep A&P's business and was making the new offer solely to meet the described competitive bid (Tr. 228). Of course, as noted, Borden knew very little about the competitive bid that it was purporting to

[2] Contrary to Judge Hinkes' conclusion (I.D. 103, 106-07, 114), we find that the Bowman bid was operative and could be compared to the Borden offer.

meet. Later, Borden submitted a detailed offer (CX 56), which it slightly revised to meet some of A&P's specific demands (CX 62).[3] **[5]** A&P concluded at the time that Borden's offer was "substantially better" in price[4] than Bowman's (Tr. 1413-1414, 1896-1997; CX 263), and therefore, in October of 1965, A&P accepted it (Tr. 1413; CX 71). The offer was, in fact, much better in price than Bowman's (*See* CX 263B; compare CX 75F-J with CX 50).

A&P's Schmidt requested a letter from Borden which would state that the prices Borden had quoted were proportionately available to competitors of A&P (Tr. 1783, 1786). Borden supplied a letter stating simply that the prices were legal and that Borden would defend them (RX 2). In fact, officials of Borden thought that the other bids were based on "anyhow accounting"—including only out-of-pocket or direct costs—and informed A&P of their belief (CX 63; *see* Tr. 213-214, 872-873, 955).

II. COUNT I: FAILING TO INFORM

Count I charged that A&P violated Section 5 of the F.T.C. Act as well as the policy of Section 2 of the Robinson-Patman Act by misleading Borden during negotiations concerning the sale by Borden of milk and other dairy products to A&P. The thrust of the charge is that A&P failed to inform Borden that Borden's offer, made in an attempt to meet a competitive bid received by A&P from another potential supplier, was substantially lower than that of the only other bidder. The count is directed to the question of what must legally be disclosed during contract negotiations.

We briefly state the relevant facts. A&P compared the Bowman bid with Borden's and concluded that Borden's bid was **[6]** substantially lower. Also, A&P knew that Borden was relying on the meeting competition defense (Tr. 248, 886, 1789, 1792, 1801). Finally, A&P accepted Borden's bid without telling Borden that Borden substantially "beat" Bowman's bid as it clearly had (Tr. 1413; CX 71, 263; *see* Answer at 42). Because A&P did not then inform Borden that the meeting competition defense was unavailable, Judge Hinkes concluded that A&P engaged in an "unfair" practice that violated Section 5 of the F.T.C. Act (I.D. 115, 116).[5]

At the outset we emphasize our belief that Section 5 of the F.T.C.

[3] After submission of the bid, Borden excluded glass gallons because A&P stated that "it is not fair to the other bidders." (Tr. 884). In fact, however, the Bowman bid had included a quote on glass gallons (CX 50). A&P also told Borden to "sharpen your pencil a little bit because you are not quite there" meaning, according to Borden's Tarr, that Borden had not yet met the competitive bid (Tr. 885).

[4] A&P was only interested in obtaining the lowest price possible (CX 25B, 263B; Tr. 1400-1401, 1728-1729).

[5] Although A&P made certain misrepresentations, *see* note 3, *supra*, such misrepresentations are not relevant to the charge.

Act can reach actions that violate the policy of the Robinson-Patman Act, *cf. FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972), and, further, that Section 5 should be used to fill the gap in coverage caused by the manner in which Congress added the buyer liability provision contained in Section 2(f) of the Robinson-Patman Act.[6] It is well established that Section 5 can reach buyers who induce violations of the promotional allowance and payment for services provisions of the Robinson-Patman Act. *Fred Meyer, Inc.* v. *FTC*, 359 [7] F.2d 351, 367 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968); *Giant Food Inc.* v. *FTC*, 307 F.2d 184, 186 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963); *Grand Union Co.* v. *FTC*, 300 F.2d 92, 98-99 (2d Cir. 1962). According to the Court in *Grand Union*, the application of Section 5 to buyers who violate specific provisions of the Robinson-Patman Act neither offends Congressional policies nor circumvents the criteria of illegality prescribed by the Robinson-Patman Act. *Id.* at 98. In addition, it is appropriate to use Section 5 to fence in activities which, if permitted to mature, could violate the antitrust laws, including the Robinson-Patman Act, or which otherwise violate the policy of the antitrust laws. *Id.* at 99.

Having recognized this, however, and having measured A&P's conduct against these standards, we do not think that a violation of Section 5 has occurred here. The imposition of a duty of affirmative disclosure, applicable to a buyer whenever a seller states that his offer is intended to meet competition, is contrary to normal business practice and, we think, contrary to the public interest. As the Court in *Forster Mfg. Co.* v. *FTC*, 335 F.2d 47, 56 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965), stated in describing normal practice:

> The seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule. Haggling has ever been the way of the market place.

[8] We recognize the need to curb undue pressure on sellers by powerful buyers such as A&P but do not think that changing the rules of commercial bargaining in this way is the answer. We are fearful that such a change would harm the freedom of buyers to engage in aggressive bargaining over price and would thereby affect competitive distribution. As the Attorney General's National Committee to Study the Antitrust Laws stated, "Legalistic impediments to the normal

[6] "Although Robinson-Patman Act prohibitions were predominantly directed at discriminatory concessions coerced by powerful buyers, the legislative process relegated Section 2(f) to a minor role * * * Section 2(f) first emerged as an amendment offered in debate on the floor of the Senate * * * and represented a last minute afterthought addition." Att'y Gen.'s Nat'l Comm. to Study the Antitrust Laws, Report 193 (1955) (hereinafter "Report").

bargaining process * * * might well deprive the public of gains that under effective competition it has a right to expect." Report, *supra* note 6, at 196. We fear a scenario where the seller automatically attaches a meeting competition caveat to every bid. The buyer would then state whether such bid meets, beats, or loses to another bid. The seller would then submit a second, a third, and perhaps a fourth bid until finally he is able to ascertain his competitor's bid. We do not believe that the failure of buyers to engage in such disclosure should violate the F.T.C. Act.[7] Therefore, Count I should be dismissed. **[9]**

III. COUNT II: KNOWINGLY INDUCING OR RECEIVING DISCRIMINATIONS IN PRICE

Count II charged that A&P violated Section 2(f) of the Robinson-Patman Act by knowingly inducing or receiving discriminations in the price of milk and other dairy products from Borden, which discriminations are prohibited by Section 2(a) of that Act.[8]

Section 2(f) was enacted to make the prohibitions of price discrimination applicable to buyers. *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 70 (1953). In order to **[10]** prove a violation of Section 2(f), complaint counsel must not only establish all elements of a Section 2(a) violation, but must also meet special requirements with respect to showing the respondent's "knowledge." Further, the buyer is entitled to raise any defenses that the seller might have raised, specifically those listed in Sections 2(a) and 2(b).[9]

A&P admits that the A&P-Borden transaction contained many of the elements of a Section 2(a) offense. It argues, however, that the sales in Illinois were not "in commerce" and that A&P did not receive a

[7] We are not concluding that nondisclosure during commercial bargaining never rises to a Section 5 offense. We simply hold that it should not be A&P's responsibility to tell Borden whether a legal defense is available. As discussed at p. 20 n. 19, a seller's good faith meeting competition defense under the Robinson-Patman Act is dependent on some factors that are more readily available to him than to the buyer. For example, to have a meeting competition defense, the seller who has knowingly discriminated in price must show that he acted prudently in surmising whether his bid, in fact, met the equally low price of a competitor. *FTC* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1945); *Viviano Macaroni Co.* v. *FTC*, 411 F.2d 255, 257-58 (3d Cir. 1969).

[8] Section 2(f) reads:

> 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.

Section 2(a) reads in pertinent part:

> 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 the effect of such discrimination may be substantially to lessen competition * * * 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 * * *.

[9] Section 2(b) reads in pertinent part:

> * * * nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor * * *.

discriminatory price that caused competitive injury. In addition, A&P asserts that complaint counsel failed to establish (1) that the price quoted by Borden was not made to meet a competitive bid and was not cost justified and (2) that A&P knew that the price received was not covered by one of those defenses.

