IN THE MATTER OF

CORDOVA DISTRICT FISHERIES UNION ET AL.

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

Docket 6369. Complaint, June 27, 1955—Decision, Feb. 4, 1956

Consent order requiring an association of fishermen engaged in the catching of the Dungeness crab in the waters adjacent to Cordova, Alaska, and three canning firms, to cease concertedly fixing minimum prices and otherwise restraining competition in the sale and distribution of Dungeness crab and crab meat in commerce.

Before *Mr. Earl J. Kolb*, hearing examiner.

Mr. Fletcher G. Cohn and *Mr. Lewis F. Depro* for the Commission.

Mr. Roy E. Jackson, of Seattle, Wash., for Cordova District Fisheries Union, Harold Z. Hansen, James Nichols, Charles Simpler, Lyle Lufkin and John Johnson.

Dalton & Bibb, of Seattle, Wash., for John W. Dawson and William O. Lutz.

Mr. Herald A. O'Neill, of Seattle, Wash., for Cordova Fish & Cold Storage Co.

Medley & Haugland, of Seattle, Wash., for H. M. Parks Co.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties hereinafter referred to as respondents have violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in this respect as follows:

PARAGRAPH 1. Respondent Cordova District Fisheries Union, hereinafter referred to as "respondent Union," is an unincorporated association among whose members are fishermen who fish for Dungeness crab in waters adjacent to Cordova, Alaska including Copper River and Prince William Sound area. Its principal office and place of business is at Cordova, Alaska, where its mailing address is P. O. Box 939, Cordova, Alaska.

PAR. 2. Respondent Harold Z. Hansen is an individual and is Executive Secretary of respondent Union, with his office and place of business being the same as that of respondent Union.

Respondents James Nichols, Charles Simpler, Lyle Lufkin, and John Johnson are individuals who are Trustees of respondent Union. Said respondents, individually and in their respective capacities as officials of respondent Union, have formulated, directed, or controlled the policies and activities of said Union, and in so doing have, expressly or impliedly, authorized, performed, adopted, or affirmed one or more of the policies, acts and practices herein alleged to have been performed by or through respondent Union. Such policies, acts and practices were performed through the medium of said respondent Union, with the approval, and on behalf, of all of its fishermen members, and particularly those engaged in the catching of Dungeness crabs in the waters adjacent to Cordova, Alaska, and were intended to, and did, bind said respondent members in the same manner and with the same effect as though they had individually engaged in same.

The members of respondent Union are too numerous and the changes in the membership of said Union too frequent to render it practicable to name as respondents herein each and all members of respondent Union without manifest delay and inconvenience. Therefore, there are named and included as respondents in this proceeding the above-named officials of respondent Union individually, as officials of respondent Union, and as representing all members of said Union.

PAR. 3. Respondents John W. Dawson and William O. Lutz are individuals composing a partnership trading as Copper Delta Sea Food Company, with their principal office and place of business being located at Cordova, Alaska. As part of their business, they are engaged in canning and packing the crabmeat secured from Dungeness crab caught in the waters adjacent to Cordova, Alaska. For the year 1953, they packed such crab in the amount of approximately $52,000.

PAR. 4. Respondent Cordova Fish & Cold Storage Company is a corporation organized and existing under the laws of the State of California, with its principal office and place of business being located at 123 Jackson Street, San Francisco, California. It maintains a cannery, freezing plant, and cold storage facilities at Cordova, Alaska, where, during the year 1953, it packed crabmeat secured from Dungeness crab caught in the waters adjacent to Cordova, Alaska, in an amount of approximately $250,000.

PAR. 5. Respondent H. M. Parks Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business being located in the

Colman Building, Seattle, Washington. It maintains a cannery at Cordova, Alaska, at which it packs Dungeness crab, and in 1953 packed 3,400 cases of such crab.

PAR. 6. All of the respondent fishermen members of respondent Union who are engaged in the catching of the Dungeness crab in the waters adjacent to Cordova, Alaska, are independent fishermen who own their own boats and either own or rent the traps and other gear used in the catching of said crabs. None of said respondent fishermen members of respondent Union are employees of any of the respondents who are engaged in the business of packing or canning Dungeness crab. Respondent Union is the medium whereby the respondent officials of respondent Union and its respondent fishermen members who are engaged in the catching of such crab, have performed the illegal acts and practices hereinafter alleged.

PAR. 7. In the course and conduct of their respective businesses, respondents John W. Dawson and William O. Lutz, doing business as the Copper Delta Sea Food Company, respondent Cordova Fish & Cold Storage Company and respondent H. M. Parks Company each makes substantial sales of Dungeness crabmeat and crab, which they purchase from the respondent fishermen members of respondent Union and pack and can in their respective plants, to customers located in the various States of the United States, and cause same to be transported from the Territory of Alaska to such customers. Said respondents, as well as the respondent fishermen members of respondent Union, maintain, and at all times herein mentioned have maintained, a regular course or current of trade in commerce in Dungeness crab and crabmeat in the Territory of Alaska, between said Territory and the various States of the United States, and among and between the several States of the United States. The respondent Union has been and is a medium whereby the other respondents, including the officials and members of the respondent Union, have committed and performed, in commerce, the alleged illegal policies, acts, and practices hereinafter set forth.

All respondents named herein have been, and are now, engaged in commerce in Dungeness crab and crabmeat as "commerce" is defined in the Federal Trade Commission Act.

PAR. 8. In the course and conduct of their respective businesses, respondents John W. Dawson and William O. Lutz, doing business under the trade name of Copper Delta Sea Food Company, Cordova Fish & Cold Storage Company, and H. M. Parks Company are in competition in such commerce with each other, and with others likewise engaged in the business of purchasing, canning, and selling

Dungeness crab and crabmeat except in so far as such competition has been restrained or destroyed by the policies, acts, and practices hereinafter set forth.

Also, except as it has been restrained or destroyed by the policies, acts, and practices hereinafter set forth, the respondent fishermen members of respondent Union who are engaged in catching Dungeness crab in the waters adjacent to Cordova, Alaska, are in competition in such commerce with each other and with others engaged in the same business, in offering for sale and selling such crab to the respondents named herein who are engaged in the business of canning, packing, and selling Dungeness crab and crabmeat, and to others engaged in similar businesses.

PAR. 9. Each of the respondents named herein has, directly or indirectly, participated in, approved, or adopted one or more of the alleged illegal policies, acts, and practices hereinafter set forth.

PAR. 10. For many years last past, and especially during the years 1952 and 1953, respondent Union and respondents Harold Z. Hansen, James Nichols, Charles Simpler, Lyle Lufkin, and John Johnson, acting individually and/or through or by means of respondent Union, respondents John W. Dawson and William O. Lutz, acting as a partnership doing business under the name of Copper Delta Sea Food Company, respondent Cordova Fish & Cold Storage Company, and respondent H. M. Parks Company, have entered into, maintained, and effectuated an agreement, understanding, or conspiracy between and among themselves to pursue, and they have pursued, a planned common and concerted course of action to adopt, fix, and adhere to the practice and policy of restricting and restraining competition in the offering for sale, sale, and distribution of Dungeness crab and Dungeness crabmeat, in commerce, in the Territory of Alaska, between said Territory and the several States of the United States, and among and between said States.

PAR. 11. As part of, pursuant to, and in furtherance of the aforesaid agreement, understanding, conspiracy, and planned common and concerted course of action, respondents have performed and pursued the following policies, acts, and practices:

(1) Said respondent Union has entered into annual contracts with respondents John W. Dawson and William O. Lutz, doing business as Copper Delta Sea Food Company, Cordova Fish & Cold Storage Company, and H. M. Parks Company, wherein and whereby have been fixed, established, and maintained the minimum prices which said last-named respondents shall each pay, and each has paid to respondent fishermen members of respondent Union for the raw

Dungeness crab which said fishermen members of respondent Union catch in the waters adjacent to Cordova, Alaska, during the respective periods covered by such contracts;

(2) Fixed and maintained the minimum prices at which all raw Dungeness crab caught in the waters adjacent to Cordova, Alaska, are bought and sold;

(3) Said respondents John W. Dawson and William O. Lutz, doing business as Copper Delta Sea Food Company, Cordova Fish & Cold Storage Company, and H. M. Parks Company have jointly negotiated with respondent Union as to the minimum prices each and all would pay to the respondent fishermen members of respondent Union for the raw Dungeness crab caught by such fishermen members of respondent Union in the waters adjacent to Cordova, Alaska;

(4) Said respondents John W. Dawson and William O. Lutz, doing business as Copper Delta Sea Food Company, Cordova Fish & Cold Storage Company, and H. M. Parks Company, have agreed to pay and have paid, through and by means of the aforesaid agreements between each of them and respondent Union, the identical prices to the respondent fishermen members of respondent Union for such Dungeness crab.

PAR. 12. The capacity, tendency, and effect of the aforesaid understanding, agreement, combination, conspiracy, and planned common and concerted course of action, and the policies, acts, and practices as hereinbefore set forth, have been, and are now, to unlawfully restrict, restrain and hinder the catching of Dungeness crab in the waters adjacent to Cordova, Alaska; to prevent price competition between and among respondents John W. Dawson and William O. Lutz, doing business as Copper Delta Sea Food Company, respondent Cordova Fish & Cold Storage Company, and respondent H. M. Parks Company in the purchase of such Dungeness crab; to prevent competition between said respondents and others engaged in the purchase and sale of such crab, and to prevent competition between and among the respondent fishermen members of respondent Union, and between such members and other fishermen who are not members of respondent Union but are engaged in catching such crab, in the sale of same to said respondents John W. Dawson and William O. Lutz, doing business as Copper Delta Sea Food Company, Cordova Fish & Cold Storage Company, and H. M. Parks Company, and to others engaged in the purchase and/or sale of Dungeness crab and crabmeat in interstate commerce: all within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 13. In addition to the effects, hereinbefore set forth, of said understanding, agreement, combination, conspiracy, and planned common and concerted course of action of the respondents and the policies, acts, and practices done pursuant thereto, they likewise have the capacity and tendency to unduly enhance the price which the public is required to pay for Dungeness crab and crabmeat when same is offered for sale to the consuming public.

PAR. 14. The policies, acts, and practices of the respondents, all and singularly, as hereinbefore set forth, are to the prejudice of the public, have a dangerous tendency to unduly hinder competition and to create a monopoly in respondents in the Dungeness Crab Industry for the Cordova area of Alaska, and constitute unfair acts and practices and unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

The respondents named in the complaint in this proceeding are charged with having engaged in acts and practices which have a tendency unduly to hinder competition and to create a monopoly in respondents in the Dungeness crab industry for the Cordova area of Alaska and constitute unfair acts and practices and unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Respondents represent two phases of the Dungeness crab industry for the Cordova area of Alaska:

(*a*) Respondent Cordova District Fisheries Union, located at Cordova, Alaska, is an unincorporated association, among whose members are fishermen who fish for Dungeness crab in waters adjacent to Cordova, Alaska, including Copper River and Prince William Sound area. Respondent Harold Z. Hansen is Executive Secretary and respondents James Nichols, Charles Simpler, Lyle Lufkin and John Johnson are Trustees of said Cordova District Fisheries Union.

(*b*) The following respondents are engaged in canning and packing Dungeness crab and crabmeat: John W. Dawson and William O. Lutz, copartners trading as Copper Delta Sea Food Company located at Cordova, Alaska; Cordova Fish & Cold Storage Company, a California corporation, located at 123 Jackson Street, San Francisco, California; and H. M. Parks Co., Inc., a Washington corporation, (designated in the complaint as H. M. Parks Company) located in the Colman Building, Seattle, Washington.

After the issuance of said complaint and the filing of their answers thereto, the respondents entered into an agreement for consent order with counsel in support of the complaint, disposing of all the issues in this proceeding, which agreement was duly approved by the Director of the Bureau of Litigation. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

By the terms of said agreement, the respondents admitted all the jurisdictional allegations of the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations.

By said agreement, the answers heretofore filed by respondents were withdrawn and the parties expressly waived a hearing before the hearing examiner or the Commission, the making of findings of fact or conclusions of law by the hearing examiner or the Commission, the filing of exceptions and oral argument before the Commission, and all further and other procedure before the hearing examiner and the Commission to which the respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission.

By said agreement, the respondents further agreed that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if made after a full hearing, presentation of evidence and the findings and conclusions, and specifically waived any and all right, power or privilege to challenge or contest the validity of such order.

It was further provided that said agreement, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order issued pursuant to said agreement; and that the said order may be altered, modified or set aside in the manner provided by the statute for the orders of the Commission.

The hearing examiner has considered such agreement and the order therein contained, and, it appearing that said agreement and order provides for an appropriate disposition of the proceeding, the same is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice, and in consonance with the terms of said agreement, the hearing examiner finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents named herein, and that this proceeding is in the interest of the public, and issues the following order:

ORDER

It is ordered, That respondents Cordova District Fisheries Union, an unincorporated association; and Harold Z. Hansen, individually, as Executive Secretary of Cordova District Fisheries Union, and as representative of all members of said Union; James Nichols, Charles Simpler, Lyle Lufkin and John Johnson, individually, as Trustees of Cordova District Fisheries Union, and as representing all members of said Union; John W. Dawson and William O. Lutz, individually and as partners doing business under the trade name of Copper Delta Sea Food Company; Cordova Fish & Cold Storage Company, a corporation, and H. M. Parks Co., Inc., a corporation, who shall be deemed herein to be parties respondent, their respective officers, agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined by the Federal Trade Commission Act, of raw Dungeness crab or crabmeat caught in waters adjacent to Cordova, Alaska, including the Copper River and Prince William Sound area, do forthwith cease and desist from entering into, continuing, cooperating in or carrying out any planned common and concerted course of action, understanding or agreement between or among any two or more of said respondents or between any one or more of said respondents and others not parties hereto to do or perform any of the following acts:

1. Fixing, establishing, maintaining or adhering to or attempting to fix, establish, maintain or cause adherence to, by any means or method, any prices for the purchase or sale of raw Dungeness crab or Dungeness crabmeat;

2. Jointly or collectively negotiating, bargaining or agreeing, by any means or method as to the price or prices at which raw Dungeness crab or crabmeat are to be offered for sale or sold;

3. Authorizing or empowering any association, group, corporation or union to negotiate, bargain or agree as to the purchase or selling price or prices of raw Dungeness crab or crabmeat.

Provided, however, That nothing herein contained shall prevent any association of bona fide crab fishermen from acting pursuant to and in accordance with the provisions of the Fisheries Cooperative Marketing Act (15 U.S.C.A. Sections 521 and 522) and from performing any of the acts and practices permitted by said Act; and

Provided further, That nothing herein contained shall prevent collective bargaining between respondent Cordova District Fisheries Union and any employer with respect to wages and working conditions of any employee member of said Union within those districts where they may be employed.

Provided further, That nothing herein contained shall be deemed to prohibit one or more respondents from entering into or continuing a bona fide partnership, joint operation or venture, or consolidation, for the purpose of operating one or more canneries, and in which the prices paid for raw or fresh Dungeness crab or crabmeat are determined by said partnership, joint operation or venture, or consolidation, and where such determination is, under the contract establishing such partnership, joint operation or venture, or consolidation, binding upon all members thereof; This proviso shall not be construed as either an approval or disapproval of any specific partnership, joint operation or venture, or consolidation, nor as permitting any such partnership, joint operation or venture, or consolidation, to be continued or formed for the purpose or with the effect directly or indirectly of rendering ineffective or unenforceable the inhibitions of this ORDER and the purposes thereof.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 4th day of February, 1956, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

RANDOM HOUSE, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT[1]

Docket 5901. Complaint, June 29, 1951—Decision, Feb. 7, 1956

Consent order requiring a New York City publisher to cease fixing and maintaining resale prices and terms and conditions of sale of the publisher's editions of books which it sold to its retail book seller customers while permitting book clubs to sell their own editions of the same books in competition with such retailers at any prices and on any terms they might determine.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Fletcher G. Cohn and *Mr. Lewis F. Depro* for the Commission.

