

THE SALT PRODUCERS' DISCOUNT PRACTICES BEFORE AND AFTER
THE ROBINSON-PATMAN ACT
AND THE FTC'S CHALLENGE TO THEM:
THE MORTON AND INTERNATIONAL SALT CASES

JOHN L. PETERMAN



FEDERAL TRADE COMMISSION
BUREAU OF ECONOMICS

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**BUREAU OF ECONOMICS STAFF REPORT
FEDERAL TRADE COMMISSION
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John L. Peterman¹

I. INTRODUCTION

In 1939 the Federal Trade Commission (FTC) issued a complaint against Morton Salt Co.² and in 1940 against International Salt Co.³ charging that the discounts they granted on sales of packaged table salt to grocery wholesalers (defined here to include the large grocery chains) were discriminatory and in violation of Section 2(a) of the Clayton Act as amended by the Robinson Patman Act. FTC interest in these discounts apparently arose from complaints of wholesalers who did not purchase sufficient salt to secure the annual volume discounts granted by the salt companies.⁴ Morton and International were the two largest producers of dry salt in the United States and the FTC

¹ The remarks in this study represent the personal views of the author, who was Director of the Bureau of Economics of the Federal Trade Commission, and do not necessarily represent the views of the Federal Trade Commission or any individual Commissioner.

² Morton Salt Co., 39 FTC 35 (1944); Morton Salt Co. v. Federal Trade Commission, 162, F.2d 949 (1947); Federal Trade Commission v. Morton Salt Co., 334 U.S. 37 (1948). The FTC's records are filed under the original docket, No. 4319. I will refer to material contained in these files as Record, 4319 followed by identifying volume numbers and page references.

³ International Salt Co. et al., 49 FTC 138 (1952). I will refer to the FTC's files in this case as Record, 4307 followed by identifying volume numbers and page references. I have also relied on information contained in the FTC's proceedings against the Salt Producers Association. I refer to this material as Record, 4320 followed by identifying volume numbers and page references.

⁴ Copies of letters to the U.S. Wholesale Grocers Association by its members complaining about the annual discounts were forwarded to the FTC. See Record, 4307-3-2, at 91-96.

may have felt that success against them would make it easy to secure the elimination of similar discounts granted by the other salt companies. At the time, 13 companies produced table salt besides Morton and International.⁵ When the Supreme Court in 1948 upheld the FTC's decision that Morton's discounts were illegal, all of the other salt companies abandoned their discounts even though (except for International) no complaints had been filed against them. International also abandoned its discounts in 1948, although it was not until 1952 that the FTC issued its decision that International's discounts were illegal. My aim in this study is (1) to discover why discounts were granted by the salt producers and (2) to discuss their treatment by the FTC and the Courts. The FTC's approach as revealed in Morton and International reflects what was for many years (and in many respects still is) its approach to the regulation of price discrimination, so an analysis of these cases has broad application.

⁵ I refer here to all firms that produced table salt from the evaporation of brine in vacuum-pans (which was the source of most table salt) and that operated evaporating plants outside of California. Except for Morton, which operated a plant in California, no California producer operated a plant elsewhere in the U.S. The discount practices of the California firms are excluded from detailed consideration in this study. International sold no salt in direct competition with the California producers, and the FTC's investigation of International provides no direct evidence on the discounts granted by the California firms. Similarly, the FTC focused on Morton's discounts on shipments or sales from other than its California plant. I suspect that the discounts of the California producers were similar to those of the other producers. Testimony of Morton's officials made it clear that its discounts were the same throughout the U.S. It is also known that the annual-volume discounts of the California firms during the period 1933-1935, just before the evidence in Morton and International begins, were the same as those of the other producers. Shipments from California were confined to the far Western states and California production provided the bulk of the far Western supply. Shipments from the "Eastern" producers typically did not extend into areas supplied from California. No doubt the prices of the Eastern producers were influenced by California output. But this does not mean that the Eastern producers could not have discriminated through discounts in their pricing of table salt. In this study, the focus is on the Eastern producers and whether the evidence concerning them alone permits conclusions to be drawn on whether their discounts were discriminatory. Excluding California, the 15 Eastern firms produced most of the dry salt in the U.S. Only part of the vacuum-pan salt produced by these firms was packaged as table salt for household use, although the discounts at issue applied only to this salt. Features of the salt production of these firms is briefly discussed in Appendix A of this study.

a. The Robinson Patman Act

The Robinson Patman Act reflected a change in attitude to government regulation of price discrimination. Previously the aim seems to have been to protect the small competitor from predatory price-cutting by the large competitor. The new aim was to protect the small buyer from the large buyer who it was believed used his power to secure advantages not available to the small buyer. This concern is reflected in the Supreme Court's opinion in Morton:

The legislative history of the Robinson-Patman Act makes it abundantly clear the Congress considered it an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price. Section 2 of the original Clayton Act had included a proviso that nothing contained in it should prevent "discrimination in price ... on account of differences in the cost of selling or transportation..." That section has been construed as permitting quantity discounts, such as those here, without regard to the amount of the seller's actual savings in cost attributable to quantity sales or quantity deliveries ... The Committee considered the ... Robinson-Patman Amendment to [Section] 2 of great importance. Its purpose was to limit the use of quantity price differences to the sphere of actual cost differences. Otherwise ... such differentials would become instruments of favor and privilege and weapons of competitive oppression.⁶

⁶ FTC v. Morton Salt Co., 334 U.S. 37, 43-44 (1948).

The cases against Morton and International fit this concern in this sense: the major grocery chains secured the largest discounts on table salt and were the same buyers proponents of the Act pointed to as examples of large buyers said to obtain unjustified concessions from suppliers. Discounts on sales of salt to industrial users were excluded from consideration by the FTC, although the existence of such discounts was known. But whether the FTC believed that the discounts reflected the buying power of the chains or stemmed from other causes remains an open question. The records and opinions in Morton and International contain no analysis, arguments, or statements suggesting why discounts were granted. What is clear is that in the end they were not believed to reflect cost differences.

The evidence in Morton begins in late 1936 -- after passage of the Robinson-Patman Act -- and continues into 1942 when testimony was completed. This is also true for International, except that testimony in this case continued into 1944. In Morton, the FTC focused primarily on the pricing of its familiar Blue Label table salt (hereafter BL salt). BL typically sold for a premium over other brands. BL also was sold under an annual-volume discount structure that in certain respects differed from that which covered Morton's sales of its other brands. The latter discount was the same as that granted by the other producers on their sales of table salt to wholesalers and chains. This other salt was sold in standard weights and packs, and from all accounts no one of these producers secured a premium over any other.

Basically two types of discounts were challenged in Morton and International. The first involved discounts relating to what the trade called "carload" purchases. The

second involved discounts based on the buyer's annual purchase volume. Each discount is discussed in detail in different Chapters of this study. To provide necessary background, I first describe, in Chapter II, various practices of the salt producers and features of the industry that will be helpful to this later discussion. In large part, Chapter II focuses on the practices adopted by the producers as part of their Code of Fair Competition under the National Recovery Administration (NRA). The code operated from 1933-1935. The practices mandated under the code were sought to be continued voluntarily (with varying degrees of success) after the NRA's demise -- in fact throughout much of the period covered by the FTC's investigation. Discussion of the firms' practices before the evidence from the FTC's investigation begins is particularly helpful in understanding the annual-volume discounts that were challenged in Morton and International. Investigation of the code uncovered few details about carload discounts. Consequently, discussion of these discounts focuses on the firms' practices beginning in 1936.

b. The \$1.50/\$1.60 Differential in the Price of BL Salt

In April of 1937, Morton changed the size of its BL containers and from that time until at least the completion of testimony in 1942, BL was priced (at list) at \$1.60 per case for what was termed a "less carload" sale and at \$1.50 per case for a "carload" sale. The FTC and the Supreme Court found this differential illegal, apparently believing that only large buyers capable of ordering in carload lots secured the \$1.50 price. These buyers were said to secure an advantage over small buyers unable to purchase in carload lots and

who therefore paid \$1.60. In fact, Morton charged \$1.50 per case to any buyer whose order, regardless of its size, was shipped in a carload, and it was almost invariably the case that small orders were combined or pooled by Morton's salesman so that only carloads (called pool cars) were so shipped. As a result, virtually all buyers whether large or small paid \$1.50 per case. The \$1.60 price was charged only on rare occasions when an order for less than a carload was not pooled and was shipped less-than-carload. The evidence suggests that the higher price charged for these orders reflected higher freight rates for less-than-carload shipments. In Chapter III, I discuss the \$1.50/\$1.60 differential and how it was handled by the FTC and the Supreme Court. It is interesting to note that the Supreme Court centered its analysis of the legality of all of the Morton's discounts on this differential.

c. The Carload Discount on Other Table Salt

At different times and covering sales in particular geographic areas, Morton, International and several of the other salt companies had published a discount (of about 5 percent) available to a buyer who individually ordered a carload of salt (called a straight car order) from the price charged to each buyer whose order was included in a pool car. From the earliest date of record until at least the completion of testimony in Morton, no such discount applied on BL salt: as noted above, all BL orders whether shipped in straight or pool cars were priced the same (at \$1.50 per case). The FTC alleged that Morton's grant of this discount on its sales of other than BL salt (and by implication its grant by any other producer) was illegal again largely because "large"

buyers who were capable of ordering straight cars secured an advantage over "small" buyers whose orders were pooled and who thus were said to pay the higher price. Although it is not clear exactly when the initial efforts were made to establish this discount, virtually all of the evidence that I could uncover indicates that it had disappeared in practice throughout the country by 1936, when the evidence in Morton and International begins. The discount did not exist in any area where the FTC sought out the testimony of local buyers to support its view that small buyers were disadvantaged by the discount. What happened is that the discount, although originally published as available only to a buyer who ordered a straight car, had been extended in practice (in some cases almost immediately after the discount was published) to any buyer whose order was included in a pool car. As a result, virtually all buyers paid the discount price. In effect, salt shipped in a carload, whether in a pool or straight car, was priced the same. In Morton's case, this was the same practice that it followed in pricing BL. An account of the history of the carload discount and a discussion of the factors bearing on its disappearance and of the FTC's and the Court's handling of it are presented in Chapter IV.

Chapter IV also contains a discussion of a remnant of the carload discount that remained in the area served primarily by the producers in New York State: by late 1936, the carload discount had been extended but only to those buyers whose orders for inclusion in pool-cars contained at least 100 cases of table salt in cartons or cans, or five tons of miscellaneous salt items. Pool-car orders containing less than these amounts were charged the higher price. Morton did not produce salt in this area but made shipments

into it from its other plants. On these shipments (excluding BL), Morton followed the pricing practices of the New York producers: it granted the discount but only to buyers whose orders for inclusion in a pool car exceeded 100 cases/5 tons. No such requirement existed on BL. The FTC's case against Morton did not explicitly challenge its practice on shipments into New York territory. The FTC instead focused on Morton's pricing elsewhere in the country (where most of its sales were made) and where it was assumed that the carload discount was granted only to buyers of straight cars. The challenge to the discount in New York came in the FTC's case against International. International produced salt in New York and from 1936 on had granted the discount on pool car orders containing at least 100 cases/5 tons. It is difficult to relate this challenge to the concerns expressed by the Supreme Court, since almost all buyers (most of whom were small) ordered sufficient salt to secure the discount.

d. The Annual Volume Discounts

Two annual-volume discounts were in effect during the time covered by the FTC's investigation. Both were found illegal. One was granted only by Morton on BL salt. The other was granted by all of the producers (including Morton) on their sales of other packaged table salt. Morton granted buyers of 5,000 cases or more (up to 50,000 cases) of BL per year discounts of 10 cents per case. Buyers of 50,000 cases or more of BL per year were granted 15 cents per case. On sales of all other table salt, each salt company including Morton offered a discount of about 5 percent (commonly five cents per case for many standard containers) to a buyer who purchased from the seller \$50,000

or more of table salt per year. It was typically the case that a buyer who secured this discount from one producer by purchasing \$50,000 or more per year from it also received the discount on his purchases (regardless of their value) from any other producer from whom the buyer obtained salt.⁷

Both International and Morton tried to defend their annual-volume discounts on grounds of lower costs. In International's case, the defense applied only to the \$50,000 discount, since this was the only annual-volume discount that it granted. International's position was that it cost it less to supply buyers who purchased at least \$50,000 per year from it than buyers who purchased less than this amount. But suspicions and difficulties with the defense soon arose (and it was ultimately rejected) in part because the evidence indicated that International granted this discount primarily to buyers who purchased less (at times substantially less) than \$50,000 per year from it but who had purchased this amount from one of the other producers (who "qualified" the buyer for the discount). The difficulty was that if it cost International less to supply buyers who purchased at least \$50,000 per year from it (as International advanced in its defense), what cost difference then justified its grant of the discount to buyers who "qualified" with other producers and who purchased less than \$50,000 from International? International never provided a satisfactory answer. Its answer was that it granted the discount to these buyers not because they were cheaper to supply but to meet the lower prices of its competitors.

⁷ In the case of Morton, purchases of BL salt counted toward the buyer's \$50,000 qualifying volume, but the discount on BL depended only on the buyer's annual purchases of cases of BL. A buyer of 50,000 cases BL per year would necessarily secure the \$50,000 discount on any purchases of other table salt from Morton. An annual buyer of 5,000 cases of BL might or might not secure the \$50,000 discount. This would depend on the value of his purchase of other table salt from Morton (or on whether the buyer was qualified by another seller).

Morton also sought to defend its discounts on cost grounds. Its defense focused primarily on the annual discounts on BL salt. These discounts did depend on the buyer's purchases on BL alone. Morton also granted the \$50,000 discount on its sales of table salt other than BL. As did International, Morton granted this discount to buyers who were "qualified" to receive it from other producers and who purchased less than \$50,000 per year from Morton. The same suspicions and doubts as those arising in International arose in Morton and I believe weakened Morton's whole effort to justify its discounts on cost grounds. At any rate, its defense was rejected by the FTC and the Supreme Court.

The \$50,000 discount was adopted by all producers in 1936, just after passage of the Robinson-Patman Act. It reflected a change in the discount that had been implemented during the NRA and which had continued after it up until passage of the Robinson-Patman Act. In my view, the revision in 1936 was in part a response by the producers to the passage of the Robinson-Patman Act: it was an effort that at the time was believed to diminish the likelihood that their discount would be challenged and if challenged to provide a more solid defense. This effort obviously failed. In Chapter V, I will discuss the annual-volume discount existing during and after the NRA up until passage of the Robinson-Patman Act. Without this discussion, the \$50,000 discount that the FTC challenged is difficult to understand, as are the testimony and the cost justification that Morton and International advanced in support of it. In Chapter VI, I recount International's defense of the \$50,000 discount and discuss the FTC's handling of its effort. In Chapter VII, I consider Morton's defense of the \$50,000 discount and

of its annual discounts on BL. The handling of Morton's annual discounts by the FTC and the Supreme Court is also discussed in this Chapter.

e. Possible Reasons for the Discounts

The concern expressed by the Supreme Court in the earlier quotation from its Morton opinion might be taken to mean that a dominant buyer (or group of buyers) will typically secure prices below those paid by small competing buyers and that these price differences will not reflect cost differences. In explaining the annual discounts on salt, I do not rely on buyer dominance: the facts seem to me too far removed from a situation of dominance to permit this as a plausible explanation. Only five buyers secured Morton's largest discount on BL salt. Few buyers other than these five secured the \$50,000 discount. The A&P, by far the largest of these buyers, had roughly 9 percent of the retail grocery trade in 1940. I assume it purchased about this same proportion of the output of packaged table salt. By the same logic, the five buyers as a group would have purchased about 17 percent of packaged salt. There is no evidence that these buyers combined or coordinated their purchases of salt; nor do I believe that if they had that their combined position could be considered dominant. This view is reinforced by the fact that only about one-third of the output (in tons) of the evaporated salt suitable for household use was packaged and sold as table salt. The balance was packaged and sold for industrial and commercial use. Since the producers could vary the amount of their output that they packaged for table use, then the purchases of A&P would represent less than 9 percent (and those of the 5 buyers less than 17 percent) of the total against which

possible dominance should be assessed. In fact, if relative packaging costs did not vary in relation to the amount packaged for any particular use, the relevant percentages would fall to about 3 and 6 percent. Further it is doubtful that Morton and International would have sought to defend their annual discounts if they stemmed solely from the dominance of buyers; nor is there evidence, as discussed in Chapter VIII, that the contracts for salt entered by the large buyers (a) differed from those of the small buyers and (b) were consistent with price discrimination reflecting buyer dominance.

If buyer dominance is ruled out, then the explanation of the annual discounts must be sought elsewhere. If persistently granted by some or all suppliers to certain buyers or to buyers when specified purchase requirements were met, such discounts would reflect cost differences if the suppliers were competitive. If the cost of supplying buyers did not differ, the discounts would persist only if the suppliers were not competitive. In this case, the lower price charged to large buyers (as might be accomplished by the annual discounts on salt) might have been the result of the large buyer's demand for salt being more elastic than that of small buyers. This could be because the large buyers supplied more price responsive customers (or led the suppliers to believe that they did). It might also have been the case that the large buyers behaved in ways not available to small buyers, i.e., threatening to enter into production, that resulted in a lower price to them if the price of salt were set collusively. Finally, lower costs of supplying the large buyers would also provide an incentive to discount if the producers were not behaving competitively. Discrimination would not exist if the price to the large buyers fell by no more than the lower cost of their supply.

Given that the producers during the NRA jointly adopted a discount which continued after the NRA's collapse, and given evidence that the producers jointly revised their discount in 1936 in response to passage of the Robinson-Patman Act, the possibility exists that the annual discounts were a means to price discriminate in favor of large buyers. But cost differences cannot be ruled out. In discussing the annual discounts in the various Chapters below, my aim is to discover whether price discrimination or cost differences seem the more likely explanation of them. My answer is cost differences.

Chapter VIII is a summary and an extension. It contains general comments on the FTC's approach to the regulation of price discrimination as reflected in Morton and International as well as evidence drawn from other cases to suggest how general the approach in Morton and International has been.

II. THE NRA PERIOD¹

a. Introduction

The Act creating the NRA empowered members of an industry to draw up a code that once approved by the NRA authorities and signed by the President, became binding on the whole industry. Members of the salt producing industry, through a series of meetings under the auspices of the Salt Producers Association (SPA), reached agreement on a code that, with minor revisions required by the NRA, was signed by the President and took effect on September 17, 1933. The code applied to all producers of dry salt in the U.S. and therefore to the 15 producers of table salt located outside of California. Few details are available about the industry's deliberations leading up to the code, although it is clear that a variety of competitive practices that the producers had in the past sought to control, apparently without a great deal of success, were identified in the code and restrictions on them were made binding. At a meeting between NRA officials and representatives of the salt producers shortly before submission of the code, NRA officials directed the producers to

state absolutely 'It shall be considered unfair trade practice to ...' then list the things you don't want [the producers] to do. That is one of the advantages of your having a code Give your committee all the power you think you are going to need [T]he general principle of control of the industry by committee does apply, in actual fact your

¹ Much of the following discussion is drawn from material contained in: Salt Producing Industry, Code No. 20, Consolidated Approved Code Industry File, Records of the National Recovery Administration (Record Group 9, National Archives, Washington, D.C.). I will refer to this as Consolidated File. When the text itself is sufficiently clear, specific reference is not made to the Consolidated File.

committee is being delegated by the Administration to administer your code.²

This committee (the Code Committee) was composed of 7 members, four of whom constituted the executive committee of the SPA. The remaining members were selected by the SPA membership. The Code Committee was responsible for administering and interpreting the code, and any decisions reached by it were binding on the industry, providing that the NRA was in agreement. No business practice prohibited or regulated by the members and incorporated in the code nor any ruling or interpretation by the Code Committee was reversed or altered by the NRA administration.

b. Provisions of the Code

The code states that:

Time and experience have developed an orderly method of marketing under which the producers in each producing field publish their prices in their respective marketing fields; and this industry declares its policy to be that such practices shall be continued. Each producer in each field of production shall individually publish to the trade and to the Code Committee the prices at which he will sell. Any producer may change his prices provided ten days' prior notice thereof be given to the Code Committee. The minimum prices published in any marketing field by any producer in that field shall be the lowest prices at which any producer may sell in that field No producer shall sell any grade of salt at a price which will net him, at his point of production, a price less than his current cost of

² Statement of R.B. Paddock, Deputy Administrator, NRA, to individuals representing the Salt Producing Industry, at a meeting on July 26, 1933, Consolidated File.

production or the current cost of the lowest cost producer in the field in which the sale was made.³

The cost provision was inserted in the code at the request of the NRA and although during the NRA work was done to develop a uniform cost accounting system to implement it, agreement was never reached over what costs should be included and how they might be measured. I believe that the producers were primarily concerned that, however such a provision to restrict competition among themselves might be developed, it also would have diminished their ability to compete against imports, which were considered a threat to the code and to the prices established under it. Imports (or potential imports) were deemed a menace particularly by the New York and California producers and probably had some bearing on the prices established by the producers in these territories. In a conference in July, 1933, prior to the submission of the code, the NRA authorities suggested to the industry that it seek to eliminate imports. But this was more easily said than done. Success in raising the tariff or in requiring importers of salt to abide by the code (which could be accomplished by executive order) imposed data requirements that the salt producers could not meet; and although efforts to restrict imports were made and reports occasionally appeared that progress was being made, throughout the NRA imports were left essentially unaffected.

Salt was commercially refined in New York, Ohio, Michigan, Kansas, Texas, Utah, Louisiana, Oklahoma and California, and the code assigned a "natural marketing territory" to the producers in each of these states. Understandings that were reached with

³ National Recovery Administration, Code of Fair Competition for the Salt Producing Industry 3-4 (1933).

respect to these territories before submission of the code were circulated as formally adopted two days after the code took effect. During the code period, only two requests were made to alter the territories as initially established -- one by the Ohio producers seeking an extension of their Southern boundary, and one by the Texaco Salt Products Co., the sole producer in Oklahoma, seeking an extension of its territory as against Louisiana territory. Both requests were denied:

The Code Committee having considered the written statements as well as the understanding among all producers at the time of the formulation of the Code to the effect that there would be no change in the marketing fields theretofore recognized unless conditions changed; and no change of conditions having arisen requiring any change in the territorial limits of such marketing fields; the Code Committee now recommends that it is to the best interests of the industry that no change be made at this time.⁴

The Code Committee later ruled that "until such time as the industry could be guided by further experience, it would be advisable to continue the fields [territories] as they were prior to the adoption of the code."⁵ The continuation during the NRA of territories previously established held with one exception. Texaco Salt Products Co. had entered production just before the code was adopted, and it was assigned Oklahoma and parts of Arkansas as its marketing territory. Texaco ceased production in 1936, after which its territory was reassigned to the producers to whom this area had been assigned before Texaco's entry.

⁴ Minutes of Meeting of the Code Committee, December 12, 1933, contained in Consolidated File.

⁵ Minutes of meeting of the Code Committee, June 13, 1934, contained in Consolidated File.

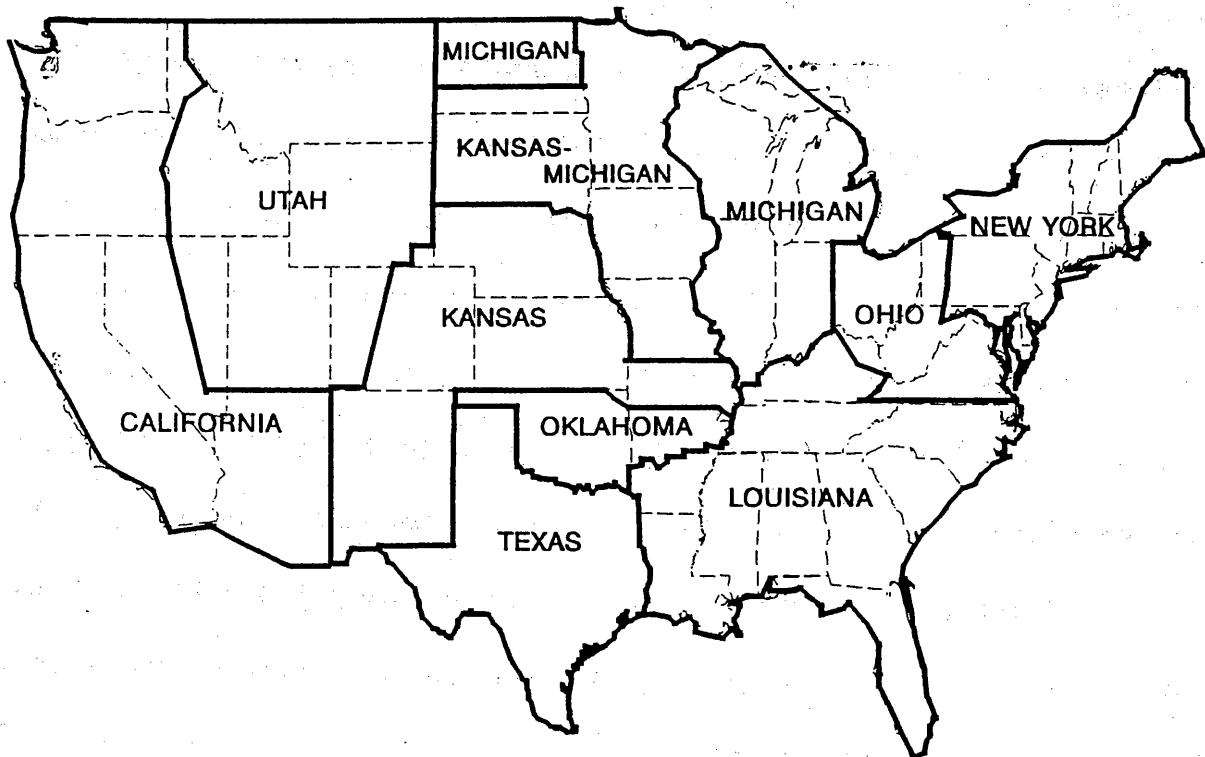
The producers in New York were assigned the following territory: New York, New Jersey, Delaware, Maryland, the New England States, the District of Columbia, parts of Pennsylvania extending West to about Pittsburgh and two counties in Virginia. The producers in Ohio were assigned the remainder of Pennsylvania, Ohio, Virginia (except the two counties assigned to New York), parts of Kentucky and West Virginia. Two small producers of medium salt in West Virginia were assigned no specific territory but were included in Ohio territory. The producers in Michigan were assigned Michigan, Illinois, Wisconsin, parts of North Dakota and Indiana except for two destination points (New Albany and Jeffersonville). The producers in Kansas were assigned Kansas, South Missouri, Nebraska, Wyoming, New Mexico and parts of Colorado. The producers in Texas were assigned the state of Texas. The producers in Utah were assigned Utah, Montana, and parts each of Idaho, Wyoming, Nevada and Colorado. The producers in Louisiana were assigned Louisiana, Mississippi, Alabama, Georgia, Florida, North and South Carolina, Tennessee, parts of Kentucky, the two destination points in Indiana, and that part of Arkansas not assigned to Oklahoma. California territory included Arizona, Washington, Oregon, California and parts each of Nevada and Idaho. The California producers were under the jurisdiction of the Code Committee, but trade complaints and local rulings were handled by a subcommittee composed entirely of California producers. There was also what was known as Kansas-Michigan territory. No salt was produced within this area and the determination of prices and other terms of sale were decided jointly by the Kansas and Michigan producers. The territory included Iowa, South Dakota, parts of North Dakota, Minnesota

and North Missouri. Shipments into the Kansas-Michigan territory were made primarily by Kansas and Michigan producers and freight costs to much of the territory from either producing state generally did not diverge substantially. Any shipments into Kansas-Michigan territory by the producers in states other than Kansas or Michigan were required to conform exactly to the prices and other terms of sale jointly established by the Kansas and Michigan producers. The boundaries of the territories are given in Illustration 1.

c. Pricing

Price scales or lists were published by the producers in each producing state to cover all sales in their respective marketing territories. As might be expected, the published prices and other terms of trade adopted by the producers for sales in their territory were identical. The price lists applicable to a particular territory were submitted to the Code Committee which in turn circulated them to all other producers. Since any producer in one territory shipping salt into another was required by the code to sell at prices no more favorable than those of the producers into whose territory such shipments were made, the "outside" producers simply reproduced as their own the price lists of the producers within whose territory such shipments were made.

ILLUSTRATION 1
THE SALT PRODUCERS' TERRITORIES, 1934



Salt was sold on a delivered-price basis. Rail freight rates were published by International for each destination in the New York and Louisiana territories, and by Morton for destinations in all other territories. The rate-books were used by all producers and showed freight costs from each producing state to any destination within a given territory. In general, freight costs from a producing state to destinations within its "natural marketing territory" were lower than freight costs from another producing state, although this was not invariably true. Table salt items sold primarily to grocery wholesalers and retail chains were sold in each territory at a uniform delivered price (what the producers called a blanket price). The delivered prices of these items did not vary with freight costs. Producers in one territory could sell table salt in another territory but only at prices that were no more favorable than those of the producers in whose territory such sales were made. For other types of salt, delivered prices in a given territory were equal to the f.o.b. plant prices of the producers in the territory plus the lowest freight cost from any producing state to any destination in the territory. In Kansas-Michigan territory, delivered prices were the base prices published by the Kansas and Michigan producers plus the lowest freight cost from any producing state to any destination in Kansas-Michigan territory.

If a particular type of salt was not produced in a territory, then its f.o.b. plant price was that of the producers in the nearest producing state, so the territories varied (slightly) according to the character of production. In Louisiana, the plants were not particularly close to each other. Freight costs were published from each plant to destinations in the territory, and the delivered price to any particular destination was

equal to the f.o.b. plant price (which was the same for each Louisiana producer) plus the lowest freight cost from any producing point. The differences in plant locations influenced delivered prices within a fairly narrow area around each plant. Beyond these areas, either by agreement or competition of the railroads, freight costs to most destinations in the Louisiana territory (or to other territories from Louisiana) were the same regardless of the plant from which shipment was made. In general, freight costs for shipments from one territory to destinations in another did not vary in relation to the locations of the plants in the territory from which the shipments were made.

At the Code Hearings, Daniel Peterkin, President of Morton Salt Co., referred to what he considered abusive practices that had developed in the industry:

Chief among these abuses has been the cutting of published list prices -- secretly, by means of discounts, rebates, concessions of one sort or another, and the dumping of salt by a producer in one field into the field of another producer by extravagant absorption of transportation costs -- in many instances at less than his fair cost and at prices lower than those made by any of the producers whose natural marketing territory it may be. We believe that the adoption of the proposed code by the industry ... will be of great assistance in correcting the abuses above referred to, along with many other abuses which it may not be necessary to particularize here⁶

L.F. Fiely, President of Ohio Salt Company, in describing conditions before the code, refers in much the same way to the practices then in effect:

Prior to the time that the Salt Code became effective, prices on salt to the class of trade as referred to above [sales of table salt to wholesalers] in our Ohio field and in fact in all fields, were greatly demoralized. Secret

⁶ Hearings on a Code of Fair Practices and Competition in the Salt Producing Industry, Vol. 1, at 54-55 (August 14, 1933).

discounts, brokerages, allowances and rebates were made to practically all the trade. This condition was brought about by uncontrolled and unfair trade practices by competitors within the Salt Industry. During this time we did allow discounts [referring to price cuts from list to a particular buyer mentioned], as we did grant discounts [or price cuts] to other jobbers. Since the Salt Code has been effective, all of these discounts to all of these classes of trade have been eliminated.⁷

How far and frequently prices diverged from list before the code are not known, although sales below list seem to have been common. Some indication is given later in this Chapter, in discussing the course of events after the demise of the NRA, in May 1935. By agreement among the producers, the prices published for each territory and initially filed with the Code Committee were those published in late 1932 and which still existed but were apparently largely ignored when the code was adopted. The plan was to require sales at these prices "until the Code has been in effect for a sufficient length of time to determine future costs."⁸

At a meeting of the Code Committee on September 13, 1933, just after the code was approved but before it took effect (on September 17) all members were notified that the

Code prohibits any sale of salt on or after September 18, 1933 at other than the producers' established prices and prohibits any secret allowance by way of discount,

⁷ Letter from L.F. Fiely, President, Ohio Salt Co., to E.W. Dahlberg, Deputy Administrator, NRA, April 20, 1934, contained in Consolidated File.

⁸ Administration materials discussing features of the code, Inventory A, contained in Consolidated File.

brokerage, storage or advertising. Any departure from the above or from any other code provision will be a violation of the Code.

Contracts for salt had been entered prior to the code's effective date and continued in effect after it. Some of them contained price and other terms that if permitted to continue would have violated the code. At the September 13 meeting, the Committee decided to collect from all producers information:

- (a) relating to contracts extending beyond October 18, 1933 with jobbers, dealers, chain stores and buying agencies, specifying the quantities, price, expiration date, control of resale price, discounts, or other allowances;
- (b) relating to the quantity and expiration date of all contracts with consumers in excess of one carload and which extended beyond October 18, 1933;
- (c) relating to contracts with distributors, specifying the date of expiration thereof and if such contracts do not carry with them the control of resale prices, then information shall be furnished as to the prices made to such distributors and all other particulars surrounding the agreement;
- (d) relating to any contract or other agreement with brokers which permit reselling at variance with producers' published prices, warehousing, or rendering of other valuable service;
- (e) relating to any contract or arrangement with anyone extending beyond October 18, 1933 which permits any unfair trade practice as defined in the code.

The producers were given until October 18 to revise any contracts whose terms differed from those published on September 18, so that sales made after October 18 would conform exactly to code. Presumably, this was not done, or at least not completely, and some contracts whose terms differed from those adopted on September

18 were continued beyond October 18. The terms and expiration dates of these contracts were circulated among the producers, indicating to each of them what transactions were to be permitted and for how long at terms that were not in compliance with the code. On the whole, however, most contracts for salt were not long term in nature (or at least typically did not specify prices other than to guarantee the buyer the prevailing market), so revisions of price and most other contract terms to comply with the code probably did not involve a substantial proportion of output. There was a provision in the code indicating that:

When the costs of executing contracts, entered into by the Salt Producing Industry prior to the approval ... of the Code, are increased by the application of [the] Act to the Industry, it is equitable and promotive of the purposes of the ... Act that appropriate adjustments of such contracts to reflect such increased costs be arrived at by arbitral proceedings or otherwise, and the Salt Producers Association ... is constituted an agency to assist in effecting such adjustments.⁹

How widely if at all the arbitration provision was used is not known.

d. Trade Practices

Article 4(b) of the code specified that "published prices shall include terms of payment, length of bookings or contracts, whether prices are guaranteed against decline and such other provisions as may be necessary to fully inform the trade of all conditions of sale."¹⁰ Article 4(c) provided that

⁹ Supra note 3, at 6.

¹⁰ Id. at 4.

terms of sale shall be fully stated and strictly adhered to and invoice shall show same. There shall be no discrimination between customers. Difference in price based on difference in grade, quantity, quality, selling or transportation costs, or made in the same or different communities in good faith to meet competition, shall not constitute discrimination.¹¹

Article 4(e) lists what were deemed "unfair trade practices." All of them were prohibited.¹² I reproduce below most of the prohibited practices:

1. Variations from openly and publically announced prices and terms.
2. Secret allowances by way of discount, brokerage, storage, or advertising.
3. Variation from openly announced grade or package differentials.
4. Substitution of grades or packages.
5. Delayed billings.
6. Rebates or other similar allowances by any name or of any nature.
7. Storage of salt in customers' warehouses.
8. Special services or privileges to certain purchasers when not extended to all purchasers under like terms and conditions.
9. Offerings of saleable gifts or prizes.
10. Free deals to any class of purchasers or prices made in combination with any product or commodity.
11. Inducing or attempting to induce a breach or cancellation of a contract between a competitor and his customer.
12. Giving of gratuities or special concessions to buyers, or rewards, or payments to the employees of buyers or distributors, or the lavish entertainment thereof.

¹¹ Id.

¹² Id.

Presumably, these provisions were to prevent erosion of published prices by means often used before the code, and in general their prohibition would not be thought necessary if published prices had not initially exceeded costs. The prohibited practices require little by way of explanation.

e. Trade Complaints

During the early stages of the code, few complaints were filed with the Committee concerning evasion of the price or trade practices provisions of the code. There was a complaint against Jefferson Island (one of the Louisiana producers) for making sales in Texas and in Louisiana territory below published list. This was investigated by the Code Committee and Jefferson Island discontinued the practice. No formal action was taken. There was also a complaint that Hardy Salt Co. (a Michigan producer) supplied a wholesaler at less than published list. This matter was investigated thoroughly. What occurred was that the wholesaler was billed by Hardy at the published list and remittance to Hardy was made at same. But the sale to the wholesaler had been made by a distributing firm that represented Hardy in the area. The distributor as Hardy's agent was compensated by a commission, part of which, presumably with Hardy's support, was rebated to the wholesaler. Hardy also discontinued the practice without formal action. This episode led the Code Committee to rule that "the sale of salt through an agent is always subject to the producers' control, and any code violation on the part of their agents makes the principal answerable to the Code Committee." ¹³

¹³ Minutes of Meeting of Code Committee, Sept. 16, 1933, contained in Consolidated File.

Subsequently, any contract between a producer and a distributing agent was required to specify that the agent sell only at the prices and terms published by the producer and which would apply if the producer and not his agent had made the sale.

In handling trade complaints, the typical procedure was for the Code Committee to request the alleged offender to abide by the code, with the threat, if he did not, that the Code Committee, after investigation, would recommend that the NRA take legal action. At one time it was proposed that the industry adopt an agreement to assess damages against any producer for a code violation. The proposed agreement (the details of which are not known) was voted down by the producers. But the producers were then informed of their right individually to enter such agreements with other producers subject to NRA approval. The vote on the industry wide agreement occurred in February of 1935. There is no mention of such agreements entered individually, although the code itself came to an end only about two months after the vote.

f. Selling Practices During the Code

The code introduced no major changes in the distribution practices of the producers. The prices set when the code took effect reflected the fact that all of the producers employed salesmen who solicited orders from all classes of trade: for table salt from wholesalers and retail chains, and for all other types of salt from a variety of industrial and commercial users. Virtually all of these orders were shipped from plant to destination in carloads, either in straight cars (a carload ordered by an individual buyer) or in pool cars (orders of several buyers which, when pooled by the salesmen,

made-up a carload). The published lists specified the prices of all grades, types and packs of salt, and enumerated all other terms and conditions of sale. It was from these published prices and terms that no reductions in price could secretly or indirectly occur. Except for types of salt not produced within a territory (in which case their prices would be determined by the producers in the nearest producing state), the producers in each producing state were to establish prices applicable to their territory, even on grades or packs that they could but did not produce, presumably to avoid possible erosion of their prices by shipments from outside producers of these packs or grades for which lower prices might be charged. New packs or grades could not be established and priced to circumvent the clear intent of the code. The Code Committee was empowered to examine and set grade and package differentials to insure that evasion of the code did not occur.

On sales of table salt to wholesalers and chains, marketing provisions typically defined the booking period (usually 30 days), provided no protection of floor stocks against price declines, guaranteed buyers against price declines on shipments made within ten days before the effective date of any such decline, specified check-out allowances,¹⁴ provided that buyers were required to pay stop-over charges on pool cars,¹⁵ specified terms of payment, etc. Such terms may have differed across fields, although what evidence exists suggests that such differences were slight. Any shipments made to a

¹⁴ Payment to the recipient of a pool car usually on tons sold to buyers other than the recipient for notifying buyers of the car's arrival and arranging orderly distribution.

¹⁵ Railroad charge for stopping a car at one destination for partial unloading, the car then continuing on to another destination.

buyer located within a given territory from a producer in another territory were required to abide by the terms of sale established by the producers into whose territory such shipments were made. On any contract calling for shipments into more than one territory, it was required that the buyer be billed at the prices applicable to each territory into which shipments were made. It was the divergence from these published terms before the code took effect that led the Code Committee to request information on all contracts containing prices or other terms that differed from those published.

The common grades of salt offered by the various producers were extremely close substitutes in demand and only slight differentials would induce shifts by buyers and competitive responses by other firms. The code's prohibition of "unfair trade practices" was an effort to prevent what undoubtedly were common ways to cut prices from published list and which presumably often led to transactions generally occurring below list. Payments for storage of salt in customers' warehouses, shipments made with billings delayed, shipments to buyers on consignment (the salt being paid for by the buyer after sales were made), assistance to buyers' advertising, billing for particular grades but substituting higher grades when shipped, rebates, etc. were all means by which one producer could expand his sales at modest expense (if not immediately detected and met by competitors). All such efforts, as well as new ones that might develop, were prohibited by the code, unless any change in practice was publically announced and applied to all buyers, which would defeat its purpose. Sales of private-label table salt were also discontinued during the code, possibly because such sales were more subject to potential "abuse", for example, through label allowances which provided

greater leeway for price variations, or because it was more difficult to control agents' sales of brands that were not owned by the producer. Invoices were to be issued showing all terms of sale as well as the items purchased; and copies of such were to be saved and made available to the Code Committee should any dispute arise. Morton had for a time issued invoices showing that the price was subject to "published quantity discount." This was not a violation of the code per se, but it brought forth a complaint by a competitor on the ground that the practice was subject to abuse. The Code Committee recommended that henceforth all invoices reflect the exact discount granted. This recommendation was followed by all producers.

During the NRA, certain clarifying interpretations were made of the trade practices prohibited by the code. There were not many interpretations, probably because the practices themselves were well understood and at least at the start of the code there appeared a genuine enthusiasm by the producers to abide by it. Most of the interpretations contain no detail concerning the events that gave rise to them.

On September 16, 1933, a bulletin was issued by the Code Committee to all producers stating as follows:

The making of any allowance or a payment for advertising done by any purchaser is construed to be a special service rendered to such purchaser in violation of Section 8., Para. C of Article 4, unless such service be extended by such producer to all purchasers under like terms and conditions, and if so extended shall become part of the condition of sale contained in the published price list.

The minutes of the October 11, 1933 Code Committee meeting reflect the following decision:

On it being brought to the attention of the Code Committee that salt salesmen have been paying jobbers and jobbers salesmen for accommodation incidental to their calling on trade and which payments have opened a fertile field for rebates in violation of the Code ..., the Committee voted that such allowances be discontinued.

On October 17, 1933 a bulletin was issued by the Code Committee to all producers referring to the above in greater specificity:

Owing to the practice being open to abuse, where salt salesmen travel with jobbers' salesmen, and are allowed a charge of \$2.00 or \$3.00 per day, or some other sum, for use of the jobbers' salesmen cars, the Code Committee has declared it to be a special service and as such constitutes an unfair trade practice. Practice should stop immediately.

At a meeting on November 23, 1933 the Committee decided that a producer could not make a charitable donation if it was made through the producer's customer "in such manner that the customer derives direct benefit from the donation." The Committee also ruled that "the maximum samples for trial purposes to be furnished a consumer shall not exceed one package, either bag, sack or barrel -- any trial lot in excess of this shall be billed at the regular price." At the same meeting the Committee further decided:

that advertising carrying the dealer's name, whether in newspapers, trade journals, house organs, handbills, etc., where payment thereof, either in cash or in merchandise, or the equivalent thereof, is made by a producer, is within the prohibition [on advertising contained in the ruling of September 16, previously quoted].

This prohibition was later extended to radio advertising.¹⁶ The Committee also

prohibited window displays or interior displays when payment therefore, either in cash or in merchandise, or the

¹⁶ Minutes of meeting of Code Committee, November 9, 1933, contained in Consolidated File.

equivalent thereof, is made by the producer to the customer

....¹⁷

On November 9, 1933, the Committee voted to prohibit "the shipment of salt on consignment to a customer ... unless like service [was] extended to all purchasers."

In December 1933, it was brought to the attention of the Code Committee:

that certain producers were furnishing advertising novelties to help induce sales in connection with the marketing of their salt [T]o determine the extent of this practice, the ... committee instructed the Secretary to request each producer to furnish a complete list of all advertising novelties and premiums now being used in their sales promotional work, and also a list of commitments with customers to be supplied such advertising material, showing the expiration dates of such commitments.

Apparently, the use of novelties was not found sufficiently important to raise serious concerns. In January 1934, the Committee ruled that advertising novelties

were not under ordinary circumstances in violation of the code. The committee announced that if a producer views the uses of any advertising novelty in sales promotion work a violation of the code and makes specific complaint, the matter will have careful consideration.

g. Brokerage

Virtually all of the salt companies used brokers to distribute part of their output. Prior to the code, it seems to have been common for the producers to compete by granting brokers commissions that exceeded the cost of their service with the understanding that part of their payment would be rebated to buyers (the buyers' invoices reflecting sales at the published list); or by appointing buyers as brokers who were

¹⁷ Minutes of Meeting of Code Committee, February 16, 1934, contained in Consolidated File.

granted a commission, although it was understood that no brokerage service would be provided. These practices were well known to the producers, and their continuation would provide a means to evade the code, which the Code Committee early on sought to prevent. In fact, the bulk of the Committee's efforts to regulate "unfair practices" involved brokerage and related issues.

There are examples before the code suggesting that brokerage was used probably to circumvent understandings reached about prices. For example, there is a letter from the Secretary of the SPA to one of the Kansas producers suggesting this:

This will acknowledge receipt of your letter of July 13, referring to the amount of brokerage allowed to brokers on your list. This is certainly some stunner. It doesn't surprise me at all that you have had trouble in your territory. The most brokerage paid in any territory in which the Association operates at present is 20 cents per ton on table salt. The 20 cents per ton on common is varied only when the brokerage is made 3 cents per barrel. If any broker representing Kansas concerns, at the brokerage they are getting, is not splitting it, I should be surprised -- all of which acts against your market every second.¹⁸

A later letter from the Secretary to another producer reflects the same concern:

It is easy to see why you have no market. When brokers are permitted as high as 10 cents per barrel on common and 20 cents per barrel on table, it means that in order to get business, they can reduce the market price 8 cents on common and 15 cents on table, and still get the regular margin allowed the brokers.¹⁹

¹⁸ Irwin S. Moise and George B. Haddock, *Manufacturers' Control of Distribution: A Study of Trade Practice Provisions in Selected NRA Codes 109* (Office of NRA, Division of Review, Trade Practices Study Section 1936).

¹⁹ Id.

International, in appointing a new broker just before the NRA, wrote to him as follows:

[W]e will allow you a commission of \$1.00 per ton on shipments of both Louisiana and New York State salt. This allowance is to cover everything, such as handling charges, switching of cars or any other costs that may accumulate. We might say to you that this is considerably more brokerage than we are paying any other broker that represents us. However, realizing the situation there in Tampa and anticipating some real work on your part with a view to developing some business, we are making this allowance to you. We ask that you consider it a confidential proposition.²⁰

How common such arrangements were is not known. Just before the code took effect, Silas Walter, Vice President of International Salt Co., described the variation in brokerage rates:

It has been difficult at times to establish uniform rates of brokerage on salt and also define the exact status of brokers and distributors, some receiving flat rates or fixed amounts per ton, while others received a flat rate per package or unit according to grade, and still others having received a percentage based on prices applying in other territory.²¹

Early in the NRA, the Code Committee sought to restrict the ability of the producers to use brokerage to circumvent the code's price and marketing provisions. It was ruled that the producer was responsible for the acts of his agent, and that any sale by a broker had to be made at the published prices and terms that would apply if the producer had made the sale. A code violation by an agent was considered a violation by the producer. The Committee also proposed a uniform broker's contract that contained

²⁰ Letter from J.G. Womble, Southern Sales Manager, International Salt Co. to C.B. Gill, August 20, 1929, Contained in Consolidated File.

²¹ Letter from P. Silas Walter, Vice President, International Salt Co. to Frank Morse, Secretary, Salt Producers Association, October 28, 1933, contained in Consolidated File.

specified brokerage rates for each item sold (for no item was brokerage to exceed 5 percent of list).

This contract was adopted by all producers and replaced outstanding brokers' contracts containing different terms or commission rates. The contract, besides specifying that sales by the broker must conform to the price and marketing provisions published by the producer, also forbade the direct or indirect rebate of any broker's commission to a buyer, provided for cancellation in the event of any code violation, and required that the producer invoice the buyer directly on any sales made by a broker. The broker in Florida who had received \$1.00 per ton from International received the following letter dated September 21, 1933 (four days after the Code took effect):

As you have been notified the Salt Code ... became effective on September 17. In order to comply with the regulations of the Salt Code, our brokerage rates to you effective on and after October 1st will be as follows: ²²

The rates listed were those contained in the uniform broker's contract. The listed rates were approximately one-half those previously granted.

There also exists a letter to the NRA from the Southwest Company complaining about a similar change in its brokerage:

Our regular brokerage on salt has been 10 percent of the net amount of the invoice. Today we received the following letter: 'at a recent meeting of the Executive Committee of the Salt Producers Association operating under the NRA code, they passed a ruling whereby the maximum commission that is permitted to be paid to any broker for selling salt is 5 percent of the net amount of the invoice. It is therefore necessary that we cut your brokerage to the

²² Unsigned letter from International Salt Co. to C.B. Gill, September 21, 1933, contained in Consolidated File.

maximum amount, as allowed by the Salt Producers' Association'.²³

International's broker in Florida whose rates had been cut also complained to the NRA. He received the following response: "While it is the purpose of the Administration to be as helpful as possible to everyone, yet we cannot participate in matters of this kind."²⁴ In general, the NRA's position was that the individual producer was free to appoint whomever it wished as a broker and to offer any brokerage rate, providing that the contract between the producer and broker contained no code violation. Since the provisions in the uniform broker's contract were individually adopted by the producers (although the contract itself seems clearly to have been jointly proposed), and since no provision in this contract violated the code, there was said to be no ground or reason for the NRA to intervene. That the code also contained a provision that prohibited its use to promote monopoly and that the industry seemed jointly to have agreed on the uniform contract (which the producers then individually adopted) was considered of no relevance.

The Code Committee also adopted a definition of a broker (with the approval of the NRA). Thereafter, it was a code violation to appoint anyone as a broker who did not meet the definition. The definition is as follows:

A food broker is a merchandise broker [who] is an independent sales agent who performs the services of negotiating the sale of food, groceries, or other merchandise for and on account of the

²³ Letter from G.J. Albright, The Southwest Co., to Hugh S. Johnson, Administrator, NRA, October 24, 1933, contained in Consolidated File.

²⁴ Letter from E.W. Dahlberg, Assistant Deputy Administrator, NRA, to C.B. Gill, November 20, 1933, contained in Consolidated File.

seller as principal, and who is not employed or established by or affiliated with the purchaser or any purchasing organization, directly or indirectly, and whose compensation is a commission or brokerage paid by the seller.²⁵

The intent was in part to prevent brokerage payments from sellers to buyers that could provide a means to transact below published list. This prohibition was later interpreted (in November 1934) by the Code Committee in the form of a question and answer:

Do the words rebates or other similar allowances by any means or of any nature include the giving of brokerage when such allowance is given to a purchaser and is the result of effecting a sale below the lowest price filed in the specific field of production in which the sale is made?

Yes. A brokerage commission cannot be given to a purchaser but is only a payment made to an agent or broker. Hence, the payment of broker commissions to purchasers is prohibited.²⁶

A few months before this the Committee had issued the following statement:

A purchaser for his own account is not a broker and is not entitled to and shall not receive either directly or indirectly payment as brokerage or deductions of any amount which would have been paid as brokerage to a broker had one been employed.²⁷

The definition of a broker eliminated the receipt of brokerage by certain cooperatives that returned part of their earnings to their members (who were the cooperatives' owners). It was known to the producers that the definition of a broker would result in the elimination of brokerage that had been paid to some cooperatives, and

²⁵ Minutes of Meeting of Code Committee, October 10, 1933, contained in Consolidated File.

²⁶ Minutes of Meeting of Code Committee, November 14, 1934, contained in Consolidated File.

²⁷ Minutes of Meeting of Code Committee, August 8, 1934, contained in Consolidated File.

it appears that an understanding that this would be desirable was reached before the code was submitted. When the code took effect, these organizations were denied brokerage (or other payments in lieu thereof); and this led to a host of protests to the NRA, particularly by farmers' cooperatives that had previously received brokerage and now were denied it.

h. Farmers' Cooperatives

The farmers' cooperatives were typically groups of cooperative stores or elevators that jointly owned a central buying organization. The salt they acquired was in part for household use but primarily for agricultural use. Salt was normally shipped directly to the stores or elevators but invoiced to the central organization which assumed responsibility for payment. If brokerage was denied, the stores or elevators would presumably be serviced and billed directly by the salt producers: the producers' salesmen would take the orders from the stores and elevators and arrange for shipment, whereas previously one would have thought this was done by the cooperative organization. If the cooperatives performed these functions for its members more cheaply than the salt producers, the denial of brokerage would be costly to the producers. But producers would presumably gain from avoiding a more general erosion of prices if "brokerage" could be paid to buyers (which, considering their operations overall, the cooperatives would be). No doubt wholesalers and many other buyers in a particular location could have appointed one of their number as a "broker" through whom all of their orders might be placed.

Whether the central organizations of the cooperatives had actually provided services that resulted in the avoidance of selling expense otherwise incurred by the producers (and which would justify the payment of brokerage) is not clear. Certain of the producers argued that the commissions that had been paid to many of the cooperatives were simply discounts from list or rebates paid in the "guise of brokerage" and they were anxious to rid the market of them. The implication of their position would be that list prices were above marginal cost, and that the commissions paid to these cooperatives were simply price cuts. James B. Westcott, attorney for the SPA, summed up the view of these producers:

Experience has proven that in many instances purchasers will set up a fictitious purchasing agency or broker with the sole and only purpose of procuring a brokerage for themselves, thus enabling them to purchase merchandise at lower prices than competitors who do not resort to such tactics As a result ... these purchasers ... naturally may resell ... at lower prices, resulting in merchandise being offered for sale at less than published prices and in effect practically demoralize any industry that sells its merchandise on a published price list basis. Our purpose in defining a broker as we did was to prevent sales to fictitious brokers and not in any way to limit sales to coops [which the industry continued to supply].²⁸

The denial of brokerage to the farmers' cooperatives and their protests to the NRA, particularly the protests by the Farmers' Elevator Service Co. and its demands that the NRA act on the cooperatives' behalf, led to an Executive Order that prohibited any code provision from preventing payment of brokerage to any cooperative organization for services rendered because all or any part of the cooperative's earnings were returned

²⁸ Letter from James B. Westcott, Attorney for Salt Producers Association, to Frank Morse, Secretary, Salt Producers Association, July 24, 1934, contained in Consolidated File.

to its members. Nonetheless, throughout the NRA, no brokerage was paid by the salt producers to farmers' cooperatives. This was accomplished, despite the Executive Order, by raising a number of objections to such payments for the NRA's consideration. By the time decisions about them were reached by the NRA authorities, the NRA itself had about come to an end.²⁹

i. Wholesalers' Buying Organizations

Just before the code was adopted, the producers seem to have reached agreement on a list of wholesalers' buying organizations to which brokerage was to be paid. The list was adopted uniformly by the producers in each territory, and brokerage could not be paid to any such organization unless listed. Producers in one territory could not add to the list of such organizations adopted by the producers in another territory: only the producers within a territory could name the organizations eligible to receive brokerage on sales made there. The list applicable to each territory was circulated to all producers by the SPA, and any sales made by or organized through these organizations earned brokerage of 5 percent. I believe that no organizations were added to the list initially adopted.

The existence of this list, which had been approved by the NRA, was also used to argue against the payment of brokerage to farmers' cooperatives. No producer in any

²⁹ The objections were that the individual producers did not wish the services rendered by the cooperatives and therefore could not be compelled to appoint any of them as a broker, that such payments were often made without services rendered and therefore would violate the rebate provisions of the code, and that the cooperatives did not meet exactly the definition of a broker which the NRA itself had approved.

territory had listed a farmers' cooperative as a wholesalers' buying organization eligible to receive brokerage. Further, no producer in one territory could add to the list of buying organizations applicable to another territory, since to do so would have been interpreted (with the approval of the NRA) as a sale below the published prices of the producers in the territory and therefore as a code violation.

An example of the list to which I refer was circulated by Jefferson Island to its sales force on June 1, 1934:

Jobbers Buying Organizations, Louisiana, Michigan,
Kansas-Michigan, Kansas, Ohio, Utah, Texas and New
York Fields

To jobbers buying organizations we will allow a brokerage of 5 percent on the net plant price as arrived at by deducting from the delivered price the freight rate from the shipping point having the lowest freight rate; excepting on items on which a blanket price is made, from which no freight will be deducted.

The above brokerage is to be paid to the buying organization direct.

The buying organizations which we recognize at this time as being entitled to the brokerage are as follows:

Clover Farm Stores
I.G.A.
Jobbers Service, Inc.
Mfrs. Jobbers Assn.
Merchandise Service Corp.
Plee-Zing, Inc.
Red and White Corp.
Nationwide Stores Corp.
Wholesale Grocers Exchange
United Buyers Corp.
National Brand Stores

I do not know exactly what relations existed between these organizations and the wholesalers on whose behalf purchases were arranged, although I believe that in general they arranged for the supply of salt (and various other items) to a regular group of wholesalers and had signed the uniform broker's contract with the salt producers. The wholesalers (and not the buying organization) would thus be invoiced directly by the producer, and no part of the brokerage commission paid to the buying organization was to be rebated to the wholesaler. Presumably, these organizations could arrange sales to these wholesalers (in combination with services provided by the producers) more cheaply than could the producers, and the arrangements would make sense. I assume that 5 percent approximated the cost of their services.

Certain wholesalers' buying organizations were excluded from the list. For example, Biddle Purchasing Co. complained to the Code Committee over its exclusion:

We do not know why, when a certain group of wholesaler buying organizations were recognized as entitled to an extra 5 percent on salt, our company was not included when we were ... the largest in the business and by far the oldest in operation, representing the highest class of trade. We turn orders direct to manufacturer without the use of brokers or sales expense and, therefore, are entitled to a brokerage of 5 percent as paid to others.³⁰

Whether Biddle was ultimately added to the list is not known. There is no evidence that it was.

³⁰ Letter from John P. Cole, Vice-President, Biddle Purchasing Co., to James B. Westcott, Attorney for Salt Producers Association, May 4, 1934, contained in Consolidated File, supra note 1. Biddle was known to have returned some of its earnings to wholesalers under contract with it. For this reason, Biddle was later found by the FTC to have violated Sec. 2(c) of the Robinson-Patman Act. See Biddle Purchasing Co., 25 FTC 564 (1937).

j. Distributing Companies

Contracts with distributing companies were also regulated during the code. The distributing companies were firms under contract with one or more salt producer to perform the various distribution functions otherwise undertaken by the producer, typically within some defined geographic area. They solicited orders for salt, arranged straight and pool car shipments, sent shipping instructions to the producer, and maintained an inventory for local pick-ups and deliveries. The distributing companies typically received a commission. During the NRA, the distributing companies were required to sell at the producer's published prices and to adopt as their own the producers published terms. The contracts also specified, on threat of termination, that the distributing company retain the whole of any commission earned. These provisions controlled the prices at which the distributor might sell, but they would not control competition among the producers to induce the distributor, by means of a higher commission, to shift his efforts to one as against another producer, or to shift his efforts entirely to another producer. There were code provisions that sought to control this. On December 21, 1933, the Code Committee decided that "the rules and regulations established by a producer applicable to distributors in his territory [are required] to be followed by producers in outside territories when entering into distributor relations." On the same day, the Committee issued a bulletin to all producers that

no producer in an outside [territory] could make prices or grant terms more favorable than the most favorable terms granted by a producer in the [territory] in which the distributor was located. If a distributor is representing a producer on an agency basis, the producer is responsible

for all acts of the distributor insofar as they are governed by the provisions of the Code.

I suspect, although this could not be altogether confirmed, that the price filing requirements were extended to cover commissions paid to distributing companies, and that the producers in a given territory published uniform commission rates (and perhaps adopted a uniform contract) applicable to distributing companies; and the rates and terms so filed and published could not be exceeded by any outside producer.

I also suspect that the regulation of commissions to distributing companies led some of the producers to begin selling salt to them at prices that were not published and which probably resulted in the distributing companies earning more than they would have earned had commissions been paid. It was probably activities along these lines that led the Code Committee (on February 6, 1934) to issue the following regulation:

The making of an agency contract with any person who normally buys salt competitively from more than one salt producer when such agency contract is made with the intent of or having the effect of evading the provisions of the code ... by using agency contract as a means for making prices to such buyers which are not published as provided by the code or which, in effect, constitute secret discounts; and where the purpose and/or effect is to procure all or the major part of the business of such a buyer constitutes a violation of the code.

How effective these controls were is not known.

k. Bulk Salt

Salt in bulk (salt shipped loose or unpackaged in a carload) was sold to what the trade called consumers -- those who used the salt directly in some manufacturing process-

es. Bulk salt was sold in straight cars only, was priced separately by the producers, and was sold only to buyers who entered contracts in which they agreed not to resell or divert to other than their own use the salt so acquired. The price scales of all producers contained marketing provisions that prohibited bulk sales to other than recognized consumers. During the NRA, certain consumers who violated their contracts by reselling part of their bulk purchases were denied future supplies -- at least until they provided greater assurance that they would no longer resell any part of their purchases -- and certain buyers who before the code were not consumers but had been buying bulk salt and reselling it in packaged form were no longer able to do so once the code took effect.

These restrictions applied uniformly in all territories, and the buyers of bulk salt who had been reselling it in packaged form (and who could no longer do so after the code took effect) complained to the NRA. The justification advanced by the Code Committee in response to such complaints was that salt shipped in bulk was subject to deterioration and contamination, and that it would be undesirable if any part of it was packaged and found its way to human consumption. But we get a very different view of the prohibition from International as it explains to the NRA why it discontinued bulk sales to resellers, in particular to the A.P. Ames Co. The A.P. Ames Co. was one of the firms that had been packaging and reselling bulk salt before the code and complained to the NRA when it was unable to purchase bulk salt once the code took effect:

Our price lists provide that bulk salt will not be sold ... to resellers, other than recognized salt distributors, for the reasons stated in our telegram ... dated December 23, 1933, to wit:

'To correct unfair trade practices existing prior to the code, it has become absolutely necessary to decline to supply bulk salt to dealers to prevent chiselling of our published prices of packaged salt with our own salt. It has been the practice of some dealers as a subterfuge to purchase bulk salt solely with the object of defeating producers' published prices on packaged grades. There would be no objection to selling [Ames Co.] bulk salt in carloads for consignment direct to its consumer customers, providing complainant would agree not to divert such shipments to its own warehouse for packaging and reselling, and further that complainant would agree to be bound by applicable provisions of the Salt Producers Code

In such case, [Ames] would be classified as an agent or a dealer and would receive prevailing rates of commission or discount applying to such classification.' ...

[A]ccording to its own admission, [Ames] desires to purchase bulk salt in order that it may resell at lower than prevailing published prices of producers in the market in which it operates, thereby defeating the efforts of the company to stabilize its natural market

We maintain the right to protect ourselves and our customers against such competition, and to sell our salt to whomever we please at such prices and terms of sale as we may publish in accordance with the ... Code. We cannot be forced to be placed in a position nor to adopt practices that will result in selling salt to customers who in turn resell in competition with ourselves at prices and terms that result in the demoralization of the market, and a loss of revenue to ourselves and the industry If we did not adopt this policy and protect ourselves against such competition, it would inevitably result in a situation that would cause us to sell a major portion of our salt at little or no profit [W]e cannot sell bulk salt to customers who would purchase and resell same at little or no profit in competition with us. This is the manner in which complainant has operated in the past and would continue to do so according to his own admission.³¹

³¹ Letter from P. Silas Walter, Vice-President, International Salt Co., to C.E. Willis, Asst. Deputy Administration, NRA, February 14, 1934, contained in Consolidated File.

Similarly, a letter of February 23, 1934 from the Secretary of the SPA to H.T. Bibb. Co., states that the reason why Morton refused to sell bulk salt to resellers was to prevent "repackaging of salt for the purpose of defeating their published prices to the trade."

The NRA's response to the Ames Co. was that (1) no code provision prevented International, if it wished, from supplying Ames and (2) no code provision gave the NRA authority to compel International to supply Ames. It was also noted "that the controversy is one not coming within the jurisdiction of the Administration."³² This response was not lightly received by Ames:

Your letter proves you have not considered the real issue. Why will not producers sell salt in bulk to any resellers? We demand an answer to the question. The Code gives you authority to prevent discrimination and monopoly. Use it. Shall push case to the limit.³³

This in turn received two brief responses from the NRA: (1) that it could not act in this controversy³⁴ and (2) that "further investigation of the situation appears to be unwarranted."³⁵ There the matter seems to have rested.

³² Letter from R.B. Paddock, Deputy Administration, NRA, to Mr. Redman, Secretary, Peabody Chamber of Commerce (writing on behalf of A.P. Ames, Co.), February 26, 1934, contained in Consolidated File.

³³ Telegram from Mr. Redman, Secretary, Peabody Chamber of Commerce, to E.W. Dahlberg, Asst. Deputy Administrator, NRA, date unknown, contained in Consolidated File.

³⁴ Letter from E.W. Dahlberg, Asst. Deputy Administration, NRA, to Mr. Redman, Secretary, Peabody Chamber of Commerce, March 10, 1934, contained in Consolidated File.

³⁵ Letter from E.W. Dahlberg, Asst. Deputy Administrator, NRA, to Mr. Redman, Secretary, Peabody Chamber of Commerce, March 14, 1934, contained in Consolidated File.

It seems reasonably clear that during the NRA the prices of packaged salt were raised relative to bulk salt by more than the cost of packaging, and that this would have encouraged the purchase of bulk salt for resales as packaged salt, which would tend to diminish the differences between bulk and packaged prices to differences in packaging costs. Since the list prices adopted when the code took effect were those that existed just before it, the same incentive presumably existed before the code, particularly when the producers sought to sell at list, so the existence of bulk sales to resellers before the code probably caused transaction prices of packaged salt to fall below published list. If the resellers could have converted bulk to packaged salt and distributed it more cheaply than the producers, then during the code, agency contracts might have been entered with the resellers, but with the understanding that resales would be at published list. But the resellers often did not wish to do this -- apparently some of them were offered agency contracts but refused to accept them -- suggesting that they were not more efficient packagers and distributors than the producers.

At any rate, the refusal to sell bulk salt to resellers suggests that during the NRA the producers were discriminating against purchasers of packaged salt. This is not altogether implausible. Consumers of bulk salt often converted the salt to brine for use in their manufacturing processes, and these buyers may have had relatively greater access to alternative brine sources (say through their own brine wells, or from firms that only extracted brine, neither of which were under the jurisdiction of the salt code) than did users of smaller quantities who purchased their salt in packaged form. John L. Ryon,

Sales Manager of International, mentioned that bulk prices were kept close to costs because of these substitution possibilities.³⁶

At the time of the NRA, 45 percent of total salt output (in tons) was contained in brine produced by firms not subject to the code. George Haddock, who was involved in the NRA's administration of the code, later wrote that toward the end of the NRA, when it became reasonably clear that code violations were unlikely to be punished, the producers again began to ship in bulk to resellers; but more commonly, consumers buying in bulk began to sell part of their salt to resellers who arranged its resale.³⁷

I. Discounts

During the NRA, certain discounts from list prices were granted to what were called "quantity buyers." Each discount was published by the producers in each territory as was a list of buyers certified as eligible to receive it. Certification that a buyer was eligible for a discount on his purchases in a particular territory was made either by an individual producer in the territory (subject to verification by the Secretary of the SPA) or by the Secretary of the SPA. A list of eligible buyers in each territory was circulated to all producers by the Code Committee, and no producer in one territory could add to the list of eligible buyers or grant a discount larger than that published by the producers in another territory. The discounts applied to salt purchased for particular uses, and a complete listing of all discounts and the buyers who were eligible to receive them is not

³⁶ Record, 4307-4-3-6, at 24.

³⁷ Supra note 18, at 146.

available. General agreement on what discounts would be granted seems to have been reached prior to submission of the code, and except for a discount on table salt sold for household use (described more fully below), what evidence exists suggests that the discounts and the lists of buyers eligible to receive them were identical in all territories.

The discounts were not strictly quantity discounts, insofar as this means that price declines with the amount a buyer purchases from an individual producer. Instead, each discount was based on the buyer's aggregate purchases from all producers over the past 12 months. Once a buyer was certified, the discount took effect in 10 days. All producers then granted the discount on all sales to the certified buyer subsequent to the effective date. Eligibility was lost if the buyer failed to purchase the annual volume specified by the producers as necessary to secure the discount. In practice, a producer either supplied an eligible buyer nothing or granted the discount on any sales made to it. Each producer's published price list indicated that a particular discount would be granted to any buyer whose aggregate purchases from all producers met the specified requirement. This satisfied the code requirement that the individual producer publish the terms at which it would sell and abide strictly by them. To discount to any buyer who was not certified and whose identity had not been circulated to all producers was a violation of the code. Except for the discount on table salt, for which some evidence was developed during the NRA and which I will discuss in Chapter V, there is no evidence from the NRA file suggesting how or why the producers' costs were lower on sales to the certified buyers.

One discount was granted on evaporated salt sold to baking companies that had purchased 1000 tons or more during the past 12 months. A memo from International Salt Co. to its sales department and to the Code Committee dated December 13, 1933 indicates that "we have ascertained that the following buyers have taken 1000 tons or more during the past 12 months" and lists 7 large bakery companies eligible for the discount on baker's salt. The memo goes on to note that

it is required to certify that [the buyer] individually purchased 1000 tons or more during the past 12 months, unless our sales records disclose that to have been the case. Should our records not confirm such fact, then certification of the buyer shall be subject to confirmation through the Secretary of the Salt Producers Assn.

If any producer objected to International's certification, it would have been subject to verification by the SPA. International's list was circulated to all producers and any sales to these buyers in New York and Louisiana territories (where International produced salt) were discounted. By Jan 29, 1934 four other bakery companies were qualified by other producers or by the Secretary of the SPA and their names also were circulated to all producers. The list of baking companies eligible for the discount was uniformly adopted in all territories. International's December 13 memo also lists three bakers' buying organizations entitled to brokerage of 5 percent. This listing applied specifically to New York territory, although I believe that the same list was adopted in all territories. The memo notes that

no additional Bakers' Buying Organizations will be listed unless by approval of the Producers in New York State, and the usual 10 days notice shall be given to the Code Committee before such buying organization will be listed and entitled to a brokerage.

A discount similar to that to large baking companies was granted to butter and margarine producers who purchased 1000 bbls. or more per year. The list of certified buyers included 14 firms. The discount and the list of certified buyers were uniformly adopted in all territories.

A similar discount also was granted to "quantity buyers" of table salt. The discount was published by the producers in each territory and was granted to buyers certified as eligible by the individual producer or by the Secretary of the SPA. Eligible buyers were those whose aggregate purchases of table salt from all producers during the past 12 months exceeded a specified dollar value. Along with the dollar values, other definitions were applied to quantity buyers that sought to insure that discounts were granted primarily to the large retail chains. Each producer published the discount and specified that it would be granted on any sales of table salt made to an eligible buyer. That is, the grant of the discount by any producer to a quantity buyer did not depend on the amount sold by the producer to the buyer. The list of eligible buyers in each territory was circulated to all producers by the SPA. A producer in one territory could not certify name a buyer in another territory as eligible for a discount, nor could a producer in one territory grant a discount on its sales to a quantity buyer in another territory that was larger than the discount published by the producers in whose territory such sales were made. Further, no producer could grant a discount on table salt except to a buyer certified as eligible to receive it. Table salt on which the discount was granted was uniformly defined as evaporated salt (and in certain instances rock salt) packed in standard containers of specified weights. The discount applied to the buyer's

purchases of these packages only. The annual value of purchases necessary to secure the discount was not the same in all territories, and this led to some differences across territories in the identity of qualified buyers. In New York territory only, there existed a scale of discounts based on a range of annual purchases. In all other territories, the discount was 10 percent (of either the base price for delivered-price items or the blanket price for blanket-priced items). Except in New York, the discount was granted to buyers whose purchases of table salt during the past 12 months aggregated at least \$100,000 (in Louisiana territory the minimum was \$250,000).

The discounts on table salt led to a host of protests to the NRA by wholesalers who did not receive them. Their aim was to get the NRA to eliminate the discounts. This the NRA did not do. But the protests as well as disagreements among the producers over the desirability of discounts on table salt led the NRA to investigate the issue. In Chapter V, I will return to discuss in greater detail the discounts on table salt during the NRA and the protests and disagreements and how they were handled by the NRA authorities. The character of the discount during the NRA is helpful to understanding the \$50,000 annual-volume discount that the FTC later challenged. The \$50,000 discount reflected a revision of the basic discount that existed during the NRA and which was subsequently continued by the producers. The revision was adopted in 1936, just after the Robinson-Patman Act was passed. In my view, the revision reflected an attempt to continue the discount in a way that the producers believed was unlikely to be challenged, and if challenged, would provide a better defense. It turned out that the producers were mistaken about this.

m. Territorial Pricing

Prior to and during the NRA, probably over 90 percent of salt shipments (in tons) was sold under a delivered price system: the price at any destination equalled the f.o.b. plant price of the producers in whose "territory" the destination was located plus the lowest rail-freight to that destination. The "territory" assigned to a producing state usually was defined by the border where freight cost from the producing points in that state rose to equal (or approximately so) the freight from another producing state. The producers in one territory making shipments into another territory adopted as their own the delivered prices of the producers into whose territory such shipments were made. Pricing in this way is consistent with competition among salt producers. But since the code's aim was to reduce competition, such pricing also could be the result of a lessening of competition among salt producers.

To illustrate consistency with competition, suppose that the producers competed and that the marginal cost of production was constant and identical in each producing state. Then the delivered price to any destination would equal the marginal cost of production plus the lowest freight cost to it. Shipments from each producing state would be confined to its "territory" as defined above. If marginal cost differed across producing states or was rising, then shipments from each producing state need not be confined to its territory.

Thus suppose that marginal cost in producing state A is less than in producing state B (when producers in A supply the total demand in territory A and producers in B supply the total demand in territory B). At the boundary of their territories (where

freight cost from A equals that from B) the net price (the price net of freight) that the A producers receive, given competition, would equal their marginal cost of production. This price would be below the net price that the B producers receive, since their marginal cost is higher. This difference in net prices would lead the A producers to divert some of their existing shipments from destinations in A to destinations in B, since on shipments to some destinations in B the net price they receive would be higher. Such diversions would cause the net price throughout A to rise, because less is shipped there.

Conversely, the net price throughout territory B would fall. At the destinations in B that receive shipments from A, the B producers would find, on their current shipments there, that the net price they receive is less than on their shipments to destinations in B not reached by shipments from A. The B producers would gain by diverting some shipments from destinations in B reached by shipments from A to destinations in B not reached by shipments from A. Such diversions will cause the net price throughout B to fall.

A rise in the net price received by the A producers also will lead them to increase their output, and this will mitigate the rise in net price in territory A and influence shipments from A into B. Conversely, the B producers, when confronted with a lower net price, will reduce their output, and this will mitigate the fall in the net price in territory B and also influence shipments from A into B. If the marginal cost of the B producers increases with output, then their marginal cost will equal the lower net price only at a smaller output. If the marginal cost of the B producers is constant but above the A producers', then a net price that equals the B producers' higher marginal cost could

only be secured at destinations in B closer to the point of production there -- where freight costs from B are sufficiently below those from A to offset the difference in marginal costs. This can only occur when the output of the B producers is less than what was initially assumed.

In equilibrium, the delivered price of the A producers would equal their marginal cost of production plus freight to any destination to which they ship. The delivered price of the B producers would equal their marginal cost of production plus freight to any destination to which they ship. On shipments by the A producers to any destination in territory B, the delivered price from either A or B could not differ. Since the A producers could charge no more on shipments into territory B than what the B producers charge, then the A producers, on shipments into territory B, could do no better than to "adopt" the delivered prices of the B producers to any destination in territory B. Similarly, if shipments instead were from the B producers into territory A (which would occur if the conditions assumed above were reversed), the B producers would adopt the delivered prices of the A producers to any destination in territory A. This essentially is the system that was adopted by the salt producers.

As described so far, the delivered prices at any destination in territories A and B are competitive. But in fact, in certain producing states at the time of the code, there was only one producer. Consequently, delivered prices may not have been competitive at each location, although producers making shipments into another territory still adopted the delivered prices of the producers into whose territory such shipments were made.

To illustrate this, suppose initially that the producers in A and B compete, and that the marginal cost of production plus freight from A and B are equal at the boundary of their territories (when the demand in each territory is met by the producers located there). Suppose next that the A producers reach an agreement not to compete, and that as a result their net price is raised above their marginal cost of production. Let the A producers' shipments to each destination be such that they receive the same net marginal revenue (marginal revenue net of freight) on all of their shipments in territory A. The delivered price of the A producers is now higher than before at all destinations, and therefore is higher at the boundary of their territory with B. The B producers, assumed still to compete, would now find it profitable to divert shipments from territory B into territory A until the net price they receive is everywhere the same. Such shipments will cause delivered prices in territory B to rise and in territory A to fall. The higher net price received by the B producers also will lead them to increase their output, mitigating the extent to which price in both territories will rise. On their shipments into territory A, the delivered prices of the B producers could not exceed the delivered prices of the A producers; so again the B producers would "adopt" the delivered prices of the A producers for shipments the B producers make into territory A.

The extent to which shipments by the B producers would be made into territory A, given any rise in price by the A producers, would depend in part on how freight costs vary with distance and how the B producers' marginal cost of production varies with changes in their output. Presumably, the A producers would take these factors into account in deciding by how much to raise their price. The demand the A producers face

will be more elastic the more responsive are shipments from B to any given price increase by the A producers. Nevertheless, that additional shipments from the B producers into territory A may occur does not mean that the A producers would not find a price increase profitable. In equilibrium, the net price the B producers receive at any destination in territory A would be the same as that received by the A producers. This result would again be reflected by the B producers adopting the prices set by the A producers on shipments to destinations in territory A.

If the A producers and the B producers had each reached agreements not to compete, price would be raised in both territories. If, for example, the marginal costs of production of the A and B producers were the same and the territorial boundary defined the area beyond which shipments from either territory would not be made when the producers competed, then this boundary also would define where, at the higher prices set, marginal revenue (net of freight) would be the same for the A and B producers. For if, at this common marginal revenue, price would otherwise be higher in (say) territory A, because the elasticity of demand in A is lower than in B, then buyers would purchase in B and ship to A, so that any such difference in elasticities would no longer hold. A restriction in output in both territories could thus occur. If the marginal cost of production of the A producers was lower than that of the B producers, shipments from A into B could occur, but net marginal revenue and net price in each territory nonetheless would be the same. On shipments from A into territory B, the A producers would adopt the delivered prices of the B producers; and conversely, the B producers

would adopt the A producers' delivered prices if shipments into territory A from B were instead to occur.³⁸

The territories existing before the code were incorporated into the code. Shipments from one territory to another were not prohibited, but were required to conform exactly to the list prices and other terms of sale of the producers into whose territory such shipments were made. Initially, the producers in each territory adopted the list prices existing just before the code which had been published but largely ignored. Just before the code, it appears that transactions prices were often below list, suggesting that the list prices reflected what the producers might have hoped to achieve.