We find that A&P has violated Section 2(f) and reject its proffered arguments.

a. *In Commerce*

The Robinson-Patman Act forbids discriminatory pricing arrangements only "where either or any of the purchases involved in such discrimination are in commerce." 15 U.S.C. § 13(a). Therefore to conclude that jurisdiction exists to [11] prosecute A&P, either A&P's or its competitors' purchases must be "in commerce." Recently, the Supreme Court has reiterated its position that at least one of the two transactions which result in the discrimination must cross a State line. *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 199-201 (1974). Although A&P does not dispute the finding that the sales to stores in Indiana are "in commerce" for Robinson-Patman Act purposes, A&P argues that the "in commerce" requirement is not met for the Illinois sales.

We reject A&P's claim. In *Foremost Dairies, Inc.* v. *FTC*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965), the respondent dairy claimed that none of its sales were made in interstate commerce although 20 percent of its raw milk came from out-of-State. The dairy sold fluid milk processed in its Albuquerque, New Mexico plant to stores in Albuquerque. In holding that the "in commerce" requirement was met, the Court stated:

> [T]he milk passed in a steady flow from the farms in Colorado through the Santa Fe processing plant, where it underwent a rather negligible processing operation, which did not change its character appreciably, to the shelves of retail grocery establishments in Albuquerque * * * [U]nder the stream of commerce doctrine, milk produced in one state and processed and distributed in another state does not lose its interstate character because of standardization, and pasteurization. *Id.* at 677.

Other courts concur with the reasoning and results in *Foremost Dairies. E.g., Dean Milk Co.* v. *FTC*, 395 F.2d 696, 714-715 (7th Cir. 1968) (25 percent of raw milk came from out-of-State).

[12] Most of the raw milk used by Borden's Woodstock, Illinois dairy—approximately 60 percent—came from Wisconsin (Borden Admission at 8, Sept. 29, 1972). This dairy supplied substantially all of the private label milk sold to A&P (Borden Response at 5, May 3, 1972; A&P Admission at 7, Sept. 27, 1972). Finally, the processing in

Woodstock did not interrupt the flow of milk from the farm to A&P's stores (I.D. 17, 168; *see* Borden Additional Admission at 13-14, March 15, 1973; Tr. 107-109). Therefore, the *Foremost Dairies* test is met.

In addition, the negotiations leading up to the agreement between A&P and Borden were multi-State in nature (Tr. 1711) and therefore "in commerce" (I.D. 167). *See Beatrice Foods Co.*, 76 F.T.C. 719, 747 (1969). A&P's Schmidt testified that A&P would not accept an offer to supply only a portion of its stores in Illinois and Indiana (Tr. 1711; *see* Tr. 6126-27).

b. *Discrimination in Price and Competitive Injury*

The Robinson-Patman Act requires both that a discrimination in price take place and that the possible effect of such discrimination be substantially to lessen competition or to injure, destroy, or prevent competition with a primary or secondary line competitor or with a direct or indirect customer **[13]** of the buyer.[10] In addition, to conclude that a Section 2(f) violation has taken place, it must be found that the buyer knowingly received the illegal price discrimination. *Automatic Canteen Co.* v. *FTC, supra*, 346 U.S. at 71. A&P argues that the evidence fails to demonstrate that it was a beneficiary of a price discrimination or that competition was injured. A&P criticizes the price comparisons of complaint counsel, the representativeness of the competitors who were allegedly injured, and the establishment of substantial injury. In addition, A&P states that it did not know that it was a beneficiary of an illegal price discrimination.

We agree with Judge Hinkes' findings (I.D. 62-88; 118-123) that the relevant comparisons demonstrate the existence of discriminations in price. We note that a price comparison does not have to include the full line of dairy products nor A&P's purchases of Borden brand products. We faced and dismissed this same argument in *Beatrice Foods Co.*, 76 F.T.C. 719, 806 (1969), *aff'd sub nom.*, *Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971). Specifically, the price of private label milk and other dairy products sold to A&P may validly be compared with Borden's sales of such items to other groceries to ascertain whether **[14]** discrimination took place. The *Kroger* Court stressed "the competitive advantage which results when disadvantaged competitors are denied a [private] label which the favored buyer receives." 438 F.2d at 1379. In addition, although there were differences in the way A&P and its competitors were served, the distinctions were often minimal and, in any event, are more properly considered in connection with the cost justification defense.

[10] Although one could conceivably argue that injury at the primary or seller level took place, complaint counsel limited their case to proving secondary or buyer level discrimination.

We are unclear as to what A&P means when it argues that the sample of stores must be "representative." As the Court in *Kroger Co.* v. *FTC, id.* at 1378, stated, "[E]vidence of discrimination in only one area is sufficient to meet the requirements of the Act." *Accord, Foremost Dairies, Inc.* v. *FTC, supra,* 348 F.2d at 681. "[U]nless minuscule, the portion of the market that might be affected by the charging of these discriminatory prices is immaterial." *National Dairy Products Corp.* v. *FTC,* 395 F.2d 517, 522-23 (7th Cir.), *cert. denied,* 393 U.S. 977 (1968). The area studies[11] presented by complaint counsel are quite detailed and are, in fact, representative of the areas allegedly affected (*see, e.g.,* CX 182; RX 234 at 19). If anything, complaint counsel has exceeded any requirement of "representativeness" (*see* I.D. 121).

[15] In addition, complaint counsel has shown that competitive injury occurred, regardless of whether we applied the reasonably "possible" test, *e.g., FTC* v. *Morton Salt Co.,* 334 U.S. 37, 46 (1948); *Purolator Products, Inc.* v. *FTC,* 352 F.2d 874, 881 (7th Cir. 1965), *cert. denied,* 389 U.S. 1045 (1968), or the "probable" test, *Foremost Dairies, Inc.* v. *FTC, supra,* 348 F.2d at 680.[12] The Robinson-Patman Act does not require proof that injury actually occurred but merely a showing that competition *may* be reduced because discrimination took place. *National Dairy Products Corp.* v. *FTC, supra,* 395 F.2d at 521. "The statute is designed to reach such discriminations 'in their incipiency' before the harm to competition is effected." *FTC* v. *Morton Salt Co., supra,* 334 U.S. at 46 n. 14.

We note that many courts have discussed the significance of differences in the prices charged to competing businesses in industries such as retail food, which are characterized by keen competition and low profit margins. *E.g., Kroger Co.* v. *FTC, supra,* 438 F.2d at 1379; *Fred Meyer, Inc.* v. *FTC, supra,* 359 F.2d at 367; *see United Biscuit Co. of America* v. *FTC,* 350 F.2d 615, 621-22 (7th Cir. 1965), *cert. denied,* 383 U.S. 926 (1966). Milk is one of the most important **[16]** commodities carried in retail grocery stores (A&P Admission at 3, March 1, 1973). Therefore, discriminations in favor of A&P amounting to as much as 22.5 percent (Model Food Center, CX 182, 187, 191A)[13] in this extremely competitive, price sensitive industry compel an inference of

[11] These include Chicago and its suburbs, Gary-Hammond, and Valparaiso, Indiana.

[12] As the court in *Foremost Dairies* noted, 348 F.2d at 680 n. 11, "[T]he distinction between the two standards may be more apparent than real."

[13] The *Kroger* Court, 438 F.2d at 1379 n. 4, listed examples of discounts in secondary line cases. The discounts to A&P are in line with those found to cause injury in other cases. For example, the Court in *Foremost Dairies, Inc.* v. *FTC, supra,* 348 F.2d at 675, found competitive injury where discounts were as low as 5 percent.

adverse competitive effect. *See, e.g., FTC* v. *Morton Salt Co., supra,* 334 U.S. at 46-47; *Kroger Co.* v. *FTC, supra,* 438 F.2d at 1379.[14] That A&P did not pass the discount on as a lower price to consumers does not rebut the inference. *Foremost Dairies Inc.* v. *FTC, supra,* 348 F.2d at 680. For example, in receiving the price discount, A&P enlarged its profit margin (*See* CX 185, 255; Tr. 2059-2060)[15] and thereby obtained a material capital advantage in this highly competitive field. *See Kroger Co.* v. *FTC, supra,* 438 F.2d at 1378; *Foremost Dairies, Inc.* v. *FTC, supra,* 348 F.2d at 680.