Weil, Gotshal & Manges, of New York City, for respondent.

Wolfson, Caton & Moguel, of New York City, for Book-of-the-Month Club, Inc., *amicus curiae*.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Antitrust Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Random House, Inc., hereinafter referred to as respondent, has violated the provisions of section 5 of the said Federal Trade Commission Act and section 2 (a) of the said Clayton Antitrust Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C. Title 15, Sec. 13), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in these respects as follows:

COUNT I

PARAGRAPH 1. Respondent, Random House, Inc., is a corporation organized and existing under the laws of the State of New York with its principal office and place of business located at 457 Madison Avenue, New York, New York.

PAR. 2. Respondent is now, and for many years last past has been, engaged directly or indirectly in the publication, distribution, and sale of popular fiction and non-fiction books, commonly known as trade books.

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[1] For consent settlement of Count III of complaint, see 48 F.T.C. 878.

Respondent was organized in 1925 and is one of the major books publishers of said trade books in the United States. It does not do its own printing, which is handled by several different printing companies.

Respondent sells and distributes its trade books to retail book sellers for resale to the public and to wholesalers or jobbers for resale to retail book stores and others, including public libraries and educational institutions. Editions of said trade books so sold and distributed are known as publisher's editions.

Respondent, as part of its business, enters into agreements, understandings, or contracts with the authors of trade books, whereby the respondent is granted by the authors the exclusive rights to make, publish and sell in book form the literary works of said authors, including the right or privilege of making the hereinafter described understandings or agreements with book clubs.

PAR. 3. In the course and conduct of its business for many years last past, respondent has been, and is now, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and in the Clayton Antitrust Act, as amended by the Robinson-Patman Act, in that it ships or causes to be shipped publisher's editions of said trade books and printing plates from the States in which the several places of production and business of the respondent are located, to purchasers or to lessees thereof located in other States and in the District of Columbia; and there is, and has been at all times herein mentioned, a continuous current of trade and commerce in said books between and among the several States of the United States and in the District of Columbia.

Also, by virtue of and pursuant to, the contractual relationship of respondent with book clubs, as hereinafter set forth, the latter in the course and conduct of their businesses are enabled to, and do, ship or cause to be shipped from the States in which they are published to purchasers located in other States and in the District of Columbia, the book club edition of books printed from the plates of particular titles leased to them by the respondent and which book club editions are sold in said commerce in competition with the aforesaid publisher's editions of such books.

PAR. 4. Except in so far as it has been affected, as hereinafter alleged, respondent, in the course and conduct of its said business in commerce, has been and is now in competition with persons, firms, and other corporations, some of which were, and are engaged in similar businesses in commerce.

Also, except in so far as it has been affected, as hereinafter alleged, many of said jobbers or wholesalers were, and are, in competition, some in commerce, with each other, and many of said retail book

sellers were, and are, in competition, some in commerce, with each other and with said book clubs in the retail sale of said trade books.

PAR. 5. Respondent also, as part of its business, is now entering into and has, for many years last past, entered into agreements or understandings with so-called book clubs by which said clubs are granted exclusive delegated rights to publish, sell and distribute certain titles of said publisher's editions in what are known as book club editions. Book clubs are organizations engaged in the business of publishing trade books and in the sale and distribution thereof by the mail order method at retail. Among the book clubs with which respondent made said agreements or understandings are the Book-of-the-Month Club and The Literary Guild of America, Inc. Under said agreements or understandings, the terms of which are hereinafter more particularly alleged, printing plates are leased by the respondent to the book clubs for use in printing book club editions. There is a publisher's edition of each title of which there is a book club edition, and both editions are contemporaneously available, are alike, the same, or practically the same in design, format, quality, size and appearance, and are sold in competition with each other.

PAR. 6. The said agreements or understandings between respondent and the book clubs provide that, in consideration of leasing the aforesaid printing plates, together with additional rights granted the book clubs as herein set forth, the clubs pay to respondent certain specified royalties, the total amounts of which are dependent, directly or indirectly, upon the number of copies of book club editions sold by said book clubs. Said agreements or understandings generally also provide that respondent shall fix and maintain specific minimum prices for the resale of the publisher's editions of the books bearing the titles covered by said agreements or understandings for a period of not less than one year from the dates of publication thereof.

These fixed resale prices in some instances are in excess of the prices which the book club charges its purchasers for the book club edition of the same title.

Under the provisions of the agreements or understandings which respondent has with each of the book clubs, the club receives from the respondent the exclusive delegated rights to use the printing plates of books of the particular titles selected by said club for a specified period which usually is for two or more years. During such period, the book club is enabled to exercise such exclusive rights in producing, selling and offering for sale the books printed from the plates thus selected, at any price and on any terms or conditions that the said club may determine.

PAR. 7. Furthermore, in accordance with, and pursuant to, its understandings or agreements with said book clubs, the respondent has refused to offer or to grant such leasing of plates and such other rights to its retail book seller customers who, in selling or offering to sell the publisher's editions, compete with said book clubs in their retail sale of the book club editions of the same title.

PAR. 8. The execution of the provisions in the aforesaid agreements between the respondent and the book clubs, whereby the respondent agrees to fix and maintain, for the period of agreement, the prices at which the retail book seller customers are to resell the publisher's editions of books which are sold in competition with the book club edition of said books, gives the book club an unfair competitive advantage.

PAR. 9. As a result of the respondent leasing the printing plates for a particular title to a book club in the manner hereinbefore described, it is selling and distributing, and knowingly and intentionally granting the means of selling and distributing, in commerce, for resale within the United States and in the District of Columbia, a publisher's edition and a book club edition of the same book, which editions are, in effect, of the same grade and quality, and which are sold in competition one with the other. The respondent is indirectly discriminating between its retail book seller customers, to whom it sells, for the purpose of resale, such publisher's editions, and its book club customers, to whom it leases the plates from which it knows that such book club editions will be printed, by imposing the aforedescribed restrictions and conditions only on the resale of such publisher's editions by its retail book seller customers and by granting the leasing and other rights, hereinbefore set forth, only to its book club customers.

PAR. 10. The result and effect of such understandings, agreements, contracts, arrangements, discriminations, and of the system itself, have been, and are, that the competition between the respondent's retail book seller and book club customers has been, and is now, substantially lessened, that the said book club customers have received an unfair competitive advantage over said retail book seller customers and have tended, and are now tending, to create in said book club customers a monopoly in the sale and distribution, in commerce, in the books, the titles to which said book clubs have leased the printing plates.

PAR. 11. The acts, practices, methods, understandings and agreements of respondent, as hereinabove alleged, are all to the prejudice of the public, have a dangerous tendency to, and have actually frustrated, hindered, suppressed, lessened, restrained and eliminated com-

petition in the sale and distribution in commerce of trade books within the intent and meaning of the Federal Trade Commission Act; have resulted in an unfair competitive advantage to respondent's book club customers over respondent's retail book seller customers; have a dangerous tendency to destroy, hinder and prevent the resale by respondent's retail book seller customers not only of publisher's editions of the books sold in competition with the book club editions of such books, but also of other trade books; have the capacity and tendency to restrain unreasonably and have restrained unreasonably interstate commerce in such products; and constitute unfair methods of competition in commerce within the intent and meaning of section 5 of the Federal Trade Commission Act.

COUNT II

PARAGRAPH 1. The allegations of Paragraph 1 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 2. The allegations of Paragraph 2 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 3. The allegations of Paragraph 3 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 4. The allegations of Paragraph 4 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 5. The allegations of Paragraph 5 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 6. Respondent, by contracts, agreements, understandings, or suggestions, has fixed and maintained, and now fixes and maintains, at least for specified periods, the minimum prices at which the publisher's editions of certain of its trade books are to be resold by its retail book seller customers.

PAR. 7. Also respondent, in some instances, illegally has attempted to fix and maintain, and has fixed and maintained, such minimum prices at which the publisher's editions of certain of its trade books were to be resold by some of its retail book seller customers, even

though such customers did not enter into any contract or agreement with respondent regarding such prices but such contracts or agreements had been entered into within the same State by and between respondent and others of its retail book seller customers.

PAR. 8. The contracts, agreements, understandings or suggestions whereby respondent has fixed and maintained and now fixes and maintains, at least for specified periods, the aforementioned minimum resale prices for its publisher's editions of certain of its trade books are also illegal, at least with reference to some of such books, including those the titles to which are selected and the printing plates for which are leased by the book clubs, in the manner hereinbefore described, in that they are not sold or resold in free and open competition with commodities of the same general class, that is, with trade books produced or distributed by others. Respondent is the only publisher of the publisher's editions of the trade books which it sells and distributes in the United States.

PAR. 9. Respondent has maintained the direct observance of said fixed resale prices on the publisher's edition of such books and has enforced indirect observance by prohibiting, in connection with the resale thereof at said fixed prices, the granting of any premium, gift, dividend, or other thing of value.

PAR. 10. Under the provisions of the understandings or agreements which the respondent has with the book clubs, these clubs received not only the exclusive delegated rights for a specified period to use the printing plates for the publication of the book club edition for the particular titles which the club has selected, but the said clubs were permitted to, and do, sell such editions in competition with the said publisher's editions of the same titles at any price and on any terms or conditions they may determine. Respondent's retail book seller customers have thereby been placed at a competitive disadvantage in the sale and distribution of such publisher's editions.

PAR. 11. The acts, practices, methods, and agreements of respondent, as hereinbefore alleged, are all to the prejudice of the public, have a dangerous tendency to and have actually frustrated, hindered, suppressed, lessened, restrained and eliminated competition in the sale and distribution of trade books in commerce within the intent and meaning of the Federal Trade Commission Act; have resulted in an unfair competitive advantage to respondent's book club customers over respondent's retail book seller customers; have the capacity and tendency to restrain unreasonably and have restrained unreasonably interstate commerce in such products; and constitute unfair methods of competition in commerce within the intent and meaning of section 5 of the Federal Trade Commission Act.

COUNT III

PARAGRAPH 1. The allegations of Paragraph 1 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 2. The allegations of Paragraph 2 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 3. The allegations of Paragraph 3 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 4. The allegations of Paragraph 4 of Count 1 of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 5. Respondent in the course and conduct of its said business, in commerce, has been for many years last past, and more particularly since June 19, 1936, and is now, either directly or indirectly discriminating in price between different purchasers of its said trade books by selling such products to some purchasers at higher prices than it sells such products of like grade and quality to other purchasers, and many of such other purchasers are engaged in active and open competition with the less favored purchasers in the resale of such products within the United States, except as it has been affected as herein alleged.

Respondent has priced and sold its publisher's editions at list prices, which are the minimum resale prices fixed by contract or otherwise by respondent, less specific discounts allowed to each class of purchasers among which are jobbers or wholesalers.

Respondent has priced and sold said books to some jobbers or wholesalers at said list prices less discounts ranging from 49½% to 43%, with the former being granted with respect to quantities of 5,000 or more copies and the latter to less than 100 copies. Respondent has priced and sold said books to other jobbers or wholesalers who are in competition with those jobbers or wholesalers receiving the aforementioned discounts above described, at list prices less a discount of only 43% irrespective of the quantities purchased.

PAR. 6. The effect of the aforesaid discriminations or of any appreciable part thereof has been or may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in

which respondent and said jobbers or wholesalers are respectively engaged, or to injure, destroy or prevent competition with respondent or with said jobbers or wholesalers who receive the benefit of said discriminations or with the customers of either of them.

PAR. 7. The aforesaid acts and practices of respondent are in violation of subsection (a) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. Title 15, Sec. 13).

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C.A. 45) the Federal Trade Commission on June 29, 1951, issued its complaint in this proceeding and duly served same upon respondent, a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 457 Madison Avenue, New York, New York. Said complaint was issued simultaneously with similar complaints, charging substantially the same violations of law, against five other publishing firms one of which was that against Doubleday & Company, Inc., Docket 5897. Counts I and II of the complaint herein were substantially similar to Counts I and II in the Doubleday complaint. Counsel in all of these proceedings agreed that since the issues were substantially the same in Counts I and II that the proceeding against Doubleday & Company, Docket 5897, would be fully tried first and after the taking of evidence in that case was closed, counsel in the other cases further agreed that the record in the matter of Doubleday & Company, Inc., Docket 5897, would be taken by them as the record in each of the individual cases. Under date of August 31, 1955, the Commission issued its final order in the Doubleday case which order has not been appealed from.

Thereafter, on December 27, 1955, there was submitted to the undersigned examiner an agreement between the respondent and counsel supporting the complaint providing for the entry of a consent order which is identical with the order of the Commission in the Doubleday case insofar as it applies to Counts I and II of that case. By the terms of said agreement respondent admits all the jurisdictional facts alleged in the complaint served upon it; the parties thereto agree that the record may be taken as if findings of such jurisdictional facts had been duly made in accordance with such allegations; agree that such agreement disposes of this proceeding; agree that the answer of respondent herein to the complaint shall be considered as having been withdrawn; agree that the record on which the initial decision and the decision of the Commission shall be

based shall consist solely of the complaint and this agreement; agree that the agreement shall not become a part of the official record until and unless it becomes a part of the decision of the Commission; agree that the agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint. By such agreement respondent waives any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights it may have to challenge or contest the validity of the order to cease and desist entered into in accordance with this agreement. Such agreement further provides that the following order to cease and desist may be entered in this proceeding by the Commission without further notice to the respondent, and that when so entered it shall have the same force and effect as if entered after a full hearing; that it may be altered, modified or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding, the agreement is hereby accepted. The hearing examiner further finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and that the proceeding is in the public interest and in accordance with such agreement hereby enters the following order.

ORDER

It is ordered, That respondent Random House, Inc., a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the publication, sale or distribution of trade books in commerce, as "commerce" is defined, construed and understood in the Federal Trade Commission Act (15 U.S.C.A. Section 45) do forthwith cease and desist from:

Entering into, maintaining or continuing any contract, agreement or understanding of any nature with any book club or similar organization whereby respondent, while exempting said book club or organization from any responsibility for resale price maintenance, undertakes to fix, establish or maintain the resale price, terms or conditions of sale of any literary work which it publishes and sells and which it also sub-licenses such book club or organization to publish and sell, in any area wherein said book club or organization and retail booksellers purchasing from respondent compete with one another in the sale of such work.

It is further ordered, That any and all other charges contained in the complaint are herewith dismissed.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 7th day of February, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist.

IN THE MATTER OF

HOUGHTON MIFFLIN COMPANY

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT[1]

Docket 5899. Complaint, June 29, 1951—Decision, Feb. 8, 1956

Consent order requiring a Boston publisher to cease fixing and maintaining resale prices and terms and conditions of sale of the publisher's editions of books which it sold to its retail book seller customers while permitting book clubs to sell their own editions of the same books in competition with such retailers at any prices and on any terms they might determine.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Fletcher G. Cohn and *Mr. Lewis F. Depro* for the Commission.

Choate, Hall & Stewart, of Boston, Mass., for respondent.

Wolfson, Caton & Moguel, of New York City, for Book-of-the-Month Club, Inc., *amicus curiae*.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Antitrust Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Houghton Mifflin Company, hereinafter referred to as respondent, has violated the provisions of Section 5 of the said Federal Trade Commission Act and Section 2 (a) of the said Clayton Antitrust Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C. Title 15, Sec. 13), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in these respects as follows:

COUNT I

PARAGRAPH 1. Respondent, Houghton Mifflin Company, is a corporation organized and existing under the laws of the State of Massachusetts with its principal office and place of business located at 2 Park Street, Boston, Massachusetts.

PAR. 2. Respondent is now, and for many years last past has been, engaged directly or indirectly in the publication, distribution, and sale of popular fiction and non-fiction books, commonly known as trade books, and is one of the largest publishers of said trade books in the United States.

[1] For consent settlement of Count III of complaint, see 48 F.T.C. 861.