If before the code list prices were above marginal costs of production plus freight, individual producers would have an incentive to cut price in their own territory or on shipments into other territories. Such behavior if widespread or frequent would erode the published lists, as apparently occurred prior to and after the code. During the code, the inability of the producers to sell at other than their published lists, and the prior publication, circulation, and presumably enforcement of their published prices, as well as the control over ways to circumvent such prices (i.e., by controlling the definition of and payments to brokers, agents, jobbers' buying-organizations, quantity buyers, etc.), probably led to far more sales occurring near published list than previously had been experienced by the producers. The secret cutting of price from published list was the

³⁸ The price set in each territory may not maximize joint profits. For example, the A producers might reckon that a reduction in their price would draw additional sales from territory B, so price is reduced to account for this, and similarly for the B producers. Consequently, price may be too low to maximize joint profits, or too low relative to the prices that would be set if all prices were set centrally.

basic "evil" that D. Peterkin, Sr. stated that he hoped the code would eliminate, and I suspect that to some extent his wish was fulfilled.

Within each territory, the joint setting of prices (taking account of potential shipments from other territories) was probably not too difficult, if only because in most territories the number of producers was not large (as will be noted in a moment). Also, the NRA encouraged joint behavior, as well as the publication of prices and other terms of sale to which each producer had to abide, all of which would tend to reduce competition. Efforts to maximize joint profits by setting prices centrally for each producing state and defining its shipping distances (beyond which shipments would not be permitted) probably posed a more complex problem, and a larger number of producers would have to be involved in resolving it. Such an effort does not appear to have been attempted.

The extent to which price in one territory might be reduced so to capture additional sales in other territories probably was limited by the fact that certain of the producers had plants in more than one territory. The relative gain from additional shipments from one into other territories would be less for the producers operating in more than one territory (since they would share in the loss in the territories into which such shipments were made), so these producers would be less inclined to make such shipments. Further, such additional shipments could not be made secretly under the code.

n. Blanket Pricing

The delivered pricing discussed above did not cover table salt packed in cases of cartons for household use: in particular cases of 36 1-1/2 lb. squares and 24 2-lb. rounds, or Morton's BL, packed 26 26-oz. rounds to the case. In all territories, these items were sold at uniform (or blanket) delivered prices before, during and after the NRA. These were items of table salt sold to grocery wholesalers and chains on which discounts were granted that the FTC later challenged. There is no evidence or discussion from the NRA's files or FTC's proceedings suggesting why blanket pricing was used for these items and no others. Blanket pricing is not easily understood, particularly when most of the industry's shipments were priced differently. I offer just a few comments.

It is possible that table salt compared with other salt was relatively more costly for the producers to sell at greater distances from their plants. The producers' selling activities, which involved primarily generating orders and assembling them for shipment in carloads, could then have been accomplished more cheaply by the buyers at more distant locations. The producers' savings from this could have approximated the additional freight for more distant shipments. A blanket price is consistent with this possibility, but there is almost no evidence in support. Why table salt would be unique in this respect is not obvious.

It also is possible that the cost of accounting for and billing actual freight for the many small orders for this salt exceeded the additional cost of freight on more distant shipments, so that a blanket price (including average freight) was more profitable. Again, although possible, there is no evidence in support.

It also is possible that the derived demand for salt was less elastic at destinations closer to the producers' plants, since relatively less is shipped to these destinations by producers in other states. The producers jointly might account for this through blanket pricing, which, since freight costs rise with distance, yields higher margins at destinations closer to the plants. Blanket prices would avoid reshipments by buyers only if the higher margins at closer destinations were less than the additional freight from more distant to closer destinations. I do not know whether this condition was met. Why this possibility might hold only for table salt also is not clear. Further, if margins were greater on closer destinations, the producers, if they were to compete (which they seemed to do before and after the NRA) would each attempt to sell more of their output closer to their plants, causing downward pressure on transactions prices there. At any rate, although I can offer little by way of explanation, the FTC's concerns in Morton and International focused on carload discounts and discounts to "quantity buyers" of table salt, and these discounts were not related to the buyers' geographic locations. All in all, my guess is that the cost of accounting and billing for actual freight is the more likely explanation.

o. The Producers

I list below the producers of vacuum-pan salt by territory. These firms were also the major producers of medium salt. The list excludes the very small producers of medium salt only. All territories except Kansas had three or fewer producers of vacuum-pan salt. Kansas had five producers:

Louisiana:	Myles, Jefferson Island, and International
New York:	International, Watkins, Worcester
Ohio:	Colonial, Ohio Salt Co., Union
Michigan:	Hardy, Diamond Crystal, Morton
Kansas:	Barton, Carey, Morton, American, Diamond Crystal
Texas:	Morton
Utah:	Morton
Oklahoma:	Texaco

The NRA file contains no information on the production of the various firms, and the FTC's investigations did not collect this information systematically. Production information that the FTC did collect reflects the output of evaporated salt (vacuum pan and medium salt) by some of the firms in 1936 or 1937. The information that exists on the output of the various producers relative to total production in each of the different producing states, and relative to U.S. production (excluding California production), is given below.

The production of evaporated salt in Louisiana in 1936 or 1937 is not known. The Bureau of Mines ³⁹ did not report Louisiana production separately, but combined it with production in New Mexico, Oklahoma and Utah. There is no evidence that vacuum-pan salt was produced in New Mexico in 1936 or 1937. In these years, some medium salt was produced in New Mexico, but I suspect in very small quantities. In Oklahoma, Texaco Salt Products Co. was the main producer, and it discontinued production in 1936. There is no evidence that its facilities were used by others to produce salt in 1936 or 1937. Probably very little evaporated salt was produced in Oklahoma in 1937. Production in Utah, which contained one of Morton's plants, is not

³⁹ The figures on total production are from 1937 Minerals Yearbook 1416; 1938 Minerals Yearbook 1271.

known for 1936 or 1937. Louisiana production plus that in Utah, New Mexico and Oklahoma was 133,936 tons in 1937.⁴⁰ Jefferson Island reported production in Louisiana of 53,823 tons in 1936, or 40 percent of the above total.⁴¹ In 1937, its share of Louisiana production alone would probably have been well above 40 percent. The production in Louisiana of Myles and International is not known. International's production in New York and Louisiana combined was 186,296 tons in 1937. International's production then equalled about 27 percent of the combined production in New York and Louisiana (the latter including production in New Mexico, Utah and Oklahoma). Of International's net sales of evaporated salt in 1942, 13 percent was derived from its production in Louisiana.⁴² If this proportion also held in 1937, then International would have secured about 13 percent of Louisiana production (including production in New Mexico, Utah and Oklahoma). Presumably, International produced more than 13 percent of Louisiana's production alone.

The Bureau of Mines reported Utah production in 1938. In that year, production in Utah equalled 42.5 percent of the combined production in Utah and Louisiana (the latter including production in New Mexico, Oklahoma and also Colorado, which was added to the Louisiana figures in 1938). I believe that production in Colorado was relatively very small. If production in Utah as a percent of production in Utah plus

⁴⁰ 1938 Minerals Yearbook 1271.

⁴¹ Record, 4319-4-3, at 531.

⁴² International's output in 1937 is contained in Record, 4307-4-3-2, at 211. Sales in 1942 are contained in Report on Review and Extension of Cost Analysis Advanced in Justification of Prices, Appendix A, Record, 4307-1-2.

Louisiana (including the production in New Mexico, Oklahoma and Colorado) in 1938 also held in 1937, then Jefferson Island would have produced about 70 percent of Louisiana production alone, and International about 30 percent. Myles, which was always reported to be a very small producer, would have produced just over zero percent (and a larger percentage if International's output in Louisiana relative to New York was less in 1937 than in 1942). Production in Louisiana was probably dominated by Jefferson Island and International. Louisiana production in 1938 (excluding Utah) was approximately 3.7 percent of U.S. production. Consequently, Jefferson Island produced about 2.6 percent of U.S. output, Myles just over zero percent, and International (combining its New York and Louisiana production) about 8.5 percent.

In New York, no information exists on the production of Watkins Salt Co. or Worcester Salt Co. In 1937, International's production in New York, assuming that 13 percent of its total output occurred in Louisiana, would have equalled about 43.5 percent of New York production. The balance would have been produced primarily by Watkins and Worcester. (There were probably a few small producers of medium-salt only in New York.) Watkins and Worcester each operated one plant and International operated two plants in New York. The combined production of Watkins and Worcester in 1937 probably equalled about 56.5 percent of New York production and 9.6 percent of U.S. production.

In Ohio, Colonial Salt Co. produced about 100,000 tons and Ohio Salt Co. about 190,000 tons in 1936.⁴³ Total production in Ohio in 1936 was 414,046 tons, so Colonial

⁴³ Record, 4319-3-2, at 294, 299.

secured about 24.2 percent, and Ohio Salt Co. 45.9 percent, of Ohio production. The balance (of 29.9 percent) was produced by Union Salt Co., and by a few small producers of medium-salt only. Production in Ohio equalled 19.1 percent of U.S. production in 1936, so the three major producers in Ohio secured, respectively, about 4.6, 8.8, and something less than 5.7 percent of U.S. production in that year.

In Michigan, the major producers were Morton and Diamond Crystal. Hardy, which also produced in Michigan, produced about 50,000 tons in 1936,⁴⁴ or 6.8 percent of Michigan output. Except for relatively small quantities of medium salt produced by a few other firms (for example, Saginaw Salt Products Co. is known to have produced about 5,000 tons of medium salt in 1936), the balance of Michigan production was secured by Morton and Diamond Crystal. Neither firm's production in Michigan is known. Total production in Michigan in 1936 equalled 41 percent of U.S. production, so Hardy secured about 2.7 percent of U.S. output.

In Kansas, Carey Salt Co. produced about 65,000 tons in 1936, or 26 percent of Kansas production in that year. Barton Salt Co. produced 42,398 tons in 1936, or 17 percent of Kansas production.⁴⁵ The balance (of 57 percent) was produced by Morton, Diamond Crystal and American Salt Co. Kansas production in 1936 equalled 11.4 percent of U.S. production, so Carey produced 3.0 percent, and Barton, 1.9 percent, of U.S. production. If production in Kansas and Michigan is combined, then Hardy's production equalled about 4.6 percent of this total, and Barton's and Carey's about 3.9 and 6.0

⁴⁴ Record, 4319, 4-3-3, at 541.

⁴⁵ Id. at 551, 567.

percent, respectively. Diamond Crystal's production (which occurred in Kansas and Michigan) equalled 16.3 percent of the Kansas-Michigan total.⁴⁶ Morton and American would then have secured about 68.8 percent of the Kansas-Michigan total.

Morton's total production (including that in California) in 1936 was 574,763 tons, or 22.7 percent of U.S. production (including California).⁴⁷ Morton's production in California is not known. If Morton's output in each of its plants was the same, then its production in 1936 would have equalled 22.1 percent of U.S. production (excluding California).

To summarize these bits of information, I list below the major producers of evaporated salt, and the production of each relative to total production in the various producing states and in the U.S. (excluding California):

⁴⁶ Record, 4319-4-3-2, at 313.

⁴⁷ Id. at 191.

Firm	Production Share: Producing State	Production Share: U.S., Excluding Calif.
Jefferson Island	70.0 (Louisiana)	2.6
Myles	>0.0 (Louisiana)	> 0.0
International	13.0 (Louisiana)	8.5
	43.5 (New York)	
Colonial	24.2 (Ohio)	4.6
Ohio Salt	45.9 (Ohio)	8.8
Union	29.9 (Ohio)	5.7
Watkins	n.a (New York)	n.a
Worcester	n.a. (New York)	n.a
American	n.a (Kansas)	n.a.
Barton	17.0 (Kansas)	1.9
	3.9 (Kansas-Michigan)	
Carey	26.0 (Kansas)	3.0
	6.0 (Kansas-Michigan)	
Hardy	6.8 (Michigan)	2.3
	4.6 (Kansas-Michigan)	
Diamond Crystal	n.a (Michigan)	8.1
	16.7 (Kansas-Michigan)	
Morton	n.a (Michigan)	22.1
	68.8 (Kansas-Michigan)	
	100.0 (Texas)	
	100.0 (Utah)	

The estimates of output of the listed firms account for about 80 percent of U.S. production (excluding California) reported by the Bureau of Mines. The discrepancy between the estimates and total output reported by the Bureau of Mines is accounted for in part by the absence of production figures for American Salt Company and for certain

producers of medium-salt only, by possible overstatement of Morton's California production, and perhaps underreporting of output by the producers to the FTC (which only requested estimates from them).

All in all, although they are not very complete, the figures suggest that output in each territory was concentrated in a small number of producers, so that during the code the setting of prices in each territory could have occurred, taking account of the effect that any rise in price in one territory would have on shipments drawn from other territories. If so, combined marginal cost (given existing services) of producers in each territory would have equalled marginal revenue (net of freight) to any destination to which shipments were made. During the code, this marginal revenue would have been less than price, and a restriction in output would thus have occurred.

In 1933, prices of vacuum-pan salt (exclusive of container costs) averaged \$6.20 per ton.⁴⁸ The code took effect in mid-September 1933, but contracts previously entered at prices below the prices published when the code took effect were permitted to continue into October, 1933 and for some of them longer than this. The NRA file also mentions that buyers bought heavily in anticipation of the code. It was reported (in February, 1934) that these stocks "had not yet been cleared from the merchant's warehouses."⁴⁹ During 1934, which is the only full year of operation under the code, output declined by about 13.2 percent, and the average price per ton increased by about 4.2 percent, from

⁴⁸ 1934 Minerals Yearbook 931.

⁴⁹ Report of the Committee in Support of Discounts at 5, contained in Consolidated File, supra note 1.

the levels existing in 1933.⁵⁰ If demand had remained constant or declined and the producers were behaving competitively, the price increase in 1934 would not be expected if marginal cost was either constant or increasing with output, unless costs shifted up in 1934 relative to 1933. If demand had increased, the reduction in output would not be expected. Whether factors existed in 1934 that caused costs to shift up relative to 1933 is not known, although it is doubtful. In 1936 and 1937, when the influence of the code might be expected to have lessened, output increased on average by about 16.7 percent per year from that in 1934, and prices fell on average by 7.2 percent per year, which would not be expected if the producers had been behaving competitively during the code and marginal cost was either rising or constant.⁵¹

p. Events After The Code

The NRA and the code came to an end in the Spring of 1935. It is clear, however, that the producers sought to continue on a voluntary basis the practices they had mandated during the code. Meetings of the Code Committee apparently continued in subsequent months, although this Committee was then the Executive Committee of the SPA. Published prices and terms of sale continued to be set by the producers in each territory, and in each territory the published prices and terms of sale of the various producers were identical. Producers shipping salt from one territory into another continued to publish the prices of the producers into whose territories such shipments

⁵⁰ 1936 Minerals Yearbook 918.

⁵¹ 1938 Minerals Yearbook 1273.

were made. These pricing practices, assuming they were not simply a price-fixing agreement, need not be inconsistent with competition, although if the published prices that existed during the code were continued after it, competition would be reflected by transactions occurring below published list, which is what the producers described as common practice before the code took effect. Discounts granted to "quantity buyers" were initially continued, and the buyers eligible for any discount were qualified in each territory by the individual producer there, or by the Secretary of the SPA. The names of all qualified buyers were circulated to all producers. Qualified buyers were granted the discount on any sales made to them by each producer. I also believe that the list of jobbers' buying organizations was maintained and circulated, and the uniform broker's contract containing specified brokerage rates was continued.⁵²

But whether prices and other terms of sale were maintained in other than a formal sense after the code is questionable, and the price reductions that occurred in 1936 and 1937 suggest that they were not. Some practices prohibited by the code reappeared after it. Haddock, for example, mentioned that bulk shipments to packagers began to appear toward the end of the code, and by the time evidence from the FTC's investigations begins (in 1936), this practice was not uncommon. Sales of private-label table salt also reappeared as a common practice by all producers. In March, 1937 the discount to

⁵² These practices were formally continued until 1941, when several of them were revised by all producers to conform to an order entered with the FTC resolving charges that had been raised under Section 5 of the FTC Act. See *Salt Producers Association et al.*, 34 FTC 38 (1941). The order prohibited any producer in one territory from publishing as his own the prices published by the producers in another territory. Subsequently, the territories were retained, and "outside" producers met the published prices of the producers within any territory. The order also forbade the circulation of published prices, so what prices were to be met were probably less clear. But if transactions often occurred below published list, the revisions stemming from the order would not be expected to have a major effect. The order also forbid the circulation of the names of buyers qualified for discounts.

baking companies and to butter and margarine producers who had been identified as "quantity buyers" were withdrawn in all territories,⁵³ and I believe that when this occurred, the prices that had been charged to "quantity buyers" were extended to all buyers. However, discounts to "quantity buyers" of table salt were continued after the code. These discounts were continued, although in revised form after 1936 until 1948 when the Supreme Court found them illegal in Morton.⁵⁴ The elimination of discounts to baking companies and to butter and margarine producers under conditions that would be expected to be more competitive than under the code suggests, in the absence of evidence of substantial changes in the character of distribution to these buyers, that these discounts were probably discriminatory. Conversely, the continuation of discounts on table salt suggests the opposite.

Haddock notes that toward the end of the code,

[a]s the producers began to discover that violations of the price filing requirements ... were hard to prove and that punishment was at most uncertain, some of them again commenced to allow secret discounts or other price concessions to certain buyers. By August 1935, the practice of granting discounts from published prices became serious.⁵⁵

How serious is not known, although the previous figures on prices in 1936 and 1937 probably suggest the extent, on average. Several International bulletins which appeared during the FTC's proceedings indicate that the prices of table salt in cartons had

⁵³ Record, 4319-4-3-2, at 465.

⁵⁴ Daniel Peterkin, Jr., then President of Morton, when queried (in 1942) about Morton's discounts indicated that they existed only on sales of table salt. See Record, 4319-2-3, at 2311.

⁵⁵ Irwin S. Moise and George B Haddock, supra note 18, at 96.

at times and in particular geographic locations fallen substantially. In the trial against International, the FTC submitted invoices as evidence of what appeared to be discounts granted to particular buyers and not to others. In response, International indicated that these invoices, which had been issued after the Robinson-Patman Act was passed but contained orders taken before this, reflected sales made at prevailing market prices. In support, bulletins to its sales force containing instructions on what prices to charge for table salt were submitted, and the prices reflected in the bulletins were shown to correspond to the prices appearing on the invoices. The discounts appearing on the invoices were often expressed as percentage reductions from published list, but very commonly, after November 1935, as list minus one or more discount units -- each unit being a fixed amount of money equal to about 5 percent of list. One such bulletin was issued in February 1936 covering sales of table salt in Alabama, Florida, Georgia, Mississippi, Tennessee and South Carolina, all within Louisiana territory:

Effective as of February 19, 1936 -- we will allow six regular Unit Discounts ... from net published list to the Jobber direct

In the event you are allowing to any resale buyer discount either as units or percentages, in any amount in excess of what six regular unit discounts would figure, then you are to reduce such discounts immediately to an amount equal to six units. This we will do immediately without any protection to any customer enjoying such greater discounts. We are allowing these excessive discounts because the market has been demoralized in some instances to this extent, feeling that all customers should be treated alike.

These discounts will apply on shipments ... on or before March 13, 1936. Any business accepted as sold for

shipment March 13 and thereafter or until further notice our unit discount will be five (5)⁵⁹

On March 23, 1936, a bulletin was issued reducing the above discount to three units; and on April 21, the discount of three units was extended to sales in North Carolina and parts of Kentucky.⁶⁰ There is also a bulletin issued on May 25, 1936 reducing table salt prices by one unit in Texas.⁶¹ Also on May 25, a bulletin announces that a discount from list of 20 percent on table salt throughout New York territory was to be reduced to 15 percent until further notice.⁶² Sometime before this, J.L. Ryon, International's Sales Manager, in a letter to W.J. Bengel of Eastern Salt Co., described conditions in New York City, in February of 1936:

I talked with Edward about the New York City situation with respect to price on round cans, and told him that, in my opinion, it was best to continue meeting competitive quotations with our established customers, at least until your return from Florida. If we announced an 80 cents price for New York City, it would only be a matter of a short time before we would be obliged to establish this price for all of our Eastern Territory, and substantial floor stock adjustments would be involved. I realize that other producers would be hurt very much more seriously than ourselves, because of their larger volume of round can business outside of New York City; but on the other hand, they ... would reduce the price of squares to 70 cents and 80 cents per case respectively for punch-table and spout packages, and adjustments on floor stocks down to this basis would be terrific. I realize that it is not an orderly way of conducting business, but at the same time chaotic

⁵⁹ Respondent's Exhibit 27, Record, 1-3/4319-1.

⁶⁰ Respondent's Exhibit 26, Id.

⁶¹ Respondent's Exhibit 30, Id.

⁶² Respondent's Exhibit 29, Id.

conditions like we now have force upon us policies and methods that are not in keeping with good merchandising practices. At the same time I believe that drastic action may result in a very expensive bill, which we may possibly avoid.⁶³

Similar examples involving sales in other territories are not available, although lower prices in New York, Louisiana and Texas territories would provide an incentive to divert sales to Ohio, Utah, Michigan and Kansas territories, causing prices in them to fall. There probably were such cuts, although whether of the magnitudes as those in New York or Louisiana is not known. Six discount units was approximately 30 percent of list. Eighty cents for two-pound rounds to which Ryon's letter refers represented a discount from list of about 36 percent.

During the FTC's proceedings against Morton and International, most invoices submitted as evidence covered periods after 1936, and reductions from list appearing on them and not explained or alleged to be discounts applicable to particular buyers of table salt were explained, through the testimony of Morton's and International's officials, as price reductions granted generally to buyers within some geographic area. Such reductions seemed common.

With the above as background, I now turn to consider the FTC's cases against Morton and International. Chapter III considers the \$1.50/1.60 differential on BL salt. Chapter IV considers what was called the carload discount. The discussion of both of these issues draws only slightly on direct experience during the NRA and just after it, largely because I was unable to uncover evidence about the firms' practices then. The

⁶³ Record, 4307-4-3-6, at 925.

discussion of these issues begins in 1936, drawing primarily on the evidence collected during the FTC's investigations. Later, in discussing the discounts on table salt to quantity buyers, I will return to consider in greater detail the firms' practices during the NRA.

III. THE \$1.50/\$1.60 DIFFERENTIAL ON BL SALT

a. Introduction

Except during the war years when requirements were raised to 30 tons, a carload of packaged salt (or packaged salt mixed with bulk or loose salt) contained a minimum of 22-1/2 tons. Virtually all salt shipments during the years covered by the case against Morton moved from plant to destination by rail in full carloads and in later years (particularly in areas surrounding the producing plants) in full truckloads. Some idea of the importance of carload movements is contained in evidence presented by Morton, to which I will later refer in greater detail, indicating that substantially less than 1 percent of its rail shipments of table salt in 1939-1940 involved shipments in less than carloads.

Although virtually all shipments of salt moved in carloads, not all purchases were individually of carload quantities. Very often they were not and instead the car when landed at its destination contained the orders of several buyers. As a general rule, full cars were loaded by the salt companies at their sidings and, whether a car contained the orders of several buyers (a pool car) or of a single buyer (a straight car), moved at the carload (CL) package rates, which in the rail territories recognized by the ICC were commodity rates fixed at approximately 23 percent of first-class rates.

The distinction between straight and pool cars relates to one of two uses in the salt trade of the terms "carload discount." In the one case, the discount, at least when it was originally published, referred to a lower price (per item) charged to a buyer ordering a straight car compared with the higher price charged to each of a group of

buyers whose orders were pooled by the producer to make-up a carload. This discount bore no relation to differences in freight costs to a given destination: both straight and pool cars were shipped at CL rates.

The discount on items shipped in straight versus pool cars had all but disappeared in practice from approximately the start of the FTC's evidence in 1936 until the Supreme Court reached its decision in Morton in 1948. What occurred is that the discount, although originally published to apply only to orders for straight cars, had been extended to the smaller orders shipped in pool cars. Since almost all table salt was shipped in straight or pool cars, then almost all buyers received the discount, or were charged what was called the "carload" or "net" price. The qualification to this statement is that for certain periods of time in particular geographic areas, the discount had not been extended to all pool-car orders, but to only those orders exceeding some minimum size. For example, in New York territory, the discount was not granted on pool-car orders under 100 cases of table salt or 5 tons of miscellaneous salt items. I will discuss in detail the producers' practices in pricing straight and pool cars in Chapter IV. It is important to note here that throughout the FTC's investigation, Morton priced BL at \$1.50 per case for any order shipped either in a straight or pool car. This was so whether or not any minimum-order requirement to secure the discount was imposed by other producers (or by Morton on its sales of other than BL salt). Morton did not distinguish between straight and pool cars in its pricing of BL.

"Carload discount" (or "carload price") also referred to the difference in the delivered price (per item) when shipped from plant to destination at CL freight rates

compared with less-than-carload (LCL) freight rates. LCL freight rates were substantially above CL freight rates. LCL shipments of salt were rare and relatively unimportant. In pricing BL, Morton did distinguish between orders shipped at CL and LCL freight rates. From 1937 until at least 1948, BL was priced at \$1.50 per case for any order shipped at CL rates, whether in a straight or pool car. It charged \$1.60 per case for any order not shipped in a carload and thus whenever LCL rates applied.

In this Chapter, I discuss the \$1.50/\$1.60 differential on BL, noting particularly how it was interpreted by the FTC and the Supreme Court. As we shall see, the FTC and the Supreme Court seem to have misunderstood when \$1.50 and \$1.60 were charged. It came to be argued that \$1.50 was charged only on orders in straight cars, so orders shipped in pool cars were assumed to be priced at \$1.60. This interpretation made it appear that most buyers (the bulk of whom could be described as "small" and whose orders were typically shipped in pool cars) paid \$1.60, and only "large" buyers capable of ordering straight cars paid \$1.50. In fact, virtually all buyers paid \$1.50 (\$1.60 being charged only on rare occasions when orders were shipped LCL).

b. Salt Company Selling Practices

One of the functions of the salesforces employed by the salt companies was to generate carload shipments, and this was done either by selling a full car to an individual buyer or by combining the orders of several buyers (whether they be wholesalers or industrial users) sufficient when pooled to make-up a carload. On pool car orders, the salesforce would work out an agreement with one of the buyers to be the consignee of

the car, and the latter would notify the other participants when the car arrived. The typical practice was that each buyer would be responsible for obtaining his salt from the car.

Relative to the buyer of a straight car who took delivery on his own siding, the cost to the pool car participant of salt landed at his destination was probably higher, although this difference would be thought slight, since the car typically was delivered to a destination convenient to all participants, and it may well be that some of these buyers avoided storage costs relative to the straight-car buyer. At various times and in different locations, the salt companies granted allowances to the consignee of the pool car for "checking-out" the salt of the other participants, although this was not the normal practice. For example, throughout the period 1936-1948 and perhaps longer, no check-out allowance was allowed in Louisiana territory, whereas in New York territory an allowance of 50 cents a ton was granted the consignee on other than his own salt; during 1941 and perhaps for longer, in areas typically supplied by the Kansas and Michigan producers, a \$5.00 check-out allowance was granted to the consignee for handling a car.

Alternatives to the consignment of the pool car to one of the participants were delivery to a broker or distributing firm specializing in the receipt and distribution of pool cars. The salt companies also maintained warehouse stocks primarily in the larger metropolitan areas. Full carloads would be shipped to the broker, distributing company or warehouse from which in effect less than carload quantities would be drawn by the

various buyers. The typical arrangement would again be for the buyer to arrange delivery from the destination of the carload.

On pool car orders assembled by Morton or its brokers, no distinction in price was made whether the carload was consigned to a broker, distributing company, or to one of the participants. Similarly, almost without exception, the salt companies including Morton charged buyers the same price on orders picked-up from metropolitan warehouses as on orders shipped in pool cars. The only contrary example that I found involved International's pricing of warehouse stocks in certain cities where a surcharge of roughly 2 percent and occasionally more was added to the pool-car price. This price difference formed no part of the FTC's proceedings and will not be further discussed.

On salt orders moving in carloads (whether in straight or pool cars), each of the salt companies charged buyers a delivered price equal to a plant (or what the trade called a works) price plus the carload freight to destination, except for cases of table salt in cartons or cans for which each company, from 1936-1953, charged a uniform or blanket delivered price wherever shipped. Sales of the latter were predominately to grocery wholesalers and retail chains. From at least 1936 (the earliest date for which information is available) until August 1941, Morton's price lists (or scales) for shipments in carloads indicate that all orders for BL were to be sold at the same blanket price whether the

order was for a straight car or for inclusion in a pool car.¹ The blanket delivered price of BL from early 1937 on (after the change in carton size) was \$1.50 per case.

c. Testimony On The Ubiquity Of The \$1.50 Carload Price

That \$1.50 per case was charged to all buyers whose orders moved in carloads was confirmed by the testimony and invoices of wholesalers presented by the FTC to support its case, and by the testimony of D. Peterkin, Jr., the President of Morton and H. Stratford, the firm's Sales Manager. Peterkin went so far as to say that \$1.50 was charged to all customers:

Q. Are all customers buying [BL] ... paying \$1.50 for that particular salt?

A. All customers are paying our published prices on Morton's [BL] salt. \$1.50 is the cost to any customer, with the exception that there are some buying in [annual] quantities for which we have lower prices published

Q. ... But am I correct when I state that all customers in every state where that product is sold are paying the list price of \$1.50 per case, except those customers who get [annual] quantity discount[s]?

A. With that exception, yes.²

¹ The scales are price lists for salt moving in carloads. Except for BL, Morton's scales contain a discount for straight-car buyers from the "gross" scale (or the price for orders shipped in pool cars). Sales at the discounted price were said to be made at net scale or simply net. Only a net price is published for BL. This meant that any order for BL moving in a carload (whether in a straight or pool car) was priced net, or at \$1.50 per case. This is reflected in Morton's scales for the Texas, Ohio, Michigan, Kansas-Michigan, Kansas and Louisiana fields. See Record, 1-2/4319-1. The same practice applied on shipments of BL into New York territory.

² Record, 4319-2-1, at 30.

Some difficulty in interpreting Peterkin's testimony arose from what appeared to be a conflict between what he said and what was stated on Morton's carload scales when they were republished in August 1941. In the republished scales the price of \$1.60 appears and is referred to as a "less-carload" price. Since these were carload scales, this would normally be interpreted to mean that BL was to be priced at \$1.50 when shipped in straight cars and at \$1.60 when shipped in pool cars. However, Peterkin testified that Morton's policy did not change in 1941 or subsequently and that in practice \$1.50 continued to be charged on all shipments in straight or pool cars:

Q. I notice [from the new price scales] that the price of ... BL ... is \$1.60 per case. Was there an increase on that particular type of salt?

A. No. The reason for that apparent discrepancy is that we republished our scales, and in doing so we quoted ... [BL]... at \$1.60 less 10 cents, whereas we previously published the price at \$1.50 net.

Q. The list price is \$1.60.

A. As a practical matter.

Q. That is right.

A. All customers pay \$1.50.

Q. All customers get the 10 cents?

A. That is correct. ³

³ Id. at 65. The 1941 scales are more difficult to interpret than those previously existing. From 1936 until the revisions in 1941, it is clear that BL was priced the same when shipped in either straight or pool cars. All testimony and invoices of wholesalers that reflected the situation before 1941 indicate this, as do Morton's scales and the testimony of its officials. As written, the 1941 scales indicate that \$1.50 would be charged only on orders in straight cars and those in pool cars would be charged \$1.60. This would have reflected a change in Morton's policy and Morton's officials denied that any such change occurred. It is possible that in 1941 Morton sought to restrict the \$1.50 price to straight-car

(continued...)

Stratford, the sales manager, also testified (in 1942) that \$1.50 was charged to all buyers wherever BL was sold providing only that orders moved in carloads.⁴

It turns out that Peterkin stretched things a bit far when saying that all customers paid \$1.50. Morton was known to have had a price of \$1.60 per case and presumably at least some transactions occurred at it. When later queried about this, Peterkin testified as to when \$1.60 was charged:

A. In one instance the carload [price of \$1.50] may not apply. If a few packages of our salt are ordered by a customer and are transported to him not in a carload of salt but by local freight as a small unit, which in our business would be referred to as a strictly retail sale.

Q. I see, but it would not be transported in a regular carload of salt?

A. It would not move as part of a carload of salt.

Q. You have some such customers?

A. Very few.⁵

³(...continued)

buyers (charging \$1.60 to buyers whose orders were in pool cars). If so, the effort failed: BL continued to be priced at \$1.50 for all orders in carloads, whether in straight or pool cars. As discussed in Chapter IV, such an outcome would not have been unusual. Past efforts by any of the producers to charge higher prices on orders in pool versus straight cars invariably failed. As a general rule, orders in pool or straight cars were priced the same. The pricing of BL is consistent with this. The testimony of Morton's officials concerning events after 1941 indicates that BL was priced at \$1.50 for all orders shipped in straight or pool cars. Any wholesaler testimony and invoices presented by the FTC reflecting the situation after 1941 involved sales made in Louisiana territory. It is clear beyond doubt that on all sales made there from 1936 until the conclusion of the case, BL was priced at \$1.50 when shipped in pool or straight cars. What was confusing was that Morton was known to have charged \$1.60 on certain purchases of BL. These were purchases shipped LCL and this came out later in the testimony.

⁴ Id. at 463.

⁵ Id. at 126.

Basically, on what turned out to be relatively rare occasions, orders for BL of less than carload quantities were shipped by Morton but not as part of a carload. On these shipments, LCL freight rates applied and \$1.60 per case was charged. Such orders were typically avoided by buyers in favor of straight or pool cars, which were shipped at CL rates and priced at \$1.50 per case. In general, the testimony indicates that the only time that items were shipped by Morton LCL was if the buyer ran short (primarily of BL salt) and it would be some time before the next pool car would arrive, or if the buyer could not obtain some salt as a matter of convenience through arrangements with other local wholesalers (which were common).

Most of the scales of the salt companies do not reveal how items shipped LCL were priced. The scales themselves basically govern carload shipments. LCL shipments were apparently so rare that scales or instructions were often not published. Some examples exist. Instructions to International's salesforce for LCL shipments were contained in its carload scales throughout the period 1936-1944. These shipments were to be priced by applying

the printed list price delivered at destination to which shipment is made less the carload freight rate printed in eastern (freight) rate books to point shipped. Buyer to stand the difference between the carload and less than carload freight. On blanket priced items charge the [carload] blanket price plus 10 cents per case and allow less carload freight. ⁶

⁶ Record, I-1/4307-1, at 275-307. See also various of International's scales contained in Record, 4320-4-2-10, 11, 12, 13, 14. International invoiced buyers at the delivered price, the buyer paid the freight, and then deducted the paid freight in its remittance to International. International discontinued LCL shipments in 1944.

My understanding is that this was the general practice of all the companies. Morton priced LCL shipments of delivered-price items similarly. Its salesforce in all territories was instructed to:

Determine the delivered car price to the buyer, deduct the actual freight on which shipment would move in a carload, the difference is buyer's cost f.o.b. plant.⁷

No instructions are given on pricing LCL shipments of blanket items, but the testimony concerning BL indicates that a 10 cents surcharge was added.

In general, on other than blanket items, the higher delivered prices for LCL shipments were equal to the differences between CL and LCL freight rates. At any destination the difference in price for an order shipped in a CL compared with its shipment LCL could hardly be thought other than cost based, because each sale yielded the seller the identical net. On blanket items, the price to the LCL buyer was 10 cents per case higher than the price to the CL buyer. But the seller's net at a given destination could only be the same if the blanket price was raised, since LCL freight was higher.

A bit more can be said about the difference in freight costs. Morton indicated that its freight costs on BL shipments averaged 9.5 cents per case in 1939-1940.⁸ This figure includes both CL and LCL shipments. However, if LCL shipments are excluded, the average freight would fall only slightly.⁹ Assuming carload sales were made at \$1.50

⁷ Morton Bulletin of July 24, 1938 covering all fields, Record, 4319-4-3. In effect, the delivered price to the buyer on LCL shipments was higher by the difference between the CL and LCL freight charge.

⁸ Record, 4319-2-4, at 2758-62.

⁹ Given the proportion of LCL and CL shipments of BL estimated by Morton for 1939-40, the average freight falls from 9.5 cents to 9.44 cents if LCL shipments were excluded.

per case (taking no account of annual discounts or other concessions), the subtraction of freight would net Morton an average of about \$1.41 per case. CL shipments of packaged salt in the Official, Illinois, and Southern Territories¹⁰ moved at rates equal to 22.5 percent of first-class rates. LCL rates were substantially higher. In the Official and Illinois Territories, LCL rates on packaged salt were 4th class (which were equivalent to 50 percent of first-class rates) and in the Southern Territory, 5th class (or 45 percent of first class rates).¹¹ Since the net on CL shipments averaged about \$1.41, the LCL price would have to average \$1.59 (at the 45 percent rate) or \$1.61 (at the 50 percent rate) to yield the same net to Morton. If the geographic pattern of LCL and CL shipments is assumed the same, then the figures suggest that the 10 cent surcharge on BL salt covered the higher average cost of freight.¹²

¹⁰ "Official", "Illinois", and "Southern" Territories were broad geographic areas within each of which rail rates were jointly set by the carriers and approved by the ICC. These territories plus the Western Territory basically covered the United States. The Official, Illinois and Southern territories covered the areas of primary interest in the Morton and International cases. Western Territory rates were similarly structured and their inclusion would presumably lead to results comparable to those presented.

¹¹ See Consolidated Freight Classification No. 14, Ratings, Rules and Regulations, Effective December 31, 1940, Consolidated Classification Committee (Chicago, October 23, 1940). Mr. Scott Kennedy, Member, Uniform Classification Committee was very helpful to me in converting class-rates to percentages of first-class rates. The commodity rates on carloads of salt (as percentages of first-class rates) appear to have been in effect for many years. See Railroad Committee For the Study of Transportation, Subcomm. for Economic Study, Assoc. of American Railroads, Salt, Group 9, September 5, 1944.

¹² A similar calculation can be made for International. International estimated that its average carload freight costs were 13.9 cents per case of Sterling salt shipped from its New York evaporating plants. Record, 4307-2-3, at 275. Sterling shipped in carloads was priced at \$1.08 per case (in 100 case lots) yielding on average a net to International of about 95 cents per case. Most of these shipments occurred in Official Territory, in which case the LCL price would have to rise to about \$1.21 per case to yield International the same average net (assuming the geographic pattern of CL and LCL shipments was the same). The LCL price had been \$1.18 per case prior to 1942 but was raised in 1942 to \$1.23. Record, 4320-4-2-11. International's estimate of average freight costs covers 1944. The similarity in average nets for both Morton and International between CL and LCL shipments may

(continued...)

d. Conditions Under Which \$1.60 Per Case Was Charged

Not all LCL shipments by Morton occurred directly from plant to destination. What little evidence there is on the issue suggests that such orders also were filled by shipments to a particular destination in a pool car (and thus at CL rates) from which Morton then arranged for reshipment to the buyer's destination, which entailed LCL freight; or if LCL orders were received at branch offices where Morton also maintained warehouses, the LCL shipments were arranged from the warehouses. Since carloads were always shipped from Morton's plants to its warehouses, then in effect such LCL orders would involve carload rates from plant to warehouse, and then LCL rates from the warehouse to the buyer's destination. There was some questioning of witnesses suggesting that shipments other than directly from plant to destination were not unusual ways to handle LCL orders. For example, the manager of Morton's New Orleans sales office, where a warehouse was also maintained, had this to say:¹³

¹²(...continued)

be somewhat deceptive. The correspondence would be as suggested if distance related differentials in rail rates were the same or approximately the same for CL and LCL shipments, so that the difference between CL and LCL charges related almost entirely to such factors as assembly and loading costs incurred by the railroads and which apparently differed greatly between CL and LCL shipments. My understanding is that the railroads themselves assembled and loaded LCL orders which they then shipped in carloads. CL rates were charged on CL shipments that were assembled and loaded by the shipper. Distance related costs would not be thought to vary greatly between CL and LCL unless the latter involved more frequent stops. But separate charges were often imposed by the carriers for stopovers, etc. I did not have access to old railroad tariffs to discover whether in fact distance related differentials varied between CL and LCL shipments. If CL and LCL tariffs for salt were based strictly on a percentage of the first-class rate charged from one point to another, then the distance differential for longer distances would become absolutely larger for LCL compared with CL shipments and beyond some point Morton's net on LCL shipments would fall relative to that on CL shipments. In this case, Morton would have an incentive not to ship LCL very long distances, and this appears at least consistent with the testimony indicating the typical conditions under which its LCL shipments occurred.

¹³ In New Orleans, Morton maintained a sales office from which carload orders were assembled by the salesforce for shipments covering a good part of Louisiana territory. It also maintained a

(continued...)

Q. ...[I]f you had a customer located at some outlying territory who purchases, say, 500 cases a year, but purchases through your office here, would you sell him at the same price out there as you do here ...? ¹⁴

A. If he bought in carloads. [i.e., if the order moved in a carload].

Q. No, in less than carloads.

A. If he bought a less than carload shipment in New Orleans, and we had to go to the expense of shipping, the price would be higher, it would be \$1.50 at New Orleans if he trucked it, but if we had to do the shipping, the price would be higher.

Q. And what would that price be, sir?

A. \$1.60.

Q. And the difference between the \$1.50 price and the \$1.60 price would then be the actual cost of transportation from New Orleans to the particular point of destination?

A. Well, in some cases it might cover the transportation charges.

Q. And in some it might not?

¹³(...continued)

warehouse to facilitate such shipments and to supply salt to buyers in and around New Orleans who called on the warehouse for pick-ups.

¹⁴ In warehouse towns the salt companies occasionally delivered by truck to buyers within the metropolitan area. The LCL shipments discussed in the text are different and involved reshipments from the warehouse to destinations outside of the metropolitan area and not served by local delivery. On local deliveries, a surcharge of 5 cents per case was often added to the warehouse price. Local deliveries were not made by Morton in New Orleans. Obviously, on local deliveries Morton incurred higher costs relative to serving local buyers who arranged their own delivery from the warehouse. Price discrimination on local deliveries would only exist if the surcharge exceeded Morton's cost of delivery. This seems unlikely given that buyers were left free to arrange their own delivery or include their purchases with others who found it cheaper to pick-up at the warehouse than to have Morton deliver. Local delivery charges were not made an issue in the case.

A. It all depends on the distance Our price is \$1.50 in carload lots or from a warehouse in New Orleans, it is \$1.60 flat price [if Morton reships] to the country If you are a merchant and you ask us to ship you a few cases of our Blue package out of New Orleans, our price would be \$1.60.

Q. \$1.60, no matter where the customer is located?

A. Well, it is not reasonable to believe that we would ship it any great distance. He wouldn't buy it, because these people would buy in carload lots. It is only when a man might run short.¹⁵

This witness was also asked about freight rates (information that was regularly compiled by the salt companies for CL shipments) for LCL shipments and he had this to say:

Q. Now, do you have a list of freight rates... for less than carload shipments?

A. We do not.

Q. You do not ...?

A. No ...

Q. And that is only on carload shipments, that freight list?

A. Yes, sir.

Q. Would it be a great deal of difficulty to find out for us how you arrived at your freight prices for less than carload shipments?

A. We would have to get ... the destination and call the railroad, we have no way of knowing it.

Q. Is that the general procedure?

¹⁵ Record, 4319-2-1, at 383-84.

A. Oh yes, we so seldom have stuff moved less than carload that we have to find out the rate; we have to call the carriers and get the rate. We have no rate list at the origin.¹⁶

Mr. Cameron, manager of Morton's Nashville sales territory (no warehouse was maintained here) indicated that the LCL price was also charged on reshipments arranged by Morton from the destination of a pool car:

Q. Have you any customers from the Nashville office that are charged \$1.60 a case for [BL]?

A. Yes, if they should buy in a pool car and it is reshipped from the car destination, they have to pay \$1.60 from that destination.¹⁷

Morton's attorney later queried Cameron on this point:

Q. You testified ... that where you reshipped, redistributed ... cases of Morton's Blue [label] from the destination point of the car, that the price ... was \$1.60, is that correct?

A. Correct.

Q. Are those shipments ... done ... at the customer's request.

A. At the customer's request.

Q. And does the customer in each instance know that he can take the salt at \$1.50 a case f.o.b. the car, at destination, if he calls for it?

A. Yes ...

Q. Do you have very many such less than carload distributions to which you just testified?

¹⁶ Id. at 435.

¹⁷ Id. at 611.

A. I would say one-tenth of one percent.¹⁸

Stratford confirmed the views of the New Orleans and Nashville managers, and noted the following concerning the \$1.50/\$1.60 differential:

A. The 10 cent differential is an arbitrary figure, obviously to approximate the extra cost of handling on our part when shipped from a destination point of our car to some outside point, entailing double handling.

Q. Then in some instances the freight would be more than the 10 cents allowance, and in other cases it would be less than the 10 cents allowance, is that correct?

A. It may be one or the other.

Q. Then it depends entirely on what the destination is?

A. Yes, sir. I might add that these cases are so infrequent that it is hard to make any definite statement on what the actual freight cost might be.¹⁹

Stratford went on to note that Morton's policy as to when it charged \$1.60 applied uniformly in all areas served by Morton.

The quotations suggest that whenever possible Morton included a LCL order in a carload shipped part way to the buyer's destination (and thereby secured CL rates at least on this distance) and then reshipped LCL from the destination of the carload (which might be a warehouse) to the final point. Such orders would involve higher costs for Morton relative to the situation in which the buyer accepted the order at the destination of the carload (for which Morton charged \$1.50 per case) because the order reshipped required rehandling plus LCL freight to final destination. Alternatively, and probably

¹⁸ Id. at 682.

¹⁹ Id. at 483.

on orders destined for points relatively close to its plants, Morton shipped LCL orders directly from plant to destination. Again, this would involve higher freight relative to a shipment to the same destination in a pool or straight car.

In general, the additional cost of LCL shipments would only be covered if the blanket price was raised. Morton made no effort to cost justify the LCL surcharge in detail. Whether the effort would have been worth making would in part depend on what Morton might expect to lose if the FTC succeeded in abolishing the surcharge. This would depend partly on the volume of trade at the LCL price (which the evidence indicates was inconsequential) and on the extent to which any loss from eliminating LCL shipments (assuming that the surcharge was cost based) would be made up by additional sales shipped in carloads. It is not unreasonable to suppose that the latter would offset much of the loss, particularly if threats of FTC action would lead the other producers to discontinue LCL shipments. Morton's defense of the \$1.50/\$1.60 differential was that its sales at \$1.60 were so infrequent and small relative to its total sales of BL that the surcharge could not "injure competition". (A finding that a price difference injures competition is a prerequisite to a determination of illegal discrimination, and I will say more about this in a moment.) I note that the blanket price of \$1.50 may have yielded Morton different nets in relation to differences in distance shipped. Such variations in nets were not part of the FTC's complaint. Had Morton shown that on average its net on LCL shipments of BL approximated that on its CL shipments, perhaps this would have carried the day. If more than this would be required -- for example, that any difference in nets would have to equal the difference in the cost of CL and LCL

shipments to each destination to which both shipments were made -- the outcome would probably have been less certain and the cost and complexity of the justification greater. But no effort was made by Morton, and so what would have been required is not known.

e. Other Evidence On The Infrequency Of Sales Of \$1.60 Per Case

Confirmation of the testimony of Morton's officials that sales of BL at \$1.60 per case were rare came about in two ways. First, and somewhat surprisingly, support came from the FTC itself, through the testimony of its primary witnesses, who were a group of 75 wholesalers located in various cities throughout Louisiana territory. The aim of this testimony was to prove that Morton charged competing wholesalers different prices, from which the conclusion would be drawn that those buyers charged a higher price were substantially injured in their ability to compete. The focus of the questioning was on BL salt and testimony concerning the prices they paid for BL was corroborated by the invoices issued to them by Morton. The testimony and invoices established that it was very unusual not to pay \$1.50. Of the group of wholesalers, only two indicated that they had made purchases at \$1.60 and at that their testimony suggests that they did so only on occasion. Of the collection of invoices presented as evidence, 94 reflected shipments of BL salt totalling 16,700 cases. Two of the 94 invoices contain LCL shipments totalling 80 cases (.5 percent of the 16,700) billed at \$1.60. All other invoices reflect purchases at \$1.50.

Thirty of the 80 cases were shipped to the Interstate Wholesale Company and in particular to its branch in Huma, LA. From the testimony, LCL shipments were

occasionally made to Huma and more commonly to Interstate's branch in Morgan City, LA. There are no invoices for shipments to Morgan City in the Record. The Record contains three other invoices issued to Interstate totalling \$1,759. The prices listed on each reflect movements in carloads. The LCL purchase of 30 cases represents 2.7 percent of \$1,759. How closely this reflects the importance of LCL relative to CL purchases by Interstate could not be determined with certainty, but the figure probably does not take us very far from the truth.

Did Morton receive different nets on its CL and LCL shipments to Huma and Morgan City? The LCL invoice to Huma indicates a net to Morton after freight of \$1.42 per case. Had the sale instead been made at \$1.50 and shipped at the carload rate from Morton's nearest plant (in Grand Saline, Texas), the net would have been about \$1.41. Similarly, if 30 cases were sold at \$1.60 and shipped to Morgan City at the LCL rate, Morton's net would have been \$1.38. A comparable sale at \$1.50 shipped at the carload rate would have netted \$1.39. On average, the net is the same on CL and LCL shipments to Huma and Morgan City.²⁰

The second example involved a LCL shipment of 50 cases to Consolidated Wholesale Co. in Plaquemine, LA. In this instance the invoice reflects a \$1.60 sale shipped from Morton's New Orleans warehouse by steamer for which Morton netted \$1.43 per case. On a CL shipment by rail from Grand Saline, the net would have been \$1.37; and I believe on a LCL shipment, \$1.35. Presumably, the steamer was chosen over rail because it yielded a larger net. But probably offsetting this in part would be

²⁰ See Commission Ex. 69, Record, 4319-1-1/4319-1.

higher costs on Morton's part from double-handling of the salt (shipped from Grand Saline to New Orleans in a carload, unloaded, and then arrangements made for reshipment of the LCL order by steamer to Plaquemine). All in all, these two examples do not suggest discrimination at any given destination according to the nature of the shipment to it.²¹

It is of interest that wholesalers both in their original complaints to the FTC and in their testimony did not complain about the LCL price of BL. It was clear to them that shipments in other than carloads were more costly to Morton and the other salt companies. Furthermore, virtually all of the wholesalers testified that they purchased in straight or pool cars and so there was little reason to complain about a higher price that they rarely or never paid.

Interstate's branches in Huma and Morgan City were located in rural areas. On its sales from Huma, Interstate typically resold BL at \$1.80 per case and from Morgan City at \$1.90 per case. In New Orleans and other more densely populated regions (in terms of population and wholesalers) resale prices were typically \$1.65 per case. The higher resale prices at Huma and Morgan City probably reflected a desire of retailers located there and served by Interstate to have ready access to a stock of BL salt and they were willing to pay the higher cost this might have entailed, including occasional LCL shipments. The higher resale prices might also have reflected an absence of local competition among wholesalers. The only implication drawn by the FTC was that the

²¹ See Commission Ex. 56(a)-(c), Record, 4319-1-1/4319-1.

\$1.60 price harmed Interstate in that it would have been better off (all else assumed the same) if it could have purchased the 30 cases at \$1.50.

The LCL shipment to Interstate is quoted frequently in the FTC's arguments before the courts. However, the shipment to Interstate was combined by the FTC with what was alleged to be many other instances it had uncovered (but which in fact it had not) of shipments for which buyers paid \$1.60. In this process, the \$1.60 shipment to Consolidated in Plaquemine was not mentioned. Consolidated was later used by the FTC as an example of a firm that secured annual discounts from Morton that most of Consolidated's competitors had not and who it was argued were injured in their ability to compete against Consolidated.

The second piece of evidence suggesting the infrequency of sales at \$1.60 was presented by Morton. This was an analysis of its invoices issued on what was called "Chicago billings".²² Morton's main office was in Chicago. The Chicago office billed for all sales except those made by Morton's sales offices in Kansas City, Dallas and California. The analysis included sales billed directly by the Chicago office plus those billed by branch offices within the sales area covered by Chicago billings. Mr. Coyne, who supervised Morton's billings, testified that from his knowledge of the business, inclusion of the billings of the three Western sales offices would not have affected the general picture but would have added to the cost of making the analysis. The included billings represented approximately 70 percent of Morton's total billings. All Chicago billings involving LCL shipments were tabulated for every other month for a year

²² Respondents' Ex. 17, Record, 4319-1-2/4319-1.

beginning August 1939. The total of such billings (net of freight) was doubled (to provide an annual estimate) and then expressed as a percentage of Morton's total Chicago billings (net of freight) for all salt shipped during the year. On all salt items for which a CL/LCL differential was maintained (which with minor exceptions included all of Morton's salt), sales shipped LCL represented .1 percent of total sales.

Considering BL alone, LCL shipments were estimated to equal \$2756 for the year (net of freight).²³ We do not have from this analysis or elsewhere Morton's total sales of BL salt. However, there is other information in the Record from which an estimate can be derived of the importance of LCL to Morton's total sales of BL. Assume first that on average Morton's net after freight on CL and LCL shipments of BL was the same. Then for the year the total number of cases of BL shipped LCL on Chicago billings was about 1969 cases ($1969 = \$2756 / \1.40 , where \$1.40 approximates Morton's average receipts per case of BL net of freight). The Record elsewhere contains the total number of cases of BL sold to all buyers receiving the \$50,000 annual discount and to buyers receiving either the 5000 or 50,000 case annual discount. Eliminating any overlapping entries and assuming that 70 percent of these shipments were on Chicago billings, then the 1969 cases shipped LCL would represent .3 percent of the cases purchased by the annual discount buyers alone. Inclusion of cases sold to buyers who received no annual discount would reduce this percentage substantially. Morton elsewhere lists the number of its customers within Chicago billings classified by the

²³ Id.

number of cases of BL purchased in 1941.²⁴ The size-classes are in 500 case increments. If we assume that buyers of up to 5000 cases per year purchased at the mid-point of each size-class and then add these cases to those purchased by the discount buyers noted above, then the 1969 cases shipped LCL equal only .09 percent of the total.²⁵

It is clear that it was very unusual not to pay \$1.50.

f. The \$1.50/\$1.60 Differential Before the Courts

Commission and the Supreme Court found the surcharge on BL shipped LCL illegal. Also found illegal, although neither the FTC nor the Court dealt with this explicitly, were similar surcharges on LCL shipments of other table salt items that were blanket priced, since the order against Morton (which is discussed below) prevented it from imposing any surcharge on blanket items. Given the facts as presented above, one cannot help but wonder on what grounds illegality was based. For even if we move away from general statements that it was against the advantages secured by large buyers that the Robinson-Patman Act was directed (which would bear little or no relationship to the differential at issue here), the Act does require that a price difference to be found illegal must be sufficiently important to cause "competitive injury". If the additional \$197 paid by the buyers of the 1969 cases of BL sold on Chicago billings at \$1.60 rather than

²⁴ Respondents' Ex. 6, 18-20, Record, 4319-3-8.

²⁵ This percentage increases to .1 if buyers of up to 5,000 cases are assumed to buy at the starting-point of each class (except buyers of from 1 to 500 cases, in which case I have assumed each buyer purchased 100 cases). LCL shipments of blanket items other than BL equalled only \$430 per year in 1939-1940, an amount equivalent to about .006 percent of Morton's total sales of items for which CL/LCL differentials applied.

\$1.50 were returned to them in proportion to their purchases, bearing in mind that some of these buyers may have been "large"; or if Interstate Wholesale had purchased its 30 cases at \$1.50 rather than \$1.60 (and thus saved \$3.00), it is inconceivable that competitive injury could have resulted however this might be defined.

Neither the FTC nor the Supreme Court stated clearly what was meant by the "competitive injury" from Morton's \$1.60 price. The Supreme Court's opinion in Morton (particularly that part quoted in the Introduction to this study) suggests that the Robinson-Patman Act was to deter price discrimination; since price differences among buyers that reflected differences in a seller's costs of supplying them were not made illegal. Let us suppose that the harm against which the Act was directed was that buyers discriminated against would supply too small a proportion of the resale market for efficient distribution; and that some buyers, to avoid the discriminatory price, would use up resources to secure a lower price. The Act however, does not make all price differences illegal unless the seller shows that they are cost based, but only those first found "substantially to lessen competition or tend to create a monopoly ..., or to injure, destroy or prevent competition with any person who either gets or knowingly receives the benefit of such discrimination." That is, a price difference must be found to injure competition before it is illegal unless cost based. When the seller is the party potentially discriminating among resellers, "competitive injury" would seem to reflect two possibilities. The first is that the price difference would confine resales into so few hands that the resellers would be unlikely to remain competitive. With respect to the surcharge on BL, this result is inconceivable, since virtually all buyers paid \$1.50. The

second possibility is that the price difference would cause more than a minor diversion of trade from those charged the higher price to those charged the lower price; or it would cause those charged the higher price to forego substantial sales. Then if the price difference is not cost based, the potential harm from discrimination would itself be more than minor. Again with respect to the surcharge on BL, competitive injury suggested by this possibility also seems inconceivable. After all, the FTC uncovered only 80 cases (or 1969 cases on Chicago billings) sold at \$1.60. The buyers of them would of course have been better off if they could have purchased them at \$1.50 and saved \$8.00 (or \$197), assuming all else remained the same. They would also have gained had they purchased more than 80 cases (or 1969) if the LCL price was lower. But again it is hard to describe these losses as other than minor or as reflecting a potentially significant scheme of price discrimination.

I. The FTC's Opinion

The Hearing Examiner issued a Report on the Evidence. His Report contains no recommended decision. By and large the Examiner correctly summarized the evidence as to when Morton charged \$1.60. The arguments of Morton and of Counsel supporting the complaint then moved to the Commission.

Morton's position was that its LCL shipments of BL were so minor and infrequent that competitive harm could not have occurred from the LCL surcharge imposed. No effort had been made systematically to cost justify the \$1.60 price, although the task would probably not have been so easy and straightforward as it might seem. Morton's

view was that it need not justify that which caused no injury. Cost justification was reserved for its other discounts, and the success of this attempt will later be discussed.

In their Brief to the Commission, Counsel supporting the complaint served only to confuse the issue. The \$1.60 price for the 30 cases sold to Interstate Wholesale is noted and this example is combined with a number of others in which the LCL price was said to be charged but in fact was not. A general conclusion is then drawn:

The above illustrations are similar to and practically identical with other areas where [Morton] sells its products and grants to some customers the carload discount and withholds such discount from other of its customers competing with the former....²⁶

To this statement there is attached a series of references to supporting testimony and exhibits. In fact, each such reference indicates that the buyer paid \$1.50 per case. Consolidated Wholesale which had on occasion bought LCL is not mentioned. So the only valid example presented is that of Interstate. Later, when summing up the competitive injury from Morton's practices, the discount on shipments of BL in carloads is combined with Morton's other discounts:

The price discriminations were effected by means of so-called 'carload' discounts, 'quantity discounts' and 'competitive adjustments'....²⁷

The evidence is clear and uncontradicted that Morton's practices have seriously injured competition existing between the customers securing the benefit of the discriminatory discounts and those to whom they are

²⁶ Brief of Counsel for the Commission at 11, Record, 4319-1.

²⁷ Id., at 58.

denied.²⁸

The statement of facts heretofore set forth clearly demonstrates that non-preferred customers ... who are not securing the benefits of the respondents' discriminatory prices brought about by a so-called carload and quantity discount schedule have been placed at a competitive disadvantage by reason of the fact that the preferred customers receiving the carload discount and the quantity discounts ... have diverted business to them by the use ... of the weapon placed in their hands ..., namely, lower price²⁹

[T]he discriminations enjoyed by the favored customers are sufficiently large to ... hold that its effects may be substantially to lessen competition ... with such favored customers.³⁰

How far the Commission accepted Counsel's statement of the facts is not known.

The Commission did agree with Morton as to when \$1.60 was charged. Its opinion states clearly that \$1.50 was charged on all purchases moving in carloads, whether in straight or pool cars, and that the 10 cents surcharge was added only on orders shipped LCL. No detailed reference to the frequency or significance of LCL sales is made. A conclusion is later drawn:

that the discounts allowed by [Morton] in the sale of its BL salt, including price differences on carload and less than carload lots, purchases under so-called pool-car arrangements ... [as well as Morton's other discounts] constituted discriminations in price. ...³¹

²⁸ Id.

²⁹ Id. at 54.

³⁰ Id. at 57.

³¹ Morton Salt Co., 39 FTC 35, 42-43 (1944).

The wording is difficult to follow because pool car arrangements are distinguished from price differences between carload and less than carload lots. Nevertheless, since the Commission agreed that carload shipments were priced at \$1.50 whether in straight or pool cars, I take the statement specifically to mean that the Commission found LCL pricing of BL discriminatory. The term discriminatory has here a specific meaning. It means that there exists a price difference that is illegal if (a) it is found to injure competition and (b) is not cost based. The opinion goes on to conclude that the LCL surcharge on BL injured competition: it tended "to create a monopoly in those purchasers receiving ... the benefit of said discriminatory price" ³² Concerning cost differences, no consideration is given by the Commission to the differences between CL and LCL freight rates, or to the testimony suggesting that LCL orders often incurred higher handling expense. This is dismissed with the statement that Morton did not cost justify the CL/LCL differential. The opinion contains no discussion of whether the surcharge on LCL might have reflected a scheme of price discrimination or whether competition among the salt producers, all of whom charged a higher price for blanket items shipped LCL, was so lacking that the surcharge could be other than cost based.

Morton appealed to the Court of Appeals and by stipulation the FTC's opinion and order were remanded to the Commission (for reasons that need not concern us here) for reconsideration. Ultimately, a modified opinion appears. Specific reference to pool cars is omitted and in its place the following statement is made:

Respondent has discriminated in price by selling its BL salt ... at ... \$1.60 when delivery was made in less than carload

³² Id. at 44.

lots, while at the same time it sold ... BL salt... at \$1.50 ... when delivery was made in carload lots. There were wholesalers and retailers who secured the \$1.50 ... price and wholesalers and retailers who secured the \$1.60 ... price who were in competition....³³

The conclusion follows:

The Commission finds that the price differences on sales of its BL salt, including price differentials on carload and less than carload lots [as well as all other of Morton's discounts] constituted discriminations in price³⁴

Each of Morton's discounts, including that on shipments of BL in carload lots, was found to injure competition. Again, the discount was found illegal because Morton had not specifically justified it on cost grounds. Whether the Commission meant that only straight-car buyers paid \$1.50 cannot be determined, although the wording of its statement tends in that direction. If the \$1.50 price only applied to straight-car buyers, the importance of sales made at \$1.60 would increase, since all shipments in pool cars would then be so priced. However, the only example of a sale at \$1.60 that counsel presented in its statement of the facts was the 30 cases shipped LCL to Interstate Wholesale.

2. The Court of Appeals

Before the Court of Appeals, the FTC argued that:

In selling BL salt [Morton] allows three separate discounts, all based on purchases of very large quantities of salt. (1)

³³ Morton Salt Co. 40 FTC 388, 344(1945).

³⁴ Id. at 396.

BL salt has been sold at \$1.60 ... when purchased in other than carload lots, but at \$1.50 when purchased in carload lots;³⁵

There follows a description of Morton's annual discounts on BL. None of the discounts are said to be available except to "large" buyers:

In fact, only those already well advanced on the road to monopoly are so well favored financially, or possess storage facilities so extensive to enable them to purchase 50,000 cases ... or even 5000 cases or carload lots. Those small business concerns whose yearly needs are limited to a few hundred cases have no more opportunity to obtain the lower prices, in fact, than they would if the theoretical offers were not made to them.³⁶

Morton's position that virtually all buyers (even those purchasing a few hundred cases) paid the \$1.50 price is later addressed:

[Morton] itself admits that there is one exception to the statement that every witness secured the discount. It is not necessary to show actual injury to competition since the ... Act is to reach price discriminations in their incipiency. Therefore, ... this discount would not be eliminated from the case. A discount against even one dealer -- especially should [Morton] be informed ... that such discrimination is legal -- could easily be extended without limit. The practice 'may' result in the substantial injury to competition, and in the creation of a monopoly.³⁷

I take this to mean that although charging the LCL price for many years cannot now be said to have caused competitive injury, it should be found illegal anyway because it later

³⁵ Respondents' Brief at 2, *Morton Salt Co. v. FTC*, 162F. 2d 949 (7th Cir. 1947).

³⁶ *Id.* at 12.

³⁷ *Id.* at 26.

might. What defense one might raise against this approach is not obvious. At any rate, the FTC did not rest its case entirely on this. It is stated that:

the record, however, does not show that all dealers except one receive the discount. By its terms the discount is only available to those who buy in carload lots. It is a matter of common knowledge and the record shows that many dealers cannot and do not buy in carload lots. Such dealers are excluded by the very terms of the offer. It is immaterial how small a percentage of [Morton's] business moves in less than carload lots. It is evident that the number of people who do not buy in carload lots must be large, regardless of percentages in [Morton's] business. The injury to competition may be substantial.³⁸

All in all, the circumstances under which Morton charged \$1.50 were changed to make its sales at \$1.60 appear more significant than they actually were.

The Court of Appeals found all of Morton's discounts legal.³⁹ I note here only its view of the \$1.50/\$1.60 differential. The Court believed that distinctions in price based upon quantity sold and

conforming with reasonable, customary and accepted economic differences [do] not inherently import adverse effects upon competition ... condemned by [the] Act. ...

The quantity carload discount ... was related by substantial and uncontroverted evidence to the cost of the sale and delivery of [Morton's] product resulting from the differing methods of handling a carload quantity in the sale and delivery to a carload quantity buyer from the method of handling lesser quantities. It cannot be said ... that this differential exceeds a due allowance for the difference in such costs.⁴⁰

³⁸ Id. at 27.

³⁹ Morton Salt Co. v. FTC, 162 F. 2nd 949 (7th Cir. 1947).

⁴⁰ Id. at 955-57.

Although the Court did not seem to have right the situations when Morton charged \$1.60 and when \$1.50, and aside from the fact that substantial evidence was not presented reflecting the actual cost difference between blanket items shipped CL and LCL, it seems clear that the Court believed that the differential was probably cost based and not the sort of established practice that the Act was designed to condemn.

3. The Supreme Court's Opinion

The FTC appealed to the Supreme Court. Its brief discusses the \$1.50/\$1.60 differential in very general terms. Specific references to the evidence are not made. In general, the FTC's position was the same as that advanced in the Court of Appeals. Morton's position was again that virtually all of its BL sales were made at \$1.50, so that its sales at \$1.60 could not have "injured competition". The upshot of the Court's opinion can be briefly summarized, leaving little of substance out:

- (1) In a case involving competitive injury between a seller's customers the FTC need only prove that the seller charged one such customer a higher price than one of the customer's competitors;
- (2) In determining whether a price difference found in (1) resulted in competitive injury, the Act only requires that there be a reasonable possibility that competition may be injured;
- (3) Evidence sufficient to prove (2) is satisfied by a showing that the price difference could influence a resale price.

It is interesting that the Court centered virtually the whole of its opinion around the \$1.50/\$1.60 differential, so that its analysis of Morton's annual discounts which were secured by relatively few buyers are hardly mentioned.

The Court goes on to discuss how (3) is satisfied using as its example Morton's CL/LCL pricing of BL:

The adequacy of the evidence to support the Commission's findings of reasonably possible injury to competition ... between competing carload and less than carload purchasers is singled out for special attacks here. It is suggested that in considering the adequacy of the evidence to show injury to competition, [Morton's] carload discounts and its other quantity discounts should not be treated alike. The argument is that there is an obvious savings to a seller who delivers goods in carload lots. Assuming that to be true, that fact would not tend to disprove injury to the merchant compelled to pay the less than carload price. For a 10 cents carload differential against a merchant would injure him competitively just as much as a 10 cents differential under any other name Such discounts, like all others, can be justified by a seller who proves that the full amount of the discount is based on his actual savings in cost. The trouble with this phase of [Morton's] case is that it has thus far failed to make such proof.⁴¹

In fact, Morton had not sought to prove, nor did it otherwise rely, on the obvious savings on goods delivered in carload lots. Instead it had argued that its sales at \$1.60 were too limited to cause competitive injury. The Court's specific response to this is to note that:

in enacting the Robinson-Patman Act, Congress was especially concerned with protecting small businesses unable to buy in quantities, such as the merchants here who purchased in less than carload lots Since there was evidence to show that the less than carload purchasers

⁴¹ FTC v. Morton Salt Co., 344U.S. 37, 47-48(1948).

might have been handicapped in competing with the more favored carload purchasers ..., the Commission was justified in finding that competition might have thereby been substantially lessened....⁴²

The statement seems clearly to imply that only straight-car buyers secured the CL price.

There also is a footnote reference to Morton's analysis of its LCL shipments. This was rejected of hand:

It appears that the figures relate only to a single one year period and was obtained by lumping together statistics on respondent's sales of table salt along with those on sales of its other products, such as salt tablets, coarse rock salt, and salt soda. Since this proceeding is concerned only with discounts on table salt, these figures are of dubious value. Furthermore, they were limited to sales in respondents Chicago area whereas [Morton] carried on a nation-wide business.⁴³

No mention is made of the fact that the analysis covered Chicago billings which represented 70 percent of Morton's total sales, that there was testimony of Morton's officials that the inclusion of Western territory would not have altered the general picture, and that the figures indicated that LCL shipments amounted to about .1 percent of its total shipments of BL.⁴⁴

One cannot help but feel that it was by ignoring the facts and thus by redefining the price relationship at issue that the FTC and the Court were able to conclude that the

⁴² Id. at 49.

⁴³ Id. at 48.

⁴⁴ There was a dissent which deals almost entirely with whether the standard of competitive injury is whether a price difference "may probably" injure competition or "may possibly" injure competition (which the majority had adopted). What this distinction would mean in practice is not clear. Under either standard the minority found the CL/LCL differential legal, because \$1.50 was charged to all buyers whose orders moved in carloads.

\$1.60 price injured competition and was therefore illegal because Morton did not cost justify it. Perhaps this was done to satisfy what was often said to be an aim of the Act: to prevent unjustified price differences favoring large buyers. No doubt buyers who ordered straight cars were larger than buyers whose orders were typically shipped in pool cars. Or perhaps this was done to establish what might be taken as a more a general point: if buyers of straight cars secured a discount of about 6 percent (.10/1.60) from the price charged buyers of smaller quantities, this would provide the sort of advantage sufficient in magnitude to meet the competitive injury standard, and so would be illegal unless cost justified. (It might also have been believed that this point could be made at little cost, since if the surcharge was made illegal, probably the worst that could happen would be the elimination of LCL shipments by Morton, which would injure buyers only slightly, since so little trade was involved.) Nonetheless, if we take what the facts actually showed, or a roughly comparable situation and assume that the facts would be similarly treated, then the upshot of the FTC's and the Courts's opinions was to make illegal any systematic price difference charged to competing buyers unless the difference is cost justified by the seller.⁴⁵ The injury standard would impose no hurdle to be met before a price difference could be challenged as discriminatory. When this is coupled with the absence of any apparent consideration by the FTC or the Court (judging from

⁴⁵ The Act also contains a "meeting competition" defense. Morton did not rely on this to justify the CL/LCL differential on BL. The defense permits a seller to charge a lower price to particular buyers to meet a lower price offered by a competitor. If the Act is to deter price discrimination, systematic and persistent price differences could not be defended on this basis, since sellers could discriminate and justify this by each claiming that it was meeting the price of a competitor. The defense would be thought applicable only to short-term, unsystematic price differences unrelated to price discrimination that the Act seemed designed to deter. Morton and International relied in part on this effort to justify the \$50,000 annual-volume discount, but the defense was rejected. This will be discussed when the annual discount is considered in detail.

the conduct of the trial and the opinions) whether market conditions conducive to price discrimination existed, or whether the surcharge might have related to a sensible scheme of price discrimination, and given also the absence of any independent consideration of costs by the FTC, then any systematic price difference, even in a competitive industry in which price discrimination would not be possible, would be illegal unless cost justified by the seller. How easily cost differences might be established is suggested later in considering how Morton and International fared in their efforts to justify their annual discounts and by considering, as is done in the last chapter of this study, the competitive structure of the industries in which the FTC has obtained orders resolving charges raised under the Robinson-Patman Act.

g. Price Discrimination And The \$1.50/\$1.60 Differential

It is clear that on other than blanket items Morton's net at a given destination was the same on CL and LCL shipments. The difference in the delivered price equalled the difference in freight costs. If discrimination occurred according to method of shipment (perhaps reflecting something about the greater urgency of demand on LCL), it is reasonable to suppose that discrimination would have occurred on these items as well as on blanket items. It is also clear that the costs of shipping blanket items LCL were higher than when shipped in carloads. Given the available evidence, it cannot be said with certainty that the 10 cents surcharge just covered the difference in Morton's average costs, although what evidence I could gather suggests that this was so.

Morton itself provided buyers the options to avoid the surcharge by purchasing in straight and pool cars. Overwhelmingly buyers chose the options because any increase in costs this entailed (which would be thought primarily an increase in inventory cost, since for example orders for inclusion in pool cars could be placed only when pool cars were being organized, whereas LCL orders could be placed at any time) was less than the surcharge on orders shipped LCL. Each buyer would not order BL in such quantities that he would always have inventory to meet every request, and there were occasions when LCL orders were placed. Suppose Morton had raised its LCL price relative to its CL price by more than the cost difference that such orders entailed. This would induce buyers to increase their inventory acquired at the CL price (given what would now be the relatively higher cost of meeting shortfalls through orders shipped LCL), it would encourage additional sales from these larger stocks to buyers whose inventory was depleted and who otherwise would have purchased LCL from Morton, and it would encourage buyers located outside of one area and who purchased at the CL price to resell to buyers located in another who would otherwise have placed an LCL order with Morton. The option to purchase in pool and straight cars at the CL price through which buyers themselves and resellers could accommodate the LCL demand would obviously limit the extent to which Morton's CL and LCL prices could differ.

If Morton's CL customers could supply the LCL demand at the same cost as Morton, then Morton's CL/LCL differential could not have exceeded the difference in its costs of supplying CL and LCL buyers. There would be no injury to buyers or discriminatory gain to Morton. Nevertheless, because Morton supplied part of the LCL

demand, it presumably supplied these buyers more cheaply than could others. How much more cheaply is not known, although one would not think by a great deal (because Morton would have to incur many of the same costs as others and there is little reason to believe that it could have assumed them much more cheaply). To these buyers, Morton's surcharge could have exceeded the additional cost of its LCL shipments, so some LCL purchases could have been deterred that would otherwise have been made, and there is an injury from this. But the discrimination against Morton's LCL customers would have been only a portion of the surcharge given that orders shipped LCL cost more than orders in carloads. Let it have been as high as 20 percent. Then the annual discriminatory gain to Morton on the 1969 cases of BL shipped LCL on Chicago billings would have been on the order of \$39. The amount hardly seems worth challenging, or defending for that matter. ⁴⁶

The Record in Morton (and in International) covered several thousand pages of testimony largely devoted to the question of "injury to competition". Injury was established by asking a wholesaler whether he would be better off if he could have purchased Morton's salt cheaper than what he in fact paid, assuming all else remained the same. The answer was obvious and the questioning seemed pointless. A sufficient number of buyers were asked the same question until "proof" of competitive injury was

⁴⁶ In addition, while the LCL price set by Morton could have exceeded the higher cost directly associated with these sales, it could be that a reduction in the LCL price to just equal the difference in the average costs of shipping CL and LCL might diminish the demand for pool cars and cause the overall cost of their assembly to rise. The loss associated with this could have exceeded the gain from the additional sales at a lower LCL price. This would be a cost of supplying LCL buyers, although this would certainly have been difficult for Morton to show. Overall, the Record suggests that Morton made LCL shipments in a few instances when the buyer's cost of obtaining BL primarily from other wholesalers exceeded 10 cents per case (which on average probably approximated Morton's higher cost of making such shipments).

established. In a move for judicial economy, the Supreme Court eliminated this burden. Henceforth, it would be enough for the FTC to show that a price difference existed among competing resellers that could possibly influence a resale price, and from this the requisite injury could be inferred.

The order required Morton to charge the same price of BL to all competing wholesalers (including the retail chains). This required the elimination of the 10 cents surcharge on BL and on other blanket items shipped LCL. To raise the price to buyers whose orders moved in carloads would have reduced Morton's net receipts. Lowering its LCL price to equal the CL price would also have lowered its net receipts and would probably have resulted in the cost of such sales exceeding the receipts from them. Lowering the LCL price would also have encouraged additional orders to be shipped LCL, and this may have imposed other costs on Morton. What Morton did was perhaps obvious. It subsequently refused to accept LCL orders, confining all future shipments to movements in carloads at the CL price.⁴⁷ Buyers who previously purchased LCL from Morton were undoubtedly made worse off by this, although one cannot believe by a very great deal. Nevertheless, those who the FTC might have wished to help by its actions were actually injured.

⁴⁷ That Morton behaved in this way is supported by statements in future scales that no discounts of any type exist, that its prices were to apply only on orders moving in carloads at CL freight rates; and by statements of counsel for the FTC that LCL shipments were discontinued subsequent to the order. See Morton scales contained in Record, 4320-3-3-2-4.

IV. THE CARLOAD DISCOUNT ON OTHER THAN BL SALT

a. Introduction

At about the time of the FTC's complaints against Morton and International, many of the salt companies published scales containing a discount¹ granted to straight-car buyers from the prices charged for the same items to each participant in a pool car. Since pool and straight cars both moved at CL freight rates, any cost justification of this discount must relate to factors other than freight costs. As discussed before, there was no straight car discount on BL: all such orders whether shipped in straight or pool cars were priced the same from at least 1936 (the earliest date of observation) to the end of the FTC's case and beyond.

The difficulty in discussing this discount (which was called a carload discount) is that the practices of the producers differed from what their published scales sometimes stated, and there is a good deal of evidence to suggest that the efforts of the producers to establish the discount in the various territories failed, in most cases almost immediately after the discount was published. What typically occurred is that the discount published to apply only to straight cars was extended to orders in pool cars, providing in some cases that the orders in pool cars met certain minimum purchase requirements (usually 5 tons, or 2 tons of salt). Extensions of the discount to orders in pool cars were not temporary reductions from published list but were the typical practice throughout virtually the whole of the time covered by the FTC's investigations. This

¹ The published discount applied on salt in packages to a straight-car buyer who required a single invoice.

pricing practice is consistent with Morton's pricing of BL, except that Morton never imposed a minimum purchase requirement on BL.