[17] Finally, we address the issue of knowledge. A&P admitted that milk is one of the most important commodities in groceries and that milk is a staple purchased more frequently by consumers than other products (A&P Admission at 3, March 1, 1973). It is acknowledged that selling milk at a higher price than one's competitors will cause some consumers to switch stores. A&P also admitted that profit margins in the retail grocery business are very low (A&P Admission at 4, March 1, 1973). Therefore, A&P, by virtue of its trade experience or simply common sense, knew or should have known that it was a beneficiary of a price discrimination having the requisite harmful competitive effects (*see* I.D. 86-88, 97). Accordingly, we reject A&P's arguments.

c. *Meeting Competition*

A seller who has discriminated in price is guiltless under the Robinson-Patman Act if the lower price was offered in good faith to meet an equally low price of a competitor. 15 U.S.C. § 13(b). The Supreme Court has stated that the buyer is not liable under Section 2(f) if the lower price he induces is within the meeting competition defense or if the buyer is unaware that the price cannot be protected by that defense. *Automatic Canteen Co.* v. *FTC, supra,* 346 U.S. at 74. The Court in *Kroger Co.* v. *FTC, supra,* 438 F.2d at 1377, noted that when a buyer is charged with violating Section 2(f), the price he induces must come within the meeting competition defense not only from the seller's point of view but also from the buyer's. This is consistent with the Supreme Court's statement concerning the burden of going forward in a Section 2(f) case:

> [18] Our view that § 2(b) permits consideration of conventional rules of fairness and convenience of course requires application of those rules to the particular evidence in question. Evidence, for example, that the seller's price was made to meet a competing seller's offer to a buyer charged under § 2(f) might be available

[14] The Court in *Fowler Mfg. Co.* v. *Gorlick,* 415 F.2d 1248, 1252 (9th Cir. 1969), *cert. denied,* 396 U.S. 1012 (1970), a private Robinson-Patman Act action, stated that a price differential alone establishes competitive injury. There is no need to prove a lessening of competition to obtain damages.

[15] The profit margins of the unfavored competitors were very low, ranging from less than 1 percent to 5 percent (*See* Appendix 4 [*in camera*]; CX 184, 189, 192, 199A, 199 J-Z, 201, 203 [all *in camera*]; I.D. 88).

> to a buyer more readily even than to a seller. *Automatic Canteen* v. *FTC, supra,* 346 U.S. at 79 n. 23.

Specifically, proof that the seller did not act in good faith is unnecessary to a finding that a buyer cannot assert the meeting competition defense.

In its reply brief, A&P argues that its contemporaneous comparison of the Bowman and the last Borden bid is not relevant (Reply at 35). We disagree. The comparisons demonstrate whether A&P acted in good faith. For example, if the Borden bid "*beat*" the Bowman bid yet A&P contemporaneously reasonably believed that it only *met* the bid, we believe A&P (as well as Borden, if Borden prudently reached the same conclusion) could assert the meeting competition defense. *See FTC* v. *A.E. Staley Mfg. Co.,* 324 U.S. 746, 759-60 (1945).[16] However, we conclude that A&P contemporaneously concluded that Borden's bid was "substantially better" than Bowman's (Tr. 1413-1414, 1896-1897; CX 263), and A&P, therefore, cannot assert the seller's meeting competition defense.

We assume, *arguendo,* that A&P can assert the defense if the Borden bid did, in fact, happen only to meet the Bowman bid. [19] However, while we believe that the Bowman bid was comparable and operative,[17] we conclude that the Borden bid was substantially better than the Bowman bid. Specifically, we find that prior to adjusting the Bowman bid to make it reflect such items as A&P's true volume requirements and delivery requirements, Borden's bid substantially beat Bowman's (*See* CX 263B; Compare CX 75 F-J with CX 50). In addition, after adjusting the Bowman bid to make it responsive to A&P's true situation, Borden's bid beats Bowman's by an even greater amount. Bowman would not be able to give A&P such a low price because A&P's volume was less than the $1 million per month stipulated in the Bowman offer (*See* citations in I.D. 106) and because Bowman would have to increase the days of delivery in the Gary-Hammond area (*See* citations in I.D. 107).[18]

Finally, A&P argues that because Borden has not been found in violation of Section 2(a), A&P cannot be charged under Section 2(f). In other words, A&P asserts that Borden must be convicted of a Section 2(a) violation prior to or at the same time as A&P is found in violation of Section 2(f). In developing this argument, A&P claims that complaint counsel's case against A&P is premised on Borden's having a

---

[16] A&P argued that in this case, it contemporaneously believed that Borden's bid beat Bowman's but after "properly" comparing the bids, Bowman's bid, in fact, beat Borden's (Appeal at 31-33).

[17] Specifically, we reverse Judge Hinkes' conclusion to the contrary (*See* FF 103, 106-07, 114).

[18] The difference in stipulated butterfat content would not greatly change the difference in prices. Contrary to A&P's study, Borden's butterfat level was probably about 3.45 percent (Tr. 5513), and the Bowman bid may not have called for 3.5 percent (Tr. 5450-5453, 5461, 6187-6188; *see* I.D. 129).

valid meeting [20] competition defense, and that therefore, Borden would be absolved from any Section 2(a) charge. We reject the argument.

The Commission alone establishes the enforcement policy which will best accomplish the ends contemplated by Congress. *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958); *see Jewel Companies, Inc.* v. *FTC*, 432 F.2d 1155, 1160 (7th Cir. 1970). In deciding to issue a complaint against A&P charging a violation of Section 2(f), the Commission concluded that A&P's conduct was egregious enough to warrant such action. It did not follow that the Commission condones Borden's behavior. In addition, as complaint counsel notes (Answer at 50), A&P was the "principal malefactor" in the negotiations with Borden. It placed the pressure on Borden, not *vice versa*. Although the Commission decided not to issue a complaint against Borden for violation of Section 2(a), the Commission has not concluded that Borden would have a valid meeting competition defense to such a charge.[19]

[21] Furthermore, even though a seller has a defense to a Robinson-Patman Act charge, a buyer can still violate Section 2(f). The court in *Kroger Co.* v. *FTC*, *supra*, found that the buyer lied to the seller about the details of a competing bid, 438 F.2d at 1375-1376, and that the seller had no way of knowing that the buyer had lied. Therefore, in submitting the second bid, the seller had a meeting competition defense within the meaning of Section 2(b). However, this defense did not exonerate the buyer who knew that the bid was, in fact, not within the defense. "To hold otherwise * * * would put a premium on the buyer's artifice and cunning in inducing discriminatory prices [and] would violate the purposes of the Act, and frustrate the intent of the Congress." *Id.* at 1377.

d. *Cost Justification*

A seller who charges different prices is exonerated if the differences are justified by a savings in cost. 15 U.S.C. § 13(a). As in the case of meeting competition, a buyer is not liable under Section 2(f) if the

[19] Judge Hinkes did not reach the question of whether Borden had a meeting competition defense (*see* I.D. 166). We believe that it is very probable that Borden did *not* have such a defense. To have a meeting competition defense, the record must demonstrate the existence of facts which would lead a reasonable and prudent person to conclude that the lower price would, in fact, meet the competitor's price. *FTC* v. *A. E. Staley Mfg. Co.*, *supra*, 324 U.S. at 759-760; *Hampton* v. *Graff Vending Co.*, 478 F.2d 527, 534 (5th Cir. 1973). As noted, Borden had serious doubts concerning whether the competing bid was legal. Specifically, it believed that the other bid only considered direct costs (Tr. 237-239, 376-77, 878, 961-62). It should have asked A&P for more information about the competing bid. By not making the request, it was not acting prudently. *See Standard Oil Co.* v. *Brown*, 238 F.2d 54, 58 (5th Cir. 1956); F. Rowe, Price Discrimination under the Robinson-Patman Act 226 (1962). As the record clearly indicates, A&P had knowledge of Borden's belief that other dairies might submit bids that did not include all costs (Tr. 213-214, 872-873, 955).

lower price he induces is within the cost justification defense or if the buyer is unaware that the price is not protected by that defense.