Respondent's corporation was founded by Henry O. Houghton in 1852 as H. O. Houghton & Company, the proprietors of Riverside Press. The firm later became a partnership and finally in 1908 it was changed to a corporation under its present name. The Riverside Press in Cambridge, Massachusetts, is its manufacturing plant.

Respondent sells and distributes its trade books to retail book sellers for resale to the public and to wholesalers or jobbers for resale to retail book stores and others, including public libraries and educational institutions. Editions of said trade books so sold and distributed are known as publisher's editions.

Respondent, as part of its business, enters into agreements, understandings or contracts with the authors of trade books, whereby the respondent is granted by the authors the exclusive rights to make, publish, and sell in book form the literary works of said authors, including the right or privilege of making the hereinafter described understandings or agreements with book clubs.

PAR. 3. In the course and conduct of its business for many years last past, respondent has been and is now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and in the Clayton Antitrust Act, as amended by the Robinson-Patman Act, in that it ships or causes to be shipped publisher's editions of said trade books, and printing plates from the States in which the several places of production and business of the respondent are located to purchasers or to lessees thereof located in other States and in the District of Columbia; and there is, and has been at all times herein mentioned, a continuous current of trade and commerce in said books between and among the several States of the United States and in the District of Columbia.

Also, by virtue of and pursuant to, the contractual relationship of respondent with book clubs, as hereinafter set forth, the latter, in the course and conduct of their businesses, are enabled to, and do, ship or cause to be shipped from the States in which they are published to purchasers located in other States and in the District of Columbia, the book club edition of books printed from the plates of particular titles leased to them by the respondent and which book club editions are sold in said commerce in competition with the aforesaid publishers' editions of such books.

PAR. 4. Except in so far as it has been affected, as hereinafter alleged, respondent, in the course and conduct of its said business in commerce, has been and is now in competition with persons, firms and other corporations, some of which were and are engaged in similar businesses in commerce.

Also, except in so far as it has been affected, as hereinafter alleged, many of said jobbers or wholesalers were and are in competition, some in commerce, with each other, and many of said retail book sellers were, and are, in competition, some in commerce, with each other and with said book clubs in the retail sale of said trade books.

PAR. 5. Respondent also, as part of its business, is now entering into and has, for many years last past, entered into agreements or understandings with so-called book clubs by which said clubs are granted exclusive delegated rights to publish, sell and distribute certain titles of said publisher's editions in what are known as book club editions. Book clubs are organizations engaged in the business of publishing trade books and in the sale and distribution thereof by the mail order method at retail. Among the book clubs with which respondent made said agreements or understandings are the Book-of-the-Month Club and The Literary Guild of America, Inc. Under said agreements or understandings, the terms of which are hereinafter more particularly alleged, printing plates are leased by the respondent to the book clubs for use in printing book club editions. There is a publisher's edition of each title of which there is a book club edition, and both editions are contemporaneously available, are alike, the same, or practically the same, in design, format, quality, size and appearance, and are sold in competition with each other.

PAR. 6. The said agreements or understandings between respondent and the book clubs provide that, in consideration of leasing the aforesaid printing plates, together with additional rights granted the book clubs as herein set forth, the clubs pay to respondent certain specified royalties, the total amounts of which are dependent, directly or indirectly, upon the number of copies of book club editions sold by said book clubs. Said agreements or understandings generally also provide that respondent shall fix and maintain specified minimum prices for the resale of the publisher's editions of the books bearing the titles covered by said agreements or understandings for a period of not less than one year from the dates of publication thereof.

These fixed resale prices in some instances are in excess of the prices which the book club charges its purchasers for the book club edition of the same title.

Under the provisions of the agreements or understandings which respondent has with each of the book clubs, the club receives from the respondent the exclusive delegated rights to use the printing plates of books of the particular titles selected by said club for a specified period which usually is for two or more years. During

such period, the book club is enabled to exercise such exclusive rights in producing, selling and offering for sale the books printed from the plates thus selected, at any price and on any terms or conditions that the said club may determine.

PAR. 7. Furthermore, in accordance with, and pursuant to, its understandings or agreements with said book clubs, the respondent has refused to offer or to grant, such leasing of plates and such other rights to its retail book seller customers who, in selling or offering to sell the publisher's editions, compete with said book clubs in their retail sale of the book club editions of the same title.

PAR. 8. The execution of the provisions in the aforesaid agreements between the respondent and the book clubs, whereby the respondent agrees to fix and maintain, for the period of agreement, the prices at which the retail book seller customers are to resell the publishers' editions of books which are sold in competition with the book club edition of said books, gives the book club an unfair competitive advantage.

PAR. 9. As a result of the respondent leasing the printing plates for a particular title to a book club in the manner hereinbefore described, it is selling and distributing and knowingly and intentionally granting the means of selling and distributing, in commerce, for resale within the United States and in the District of Columbia, a publisher's edition and a book club edition of the same book, which editions are, in effect, of the same grade and quality, and which are sold in competition one with the other. The respondent is indirectly discriminating between its retail book seller customers, to whom it sells, for the purpose of resale, such publisher's editions, and its book club customers, to whom it leases the plates from which it knows that such book club editions will be printed, by imposing the aforedescribed restrictions and conditions only on the resale of such publisher's editions by its retail book seller customers and by granting the leasing and other rights, hereinbefore set forth, only to its book club customers.

PAR. 10. The result and effect of such understandings, agreements, contracts, arrangements, discriminations, and of the system itself, have been, and are, that the competition between the respondent's retail book seller and book club customers has been, and is now, substantially lessened, that the said book club customers have received an unfair competitive advantage over said retail book seller customers and have tended, and are now tending, to create in said book club customers a monopoly in the sale and distribution, in commerce, in the books, the titles to which said book clubs have leased the printing plates.

PAR. 11. The acts, practices, methods, understandings and agreements of respondent, as hereinabove alleged, are all to the prejudice of the public, have a dangerous tendency to, and have actually frustrated, hindered, suppressed, lessened, restrained and eliminated competition in the sale and distribution in commerce of trade books within the intent and meaning of the Federal Trade Commission Act; have resulted in an unfair competitive advantage to respondent's book club customers over respondent's retail book seller customers; have a dangerous tendency to destroy, hinder and prevent the resale by respondent's retail book seller customers not only of publisher's editions of the books sold in competition with the book club editions of such books, but also of other trade books; have the capacity and tendency to restrain unreasonably and have restrained unreasonably interstate commerce in such products; and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT II

PARAGRAPH 1. The allegations of Paragraph 1 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 2. The allegations of Paragraph 2 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 3. The allegations of Paragraph 3 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 4. The allegations of Paragraph 4 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 5. The allegations of Paragraph 5 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 6. Respondent, by contracts, agreements, understandings or suggestions, has fixed and maintained, and now fixes and maintains, at least for specified periods, the minimum prices at which the publisher's editions of certain of its trade books are to be resold by its retail book seller customers.

PAR. 7. Also respondent, in some instances, illegally has attempted to fix and maintain, and has fixed and maintained such minimum prices at which the publisher's editions of certain of its trade books were to be resold by some of its retail book seller customers, even though such customers did not enter into any contract or agreement with respondent regarding such prices but such contracts or agreements had been entered into within the same State by and between respondent and others of its retail book seller customers.

PAR. 8. The contracts, agreements, understandings or suggestions whereby respondent has fixed and maintained and now fixes and maintains, at least for specified periods, the aforementioned minimum resale prices for its publisher's editions of certain of its trade books are also illegal, at least with reference to some of such books, including those the titles to which are selected and the printing plates for which are leased by the book clubs, in the manner hereinbefore described, in that they are not sold or resold in free and open competition with commodities of the same general class, that is, with trade books produced or distributed by others. Respondent is the only publisher of the publisher's editions of the trade books which it sells and distributes in the United States.

PAR. 9. Respondent has maintained the direct observance of said fixed resale prices on the publisher's edition of such books and has enforced indirect observance by prohibiting, in connection with the resale thereof at said fixed prices, the granting of any premium, gift, dividend, or other thing of value.

PAR. 10. Under the provisions of the understandings or agreements which the respondent has with the book clubs, these clubs received not only the exclusive delegated rights for a specified period to use the printing plates for the publication of the book club edition for the particular titles which the club has selected, but the said clubs were permitted to, and do, sell such editions in competition with the said publisher's editions of the same titles at any price and on any terms or conditions they may determine. Respondent's retail book seller customers have thereby been placed at a competitive disadvantage in the sale and distribution of such publisher's editions.

PAR. 11. The acts, practices, methods and agreements of respondent, as hereinbefore alleged, are all to the prejudice of the public, have a dangerous tendency to and have actually frustrated, hindered, suppressed, lessened, restrained and eliminated competition in the sale and distribution of trade books in commerce within the intent and meaning of the Federal Trade Commission Act; have resulted in an unfair competitive advantage to respondent's book club cus-

tomers over respondent's retail book seller customers; have the capacity and tendency to restrain unreasonably and have restrained unreasonably interstate commerce in such products; and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT III

PARAGRAPH 1. The allegations of Paragraph 1 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 2. The allegations of Paragraph 2 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 3. The allegations of Paragraph 3 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 4. The allegations of Paragraph 4 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 5. Respondent in the course and conduct of its said business, in commerce, has been for many years last past, and more particularly since June 19, 1936, and is now, either directly or indirectly discriminating in price between different purchasers of its said trade books by selling such products to some purchasers at higher prices than it sells such products of like grade and quality to other purchasers, and many of such other purchasers are engaged in active and open competition with the less favored purchasers in the resale of such products within the United States, except as it has been affected as herein alleged.

Respondent has priced and sold its publisher's editions at list prices, which are the minimum resale prices fixed by contract or otherwise by respondent, less specific discounts allowed to each class of purchasers among which are jobbers or wholesalers.

Respondent has priced and sold said books to some jobbers or wholesalers at said list prices less discounts ranging from 40% to 46% for varying quantities of books. Respondent has priced and sold said books to other jobbers or wholesalers, who are in competition with those jobbers or wholesalers receiving the aforementioned discounts above described at said list prices less discounts ranging

from 43% to 48% for the same quantities of books as those sold at 40% to 46% discounts as aforesaid.

PAR. 6. The effect of the aforesaid discriminations or of any appreciable part thereof has been or may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and said jobbers or wholesalers are respectively engaged, or to injure, destroy or prevent competition with respondent or with said jobbers or wholesalers who receive the benefit of said discriminations or with the customers of either of them.

PAR. 7. The aforesaid acts and practices of respondent are in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, Sec. 13).

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C.A. 45) the Federal Trade Commission on June 29, 1951, issued its complaint in this proceeding and duly served same upon respondent, a corporation organized and existing under the laws of the Commonwealth of Massachusetts, with its principal office and place of business located at 2 Park Street, Boston, Massachusetts. Said complaint was issued simultaneously with similar complaints, charging substantially the same violations of law, against five other publishing firms one of which was that against Doubleday & Company, Inc., Docket 5897. Counts I and II of the complaint herein were substantially similar to Counts I and II in the Doubleday complaint. Counsel in all of these proceedings agreed that since the issues were substantially the same in Counts I and II and that the proceeding against Doubleday & Company, Docket 5897, would be fully tried first and after the taking of evidence in that case was closed, counsel in the other cases further agreed that the record in the matter of Doubleday & Company, Inc., Docket 5897, would be taken by them as the record in each of the individual cases. Under date of August 31, 1955, the Commission issued its final order in the Doubleday case which order has not been appealed from.

Thereafter, on December 19, 1955, there was submitted to the undersigned examiner an agreement between the respondent and counsel supporting the complaint providing for the entry of a consent order which is identical with the order of the Commission in the Doubleday case in so far as it applies to Counts I and II of that case. By the terms of said agreement respondent admits all the jurisdictional facts alleged in the complaint served upon it; the parties thereto agree that the record may be taken as if findings of

such jurisdictional facts had been duly made in accordance with such allegations; agree that such agreement disposes of this proceeding; agree that the answer of respondent herein to the complaint shall be considered as having been withdrawn; agree that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; agree that the agreement shall not become a part of the official record until and unless it becomes a part of the decision of the Commission; agree that the agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint. By such agreement respondent waives any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights it may have to challenge or contest the validity of the order to cease and desist entered into in accordance with this agreement. Such agreement further provides that the following order to cease and desist may be entered in this proceeding by the Commission without further notice to the respondent, and that when so entered it shall have the same force and effect as if entered after a full hearing; that it may be altered, modified or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding, the agreement is hereby accepted. The hearing examiner further finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and that the proceeding is in the public interest and in accordance with such agreement hereby enters the following order.

ORDER

It is ordered, That respondent Houghton Mifflin Company, a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the publications, sale or distribution of trade books in commerce, as "commerce" is defined, construed and understood in the Federal Trade Commission Act (15 U.S.C.A., Section 45) do forthwith cease and desist from:

Entering into, maintaining or continuing any contract, agreement or understanding of any nature with any book club or similar organization whereby respondent, while exempting said book club or organization from any responsibility for resale price maintenance,

undertakes to fix, establish or maintain the resale price, terms or conditions of sale of any literary work which it publishes and sells and which it also sublicenses such book club or organization to publish and sell, in any area wherein said book club or organization and retail booksellers purchasing from respondent compete with one another in the sale of such work.

It is further ordered, That any and all other charges contained in the complaint are herewith dismissed.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 8th day of February, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist.

IN THE MATTER OF

LITTLE, BROWN AND COMPANY, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT[1]

Docket 5900. Complaint, June 29, 1951—Decision, Feb. 8, 1956

Consent order requiring a Boston publisher to cease fixing and maintaining resale prices and terms and conditions of sale of the publisher's editions of books which it sold to its retail book seller customers while permitting book clubs to sell their own editions of the same books in competition with such retailers at any prices and on any terms they might determine.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Fletcher G. Cohn and *Mr. Lewis F. Depro* for the Commission.

Haussermann, Davison & Shattuck, of Boston, Mass., for respondent.

Wolfson, Caton & Moguel, of New York City, for Book-of-the-Month Club, Inc., *amicus curiae*.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Antitrust Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Little, Brown and Company, Inc., hereinafter referred to as respondent, has violated the provisions of Section 5 of the said Federal Trade Commission Act and Section 2 (a) of the said Clayton Antitrust Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C. Title 15, Sec. 13), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in these respects as follows:

COUNT I

PARAGRAPH 1. Respondent, Little, Brown and Company, Inc., is a corporation organized and existing under the laws of the State of Massachusetts with its principal office and place of business located at 34 Beacon Street, Boston, Massachusetts.

PAR. 2. Respondent is now, and for many years last past has been, engaged directly or indirectly in the publication, sale and distribu-

[1] For consent settlement of Count III of complaint, see 48 F.T.C. 869.

tion of popular fiction and non-fiction books, commonly known as trade books.

Respondent is one of the major book publishers of said trade books in the United States. The name Little, Brown and Company came into being in 1837. At that time it conducted a retail book store and engaged in some publishing. From 1847 on, it engaged primarily in publishing and with the turn of the century, Little, Brown was entrenched as one of the leading publishers in the general field. It does not own its own printing plant and its printing is done by other concerns with whom it enters into contractual relationships.

Respondent sells and distributes its trade books to retail book sellers for resale to the public, and to wholesalers or jobbers for resale to retail book stores and others, including public libraries and educational institutions. Editions of said trade books so sold and distributed are known as publisher's editions.

Respondent, as part of its business, enters into agreements, understandings or contracts with the authors of trade books, whereby the respondent is granted by the authors the exclusive rights to make, publish and sell in book form the literary works of said authors, including the right or privilege of making the hereinafter described understandings or agreements with book clubs.

PAR. 3. In the course and conduct of its business for many years last past, respondent has been, and is now, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and in the Clayton Antitrust Act, as amended by the Robinson-Patman Act, in that it ships or causes to be shipped publisher's editions of said trade books, and printing plates from the States in which said trade books and said plates therefor are produced, to purchasers or to lessees thereof located in other States and in the District of Columbia; and there is, and has been at all times herein mentioned, a continuous current of trade and commerce in said books between and among the several States of the United States and in the District of Columbia.