Indeed, one difficulty the FTC had was that before the complaint was issued and continuing after it, Morton had extended the straight car discount to orders in pool cars.² So what the FTC challenged in its case against Morton did not exist in practice, and this was confirmed by the testimony and invoices that the FTC presented to support its case. In its case against International, what the FTC challenged was a relatively minor discount that remained after a brief but unsuccessful attempt to establish a straight-car discount. This challenge is also discussed in this Chapter.

b. Evidence Of The Discount Before 1936

I was unable to uncover much evidence about the carload discount prior to the FTC's investigations. Price scales existing during the NRA and before it are no longer available, and there is virtually no mention of the discount in the NRA's records. That there had often been some discount in the published scales seems clear. It appears, however, that as a general rule it was not restricted to straight cars. Instead, much as during the period covered by the FTC's investigations, the discount was extended to orders in pool cars. Peterkin, Jr. refers to this in his testimony in Morton. He states

² The published discount applied on packaged salt, so a straight car of table salt alone or of table salt mixed with other items of packaged salt (for example, 100 lb. bags) would secure the discount applicable to each item. Suppose a wholesaler ordered a straight car containing BL and other table salt. The BL would be priced at \$1.50 per case and the other items would secure the discount applicable to each. Suppose the wholesaler placed an order containing BL and other table salt for inclusion in a pool car. The BL would be priced at \$1.50 per case but the discount would not apply to the other salt. The extension of the discount to pool car orders resulted in extending the straight car price to the other items, so orders in either straight or pool cars were priced the same.

that Morton "always had a discount on a carload of salt, salt moving in a carload."³ His statement appears in the context of a discussion that Morton granted the discount on orders in pool cars; and since a pool car always involved "salt moving in a carload", it seems clear that at least from Peterkin's perspective Morton's practice was not of recent origin. Similarly, a letter in the NRA files from F.J. Venning, President of The Union Salt Co., indicates that the discount had in the past almost always been extended to include orders in pool cars:

The inevitable result [of competition] has been in the sale of pool cars with Salt for several in the same carload at the same prices F.O.B. car as carload [straight-car] prices, which has been the practice for about 18 of the last 20 years, and the exception was a comparatively short period of 2 years or less, when we attempted to obtain 3 cents per 100 lbs. ... in pool cars above the straight carload prices, but so unsuccessfully we were compelled to discontinue it.⁴

Just prior to November 1935, the straight-car discount published (but apparently not in practice applied) by Morton and I believe by the other producers was 5 percent of the pool-car price of each item of salt.

On November 22, 1935, Morton issued Bulletin No. 900 to its sales force. This bulletin changed the expression of the discount from a percentage reduction from the pool-car price to a specific amount of money per item of salt:

Our present method of figuring discounts on a percentage basis [of 5 percent], either on the works net or on the delivered price [for blanket items], has brought forth many

³ Record, 4319-2-1, at 269.

⁴ Letter from Frank J. Venning, President, The Union Salt Co., to Frank Morse, Secretary, Salt Producers Association, March 19, 1934, contained in Consolidated File, supra note

misunderstandings as to the proper amount to be allowed. In order to simplify and make a uniform discount we will establish what is known as a 'unit' discount, which is a specified amount per package. The amount of this discount will be approximately the same as a 5 percent discount....⁵

There is attached to Bulletin 900 a list of common salt packages and the unit discount granted for each. (I have appended this list as Appendix B of this study). The original list makes no reference to BL, and this is consistent with the absence of any straight-car discount for this salt. On cases of 24 2 lb. rounds and on 36 1-1/2 lb. squares (common items handled by grocery wholesalers) the unit was 5 cents per case, which in each case approximated 5 percent of the pool-car price. That the units continued a discount previously expressed in percentage terms is confirmed by Peterkin's testimony:

Q. This unit discount of approximately 5 percent--that came about apparently recently, did it not?

A. No, the application of the discount in a unit form came about comparatively recently -- and the origination of the idea of applying it as a unit [was] to make the discount a fixed amount and not have to continually figure out what it would amount to if it were a percentage discount. It was merely a simplification of accounting practices. ⁶

How or why this simplified accounting practice is not clear, since it would not seem easier to deduct units of money per item ordered than to deduct 5 percent of the amount due. But this need not concern us here.

In his testimony, Peterkin, Jr. referred to the discount units as "arbitrary" amounts and this was unfortunate, for this was later used by the FTC to mean that they

⁵ Record, 4319-4-3-2, at 271.

⁶ Id. at 197-98.

were arbitrary discriminations, whereas it is clear that Peterkin meant that the units, being fixed amounts of money, resulted in different percentage discounts depending on variations in the market prices of salt, which were common after the demise of the NRA;⁷ and that the units as originally set up did not correspond exactly to 5 percent of the pool car price for each item.

Bulletin 900 was circulated among the salt companies much as were all price announcements during the NRA and I believe was adopted by them all as the common, published expression of the terms and magnitude of the straight-car discount. The discount as so published incurred no subsequent modifications throughout the period of the FTC's investigations. What came to differ from the terms expressed in Bulletin 900 were the purchase requirements that in practice were imposed to secure the discount. These requirements differed greatly from what appeared in Bulletin 900. In what follows, I discuss what the price scales collected during the FTC's investigations reveal about the discount. These scales begin in 1936, after Bulletin 900 had been circulated and adopted by the producers. What other evidence I could gather on the firms' practices is also presented, turning first to International and pricing in New York territory.

New York Territory:

Just after passage of the Robinson-Patman Act and arising from uncertainty about the legality of their practices, International and the other New York producers discontinued all discounts. They subsequently readopted those discounts or modifications

⁷ There are many examples of sales below list in the Records of the FTC's cases against Morton, International and the Salt Producers Association.

of them that at least from International's perspective were cost justified or necessary to meet discounts offered by competitors.⁸ The Robinson-Patman Act was passed in June 1936 and in September of that year International adopted (or perhaps readopted) Morton's straight-car discount as reflected in Bulletin 900. International justified this before the FTC on the ground that its receipt in the normal course of business of Bulletin 900 which Morton had not rescinded after passage of the Robinson-Patman Act, indicated clearly and with certainty a discount offered by a competitor, and so its adoption by International was necessary to meet competition. I note a good bit of fiction in International's claim, for it was still the typical practice for the producers in any outside territory to adopt as their published prices those of the producers within any territory, as during the NRA. Morton's Bulletin 900 did not actually apply to its shipments into New York territory, but only to those within the territories in which it produced salt. In fact, Morton had discontinued its discounts on shipments into New York territory when International and the other New York producers eliminated their discounts after passage of the Robinson-Patman Act. Shortly after the carload discount was reestablished and announced by the New York producers, it was adopted by Morton on its shipments of other than BL into New York territory.⁹

At any rate, International, in September of 1936, adopted the discount contained in Morton's Bulletin 900. The discount when first published was to apply to straight cars

⁸ Record, 4307-2-3, at 2719-2822.

⁹ The discount that soon evolved in New York territory differed from that in Bulletin 900. This discount was then adopted by Morton on its shipments there. See Morton's instructions to its salesmen, Record, 1-1/4319-1, Commission Exhibit 2q.

only. Items shipped in pool cars were to be priced one discount unit higher than those in straight cars. The discount first appears in International's scale of September 15, 1936. It is there noted that: "the unit discounts listed below will be allowed on carload sales to one buyer from our price list No. 1244 (September 15, 1936)." ¹⁰ The prices listed in scale No. 1244 applied to orders in pool cars.

When International discontinued its discounts just after passage of the Robinson-Patman Act, its prices were the same on orders shipped in either pool or straight cars. The price structure adopted in September changed this. The change was accomplished by restricting the prices previously charged on all orders to straight cars only, and by raising the prices for orders in pool cars by one discount unit. For example, the price of Sterling (International's major brand of table salt) before September 15 was \$1.08 per case to buyers in either straight or pool cars. After September 15, \$1.08 per case was charged on orders in straight cars, and \$1.13 per case was charged on orders in pool cars. However, whether this change persisted for other than the briefest moment is doubtful.

J.L. Ryon, International's Sales Manager, who was largely responsible for the firm's pricing policies, referred to problems that International encountered just after its prices for orders in pool cars were raised:

I will just make a statement describing the policy of our company, which has always been to work in the direction of establishing a carload of salt with an allowable 22 1/2 tons minimum weight to get the carload rate of freight as the unit of sale, with any smaller sales carrying some premium. This principle was put into our pricing policy some years ago [referring here to September 1936], but due to the fact that competitors' salesmen and our own, in some

¹⁰ Record I-1/4307-1, Commission Exhibit 155B.

instances, broke down the practice by appointing alternate buyers to receive the billing of the carload and thereby earn the full unit discount, guaranteeing to collect the accounts for the smaller participants in the car and giving the smaller buyers the benefit of the carload price, we were forced to recognize this competition. We, therefore, established the limits of 5 tons and/or 100 cases on which we would grant the discount. ¹¹

In effect, sometime after September 15, the published price for orders in straight cars was extended to orders in pool cars, providing that at least 5 tons/100 cases was ordered. In terms of Sterling, \$1.08 per case was charged on orders of 100 cases or more; and \$1.13 per case was charged on orders under 100 cases. A straight car composed of Sterling would have contained over 800 cases. I will later present evidence suggesting that virtually all of International's orders from wholesalers exceeded 5 tons/100 cases. This change in International's policy shows up in its scale of December 20, 1937. It is there stated:

"The discounts listed below will be allowed from our price list No. 1258 on lots of not less than 100 cases of Table Salt in cartons or cans, or on lots of not less than 5 tons of miscellaneous items. ¹²

In response to a query whether it was necessary in order to secure the listed prices and discounts that the salt be shipped in carloads, Ryon stated: "Absolutely, in every instance that applies."¹³ The original straight-car discount (or the extension of

¹¹ Record, 4307-4-3-2, at 152. The discount was granted on orders of at least 5 tons of miscellaneous items of packaged salt or 100 cases of table salt.

¹² Record, 1-1/4307-1, Commission Exhibit 158B.

¹³ Record, 4307-43-2, at 153.

it to orders over 5 tons/100 cases) had nothing to do with a distinction between CL and LCL shipments (as in the case of the \$1.50/\$1.60 differential on BL).

The December 20 revision appeared about 15 months after the straight-car discount was published (or republished) in September 1936. But it is doubtful that it took anywhere near this long for the discount to be extended to pool cars. For example, Diamond Crystal (a Michigan producer) published a scale applicable to sales in New York territory effective June 15, 1937 indicating that the discount was applied to orders over 5 tons/100 cases.¹⁴ In fact, Ryon testified that in practice International never had a discount on straight cars only after the Robinson-Patman Act was passed:

Q. Do you, in fact, or have you, at any time since June 19, 1936 had a special discount to any person who purchases a freight carload of your salt?

A. No.¹⁵

As to when the straight-car discount was extended to orders over 5 tons/100 cases, Ryon testified that this occurred in the Fall of 1936 (which is when the straight-car discount was itself published). He went on to note:

It might be worthwhile to consider that prior to the time we put in . . . the discount on purchases of 100 cases or more, we had a price of \$1.08 a case on Sterling in any quantity, and then, when we decided to limit our sales to 100 cases, at the going price, we altered our price list and we put a premium on sales for less than 100 cases. Our normal price of \$1.08 still maintained on sales of 100 cases or

¹⁴ Record, 1/4319-4.

¹⁵ Record, 4307-2-3, at 2842-43.

more, and in less than 100 case lots, we charged the higher price [of \$1.13]. That is actually what was done.¹⁶

Ryon's testimony is corroborated by invoices issued by International on sales made in New York territory well before December, 1937 and which indicate that the straight-car price applied to orders down to 5 tons/100 cases. The testimony and other evidence indicate that the straight-car discount published in late 1936 was in practice extended more or less immediately to pool-car orders exceeding 5 tons/100 cases.

It was not possible to discover whether International's attempt in late 1936 to restrict the discount to straight cars and to raise price on smaller orders (by one discount unit) represented an attempt to return to a price relationship that existed before the Robinson-Patman Act, or during the NRA. But at any rate, the price increase was not sustained, and the pricing structure that appeared, in which the straight-car price was applied to orders over 5 tons/100 cases and a surcharge of one discount unit was applied to orders below these amounts, remained in effect until 1948, when International, in response to the Supreme Court's opinion in Morton, abolished the surcharge on the smaller orders.¹⁷ There were thus a good many years during which a straight-car discount might have been sought or established, but such efforts either by International or the other New York producers never emerged; and although there were many instances uncovered in the FTC's investigations (far too many to enumerate here) during

¹⁶ Record, 4307-2-4, at 3030-31. In warehouse towns, the same purchase requirements were imposed.

¹⁷ In 1939, International considered but did not adopt a price structure in which one discount unit would be granted on straight cars and one-half unit on pool-car orders over 5 tons. No discount was to apply to orders under 5 tons. Some minor changes did occur in the definition of what items constituted cases (and thus what items counted toward the 100 case minimum). These changes might be described as a slight liberalization of policy.

which the prices of table salt in New York territory fell from published list, at times substantially and apparently from the competitive activities of the producers, the surcharge imposed on orders under 5 tons/100 cases remained intact.

One change of substance occurred in August 1941, when International imposed a minimum order of 2 tons: Orders for less than this amount were no longer accepted for shipment.¹⁸ The unit surcharge then applied on orders under 5 tons/100 cases down to the 2-ton minimum. In terms of Sterling salt packed 36 1-1/2 lb cartons to the case, the 2 ton minimum was reached with 74 cases.

The changes in International's pricing were adopted on approximately the same dates by Worcester Salt Co. and Watkins Salt Company (the two other New York producers) and by all other firms shipping into New York territory¹⁹ and were similarly continued by them until the Supreme Court reached its decision in Morton in 1948.

To sum up, beginning probably in late 1936 and continuing until 1948 (well before and after the FTC's complaint against International in 1940), the discount originally published to apply to straight cars was in practice extended by International to pool-car orders over 5 tons/100 cases. A surcharge equal to one discount unit was imposed on

¹⁸ Record, 4320-4-2-3, at 714.

¹⁹ The scales reflecting New York pricing are: Diamond Crystal, September 16, 1936 (Record, 4319-4-3-2); Hardy, January 15, 1937 (Record, 4319-4-3-3); Diamond Crystal, June 15, 1937 (Record 1/4319-1); International, September 15, 1936; June 15, 1937; December 20, 1937; January 15, 1940; April 15, 1942 (Record, 1-1/4307-1); Watkins, September 15, 1941; May 15, 1943 (Record, 4320-4-2-3); Worcester, September 2, 1941; March 18, 1942; May 15, 1943 (Record, 4320-4-2-3); International, May 15, 1943; May 15, 1944 (Record, 4320-4-2-3); Morton, August 28, 1941 (Record 1-1/4319-1); Watkins; September 10, 1946; June 21, 1947 (Record, 4320-3-3-2-5); Set of scales and bulletins of International covering the period 1943-1948 contained in Record, 4320-4-2-10, 11, 12, 13, 14.

orders below these amounts. From late 1936 to mid-1941, no minimum-order existed. From mid-1941 until 1948, International required a minimum order of 2 tons.

Louisiana Territory: Whether the carload discount was announced in Louisiana territory in late 1935 (with the circulation of Morton's Bulletin 900) is not known. One reference indicates that the discount described in Bulletin 900 and applying to straight cars had been published in Louisiana territory sometime before August 1936. The reference is to a bulletin of Diamond Crystal's to its sales force on pricing in Louisiana territory indicating that this discount was to be discontinued:

Effective August 15, 1936 we will discontinue allowing any unit discount to the resale trade throughout the entire Louisiana field. Scale prices for the Louisiana field will henceforth be net.²⁰

The bulletin specifically meant that prices previously published as applicable to straight cars only were to be charged on orders in pool cars. When the bulletin was issued, there was no corresponding change in the scale prices from which "net" prices were derived. Most evidence concerning pricing in Louisiana territory begins later in 1936, and by then it is clear that there existed no discount applicable in practice to straight cars only. In fact, from late 1936 until at least 1948, straight and pool cars were priced the same. This is reflected in scales issued by Morton, International, Diamond Crystal, Jefferson Island, Myles, Ohio, Colonial, Carey, Barton and Hardy during the period 1936-1941; and after 1941 by the scales of Jefferson Island, International and by the other producers in

²⁰ Record, 4319-4-3-2, at 427.

instructions to salesmen on pricing in Louisiana territory.²¹ These scales and instructions variously indicate that all orders were to be priced "net" whether in straight or pool cars (the expression itself giving some indication that a carload discount had previously existed or at least been attempted) or they simply indicate that orders were not subject to a carload discount. In the latter cases, the firms' scales contain the same prices for orders in straight and pool cars and these prices were equal to the "net" prices in the former cases. No minimum order was imposed in Louisiana territory until 1944. In May of that year, International first announced that it would not accept orders under 2 tons.²² I believe this minimum was adopted by all suppliers. In 1947, International published a scale containing a surcharge of one discount unit for orders under 5 tons/100 cases down to the 2-ton minimum. But this change seems to have lasted for less than a month, after which International reverted to its previous practice, in which the same price was charged on any order down to the 2-ton minimum. International's instructions to its salesmen reflect this change:

²¹ The scales and bulletins reflecting Louisiana pricing are as follows. For the period 1936-1941: Hardy, July 1, 1937 (Record, 4319-4-3-3-3); Carey, July 1, 1937 (Record, 4319-4-3-3); Barton, June 25, 1936 (Record, 4319-4-3-3); Diamond Crystal, July 1, 1937 (Record, 1/4319-4); Morton, June 25, 1936 (Record, 1-1/4319-1); International, June 25, 1936; July 1, 1937; March 28, 1938; May 20, 1939 (Record, 1-1/4307-1); Colonial, Nov. 20, 1937 (Record, 4307-4-3-6); Colonial, March 25, 1939 (Record, 4307-4-3-6); Ohio, June 20, 1939 (Record, 4307-4-3-6); Myles, October 27, 1938 (Record, 4307-4-3-6); Diamond Crystal, August 15, 1936 (Record, 4319-4-3-1); Diamond Crystal, September 15, 1936 (Record, 4319-4-3-2); Diamond Crystal, August 12, 1937 (Record, 4319-4-3-2); Jefferson Island, July 1, 1937 (Record, 4319-4-3-3); International, March 28, 1939 (Record, 4307-4-3-4); Avery, March 28, 1939 (Record, 4307-4-3-4); Avery, June 25, 1936; July 1, 1937; March 28, 1938 (Record, 1-1/4307-1). For the period after 1941: Morton, August 28, 1941 (Record, 4320-4-2-1); Mulkey, August 28, 1941 (Record, 4320-2-1); Avery, October 6, 1941; May 15, 1943; May 15, 1944 (Record, 4320-4-2-3); Jefferson Island, July 1, 1942 (Record, 4320, 4-2-2-2); Avery, June 15, 1947 (Record, 4307-4-5). International's scales and bulletins from 1943-1948 (and beyond) are contained in Record, 4320-4-2-10, 11, 12, 13, 14.

²² See Avery List No. 3, May 15, 1944 (Record, 4320-4-2-3).

[I]n view of the competitive conditions found to exist ..., temporarily disregard the 2-ton column [which reflected the surcharge]. Quote from 5-ton column only with minimum order at this price being two tons.²³

No attempt was later made to impose the surcharge on orders under 5 tons/100 cases. In August 1948, the minimum order was raised from 2 tons to 5 tons/100 cases, and this change was also adopted by all suppliers.

To sum up, no straight-car discount existed in Louisiana territory from mid-1936 until at least 1948. This is reflected in the scales of all suppliers and in the testimony of the many wholesalers located in Louisiana territory who were called as witnesses by the FTC in its cases against Morton and International. Of all who testified, and of all invoices submitted as evidence of pricing in Louisiana territory, not one indicated that straight and pool cars were priced differently.

Ohio and Kansas Territories: Whether the Ohio and Kansas producers had attempted, as had those in New York and apparently Louisiana, to establish a straight-car discount sometime before or during 1936 could not be discovered from the available evidence. I recall the statement of Mr. Venning of The Union Salt Co., which produced salt in Ohio, suggesting that historically all such efforts had failed. At any rate, from mid-1936 (when the evidence begins) until mid-1941, prices in Ohio territory were the same for orders in pool and straight cars, subject (until sometime in 1939) to a one-ton minimum order, and subsequently (until August 1941) to a 2-ton minimum.²⁴ In Kansas

²³ See Avery List No. 5, Bulletin of June 15, 1947 (Record, 4320-4-2-10).

²⁴ See International, April 19, 1937 (Record, 4307-4-3-5); Morton, July 1, 1936 (Record, 1-2/4319-1); Morton, June 5, 1938 (Record, 4307-4-3-5); Colonial, February 25, 1938 (Record,

(continued...)

territory from mid-1936 until mid-1941, straight and pool cars were priced the same. No minimum order was imposed.²⁵

In August 1941, the Ohio producers published new scales that contained a unit discount to be granted only on straight cars.²⁶ But shortly thereafter, supplements to these scales and bulletins to salesmen appear that extended the discount to orders in pool cars, subject to a 2-ton minimum order.²⁷ Scales reissued by Colonial Salt Co. in August 1942 and by Ohio Salt Co. in November 1942, reflect this extension.²⁸ There is no evidence (up until 1948) of other efforts to restrict the discount to straight cars. There is substantial evidence from International's pricing for shipments into Ohio, West

²⁴(...continued)

4307-4-3-6); Union, August 11, 1937 (Record, 4307-4-3-6); Diamond Crystal, July 1, 1936 (Record, 4319-4-3-1); Mulkey, July 1, 1936 (Record 4319-4-3-1); Diamond Crystal, April 19, 1937 (Record, 1/4319-4); Ohio Salt Co., April 19, 1937 (Record, 4319-4-3-2); Colonial, April 19, 1937 (Record, 4319-4-3-2). Stratford of Morton testified that in Ohio territory net prices applied on pool and straight cars. See Record, 4319-2-3, at 2280. International's scale states: "On shipments of evaporated salt, quote net delivered price in straight carloads and pool car lots. The carload discount allowed to all buyers of evaporated salt in straight carloads and pool car lots when moving by rail at the carload rate." All other scales give similar instructions except those of Ohio Salt Co. which quote net prices only and do not list unit discounts.

²⁵ See International, February 18, 1938 (Record, 4307-4-3-41); Diamond Crystal, April 22, 1937 (Record, 4319-4-3-2); Carey, March 22, 1937 (Record, 4319-4-3-3); Barton, March 22, 1937 (Record, 4319-4-3-3); Barton, February 10, 1938 (Record, 4319-4-3-6); Morton, February 18, 1938 (Record, 4307-4-3-5); Morton, March 22, 1937 (Record, 1-2/4319-1).

²⁶ Union, August 18, 1941 (Record, 4320-4-2-1); Ohio Salt Co., August 18, 1941 (Record, 4320-4-2-2); Colonial, August 18, 1941 (Record, 4320-4-2-2); Hardy, August 1, 1941 (Record 4320, 4-2-2).

²⁷ Ruggles and Rademaker Salt Co. and Mulkey Salt Co., Pricing Supplements for shipments into Ohio, Virginia, West Virginia and Kentucky starpoints, August 28, 1941 and September 26, 1941 (Record, 4320-4-2-1); Morton, Pricing Supplement for shipments into Ohio, Virginia, West Virginia and Kentucky starpoints, August 28, 1941 (Record, 1-1/4319-1); Diamond Crystal, April 19, 1937 (Record, 1/4319-4); International, Bulletins and Instructions, 1943-1948 (Record, 4320-4-2-10, 11, 12, 13, 14).

²⁸ Bulletin of Ohio Salt Co., November 4, 1942 (Record, 4320-4-2-2); Colonial, April 1, 1942 (4320-4-2-2).

Virginia, Virginia, Western Pennsylvania and Kentucky (comprising Ohio territory) that until 1947 all sellers charged the same prices for orders in straight and pool cars (subject to the 2-ton minimum). On July 3, 1947 and continuing for a brief period thereafter, a surcharge of one discount unit was imposed on orders under 5 tons/100 cases down to the 2-ton minimum. This resulted in a pricing structure identical to what then existed in New York territory. The surcharge in Ohio territory (as in New York territory) was eliminated in October 1948, after the Supreme Court's decision in Morton.²⁹ Subsequently, pool and straight cars were priced the same; but the minimum order was raised from 2 tons to 5 tons/100 cases.

Events in Kansas territory took a similar turn. As in Ohio, the Kansas producers in August 1941 published new scales that restricted the carload discount to straight cars only. Prices for orders in pool cars were raised by one discount unit. But by at least 1944 (and probably a good deal before, although the evidence on this is more limited) and continuing to late 1948, the discount was extended to orders in pool cars. Whether a minimum order was imposed is uncertain, although if it was, it is unlikely to have exceeded 2 tons.³⁰ Stratford of Morton testified that the discount was granted on pool car orders in Kansas territory in 1941. Morton produced in Kansas. The implication of Stratford's testimony is that the extension of the discount to pool cars occurred just after publication of the revised scales that had confined the discount to straight cars.

²⁹ Pricing bulletins and instructions, International Salt Company 1943-1948 (Record, 4320-4-2-10, 11, 12, 13, 14).

³⁰ Barton, February 15, 1944 (Record, 4320-2-2-); Barton, June 10, 1946; September 10, 1946, February 17, 1947 (Record, 4320-3-3-2-1); International's bulletins and instructions for Avery shipments (Record, 4329-4-2-10, 11, 12, 13, 14).

The Remaining Territories:

In the remaining territories--Texas, Michigan and Kansas-Michigan--it is clear that the producers had published a discount applicable to straight cars in 1936.³¹ It is a bit less clear (particularly for Michigan) that the discount was subsequently extended to pool cars as quickly as this occurred in the other territories, although I suspect that it was. Morton produced in Michigan and Texas and published prices applicable to Kansas-Michigan. In its answer to the FTC's complaint (filed in 1940) the following statement appears:

With regard to certain products a discount amounting to approximately 5 percent of the list price is allowed to a buyer who purchases a carload, and in all cases where such discount is allowed to a buyer who purchases a carload, an equal discount is allowed to buyers whose individual purchases are much less than a carload lot but who combine their purchases to form a carload, such carload being known in the trade as a pool-car.³²

This is consistent with testimony of Morton's officials to which I will refer in greater detail later but briefly note here that of Peterkin, Jr. concerning Morton's pricing after passage of the Robinson-Patman Act up until the time of his testimony in 1942. Peterkin

³¹ Texas: International, March 28, 1937 (Record, 4307-4-3-4); Avery, March 28, 1938 (Record, 4307-4-3-4); Morton, July 3, 1936 (Record, 1-1/4319-1); Diamond Crystal, August 12, 1937 (4319-4-3-2); Carey, June 27, 1937 (4319-4-3-3); International, Nov. 14, 1938 (Record, 4307-4-3-5); Morton, March 22, 1937 (Record, 1-2/4319-1); Barton, March 22, 1937 (Record, 4319-4-3-3); Morton, August 15, 1941 (Record, 1-1/4319-1). Michigan: Morton, June 27, 1936 (Record, 1-2/4319-1); International, June 7, 1937 (Record, 4307-4-3-4); Diamond Crystal, June 27, 1936 (Record, 4319-4-3-1); Hardy, June 7, 1937 (Record, 4319-4-3-3); Carey, June 7, 1937 (Record, 4319-4-3-3); Barton, March 22, 1937 (Record, 4319-4-3-3).

Kansas-Michigan: International, November 14, 1938 (Record, 4307-4-3-4); Morton, November 14, 1938 (Record, 4307-4-3-5); Diamond Crystal, August 12, 1937 (Record, 4319-4-3-2); Carey, March 22, 1937 (Record, 4319-4-3-3); Barton, March 22, 1937 (Record, 4319-4-3-3); Morton, March 22, 1937 (Record, 1-2/4319-1).

³² Answer of Morton Salt Co. at 2, Record, 4319-1 (filed Oct 10, 1940).

indicated that throughout this time the carload discount was granted in all territories on orders in pool cars. Stratford, who focused primarily on Morton's pricing after 1941 testified similarly. Other evidence is spotty. There is a bulletin published by International on December 21, 1936 indicating that table salt in pool or straight cars was to be priced the same throughout Texas.³³ There is also an announcement of Morton's made in 1941 that it would meet Louisiana competition on table salt shipped into Texas. On their sales in Texas, the Louisiana producers had been charging the same prices on pool and straight cars.³⁴ No minimum order was imposed in Texas. Morton's announcement was not later withdrawn, although in 1944, a 2-ton minimum order was adopted. There are invoices of Morton's and Diamond Crystal's for shipments into Kansas-Michigan territory in 1937 and 1938 indicating that orders in pool cars were priced the same as those in straight cars.³⁵ Beginning in 1937 and continuing until at least 1939, pool car shipments into lower Michigan and Indiana (part of the Michigan field) secured the straight-car discount, subject to a 10-ton minimum order.³⁶ But by at least 1941 (and probably before if we take Peterkin's testimony at face value), the discount had been extended throughout Michigan territory to pool cars (subject to what was then a 2-ton minimum order). In August 1947, the Michigan producers established

³³ International, Dec. 21, 1936 (Record, 4307-4-3-4). Texas territory comprised the state of Texas.

³⁴ Morton, November 28, 1941 (Record, 1-1/4319-1).

³⁵ Morton, invoices contained in Record 4319-4-3-1 and in Record, 1-1/4319-1. Diamond Crystal, invoices contained in Record, 4319-4-3-2.

³⁶ International, May 5, 1937; March 15, 1939, State of Indiana (Record, 4307-4-3-4); Hardy, January 7, 1937 (Record, 4319-4-3-3); Carey, January 7, 1937 (Record, 4319-4-3-2); Diamond Crystal, January 7, 1937 (Record, 1/4319-4).

a surcharge of one discount unit for pool-car orders under 5 tons/100 cases (down to the 2 ton minimum). This structure was identical to what then existed in the New York and Ohio territories.³⁷ As in New York and Ohio, the surcharge was eliminated in June 1948, after the Supreme Court's decision in Morton. After the Court's decision, the prices that had been applicable to orders down to 5 tons/100 cases were temporarily extended by Morton to orders down to the 2-ton minimum.³⁸ But by October 1948 at the latest, the minimum order was raised from 2 tons to 5 tons/100 cases. Orders below these amounts were no longer accepted.³⁹

None of the discussion of pricing in the various territories directly applied to BL. But we know that from 1936 until at least 1948, BL was priced the same on orders in straight or pool cars. No minimum order applied to BL, although Morton did permit purchases of BL to count toward the minimum weight of salt required to secure the discount on other items.

c. The Evidence Elicited During The Trial Against Morton

During the proceedings against Morton, the firm's pricing scales were introduced by the FTC as evidence that Morton granted a straight-car discount. Morton published scales for all territories, and those introduced as evidence were published in 1936 and in 1941. The scales themselves painted a mixed picture, although in practice the firm's

³⁷ International, August 6, 1947 (Record, 4320-4-2-10).

³⁸ International, June 29, 1948 (Record, 4320-4-2-11).

³⁹ International, October 1, 1948 (Record, 4320-4-2-11).

pricing did not. Little questioning by the FTC was directed toward the scales themselves, for example, to uncover why a straight car discount was published for some territories but not others, or what accounted for the change in the scales published in 1941 by the Ohio and Kansas producers from those they published in 1936. Instead, what FTC counsel sought to do was to present the scales, and then, through the questioning of Morton's officials and of wholesalers and chain buyers, prove that Morton charged competing buyers different prices because some of them ordered straight cars (and secured the discount) and others ordered in pool cars (and thus did not secure the discount). As the case progressed, the results must have been a disappointment.

All of the wholesalers who testified were located in Louisiana territory. It was clear beyond doubt, both from the scales themselves and from the wholesalers' testimony (and from the invoices submitted as evidence) that a discount applicable only to straight cars did not exist on transactions there. Without exception, all of this evidence indicated that orders in straight and pool cars were priced the same. Similarly, invoices that were submitted as evidence of pricing in other territories (of which there were not a great many) indicated that orders in straight and pool cars were priced the same.

The questioning of Morton's officials also indicated that in all territories orders in straight and pool cars were priced the same. This testimony conflicted with certain of the published scales that reflected a straight-car discount. However, the testimony went unchallenged, and I have little doubt that the testimony of Morton's officials represented the firm's practice.

When queried by FTC counsel specifically about the carload discount on items other than BL, Peterkin, Jr. had this to say:

A. We grant what we call a unit discount to a participant in a carload, and that participant may be purchasing less than the required minimum weight of a carload but his salt moves as part of the carload.

Q. And [the buyer] receives the unit discount on the amount that he purchases?

A. That is correct.⁴⁰

A bit later, the following exchange occurs:

Q. Do you have customers who purchase less than a carload who receive the carload discount?

A. Yes.

Q. Will you tell me that class of customers, sir?

A. A customer who purchases a quantity of salt less than that ordinarily used to make-up a full car under ICC terms of a full carload would receive the carload discount if the salt moves in a carload.

Q. If the salt was part of a carload of salt, and that would apply to customers who purchase other than BL table salt.

A. Yes.

Q. Would it apply on . . . brands of table salt other than [BL]?

⁴⁰ Record, 4319-2-1, at 47.

A. It would not apply on [BL] as you have termed it....
[Except for BL] a carload discount of one unit is allowed to
any purchaser of salt moving in a carload. ⁴¹

Other similar questions elicited the same response:

Q. Then you grant the approximate 5 percent discount . .
. [when] a group of customers combine their purchases in
order to purchase a carload?

A. When a carload of salt moves from our plant as such,
that is correct.

Q. And do you grant . . . the discount to each and every
customer that has purchased your products on [this] carload
basis?

A. So far as I know that is true. ⁴²

Later in the proceedings, Stratford testified along similar lines:

Q. Is it the policy of the Morton Salt Co. to grant the
carload discount to a group of purchasers [who] combine
their purchases and purchase on a carload basis?

A. For all who participate in a pool car, such carload
discount is granted [and applied] to the items purchased by
each participant in the car.

Q. Now, in order that the Record may be very clear on the
subject, would you explain how a discount on a carload
basis is effected?

A. Our current scales [referring to certain of those issued
in 1941] show a carload discount for those who buy a full
carload of salt, those single buyers [who] buy a full carload

⁴¹ Record, 4319-2-1, at 259. BL was sold net if the order moved in a carload, so no "carload" discount applied on BL salt. The witness went on to note that "it is not our practice" to grant a carload discount on BL. "That is a net price." Id.

⁴² Record, 4319-2-1, at 127.

of salt, [but] we are applying [this] discount to all buyers in cars.

Q. Whether pool or otherwise?

A. Yes.⁴³

To sum up, it seems clear that the salt companies sought in 1936 and in some instances before, to establish a straight-car discount but that their efforts failed, in some territories immediately, whereas in others this may have taken somewhat longer. Judging from the testimony of Morton's officials and its answer to the complaint, the straight car discount had in practice disappeared completely before 1940. Other evidence indicates that in most of the territories it had disappeared much earlier than this. The testimony and other evidence presented by the FTC uncovered no contrary evidence.

⁴³ Record, 4319-2-1, at 487. An interesting example appeared in 1943, after Morton acquired Worcester Salt Co., one of the New York producers. Before the acquisition Worcester published a discount applicable to pool-car orders of 5 tons/100 cases or more. Morton revised Worcester's scale after the acquisition. The revised scale states: "The carload discount is allowed to any buyer of the minimum quantity required to secure carload rates." The reader is then referred to Marketing Provision No. 10. Provision 10 states that "carload costs [prices] also apply on either 5 ton lots of miscellaneous items or 100 cases of table salt in cartons." Only orders under 5 tons/100 cases did not secure the discount, so in practice Worcester's pricing was not changed. Worcester, May 15, 1943 (Record, 4320-4-2-3).

d. Morton's Carload Discount Before the Commission and the Courts

How was Morton's "carload" discount handled by the Commission and the Courts?

Throughout the proceedings, Morton's position was that it priced orders in straight and pool cars the same, so that there was no discount for the FTC to challenge: all buyers paid the same price. Morton made no mention of New York territory where it imposed a surcharge (except on BL) on orders under 5 tons/100 cases down to the 2-ton minimum. However, evidence about this had not been presented by the FTC, and Morton did not volunteer it. Had the issue been raised, no doubt Morton would have argued that it was meeting the competition of International and the other New York producers.

As in his discussion of BL, in which he concluded that Morton charged the same price (of \$1.50 per case) for any order shipped in either a straight or pool car, the Hearing Examiner accurately summarized the evidence presented to him on the carload discount as it was applied by Morton on its sales of other table salt. He refers to the fact that certain of Morton's scales reflected a straight-car discount for items other than BL, but notes that the testimony and all other evidence indicated that in practice the same prices were charged on orders in either straight or pool cars (as he had found in the case of BL). The Examiner made no decision, so the argument moved before the Commission.

The argument of counsel supporting the complaint is at best hard to follow so far as it deals with the matter at issue. It is stated that

an amount equal to approximately 5 percent ... is granted .
.. by [Morton] to its carload purchasers [and] amounts to 5
cents per case on grades of table salt other than BL⁴⁴

Counsel argued that this discount should be found illegal because Morton did not prove
it to be cost based, and because buyers who were denied it were sufficiently injured
to permit the Commission to hold that its effect may be substantially to lessen competition.

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On what evidence did counsel rely to indicate that buyers paid different prices?

Reference is made to those of Morton's scales that reflected a straight-car discount. But
the scales are said to be misleading, and it is stated that Morton

grants the approximately 5 percent discount on the carload
basis to customers who pool their purchases to obtain a full
carload of salt. Such discount is known as a pool car
discount.⁴⁶

In which case, one is led to wonder what it was that counsel found objectionable. This is
soon stated:

to other of respondent's customers who purchase salt
products of the same grade and quality, [Morton] has not
allowed ... the so-called carload discount.⁴⁷

⁴⁴ Brief of Counsel for the Commission at 57, Record, 4319-1.

⁴⁵ Id.

⁴⁶ Id. at 10. There is no mention that the injury was felt to stem from the fact that small buyers
had to incur the costs of pooling. The Record was clear that organizing the cars was done by Morton.

⁴⁷ Id.

But who were these customers? If pool and straight cars were priced the same, what counsel must have found objectionable was that some buyers made LCL purchases and therefore incurred LCL surcharges.

There is some support for this interpretation: counsel at this point in the argument refers to a statement by Peterkin, Jr. that some of Morton's customers purchased LCL.⁴⁸ Of course, the unit discount that counsel described and which he argued should be illegal had nothing to do with the LCL surcharge but with whether the carload discount was restricted to straight cars, and by his interpretation of the evidence it was not. Further, the surcharge on LCL shipments of blanket items was not the unit discount that counsel described as illegal. The LCL surcharge was 10 cents per case on blanket items. Counsel had previously dealt with this in considering why the \$1.50/\$1.60 differential on BL (and on other blanket items) should be found illegal.

Actually, throughout the proceedings, no evidence had been presented or uncovered of LCL shipments of other than BL salt. Excluding the few examples involving BL, none of the wholesaler testimony or invoices reflected LCL shipments. What evidence existed about this was presented by Morton (based on its Chicago billings) and this showed that virtually no salt was shipped LCL. Of course, Morton's aim in presenting this evidence was to suggest the absence of competitive injury from the LCL surcharge, however injury might be defined. Morton's evidence based on its Chicago billings indicated that its sales of table salt excluding BL shipped LCL were only \$433 (net of freight) for the year

⁴⁸ Id. at 11.

studied, an amount equal to about .006 percent of Morton's total sales of salt for which CL/LCL differentials were maintained.

FTC counsel in arguing his case relied on examples from the Record that were thought to show that the carload discount was granted to certain buyers and not others. None of the examples supports the point.

FTC Counsel's first example is the following:

[Morton] sold 100 cases of 36 1-1/2 lb. Klear Table Salt to Grocery Company of Columbia, SC at 80 cents a case while at approximately the same time sold 50 cases of 36 1-1/2 Klear Table Salt to its preferred customer at 75 cents a case, the 5 cent differential in price reflecting the difference between the carload and less than carload price.⁴⁹

In fact, the price difference to which counsel refers, and which was clearly shown as such by Morton, reflected a change in the market price of salt between the time that the two orders were placed. It did not reflect the receipt of a discount in the one case and not the other: the orders of both buyers moved in carloads and were always priced net.⁵⁰

A second example refers to a shipment of BL salt. This is the example of the 30 cases shipped LCL to Interstate Wholesale. But the matter at issue was not the LCL surcharge. Moreover, the evidence is overwhelming that Morton from at least 1936 on charged the same price for BL whether shipped in a straight or pool car.

Counsel goes on to state that these two examples are

similar to and practically identical with other areas where the respondent sells its products and grants to some

⁴⁹ Id. at 10..

⁵⁰ Record, 4319-2-3, at 1686-1770, 1842-1862.

customers the carload discount and withholds such discount from other of its customers competing with the former in the resale of the respondent's products.⁵¹

Page references to the Record then follow. All such references are to BL salt, and all of them reflect purchases made by wholesalers at \$1.50 per case. As far as I can tell, this was all of the evidence used to show that Morton granted a carload discount on table salt other than BL salt to some buyers and not others.

e. The Commission's Opinions

The Commission's initial opinion closely follows the argument of FTC counsel.

It is stated that on table salt items other than BL, Morton

maintains a schedule of discounts known as the 'unit discount'.... One unit is allowed to a customer who purchases in carload lots. This discount is also allowed to customers whose individual purchases are less than a carload but who combine their purchases to form a carload on the so-called pool-car arrangement.⁵²

No reference to the evidence is made nor is there any other discussion. What follows is a conclusion:

The Commission finds that the discounts allowed by the respondent in the sale of its BL Salt ... as well as unit discounts allowed on carload lots [of other table salt items] constituted discriminations in price⁵³

⁵¹ Brief of Counsel for the Commission, *supra*, note 44, at 11.

⁵² Morton Salt Co., 39 FTC 35, 42 (1944).

⁵³ *Id.* at 42-43.

The opinion goes on to find the "discriminations in price" resulting from the unit discounts illegal, because competition was injured between buyers who received them and those who did not, and because Morton did not prove the units to be cost based. Read together the two statements imply that what the Commission found illegal was the price difference between CL and LCL shipments on items other than BL. This seemed to be so even though there was no evidence of such shipments (except what Morton presented, to which the FTC does not refer and which had been presented to show that such shipments were insignificant) and even though the unit discounts described in the opinion did not reflect price difference between CL and LCL shipments. It may be recalled that on other than blanket items, the difference between the delivered price for an order shipped to a given destination in a carload and in less-than-a-carload equalled the difference between CL and LCL freight costs. On blanket items, the price difference was 10 cents per case, which was not the unit discounts described in the opinion and found illegal.

In the Commission's modified opinion, no reference is made to the fact that orders in pool and straight cars were priced the same. No other references to the evidence are made, and the following statement appears:

On the sale of ... salt other than BL [Morton] ... maintains a schedule of discounts known as the 'unit discount' One unit ... is allowed to a customer who purchases in carload lots There were wholesalers and retailers not receiving such unit discounts who were in competition in the same trade areas with wholesalers and retailers who received the unit discounts on carload shipments The Commission finds that the ... unit discounts allowed on carload lots of

salt other than [BL constitute] discriminations in price [injurious to competition and thus illegal].⁵⁴

As so written, the opinion implies that the discount was granted on straight cars only and that this was what was injurious. What seems to have occurred is a recognition by the Commission that its previous opinion had described the unit discounts as reflecting the LCL surcharge and that this was incorrect. Its revised opinion shifted focus to indicate that the unit discounts reflected the existence of a straight-car discount received by some competing buyers and not others. But since the unit discounts were granted on orders in pool cars (as recognized in the previous opinion), there actually was no price difference that might be said to injure competition.

In the Court of Appeals, FTC Counsel argued that each of Morton's discounts, including its carload discount, was available only to buyers of very large size (those described as already "well advanced on the road to monopoly").⁵⁵ Buyers whose

yearly needs are limited to a few hundred cases of salt have no [greater] opportunity to obtain the lower prices ... than they would if the ... offers [of discounts] were not made to them.⁵⁶

Mention is not made of pool cars, or to the fact that, except for certain of Morton's scales (which are not themselves mentioned), the evidence indicated that pool and straight cars were priced the same.

Later in the argument, the carload discount is dealt with explicitly:

⁵⁴ Morton Salt Co., 40 FTC 388, 395-96(1945).

⁵⁵ Brief for Respondent at 10, Morton Salt Co. v. FTC, 162 F.2nd 949 (1947).

⁵⁶ Id.

In the sale of salt other than BL, [Morton] maintains a schedule of discounts known as the unit discount One unit ... is allowed to a customer who purchases in carload lots The Record shows that the recipients of either this discount [or another of Morton's discounts] had competitors who were not so favored.⁵⁷

In support, some examples are given. Several wholesalers are mentioned: Lipscomb-Russell Co. of Greenville, S.C.; Grocery Supply Co. of Columbia, S.C.; and Philip-Stone and Company and Wholesale Grocery Company of Winston-Salem, N.C., which were all said to compete with Thomas and Howard and/or C.D. Kenney Co., wholesalers located in the same cities. Thomas & Howard and C.D. Kenney were said to secure discounts whereas the other wholesalers did not.

Nevertheless, the evidence indicates that, so far as the carload discount was concerned, all of the buyers mentioned purchased in pool or straight cars at the same prices (their orders always moved in carloads). This was confirmed by the testimony and invoices of these wholesalers. It is true that Thomas and Howard and C.D. Kenney secured annual-volume discounts from Morton and the other wholesalers did not. But the issue being dealt with here was whether the carload discount applied only to straight cars. The evidence indicates that it did not.

The Court of Appeals did not deal explicitly with the carload discount as applied to Morton's sales of other than BL salt. No mention is made of the unit discount. But given the Court's view of the \$1.50/\$1.60 differential on BL, I presume that it would have found a straight-car discount legal (assuming the Court believed that Morton granted one).

⁵⁷ Id. at 38.

The Supreme Court focused its opinion almost exclusively on BL salt and in particular on an analysis of the \$1.50/\$1.60 differential. Mention is made of the carload discount on other items, but the language is not sufficiently precise to determine whether the Court believed that buyers in pool cars were excluded from it. Since the Court's analysis of the \$1.50/\$1.60 differential on BL seemed to assume that only buyers of straight cars were charged \$1.50, I presume that a similar view would have been held had its opinion dealt explicitly with the unit discounts. At any rate, the FTC's conclusion that the carload discount was illegal was upheld.

All in all, the evidence showed that Morton charged buyers the same price on orders in pool and straight cars. Some published scales restricted carload discounts to straight cars, but in practice Morton's discounts were extended to pool cars almost immediately. Nonetheless, the firm was found guilty of price discrimination because it was said to charge different prices on orders in pool and straight cars. The evidence used to support this conclusion had little to do with differences in pricing orders in pool and straight cars.

f. The Effect Of The Commission's Order

The FTC's order required Morton to charge competing wholesalers (including the retail chains) identical prices for table salt. Morton abolished its discounts on June 15, 1948.⁵⁸ Concerning only the carload discount, what effect did the FTC's order appear to have?

⁵⁸ Morton, Report of Compliance, filed August 16, 1948 (Record, 4319-3-3).

If we return to earlier discussion of pricing in the various territories, the situation by mid-1947 (about one year before the order) was as follows: (1) on all shipments except those in New York territory, the producers charged the same prices for orders in straight or pool cars, subject to a 2-ton minimum order. In New York territory, the same prices were charged on orders in straight cars and on orders in pool cars over 5 tons/100 cases. A surcharge of one discount unit applied to orders under 5 tons/100 cases down to the 2 ton minimum-order. Except in New York territory, the FTC's order would have had no effect. (2) A bit later in 1947, by October or November, the producers in Michigan and Ohio had adopted the pricing structure existing in New York territory.⁵⁹ The FTC's order made the surcharge on orders under 5 tons/100 cases down to the 2-ton minimum illegal. Morton had plants in New York, Michigan, Ohio, Kansas and Texas. The immediate result of the order seems to have been to lead Morton on its shipments in the Michigan, Ohio and New York territories to eliminate the surcharge on orders under 5 tons/100 cases and to extend the "net" price to orders down to the 2-ton minimum.⁶⁰ But this change was short lived: by October 1948 at the latest, all of the producers in New York, Ohio and Michigan had raised the minimum order from 2 tons to 5 tons/100 cases.⁶¹ The order thus seems to have eliminated an option to purchase in very small lots, and no doubt this made those buyers who on occasion chose it worse-off. The 5-ton minimum was soon adopted by the producers in all other

⁵⁹ International, Bulletin of November 1947 (Record, 4320-4-2-10).

⁶⁰ International, Bulletin of June 29, 1948.

⁶¹ International, Bulletin of October 1, 1948 (Record, 4320-2-11).

territories, except in Kansas, where a smaller minimum was retained.⁶² The spread of the 5-ton minimum cannot be attributed to the FTC's order unless in its absence the producers in these other territories would have adopted a surcharge on orders under 5 tons/100 cases (in which case a smaller minimum-order might have been maintained). Whether they would have done so could not be determined.

g. The Carload Discount In The Case Against International

What the FTC challenged in its case against International was the remnant of the firm's effort in 1936 to establish a straight-car discount in New York territory. This effort failed, almost immediately, after which the discount was extended to orders down to 5 tons/100 cases. On orders under 5 tons/100 cases down to the 2-ton minimum, prices were higher by one discount unit. This surcharge was challenged and found illegal by the FTC in its case against International. Testimony of wholesalers (and invoices in support thereof) were presented by the FTC involving International's pricing in the Louisiana and New York territories, where the firm produced and sold most of its salt. As in Morton, the evidence involving Louisiana territory indicated that straight and pool cars were priced the same, so no challenge was made to International's pricing on its shipments there. Instead, attention focussed on New York, where a price difference

⁶² Morton, April 30, 1953 (Record, 4320-3-3-2-4); Avery, August 22, 1948; August 21, 1949; July 16, 1950 (Record, 4307-4-5); Hardy, July 29, 1951 (Record, 4307-4-5); Avery, July 20, 1953 (Record, 4307-4-5); International, August 22, 1948; Aug. 21, 1949; July 15, 1950; July 20, 1953 (Record, 4307-4-5); Hardy, December 1, 1953 (Record, 4320-3-3-2-3); Watkins, 1954 and 1955 (Record, 4320-3-3-2-5); Barton, 1954 and 1955 (Record, 4320-3-3-2-1); Carey, 1955 (Record, 4320-3-3-2-2). Hardy's scale of December 1, 1953 indicates that the 5-ton minimum applied in all territories except when meeting Kansas competition. (Record, 4320-3-3-2-3). Barton's 1954 and 1955 scales for Kansas reflect a minimum order of 50 cases of table salt.

existed. It is interesting that International's pricing in Louisiana territory was found acceptable, whereas the identical pricing by Morton provided the support for finding Morton's pricing illegal.

The testimony presented by the FTC was concerned almost exclusively with the question of injury. What the FTC sought to show was that wholesalers who paid a higher price for salt (because they ordered less than 5 tons/100 cases) would have been better-off if they could have purchased at a lower price (all else assumed the same). This was the proof of injury. This testimony was what the Supreme Court in its Morton opinion said would no longer be necessary. But the testimony in International was taken well before the Supreme Court issued its Morton opinion.

h. Importance Of Sales Under 5 Tons/100 Cases

During the proceedings, no effort was made to uncover the importance of orders on which the surcharge was imposed. One piece of evidence on which the FTC relied was a statement by W.J. Benger, President of Eastern Salt Co. (a subsidiary of International's distributing salt in New England) that his firm had "many" buyers who ordered in lots of less than 5 tons/100 cases. But Benger's testimony is not helpful, because Eastern operated a warehouse in Boston from which sales to retailers in very small lots were often made. On these sales, Eastern typically charged prices comparable to those charged by wholesalers.

Two pieces of evidence bear on the significance of sales under 5 tons/100 cases to wholesalers. One appeared several years after the conclusion of the case. In 1958,

International sought unsuccessfully to have the FTC's order set aside and in support of its petition presented evidence on its sales of table salt in less than 100 case lots. By a count of invoices for 8 months in 1942 (which was projected to an annual estimate), sales in less than 100 case lots were equal to 0.4 percent of International's total sales of table salt. For New York territory alone, where the surcharge on orders under 100 cases existed, the percentage was equal to 0.45. Whether the tabulation included sales to retailers from metropolitan warehouses is not known. Their inclusion would overstate the importance of sales to wholesalers in less than 100 case lots.

That so small a proportion of sales occurred in lots under 100 cases should probably not be surprising. The estimate covers 1942 when the 2-ton minimum order was in effect. The minimum represented 74 cases (of 36 1-1/2 lb Sterling pkgs.). It would probably be unusual for a buyer considering the purchase of 74 cases (priced at \$1.13 per case) not to increase his order to 100: purchasing 26 cases now in addition to 74 would lower the price to \$1.08 per case for the 100 cases, and so would involve an outlay for the 26 cases equivalent to 88 cents per case (as against \$1.13 if just the 26 cases were purchased later). The 26 cases would be worth buying now if the cost of money over the relevant time (plus any additional costs of storage) was less than 25 cents per case for the 26 cases. The money savings from buying the 26 cases now (with the 74) represents about 21 percent of the price if purchased later in the smaller lot. Typical operating expenses of grocery wholesalers were 10 percent of sales (in 1939).⁶³ There is no evidence about other costs of storing salt. But I doubt that they would rise so

⁶³ 1939 Census of Business II, Wholesale Trade, Table 4, Business Size, Wholesale Merchants 541 (1939).

greatly as to offset the savings from buying the 26 cases now. At any rate, International's submission indicated that virtually all sales of table salt occurred in lots over 100 cases.

The second piece of evidence is from the testimony of wholesalers and their invoices presented by the FTC during the proceedings. The invoices were offered to corroborate the wholesalers' testimony about the prices they paid. It is reasonable to suppose that the FTC's selection of both wholesalers and invoices was not random. The invoices involving sales in New York territory were issued during 1937-1942 and in total contained shipments of about 47,200 cases of 36 1-1/2 lb. or 24 2-lb. containers (the table salt typically carried by wholesalers). About .9 percent of all cases were in orders under 5 tons/100 cases on which the surcharge was imposed. The invoices reflect a higher proportion of such sales than International estimated for 1942; but this might be expected, because the 2-ton minimum was first imposed in 1941, and this minimum might have diminished sales in less than 100 case lots.

Thirty wholesalers (not counting the retail chains) operating in New York territory testified for the FTC. It was possible to determine for 28 of the 30 their typical practices in buying from International. Twenty-three of the 28 always ordered in lots of more than 5 tons/100 cases. Of the remaining five, three typically did so, but on occasion did not. No reasons were given why these three ordered the smaller lots. The impression from their testimony is that these orders were infrequent and unimportant.

Two of the five buyers typically ordered from International in lots of less than 5 tons/100 cases. Invoices submitted by one of the two (Letendre and Boule Co.) reflect

purchases from International of \$220.90 (net of freight) over 14 months, an amount that would have been reduced by \$8.55 had there been no surcharge. Whether these invoices reflected Letendre and Boule's total purchases from International is not known with certainty, although the impression is that they did.⁶⁴ The other buyer typically ordering in lots under 5 tons/100 cases was National Distributing Cooperative. National was a member of a larger cooperative organization through which it typically placed its orders for salt. On occasion, however, National purchased Sterling directly from International in very small lots. Over 18 months, these purchases totaled \$69.90 (net of freight). National would have saved about \$3.50 had no surcharge been imposed. When queried about these purchases, National's buyer indicated that Sterling was ordered in lots of 10-15 cases to accommodate the preferences of certain of his customers for this brand: the purchases were made with immediate resale to specific buyers in mind. That this was a losing proposition for National is doubtful: the salt was resold at \$1.28 per case, well above typical wholesale prices of Sterling (of \$1.20 per case). National purchased most of its salt in larger lots from suppliers other than International.⁶⁵ This is less clear with respect to Letendre and Boule. But when International's counsel sought to clarify this, the questioning was not allowed -- the Examiner would permit no witness to be questioned about prices paid to any other supplier.

⁶⁴ Record, 4307-2-1, at 967.

⁶⁵ Record, 4307-2-1, at 982-86.

i. The Decisions By The Examiner And The Commission

The Hearing Examiner concluded that International's surcharge on orders under 5 tons/100 cases "injured competition" because some buyers (presumably one would have sufficed) paid a higher price and would have preferred to pay less (all else assumed the same). No analysis of any kind or detailed reference to the facts is presented. International's position was that the surcharge was cost based. Its effort to show this will be discussed later. The Examiner rejected the defense and so found the surcharge illegal.

The same conclusion was reached by the FTC: buyers who paid the higher price (all else assumed the same) would have to resell at a higher price (causing a diversion of their sales to others) or they would secure a lower margin. Either was judged of sufficient importance

to injure, destroy or prevent competition between those purchasers receiving the benefit of said discriminatory ... discount and those to whom [it] is denied." ⁶⁶

No meaning is attached to injury other than that a price difference may divert sales or lower a seller's margin. Given the facts previously presented, the diversion of sales or reduction in margin can be of any amount to satisfy the competitive injury standard. The FTC also rejected International's cost defense, for reasons I will later discuss. No argument is given why the surcharge might have reflected a scheme of price

⁶⁶ International Salt Co., 49 FTC 138, 152 (1952).

discrimination. The request by International in 1958 to set aside the order which prohibited the surcharge was rejected.⁶⁷

j. The Effect Of The Commission's Order

The order against International was entered in 1952. It is identical to that against Morton. What effect might the order against International have had? Let us recall the situation existing just before the Supreme Court's decision in Morton. The producers in Michigan and Ohio had adopted the pricing structure then in effect in New York territory: a surcharge of one unit was imposed on orders under 5 tons/100 cases down to the 2 ton minimum. The Court's decision led Morton on shipments in Michigan, Ohio and New York territories (on about June 15, 1948) to eliminate the surcharge and to extend the net price on smaller orders down to the 2-ton minimum. International responded to this on June 29, 1948. The following bulletin was distributed to its sales force:

Upon advice of our legal counsel; based on a recent decision handed down by the Supreme Court ... concerning quantity discounts, effective immediately there will be no overage charged for less than 5 tons or 100 cases. The present 5 ton or 100 case costs will apply on all sales down to our lowest acceptable minimum order of two tons for

⁶⁷ Grounds for rejecting the request were (a) that the figures on sales of table salt in lots of under 100 cases which International had presented to suggest the absence of competitive injury referred to 1942 only, whereas sales in less than 100 case lots could have been "hundreds or even thousands" of times greater in earlier years. No reasons were given why this might be so; and (b) that the evaluation of such sales for 8 months of 1942 (rather than for a period covering many years) represented "a type of statistical gerrymandering that is unacceptable and should be rejected." Record, 4307-1-2. International's records for earlier years had been destroyed in a flood.

shipment from our plants in cars or through our metropolitan warehouses.⁶⁸

On July 20, 1948, there is another announcement:

Recently we are getting orders calling for less than two tons to be shipped in pool-cars. Two tons is the smallest tonnage we should accept and unless competition makes it necessary all of our representatives should limit orders to 2 tons or more when shipped in a pool car.⁶⁹

On August 5, 1948, a final announcement is made:

Effective August 15, 1948 - The minimum order we will accept for shipment in pool-cars will be 5 tons/100 cases. [Louisiana] as well as New York. The previous pool-car situation created by the two ton minimum has made it advisable that we establish the new minimum.... This change will have no effect on warehouse and warehouse truck delivered costs. Continue warehouse prices as they apply at present.^{70, 71}

⁶⁸ Record, 4320-4-2-11.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Warehouse prices were thus to remain net for orders under 5 tons/100 cases down to 2 tons. Sometime later, although exactly when is not known, the surcharge for orders under 5 tons/100 cases down to the 2 ton minimum was reimposed on warehouse sales. When the FTC's order took effect in 1952, the surcharge existed in Boston, Baltimore and New York City, where warehouse operations were maintained by International in New York territory. In New York City, the surcharge seems to have taken a different form than in the past: on warehouse pick-ups by the buyer, the minimum purchase was 5 tons/100 cases (so the same minimum was applied as on pool cars). On local deliveries, a delivered price only was quoted that distinguished between orders for 5 tons/100 cases or more and smaller orders down to the 2 ton minimum. The difference in the delivered price was one discount unit. The previous surcharge for local delivery had typically been independent of lot-size. The change probably reflected the imposition of the surcharge for orders under 5 tons/100 cases. International requested that it be permitted to retain this difference on the ground that it reflected the difference in delivery costs between larger and smaller orders. This was permitted by the FTC. The order did result in revisions in warehouse prices in Boston and Baltimore. In these cities, the surcharge was eliminated in 1953. In Baltimore, a single price was then charged for all orders down to a minimum of 10 cases. The price set substantially exceeded the 5 tons/100 case price: by 20 cents per case, using Sterling 36 1-1/2's as an example. Presumably sales to wholesalers were no longer made from the Baltimore warehouse. It is difficult to see how this change would have benefitted the wholesalers. In

(continued...)

The establishment of the 5 tons/100 case minimum by International (and by the other New York producers) corresponds in time to when the same minimum was adopted by the Michigan and Ohio producers. The same minimum was simultaneously adopted by the Louisiana producers (where International also produced salt) and was gradually extended throughout the country, except in Kansas territory. Presumably, the order against Morton led to changes in International's behavior in 1948 in the New York and Louisiana territories (and on its shipments into Michigan and Ohio territories in competition with the producers there) that it presumably would have had to change in 1952. The change was to eliminate the option to order less than 5 tons/100 cases, which some buyers had preferred. This was a change that made these buyers worse-off. Using the FTC's own standard, the order injured competition and by more than what it was hoped to cure. Given the limited importance of sales in lots of under 5 tons/100 cases, the overall effect of the change would be thought minor -- but then so would be what might have been hoped the desirable effect of the case.

k. International's Cost Justification Of The Surcharge

International tried to cost justify the unit surcharge on orders under 5 tons/100 cases. Its attempt was confusing, and the interpretation of what was shown differed between J.L. Ryon, who was in charge of International's pricing and marketing, and the

⁷¹(...continued)

Boston, the price for orders of 5 tons/100 cases or more was extended to smaller orders down to the 2-ton minimum. The extension of the net price applied only to cases of table salt in cartons and cans. The surcharge was retained on all other salt. Thus in part a result presumably hoped to be achieved by the FTC occurred. Why International behaved in this way in Boston and nowhere else could not be determined. Record, 4320-4-2-10, 11, 12, 13, 14.

accountant who prepared and testified about International's submission, and in the end the FTC rejected the defense.

The surcharge applied to orders in pool cars, so its justification would presumably relate to the rise in costs of selling and assembling carloads, and perhaps of plant loadings and invoicing, if no surcharge existed and average order-size fell. The extent to which order-size might fall would depend on such factors as the buyers' costs of storage and carriage, and of more frequent pickups from pool cars. The change in order-size could be small or relatively important. The previous quotation from International indicating that the brief extension of the "net" price from 5 tons/100 cases to 2 tons, in the New York, Michigan and Ohio territories just after the Supreme Court's decision in Morton, created an "undesirable pool car situation" (after which the minimum order was raised to 5 tons/100 cases) suggests that very small orders had increased in overall importance. The question posed for the FTC was whether the surcharge was necessary to cover the higher costs that very small orders might have entailed. If it was, then its elimination would disadvantage the buyers whose interests the FTC seemed most to have at heart. That it was necessary is suggested by the refusal, after the surcharge was made illegal, of International and the other producers in the territories noted above to accept orders under 5 tons/100 cases, and perhaps also by the spread of the 5 ton minimum to other territories where previously a 2-ton minimum had existed.

The question as posed is not easily answered, and International did not attempt to answer it carefully or directly. Perhaps it would have made a more careful effort if

eliminating the surcharge was expected to result in a substantial loss to it. But International might have reckoned that success by the FTC would lead it to require all sellers to eliminate the surcharge. If the surcharge was cost based, its elimination would then be likely to result in a higher minimum-order by all producers (which it did); and the loss to International (and to the other producers) might in large part be offset by additional sales in larger lots. In 1944, International sold from its New York plants (which supplied most of its salt where the surcharge was in contention) about \$890,000 of table salt in cartons. In 1942, its sales in lots of less than 100 cases equalled .45 percent of its total carton sales. If this percentage also applied in 1944, then sales in less than 100 case lots would have equalled about \$4000 for the year.⁷² The amount is not so large as to suggest that much of the loss from eliminating these sales could not be made up by additional sales of larger lots. I note that the \$4000 in sales in lots under 100 cases would have amounted to about \$3800 had the same quantity been sold without the surcharge. If the surcharge was altogether discriminatory, the gain from it would have been on the order of \$200 per year minus the gain from any additional sales had a uniform price been charged. Whether the surcharge was discriminatory or cost based, it is unlikely that International expected to lose a great deal from eliminating it.

Ryon in his testimony tried to make clear that very small orders made pool cars more difficult and costly to assemble, process and invoice, and that he did not want International's pricing to encourage these orders, which in his view explained why a 2-

⁷² Sales figures are from Respondent's Ex. 14(a)-(b), Record, 1-2/4307-1. The proportion of sales in less than 100 case lots is contained in Report on Review and Extension of Cost Analysis at 26, Record, 4307-1-2.

ton minimum and a surcharge on orders under 5 tons/100 cases existed. But the burden of cost justification cannot be met by assertion, so International also submitted an example of a calculation that it made from time to time and which stemmed from Ryon's concern, after the Robinson-Patman Act was passed, that the firm have in writing some indication that it had evaluated the surcharge and considered it justified. Ryon said that the calculations were made to estimate whether the unit surcharge covered the higher cost of very small orders, and to help determine the minimum order under 5 tons/100 cases that would not be accepted, given that a unit surcharge was to be imposed on orders under 5 tons/100 cases.

The example contains an estimate of the longer-term cost of producing a case of table salt (Sterling packed 24 1-1/2 lbs. to the case was the example used) excluding any return to investment and selling expense. The estimated cost of salt was \$.96 per case, so a lot composed of 100 cases cost \$96 in terms of salt, and a lot of (say) 50 cases cost one-half this amount (\$48). The example compares the return from the sale of a lot of 100 cases with the returns from the sale of various smaller lots each under 100 cases. To do this, selling expense incurred in the sale of each lot was added to the cost of salt. Selling expense was assumed independent of lot size and equal to \$5.62 for any sale. This was derived by dividing the salaries and expenses of its salesmen by the number of transactions made during a 7 month period in 1944. The return from the sale of each lot equalled total receipts minus the cost of salt and the selling expense of \$5.62. Total receipts were derived by assuming first, that each lot was sold at \$1.08 per case (which was the price of Sterling in 100 case lots); and second, by assuming that each lot under

100 cases was sold at \$1.13 per case (which was the price of Sterling in lots of under 100 cases).

The returns are listed below in Columns (a) and (b). Column (a) lists returns when each lot was assumed sold at \$1.08 per case; and Column (b) lists returns when each lot under 100 cases was sold at \$1.13 per case.⁷³ The remaining Columns will be explained shortly.

Lot Size	(a)	(b)	(c)	(d)	(e)	(f)
100 cases	6.38	6.38	5.62	5.62	1.57	1.57
80 cases	3.98	7.98	4.50	8.50	1.26	5.26
75 cases	3.38	7.13	4.21	7.97	1.18	4.93
60 cases	1.59	4.58	3.37	6.37	.94	3.94
50 cases	.28	2.88	2.81	5.31	.79	3.79
40 cases	-.84	1.18	2.24	4.24	.63	2.6

The results were used by International as follows. Consider the returns when all lots are sold at \$1.08 per case (Column a). The sale of 100 cases returns \$6.38 over the cost of salt and selling expense, whereas the sale of each smaller lot returns less than this. According to Ryon, the sale of each smaller lot would not cover its cost, in that a sale of 100 cases would return more. The conclusion drawn was that sales of lots under 100 cases should not be made at \$1.08 per case, since each such sale returned less than the sale of 100 cases. Consider next the returns from lots under 100 cases sold at \$1.13 per case (Column b). The sale of 70 cases at \$1.13 per case returns roughly the

⁷³ The figures are from Respondent's Ex. 14(a)-(b), Record, 1-2/4307-1.

same amount as 100 cases sold at \$1.08 per case (\$6.28 vs. \$6.38). The sale of each lot under 70 cases returns less than 70 cases (or than 100 cases sold at \$1.08 per case). The conclusions drawn were (a), that lots under 70 cases would not be sold at \$1.13 per case (the cut-off was 74 cases at the time), since each such sale returned less than 70 cases (or 100 cases at \$1.08 per case); and (b), that lots under 100 cases down to 70 would be sold at \$1.13 per case, since each such sale would cover (actually more than cover) its cost, or the return from the sale of 70 cases at \$1.13 per case (or 100 cases at \$1.08 per case).

That the above corresponds (as nearly as I can tell) to Ryon's use of the calculations is suggested by his testimony, of which part is reproduced below:

Q. Mr. Ryon, why was the figure of 100 cases selected as the line of demarcation between the purchasers getting the discount and those to whom the discount was denied?

A. The 100 cases was about the breaking point in the calculation of the cost of sales, and the 100 case minimum was selected because we were trying to avoid sales in very small quantities, which was upsetting our whole scheme of sales, you see.

Q. Well, how did you arrive at the 100 [case] sale? Why wasn't it 50 or 500?

A. At the time we made the calculation, the breaking point was slightly under 100 cases, so that I had one of our accountants make a calculation of the differential of 5 cents per case, and it showed that at \$1.08 per case, for example, on 100 cases we would make a slight profit. On 85 cases, at one time we found that the price of \$1.13 would give us the same profit as we made on the sale of 100 cases.

Q. You mean proportionately, or actually?

A. I mean, when the figures were made, it was actually -- the calculation that proved that to be true. That had the effect, however, of fluctuating to some extent. As the cost advances, the number of cases changes, so that it might be that in 1940 the breaking point might be 85 cases. In 1944, it might be 70 cases, or 65 cases, and we can't change that quantity from month to month and from year to year.⁷⁴

A basic assumption underlying Ryon's interpretation is that each lot must yield the same absolute return, but why this should be so was not explained. In fact, requiring the same return implies discrimination in the price of salt against smaller lots, and of course the point of the example was to reflect the absence of such discrimination. For example, consider the sale of each lot listed in Columns (a) and (b) that yields a positive return. Each such sale covered selling expense, so if each lot is required to yield the same return net of this expense, the price per case of salt, when sold in lots under 100 cases, would have to exceed the price per case when sold in a lot of 100 cases (since the number of cases sold differs). But we are told that the cost per case of salt was the same whether sold in larger or smaller lots. To require a higher price of salt when sold in smaller lots but when the cost of salt is the same implies discrimination against smaller lots. In general, in the absence of price discrimination, each case of salt would be expected to yield the same return, so price per case would also be the same, unless the cost of selling salt in particular ways or to particular buyers differed.

In the example, the only factor bearing on the latter is that selling expense was the same for any lot. We can recast the example to account only for the fact that in the

⁷⁴ Record, 4307-2-3, at 3028-29.

absence of discrimination, International would not wish to accept a smaller lot that returned less per case than a larger lot because selling cost per case was higher for the smaller lot. If the smaller lot is to be accepted, the return per case could be raised to equal that from the larger lot by raising the price per case when sold in the smaller lot, or by lowering the cost of selling the smaller lot. International's example implies that the latter was not done.

The example as so recast is listed in Columns (c) and (d) above. The assumption is retained that it cost \$5.62 to sell any lot. I assume that this cost is covered on the sale of 100 cases at \$1.08 per case. Column (c) then lists how much of the selling expense is covered on the sale of each lot under 100 cases when all lots are sold at \$1.08 per case; Column (d) lists how much of the selling expense is covered when each lot under 100 cases is sold at \$1.13 per case. When all lots are priced at \$1.08 per case, each lot under 100 cases would not cover selling expense and would return less per case than the sale of 100 cases, so in the absence of a surcharge, lots under 100 cases would not be accepted, consistent with International's policy. When \$1.13 per case is charged on lots under 100 cases, lots under 50 cases (actually under 53 cases) would not cover selling expense, and would return less per case than the sale of 100 cases, so lots under 50 cases would not be accepted unless the surcharge was raised. At the time, the cut-off was 74 cases, so as recast, the example does not approximate what International's policy was. Lots over the actual minimum of 74 cases up to 100 cases would return more per case than 100 cases sold at \$1.08 per case, and so would suggest discrimination against lots from 74 cases up to 100. The discrimination is less pronounced as lot-size approaches

74 cases. Bear in mind, however, that lots close to 100 cases would presumably be ordered so infrequently as to be virtually a fiction: Increasing an order from (say) 85 cases to 100 would secure the buyer a discount of 35 percent on the additional 15 cases, well above typical wholesalers' margins. All in all, however, the recasted example provides little support for International's policy.

In International's example, the selling expense of \$5.62 is the average per sale to all types of buyers and for all grades of salt, and may not reflect selling expenses actually incurred on sales of table salt to wholesalers. Such expenses could be higher or lower than what International incurred on its sales of other grades of salt, or on its sales to other classes of buyers. No consideration was given to this in the discussion surrounding International's submission. International's estimate implies that its salesforce on average spent the same time and effort on any transaction. But it could be that sales (say) of large quantities to industrial users required less selling time and effort than did sales of relatively small quantities of table salt to wholesalers.

International's carload representatives (hereafter reps) sold salt of all types to all classes of buyers, and presumably they allocated their efforts to equalize the expected gain from any sale. Salt that required little or no selling effort would presumably be priced below that which required relatively greater selling effort. If so, and if the sales reps allocated their effort in proportion to the expected gain from sales of different grades, or to different classes of buyers, then no close relationship need exist between average selling expense per sale of table salt and \$5.62. For example, suppose that all selling effort was devoted to table salt (because this was the only salt the sales of which

responded to this effort). Then average selling expense per sale of table salt would exceed \$5.62, since the latter figure is based in part on the inclusion of transactions that (by assumption) imposed no selling expense. If the actual average differed from \$5.62, the extent to which discrimination would exist against small lots (as suggested by the figures in Column (d)) would change, as would the minimum order with the surcharge imposed. But for the minimum order derived from International's example to approximate the actual minimum of 74 cases, average selling expense would have to about double the figure used by International. Smaller changes in the average selling expense would have correspondingly smaller effects on the minimum order, and on the extent to which the figures in Column (d) suggest discrimination. Selling expense 10 percent above or below \$5.62 would change the minimum order from about 53 cases to 50 and 55 cases respectively.

To sum up, International's example as interpreted by Ryon implied price discrimination against lots under 100 cases. When the example is recast, some discrimination would remain, and the minimum order would fall to just over 50 cases from the minimum of 74 actually imposed. For the minimum to approximate 74 cases, average selling expense would have to about double the figure used by International. In general, the example is not particularly helpful in understanding International's policy, or in suggesting the absence of discrimination. One wonders whether the example was actually more than evidence that International had put something in writing about the surcharge after the Robinson-Patman Act was passed.

The limited usefulness of the example is reinforced by considering International's practices in selling table salt. In substantial part, International's efforts in selling table salt involved what it called merchandising service. In assembling carloads for shipment to any particular area, International relied primarily on merchandising reps to develop the orders for table salt. The merchandising reps called on grocery retailers to generate orders taken for the account of any wholesaler designated by the retailer. I will have more to say about these efforts later, in discussing possible reasons why a straight-car discount did not exist. The orders generated by the merchandising reps were turned over to the carload reps who called on the wholesalers (and other direct buyers of salt) to convert the orders into sales, and to assemble them into carload shipments. The cost of merchandising service per case would not be thought to vary in relation to the lot-size ordered by a wholesaler. That is, there is no reason to suppose that the merchandising service devoted to a particular area varied in relation to differences in the lot-sizes ordered by wholesalers. In its cost justification of the \$50,000 annual-volume discount, International estimated that about 72 percent of the total expense of its salesforce incurred in selling table salt was incurred on merchandising service. If we suppose that \$5.62 approximated average selling expense (of both carload and merchandising reps) per sale of table salt, then we might also suppose that only about 28 percent of this amount varied in relation to the lot-sizes sold to wholesalers by the carload reps.

To account for this possibility, I have again recast International's example. That is, I have assumed (a), that the selling expense to be covered on the sale of each lot is \$1.57 (28 percent of \$5.62); and (b), that this expense is covered on the sale of 100

cases at \$1.08 per case. I have then listed in Column (e) above the amount of this expense returned if each lot is sold at \$1.08 per case; and in Column (f), the amount of this expense returned if each lot under 100 cases is sold at \$1.13 per case. When all lots are sold at \$1.08 per case, the selling expense would not be covered on any sale below 100 cases, so without a surcharge such lots would not be sold. With the surcharge on lots under 100 cases, selling expense is more than covered for all lots listed, so no minimum order would be expected. The figures in Column (f) also reflect a higher return per case on lots under 100 cases sold at \$1.13 per case than on lots of 100 cases sold at \$1.08 per case, and so would again suggest discrimination against lots under 100 cases (and in fact discrimination greater than that reflected in Column (d)).

Second, the carload reps appeared to call on virtually all wholesalers when selling efforts were devoted to a particular area, so that calls on wholesalers who purchased larger lots did not obviate any calls on wholesalers who purchased smaller lots. If so, wholesalers buying smaller lots did not (at least in any obvious way) raise International's costs of supplying table salt to the area. The cost per case sold in smaller lots would be the same as when sold in larger lots, and the price per case would be expected to be the same. Consideration of this point increases the extent of discrimination against lots under 100 cases suggested by the figures in Column (f).

The sale of small lots could have raised in a general way the time and difficulty of assembling carloads for shipment to any particular area. These sales also could have raised the cost of loading cars at the plant, and of invoicing. These were the concerns about very small orders that Ryon expressed (at least in part of his testimony) and which

in his view explained why the surcharge was imposed, and orders under 2 tons were not accepted. But none of this is reflected in International's exhibit.

In fairness to International, it did not try very hard to get the Commission to accept its example as a defense. It was submitted for whatever use the FTC might make of it. The example brought forth a criticism from the FTC's accountant:

The principal objection that I have ... would naturally be to the calculation of a cost of \$5.62 per sale. I rather think that some sales ... would cost considerably more than \$5.62, and ... some sales might cost considerably less than that, and when we toss them into just one round figure, take all of our cost, divide all of our sales, I think we get a distorted result. I am afraid that we would.⁷⁵

What the accountant wanted was not altogether clear, but presumably he wanted a detailed study showing that the same selling expense was incurred to supply each buyer of table salt, so that a uniform surcharge on smaller lots could be justified. No reasons are given why selling expense across buyers might have varied significantly, or why accounting for such differences through greater price variations might have made sense; nor does he indicate why in general the selling cost per case when sold in smaller lots might have been less than the cost per case when sold in larger lots, so that a surcharge could not be justified. Nothing was made of the fact that orders under 74 cases were not accepted after 1941 even though the surcharge existed. There is no reason to believe that such sales would be refused if they could have been made profitably, suggesting that very small lots imposed higher costs.

⁷⁵ Record, 4307-2-4, at 3398.

The Hearing Examiner accepted the accountant's criticism and found the surcharge unjustified. He also would have required International to justify separately the unit discount granted on each item of table salt:

anything less than a complete justification for each ... unit quantity discount would not be a defense to the charge of price discrimination.⁷⁶

The point refers to International's use of Sterling salt as an example. But other table salt in cartons sold at approximately the same price as did Sterling, and since these items carried essentially the same surcharge and were all jointly sold and could be purchased in any proportions that the buyer wished, the Examiner's demand would have done little more than to impose an unnecessary burden.⁷⁷

The Commission also found the surcharge unjustified. Interestingly, its rejection of the defense was based on testimony about International's example by the firm's accountant. The accountant's interpretation of the example differed from Ryon's. Ryon, it may be recalled, argued that the absolute return (net of cost) from the sale of any lot should be the same, from which he concluded that lots under 100 cases should not be

⁷⁶ Trial Examiner's Recommended Decision at 164, Record, 4307-1-1.