[22] The parties and Judge Hinkes disagree as to who has the burden of proof in demonstrating whether the cost justification defense is available (I.D. 134; Answer at 66-68; Reply at 48-49). A&P and Judge Hinkes are mistaken in concluding that the *Automatic Canteen* case dealt with the burden of proof issue. Rather, the Supreme Court stated twice that it was deciding only who had the burden of first coming forward with probative evidence. 346 U.S. at 65, 82. In promulgating its rule of "fairness and convenience," *id.* at 78, the Court determined that the Commission did not satisfy this burden by showing only that the buyer had knowledge of a price differential.[20] Rather, the Commission must present evidence to demonstrate that the buyer was reasonably aware that the price differential could not be cost justified. *Id.* at 78-80.

The Court believed, however, that the burden of showing this knowledge "should not be difficult." *Id.* at 79. As an example of the evidence which would satisfy this burden in a situation where methods of services and quantities delivered differ, the Court held that the Commission "must only show" that the differences could not give rise to sufficient cost savings and that the buyer, knowing that these were the only differences, should have known that the differences were not [23] cost justified. *Id.* at 80. The Court emphasized that it would not attempt to illustrate "what other circumstances can be shown to indicate knowledge on the buyer's part that the prices cannot be justified," *id.* at 80, concluding that the Commission should do this.[21] *Id.* at 80-81; *accord, Suburban Propane Gas Corp.*, 73 F.T.C. 1269, 1272-1274 (1968) (interlocutory order); 16D J. von Kalinowski, Business Organizations: Antitrust Laws and Trade Regulation §§ 36.05[2]-36.05[3] (1971).

We have described on several occasions how complaint counsel can successfully meet the burden of going forward with the evidence where a favored buyer purchases in quantities or under methods differing from those accorded to disfavored buyers:

> [I]f 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. *Beatrice Foods Co.*,

[20] In *Automatic Canteen*, the Commission only established that the buyer had obtained prices as much as one-third below its competitors.

[21] The Commission has frequently decided what circumstances demonstrate that a buyer had the requisite knowledge. *E.g.*, *Mid-South Distributors* v. *FTC*, 287 F.2d 512, 518-19 n. 15 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961).

supra, 76 F.T.C. at 820, *quoting Suburban Propane Gas Corp.,* 71 F.T.C. 1695, 1699 n. 2 (1967) (interlocutory order).

We reiterate what we said in *Suburban Propane Gas Corp., supra,* 73 F.T.C. at 1273—the burden of establishing a *prima facie* case or first going forward with the evidence may [24] be satisfied without introducing a formal cost study showing that the lower prices were not, in fact, cost justified. The Court of Appeals for the Sixth Circuit has affirmed our use of this rule. *Kroger Co.* v. *FTC, supra,* 438 F.2d at 1378.

Once complaint counsel has satisfied their initial burden, the buyer must demonstrate that it did not know or could not reasonably have known that the price differential was not cost justified. If it fails to prove lack of knowledge, it must show that the price differential was, in fact, cost justified. *See Automatic Canteen Co.* v. *FTC, supra,* 346 U.S. at 74. Therefore, if the buyer establishes that it neither had nor should be charged with such knowledge, the buyer does not have to submit any cost justification study. However, if the buyer cannot establish the requisite lack of knowledge, it must submit a cost study if it wishes to prevail, which study generally will be held to the same standard as are cost studies offered by sellers. In other words, it is possible for the buyer to be unable to respond adequately to complaint counsel's evidence demonstrating knowledge yet be able to demonstrate that, in fact, the price differential was cost justified. Unlike the meeting competition defense, one does not need to demonstrate good faith in proving cost justification. Therefore, it is completely permissible to receive in evidence cost studies prepared after the alleged discriminatory sale and only for purposes of litigation. Rowe, *Cost Justification of Price Differentials Under the Robinson-Patman Act,* 59 Colum. L. Rev. 584, 610 (1959).

[25] Finally, if the buyer satisfies the burden of meeting complaint counsel's *prima facie* case, then complaint counsel must rebut the buyer's evidence. The buyer may then introduce other evidence responding to complaint counsel. Although the burden of going forward may shift back and forth during the hearing and is frequently not so easily segregated, the burden of persuasion as to the issue of whether the buyer had the requisite knowledge that the cost justification defense is unavailable rests with complaint counsel while the burden of persuasion as to the issue of whether the prices are, in fact, cost justified rests with the buyer. *Suburban Propane Gas Corp., supra,* 73 F.T.C. at 1274-1275; *see Beatrice Foods Co., supra,* 76 F.T.C. at 820.

We believe that the evidence submitted by complaint counsel in this case well exceeded its initial burden. Many competitors were charged a much higher price than A&P for Borden's milk products even though they bought in greater quantities than the individual A&P stores with which they were competing (*E.g.*, Burger's: CX 182, 187, 188A, RX 234, p. 19; Tr. 2270, 2381, 2385). Although many of these stores received more service than A&P, the service savings to Borden could not in any way justify the price differentials (*See* I.D. 109-110). In addition, even those companies that received limited service paid a higher price than A&P (*See* Complaint Counsel's Proposed Findings, Vol. 1 at 150-151), a price differential that was not justified by the saving of such costs as advertising (*See* CX 54; Tr. 3387, 3430, 6136). A&P knew about the differentials, since it was being charged the "regular" price for branded items (*See* CX 75, 255; RX 66). [26] This evidence in itself would probably be sufficient to shift the burden of going forward. However, complaint counsel introduced much more evidence to demonstrate that A&P knew or should have known that the prices it received were not cost justified.

First, Borden stated explicitly that its final offer could *only* be justified on the basis of meeting competition, and A&P accepted the offer on this representation (Tr. 248, 886, 1789, 1792).[22] As the Supreme Court stated in *Automatic Canteen Co.* v. *FTC, supra*, 346 at U.S. 73: "§ 2(f) was explained in Congress as a provision under which a seller, by informing the buyer that a proposed discount was unlawful under the Act, could discourage undue pressure from the buyer." *Accord*, 80 Cong. Rec. 9419 (1936) (Statement of Congressman Utterback in presenting conference report to House); Report, *supra* note 6, at 193. The Borden statement put A&P on notice that it was likely that Borden did not have a cost justification defense. *Cf. Beatrice Foods Co., supra*, 76 F.T.C. at 821 (because seller was told by two other dairies that price might not be cost justified, he had notice of possible cost justification problems).

[27] Second, although A&P requested the customary assurances from Borden that Borden's discounts were available to others on proportionately equal terms (Tr. 1783, 1786-1788, 1978-1979), A&P did not receive them. In fact, Borden specifically refused to comply, writing instead, "our prices are proper under applicable law and we are prepared to defend these prices." (CX 263H; *see* Tr. 1406, 1428, 1438-1440).[23]

Third, Borden provided A&P with detailed cost data during the

---

[22] When Ralph Minkler, President of Borden's Central District, presented Borden's final bid to A&P's Schmidt, he stated: "This price is given to you by us on the feeling and belief that we are meeting a competitive bid. We know of no other way to justify this. You have to accept it on that basis." (Tr. 248).