Also, by virtue of and pursuant to, the contractual relationship of respondent with book clubs, as hereinafter set forth, the latter, in the course and conduct of their businesses, are enabled to, and do, ship or cause to be shipped from the States in which they are published, to purchasers located in other States and in the District of Columbia, the book club edition of books printed from the plates of particular titles leased to them by the respondent and which book club editions are sold in said commerce in competition with the aforesaid publisher's editions of such books.

PAR. 4. Except in so far as it has been affected, as hereinafter alleged, respondent, in the course and conduct of its said business in commerce, has been and is now in competition with persons, firms and other corporations, some of which were and are engaged in similar businesses in commerce.

Also, except in so far as it has been affected, as hereinafter alleged, many of said jobbers or wholesalers were and are, in competition, some in commerce, with each other, and many of said retail book sellers were, and are, in competition, some in commerce, with each other and with said book clubs in the retail sale of said trade books.

PAR. 5. Respondent also, as part of its business, is now entering into and has, for many years last past, entered into agreements or understandings with so-called book clubs by which said clubs are granted exclusive delegated rights to publish, sell and distribute certain titles of said publisher's editions in what are known as book club editions. Book clubs are organizations engaged in the business of publishing trade books and in the sale and distribution thereof by the mail order method at retail. Among the book clubs with which respondent made said agreements or understandings are the Book-of-the-Month Club and The Literary Guild of America, Inc. Under said agreements or understandings, the terms of which are hereinafter more particularly alleged, printing plates are leased by the respondent to the book clubs for use in printing book club editions. There is a publisher's edition of each title of which there is a book club edition, and both editions are contemporaneously available, are alike, the same, or practically the same, in design, format, quality, size and appearance, and are sold in competition with each other.

PAR. 6. The said agreements or understandings between respondent and the book clubs provide that, in consideration of leasing the aforesaid printing plates together with additional rights granted the book clubs as herein set forth, the clubs pay to respondent certain specified royalties, the total amounts of which are dependent, directly or indirectly, upon the number of copies of book club editions sold by said book clubs.

Under the provisions of the agreements or understandings which respondent has with each of the book clubs, the club receives from the respondent the exclusive delegated rights to use the printing plates of books of the particular titles selected by said club for a specified period which usually is for two or more years. During such period, the book club is enabled to exercise such exclusive rights in producing, selling and offering for sale the books printed

from the plates thus selected, at any price and on any terms or conditions that the said club may determine.

Respondent, by suggestion or other means, has fixed and maintained specific minimum prices for the resale by its retail book seller customers of the publisher's editions of the books bearing the titles covered by the aforesaid agreements or understandings with the book clubs, from the dates of publication thereof. Said fixed resale prices, in some instances, are in excess of the prices which the book club charges its purchasers for the book club edition of the same titles.

Said agreements or understandings between respondent and the book clubs, on occasion, also provide that respondent shall fix and maintain specific minimum prices for the resale of the publisher's editions of the books bearing the titles covered by said agreements or understandings for certain specified periods.

PAR. 7. Furthermore, in accordance with, and pursuant to, its understandings or agreements with said book clubs, the respondent has refused to offer, or to grant, such leasing of plates and such other rights to its retail book seller customers who, in selling or offering to sell the publisher's editions, compete with said book clubs in their retail sale of the book club editions of the same title.

PAR. 8. The establishment and maintenance of said specific minimum resale prices, which respondent has fixed in the manner hereinbefore described, for the resale by its retail book seller customers of the publisher's editions of such books which are sold in competition with the book club edition of said books, gives the book club an unfair competitive advantage.

PAR. 9. As a result of the respondent leasing the printing plates for a particular title to a book club in the manner hereinbefore described, it is selling and distributing, and knowingly and intentionally granting the means of selling and distributing, in commerce, for resale within the United States and in the District of Columbia, a publisher's edition and a book club edition of the same book, which editions are, in effect, of the same grade and quality, and which are sold in competition one with the other. The respondent is indirectly discriminating between its retail book seller customers, to whom it sells, for the purpose of resale, such publisher's editions, and its book club customers, to whom it leases the plates from which it knows that such book club editions will be printed, by imposing the aforedescribed restrictions and conditions only on the resale of such publisher's editions by its retail book seller customers and by granting the leasing and other rights, hereinbefore set forth, only to its book club customers.

PAR. 10. The result and effect of such understandings, agreements, suggestions, contracts, arrangements, discriminations and of the system itself, have been, and are, that the competition between the respondent's retail book seller and book club customers has been, and is now, substantially lessened, that the said book club customers have received an unfair competitive advantage over said retail book seller customers and have tended, and are now tending, to create in said book club customers a monopoly in the sale and distribution, in commerce, in the books, the titles to which said book clubs have leased the printing plates.

PAR. 11. The acts, practices, methods, understandings, agreements and suggestions of respondent, as hereinabove alleged, are all to the prejudice of the public, have a dangerous tendency to, and have actually frustrated, hindered, suppressed, lessened, restrained and eliminated competition in the sale and distribution in commerce of trade books within the intent and meaning of the Federal Trade Commission Act; have resulted in an unfair competitive advantage to respondent's book club customers over respondent's retail book seller customers; have a dangerous tendency to destroy, hinder and prevent the resale by respondent's retail book seller customers not only of publisher's editions of the books sold in competition with the book club editions of such books, but also of other trade books; have the capacity and tendency to restrain unreasonably and have restrained unreasonably interstate commerce in such products; and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT II

PARAGRAPH 1. The allegations of Paragraph 1 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 2. The allegations of Paragraph 2 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 3. The allegations of Paragraph 3 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 4. The allegations of Paragraph 4 of Count I of this complaint are incorporated by reference and made a part of the allega-

tions of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 5. The allegations of Paragraph 5 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 6. Respondent, by contracts, agreements, understandings, suggestions or other means, has fixed and maintained, and now fixes and maintains, at least for specified periods, the minimum prices at which the publisher's editions of certain of its trade books are to be resold by its retail book seller customers.

PAR. 7. Also respondent, in some instances, illegally has attempted to fix and maintain, and has fixed and maintained, such minimum prices at which the publisher's editions of certain of its trade books were to be resold by some of its retail book seller customers, even though such customers did not enter into any contract or agreement with respondent regarding such prices but such contracts or agreements had been entered into within the same State by and between respondent and others of its retail book seller customers.

PAR. 8. The contracts, agreements, understandings, suggestions or other means whereby respondent has fixed and maintained and now fixes and maintains, at least for specified periods, the aforementioned minimum resale prices for its publisher's editions of certain of its trade books are also illegal, at least with reference to some of such books, including those the titles to which are selected and the printing plates for which are leased by the book clubs, in the manner hereinbefore described, in that they are not sold or resold in free and open competition with commodities of the same general class, that is, with trade books produced or distributed by others. Respondent is the only publisher of the publisher's editions of the trade books which it sells and distributes in the United States.

PAR. 9. Respondent has maintained the direct observance of said fixed resale prices on the publisher's edition of such books and has enforced indirect observance by prohibiting, in connection with the resale thereof at said fixed prices, the granting of any premium, gift, dividend, or any other thing of value.

PAR. 10. Under the provisions of the understandings or agreements which the respondent has with the book clubs, these clubs received not only the exclusive delegated rights for a specified period to use the printing plates for the publication of the book club edition for the particular titles which the club has selected, but the said clubs were permitted to, and do, sell such editions in competition with the said publisher's editions of the same titles at any price and

on any terms or conditions they may determine. Respondent's retail book seller customers have thereby been placed at a competitive disadvantage in the sale and distribution of such publisher's editions.

PAR. 11. The acts, practices, methods, and agreements of respondent, as hereinbefore alleged, are all to the prejudice of the public, have a dangerous tendency to and have actually frustrated, hindered, suppressed, lessened, restrained and eliminated competition in the sale and distribution of trade books in commerce within the intent and meaning of the Federal Trade Commission Act; have resulted in an unfair competitive advantage to respondent's book club customers over respondent's retail book seller customers; have the capacity and tendency to restrain unreasonably and have restrained unreasonably interstate commerce in such products; and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT III

PARAGRAPH 1. The allegations of Paragraph 1 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 2. The allegations of Paragraph 2 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 3. The allegations of Paragraph 3 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 4. The allegations of Paragraph 4 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 5. Respondent in the course and conduct of its said business, in commerce, has been for many years last past, and more particularly since June 19, 1936, and is now, either directly or indirectly discriminating in price between different purchasers of its said trade books by selling such products to some purchasers at higher prices than it sells such products of like grade and quality to other purchasers, and many of such other purchasers are engaged in active and open competition with the less favored purchasers in the resale of such products within the United States, except as it has been affected as herein alleged.

Respondent has priced and sold its publisher's editions at list prices, which are the minimum resale prices fixed by contract or otherwise by respondent, less specific discounts allowed to each class of purchasers among which are jobbers or wholesalers.

Respondent has priced and sold said books to some jobbers or wholesalers at said list prices with the following schedule of discounts being applicable thereto:

Number of copies ordered of same title:	*Discount (percent)*
1–2	40
3–24	41
25–49	42
50–99	43
100–249	43½
250–499	44
500–999	45
1,000–2,499	45½
2,500–4,999	46½
5,000 and over	47

Respondent has priced and sold said books to other jobbers or wholesalers who are in competition with those jobbers or wholesalers receiving the aforementioned discounts above described, at said list prices, with the following schedule of discounts being applicable thereto:

Number of copies ordered of same title:	*Discount (percent)*
1–49	43
50–99	44
100–249	44½
250–499	45
500–999	45½
1,000–2,499	46
2,500–4,999	47
5,000–9,999	48
10,000–24,999	49
25,000 and over	50

PAR. 6. The effect of the aforesaid discriminations or of any appreciable part thereof has been or may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and said jobbers or wholesalers are respectively engaged, or to injure, destroy or prevent competition with respondent or with said jobbers or wholesalers who receive the benefit of said discriminations or with the customers of either of them.

PAR. 7. The aforesaid acts and practices of respondent are in violation of subsection (a) of Section 2 of the Clayton Act, as

amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, Sec. 13).

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C.A. 45) the Federal Trade Commission on June 29, 1951, issued its complaint in this proceeding and duly served same upon respondent, a corporation organized and existing under the laws of the Commonwealth of Massachusetts, with its principal office and place of business located at 34 Beacon Street, Boston, Massachusetts. Said complaint was issued simultaneously with similar complaints, charging substantially the same violations of law, against five other publishing firms one of which was that against Doubleday & Company, Inc., Docket 5897. Counts I and II of the complaint herein were substantially similar to Counts I and II in the Doubleday complaint. Counsel in all of these proceedings agreed that since the issues were substantially the same in Counts I and II that the proceeding against Doubleday & Company, Docket 5897, would be fully tried first and after the taking of evidence in that case was closed, counsel in the other cases further agreed that the record in the matter of Doubleday & Company, Inc., Docket 5897, would be taken by them as the record in each of the individual cases. Under date of August 31, 1955, the Commission issued its final order in the Doubleday case which order has not been appealed from.

Thereafter, on December 12, 1955, there was submitted to the undersigned examiner an agreement between the respondent and counsel supporting the complaint providing for the entry of a consent order which is identical with the order of the Commission in the Doubleday case in so far as it applies to Counts I and II of that case. By the terms of said agreement respondent admits all the jurisdictional facts alleged in the complaint served upon it; the parties thereto agree that the record may be taken as if findings of such jurisdictional facts had been duly made in accordance with such allegations; agree that such agreement disposes of this proceeding; agree that the answer of respondent herein to the complaint shall be considered as having been withdrawn; agree that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; agree that the agreement shall not become a part of the official record until and unless it becomes a part of the decision of the Commission; agree that the agreement is for settlement purposes only and does not constitute an admission by respondent

that it has violated the law as alleged in the complaint. By such agreement respondent waives any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights it may have to challenge or contest the validity of the order to cease and desist entered into in accordance with this agreement. Such agreement further provides that the following order to cease and desist may be entered in this proceeding by the Commission without further notice to the respondent, and that when so entered it shall have the same force and effect as if entered after a full hearing; that it may be altered, modified or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding, the agreement is hereby accepted. The hearing examiner further finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and that the proceeding is in the public interest and in accordance with such agreement hereby enters the following order.

ORDER

It is ordered, That respondent Little, Brown and Company, Inc., a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the publication, sale or distribution of trade books in commerce, as "commerce" is defined, construed and understood in the Federal Trade Commission Act (15 U.S.C.A., Section 45) do forthwith cease and desist from:

Entering into, maintaining or continuing any contract, agreement or understanding of any nature with any book club or similar organization whereby respondent, while exempting said book club or organization from any responsibility for resale price maintenance, undertakes to fix, establish or maintain the resale price, terms or conditions of sale of any literary work which it publishes and sells and which it also sublicenses such book club or organization to publish and sell, in any area wherein said book club or organization and retail booksellers purchasing from respondent compete with one another in the sale of such work.

It is further ordered, That any and all other charges contained in the complaint are herewith dismissed.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 8th day of February, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist.

Decision

IN THE MATTER OF

JOSEPH NEWGARDEN, SR., TRADING AS WESTBROOK STUDIOS

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

Docket 6382. Complaint, June 29, 1955—Decision, Feb. 8, 1956

Order requiring a photographer in Willoughby, Ohio—charged with making false representations on certain form permit post cards mailed to all residential patrons of certain post offices in four States to promote the sale of his pictures—to cease representing falsely that he was conducting a photographic contest to select "The Child of the Year," that pictures of the child selected would be featured in a series of newspaper and magazine advertisements, that he would pay the selected child the usual modeling fee and award him a one-year contract, and that he would pay one dollar to each child at the time of posing.

Mr. William R. Tincher, counsel supporting the complaint.
Mr. Joseph Newgarden, Sr., pro se.

INITIAL DECISION OF HEARING EXAMINER JOHN LEWIS

STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above-named respondent on June 29, 1955, charging him with having engaged in unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of the Federal Trade Commission Act. Said complaint, in substance, charges respondent with having falsely represented that he was conducting a photographic contest and with having made certain false and misleading statements in connection therewith. A copy of said complaint and notice of hearing were duly served upon respondent. No written answer to the complaint was filed by respondent.

Following the issuance of the aforesaid complaint and service thereof upon respondent, a hearing was held before the undersigned hearing examiner, theretofore duly designated to hear this proceeding, on October 17 and 18, 1955, in Cleveland, Ohio. At the opening of such hearing respondent, who appeared without counsel, was permitted to make oral answer to the complaint, placing in issue the main allegations thereof. Testimony and other evidence were thereafter offered in support of and in opposition to the allegations of the complaint, which testimony and other

evidence were duly recorded and filed in the office of the Commission. Counsel supporting the complaint and respondent were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues. At the close of the evidence, both sides were given an opportunity to file written proposed findings of fact and conclusions of law. Proposed findings and conclusions and a suggested order were thereafter filed by counsel supporting the complaint, on November 25, 1955. Respondent did not avail himself of the opportunity to submit proposed findings and conclusions, but filed a written statement requesting that the complaint be dismissed because of a failure of proof. Such request is disposed of in accordance with the findings, conclusion and order hereinafter made.

Upon the entire record in the case and from his observation of the witnesses, the undersigned finds that this proceeding is in the public interest and makes the following:

FINDINGS OF FACT

I. The Business of Respondent and the Interstate Commerce

Respondent Joseph Newgarden, Sr., is an individual trading as Westbrook Studios. From about January 1953 to August 1955, respondent operated his business at 4126 Erie Street, Willoughby, Ohio. In or about August 1955, respondent moved his place of business to 900 Penn Avenue, Pittsburgh, Pennsylvania. Respondent's business is now, and has been for several years last past, that of photography, involving the promotion, sale and distribution of photographs taken by respondent, his agents or employees.