⁷⁷ I note that the minimum purchase of 2 tons applied to all types of salt. The surcharge was avoided if the buyer ordered 100 cases of table salt, or 5 tons of miscellaneous items. Five tons exceeded the weight of 100 cases. Orders for 5 tons containing less than 100 cases of table salt involved grades and packs that sold for less per unit weight of salt than did table salt. Suppose that a minimum order of table salt just covered selling expense when the surcharge was imposed. Suppose that selling expense did not change with an increase in lot-size, and that a sale of 100 cases of table salt also just covered selling expense at the "net" price. Suppose further that a minimum order of miscellaneous items just covered selling expense when the surcharge was imposed. Then a lot of miscellaneous items sold "net" would have to exceed by weight 100 cases of table salt to cover the same selling expense, because the unit discount on each salt item was 5% of list, and was therefore absolutely smaller per unit weight of salt for the miscellaneous items. Considerations along these lines may have resulted in setting 5 tons/100 cases as the minimum orders required to secure unit discounts.

accepted at \$1.08 per case; and that lots under 100 cases down to about 70 should be accepted if priced at \$1.13 per case. Orders under 70 cases were not to be accepted. As discussed before, Ryon's interpretation implied price discrimination against lots under 100 cases down to the minimum order. The accountant's interpretation was that discrimination would not exist if each lot (net of cost) returned the same amount per case (which would imply that the return relative to cost from the sale of any lot was the same). In fact, his interpretation is the same as that underlying the recasting of International's example which I have reflected in Columns (e) and (d) above.

In the accountant's view, the sale of lots under 100 cases if sold at \$1.08 per case would return less per case than the sale of 100 cases (because the cost of selling smaller lots was the same as the larger lot). From this he concluded that lots under 100 cases should not be accepted at \$1.08 per case, which was consistent with International's policy. At \$1.13 per case, a lot of about 55 cases yielded the same return per case as 100 cases at \$1.08 per case.⁷⁸ Lots under 55 cases returned less per case than did a lot of 55, and so (it was argued) lots under 55 cases should not be accepted. This minimum did not correspond to International's policy. On lots over 55 cases up to 100 sold at \$1.13 per case, the return per case exceeded that on 55 cases (or on 100 cases at \$1.08 per case), so discrimination was implied on lots over 55 cases up to 100. But this was not mentioned by International's accountant. It is curious that the testimony of International's officials differed, since this would obviously create confusion as to meaning. Nonetheless, the testimony of both officials implied discrimination against lots

⁷⁸ Fifty-five cases was an approximation used by the accountant. The minimum implied by his interpretation was closer to 53 cases.

under 100 cases, although the example was used by both witnesses to suggest the absence of discrimination.

The Commission relied on the accountant's interpretation but rejected the exhibit as justification of the surcharge. It rejected the exhibit because the minimum order was set at 74 cases rather than at 55, and because sales in lots of over 55 cases up to 100 when sold at \$1.13 per case yielded a higher return per case than did 100 cases sold at \$1.08 per case. The implication drawn was that the surcharge discriminated against lots under 100 cases down to the minimum actually sold. The Commission's position is reflected in the following statement:

[U]nder respondent's own theory, a 5 cent per case higher price would be fully cost justified only on purchases of 55 cases or less. Even assuming it would be proper for respondent to maintain the price differential if their sales in single order quantities under 100 cases averaged 55 cases or less per order, the record shows that this is not the fact. Since August 27, 1941 ... respondents refused to sell table salt in quantities of less than 2 tons which equalled a minimum sale of 74 cases of Sterling Respondent's average sale of table salt in lots of less than 100 cases, therefore, must have been in excess of the minimum. Thus, respondent's attempted justification by comparing the cost of selling in 100 case quantities with the cost of selling in 55 or less case quantities is not adequate to justify respondent's actual discriminatory pricing practice.⁷⁹

All in all, International's submission was of little help to it, and in fact provided the evidence on which the Commission based its finding of discrimination.

While the example implied discrimination against small lots, this does not mean that such discrimination actually existed. The problems that International experienced

⁷⁹ International Salt Co., 49 FTC 138, 154 (1952).

when the discount was briefly extended to orders under 100 cases down to 74 after the Supreme Court's opinion in Morton, which seemed to be the same problems that Ryon had mentioned as leading to the surcharge and the refusal to accept orders under 74 cases, were not revealed in the example submitted as a defense. That small orders imposed higher costs, and that the surcharge imposed on them was thus unlikely to be discriminatory, is indicated by the refusal of International and the other producers to accept orders under 100 cases after the surcharge was made illegal. But evidence bearing directly on the issue was not presented, nor did the FTC seek it out.

Besides the refusal to accept orders under 100 cases after the surcharge was made illegal, other reasons suggest that the surcharge was not discriminatory. If discriminatory, International would not be expected to offer buyers the option to circumvent the higher price surcharge simply by increasing their orders to 100 cases from a minimum of 74. I previously noted that increasing an order to 100 cases from 74 would be profitable for the typical wholesaler, and in fact almost no buyers ordered lots under 100 cases. Further, if the surcharge was discriminatory, at least some wholesalers who wanted lots under 100 cases would attempt to buy them from wholesalers who purchased in larger lots and avoided the surcharge. There were no prohibitions on such resales. In such cases, the buyer of the smaller lot would in effect consider the buyer of the larger lot as the destination of a pool car, and it is hard to see why his cost of picking up salt from the one would differ from the other. Some cost would be incurred by the reseller, but such costs would also be incurred by International, and there would seem little reason to suppose that the one could do this much more

cheaply than the other. Such possibilities suggest that discrimination of any significance would neither exist nor be attempted.

It also is not clear why the elasticity of demand of buyers of under 100 cases would be less than that of buyers of 100 cases or more. All of the buyers were wholesalers, and it seems doubtful that those who purchased under 100 cases supplied retailers whose elasticity of demand for salt was less than that of retailers supplied by wholesalers who purchased 100 cases or more, or that such differences would relate to orders that could differ by as little as between 74 and 100 cases. I also mention many instances of price cutting in New York territory often for what appeared to be prolonged periods of time during which the surcharge did not disappear. Its disappearance would be expected if the surcharge was discriminatory.

All in all, the FTC's challenge to the straight-car discount, which had disappeared in almost all areas of the country before the complaints against Morton and International were issued, ended up by prohibiting a surcharge that almost certainly was not discriminatory on orders for very small lots.

I. The Absence Of A Straight-Car Discount

In the remainder of this Chapter, I set out what the Records in Morton and International reveal about the producers' selling practices, and discuss what light this sheds on the absence of a straight-car discount. It is clear that the producers had made efforts to establish a straight-car discount, but these had failed, in most instances almost

immediately. These efforts could have reflected attempts to discriminate against buyers ordering less than carload quantities. If so, the failure of the attempts suggests that the producers were not able to control their competition, or that the buyers adversely affected were able to make discrimination unprofitable, through various means of pooling or reselling. Given the speed with which the discount was extended to buyers ordering in pool cars, it is hard to believe that the incentive to discriminate through a straight-car discount was very strong. The FTC's orders would have prohibited attempts to discriminate in the future, but given past failures, the practical effect of the orders would seem minor. If discrimination is not the explanation, then the straight-car discount must have reflected the producers' expectation of a cost savings, which did not materialize, consistent with the general absence of the discount, and the failure of the brief attempts to establish (or reestablish) it in certain territories in 1936 and 1941. We should thus find that the producers' distribution practices can be interpreted to suggest the absence of a cost difference between orders for straight cars and smaller orders shipped in pool cars.

All of the salt companies generated orders for salt and assembled pool cars, although their practices differed in detail and organization. International (used here to illustrate) employed several classes of sales reps. Those called special representatives sold primarily to large industrial buyers but on occasion called on wholesalers to generate new accounts or discuss problems and prices. Most selling to wholesalers was done by the carload reps whose primary functions were to sell to smaller industrial buyers and wholesalers, and to organize the pool cars typically involved in shipments to them. International also employed merchandising reps who called on retailers, taking orders for

the account of any wholesaler designated by the retailer. These orders were used by the carload reps to facilitate the selling efforts made to wholesalers. According to Ryon:

Our normal practice is to develop as much package salt business as we can through the operation of retail missionary salesforce. Then by using these sales as a lever, get the jobbers to balance out their requirement with whatever miscellaneous sizes they may need. Our carload salesman follows the retail salesforce and writes the order, whether it is a straight carload for one man or a pool-car for [several].⁸⁰

Orders generated by the merchandising reps were almost entirely of table salt in cartons. The wholesalers typically purchased more salt than this: International's experience was that carton salt represented about 80 percent of the wholesaler's total order.⁸¹ In less densely populated areas, when carloads were being generated, the merchandising reps would move in and in conjunction with merchandising work also done by carload reps generate the orders and then move on.

Morton similarly employed merchandising reps. Bringhurst, manager of the New Orleans sales district, describes the general process:

A. Well, we have some men, I would say three or possibly four, of the ten [sales reps in the district] who devote their entire time to missionary work, retail work. The remainder are what we call combination men, carload and jobbing trade.

Q. Now, when you say 'missionary work' will you ... elaborate on that point a little?

⁸⁰ Record, 4307-4-3-2, at 148-9.

⁸¹ Record, 4307-2-4, at 3162-72.

A. Well, they go to a retail store and solicit his order for the account of a wholesale groceryman, and the order is billed by the wholesale groceryman.

Q. The wholesale groceryman doesn't pay any compensation for that service?

A. Oh, no.... The [carload men] will gather orders from these retail men ... and take them over to the wholesaler and will figure up the amount of business that he has sold for the jobber, and endeavor to get a carload order from him.⁸²

From what I can gather, selling effort of this sort was undertaken by all of the producers, although it may not have been as formally structured as in the cases of International and Morton. Diamond Crystal's selling efforts were organized in much the same way as Morton's and International's. Barton, one of the smaller producers, indicated that it was typical for it to sell a straight car to a wholesaler and then assist in its resale, partly to other wholesalers, but often by taking orders from retailers for the wholesaler's account.⁸³ This effort would compare to those of Morton, International and Diamond Crystal, although the sequence of events might occur in a different order.

One of the wholesalers who testified in Morton noted this practice:

A. When we buy a car of salt it is usually the custom to have specialty work, promotional work done with our men in the way of reselling the salt, and to that extent they travel with our men and push their own products.

Q. They go out with your own salesforce?

⁸² Record, 4319-2-1, at 293.

⁸³ For example, See Record, 4319-4-3-6, at 1128.

A. At times, and then they travel independently.⁸⁴

Since in any trading area salt of the various producers (except for BL) typically sold at the same prices, it is reasonable to suppose that in general the various services accorded buyers by the different suppliers were of equal value to them.

There were certain buyers not offered and who did not accept merchandising service, and the saving of this expense was advanced by Morton and International as a major reason why these buyers were granted the \$50,000 annual-volume discount. Excluding these buyers, the amount of merchandising service provided would be influenced by the fact that the orders that it generated relied on carload reps to call on wholesalers to sell these orders and other salt. Similarly, the amount of carload service provided would be influenced by the fact that the orders generated by it relied on merchandising service to develop orders from retailers (which facilitated sales to wholesalers). In general, one would expect total selling services to be expanded until the cost of an increment in their supply just equalled the additional revenue generated. Further, the amount of merchandising and carload services supplied would be such that in equilibrium the cost of a given increment to the supply of either would increase revenue by the same amount.⁸⁵

⁸⁴ Record, 4319-2-3, at 1200.

⁸⁵ The costs of carload and merchandising service could have been interrelated, so in determining the cost of an increase in the quantity of one service, account would be taken of the change in the quantity of the other required to maintain any given value of output produced by it. To illustrate, suppose prices to wholesalers and retailers are given. An increase in merchandising service would increase orders by retailers. Fewer calls might then be required by carload reps to sell a given quantity to wholesalers, so less carload service (and therefore expense) would be required per unit sold. The fall in carload expense would reduce the cost of the increase in merchandising service, and so would tend to increase the relative amount of merchandising service for any given quantity sold. Similarly, an
(continued...)

The discussions in Morton and International suggest that when selling efforts were devoted to a particular area, the merchandising reps made calls on all or virtually all retailers (except the large chains) and the carload reps made calls on all or virtually all wholesalers. On orders generated by the merchandising reps, the retailers designated the wholesalers with whom their orders were to be placed. The orders were later billed to the retailers by the wholesalers at prices set by the wholesalers. No quantity discounts were offered by the producers on these orders. Similarly, no quantity discounts were offered by the producers to wholesalers (beyond the discount on orders above 5 tons/100 cases and which was secured by almost all buyers).

Since calls were made on virtually all retailers and wholesalers when selling efforts were devoted to an area, no merchandising expense was avoided if one retailer ordered a larger quantity than another, and no carload expense was avoided if one wholesaler ordered a larger quantity than another. Without the avoidance of selling expense, a discount on a larger order would not be justified, since a discount would lower price without a corresponding reduction in costs. The total amount of salt supplied to an area would depend on prices charged and selling services provided. But given these, unless the sale of larger quantities to particular wholesalers or retailers eliminated

⁸⁵(...continued)

increase in carload service would increase orders by wholesalers. If as a result, retailers became more familiar with the producer's products, or if wholesalers' deliveries to them improved, less merchandising service might be required per unit ordered by retailers. This fall in merchandising expense would reduce the cost of the increase in carload service, and so would tend to increase the relative amount of carload service for any given quantity sold. These effects might be stronger in one direction than the other or differ for different outputs of salt. What we can say is that, for given prices to wholesalers and retailers, the quantity of carload service that would lead the producer to supply a given quantity of merchandising service would be the same quantity of merchandising service that would lead the producer to supply that quantity of carload service.

selling calls on other wholesalers and retailers, then selling expense would be the same regardless of the quantities ordered by individual buyers, and would be considered by the producer as a cost uniformly incurred per case sold and provide no basis for a discount. As no discounts were granted (beyond the discount for orders over 5 tons/100 cases), the producers may have considered selling expense in this way.

A discount on a carload (or on larger lots generally) might be justified if it resulted in a reduction in the number of selling calls (and therefore in a reduction in selling expense) relative to the number of calls that would be made (and therefore in selling expense incurred) if no discount was granted, all else assumed the same. For example, suppose that at given prices to wholesalers and retailers, wholesaler A would purchase a carload (or a quantity smaller than this but specified in amount). A discount for a carload order (or for an order larger than the specified amount) would increase the chance that A would buy a carload in the first place (or a larger quantity than otherwise). If the money cost of any discount that increased the quantity ordered by A was less than what it would cost to generate the same increase if another wholesaler (say B) was called upon, then a discount would make sense, since it would permit a given quantity to be supplied at lower cost to the producer. The saving would materialize only if the number of wholesalers called upon was reduced from the number required to sell the same quantity in the absence of a discount. Thus, if the money cost of any discount that increased the quantity ordered by A exceeded what it would cost to generate the same increase in quantity if B was called upon, a discount would not make sense, since it would not permit a given quantity to be supplied at lower cost. The implication would

be that wholesaler A valued the additional quantity less than B by an amount that exceeded the additional cost of selling this quantity to B, so that the value of production would increase by supplying the additional quantity to B and not A.

That wholesaler B might value the additional quantity more than A is not implausible. With no discount, retailers specified the wholesalers with whom their orders were to be placed by merchandising men. The retailers' choices of wholesalers would have to change if a discount was to be granted. That is, a discount to wholesalers would have to induce retailers to place relatively more of their orders with the wholesalers with whom the producer's sales were being consolidated. This would be encouraged by a discount, since lower resale prices could be charged by the wholesalers who received it. But retailers would presumably select wholesalers on the basis of a great many factors other than differences in the price of salt. Furthermore, a discount must also offset any higher costs of distributing additional salt by the wholesalers with whom the producer was consolidating his sales. Costs may rise because relatively more of this salt is delivered to retailers more distant in location than those who were supplied in the absence of a discount, or because some of the salt is purchased by retailers who order only salt and not the other items that wholesalers typically distributed jointly with salt. Consequently, the discount required to influence retailers' choices sufficiently to result in a given consolidation of sales into fewer wholesalers may cost the producer more than what it would cost to supply the same output using additional wholesalers. The absence of a discount implies this. I note that a given consolidation of sales to particular wholesalers could be made by a discount to retailers, although obviously the

discount required to bring this about would differ from that offered to wholesalers.⁸⁶

Some indication can be given of the potential savings in carload expense if the number of selling calls required to generate a given volume was reduced. At a minimum, selling effort was devoted to a particular area until a carload was generated, since virtually no wholesalers placed orders for LCL shipments. In its example to justify the unit surcharge, International estimated that its selling expense averaged \$5.62 per sale. International also estimated that about 72 percent of total selling expense (of carload and merchandising reps) in selling table salt involved merchandising service. Suppose that \$1.57 (28 percent of \$5.62) of carload reps' expense was incurred per sale of table salt, and that this expense was covered if a straight-car was sold. Suppose the car contained 900 cases of Sterling (which slightly exceeded a carload) sold at \$1.08 per case. We can then ask: by how much would price per case have to rise to cover carload reps' expense if the 900 cases contained the orders of more than one buyer, assuming that each buyer required the same carload reps' expense on average? The rise in price on smaller orders would reflect the potential saving if a straight car had been sold: the sale of a straight car would avoid the selling expense required to generate the carload through a combination of smaller orders. The number of additional sales avoided by the sale of a straight car would depend on the amounts ordered by other buyers. The total number of orders could be as many as 9 (each buyer ordering 100 cases), or any smaller number of orders that in combination would sum to 900 cases. If two orders were

⁸⁶ Quantity discounts to retailers could also consolidate sales to fewer retailers and possibly reduce merchandising expense. Such discounts were not granted by the producers. A discussion of discounts to retailers would parallel that of discounts to wholesalers to reduce carload men's expense.

required, there would be no difference in expense if the carload was generated by the sale of 800 and 100 cases, or 700 and 200 cases, etc. If three orders were required, there would be greater expense, but it would be independent of the amount ordered by any buyer. Obviously, the sale of a larger lot (but less than a carload) to one buyer could make it more likely that the remainder of the car would be filled with fewer orders. If so, an incentive to grant discounts on larger lots generally might exist (but be most pronounced for a straight car). I note that the incentive to discount would be larger if the number of calls on wholesalers required to generate a straight-car order was less than the number of calls required to generate a smaller order. I suspect that in practice the incentive to discount would be diminished by consideration of this point, although there is no evidence bearing directly on it.

Listed below are the prices per case that would cover the additional carload reps' expense if the sale of 900 cases required more than one order. Column (a) assumes that carload reps' expense per order was \$1.57. Column (b) assumes that \$1.57 understates carload reps' expense, so the amount has been increased arbitrarily by a multiple of three:

no. of buyers	(a)	(b)
1	\$1.08	\$1.08
2	1.082	1.084
3	1.083	1.088
4	1.085	1.092
5	1.087	1.096
6	1.088	1.100
7	1.090	1.104
8	1.092	1.108
9	1.094	1.112

Column (a) indicates that increasing the number of buyers from 1 to 7 raises price over the straight-car price by less than 1 percent. Increasing the number of buyers to 9 raises price by just over 1 percent. Column (b), based on a larger expense per order, indicates that increasing the number of buyers from 1 to 7 raises price by about 2 percent of the straight-car price; increasing the number of buyers to 9 raises price by about 3 percent. Only the figures in Column (b) suggest much of an incentive to discount; the figures in Column (a), drawn directly from International, suggest virtually no incentive to discount. Thus, for example, if a straight-car discount reduced the average number of buyers per car from 9 to 1, the potential saving in carload men's expense could have been as little as 1 percent per case. That it would cost substantially more than this in terms of the money value of a discount to effectuate a consolidation of sales of this magnitude is not an unreasonable view.

How many sales were typically required to make up a carload in the absence of a discount is not known. Some idea is contained in the invoices presented in International. These invoices probably reflected a disproportionate number of small orders, since the FTC's aim was to show the existence of buyers purchasing under 5 tons/100 cases who paid the surcharge. Of these invoices, about 50 percent contained orders over 600 cases, and 63 percent contained orders over 300 cases. When it is realized that the orders also contained other salt (the above reflect cases of table salt only), it was probably the case that most cars were filled with the orders of 2 - 4 buyers. For three buyers, the price increase in Column (a) is substantially less than 1 percent of the straight-car price; and in Column (b), just less than 1 percent. A discount of about 1 percent might have been granted if it reduced the average number of buyers per car from 3 to 1. That it would require a discount larger than this to effectuate such a consolidation is again not an unreasonable view.⁸⁷

Only selling expense has been considered. But there were other expenses that could have fallen with larger orders. A straight car, for example, required one invoice whereas a pool car required several. Pool-car orders were also segregated in the car whereas straight cars did not require this, so the former may have imposed somewhat greater expense. But it is hard to believe that such differences were substantial, or necessarily decisive in deciding the question of discounts, since given their magnitude, it may be that the reflection of them through discounts would not have made sense. If

⁸⁷ If cost differences justified a discount but no discount was granted, the implication would be discrimination against buyers of larger lots, contrary to the FTC's position. There is little reason to suppose this would be profitable. If it did exist, the FTC's orders would not have eliminated it.

they were insufficient to result in a consolidation of sales into fewer accounts and therefore did not avoid selling expense, then most of the factors of production used in invoicing and car loading would be retained in these uses, so there would be little saving to reflect through a discount.

In general, given the method of selling, it is reasonable to suppose that costs were covered when no discount was granted. What then might account for the efforts of the producers in particular territories to establish a straight-car discount? It is possible that the producers tried to reestablish sales at list but believed that they could not succeed in the case of wholesalers capable of buying straight cars. This view is consistent with evidence from New York in 1936 and Ohio and Kansas in 1941, where the efforts to establish a straight-car discount were made: in each case, the published list price existing before the new discount and which applied to all buyers whether in straight or pool cars was to be applied only to straight-cars after the new discount was published. The pool-car price was raised by one discount unit. Assuming costs did not differ between straight and pool car orders (or did not differ by as much as the discount), then the implication would be discrimination in favor of buyers of straight cars. These efforts failed, according to Ryon, because the individual sellers or the buyers simply assigned one member of a pool car to accept the billing for it. In fact, the efforts to establish straight car discounts failed almost immediately, and in most areas of the country well before the FTC issued its complaints.

V. THE DISCOUNT TO QUANTITY BUYERS DURING THE NRA

a. The Character of the Discount

In this Chapter I discuss the discount on table salt granted during the NRA by all producers to what were called "quantity buyers". The \$50,000 annual volume discount that the FTC came to challenge in its cases against Morton and International was a revision of the discount that existed during the NRA and continued after it. The revision was adopted by the producers in 1936, just after passage of the Robinson-Patman Act. Discussion of the discount existing before the revision leads to a clearer understanding of the discount that the FTC later challenged.

The Hearings on the Code uncovered few details about the producers' pricing practices and no mention was made by the producers that a discount had been granted or was contemplated. The Administrator of the NRA, in recommending to the President that the code be approved, stated that it "is not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them."¹ This conclusion was probably reached without knowledge that a discount was to be granted to large grocery chains. I suspect that the Administrator based his conclusion on the specific provisions in the code that prohibited the promotion of monopoly and price discrimination. These provisions were soon used by opponents of the discount in efforts to have the NRA declare it a code violation. The opponents were grocery wholesalers whose salt purchases were too small to secure the discount and certain of the

¹ Hugh S. Johnson, Report to the President on the Code of Fair Competition in the Salt Producing Industry VI (1933).

producers who opposed the discount but who nonetheless granted it to maintain their sales to the buyers who were granted the discount by other producers. The code contained a provision that "differences in price based on differences in grade, quantity, quality, selling or transportation costs, or made in the same or different communities in good faith to meet competition, shall not constitute discrimination."² Producers who favored the discount relied on this provision to support its continuation. Opposition to the discount was strong and persistent -- throughout the NRA demands were made by wholesalers and by certain producers that the NRA take steps to eliminate it. In the end however, the NRA authorities, although they investigated the issue, required no change in the discount. This occurred later, when the wholesalers brought their complaint to the FTC.

A resolution considered by the Code Committee on March 29, 1934 (to which I will later refer in greater detail) states that "[i]t has been the practice of a number of salt producers over a long term of years to grant discounts to large quantity buyers."³ Whether the discount during the NRA simply continued past practice or represented a revision could not be determined. My belief is that the discount granted just before the NRA was similar to the discount granted during it, and opposition to the discount no doubt existed before, although there probably was no government agency to which the opposition could be directed with any hope of success until after passage of the Robinson-Patman Act.

² NRA, Code of Fair Competition for the Salt Producing Industry 6 (1933).

³ Resolution considered by the Code Committee, March 29, 1934, contained in Consolidated File.

The setting of prices during the NRA by the producers within each territory included discounts. In each territory a discount on table salt was granted to buyers for resale whose annual purchases of evaporated salt from all producers during the past 12 months aggregated more than a specified minimum. The discount bore no necessary (if any) relationship to the amount the buyer purchased from an individual producer: the discount was granted by each producer on any sales of table salt to a buyer certified as a "quantity buyer" according to his total purchases from all producers during the past 12 months. In qualifying, a buyer's purchases were summed over all territories. Any producer who shipped salt from one territory into another could not, without violating the code, discount (1) by more than the amount published by the producers within the destination territory and (2) to any buyer who did not meet the annual purchase requirement (the qualifying volume) established by the producers there. Except in New York territory, where discount practices differed somewhat, the buyers who qualified as quantity buyers and who received a discount were large grocery chains.

In May 1934, Ovid Roberts Jr., of the NRA Administration, requested a statement from the Code Committee "setting forth the manner in which quantity discounts are given in the industry."⁴ In response, the following statement was submitted:

To resale buyers whose total purchases during the past 12 months aggregate any of the amounts mentioned below, discounts are allowed as follows on Table Salt:

⁴ Letter from O. E. Roberts, Jr., Dep. Administrator, NRA, to Frank Morse, Secretary, Salt Producers Association, May 3, 1934, contained in Consolidated File.

New York Producing Field:

Total Purchases	Rate of Discount Applying
\$ 25,000	2%
\$ 50,000	3%
\$ 75,000	4%
\$100,000	4%
\$150,000	7.5%
\$250,000	10%

Ohio, Michigan, Kansas, California, and Utah Producing Fields: Annual Purchases \$100,000 or over, 10%

Louisiana Producing Field: Annual Purchases \$250,000 or over, 10%

The granting of a quantity discount is always an individual action on the part of any producer and he is at liberty to allow any discount he pleases so long as he publishes it in compliance with the provisions in the Code.⁵

Greater detail is contained in a memorandum by International to its sales force.

The general practice described was the same in other territories, the differences resting primarily on the annual volumes necessary for a buyer to qualify:

December 7, 1933. Quantity Discount - Eastern Key Letter Territory - Superseding all previous notices on Quantity Discounts in Eastern Key Letter Territory. [Eastern Key Letter Territory refers to New York territory]. Effective 10 days from this date in Eastern Key

⁵ Letter from Frank Morse, Secretary, Salt Producing Industry Code Committee, to O. E. Roberts, Jr., Dep. Administrator, NRA, May 4, 1934, contained in Consolidated File. The 10 percent discount to buyers of \$100,000 or more also applied in Kansas-Michigan territory. A short time later a 10 percent discount to \$100,000 buyers was published for Texas territory. In all territories, the discount was granted only on table salt packed in cartons and cans for household or table use. The qualifying volume included purchases of other evaporated salt.

Letter Territory, to a single buyer where there is one credit risk and where there is centralized control of buying and selling and direct control of merchandising and advertising, and to such buyer's wholly owned subsidiaries where the payment is guaranteed by the centralized control, who buys salt for resale and whose total purchases of evaporated salt from all sources equal any of the amounts stated below, figured at net plant prices, and considering the blanket price items such as round cans and square cartons, etc., as being the plant price, we will grant the following discount:

To such buyers whose respective total purchases of evaporated salt during the past 12 months aggregated any of the amounts mentioned below, we will allow the rate of discount applying as stated on purchases of Table Salt only:

	Rate of Discount
\$ 25,000	2%
\$ 50,000	3%
\$ 75,000	4%
\$100,000	5%
\$150,000	7.5%
\$250,000	10%

Every buyer is required to certify that he individually purchased such quantity of salt during the past 12 months, unless our own sales records disclose that to have been the case. Should our own records not confirm such fact, then certification of the buyer shall be subject to confirmation through the Secretary of the Salt Producers Assn. before any buyer may qualify for such quantity discount, and the usual advance 10 day's notice shall be given to the Code Committee before such a discount is named to any buyer.

The net plant price is to be arrived at by deducting from the delivered price the freight from the shipping point bearing the lowest freight rate, except on items on which a blanket price is made, such as round cans and square cartons, from which no freight shall be deducted. ...

In all other territories ..., the quantity discount in effect will be 10 percent of the net plant price on Table Salt to buyers whose aggregate salt purchases amounted to \$100,000 or more during the past 12 months, subject, however, to like qualifications, terms and conditions as set forth in the 1st paragraph of this memo.⁶

Whether qualified by the SPA or International (or by another producer), the name of any qualified buyer was circulated by the SPA to all producers; and the discount could be granted to any such buyer no sooner than 10 days after qualification. The Code prohibited the producers from making effective any change in price unless 10 days advance notice was given to the Code Committee. A ruling waived this requirement if any producer was meeting a price published by another producer and effective 10 days hence. As a consequence, the date when a discount was made effective to any qualified buyer was typically the same for all producers and occurred 10 days after the buyer was qualified.

An example of buyer qualification by a producer is contained in a bulletin to International's sales force circulated in early 1934. The bulletin was sent by International to the SPA from which it was circulated to all producers. The buyers so qualified were granted the applicable discount by all New York producers and by any outside producer making shipments into New York territory to these buyers:

We have developed that the following concerns have purchased evaporated salt during the past 12 months valued in excess of \$25,000 and less than \$50,000 and are entitled to 2 percent discount from the net plant price on table salt

⁶ Bulletin from John L. Ryon, Sales Manager, International Salt Co., to International's sales force, Dec. 7, 1933, contained in Consolidated File.

only with the exception of cases of cartons and cans on which the discount will apply to the delivered price.⁷

There follows a list of 12 buyers. Also in this bulletin three buyers were qualified as purchasers of between \$50,000-\$75,000 during the past 12 months and were qualified for a 3 percent discount on table salt. There is a later circulation from International noting that A. Krasne, who previously qualified as a \$50,000-\$75,000 buyer,

has purchased from salt producers during the past 12 months a total in excess of \$150,000, figuring case goods at delivered prices, and balance of purchases at the f.o.b. work prices; therefore A. K. is entitled to a discount of 7.5 percent on all items of table salt at f.o.b. works' prices, with the exception of case goods which will be figured at the delivered price.⁸

Except for the large grocery chains (which I will identify in a moment), I believe the above were the only buyers who qualified for discounts on table salt in New York territory during the NRA.

An example of buyer qualification by the SPA is contained in a bulletin circulated to all producers about one month after the code took effect:

We [have] verified ... that the following buyers' salt purchases for the past 12 months were [each] \$100,000 or more, after deducting freight, excepting items on which a blanket price applies.⁹

⁷ Bulletin from John L. Ryon, Sales Manager, International Salt Co., to International's sales force, Jan. 16, 1934, contained in Consolidated File.

⁸ Letter from A. A. Walter, International Salt Co., to Frank Morse, Secretary, Salt Producing Industry Code Committee, contained in Consolidated File.

⁹ Bulletin from Frank Morse, Secretary, Salt Producing Industry Code Committee, to all Members, October 21, 1933, contained in Consolidated File.

The buyers listed are: First National Stores, A&P, Kroger, National Tea and Western States Grocery Co. (Safeway), all very large grocery chains. The bulletin notes that "on receiving information of other buyers qualifying in like manner, you will be advised."

This bulletin was sent by the SPA to all producers to identify the buyers eligible for a 10 percent discount, or at least the producers interpreted it this way. The interpretation would be correct on shipments to the listed buyers in most territories but not necessarily in New York or Louisiana, where the minimum purchase requirement to secure 10 percent was \$250,000. Nevertheless, of the listed buyers who operated in Louisiana territory -- A&P, Kroger and Safeway -- each had purchased \$250,000 or more over the past 12 months, and so would have qualified for the 10 percent discount on any shipments to them there. Similarly for the listed buyers that operated in New York territory, except for First National Stores. First National operated only in New York territory and confusion arose over the appropriate discount to grant it. This was clarified two days later in a memorandum from the SPA:

Please be advised that salt purchases made by the First National Stores ... were in excess of \$100,000 during the past 12 months, but less than \$250,000. According to published discounts applicable to quantity buyers in Eastern Key Letter Territory, it would follow that this organization is entitled to a discount of 7 1/2 percent on the net plant prices of table salt items on all shipments of table salt to their branches in Eastern Key Letter Territory.¹⁰

About one week later, in a bulletin to all members, the SPA announced that "American Stores purchased over \$250,000 this past 12 months, exclusive of freight,

¹⁰ Bulletin from Frank Morse, Secretary, Salt Producing Industry Code Committee, to All Members, October 23, 1933, contained in Consolidated File.

excepting on items carrying a blanket price."¹¹ Consequently, in the territories in which American Stores operated (primarily New York and Louisiana) its purchases would have qualified the firm for a discount of 10 percent.

In early 1934, Walter Ince of Colonial Salt Co., who was knowledgeable about these matters, wrote to the NRA listing the buyers eligible for the 10 percent discount.¹² The letter lists A&P, Kroger, National Tea, Safeway and American Stores. American, having been certified as purchasing over \$250,000, would have qualified in all territories. A&P, Kroger and Safeway also purchased over \$250,000 and qualified for 10 percent in all territories. National Tea had no operations in New York or Louisiana territory and its purchases, which were certified as over \$100,000, would have qualified the firm for 10 percent in the territories in which it operated (primarily Michigan, Kansas-Michigan and Ohio which all had the \$100,000 limit). Ince lists First National as eligible for a discount of 7.5 percent. These were the only buyers during the NRA who received a discount on table salt, except for the buyers in New York territory who were granted discounts under 10 percent.

The discounts described above continued without modification throughout the NRA, except in New York where a revision occurred. Exactly when this occurred is not clear. The revision appears in correspondence in late September 1934 between

¹¹ Bulletin from Frank Morse, Secretary, Salt Producing Industry Code Committee, to All Members, Oct. 30, 1933, contained in Consolidated File.

¹² Letter from Walter Ince, Vice President, Colonial Salt Co., to E.W. Dahlberg, Asst. Dep. Administrator, NRA, Jan. 3, 1934 contained in Consolidated File.

International and the SPA and is noted below.¹³ No other changes were made at least up to the demise of the NRA in May 1935:

New York Producing Field

<u>Annual Purchases</u>	<u>Rate of Discount</u>	
	Previous	Revised
\$ 25,000 to \$ 50,000	2%	5%
\$ 50,000 to \$ 75,000	3%	6%
\$ 75,000 to \$100,000	4%	7%
\$100,000 to \$150,000	5%	8%
\$150,000 to \$250,000	7.5%	10%
\$250,000 to over	10%	10%

The effect of the revision was to raise First National's discount to 10 percent (to equal the discount granted to the other but larger chains that operated in New York territory and had been qualified for 10 percent) and to raise the discount to buyers in each classification under \$150,000 by three percentage points.

To sum up, during the NRA the producers granted a discount on table salt to a buyer for resale whose aggregate purchases of evaporated salt over the past 12 months exceeded \$100,000 (\$250,000 in some territories). Except in New York territory, the minimum purchase requirements (as well as other statements respecting buyer characteristics) insured that only the major grocery chains qualified for the 10 percent

¹³ Letter from P. Silas Walter, Vice President, International Salt Co., to Frank Morse, Secretary, Salt Producing Industry Code Committee, September 24, 1934, contained in Consolidated File.

discount. In New York territory alone, smaller discounts were granted to buyers who met smaller purchase requirements.

b. Controversy Over the Discounts During the NRA

Complaints to the NRA about the discounts from wholesalers and certain of the producers were made throughout the NRA. The complaints centered on the fact that the discounts were granted primarily to the large grocery chains and thus excluded most wholesale grocers. The complaints required investigation by the NRA and efforts on its part to resolve a controversy in which the parties held strong views. An account of events follows.

Shortly after the Code took effect, the National-American Wholesale Grocer's Association forwarded to the NRA complaints it had received from its members about the discounts. To these complaints the Secretary of the Association added his own view:

[U]nder the provisions of the NIRA, and in fact under the provisions of Article 1 of the Salt Industry Code, nothing in such Code shall be designed to promote monopolies, nor to eliminate, oppress, or discriminate against small enterprises If the quantity discount plan to which I have referred has been adopted, I doubt very much whether it is within the spirit of the statute and the code, since it certainly will 'discriminate against small enterprises.' Under Article 4 of the ... Code it is provided that each producer 'shall individually publish to the trade and to the Code Committee the prices at which he will sell.'

I do not believe that under this provision it was contemplated that producers should agree upon uniform quantity discount percentages, but it would seem to me that each producer would be required to establish his own individual prices and terms of sale Paragraph (c) of Article 4 provides that differences in price based on

differences in grade, quantity, quality, etc., shall not constitute discrimination While it is ... true that an individual manufacturer may discriminate in price based on the quantity sold, I know that it was not contemplated by the Clayton Act, nor do I believe that it was contemplated by the recently approved Code, that manufacturers should agree upon uniform quantity discounts along the lines of that which I have quoted earlier¹⁴

The main point was that the producers appeared jointly to have identified a group of buyers who were supplied at a lower price by all producers regardless of the amount that the individual producer supplied to any such buyer. This was different from the individual producer offering a lower price based on the quantity or volume that a buyer acquired specifically from it and which according to the Secretary was what the code contemplated.

This complaint led up to a meeting in November between the producers and the NRA. Reference to this meeting is made by the Code Committee in December 1933:

The Deputy Administrator met in [Washington] D.C. on November 13 to discuss secret rebates and special discounts, often in the guise of brokerage, previously allowed to farm bureaus and cooperative associations which had been discontinued. Discount to large quantity buyers questioned. The Administration requested a small committee of producers be appointed to present the data in regard to the practice.¹⁵

At this meeting, salt producers who opposed the discount were represented and made their views known. Their disagreement with salt producers who supported the discount

¹⁴ Letter from M. L. Toulouse, Secretary, National American Wholesale Grocers' Association, to Frank Morse, Secretary, Salt Producing Industry Code Committee, Oct. 26, 1933, contained in Consolidated File.

¹⁵ Minutes of Code Committee Meeting, Dec. 12, 1933, contained in Consolidated File.

who also were present (coupled with the wholesalers' complaints) led the Deputy Administrator to request that a committee of producers be appointed to present data in favor of and in opposition to the discount so that the NRA could reach an informed view. No reference was made to the scale of smaller discounts in New York territory.

The establishment of this committee was formally requested by the NRA in late November 1933, and after some controversy over membership and structure, ended up in the appointment by the Code Committee of two subcommittees. One subcommittee was composed of producers who opposed the 10 percent discount and was to present arguments and evidence suggesting why it should be abolished. The other subcommittee was composed of producers who favored the discount and was to present the arguments and evidence suggesting why it should be continued. It was contemplated that the subcommittees' reports were to form the basis of a single report for submission to the NRA. This never happened. Instead, the reports of the subcommittees were submitted directly to the NRA without any comment or analysis by the Code Committee.

Not long after the subcommittees had been appointed, the Code Committee received the following letter from the NRA:

We pointed out to you [at the November meeting in D.C.] the seeming discrimination afforded 2 or 3 large buyers, and how it would result [in] the serious detriment of the great number of independent wholesalers and retailers and to the Farmers' Bureaus.

It is our belief that since the ruling issued by the Code Authority limits the special discount to accounts purchasing more than \$100,000 annually, it does not take into consideration the basic reasons for quantity discount, i.e., that big shipments made possible a reduced packing and shipping cost to the producer. In many cases the \$100,000

accounts place orders for large amounts of salt to be broken down by the producers and shipped in small quantities to various points in the U.S. as in the case of the chain stores, etc. It now develops that a number of the members of your industry, as well as hundreds of the independent consumers, have written the Administration requesting that the Code Authority for your industry issue a ruling to all members to eliminate price discrimination in all forms of extra discounts.¹⁶

The letter concludes with a request for the industry's views on whether the discount should be permitted or not.

What motivated this letter is not clear. At the time, the NRA knew that the subcommittees had not completed their work. Perhaps the NRA's aim was to insure that the subcommittees' work was done quickly, or at least not neglected, so that the wholesalers' complaints could receive an informed response. The mention of members of the industry writing to the Administration probably refers to an earlier note from Walter Ince of Colonial Salt Co. in Ohio. Ince writes:

I sincerely hope you have not overlooked this very important matter, which is important as far as the salt industry is concerned, and that very shortly you will take some action concerning it.¹⁷

Ince was opposed to the discount and his views were known to the industry and the NRA. At the November meeting in D.C., he was one of the group representing the producers.

¹⁶ Letter from R. B. Paddock, Dep. Administrator, NRA, to Frank Morse, Secretary, Salt Producing Industry Code Committee, Jan. 26, 1934, contained in Consolidated File.

¹⁷ Letter from W. F. Ince, Vice-President, Colonial Salt Co., to R. B. Paddock, Dep. Administrator, NRA, Jan., 23, 1934, contained in Consolidated File.

No formal response to the NRA's letter was made by the Code Committee. Instead, it decided to forward the reports of the subcommittees as soon as possible. This was done on February 13, 1934. A letter from the NRA acknowledges receipt of the reports and requests that the Administration "be informed of the action of the Code Committee in connection with the quantity discount problem."¹⁸

During February, March and April of 1934 complaints from wholesalers about the discount continued to arrive at the NRA and apparently with great frequency. The NRA's typical response was to state that the discount was under review and that it was awaiting information from the producers to help assess the discount's desirability. But what information the NRA was to receive from the producers had already been received in the subcommittees' reports. I suspect that what the NRA really wanted was a decision by the Code Committee and a ruling by it setting forth whether and why the discount to quantity buyers was to be continued or not. That this is what the NRA wanted is suggested by its letter to the Code Committee of January 26, 1934 (from which I quoted above). With a decision by the Code Committee in hand, perhaps the NRA would have been in a better position to accept or reject what the Committee decided and to respond to those who complained.

Two examples of the complaints received by the NRA that I believe can be considered typical are given below. The first is from the Secretary of the U.S. Wholesale Grocers Association (who later brought the discount on table salt to the FTC's attention after the Robinson-Patman Act was passed):

¹⁸ Letter from E. W. Dahlberg, Asst. Dep. Administrator, NRA, to Frank Morse, Secretary, Salt Producing Industry Code Committee, Feb. 16, 1934, contained in Consolidated File.

Please permit us to add our protest to that of the Hamill Co., to the effect that the spread in the quantity discount set forth by the Salt Manufacturers is to [sic] large, and works an injustice upon the average buyer.

We have also had an additional protest from the James A. Dick Co., wholesale grocers of El Paso, Texas. They state that these salt discounts are so arranged that only 4 preferred dealers in the U.S. will get the maximum discounts.¹⁹

A few days later the Secretary again writes:

Please permit us to urge you to consider this letter with the view of remedying the situation whereby these quantity discounts operate so largely to the advantage of the big buyer and the detriment of the small buyer.²⁰

The second example expresses the sentiments of the Buffalo, New York Food Distribution Council:

Unanimously resolved that the wholesalers comprising the area are utterly and absolutely opposed to the salt code ... as being detrimental to each and every wholesale jobber, and that these codes penalize each and every wholesale jobber in their district and as favorable to our competition, the large chain store operator. We do hereby petition you to eliminate the quantity discount as being unfair and discriminatory.²¹

¹⁹ Letter from R. H. Rowe, Secretary, U.S. Wholesale Grocers Association, to NRA, Feb. 23, 1934, contained in Consolidated File.

²⁰ Letter from R. H. Rowe, Secretary, U. S. Wholesale Grocers Association, to NRA, Feb. 26, 1934, contained in Consolidated File.

²¹ Letter from Peter J. Schmitt, Buffalo, N. Y., to President Franklin D. Roosevelt, Feb. 7, 1934, contained in Consolidated File.

c. Consideration of the Discount by the Code Committee

At its meeting on March 29, 1934, the Code Committee took up the discount question. The reports of the subcommittees had been in hand for over a month. Ince, Chairman of the subcommittee opposed to the discount, had earlier informed the Code Committee that:

My committee after fully discussing the matter, decided that it would not make a combined report We have no data to collect and therefore we decided that each member would make a separate and distinct report.²²

The members of Ince's committee (all opposed to the discount) were O. E. Schupp of Myles Salt Co. in Louisiana; Howard Carey of Carey Salt Co. in Kansas; W. W. Clute of Watkins Salt Co. in New York; and Ince of Colonial Salt Co. in Ohio. Schupp made no report. Carey, Clute and Ince submitted letters the contents of which I shall later note. The subcommittee supporting the discount submitted a single report. This committee was chaired by W. G. Wilcox, President of Mulkey Salt Co., a subsidiary of Morton, and his views no doubt reflected those of Morton. Morton itself was not represented on the subcommittee, although it submitted data to it. The remaining members were H. H. Torango of Diamond Crystal Salt Co. in Michigan; E. H. Pendleton of Worchester Salt Co. in New York; L. F. Fiely of Ohio Salt Co. in Ohio; and John L. Ryon of International in New York and Louisiana.

²² Letter from W. F. Ince, Vice-President, Colonial Salt Co., to Frank Morse, Secretary, Salt Producing Industry Code Committee, Feb. 12, 1934, contained in Consolidated File.

There is no detailed record of the Code Committee's deliberations at the March 29 meeting. Two resolutions were presented and votes on them were taken. The resolutions probably give some idea of what was discussed and are reproduced below:

Under unfinished business, the subject of quantity discounts to large resale buyers was considered by the Code Committee, and after much discussion the following resolution approving the continuance of quantity discounts to large resale buyers was introduced:

Marketing provisions of the Code provide that 'Each producer in each field of production shall individually publish to the trade and to the Code Committee the price at which he will sell.' Under this provision, any producer in his field of production may individually quote and sell his salt at such prices as he may establish and it would appear likewise that this carries with it the right to make such prices net or subject to discount. Under our Code the only limitation on this right is that he may not sell his salt at a price which will net him at his plant less than his current cost of production.

Should the Code Committee find prices in any field unreasonably high, it may require them to be reduced to a reasonable figure, and this might further be construed to give the Code Committee the right to require a reduction of discounts if found to be unreasonable or economically unsound.

It has been the practice of a number of salt producers over a long term of years to grant discounts to large quantity buyers, and this Committee recognizes that price differentials are an established practice in many industries. They are not necessarily discriminatory, but are the result of considered judgment in appraising the value of different marketing channels, from the standpoint of volume or distribution facilities or for other reasons. We believe that differentials based on quantity most fairly recognizes the value of such channels of distribution, and that the total business over a period of time rather than individual transactions more equitably establishes the true status of the quantity buyer, in that such a method affords each

competitive seller an opportunity to share in the business of the large buyers, whereas if the discount were applied to a quantity purchased at one time from one manufacturer, it might result in excluding competitive sellers from that particular business.

Discounts allowed should bear a definite relationship to the benefits accruing to the seller. The report of the special committee submitted in favor of quantity discounts quotes figures submitted in favor of quantity discounts by a number of manufacturers, showing their differences in selling costs as between the large buyer and the general run of trade, which indicate that the discounts now allowed are less than the saving in selling costs alone, without considering other definite advantages which accrue to the manufacturer through selling to these large buyers.

The report of the committee opposing quantity discounts sets forth a number of meritorious arguments why quantity discounts should not be allowed, and while we recognize many reasons why it would be desirable to discontinue all discounts or differentials from quantity buying to the resale trade, and have given full weight to the attitude of buyers whose purchases are not of sufficient volume to entitle them to the benefit of such discounts, we believe that at this time it will be unwise and constitute a hardship on such manufacturers in our industry who for many years have enjoyed a large share of the business of these quantity buyers and are dependent on such business to a large extent for the efficient operation of the their plants.

Therefore, upon motion made and seconded, it is resolved that this committee should not interfere with the selling prices or discounts of individual producers selling to quantity buyers so long as such discounts are not out of proportion to the benefits accruing to the seller through the enjoyment of such business.

A vote having been taken, three members of the Code Committee voted in favor thereof and four members voted in the negative. The Chairman declared the resolution lost. There was then presented to the Code Committee the following resolution:

Marketing conditions of the code provide that 'Each producer in each field of production shall individually publish to the trade and to the Code Committee the prices at which he will sell.' Should the Code Committee find prices in any field unreasonably high, it may require them to be reduced to a reasonable figure, and this might further be construed to give the Code Committee the right to require the elimination of discounts found to be unreasonable or economically unsound. It has for some time been the practice of a number of salt producers to grant discounts to large quantity buyers and this committee recognizes that such discounts may result in discrimination as between buyers conducting similar businesses and marketing similar grades of salt.

The report of the Special Committee opposed to the granting of quantity discounts does, in the opinion of this Committee, set forth such facts in support of their recommendation that the Code Committee feels justified in recommending the elimination of quantity discounts to resale buyers.

Now, therefore, be it Resolved that the Code Committee recommends that the practice of granting quantity discounts to resale buyers be discontinued. Motion having been duly made and seconded, and a vote having been taken, four members of the Code Committee voted in favor thereof, and three members of the Code Committee voted in the negative.

The chairman declared the resolution adopted and instructed the Secretary to inform the Deputy Administrator to the action taken by the Code Committee and request advice as to what further steps should be taken in connection with this subject.²³

It thus appeared that the discount would be discontinued (subject to NRA approval) because it was "economically unsound" or made the price to quantity buyers "unreasonably low". Authority to require a price change along these lines had been used

²³ Minutes of Code Committee meeting, March 29, 1934, contained in Consolidated File.

by the Code Committee on two previous occasions: once for example, to require Texaco to lower its price in Oklahoma territory for salt packed in hexagon cartons. Texaco did not sell hexagon cartons but under the code was responsible for publishing a price for them in Oklahoma territory. It had set the price "unreasonably high" -- according to the Code Committee to discourage consumption (and therefore imports) of hexagon cartons in Oklahoma. The resolution passed by the Code Committee did not state that the discount did not reflect cost differences and therefore violated the specific code provisions that prohibited price discrimination.

The resolution passed by the Code Committee on March 29 was only a recommendation that the discount be discontinued. It was not a ruling that the discount violated the code and had to be discontinued. In fact, the discount continued to be granted by all producers after the resolution was passed. Apparently, the Code Committee was waiting for the advice of the NRA whether a formal ruling should be made. This is reflected in correspondence between the Code Committee and the NRA which arose as follows.

In late April 1934, the NRA received a complaint about the discount from Standard Grocery Co. The NRA's response to Standard -- which no doubt was received without enthusiasm -- was that the

salt producers are not required by any provision in their Code to extend the quantity discount to large purchasers of table salt, neither does the Code prevent salt producers extending such discounts if they so desire.²⁴

²⁴ Letter from O. E. Roberts, Jr., Dep. Administrator, NRA to Standard Grocery Co., May 1, 1934, contained in Consolidated File.

The NRA forwarded Standard's complaint to the Code Committee, which responded as follows:

The quantity discounts to which [Standard refers] are allowed by the producers [in the New York territory] who grant them on the theory that they are economically justified. The Code Committee is awaiting the Deputy's advice as to what further steps should be taken in connection with the subject.²⁵

The Deputy's advice was as follows:

We are under the impression that there exists in the industry a situation which requires true cooperation and diplomatic handling in order that there not be created a feeling of dissension in the Industry coupled with a general misunderstanding among the purchasers of the Industry's product.

A number of protests have been received ... from various purchasers of salt. These specifically protest certain discounts given ... to large purchasers There appears no provision in the Code ... which prohibits the procedure. There is, however, evidence that such is undesirable and creates a condition of unrest which might well be avoided It is our desire that this office be of assistance to the Industry in every manner possible to the end that we may aid the Industry in its efforts to become self-governing. It appears ... that the practice of granting quantity discounts ... to resale purchasers was voted to be discontinued. It further appears that the Code Committee desired advice from the Administration as to what further steps should be taken in connection with the subject. There would appear to be 3 courses of action open:

1. Industry may by amending code prohibit discounts.
2. Administration may propose equivalent action.

²⁵ Letter from Frank Morse, Secretary, Salt Producing Industry Code Committee, to O. E. Roberts, Jr., Dep. Administrator, NRA, May 4, 1934, contained in Consolidated File.

3. The Industry members may by mutual consent discontinue discounts.²⁶

The letter concludes by asking whether the Administration might help in implementing any such course of action and expressing hope that an understanding might be reached on what course to follow.

It seems clear that the NRA was willing to see the discount disappear should this eliminate the "unrest." But this would not have pleased the producers who favored the discount nor the buyers who received it. There appears to have been no direct response to the NRA's advice and no steps were taken along the lines suggested. Instead, at its meeting in May 1934, the Code Committee reached the following conclusion:

The Code Committee gave further consideration to the subject of quantity discounts and after a careful examination of all facts found a divided opinion in the industry on the question Pricing salt at which it will be sold has always been an individual matter for each producer and this is so recognized in the Code by the provision that each producer in each field of production shall individually publish to the trade the prices at which he will sell. The Code does not provide for the Code Committee to make or fix prices at which producers in the industry shall sell salt above cost.²⁷

Since the membership of the Code Committee was the same as that which had passed the resolution recommending that the discount be discontinued, this change in the Committee's position (which reflects the same position as in the resolution previously lost that the discount be continued) is interesting. There is no indication of what led up to

²⁶ Letter from O. E. Roberts, Jr., Dep. Administrator, NRA, to Frank Morse, Secretary, Salt Producing Industry Code Committee, May 2, 1934, contained in Consolidated File. This letter probably crossed paths with Frank Morse's May 4 letter to O. E. Roberts.

²⁷ Minutes of Code Committee meeting, May 9, 1934, contained in Consolidated File.

this reversal. It could be that the producers who wanted the discount simply indicated that they were going to continue it, perhaps believing that the NRA would be unlikely independently to prevent them from doing this. Without direct action by the NRA, it seems doubtful that the producers could have been prevented from granting a discount. If these producers continued to discount to quantity buyers, the opposing producers also would have to discount if they wished to maintain their existing sales to these buyers. Given the locations of the producers known to favor the discount, the publication of a discount by them would have covered all territories with the possible exception of Oklahoma. Amending the Code as suggested by the NRA was not attempted. This would have required a vote of all industry members (not just those on the Code Committee), and it may be that the producers opposing the discount did not have the votes to win. Of the 15 firms that produced salt for table use, the views of 11 of them concerning the discount are known. Six favored it (Diamond Crystal, International, Morton, Union, Ohio and Worcester) and five opposed it (Carey, Colonial, Jefferson Island, Myles and Watkins). Of the remaining four, Barton I believe was almost certainly opposed and Hardy and American were probably in favor. Texaco's position is not known.

d. Absence of Direct Intervention by the NRA

As of May 1934, the efforts to abolish the discount had failed, and it seemed clear that any future success would require direct intervention of the NRA. But such intervention was not forthcoming. This is revealed by the NRA's handling of a

wholesaler's complaint filed in late 1934 and which was finally resolved just one month before the demise of the NRA itself in May 1935.

In December 1934 Milo Rowell, an attorney representing Hobbs-Parsons Co. (a California wholesaler), complained to the Code Committee that the quantity discount violated Article 1, Section 3(a)(2) of the National Recovery Act. That section provides

that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them.²⁸

Rowell notes that Hobbs-Parson purchased insufficient salt to earn the discount and that its business suffered in that buyers who did expanded relative to his client.

Rowell's complaint states that:

Members of the salt ... industry have been consulted in regard to the discrimination; and state that under the provisions of the Code and certain supplemental agreements thereto, it is necessary for them to follow the practice above outlined, and that should they give a discount of 10 percent to small business it would be in violation of the Code and they would suffer a penalty therefore.

We disagree with such an interpretation on the part of the ... industry and request a ruling of the Code Authority on the point.

The price provisions of the Code limit members of the industry only to selling at or above cost according to our interpretation. We believe the code permits the sale of salt at any price which may be posted by any member ... so long as such price is at or above cost. This is denied by members of the industry. We request a ruling of the Code Authority on this point also.²⁹

²⁸ Letter from Milo Rowell Jr., attorney, to Salt Producing Industry Code Committee, Dec. 17, 1934, contained in Consolidated File.

²⁹ Id.

Rowell was correct that the code did not prevent the individual producer from publishing a lower price. Perhaps producers found that indicating they were unable individually to lower price because of the code was an easy answer to any buyer seeking better terms. But as described by Rowell, the situation would have violated the code.

The Code Committee in its response to Rowell argued that the discount was not discriminatory and went on to note that:

Members of the Industry are of the opinion that there is a considerable saving to them in selling large quantity buyers (and for this reason publish the discount). The Hobbs-Parson Company to which you refer may receive the benefit of the discount, provided its purchases are of sufficient volume. Under the terms of the Code ..., all producers are required to individually publish the prices (including discounts) at which they sell and the Code further requires that no producer may sell his product at less than his published price. The fact that these producers publish prices and discounts applicable to certain volume purchasers is not, in the opinion of the Code Committee, a violation of the Code in any way, nor does it oppress small enterprises.³⁰

Rowell did not let the matter rest. He forwarded to the NRA his letter to the Code Committee and the latter's response to him, along with the following comment:

In my letter I requested a ruling from the authority whether it would be allowable to give a discount of 10 percent to a purchaser of less than \$100,000 worth of refined salt per year. This inquiry was not answered. I also requested a ruling of the Code Authority whether or not the Code would permit any member of the industry to sell salt at any posted price so long as such price was at or above cost. This inquiry was not answered.

³⁰ Letter from Frank Morse, Secretary, Salt Producing Industry Code Committee, to Milo Rowell, Jr., attorney, Jan. 14, 1935, contained in Consolidated File.

In addition to these requests I complained of the oppression and discrimination against small enterprises by the [producers] The response from the Code Committee was arbitrary and apparently made without consideration of the facts.³¹

The NRA's response was to note that the code "specifically states that a discount based on quantity purchased shall not constitute discrimination;"³² and that each member "may file any price that he so desires as long as it is not lower than the cost of production. There is no setting of prices or discounts provided for by the Code."³³ But it was clear that the producers had established a discount granted only to buyers whose aggregate purchases from all producers exceeded \$100,000 (or \$250,000 in some territories). This discount was granted by each producer regardless of the amount individually sold to any such buyer. Whether this discount was discriminatory or not was a question that the NRA seemed never to address directly. The NRA's response to Rowell continues:

Your letter implies that members of the Industry have stated that 'under the provision of the Code and certain supplemental agreements thereto,' it is necessary for them to follow certain outlined practices in the quoting of prices. Other than the provisions of the Code which allow for the filing of a member's own selling price, and the fair practice provisions of the Code, there is no restriction upon the selling price of a member of the industry. This office has no record of the existence of any supplemental agreements.

³¹ Letter from Milo Rowell, Jr., attorney, to NRA, Feb. 4, 1935, contained in Consolidated File.

³² Letter from E. R. Stoll, Asst. Dept. Administrator, NRA to Milo Rowell, Jr., attorney, Feb. 20, 1935, contained in Consolidated File.

³³ Id.

You make the statement also that the Code is unfair in operation and aids in the promotion of monopolies. These ... are general allegations, and do not offer any specific evidence in substantiation thereof. It is therefore requested that you furnish this office with definite data upon which such charges might be sustained.³⁴

The letter concludes by noting that the Code Committee was to be requested to make sure that all producers were abiding by the Code.

With respect to the latter request, the Code Committee writes:

According to the prices individually published by the Pacific Coast Producers, a 10% discount on table salt is applicable to any buyers whose aggregate salt purchases amount to \$100,000 or more per year, but the quantity discount is not applicable to a purchaser of a lesser amount The prices posted by any member of the industry are within his discretion and not within the province of the Code Committee to fix, unless they seem to be unreasonably high, in which case the Code Committee may require their reduction.

This question of quantity discounts has heretofore had the attention of the Code Committee as well as the Administration, and the principle by which quantity discounts are computed is fully set forth in brief filed with the Administration a year ago.³⁵

In an internal communication, the Deputy Administrator of the NRA notes that he examined Rowell's complaint and found "no violation of the Code ... or that [it] is unfair in operation"³⁶ His recommendation to the Division Administrator was to

³⁴ Id.

³⁵ Letter from Frank Morse, Secretary, Salt Producing Industry Code Committee, to E. R. Stoll, Asst. Dep. Administrator, NRA, March 4, 1935, contained in Consolidated File.

³⁶ Memorandum from O. E. Roberts, Jr., Dep. Administrator, NRA, to J. F. Battley, Division Administrator, NRA, April 8, 1935, contained in Consolidated File.

dismiss the complaint and in this he was joined by the NRA's Legal and Industrial Advisors. Just before this recommendation was made, A.B. Quinton, Jr., the Administration's member on the Code Committee, submitted his view of Rowell's complaint:

Mr. Frank Morse [Secretary of the Code Committee] ... answered correctly the practice relative to quantity discounts within the industry. However, he made no specific reply to the claim that the greatest quantity discount is given to 'any purchaser who buys one hundred thousand dollars of refined salt per year from any or all members of the salt producing industry.' [Rowell] is correct ... that the above ... practice is followed.

...[W]ithout taking issue at this time on the merit of such practice, I do believe that certain aspects of the methods used deserve further study. [I]t is suggested that you review [the reports by the Committees on the quantity discount] with the end in view of determining whether or not the Code Committee should be directed to re-open this matter. I strongly recommend that it be so re-opened.³⁷

Quinton's recommendation was not followed, and Rowell was notified as follows:

The matters brought out in your letter have been given careful consideration and since no additional evidence has been submitted to substantiate these statements, the matter has been ... filed as closed.³⁸

The NRA's records contain no evidence of any further deliberations over the discount.

In sum, during the NRA, efforts were made by wholesalers and some of the producers to abolish the 10 percent discount granted in all territories to large grocery

³⁷ Letter from A. B. Quinton, Jr., Administration Member, Code Committee, to O. E. Roberts, Jr., Dep. Administrator, NRA, March 7, 1935, contained in Consolidated File.

³⁸ Letter from E. R. Stoll, Asst. Dep. Administrator, NRA, to Milo Rowell, attorney, April 22, 1934, contained in Consolidated File.

chains and the smaller discounts granted in New York territory to certain other buyers. So far as these efforts were directed to the Code Committee, they were doomed to failure unless the NRA intervened directly. But this the NRA did not do.

c. The Subcommittees' Reports

The reports of the committees are something of a disappointment. They lack detail and reveal little why costs of supplying the large chains as against wholesalers were or were not lower. What is clear is that the savings that the subcommittee in support of discounts alleged to exist resided almost entirely in selling (or more broadly distribution) expense on sales to the large chains as against wholesalers generally; and that the subcommittee in opposition focussed less on costs than on other reasons why they favored eliminating the discount. Neither report mentions the sliding scale in New York territory.

1. The Report of the Subcommittee in Support of Discounts

The report of the subcommittee in support contains the following statement:

The Committee believes the only question at stake is whether the present published discounts available to buyers of \$100,000 worth of salt or more per annum are justified by the difference in cost in selling buyers of this classification as compared with the cost of selling the average buyer. The committee has, therefore, requested six different salt companies who have made substantial sales to buyers of \$100,000 or more of salt per annum and who also do a substantial volume of business with all other types of

buyers to submit to you their direct selling expense in the two cases.³⁹

The figures are listed below, expressed as a percentage of sales (net of freight) to the buyers as so classified. The estimates are not identified by company:

Selling Expense Rates by Buyer Classification, 1933

Company	In Selling Quantity Buyers	In Selling All Others	Differences in Expense Rates
A	6.9	21.52	15.03
B	13.60	21.89	15.20
C	7.50	13.50	6.00
D	1.19	16.89	15.70
E	9.13	20.37	12.24
F	.92	17.00	16.08
Average	6.30	19.68	13.38

For each firm the difference in reported expense rates is substantial, from which the committee concluded that the discount to quantity buyers "is certainly justified by the experience reflected in these figures."⁴⁰ No detail is submitted how the estimates were derived in general, or by the individual producers in particular. Nor does the report identify the components of selling expense and why they were reduced on sales to quantity buyers. The reported expense rates vary substantially across companies,

³⁹ Letter from W.G. Wilcox, Chairman, Committee Supporting the Discount to Quantity Buyers, to Frank Morse, Secretary, Salt Producers Code Committee, February 7, 1934, contained in Consolidated File.

⁴⁰ Id.

although for each producer the difference between the two buyer classifications is similar, except for Company C. Why C would be supplying the chains is not clear, given that the discount was 10 percent.

The variation across producers probably reflects that the firms differed in what they included as selling expense but much less so in terms of the components believed to differ between quantity and "all other" buyers. I suspect that the estimates were made with some care, in part because the firms were anxious to continue the discount and because it was known that their figures were to be submitted to the NRA. At the time, the expectation that the NRA would examine the estimates in detail and perhaps decide on the basis of them whether the discount should be continued would seem reasonable, particularly given the pressure for information that the NRA had imposed. Nevertheless, the NRA apparently never requested greater detail or clarification and the underlying support for the estimates never surfaced.

2. Analysis of the Possible Cost Differences

Reasonable guesses can be made about what the estimates sought to reflect, drawing primarily on the evidence and testimony from the FTC's proceedings against Morton and International. As submitted, the comparisons are said to reflect differences in direct selling expense on sales to the discount chains (whose purchases were predominately of table salt) and to "all other buyers." The latter classification includes wholesalers (whose purchases were predominately of table salt) plus all other buyers (whose purchases were predominately not of table salt). Since the basic question was whether the cost of

distributing table salt to the large chains differed from that to wholesalers, the comparison would have relevance only if direct selling expense on sales to wholesalers was relatively the same as on sales to other buyers within the "all other buyers" classification. The assumption is that they were the same, although no support is given.

The major direct selling expense of the salt companies (or at least the predominant expense that might be thought to vary across buyers) was the salaries and expenses of the salesmen who generated and assembled orders for carload shipments from all classes of trade. The basic question would thus seem to be whether salesmen's expense in supplying the chains was typically less than what was incurred in supplying wholesalers; and further, whether the difference in expense was consistent with the magnitude and character of the discount granted.

In terms of magnitude, the figures themselves seem to more than justify the discount: the differences in expense rates average about 13 percent, and the discount was 10 percent. In terms of character, what would be relevant is evidence that the savings applied on any sales made to the quantity buyers: the discount was granted by each producer independently of the volume it supplied to any particular quantity buyer, so the difference in expense rates should similarly be unrelated to the individual seller's volume to any of them. The study throws no light on this issue. The cost justifications submitted by Morton and International during the FTC's proceedings do suggest that the differences in expense rates were independent of the seller's individual volume to any quantity buyer. The savings then were shown to relate to the character of the chains' buying practices which differed from those of wholesalers generally, and which imposed

less cost on the sellers on all sales to them. Basically, the chains themselves assumed certain distribution functions and so relieved the sellers of them, whereas the sellers assumed them on sales to wholesalers and so relieved the buyers of them. From all appearances the differences in buying practices between chains and wholesalers had existed for many years and had not changed in fundamentals during and after the code.

The discount chains maintained branch warehouses to which all shipments of salt were made and from which they made shipments to their stores. Orders for salt were placed by branch buyers and were shipped either in straight or pool cars. The latter were assembled by the sales reps employed by the producers. On sales made to grocery wholesalers, merchandising work was performed. That is, when sales were being assembled for shipment into particular areas, the salt companies would canvas retailers taking orders for the account of any wholesaler that the retailers might designate. These orders were used to facilitate sales to wholesalers, whose orders were also gathered by the sales reps and shipped in pool or straight cars. Morton, International, Diamond Crystal and Mulkey employed merchandising reps whose primary function was to call on retailers. The orders they generated were turned over to carload reps, who called on wholesalers (and on buyers of other grades) and assembled the pool cars. Carload reps also spent part of their time on merchandising work. The smaller producers typically did not employ merchandising reps, although comparable or substitute service was provided by their carload reps. Undoubtedly these services were of roughly comparable value to buyers given that published prices in any territory were the same during the code (and transactions prices seemed clearly to be the same before and after the code).

Merchandising service was neither offered nor supplied to the discount chains, so this class of expense was avoided on sales to them. No doubt the estimates of the cost differences contained in the committee's report account for the avoidance of this expense.

In the case of firms like Morton and International which employed separate merchandising reps, figures on this expense were readily available. In International's case, the firm also kept detailed records to estimate the proportion of carload reps' time devoted to merchandising work. We know that International relied on these figures in preparing its estimates for the committee. For these firms merchandising expense was almost certainly assigned to "all other" buyers. As reported the figures may understate the relevant differentials in expense rates, because merchandising expense was incurred on sales to wholesalers but not to the other buyers contained in the "all other" classification. In the case of the smaller firms who employed only carload reps, it is not known how they might have estimated merchandising expense and I suspect that they probably did not do so directly. What these firms probably did was to estimate the proportion of the carload reps' time spent on sales to discount chains and then allocated sales reps' salaries and expenses between the chains and "all other" buyers in proportion to this. This would be reasonable in terms of the comparison sought providing that the sales reps allocated their efforts across different grades and classes of buyers roughly in proportion to sales. The report implies that this was so, although no support is given. I also suspect, although this could not be confirmed, that the carload reps' expense of the firms which employed merchandising reps was allocated to each buyer classification in proportion to sales. Whether this is reasonable in light of the

comparison sought is subject to the same qualification noted above. For example, if it required the use of relatively more carload reps' service to supply table salt to wholesalers than to supply other buyers, then the price of table salt would be expected to reflect this; and since the sales reps would be expected to allocate their efforts across grades and buyers so that expected gains are everywhere the same, then the allocation of expense in proportion to sales could yield a reasonable approximation of carload's reps' expense on sales to wholesalers. But prices also reflect other differences across grades and types of salt: table salt imposed relatively greater packaging costs than most other grades, so a given amount of salt sold as table salt would generate higher sales. But sales reps would not be expected to allocate their efforts in relation to price differences reflecting packaging differentials.

All in all, although the figures reflect a cost difference, it is not certain what costs they reflect or whether they can be taken as reasonable estimates of cost differences in supplying chains and wholesalers. Morton, International and the other producers who favored the discount always supported it in terms of a difference in selling expense stemming primarily from the avoidance of merchandising work on sales to the chains and also from the fact that relatively less carload reps' service was required to supply these buyers. Evidence that bears more closely on these points was later presented by Morton and International during the FTC's proceedings. In terms of carload expense, what the later evidence reveals is that the carload reps called on the chains' branch warehouses relatively much less frequently than on wholesalers because the chains, under agreements

reached with the producers, ordered more of their requirements directly, without the intervening service of the carload reps (and without any associated merchandising work).

The discount granted during the code is not inconsistent with lower costs, providing that the lower costs reflected the avoidance of merchandise expense and a general reduction in services of carload reps on sales to the large grocery chains. To any seller supplying a discount buyer, merchandising expense would be avoided on all sales, and this would be independent of the annual volume individually supplied to any such buyer. Similarly, reductions in carload reps' service would be reflected on all sales to discount buyers and again would seem independent of the volume supplied by the seller to any particular quantity buyer. The circulation by the code committee of the names of buyers who had qualified as quantity buyers would no doubt diminish the chances of error or the likelihood that lower prices would be charged to buyers said to be quantity buyers by the individual seller but who really were not, since incentives to cut prices almost certainly existed during the code. The procedure also would identify the buyers within any territory who were to secure a lower price (and by how much price to them was to be reduced) and therefore the buyers and price that outside suppliers could meet but not offer to any buyer other than those identified.

Toward the end of the committee's report appears the following statement:

During recent years and up to the signing of the Code ..., the industry suffered from excessive over capacity, from the entrance of new factors into the industry, and in short from all the ills affecting any commodity business. It became a buyers' market. The struggle for attractive business became intense and bitter. Concessions were freely given and immediately met. Secret discounts, confidential deals and all other devices, always resorted to under such condition in the past, eventually made the

manufacturer almost powerless in the face of concentrated buying power. The inevitable result was that the large quantity buyers were securing prices that were undoubtedly in some cases below actual manufacturing cost. These special concessions applied to any types of salt sold ... As the conditions became worse the buyer of lesser buying power was of necessity being increasingly discriminated against. The small buyer is now buying all items except table salt on exactly the same basis as the biggest buyers in the country. Only those acquainted with the troubles which beset this industry in the past can appreciate the immense effort which the industry has put forth to eliminate discrimination. Today the only difference between the average small buyer and buyers of such size that their annual purchases amount to \$100,000.00 or more is a quantity discount open and published applying to table salt only ...

While our code was awaiting approval ... the buyers of salt, knowing that the old deals and special favors would be eliminated bought heavily at the then prevailing price basis to them. The large stocks of salt purchased at those prices have not yet entirely cleared from the merchants' warehouses. For this reason, it is still too early to see the true benefits and actual effects of our present price structure. It is the belief of your Committee that it will take another six months to develop sufficient experience under our present price structure and our published quantity discount. The question is solely as to whether these discounts are discriminatory or not; on the basis of economics or law or code they are absolutely justifiable. This committee strongly recommends that these facts be regarded impartially and fairly and that no conclusion be reached and that no firm decision be made until a sufficient amount of time has elapsed to indicate whether or not the amount of the discount or the basis of discount needs revision as shown by its practical working.⁴¹

The quotation suggests that conditions prior to the code were competitive, or approximately so. There is evidence that before the code a discount to quantity buyers existed, although its exact nature and the buyers who secured it are not known. The quotation from the committee's report suggests that prices to the large chains were

⁴¹

Id.

probably below those typically charged wholesalers generally, and no doubt this in part reflected the existence of a discount. If conditions were competitive, persistent price differences among buyers would be expected to be cost based.

3. Price Setting to Discount Chains and Wholesalers

Suppose that the cost of supplying the large chains was less than that of wholesalers, and let us consider how account for this might have been taken during the code. Suppose that in each territory the sellers were to set a uniform price to wholesalers and chains. If at this price the chains' elasticity of demand was the same as that of wholesalers, an incentive would exist to lower price to the former, since an increment in output distributed to them could be made at less cost and would yield more than if the increment were sold to wholesalers. Let the sellers consider lowering price to the chains. How far price would fall would depend on how the elasticity of the chains' demand is altered as the price to them is reduced, on how marginal cost changes with increases in the quantity sold to them (and on how the marginal cost of supplying a given amount to wholesalers might be affected if the chains' supply is increased) and on the change in net receipts from wholesalers (at any price initially charged to them) that would accompany any lowering of price to the chains, since the demands of wholesalers and chains were almost certainly interrelated. The latter implies that any reduction in the price charged the chains would lead the producers to wish to change the price to wholesalers, since at the price initially charged to them, their demand would now be less. But any change in the price to wholesalers would in turn have effects on the demand of the chains (at the price

charged to them) and thus on the price that the producers might wish to charge them; and so on. Whether in making a decision to lower price to the chains these attendant effects could be accounted for other than very imperfectly by so large a group of producers, particularly when consideration is given to the fact that prices in one territory will effect the demand in another, is uncertain, and there is no record of the firms' deliberations leading up to the decision to fix the price to quantity buyers 10 percent below that to wholesalers. Given the disagreement among the producers about the advisability of the discount, those who established it and published its terms must have taken account at least roughly of the amount that would be supplied to the quantity buyers by those who objected to the discount, since the marginal cost of supplying the quantity buyers as well as wholesalers by those who fixed and published the discount presumably would be related to the proportion of the quantity buyers' demand that they believed they would supply.⁴²

Although there are complications, suppose that prices are set so that the marginal cost of supplying wholesalers approximates the net marginal revenue derived from them and similarly for the chains. Suppose further that at these prices the elasticity of the chains' demand sufficiently exceeds that of wholesalers that the difference between price and marginal cost is smaller on sales to the chains than to wholesalers. That is, suppose that the price set discriminates in favor of the chains. Then all or at least some of the producers considered individually would wish to divert sales from the chains to

⁴² There is some evidence, although this relates to the period after the code, that those who opposed the discount supplied part of their output to buyers who received it. See Record, 4319-4-3-2, at 295; Record, 4319-4-3-3, at 531, 552, 567.

wholesalers. Assuming a given total output, any such diversion would at the margin raise the return from the chains and lower that from wholesalers, either because price to the former would rise and that to the latter would fall; or if price did not change by an amount sufficient to equalize returns, because the services that the producers offered on sales to wholesalers would increase. Any such increment in service expense could presumably be avoided by setting the discount to approximate the cost difference, since this substitutes a less costly for a more costly adjustment mechanism. If services to wholesalers were inefficiently supplied, individual sellers could offset this by publishing a somewhat lower price, since even if met by other sellers net returns would be expected to increase, assuming the supply of services could not be controlled.

Lowering price in this way might encourage other price cuts, although it is by no means clear that it would. If pricing were such as to induce an increment of service to wholesalers, then these buyers would be disadvantaged in that the quantity of salt distributed through them would be less than if price had fallen. The disadvantage would stem from the fact that the additional service is unlikely to substitute perfectly for services otherwise provided by wholesalers, so that the overall cost of distribution through them rises. Nonetheless, the disadvantage might be very small if the sellers' service closely substituted for that which the wholesalers themselves performed -- for example, the generation of orders from retailers through merchandising work. At any rate, the disadvantage would relate only to the difference between the price charged chains and wholesalers minus the difference in the marginal costs of their supply, which might itself be small.

The Code contained no provision that in any clear way restricted the supply of service and there is no evidence or code provision suggesting that particular proportions of the output of each producer had been assigned to quantity and other buyers. Such controls would seem necessary if at the margin sales to wholesalers yielded a higher net. There are no complaints during the code period that suggest violations of any such agreements. From all appearances the sellers were left free to supply any buyer at the prices set, and the buyers were free to choose from whomever they wished to obtain all or any part of their requirements. There is also no evidence that the quantity buyers resold salt to wholesalers. There were no restrictions on resales of table salt. The absence of restrictions on buyers and sellers suggests that the discount was probably cost based and that at the time 10 percent approximated the extent to which any such differences could be maintained. The alternative would be to assume that the sellers could agree among themselves informally and without sanctions to maintain prices to chains and wholesalers that differed by more than the difference in the costs of their supply. The description of conditions before and after the code suggest that this was unlikely, particularly given the disagreement among the producers over the discount itself. It is doubtful that the producers who opposed the discount had agreed to some allocation of the less profitable business.