[23] Herschel Smith, A&P's Headquarter's Dairy Buyer, said that he received oral assurances from Harry Archer, Borden's Executive Vice President in New York, that this was a letter of availability (Tr. 1407). However, Archer denied having such a conversation (Tr. 1246-1247). After viewing both witnesses and examining all of the evidence, Judge Hinkes did not credit Smith's testimony (I.D. 96).

course of the negotiations, data which showed that Borden would be either losing money or making a minimal profit (CX 23, 24, 25A, 26; Tr. 201-205, 1866-1869). Although the data may not be completely accurate, it demonstrates that A&P at least had knowledge that the discounts could drastically affect Borden's profits, and therefore, A&P should have inquired whether the prices were available to others. *See Fred Meyer, Inc.* v. *FTC, supra,* 359 F.2d at 365-67.[24] Of course, if the A&P-Borden contract was profitable for Borden before the [28] switch to limited service and Borden would lose money after the change, then A&P should have doubted whether the new prices could be cost justified (*See* I.D. 91-93).[25]

Fourth, A&P's trade experience should have given it reason to know that Borden's private label prices were not cost justified. *See Automatic Canteen Co.* v. *FTC, supra,* 346 U.S. at 79-80 (Trade experience "can afford a sufficient degree of knowledge to provide a basis for prosecution."); *Kroger Co.* v. *FTC, supra,* 438 F.2d at 1378. As Judge Hinkes concluded (I.D. 97, 98, 127), A&P was familiar with the dairy industry generally and with the Chicago area specifically. Also, A&P knew that Borden's private label price was substantially lower than its branded label price because A&P bought both types of milk from Borden (*See* CX 75, 255; RX 66). Therefore, A&P should have known that its competitors, some of whom received limited service, were paying much more than A&P for the same product.[26]

Finally, A&P's conduct after the private label agreement was consummated convinces us that A&P knew or had reason to [29] know that any differences in service were not cost justified. First, in mid-November of 1965, Borden decreased the price A&P paid for Borden label products but at a much lower discount than it granted A&P on private label products (RX 66). Except for the small amount devoted to advertising, there was no difference in the cost to Borden of private and branded products. Therefore, A&P should have realized that the price was not cost justified (*see* I.D. 99). Second, in May of 1966, A&P accepted an increase on Borden label products which reflected increased container, labor, and social security costs, an increase which Borden apparently charged all of its purchasers. However, A&P at first refused Borden's request that the price of A&P's private label

---

[24] Citing *Automatic Canteen Co.* v. *FTC's* language about puffing in a bargaining situation, 346 U.S. at 80 n. 24, A&P argues that Borden might very well have submitted a purposely inaccurate bid (Appeal at 45-47). At this point, A&P's evaluation of Joseph Malone, the Vice President of Governmental Controls and formerly the Comptroller of Borden's Central District and the employee who prepared the data, is relevant: A&P believed that Malone was "honest and forthright." (Tr. 1843). In addition, if we disregarded all studies in which a self-interest motive is present, then, of course, we must dismiss the studies prepared for A&P's cost justification defense.

[25] As noted at pages 23-24, we do not believe that complaint counsel has the burden of introducing a formal study demonstrating that the price differential is not cost justified and do not consider these calculations such a study.

[26] Of course, labels do not differentiate products for purposes of determining "like grade and quality." *FTC* v. *Borden Co.*, 383 U.S. 637, 640 (1966). The only benefit lost by A&P was advertising, which was a very small expense.

products be raised commensurately (CX 79, 81, 255B; Tr. 1050-1054) and later accepted only a proportionately smaller increase (Tr. 1056-1062; *See* CX 102, 103, 105, 106, 110).[27] Because A&P readily accepted the increases on branded milk, we infer that A&P believed that Borden was selling branded milk to some of A&P's competitors at delivery terms similar to those at which Borden was selling branded and unbranded milk to A&P, and therefore, considering Borden's small advertising expenses, A&P's private label discount was not cost justified. *See Automatic Canteen Co.* v. *FTC, supra,* 346 U.S. at 80.

[30] In conclusion, viewing all of these facts together, we find that complaint counsel fully established a *prima facie* case that A&P knew or should have known that the prices Borden charged it for private label products was not cost justified.[28] The burden then shifted to A&P to demonstrate that it did not have knowledge that the prices it received were not cost justified or, failing to establish that, that the prices were, in fact, cost justified.

We do not find persuasive A&P's assertions that it did not know nor should have known that the prices it received were not cost justified. Its statements concerning the meeting competition language in the negotiations and the "legal letter" are not convincing (*see* A&P's Proposed Findings at 76-86). In a post-hoc analysis of the cost data that Borden supplied it, A&P argued that the Borden study was not completely reliable (Appeal at 45-47). However, A&P did not show whether it had contemporaneous criticisms of the quality of the data nor whether it communicated any of its criticisms, perhaps in the form of additional inquiries, to Borden. As noted at page 27, this data does not have to be completely accurate [31] but is useful in proving that A&P was on notice that the new contract could be unprofitable to Borden. Finally, A&P's post-agreement behavior is relevant to show what knowledge A&P had at the time the agreement was entered.

A&P introduced evidence which showed that A&P's Smith used a "2-2-2 formula" to evaluate the reasonableness of a bid. The formula states that a dairy can profitably sell milk for approximately six cents more per quart than the dairy's cost for raw milk.[29] Although we agree that this formula is relevant in considering whether A&P had knowledge, it does not rebut complaint counsel's *prima facie* case. As

[27] This action is conceivably a second inducement by A&P of discriminatory prices and therefore, a separate and distinct violation of the Robinson-Patman Act (*See* I.D. 57, 58, 89, 101; Complaint Counsel's Proposed Findings, Vol. 1 at 119). Because we have found that A&P received an illegal price preference prior to these increases, we do not specifically address this claim.

[28] We are not convinced that because Borden spread the savings over eleven rather than thirteen items, A&P was on notice that the bid was not cost justified. Although generally we agree that "the same cost savings applicable to different products with different volumes would not likely be related to * * * cost savings" (I.D. 90), it is at least conceivable that the $820,000 savings represented the amount Borden would save by switching to limited delivery service.

[29] Two cents each are allocated for cartons, plant costs and profits, and delivery costs (Tr. 6399).

noted, the formula was simply a reference point from which to estimate costs (Tr. 6399). It was developed from A&P's experience in negotiating for its private label supply of milk in New York and Massachusetts. Because the costs and conditions in the Chicago area were different (*e.g.*, in-plant wages: CX 25C, 26), it should have been adjusted. In fact, as A&P admits, the formula was never used to determine the exact measure of a dairy's cost but only to serve as a "workable rule of thumb." (Appeal at 49). Reliance on such a formula would be very irrational in light of all the other evidence (*See* I.D. 98).[30]

[32] Since A&P did not present enough evidence on the issue of knowledge to shift the burden back to complaint counsel, it had to submit a cost justification study if it wished to prevail. The studies entered by A&P on the record (RX 233, 234) were prepared specifically for purposes of this litigation.[31]

We affirm Judge Hinkes' findings (I.D. 136-165) that A&P's cost justification studies "are so defective and inadequate as to furnish no evidentiary basis" to justify the price differential that A&P received for private label products on the basis of Borden's cost savings (I.D. 165). Because the studies are so flawed, we would not find them persuasive under any reasonable standard. However, as we have stated, generally a buyer's cost justification study should meet the same standard that a seller's must. On the other hand, a buyer need not submit any study if complaint counsel fail to prove that the buyer knew or could be charged with knowledge that the prices were not cost justified. *See* [33] *Automatic Canteen Co.* v. *FTC*, *supra*, 346 U.S. at 74.[32] We note in passing that we would be willing to lower the standard if it was demonstrated that the buyer could not obtain the necessary records from the seller to undertake the study. *See id.* at 79, 81. A&P alleges that hostility existed between Borden and itself (Appeal at 15-16; A&P's Proposed Findings at 8-9) but does not confirm that these "inherent conflicts" prevented it from obtaining records from Borden. In fact, the record shows that A&P was able to get the documents it needed.

A&P asserts that "the most egregious example" of the failure by Judge Hinkes to follow a liberal approach to its cost study is his rejection of the original derivation of Borden's delivery costs (Appeal

[30] A&P's other arguments—for example, that A&P could get better prices on private labels in other parts of the country (Tr. 7326)—also do not adequately rebut complaint counsel's strong showing.

[31] Because we do not find the studies sufficiently reliable, we did not decide whether Borden's internal cost calculations (CX 54, 87, 206) are accurate. If A&P's studies adequately showed some type of cost justification, the Borden studies would have been considered as complaint counsel's rebuttal. Accordingly, we did not ascertain whether the A&P study (RX 232) which was offered to rebut Borden's internal cost calculations is accurate.