In the course and conduct of his business, respondent has caused said photographs, when sold, to be transported from his place of business in the State of Ohio to purchasers thereof located in various other States of the United States. At the times mentioned herein, respondent has maintained a substantial course of trade in commerce in said photographs.[1]

In connection with the solicitation of prospective customers, respondent has engaged in the extensive use of the United States mails. Respondent and his agents have also, in connection with the solicitation of prospective customers, engaged in extensive travel between and among various states of the United States.

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[1] The complaint also alleges that respondent is in substantial competition in commerce, with others engaged in the sale of photographs. While the evidence establishes that respondent is engaged in commerce, there is no evidence to support the allegation that respondent competes, in commerce, with other firms engaged in the sale of photographs.

II. The Alleged Illegal Practices

A. *The Charges*

The charges of wrongdoing here involved arise out of respondent's solicitation of customers by the use of certain form permit postcards. Such postcards are addressed and mailed to all residential patrons of certain local post offices. A typical postcard used, in this connection, is as follows:

DEAR MADAM:

You are cordially invited to bring your child, 2 months to 6 years, to be photographed by our staff specialist! We are planning a series of newspaper and magazine ads featuring "The Child of the Year"! *Whether your child is selected or not*, the child will be paid a brand new dollar bill for posing! If selected your child will be paid the usual model's fees and may be given a one year contract (subject, of course, to the parents' permission).

Up to twelve different poses will be taken and our selection will be made on photogenic personality only. We wish to make it very clear *THERE IS NO CHARGE AND NO OBLIGATION OF ANY KIND!* You will be shown all the proofs, and will then have the opportunity to place an order if you wish.

Yours very truly,

WESTBROOK STUDIOS------OHIO DIVISION

"Photographers of Children *Exclusively*"

It is alleged that by means of the statements appearing in these postcards respondent has represented, directly or by implication, that: (*a*) He is conducting a photographic contest to select "The Child of the Year"; (*b*) pictures of the child so selected will be featured in a series of newspaper and magazine ads which respondent will insert; (*c*) the child selected will be paid the usual and customary model's fees for posing and will be given an advantageous contract for a year; and (*d*) each child who poses will receive a brand new one dollar bill at the time of posing. It is alleged that these representations are grossly exaggerated, false and misleading in that: (*a*) Respondent is not conducting a photographic contest but has disseminated the postcards for the purpose of selling photographs to parents; (*b*) no child of the year has been selected and no such child's picture has been featured in newspaper and magazine advertisements; (*c*) no payments have been made to any child and no contract has been given; and (*d*) respondent has not given each child who poses a dollar bill at the time of posing.

B. *The Facts*

Respondent commenced operating under the promotional plan which is the subject of this proceeding in or about June 1954. The plan involved the sending of postcards of the type above described to householders in various communities throughout Ohio,

Pennsylvania, New York, and West Virginia. During the balance of 1954, approximately 300,000 of such cards were mailed to persons in those four states.

The card, in addition to the above subject-matter, indicated the exact time when, and place where, a representative of respondent would be present in the particular community for taking of photographs. Persons who appeared at the indicated time and place had their child's picture taken by the photographer and were instructed to return in about two weeks to see the proofs of the pictures. When they returned two weeks later they were shown the proofs and given an opportunity to order any number of pictures that they desired at prescribed rates. In addition, they usually received a one dollar bill at the time the proofs were exhibited.

Respondent selected a so-called "Child of the Year" around the latter part of November 1954. This occurred after respondent had received several visits from Commission investigators inquiring into the bona fides of his operations. The child selected was one Kim Persons of Elyria, Ohio. The child received a check for $25.00 and a so-called "Contract of Employment" was entered into with her parents, dated November 23, 1954, giving respondent the exclusive right to use photographs of the child for advertising purposes, and providing that the child would receive $25.00 for one-half hour of time spent before the camera. The contract did not run for any specific time but gave either party the right to terminate it upon thirty days' written notice to the other party. Outside the $25.00 payment which was made in the latter part of November, no other payment was made to the Persons child or her parents. No advertisements featuring the Persons child as the "Child of the Year" were inserted by respondent in any newspapers or magazines.

During the year 1955, however, respondent used the picture of the Persons child on a postcard similar to the one above described. The second postcard described the Persons child as "The Child of the Year for 1954" and invited the householders to whom it was addressed to bring in their children to be photographed by respondent's photographer, stating that respondent would "again select 'The Child of the Year' to feature in our advertisements." Approximately 296,000 such cards were sent out by respondent during 1955. No further payments were made to the Persons child for the use of its picture on these direct mail advertisements. In April 1955, respondent inserted an advertisement in a local Ohio newspaper advertising that a child "whose picture will be featured

in all our national advertisements" would again be selected. The advertisement made reference to the fact that the Persons child had been selected as the 1954 "Child of the Year" and that she had received "a substantial check" from respondent. While the advertisement contained a picture of a child, it was not that of the Persons child but of a professional model. There is no evidence to indicate that any child was selected during 1955, or that any child received any fees for posing or that any contract of any nature was made with any such child.

C. *Contentions and Conclusions*

There is no question, and it is so found, that by his use of the above-mentioned postcards and other advertising matter respondent represented that he was going to conduct a photographic contest for the purpose of selecting a "Child of the Year." It is also clear, and is so found, that by the aforesaid advertising, the respondent undertook to feature such child in a series of newspaper and magazine ads, to pay the child the usual and customary model's fees and to give the child an advantageous contract for a year. While a child was selected in the latter part of November, it was not featured in any newspaper or magazine advertisements and outside of one $25.00 fee, it received no other benefits from the selection. During the year 1955, no child whatsoever was selected and there were no payments made to, or advertisements inserted featuring, such child.

It is the contention of respondent that at the time he inaugurated the promotional plan here involved, he contemplated conducting a bona fide contest to select a child of the year and to feature the child in magazine and newspaper advertisements which would result in the child being advantageously remunerated, but that as the plan developed and the anticipated revenues from the sale of photographs did not come up to expectation, he had to abandon carrying out the plan because of its lack of "feasibility." The undersigned cannot, however, accept this contention of respondent as valid. The examiner is convinced, in the light of the record as a whole, that respondent never had any serious intention of conducting a bona fide contest for the selection of a "Child of the Year," and that the whole operation was simply a promotional scheme to facilitate the sale of pictures.

Respondent's own testimony concerning the plan and its execution, or reasons for non-execution, was so thoroughly confused, contradictory and unconvincing that no credence can be given to his claims. Thus, for example, at one point in his testimony he

stated that he planned to conduct his contest like the Miss America contest.[2] However, at a later point when asked whether the Miss America contest was the genesis of his idea, respondent gave the following evasive and contradictory response:

A. Well, I said it may have been the genesis. It is pretty hard to say where an idea comes from. I think now that that may have been the thing that——

Q. Well, was the Miss America contest of 1954 the genesis of your idea or the Miss America contest idea in general?

A. I probably say in general.[3]

It seems evident from the record that at the time he inaugurated the widespread mailing of postcards advertising his "Child of the Year" contest, respondent's plans for its execution were extremely vague and ethereal, if at all existent. Significantly, he took no steps to inquire into the feasibility of the alleged plan for advertising his child of the year until September 1954, shortly after a visit from a Commission investigator, at which time he made inquiry of a Cleveland advertising agency as to the cost of an advertisement in Parents' Magazine. Respondent's explanation as to why he did not follow through on his inquiry was thoroughly unconvincing. His explanation suggested, alternately, that he was unable to reach the advertising agency by telephone and, again, that he didn't have the money to go through with the plan anyway.

By coincidence, the so-called selection of a "Child of the Year" in November 1954, like the inquiry from the Cleveland advertising agency, followed a visit from a Commission investigator. Respondent sought to explain his choice of November as the month for selecting the child of the year on the ground that:

The idea was from the Miss America selection in Atlantic City, which was probably the genesis of my own idea. She is selected at the end of the year, and publicized through the coming year.[4]

Respondent finally conceded, as is common knowledge, that Miss America is selected at the end of the bathing season in September, rather than at the end of the year.

Although respondent did choose a child of the year in the latter part of November, the so-called "Contract of Employment" which was entered into with its parents was of a hollow and synthetic nature. It was for an indefinite term, terminable upon thirty days notice. The child did receive one $25.00 payment, but nothing further was done to feature the child so as to enable it to earn further modeling fees.

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[2] R. 56.
[3] R. 147.
[4] R. 123.

After being impelled by events to select a child and to pay it a minimal fee, respondent sought to exploit this selection solely to his own advantage. The picture was used only on postcards advertising another contest for 1955 and sought to create the impression that the child selected in 1954 had received substantial benefits.[5] The advertisement which respondent did insert in a newspaper in 1955, and on which the Persons child might have been entitled to a fee, contained the picture of a professional model. The advertisement, however, referred to the Persons child as having been selected as the child of the year, referred to the fact that it had received a "substantial check," and tended to create the impression that the picture featured in the advertisement was that of the child selected in the contest.

Respondent's explanation for not using the picture of the Persons child in the newspaper advertisement was that it was not "photogenic" enough because the child had changed in appearance between the time of taking the original picture and her selection in the contest. When asked why he did not use the original photograph of the child, which had evidently been sufficiently photogenic to justify selection of the child as the child of the year, respondent gave the unconvincing explanation that he had lost the negatives.

Further evidence of respondent's lack of good faith and of any genuine intent to conduct a child of the year contest was his repetition of substantially the same plan in 1955, after its alleged lack of feasibility had been amply demonstrated. While it is true that the postcard mailing in 1955 referred to the fact that the child of that year would be "featured in our advertisements" instead of in "a series of newspaper and magazine ads," as had the 1954 cards, this is a distinction without a difference. The sum total of the statements made was the same, as far as the probable effect on the public was concerned, *viz*, that respondent was conducting a bona fide contest in which the winner would have an opportunity to win substantial benefits. It is significant that in the newspaper advertisement which respondent inserted regarding the contest in 1955, the expression used was that the child selected would be featured in all respondent's "national" advertising. While respondent testified that he sought to minimize the benefits under the contest in talking to prospective customers, it is evident from his testimony that the impression had already been created that the winner could expect to receive substantial benefits. The record also shows that certain of respondent's agents helped encourage

[5] In addition to the picture of the child described as "The Child of the Year for 1954!", the card contained the legend: "Little Kim signs her contract."

this impression.[6] In any event, no child was selected in 1955, and no child was featured or compensated in any way, shape or form.

Viewing the record as a whole, the examiner is convinced and finds, that respondent never had any serious intention of conducting a genuine contest for the selection of a child of the year, or to feature any child selected in newspaper and magazine ads, or to pay the child selected the usual and customary model's fees for posing for such ads, or to give the child a contract for a year for some advantageous purpose. The basic purpose of respondent's plan was admittedly to promote the sale of photographs. No definite plans were made for any contest and no steps of any kind were taken to carry it into execution until after the respondent had received official impetus in the form of an investigation by the Commission. Such fulfillment as then occurred, was on a restricted and marginal basis and was evidently calculated to meet what respondent considered to be the requirements of legality. The so-called child of the year received a single $25.00 payment and a hollow contract. Respondent then sought to subvert, to his own advantage, this limited and grudging fulfillment of his commitments by using the photograph of the child selected solely for the purpose of soliciting new business, on his direct mail advertising, and by using the name of the child in a newspaper advertisement containing the picture of another child. Under all the circumstances, the examiner can give no credence to respondent's contention and explanation regarding his intent to conduct a genuine contest and as to the reasons why it was not carried out.

The only remaining issue is with respect to the statement made in the postcard that each child who posed would be "paid a brand new dollar bill for posing." The evidence discloses that in most instances payment was not made at the time of posing but when the parent called to see the proofs several weeks later. The complaint alleges that the dollar was not even paid at the time the proofs were exhibited, unless the parents insisted upon it. However, the evidence does not support this allegation since it appears that, generally speaking, the persons calling to see the proofs were voluntarily given a dollar bill. The only exception to this was that where more than one child in a particular family had posed, it was respondent's practice to pay only a single dollar to the family, rather than one dollar for each child posing.

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[6] One customer was told that the child selected might receive a Hollywood screen test. Another was told that the winner's picture would appear in the Saturday Evening Post or Collier's Magazine.

Aside from whether the dollar was paid voluntarily at the time of viewing the proofs or not, it is the contention of counsel supporting the complaint that respondent, in his postcard advertisement, had undertaken to pay the dollar at the time the child posed. Respondent, on the other hand, contends there was no undertaking to pay the posing fee at any particular time. From his own reading of the advertisement and after listening to the testimony of some of the witnesses, the examiner is convinced that the impression which respondent sought to create in his advertising postcard was that the dollar would be paid at the time of posing.

It seems clear from the operation of the plan that the offer of a dollar bill was used as a form of bait, in addition to the so-called contest, to induce persons to come in and have the pictures of their children taken. It is evident that the reason they were not paid the dollar at the time of posing was to give them an inducement to return to view the proofs several weeks later, thereby giving respondent an opportunity to sell them pictures. The result was that those persons who did not return to view the proofs did not receive a dollar bill. While respondent testified that he had a representative who called at the homes of those persons that did not come to see their proofs in order to pay them the dollar bill, it is evident that he called on only some of the customers and, further, that his purpose in calling upon such persons was not to give them a dollar bill but to seek to induce them to purchase pictures. In any event, it is the opinion and finding of the examiner that respondent, by his advertising, represented that each child who posed for a picture would be given a dollar bill at the time of posing and that such representation was false since the only persons who received such dollar bill were those who called to see their proofs at a later date or, in some instances, those upon whom respondent's representative called at their homes.

III. Effect of the Illegal Practices

The use by respondent of the foregoing false, deceptive and misleading statements, representations and practices in connection with the sale and distribution of his photographs in commerce has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasers and prospective purchasers of said photographs into the erroneous and mistaken belief that such statements and representations were and are true, and into the purchase of substantial quantities of the photographs offered for sale in commerce by the respondent.

CONCLUSION OF LAW

The acts and practices of respondent, as hereinabove found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent, Joseph Newgarden, Sr., an individual trading as Westbrook Studios, or trading under any other name, and his agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of photographs, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication that:

(1) Respondent is conducting, promoting or sponsoring a photographic contest to select the "Child of the Year" or for any similar purpose.

(2) Respondent will feature the picture of the person selected in any such photographic contest in newspaper and magazine advertisements.

(3) Respondent will pay to the person selected in any such photographic contest, modeling fees or award such person a contract.

(4) Respondent will pay one dollar or any other amount to persons for posing unless such sum is paid to all such persons at the time of posing, or unless the announcement that such amount will be paid clearly states that it will be paid at some other time and it is paid at such time to all such persons.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 8th day of February, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That the respondent herein shall within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist.

Decision

IN THE MATTER OF

BENJAMIN D. RITHOLZ ET AL. TRADING UNDER THE NAMES OF CHICAGO INVISIBLE CONTACT LENS SERVICE, ETC.

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

Docket 6155. Complaint, Dec. 30, 1953—Decision, Feb. 9, 1956

Order requiring eight individuals, engaged in the sale of corneal contact lenses from their main office in Chicago and numerous branch offices in other States, to cease representing falsely in advertisements in newspapers, etc., that there was no feeling in the eye when their contact lenses were worn and that they could be worn all day without discomfort; that their lenses were safer than eyeglasses and provided better vision and that eyeglasses could be discarded upon purchase thereof; that their contact lenses were radically different from all others; and that the price of their lenses was reduced to $50 from $125 and $150, and that the lenses were of the latter value.

Mr. Frederick McManus for the Commission.

Frank E. & Arthur Gettleman and *Mr. Benjamin D. Ritholz*, of Chicago, Ill., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges that the respondents named in the caption hereof have violated the Federal Trade Commission Act by disseminating false and misleading advertising relating to corneal contact lenses which they manufacture and sell in commerce. Respondents filed an answer denying these charges. Thereafter hearings were held at which testimony and other evidence were received in support of and in opposition to the allegations of the complaint, duly recorded and filed in the office of the Commission. Thereafter proposed findings were presented by counsel.