4. Complaints by Wholesalers

If the discount approximated a cost difference, wholesalers might nonetheless find it sensible to complain to the NRA in hopes that the discount would be abolished, for if this

was expected to result in a rise in the chain price the demand faced by the wholesalers would be expected to increase. They would also complain if the discount discriminated against them. The complaints by wholesalers would not reflect the view that the discount was cost based but would instead assert discrimination. If the price difference reflected a cost difference, the outcome from eliminating the discount is complex. A rise in the chain price perhaps contemplated as a result if eliminating the discount would increase the demand faced by wholesalers. But such a rise would impose a loss from the chains. Consequently, to diminish this loss the chain price might not rise to equal the wholesaler price, in which case there is a loss from wholesalers. What the price would be in the absence of a discount is not clear. Obviously, the producers who favored the discount presumably believed that they would incur an overall loss from any such change, whereas the wholesalers believed otherwise. The producers who opposed the discount specialized relatively in supplying wholesalers.⁴³ Consequently, if they believed that a uniform price would approximate that previously set to wholesalers, they might also have believed that they would gain relative to the producers who favored the discount (and who in fact supplied both wholesalers and chains). If the chain price were to rise to the previous wholesaler price or approximately so, the wholesalers' demand would rise; and insofar as additional service was encouraged on sales to the chains at the higher price, these buyers would be inefficiently supplied.

If price to chains and wholesalers exceeded costs of supply during the code, then the producers would individually have an incentive to increase services on sales to both.

⁴³

Id.

Were this to occur, it is not clear that wholesalers would be disadvantaged, because their demand may have been more responsive than the chains to an increment in service. This would be likely if the sellers could offer services that more closely substituted (at comparable cost) for those offered by wholesalers than it was true for the chains. That this might be so is not an unreasonable point of view. But in either case various money payments might have been made during the code that effectively substituted for price cuts. I note here the payments to wholesalers when the producers' sales reps travelled with those of the wholesalers. This practice was immediately stopped when discovered; but no doubt there were many substitutes. I note that the average price of all vacuum-pan salt as reported by the Bureau of Mines appeared to fall after the code by less than the prices of carton salt, as reflected by the various bulletins issued by the companies. This could reflect the fact that during the code sales of carton salt were effectively made below list, and the relatively steep reductions from list appearing after the code may in fact have represented relatively smaller reductions in transactions prices.

5. Possible Price Discrimination

All in all however, discrimination favoring the chains cannot be ruled out with available information. We could suppose that costs of supply did not differ at all (although I doubt that the figures submitted by the committee favoring discounts were altogether fictitious) and that the chains' demand for salt was more elastic than that of wholesalers, either because the chains supplied more price responsive consumers, because one or more of them threatened to enter salt production unless price was closer to cost,

or because their purchases were so large that it was worthwhile for them but not small buyers to contract or threaten to contract with suppliers outside of a given territory for a relatively large amount of salt (possibly without any selling service), so that the producers within the territory reckoned that the chains' demand for their salt was more elastic than that of wholesalers (at the price set to wholesalers); or it could be that it was worthwhile for the chains to induce individual sellers inside the territory through potentially large shifts in orders to cut price which, though this would violate the code, it was believed could not be controlled effectively. So price to the chains is lowered in anticipation of all of the above. Similar comments might also explain why price to the chains could have born a closer relation to cost than in the case of wholesalers, as discussed before. The difficulty again rests in what would appear as the absence of any scheme to allocate the less profitable business, which would seem necessary, since each seller would wish to supply the whole or at least a relatively larger part of his output to the wholesalers.

It could be that a subgroup of the producers (say those who favored the discount) agreed to supply the chains at a lower price and to restrict only their output to wholesalers, taking account of the supply from those who opposed the discount and who might be expected to divert the whole or a very substantial part of their output to wholesalers. If the subgroup was sufficiently small in number and produced a sufficiently large proportion of total output, price discrimination could exist. But then one would wonder why the producers who opposed the discount did so. For it would be assumed that these sellers were not restricted in their sales to the high-priced market.

They might object if they believed discrimination was a mistake. But it is not reasonable to suppose that firms as experienced as Morton and International would adopt a discriminatory price in error. I note that there were 6 or 7 producers who favored the discount and agreement by them to restrict their sales to wholesalers, without evidence of formal sanctions, would itself pose difficulties. Further, 6 or 7 producers opposed the discount, and these firms supplied about 19 percent of the total market. Consequently, sales of table salt to wholesalers by them (taking account of the fact that table salt represented only a part of their total output of vacuum-pan salt) would seem almost certain to eliminate any gain from discrimination.

6. The Reports of the Committee in Opposition

What objections were raised by the committee opposed to the discount? Three of the committee's four members filed separate statements. That of W.W. Clute of Watkins Salt Co. was very brief:

I beg to advise that this Company is opposed to quantity discounts, as we believe in quoting everyone the same price on carloads whether they take one carload or ten or more.

I am mailing you a few bulletins, only a small part that have been received here in the past two months. You will note that there are a number of dealers favored with discounts ranging from 2 percent to 10 percent which gives the chain stores, and other buyers who get these discounts, quite an advantage over the small dealers; which we consider very unfair treatment.⁴⁴

⁴⁴ Letter from W.W. Clute, President, The Watkins Salt Co., to E.W. Dahlberg, Asst. Dep. Administrator, NRA, January 12, 1934, contained in Consolidated File.

Watkins Salt Co. was a New York producer and the discounts ranging from 2 percent to 10 percent reflected the sliding scale in New York territory. The bulletins to which Clute refers were those "qualifying" various discount buyers. New York was the only territory with a discount granted to other than the large chains. The latter had been qualified immediately after the code took effect and before receipt of the bulletins received in the "past two months" to which Clute refers. Clute's concerns may have related more to the smaller discounts granted to buyers other than the large chains. Concern over the discounts to smaller buyers was later expressed by International, although International clearly favored the discount to the large chains. The problem seemed to be that smaller buyers in New York were assigning to one of their number all of their salt purchases, so to secure a discount (or a larger one). This practice was not effectively controlled by the producers, particularly toward the end of the code. I will later note Ryon's comments about this, since he refers specifically to the problem in greater detail. In general, Clute's statement is not particularly helpful or informative, particularly as it relates to the discount granted to the large chains.

Ince of Colonial Salt Co. in Ohio was the most outspoken critic of the discount and the most active in his efforts to have the NRA abolish it. Ince's statement is composed of two parts.⁴⁵ The first raises a series of "pointed questions," the answers to which he alleged cast doubt on the cost justification likely to be advanced by the committee in support. I reproduce the more important of Ince's questions and comment briefly on them:

⁴⁵ Letter from W.F. Ince, Vice-President, Colonial Salt Co., to E.W. Dahlberg, Asst. Dep. Administrator, NRA, January 3, 1934, contained in Consolidated File.

(1) Is it not a fact that in their relations with one chain store at least (Safeway Stores) it has been a practice to bill each unit [branch warehouse] direct which involves extra expense in billing so many invoices?

All orders were placed by and shipped to the chains' branch warehouses. Invoices were typically prepared whenever shipments were made. That the branches of Safeway paid the bills (rather than central headquarters) would have imposed little if any additional billing cost. There is no evidence that the committee supporting the discount relied on differences in billing cost as partial justification of the discount. Nevertheless, I note that Morton does in its justification of discounts before the FTC.

(2) Is it not a fact that the chain stores do not always confine their purchases to straight carloads? Do they not often order L.C.L. shipments, to be delivered in pool cars to their various units? This would represent a heavy expense to the producers, because it would necessitate salesmen spending a day, or possibly two days, making up the balance of the car at a point where the unit, or units, are located.

This is an interesting point and what evidence bears on it appears later, during the FTC's proceedings against Morton and International, and will be discussed in the context of the cases. Ince implies that the selling process was one in which the carload men call on the chains' branches, accept an order for a partial car, and then call on wholesalers to fill it. If so, the chain call would impose carload men's expense comparable in character and magnitude to that incurred if the sale had first been made to a wholesaler. But this does not appear to describe accurately the character of the firms' sales to the chains. In general, it appears that the chains through agreements reached with the individual sellers placed their orders directly to the seller without the intervention of sales reps, much more than it was true in the case of wholesalers whose orders were almost

invariably solicited by sales reps. The chains' orders were often for straight cars, but not always. Orders for shipment in pool cars were also placed directly, for inclusion in the next car assembled. When such cars were assembled, the salt companies would have their carload and merchandising reps provide service to wholesalers, and typically would not call or would call with less frequency on the chains' branches. This behavior would be expected if conditions were competitive and if services of carload and merchandising reps were the main cost difference in supplying discount chains and wholesalers. Whether chain orders for partial cars influenced significantly the time when orders from wholesalers were assembled is not known with certainty. There is no evidence that they did. I suspect that during the code greater service was encouraged on all sales but that this was unlikely after the code, when the code could no longer be enforced.

(3) Is it not true that these chain stores are often supplied from warehouse stocks, and the salt is invoiced at net carload prices, no charge being made for warehousing, which charge is absorbed by the producer?

In certain of the larger cities, warehouse stocks were maintained from which local wholesalers and chain branches typically picked-up their requirements. There is no evidence that sales from warehouse stocks occurred with greater frequency to chains than wholesalers. This practice continued after the demise of the NRA. The warehouse stocks probably substituted for the services of the carload reps whose activities were primarily devoted to buyers not conveniently located to the warehouses. Warehouse prices were usually the same as when delivered in cars. Imposing a surcharge on warehouse sales would probably encourage local buyers to purchase for delivery in cars, so their orders would then require assembly. Assembly costs would thus be avoided by

providing arrangements for local pick-ups. The quantity buyers secured the discount on all of their purchases of table salt. If the discount were granted only on deliveries in cars, some increase in carload reps' expense would probably be required, although perhaps not as much as in the case of wholesalers. On the whole, most orders were delivered in cars, and the question was whether the discount reflected savings in costs overall, even though on some transactions such savings might not materialize.

(4) Is it not also true that certain producers are paying legitimate brokers a commission on sales to these chain stores, ranging from 3 percent to 5 percent?

It is difficult to respond to this with available information. In all territories, the salt companies relied partly on brokers for distribution. The brokers performed much the same service as the carload reps directly employed by the companies. Brokers were never employed to the complete exclusion of carload reps, although on sales to more distant destinations they might have been. Morton and International later indicated, referring to events after the NRA, that on sales to the discount chains brokerage was not paid at all, and this is consistent with the view that most of the chains' orders were placed directly to the sellers. During the NRA, brokerage commissions were fixed by the Code Committee. It was an unfair trade practice to pay rates above those fixed or for the broker to remit any part of his commission to the buyer. If prices during the code exceeded cost, the payment of brokerage on chain sales would be encouraged assuming the brokerage rate was less than the producer's margin over cost, since the chains would presumably be responsive to greater selling efforts of brokers. It cannot be assumed that the payments to which Ince refers reflected only an increment in cost

that offset in whole or in part the savings that might otherwise have existed on sales to the chains.

(5) Why is it that the 10 percent bonus is not applicable to the Texas Territory?

When the Secretary of the Code Committee responded, just after the code took effect, to the NRA's request for a description of the discount in each territory, none was listed for Texas. This simply reflected the fact that a discount had yet to be published for Texas. Shortly after the response was submitted, the 10 percent discount was published for sales in Texas. Its existence is reflected in the goodly number of complaints about the discount received by the NRA from wholesalers in Texas.

In general, I believe that Ince's aim was to cast doubt in the minds of the NRA's officials about the desirability of the discount; and although he might well have succeeded in doing this, his efforts clearly had no real effect. The second part of Ince's statement reveals other of his sentiments:

Now let us view the matter from another angle, namely Unfair Trade Practices, Unjust Discrimination

[W]hy penalize the Wholesaler Grocer to the extent of 10 percent and indirectly, also, the independent retail grocer? Please note Exhibits 1 and 2 attached. No. 1 represents a Kroger ad appearing in the Pittsburgh paper They price two pound packages to the consumer, 3 for 10 cents, which is approximately \$.0333 per package. The same package costs the Pittsburgh Wholesale Grocer \$.0315. In selling to the independent retailers, he must consider a fair margin of profit for himself, and this is also true of the Independent Grocer when he sells to the consumer.

Exhibit 2 is another Kroger ad appearing in the Akron, Ohio paper The price to the consumer is again \$.033 per package, the same package costing the Akron Wholesale Grocers \$.0294. In

the two cases cited, would it be considered fair competition, or discrimination in favor of the chain stores?

It is only fair to point out that there are probably hundreds of wholesale grocers and other buyers of salt in carload lots, who would gladly dispense with any and all sales expenses on the part of the producers, and thereby qualify for the 10 percent discount, or any other discount established by a producer, based on less sales expense, or in other words 'Earned Discount.'

Conclusion: large discounts, and ever larger discounts to chain stores, has been the procedure brought about by the eagerness of manufacturers to sell, and the playing of one manufacturer against another, by said chain stores.

The Result - Forcing even lower prices to smaller buyers, wholesalers and retailers, so that they might have some chance to stay in business. Further Result - Even lower prices required of salt manufacturers.⁴⁶

Ince's conclusion is that the net carload price on resale salt "should be the lowest price to anyone." If Ince believed that the costs of supplying chains and wholesalers were the same, which the first part of his statement implies (although this view seems contradicted by the second part), then presumably he believed that the discount was discriminatory. His advocacy of a uniform price implies that the industry was making a mistake. I doubt this position is defensible, particularly given the absence of any apparent restrictions on Colonial's sales to the high-priced buyers. Alternatively, we might suppose that Colonial specialized in supplying wholesalers (which I believe it did)⁴⁷ and that the lower chain price, which I assume here to be cost based, reduced the wholesalers' demand and therefore the price that could be charged for any quantity

⁴⁶ Id.

⁴⁷ See Record, 4319-4-3-2, at 295.

supplied to them. The reference to Kroger's ads seem clearly to point in this direction.

A rise in the chain price, by increasing the wholesaler's demand, might have been expected to raise Colonial's net receipts on its sales to wholesalers; and any loss from potentially fewer sales to the chains could have been more than offset by this.

Ince's comment in the second part of his statement --

that there were probably hundreds of wholesale grocers and other buyers of salt in carload lots who would gladly dispense with any and all sales expense on the part of the producers, and thereby qualify for the 10 percent discount --

implies a cost difference. There was of course nothing in the code to prevent Colonial from publishing a discount to wholesalers who dispensed with selling service, but this Colonial did not do. According to Ince, this would not be unprofitable, presumably even if met by other sellers. The publication of a discount to wholesalers who dispensed with services would have been difficult for the producers to police, and no doubt would have caused erosion of the code, and clearly Ince wished to avoid this. But without a reduction in price, wholesalers would not be likely to dispense with selling services. What seemed so upsetting to Ince was that the chain price made it difficult to maintain the higher price to wholesalers. I find it difficult to believe that Ince wished to do other than to raise the chain price to equal that charged wholesalers, which he might have expected to increase the wholesalers' demand or at least make it easier to maintain the existing price to these buyers.

It is interesting to contrast Ince's views with those of Frank Venning, of The Union Salt Co., also in Ohio.⁴⁸ In comments later made to the FTC, Venning supported the discount as strongly as Ince opposed it. Union supplied most of its table salt to large chains. In Venning's view, eliminating the discount would lower the chain demand; and the loss from this could only be offset to buyers (who would now include the large chains) who required greater service. In supplying these services, Venning did not believe Union was particularly efficient.

The final statement is from Howard Carey of Carey Salt Co. in Kansas, from which extracts are reproduced below:

It is argued that no resale work [missionary work] is necessary in case of large quantity buyers. This is not a just claim, because no resale work is necessary in case of many carload sales. In fact, in most instances resale work has been proffered or suggested or arbitrarily given by producer for the purpose of forcing brands in, and in comparatively few cases is it demanded by any buyer. Furthermore, producers have consistently refused to make any differential or additional charge for salt sold by resale work or intensive selling over that salt on which no resale work is given.

...

It is greatly to the benefit of the salt industry if the product in its various forms and packs can be placed in practically all stores or shops This ideal cannot be attained if any one buyer or class of buyers is accorded a discount, or an inside or lower price, than any other buyer. Viewed from the standpoint of the salt industry, mere membership in or ownership by any organization or corporation, or group, or so-called chain, does not give any greater value to the retail outlet or wholesale distributor. Nor should such membership or ownership entitle that outlet to own its salt at any lower price than another individual outlet of similar importance to the salt business.

⁴⁸ Letter from Frank J. Venning, President, The Union Salt Co., to Federal Trade Commission, February 1, 1937, Record, 4319-4-2.

...[I]f such is the case, the salt industry is guilty of fostering one class of buyer as compared with another, with the probable result that more and more of the tonnage will move through the outlet with the lower cost price. This is not at all a desirable thing economically because it not only works for the exclusion of distributive outlets but to the exclusion of producers as well....

It is argued by those proponents of a discount to quantity buyers ... that the cost of doing business with such concerns is so much less, and that there is so much less service required I submit to you that any study of the cost of doing business with such concerns will be only a theoretical study, and in making such a study, the cost of rendering that extra service will be arbitrarily charged against hundreds of orders received by various producers by mail, telegraph and telephone, on which no service is necessary, and many hundred other orders taken by salesman of the various [wholesalers], and on which no additional service is necessary or rendered.

... Discounts ... paid large quantity buyers or buying organizations ... do not in any way promote or increase the use of salt one iota. Rather is the use of salt promoted by having it universally handled by all possible outlets, rather than by concentrating its distribution through a few limited channels which receive more favorable prices, and enjoy more favorable costs.

The ideal for the industry, for the distributor and for the consuming public is, one price to all with no discounts ... of any kind.⁴⁹

Carey's firm also specialized in supplying wholesalers.⁵⁰ In general character Carey's comments are similar to Ince's. There is mention by Carey of higher selling expense on sales to wholesalers, but that many such buyers would prefer a lower price. Whether Carey wished to lower the wholesaler price to equal the chain price is not clear,

⁴⁹ Letter from Howard Carey, President, The Carey Salt Co., to E.W. Dahlberg, Asst. Dep. Administrator, NRA, January 18, 1934, contained in Consolidated File.

⁵⁰ Record, 4319-4-3-3, at 552.

although it is a move in this direction that would diminish the service on sales to wholesalers. Carey did not directly suggest a lower wholesaler price, nor did he publish one.

There is contained in Carey's statement the view that the discount caused some wholesalers to discontinue handling salt. The implication is that the producers in setting the discount had not taken full account of its effect on the wholesalers' demand. This could be true whether the discount stemmed from discrimination or a cost difference. Account for this effect could not be taken under competition. If the discount stemmed from a cost difference (which Carey implies), then the chain price would not be expected to equal the wholesaler price, so Carey's proposal would seem to suggest that the chains should be discriminated against.

7. The View of Barton Salt Co. on the Discount

There is an interesting comment made by the President of Barton Salt Co., another Kansas producer, who also opposed the discount and who later indicated to the FTC, as a reason for his opposition, that Eastern producers were more likely to ship into Kansas territory to the chains than to wholesalers.⁵¹ I believe Carey shared this view. Barton also supplied little of its output to the chains. If "outside" shipments to the chains required little by way of selling expense whereas those to wholesalers did, then outside suppliers might have been less inclined to supply Kansas wholesalers than chains, because sales to the former may have been relatively more costly for outside suppliers

⁵¹ Record, 4319-4-3-3, at 567-70.

than for the Kansas producers, since the maintenance of a distant sales force by an outside supplier perhaps on a limited volume may have been more costly when compared with the local producers. In the absence of a cost difference it is difficult to see why shipments from outsiders would favor buyers charged a lower price, and in itself this cuts against discrimination as the explanation of the discount. A higher chain price would be expected to raise the wholesalers' demand from which Carey might have expected to benefit.⁵²

All in all, the committees' reports do not get us very far. The committee favoring the discount advocated its position on cost grounds, but the evidence presented is incomplete and it is difficult to assess the claims made. Those who opposed the discount did so on grounds that were perhaps primarily self-serving and provide little clear reason to believe that price discrimination favoring the chains existed. How consistent this view is with the evidence presented during the FTC's proceedings will later be considered. What is interesting is that the evidence presented during the FTC's proceedings provides greater support on cost grounds for the discount existing during the NRA than for the discount challenged by the FTC. The discount challenged by the FTC was a revision of the discount existing during the NRA adopted by the producers just after passage of the Robinson-Patman Act.

⁵² The chain price set by the Kansas producers would be lower than if no or fewer outside shipments were made to these buyers. At the lower chain price the wholesalers' demand would fall and therefore the price charged to them by the Kansas producers would presumably be lower. If the discount is eliminated, the chain price would be expected to rise. If greater service is induced on sales to the chains, some loss is incurred. But outside shipments are also reduced; and the wholesalers' demand is also greater. Producers who specialized in supplying wholesalers might have expected to gain.

d. The Discount Scale in New York Territory

The discount in New York differed from that in other territories. In New York, the 10 percent discount to buyers of \$250,000 or more of salt per year (which later was reduced to \$150,000 or more per year to accommodate First National Stores) initially identified large chains only. This was also true of the qualifying volume required in other territories to secure the 10 percent discount. In New York however, smaller discounts were also granted to buyers of lesser annual volumes. This discount scale was first published in December 1933 and replaced a previous discount of unknown character.

The smaller discounts shared features with that granted to the large chains: buyers were qualified either by the individual New York producer or by the SPA. Once qualified the buyers' names were circulated to all producers. No outside producer could grant a discount larger than that published by the New York producers or to any buyer not so qualified. Qualification was based on the buyer's aggregate purchases over the past 12 months from all suppliers. No requirement was imposed that the buyer purchase any amount from an individual seller. The terms of the discounts also specified that the buyer retain centralized control of merchandising. It appears that this provision had no practical effect, so that the primary determinant of the discount earned was the buyer's purchase volume.

What savings (if any) the New York producers believed the discount scale reflected is not clear. The only comment about it is by an official of International's responding to a complaint to the NRA by a wholesaler:

It is realized that an accurate measurement of the degree of economic justification is difficult to arrive at, on relative quantities

purchased, although undoubtedly there is some saving to a manufacturer in the cost of solicitation, selling and accounting expenses, on larger sales volumes to a single buyer, and with only one credit risk involved⁶⁴

The statement seems to imply that certain expenses would fall if the buyer purchased a larger annual volume from the individual seller. But the discount was not structured in this way. There is no evidence that the individual sellers limited their sales to only those discount buyers who purchased from them the volume specified as necessary to secure a given discount. If they did, one would wonder why buyers were classified for discounts according to their aggregate purchases.

I previously mentioned the cost savings said to justify the discount to the large chains. The savings derived from the character of the chains' buying, which eliminated or reduced the services typically supplied on sales to wholesalers: in particular the services of merchandise and carload reps. If these expenses were comparably reduced on sales to buyers within each smaller discount-classification, the discount granted to them would be expected to equal that granted the chains. But the size of discounts varied: they ranged initially from 2 to 10 percent and later from 5 to 10 percent. I note that many of the buyers who secured smaller discounts were wholesalers, and it is doubtful that merchandising or carload reps' expense was avoided or reduced on sales to them, given typical practices. That is, unless the sellers dealt comparably with these buyers and the chains, there is no reason to suppose costs would be reduced comparably. But there is

⁶⁴ Letter from P. Silas Walter, Vice-President, International Salt Co., to Frank Morse Secretary, Salt Producers Code Committee, September 24, 1934, contained in Consolidated File.

no evidence suggesting that wholesalers who secured a discount were dealt with differently from wholesalers who secured no discount.

There could have been some savings in invoicing and related expense as suggested. But again this would seem to relate to the individual firm's sales to the buyer. To some extent the specification that the buyer retain central control of merchandising could have meant that the discounts corresponded to savings comparable in character to those used to justify the large-chain discount. These buyers might have had some clearly identified group of retailers for whom the buyers did all or most of the solicitation work, so merchandising expense by the seller is avoided or reduced. But then the discount might be expected to be equal (but perhaps less than that granted to the large chains) across the buyer classifications at issue here.

Although difficulties exist in understanding why the smaller discounts reflected cost differences, difficulties also exist in explaining them as a scheme of price discrimination. Discrimination would require some scheme to allocate the less profitable business, so the producers would be presumed to have agreed to supply specified quantities to buyers as so classified. There is no direct evidence of this, although this does not mean that such an agreement did not exist. If an agreement about individual firm's supply to discount buyers had not been reached, the discount spread would be reduced or eliminated, since the sellers who formed no part of the agreement would supply the whole or a very substantial part of their output to the high-priced market.

If discriminatory, the reductions in prices with increases in the buyer's volume imply that the elasticity of the various buyers' demands increased consistently with this. Since

larger as against smaller buyers would presumably differ primarily in terms of the number of retail outlets they supplied (in many cases large wholesalers simply operated multiple branches), and because the retailer's customers in turn would not be thought to differ in their responsiveness to changes in the price of salt, it would not appear that discrimination would make sense if judged along these lines. The producers in New York could have reckoned that larger buyers would have more incentive to buy from outside unless price to them was cut. The larger buyers might then have been reckoned to have more elastic demands for NY salt, so a graduated scale of discounts was introduced. But if the price differences were not cost based and if the buyers at issue here all secured merchandising and carload reps' services, outside suppliers would be more inclined to supply the smaller than larger buyers since sales to the former buyers would be more profitable, so variations in price for the reason stated would also not make a great deal of sense. Furthermore, no restrictions on resales of table salt existed, so if prices were discriminatory the discount buyers would gain from resales, if the cost of reselling was less than the discount. Similarly, buyers would jointly purchase if the cost of this was less than the discount. If buyers secured merchandising and carload reps' service but purchased through one of their number, the additional cost would primarily be that of rebilling.

1. Abandonment of the Graduated Scale

At any rate, although the reasons for the discount structure are difficult to discern, there is comfort in that the structure did not last for very long. When the graduated scale

was announced, buyers were qualified according to their salt purchases over the past 12 months. Few buyers were initially qualified: approximately 12 for 2 percent, 3 for 3 percent and perhaps one (or a very small number) for any larger discount, excluding the large chains. The past 12 months was based on a running calendar: the buyer could at any time qualify depending on his purchases during the immediate past 12 months. So an incentive existed to purchase more salt, which could be facilitated by lowering resale price but also by making arrangements with other wholesalers to buy salt jointly or for one wholesaler to assume the supply of others. If prices exceeded marginal cost by more than the discounts, individual sellers, without direct code violation, could engage in normal selling efforts but also offer a price cut to particular buyers by combining their purchases with those of other buyers and arranging the billing through one of them. As time progressed, more buyers might be expected to "qualify" for discounts, and that they did so is suggested by the letter of Clute whose opposition to the discount structure seemed to stem primarily from the increase in the number of bulletins announcing quantity buyers received "in the past two months."

In October of 1934, less than one year after the graduated scale was first announced, the New York producers abandoned it, and in its place they adopted a single discount of 3 percent granted to buyers of \$150,000 or more of salt per year and who maintained centralized control of merchandising activity. The reason given by Ryon of International for the abandonment of the graduated scale was the problem posed by joint buying arranged either by sellers or buyers. In response to questions about this, Ryon stated:

A. [The graduated scale] was abandoned because we found that smaller wholesale and retail buyers were combining to

purchase collectively and put themselves in higher brackets for larger discounts.

Q. With what effect?

A. The effect was very demoralizing. It was a plan which confused the correct record of business and which allowed small concerns, purchasing as little as 2 or 3 carloads of salt per year, to get into a group which had qualified for the top quantity discount and participate somewhere along the line. It developed into a first-class racket.⁶⁵

About one month before its abandonment the graduated scale was revised. The revision did essentially two things: (a) it lowered the minimum purchase volume to secure a 10 percent discount from \$250,000 to \$150,000, and this permitted First National Stores to secure the same discount as the larger national chains operating in New York territory and who had qualified for 10 percent in all other territories; and (b) it retained the remaining volume classifications but raised the discount applicable in each of them uniformly by 3 percentage points. There is no indication why this increase occurred. It could be, consistent with Ryon's statement that buyers purchasing between \$25,000 - \$50,000 per year and who would have been eligible for a 2 percent discount were combining their orders with other buyers of the same or larger amounts, so granting a larger discount to them (of 5 or 6 percent) may simply have reflected the fact that the market price to them had effectively fallen, so a grant of 5 percent (rather than 2 percent) to buyers within the smallest volume classification might have been thought to reduce the extent of joint buying and eliminate some inefficiencies in transacting that had arisen. Offsetting this is the fact that the uniform increase did not eliminate the spread across the

⁶⁵ Record, 4307-4-3-2, at 158-9.

discount classes, so incentives for one group to pool with another would not be changed; and by increasing the size of the discount in each classification, buyers who had previously not pooled would now have greater incentive to do so. Further, buyers after the revision need purchase only \$150,000 per year rather than \$250,000 to secure the largest discount. But the revision lasted only about a month, and then was replaced by a single discount of 3 percent to buyers of \$150,000 or more per year. I could not discover whether list prices were also reduced when the graduated scale was discontinued. No doubt the revision eliminated a good number of joint purchasing arrangements, because purchases of \$150,000 were far larger than what previously was required to secure a discount of 3 percent or more; and the costs of arranging this volume by individual sellers or buyers could surely have exceeded 3 percent.⁶⁶

2. General Adoption of the 3 percent Discount in New York Territory

As required by the code, the 3 percent discount was adopted by all outside producers for sales in New York territory. Presumably, in setting prices in New York, the New York producers would reckon that outside suppliers would have greater incentive to ship to the chains in New York territory if list prices remained the same as before. To account for this, list prices in New York may well have been reduced in conjunction with the establishment of the 3 percent chain discount. It is not known whether they were reduced, nor is it known whether shipments to the chains in New York by outsiders

⁶⁶ The qualifying volume was also changed to purchases over the past calendar year. This would have eliminated discounts paid in 1934 to joint buying organizations formed during 1934.

increased relatively after the change.⁶⁷ An increase in outside shipments would be expected if list prices remained the same whether the 3 percent discount was discriminatory or not. If cost based, such shipments would be more profitable than before, and similarly if discriminatory, since marginal revenue on existing shipments by outsiders would be higher than before.

The discount of 3 percent is far less than the difference in costs of supplying wholesalers and chains alleged to exist by the committee in support of discounts. Ryon was on this committee, and the figures he submitted for International were well above 3 percent. A cost difference of more than 3 percent is also reflected in figures submitted by International during the FTC's proceedings. If list prices remained the same, the reduction in the discount suggests discrimination against the chains; or that services supplied to them increased. If the latter, this would be imposed on them by the New York producers, since the services were presumably supplied more cheaply by the chains. The gain to the New York producers would derive from avoiding losses from wholesalers who received services and jointly purchased to secure a discount.

If the original 10 percent discount represented a cost difference and no additional service was supplied to the chains, then these buyers would be discriminated against by approximately 7 percent; or perhaps by 3 percent if an increment in service was supplied to them. If list prices were reduced with the adoption of the 3 percent discount, then the service level on sales to wholesalers would be expected to decline. A change of this

⁶⁷ One change in practice adopted with the 3 percent discount was to permit its deduction from the delivered price rather than the plant price, in effect lowering the chain price on more distant deliveries, presumably to diminish shipments from outside. This would not have affected the pricing of blanket items, which were the primary purchases for retail outlets.

nature likely would impose a loss from wholesalers, but there would be a gain from reducing the loss from the chains: the lower list price is closer to the lower cost of supplying the chains. The discount of 3 percent could then be interpreted as a remaining cost differences in supplying the chains, or if the same service was supplied to the chains as to wholesalers, it could also be interpreted as a discrimination in favor of them.

Why in New York but apparently not elsewhere buying groups appeared to pose so substantial a problem is not certain. In Louisiana, the discount was restricted to buyers of at least \$250,000. So high a limit was possible because only the very large national chains operated there. Wholesalers were also said to be geographically dispersed. In other territories however, the purchase minimum was \$100,000 per year and surely in some of the larger metropolitan areas wholesalers must have been located in close proximity. In New York territory, the concentration of wholesalers in New York City and surrounding area may have greatly facilitated joint buying, since the destination of cars may have been in close proximity to the buyers, and involved table salt purchases by wholesalers only. If only part of the 10 percent discount represented discrimination, then these buyers by agreement may have been willing to accept less service from the sellers in exchange for a lower price, since the assembly and merchandising functions may have been performed by them at almost the same cost as by the sellers. If price to these buyers was significantly reduced, then it may not have been possible to maintain the existing service level to other buyers, because these services could also be consumed by the buying groups, given the nature of the services provided; so the previous service level would no longer cover costs. On the whole, less service might have been supplied,

and list price was reduced to reflect this. The discount may then have been reduced to 3 percent, representing a remaining cost difference or possibly a discrimination favoring the chains. The discount in all other territories was reduced to 5 percent in 1936 (and will later be discussed) at which time it appears that certain wholesaler groups had secured the discount. There is no direct evidence that the decision to reduce the discount stemmed from this, although it could have had a bearing.

All in all, the New York experience, although interesting and difficult to interpret, does not in my view support strongly the view that the 10 percent discount was altogether discriminatory, and on the whole probably suggests, if discrimination existed at all, that it represented only a part of the discount.

e. The Discounts After the NRA

After the demise of the NRA the producers continued the practices adopted during it, or at least they attempted to do so. Haddock notes (in March 1936) that the 10 percent discount granted to buyers of \$100,000 or more per year (\$250,000 in Louisiana) was still in effect, as was the 3 percent discount to buyers of \$150,000 in New York.⁶⁷ We know that the New York discount was still in effect in May 1936. This is reflected in a bulletin by Ryon to International's sales reps:

To quantity buyers who have purchased \$150,000 worth or more of salt during the calendar year, we will continue the quantity discount applying in the New York field of 3 percent [on] ... table salt items up to and including 50 lb. bags.⁶⁸

⁶⁷ Irwin S. Moise and George B. Haddock, supra note 18, at 104.

⁶⁸ Respondent's Ex. 28, Record, 1-3/4703-1.

In all territories, buyers were qualified as during the NRA, either by the individual producer or by the SPA, and the names of all qualified buyers were circulated to all sellers. No discount in any territory was to be granted to any buyer other than those who had been qualified; and no discount larger than that published was to be granted to any qualified buyer. One change occurred in late 1935, when the 10 percent discount came to be expressed in units of money, each unit representing approximately 5 percent of the plant price on delivered-price items and 5 percent of blanket prices. This change was adopted by all producers, and applied on all shipments, except those in New York territory, where the 3 percent discount was continued. A good example of the discount units as well as the basic features of the discount is contained in a bulletin from Ryon, issued in late November 1935, to International's salesforce covering sales in Louisiana territory. Excluding New York, the basic description would apply to all territories, except that the minimum purchase volume would be stated as \$100,000 per year.

Quantity Discounts, Louisiana Field

Effective December 1, 1935, to a single buyer where there is one credit risk and where there is centralized control of buying and selling and direct control of merchandising and advertising and to such buyers' wholly-owned subsidiaries, where the payment is guaranteed by the centralized control, who buys salt for resale and whose purchases from all sources amounted to \$250,000 or more per year, we will allow two 'Unit Discounts' on Table Salt only.

The 'Unit Discounts' referred to above ... are in lieu of the percentage discounts formerly allowed in our Bulletin K-185, and which is hereby cancelled.

Any such buyer will be required to certify that he has purchased such quantity of Salt, or if a new organization, that the constituent companies making up the organization shall have purchased such quantity of Salt during the past 12 months, unless our own sales

records disclose that to be the case. Should our own sales records not disclose this fact then the certification of the buyers will be subject to verification through the Secretary of the Salt Producers Association.

Other than above mentioned discounts, sales made to Quantity Buyers will be on such regular terms, booking period, etc., as applied to all other buyers in the Louisiana Field.⁶⁹

f. The Revisions Made in July 1936

The Robinson-Patman Act was passed in June 1936. In July of that year, a revised discount to quantity buyers appeared, which was soon adopted in all territories by all producers. It is the revised discount that the FTC challenged in its case against International and in part of its case against Morton: this discount covered Morton's sales of table salt except BL. BL had its own annual-volume discount.

With the passage of Robinson-Patman, there is little doubt that the producers would have reckoned that the wholesalers who opposed the discount during the NRA would shift their attention to the FTC. In fact it was the wholesalers who called the FTC's attention to the discount on salt. Recognizing this, it is reasonable to suppose that the producers would have considered whether their discount would be challenged and could be successfully defended; and also whether revisions could be made that might diminish the chances of its being challenged and if challenged perhaps provide a more solid defense. The producers who supported the discount no doubt knew that a united front could not be maintained and in fact, in responses made to the FTC's initial queries about the firms'

⁶⁹ Respondent's Ex. 25, Record, 1-3/4307-1.

discount practices, certain producers noted their opposition or stated that they welcomed the FTC's investigation as a means finally to resolve the issue.⁷⁰ This opposition was relatively mild in nature, even by Ince, although he did submit to the FTC his comments in opposition earlier submitted to the NRA.

Apparently, just after passage of the Robinson-Patman Act, meetings were held under the auspices of the SPA and legal counsel was sought to decide, or perhaps more accurately to make suggestions, how each producer might respond to the Act's requirements. Circulations were later made probably reflecting the recommended course of action.⁷¹ Details of these meetings and circulations are not available, so it is possible only to surmise what was decided by examining the changes in the discount and the arguments made by the producers to justify their practices to the FTC. What was put into effect seems more an effort to adjust to the requirements of the law than a reflection of any basic change in the character of salt distribution. All of the producers who favored the discount revised it identically after the Act's passage, and they each made essentially the same arguments to defend it. The producers who opposed the discount, when confronted with a revised discount granted by their competitors, also adopted the same terms (virtually all opposing firms made some sales to quantity buyers). These producers argued that they granted the discount to meet competition but would prefer that no discount exist whose terms they were required to meet. Two revisions of importance occurred.

⁷⁰ See Record, 4319-4-2.

⁷¹ See list of materials requested from International Salt Co. contained in Record, 4307-4-2. Most of the information dealing with this does not seem to have been submitted.

1. Revision in Buyer Qualification

First, the discount was tied to the buyer's purchases from an individual seller. Each producer published a discount granted to any buyer from it of \$50,000 or more of table salt per year.⁷² This reflected a change from past practice in which the discount was granted to a buyer whose purchases from all sources aggregated \$100,000 or more of salt per year (\$250,000 in Louisiana territory and \$150,000 in New York).⁷³ As in the past, the name of any buyer who qualified for the discount (by purchasing \$50,000 or more per year from one producer) was circulated to all producers. Once in receipt of any such announcement, all of the other producers would grant the buyer the identical discount on any sales made to it. No volume requirement was imposed to secure the discount on such sales. This change basically meant that the "qualification" of a buyer was to be based on his purchases from an individual seller rather than from all suppliers combined. Once qualified, the buyer secured the identical discount on any purchases from any producer. All of the large chains that had previously qualified as discount buyers were qualified (and their names were circulated by the "qualifying" producer) immediately after and in some cases jointly with the publication of the revised discount. Each of these buyers had purchased \$50,000 of table salt over the past 12 months from at least one and in some cases more than one seller.

⁷² The discount was to be granted to a buyer of \$50,000 or more over the past 12 months and who continued to buy at that rate.

⁷³ This discount was also granted to a buyer of the specified minimum over the past 12 months (except in New York where the calendar year was used) and who continued to buy at that rate.

The publication of the new discount by each producer and the circulation by bulletin of the names of any "qualified" buyer provided each producer with clear and unmistakable evidence of a discount of specified amount being granted by a competitor to identified buyers. The grant of the discount to these buyers by each producer making any sales to them (even though these sales were less than \$50,000 per year) was said by all producers to be necessary to meet competition and therefore legal under the Act's meeting competition defense. If we assume for the moment that a seller's costs were less to supply a buyer who purchased \$50,000 or more of table salt per year from it, then there seemed to be no recognition that granting the same discount by the seller to a buyer who purchased less than this amount from it (and at times substantially less) would be an unlikely result under competition at least if the discount was granted persistently. It would imply that certain buyers secured a lower price who cost the seller no less to supply than other buyers who paid a higher price. But at the time, with little experience under the Act, it may be that the producers believed that meeting a competitor's price provided an unqualified defense.

This change in the discount is reflected in the testimony of Ryon and Peterkin, Jr. in response to questions later put to them by FTC counsel:

Q. Now, Mr. Ryon, so far as International Salt Company is concerned, a purchaser ... who is to qualify with your company for the \$50,000 quantity discount -- must he purchase \$50,000 worth of salt from your company in a twelve consecutive month period, or may that \$50,000 be from all [sources] of which you have only a part?

A. No, he must buy that from us.

Q. In order to qualify with you?

A. In order to qualify.

...

Q. Now, [it was] testified that International Salt Company would grant the unit discount to any customer who purchases \$50,000 worth of table salt from other sources of supply [but not from International]. When you do that why do you do that?

A. When we have done it, we have done it to meet a competitive price by another salt producer.⁷⁴

Peterkin, Jr. testified similarly:

A. ... [A] discount [is] paid to any purchaser of table salt grades whose purchases in any twelve consecutive months ... [are] equal to or in excess of \$50,000.

Q. Now, do such purchasers ... have to purchase that amount of salt from you ... in order to be eligible for the additional discount?

A. If they were buying their salt from us they would have to purchase an amount equal to \$50,000 annually ...

Q. Well, if they bought \$50,000 worth of salt from International Salt Company and \$500 worth of salt a year from you would they get the ... discount ...?

A. They might or might not.

Q. What would be the governing factor.

A. Competition.

Q. If International Salt Company were granting five percent discount on \$50,000 would you grant a five percent ... discount ... on \$500 worth of salt.

A. We might.

Q. Has that been done, sir?

⁷⁴

Record, 4307-2-3, at 2811, 2857-58.

A. Yes.

...

Q. Then it is the policy of the Morton Salt Company to grant the approximate five percent ... discount ... to any customer who is receiving a similar discount from a competitor of Morton Salt?

A. We endeavor at all times to be competitive.⁷⁵

2. Change in the Argument About Cost Justification

The change in the way buyers were qualified was accompanied by the argument, at least by those who favored the discount, that a buyer of \$50,000 or more per year from an individual seller was cheaper to supply than a buyer of any lesser volume and that this was why the discount was granted. The reduction in price to the \$50,000 buyer was said to be cost based, which was also a defense permitted by the Robinson-Patman Act.⁷⁶ This argument had not been advanced to justify the discount during the NRA, no doubt because it would have been very hard to make, given that "qualification" was based on the buyer's aggregate purchases from all suppliers and was thus independent of the amount acquired from an individual seller.

Both Morton and International argued that cost savings were achieved only if the buyer purchased at least \$50,000 or more per year from the individual seller. This would be expected, given the revision in the discount: it is hard to see why a firm would publish a discount to a buyer of \$50,000 or more per year and defend it except on

⁷⁵ Record, 4319-2-1, at 57-58.

⁷⁶ The lower price met by a seller of less than \$50,000 per year to a buyer qualified by another seller was also said to be a legal, cost-based price.

grounds of lower costs. What is less clear are the considerations that led up to the producer's decision to relate the "qualifying" volume to an individual seller.

I suspect that the qualification of a buyer based on his aggregate purchases was felt, were an investigation to start, to leave the firms open to a charge of jointly determining a group of buyers who were to be supplied at a lower price, and perhaps also leave them more open to a charge of price discrimination, since no obvious or simple relationship existed between the seller's costs and the discount granted. Relating the discount to the volume acquired from an individual seller could have been seen to eliminate the potentially collusive nature of the discount and perhaps also to structure it more in accord with common sense: that a seller obviously would secure a saving in supplying a large annual volume to a particular buyer. Morton also advanced the view, particularly in its argument before the Supreme Court, that the Robinson-Patman Act was not applicable to a firm's quantity or volume discounts publicly announced and available to any buyer meeting its terms, so the revision could have been believed to restructure the discount in a way that would escape legal challenge altogether. When the revision was adopted there was no experience under the Act, and perhaps this view was not unreasonable at the time. In fact, the Court of Appeals in Morton went a good part of the way toward accepting it, although the Supreme Court did not at all.

3. Avoiding Mention of Past Discounts

Throughout the proceedings against Morton and International almost no mention is made of any previous discounts to quantity buyers. Morton never mentions the previous

10 percent discount, except to note that a discount to large buyers had been granted for many years. There were a few detailed references by International to earlier discounts. This was done not so much by choice but by necessity, to offset inferences that the FTC was likely to draw from certain invoices that it had submitted as evidence in its case against International. These invoices indicated that discounts were granted to some buyers and not others, from which the FTC might conclude that price discrimination existed. These invoices were issued after the Robinson-Patman Act was passed but reflected orders taken before this. International submitted bulletins to its salesforce reflecting the discounts to quantity buyers in effect when the orders were taken. These discounts were what appeared on the invoices. International's point was that the invoices could not be taken as evidence of illegal discrimination since they reflected discounts existing before the Robinson-Patman Act that had been discontinued just after the Act was passed.

4. Difficulties Posed by the FTC's Challenge

Whether the producers believed that the revision in the discount would lead the FTC not to challenge it is not known. But of course the discount was challenged, and this posed certain difficulties that the producers might not have anticipated and that might not have arisen under the previous discount. Much of the discounting by individual sellers was to "qualified" buyers who did not purchase \$50,000 or more per year from each of them. These were the discounts granted independently of volume to a buyer qualified by another seller. If for any reason the FTC rejected the meeting competition defense,

this discounting to continue would have to be justified on the basis of cost. But this could not be done (or could not be done easily) if lower costs were said to relate to the buyer's purchase of \$50,000 or more per year from the individual seller.

I also note that relating a cost difference to the purchase of a large annual volume from the individual seller might also increase the likelihood that the FTC would reject the meeting competition defense on which the producers relied to defend much of their discounting. This is because, in all cases in which the purchase volume from the seller was under \$50,000 per year and the discount was granted, a lower price would be seen to be charged to certain buyers and not others whose costs of supply were the same -- and this by the sellers' own admissions. If so, the pricing structure might be thought by the FTC to be discriminatory, in that one would not expect competitive sellers to charge different prices to buyers who cost them the same to supply. One can doubt that the FTC would permit the meeting competition defense to justify prices that it might perceive systematically to discriminate in favor of a particular group of "large" buyers.

Relating the cost difference to the volume purchased from an individual supplier would seem to make cost justification more difficult to establish than under the discount structure existing during the NRA and up to the revision in 1936. What the salt companies argued throughout the FTC's proceedings was that the large chains (who could be identified by their purchases of very large annual volumes) were cheaper to supply because merchandising and carload reps' services were avoided or reduced on sales to them. A discount to these buyers could be justified on grounds of lower costs, which by and large would occur independently of the volume supplied to them by the individual

producer. The testimony of Morton's and International's officials during the FTC's proceedings about the character of salt distribution and the services provided on sales to different types of buyers dealt almost entirely with the avoidance of merchandising expense and savings in carload reps' expense on sales to the large chains. In large part, particularly in the case of International, these were the savings said to give rise to the discount. Further, the cost justifications submitted by Morton and International, again particularly that by International, focused on the avoidance of merchandising expense and savings in carload reps' expense on sales to the large chains that seemed almost completely independent of the annual volume sold by the individual seller to any such buyer. In general, the nature of the cost differences said to exist seemed unrelated to the discount structure that they were to explain, and this strengthens the view that the revisions in the discount were primarily an effort to accommodate to the passage of the Robinson-Patman Act.

Arguing that costs were reduced on sales by the individual seller to a buyer of \$50,000 or more per year from it would obviously make it difficult to justify on cost grounds the discounts granted to buyers who purchased less than this amount from the seller -- these discounts were to be defended on grounds of "meeting competition." In fact, International ended up presenting a cost study that sought to justify its pricing only to A&P. It then asked the FTC to accept on faith that similar results would be found in the case of other buyers who secured the discount. The reason for restricting its study to A&P is that this was the only buyer that purchased \$50,000 or more per year from International, so it was the only buyer, from the logic of International's position, that was

cheaper for International to supply. First National Stores also purchased more than \$50,000 per year from International but did so indirectly, through a marketing subsidiary of International's (Eastern Salt Co.). Justification of its discount to First National would have required separate study, and I do not believe that Eastern kept its records in the same detail as International. Detailed records were necessary for any such attempt. At any rate, since most of the buyers granted a discount by International did not purchase \$50,000 or more per year from it, whether the expansion of its justification to include two buyers would have made much difference can be doubted. It is not surprising that International placed great weight on the meeting competition defense.⁷⁷

g. Change In The Size of the Discount

The second change adopted in 1936 was that in all territories except New York, the discount was reduced from two units to one unit (or from approximately 10 percent to 5 percent of list). In New York, the discount was raised from 3 percent to one unit. There are no references indicating why this occurred. No doubt a smaller discount on balance would be less opposed by wholesalers and by the producers who opposed discounts; and a smaller discount might also be less subject to FTC challenge. Whether such considerations had any bearing on this change is not known. During the code list

⁷⁷ The adoption of the revised discount by the New York producers may again have caused some problem with joint buying, although I am not certain of this. There are two wholesaler groups in New York territory who secured a discount after the \$50,000 purchase minimum was imposed that may not have secured a discount just before this change. I note here that the discounts on baker's salt and butter salt, which were abolished in 1937 or 1938, were also altered after the passage of the Robinson-Patman Act to reflect purchases from an individual seller. In the case of baker's salt for example, qualification was changed from 1000 tons per year from all sources to 500 tons per year from an individual seller. Any qualified buyer received the same discount from all sellers. See Record, 4319-4-3-2, at 319-20.

prices were higher than transactions prices after it, and service levels maintained during the code or which would have been encouraged by it might not have been maintained afterward, when prices more freely varied. The reduction in the discount in most territories might have taken account of this, since under more competitive conditions some downward adjustment in services might be expected. If service levels were reduced, then the savings expected on sales to the chains from the avoidance of merchandising expense and reductions in carload reps' service would be less, and represent a smaller percentage of list. This would certainly be true if list prices remained the same when the changes were made in 1936 as during the code. If list prices fell in 1936, this is much less clear. When the change in the discount was announced, new price scales were issued at about the same time. Whether they contained changes in list prices could not be discovered. If list prices during the code went about as far as the producers could go to set prices jointly, then the retention of the same list prices in future might make sense -- to reflect what the producers might hope to achieve. I turn now to consider in detail the FTC's proceedings against International's \$50,000 discount and what the evidence developed during the trial reveals about the likelihood of price discrimination arising from it.

VI. THE CASE AGAINST INTERNATIONAL

a. Introduction

The FTC's challenge to International's \$50,000 annual volume discount is the subject of this Chapter. The discounts to quantity buyers existing before the Robinson-Patman Act, but which did not continue after it was passed, were not subject to challenge, so virtually no inquiry was made or information uncovered about International's discounting practices prior to the Act. In fact, International's attorney objected to any such inquiries by FTC counsel, no matter how limited in nature they were. These objections were sustained. About the only information that was uncovered stemmed from the bulletins introduced by International to refute the inferences likely to be drawn from discounts appearing on invoices issued after the Robinson-Patman Act was passed. These invoices were shown to reflect discounts on orders taken before the Act was passed.

International's defense of its \$50,000 annual volume discount was based on cost justification and meeting competition. International argued that it adopted the \$50,000 discount only after it was clear that its competitors were offering it. International's adoption of the same discount was said to be necessary to meet competitors' offers to buyers that International also wished to supply. Of course, a seller would be unlikely to publish a discount to buyers who met specified purchase requirements unless it cost the firm less to supply these as against other buyers -- or unless the discount was part of a scheme of price discrimination. Presumably the latter was the FTC's position. So International also argued that it adopted the discount because it cost less to supply buyers

who purchased \$50,000 or more of table salt per year from it than buyers who purchased less than this amount.

A difficulty arose in that International also granted the discount to buyers who purchased less (often substantially less) than \$50,000 per year from it. These were the discounts granted to buyers who International argued it was clear purchased \$50,000 or more from one or more of its competitors and who therefore were known to secure a discount from them. It knew this because it had come into possession of competitors' bulletins establishing the discount (that International later adopted) and identifying the buyers eligible to receive it. International could not argue (at least not convincingly) that it granted the discount to these buyers because it cost less to supply them: it would then be arguing that it cost less to supply buyers who purchased \$50,000 or more per year from it and also buyers who purchased less than this amount from it. Further, if International were to argue that it cost less to supply all of the buyers who secured the discount from it, then why would International publish a discount available only to buyers who purchased \$50,000 or more of table salt per year from it?

International's position was that in all instances in which it granted the discount to buyers who purchased from it less than \$50,000 per year, it did so to meet the discount - or equally low price -- known to be granted to these buyers by competitors. This was argued to be a defense to any charge that the FTC might raise under the Robinson-Patman Act about International's pricing to these buyers. Presumably, the FTC would be reluctant to accept this view, because the discount granted by International to these buyers would seem to imply discrimination in their favor, given International's position

that it cost less to supply only those buyers who purchased \$50,000 or more per year from it. In fact, the discount to buyers who purchased less than \$50,000 of table salt from International may have suggested to the FTC that the discount was part of a discriminatory scheme, because it was granted to particular buyers by the seller(s) from whom these buyers purchased over \$50,000 per year and by the sellers from whom they purchased less than this amount. The cost of these latter sales were said to be no less than the cost of sales to wholesalers generally.

If the FTC were to reject the meeting competition defense, substantial difficulty would be created for International. Rejection would mean that the discount to all buyers would have to be cost justified to escape condemnation. Obviously, this would be difficult to do, given International's position on costs. As it turned out, International's cost justification, although it reflected lower costs, did not suggest that lower costs were clearly or closely related to the buyer's purchase of \$50,000 or more per year of table salt from it. Although this seems to make sense in terms of International's actual pricing -- i.e., it granted the discount to a group of buyers whether or not the individual buyer purchased \$50,000 or more per year from International -- in itself this could have raised the FTC's suspicions, because lower costs were not shown to relate to the individual buyer's purchase of \$50,000 or more per year from International, which International said was necessary to secure lower costs. All in all, International advanced a defense very much like the defense that the salt producers seemed to contemplate when they revised their discount just after passage of the Robinson-Patman Act.

b. International's Meeting Competition Defense

1. Establishing the Discount and Qualified Buyers

John L. Ryon was International's chief witness on pricing. He testified that just after the Robinson-Patman Act was passed, International discontinued all discounts to quantity buyers and subsequently adopted the \$50,000 discount as a competitive measure after Morton and certain other producers had published it beginning in July 1936.

Ryon testified that Morton was the first to publish the discount:

Q. ... If you know, who originated the quantity discount?

A. The Morton Salt Company; the present quantity discount based on \$50,000 ...

Q. Now, are you able to fix the approximate date when the Morton Salt Company instituted the \$50,000 discount?

A. It was the summer of 1936; I believe July.

Q. In July of 1936 did International Salt Company have any unit discount to those who purchased \$50,000 worth of table salt from it in 12 consecutive months?

A. No, we did not.

Q. Now, did you manage to secure possession of any bulletin issued by the Morton Salt Company and other companies with reference to their quantity discount?

A. Yes.¹

Morton's announcement to which Ryon refers is dated July 24, 1936 and is in two steps. The first (Morton Bulletin 977) is a general announcement. The second (Morton Bulletin 978) is more specific. Bulletin 977 states:

¹ Record, 4307-2-3, at 2737-40.

Effective immediately, our price on table salt to a buyer who purchases from this company an amount of table salt equal to \$50,000 or more annually will be one (1) Unit Discount less than our price to buyers of lesser quantities.²

Bulletin 978 follows:

Our records disclose that the following buyers have purchased from us an amount of \$50,000 during the past 12 months, and, should they continue to buy at that rate, will be entitled to our published price on that quantity:

The Great Atlantic and Pacific Tea Co.
National Tea Co.
American Stores
Safeway and their wholly owned subsidiaries

A search of our records will be made to ascertain if there are other buyers who have purchased this quantity. Should any buyer purchasing large amounts from a competitive salt company be receiving a price less than our published price, we will meet the competition.³

Similar bulletins announcing the discount and the buyers who qualified were issued by the other producers and circulated to all producers. All such bulletins were received by International. On July 27, 1936, Mulkey Salt Co. (a subsidiary of Morton's) circulated a bulletin announcing the discount and its qualification of Kroger and C.F. Smith (in Detroit).⁴ Both were large retail chains. On August 14, 1936, Morton circulated a bulletin qualifying National Retail Owned Grocers, Inc. (NROG) and another on October 24, 1936 qualifying C.D. Kenny Co.⁵ Morton also circulated its qualification

² Id. at 2740-41.

³ Respondent's Ex. 15, Record, 4307-3-9.

⁴ Record, 4319-4-3-2, at 347.

⁵ Id. at 345, 346.

of The Creasey Co., in April of 1938.⁶ Colonial Stores I believe was qualified by Morton sometime in 1940, although there does not appear to have been a circulation to this effect. In early 1937, Worcester Salt Co. in New York qualified Frankford Grocery Co. and circulated an announcement to this effect.⁷ In addition to the above, four other buyers received the discount -- First National Stores, Wholesale Grocers Sales Co., Thomas and Howard, and Consolidated Grocery Co. -- but there was confusion over who qualified them. Ryon denied that International qualified any of them, although I doubt very much that this was so. I will return to this in a moment.

The list of qualified buyers is larger than during the NRA, although all of the large grocery chains that had qualified then (except for First National, about which there was some confusion) were immediately qualified with the publication of the revised discount. Each of these buyers had been purchasing \$50,000 per year from the qualifying seller before this was imposed as a requirement to secure the discount. The list includes two other large grocery chains -- Colonial and C.F. Smith. Whether C.F. Smith had qualified toward the end of the NRA or after it but before the revised discount was adopted is not known. All of the other "qualified" buyers were groups or organizations of wholesalers and I will have more to say about the discount to them later. These wholesaler organizations -- NROG, C.D. Kenney, Creasey, Frankford Grocery, Wholesale Grocers Sales Co., Thomas and Howard and Consolidated -- represented 7 of the 15 qualified buyers. The bulletins announcing the discount and the various

⁶ Respondent's Ex. 22, Record 4307-3-9.

⁷ Record, 4319-4-3-2, at 326.

qualified buyers when circulated obviously provided clear notice of what buyers secured a discount and by how much price to them was reduced.

On receipt of any bulletin qualifying a buyer, the other producers would issue announcements of the following nature. I use as typical examples those of Jefferson Island and Diamond Crystal. On July 27, 1936, Jefferson announced its adoption of the \$50,000 discount:

Effective immediately our price on table salt to buyers who purchase from this company an amount of table salt equal to \$50,000 or more per year will be one Unit Discount less than our price to buyers of lesser quantities. Should any buyer purchase sufficient salt from a competitive salt company to receive a discount less than published list price, we will meet the competition.⁸

On the same date, Jefferson Island issued bulletin 660-A to its salesforce:

We understand that the following companies have purchased either from us or from competitive salt companies amounts of table salt in excess of \$50,000 during the past 12 months and are, therefore, entitled to the quantity discount of one unit on table salt only:

The Great Atlantic & Pacific Tea Co.
Kroger Grocery and Baking Co.
National Tea Company
American Stores
Safeway Stores
C.F. Smith Co., Detroit

A search of our records will be made to ascertain if there are other buyers who have purchased this quantity and if any are found they will be added to the list.⁹

⁸ Respondent's Ex. 16, Record, 4307-3-9.

⁹ Respondent's Ex. 17, Record 4307-3-9.

Subsequently, for example, on August 15, 1936, one day after Morton qualified NROG, Jefferson Island issued Bulletin 660-B:

We understand that the following company has purchased from a competitive salt company an amount of table salt in excess of \$50,000 during the past 12 months and is, therefore, being allowed the Quantity Discount of one unit on table salt only:

National Retailers Owned Grocers, Inc.

In order to meet the competition, we will allow one unit on table salt only, to this Company.¹⁰

Similarly, Diamond Crystal in Bulletin 81 of August 17, 1936 announces for all territories except New York the discount to quantity buyers:

Effective ... immediately our price on table salt to buyers who purchase from this company or from a competitive producer an amount of table salt equal to \$50,000 or more per year will be ONE UNIT DISCOUNT less than our price to buyers of lesser quantities.

We understand that the following companies have purchased either from us or from another producer an amount of TABLE SALT in excess of \$50,000 during the past twelve months and are, therefore, entitled to the Quantity Discount of ONE UNIT on table salt only: [There follows the list of buyers who had been qualified by this date]. If or when any other Companies are found to have purchased the required quantity of table salt from one producer, either from our Company or from a competitor, their names will be added to this list as qualifying for the one unit Quantity Discount on table salt.¹¹

Several of the producers did not formally publish the discount by and large because individually they did not supply any buyer (except perhaps A&P which had already been qualified by Morton) who purchased from them as much as \$50,000 of table salt over

¹⁰ Record, 4319-4-3-3, at 536.

¹¹ Record, 4319-3-2, at 429.

the past 12 months. These producers simply published bulletins to their salesforces identifying the buyers qualified by other sellers and who therefore were to secure the discount on any sales made to them. Morton admitted quite freely that it circulated the names of its "qualified" buyers to the other producers:

So far as we are concerned, we publish our prices and endeavor ... to inform all of our competitors what our prices are and so that in so doing all of our competitors would receive the information that certain buyers had purchased from us \$50,000 worth or more of table salt in the course of a year and were receiving discount.¹²

2. International's Position on Meeting Competition and Cost Differences

During the proceedings International took great care to show that it had published the \$50,000 discount only after its competitors had done so (as reflected by the bulletins that came into International's possession) and that it granted the discount to certain buyers who purchased less than \$50,000 from it only because competitors were known to have qualified them for a discount. The evidence supporting this was the bulletins of competitors establishing the discount and identifying the buyers who had qualified. International's aim was to establish a meeting competition defense both for the adoption of the discount (and therefore for the grant of the discount to buyers who purchased from International \$50,000 or more per year) and for granting the discount to buyers who purchased from International less than \$50,000 per year but who purchased this amount from other sellers and therefore secured the discount from them. Morton at one point also argued that it had adopted the \$50,000 discount only after one of its competitors had done so. But its effort to support this was feeble, since the documentary evidence

¹² Record, 4319-4-3-2, at 208.

seemed clear that Morton was the first firm to publish the discount and to circulate the names of buyers it qualified. Morton came to rely on the meeting competition defense to justify the discount to buyers qualified by other producers and who purchased less than \$50,000 annually from it.

Ryon also argued that it cost his firm less to supply buyers whose purchases of table salt from International exceeded \$50,000 per year compared with its cost of supplying buyers of lesser annual volumes. According to Ryon, this view was based in part on a study made just after the Robinson-Patman Act was passed which he believed justified on cost grounds the discount to International's \$50,000 buyers. I will later refer to this study in greater detail but note here that it provided a good deal less support for Ryon's position than he implied that it did.

What the study suggests is that International's cost of supplying the large grocery chains (basically the chains "qualified" as discount buyers during the NRA) was less than its cost of supplying wholesalers generally. It also suggests that the cost difference was independent of International's annual volume to these buyers but was instead related to the character of the chains' buying which lowered costs on any amount that International supplied them. This study, which I believe was an updated version of the study submitted to the committee in support of discounts during the NRA (and which was used to support a chain discount independent of the individual firm's annual volume to the buyer) was not introduced as evidence, although the cost study that ultimately was submitted had important similarities to it. Ryon was queried about the earlier study and the responses set out fairly clearly the nature of International's defense:

FTC Counsel: Did the figures of the cost survey made back in July of 1936 justify the discount given to customers purchasing [from International] \$50,000 worth of table salt during 12 consecutive months ...?

Ryon: Yes. The compilation showed very definitely that there was a saving in excess of the quantity discount on sales of \$50,000 worth of table salt.

FTC Counsel: Then it wasn't the fact that competitors were quoting a discount of five cents per case on \$50,000 purchases that caused your company to effectuate its discount on the \$50,000 purchase?

International's Counsel: Just a second. I object to that as arguing with the witness, trying to get the witness to assume a position of law. We represent the respondents here and counsel for respondents will state what our position is, and our position, as a matter of law here, is that we were justified in meeting the competition of our competitors ... And our position is likewise that apart from that our accounting figures show a justification far in excess of any quantity discount. We have here two defenses and I object to any attempt to argue questions of law with the witness ...

FTC Counsel: Did the cost justification have anything to do with putting in the \$50,000 discount?

Ryon: When we found that a quantity discount was being offered, and we knew that in order to be wholly within the law that had just been enacted, the Robinson-Patman Act, that in addition to meeting the competition, if any of these buyers had bought from us \$50,000 worth of table salt, that would be that much more justification [on cost grounds] ... for the quantity discount being made.¹³

It was the establishment of the discount by other producers and their circulation of bulletins identifying qualified buyers that International argued led it to adopt the \$50,000 discount and also grant it to buyers qualified by other producers and who did not

¹³ Record, 4307-2-4, at 3012-16.

purchase \$50,000 or more per year from International. International also argued that it adopted the discount because buyers who purchased \$50,000 or more per year from it were cheaper to supply.

3. International's Discount and Qualification of Buyers

According to Ryon, International first announced its discount on September 17, 1936 in a bulletin to its salesforce from which I quote below:

Quantity Discount

Our records disclose that the following buyers have purchased from us an amount of table salt in excess of \$50,000 during the past 12 months, and should they continue to buy at that rate will be entitled to our published price on that quantity:

The Great Atlantic and Pacific Tea Co.
First National Stores
Wholesale Grocers Sales Co.
Thomas and Howard

A search of our records will be made to ascertain if there are other buyers who have purchased \$50,000 or more of table salt.

Should any buyer purchasing large amounts from a competitive salt company receive a price lower than our published price, it will be our policy to meet that competition.¹⁴

This bulletin was circulated to all producers and was used by each of them to justify to the FTC on grounds of meeting competition the discount granted on any sales to the identified buyers, unless the seller also supplied \$50,000 or more to any of them, in which case the justification was lower costs. For example, Diamond Crystal used International's bulletin to justify its discounts to the identified buyers with the exception

¹⁴ Record, 4319-4-3-2, at 348.

of A&P, whose purchases from Diamond Crystal exceeded \$50,000 over the past 12 months and therefore qualified it for a discount from Diamond Crystal (which it granted because costs were said to be lower). Similarly, Morton and the other producers supplying these particular buyers (and except for A&P and First National none purchased \$50,000 or more from any producer) relied on International's bulletin to justify the discount on sales to them.

International's bulletin seems to indicate that it had qualified First National, Wholesale Grocers and Thomas and Howard. International denied this and I believe for two reasons. First, if cost justification failed, International wished to have a complete defense on meeting competition grounds. It could not do this if it was the first to qualify certain buyers who were then granted the discount by other producers. Second, in the case of at least two of the identified buyers (Wholesale Grocers and Thomas and Howard) International probably knew that cost justification would face substantial difficulty. This is because these two buyers did not actually purchase \$50,000 or more per year from International (or for that matter from any individual producer, a point about which I will say more later). Given that International's costs were said to be lower only if buyers purchased at least this amount from it, the defense would seem destined to fail, at least as it might apply to these two buyers.

What International argued was that except for A&P, which was known to have been qualified by Morton, the three buyers identified in its bulletin had been qualified by American Salt Co. (a Kansas producer) and to support this it submitted a bulletin

circulated by American and dated September 13, 1936 -- four days before International's bulletin appeared. American's bulletin is as follows:

It is our understanding that the following companies have purchased an amount of table salt in excess of \$50,000 during the past 12 months, and are being allowed Quantity Discount of one unit on table salt only ...

First National Stores
Wholesaler Grocers Sales Co.
Thomas and Howard

In order to meet the competition, we will allow one unit Discount on Table Salt only, to the above companies.¹⁵

It is obvious that American's bulletin did not qualify these buyers. In the view of the other producers it was International, and their support for this was International's bulletin. International said it was American. But American's bulletin suggests that it was someone else.

International's bulletin of September 17 is numbered RPA#2. I believe this meant that it was the firm's second announcement involving Robinson-Patman Act concerns. Ryon stated that this was the bulletin that announced the adoption of the \$50,000 discount. But the bulletin in general character is similar to those issued by all of the other producers "qualifying" particular buyers and in fact the wording of it -- that the identified buyers were to secure "our published prices on that quantity" -- suggests that this was what it was. Both the numbering of the bulletin and the reference to the published price to quantity buyers implies the existence of an earlier bulletin. It is possible that it was this earlier bulletin (probably RPA #1) that had established

¹⁵ Respondent's Ex. 19, Record 4307-3-9.

International's discount. But when and if this occurred is not known with certainty, and International submitted no such bulletin. It wished to suggest that it had adopted the discount only after it was clear that other producers had.

Of the buyers mentioned as qualified in American's bulletin, I suspect that International first discounted to them. Its price was met immediately by other sellers and bulletins were circulated by them that these buyers had been qualified. Subsequently, out of step in timing, International announced its qualification of these buyers, as in its September 17 bulletin. That International first discounted to and then qualified First National is logical, since First National was a major buyer in New York territory and International was the only seller from whom First National purchased \$50,000 or more per year. Little is known about Wholesale Grocers except that it was a multi-branch wholesaler in New York territory and a substantial buyer from International. Again, it is likely that International first discounted to Wholesale Grocers and formally qualified it as a quantity buyer after other sellers met the discount and announced the buyer as qualified.

Thomas and Howard comprised a group of wholesalers operating in Louisiana territory. Most producers claimed that International qualified this buyer. That International rather than American qualified Thomas and Howard is corroborated by a letter from International's Louisiana Sales Manager to a salesman. The letter concerns the qualification of Consolidated Grocery, but in it reference is made to International's earlier qualification of Thomas and Howard:

I have not had a chance to check up on all of the houses you have listed, but I believe we are selling some of them and while it is

true the set up is that in order to qualify their purchases of table salt should amount to \$50,000 from one producer, undoubtedly our friends in New Orleans [to which he means Myles Salt Co.] are working in this direction. However, in case they are qualified by one producer, there is no reason in the world why we should not secure at least a portion of the business, because, after they have qualified, we can sell the respective houses based on the quantity discount, under the rule of "meeting competition". We have the same situation with Thomas and Howard Houses. [We] qualified them as a quantity buyer, but other producers are selling them at some of their houses on the quantity discount, even though their sales are small, I believe, as compared to the volume we secure.¹⁶

4. Qualification of Other Discount Buyers

Consolidated Grocery Co. was not qualified until July 1938. The circumstances surrounding its qualification in July 1938 are also reflected in International's correspondence:

The Consolidated Company of Plaquemine, LA is owned and controlled by the United Investments, Inc. Consolidated have 24 branches in Louisiana. The United Investments, Inc. also owns and controls the Cash Grocery and Sales Co. of Louisiana who have 10 branches. This investment company also owns 3 chain store groups in Baton Rouge, Lake Charles, and New Orleans. It is also reported that the United Investments, Inc. are backing with their capital other independent wholesalers in Louisiana and can control their purchases. This is 42 outlets in ... Louisiana, all controlled by one buyer, Mr. Charles Kurzweg

¹⁶ Letter from J.G. Womble, Southern Sales Manager, International Salt Co., to W.K. Taliaferro, Salesman, International Salt Co., June 3, 1938, Record, 4307-4-3-6, at 911. Thomas and Howard's total purchases exceeded \$50,000 per year. Its buyer indicated to International that he could place all orders with one buyer so to secure the discount. Thomas and Howard was then qualified by International and granted the discount by all producers. I do not believe that Thomas and Howard purchased \$50,000 per year from International or any other individual seller. Record, 4319-4-3-4, at 682.

For some reason or another, this outfit has always given the largest percentage of their business to the Myles Salt Company. We have always believed that Myles did something unethical to warrant the majority of this business. However, Jefferson, Morton and ourselves enjoy a fair percentage of this volume.

We had a recent report from our salesman Pearson advising that Kurzweg told him that he had about decided to place all of this salt business with one salt company for a period of 12 months, so that he could qualify for the \$50,000 quantity discount and he also told Pearson that it would not be our company. We almost know that it would be Myles because they have been buying most of their salt from Myles and Myles have approached them on various occasions trying to get them to confine their purchases so that they would qualify. Mr. Kurzweg told Pearson that he was advised by one salt company that all purchases would be taken into consideration in order to help him qualify and we believe that Myles must have told him this.

... Mr. Kurzweg, to my knowledge, has not issued instructions confining his purchases to one producer yet, but if he does do this, it is going to mean a big salt fight in the State of Louisiana because the producers that are cutoff are going to try to get their volume of business elsewhere and all of them will be fighting Myles and the Consolidated outfit which can have but one effect and that is to lower the price level.

... [Kurzweg] told me that he would like to continue to divide up the business, but he understood that in order to qualify, all of his purchases would have to be from one concern and he told me that this was a rule of the salt companies and if he did qualify, he would have to abide by this rule. However, he said the he would like to continue to divide up his business if all of the producers would allow him to pool his purchases in order to reach the \$50,000 minimum. If this could be done, it would certainly avoid a big salt fight and a subsequent reduction in price in Louisiana.¹⁷

The report from Pearson, referred to above, indicates that:

¹⁷ Letter from W.K. Taliaferro, Salesman, International Salt Co., to John L. Ryon, Sales Manager, International Salt Co., June 28, 1938, Record 4307-4-3-6, at 912.

[Kurzweg] ... checked up and found that he was close to the \$50,000 purchase limit and if he decided to confine all of his purchases to one concern, this one concern would give him two additional salesmen and with their help he could make the grade. However, he did say that all salt would have to be taken into consideration, not only package salt, and also said he believed that one salt company would consider his entire purchases in order to enable him to qualify.¹⁸

International qualified Consolidated before Myles and apparently notified other producers to this effect.¹⁹ No commitment was made by Kurzweg to purchase \$50,000 per year from International, so his orders were allowed to be allocated among sellers (and to include other than table salt). In no year for which there is evidence did International supply as much as \$50,000 of table salt to Consolidated.

Events surrounding Worcester's qualification of Frankford Grocery Co. in early 1937 are summarized by an official of Diamond Crystal:

This replies to your ... letter of December 31, [1936] and although Worcester have not qualified subject in usual manner, that is on the basis that subject would purchase not less than \$50,000 worth of table salt from Worcester alone within a twelve month period, they have decided to protect their interests and, since subject would not purchase \$50,000 worth of table salt from one manufacturer and because of business Worcester are enjoying from subject, which business might be replaced by a competitor who might succeed in prevailing on subject to place all his purchases with one producer, Worcester have decided to allow subject the quantity buyers discount of 5 cents per case or one unit on all table salt Worcester sells them.

We are meeting this competition, and ... you may tell subject we will extend to them an additional one unit, the quantity buyers discount on all table salt you sell them

¹⁸ Letter from W.K. Taliaferro, Salesman, International Salt Co., to W.G. Womble, Southern Sales Manager, International Salt Co., May 30, 1938. Record, 4307-4-3-6, at 910.

¹⁹ Record, 4307-4-3-6, at 914.

I am endeavoring to find out the effective date Worcester will establish as the date they will allow subject the quantity buyers additional unit I am of the opinion that it will be as of December 1, or 15 although if it effects shipments made still farther back, we will be guided accordingly in extending this additional unit on shipments made to subject.²⁰

After Consolidated's qualification in 1938, only one other buyer is known to have qualified. This was Colonial Stores, a retail chain operating primarily in Louisiana territory, which first received the discount in 1940. No bulletin was issued qualifying Colonial. Ryon testified that International granted the discount to Colonial to meet Morton's price:

Q. Do you know whether or not Morton Salt Co. gave quantity discount to Colonial Stores about the year 1940.

A. I am quite certain that they did. I have never seen any documents that would indicate in writing that they had.

Q. Were you able to ascertain, and if so how, that the Colonial Stores were receiving a quantity discount from Morton.

A. We were told definitely by the management of Colonial Stores that they were receiving a quantity discount, and they were buying from the Morton Salt Co. at the time.

Q. So they were receiving the quantity discount from Morton, is that right?

A. That is right.²¹

Stratford, Morton's Sales Manager, testified that its discount to Colonial was "to meet a price made by another salt producer, which we understand is given them as a quantity

²⁰ Unsigned letter from Diamond Crystal Salt Co., to J.W. Schmalz, Diamond Crystal Salt Co., Philadelphia, Jan. 5, 1937, Record, 4319-4-3-2, at 350.

²¹ Record, 4307-2-3, at 2781.

discount."²² When asked whether Colonial purchased \$50,000 per year from any salt company, Stratford indicated that he did not know. Harris Dodd, Colonial's buyer, testified as follows:

Q. Well, does your company purchase from the Morton Salt Company \$50,000 worth of salt during any consecutive twelve month period?

A. From Morton salt alone, we do not; from all companies together, we do We get the usual allowance from [Morton and the] other salt companies.²³

Who initiated the discount to Colonial is uncertain, although it probably was Morton.

That the FTC might have suspected discrimination in International's pricing is not implausible. Costs were said to be lower if the buyer purchased \$50,000 or more from International, but of the qualified buyers (and I believe International supplied salt to them all) only two (First National and A&P) acquired this amount from International. Three buyers who International probably qualified (Wholesale Grocers, Consolidated and Thomas and Howard) and who therefore International identified as \$50,000 buyers did not purchase this amount from International. The evidence also suggests that wholesaler groups capable of purchasing \$50,000 per year seemed to have little difficulty in securing the discount, even though the qualifying volume was not obtained from any one supplier, and so may have suggested to the FTC discrimination in favor of large wholesalers and chains. I note that the producers' decision to reduce the discount in all territories except New York from 10 to about 5 percent given the reduction in qualifying volume may in

²² Record, 4319-2-3, at 2264.

²³ Record, 4319-2-2, at 1256.

part have reflected an expectation that wholesaler groups would be able to secure the discount, lowering net receipts on sales to them (unless costs of their supply were reduced) and potentially putting downward pressure on price to other wholesalers.

5. Morton's Position on Meeting Competition

Morton also defended its discount to buyers qualified by other sellers on meeting competition grounds. Peterkin, Sr. set out the firm's position:

Q. Now at times a purchaser does not buy \$50,000 worth of merchandise from the Morton Salt Co., yet the purchaser does receive the unit discount on a \$50,000 purchase, provided he has purchased salt elsewhere to the extent of \$50,000 per year. Am I correct in that assertion?

A. ... [I]f a producer of salt had sold a purchaser \$50,000 or more of table salt and we were informed of that fact, we would realize that the purchaser was receiving from that producer such discount as that producer might have published and if we sold that buyer, we would necessarily have to allow him a similar discount, else we would have no chance of getting any business from him.²⁴

Morton justified its discount to Thomas and Howard on its receipt of International's bulletin qualifying Thomas and Howard as a \$50,000 buyer.²⁵ Whether Peterkin, Sr. believed that Thomas and Howard and the other buyers qualified by firms other than Morton actually purchased \$50,000 from the qualifying seller is doubtful. He noted that although the other salt companies published a discount similar to Morton's, "we may

²⁴ Record, 4319-4-3-2, at 207.

²⁵ Id. at 209.

suspect that they are not similar just as we often suspect that their prices are lower than ours."²⁶

Peterkin, Jr. also testified with respect to Morton's pricing to buyers qualified by others:

Q. Now, with reference to the Thomas and Howard Company, the Wholesale Grocery Supply Co. ..., and the Frankford Grocery Co., is there any connection between the competitive adjustment on table salt grades other than [BL] paid to these companies, and the quantity discount of one unit paid to purchasers of the Morton Salt Co.? ...

A. In the instances just cited, it was determined that the competitive condition with which we found ourselves confronted, in attempting to sell [to these buyers] arose from the fact that other producers were supplying [them] with salt of similar grade and quality to ours, at a price which included a quantity discount of the same amount, roughly, as our quantity discount, applying to a \$50,000 purchase, and it was therefore determined we would meet the competitive situation as we found it²⁷

Stratford testified that Consolidated also received the discount because Morton was told that it had been offered the discount by Myles.²⁸ This seems true according to International's documents, although before Myles qualified Consolidated, International had done so.