[32] Of course, if the seller is joined in the Robinson-Patman action and relies on the cost justification defense, he will submit the cost justification study.

at 53). The calculations, based on "time standards" developed in 1949 from studies made of Bowman Dairy deliveries in Chicago and confirmed by additional work in the 1950's and 1960's, are summary in nature. Also, the underlying data necessary to conduct an effective examination of their reliability were destroyed (order, Sept. 16, 1974). In addition, Robert Havemeyer, the author of the A&P studies, did not participate in the collection of the data nor in the preparation of the standards (*Id.* at 2). [34] Therefore, he could not be effectively cross-examined on the validity of the underlying data.[33] For these, as well as other reasons, Judge Hinkes properly refused to admit the calculations. *Id.* This is not a matter of preferring one method of calculation over another. Judge Hinkes simply could not determine whether the calculations were even arguably reliable. *Cf. FTC* v. *Standard Motor Products, Inc.*, 371 F.2d 613, 622 (2d Cir. 1967).

A&P's arguments concerning the relevance of the Wisconsin research (RX 9, 11) are adequately dealt with by Judge Hinkes (*See* I.D. 139-142). We note, however, our disagreement with the Judge's general rejection of standarized costs (I.D. 143). If it could be proven that standardized costs are reflective of actual costs—a showing not made in this case—then we would be willing to accept standarized costs as a substitute for actual costs.[34]

The studies are unpersuasive for numerous other reasons. For example, the studies did not consider the fact that a portion of Borden's expenses were incurred only in connection with its dealings with A&P (*see* citations in I.D. 157-160). Without a study of these costs, one cannot ascertain the true [35] cost differences between the costs of handling the A&P account and the costs of handling the accounts of other purchasers (*see* Tr. 9422). *See* Rowe, *supra* note 19, at 287 ("It would be hard to defend a cost study which lacked internal consistency by resort to analytic reasoning with respect to one factor that would vitiate another."). Furthermore, the studies do not allocate costs according to the manner in which they were incurred (*see* citations in Complaint Counsel's Proposed Findings, Vol. II at 295-296), do not allocate overhead expenses according to accepted accounting principles (*id.* at 296-297; *see FTC* v. *Standard Motor Products, Inc., supra,* 371 F.2d at 622), and inaccurately assign costs to certain customers (*e.g.,* citations in I.D. 162).

But the most important task in evaluating the studies lies in ascertaining the credibility, intelligence, and experience of Mr.

[33] Havemeyer frequently was not helpful in describing the relationship of underlying data to the summaries. For example, when asked which study was not included in making certain observations, he stated, "I cannot tell you because the working papers * * * are no longer available." (Tr. 9130-9131).

[34] Even if the time calculations were acceptable, we would not find Havemeyer's calculations of delivery costs reliable. Some of the problems with the Havemeyer analysis are described in the initial decision (I.D. 144).

Havemeyer. Judge Hinkes found (I.D. 137) that Havemeyer did not base his studies on any personal knowledge of Borden's operations. Because Havemeyer was unfamiliar with Borden's operations and activities, he did not consider many relevant factors (*see* discussion in I.D. 146-152). In addition, Havemeyer did not review all of the available evidence to determine the completeness of his studies. For example, when asked if he made any check to determine if all loading expenses were included on a certain ledger, he stated he did not but added that his staff had made "some type of check." When asked about the type of check, he stated that he could not be specific (Tr. 7520). [36] His experience with Robinson-Patman cost studies was limited to preparation of a study for one other litigated case, *United States* v. *Borden Co.*, 370 U.S. 460 (1962), in which the study was rejected by the Court because Havemeyer failed to classify stores adequately. *Id.* at 470-471.

A&P asserts that Judge Hinkes erred in finding that the studies failed to classify customers properly (Appeal at 55-56; *see* I.D. 154-155). The studies do, in fact, differentiate stores on the basis of "limited service" and "full service." However, it is clear that stores differ in terms of all types of expenses, including delivery expense, clerical expense, product waste, selling expense, credit loss, merchandising expense, and overhead. More important, the stores also differ in volume of purchases.

The Supreme Court in *United States* v. *Borden Co., supra*, criticized requiring cost justification on a customer by customer basis. 370 U.S. at 468. It tried to strike a balance which would permit group averaging where the group members were sufficiently alike especially "on the essential point or points which determine the costs considered" to make the averaging a reasonable indication of the cost of dealing with individual members. *Id.* at 469. We believe that the A&P classification makes some sense and could meet the *Borden* test although we are troubled by the volume differences between stores. *See Foremost Dairies, Inc.*, 62 F.T.C. 1344, 1361-1362 (1963), *aff'd, supra*. However, we [37] do not have to decide this issue because the studies are so fundamentally flawed.[35]

For all of these reasons, we find that the cost justification studies are inadequate to shift the burden back to complaint counsel.

[35] Similarly, we do not have to reach the question whether the studies are invalid because they determine cost for A&P stores on an average basis and compare this average with the specific costs of serving allegedly injured competitors (Appeal at 56-57; *see* I.D. 156). We note, however, that such a procedure could hide large discrepancies in size among A&P stores. And size, of course, is often related to cost differences. *See National Dairy Products Corp.* v. *FTC, supra*, 395 F.2d at 525-26, *aff'g* 70 F.T.C. 79, 193-196, 207 (1963). Finally, we also do not have to address complaint counsel's assertions that the studies should cover the entire discrimination period (*see* Complaint Counsel's Proposed Findings, Vol. II at 300-305). We think, however, that such a requirement is unduly burdensome.

Therefore, we find that A&P did not prove that the differential it received was cost justified.

IV. COUNT III: COMBINING TO STABILIZE PRICES

Count III charged that A&P and Borden entered into a combination having the tendency or effect of stabilizing and maintaining retail and wholesale prices for milk and other dairy products.[36] Judge Hinkes dismissed the count. Complaint counsel argue that Judge Hinkes applied the wrong standard of proof—that he did not view the evidence in the case *in toto* but looked at each part separately. According to complaint counsel (C.C. Appeal at 3-4, 7-8), Judge Hinkes required that each element of the conduct of the parties be sufficient to [38] demonstrate the existence of an unlawful combination, contrary to the teaching of such cases as *C-O-Two Fire Equip. Co.* v. *United States*, 197 F.2d 489, 494 (9th Cir. 1952).

Complaint counsel emphasize that the communications between A&P and Borden and the "needs" of these parties show that a combination took place (*e.g.*, C.C. Appeal at 9, 18).[37] Concerning the communications, we agree with Judge Hinkes (I.D. 199) that the record contains no evidence suggesting that Borden and A&P discussed the price A&P would charge retail customers or the price Borden would charge A&P's competitors, except to note that a price differential at the retail level between branded and unbranded products might create problems. Viewed together as well as separately, we do not find that the statements relied on by complaint counsel show that a combination to stabilize price existed.[38] The statements do not in any way convince us that A&P ever gave Borden the assurance that A&P would not create a price differential at the retail level.

[39] We also do not understand why A&P and Borden needed to enter into a combination to stabilize prices. Their pre-and post-agreement conduct show only that they were acting as economically rational businessmen. Although clearly adversaries in their negotiations—A&P wanting the lowest price possible and Borden the

[36] Although the count charges that the combination had a tendency to stabilize prices at both the retail and wholesale level, the thrust of complaint counsel's case is directed to the retail level aspect (*see* I.D. 179-187).

[37] Complaint counsel presented other arguments which we find unconvincing. For example, they note that the $820,000 savings was not made on any straight discount basis but spread by Borden over the 11 different product lines. Thereby Borden could influence A&P's retail price (Tr. 5233-5234). But as A&P's expert economic witness, Dr. Markham, stated (Tr. 7041-42), a distribution of cost savings among the various products was rational and in accordance with customary industry practice. In addition, each item was ordered separately on a demand basis, and therefore, a single price for one year's purchase of all 11 items could not be quoted (*see* I.D. 194).