Upon consideration of the entire record, the following findings are made:

1. Respondents Benjamin D. Ritholz, Samuel J. Ritholz, Sylvia Ritholz, Morris L. Ritholz, Fannie Ritholz, Sophie Ritholz, Jacob Bedno and Anna Bedno, individually and as copartners trading under the names of Chicago Invisible Contact Lens Service, D. C. Invisible Contact Lens Service, Pittsburgh Invisible Contact Lens Service, Fort Wayne Invisible Contact Lens Service, Flint Invisible Contact Lens Service, Lansing Invisible Contact Lens Service, King Optical Company, Midwest Scientific Company, and other

names, are engaged in the sale of corneal contact lenses, having their principal place of business located at 1148 Chicago Avenue, Chicago, Illinois. Respondents maintain numerous branch offices located in various cities scattered throughout the United States including Atlanta, Georgia; Birmingham, Alabama; Minneapolis, Minnesota; Kansas City and Springfield, Missouri; South Bend and Fort Wayne, Indiana; and Lansing and Flint, Michigan.

2. Respondents are now, and for some years last past have been, engaged in the manufacture and sale of corneal contact lenses and other optical supplies. Corneal contact lenses are designed to correct errors and deficiencies in the vision of the wearers, and are devices, as "device" is defined in the Federal Trade Commission Act. Respondents carry on their business through their branch offices in the following manner. Persons calling at the branch offices, unless they already have prescriptions, are referred to optometrists, who examine the eyes of such persons, write prescriptions and charge fees for such examinations. The prescriptions then are taken by such persons to respondents' branch offices and are forwarded by the branch offices to respondents' main office or factory in Chicago, where corneal lenses are prepared in accordance with the prescriptions. The lenses are sent back to the various branch offices, and are there fitted to the eyes of the individual customers. In transacting this business, respondents maintain a substantial course of trade in commerce.

3. In connection with their business respondents have disseminated advertisements concerning their said devices by the United States mails and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including advertisements in newspapers, circulars and pamphlets, for the purpose of inducing, and which were likely to induce, the purchase of said devices.

Among the statements contained in respondents' advertising matter, so circulated, are the following:

(1) An amazing new invention by Hornstein of Budapest has startled the optical world. His invention is on file in the United States Patent Office. It is comprised of a tiny glass disk, smaller than a dime and it is radically different from all contact lenses. There is no feeling in the eye from it.

Clinical tests on numerous persons in all walks of life, *over long periods of time*, give convincing proof that they can be worn all day long with complete comfort and that there is no feeling in the eye from them. * * * [Emphasis supplied.]

(2) Wear them every waking moment with ease and comfort.

(3) Floating fluidless contact lens are a natural for you if you wear glasses.

(4) Throw away your glasses.

(5) Worn by thousands from rising to bedtime.

(6) Wear new miniature "all day" corneal contact lenses.

(7) Safer and better than glasses.

(8) Can anyone be fitted with contact lenses? Almost anyone who wears glasses can secure the same or even better visual aid from Contact Lenses.

(9) It takes very little time to become accustomed to them so that they may be worn indefinitely.

(10) Remember you can now get these "all day" miracle lenses for $49.95 a pair. They are the identical lenses others charge $125 to $200. You can save yourself $75 to $150. * * * The price now is only $49.95.

(11) Special introductory offer! $125 to $150 value reduced to only $50.

4. Through these and similar statements respondents have represented that:

(1) Respondents' lenses are a new invention and are radically different from other corneal lenses;

(2) There is no feeling in the eye when respondents' contact lenses are worn, and that they may be worn all day without discomfort to the wearer;

(3) Said contact lenses are safer than eyeglasses;

(4) Said contact lenses provide better vision than eyeglasses;

(5) Persons who purchase respondents' contact lenses can discard their eyeglasses; and

(6) Respondents' lenses are of a value of $150 to $200 and have been sold by them and others for that amount, but have been reduced by respondents to $50.

5. As to each of the aforementioned representations the facts are:

(1) Respondents urge that the word "new" is a relative term, that it refers to something that has been in existence "but a short time." It is an indefinite expression. As was pointed out, we speak of the New Testament, although it is centuries old. We talk of new remedies, new eras and the new look—mostly in a most general way, without any specific period in mind. The word "new" does not carry any specific time limitation.

Various types of spectacles have been worn for centuries to give relief for defective vision. Certain types of contact lenses have been worn for several decades. Corneal contact lenses are of a later origin, and the Hornstein lens is one of the more recent modifications of the contact lens, so it is of comparatively recent origin. To describe it as "new" is therefore not beyond the bounds of the reasonable and ordinary application of that term.

But respondents add that their lenses "are radically different from other corneal lenses." Here they are using terminology that does have specific connotation. The word "radically" means completely, thoroughly, fundamentally. Respondents' corneal lenses are not *radically* different from other corneal contact lenses.

Contact lenses fall into two general classifications—the scleral type which covers most, if not all, of the visible portion of the eyeball, and the corneal type, which covers a surface of the eyeball only slightly larger than the cornea itself. There are several varieties of corneal lenses.

The Hornstein lens is a convex plastic disc. The central portion, varying from 6 to 9 millimeters in diameter, is domed with a radius shorter than that of the cornea; surrounding this is a 3 to 5 millimeter flange which has a greater radius than the central portion, making it somewhat flatter so that it conforms closely to the curvature of the eyeball; the edge is rounded so that it will not be irritating. The radius of the central dome-shaped part of the lens may be varied to produce the necessary correction of vision required by the individual wearer. It also tends to create a vacuum, thus helping to hold the lens in place.

Many of the other corneal lenses have a uniform radius of curvature and fit more closely to the eyeball throughout. There may be other variations in detail, but all operate on the same principle and serve the same purpose. All can be made to provide the desired corrective effect on vision.

(2) Individuals differ, physically and psychologically. Some can wear the corneal lenses manufactured and sold by respondents with a reasonable degree of comfort. There is some sensation or feeling when contact lenses are first fitted, to which the wearer may later become insensitive, or which, on the other hand, may increase to such a degree that the lenses cannot be worn for any appreciable length of time. Some persons cannot wear contact lenses at all; some can wear them for a few hours only: while others, fewer in number, can wear them all day, even to the extent of discarding the eyeglasses formerly used. There is a wide variation in this respect, depending upon individual idiosyncrasies. There is no general rule applicable to all.

(3) Some persons, after becoming accustomed to corneal contact lenses, wear them for all purposes in place of eyeglasses and so discard the eyeglasses they had previously used; others use them for appearance' sake when engaged socially or professionally, retaining their eyeglasses for non-public occasions; still others use them in sports which involve physical contact because the corneal lenses, being of plastic, do not break or shatter as eyeglasses might. Again the question of comfort arises, and it cannot be said, as a general rule, that purchasers of corneal lenses can discard their eyeglasses.

(4) As to comparative safety, there is likewise no generally applicable rule. As stated above, corneal lenses, being of plastic,

will not shatter or easily break; they are less exposed to the danger of being struck by foreign objects than eyeglasses; they do not become fogged by sudden changes of temperature, and are not affected by perspiration, rain or other dampness. On the other hand, they may slip out of position at critical moments and, if not properly fitted, may cause abrasions and trauma. For all persons and all purposes they are not safer than eyeglasses.

(5) Eyeglasses provide opportunity for a wider range of adjustments than do corneal contact lenses because of the variety of simple lenses that may be used and because of the availability of dual corrections through the use of bifocal combinations. In some cases, particularly those involving malformation of the cornea, contact lenses provide improvement of vision not possible through the use of eyeglasses. It cannot be said of either device that in all instances and under all circumstances it is best.

(6) Respondents' corneal lenses do not have a value of $150 or $200, nor any other value in excess of that which respondents regularly and customarily charge, which, according to the evidence, varies from $49.95 to $75.00 per pair. There is no evidence to establish that identical lenses have been sold by respondents or by others for from $125 to $200. It does appear that there is much variance in the price which a purchaser may be required to pay for corneal contact lenses. Before a purchaser may procure respondents' lenses he is usually obligated to consult an oculist, optician or optometrist for examination and prescription. Respondents' advertised prices do not include these services, nor does the record show what these additional services ordinarily cost. A person with impaired vision might visit an oculist, optometrist or optician and be charged $125, $150 or more for complete services, including examination, prescription, treatment if necessary, lenses, fitting services and further necessary adjustments. He might be charged much less. Since the type and quantity of services that are furnished with lenses may vary widely, no basis exists for making price comparisons, and faulty conclusions may be drawn from the statements made by respondents.

CONCLUSIONS

On the basis of the facts of record as established by substantial, reliable and probative evidence, the conclusion must be reached that much of respondents' advertising is false and deceptive. Their lenses are not radically different from other corneal contact lenses; there is some feeling in the eye when they are worn, particularly when first worn; in some instances, corneal contact lenses may be

worn without discomfort all day; in some instances eyeglasses may be discarded; in some instances contact lenses are safer and provide better vision than eyeglasses, but these are individual instances, and not of universal or even general occurrence as respondents' advertising would lead a prospective purchaser to believe. The prices advertised by respondents are not reduced prices, nor are identical lenses sold by others for from $150 to $200.

The use by respondents of the foregoing advertisements, and the false, deceptive and misleading statements contained therein, has had and now has the capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true and into the purchase of respondents' corneal contact lenses because of such erroneous and mistaken belief.

The acts and practices of respondents herein found to be false and deceptive are all to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. Accordingly,

It is ordered, That Benjamin D. Ritholz, Samuel J. Ritholz, Sylvia Ritholz, Morris L. Ritholz, Fannie Ritholz, Sophie Ritholz, Jacob Bedno and Anna Bedno, trading under the names of Chicago Invisible Contact Lens Service, D. C. Invisible Contact Lens Service, Pittsburgh Invisible Contact Lens Service, Fort Wayne Invisible Contact Lens Service, Flint Invisible Contact Lens Service, Lansing Invisible Contact Lens Service, King Optical Company, Midwest Scientific Company, or any other name or names, their representatives, agents and employees, directly or through any corporate or other device, in connection with the sale of contact lenses, do forthwith cease and desist from directly or indirectly:

1. Disseminating or causing to be disseminated any advertisement, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisements represent, directly, indirectly or by implication:

(*a*) That there is no feeling in the eye when respondents' contact lenses are worn;

(*b*) That respondents' corneal contact lenses can be worn all day without discomfort;

(*c*) That the wearing of respondents' contact lenses is always safer than the wearing of eyeglasses;

(*d*) That respondents' contact lenses provide better correction of defective vision than eyeglasses except in the cases of those persons who have malformation of the cornea;

(*e*) That eyeglasses can always be discarded upon the purchase of respondents' corneal contact lenses;

2. Disseminating or causing to be disseminated any advertisement, by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said contact lenses, which advertisement contains any of the representations prohibited in paragraph 1 hereof.

It is further ordered, That the aforesaid respondents, in connection with the offering for sale, sale and distribution of contact lenses in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing:

1. That the difference between respondents' and all other corneal contact lenses is radical or fundamental;

2. That the price at which respondents' corneal contact lenses are offered for sale is a reduced price, unless such price is substantially less than the price at which the same lenses were being sold by respondents immediately prior to the announcement of such reduced price;

3. That any price at which respondents' contact lenses and services precedent and subsequent to the acquisition thereof are offered for sale represents a saving, unless such price is lower than that at which similar contact lenses and services are being offered by others in the same competitive area.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 9th day of February 1956, become the decision of the Commission; and, accordingly,

It is ordered, That respondents Benjamin D. Ritholz, Samuel J. Ritholz, Sylvia Ritholz, Morris L. Ritholz, Fannie Ritholz, Sophie Ritholz, Jacob Bedno and Anna Bedno, individually and as copartners trading under the names of Chicago Invisible Contact Lens Service, D. C. Invisible Contact Lens Service, Pittsburgh Invisible Contact Lens Service, Fort Wayne Invisible Contact Lens Service, and other names, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease or desist.

IN THE MATTER OF

SIMON AND SCHUSTER, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT[1]

Docket 5902. Complaint, June 29, 1951—Decision, Feb. 11, 1956

Consent order requiring a publisher in New York City to cease fixing and maintaining resale prices and terms and conditions of sale of the publisher's editions of books which it sold to its retail book seller customers while permitting book clubs to sell their own editions of the same books in competition with such retailers at any prices and on any terms they might determine.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Fletcher G. Cohn and *Mr. Lewis F. Depro* for the Commission.

Paul, Weiss, Rifkind, Wharton & Garrison, of New York City, for respondent.

Wolfson, Caton & Moguel, of New York City, for Book-of-the-Month Club, Inc., *amicus curiae*.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Antitrust Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Simon and Schuster, Inc., hereinafter referred to as respondent, has violated the provisions of Section 5 of the said Federal Trade Commission Act and Section 2 (a) of the said Clayton Antitrust Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, Sec. 13), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in these respects as follows:

COUNT I

PARAGRAPH 1. Respondent, Simon and Schuster, Inc., is a corporation organized and existing under the laws of the State of New York with its principal office and place of business located at 1230 Sixth Avenue, New York, New York.

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[1] For consent settlement of Count III of complaint, see 48 F.T.C. 886.

PAR. 2. Respondent is now, and for many years last past has been, engaged directly or indirectly in the publication, distribution, and sale of popular fiction and non-fiction books, commonly known as trade books.

Respondent commenced business in 1924 shortly after its incorporation and since then has become and is now one of the largest publishers of said trade books in the United States.

Respondent sells and distributes its trade books to retail book sellers for resale to the public, and to wholesalers or jobbers for resale to retail book stores and others, including public libraries and educational institutions. Editions of said trade books so sold and distributed are known as publisher's editions.

Respondent, as part of its business, enters into agreements, understandings, or contracts with the authors of trade books, whereby the respondent is granted by the authors the exclusive rights to make, publish and sell in book form the literary works of said authors, including the right or privilege of making the hereinafter described understandings or agreements with book clubs.

PAR. 3. In the course and conduct of its business for many years last past, respondent has been, and is now, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and in the Clayton Antitrust Act, as amended by the Robinson-Patman Act, in that it ships or causes to be shipped publisher's editions of said trade books and printing plates from the States in which the several places of production and business of the respondent are located, to purchasers or to lessees thereof located in other States and in the District of Columbia; and there is, and has been at all times herein mentioned, a continuous current of trade and commerce in said books between and among the several States of the United States and in the District of Columbia.

Also, by virtue of, and pursuant to, the contractual relationship of respondent with book clubs, as hereinafter set forth, the latter, in the course and conduct of their businesses, are enabled to, and do, ship or cause to be shipped from the States in which they are published to purchasers located in other States and in the District of Columbia, the book club edition of books printed from the plates of particular titles leased to them by the respondent and which book club editions are sold in said commerce in competition with the aforesaid publisher's editions of such books.

PAR. 4. Except in so far as it has been affected, as hereinafter alleged, respondent, in the course and conduct of its said business in commerce, has been and is now in competition with persons, firms,

and other corporations, some of which were, and are engaged in similar businesses in commerce.

Also, except in so far as it has been affected, as hereinafter alleged, many of said jobbers or wholesalers were, and are, in competition, some in commerce, with each other, and many of said retail book sellers were, and are, in competition, some in commerce, with each other and with said book clubs in the retail sale of said trade books.

PAR. 5. Respondent also, as part of its business, is now entering into and has, for many years last past, entered into agreements or understandings with so-called book clubs by which said clubs are granted exclusive delegated rights to publish, sell and distribute certain titles of said publisher's editions in what are known as book club editions. Book clubs are organizations engaged in the business of publishing trade books and in the sale and distribution thereof by the mail order method at retail. Among the book clubs with which respondent made said agreements or understandings are the Book-of-the-Month Club and The Literary Guild of America, Inc. Under said agreements or understandings, the terms of which are hereinafter more particularly alleged, printing plates are leased by the respondent to the book clubs for use in printing book club editions. There is a publisher's edition of each title of which there is a book club edition, and both editions are contemporaneously available, are alike, the same, or practically the same, in design, format, quality, size and appearance, and are sold in competition with each other.