²⁶ Id. at 217.

²⁷ Record, 4319-2-3, at 2374-75.

²⁸ Record, 4319-2-3, at 2298.

c. Success of the Meeting Competition Defense

1. International's Efforts During the Trial

International's meeting competition defense was rejected. The likelihood of this became evident to International early in the proceedings and dampened any hopes of success. In general, what International hoped to achieve and what the FTC would accept were so far apart that the FTC's Counsel felt no need to rebut or weaken the factual foundation concerning "meeting competition" that International tried to lay. FTC Counsel moved to reject the whole effort as irrelevant and immaterial to any issue in the case, and in this view he was supported by the Hearing Examiner and later by the Commission. In fact, the defense was rejected without giving the reasons why.

Difficulties first appeared when International tried to cross-examine the FTC's witnesses. These witnesses were representatives of wholesalers and chains whose testimony was to prove that some buyers secured the discount and others did not. Those who did not receive a discount were said to be competitively injured, in that they would prefer also to receive the discount (assuming all else remained the same). Given competitive injury, the discount would be illegal, unless the defenses were to hold.

International sought to elicit from the buyers who secured a discount from International whether they also secured (or could have secured) a discount from other producers, and if so whether it would have been necessary for International to meet the price of the other producers so to secure their business. Each time that International opened any such line of inquiry FTC Counsel objected on grounds of irrelevancy, and

the Examiner sustained all such objections. I set out below just one such exchange which gives the general flavor:

International's Counsel: Have you received any discounts from anyone else?

FTC Counsel: I object.

Hearing Examiner: The objection is sustained.

International's Counsel: May I ask the reason why I am not allowed to ask this witness whether he has received any discounts from anybody else?

Hearings Examiner: There is nobody else being tried except this respondent. I am not trying some other salt company, and that ought to be reason enough.

International's Counsel: Well, the question also is whether we are meeting competition, is it not?

Hearing Examiner: Well, that is not competent of what the other fellow is doing.

International's Counsel: In deference, I submit that the statute is clear.

Hearing Examiner: The objection is sustained on the theory that we are not trying anybody or any other case except that involving the International Salt Company, and what some other company is doing, ... if some other company is giving discounts, is no defense on the part of the International Salt Company.

International's Counsel: ... [I]t is your interpretation of the statute that it would not constitute a defense to this respondent to show that some other competitor of this respondent was giving a discount?

Hearing Examiner: Yes.

International's Counsel: That is your point of view?

Hearing Examiner: Yes, on this theory: that if one man violates a law and commits a felony, that another cannot excuse himself because he has committed the same offense in doing a like kind of business.²⁹

Such an interpretation had important implications when International later tried to present its meeting competition defense. In fact, the whole of its effort was rejected. All of the bulletins announcing the discount by the various producers and the qualification of particular buyers on which International hoped to base its defense were rejected as evidence. I present one such exchange which again gives the general flavor.

FTC Counsel: I object to the admission of the document in evidence for the reason ... that it does not constitute a defense to the Robinson-Patman Act -- the fact that Morton Salt Company was granting to [its] customers a unit discount where such customers purchased \$50,000 worth of Table Salt during the 12 month consecutive period. Morton Salt Company is not ... a respondent ... It would not be an excuse for the respondent to effect a similar discount schedule for the reason that the Morton Salt Company gave a discount to their customers on such quantity purchases.

International's Counsel: ... So far as to relevancy and materiality, I think from the point of view of our defense we are entitled to show ... that the Morton discount was introduced before our discount was introduced, and I think we are entitled to establish that fact ... I think we are also entitled to establish the fact of who received the discount....

...

I think that document is extremely relevant and important both for the date which it proves and for the action which Morton was doing at that time, and its importance will be augmented as other facts are developed

²⁹ Record, 4307-2-1, at 743-45.

I am not advancing the claim ... that because Morton gave that discount to Smith we were justified in giving it to Jones ... My argument only goes this far: That if Morton gave the discount to Smith, we, under the statute, were justified in giving that same discount to Smith.

Hearing Examiner: Whether Morton was within the pale of the statute or not?

International's Counsel: Your Honor, it cannot be known by a business man in July 1936, which is the date of that exhibit, whether or not a discount ... will or will not be attacked subsequently by the [FTC]; and if attacked, whether or not the [FTC] will approve or disapprove of that discount; and if the [FTC] disapproves whether or not the ... Court of Appeals will subsequently agree or disagree with the [FTC].

The businessman has to act. He can't lose his sales, for example, from 1936 ... to 1944, which is the date when the [FTC] decided the Morton case, or until 1945 or 1946, whatever the date may turn out to be, when the courts may pass upon the Morton case.

Now, furthermore, quantity discounts are sometimes lawful The [FTC] has found certain discounts to be justified There is no prima facie presumption that a quantity discount is unlawful. So that a businessman acting in good faith and finding that his competitor has a quantity discount and is employing that quantity discount to sell to Smith, I say the businessman who is also trying to sell to Smith may sell to [him] on the same terms.

Hearing Examiner: You maintain you are entitled to do the same thing.

International's Counsel: Exactly

Hearing Examiner: That is the purpose of this exhibit.

International's Counsel: Yes.

Hearing Examiner: The admission of the exhibit may be denied.³⁰

³⁰

Record, 4307-2-3, at 2742-46.

No reasons are given why the exhibits were rejected. By the time International came to present its defense, the FTC had already found Morton's \$50,000 discount illegal. But this was not true when International tried to cross-examine the FTC's witnesses. Whatever the exact reasons, it seems that the "meeting competition defense" was not to be easily met.

2. Temporary and NonSystematic Price Differences

One issue arose in the case about which I have said little. Sales often occurred below list and this was reflected in several ways on the invoices that the FTC submitted to support its case: for example, list minus a competitive adjustment, or list with a credit memorandum attached to the same effect. Many invoices reflected such adjustments and these were different from the unit discount to \$50,000 buyers. Basically, they were temporary price cuts granted virtually to all buyers within some defined geographic area. They reflected the prevailing market, and the discount to quantity buyers was in addition to any such cuts.

FTC Counsel argued that all such adjustments were illegal discriminations, unless defended either by cost justification or meeting competition. Concerning these invoices, International sought to elicit from the FTC's witnesses whether the prices paid were the prevailing market -- whether they were the same prices at which these buyers could have secured salt from other producers at the time. This effort also was rejected. One typical example follows:

International's Counsel: So, I now show you Commission Exhibit 377 and ... Exhibit 378, the credit memorandum, I ask you if the

figures and entries appearing on Exhibit 378 do not represent a price adjustment to meet a competitive situation in the price of salt?

FTC's Counsel: I object to that.

Hearing Examiner: Sustained.

International's Counsel: May I have the ground for the objection, please?

FTC's Counsel: Because it does not prove or disprove any of the issues.

International's Counsel: Well, your Honor, it does, very much indeed, as I shall show. It shows what the nature of some of these credit memoranda are. It is very important to show that.

FTC's Counsel: Other processors of salt are not here charged with violating the provisions of the Robinson-Patman Act ...

International's Counsel: Here is the buying representative of the Company. He knows what prices were quoted to him if anybody else in the world does ...

The Witness: This particular credit memorandum here, it would be impossible for me to state under oath ... as to just what is the price at that particular time in 1941, and what led up to it. But I do know that there were fluctuations ... to meet competitive situations, and we have had credit memorandums from this salt company to meet competitive situations in the market ... But to say, that particular memorandum and who was quoting and what the price was ... I would not be in a position to tell this Court, but I do say it is not a quantity discount.

It is logical ... to believe that that change in price was to meet a competitive situation in the market at a given time.

Hearing Examiner: You have no way of knowing, however, what price the other fellow [buyer] was paying for the salt?

Witness: No, the only thing we know is what the other salt companies will sell us for. What the other fellow pays for his salt, I don't know.

Hearing Examiner: You rely on what the salesman tells you, what the prices are?

Witness: If a representative comes in, he says: 'I can sell you salt for a stipulated figure', ... we take it for granted that is his price ... We could have bought from the other fellow at the time.

International's Counsel: You buy from other processors of salt other than the International Salt Co., do you not?

Witness: Yes, sir.

International's Counsel: And their representatives approach you, do they not?

Witness: Yes, sir.

FTC's Counsel: I object to that.

Hearing Examiner: Sustained This would enable you, would it not, ... to sell that salt at a substantially lower price? ...

International's Counsel: I think your honor confuses the record

Hearing Examiner: A rose will smell as sweet by any other name. Call it a credit memorandum. By the use of that credit memorandum, you would be able to sell your salt at a lower price? ...

Witness: If we did in this case. I don't know if we did.

International's Counsel: But if you did so, you would be selling at the same prices that were in line with [what] other manufacturers were quoting at that time, isn't that so?

FTC's Counsel: I object to that.

Hearing Examiner: Sustained. There is no evidence that the prices are in line with the other people, nor would it be any evidence that it might be

International's Counsel: Isn't it a fact [that] you seek to buy your table salt at the lowest market price you can obtain?

FTC's Counsel: I object to that.

Hearing Examiner: Sustained. Let us stick with the International Salt Company on this.

International's Counsel: ...[O]ur salesman comes in to quote him a certain price, and if our price is out of line, he will tell [us] so. I think it is obvious this ... company wants to buy ... salt at the lowest price they can get. I cannot see any reason to sustain an objection to a question of that sort, and not permitting the witness to answer.

Hearing Examiner: I do not think that factor ... has anything to do with the issues in the case.

FTC's Counsel: ... [I]t has nothing to do with the issues of the case; whether someone else comes in and quotes him a lower price, or whether A, B and C or X, Y and Z quote a lower price.

Hearing Examiner: I will allow the motions [to strike answers to any questions concerning the prices of other salt companies].³¹

What FTC Counsel and the Hearing Examiner would have permitted under "meeting competition" is not explained, although it must have been extremely limited in scope and it may have had little to do with market processes.

Given that the FTC's witnesses could not be questioned, International later took each of the invoices reflecting sales at other than published list (but excluding the discount to quantity buyers) and through the testimony of Ryon and various bulletins to its salesforce giving instructions on prices to be charged during particular times and within specified geographic areas, sought to show the absence of discrimination, in that the prices at issue were charged to all buyers during the times and inside the geographic areas defined.³²

³¹ Record, 4307-2-2, at 1615-28.

³² Record, 4307-2-3, at 2726-37, 2824-2919.

No mention is made of other sellers. This testimony and evidence was accepted, but had no bearing on the outcome. All of the transactions are listed in an Appendix to the Examiner's decision and any divergences from list prices were found to be illegal discriminations.³³ No effort was made by FTC Counsel to show that the various buyers were competitive. In effect, all differentials from list at different times and in different geographic areas would have to be cost justified, no matter how temporary or unsystematic such price differences were. Ryon indicated that most of the reductions reflected competitive behavior that had eroded published list. This was the "basic evil" that the industry had sought to avoid during the NRA.

3. The Commission's Position

Whether the Commission accepted the Examiner's view of the illegality of temporary and unsystematic price differences is unclear. The Commission's opinion focuses on International's discounts to quantity buyers. But there is a broader statement in its opinion that seems to imply that all price differences uncovered during the proceedings were illegal (since not justified on cost or meeting competition grounds):

The Commission finds that the price differences allowed by respondents in the sale of their table salt of the same brand, including the price differential on purchases of 100 cases or more and the unit discount allowed to the accounts classified as \$50,000 purchasers, constituted discriminations in price between purchasers of commodities of like grade and quality.³⁴

³³ Schedule 1, Trial Examiner's Recommended Decision, 4307-1-1.

³⁴ International Salt Co. et al., 49 FTC 138, 150 (1952).

Since the Examiner did not permit a "meeting competition" defense of any price differences, and since International made no attempt to cost justify those that were temporary or unsystematic, I presume that all price differences were found illegal. This interpretation seems consistent with the order. International was prohibited from charging different prices to competing wholesalers.

The FTC clearly rejected International's meeting competition defense of the \$50,000 discount:

[W]hile respondents on September 17, 1936, apparently altered the amount of and the requirements for receiving this quantity discount to conform with what they understood to be the pricing practices of their competitors, this fact is of no particular importance, since the practice of granting discounts on the basis of the total annual requirements of a purchaser regardless of from whom they were purchased was employed by respondents ... prior to that date. Contrary to respondents' contention, the price differences resulting from the granting of these discounts to some but not all of [its] competing customers were not the consequence of departures from a non-discriminatory pricing scale which were made to meet lower prices of competitive sellers, but represented only the continued application of the discriminatory pricing standard previously adopted ... Moreover, despite the fact that the illegal nature of the discount was brought to the attention of [International] by the Commission's complaint in 1940, there is no evidence that respondents made any attempt to eliminate or lessen the amount of this discrimination until 1948. Respondents, in such circumstances, cannot be said to have acted 'in good faith' within the meaning of Section 2(b) of the statute.³⁵

The reference to discounts before the revision in 1936 I believe stemmed from the evidence presented by International to offset the inferences likely to be drawn from discounts appearing on invoices issued after, but for orders taken before, the Robinson-Patman Act was passed. The FTC's statement suggests that the discount structure in

³⁵ Id., at 154.

effect before the Robinson-Patman Act had features consistent with price discrimination: particular buyers were identified and sold at a lower price by all suppliers and the discount adopted, just after the Act was passed, had in practical effect features consistent with the earlier discount structure. Further, some buyers secured the discount (consistent with the past structure) if their aggregate purchase volume exceeded a specified annual amount, even though they did not individually purchase this amount from at least one supplier even though the annual amount was said to be a requirement necessary to secure a discount. The meeting competition defense was then rejected: a potentially discriminatory price structure cannot be defended through proof that each producer's price meets the price of its competitors. A group of firms capable of price discrimination could surely mount such a defense; and if accepted, might permit discrimination to continue, contrary to the aims of the Robinson-Patman Act. The presumption is that meeting competition cannot justify persistent, systematic price differences consistent with price discrimination, which does not seem to me an unreasonable view. In such instances, cost justification is the only defense. Meeting competition might justify temporary, unsystematic price differences consistent with competitive behavior. But the difficulty in accepting this interpretation is the Examiner's finding (and perhaps also that of the Commission) that all price differences on International's invoices were illegal. This seems to reflect more a hostility to price differences than a concern with price discrimination.

Morton's efforts to justify as "meeting competition" its discount to buyers qualified for the \$50,000 discount by other sellers met with no greater success. Its defense seems

to have been rejected on the ground that systematic and persistent price differences possibly consistent with price discrimination cannot be defended as meeting competition:

Based on the record in this case the Commission finds that the respondent has not shown the existence of facts which might indicate or prove that these discriminations in price were made in good faith to meet an equally low price of a competitor. The evidence submitted by the respondent is too vague and indefinite to show that the long-continued discriminations herein described were made in good faith to meet an equally low price of a competitor.³⁶

This is all that is said and the Supreme Court let this finding stand.

Morton's invoices also reflected temporary and unsystematic price reductions on grades other than BL granted at particular times to all buyers within specified geographic areas. But the proceedings in Morton focused very little on them, and they did not become an issue in the case. These were said to be market prices charged at particular times in particular geographic areas and thus were not discriminatory. Such price differences were not dealt with explicitly by the Commission or the Courts. Nevertheless, the order in Morton is identical to that in International, and so may have prohibited virtually all price cuts unless made everywhere, given the virtual impossibility of applying a cost defense based on accounting figures in such instances.

All in all, the meeting competition defense that the producers seem to have so carefully crafted just after the Robinson-Patman Act was passed carried no weight, and what remained for them was cost justification.

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Morton Salt Co., 40 FTC 388, 396 (1945).

d. Cost Justification of the \$50,000 Discount

1. Difficulty Posed by Rejection of Meeting Competition Defense

Rejection of the meeting competition defense posed a problem that International was not well prepared to meet. Given Ryon's statement that it cost less to supply only those buyers whose purchases from International exceeded \$50,000 per year, it obviously would be on weak ground should it attempt to cost justify the discount granted to the buyers whose purchases from International were less than this amount (and which International had sought to defend on meeting competition grounds). Of all qualified buyers, International supplied \$50,000 or more per year to only two: A&P and First National Stores. Its discount to the other qualified buyers would imply discrimination, since the cost to supply them was said to be no less than that to supply wholesalers who secured no discount.

A second problem involved the discount granted to the wholesaler groups compared with the large grocery chains. There was doubt in Ryon's mind whether the wholesalers who secured the discount were cheaper to supply than other wholesalers. This was expressed in comments of Ryon's from which I quote below:

FTC's Counsel: ... [C]an any one branch obtain the ... discount simply because of its affiliation with a certain buying agency which determines to whom the entire purchase may be diverted? Assuming that the Scranton branch [of a wholesaler group] purchases only \$2,000 worth of table salt in any given year, what justification exists which would entitle that branch to a ... discount?

J. Ryon: There is little justification in my mind. However, we were confronted with a similar problem in connection with one of our customers, whose places of business are located in North and South Carolina. [Ryon is here referring Thomas and Howard].

Its branches collectively purchase the required amount of \$50,000 worth of table salt and thereby earn the quantity discount. There was a question ... whether the individual [branches] should be required to purchase this amount of salt, but we decided that it would be bad business policy and completely unjustifiable to have a chain store discount applying only to chain store organizations, corporately owned and managed as such. In other words, without trying to justify in our own minds the quantity discounts to the [wholesaler] organization, if [it] has purchased \$50,000 worth of table salt and the corporate chain is receiving a quantity discount on its purchases, it would seem to us discriminatory to eliminate the [wholesaler] organization and pay the quantity discount to the corporate chain

There is a very specific saving in sales expense in large quantity sales to retail chain organizations, due to the fact that their orders are automatically received by us with little solicitation from their branches. However, from a more important angle, we are not required to conduct the missionary retail sales service that is given to the wholesale grocery type of concern which depends on the merchandising support that we have to give to the stores which they sell, in order to compete with other salt manufacturers for this business. Therein lies the justification for the quantity discount to retail chain organizations, but in giving the quantity discount to chain organizations we could hardly fail to give the same quantity discount to the wholesale grocer type of organization which purchases the \$50,000 quantity, even though we were obliged to do the merchandising and sales work.

FTC's Counsel: Doesn't the whole principle of quantity discounts boil down to the fact that it is an inducement for them to purchase from your firm, thereby insuring to you the potential volume of their collective purchases rather than an actual and real reflected saving in the cost of selling, handling or production?

J. Ryon: Not exactly. Insofar as the corporate chains are concerned, where the sales cost is decidedly less, there is a saving -- even more than the quantity discount that is given.

FTC's Counsel: Can you submit figures truly reflecting that fact?

J. Ryon: Some years ago, when we had the whole quantity discount problem under advisement, we compiled the sales cost

figures which definitely established the savings in doing business with these corporate chain organizations

FTC's Counsel: You stated that an actual savings in sales cost was realized on volume purchases of retail chain organizations, which type of customer does not receive the missionary sales work of your salesmen. Does the wholesale customer, whose aggregate branch purchases amount to \$50,000 or more, receive such missionary sales service and do your salesmen call on each of these branches in soliciting sales.

J. Ryon: Yes, they do call on each individual branch and, in addition to that, they call on most of the retail grocer customers which each branch sells.³⁷

What International did was perhaps the best that it could given the difficulties confronting it. It compared its costs of distributing table salt to A&P with its costs of distributing table salt to all other buyers. Supplying A&P was shown to be cheaper than supplying other buyers. What inferences were to be drawn from this comparison were left ambiguous. The results for A&P were said to represent International's experience with all quantity buyers -- both wholesaler groups and large chains. It also is stated that the results for A&P were comparable to those obtained in studies that International had made of its costs of supplying other qualified grocery chains. These studies did not include comparisons of International's costs of supplying qualified wholesaler groups with other buyers. These other studies were not submitted during the trial. They were offered to the FTC's staff for examination -- an offer that was not accepted.

I suspect that these studies were not submitted because most of the chains involved did not purchase \$50,000 or more per year from International and because the wholesaler groups were not included in them. The focus on A&P alone at least retained the

³⁷

Record, 4307-4-3-2, at 159-62.

association between lower costs and the purchase of \$50,000 per year from the seller; and perhaps it clouded the issue concerning the wholesaler groups.

What becomes reasonably clear from the A&P study is that the lower costs that it reflects were not related to the purchase of \$50,000 or more per year from International but stemmed primarily from differences in the way salt was distributed to A&P (and probably to the other discount chains whose operations were similar to A&P's) compared with wholesalers generally. The study suggests that certain costs typically incurred in distributing salt to wholesalers were avoided or reduced on sales to A&P (and the other discount chains). The study is interesting in that it reflects cost reductions that appear independent of the seller's annual volume to the buyer and provides more justification of the discount during the NRA than that adopted just after passage of the Robinson-Patman Act. Consistent with this is the statement that International's costs of supplying the other large grocery chains (said to be revealed in its other studies) were comparable to its costs of supplying A&P, although most of these buyers did not purchase \$50,000 or more per year from International.

A difficulty for the FTC was whether it could accept on faith International's representations that its results for A&P applied to all other quantity buyers. Ryon's comments suggested that they could not, at least for the wholesaler groups. A further difficulty was to make sense of a discount granted to a buyer who purchased \$50,000 or more per year from International (because the purchase of this volume permitted cost reductions) but which also was granted to buyers who purchased less (in some instances far less) than this amount from International. I turn now to consider International's cost

justification of the \$50,000 discount to the large grocery chains. The discount to wholesaler groups is discussed later.

2. General View of Differences in Costs

No producer commenting on discounts suggested that sales to the discount chains facilitated savings in manufacturing costs. The products sold to the chains were the same as to other buyers, and the chains did not commit to place orders in ways that might be thought consistent with such savings. The committee in support of the discount during the NRA referred to savings in manufacturing costs derived from dealings with the large chains, but its statements are vague and unsupported. Similarly, no producer claimed that savings in transport expense justified a discount to the chains.

The cost difference emphasized by all producers who favored a discount resided in selling expense. The services of the merchandising reps were said to be avoided on sales to the chains; and typically it also was said that relatively less carload reps' service was required to supply the chains as against wholesalers. It was the carload reps who called on buyers and assembled their orders for shipments in carloads. Any reduction in carload reps' service in supplying the chains is not accounted for by International, and this will become clearer as the discussion proceeds.

The general practice in dealing with the chains can be described roughly as follows.³⁸ Typically the producers would negotiate directly with the chains' headquarters to secure approval to supply their branch warehouses. The general terms

³⁸

The description is drawn from sources scattered throughout the Records.

and conditions of sale, how and where orders were to be placed, the disposition of discounts and invoices, and so forth were then worked out. If the negotiations were successful, the branch buyers were permitted to purchase salt from the producer. Price lists were periodically sent by the seller to the branches and these typically specified that orders when placed were guaranteed against the prevailing the market or the seller's own lowest price. The prices specified were typically for straight cars and the orders for such were placed directly (although not invariably) by the branch buyers to the seller's headquarters or district offices. The chains' orders were shipped directly to the branches, or near the branches if they were included in pool cars.

Generally, and this is certainly true for International, the negotiations and periodic calls on the buyers' headquarters organizations were made by the selling firms' major officials who as a general rule did not make selling calls on wholesalers. In the case of A&P, for example, it was Ryon who called on the firm's head buyer. These calls were relatively infrequent but would offset to some extent any savings in distribution expense that sales to the chains otherwise entailed. In the study that International submitted during the trial, no account is taken of this, although some effort to do so appears in an earlier study of International's.

In the normal course of selling, the carload reps would call on wholesalers within a particular area taking orders for straight cars or for assembly into pool cars. Generally, the wholesalers' orders were taken only when solicited by the carload reps, and in this respect their efforts were facilitated by merchandising reps who called on retailers taking orders for the account of any wholesaler that the retailer designated. Morton,

International and Diamond Crystal maintained separate sales forces for merchandising work. In the case of the smaller firms, similar service was provided by their carload reps directly, or they in other ways assisted the wholesaler in disposing of an order larger than the buyer himself would place, or cared to carry.

In International's case, the carload reps also devoted part of their time to merchandising work. The firm kept detailed records of this and relied on them in its submission during the trial. Merchandising service was not provided to the large chains classified as quantity buyers, and this expense was avoided on sales to them. This is revealed by the testimony of the chains' buyers and of officials of Morton and International, and in the latter's records. The avoidance of merchandising expense on sales to the discount chains would reflect (all else the same) a reduction in selling expense that would seem independent of the amount supplied by the individual seller to the buyer. Put differently, merchandising service would reflect an increase in selling expense on sales to wholesalers that would be independent of the amount supplied by the seller to the individual buyer.

The discount to quantity buyers during the NRA was granted by all producers on any sales made to buyers whose aggregate purchases of salt over the past 12 months exceeded \$100,000 (\$150,000 in New York, \$250,000 in Louisiana) and for whom no merchandising work was done and who retained central control of purchasing arrangements. Except in New York where problems arose, the classification of buyers eligible for the discount identified only large retail chains, and the discount granted to

them is consistent with the avoidance of merchandising expense. This was among the chief justifications advanced for the discount during the NRA.

With the revision in 1936, the same large chains were immediately requalified. The requirement then was that the buyer purchased over the past 12 months \$50,000 or more of table salt from at least one supplier. The immediate requalification of the large chains presumably reflected the fact that each of them had acquired at least this amount from one supplier when this was not a requirement for the discount. Once qualified, the buyer was granted the same discount on any sales regardless of volume made to it by the other producers. In practical effect, this pricing is consistent with avoidance of merchandising expense by each seller (since the reduction in this expense would be thought independent of the seller's volume to the buyer) and consistent with the discount during the NRA. What changed was the method to identify buyers who were to secure the discount. This was changed from buyers who purchased \$100,000 or more of salt over the past year (and more than this minimum in New York and Louisiana) to buyers who purchased \$50,000 or more of table salt over the past year from at least one seller. It is doubtful that the purchase volume itself bore any direct relation to the seller's costs; and the grant of the discount by sellers to buyers whose purchases did not exceed \$50,000 per year from them individually seems to bear this out.

The \$50,000 annual volume purchased from at least one seller necessary for qualification seems itself to have changed in fairly short order. At first the discount was restricted to the buyers who had purchased \$50,000 per year from at least one seller. But with the qualification of Consolidated, Wholesale Grocers, Frankford, and Thomas

and Howard, it appears that this requirement had changed: none of these buyers purchased \$50,000 per year from any one supplier. But they each purchased this amount from all suppliers combined and possibly could have purchased the qualifying volume from one supplier. In effect, the discount was extended to buyers whose aggregate purchases exceeded \$50,000 per year and thus reflected a substantial reduction in the required minimum annual volume from what was required during the NRA. But during the NRA, such requirements had a greater chance of enforcement, and the extension of the discount to the wholesaler groups listed above probably reflects the competitive behavior of the producers tending to erode the published price structure. From Ryon's comments there were doubts that these buyers were cheaper to supply, since they consumed the services of carload and merchandising reps as did other wholesalers. In fact, the expectation that the discount could not be restricted to the large chains may in part account for its reduction (except in New York) from 10 to 5 percent.³⁹

Aside from merchandising service, relatively less carload service was said to be required to supply the chains as against wholesalers. The difference stems from the fact that wholesalers' orders were almost always solicited by the carload reps (in conjunction with missionary work) whereas the discount chains placed their orders with much greater frequency directly to the seller's headquarters or district offices (according to the negotiated agreements) and without the service of the carload reps. International does

³⁹ The revised discount did not state as did that during the NRA that the buyer (to earn a discount) forego merchandising work and retain centralized control over purchasing. I do not know whether the elimination of these provisos in the revised discount was jointly decided. Their elimination appears consistent with Ryon's concern that restricting the discount to large chains would appear "discriminatory." Retention of the provisos would also suggest more than a direct relationship between volume and cost that the firms wished to assert.

not account for this difference in its study and so it remains a potential saving asserted to exist. Nevertheless, there are no suggestions or hints in the records that relatively more carload service was required to supply the discount chains. Some examination of this point is contained in a study by Morton submitted to the FTC before its complaint was issued. Neither this study, nor the approach to the issue it reflects, was later used by Morton in its defense during the trial. The study Morton submitted in the trial does not account for any differences in carload service in supplying the chains compared with wholesalers. I later discuss Morton's earlier submission and present what other evidence exists suggesting that the chains placed their orders without the service of carload reps more frequently than wholesalers.

If the discount chains always ordered directly, services of carload reps would be avoided on sales to them and again would suggest a discount that is largely independent of the individual seller's volume to any such buyer. Again, this would also be consistent with the discount during the NRA and with the practical operation of the revised discount. That the chains always ordered directly is too strong a statement, for the carload reps occasionally called on their branch buyers, perhaps to get orders to complete pool cars they otherwise were having difficulty in filling, or to facilitate the sale of a partial car shipped to a wholesaler and which exceeded the latter's own requirements. In general, however, the position of the producers was that relatively less carload service was required to supply the discount chains than wholesalers. To account for this by a discount unrelated to the seller's volume to any discount chain is not unreasonable, nor need it be discriminatory.

3. Avoidance of Merchandising Service on Sales to the Discount Chains

The avoidance of merchandising service on sales to the discount chains is reflected throughout the Records but primarily in the testimony of the chains' buyers and of Morton's and International's officials. Ryon testified as follows:

FTC's Counsel: Well, Mr. Ryon, do you do any merchandising work for the chain organizations, such as the A&P, and the First National Stores?

Ryon: Through salesmen?

FTC's Counsel: Yes sir.

Ryon: No, we do not.

FTC's Counsel: I see. That is confined to the independent retail stores, is that right?

Ryon: Yes. ⁴⁰

Peterkin, Sr. of Morton made similar comments and I present his views in some detail. He refers primarily to the discounts on BL: to the 10 cents per case to buyers of 5,000 or more cases per year, and to the 15 cents per case to buyers of 50,000 or more cases per year. Buyers of 50,000 cases necessarily were \$50,000 buyers and so were qualified by Morton as eligible for the unit discount on all table grades other than BL. All of the buyers who secured 15 cents on BL were large chains:

Peterkin, Sr.: [I]f a buyer purchases 5000 cases [of BL] in the course of a year, we allow him a fixed discount of 10 cents per case ... and furnish him help in the way of sales work by our own salesmen to dispose of it. To a buyer who purchases in the course of a year 50,000 cases or more, we allow a discount of 15 cents per case ... and furnish little or no resale work

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Record, 4307-2-4, at 3087.

The type of service rendered ... is help by our own salesmen to [the] buyer in disposing of his purchases of round cans to other buyers.

FTC's Counsel: Specifically then, a jobber ... would buy 5000 cases throughout the year, and he would be entitled to the services of your man to dispose of his salt to the various retail merchants.

Peterkin, Sr.: That is correct.

FTC's Counsel: Now the salesman ..., what does he do? He contacts the various retail markets and obtains orders for the particular jobber ...?

Peterkin, Sr.: That is correct.

FTC's Counsel: What are all of the services and functions this salesman performs on behalf of this purchaser of yours?

Peterkin, Sr.: I think that is all the service or function the jobber would care for

FTC's Counsel: If I recall, sir, the services are not given to those who buy 50,000 cases, except in some instances -- there are cases where you do give that service -- is that correct?

Peterkin, Sr.: No, I don't think you put that right. Those services are given to anyone who buys 5000 cases or more per year and becomes entitled to ten cents per case and also to anyone who buys less than 5000 cases and receives no discount Now that means he can buy 1000 cases, or 5000 cases, or he can buy 50,000 cases or more ..., and he will receive the services of our salesmen.

FTC's Counsel: But if he does receive the services of your salesmen and he does buy 50,000 or more cases, what then would be the discount?

Peterkin, Sr.: Ten cents per case. [But] to put it plainly, there are certain types of buyers who are large buyers, such as the Great Atlantic and Pacific Tea Co., for instance, for whom we perform no service in the way of resale work.

FTC's Counsel: They have their own organization and their own facilities for that purpose?

Peterkin, Sr.: Exactly

FTC's Counsel: Am I [correct] ... that there are a few purchasers of 50,000 cases per year receiving fifteen cents ... [t]o whom services of specialty work is also accorded? Am I correct in that or in error?

Peterkin, Sr.: I don't think you are correct We might occasionally do some sales work for chain stores. I don't see how we could, but it is possible that may be done. That isn't our purpose, however, and it is not their purpose to ask us to do it. That is, when you came right down to it, our sales of round cans to a large chain store organization, to whom we allow a discount of fifteen cents per case is more profitable to us than a sale of round cans to a buyer to whom we allow no discount or to a buyer to whom we allow ten cents per case discount and perform services. It is the most profitable business we have.

FTC's Counsel: It really amounts to an outright sale and that is the end of it?

Peterkin, Sr.: That is it.⁴¹

Stratford, Morton's sales manager, similarly testified:

FTC's Counsel: ... [D]oes your company offer any services to jobbers who purchase 5000 cases of [BL] salt?

Stratford: Yes, sir.

FTC's Counsel: What type of services are offered, sir?

Stratford: We solicit the retail trade and secure their orders, the retailers' orders through jobbers who we are selling, some of our 5000 case buyers.... [o]rders that we secure for these jobbers are turned over to them....

FTC's Counsel: That is the 5000 case jobber?

Stratford: Yes.

FTC's Counsel: Or less?

⁴¹ Record, 4319-4-3-2, at 198-204.

Stratford: Or less.

FTC's Counsel: ... [D]oes ... Morton offer [these] services [to jobbers who purchase up to 50,000 cases]?

Stratford: Yes, [w]e offer the same service I have just described We offer the same services up to 50,000 cases.

FTC's Counsel: ... [D]o you offer any services to jobbers who purchase more than 50,000 cases per year?

Stratford: We do not do any similar service for that type. In fact, there are no jobbers as such that are in the 50,000 case bracket, if I am correct.

FTC's Counsel: It would be large purchasers such as retail chain stores?

Stratford: Yes.

FTC's Counsel: A&P?

Stratford: A&P, Safeway, American Stores, Kroger.... [T]hey have their own sales and merchandising practices, and do not permit any such work in their stores, therefore, we haven't done any, nor attempted to. ⁴²

4. Earlier Cost Study by International

In September 1936, just after the revised discount had been adopted by International,

Ryon made the following request to S. Schneider, who was the firm's accountant:

This matter of justification is one which we will have to keep in mind. Our knowledge of expenses involved in selling these large buyers points to the fact that this saving actually exists; however, feel that we should be prepared at all times to defend our policy in connection with quantity discount practices. Therefore, suggest that you arrive at a comprehensive formula for distributing our

⁴²

Record, 4319-2-3, at 2212-14.

expenses as fairly as we can to indicate wherein the savings exists and to what extent.⁴³

No doubt Ryon's concern stemmed from the likelihood that the discount would be investigated, given the wholesalers' opposition to it and the opening to the FTC now available to them after passage of the Robinson-Patman Act.

Schneider's response also emphasizes the avoidance of merchandising service in supplying the discount chains, and his estimate of the saving from this is not confined to the two chains whose purchases from International exceeded \$50,000 per year.

Schneider notes:

The discount is justified through the known saving in selling expense. Due to the fact that we know on our large chain store accounts there is no expense of missionary men involved, we are sure in our minds that there is a saving in this type of business over the sale of the table salt items to other accounts. We have a record of the expenses of our missionary [merchandising] men in our Monthly Territorial Profit Statements on both New York State Evaporated and Avery Carton [Louisiana] Salt. This expense is charged directly against the total sales of table salt, and eliminated from the expense of selling the quantity discount buyers.⁴⁴

The Territorial Profit Statements on which Schneider relies separately report the salaries and expenses of the merchandising reps (merchandising expense) for New York and Louisiana territories for the last quarter of 1935 and the first 9 months of 1936.⁴⁵ Sales reported on the Territorial Statements are net of freight. Freight expenses are

⁴³ Record, 4307-4-3-6, at 900.

⁴⁴ Record, 4307-4-3-6, at 901.

⁴⁵ The Territorial Statements do not account for merchandising work done by carload men and so understates merchandise expense.

important: in 1942 (the only year for which figures exist) they were 17.1 percent of gross sales on shipments from Louisiana and 12.4 percent from New York. Merchandising expense as a percent of net sales of table salt from Louisiana and New York combined to all buyers averages 10.1 percent per month. Over the time period studied, total merchandising expense also equals 10.1 percent of total sales of table salt. Sales to quantity buyers are not separately reported for New York and Louisiana. They are reported only for the two territories combined. They were combined presumably because Schneider's aim was to discover whether the overall saving from the avoidance of merchandising expense on sales to discount buyers covered the unit discount that had just been adopted and which was to be uniformly applied in both fields. For the two territories combined, merchandising expense as a percent of net sales to nondiscount buyers averages 13.5 percent per month. Over the time period studied, total merchandising expense equals 13.5 percent of total sales of table salt.

Schneider's comment to Ryon implies that he considered only the discount chains as quantity buyers, although this is not certain. In Louisiana during the study period, I believe that only large chains were qualified for the discount. In New York, this is a bit less certain. Assuming that merchandising expense was avoided on sales to the discount chains, then prices to them could fall relative to the wholesaler price perhaps by as much as 13.5 percent and yield the same net as that on sales to wholesalers (if in other respects expense rates on sales to both classes of buyers were the same). This figure overstates the potential saving if Schneider included certain wholesalers in New York as quantity buyers but who nonetheless secured merchandising service. But merchandising expense

on sales to nonquantity buyers could not be less than 10.1 percent, and therefore the expense avoided on sales to the discount chains would not be less than this.

Schneider also notes:

Of our sales force in the field, the district managers are the only ones who do any work in connection with these large accounts. Their expenses and salaries must be applied against ... both the regular run of accounts and the large buyers. We add them again to the quantity buyer accounts, as approximately double their effort is spent on these large accounts.

From the general expense items we take the expenses of JLR, AAW, and JGW and apply them against the expense of table salt, doubling this amount in connection with the sales for the large accounts, as all of the expenses of contacting the headquarters of the large buying groups are included in these expense items.⁴⁶

The comment is interesting because it implies that the carload reps did no work on sales to the discount chains whereas they did on sales to wholesalers who secured no discount. No attempt was made to estimate the potential saving from this. But on the other side, Schneider notes that the district managers⁴⁷ devoted relatively more of their time to the quantity buyers, as did JLR, AAW, and JGW (who in order were International's sales manager and its territorial sales managers for New York and Louisiana). This difference he does attempt to account for, as an offset to the avoidance of merchandising expense.

Schneider accounts for the latter by first allocating the salaries and expenses of the individuals mentioned across all grades and buyers in proportion to sales and then

⁴⁶ Record, 4307-4-3-6, at 901.

⁴⁷ District managers were in charge of branch offices and devoted part of their time to selling. The branch offices also performed work related to order processing.

doubling the amount thus assigned to the discount buyers. As so estimated, the additional expense of supplying the discount buyers averages about 2.5 percent of International's sales to them. The individuals listed devoted their efforts generally to International's selling and distribution functions and no doubt their activities increased sales or lowered costs across all grades and buyers. The Territorial Statements assign this expense across buyers of table salt in proportion to sales implying that in general no specific allocations were made to reflect differences in the cost of supplying wholesalers and chains. Probably much of the efforts of these individuals benefitted sales generally.

It seems probable however that some additional time was involved in supplying the chains (according to Schneider approximately twice the effort per unit sold to the chains than to wholesalers). Basically, it appears that the sales officials made calls on the chains' head buyers (and the district managers made calls on the chains' branch buyers). Once supply agreements were reached, these calls appear to have been relatively infrequent (and expressed in terms such as "occasionally", "once a month or so") and were to maintain relations and good will. The impression is that such calls occupied but a small part of the individuals' time, and in fact doubling an allocation initially assigned across grades and buyers in proportion to sales could easily overstate the additional sales that might be generated or other costs reduced if the additional efforts on sales to the chains were directed elsewhere.

Suppose that the avoidance of merchandising expense on sales to the chains is offset by 2.5 percentage points as suggested by Schneider. Then the previous estimates of merchandising expense avoided on sales to the chains would net to approximately 7.6

percent at a minimum, and 11.0 percent at a maximum.⁴⁸ What is the discount with which these savings (which I will simply call the net savings) might be compared?

Over the study period, the discount on shipments from Louisiana was 2 units or approximately 10 percent of the list price of blanket items and of the fob plant price on delivered-price items. For shipments from New York, the discount was 3 percent of the delivered list on both blanket and delivered-price items. Sales of blanket and delivered-price items supplied from Louisiana and New York are separately reported by Schneider. Using International's estimates of relative freight costs for 1942, we may increase sales from New York of blanket and delivered items and of blanket items only from Louisiana to derive estimated sales from which discounts were taken. Net savings as a percent of sales (as so adjusted) then fall to a minimum of about 6.4 (from 7.6) percent and to a maximum of 9.2 (from 11.0) percent. As noted, sales to quantity buyers from Louisiana (where the 10 percent discount was granted) and from New York (where a 3 percent discount was granted) are not separately reported.

Suppose that all sales occurred at list and that sales to discount buyers were distributed between New York and Louisiana in proportion to International's total sales of table salt from these territories. Then as so weighted the average discount granted would equal 4.7 percent of sales to discount buyers -- and the net savings on sales to

⁴⁸ At a minimum because the figure of 7.6 percent is based on merchandising expense expressed as a percent of sales to discount and nondiscount buyers. So merchandising expense as a percent of sales to nondiscount buyers alone would be larger, and it is this expense rate that is avoided on sales to the chains. At a maximum because the figure of 11 percent is based on merchandising expense as a percent of sales to nonquantity buyers. This will overstate the expense avoided on sales to the chains if the classification of discount buyers includes certain wholesalers who received merchandising service.

them would be at a minimum 6.4 percent (and perhaps as high as 9.2 percent). Alternatively, suppose that one-half of International's sales to quantity buyers were secured in Louisiana territory and one-half in New York. Then the average discount would rise to 6.7 percent, which may again be compared with minimum savings of 6.4 percent (and perhaps 9.2 percent). The minimum net saving exceeds or falls just short of the average discount depending on the weighing of sales to discount buyers.⁴⁹ If New York and Louisiana are considered separately (that is, I express merchandising expense as a percent of total sales to discount and nondiscount buyers in each territory), minimum net savings exceed the discount in each case.

Sales often occurred below list particularly during the time period studied. There is evidence that in New York territory in late 1935 and early 1936 transactions prices of table salt items were 15 to 20 percent below list and perhaps by more than this in Louisiana territory. The discount would be a larger proportion of sales than of list prices. This is because in Louisiana territory the discount was 2 units (each unit being a fixed amount of money equal to about 5 percent of list price) and in New York as 3 percent of the delivered list price (for both blanket and delivered-price items). If sales on average occurred by as much as 25 percent below list, then the average effective discount would rise to 6.8 percent (if sales to discount buyers are assigned in proportion to International's total sales from New York and Louisiana) and to 8.7 percent (if one-half of International's sales to discount buyers are assumed from Louisiana and one-half

⁴⁹ It is doubtful that one-half of International's sales to quantity buyers were in Louisiana territory. Sales from New York were about 78 percent of International's total sales of table salt and some of its largest chain accounts were in New York territory. The greater weight assigned to Louisiana raises the average discount.

from New York). As mentioned, the latter overstates sales from Louisiana to discount buyers. The largest estimated discount (of 8.7 percent) probably overstates the case; and the minimum estimated net savings previously noted (of 6.4 percent) probably understates the case. The average effective discount was probably closer to 6.8 percent and the net savings above this. It is doubtful that sales occurred an average of 25 percent below list. If sales were closer to list, the effective discount would fall. Nonetheless, if sales occurred 25 percent below list, then in New York considered separately, the minimum net savings would exceed the discount by about 2.2 percentage points; and in Louisiana by somewhat more than this.⁵⁰

All in all, Schneider's study suggests savings on sales to the large chains and the absence of price discrimination favoring the chains. In fact, in New York, where the discount was reduced to 3 percent apparently in part because of the incentives otherwise created to form wholesaler groups to secure larger discounts, the results seem to imply discrimination against the chains. The results are not inconsistent with Peterkin, Sr.'s statement that the large chains were the most profitable business his firm had. But given what would appear as the competitive behavior of the producers after the NRA, it is difficult to believe that over the longer term the chains would be discriminated against, so presumably additional services or price advantages ultimately were provided to them. This is not revealed in the study, which covered a relatively short period of time.

⁵⁰ At the minimum again because I have assumed for each territory that merchandising expense avoided on sales to the discount chains equals merchandising expense as a percent of sales to quantity and nonquantity buyers combined. This understates merchandising expense on sales to nonquantity buyers avoided on sales to the chains.

e. Cost Justification During the Trial

During the trial International submitted a study comparing estimates of its distribution expenses in selling table salt to A&P and to "All Other Buyers" during 1942. The latter classification includes all buyers except A&P and includes buyers who secured a discount comparable to that granted A&P (other discount chains and certain wholesaler groups) and buyers who secured no discount (primarily wholesalers). The study is based on information from the Territorial Profit Statements. Again, the main difference in expense rates resides in the avoidance of merchandising expense on sales to A&P (and by implication on sales to the other discount chains). No consideration is given to possible savings from reductions in carload service required to supply A&P (and other discount chains) as against wholesalers.

This study is more detailed than the one I just discussed. It includes more expense categories said to reflect differences in the cost of supplying A&P and All Other Buyers. But most of these other categories result in minor differences and several seem unrelated to the basic issue. The study separately estimates expenses incurred on sales from New York and Louisiana. These expenses are summed and expressed as a percent of total sales to A&P and to All Other Buyers. The conclusion is that the overall expense rate on sales to A&P was below that on sales to All Other Buyers and more than justified the discount to A&P. At the time the discount was one unit (about 5 percent of list) in both New York and Louisiana and the difference in expense rates was said to justify more than twice the discount granted. The discrimination this seemed to imply against A&P was not queried or considered by the FTC.

The study brought forth a host of criticisms by the FTC's accountant who recommended that it be rejected. No adjustments to the study were made to reflect the significance or influence of the various criticisms. The criticisms were adopted by the Hearing Examiner and the Commission and on the basis of them the study was rejected.

Table VI-1 summarizes the results of International's study. Part 1 of this Table presents sales of table salt to A&P and to All Other Buyers. The estimated expenses in supplying A&P and All Other Buyers are given in Part 2. The figures in parentheses are expenses expressed as a percent of sales. I turn now to discuss the expense categories and why expenses were said to differ between A&P and All Other Buyers. My aim is to discover whether cost differences might have existed consistent with the discount granted to A&P.

Table VI-1
International's Sales of Table Salt and Estimated
Expenses Incurred, A&P and All Other Buyers, 1942

1.	Sales	A&P	All Other Buyers	All Buyers
a.	NY Evap. Carton	\$ 199,903	\$ 746,836	\$ 946,739
b.	NY Other Evap.	108,548	216,976	325,524
c.	Avery Carton	19,343	238,668	258,011
d.	Avery Other Evap. Table Salt	238	44,405	44,643
e.	Avery Other Rock	2,265	141,084	143,349
f.	Total Sales	330,297	1,387,969	1,717,266
2.	Estimated Expenses on Sales			
a.	Merchandise Expense	\$ 270	\$ 132,097	\$ 132,367
		(.08)%	(9.5)%	
b.	Other Field Sales Exp.	11,031	58,958	69,989
		(3.3)	(4.2)	
c.	Advertising Carton	11,410	74,228	85,638
		(3.5)	(5.3)	
d.	Other Advertising	1,494	5,348	6,842
		(.45)	(.39)	
e.	Sales Promotions	2,854	7,141	9,995
		(.86)	(.51)	
f.	Brokerage	938	41,681	42,619
		(.28)	(3.0)	
g.	Overhead	36,858	159,297	196,153
		(11.2)	(11.5)	
h.	Total Expense	64,853	478,750	543,603
		(19.6)	(34.5)	(31.6)

Source: Respondent's Exhibits 13-V, Record, 1-3/4307-1.

The sales reported are of table salt net of freight, allowances and discounts. Allowances and discounts were charged by International entirely against its total sales of evaporated salt from New York although these were also incurred on sales from Louisiana. In the aggregate, allowances and discounts were small: about .3 percent of International's gross sales of all salt. Sales to A&P are net of the discount granted to it, and this is also true for All Other Buyers who received a discount. All Other Buyers included grocery wholesalers and grocery chains. New York Evaporated Cartons are cases of table salt packed in cartons or cans and basically were blanket priced. New York Other Evaporated Table Salt includes other packs of table salt most of which were delivered-price items. Some sales of salt other than in packs for resale as table salt were made to A&P's branch warehouses and also to All Other Buyers. These sales were relatively unimportant. They represented about 3 percent of total sales to chains or wholesalers and are not included in the Table. Avery sales are from Louisiana. Avery items are defined the same as for New York except that they include rock salt crushed and sold as table salt. Sales of this salt occurred only from Louisiana.

2 (a). Merchandising expense. This represents the major difference in expenses between A&P and All Other Buyers. Merchandising expense was estimated to equal 9.5 percent of sales to All Other Buyers and .08 percent of sales to A&P. The estimate of 9.5 percent understates the difference in expense rates, in that for all practical purposes this expense was avoided on sales to other discount chains but sales to them are included in All Other Buyers. If sales to All Other Buyers are reduced by International's sales

in 1941 to other discount chains, merchandising expense as a percent of sales to wholesalers would rise to about 10.6 percent.⁵¹

Merchandising expense includes (a) salaries and expenses of merchandising reps plus (b) estimated salaries and expenses of carload reps incurred on merchandising work. Merchandising reps devoted the whole of their time to merchandising work whereas the carload reps did not. Estimates were made of the proportion of time that the carload reps devoted to merchandising work. This proportion of the carload reps' salaries and expenses was included as merchandising expense. The proportion of time devoted to merchandising work was estimated from the carload reps weekly "call reports". In the normal course of business, summaries of these reports were compiled by the New York and Louisiana sales offices. No doubt the estimates were influenced by the firm's general understanding of the work of the carload reps.

Merchandising expense reported in Table VI-1 equals \$132,367. However, this amount actually represents 80 percent of total merchandising expense as estimated by International. If the total were used (rather than 80 percent of it), merchandising expense as a percent of sales to All Other Buyers would rise from 9.5 to about 11.9 percent; and to 13.3 percent if 1941 sales to the discount chains are excluded from sales to All Other Buyers.

Only 80 percent of merchandising expense was reported by International within this expense category because this is the way the firm regularly reported its figures in the

⁵¹ Commission's Ex. 3, Record, 1-1/4307-1. 1941 is the latest year for which this information is available. For International's study and testimony concerning it, see Respondent's Ex. 13(a)-13(z)-4, Record, 1-3/4307-1; Record, 4307-2-3, at 2134-67; Record, 4307-2-4, at 3096-293.

Monthly Statements; and it wished to rely as far as possible on its regular accounts in making its defense. Eighty percent of merchandising expense was reported on the Monthly Statements as a specific charge to carton sales and according to Ryon was used as an estimate for what the firm considered the additional cost of distributing table salt against other grades of salt.⁵² Merchandising reps typically sold only carton salt; but when the carload reps called on wholesalers with the merchandising reps' orders in hand, the latter typically placed orders for table salt in addition to cartons. From past experience, the wholesalers' orders averaged (in value) 80 percent cartons and 20 percent other table packs.⁵³ So 80 percent of merchandising expense as a percent of carton sales would yield the same expense rate as would 100 percent of merchandising expense as a percent of total sales of table salt. International could perhaps as easily have reported the one as the other, and it chose 80 percent. The remaining 20 percent of merchandising expense is not excluded from consideration in the study: it is included in expense category 2(b), Other Field Sales Expense. But the allocation of this expense between A&P and All Other Buyers, which I will note in a moment, seems to understate the merchandising expense incurred on sales to All Other Buyers and therefore understates the expense avoided on sales to A&P (and presumably the other large chains).

Schneider's testimony refers in a general way to how salaries and expenses of carload reps were allocated between merchandising and other services:

⁵² Letter for John L. Ryon, Vice-President, Sales, International Salt Co., to Federal Trade Commission, Feb. 3, 1937, Record, 4307-4-2.

⁵³ Respondent's Ex. 13-M, Record, 1-3/4307-1.

Q. Now Mr. Schneider, ... you show a total of \$132,367 as representing merchandise expense.

A. That is right.

Q. Is that all of the merchandising expense?

A. That is all of the expense of the merchandising reps that we charge against carton sales. [That is, it is 80 percent of the total of such expense.]. ... These figures are taken from statements ... that we keep up from month to month, and those are the amounts we charge against the various departments of our business. These statements were ... shown in this form in the exhibit with the idea that counsel for the Commission might want to inspect our statements, and these figures were written in this form so that it would be easy to take the figures directly from our statements which we keep up every year. ...

[In the district offices we receive] two types of reports, merchandising reps reports and the regular carload reps reports [The carload reps] sometimes do merchandising work. When they do they turn in merchandising work reports. So, these figures are an accumulation of these merchandising reports

All of the expense of the merchandising reps is merchandising work. From month to month we receive from our district offices a basis of distribution for the [carload reps] showing the part of their time they spend on merchandising work. We also have their reports which they send in which indicate, in a general way, the portion of their work that is on merchandising work.⁵⁴

The allocation of the 80 percent of total merchandising expense (of the \$132,367) between A&P and All Other Buyers is made in proportion to the number of retail calls made by the merchandising reps on A&P and All Other Buyers. I believe that the number of calls made on A&P also includes calls made on First National Stores. Why this was done is not explained. It was assumed that the merchandising calls to A&P and

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Record, 4307-2-4, at 3166-68.

All Other Buyers by carload reps were made in the same proportion as those by the merchandising reps. Of 274,886 merchandising calls made during the study period, 560 (or .204 percent of the total) were on A&P (and First National). So merchandise expense assigned to A&P was \$270 or (.204)(\$132,367). In practical effect, merchandise expense on sales to A&P was zero.

2(b). Other Field Sales Expense. This category includes three expense classifications which together were an important element of distribution expense. The category contains (1) the 20 percent of merchandising expense not previously assigned to carton sales; (2) salaries and expenses of carload reps; and (3) branch or district office salaries and expenses. These expenses were estimated and allocated to A&P and All Other Buyers separately for New York and Louisiana and then were summed for each buyer classification and expressed as a percent of total sales. Each expense classification was allocated between A&P and All Other Buyers in the same way. I will note how this was done in a moment. As so allocated, Other Field Sales Expense is 3.3 percent of sales to A&P and 4.2 percent of sales to All Other Buyers. The difference was said to justify about 1 percentage point of the discount to A&P.

Branch or district office salaries and expenses are associated with the field sales offices. The district managers' salaries and expenses are included in this classification as are salaries and expenses of support staff. No carload or merchandising reps' salaries and expenses are included here. District managers were engaged partly in selling, and as Schneider noted, they devoted about twice as much effort per unit in selling table salt

to the large chains than in selling to wholesalers. No account for this is taken in the present study.

Orders for salt generated by the field sales reps (for all grades and types of buyers) and also those directly placed by the chains were sent to the district offices. Some clerical work was done in the districts to prepare the orders before they were sent to International's headquarters for billing and to the plants for filling and shipping. Certain branch office expenses were specifically assigned to sales of rock salt for industrial use. These expenses were excluded from the study as were the associated sales. Branch office salaries and expenses were 1.3 percent of total sales of evaporated salt from New York and about 1.9 percent from Louisiana. Other than for the district managers, there is no evidence or testimony to suggest, if A&P and other discount chains were to acquire their salt in the same way as wholesalers, that more service would be required by the branch offices. There is thus little reason to suppose that the character of the chains' buying reduced branch offices expenses and thus provided support for the discount: an order received by the branch from a chain would be likely to impose the same cost as an order submitted by a wholesaler. International never claimed that the chains facilitated reductions in branch office expense, nor did any other producer. I exclude this expense from further consideration.

The 20 percent of merchandising expense not assigned to carton sales is included in Other Field Sales Expense. The expense involved \$33,092 for New York and Louisiana combined. Some part of this expense was allocated to A&P, although the testimony (and

the previous allocation of 80 percent of merchandising expense in category 2(a)) suggests that virtually no such expense was incurred on sales to A&P.

The salaries and expenses (travel, lodging, etc.) of the carload reps are also included in Other Field Expense. This was an important element of selling expense: 5.7 percent of sales generated in the field. For New York, carload reps' expense was 4.1 percent of sales; for Louisiana, 12.2 percent of sales. Why carload reps' expense was so much higher in Louisiana is not known. It could be that at the time transactions in Louisiana occurred at greater reductions from list and that the salesforce had not been adjusted to reflect this. The carload reps called on all types of buyers and it was they who solicited orders from wholesalers and assembled them into carloads.

Each of the three classifications of expense within Other Field Sales Expense was estimated and allocated to A&P and All Other Buyers separately for New York and Louisiana. These allocations were then summed and expressed as percentages of total sales. The total expenses in these three classifications were not confined to table salt, so they were allocated between table and all other grades of salt. What International did was to follow the approach taken in its accounts. It assigned the expenses across the various grades and types of salt in proportion to sales. However, before these assignments were made, sales of table salt in cartons were excluded from total sales, so that the allocation of Other Field Sales Expense to table salt was in proportion to sales of table salt other than cartons. Carton sales were approximately 80 percent of total table salt sales, so that the part of Other Field Expense assigned to table salt was in proportion to only 20 percent of International's total sales of such salt. The expense so assigned to

table salt was then assigned to A&P and All Other Buyers in proportion to International's sales of table salt excluding cartons to each such buyer classification.

Two features of this allocation are confusing. The 20 percent of merchandising expense is assigned to A&P and All Other Buyers not on the basis of retail calls (as was the 80 percent of merchandising expense) but in proportion to sales of table salt other than cartons to each buyer classification. Since merchandising service was not provided to A&P, this assignment would bias the result against A&P. Further, the allocation assigned the bulk of the 20 percent of merchandising expense to buyers of grades other than table salt. About 82 percent of International's total sales was of grades other than table salt. In fact, only about 4 percent of the 20 percent of merchandising expense was allocated to table salt, the balance being assigned to other grades. Throughout the proceedings International emphasized that merchandising service was provided only on sales of table salt. Why International took this approach is not explained.

Second, carload reps' expense is allocated primarily to buyers of grades other than table salt: carload reps' expense allocated to table salt resulted in an expense rate equal to about 1/5 that on other grades. This might reflect the possibility that merchandising services were substituted in large part for services that would otherwise be provided by carload reps, so the latter devoted their efforts primarily to sales other than table salt, and the allocation reflects this. If so, this conflicts with Ryon's view that merchandising expense reflected the additional cost of distributing table as against other grades of salt. I do not have information that would allow me to explore this issue further.

At any rate, that part of the 20 percent of merchandising expense and carload reps' expense allocated to table salt was then assigned to A&P and All Other Buyers in proportion to International's sales of table salt to each such classification (albeit of table salt other than cartons). One might think that no difference in expense rates would be shown. But a difference is shown, for the following reasons.

Of its total purchases of table salt, A&P purchased relatively less in cartons than did All Other Buyers, so relatively more of the Other Field Sales Expense assigned to table salt was allocated to A&P. Expressed as a percent of total sales (including cartons) to A&P, this resulted in a higher expense rate than that for All Other Buyers (whose purchases were relatively more of cartons, to which none of the expense was assigned). However, more than offsetting this is that A&P, compared with All Other Buyers, purchased relatively less of its table salt not in cartons from Louisiana than from New York; and Other Field Expenses were higher for Louisiana than for New York. On net, Other Field Sales expense on total sales to A&P (including cartons) from New York and Louisiana is reported as 3.3 percent; and 4.2 percent on sales to All Other Buyers. In general, A&P was said to be cheaper to supply because it purchased relatively more of its requirements of the salt to which Other Field Sales Expense was assigned from New York than from Louisiana.

Why International believed that these differences helped justify its discount is not explained. Consider the difference between A&P and All Other Buyers in carload reps' expense resulting from A&P's purchase of fewer cartons relative to its total purchases than was true for All Other Buyers. When carload reps called on wholesalers, the latter

placed orders for all table salt items, and it seems unlikely that International's selling costs would differ in relation to differences in the proportion of carton to other table items that their orders contained. Buyers could choose among all items, and price did not vary in relation to order composition. Similarly, A&P's orders included all table items, and again it is hard to see why selling costs would differ in relation to the proportion of carton to other table salt that its orders contained. Prices to A&P also did not vary in relation to such differences. The fact that A&P ordered relatively fewer cartons and more of other table items than did All Other Buyers would seem unrelated to any selling cost justifying a discount to A&P but not other buyers. If the allocation of carload reps' expense were made to A&P and All Other Buyers in proportion to sales of all table salt to them, no difference in expense rates would be shown.

Similarly, part of the difference in expense rates between A&P and All Other Buyers relates to the fact that A&P purchased relatively less of its requirements of table salt other than cartons from Louisiana (where the expense rate was higher) than from New York (where the expense rate was lower). Overall, A&P was said to be cheaper to supply because it obtained relatively more of its salt from New York where the expense rate was lower. But the discount did not vary in relation to the proportion of the buyer's purchases obtained from one or the other territory. For example, if A&P had confined its orders entirely to New York, it would have secured the same discount (and faced the same list prices) as if its orders had been placed entirely in Louisiana. First National Stores placed its orders entirely in New York and it secured the same discount as did A&P, suggesting that the discount was independent of the location from which sales were

made. On sales from Louisiana to A&P compared with All Other Buyers purchasing from Louisiana, no difference in selling expense was shown to justify a discount to the former but not the latter; and similarly for sales made from New York. All in all, the entries in Other Field Sales Expense do not help justify a discount to A&P but not to other buyers.

2(c) and 2(d). Carton Advertising and Other Advertising. International's advertising was primarily of Sterling brand table salt in media of general circulation. Of the total expense reported for these two entries in Table VI-1, 93 percent was advertising of carton salt, and virtually the whole of this was spent on advertising Sterling. Carton advertising expense was allocated between A&P and All Other Buyers in proportion to the number of Sterling cases sold to them, so in effect a uniform amount of money per case was assigned to A&P and All Other Buyers. The amount allocated to A&P is 3.7 percent of total sales; and that allocated to All Other Buyers is 5.3 percent of total sales. The difference stems from the fact that A&P purchased fewer Sterling cartons relative to its total purchases from International than did All Other Buyers. Since a uniform amount of money was assigned per case, the amount assigned to A&P necessarily represented a smaller proportion of International's total sales to A&P than to All Other Buyers.

Other Advertising (Category 2(d)) refers to advertising not specifically directed to carton salt. Much of this was institutional advertising and was allocated in International's accounts across all grades and buyers in proportion to sales excluding cartons. The amount assigned to A&P equals .45 percent of total sales; that assigned to All Other

Buyers equals .30 percent of total sales. The allocation to A&P is relatively larger because its purchases were composed of relatively more of the salt items to which the expense was assigned than it was true for All Other Buyers. The difference is minor.

What International tried to show by these entries is not explained. A&P and All Other Buyers presumably purchased Sterling appropriately in response to their customers' demands. Consequently, for a given price and advertising level, purchases of Sterling by A&P and by All Other Buyers would be extended until, from International's perspective, the cost of supplying either buyer classification was covered, in that an increment of Sterling diverted from A&P to All Other Buyers would gain roughly what was given up. The allocation of equal amounts of money per case between A&P and All Other Buyers would seem to reflect this. If A&P were more or less responsive to advertising than All Other Buyers, this might influence the amount of advertising done. But this would not seem to result in a discount to A&P compared with the price to other buyers. A lower price to A&P might be justified if an increase in its relative purchases of Sterling was itself advertising that promoted the demand by All Other Buyers, assuming that a comparable effect did not occur in the opposite direction. If so, the price of Sterling might be discounted to A&P by more than other table salt. But this was not done. All in all, absent any analysis by International, I exclude the advertising entries as reflecting a cost saving justifying a discount to A&P.

2(e) Sales Promotions. This category reflects relatively minor expenses of \$2854 on sales to A&P (.86 percent of sales) and of \$7141 to All Other Buyers (.51 percent of sales). The expenses were those not included in regular advertising budgets and involved

expenditures on trade shows, short term dealer incentives and contests, novelties, etc. The expense includes salaries and expenses paid and directly attributable to the promotions. Of the total of all such expenses, International separately estimated that part attributable to carton sales. This resulted in an expense on carton sales of .63 percent. The remaining expense was allocated across grades in proportion to sales excluding cartons. As so assigned, promotion expense was .46 percent of sales of table salt excluding cartons. In total, promotion expense was .58 percent of sales of all table salt. From this total, the promotions paid to A&P were separately derived. This resulted in promotion payments to A&P of \$2854. The balance was assigned to All Other Buyers, resulting in the figure of .51 percent.

What the difference between A&P and All Other Buyers was designed to show is neither obvious nor stated. In general it would be thought that promotional expenditures would be allocated among buyers in proportion to the additional sales expected from them. If so, what relation the amounts paid any buyer would bear to his aggregate salt purchases is not clear. If the expenses were allocated in relation to expected sales, there would be no difference in expense rates across the buyer classifications. Promotions could have been cheaper to arrange for A&P than for All Other Buyers, so relatively more promotional expense was incurred on A&P than All Other Buyers. This could be reflected in a higher expense rate on sales to A&P. But the payments to A&P would be thought to cover the lower cost of the promotions, and so would not bear on other cost reductions that might justify the discount. It also could be that promotions to A&P permitted relatively greater reductions in other selling expenses than promotions to All

Other Buyers. Payments to A&P could again be larger relative to sales than in the case of All Other Buyers. But the additional promotions to A&P would be expected to help compensate for the cost reductions that they permit, so these cost reductions cannot be fully used to justify the discount. As a result of this possibility, I will consider promotional expense assigned to A&P as an offset to other cost savings shown that might justify the discount granted to it.

2(f) Brokerage. This category reflects what appears as an important difference in favor of A&P: the entry for A&P is \$938 (.28 percent of sales) and for All Other Buyers, \$41,681 (3.0 percent of sales). Difficulty in interpretation arises because the category includes more than brokerage and the amounts attributable to the various components cannot be separated from the total. Besides brokerage, the entry includes check-out allowances, and in fact the whole of the \$938 charged to A&P represents payment for this.⁵⁵ What part of the charge to All Other Buyers represents check-out allowances is unknown. Check-out allowances paid to All Other Buyers probably were a larger proportion of sales to them than to A&P because the former typically ordered their requirements for shipments in pool cars. If A&P was as likely to order in pool cars as other buyers, there would be no difference in cost since whether the check-out allowance was paid to A&P or to someone else would not reflect a difference in International's costs. Avoidance of check-out allowances would provide greater support for a carload than for the \$50,000 discount, since the expense would be avoided

⁵⁵ I remind the reader that a check-out allowance was a payment by the salt producer to the recipient of a pool car to inform the other participants of the car's arrival and arrange the orderly pick-up of their salt.

whenever a straight car was ordered. The absence of a carload discount suggests that savings from this source were relatively minor.

The entry also includes brokerage. The amount paid as brokerage on sales to All Other Buyers came from International's records. Schneider testified that brokerage was not paid on sales to A&P. Morton made the same point but more broadly: that brokerage was not paid on sales to discount chains. The absence of brokerage on sales to A&P suggests that less carload service was required on sales to A&P. This is because the brokers performed many of the same services as carload reps. Also, A&P had branch warehouses in many areas where International employed brokers. I take the absence of brokerage on sales to A&P as a clue suggesting that less carload service was required to supply A&P. But as noted before, International's allocation of carload reps' expense did not reflect this in any relevant sense. Absence of brokerage on sales to A&P would reflect a cost difference in A&P's favor if the carload reps did not fully offset, on sales to A&P, the services that brokers provided to All Other Buyers but not to A&P. I doubt that International's carload reps provided such an offset, but this cannot be discovered from International's study.

The brokerage entry for All Other Buyers is 3 percent of sales. Brokerage rates were themselves about 3 percent suggesting that brokers were employed on virtually all sales to these buyers. This is incorrect. The reason is that this category of expense also includes commissions paid by International to sales subsidiaries and independent agents who performed all of the distribution services that International itself provided in areas

in which it did not use subsidiaries or agents. The commissions paid the subsidiaries or agents far exceeded brokerage rates. They were about 15 percent of list.

This expense is not separately reported. A&P purchased no salt from any of the subsidiaries or agents but instead dealt directly with International. The question then is whether sales to A&P imposed less cost than the commissions paid on sales to buyers who purchased from the subsidiaries or agents. Since part of the commission included payment for services comparable to International's carload reps no cost difference for such services would be shown given International's method of allocating carload reps' expense elsewhere in its study. Part of the commission represented payment for merchandising service. Since this was incurred only on sales to All Other Buyers, merchandising expense avoided on sales to A&P would be higher than what I previously reported. That A&P did not buy from International's subsidiaries or agents again provides a clue that less carload reps' expense was incurred on sales to it, but nothing can be made of this here. In general, I exclude the brokerage category as reflecting a cost difference in supplying A&P as against All Other Buyers.

2(g). Overhead. This category includes general business expenses derived from International's records and assigned across all grades and buyers in proportion to sales. The expenses were separately derived and allocated for New York and Louisiana and the amounts so assigned to A&P and All Other Buyers were summed and expressed as percentages of total sales to each buyer classification. This resulted in a slight difference favoring A&P (11.2 v. 11.5 percent of sales). The difference stems from relatively higher Overhead Expense for Louisiana, where A&P purchased relatively less of its total

requirements than did All Other Buyers, so that less of the higher Louisiana expense was assigned to A&P.

The main reason why Louisiana overhead is reported higher than New York is because royalties paid to the owners of the land on which the Louisiana mine was located exceeded the depletion allowance charged against the New York deposits owned by International. The salaries and expenses of Ryon and the Territorial Sales Managers were included in the Overhead category, but no account is taken as in Schneider's earlier study of the fact that these individuals devoted relatively more of their time to the large chains than wholesalers. There is no reason to believe (and none is given) that royalties or depletion allowances would vary in relation to whether salt was sold to A&P or other buyers and therefore that these particular entries were relevant to the discount. I note again that A&P would have secured the same discount had it confined its purchases to either territory. I believe that International listed overhead expenses primarily to show that in its accounts no specific allocations were made between discount and other buyers - - to show that the issue was considered and resulted in no cost difference.

To sum up, except for merchandising expense, International's study contains a number of accounting entries that do not reflect clearly any cost differences relevant to the discount question. The service of carload reps might have been reduced on sales to A&P (and possibly other discount chains) but this expense was allocated between A&P and All Other Buyers in such a way that no savings were shown. What remains is that merchandising service, which was important on sales to wholesalers, was almost completely avoided on sales to A&P (and other discount chains). Estimates of the

expense of merchandising service avoided on sales to A&P range from 9.5 percent to 13.3 percent of sales. The minimum figure reflects 80 percent of merchandising expense as a percent of sales to All Other Buyers; the maximum figure reflects all merchandising expense as a percent of sales to All Other Buyers less sales to the other discount chains. The range shifts slightly downward if account is taken of the additional sales promotion payments to A&P.

How do the estimates of merchandising expense avoided on sales to A&P compare with the discount granted to it? The discount was one unit from list on blanket items and from the fob plant list on delivered-price items. Sales figures are reported net of freight and allowances. For purposes of comparison, I have increased sales of blanket items by estimates of freight expense. The estimate of merchandising expense as a percent of sales so adjusted then range from 8.2 to 11.5.⁵⁶ The unweighted average discount for all table salt items is 5.1 percent of list. The variation in discounts across items is relatively small. For commonly traded cartons, the average is 4.9 percent of list. Transactions often occurred below list. How far below list sales might have occurred in 1942 is not known. The average discount rises to 5.6, 6.3 or 7.1 percent if transactions occurred respectively 10, 20 or 30 percent below list. The minimum estimated savings for A&P is 8.2 percent of adjusted sales; the largest discount noted above is 7.1 percent (if sales occurred 30 percent below list). The maximum estimated saving is 11.5 percent; the smallest discount is 5 percent (if all sales occurred at list). So savings in excess of the discount range from 1.1 to 6.5 percentage points.

⁵⁶ I have netted from these figures the additional promotional payments to A&P.

If we recall previous discussion that the time spent on the large chains by International's district managers and sales officials could have reflected an increment in expense approximating 2.5 percent of sales to them, then accounting for this reduces the range of savings in excess of the discount to between -1.4 and 4.0 percentage points. The figure of -1.4 is based on only 80 percent of merchandising expense assigned to All Other Buyers. If all merchandising expense is assigned to table salt, the saving in excess of the discount ranges from 1.5 percentage points (if all sales occurred at list) to 2.5 percentage points (if sales occurred 10 percent below list). The last two estimates would be a bit larger if other discount chains are excluded from All Other Buyers. All in all, the figures suggest that the avoidance of merchandising service in supplying the discount chains is close to the discount they were granted, suggesting the absence of price discrimination favoring the discount chains. This result is similar to that in International's earlier study. Previously, I had given arguments why price discrimination favoring the discount chains probably did not exist, although discrimination could not be ruled out. Results from International's cost studies further weaken the case for discrimination. What also is clear is that any reduction in International's costs of supplying A&P (and probably the other discount chains) was related to the character of the chains' buying rather than the fact that A&P purchased \$50,000 of table salt per year from International.

f. The Objections to International's Study and the Commission's Opinion

1. Criticisms by FTC Staff

International's study brought forth testimony by the FTC's accountant concerning its acceptance as a defense. A number of criticisms were raised, but no results of the study were adjusted to reflect their significance. The testimony does not analyze the character of salt distribution to help suggest how or why International's study was misleading. In sum, the accountant's testimony failed to focus on significant cost relationships in salt distribution.

William Warmack, the FTC's chief witness, summed up his position:

In my opinion these exhibits are inadequate, incomplete, and insufficient to show what costs should be rightfully assigned to the separate customers who paid separate prices for their products [T]hese exhibits represent a conglomeration of mathematical calculations and guess work and certainly do not represent in my opinion, a sound accounting study to say the least.⁵⁷

What criticisms led up to this conclusion?

(1) The All Other Buyers Classification is too Broad.

Buyers within this group should be separated according to the quantities they buy and the prices they pay for those quantities. There are several of them. Then an intelligent comparison could be made between the cost to serve one group buying one quantity at a price applicable thereto, and another group buying another quantity at a price applicable to that quantity, and so on down the line. If for no other reason, that one reason in my opinion invalidates this document as showing anything worthwhile with respect to cost.⁵⁸

⁵⁷ Record, 4307-2-4, at 3356.

⁵⁸ Id. at 3359.

It is true that the classification is too broad. It includes certain wholesalers who secured a discount but who it appears also received merchandising service and other chains that secured a discount. It also is too broad in that it masks any relationship between the discount and the purchase of \$50,000 of table salt per year from International, which was said to be necessary to secure lower costs. But I do not believe that considerations such as these were what the witness had in mind. His comment seems instead to imply that there existed a series of discounts in relation to quantity and each of them required separate justification. Obviously, a single buyer classification would be too broad if it contained buyers who received a range of discounts each requiring justification.

International's Counsel later asked the witness what he meant. The exchange seems to indicate that he believed there existed a range of quantity discounts to be justified:

Q. ... [S]tate what the discount schedules were that you were testifying about ... yesterday?

A. You have one discount schedule which states that a 5 cent discount is given if 100 - case lots are sold or more, in some territories.

Q. Did you say anything about that [in your prior testimony]?

A. That is one I had in mind, yes. There was a discount that you gave for, I believe \$50,000 purchases per annum, and I do not remember exactly just how many other discounts that you have given as set forth in these records, but I had those things in mind.

Q. By 'those things' you mean the two discounts you have mentioned, and perhaps other discounts also?

A. If you gave other discounts, that would be included, yes Any discount where price follows quantity that your company may have.⁵⁹

The exchange continues and the Examiner soon interjects:

You challenge this witness because he doesn't know what the various discounts were. He referred to discounts. He apparently doesn't know although the Trial Examiner knows there were lots of different discounts given to different types of customers.⁶⁰

International's counsel did not let the matter rest:

Q. Do you claim that International Salt Co. ... had three discounts?

A. Oh, they had lots of discounts.

Q. How many do you say they had.

A. I certainly do not have the vaguest idea more than they had several

Q. And you don't remember how many several is, which you had in mind, is that right?

A. Oh, they had quite a number of them. I do not remember exactly how many they had.⁶¹

The exchange seems to suggest that the witness believed the study should be rejected because the All Other Buyers classification was too broad to permit justification of a range of quantity discounts. But such discounts did not exist. The Examiner's comment is clearer: he is referring to the various price reductions and credit allowances granted

⁵⁹ Id. at 3447-48.

⁶⁰ Id. at 3451.

⁶¹ Id. at 3454-54A.

to adjust price to the prevailing market and to the individual discount units for the various table salt items. In his view, all would require separate justification. Whether the witness had in mind the same thing as the Examiner is not clear. The witness did not express concern that certain buyers secured the discount even though they did not purchase \$50,000 per year from International, which was said to be necessary to secure lower costs.

(2) Merchandising Expense. This was recognized as the primary determinant of the lower expense rate on sales to A&P but was felt not to have been established "in accordance with ... sound and accepted accounting practice and procedure."⁶²

(a) Insufficient detail was given to indicate how the expense was derived. The entry includes salaries and expenses of merchandising reps and an estimate of salaries and expenses of carload reps based on the proportion of time they spent on merchandising work. The latter was based on information on sales reps' activities reported monthly by the territorial offices, and all of the information leading up to the assignment was made available to the FTC for its consideration. The criticism cannot be considered substantive in nature. International's approach to the problem does not appear unreasonable.

(b) The assignment of 80 percent of merchandising expense to carton salt was not sufficiently justified:

The record and testimony of Mr. Schneider will show that the company has never made a thorough cost survey or analysis to determine whether or not dollar sales is a sound measuring factor and may be expected to afford accurate results. In the absence of

⁶² Id. at 3366.

that the figure of \$132,367 assigned to carton table salt is a guess figure, an estimate, and a rough one at that.⁶³

The figure of \$132,367 is 80 percent of merchandising expense and this amount was assigned to carton sales. Assigning 80 percent of the expense to cartons resulted in the same expense rate as if the whole of the expense were assigned to sales of carton plus other table salt. If an individual buyer placed an order whose composition in terms of cartons and other table items diverged from the average, there is no reason to believe that costs would vary in relation to this, or that as a result some other assignment of the expense would be required. Merchandising service was provided on sales of table salt only, and International's point was that the whole of this expense was avoided on sales to A&P. What was peculiar about International's study was not the assignment of 80 percent of this expense to cartons but that its allocation of the remaining 20 percent assigned most of it to buyers who purchased no table salt and who therefore received no merchandising service. The effect of this allocation was to reduce merchandising expense on sales of table salt and therefore the expense avoided on sales to A&P. This was not noted or mentioned by the witness. If the whole of merchandising expense had been assigned to table salt, concern about the 80/20 split would seem to be eliminated. That the whole of the expense should have been assigned to table salt seems a point with which the witness would have agreed. He seemed to have no problem assigning none of the 80 percent of merchandising expense to A&P if this expense was avoided on sales to A&P. This is reflected in a comments he later made:

⁶³ Id. at 3362.

Q. Would you say that the activities of merchandising men who go out to retail stores ... and solicit business which goes to wholesalers is an item which on a proper cost distributing basis should be charged against A&P in any respect.