[38] These include the "sensitiveness of the market (CX 12A)," the "depressed competitive situation (CX 18P)," and comments at the May 26, 1965, meeting between A&P and Borden (CX 19).

highest—both A&P and Borden were strongly motivated by independent causes to maintain existing dairy prices.[39]

A&P hoped that by switching to private label milk, it could obtain lower costs and increase its gross margin (*e.g.*, Tr. 1400-1401). This was its whole purpose in negotiating the private label agreement with Borden, not passing lower costs on to customers to increase volume. We note that throughout the A&P-Borden negotiations, no provision was ever discussed for increases in volume of A&P's previous sales. We infer from this that the parties never contemplated that A&P would use its lower cost to lower price and thereby increase volume. Were A&P to lower its retail price, A&P would not achieve its immediate goal: to maximize profits (*see* Tr. 5230; 7038). Also, A&P feared that if it lowered **[40]** the retail price of milk, Borden might be forced to give a similar wholesale discount to A&P's competitors. In addition, A&P was aware that the price it obtained from Borden cut Borden's profit margin to a point at which Borden might be driven out of the market if the prices that Borden charged decreased further.

Borden had recently completed building a large plant in Woodstock, Illinois and was willing to sacrifice some price to increase volume and thereby operate efficiently (Tr. 217, 5230). Especially, Borden needed to keep its major customer, A&P (*see* CX 42D). Borden did not want A&P to use a private label at all but was ultimately forced to offer to provide one. Borden then sought to minimize the substantial price concessions A&P requested. Unless such discounts were the only way to make use of idle machinery at Woodstock, Borden did not want to give other potential purchasers the same discount.[40] However, if A&P charged a lower price on private label products and thereby precipitated a price war,[41] Borden would be forced to extend the discount to others. Since Borden's dairy business was in a precarious financial **[41]** position, such action could conceivably drive it to the point where it would have to withdraw from the Chicago market. Therefore, because it was in both parties' interest for A&P to maintain the prevailing price on its private label dairy products, there was no comprehensible reason for A&P and Borden to construct an illegal combination to achieve that end (*see* I.D. 199). We decline to construct one for them.

Of course, combinations having any tendency or effect of stabilizing prices are unlawful. *See United States* v. *Container Corp.*, 393 U.S. 333, 336-338 (1969); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150,

[39] The evidence submitted relating to market structure (*see* C.C. Appeal at 19-23) convinces us that A&P and Borden lacked the ability to stabilize prices (*see* Borden's Answering Brief at 31-37). Therefore, this evidence does not buttress complaint counsel's position that a combination took place.

[40] In fact, because Borden probably wanted to increase volume, it considered offering the discount to others. Its counsel, however, advised Borden that such action would destroy Borden's meeting competition defense (Tr. 1076).

[41] Although, as noted, A&P and Borden lacked the ability to stabilize the market, A&P was large enough to start a price war.

221 (1940). Although complaint counsel has introduced only circumstantial evidence to prove the existence of a combination intended to stabilize the prices in a given market, we recognize that such evidence may well be sufficient. *See Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 221 (1939); *Treasure Val. Potato Bargaining Ass'n* v. *Ore-Ida Foods, Inc.*, 497 F.2d 203, 208 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974). The problem is that complaint counsel's circumstantial evidence provides more support for the proposition that both parties acted independently in deciding their pre- and post-agreement strategies than for the inference that they entered into an illegal combination. And, even if the circumstantial evidence here gives equal support to inconsistent conclusions, it is insufficient to establish liability. *Pevely Dairy Co.* v. *United States*, 178 F.2d 363, 370 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950).

[42] We conclude that both A&P and Borden acted as rational and law abiding businessmen in this regard. *See Callaway Mills Co.* v. *FTC*, 362 F.2d 435, 441-42 (5th Cir. 1966). They did not need to engage in an illegal combination because maintenance of the retail price of milk was in the independent interests of each. "An inference of conspiracy would only arise from similar business conduct if it appeared more to the interest of competitors to adopt different practices." *Independent Iron Works, Inc.* v. *United States Steel Corp.*, 177 F. Supp. 743, 747 (N.D. Cal. 1959), *aff'd*, 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963). That A&P did not lower the price it charged consumers and that Borden did not immediately lower the price it charged its purchasers "should be deemed neither surprising nor illegal." *North Carolina* v. *Chas. Pfizer & Co.*, 384 F. Supp. 265, 284 (E.D.N.C. 1974). Therefore, we reject complaint counsel's arguments and affirm Judge Hinkes' dismissal of Count III.

V. A&P'S DUE PROCESS CLAIM

A&P asserts that it was denied due process of law by the Commission's delay in instituting these proceedings. It makes this claim as to all three counts. Because Counts I and III are dismissed, we respond to the claim only as it relates to Count II.

As early as February of 1967, A&P was informed that the Commission had commenced an investigation of its private label agreement with Borden and that the purpose and scope [43] of the investigation was to determine whether an illegal price discrimination in violation of the Robinson-Patman Act and the Federal Trade Commission Act had occurred (*see* Affidavit of Richard A. Palewicz attached to Complaint Counsel's Answer to A&P's Motion to Dismiss, Oct. 20, 1972). At that point, less than 1 1/2 years after the agreement and less than nine months after the renewed inducement, *see* note 27 *supra,* A&P was on notice of possible litigation, especially with regard to the Robinson-Patman Act. [42] If A&P was, in fact, indifferent to this possibility of litigation, the Commission is not at fault. Certainly, A&P's lack of concern does not lead us to conclude that A&P was denied due process. In addition, we reiterate our position as stated in our Order Denying A&P's Motion to Dismiss, Jan. 19, 1973, that considering the complexity of this case as it was presented and argued by complaint counsel and A&P, the time taken to conduct the investigation leading to the issuance of the complaint in 1971 was not excessive. *Id.* at 4.

Because we have concluded that the delay in notifying A&P of the investigation and in bringing the complaint is not unreasonable, we do not have to reach the question of prejudice to conclude that A&P has not been denied due [44] process.[43] *United States* v. *Wilson,* 357 F. Supp. 619, 620 (E.D. Pa. 1973); *see United States* v. *Marion,* 404 U.S. 307, 324 (1971). However, because we invited A&P to renew this argument (Order at 5, Jan. 19, 1973), we address it now. We agree with Judge Hinkes (I.D. 213) that any prejudice that A&P has suffered from the passage of time is minimal and no more than that suffered by complaint counsel. Therefore, we reject A&P's claims.

VI. THE REMEDY

Since we have decided to dismiss Counts I and III, the final order refers only to the Count II violation. We have made three substantive changes in Judge Hinkes' order. First, the order states that in the future A&P has the burden of going forward with the meeting competition defense. Of course, this provision comes into effect only when A&P knows or has reason to know that prices offered to it are lower than those offered to others. We believe that such a requirement is not inconsistent with *Automatic Canteen Co.* v. *FTC, supra,* 346 U.S. at 79 n. 23. *See American Motor Specialties Co.,* 55 F.T.C. 1430, 1466-67 (1959), *aff'd,* 278 F.2d 225 (2d Cir.), *cert. denied,* 364 U.S. 884 (1960).[44] As [45] demonstrated in this case, evidence that the seller's offer was

[42] In 1966, the Justice Department initiated an investigation of the agreement to ascertain whether the agreement violated the order issued against Borden for discriminations in favor of A&P and Jewel Tea Company (Complaint Counsel's Answer at 3, October 20, 1972).

[43] It should be noted that the cases defining unreasonable delay cited by A&P are criminal cases where, unlike the situation in an F.T.C. proceeding, the Sixth Amendment and other restrictive procedures and safeguards are applicable. *See, e.g., Genuine Parts Co.* v. *FTC,* 445 F.2d 1382, 1387-1388 (5th Cir. 1971); *United States* v. *Roundtree,* 420 F.2d 845, 852 (5th Cir. 1969).

[44] The Court in *Mid-South Distributors* v. *FTC, supra,* 287 F.2d at 517, stated that the Commission has the burden of going forward with evidence to show that the buyer knew that the seller could not assert the meeting competition defense. Although we are not convinced that complaint counsel have this burden, we note that they assumed it and sustained it in this case.