PAR. 6. The said agreements or understandings between respondent and the book clubs provide that, in consideration of leasing the aforesaid printing plates, together with additional rights granted the book clubs as herein set forth, the clubs pay to respondent certain specified royalties, the total amounts of which are dependent, directly or indirectly, upon the number of copies of book club editions sold by said book clubs. Said agreements or understandings generally also provide that respondent shall fix and maintain specific minimum prices for the resale of the publisher's editions of the books bearing the titles covered by said agreements or understandings for a period of not less than one year from the dates of publication thereof.

These fixed resale prices in some instances are in excess of the prices which the book club charges its purchasers for the book club edition of the same title.

Under the provisions of the agreements or understandings which respondent has with each of the book clubs, the club receives from the respondent the exclusive delegated rights to use the printing

plates of books of the particular titles selected by said club for a specified period which usually is for two or more years. During such period, the book club is enabled to exercise such exclusive rights in producing, selling and offering for sale the books printed from the plates thus selected, at any price and on any terms or conditions that the said club may determine.

PAR. 7. Furthermore, in accordance with, and pursuant to, its understandings or agreements with said book clubs, the respondent has refused to offer or to grant, such leasing of plates and such other rights to its retail book seller customers who, in selling or offering to sell the publisher's editions, compete with said book clubs in their retail sale of the book club editions of the same title.

PAR. 8. The execution of the provisions in the aforesaid agreements between the respondent and the book clubs, whereby the respondent agrees to fix and maintain, for the period of agreement, the prices at which the retail book seller customers are to resell the publisher's editions of books which are sold in competition with the book club edition of said books, gives the book club an unfair competitive advantage.

PAR. 9. As a result of the respondent leasing the printing plates for a particular title to a book club in the manner hereinbefore described, it is selling and distributing, and knowingly and intentionally granting the means of selling and distributing, in commerce, for resale within the United States and in the District of Columbia, a publisher's edition and a book club edition of the same book, which editions are, in effect, of the same grade and quality, and which are sold in competition one with the other. The respondent is indirectly discriminating between its retail book seller customers, to whom it sells, for the purpose of resale, such publisher's editions, and its book club customers, to whom it leases the plates from which it knows that such book club editions will be printed, by imposing the aforedescribed restrictions and conditions only on the resale of such publisher's editions by its retail book seller customers and by granting the leasing and other rights, hereinbefore set forth, only to its book club customers.

PAR. 10. The result and effect of such understandings, agreements, contracts, arrangements, discriminations and of the system itself, have been, and are, that the competition between the respondent's retail book seller and book club customers has been and is now, substantially lessened, that the said book club customers have received an unfair competitive advantage over said retail book seller customers and have tended, and are now tending, to create in said book club customers a monopoly in the sale and distribu-

tion, in commerce, in the books, the titles to which said book clubs have leased the printing plates.

PAR. 11. The acts, practices, methods, understandings and agreements of respondent, as hereinabove alleged, are all to the prejudice of the public, have a dangerous tendency to, and have actually frustrated, hindered, suppressed, lessened, restrained and eliminated competition in the sale and distribution in commerce of trade books within the intent and meaning of the Federal Trade Commission Act; have resulted in an unfair competitive advantage to respondent's book club customers over respondent's retail book seller customers; have a dangerous tendency to destroy, hinder and prevent the resale by respondent's retail book seller customers not only of publisher's editions of the books sold in competition with the book club editions of such books, but also of other trade books; have the capacity and tendency to restrain unreasonably and have restrained unreasonably interstate commerce in such products; and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT II

PARAGRAPH 1. The allegations of Paragraph 1 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 2. The allegations of Paragraph 2 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 3. The allegations of Paragraph 3 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 4. The allegations of Paragraph 4 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 5. The allegations of Paragraph 5 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 6. Respondent, by contracts, agreements, understandings or suggestions, has fixed and maintained, and now fixes and main-

tains, at least for specified periods, the minimum prices at which the publisher's editions of certain of its trade books are to be resold by its retail book seller customers.

PAR. 7. Also respondent, in some instances, illegally has attempted to fix and maintain, and has fixed and maintained, such minimum prices at which the publisher's editions of certain of its trade books were to be resold by some of its retail book seller customers, even though such customers did not enter into any contract or agreement with respondent regarding such prices but such contracts or agreements had been entered into within the same State by and between respondent and others of its retail book seller customers.

PAR. 8. The contracts, agreements, understandings or suggestions whereby respondent has fixed and maintained and now fixes and maintains, at least for specified periods, the aforementioned minimum resale prices for its publisher's editions of certain of its trade books are also illegal, at least with reference to some of such books, including those the titles to which are selected and the printing plates for which are leased by the book clubs, in the manner hereinbefore described, in that they are not sold or resold in free and open competition with commodities of the same general class, that is, with trade books produced or distributed by others. Respondent is the only publisher of the publisher's editions of the trade books which it sells and distributes in the United States.

PAR. 9. Respondent has maintained the direct observance of said fixed resale prices on the publisher's edition of such books and has enforced indirect observance by prohibiting, in connection with the resale thereof at said fixed prices, the granting of any premium, gift, dividend, or other thing of value.

PAR. 10. Under the provisions of the understandings or agreements which the respondent has with the book clubs, these clubs received not only the exclusive delegated rights for a specified period to use the printing plates for the publication of the book club edition for the particular titles which the club has selected, but the said clubs were permitted to, and do, sell such editions in competition with the said publisher's editions of the same titles at any price and on any terms or conditions they may determine. Respondent's retail book seller customers have thereby been placed at a competitive disadvantage in the sale and distribution of such publisher's editions.

PAR. 11. The acts, practices, methods and agreements of respondent, as hereinbefore alleged, are all to the prejudice of the public, have a dangerous tendency to and have actually frustrated,

hindered, suppressed, lessened, restrained and eliminated competition in the sale and distribution of trade books in commerce within the intent and meaning of the Federal Trade Commission Act; have resulted in an unfair competitive advantage to respondent's book club customers over respondent's retail book seller customers; have the capacity and tendency to restrain unreasonably and have restrained unreasonably interstate commerce in such products; and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT III

PARAGRAPH 1. The allegations of Paragraph 1 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 2. The allegations of Paragraph 2 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 3. The allegations of Paragraph 3 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 4. The allegations of Paragraph 4 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 5. Respondent in the course and conduct of its said business, in commerce, has been for many years last past, and more particularly since June 19, 1936, and is now, either directly or indirectly discriminating in price between different purchasers of its said trade books by selling such products to some purchasers at higher prices than it sells such products of like grade and quality to other purchasers, and many of such other purchasers are engaged in active and open competition with the less favored purchasers in the resale of such products within the United States, except as it has been affected as herein alleged.

Respondent has priced and sold its publisher's editions at list prices, which are the minimum resale prices fixed by contract or otherwise by respondent, less specific discounts allowed to each class of purchasers among which are jobbers or wholesalers.

Respondent has priced and sold said books to some jobbers or wholesalers at said list prices less a discount of 43%, irrespective

of the number of copies of a title purchased. Respondent has priced and sold said books to other jobbers or wholesalers, who are in competition with those jobbers or wholesalers receiving the aforementioned discount above described, at list prices less discounts ranging from 46% to 50%.

PAR. 6. The effect of the aforesaid discriminations or of any appreciable part thereof has been or may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and said jobbers or wholesalers are respectively engaged, or to injure, destroy or prevent competition with respondent or with said jobbers or wholesalers who receive the benefit of said discriminations or with the customers of either of them.

PAR. 7. The aforesaid acts and practices of respondent are in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C. Title 15, Sec. 13).

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C.A. 45), the Federal Trade Commission on June 29, 1951, issued its complaint in this proceeding and duly served same upon respondent, a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 630 Fifth Avenue, New York, New York. Said complaint was issued simultaneously with similar complaints, charging substantially the same violations of law, against five other publishing firms one of which was that against Doubleday & Company, Inc., Docket 5897. Counts I and II of the complaint herein were substantially similar to Counts I and II in the Doubleday complaint. Counsel in all of these proceedings agreed that since the issues were substantially the same in Counts I and II that the proceeding against Doubleday & Company, Docket 5897, would be fully tried first and after the taking of evidence in that case was closed, counsel in the other cases further agreed that the record in the matter of Doubleday & Company, Inc., Docket 5897, would be taken by them as the record in each of the individual cases. Under date of August 31, 1955, the Commission issued its final order in the Doubleday case which order has not been appealed from.

Thereafter, on December 29, 1955, there was submitted to the undersigned examiner an agreement between the respondent and counsel supporting the complaint providing for the entry of a

consent order which is identical with the order of the Commission in the Doubleday case in so far as it applies to Counts I and II of that case. By the terms of said agreement respondent admits all the jurisdictional facts alleged in the complaint served upon it; the parties thereto agree that the record may be taken as if findings of such jurisdictional facts had been duly made in accordance with such allegations; agree that such agreement disposes of this proceeding; agree that the answer of respondent herein to the complaint shall be considered as having been withdrawn; agree that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; agree that the agreement shall not become a part of the official record until and unless it becomes a part of the decision of the Commission; agree that the agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint. By such agreement respondent waives any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights it may have to challenge or contest the validity of the order to cease and desist entered into in accordance with this agreement. Such agreement further provides that the following order to cease and desist may be entered in this proceeding by the Commission without further notice to the respondent, and that when so entered it shall have the same force and effect as if entered after a full hearing; that it may be altered, modified or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

The Hearing Examiner having considered the agreement and proposed order and being of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding, the agreement is hereby accepted. The hearing examiner further finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and that the proceeding is in the public interest and in accordance with such agreement hereby enters the following order.

ORDER

It is ordered, That respondent Simon and Schuster, Inc., a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the publication, sale or distribution of trade books in commerce, as "commerce" is defined, construed and understood in the Federal

Trade Commission Act (15 U.S.C.A., Section 45) do forthwith cease and desist from:

Entering into, maintaining or continuing any contract, agreement or understanding of any nature with any book club or similar organization whereby respondent, while exempting said book club or organization from any responsibility for resale price maintenance, undertakes to fix, establish or maintain the resale price, terms or conditions of sale of any literary work which it publishes and sells and which it also sublicenses such book club or organization to publish and sell, in any area wherein said book club or organization and retail booksellers purchasing from respondent compete with one another in the sale of such work.

It is further ordered, That any and all other charges contained in the complaint are herewith dismissed.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 11th day of February, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist.

IN THE MATTER OF

GENERAL FOODS CORPORATION

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

Docket 6018. Complaint, July 29, 1952—Decision, Feb. 15, 1956

Order requiring a corporation, engaged in the sale and distribution of its packaged food products, many of them nationally advertised and the subject of considerable consumer demand, and with annual sales in excess of $500,000,000, to cease discriminating in price in violation of Sec. 2 of the Clayton Act, as amended, through—

(1) Selling to its Institution Contract Wagon Distributor customers (ICWDs) its institution-pack grocery items for 10% less than the price it charged competing conventional wholesalers, and its institution coffee at two cents (2¢) per pound less, in violation of Sec. 2 (a); and

(2) Furnishing its ICWDs with institution-size packaging of its products and institution blends of coffee, without making such packaging and blends available to competing conventional wholesalers on proportionally equal terms in violation of Sec. 2 (e); and

Dismissing for want of proof Count II of the complaint, charging violation of Sec. 2 (d) of the Clayton Act.

Mr. Eldon P. Schrup and *Mr. Francis C. Mayer* for the Commission.

Mr. Lester E. Waterbury, *Mr. Frederick F. Mack* and *Mr. Frederick H. Heck*, of White Plains, N. Y., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The respondent, General Foods Corporation, is charged in this proceeding, in three separate counts of the complaint, with having violated Sections 2 (a), 2 (d) and 2 (e) of the Clayton Act (U.S.C. Title 15, Sec. 13) as amended by the Robinson-Patman Act. The pertinent parts of these sections are as follows:

SEC. 2. (a): * * * it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent dif-

ferentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *.

* * * * * * *

(d) * * * it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any product or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) * * * it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

After answer by respondent, hearings were held, at which voluminous testimony, numerous exhibits and other evidence were received, duly recorded, and later filed in the office of the Commission. Proposed findings of fact and conclusions of law, accompanied by supporting memoranda of law, have been submitted by counsel. On the basis of the entire record, the following findings of fact are made:

1. The respondent, General Foods Corporation, is now, and has been at all times pertinent to this proceeding, a Delaware corporation. Its office and principal place of business is now at 250 North Street, White Plains, New York.

2. Respondent is now, and at all times pertinent to the issues herein has been, engaged in the sale and distribution in interstate commerce of packaged food products manufactured by one or more of its Divisions. Many of these products are nationally advertised and well-known throughout the entire United States, and are the subject of considerable consumer demand and acceptance. Respondent's annual sales are in excess of $500,000,000; it is in substantial competition with other corporations, firms and individuals similarly engaged; and many of the purchasers of respondent's products are in competition with each other.

3. Among the many products sold and distributed by the respondent are Maxwell House, Sanka, Kaffee Hag, Yuban, Bliss and other brands of coffee, breakfast cereals (Grapenuts, Post Toasties, Post's Bran Flakes, Post's Puffed Wheat, Puffed Rice, etc.), Maxwell House tea, Baker's cocoa, Jello brand gelatin desserts, pud-

dings and pie mixes, Minute tapioca, Log Cabin and Wigwam syrups, and Calumet baking powder. Many of respondent's products are marketed in various sizes and types of packages; some are sold in containers and units particularly suitable for use by public feeding establishments, such as hospitals, hotels, restaurants, factory lunchrooms and the like, and are referred to as institution-pack products; others, in sizes and styles of containers designed for household use and for retail distribution through grocery stores, are referred to as grocery-pack products.

Institution coffee is blended to retain flavor and meet the aroma requirements of institution trade, and often is processed by respondent to meet the taste of a specific institution or chef. Ordinarily respondent's Maxwell House institution coffee is a blend of six different kinds of coffee beans, while the grocery-pack formula calls for five kinds; the additional kind of bean in the institution pack is to provide "staying" qualities in the coffee to insure longer periods of freshness. There is some variance also in the roasting processes, resulting in some difference between the two types of coffee in color and taste. Maxwell House grocery-pack coffee is not always of identical blend, and, of course, varies in grind.

4. Respondent's organization through which its institution products are distributed consists of a sales force of some 2,300 persons. As of January, 1953, these employees included 96 institution representatives who contact institution wholesalers in the field, 19 institution sales supervisors who supervise the 96 institution representatives and are otherwise responsible for the sale of institution products, and 24 district managers, each of whom either performs the duties of an institution sales supervisor or supervises an institution sales supervisor. In addition, respondent maintains a staff in the Institution Department of its Sales Division, whose duties relate principally, but not solely, to the sale of respondent's institution products. As of March, 1951, respondent sold institution products to 239 Institution Contract Wagon Distributors (hereinafter referred to as ICWDs), to 301 wholesalers dealing exclusively in institution products, to 2,813 wholesalers who dealt in both institution and grocery-pack products, and to numerous direct-buying purchasers who operate public feeding establishments. Its grocery-pack products were sold to wholesalers who resell to retail grocers, to chain stores, to company commissaries and others.

5. Institution products are sold to all customers on the basis of current uniform price lists issued by respondent, subject to a standard 2% discount for prompt payment, with uniform allowances for quantity purchases. On institution coffee, quantity allowances are computed on the basis of total annual purchases.