A. If this man.... calls on A&P, whatever portion of his time is applicable to that activity that should be assigned to A&P.

Q. Other than a direct call on A&P it should not be assigned to A&P.

A. I do not see how it should be. If A&P is not getting any service from this activity, why no part of that class of expense should be assigned to A&P in my opinion.⁶⁴

(c). Nevertheless, the allocation of 80 percent of merchandising expense between A&P and All Other Buyers in proportion to the number of calls was questioned: (1) there was no detailed study indicating that calls on A&P were of reasonably equal duration compared with those on All Other Buyers; (2) it was not clear that the expense would be assignable on such a basis to each of International's customers. I comment briefly on each point.

(1) No detailed study was made of call duration. But International's study was to show that for all practical purposes calls on A&P were zero, so that their duration would be of little practical significance. Let the calls actually made on A&P (which also includes those on First National) be 10 times each the duration of those made on All Other Buyers. Then if the number of calls on A&P is increased by a factor of 10 and the balance assigned to All Other Buyers, merchandising expense as a percent of sales to A&P would rise from about .08 to 1.0 and for sales to All Other Buyers would fall from

⁶⁴ Id. at 3457-58.

11.9 to about 11.7. The overall results would not change much. No consideration was given to suggest why calls on A&P might be longer. For example, if price discrimination favored A&P, an incentive would exist for each salt producer to devote relatively more selling effort to other buyers, so the duration of merchandising calls on A&P might be expected to be shorter.

(2) What the witness here meant is uncertain. International's point was to show that a class of expense was avoided on sales to A&P. On sales to wholesalers who secured the service, price was uniformly higher. Why it would be necessary to show that each of International's wholesaler customers received the service or received it in proportion to sales seems besides the point; nor is it indicated why the merchandising reps would be expected to allocate their efforts in such a way that returns across buyers were not roughly the same. It is true that All Other Buyers included certain wholesalers who apparently received merchandising service and a discount, and International's study would not provide a justification of the discount to them -- insofar as the discount reflected avoidance of merchandising expense. Whether this was Warmack's point cannot be discovered.⁶⁵ If it is, it is a valid point.

2. Warmack's remaining criticisms were relatively minor.

(a) Other Field Sales Expense. The main reason why this expense category reflected a saving on sales to A&P was because A&P purchased relatively more of its total requirements of table salt (other than cartons) from New York (where expenses

⁶⁵ The witness also questioned whether merchandising expense "in the absence of a much more thorough study than has been here made is usable in determining cost differentials." *Id.* at 3363. Why this might be so is not explained, nor is the study required to permit its use revealed.

were lower) than from Louisiana (where expenses were higher) than did All Other Buyers. I previously noted that this difference seemed unrelated to the discount. Warmack's concern was that these expenses were assigned to certain table items and other grades of salt in proportion to sales, and no detailed study had been made to show that an allocation in proportion to sales was acceptable. No alternative is suggested, nor is it indicated how the allocation might have biased results in A&P's favor. Excluding the influence of the territories in which purchases were made, an allocation in proportion to sales would reflect no cost difference. As it was, the overall difference shown between All Other Buyers and A&P was about 1 percentage point in favor of A&P. Presumably the witness was concerned that the allocation in proportion to sales masked the possibility that the main services reflected in this expense category were supplied to A&P more than in proportion to sales. But the major components of expense here were the 20 percent of merchandising expense and carload reps' expense. International's allocation assigned the bulk of this part of merchandising expense to buyers of other than table salt and so reduced merchandising expense as a percent of sales to All Other Buyers. In effect, this lowered the merchandising expense rate avoided on sales to A&P. That the expense was avoided on sales to A&P seemed clear from the analysis of merchandising calls. It is hard to see how this favored A&P. For carload reps' expense, no weight was given to the testimony that less of this service was provided on sales to the chains. The allocation in proportion to sales probably biased the results against A&P. If price discrimination favoring the chains existed, one might expect relatively

less carload service would be provided by the producers on sales to them. All in all, the criticism has little content.

(b). Allocating Expense in Proportion to Sales. A general objection was raised about expense allocations made in proportion to sales. The objection was serious (it was enough to reject the defense) but no figures were adjusted to reflect its importance. The objection refers to allocating expenses in proportion to sales when sales to A&P are net of the discount but those to All Other Buyers are not (because most such buyers did not secure a discount). Consider the effect. Let price to All Other Buyers and to A&P be \$1.00. Let a sale of \$1.00 be made to each buyer classification and let each sale incur an expense of \$.10. The expense rate on either sale is 10 percent. Instead, let the sale to All Other Buyers be \$1.00 and that to A&P be \$.95, given the discount. Total sales are \$1.95. Let the expense be the same as before but allocated between A&P and All Other Buyers in proportion to dollar sales. A&P is then assigned 48.7 percent of the expense and All Other Buyers, 51.3 percent. The sale to A&P is assigned an expense of \$.0974 and that to All Other Buyers \$.1026. The expense rate on either sale is the same: 10.25 percent. The rate is higher than before, because sales are reduced by the discount but expenses are not. But no difference is shown in favor of A&P. Further, the objection would have no bearing on the merchandising expense rate on sales to All Other Buyers which were avoided on sales to A&P. It was this "avoided expense" that was compared with the discount granted.

3. Carton Advertising. The witness concluded that this entry should be excluded from the study because the allocation of a fixed amount per case of Sterling, which was

felt acceptable, would result in no difference in expense rates for this salt. He also noted that excluding this entry would make little difference in overall results. "Other advertising" was criticized because insufficient detail was given about the components of this entry. Other Advertising was a relatively minor expense (.39 percent of total sales) and the allocation between A&P and All Other Buyers resulted in a very minor difference in expense rates. Sales promotion payments to A&P were accepted as accurate.

4. Brokerage. An objection was raised to the assignment of this expense to All Other Buyers:

There may be many other customers ... in the other group who receive or to whom this class of expense would not properly apply. Therefore, if the so called 'other' classification of customers were [separated] as previously stated, into those who pay one price for one quantity and those who pay another price for another quantity, and so on down the line, and then if the [assignments] were made properly on an actual basis, I think that would probably be the best way to do it. ...⁶⁶

There are legitimate objections to International's assignment of brokerage, but these are not mentioned by the witness and instead a point is raised of little relevance to the main issue.

5. Overhead. The witness did not see how the allocation resulted in a lower expense rate on sales to A&P. This stemmed from the assignment of relatively more of the higher Louisiana expense to All Other Buyers than to A&P. The difference in expense rates is so small as to have no significant effect. The valid point is made that certain

⁶⁶ Id. at 3377-78.

overhead entries, such as the salaries and expenses of the district managers and sales officials, might have been disproportionately incurred on sales to A&P, and this would not be revealed by International's allocation. No effort was made to discover whether this was so.

All in all, we have a study put forth by International which, through it shows avoidance of merchandising expense on sales to A&P, provides little other basis to judge cost differences; and criticisms by the FTC's witness that are beside the point or that neither add nor detract much from what International's study reveals. The main criticisms directed to merchandising expense lack substance. What I conclude is that the study could be criticized, which should not be surprising, and on the basis of this, the recommendation is to reject the whole of it.

2. Rejection of the Defense by the Hearing Examiner and Commission

The Hearing Examiner rejected the cost defense. He based his decision in part on the criticisms of the FTC's witness, all of which were accepted. But he seems to have gone beyond this. In his view it would have been necessary to justify separately on cost grounds the discount on each table item as well as all other price reductions or variations reflected on International's invoices. International's efforts to show that the latter reflected price reductions from list to meet the prevailing market did not detract

from the fact that such concessions were actual reductions in price, constitute a part of the price and discount policy and structure, and places the recipient thereof in a more favorable competitive position than those customers who did not get the allowances⁶⁷

⁶⁷ Examiners Recommended Decision at 145, Record 4307-3-2, at 145.

[A]nything less than a complete justification for each of [International's price reductions] would not be a defense to a charge of price discrimination.⁶⁸

The Commission did not go this far but it did reject International's cost defense. The rejection rested on the following:

By combining the costs of selling to all purchasers other than A&P regardless of the customers' volumes of purchases, methods of purchasing or whether purchasing at respondent's highest or lowest price, respondent's have made an analysis which is incapable of establishing the differences in costs of sales as between respondents' purchasers who received this quantity discount and those who did not. Furthermore, the allocation of certain of the costs ... was made without sufficient record basis. For example, the allocation of merchandising expenses was made on the assumption that ... each call was of equal duration regardless of the purchaser. There is no record basis for such an assumption. Also, respondents' contention that the comparative cost of selling each of the purchasers receiving their lowest prices was the same as that of selling A&P is not established by this record.⁶⁹

The statement is not very persuasive. The comment about merchandising calls was apparently adopted from the accountant's criticisms. Reference to the difficulty in making cost comparisons between buyers purchasing at International's highest and lowest price may also refer to the accountant's criticism on which great weight was placed and that stemmed from the problem posed by the fact that A&P's sales were reported net of the discount. But I suspect that perhaps more basic concerns arose from the fact that All Other Buyers included buyers who did not purchase \$50,000 per year from International and who nonetheless secured a discount. This was so even though International said that its

⁶⁸ Id. at 164.

⁶⁹ International Salt Co. et al., 49 FTC 138, 154-55(1952).

costs were lower only if the buyer purchased this amount from it. There also was the problem posed by wholesaler groups who did not purchase in the same way as the discount chains and who appeared to receive merchandising service and secured a discount.

The absence of separate study of these buyers as well as the lack of any close relationship between the discount and the \$50,000 annual purchase volume probably weakened International's defense. Its acceptance would have required the Commission to accept on faith that International's cost of supplying all discount buyers was roughly the same as its cost of supplying A&P. The Commission would not be likely to do this; and given the conduct of the trial, there was little information developed on which it could rely if it wished to decide differently. Given the rejection of International's meeting competition defense, the revision of the discount in 1936 probably made International's task of cost justification more difficult, and it was unable to overcome what perhaps were reasonable suspicions held by the Commission about its pricing. This does not mean that the discount was discriminatory so far as the large grocery chains were concerned. In my view, the discount to the large chains was not discriminatory.

The question of discounts to wholesalers remains an open question. Initially, when the discount was extended to certain wholesaler groups capable of purchasing \$50,000 per year from one producer, these buyers probably received the same services as other wholesalers, and discrimination favoring them could have occurred. This was not a price reduction that the producers as a group favored, since it reflected a price reduction unrelated to a difference in demand elasticity between these and other wholesalers. How long such discrimination might have occurred is not known. No doubt each producer would wish

to supply relatively more of its output to wholesalers paying the higher price; and this would cause price to these wholesalers to fall. Further, reductions in resale prices by discount wholesalers would reduce the demand for salt by other wholesalers, also creating incentives for the producers to lower price to them. There also would be an incentive to provide less service to the wholesalers securing discounts, although this would be difficult to accomplish so far as merchandising service was involved. No doubt the merchandising men tried to steer retailers' orders to wholesalers paying a higher price.

Whether transaction prices to wholesalers not granted discounts fell to the price charged to discount wholesalers is not known, but surely this was possible. At any rate, the cost savings noted by International did not relate to its sales to wholesalers, so the discount given to some wholesalers may have been discriminatory. Presumably, whatever the market price to wholesalers, there could be a tendency on cost grounds to lower price to the large chains, unless services to wholesalers fell to equal those to the chains.

g. Comments of the Other Producers on the Discount

Early in its investigation the FTC asked the producers why they granted the discount. The responses were generally short but revealed something of the divided opinion about the discount that existed during the NRA. This probably raised doubts on the FTC's part whether the discount was cost based. A few of the producers who favored the discount submitted brief justifications along lines similar to those advanced by International during the trial. Those in opposition typically stated that they granted the discount to buyers qualified by other producers to meet competition, which in their view was permitted under the

Robinson-Patman Act. This is consistent with the underlying reason for the revision in 1936 and the with arguments advanced by International. Since producers who opposed the discount supplied salt to discount buyers, their hostility probably did not stem from the belief that the discount was discriminatory, because in that event they might be expected to supply the high-priced market, leaving the less profitable business to the sellers who favored the discount.

Myles, which had opposed the discount during the NRA, responded to the FTC as follows:

It is our ... understanding that some salt companies are allowing one unit quantity discount ... to resale purchasers of \$50,000 worth of table salt grades per annum. Our company has not initiated the discount in any instance to any buyer; but we found it necessary to meet competition, to allow it to those buyers with whom we do business who are getting the discount from others. We believe this is in keeping with the Robinson-Patman law.⁷⁰

Jefferson Island which also opposed the discount during the NRA made the following comment:

We have, as a competitive measure, granted a discount to purchasers of \$50,000 worth of table salt in a period of 12 consecutive months. We do feel, however, that it is difficult to show savings in production or sales expense on this one bracket as against sales to other customers who may purchase something approaching this amount.

⁷⁰ Letter from R.H. Polack, Secretary-Treasurer, Myles Salt Co., to Otis B. Johnson, Secretary, FTC, January 20, 1937, Record, 4319-4-2. Diamond Crystal responded as follows: "As to certain other customers [those who did not purchase \$50,000 per year from Diamond Crystal] who receive the quantity discount from competitors, we quote prices to meet the competition. We understand that this is permissible under that clause in the Robinson-Patman Act which permits meeting the equally low price of a competitor." Letter from James S. Prescott, Vice-President, General Foods Corp., to Otis B. Johnson, Secretary, FTC, Jan. 25, 1937, Record, 4319-4-2.

Under the circumstances we are willing to eliminate this discount bracket as soon as we can do so and keep competitive.⁷¹

The comment is interesting, for it seems to imply that buyers whose purchases approach \$50,000 per year should also be charged a lower price, which Jefferson Island apparently did not wish to do. Jefferson Island opposed the discount during the NRA, when the discount was restricted to the large chains and when aggregate purchase volume was used as a means to identify these buyers. Aggregate purchase volume did not reflect a direct relation between the individual seller's volume and cost. Jefferson Island here implies that there was such a relation. I suspect instead that Jefferson's concern reflects doubts that the \$50,000 discount could be restricted to the chains, and so would be likely to result in a general lowering of the wholesaler price that it wished to avoid.

Carey in Kansas, which had also opposed the discount during the NRA, simply notes the following:

through our own records and study, [we] have not been able to justify such a discount. We have felt, however, that it was compulsory to make such an allowance in order to be competitive with other salt producers.⁷²

Ince of Colonial who was the most outspoken critic during the NRA responded as follows:

⁷¹ Letter from George E. Egger, Vice-President, Jefferson Island Salt. Co., to Otis B. Johnson, Secretary, FTC, Feb. 9, 1937, Record, 4319-4-2.

⁷² Letter from Howard J. Carey, President, The Carey Salt Co., to Otis B. Johnson, Secretary, FTC, Feb. 2, 1937, Record, 4319-4-2. Ohio Salt Co. noted the following: "We justify [the discount] on the fact that some of our competitors have published said discount and we cannot hold our share of the business unless we meet the competitive price." Letter from L.F. Fiely, Vice-President, Ohio Salt Co., to FTC, Jan. 25, 1937, Record, 4319-4-2.

We have not, and never have been in favor of the quantity discount, but owing to competitive conditions we are forced to grant it to certain of our customers.⁷³

In contrast were the views of International, Union, Diamond Crystal and Morton.

Ryon of International indicated as he did during the proceedings that the \$50,000 discount

was established primarily to cover the case of purchasers for whom ... no merchandising sales work was required or even permitted by the buyers. From ... our experience, it appears [that] the cost of sales when missionary work is done is in excess of the one unit discount granted⁷⁴

1. Cost Differences Noted by Union Salt Co.

Union made an impassioned plea in support of the discount and presented a few figures to suggest lower distribution expense on sales to the discount chains. Union sold 42 percent of its table salt to A&P (16.7 percent of its total sales of salt) and its response attempts to compare its selling expenses on sales to A&P and to all other buyers. I believe Union's concern was that an order by the FTC could raise the chain price, which would be likely to induce greater selling service on such sales; and Union believed that it would then do less well, because it was less efficient than its competitors in supplying services. Union notes that the selling services of its competitors

almost entirely corral indirect buyers through Wholesale Grocers and Dealers whereby we are compelled to supply chain stores who do not approve or accept reselling service. We, therefore, fail almost completely to sell resale salt to wholesale grocers because if we should provide some reselling service, and that in proportion to our size,

⁷³ Letter from W.F. Ince, President, The Colonial Salt Co., FTC., Jan. 29, 1937, Record, 4319-4-2.

⁷⁴ Letter from John L. Ryon, Vice-President, Sales, International Salt Co., to FTC, Feb. 3, 1937, Record, 4307-4-2.

the effort would be wasteful and inefficient, and so insufficient, it is not acceptable to Wholesaler Grocers generally.⁷⁵

Union states that from 1931-1935, its total annual selling expense averaged about 20 percent of sales. During this time either 10 or 12 carload reps were employed and, depending on their number, their salaries and expenses were either 25 or 30 percent of total selling expense. Three sales reps called on A&P's branch buyers and this was estimated to occupy less than 10 percent of their time. A large proportion of A&P's orders were placed directly to Union's office without the intervention of sales reps, whereas wholesalers' orders were typically solicited. From the above, and in light of the fact that about 16.7 percent of Union's total sales were to A&P, carload reps' expense as a percent of sales to A&P were estimated to equal about .9 (if 10 sales reps were employed) and about 1.0 (if 12 sales reps were employed). On sales to all other buyers, the corresponding percentages were estimated to equal 5.8 and 7.0. The difference between A&P and other buyers averages about 5.5 percentage points and is close to the discount granted after 1936.

During the period studied the discount in the territories primarily served by Union is not known. It was 10 percent during part of the NRA, which is encompassed by Union's study. Sales to the other large chains probably comprised a good proportion of Union's remaining sales of table salt. If these buyers received selling service comparably to A&P, the estimates may understate the expense of carload reps on sales to wholesalers. All in all, Union's figures suggest a saving, but not a great deal can be made of them. Union's characterization of the cost difference seems independent of any specific volume supplied

⁷⁵ Letter from F.J. Venning, President, Union Salt Co., to Otis B. Johnson, Secretary, FTC, Feb. 1, 1937, Record, 4319-4-2.

the discount buyer by the individual seller. This also seems consistent with another of

Union's comments:

When ... a competitor publishes a quantity discount to a larger known quantity buyer requiring sales of \$50,000 of table salt per year and continuance at that rate, we necessarily meet our competitors quantity discount even though we may not be certain to also continuously sell the same quantity buyer at the rate our competitors stipulated. We cannot conceive the intent of the Robinson-Patman Act to be that we must sacrifice or abandon any such competition or buyer nor that we should concede our competition the right to monopolize such business.⁷⁶

Union did not provide merchandising service per se to wholesalers, but instead assisted its wholesaler accounts in reselling carloads of salt. This was done directly by the carload reps, and was said to require relatively far more selling calls per unit volume distributed to wholesalers than to A&P, whose orders were typically placed directly to Union's office. Union also notes that there "have been no special types of expenses by [its] officials or sales managers to call upon A&P. [Such] expenses, if any, were infinitesimal."⁷⁷

2. Diamond Crystal's Position

Diamond Crystal's response also contains a rough comparison of sales reps' expense in supplying A&P and all other buyers. Its comment follows:

The expense of selling ... A&P ... is materially less than to other resellers. All sales to the ... A&P ... are made through headquarters contacts of our sales executives with their New York headquarters office, and of our Top Salt men with their branch offices. Our

⁷⁶ Id.

⁷⁷ Id.

territorial salesmen and resale men do not call on A&P outlets, but devote their full time to other customers.

The field force salaries and expenses, after deducting the Top Salt men's expense, was \$164,673 in the first eight months of 1937. As no portion of this expense was necessary to obtain orders from ... A&P ..., it should be applied against the total of our sales to all resellers other than A&P. This sales total is \$1,364,130 and the \$164,673 of expense is 12.1 percent.⁷⁸

The source of the saving in supplying A&P is consistent with International's views.

I note that the field force salaries and expenses are charged against resellers only (which includes wholesalers and retail grocery chains), although at least the carload reps sold to all classes of trade. Sales to other than resellers were approximately 40 percent of Diamond Crystal's total sales. The selling expense on sales to other resellers that was avoided on sales to A&P would fall to about 6.7 percent, assuming that the sales reps allocated their efforts across grades in proportion to sales. This adjustment probably understates the expense avoided on sales to A&P because some proportion of Diamond Crystal's sales to resellers other than A&P were to other large chains that probably were supplied comparably to A&P. The extent of such sales is not known. Diamond Crystal takes no account of the additional cost of the "Top Salt" reps on calls to A&P's branches and of its sales executives on calls to A&P's headquarters.

The views of Diamond Crystal and Union are similar to International's. What also is of interest are the indications of reductions in carload services on sales to A&P and

⁷⁸ Record, 4319-3-2, at 341-43. In 1937, 20 percent of Diamond Crystal's sales of table salt were to A&P, suggesting that Diamond Crystal (which produced about 8 percent of total output of evaporated salt) had accepted a relatively large share of at least this part of the less profitable business, assuming price discrimination existed. So large a share suggests the probable absence of discrimination.

by implication the other large chains. This is a point International made but did not incorporate in its study. Diamond Crystal's statement suggests that merchandising and carload services were virtually eliminated on sales to A&P, so that in distributing table salt these services were devoted to wholesalers. In Union's statement, although merchandising reps were not employed, the carload reps themselves provided service that would be expected to be of similar value to wholesalers. A substantial part of all carload reps' service was avoided on Union's sales to A&P and possibly to other large chains that Union supplied.

3. Morton's Position

Morton's response to the FTC's inquiry was to present the results of a study conducted for this purpose at a conference with FTC officials.⁷⁹ I discuss this study because it deals specifically with the question whether the large chains received carload reps' service comparable to that typically received by wholesalers.

Morton's study classifies buyers of table salt into two groups -- those purchasing \$50,000 or more per year (discount buyers) and those purchasing any lesser amounts (All Other Buyers). The aim is to estimate and compare "direct selling expense" on sales to discount buyers and to All Other Buyers. The latter classification includes primarily wholesalers. The classification of discount buyers includes the large chains qualified by Morton and who therefore purchased \$50,000 or more per year from it. It also includes chains qualified by other producers and who may not have purchased \$50,000 or more per year from Morton and certain wholesalers qualified as discount buyers either by Morton or by other producers.

⁷⁹ Record, 4319-4-3-2, at 168-177.

All discount buyers are considered jointly. The individual buyers are not identified and their purchases are not separately listed. I believe consolidation of discount buyers into one group best served Morton's interests.

The analysis involves sales (net of freight) and direct selling expenses incurred during two months of 1936. Direct selling expense is defined as the salaries and expenses of Morton's field salesforce and for the two months studied these totaled \$172,387. Salaries and expenses of sales managers are excluded. Morton's field salesforce was composed of merchandising and carload reps. The carload reps solicited orders for table salt from wholesalers. For the two months, Morton's sales of table salt were \$621,366 (38.5 percent of its total sales) and sales of all other grades were \$994,088 (61.5 percent of the total). The overwhelming bulk of table salt sales were to wholesalers and chains. The interview with Peterkin, Sr. and testimony during the trial indicate that merchandising service was not provided to the discount chains. But direct use of this is not made by Morton in this study.

Morton allocates direct selling expense to each buyer classification in proportion to the number of "selling points" involved in making sales to the buyers as so classified. A selling point is a contact by a sales rep with a buyer that resulted in a sale of table salt during the two months studied. The selling points are those of carload reps only. The expense allocated is that of the merchandising and carload reps combined. Merchandising expense is therefore assigned to each buyer classification in the same proportion as carload reps' expense. In effect, the procedure assigns to any selling point by a carload rep a uniform increment of merchandise expense, so what is of major importance in explaining

any difference is expense rates is the number of selling points required to generate the sales to the buyers in each classification. This allocation of merchandising expense seems odd, given that, as was made clear throughout the proceedings, the merchandising reps did not call on the large chains, and Morton's sales to the latter occupied the predominant share of its total sales to discount buyers. For example, using figures for 1937, about 73 percent of Morton's total sales of table salt to all discount buyers was to the chains.⁸⁰

Merchandising expense for the two months is \$80,106, which amounts to 12.9 percent of Morton's sales of table salt. Total merchandising expense equals 18 percent of sales to All Other Buyers only; it equals 16.7 percent of sales to All Other Buyers if an estimate of Morton's sales to wholesalers classified as discount buyers are added to sales to All Other Buyers. Justification for this rests on the ground that these wholesalers may have received merchandising service. Morton's merchandising expenses are relatively higher than International's. Presumably, these rates estimate an expense avoided on sales to the discount chains. However, my primary interest here is to discover what the figures reveal about carload reps' expense. Morton's cost justification during the trial deals directly with merchandising expense, and I will consider that issue later.

Carload reps' expense during the two months studied is \$92,281. This equals 5.7 percent of Morton's sales of all salt. This is the same expense rate as that previously estimated for International. This is the expense incurred on carload reps who made calls on all types of buyers generating orders for straight and pool cars. Total carload reps' expense was allocated by Morton between table and all other types of salt in proportion to sales. The

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Commission's Ex. 18a-k, Record, 1-2/4319-1.

assumption is that the carload reps allocated their efforts across grades in proportion to sales, which seems reasonable. That part of carload reps' expense assigned to table salt was then allocated between discount and All Other Buyers in proportion to the number of selling points involved in sales to the buyers in each classification.

During the study period, there were 6,984 selling points associated with the sales of table salt to buyers within both classifications. Of the total number of selling points, only 232 (or 3.3 percent) involved sales to discount buyers. If the number of selling points were proportionate to sales, then selling points on sales to discount buyers would rise to 2,607. Morton assigned 3.3 percent of carload reps expense to discount buyers and 96.7 percent to other buyers. The expense so allocated was then expressed as a percentage of sales to discount and other buyers. Using Morton's procedure, carload reps' expense on sales to discount buyers amounts to .6 percent; and that on sales to All Other Buyers, 7.0 percent. The difference, of 6.4 percentage points, suggests the reduction in carload reps' expense on sales to discount buyers. Whether this overstates the actual savings would depend on whether the carload reps spent relatively as much effort in selling table salt as they did in selling other grades of salt. They may not have, given that sales of table salt were promoted by merchandising reps. Nonetheless, it seems clear that in Morton's case little by way of carload service was provided to discount buyers.

Relatively fewer selling points on sales to discount than All Other Buyers could reflect the possibility that discount buyers (a) placed larger orders per selling point than wholesalers or (b) purchased salt differently from wholesalers, so that a much larger proportion of their purchases required no carload service and therefore reflected relatively fewer selling

points on sales to them. These possibilities would appear to have different cost implications, and Morton does not reveal which was the more likely to apply.⁸¹

I suspect that (b) is the more likely possibility. Statements consistent with it appear throughout the records in Morton and International. I refer here to statements that the large chains placed their orders directly to the producers' branch offices or headquarters without the services of carload reps with much greater frequency than did wholesalers. If the chains always ordered directly, then virtually all carload reps' expense would be avoided on sales to them (as it was roughly true in the case of merchandising service). Given the relatively small number of selling points to discount buyers reflected in Morton's study (particularly when it is noted that this classification includes certain wholesalers who may not have ordered directly), the estimate of the difference in expense rates may be close to the true state of affairs.

4. Testimony of Buyers on Purchasing Practices

That the frequency of calls on the chains by carload reps was less than on wholesalers is suggested by the following. During the proceedings in Morton and International, many wholesaler and chain witnesses were asked to describe how they typically ordered salt. The questioning was not systematic. It was to gain a general impression whether differences existed among buyers in this respect. In International, 19 wholesalers were questioned

⁸¹ Morton states that "the number of salesmen's calls 'per selling point' for large buyers is probably somewhat less than in the case of small buyers. Note that the 'selling points' are only the points at which sales were made: calls were made at many additional points, particularly in the case of the smaller buyers." Record, 4319-4-3-2, at 174. The comment suggests a possible saving from this source, but this is not a feature underlying Morton's study.

along these lines. All of them indicated that their orders were placed only when solicited by International's carload reps or brokers (and sometimes by both). Their orders were typically for inclusion in pool cars. In Morton, 59 wholesalers were so questioned, and 56 similarly responded. The remaining three gave answers that could not be interpreted clearly.

The chains' witnesses responded quite differently. The buyer for First National Stores testified that his firm purchased from International "on a direct carload basis"⁸² typically by phone to International's district office or headquarters and without the intervention of carload reps.⁸³

G.F. Morrow, who was A&P's chief buyer, testified as follows:

I am responsible ... for the buying of salt for the entire company. I am supposed to know something about the contacts that are made and practically all of the sales solicitation for the company between the International Salt Company and ourselves, I think is very, very largely confined between Mr. Ryon and myself...

For myself, I can say no ordinary sales reps ever calls on me. For the outside warehouses, [the ordinary sales reps] are not supposed to call on them.

Q. So you would know if there was some solicitation by ordinary sales reps of International Salt Company from the buyers at these warehouses?

A. Yes.⁸⁴

⁸² Record, 4307-2-1, at 433.

⁸³ Record, 4307-2-3, at 2332.

⁸⁴ Record, 4307-2-2, at 2068-69.

Morrow notes that calls by carload reps on A&P's warehouses were infrequent, although they might possibly occur. But he "could not imagine any good reason why they should occur."⁸⁵

Certain of A&P's branch buyers were also questioned and their responses were similar to Morrow's. The buyer for A&P's Boston and Providence branches testified that

we issue an order direct to the office of the International Salt Company
.... We handle our own purchases.⁸⁶

A&P's Allentown buyer testified that he

places orders mostly by sending [them] through the mail or by placing
the orders to ... the branch office of ... International⁸⁷

The witness notes that on occasion carload reps called on him:

Q. Do the sales reps of the International Salt Company call on your
company soliciting orders ...?

A. That has happened. It is a general practice for them to make
periodic calls, not necessarily every time there is an order available
.... I would say in the majority of cases that the orders are mailed
or phoned in

Very seldom does a sales reps actually get an order or make a call
just for the purpose of getting an order They don't happen very
often.⁸⁸

⁸⁵ Id. at 1076.

⁸⁶ Record, 4307-2-1, at 853.

⁸⁷ Record, 4307-2-2, at 1284.

⁸⁸ Id. at 1302.

The buyer for American Stores similarly testified that his orders are "very often by phone, most often by phone."⁸⁹ This witness noted in an earlier interview that he combined orders from the various branches which he consolidated into single orders forwarded to the producers.⁹⁰ Ryon of International also testified that the carload reps did not call on the large chains.⁹¹

In Morton, the comments were similar. Bringhurst, Morton's New Orleans District Manager, testified that none of his carload reps called on A&P but noted that he "occasionally called, just occasionally"⁹² on A&P's local buyer. A&P's New Orleans buyer testified that he ordered by phone and mostly in straight cars.⁹³ A&P's Charlotte buyer testified that

practically all of the orders go direct. [The sales reps] will call in, he doesn't particularly solicit, just a good will call, I would say, but I will say that 95 percent to 99 percent of our orders go direct [to Morton's headquarters] or ... to the Washington office.⁹⁴

These orders were primarily for straight cars. A&P's Jacksonville buyer testified that Morton's carload reps called on him but not regularly:

⁸⁹ Id. at 1251

⁹⁰ Record, 4307-4-3-1, at 58-59.

⁹¹ Record, 4307-2-4, at 3088.

⁹² Record, 4319-2-1, at 306.

⁹³ Id. at 369, 378.

⁹⁴ Record, 4319-2-3, at 1999.

They don't have to. We can give them the business over the telephone, or they do come in occasionally for contact, and also at times for orders.⁹⁵

A&P's Atlanta buyer testified that he phones orders often for inclusion in pool cars to Morton's broker:

we know about when the car is to move and we tell him we want to get in on the pool car.⁹⁶

No commission was paid on such orders. The witness also noted that the carload reps' calls on him were typically not to solicit orders. All of this testimony is similar to the view of Peterkin, Sr. that sales to the large chains required little direct selling expense.⁹⁷

All in all, I suspect that carload reps' expense was reduced on sales to the discount chains. At the least it is difficult to see how so large a difference in selling points reflected no saving at all. If we return to International's cost justification, the avoidance of merchandising expense was shown to cover the discount to the large chains. Discrimination in favor of these buyers would then imply that International's costs in other respects were increased in supplying them relative to wholesalers. The discussion above suggests that carload reps expense (which along with merchandising expense were the two major components of selling expense) was not higher on sales to the chains, unless each selling point took an extreme amount of time. That this would benefit the buyers is doubtful.

⁹⁵ Record, 4319-2-2, at 1057.

⁹⁶ Id. at 1314.

⁹⁷ Record, 4319-4-3-2, at 203-04.

To sum up, International's study when combined with other information about the character of salt distribution suggests that the discount it granted at least to the large chains was not discriminatory. This view is strengthened if consideration is given to the views of Union and Diamond Crystal and to the evidence from Morton's study suggesting that carload expense was also reduced on sales to the large chains. In its cost justification, International did not attempt to reflect any saving in carload reps' expense. No evidence was presented to suggest that certain wholesaler groups that received a discount were cheaper to supply than other wholesalers, and discrimination in their favor may have occurred, at least for a time.

VII. THE CASE AGAINST MORTON'S ANNUAL DISCOUNTS

a. The Meeting Competition Defense of the \$50,000 Discount

1. Morton's Position

The \$50,000 discount was granted by Morton on sales of table salt other than BL (purchases of BL counted toward the \$50,000 qualifying volume) and was the same discount as that granted by International and the other producers. According to Morton, the discount was granted because it was cheaper to supply buyers who purchased \$50,000 or more of table salt per year from it. It was also said to be granted to meet competition, and defended on this basis, in the case of buyers whose annual purchases from Morton did not equal \$50,000 per year but who were qualified as \$50,000 buyers by other producers and who received the discount from them.¹ This argument is identical to International's. There was no serious attempt to justify on meeting competition grounds the adoption of the \$50,000 discount itself: the evidence was clear that Morton was the first to publish the discount and to announce the buyers it qualified.

Morton had received the various bulletins announcing the buyers who had qualified as \$50,000 buyers by other producers. But it did not rely on these as did International in its defense. Morton relied on testimony of its officials that these buyers were known to receive the discount from other producers, and so granted them the discount to retain

¹ Morton also attempted a meeting competition defense to justify special discounts of 7 1/2 cents per case of BL granted to Consolidated Groceries and of 15 cents per case of BL granted to National Tea Co. The latter did not purchase 50,000 or more cases of BL per year, which was the published requirement necessary to secure a discount of this amount. The defense failed for the same reason why the defense of the \$50,000 discount failed, and will not be discussed separately.

their business. The buyers to whom Morton granted the discount but who did not purchase as much as \$50,000 from it in any year were Thomas and Howard, Consolidated Companies and Wholesale Grocers Sales Co. (all qualified by International) and Frankford Grocery Co. (qualified by Worcester). The list also includes C.F. Smith Co. of Detroit. C.F. Smith was qualified by Mulkey Salt Co., which was a subsidiary of Morton's but maintained its own salesforce and distribution system. Morton itself supplied C.F. Smith less than \$50,000 per year. Its discount to C.F. Smith was defended on meeting competition grounds. Colonial Stores also received the discount from Morton but did not purchase the qualifying volume from it. Morton stated that Colonial was qualified by another producer and sought to defend its discount on meeting competition grounds. But other producers seemed to believe that Colonial had been qualified by Morton.

Concerning the grant of the discount to buyers qualified by others, Peterkin, Sr. argued as follows:

We don't expect, for ordinary brands of salt, non-advertised brands, buyers to pay us more money than they could buy the same class of goods from someone else. I think we would be foolish to expect them to do that, and, furthermore, I don't think they would do it.

If a producer of salt had sold a purchaser \$50,000 or more of table salt and we were informed of the fact, we would realize that purchaser was receiving from the producer such discount as that producer might have published and if we sold that buyer, we would necessarily have to allow him a similar discount, else we would have no chance of getting any business from him²

We can sell our advertised brand at a different price -- a higher price perhaps than other people can sell their salt, but unadvertised factory brands or private brands we could not sell at one mill higher than the same class of goods sold by our competitors. On the other hand,

² Record, 4319-4-3-2, at 207.

I don't think our competitors could sell at any higher price than we could sell and if they did sell at a lower price, we would be compelled to meet it if we expected to get any business.³

Peterkin, Jr. was asked how buyers became eligible to receive the discount from Morton.

His answer follows:

A. If [purchasers] were buying their salt from us they would have to purchase an amount equal to \$50,000 annually, over any twelve consecutive months period.

Q. Well, if they brought \$50,000 worth of salt from International Salt Company and \$500 worth of salt from you would they get the ... discount?

A. They might or might not.

Q. What would be the governing factor there?

A. Competition.

Q. If International Salt Company were granting a five percent discount on \$50,000, would you grant a five percent ... discount ... on \$500 worth of salt?

A. We might.

Q. Has that been done?

A. Yes

Q. Then is it the policy of the Morton Salt Company to grant the approximate 5 percent additional discount over and above the regular carload discount to any customer who is receiving a similar discount from a competitor of Morton Salt?

A. We endeavor at all times to be competitive.⁴

³ Id. at 215.

⁴ Record, 4319-2-1, at 57-58.

Later questioning brought forth the circumstances surrounding Morton's grant of the discount to buyers qualified by others. Morton did not suggest that sales to these buyers were made temporarily or in small amounts in hopes that the buyers would in future shift their purchases of \$50,000 to Morton (so that according to Morton's cost defense the discounts would be covered by lower costs). For example, concerning the discount granted to Thomas and Howard, Peterkin, Jr. testified:

Thomas and Howard Company were purchasing to the best of our knowledge the bulk of their salt from the International Salt Co. The International Salt Co., we discovered, were allowing a discount in accordance with their regular price. We were offered the opportunity to serve some of the Thomas and Howard branches with our salt, but in order to sell them our products that were of the same general character as the International products it was necessary for us to meet the International price as we saw it, and in that case we allowed what we term the quantity discount ...⁵

We were told that our price was not attractive, and further investigation revealed the fact that other salt producers were allowing in accordance with their regular practice a discount, and we elected to meet the discount by applying to their purchases from us an amount equivalent to the approximate 5 percent on net works basis ...

They may have purchased \$50,000 worth, more or less, from a competitor. We were simply told that our price was not attractive, and we made it attractive by the allowance of the quantity discount, although they did not purchase the amount of salt necessary for the Morton Salt Company to permit us to allow that based upon our own figures.⁶

Stratford, Morton's Sales Manager, testified similarly concerning Consolidated:

We were advised by our field representative if we were to continue to acquire a share ... of Consolidated's business that it would be

⁵ Id. at 209.

⁶ Id. at 283-84.

necessary for us to ... allow one unit discount on other [than BL] grades of table salt.⁷

Stratford believed that Consolidated had been qualified by Myles, although International first granted the discount to it. Similar comments were made concerning the discount to Frankford Grocery Co. and Wholesale Grocers. No mention is made who qualified these buyers. I believe that there was uncertainty over who first granted the discount to Colonial Stores. Colonial's buyer indicated that he secured the discount from all suppliers but did not purchase \$50,000 worth from any of them. Its purchases in the aggregate were large enough to have done so. International and other producers stated that Morton first granted the discount to Colonial. Stratford testified that Morton's lower price to Colonial

is in the nature of a unit discount on table grades ... to meet a price made by another salt producer, which we understand is given them as a quantity discount.⁸

2. Rejection by the Commission

As in International, the Commission had little difficulty in rejecting the meeting competition defense. FTC Counsel argued for rejection because:

Morton did not show that any competitor was selling salt of like grade and quantity to any of its customers and paying to such customers a discount amounting to approximately 5 percent of the net works ... prices. True, the President [of Morton] ... testified that when it allowed a discount [to these buyers] that such was done to meet an equally low price of a competitor without naming the competitor, without naming the price, without naming the type or grade of salt.⁹

⁷ Record, 4319-2-3, at 2270-71.

⁸ Id. at 2264.

⁹ Brief of Counsel for the Commission at 58, Record, 4319-1.

But the buyers who secured the discount and by how much prices were reduced to them were well known. This was clear from the producers' bulletins announcing all "qualified" buyers. When International had so carefully documented the names of the competitors, prices and types and grades of salt, this carried no weight. I doubt that had Morton been more thorough that it would have prevailed. Counsel also noted that Morton's grant of the discount to buyers who purchased \$50,000 from another producer but not from Morton

is not meeting competition but is beating competition, since the 5 percent discount given [by Morton] is greater in an amount of money than the 5 percent given on the \$50,000 purchase.¹⁰

What this meant is not clear. Counsel could have meant that the buyer did better on its purchases from Morton, since it secured the same price with a smaller purchase commitment.

The Commission itself states:

the respondent has not shown the existence of facts which might indicate or prove that [its lower prices to buyers qualified by others] were made in good faith to meet an equally low price of a competitor. The evidence submitted ... is too vague and indefinite to show that the long continued discriminations ... were made in good faith to meet an equally low price of a competitor.¹¹

This is all that is said. The Commission could have meant that a discount systematically and persistently granted (and which therefore is consistent with price discrimination) cannot be defended on meeting competition grounds. In such instances, cost justification is the only defense. That the discount could have been suspected as discriminatory is supported by the fact that Morton argued (as had International and the other producers) that costs

¹⁰ Id. at 59.

¹¹ Morton Salt Co., 40 FTC 388, 396 (1945).

were lower only if the buyer acquired \$50,000 or more per year from it, although in fact it granted the discount to certain buyers who did not meet this requirement. The discount to these buyers could have suggested that costs did not vary as asserted, in which case the discount granted to any buyer might have been suspected as discriminatory. If this was the Commission's position, it is hard to fault. Whether it was its position is uncertain because its opinion contains so little discussion. If it was the Commission's position, the meeting competition defense would seem reserved to justify temporary, unsystematic price differences characteristic of competition and inconsistent with price discrimination that the Act was to prevent. Again, this would be a position hard to fault.

3. The Courts' Views

The Courts' opinions deal briefly (if at all) with the meeting competition defense. What was said (or implied) seems consistent with my interpretation of what the Commission might have meant. The Court of Appeals believed that Morton's \$50,000 discount was almost certainly based on cost savings associated with large annual purchases. But similar savings could not have resulted from the buyers who secured the discount but did not purchase \$50,000 per year from Morton. The discount to these buyers was believed to be discriminatory. Nonetheless, these discounts were not found illegal -- not because of the meeting competition defense, but because the Court believed the Commission did not prove that competition had been injured. By implication, the meeting competition defense would not apply to persistent and systematic price differences consistent with price discrimination.

The Supreme Court's opinion also does not deal explicitly with meeting competition. However, the Court found that Morton's \$50,000 discount (and its discounts on BL) were not cost based. This conclusion also applied to the discount granted to buyers whose annual purchases from Morton were less than \$50,000. Since the Court found all of Morton's discounts illegal, then it would seem that the meeting competition defense must have failed. Again, the implication is that price differences persistently and systematically granted and possibly not cost based cannot be defended on meeting competition grounds: the Act might otherwise be too easily circumvented. Rejection of the meeting competition defense by the Commission in International posed a serious problem for International's cost defense, since most buyers it granted the discount did not purchase \$50,000 or more per year from International. This posed less of a problem for Morton because more discount buyers purchased \$50,000 or more per year from it. Nonetheless, it is reasonable to suppose that its discount to buyers qualified by other producers and who did not purchase \$50,000 per year from Morton cast doubt on whether the discount was cost based.

b. The Question of Competitive Injury

1. Conduct of the Trial

When discussing Morton's carload discount and the \$1.50/\$1.60 differential on BL, I noted that the FTC sought to prove that competing wholesalers paid different prices for salt because of discounts and, through a great deal of testimony, that the wholesalers would prefer, all else the same, to buy salt at prices below, or at least no higher than, those paid by their competitors. This testimony was to prove injury to competition from discounts,

which is necessary to find them illegal. However, throughout the proceedings, there is virtually no mention of the injury standard -- what injury to competition meant.

The testimony of wholesalers and other evidence did not show that grocery wholesaling, because of discounts on salt, had become confined to so few firms that competition at wholesale was threatened. In the cities where testimony was taken the number of wholesalers handling salt hardly suggested conditions that could be described as other than competitive, nor did the FTC present any such view. The testimony indicated that virtually all grocery wholesalers handled salt, that most had done so for many years, and there was no suggestion that discounts to particular buyers resulted in others discontinuing salt or contributed to the demise of any of them.

Morton seemed to suggest that a showing along these lines was required if the FTC was to find its discounts illegal. So it attempted to elicit testimony that salt represented only .5 percent of the typical wholesaler's sales and in light of this that its discounts were unlikely to cause wholesalers to fail or discontinue handling salt. Most witnesses did not disagree with this. Some figures also were given to show that Morton's sales of table salt to nondiscount buyers had not declined relatively over time. This evidence had no bearing on the outcome.

FTC Counsel countered Morton's efforts by suggesting that the proceedings involved only salt, and by asking witnesses to state what would happen if there were two adjacent resellers who sold only salt and whose operations in all respects were identical except that one bought its salt more cheaply than the other. That no such situation existed, or could even be imagined by the witnesses, seemed of no importance. Nevertheless, Morton did

not explain why it believed the FTC was required to show injury to competition in the sense it argued. On the one hand, if discounts were cost based, the requirement would seem unnecessary. On the other hand, if discounts were not cost based, then a difference in the producers' prices to wholesalers and chains would not be based on differences in the costs of their supply, causing injury to the buyers discriminated against and potentially also to consumers. If so, the Act might not be designed to deter discrimination only if a showing of a diminution of competition among resellers is made along the lines suggested by Morton.

2. The Views of the Commission and the Courts

The interpretation just noted seems more consistent with the Commission's opinion, which says little more than that competitive injury resulted because some resellers who paid a higher price would have preferred a lower price, in part because the former probably lost some sales to resellers who secured a discount. Under this interpretation, "competitive injury" would impose no separate burden of proof to be met by evidence presented by the FTC. If there is a separate burden, then judging from the evidence concerning the \$1.50/\$1.60 differential on BL and Morton's carload discount (and also International's 5 ton/100 case discount), it seems that any price difference would meet it. Such a standard would find most of the wholesaler testimony presented by the FTC unnecessary: it would need only to show that prices differed. In fact, the Supreme Court found this testimony unnecessary. The Court stated that it was enough to show that a buyer paying a higher price

might have been handicapped in competing with a more favored carload purchaser [of which there were virtually none] by the differential in price established by the respondent, [so] the Commission was justified in finding that competition might have thereby been substantially lessened or have been injured within the meaning of the Act.¹²

The Court of Appeals, although its opinion is difficult to follow, would have required some showing that the number of resellers had so declined from Morton's discounts that their services could no longer be described as competitive. In the court's view, this showing was not attempted by the Commission, nor could it be inferred from the evidence submitted. But the Supreme Court did not adopt this interpretation.

¹² FTC v. Morton Salt Co., 334 U.S. 37, 50 (1948). Morton's position was that no competitive injury resulted from carload discounts because such discounts did not exist on table salt other than BL; and for BL, so few cases were sold LCL and thus at \$1.60 per case that competitive injury could not possibly result. The Commission did not discuss Morton's point that salt was a small fraction of the typical wholesaler's sales and that its annual volume discounts would not eliminate competition in wholesaling. However, the Court notes:

There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any or all goods ... , whether the particular goods constituted a major or minor part of his stock. Since a grocery store consists of many comparatively smaller articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store.

Id. at 49. What seems clear is that competitive injury was inferred from a price difference. An earlier FTC report suggested that the very large grocery chains purchased their merchandise at prices on average about 1 percent below those paid by independent wholesalers. For these chains, purchase prices averaged 80 percent of resale prices. See FTC, 4 Chain Store Inquiry, Grocery (1933). Let the relative increase in the chains' share of sales be 20 times any reduction in the relative price charged by suppliers to them. If average price is reduced .8 percent due to lower purchase prices and assuming that the 5 large chains (which secured Morton's largest discount on salt) initially secured 25 percent of retail sales (which was roughly the case), their share would then rise to 29 percent. In terms of salt alone, which represented probably less than .5 percent of sales, a 5 percent discount to large chains would potentially lower average resale price by .025 percent. The share of the 5 large chains would then increase from 25 to 25.125 percent. Neither of the changes noted would suggest a change in competitive conditions. At any rate, the Court notes that the discounts on salt were illegal unless cost based because considered alone they met the competitive injury standard.

The injury standard implicit in the Commission's and Supreme Court's decisions suggests the importance attached to cost justification. Consider a case involving a discount (or other price difference) systematically granted by sellers to particular buyers who compete (on resales) with other buyers not granted a discount. The discount defines competitive injury, and would be permitted only if the defenses hold. Of course, the discount might not be cost based, so the meeting competition defense would not be thought to apply: otherwise, the sellers might justify each other's prices on grounds of meeting competition (as was attempted by the salt producers) and permit the price discrimination that the Act is to prevent. Competitive injury exists by definition: prices differ among competing buyers. The FTC is not required to provide arguments or evidence to suggest why the price differences are unlikely to be cost based; to show that the sellers are so few that competition among them may not exist; to show that sellers may have made some accommodation to share the less profitable business; to show that resellers' demand elasticities might differ consistent with the discriminatory price differences among them, etc. Whether the sellers could present evidence along these lines to suggest competition and the likely absence of systematic price differences that are not cost based is unclear. Certainly this was not attempted in Morton and International and I do not believe it has been attempted in any future case. The only defenses are meeting competition (which in such a case would not apply) and cost justification. Cost justification, which requires a study by the challenged party, appears as the main defense, and how viable it is can only be discovered by examining what has occurred. The attempt in International does not bode well in this respect. I turn now to consider Morton's cost justification. In Chapter VIII the FTC's orders are examined

generally to discover whether challenges have been primarily in industries in which price discrimination seemed likely.

c. Morton's Cost Justification

1. Introduction

The trial in Morton focused mainly on competitive injury. Not a great deal was revealed about salt distribution and how costs might have varied in relation to the discounts granted. What the testimony did reveal (as in International) was that merchandising and carload services were reduced or avoided on sales to the discount chains. Morton also relied on a cost study prepared for the trial.¹³ A good deal hinged on it -- not only the success of Morton's defense but also help in understanding its discount practices.

The study considers each of Morton's annual discounts; these were the \$50,000 annual volume discount on table salt other than BL to buyers of this annual volume or more from Morton¹⁴ and the two discounts on BL -- of 10 cents per case to buyers of 5,000 or more cases per year and to whom merchandising service was provided, and of 15 cents per case to buyers of 50,000 cases per year and to whom merchandising service was not provided.¹⁵

¹³ The discussion of Morton's study is based on material in Record, 4319-2-3, at 2378-2614; 2690-2741; Record, 4319-2-4, at 2743-2989.

¹⁴ Morton does not attempt to cost justify its discount to buyers qualified by other producers as \$50,000 buyers and who did not purchase this amount from Morton.

¹⁵ I did not uncover evidence of Morton's discounts on BL during the NRA, which accounts for the absence of the discussion of this in earlier sections. Peterkin, Jr. testified that these discounts originated in 1927 or 1928 but their character during the NRA and subsequently up to 1936 is not known. Morton's largest discount on BL (of 15 cents, or 10 percent of list) was comparable to the 10 percent discount granted during the NRA to quantity buyers of table salt. The revision in 1936 reduced the latter discount to about 5 percent. Whether Morton's BL discounts underwent change at that time is not known.

The buyers securing 15 cents per case were all very large chains -- A&P, Safeway, Kroger, American Stores and National Tea. Except for First National Stores these were the same large chains classified as quantity buyers during the NRA. First National is excluded from Morton's list because it supplied no salt to First National. The largest discount on BL was thus confined to the very large chains. This is not true for the \$50,000 discount granted on other grades (and by all sellers) which, though it had been so confined during the NRA, was extended to other buyers after the NRA and particularly after the revision of this discount in 1936. So far as merchandising expense was avoided, and carload service reduced on sales to the large chains, these savings (as previously discussed) seemed independent of the annual volume Morton sold to the individual buyer but related to the character of the chains' purchasing. The 50,000 case limit probably defined a group of buyers who were cheaper to supply because on sales to them merchandising and carload services were avoided or reduced.¹⁶ Consistent with this is that National Tea did not purchase 50,000 cases per year but nonetheless was granted 15 cents per case on its purchases of BL. I doubt seriously that this buyer's purchasing arrangements with Morton differed from those of the other large chains granted the same discount.

Buyers of 50,000 cases of BL were permitted to count these purchases toward the \$50,000 qualifying volume to secure Morton's unit discount on table salt other than BL. On their purchases of table salt other than BL, the 5 large chains also secured the \$50,000 annual volume discount. This discount was about 5 percent of list prices and was typically 5 cents per case on standard table packs. Morton and the other producers sought to justify

¹⁶ Including brokerage, which was not paid on sales to these buyers.

their discounts to the large chains on the ground that these buyers avoided merchandising (or closely related) expense that the producers incurred on their sales to wholesalers. If so, what then accounts for the \$.10 per case discount Morton granted to buyers of 5000 or more (up to 50,000) cases of BL per year? Most of these buyers were grocery wholesalers to whom Morton said it provided merchandising service. Morton was the only producer who granted a "5000 case discount" and it did so only on BL. Very little evidence or discussion of this discount was presented during the investigation and trial. I turn now to consider Morton's study and what light it sheds on understanding Morton's discounts.

2. Morton's General Approach

Morton's study focuses on two classes of expense that were assigned to buyers classified according to discounts earned. The first is merchandising expense. The second is "order-related" expense. Order-related expense bears no direct relation to selling activities: it is the expense Morton incurred in its headquarters, branch offices and plants in processing, shipping and invoicing orders for carloads. The expense of the carload salesforce (and brokerage) are not considered. Why carload service was not considered is not known. This may have related to the lack of success of Morton's earlier submission to the FTC; or to the fact that certain \$50,000 buyers were wholesaler groups whose methods of buying did not facilitate similar reductions in carload service as did the large chains. Peterkin, Jr. was questioned why carload service was excluded from consideration. He simply noted the following:

A. Speaking from my own personal viewpoint, [consideration of carload service] probably would widen the spread between an individual purchaser and a quantity purchaser ...

Q. And that would be only an estimate or guess?

A. It would be more than a guess. It would be based upon my knowledge of our cost of sales.

Q. In the absence of a cost study?

A. In the absence of a cost study, yes.¹⁷

No criticism was raised by FTC counsel concerning merchandising expense or its allocation, although whatever difference in expense rates was revealed from this source apparently had little bearing on the outcome of the case. This was because criticisms were raised against the study of order-related expense, and these criticisms were felt sufficiently telling for the Trial Examiner to reject Morton's study completely.¹⁸ I will examine in detail Morton's study of order-related expense and the criticisms raised against it because, except for merchandising expense, it was this expense on which Morton relied to justify its discounts.

The approach reflected in Morton's study stemmed from deliberations among Peterkin, Sr., Peterkin, Jr., Stratford and Morton's auditor. The first three individuals were very knowledgeable about the salt business. The study was conducted specifically for the defense and was compiled by Arnold Coyne, who was responsible for managing Morton's order-related activities. He was Morton's office manager. Most figures used in the study were

¹⁷ Record, 4319-2-4, at 2911-12.

¹⁸ As discussed below, the Commission's opinion indicates, without elaboration, that Morton's cost study was considered during the course of Commission review of the Examiner's findings. Morton Salt Co., 40 FTC 388, 397 (1945).

derived from Morton's accounts. The study covered one year, from September 1, 1939-August 31, 1940. Order-related expense was estimated for what was known as the Chicago billing district. This district contained the area East of the Mississippi River plus North and South Dakota, Minnesota, Iowa and the Northern part of Missouri. Roughly 70 percent of Morton's sales occurred in the Chicago billing district. In actual practice, in determining the eligibility of any buyer for a discount, Morton's nationwide sales were taken into account. For purposes of its study, only sales within the Chicago billing district to discount buyers were included. This study also includes only the order-related (and merchandising expense) incurred on such sales. The separation of sales and expenses was possible because most order-related expenses (and merchandising expense) on sales outside of the Chicago district were incurred and recorded by Morton's offices in Kansas City, Dallas and San Francisco. Order-related expense within the Chicago district also included certain expenses incurred on local sales made from metropolitan warehouses.

The exclusion of sales and expenses of the Kansas City, Dallas and San Francisco offices were justified by Peterkin, Jr. as follows:

Those billings from our records and from our information as to the general nature of our business, would reflect the same results as we have attempted to put forth in these figures, but the availability of the data from which these figures were taken made it impracticable to use the Kansas City, Dallas and San Francisco tabulations. The figures here reported are, roughly I would say 70 percent of our billings, and since it is typical of our billings we wouldn't consider it economical or advisable to go beyond our own Chicago office factors The results probably would be exactly the same except as to ... volume.¹⁹

¹⁹

Id. at 2876-77.

Some order-related expense was incurred in Morton's producing plants. According to Coyne, the same procedures were followed in each plant and the expenses incurred were said to be the same on average. For its study, the plant expense was derived for Morton's Port Huron, Michigan plant. The results for Port Huron were assumed comparable to (and used as an estimate of) similar expense incurred in Morton's other plants making shipments into the Chicago district.

Buyers were classified into 4 groups: (1) those buying 50,000 or more cases of BL per year. These buyers secured the 15 cents per case discount on BL plus the unit discount granted to \$50,000 buyers on purchases of table salt other than BL; (2) \$50,000 buyers, which included the remaining buyers qualified by Morton for the \$50,000 discount (of one unit) on table salt other than BL. Each of these buyers purchased more than 5000 cases of BL per year and also secured the 10 cents per case discount on BL; (3) the remaining buyers of over 5000 cases of BL per year, who secured the 10 cents per case discount but did not secure the unit discount on other table grades; and (4) all other buyers. This is a broad classification that includes all other buyers of salt from Morton that moved in carloads. The classification includes buyers of table salt (primarily wholesalers) who secured no discount plus all other buyers of salt. The order-related expense estimated for Chicago billings was allocated to the buyers in each classification in proportion to the number of invoices issued on sales to them. In effect, it was assumed that, on average, a given expense was incurred per invoice issued, and the total expense assigned to the buyers in each classification depended on the number of invoices issued to them. The order-related expense as so allocated was then expressed as a percentage of sales to the buyers in each classification.

In effect, any reduction in office-related expense rates would stem from the fact that the orders of buyers in one as against another classification contained a larger average sale per invoice.

3. Criticisms by FTC Staff

Morton's study was strongly criticized by FTC Counsel -- in the background were the FTC's accountants. The criticisms were felt to be so telling that FTC Counsel moved to strike the study from the record. The Examiner granted the motion, so Morton's cost justification was not accepted as evidence. The criticisms can be noted in passing since basically they do not deal with the substance of the study.

(1) The study was incomplete because not all of Morton's distribution expenses were analyzed and assigned to the various buyer classifications. There were believed to be two major omissions. The first is carload men's expense. I noted this omission above and Peterkin, Jr.'s comment about it. It is almost certainly true that an analysis of carload service would have revealed savings at least in supplying the very large chains compared with wholesalers generally. No reasons are given by FTC Counsel why carload men's expense on sales to the large chains (or other discount buyers) might have been greater than on sales to buyers who secured no discount. The second omission is minor. This is that Morton assigned no rent to space used for order-related activity within certain of its metropolitan warehouses. The impression left by Coyne is that this space was so minor relative to the warehouse total that if no order-related work were done the space would have been retained. If this space had another use, then its cost for order-related work

could not be determined unless the gain from the other use was known. Coyne did not know what this was. At any rate, given the space, the cost would seem very small and no matter how allocated among buyers the results of Morton's study would not be altered in any material way.

(2) Certain costs

applicable to selling activities of the Kansas City, Dallas and San Francisco branches have been included in the costs on which the company assumes to prove a justification of sales in other districts. In other words, the sales in the three Western branches were excluded, but part of the costs applicable thereto were included in the attempted cost justification This is absolutely unsound, and for that one point alone would serve to nullify the results of the cost figures²⁰

No effort is made to weigh the importance of the objection. The criticism refers to the following. Certain order-tabulating expenses incurred in Chicago involved invoices issued by the Western offices. The problem was that all of the expense was assigned to sales in the Chicago district. Coyne was asked whether any expenses incurred in Chicago related to the Western branches, and he replied as follows:

A. Yes, but it was so minor. It was impossible to separate it.

Q. You didn't eliminate it, irrespective of how minor it was, did you, sir?

A. No.²¹

The operations in question represented 2.2 percent of the total order-related expense in Morton's study. Only part of this expense was attributable to the Western offices. If the expense attributable to Western offices was proportionate to sales, then the expense

²⁰ Id. at 2966-67.

²¹ Id. at 2921.

attributable to Chicago billings would have been overstated by about .7 percent. Total order-related expense was 6.3 percent of sales. Adjusting for the overstatement reduces the figure to 6.26 percent of sales, and would not be significant when allocated among the buyer classifications. This particular criticism, which FTC Counsel believed was sufficient to reject the study, weighed heavily with the Examiner.

(3) The study contained unsupported estimates and guesses based on the views of Morton's officials. This criticism focused primarily on assertions that order-related expense in the Western offices was comparable to that in the Chicago billing district and that the Port Huron plant expense was representative of that in Morton's other plants. It also was noted that the proportion of time spent by the office manager at Port Huron on order-related activity was simply an estimate of Coyne's. Such estimates were argued to be unacceptable. No effort was made to discover why order-related expense in the Western offices might differ from Chicago, or why Port Huron might differ from other plants; or whether, if allowances for possible differences were made, Morton's results would change significantly. Consideration also is not given to whether it was likely, if cost differences existed for 70 percent of Morton's business, that the results for the remaining 30 percent would so differ as to suggest results for any buyer classification significantly different from those shown. Except for the decision to confine the study to Chicago billings and the Port Huron plant, the only rough estimate made is the proportion of the Port Huron office-manager's time assigned to order-related activities. In the study, 50 percent of the Port Huron office manager's salary is included as an order-related expense. The amount so assigned represents 1.9 percent of Morton's total order-related expense. Suppose that only 25 percent of the

office manager's time were spent on order-related activities. Then total order-related expense would fall from 6.3 to 6.24 percent of Morton's sales.

(4) It was strongly objected that the study was conceived and made by officials who were not "properly trained accountants" and "without consultation with competent accountants or benefit of their opinion."²² This may be true, although it does not mean that the officials' understanding or characterization of costs and how they vary is wrong.

(5) The point was made

There is nothing in the records which will show that the Respondent has ever made any cost studies and analyses which will substantiate the measuring factor used, that is, the numbers of invoices, as being sound and accurate and proper, or that its use affords accurate results in the separation of the costs used.²³

This omission was established through the questioning of Coyne:

Q. Mr. Coyne, will you tell me ... exactly what cost analyses, time studies, or other studies you have made to substantiate the number of invoices as being a proper measuring factor for the separation of your costs ...?²⁴

The response was that no such studies had been made. Coyne simply noted that this was the approach used, in response to which he was asked:

Q. Mr. Coyne, do you know of any expert accountant who had advocated such a procedure?

A. No.²⁵

²² Id. at 2968.

²³ Id. at 2966.

²⁴ Id. at 2948-49.

²⁵ Id. at 2950.

I note that FTC Counsel did not reveal why in substance Morton's approach might be wrong or misleading. Some questioning of Morton's officials may have reflected what in part was FTC Counsel's concern. Morton's study assumes that order-related expense per invoice was on average the same for all buyers. Any difference in expense rates would thus derive from differences in the number of invoices relative to sales to the buyers within each buyer classification. FTC Counsel showed through a few of Morton's invoices containing different sales totals that use of the average cost per invoice yielded different expense rates on the sales shown. Whether the point was that an estimate of average cost per invoice was inadmissible, or that Morton would first have to prove that the average did not differ across buyers or buyer-classifications, is not stated. Reasons were not given why the average might be thought to differ across buyers or buyer classifications.

In general, the criticisms of Morton's study are less focused than those of International's, although in basic character they are similar. Features are found potentially wrong, misleading or incomplete; but their importance is not assessed, and adjustments to the study are not made to assess the importance of the criticisms raised.

4. The Views of the Commission and the Courts

The Commission's opinion states the following:

The trial examiner maintained a motion to strike [Morton's] testimony as being based upon estimates, hypothesis, and mere guesses and as arbitrarily including items of distribution the correctness or applicability of which was doubtful. The Commission has nevertheless considered the testimony so stricken, as well as other matters in the

record, and is of the opinion, and so finds, that respondent's price differences ... have not been shown to be [cost] justified²⁶

This is all that is said. Whether the criticisms of FTC Counsel formed the basis of the Commission's decision, or whether other factors²⁷ weighed heavily cannot be discovered, although suspicions about the industry's pricing could surely have had a bearing on the outcome.

This is the last we hear of Morton's study. On appeal, Morton did not seek review of the Commission's conclusions about its study. The appeal rested on whether competitive injury existed and on an argument that appears for the first time -- that the Robinson-Patman Act did not contemplate challenges to "standard" quantity or volume discounts.²⁸ As noted before, the Court of Appeals believed that Morton's discounts were almost certainly cost based and its failure of proof of this was of no consequence, because the FTC failed to prove competitive injury. The Supreme Court concluded that competitive injury existed. This was shown by the existence of one or more discounts leading to price differences among competing buyers. On this point the Court supported the Commission. The Court also had no difficulty rejecting the view that the Act did not contemplate challenges to quantity or volume discounts. It was noted that the Act was to prevent illegal price discrimination, whether accomplished by quantity or volume discounts, or in any other

²⁶ Morton Salt Co., 40 FTC 388, 397 (1945).

²⁷ As for example the discount granted to the discount chains by all sellers even though costs were said to be reduced only if the buyer acquired \$50,000 or more per year from the individual seller (a requirement that for most sellers was not met).

²⁸ This argument reflects an interpretation of the Act that in part may have led up to the revision of the discount to quantity buyers in 1936.

way. Morton's discounts were illegal unless cost justified, and in this respect Morton's attempt had failed. Detailed reasons for this failure were not given.

d. Morton's Study of Order-Related Expenses

What did Morton attempt to show in its study of order-related expense? For sales to wholesalers, orders were solicited by the carload salesforce and brokers, whose efforts were facilitated by the merchandising salesforce. The buyers' orders were assembled so that only carloads were shipped from the producing plants. The large chains more frequently than wholesalers placed their orders directly to Chicago headquarters or associated branch offices. Such orders if for straight cars could be shipped directly; and if for less than carloads could be combined with other orders and shipped in pool cars. The branch offices did certain clerical work on orders received (checking, recording, etc). In Chicago headquarters, clerical work was required to process orders: orders were checked, freight-routed and rated, credit checked, invoiced, routed to the appropriate plant for filling and shipping, etc. At the plant, some clerical work was done and the study of Port Huron was to estimate the expense of this.

Morton's study estimates the total order-related expense incurred up to the point of shipment once orders were received from the salesforce, or directly from the buyers, at branch and headquarters offices and at the plants. This expense was allocated to each buyer classification in proportion to the number of invoices issued by Morton for its sales to the buyers within each classification. This allocation resulted in relatively lower order-related expense on sales to buyers classified as discount buyers: on average, these buyers

placed larger orders per invoice than did buyers who secured no discount, and so required fewer invoices relative to Morton's sales to them.

Total order-related expense was estimated to equal 6.3 percent of sales (net of freight). There were no buyers on sales to whom order-related expense was avoided altogether, so the question of allocation was important. Morton's allocation in proportion to the number of invoices presents problems of interpretation and there is not much testimony to help resolve them. The basic difficulty is that for many of the activities on which Morton relies, the carload seems more relevant, in which case the allocation of expense in proportion to invoices could be misleading.

For example, almost all of Morton's shipments were in carloads to a specific destination. This is true whether an order was for a straight car or for inclusion in a pool car. Each carload would be freight-routed and rated. An order for a straight car required one invoice whereas a pool car required several. But the expense of freight-routing and rating would arise in either case. No doubt the pool car would require some increment in expense relative to the straight car: more invoice forms are required and the freight for the car would have to be apportioned among its participants. But it does not follow that the expense of the pool car would increase over the straight car in proportion to the number of invoices (as assumed by Morton), since much of the total expense may apply to the car and the increment in expense due to the number of participants may be but a small part of the total.

The problem is illustrated by the study of Port Huron. There were employees at the plant whose function was to process the instructions received from Chicago headquarters for filling and shipping a carload. Involved in this were two shipping clerks, a shipping

foreman and his assistant, a car checker (who saw that the car was filled and segmented properly) and the office manager who Coyne estimated spent one-half of his time on order processing. Salaries of the individuals mentioned (including one-half of the office manager's) were \$12,264 over the study period. Carloads shipped from Port Huron required 21,391 invoices, or an average expense of \$.571 per invoice. The same average expense per invoice was assumed for Morton's other plants making shipments into the Chicago billing district. During the year studied, 119,422 invoices were issued on total sales in the Chicago billing district. Total order-related expense at the plant level was estimated to equal \$68,070. This amount was allocated to each buyer classification in proportion to the number of invoices issued to the buyers in each classification.

It was almost certainly the case that any request from Chicago headquarters (or branch offices) to Port Huron was to assemble a carload. Let one such request be for a straight car and another for a pool car containing orders of 5 buyers. In either case, the orders must be assembled, the car filled and checked, etc. It is not obvious that the pool car would impose substantially greater order-related expense than the straight car, although of course only one invoice is required for the straight car and 5 are required for the pool car. It could be cheaper to fill the straight car if the variety of items ordered was less. It also could be cheaper to check the straight car (although the individuals who did this were said to do no other work). But possible differences along these lines were not what Morton's study revealed. Morton assumed that the order-related expense of the straight car was one-fifth that of the pool car, although it is not hard to suppose that the actual difference was but a fraction of this. So far as Coyne's testimony deals with the issue,

his comments actually imply that at the plant level it cost Morton no more to arrange shipment of a pool than a straight car (which I would note seems consistent with the absence of a carload discount). If so, it would seem more appropriate to allocate the order-related expense at the plants in proportion to sales or in some other way that would reflect no difference in expense rates across buyer classifications.

Most order-related expense (82 percent of the total) was incurred in Chicago headquarters and associated branch offices. How far my comments about plant expense also apply to Chicago headquarters and branch office expense is not known. Table VII-1 lists the various expense entries for Chicago headquarters and branch offices. I discuss them in turn, noting if possible whether the particular entry seems likely to vary in proportion to the number of invoices. I also note whether the entry seems relevant for the purposes of the study.

(1) The salary figures are of employees within all departments responsible for preparing orders to the plants, recording information and invoicing. Entry 1(a) -- Chicago, City Sales (\$13,704) -- represents a relatively minor entry, about 4 percent of the total, and is the salaries of clerks engaged in order-related activity within metropolitan warehouses in the Chicago billing district. Carload shipments were not made from warehouses. Warehouse stocks were maintained for pick-ups by local buyers, and I believe that a large proportion of such sales were on a cash basis for which the clerks wrote out a receipt. Whether discount buyers relied relatively less than wholesalers on warehouse pick-ups is not known, nor is it known whether local orders by discount buyers were on average larger than wholesalers' orders. Generally, invoices were not prepared at the warehouses.²⁹

²⁹ If on occasion they were I do not believe that they were included in the number of invoices on the basis of which Morton allocated order-related expense.

Consequently, warehouse expense was allocated according to invoices issued for other sales. This would understate order-related expense on sales to discount buyers if their use of local pick-ups was relatively the same as wholesalers. In adjustments to Morton's results later made, I exclude warehouse salaries since they seem unlikely to vary in proportion to the number of invoices, or at any rate this was by no means shown.

(1)b. Chicago, Country-billings. This entry reflects the salaries of clerks involved in order-related work in Chicago headquarters. The entry represents about 20 percent of the total expense reflected in Table VII-1. Undoubtedly the expense of some of this work increased in relation to the number of invoices associated with a carload, although by how much is not known. Some adjustments to Morton's results reflecting various possibilities are later given.

(1)c. General Office Salaries. This entry contains three separate entries, the most important being clerical salaries at branch offices. The distribution department was responsible for making-up and distributing Morton's pricing scales and price bulletins and there is no reason to suppose that the expense of this varied in proportion to the number of invoices. The mailing department involved the processing of all mail and it is doubtful that the salaries reported here varied in proportion to invoices. Branch office salaries are those of clerks in branch offices who prepared carload orders before sending them to Chicago and who (in certain branches) also handled the billing for sales within particular areas in the Chicago district. No doubt some of this expense varied in relation to the number of invoices issued against a carload, although by how much is not known.

Table VII-1
 Order Related Expense, Chicago Billings,
 September 1, 1939 - August 31, 1940

Expense Entry	Component Expense	Total Expense
1. Salaries		
a. Chicago-City		13704
b. Chicago-Country Billings		96209
c. General Office Salaries		
Distribution Dept	13550	
Mailing Dept	5338	
Branch Office Clerical	43263	
d. Traffic Dept.		20676
e. Tabulating Dept.		10081
f. Salt Tablet Dept.		49232
g. Specialty Salt Dept.		4983
2. Taxes on Above Salaries		8107
3. Office Supplies		67575
4. Traffic Expense		3252
5. Tabulating Expense		5347
6. Rent		20086
Chicago Office		13547
Miscellaneous		659
Branch Office		5830
	Total	317162

Source: Record, 4319-3-8, Res. Ex. 25.

(1)d. Traffic Department. The entry lists the salaries of clerks engaged in freight-rating and routing. This particular expense would seem independent of the number of invoices ultimately issued against a car.

(1)e. Tabulating Department. This is the salaries of clerks engaged in tabulating various sales records. The expense probably increased somewhat with the number of invoices, but one can doubt whether it did so proportionately.

(1)f and (1)g. These are the salaries of clerks responsible for order-related activity on sales of specialty salts and salt tablets. Grocery wholesalers and chains did not handle salt tablets or most specialty salts. They are included because Morton did not limit its study to table salt. Why separate departments were maintained for these salts is not known, nor is it known how many invoices were issued on their sales. Sales of specialty salts were primarily to buyers within the "all other buyers" classification, which also includes wholesalers who secured no discount. If the number of invoices on specialty salt was larger relative to sales than it was true for sales of table salt to wholesalers who secured no discount, then assigning order-related expense in proportion to the number of invoices would be misleading, since a larger proportion of expense is assigned to wholesalers (who did not purchase tablets or most specialty salts) for comparison with discount buyers (who also did not purchase tablets or most specialty salts).

(2) This entry is the social security tax on the salaries listed under (1).

(3) Office Supplies and Forms. This entry is the expense of invoice and related forms. This expense would seem likely to vary in proportion to the number of invoices.

(4) **Traffic Expense.** This reflects a minor entry involving freight rates -- travel to freight rate conferences, meetings with rail officials, etc. There is no reason to believe this expense varied in proportion to invoices.

(5) **Tabulating Expense.** This is the expense of equipment rental and materials for tabulating machines. There is no evidence that the character, quality, or even quantity, of equipment would change even with substantial shifts in the number of invoices. I doubt that the expense would vary in proportion to invoices. Some materials expense would probably change with the number of invoices.

(6) **Rent.** This reflects an allocation of rent paid for Chicago headquarters and branch offices. The entry amounts to rent times the percentage of space used for order-related activity. As noted, given that much of the order-related activity would seem required to process a carload -- whether a straight or pool car -- it seems doubtful that an increase in the number of invoices would require a proportionate increase in space.

Morton's study also contains one expense that was not allocated in proportion to invoices. This is the expense of its credit-checking operations. The total of this expense (\$40,295, or about 9 percent of all order-related expense) was assigned entirely to "all other buyers". The explanation is that discount buyers were rarely if ever credit-checked, and no bad debts ever occurred on sales to them. Many smaller wholesaler accounts had dealt with Morton for many years and many had no credit problems. Perhaps these accounts were also not carefully checked. Probably there were a good number of new accounts who were checked carefully; and they may well have imposed an initial expense disproportionate to Morton's sales to them. Credit checking expense represents .8 percent of sales to the

buyers to whom the expense was assigned, and I later indicate how Morton's results are altered by eliminating this class of expense altogether.

Morton's results are presented in Table VII-2. Also presented are results after eliminating expenses that seem the least likely to vary in proportion to the number of invoices. The Table also presents the results after certain other adjustments are made. Column (a) lists the buyer classifications used in Morton's study. Bear in mind that "all other buyers" includes wholesalers who secured no discount plus all other buyers of salt. Column (b) lists the number of invoices on sales to buyers in each classification. Column (c) lists the total order-related expense Morton assigned to each buyer classification, except for credit department expense, which was assigned to "all other buyers" only. Column (d) lists sales (net of freight) to the buyers in each classification. Column (e) expresses Morton's estimated expense as a percent of net sales for each buyer-classification.

Columns (f)-(i) reflect adjustments to Morton's estimates of expense and the results restated in light of them. In deriving Column (f), I reduced total order-related expense by eliminating the entries that appear least likely to vary in proportion to invoices. The expenses retained are (a) salaries for Chicago-Country Billings, and for the mailing and tabulating departments, and (b) office supplies (invoicing forms, etc). The retained expense is allocated in proportion to invoices, recognizing that this may still overstate the variation in order-related expense in relation to the number of invoices. Credit department expense has been retained and is assigned as in Morton's study to "all other buyers" only. The expense rates using the retained expenses are given in Column (g).

For purposes of further comparison, I also have restated the expense by assuming the following: suppose that each buyer imposed the same average cost per invoice as in Morton's study, but that total order-related expense would increase by 20 percent, and then by 40 percent, of the increase that would be implied if buyers in each discount buyer-classification required proportionately the same number of invoices as "all other buyers". These increases in expense expressed as a percent of sales to buyers in each discount classification are given in column (h), using the 20 percent assumption; and in column (i), using the 40 percent assumption. In effect, these two columns can be interpreted as reflecting the reductions in order-related expense as a percent of sales to buyers in each discount classification brought about by the fact that these buyers actually required fewer invoices relative to sales than did "all other buyers". How closely these (and the other) adjustments to Morton's estimates reflect the true state is not known. At least they permit comparisons with Morton's results which themselves seem likely to overstate the cost differences arising from differences in the number of invoices. Columns (h) and (i) retain the assumption that credit expense is incurred only on sales to "all other buyers". This accounts for about .8 percentage points of the "savings" listed for discount buyers in these two columns.³⁰

Morton uses its estimates as follows. Order-related expense for 50,000 case buyers equals 1.12 percent of Morton's sales to them; for "all other buyers", 7.38 percent of sales. The difference, of 6.26 percentage points, was said to represent the saving in order-

³⁰ It is conceivable that the decrease in invoices on sales to discount buyers reflected a reduction in carload services required by Morton to supply them compared with wholesalers generally. However, Morton did not make this point, the expense allocated was not that for carload services, and any such reduction would be unlikely to apply to discount buyers of 5000 cases of BL per year, since many of these buyers were wholesalers.

related expense from what would be incurred if the 50,000 case buyers required relatively the same number of invoices (and imposed the same credit expense) as "all other buyers". Similar comparisons were made for each other discount buyer-classification. Table VII-3 lists the buyer classifications in column (a) and in column (b), the savings in order-related and credit expenses on sales to discount buyers as estimated by Morton. Column (c) lists the savings using the expenses that I have retained and presented in column (g) of Table VII-2. Columns (d) and (e) reproduce the savings under the 20 and 40 percent assumptions just discussed. Column (f) reports the discounts granted by Morton as a percent of sales to the buyers in each classification. The discounts are the actual payments to buyers on Chicago billings only. Columns (g) - (j) list respectively the estimated savings as presented in Columns (b)-(e) but after excluding credit expense, which had posed difficulties of interpretation.