Of course, the Commission can "forbid acts lawful in themselves * * * [or] compel affirmative acts of compliance"

(Continued)

made to meet a competing seller's offer is more readily available to the buyer than to the seller. Also, this new provision is not only reasonably related to the unlawful practice found to exist, *see FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *FTC* v. *National Lead Co.*, 352 U.S. 419, 429 (1957), but is, in fact, directly related. Borden stated explicitly that it was relying on the meeting competition defense to justify the price it quoted to A&P. A&P knew that Borden had, in fact, beaten the competitive offer yet did not communicate this to Borden. If it had, Borden might very well have withdrawn its bid. *See Kroger Co.* v. *FTC, supra,* 438 F.2d at 1376-77. We believe that this provision will render it substantially less likely that A&P will violate the Robinson-Patman Act in the future.

Second, the order requires A&P to distribute a copy thereof to A&P's suppliers of milk and other dairy products as well as to all of its operating divisions. By so doing, A&P will make suppliers aware that A&P is subject to an order that prohibits it from violating the Robinson-Patman Act. The notification requirement is also related to the **[46]** unlawful practice. *See FTC* v. *Colgate-Palmolive Co., supra; FTC* v. *National Lead Co., supra.* The Robinson-Patman Act was enacted in large part to prohibit large buyers, especially chain stores, from using their purchasing power to pressure suppliers into granting unfair discounts. *See, e.g.,* H.R. Rep. No. 2287, 74th Cong. 2nd Sess. 3 (1936); 80 Cong. Rec. 6621, 7324, 7887, 8104 (1936). The courts have also emphasized the need to prohibit pressure tactics from large buyers. *E.g., FTC* v. *Henry Broch & Co.*, 363 U.S. 166, 168 (1960). The record in this case shows A&P exerted such pressure on Borden. Suppliers should be made aware that if A&P exerts similar pressure on them, such a practice is illegal.

Third, the wording of the cost justification proviso is changed to make it consistent with the holding in *Automatic Canteen Co.* v. *FTC, supra,* 346 U.S. at 74.[45] Complaint counsel object to the wording of the proviso because it does not place upon A&P the burden of going forward with the cost justification defense. Pursuant to *Automatic Canteen, id.* at 79, we find that either the seller or complaint counsel (if the Commission has brought a Section 2(f) complaint) must retain this burden because both are better able to develop the relevant information than is the buyer.

[47] A&P objects to the order because it is nationwide in scope. We

to restore and rehabilitate competitive conditions. *Ekco Products Co.*, 65 F.T.C. 1163, 1216 (1964); *see FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965). Therefore, even if this burden is more stringent than that described in *Mid-South Distributors,* it can be imposed on A&P as an exercise of the Commission's remedial powers. *E.g., FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).

[45] We concur with the Court in *Mid-South Distributors* v. *FTC, supra,* 287 F.2d at 520, that the *Automatic Canteen* Court's use of double negatives is "awkward." Nevertheless, we believe that such use conceivably makes the standard more restrictive than the positive approach, and therefore, we have decided to retain it in this order.

see no injustice in making the order nationwide. In finding the nationwide order appropriate, we have considered the frequency and duration of the violations, the business and competitive history of A&P, and the likelihood that A&P knew that it was violating the Robinson-Patman Act. *See Joseph A. Kaplan & Sons, Inc.* v. *FTC,* 347 F.2d 785, 789 (D.C. Cir. 1965). A&P's private label contract was the result of a nationwide program. It was initiated and supervised by A&P's New York dairy headquarters. This specific aspect of the nationwide program covered more than 200 A&P stores located in Indiana and Illinois, lasted for more than six years, and resulted in substantial discriminations against competitors of A&P. The purpose of A&P's program was to increase its gross margin on milk products, an extremely important line, and thus to improve its overall gross profit position.

Complaint counsel object to the order because it does not include all products purchased by A&P for resale. Although we find some merit in the position that the conduct challenged in this case related to A&P's entire business and that A&P could conceivably evade the order by turning its attention to other products, we cannot ignore the realities of the kinds of negotiations that go on with respect to a company with thousands of stores dealing in tens of thousands of products. We also note that only A&P's dairy headquarters was involved in this contract. Although we believe that an **[48]** all products order could be enforced, *see FTC* v. *Ruberoid Co., supra,* 343 U.S. at 473; *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 611 (1946); *Foremost Dairies, Inc.* v. *FTC, supra,* 348 F.2d at 681-82, we have decided to exercise our discretion and limit the order to milk and other dairy products.

We reject A&P's claim that "it is impossible to infer that, unless an order is entered, A&P will hereafter engage in the conduct alleged in the Complaint." (Appeal at 71). As noted, the purpose of A&P's program was simply to increase its gross margin on milk and other dairy products and thereby to improve its overall gross profit position. If merchandising methods now being relied upon by A&P to increase revenues fail, A&P might very well again feel the need to pressure small dairies to give A&P an unlawful discount and thereby increase its gross profits.

We also reject the contention that this case is stale. *Cf. Columbia Broadcasting System, Inc.* v. *FTC,* 414 F.2d 974, 981-82 (7th Cir. 1969), *cert. denied,* 397 U.S. 907 (1970). In fact, A&P did not terminate its relationship with Borden until 1972, four months after issuance of the complaint and five years after commencement of the investigation.[46] The dairy and retail food industries have not drastically changed in the last few years.

[49] Finally, we note that, although not specifically mentioned in the order, A&P is still entitled to all statutory defenses in any subsequent action enforcing the order. *See FTC* v. *Henry Broch & Co.*, 368 U.S. 360, 366-67 (1962); *FTC* v. *Ruberoid Co., supra,* 343 U.S. at 475-76.

Thus, for the foregoing reasons, we find that A&P violated Section 2(f) of the Robinson-Patman Act. We, therefore, enter the appended order.

Final Order

[1] This matter having been heard by the Commission upon the appeal of The Great Atlantic & Pacific Tea Company, Inc. (hereinafter "A&P") from that portion of the initial decision dealing with Counts I and II, and upon the appeal of complaint counsel from that portion of the initial decision concerning Count III; and

The Commission having considered the oral arguments of counsel, their briefs, and the whole record; and

The Commission for reasons stated in the accompanying opinion, having granted the appeal of A&P concerning Count I but otherwise denying the appeals of A&P and complaint counsel; accordingly

[2] *It is ordered,* That, except to the extent that it is inconsistent with the Commission's opinion, the initial decision of the administrative law judge be, and it hereby is, adopted together with the opinion accompanying this order as the Commission's final findings of fact and conclusions of law in this matter; and

It is further ordered, That the following order be, and it hereby is, entered:

ORDER

It is ordered, That A&P, a corporation, and its officers, representatives, agents, and employees, directly or through the use of any other device in connection with the offering to purchase or purchase of milk and other dairy products in commerce, as "commerce" is defined in the Robinson-Patman Act, for resale in outlets operated by A&P, do forthwith cease and desist from directly or indirectly inducing, receiving, or accepting from any seller a net price that A&P knows or has reason to know is below the net price at which said products of like

[46] A&P states that it terminated arrangements with Borden because it was offered lower prices by other dairy suppliers (Appeal at 1 n. 2).

grade and quality are being sold by such seller to other purchasers with whom A&P is competing; *provided, however,* that this prohibition shall not apply if A&P did not know and had no reason to know that the price difference in its favor did not make due allowance for cost differences resulting from differing methods or quantities in which such products are sold or delivered to such purchasers, or if A&P can show that said price was granted to it by the supplier to meet a competitor's equally low price, which [3] price A&P reasonably believed to be lawful. For the purpose of determining the "net price" under the terms of this order, there shall be taken into account all discounts and other terms and conditions of sale.

It is further ordered, That A&P shall forthwith distribute a copy of this order to its operating divisions and to its suppliers of milk and other dairy products.

It is further ordered, That A&P notify the Commission at least thirty days prior to any proposed change in A&P's structure, 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 under this order.

It is further ordered, That A&P shall, within sixty (60) days after the effective date of this order, file with the Commission a written report setting forth in detail the manner and form of its compliance with this order.

Not having participated in the oral argument in this matter, Chairman Collier did not participate in the resolution of it.