According to Morton, its savings on sales to "other \$50,000 buyers" and to buyers of 5000 cases exceeded the discounts granted to them. A similar result is not shown for 50,000 case buyers, although once savings in merchandise expense is accounted for (which I do later), the overall savings on sales to these buyers also exceed the discount granted to them. Obviously, however, these results depend on the allocation of order-related expense. Using "other \$50,000 buyers" to illustrate, discounts granted are less than the savings in order-related expense estimated by Morton by .6 percentage points. However, the discounts to "other \$50,000 buyers" exceed the savings by 1.9 percentage points using the savings based on "retained" expenses, by 3.5 percentage points using the 20 percent assumption, and by 3.0 percentage points using the 40 percent assumption. These net losses become

Table VII-2
Order Related Expenses by Buyer Classification
September 1, 1939 - August 31, 1940
Chicago Billings

(a) Buyer Classification	(b) No. of Invoices	(c) Total Expense (000)	(d) Sales (000)	(e) Expense/ Sales %	(f) Retained Expense (000)	(g) Retained Expense/ Sales* %	(h) (i) Incremental Expense	
							20%	40%
50,000 cases BL	1993	6.4	573.4	1.12	3.1	.53	1.92	3.01
Other \$50,000 Buyers	2953	9.5	552.8	1.82	4.5	.87	1.42	2.01
5000 Cases BL	4707	15.2	885.4	1.71	7.2	.82	1.81	2.78
All Other Buyers	97827	355.6	4818.4	7.38	190.4	3.95	0	0
Intercompany Sales	1942	38.6						
Total	119422	425.2	6799.9					

Source: Record, 4319-3-8, Res. Exhibits 18-28

* In the retained expense, branch office salaries on order-related activity were excluded, because it appears that the work in the branches involved primarily the preparation of carload orders, which I thought unlikely to vary substantially in relation to the number of invoices. However, some branches did the billing for metropolitan area sales, much as was done in Chicago headquarters on other sales. If branch office salaries are included, the figures in column (g) are as follows: .74, 1.14, 1.33, and 5.15. Obviously, the expense rates increase with increases in retained expense.

Table VII-3
 Estimated Savings in Order-Related Expense
 and Discounts Granted, by Buyer Classification

(a) Buyer Classification	(b) Savings % of Sales	(c) Savings, % Sales (Retained Expense)*	(d) (e)		(f) Discount % of Sales	(g) (h) (i) (j)			
			<u>Savings, % of Sales</u>			<u>Savings, % of Sales, Excluding Credit Expense</u>			
			20% Incremental Expenses	40% Incremental Expenses		(b)	(c)**	(d)	(e)
50,000 Cases, BL	6.26	3.42	1.92	3.01	9.85	5.42	2.58	1.09	2.18
Other \$50,000 Buyers	5.56	3.02	1.42	2.01	4.96	4.71	2.24	.59	1.18
5000 cases BL	5.67	3.13	1.81	2.78	4.91	4.83	2.29	.97	1.95
All Other Buyers	0	0	0	0	0	0	0	0	0

Source: Record, 4319-3-8, Res. Exhibit 18-27.

* If retained expense includes branch office salaries, the figures in Column (c) are as follows: 4.41, 4.01, 3.81, and 0. The savings increase with increases in retained expense.

** If retained expense includes branch office salaries, the figures in Column (h) are as follows: 3.58, 3.18, 2.99, and 0.

larger if credit expense is excluded, as may be seen by comparing Columns (g)-(j) with Column (f) of Table VII-3. Approximately the same results hold for "5000 case buyers."

These changes in results are disquieting, because Morton's study presents no reasons other than order-related expense why its costs of supplying "other \$50,000 buyers" and "5000 case buyers" were less: the avoidance of merchandise expense was said to hold only in the case of the 50,000 case buyers, who were the very large chains; and possible reductions in carload service are not mentioned. In my view, Morton's estimates probably overstate its savings in order-related expense in supplying discount compared with "all other buyers". But whether the various adjustments to the estimates that I have made bring us close to the truth cannot be discovered with available information.

Difficulty of interpretation is compounded by other features of Morton's study. The classification of "all other buyers" includes buyers of grades other than table salt and includes a much larger proportion of Morton's sales of lower-priced salt than it is true for buyers in the discount classifications whose purchases were predominately of table salt. Consequently, order-related expense when expressed as a percent of sales would reflect lower expense rates for discount buyers than for buyers within the "all other" classification. If order-related expense did not vary by grades (which seems likely), then Morton's sales to discount buyers should be adjusted downward to eliminate at least the influence of container differentials affecting price.³¹ If this were done, savings on order-related expense on

³¹ And if this could be done, adjusted to reflect cost differences influencing prices of table compared with other grades of salt.

sales to discount buyers would be less for all estimates contained in Table VII-3, because the expense rates on (adjusted) sales to discount buyers would be higher. Some indication of the influence of this is given if sales to discount buyers are reduced using International's figures on the relative increase in container expense on table as against other grades of evaporated salt. When sales are so adjusted, the expense saved as a percent of sales as estimated by Morton would fall from 6.26 to 5.83 percent for 50,000 case buyers; from 5.56 to 4.99 for "other \$50,000 buyers," and from 5.67 to 5.00 percent for 5000 case buyers. The other estimates contained in Table VII-3 would be correspondingly reduced.³²

A second point is that "all other buyers" includes grocery wholesalers as well as other buyers of salt, and the latter may well have required fewer invoices relative to sales than did wholesalers. The inclusion of such other buyers in the same classification as nondiscount wholesalers probably lowers the order-related expense that would otherwise be assigned to the wholesalers, since the allocation of expense is based on the number of invoices issued to all buyers within this classification and not in relation to the number issued on sales to nondiscount wholesalers alone. No adjustments can be made to reflect the influence of this. Its effect would probably be to provide more support for the larger estimates of savings.

Some check on Morton's approach is possible using information that it presents on the number of invoices issued on sales to discount buyers. In its study, the discounts that Morton accounted for were those based on the buyer's annual volume purchased from

³² This reflects too great an adjustment because sales to "all other buyers" includes those to nondiscount wholesalers whose purchases were also predominately of table salt. Adjustments could not be made to account for this because necessary information is lacking.

Morton. The savings in order-related expense were said to be proportionate to reductions in the number of invoices on sales to discount buyers. If so, two buyers of the same annual volume would impose different order-related expense if the number of invoices required to supply them differed. No requirement was imposed on buyers respecting order size, so it is reasonable to suppose, given Morton's approach, that an annual discount would reflect savings in order-related expense only if the behavior of discount buyers was reasonably uniform in terms of the size of individual orders placed; that is, these buyers should reflect fair uniformity in the number of invoices relative to Morton's sales to them. Table VII-4 lists the proportion of 5,000 case buyers whose average order per invoice fell within specified dollar ranges.

The variation among these buyers is substantial, suggesting that variation in the number of invoices would be unlikely closely to reflect savings in order-related expense. Suppose the 5000 case buyers who purchased under \$200 per invoice ordered on average \$139 per invoice (which is the weighted average order for those buyers). Suppose the 5000 case buyers who ordered larger amounts per invoice (about 50 percent of all such buyers) ordered on average \$556 per invoice (which is the weighted average order for these buyers). According to Morton, the former group would impose 4 times the order-related expense relative to sales than would the latter group. But all of these buyers were granted the same discount. In Morton's study, "all other buyers" were said to impose (relative to sales) order-related expense 3.8 times that of the 5000 case buyers. But all 5000 case buyers secured a discount (of uniform amount), whereas none of the "all other buyers" did.³³

³³ The size-distribution of orders for other discount buyers is not separately listed but is virtually identical to that for 5000 case buyers.

Table VII-4
 Percentage of Discount Buyers Whose
 Average Invoice Fell Within Specified
 Dollar Ranges, Chicago Billings
 September 1, 1939 - August 31, 1940

Average \$ Value of Invoice

Buyer Class	No. of Buyers	Under \$100	100-200	200-300	300-400	400-500	500-600	600-700	700-800	800-900	Over 900
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Percent of Buyers

5000 Cases BL	67	5.9	43.3	17.9	7.5	2.9	4.5	1.5	3.0	4.5	9.0
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Source: Record, 4319-3-8, Exhibits 18-20.

I note that the average invoice for "all other buyers" is only \$40 and is substantially less than the average (of \$208) for all 5000 case buyers. "All other buyers" includes various commercial and industrial users, whose orders were probably a good deal larger than those of nondiscount wholesalers, so the latter probably ordered amounts below the average for this classification. These buyers probably did impose greater order-related expense than did discount buyers. It could thus be (and this is not inconsistent with Morton's pricing) that buyers of 5000 cases or more of BL typically ordered sufficiently larger amounts per invoice than did "all other buyers" such that some saving in order-related expense was achieved. If so, it could be that this saving did not increase substantially with increases in the size of these buyers' orders, or that to account for such increases through finer price distinctions was too costly; whereas the wholesalers who bought very small quantities of Morton's salt and who secured no discount imposed greater order-related expense, and

that these increases also did not vary substantially over the range within which these buyers' orders typically fell, or that to account for them through finer price distinctions also was too costly. Nevertheless, what the increase in order-related expense for "all other buyers" might have been is very uncertain, given previous discussion.

That the discount on 5000 cases applied only to BL is of interest. There are two points that I can make about this. First, if buyers of BL ordered other grades simultaneously (which they did) and in roughly constant relation to their purchases of BL, any savings in order-related expense could be reflected in the price of BL only. Second, BL was very widely distributed and handled by most wholesalers and retailers. It seems this was far more the case for BL than for other sellers' brands. As a result, Morton canvassed virtually the whole of the retail and wholesale trade, and probably the resulting orders of many buyers were very small. Many of them may have acquired most of their salt from other sellers but nonetheless also handled some BL. Orders for BL by these buyers probably increased order-related expense and this expense may have been avoided by most other sellers whose sales were confined to fewer accounts, and the prices they charged reflected this. To buyers who handled Morton's table salt other than BL comparably, Morton probably charged the same prices as other sellers. To buyers of very small quantities of BL, a higher price was charged. The higher BL price also could account for the higher order-related expense on what also may have been very small sales of other than BL to these buyers.

All in all, it is hard to conclude that Morton's study of order-related expense provides clear justification of its discounts, excluding for the moment the 50,000 case buyers on sales to whom merchandising expense was avoided. Savings in order related-expense probably

existed, but their magnitude is uncertain. Little other evidence was presented by Morton or the FTC to help our understanding. The Commission ended-up rejecting Morton's study because it could be criticized. I suspect that it believed Morton's discounts were not cost-based, but its inquiry did not help to confirm that this was so.

e. Cost Differences in Relation to the Discounts

1. Merchandising Expense

Most buyers of BL purchased far less than 5000 cases per year -- the minimum for a discount. During the time covered by Morton's study, 90 percent of BL customers purchased under 500 cases per year, and 95 percent purchased under 1000 cases. Only 12 customers (.3 percent of the total) ordered over 10,000 up to 50,000 cases per year, and at that only 2 of these buyers ordered over 20,000 cases. The buyers of over 50,000 cases, who I previously identified, were the very large chains, and merchandising service was not provided on sales to them. These buyers assembled the orders from their retail outlets and placed them with the producers directly (apparently with much greater frequency than wholesalers generally).

In Morton's study, merchandising expense (the salaries and expenses of its merchandising salesforce) was assumed to be avoided only on sales to buyers of 50,000 or more cases of BL per year. The expense was assumed to be incurred on all other sales, including Morton's sales to buyers in the "all other buyers" classification whose purchases were not of table salt and on sales to whom it seems reasonably clear merchandising service was not provided. Merchandising expense was equal to 7.0 percent of Morton's sales

to all buyers excluding sales to the 50,000 case buyers. Since this expense was avoided on sales to the 50,000 case buyers, it was included by Morton as a cost saving in supplying them. When this saving is combined with the saving in order-related expense, Morton's discounts to the 50,000 case buyers were less than the estimated savings, by more than what Morton had shown for buyers classified as "other \$50,000 buyers" and "5000 case buyers".

Morton's allocation of merchandising expense seemed acceptable to FTC Counsel. At least no specific objections were raised. No adjustments were made to reflect merchandising expense as a percent of sales of table salt only. In Morton's study sales of table salt to nondiscount wholesalers included in the "all other buyers" classification are not separately reported. In Morton's earlier submission analyzing selling points during two months in 1936, sales of table salt were 38.5 percent of Morton's total sales of salt. If this same percentage is applied during the later study period (which begins in 1939), merchandising expense would then equal 11.7 percent of Morton's sales of table salt, again excluding sales to 50,000 case buyers. This falls to 9.2 percent of Morton's sales of table salt when sales to 50,000 case buyers are included. The figure of 9.2 percent is an estimate of the minimum merchandising expense avoided on sales to the large chains. The estimate of 11.7 percent approaches a maximum. It is not quite a maximum, because some buyers in the "other \$50,000 buyers" classification were large chains that had not (at least during the study period) purchased 50,000 cases of BL. But it is doubtful that merchandising expense was incurred on sales to them. Merchandising expense on sales of table salt excluding sales to 50,000 case buyers and to large chains classified as "other \$50,000 buyers" equals

13.0 percent. This figure provides an estimate of the maximum expense avoided on sales to the large chains.

Suppose that merchandising expense avoided on sales to 50,000 case buyers fell between 9 and 13 percent of Morton's sales to them. Next, suppose these buyers purchased only BL, so that on all of their purchases they secured a discount of 10 percent (\$.15 per case) from the list price of \$1.50 per case. In Morton's study, sales are reported net of freight. Morton reports that the price of BL net of freight (and before consideration of discounts) was \$1.405 per case. Call this the net price. Then the discount of \$.15 per case rises to 10.7 percent of net price (or of net sales). This discount may then be compared with the merchandising expense Morton avoided on sales to these buyers, which ranges from 9 to 13 percent of net sales.

Not all of the 50,000 case buyers purchases were of BL. These buyers secured a smaller discount -- one unit or about 5 percent of list³⁴ -- on these other grades. Consequently, on average, the discount to 50,000 case buyers would fall below 10.7 percent of net sales, whereas merchandising expense as a percent of sales to other than 50,000 case buyers would remain the same.³⁵ In fact, about 90 percent of the 50,000 case buyers' purchases from Morton were of BL. The discount on net sales to these buyers falls from 10.7 to about 10.1 percent if account is taken of their purchases of table salt other than BL. From Table VII-3, the discounts reported by Morton as paid to the 50,000 case buyers equal 9.85 percent of its net sales to them.

³⁴ Or about 5.5 percent of list net of freight.

³⁵ This is because merchandising expense as a percent of sales is based on Morton's sales of BL and other table salt to buyers other than 50,000 case buyers.

What these figures suggest, at least for the very large chains, is that the avoidance of merchandising expense alone justified the discount to them. Discounts averaging 9.85 percent of net sales were granted to these buyers; savings from avoidance of merchandising service range from 9 to 13 percent; and 9 percent is almost certainly too low. No account here is taken of possible reductions in carload service on sales to these buyers. From previous discussions of Morton's earlier study of selling points and the case against International, it is likely that there were such savings on sales to these buyers. It also is likely that some order-related expense was saved, although the magnitude is uncertain.

The only area in which greater cost seems to have been incurred in supplying the large chains involved that of the executives who spent relatively more of their time on sales to these buyers than to wholesalers generally. Morton's study takes no account of this. Union Salt Co. indicated that this service was negligible. International's study made before the trial estimated the additional cost at about 2.5 percent of sales to these buyers. Morton's sales of table salt were much larger than International's. Nevertheless, I have no reason to believe that executive services Morton provided in working out purchasing arrangements and generating good-will increased in proportion to Morton's sales to these buyers, suggesting that the added cost for Morton might have been relatively very small.

All in all, it seems very doubtful that discounts to the 50,000 case buyers -- the very large chains -- discriminated in their favor. If anything, the conclusion would seem to move in the opposite direction. I remind the reader of Peterkin, Sr.'s comment that the large chains were Morton's most profitable customers. But it is difficult to believe that

over time these buyers would be discriminated against. At the least, it would appear that the lower prices to the large chains did not exceed the lower cost of their supply.

Two large grocery chains (Kroger and National Tea) were classified in Morton's study as "other \$50,000 buyers". These chains received the same discount on BL as did the 50,000 case buyers. But these buyers dealt with Morton in the same way as the 50,000 case buyers and thus similarly allowed Morton to lower its cost of supplying them. So far as the discount was cost-justified on its sales of BL to the 50,000 case buyers, it also would be cost-justified for Kroger and National Tea. Kroger was included within the "other \$50,000 buyers" classification because it did not purchase 50,000 cases of BL within the Chicago billing district during the study period. Nationally, Kroger normally purchased 50,000 cases per year and was eligible for the largest discount on BL. National Tea also was granted the maximum discount even though it did not purchase 50,000 cases of BL per year. The discount to National Tea was said to be a "competitive allowance". But again Morton did not deal with National Tea differently from its dealings with the other large chains.

The large chains also secured from Morton a discount of one unit on table salt other than BL. This was the same discount as that granted to these buyers by all of the salt producers. On sales to the large chains, all producers avoided merchandising expense, and probably achieved other cost reductions as well. From International, it seems clear that the discount granted on these sales did not exceed the cost savings that they entailed. The discount on this salt was proportionately less per case than that granted on BL. But I believe, given its relatively higher merchandising expense, that Morton in selling BL

devoted more effort in canvassing the market than it was true for the other producers, or what likely would be true if Morton only sold grades of table salt other than BL. Consequently, the expense Morton would avoid on its sales of these grades to the large chains would be lower, as would be the discount per case.

The remaining buyers in the "other \$50,000 buyers" classification were the wholesaler groups qualified for a unit discount by one of the producers (even though in certain instances the buyers did not purchase \$50,000 per year from at least one producer, which was said to be required to secure the discount).³⁶ From previous discussion, it does not appear that Morton or the other producers dealt with these buyers in the same way as they did the large chains, or that they dealt with them differently from wholesalers who secured no discount. Sales to these buyers did not avoid merchandising service. They also may not have permitted reductions in carload service (as might the large chains). Testimony of International's and Morton's officials cast doubt on whether the discount to these buyers was cost-justified. Morton's study of order-related expense suggests some savings on sales to the discount wholesalers when compared with "all other buyers" -- the classification that includes wholesalers who secured no discount. But it is uncertain whether these savings alone justified the discount to them.

As noted when discussing International, the unit discount to these buyers could have reflected price discrimination in their favor. Such discrimination would create pressure to lower prices to competing wholesalers who secured no discount. Whether over time transactions prices charged nondiscount wholesalers differed from those charged wholesalers

³⁶ All but one of these buyers also qualified for the 5,000 case discount on BL. I will discuss this discount subsequently.

granted the discount is not known. But descriptions of competition among the producers on sales of these grades before and after the NRA suggest that transactions prices may not have differed.³⁷

Discounts on sales to wholesaler groups did not exist in most territories during the NRA. If the elasticity of demand of these buyers differed consistently with discounts that discriminated in their favor, it would seem more likely that such pricing would have been observed during the NRA, when the producers were able to behave jointly and enforce their discount terms. Instead, the discount appears after the demise of the NRA, when the producers seemed to behave much more competitively, and after the revisions in 1936, when the annual volume required to secure a discount was reduced substantially. This opened the opportunity for wholesaler groups to seek a discount (as happened in New York territory for a brief time during the NRA) and for individual producers to grant it, which would be likely if prices were not altogether competitive. Such behavior would tend to reduce the extent to which prices remained above the competitive level. Morton did not attempt to cost-justify its discount to the wholesaler groups by suggesting that merchandising or other selling services were avoided or reduced on its sales to them. In fact, its position was the opposite of this.

³⁷ It also is possible that services to discount wholesalers would decline relative to those to nondiscount wholesalers, although this result might be much more difficult to achieve than simply lowering prices to the latter. For example, merchandising service was supplied to retailers who decided on the wholesalers from whom they would buy. Further, it would be hard to vary the amount of carload reps' service across individual wholesalers. For descriptions of competition after the NRA, See pp. 73-76, supra.

2. The 5000 Case Discount

Discussion of the 5000 case discount is difficult. Little information about it was presented by Morton or uncovered by the FTC during the investigation and trial. On Morton's sales to the large chains, the avoidance of merchandising expense alone seemed to justify the discounts to them. This remains true after account is taken of other of Morton's costs that might have gone up, and those that might have gone down, in supplying these buyers. Morton's largest discount, granted to the buyers of 50,000 cases of BL per year (the large chains), was \$.15 per case, or 10 percent of list. Suppose that avoidance of merchandising expense justified this discount. To buyers of 5,000 cases of BL per year, Morton granted a discount of \$.10 per case, or 7.5 percent of list. Morton did not avoid merchandising expense in supplying these buyers. If we suppose that the additional discount (of 2.5 percentage points) granted the chains reflects additional savings achieved over the 5000 case buyers, because the chains permitted Morton to avoid merchandising expense, then the additional discount the chains were granted seems far less than what Morton's figures suggest was the merchandising expense it avoided on its sales to them. Morton's pricing would thus seem to discriminate against the large chains.

Suppose this was not so, and that the whole of the 10 percent discount to the chains only reflected the avoidance of merchandising expense, as Morton's figures suggest. Then it would seem, since this expense was not avoided in supplying the 5000 case buyers, that the 7.5 percent discount Morton granted to them either discriminated in their favor, or instead, reflected other reductions in Morton's costs on its sales to these buyers (but not

on its sales to the large chains). Unfortunately, absent much by way of evidence, we are left with questions largely unanswered.

The 5000 case buyers were smaller retail chains and (primarily) grocery wholesalers.³⁸ The testimony of Morton's officials and these buyers indicates that merchandising expense was not avoided on sales to them. It also is doubtful that carload service³⁹ was reduced on Morton's sales to the 5000 case buyers as it probably was on its sales to the large chains: the orders of the 5000 case buyers were solicited by the carload salesforce, and although it is true that these buyers typically placed larger orders per-call than did the wholesalers who secured no discount, it is doubtful, given the previous discussion of Morton's selling activities, that the cost of carload service varied substantially in relation to the amount these customers purchased.

It is probably true that the 5000 case buyers were regular customers of Morton's and placed most of their orders for salt with Morton, so that when selling efforts were devoted to a particular area these buyers were more likely to order than were wholesalers who secured no discount; and retailers may have been more likely to place orders for Morton's salt with the wholesalers who secured a discount than with those who did not. This could have reduced the time required for Morton to service a particular area, and Morton may have reflected this in its pricing. But evidence on this possibility is lacking.

³⁸ Except for Consolidated Groceries, Morton supplied all "other \$50,000 buyers" 5000 cases of BL per year. The "other \$50,000 buyers" were a small subset of 5000 case buyers. Most 5000 case buyers only secured a discount on BL.

³⁹ Including similar service of brokers.

It seems probable that order-related expense was reduced in supplying the 5000 case buyers compared with wholesalers who secured no discount. Morton suggested that such savings were close to the discount granted to these buyers.⁴⁰ But as discussed before, these savings are difficult to estimate, and under different but reasonable assumptions than Morton's, the savings fall substantially below the discount. I also note that savings in order-related expense on sales to the 5000 case buyers were similar in magnitude to those Morton estimated on its sales to the large chains and were less than the discount the 5000 case buyers were granted, again suggesting the possibility of discrimination (although of lesser magnitude than suggested before) in favor of the 5000 case buyers when compared with buyers of smaller annual amounts.

In general however, there are few clues in the Record suggesting why costs (other than order-related costs) might have been reduced in supplying the 5000 case buyers. Whether these buyers typically undertook more selling and assembly efforts on behalf of Morton than did wholesalers who secured no discount is not known. I suspect that they did, but evidence is lacking. Absent substantial evidence on costs, I turn next to consider other factors bearing on the likelihood of discrimination favoring 5000 case buyers.

3. Points on the Likelihood of Discrimination Favoring 5000 Case Buyers of BL

If it cost Morton the same to supply nondiscount and 5000 case buyers, then the discount on BL granted to the latter would discriminate in their favor. In general, however, the customers of the 5000 case buyers, and these buyers' methods of purchasing and overall

⁴⁰ See Table VII-3. The discount to "5000 case buyers" reported in this Table reflect discounts paid as a percent of sales of BL and other table salt. The discount was paid only on BL.

operations, seem from all appearances to be the same as those of the nondiscount buyers. If so, it is hard to see why the demand elasticities of the discount and nondiscount buyers would differ, assuming that the same price was charged to both. Assuming the costs of supplying the two groups were the same, and absent a difference in elasticities, Morton would not wish to discriminate.

If the cost of supplying the 5000 case buyers was lower, a discount could be granted to reflect this. If price to these buyers is reduced, the elasticity of their demand for BL might change. If price to them fell by the amount of the cost difference, discrimination in favor of these buyers would not exist. If price fell by more than the cost difference, discrimination favoring these buyers would exist.⁴¹ Such a result would imply that the elasticity of demand of the 5000 case buyers at a price lower by the cost difference exceeded that of the nondiscount buyers at the price charged to them. Why this might be so is not obvious, although the possibility cannot be ruled out. In any event, the likelihood that demand elasticities would not differ if the two groups were charged the same price suggests that the discount to the 5000 case buyers was cost based at least in part, thus diminishing the extent of any discrimination.

If the price of BL discriminated in favor of 5000 case buyers, the wholesalers in the various geographic areas might try to purchase BL jointly through one of their number so to secure the discount, or for one of them to purchase 5000 or more cases and become a supplier to those who purchased less. Morton did not prevent joint purchasing or resales.

⁴¹ Assuming resales by discount to nondiscount buyers (or joint purchases by nondiscount buyers so to secure the discount) were so costly as to allow discrimination to occur, or assuming resales easily could be prevented or controlled by Morton. I will say more on resales and joint purchases in a moment.

Joint purchasing by wholesalers to secure the discount did not appear to be a common practice. In some instances, Morton itself arranged joint purchasing for several wholesalers through one designated buyer who was granted the 5000 case discount. In such cases, the designated wholesaler kept records and billed the other wholesalers, typically charging them no more than \$.02 per case (and this probably offset similar costs otherwise incurred by Morton).

Thus, if discrimination existed between 5000 case buyers and other wholesalers, it probably would not have exceeded \$.08 per case (\$.10 minus \$.02); and would fall from this amount insofar as the designated wholesaler's costs of arranging resales to the other buyers approximated Morton's.⁴² If Morton's and the wholesaler's costs of arranging resales were the same, then discrimination would be unlikely. If Morton's costs of arranging resales were lower, then discrimination might exist, but would be limited by the cost difference. On the whole, since Morton typically arranged its own sales to wholesalers, its costs would be assumed lower. But this cost difference could be small (I suspect that it probably was) and represent perhaps only a small part of the price difference between the wholesalers who secured no discount and the 5000 case buyers. If so, then most of the discount would be assumed cost based.⁴³ Further, if we assume the discounts to the large chains were cost based, they might be inclined to "overbuy" BL and resell to

⁴² By designated wholesaler I mean one of a group of wholesalers through whom 5000 or more cases are jointly purchased (so each buyer secures the discount), or a wholesaler who purchases more than 5000 cases and supplies other wholesalers.

⁴³ In fact, nondiscount wholesalers might accept Morton's merchandising and carload service and then try to place their orders through a designated wholesaler. The cost of this for the wholesalers might be approximated by \$.02 per case, which would estimate the maximum discrimination per case. This would be reduced if Morton would have to incur a similar cost if the wholesalers did not purchase jointly.

nondiscount wholesalers. This behavior would be more likely if the large chains competed with each other in the various geographic areas.

Viewed in this way, significant discrimination in favor of 5000 case buyers would not seem very likely. If so, the higher price Morton charged to wholesalers purchasing less than 5000 cases per year would only cover (or approximately so) the higher cost of their supply. This result might not hold if, in the various geographic areas where nondiscount wholesalers were located and where shipments from Morton could be conveniently made, the wholesalers could not handle as much as 5000 cases per year. However, the Record in Morton covered many areas where wholesalers' orders undoubtedly exceeded this amount, and Morton nonetheless was not confronted with joint buying to secure the discount or reselling by discount buyers. Further, local purchase quantities need have no direct relevance to resales by the large chains.

Theoretically, Morton would not be expected to discriminate in its pricing if BL was fully competitive with the table salt of the other producers and with Morton's other grades. All of the latter products were priced identically. Morton probably had no discretion in pricing its other grades, but it may have had some discretion in pricing BL. The evidence bearing on this is impressionistic: the frequent, competitive price-cuts of the brands of the different producers seem not to have led to comparable cuts in the price of BL. Consequently, competition against BL cannot be relied on to eliminate the possibility of discrimination in its pricing.

Let us suppose that Morton had some discretion in pricing BL, so that discrimination favoring 5000 case buyers could occur. Then the demand for BL by nondiscount buyers

would be expected to fall over time, and that of the 5000 case buyers to rise. This is because the former buyers would substitute other grades for BL as far as practicable, since the other grades were relatively cheaper to them, and because they competed with 5000 case buyers on resales of BL in virtually all areas of the country. One might then expect the price of BL to the nondiscount buyers to fall over time, and that to the 5000 case buyers to rise. However, throughout the time covered by the FTC's investigation, the pricing of BL did not change in this way: the BL prices offered non-discount and 5000 case buyers remained the same. This result might be expected if Morton's costs of supplying nondiscount and 5000 case buyers differed and prices only reflected the cost difference. The absence of change in the pricing of BL over time reduces the likelihood that the 5000 case discount was discriminatory.

I note that since the price of other table salt did not differ between nondiscount buyers and most 5000 case buyers, it is possible that the former buyers specialized in handling other table salt, whereas the 5000 case buyers specialized in handling BL. But the buyers who secured no discount handled at least some BL, given what appeared to be the broad demand for this salt by grocery retailers. The invoice evidence from Morton's study suggests that the amounts typically ordered by the nondiscount buyers were small. Such orders, as noted before, probably imposed higher costs on Morton. But it is not possible to say with certainty that the discount to the 5000 case buyers only reflected a cost difference.

4. Conclusion

All in all, I conclude that Morton's discounts to the large chains did not discriminate in their favor. In fact there are suggestions in the evidence that Morton's prices to the large chains discriminated against them when compared with its prices to wholesalers who secured no discounts. This is the same conclusion that I reached regarding the unit discount (the \$50,000 annual volume discount) granted to the large chains by International and the other salt producers.

The unit discount granted by all producers to certain wholesaler groups probably did discriminate in their favor, at least initially. These discounts appeared soon after the demise of the NRA and just after passage of the Robinson-Patman Act. Most likely they reflected competitive price-cuts by individual producers, which over time would tend to erode published prices. Whether during the time of the FTC's proceedings transactions prices to the wholesaler groups that received the discount were actually below those paid by wholesalers not granted the discount is not known. On the whole, I suspect these price differences were minor. Very few if any cost savings could be found (or were even suggested by the producers) on sales to the wholesaler groups granted the discount.

The most difficult discount to understand and the one about which almost no evidence was uncovered is Morton's 5000 case discount on BL. My view is that this discount was probably cost-based when compared with Morton's costs of supplying wholesalers purchasing smaller annual quantities. But there is little direct evidence to support this conclusion.⁴⁴

⁴⁴ The FTC's orders against Morton and International led them (as well as all of the other producers) to abolish their discounts. Comments about possible effects of the orders are given in Appendix C.

One general point to note is that the price structure that was discussed and defended during the FTC's investigation and trial cannot be understood without taking account of the changes that were adopted in response to the change in the law -- in this instance, passage of the Robinson-Patman Act. How far such an effect might apply to other industries and laws is not known, but could well be important in some instances. Given the confusing comments that Morton and International and most of the other producers made to the FTC about their discounts, it is not surprising that the FTC was suspicious of them.

The Commission's approach to regulating price discrimination as reflected in Morton and International suggests that systematic and persistent price differences consistent with price discrimination would be ferreted-out and discrimination deterred through case selection and consideration of cost justification. The meeting competition defense would not be thought to play a significant role in such cases, and "competitive injury" would seem to impose no significant burden for the Commission to meet. In the next Chapter, I discuss the industries in which the Commission has entered orders resolving charges raised under the Robinson-Patman Act. My aim is to assess whether the focus has been on likely instances of price discrimination.

VIII. THE FTC'S REGULATION OF PRICE DISCRIMINATION

a. The Approach As Revealed in Morton and International

Let us suppose that the Robinson-Patman Act and the FTC's enforcement of it stem from the following view: that price discrimination encourages monopoly and the dissipation of resources (by seller(s), to maintain the discriminatory price, and by those discriminated against, to circumvent it or diminish its effects) and that it results in too little being sold to those discrimination against. In light of this, let us then examine the FTC's regulatory approach as revealed in Morton and International. Of course, Morton and International are just two cases. But I believe that they reflect in general, and perhaps in all but minor detail, the FTC's approach that has existed for many years. What strikes one most strongly is that the FTC seems to have so simplified its task that pricing that is not discriminatory can be challenged and found illegal as easily as that which is. It follows that the FTC's method of case selection will determine whether or not price discrimination is primarily deterred.

Consider the main elements of a case and how they might relate to the issue of price discrimination. There is presented evidence of a price difference charged by a seller to competing buyers which is defined as discriminatory and illegal unless the defenses hold. Given the findings in Morton concerning LCL pricing of BL and the carload discount on other goods (and in International concerning the 5 tons/100 case discount), if any sales are made at the higher price, the price difference is illegal unless the defenses hold. Any price difference can thus be challenged, so reliance must be placed on case selection and

on the defenses to insure that only price discrimination is prohibited. No doubt instances occur where justifiable price differences are deterred because the cost of the defenses exceed the seller's gain from charging different prices. This will be likely when the higher price involves relatively few sales and reflects (say) a charge for services provided by the seller that the buyer could furnish at only slightly greater cost. The cost of this error in deterrence might be small; and probably some relatively minor price discrimination would also be deterred that the seller makes no attempt to defend. Conversely, discrimination occurring when prices are equal would not be identified by the FTC's approach. But such instance may be rare and hard to identify, and at any rate some of the FTC's cases might have sought to cover "quality adjusted" price differences.

Since virtually any price difference can establish a case, then the defenses must hold if any challenged prices are to continue. If collusion or monopoly is suspected (as it might have been in the case of table salt), there is no "meeting competition" defense for price differences that are persistent and systematic and could be interpreted as discriminatory. Under monopoly, meeting competition is irrelevant. If collusion is suspected, the sellers cannot justify their pricing on the ground that they were each simply meeting the prices of competitors. This defense was attempted in Morton and International and failed. The rejection of the defense in such circumstances seems reasonable. Presumably, what the defense would permit, if collusion is suspected, are short-term, unsystematic price differences reflecting changes in market conditions or more competitive behavior. Just how unsystematic and lacking in persistency price differences must be to avoid challenge or a finding of illegality is not clear. In International, the Hearing Examiner found all price differences

illegal, whether or not persistent and systematic, but his approach was rejected by the FTC. In Morton, it was the systematic and persistent price differences said to result from annual and carload discounts that were found illegal. But in fact there were no carload discounts, so what conclusion might be drawn is uncertain. Basically, if the concern is price discrimination, the FTC would not be expected to pursue cases in which price differences are short-term and unsystematic, so the meeting competition defense would be thought primarily to correct errors in case selection. The difficulty in prohibiting the use of the defense when price differences are persistent and systematic is that such differences may be competitive or otherwise cost based but nonetheless challenged. So reliance must be placed on case selection and on cost justification.

Cost justification would seem possible only if price differences are persistent and systematic. It is doubtful, for example, that a seller's estimates of foregone revenues if prices in the short term had not been lowered to some buyers but not others would (or could) be accepted as a defense. At any rate, price differences or changes of this sort would not be expected to be challenged. Persistent price differences among types or classes of buyers could reflect cost differences or price discrimination. The latter may or may not favor large buyers. In application, the law has not been restricted to situations involving large buyers. Judging from Morton and International, any cost justification can be rejected if error is found (or said to be found) or if there is something left out that it is said should have been included. Error and incompleteness apply to any study, so any cost justification could be rejected, and probably would be if price discrimination is suspected and a cost defense contains weaknesses. Discrimination could have been suspected in Morton and

International, particularly from the annual discounts. Rejection of the firms' cost defenses (which contained weaknesses) posed little difficulty for the FTC. They were rejected essentially by assertion, although my examination of the evidence presented by the firms suggests that the firms did not in fact meet their burden.

Individual sellers would not cost justify if it is expensive and unlikely to succeed (and particularly if the seller can do at almost the same cost what the buyer now does in exchange for a lower price). Cost justification might be attempted if the existing price structure is important to the seller in that the potential loss from a change in it is great. In such instances, the greater care with which a study might be done may lead the FTC to a more careful consideration of why prices differ. But the treatment of the defenses in Morton and International do not bode well along these lines. Whether the cost defense has developed in such a way as to facilitate the continuation of price differences under competitive conditions or that are otherwise cost based is not clear. Some conclusions about this are drawn later, after considering the cases brought and the orders entered by the FTC.

In general, the approach revealed in Morton and International suggests that any price difference could be challenged as illegal. Evidence suggesting why price discrimination was believed to be the explanation of the discounts on salt was unnecessary for the Commission's affirmative case, and analysis of this issue was absent in Morton and International. We seem to be left to rely on the FTC's discretion in case selection and possibly on analysis of cost justification to identify and deter price discrimination.

b. The Large Buyer

It is often said that the Robinson-Patman Act was passed to prevent the large buyer from using his market power to secure advantages from suppliers not available to the small buyer. This view was prominent in the Supreme Court's Morton opinion. However, relatively few of the FTC's cases closely relate to this concern. Virtually all cases have been directed against sellers, and invariably there is no analysis determining whether the buyer(s) who received a lower price had power in any relevant market. Nevertheless, I doubt that the focus on sellers is misplaced: concern that a buyer with market power will secure discriminatory advantages over his smaller competitors would seem to arise only rarely. I discuss this issue briefly, because it has a bearing on how I will later examine the orders entered by the FTC.

Suppose there is a dominant buyer and a fringe of small competing buyers, so to propose a situation corresponding to the stated concern. Suppose further that supply to the buyers is competitive and that no cost difference exists in supplying the dominant buyer or the fringe. Then the dominant buyer would account for the fact that his additional purchases may raise supply price. If they do, his purchase decisions will be such as to restrict output. But the price paid by the fringe for its supply will be the same as (or at least will not be higher than) that paid by the dominant buyer (assuming that the fringe can absorb additional supply). For if the price offered by the dominant buyer for any quantity demanded by it is below that offered by the fringe for any part of this amount, the sellers would gain by diverting output from the dominant buyer to the fringe until the price received from

either is the same. If the cost of supplying the fringe exceeds that of the dominant buyer, then the difference in prices would at most equal the cost difference. In effect, the fringe raises the elasticity of supply faced by the dominant buyer and reduces the degree to which output is restricted. This situation is analogous to that of the dominant seller with a competitive fringe. In the latter case, the fringe increases the elasticity of demand faced by the dominant seller and results in a larger output sold at the same price by all sellers.

Alternatively, suppose that the dominant buyer discriminates among his suppliers. It could be, for example, that the elasticity of supply of each seller or group of sellers differs, so that the amount bought by the dominant buyer from the less elastic sources of supply is reduced as is the price paid to them; and conversely for the more elastic sources of supply. But the price paid by the fringe would not be higher than the lowest price paid by the dominant buyer. For again, if any seller is offered a price by the dominant buyer below the price offered by the fringe for any amount, the seller would gain by diverting output from the dominant buyer to the fringe until the price received from either is the same. The dominant buyer would thus receive no price advantage, since the average price it pays would not be less than the price paid by the fringe. If the cost of supplying the fringe exceeds that of the dominant buyer, then the average price paid by the dominant buyer would not be below the price paid by the fringe by more than the cost difference. The above is analogous to the case of the dominant seller who still finds it profitable to discriminate among his customers after account is taken of the fact that the fringe would supply the whole of its output to the most profitable segment(s) of the market, so that the

average price received by the dominant seller on its sales would not exceed the price received by the fringe.

There is the possibility that the dominant buyer would contract with each seller specifying an output and a price offered on an all or nothing basis. If there was no fringe, and assuming that the sellers' marginal costs are rising, each price paid by the dominant buyer would be below the marginal cost of the quantity acquired from each seller. Now let there be a fringe and assume that its demand is sufficiently large to offer a higher price for the same output from the seller otherwise offered the lowest price by the dominant buyer. Then the seller would supply the fringe, since this is more profitable. To prevent this, the dominant buyer could bid up its price to this seller to equal that offered to its next lowest-priced supplier. Suppose the fringe is willing to pay a price for the same output as that demanded by the dominant buyer that exceeds the price offered by the dominant buyer to either of these suppliers. Then either supplier would offer its output to the fringe. To prevent this, price could be bid up by the dominant buyer to that offered to its next lowest-priced supplier. This process would continue until all sellers receive the same price, or until the fringe pays a price equal to the lowest price paid by the dominant buyer. There would be no Robinson-Patman violation in this situation, because the law requires a given seller to charge different prices to his different customers, and this would not occur in the situation described.¹ If the cost of supplying the fringe exceeds that of the dominant buyer, then the dominant buyer could buy more cheaply by an amount no greater than the cost difference.

¹ The law does not require each seller to sell to every customer. In the situation I have described, a seller sells at a uniform price but not every seller sells to the fringe.

It could be that the fringe is so small that the amount demanded by the dominant buyer from every seller exceeds what is demanded by the fringe at the same price. There is a potential loss to any seller if the fringe offered a higher price than the dominant buyer for any part of its output. But in this case, the dominant buyer could threaten to discontinue its purchases from any seller who supplies the fringe, or who supplies any buyer except at a price above that which the dominant buyer pays. If the potential loss to the seller from discontinued sales to the dominant buyer exceeds its gain from the fringe, a threat could succeed. If so, the fringe might then have to pay a price above the average paid by the dominant buyer. A Robinson-Patman case could result from this, since an individual seller may be charging different buyers different prices. On the whole, such instances would seem to me rare, and in fact I know of no case that fits the description, even remotely. In general, it would be thought that price discrimination by a seller among his different customers would typically arise when the seller is not competitive. An absolutely large buyer might then secure a price that discriminates in its favor if the elasticity of its demand exceeds that of small buyers; and a relatively large buyer with market power as a buyer also might secure from its dealings with a seller with market power terms that discriminate in its favor. But it need not be "large" buyers who secure the more favorable terms. Most cases brought by the FTC have been against sellers, and these cases have by no means been confined to instances of potential discrimination favoring large buyers.

I will in a moment consider whether sellers were more likely than not to be competitive when orders were entered in their industries by the FTC, but note first provisions of the Robinson-Patman Act that deal with discrimination occurring other than directly in terms

of price challenged under Section 2(a). Section 2(c) prohibits a seller from paying brokerage to a buyer except for services rendered to the seller by the buyer. If buyers are competitive, such payments would be for services rendered if sellers are competitive but not necessarily if the sellers are not competitive. Similarly, the two service provisions (sections 2(d) and 2(e), covering respectively purchases from customers, or provision to customers, of promotional services or facilities by the seller) require the seller to treat competing customers on proportionally equal terms. If the customers compete as buyers, this result would arise if sellers are competitive but need not otherwise.² Section 2(f) prohibits a buyer from accepting a price known to discriminate in its favor as against the seller's price to a competing buyer. This could occur if sellers are not competitive, or possibly if a dominant buyer entered all-or-nothing contracts as discussed before.

c. The Industries In Which Orders Have Been Entered, 1936-1980

What has been the nature of the FTC's enforcement? From the Act's passage through 1980, the FTC entered, by my count, some 611 orders (or voluntary agreements to comply) resolving charges raised under sections (a), (d) and (e). Were these orders entered in industries in which discrimination by the sellers (assuming the buyers were competitive) is a likely explanation of what was challenged? To answer this, I obtained from each case the product or products concerning which charges were raised and (when possible) assigned

² Consider a competitive seller who purchases promotional services from his customers. The seller will allocate his purchases so that the price paid per unit of effective promotional service acquired is the same, so each customer who offers such service to the seller is treated on proportionally equal terms. A seller with market power who wished to discriminate could charge all customers the same price and then acquire promotional services from some of them on other than proportionally equal terms.

each of them to a 4-digit (in some instances 5-digit) SIC industry. I then obtained for the suppliers in each industry the Census estimate of 4-firm concentration, providing that concentration is reported within 3 years of the entry of any order. Many industries as so identified involved more than one order. In these instances, the concentration ratios for each industry were averaged (when reported within 3 years of more than one order). For each industry I thus derived one concentration observation regardless of the number of orders entered in it. My aim was to discover in rough terms the likelihood of competition or its absence among suppliers to the customers in the industries in which at least one order was entered.

As so derived, orders were entered in 114 industries. For these industries, mean 4-firm concentration is 39.9 percent. Column (b) of Table VIII-1 lists the proportion of these industries falling within each of several size-classes of 4-firm (supplier) concentration. Column (c) is similar to (b) except that the number of industries was reduced from 114 to 101 to account for a problem posed primarily by the orders in the apparel and furniture industries. The complaints or orders in these cases frequently specify "furniture" or "wearing apparel", and so could not be assigned to any one 4 (or 5)-digit industry. The latter contain more narrowly defined products. In constructing Column (b), I assumed that of all the orders against suppliers of wearing apparel, at least one of them involved a product falling within each of 8 different 4-digit industries which contained the bulk of the apparel products that seemed to be at issue. Given the number of orders (316) involving apparel, the assignment of these orders to 8 different 4-digit industries probably does not take us far from the mark. In contrast, in constructing Column (c), all of the apparel orders were

assigned to one "industry". The concentration ratio used for it is the weighted average concentration of the eight 4-digit industries in 1963 (which is near in time to when a great many of the apparel orders were entered). Similar treatment was accorded the orders involving furniture, although there are far fewer furniture (7) than apparel orders. Thus,

Table VIII-1
Concentration Distributions of Industries Involving
At Least One Order and of All 4-Digit Industries

(a)	(b)	(c)	(d)	(e)	(f)
Concentration %	(a) (d) & (e) Orders	(a) (d) & (e) Orders (adjusted)	(a) (c) (d) (e) & (f) Orders	(a) (c) (d) (e) & Orders (adjusted)	All 4 Digit Industries
0-19	23.7	17.8	24.4	19.5	21.7
20-39	30.7	33.7	30.5	32.1	37.8
40-59	25.4	25.7	26.0	27.1	24.1
60-79	13.2	13.9	12.2	12.7	11.1
80-100	7.0	7.9	6.9	7.6	5.6
Mean	39.9	42.1	39.3	41.2	38.8
Number	114	101	131	118	378

Source: Orders obtained from 23 FTC (1936) through 96 FTC (1980). Concentration ratios obtained from U.S. Census of Manufactures, Subject Statistics (1977), Table 7, at 2(11) - 9(65); Table 9, at 9(123) - 9(267).

in constructing Column (b), the furniture cases were assigned to 5 different 4-digit industries, whereas in constructing Column (c), these orders were combined into one "industry" observation. The concentration ratio used for the latter is the weighted average concentration of the five 4-digit industries measured in 1963 and 1972. These years are particularly near

in time to when most furniture orders were entered. Similar consolidations were made in constructing Column (c) for two other product groups -- sugar, and rugs and carpets.

The 114 industries included in Column (b) cover a substantial proportion (about 78 percent) of all industries in which orders were entered. Certain industries were excluded from Table VIII-1 because the orders identified products that I was unable to assign to any 4 or 5-digit industry. Other industries were excluded because concentration estimates were more than 3 years from the date of any order. Products that could not be assigned to industries include such items as the following: a particular form of saving account, a product used in the manufacture of home-made ice cream, commercial inoculents, an unspecified type of numbering machine, dock boards made of magnesium, fresh produce, unspecified non-edible grocery products, tables used in the offset printing trade, lithographic logs, unspecified dietetic foods, balsa wood, electric broiler rotisseries, and certain chemicals used in the graphic arts. I doubt that inclusion of these items would alter the general picture. Nineteen industries were excluded because concentration estimates were not available within three years of any order. For 12 of these industries, concentration ratios appear within 10 years (but more than 3 years) from any order. Average concentration for these industries is 40.4 percent, and the average number of years between any order and the nearest concentration estimate is 7.5.

The concentration distribution of industries in which orders were entered (Columns (b) and (c)) may be compared with the concentration distribution of all 4-digit industries. The latter is given (for 1963 only) in Column (f) of Table VIII-1. The comparison is to some extent influenced by the fact that the concentration ratios used in constructing Columns

(b) and (c) are those within 3 years of any order and many orders were entered well before or after 1963. On the whole however, changes over time in the concentration distribution of all industries have been relatively small. Average concentration has changed hardly at all: concentration for all 4-digit industries reported in 1958 averages 39.6 compared with 38.8 for all such industries reported in 1963. For the same 4-digit industries in both years, concentration averages 39.6 in 1958 and 40.5 in 1963. In 1947, concentration for all reported 4-digit industries averaged 40.8; in 1970, 39.9. For the same industries in both years, the averages are 40.6 in 1947 and 42.7 in 1970. The years between 1947 and 1970 contain the bulk of all orders. Concentration in 1963 for the 114 order industries averages 39.5 percent and is virtually the same as the average (39.9) reported for these industries in Table VIII-1 when concentration is estimated within 3 years of any order. For the 114 industries, the concentration distribution in Column (b) is also virtually the same as that derived using concentration for these industries in 1963. I note that the concentration ratios used in Table VIII-1 are reported by the Census on a national basis and probably understate concentration for some industries (and overstate it for others) in what might be considered more relevant markets. But except for certain bakery and dairy products, it does not appear that the industries in which orders were entered involve products distributed by their producers within relatively confined geographic areas.

The figures in Columns (b) and (c) indicate that about 80 percent of the industries subject to order were concentrated under 60 percent. Over 50 percent were concentrated under 40 percent. In 1963, about 84 percent of all 4-digit industries were concentrated under 60 percent. In general, the concentration distribution of the industries in which orders

were entered (either in Column (b) or (c)) is remarkably similar to that for all 4-digit industries, suggesting that the enforcement of the Act has been largely independent of concentration. If the concern was price discrimination, one would expect orders basically in industries in which supply was highly concentrated and where price discrimination would be thought more than a remote possibility. If concentration of (say) at least 60 percent (and probably a good deal more) would typically be required for systematic price discrimination, then only about 20 percent of the industries subject to order were concentrated to this extent. In 1963, roughly 16 percent of all 4-digit industries were this concentrated.³

The general picture is not changed if orders based on sections (c) and (f) are considered. Section (c) prohibits discrimination through the payment of brokerage by sellers to buyers. Charges under this section basically have no defense. Evidence that the seller's net is the same on all sales is accorded no weight. Section (c) cases may be brought against either buyers or sellers. Section (f) prohibits a buyer from knowingly accepting a price that discriminates in its favor (as against the seller's price to the buyer's competitors). These orders are against buyers only. Section (f) cases are relatively rare: of all (c) and (f) orders entered through 1980 (by my count 344 orders), about 6 percent involved charges raised under section (f).

³ Obviously the comparison is rough in that concentration for many 4-digit industries reflects an average for several individual products. It might be said that this average does not reflect concentration for the products against which orders were entered. That is, orders might have involved products in the supply of which concentration was so above the average that discrimination was feasible. I have not examined this in detail, although I doubt that the possibility would hold up. The 4-digit industries are fairly narrow product groups and I do not believe that orders were typically against products in the supply of which concentration was very different from that for other products classified in the same industry. I also would not expect the concentration distribution of order industries to conform so closely to that for all 4-digit industries, since relatively more orders would still be expected in highly concentrated 4-digit industries.

Of all (c) and (f) orders, a very large proportion involve food items or other products distributed in significant part through grocery stores: roughly 83 percent of all (c) and (f) orders might be so described. At that a substantial proportion involve three product groups: canned fruits and vegetables, canned seafood (salmon, sardines, tuna, mackerel, etc.) and fresh produce. About 35 percent of all (c) and (f) orders involve brokerage paid or received on fresh produce, primarily citrus from Florida and Texas. Judging from the number of produce orders and from the general nature of these markets, it would be hard to describe them as other than competitive at the level of distribution involved. There is no evidence of significant market power of buyers or of all-or-nothing contracting by them. Canned fruits and vegetables were involved in about 9 percent of all (c) and (f) orders. Most of these orders resolved charges under Section (c) and were entered in the 1940's, when concentration is not reported. The Census reports 4-digit concentration for suppliers of canned fruits and vegetables of 24 percent in 1963 -- and the industry then contained 1,135 companies. It is difficult to imagine that the supply of canned fruits and vegetables was not competitive when the orders were entered. Again, there is no evidence of significant market power of buyers or of all-or-nothing contracting by them. About 22 percent of all (c) and (f) orders involve canned seafood. Most of these were entered in the 1940's and 1950's and also resolved charges under section (c). The Census reports 4-digit concentration only as far back as 1963, at which time concentration was 38 percent. The Census then reports 345 companies. The figures hardly suggest other than competitive conditions at least on the part of suppliers. I doubt that the buyers had market power. In total, these three product groups represent about 66 percent of all (c) and (f) orders.

Most of the orders in these product groups were against relatively very small suppliers. If discrimination existed, it is doubtful that these sellers (in the absence of market power of buyers and all-or-nothing contracting) would have supplied other than the high-priced segments of the market, suggesting that the price differences challenged were cost based rather than discriminatory. That is, if price discrimination by large sellers existed, the small sellers likely would have supplied the whole of their output to the buyers charged higher prices. Consequently, the fact that the small sellers charged different prices (that were challenged) suggests that the price differences were cost based. There is no evidence in these cases that the sellers' net prices systematically differed on sales among competing buyers. In general, the cases typically involved lower prices charged to buyers on sales to whom the seller avoided brokerage compared with higher prices paid by buyers on sales to whom the sellers did not avoid brokerage.

From previous discussion, if sellers are competitive, relatively large buyers would not be expected to pay prices (net of cost differences) below those paid by small buyers except in unusual circumstances that I believe fit at most relatively few of the FTC's past cases. Consequently, discrimination favoring large buyers (or any other buyers) would occur primarily when sellers are not competitive. Do the (c) and (f) orders against buyers involve products that were unlikely to be competitively supplied to them?

Some of the orders against buyers involved products described so generally that it was not possible to assign them to any 4-digit industry. This group includes an order against a buyer of unidentified products sold through hardware stores, 5 orders against buyers of unidentified products sold through department stores, and 37 orders against buyers of

unspecified grocery products. There are also 22 orders against jobbers or other distributors of automotive replacement parts and supplies. In none of the above cases does it appear that the buyers could be described as dominant in any relevant buying market. Since the specific products at issue in these cases were not defined, it was not possible to discover whether the FTC's concerns involved products in the pricing of which discrimination by suppliers might have been possible. If the generality of the orders reflects the fact that the buyers generally received lower prices from suppliers over a wide range of products, it seems inconceivable that price discrimination involved them all. It could be that generally prohibiting the buyer from receiving lower prices prevented the continuation of only the lower prices that had been received; and those received could have been on products in the supply of which discrimination was possible. For example, the production of automobile replacement parts and supplies was relatively concentrated at the 4-digit level: 60 percent in 1967 (approximately when a good many of the orders against auto-parts buyers were entered). But there were a great number of companies within this industry: the Census reports 1,427 in 1967. It is reasonable to suppose that many (perhaps most) of the products handled by the buyers were competitively supplied. Whether the lower prices that the buyers received involved products that were competitively supplied as well as those that might not have been is not known. Typically, this was not an issue examined by the FTC.

If it is assumed that discrimination involving sections (c) and (f) will not arise if sellers are competitive, (that is, buyers with market power entering all-or-nothing contracts are excluded), does consideration of the industries in which the FTC obtained at least one order under these two sections alter the picture of the industries in which at least one order

was obtained under sections (a), (d) and (e)? To answer this, the products involved in the (c) and (f) orders were identified and assigned (when this was possible) to 4-digit (in some cases 5-digit) industries. For each industry, four-firm concentration was obtained as before.⁴ From the industries thus identified, 17 were not among the industries previously identified as having at least one order under sections (a), (d) and (e). The 17 industries were added to those previously identified, and concentration distributions for all industries are given in Columns (d) and (e) of Table VIII-1. Column (d) is comparable to (b) and Column (e) to (c) in their treatment of apparel, furniture, etc. as discussed before. The addition of the 17 industries changes the overall results only slightly, so the same general remarks apply as before.

In total, the products identified in all (c) and (f) orders could be assigned to 46 industries. Obviously, there is substantial overlap between the industries with at least one order under sections (a), (d) and (e) and those with at least one order under sections (c) and (f). For 34 of the 46 industries, concentration estimates within 3 years of any order were available. The concentration distribution for these 34 industries is given in Column (b) of Table VIII-2. Column (c) gives the concentration distribution for all 4-digit industries in 1963. The two distributions are again very similar. Eighty-two percent of the industries having at least one (c) or (f) order were concentrated under 60 percent. Eighty-four percent of all 4-digit industries were concentrated under 60 percent. The figures again suggest that the bulk of the industries subject to at least one order involved products likely to be supplied competitively, so far as this might initially be judged by concentration.

⁴ Fresh produce was excluded from consideration because there is no 4-digit industry for these products.

Table VIII-2
Concentration Distribution of Industries Involving at
Least One Section (c) or (f) Order and of
All 4-Digit Industries

(a)	(b)	(c)
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Percent of Industries

Concentration Ratio	(c) (f) Orders	All 4-Digit Industries
0-19	23.5	21.7
20-39	35.3	37.8
40-59	23.5	24.1
60-79	14.7	11.1
80-100	2.9	5.3
Mean	36.0	38.8
Number of Observations	34	378

Source: Orders obtained from 23 FTC (1936) through 96 FTC (1980). Concentration ratios obtained from U.S. Census of Manufacturers, Subject Statistics (1977), Table 7, at 9(12)-9(65); Table 9, at 9(123)-9(267).

Table VIII-3
Concentration Distribution of Orders and of All
Companies In 4-Digit Industries

(a)	(b)	(c)	(d)	(e)	(f)
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Percent of Orders

Concentration Ratio	(a) (d) & (e)	(a)-(f)	(a)-(f) Including Canned Fish	(a)(d) (e) Apparel Weighted	Percent of Companies All 4-Digit Industries
0-19	54.5	50.8	46.4	88.7	75.5
20-39	26.2	27.2	33.5	6.5	12.6
40-59	10.4	10.4	9.5	2.6	9.2
60-79	6.6	9.5	8.7	1.6	2.3
80-100	2.2	2.1	1.9	.5	.4
Total Number	725	809	885	2937	

Source: Orders obtained from 23 FTC 1 (1936) through 96 FTC (1980). Concentration ratios obtained from U.S. Census of Manufacturers, Subject Statistics (1977), Table 7, at 9(12) - 9(65); Table 9, at 9(123) - 9(267).

d. The Number Of Orders

Thus far, the discussion has considered the concentration of industries having at least one order. In this section, consideration is given to the number of orders in these industries. Table VIII-3 lists the percentage of all orders falling within each size-class of industry concentration. Column (b) lists the percentages for (a), (d) and (e) orders in the 101 industries previously identified. Column (c) lists the percentages after adding

the (c) and (f) orders in the 17 additional industries. Column (d) is the same as Column (c) except that I have added the orders involving canned fish. Canned fish was excluded from the previous analysis of industries having at least one order because concentration within 3 years from the date of any order was not available.⁵ I have added canned fish simply because a substantial number of orders are involved.

It may be recalled that in constructing Table VIII-1, a difficulty arose in handling the orders primarily in apparel and furniture. These orders defined the products so broadly that they could not be assigned to any 4-digit industry. However, many of the firms involved in these orders produced more than one apparel or furniture product. Had the products been identified, no doubt many of them could have been assigned to different 4-digit industries. If so, an order prohibiting discrimination (say) in the sale of apparel could correspond in practical effect to different orders in each of several 4-digit apparel industries. There were eight 4-digit industries in apparel that seemed the focus of concern. In deriving Columns (b), (c) and (d) of Table VIII-3, each apparel order has been counted only once. Each such order was assumed to be against a firm in an industry with concentration equal to the weighted average for the eight 4-digit industries. In effect, each apparel order was assumed to be against a firm that produced one 4-digit product (although the exact 4-digit product is not known, thus giving rise to the use of the weighted average concentration). The total number of orders directly affecting the apparel industries would thus equal the number of such orders. No doubt this understates the true state, because (as I say) the firms seemed typically to produce in more than one 4-digit apparel industry. Furniture

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The concentration estimate used is that nearest in time to any order.

and the few other products in which the same problem arose were treated similarly in Table VIII-3. At the other extreme, if each apparel firm produced in all eight 4-digit industries, then each apparel order could correspond in practical effect to eight separate orders. In Column (e), the percentages listed in Column (b) are restated with the apparel orders multiplied by eight. No doubt this overstates the case. Such weighting was not done for the other orders that gave rise to a similar problem. Column (f) lists the concentration distribution of the total number of companies in all 4-digit industries in 1963.

Column (c) indicates that just over 88 percent of the Section (a)-(f) orders are in industries in which concentration was under 60 percent. The percentage rises to about 91 if only Section (a), (d) and (e) orders are considered (Column b). The percentage equals about 90 with the inclusion of canned fish (Column d). With greater weight assigned to each apparel order (that is, each apparel order is counted as eight orders), the percentage of orders in industries concentrated under 60 percent rises to 98. In 1963, the percentage of companies in all 4-digit industries concentrated under 60 percent was 97.3. On the whole, the figures suggest somewhat greater relative enforcement in more concentrated industries. Nonetheless, it appears that the great bulk of the orders between 1936 and 1980 is in industries in which the likelihood of discrimination was remote.

It cannot be discovered from its opinions in Morton and International whether the FTC's basic concern was price discrimination, although it could have been, at least with respect to the annual discounts. That it actually was seems more doubtful, once consideration is given to the other industries in which orders have been entered. Most orders were in industries that seemed competitive. In response to a query raised earlier, it does not appear

that the cost defense has developed so to permit cost differences to explain price differences when discrimination is unlikely. An alternative is to assume that the approach to deter price discrimination (as revealed in Morton and International) is to prevent price differences generally. This would correspond to a merger policy that prohibits all mergers because some of them may be harmful. That it would be so difficult to identify instances in which discrimination is a likely explanation of what is being challenged, and that discrimination is so pervasive as to support a general restriction on price differences, have not to my knowledge been shown or argued by those supporting past enforcement of the Act.

It would not require a major revision of existing standards to revise the FTC's approach to conform with that used in most antitrust cases. The "injury standard" need not change appreciably, since a price difference could define competitive injury, as it seems implicitly to have been done by the FTC and the Supreme Court in Morton. What would require change is in the evidence (which heretofore has been absent) indicating that price discrimination is a likely explanation of what is being challenged. This would require evidence (as in most antitrust cases) of the likelihood of collusion or monopoly in a relevant market and reasonable arguments suggesting why what is being challenged is consistent with price discrimination. In such cases "meeting competition" would not provide much of a defense (as at present). The defense would basically reside in evidence of competition and closely related to this, that cost relationships reasonably explain the price differences at issue. Though this might not reflect a major change in certain of the legal standards, it would reflect a fundamental change in the character of the cases that would be brought.

APPENDIX A

The table salt produced by the 15 companies operating plants outside of California was derived primarily from the evaporation of brine in vacuum-pans. The salt so obtained is a fine crystal of uniform shape. At the time of the cases against Morton and International, about one-third of the total output (in tons) of vacuum-pan salt was packaged and sold for household use. The balance was packaged differently and sold for commercial or industrial use. The discounts challenged by the FTC were those granted on the salt packaged for household use and sold to grocery wholesalers and retail chains.

The vacuum-pans used in the evaporation process were near the sources of brine. In general, brine was obtained from natural wells or by dissolving in water salt contained in underground deposits. The output of vacuum-pan salt in the short run would be limited by the capacity of the vacuum-pans. But the amount of vacuum-pan salt for household use could be expanded by packaging relatively more of the total output in suitable containers. In the text of this study, figures are given on the output of vacuum-pan salt by the 15 companies.

Most of the companies that produced vacuum-pan salt also produced rock salt and "medium" or "grainer" salt. Rock salt was mined and crushed and sold as such for industrial or commercial use. However, in certain Southeastern states only, a particularly pure form of rock salt mined in Louisiana was finely crushed and packaged for household use. Medium salt was produced through the evaporation of brine in open-pans. The brine sources were the same as those used for vacuum-pan production. The evaporation of brine in open-pans

results in salt crystals that are flake-like in character. This salt was packaged and sold primarily for commercial or industrial use. I believe that very little of it found its way to household use.

In addition to the firms that produced vacuum-pan salt (and as I say most of these firms also produced rock and medium salt), there were other firms that produced only rock or medium salt. From all accounts, these firms were very small, although their combined production is not known with certainty. There were, for example, at least 9 small producers of medium salt. Of these, 5 were in West Virginia and Ohio, near the Ohio River, 2 were in Michigan, and one each was in Kansas and Texas. A small amount of medium salt also was recovered from the production of particular chemicals and marketed by the chemical companies. It was possible to identify 6 producers of rock salt only -- two in Kansas and one each in New York, Texas, Utah and Nevada. Of these, only Cayuga Salt Co. in New York and Independent Salt Co. in Kansas (which was jointly owned by Swift and Armour and supplied salt for meat packing) could be described as other than very small.

The output of medium and rock salt by the small producers would influence the prices of this salt; and the prices of rock and medium salt probably influenced the output of vacuum-pan salt (through substitution in demand or in production by the major producers). However, the supply of rock and medium salt by the small producers does not mean that the output of salt in general, or of vacuum-pan salt in particular, was competitive when the FTC's cases were brought; nor therefore does it mean that discrimination could not have existed in the pricing of table salt.

Discrimination implies that the major producers had agreed on prices and discounts and on the amount of table salt each would supply to discount and non-discount buyers. Further, if the price of table salt to buyers who received discounts yielded at the margin more than what the producers received from other users of vacuum-pan salt, then discrimination in the pricing of table salt would also imply that the producers had agreed on the proportion of their total output of vacuum-pan salt to be sold for table use, which is an obvious complication.

About 40-45 percent of salt output (in tons) was contained in brine produced and used as such. This brine was produced by chemical companies for use in other of their production processes. The output of salt in brine would influence the output of dry salt, but again this does not necessarily mean that dry salt was supplied competitively. I have not studied substitution between brine and dry salt. In this study, the focus is on the major producers of dry salt and whether the evidence bearing on their activities alone suggests whether discrimination or cost differences is the more likely explanation of their discounts on table salt.

APPENDIX B

Morton Salt Company Chicago, Illinois

"UNIT DISCOUNTS"

Our present method of figuring discounts on a percentage basis, either on the Works Net or on the delivered price, has brought forth many misunderstandings as to the proper amount to be allowed. In order to simplify and make a uniform discount, we will establish what is known as a "Unit Discount", which is a specified amount per package. The amount of this "Unit Discount" will be approximately the same as a 5 percent discount and will be as outlined on Page "2". It is understood that this "Unit Discount" is to be used only as instructed

UNIT DISCOUNT

Bulletin No. 900
Effective December 1, 1935

<u>PACK</u>	<u>UNIT DISCOUNT</u>	<u>PACK</u>	<u>UNIT DISCOUNT</u>
<u>Granulated</u>			
280# Bbl.	.10	<u>Kosher</u>	
200# Sack	.06 1/2	18/3#	.05
100# "	.03 1/2	<u>Meat</u>	
50# "	.02 1/4	70# Cot.	.04
25# "	.01 1/4	<u>Block</u>	
<u>Medium</u>		50# Plain	.02
280# Bbl.	.10	50# Sulph.	.02
280# Sack	.06 1/2	50# Iod.	.02
100# "	.03 1/2	50# Rock	.02
50# "	.02 1/2	<u>Stock Bricks</u>	
25# "	.01 1/4	15/4#	.05
<u>Packers</u>		<u>Ice Cream</u>	
200# Sack	.06 1/2	15/4# Cont. Sq	.05
140# "	.05	12/5#	.05
100# "	.03 1/2	20/10# Bales	.10
50# "	.02 1/4	10/10# "	.05
<u>Table</u>		40/5# "	.10
280# Bbl.	.15	20/5# "	.05
100# Sack	.04	12/5# Cont. Pkts.	.05
50# "	.03	<u>High Grade (All Grades)</u>	
25# "	.02	280# Bbl.	.15
28/10 Bbl.	.20	250# "	.13 1/2
60/5 "	.20	220# "	.12
70/4 "	.20	140# Sack	.07

100/3 "	.20
140/2 "	.20
200/1 1/2 "	.20
14/10 Bale	.10
30/5 "	.10
35/4 "	.10
50/3 "	.10
70/2 "	.10
100/1 1/2 "	.10
6/10 Cont.	.04
12/5 "	.04
15/4 "	.04
20/3 "	.04
30/2 "	.04
40/1 1/2	.04

Cooking

18/3 Cont.	.07 1/2
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Private Brands or Unadvertised Round

32/26 oz. Cont.	.07 1/2
24/2# "	.05

Square Table

36/24oz. Pl. or Lod.	.05
24/2# " "	.04
18.3#	.04 1/2
36/24 oz. spout	.05

100# "	.05
70# "	.03 1/2
50# "	.02 3/4
25#	.01 1/2
14/10# Bales	.09

Rock Salt (Coarse Grades)

Michigan Field (except No. Dak.)

Texas Field

Lump Rock	.32 1/2 Ton
Bulk Coarse Grades	.27 1/2 "
200# Sacks	.04 1/4
100# "	.02 1/4
50# "	.01 1/4
25# "	.00 3/4

Kansas & Kans. - Mich. Fields

State of No. Dak.

Lump Rock	.15 Ton
Bulk Coarse Grades	.15 "
200# Sacks	.03
100# "	.01 1/2
50# "	.01
25# "	.00 1/2

APPENDIX C

Potential Effects of the Orders Against Morton and International

The Commission's orders required each producer to eliminate annual-volume discounts and so charge a uniform price to competing buyers. If discrimination existed, the orders would help insure that resales to consumers by the buyers who had secured discounts would be based on their marginal costs of supply and not on lower costs due to price discrimination by the salt producers. But price discrimination cannot be assumed. Instead, the evidence suggests that the discounts, at least the annual-volume discounts to the large chains, were not cost based. In what follows, I assume that the annual-volume discounts were cost based.

I could find no evidence on the pricing of table salt after the Commission's orders, so only potential effects of the orders can be noted. In doing this, I assume first that salt was competitively supplied and then that salt was collusively supplied. The latter is a possibility given the NRA experience. But given that after the NRA (and also before it) transactions so often occurred below list (and other behavior occurred that was prevented or controlled by the code), it seems likely that the effects of the NRA had been eroded. I assume two buyer groups: large chains that received annual-volume discounts and wholesalers that did not. The wholesalers were more costly to supply because of the merchandising service (hereafter service) the producers provided on sales to them. This service was avoided by the producers on sales to the chains. The chains provided service (or substitutes for it) themselves.

Suppose the producers compete and each considered, as a response to the Commission's orders, charging the previous chain price to wholesalers to avoid a loss in net receipts from the chains. At this price there will be a loss from wholesalers. Why is this? The producers who provided service on sales to wholesalers at the higher price they were charged will no longer find this service profitable at the lower chain-price. If the producers charge the chain-price to wholesalers and provide no service to them, and the wholesalers respond by providing service themselves, then the wholesalers' demand price for the salt previously supplied to them will be less than the producers' marginal cost. This is because the wholesalers' cost of providing service is higher than the producers' cost, given that the producers provided service before. Higher costs will result in a reduction in the amount the producers distribute through wholesalers. There is a loss in that additional salt could be distributed through wholesalers at the same cost as would now be incurred to distribute a smaller output through them. This increase in output will not occur unless the producers charge wholesalers a higher price.

However, if a higher price is charged to wholesalers to reduce the loss from them, then the chains also must be charged this price, and this will result in a loss from the chains. Initially, a higher price will exceed the producers' marginal cost of supplying the chains. The producers will respond to this by providing more service, and the chains by providing less. However, the producers' net gain on any salt supplied to the chains will be less than before, since the chains provided service more cheaply than the producers. Ultimately, the chains' demand price for the salt previously supplied to them will be less than the producers' marginal cost. Higher costs of service in supplying the chains will reduce the

amount the producers distribute through them. There is a loss in that additional salt could be distributed through the chains at the same cost as would now be incurred to distribute a smaller output through them. This increase in output will not occur unless the chains are charged a lower price. But a lower price will cause a loss from wholesalers.

Conversely, suppose each producer charges the chains the previous wholesaler-price to avoid a loss from wholesalers. Then there will be a loss from the chains that will not be offset if the producers provide more service to them. This is because the producers' cost of providing service is higher than the chains', given that the chains provided service before. This loss could be reduced by lowering price. But this would result in a loss from wholesalers.

If there were no costs of specialization, two prices could exist just as before the order. Some producers would supply only chains and others only wholesalers, and the FTC's cases would be without effect. However, if there are costs of specialization, which seems likely given that the producers did not specialize to this extent before, then a requirement that each producer charge the same price to chains and wholesalers would raise costs and harm consumers. In equilibrium, each producer's price will equal its marginal cost of supplying chains and wholesalers (the cost of supplying either being the same), and the cost to consumers of the same output as before will be higher. No reduction in price by any producer would increase its net receipts from chains by more than the loss this causes from wholesalers; and no increase in price would increase its net receipts from wholesalers by more than the loss this causes from chains. If for each producer the price is the previous chain price, too little would be supplied to wholesalers to maximize the value of output;

if for each producer the price is the previous wholesaler price, too little would be supplied to the chains. It could be that the price charged by all producers would fall between these extremes. It also could be that different producers would charge different prices. But whatever the case, costs would rise.¹

Let us next consider setting price assuming the salt producers collude.² Assume as before that the producers' cost of supplying the chains is less than the cost of supplying wholesalers, and that this cost difference is reflected in a lower price to the chains. Given collusion, it is not possible to say that the price difference would just equal the cost difference, as when the producers were assumed to compete.³ What we can say is that before the orders the profit maximizing price to wholesalers was above the price to the chains, and that prices to both presumably would exceed the marginal costs of their supply. Given the orders, the producers must charge the same price to chains and wholesalers. What price would the producers wish to charge? To answer this, assume initially that the services

¹ Note that if less is supplied because costs are higher, prices to consumers will rise. This may result in shifts in consumers' demands for salt between the chains and retailers supplied by wholesalers. For most consumers, shopping costs were probably high enough that all retailers need not charge identical prices for salt, particularly given that salt was such a small part of the retailers' total sales of groceries. However, any demand shifts by consumers will affect the demands of chains and retailers that the salt producers face. In turn, the demands of chains and wholesalers will influence the producer's price and the amounts supplied to them. These consequent effects of a change in retail prices have not been considered in the text. Implicitly, the chains' and wholesalers' demands were assumed independent.

² Again assuming that the chains' and wholesalers' demands are independent.

³ In fact, the evidence from the cases suggests that the price differences were close to cost differences.

the producers provide the chains and wholesalers do not change, so that the marginal costs of supplying chains and wholesalers remain the same as before the orders.

Suppose the producers considered charging the previous wholesaler-price to avoid any loss from wholesalers. At this price there is now a loss from the chains, since the previous profit maximizing price to them was lower. The producers would gain from the chains if price is lowered. The gain would depend on how the elasticity of the chains' demand is altered as price is reduced and on the marginal costs of supplying them. No doubt the producers would take into account the gain from a lower price on the net receipts from the chains. Presumably, there would be a gain from the chains for any price reduction from the previous wholesaler-price down to the previous chain-price. To account for this, the marginal revenue from wholesalers could be increased to reflect the gain from the chains as price is reduced. The price the producers would now wish to charge wholesalers would equate this adjusted marginal revenue with the marginal cost of supplying these buyers. Since marginal revenue is higher than before, the adjusted marginal revenue will equal marginal cost at a price below the previous wholesaler-price.

There is no reason to suppose that the price the producers would set to maximize profits from wholesalers would correspond to the price the producers would set to maximize profits from the chains. In deciding what price would maximize profits from the chains, account would now be taken of the effect of any change in price to the chains on the net receipts from wholesalers. Suppose again that the producers set the previous wholesaler-price. Then the marginal revenue from the chains at this price would exceed marginal cost, and there would be a gain from the chains for any price reduction down to the previous chain-

price. But each such reduction will now be associated with a loss from wholesalers, since at any price below the previous wholesaler-price marginal revenue will be below marginal cost. In deciding whether and how much to reduce price to the chains, the losses from wholesalers would be taken into account. The losses from wholesalers diminish the extent to which price to the chains would be reduced from the previous wholesaler-price: the adjusted marginal revenue from the chains will equal marginal cost at a price above the previous chain-price.

In equilibrium, the price the producers would wish to charge wholesalers (accounting for any loss from the chains) would be the same price that the producers would wish to charge the chains (accounting for any loss from wholesalers). If such a single price did not exist, the producers would set a price that minimized their overall loss. No doubt agreement on this price would be difficult to reach, given that losses from wholesalers and chains could differ at different prices, and the producers specialized to different degrees in supplying these buyers.

Given the adjustments noted, the orders would seem to create one force leading to an increase in output sold to wholesalers and another leading to a reduction in output sold to chains. So it appears that wholesalers might gain at the expense of chains. The producers are worse-off from the orders. Consumers gain from the lower price to wholesalers but lose from the higher price to the chains. The net effect is uncertain.

In the discussion above, it was assumed that the producers did not adjust their service to wholesalers or chains from the levels before the orders. However, the producers could find it profitable to alter their service after the orders. Consider a price that if lowered

would increase net receipts from chains by more than the loss this imposes from wholesalers. There would be a gain from lowering price. The loss from wholesalers would be less if price is not reduced or is reduced by less. Suppose price is not reduced and instead additional service is provided to the chains. A loss from the chains will now occur, because the chains can provide service more cheaply than the producers. Overall, however, the gain if additional service is provided to the chains could exceed the gain from the lower price, since the loss from wholesalers would be less. Such a result might occur if the chains could provide service at only slightly lower cost than the producers. In this case, the loss from the chains if producers provided them more service could be small, and more than offset by the smaller loss from wholesalers. Thus, price after the orders might be reduced only slightly from the previous wholesaler-price, and any gain to wholesalers from the orders might be correspondingly slight. Conversely, if the wholesalers could provide service almost as cheaply as the producers, then price might be raised only slightly from the previous chain price. Here the loss from wholesalers could be small and more than offset by the smaller loss from the chains. In fact, the chains could gain from the orders at the expense of wholesalers. Whether consumers would gain is uncertain. What does seem clear is that adjustments in service levels will raise costs and this would not benefit consumers.

Although it is possible to discuss potential effects of the orders assuming collusion existed, the evidence uncovered in Morton and International suggests that the salt producers were not colluding -- at least not successfully. Probably the best assumption is that the producers behaved competitively. If so, elimination of cost based price differences would

harm consumers.