6. During the period from 1947 through 1953, respondent's total sales of institution products to ICWDs amounted to approximately $89,758,000, of which $70,079,000 represented coffee sales and $19,679,000 represented sales of other institution products. During this same period, respondent paid ICWDs, in allowances pursuant to the terms of the ICWD contracts, a total of $3,798,000, of which $1,830,000 was in connection with coffee sales and $1,968,000 in connection with sales of other institution products.

Table I, which follows, of respondent's civilian sales of institution products by years, shows that during the period 1947–1951, sales to ICWDs increased 645.7%, while sales to other than ICWDs decreased 13.7%. During this period the ICWD percentage of respondent's civilian institution business rose from 24.8% to 74%. The record contains no statistics by which comparisons can be made beyond 1951, but respondent's sales to ICWDs continued to show such substantial increases that it is reasonable to assume that the percentage of respondent's institution business represented by ICWD purchases also continued to increase through 1953.

TABLE I.—*Respondent's sales of all institution products, except those to government outlets*

	1 Total sales	2 Sales to other than ICWDs	3 Sales to ICWDs	4 ICWD percentage of all sales
1. 1947	$9,493,723	$7,138,432	$2,355,291	24.809
2. 1948	11,530,022	6,922,027	4,607,995	39.965
3. 1949	13,608,654	5,917,120	7,691,534	56.519
4. 1950	19,566,069	5,601.715	13,964,354	71.370
5. 1951	23,722,121	6,156,892	17,565,229	74.046
6. 1952	(1)	(1)	21,121,599	(1)
7. 1953	(1)	(1)	22,451,800	(1)
8. 1947–1951 [2]	149.872	−13.750	645.777	198.464
9. 1947–1953 [2]	(1)	(1)	953,250	(1)

[1] NOTE.—Figures not available after 1951.
[2] Percent increase.

7. The agreement with respondent under which a wagon distributor operates provides that he shall act as a non-exclusive distributor of respondent's institution products to certain types of public feeding establishments[1] in a specifically designated territory, that during the term of the agreement he will purchase from respondent all his requirements of respondent's institution products excepting Postum cereal beverage, and that he will sell such

[1] Hotels, restaurants, diners, hospitals, charitable and educational institutions, clubs, resorts, soda fountains, cafeterias, caterers and other similar establishments, excepting Army, Navy, Coast Guard, Marine Corps and other United States Government installations, except Post Exchanges.

products upon specified terms and conditions, among which are the following:

(C) Distributor shall use its best efforts to promote the sales of such General Foods Sales Division Institution Products to the above-mentioned types of public feeding establishments in the Designated Territory by performing the following services, the performance of which shall qualify Distributor for the allowance referred to under item (D) of subject (2):

1. Aggressively sell customers General Foods Sales Division Institution Products;

2. Provide store-door delivery from wagon on all such products at time of sale;

3. Offer services generally offered by competitors in the Designated Territory;

4. Maintain adequate stocks;

5. Arrange to move older stocks first;

6. Handle damaged merchandise in accordance with General Foods policy;

7. Arrange for distribution and proper use of display and promotional material provided;

8. Maintain replacement parts for coffee-making equipment for resale by Distributor;

9. Arrange for appropriate displays of products in public feeding establishments;

10. Make deliveries, at General Foods request, of General Foods Sales Division Institution Products to individual units of multiple food service operators designated by General Foods, General Foods to handle billing, Distributor to make deliveries and to be reimbursed by Credit memoranda for merchandise delivered.

Item (D) of subject (2), relating to allowances, is as follows:

"All goods delivered hereunder by General Foods to be resold by Distributor shall be billed to Distributor on the basis of price lists attached to and made part of this agreement, which prices are (except as to coffee) subject to an allowance of ten (10) per cent for services rendered hereunder, payable in cash or by credit memorandum at General Foods election, and which prices as to restaurant coffee are subject to an allowance of two (2¢) cents per pound of such coffee, said last named allowance to be deducted by General Foods on the invoices. Said price lists are subject to change by General Foods without prior notice to Distributor;".

The contract further provides that the ICWD will, upon respondent's request, notify it not more than four times in a given twelve-months' period of the names and addresses of all customers sold by him during that period and the products sold each. The agreement may be terminated by either party upon sixty days' notice, or in case of bankruptcy or "of the substantial failure of Distributor to perform any one or more of Distributor's obligations under this agreement," respondent may terminate the agreement on five days' notice.

Upon and since the initiation of the ICWD program by respondent, some conventional wholesalers were offered ICWD contracts. A few accepted and operated under such contracts; others were never offered the contracts. Of this latter group, some assert that they would have accepted such a contract; others were not interested.

8. Respondent's ICWD arrangement was adopted early in 1947 in an effort to increase respondent's share of the total institutional business, following an extensive study of this field of operations. As shown by Table I, above, respondent's institution business is substantial. Table II, which follows, is a tabulation, by years, of respondent's institution sales and allowances to ICWDs, so arranged as to show the sales and allowances pertaining to products other than coffee, and those pertaining to coffee alone. During the seven years covered by the tabulation, the ICWD allowances on institution grocery products under the 10% provision of the contract have amounted to $1,967,900 on $19,679,000 of purchases, while the allowances on coffee at 2¢ per pound (the rate was 1¢ per pound prior to November 22, 1948) amounted to $1,830,000 on $70,078,000 purchases, approximately 2.6%.

TABLE II.—*Respondent's sales and allowances to ICWDs, by years*

	Institution products other than coffee		Coffee		
	Sales by respondent to ICWDs	ICWD 10 percent allowance	Sales by respondent to ICWDs	ICWD allowance	Percent allowed [1]
1	2	3	4	5	6
1. 1947	$403,188	$40,319	$1,952,104	$47,039	2.410
2. 1948	1,086,356	108,636	3,521,639	86,168	2.447
3. 1949	2,100,971	210,097	5,590,563	218,808	3.914
4. 1950	3,231,819	323,182	10,732,536	289,287	2.695
5. 1951	3,770,850	377,085	13,794,379	346,158	2.509
6. 1952	4,554,619	455,462	16,566,980	414,174	2.500
7. 1953	4,531,343	453,134	17,920,456	428,719	2.392
Total	19,679,146	1,967,915	70,078,657	1,830,353	----------
Percent Increase					
8. 1947–1951 [2]	835.231	----------	596.396	----------	----------
9. 1947–1953 [2]	1,023.901	----------	818.007	811.412	----------

[1] All percentage figures are computed.
[2] Percent increase.

9. Testimony in this proceeding was taken in Dallas, Houston and San Antonio, Texas; Atlanta, Georgia; Boston and Springfield, Massachusetts; and Buffalo, New York—areas considered to be typical of respondent's general practices throughout the United States. Statistics similar to those contained in Table II were made available for three of these areas, and are presented in Table III, below. They show specifically for these smaller areas substantially

the same relationships disclosed in Table II, that respondent's sales of coffee to ICWDs far exceeded its sales of institution products other than coffee, yet the allowances, dollar-wise, were nearly the same on the two classes of products. The coffee allowance, in percentage, in the three areas approximated the nation-wide average.

TABLE III.—*ICWD transactions for 12-month period ending July 1, 1953*

	Food products		Coffee only	
	Purchases	10 percent allowances	Purchases	Allowances
Boston	$50,030	$5,003	$240,812	$5,945
Springfield	36,890	3,689	183,745	4,536
Buffalo	24,170	2,417	68,907	1,701
Total	111,090	11,109	493,464	12,182
Computed percent				2.468

The amounts paid in the same areas to ICWDs by respondent for delivery service pursuant to Item 10 of Paragraph (C) of the ICWD contract during the same period of time covered by Table III are shown below in Table IV.

TABLE IV.—*General Foods' direct-buying public feeding accounts for 12-month period ending July 1, 1953*

	Total number	Number receiving ICWD delivery	Amount paid ICWD for delivery	Number of ICWDs
Boston	11	7	$1,166	2
Springfield	2	2	470	2
Buffalo	14	8	1,213	1
Total	27	17	2,849	5

10. ICWD operations differ from those of the ordinary institution grocery wholesaler in that while the wholesaler may handle as many as 3,000 items, including bulky staple commodities and many competitive brands, sometimes including private brands of his own, the ICWD deals in a limited number of items and customarily carries on the truck which he operates an ample quantity of all his goods to supply his customers with their immediate needs. The ICWD handles chiefly respondent's products. Items not of respondent's manufacture are, in general, supplementary products such as guest checks, griddle cleaners, urn supplies, or products of other manufacturers substantially unlike respondent's products, such as pickles, spices, olives.

The ICWD does not ordinarily take orders for future delivery, but attempts, by frequent visits, to anticipate the needs of his customers. If on occasion he fails to have in his truck the needed supply of a particular product, he will make special deliveries. The ordinary grocery wholesaler customarily sends out salesmen who take orders for future delivery, but, in emergencies, he too will make special deliveries. The ICWD sells exclusively to the institution trade, whereas the majority of conventional wholesalers sell to institutions and to retail grocery outlets. The ICWD makes "store-door" delivery, frequently to the customer's stockroom; rotates or rearranges stocks so that older merchandise will be used first; replaces damaged, spoiled or stale goods; and, with the owner's consent, checks to see what items are needed. The institution wholesaler usually delivers in large quantities to the customer's receiving door or platform.

The ICWD may conduct a coffee demonstration to secure a new account, usually supplies his customers with urn bags, filters, cleaners and parts, and will repair and service coffee urns. He distributes to his customers advertising and promotional materials of various sorts—recipes and recipe booklets, dessert plans, cost analysis forms, menu blanks, menu tip-ons, cereal racks, banners and signs—which are provided by respondent. These things the conventional institution wholesaler does not do. Respondent polices operations of the ICWD by sending a representative to ride with him about once every six weeks to observe performance. His customers are checked separately about every three months as to services rendered by him.

Respondent's salesmen also make irregular calls on users or potential users of institution products and solicit orders, which are filled, at the option of the purchaser, by wholesalers or by ICWDs who deliver and bill the merchandise ordinarily at their own prices, although there are instances where respondent's representative has turned such orders over to an ICWD with instruction or suggestion that the purchaser be billed at respondent's list price. However, such instances were not shown to be customary or numerous.

11. The wagon distribution method is used by many other firms engaged in business similar to that of the respondent, and it was estimated that 85% of all the coffee sold to public feeding establishments throughout the United States is so distributed. Many of these other firms use their own personnel and their own facilities for wagon distribution, whereas the respondent operates under the contract system herein described.

12. Wagon distributors, sometimes referred to as wagon wholesalers, were recognized by the Federal wartime regulations of the

Office of Price Administration and Office of Price Stabilization. Because of the specialized nature of their services, they were exempted from many of the price restrictions limiting resale markups that were imposed on other institution wholesalers. For example, wagon distributors were permitted to continue their customary markup margins, including 25% on breakfast cereals, whereas the regular institutional wholesalers were restricted to a markup of 6% on coffee and 8% on breakfast cereals.[2]

13. Under respondent's ICWD program, twenty two-day sales and cooking schools were conducted at which demonstrations and instructions were given by trained personnel in the preparation for serving of respondent's various products, and in sales techniques. These were designed to better prepare ICWDs for demonstrating and selling respondent's products to institutional users, for whose benefit respondent also has made available several hundred recipes for preparing its various products in quantities appropriate for institutional use.

14. On merchandise purchased for resale by ICWDs, allowances to which they are entitled under the contract are paid in the following manner: on coffee the 2¢-per-pound allowance is paid by the simple device of permitting the ICWD to deduct that amount from the face of each invoice and remit the balance due to the respondent, subject, of course, to other regular deductions and allowances for cash payment or quantity discount; on products other than coffee, the 10% allowance is computed by the respondent at the end of each month, and a credit memorandum issued to the ICWD.

With respect to institution products delivered by ICWDs on respondent's account to respondent's direct-buying Multiple Food Service Accounts pursuant to Section (2) (C) (10) of the ICWD contract, the custom is for the ICWD to make delivery from his own stock. Respondent then issues a stock transfer credit memorandum which, in effect, replaces the stock or reimburses the ICWD for the original cost of goods so delivered. The 10% service payment for delivery of products other than coffee is then included in the monthly credit memorandum. On coffee, for the delivery of which the ICWD is paid 3¢ per pound, 2¢ per pound is subtracted from the face of each invoice, and the other 1¢ per pound is added to the stock transfer credit memorandum just mentioned.

These are the substantial facts upon which a determination of the issues in this proceeding rests.

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[2] Food Products Regulation 1, Supp. 11, issued March 7, 1945, 10 F.R. 2614; RX 39A–D. See also Selling Price Regulation 14, Section 33 (e), April 5, 1951, 16 F.R. 2725, and Regulation 14, Amendment 5, dated August 22, 1951; also Amendment 11 to Maximum Price Regulation 237, issued March 1, 1943, 8 F.R. 2671.

COUNT I

Under Count I of the complaint it is charged that respondent has discriminated in the selling price of its products between different competing customers—first, by granting discounts and allowances to ICWDs on their purchases of institution products while competing institution wholesalers who purchase the same kinds of products are not granted like discounts and allowances; second, by permitting certain preferred retailers and food-serving outlets to purchase respondent's grocery and institution products direct from respondent at respondent's current list prices while others competing with these preferred direct customers can procure respondent's products only through wholesalers at substantially higher and less favorable prices.

Respondent contends that the discounts and allowances granted the ICWDs on goods purchased by them for resale are not price reductions or rebates, but are payments to them for services actually rendered pursuant to their contracts, made in good faith in amounts commensurate with work performed, and that it indulges in no price discriminations whatsoever. The ICWD contracts recite that performance of the enumerated services is a pre-requisite to the allowance by respondent of 10% discount on institution grocery items, and 2¢ per pound discount on institution coffee. But the contracts also recognize that the relationship between General Foods and the ICWD is that of seller and purchaser, and that the goods delivered by General Foods to the ICWD are for resale by him. The enumerated services are performed by the ICWD in connection with the resale by him of this merchandise.

These services include such items as selling General Foods products aggressively, providing store-door delivery, maintaining adequate stocks, moving older stocks first, properly handling damaged merchandise, distributing display and promotional advertising material, arranging adequate and appropriate displays of products, maintaining a stock of replacement parts for coffee-making equipment for resale, and offering "services generally offered by competitors." The record shows generally, and it may be assumed, that these services have been performed conscientiously by each ICWD. The fact remains, however, that they were performed by him in connection with the resale of goods which he had already purchased and paid for or was obligated to pay for. They are services which, the record indicates, are similar to services performed by the ICWD's competitors, and which are advantageous, if not essential, to the successful operation of his business. By helping the ICWD procure and keep customers, these services react necessarily but secondarily

to the benefit of the Respondent who sells him his merchandise; the primary advantage is to the ICWD.

The record shows that services performed by the ICWDs frequently exceed those required under the contract. For instance, although the contract requires only that the ICWD "maintain replacement parts for coffee-making equipment for resale," in practice he ordinarily furnishes complete urn service, including replacement of parts, repairs, adjustments and day or night emergency service. One ICWD testified that he maintained a coffee-equipment repair shop and had one employee who devoted much of his time to repair and maintenance work. Sometimes ICWDs charge for this service; often it is furnished free. In some instances the ICWD loans rather than sells coffee-making equipment to customers.

Obviously these services are performed to create and maintain good will, to increase sales and profits, and for self-preservation, to stay in business. Other coffee distributors selling other than respondent's brands of coffee perform similar services, and competition is extremely keen. The coffee-roasting and distributing business is one that can be undertaken with little equipment and small investment. Consequently there are, in addition to the national processors, numerous local coffee-roasters with whose salesmen and distributors ICWDs must compete.

With reference to institution grocery products, the situation is similar. There is much competition. Public-feeding operators like frequent deliveries, which guarantee them fresh supplies and permit low inventories. Some of them appreciate and use the aids provided —menu tip-ons, back-bar advertising materials, recipe service, cost explanations; others find such services not desirable, but the ICWD, to meet competition, must be in a position to render these services or extend these favors. It is good business practice.

Anyone who has sat in the early morning at a lunch counter in a wayside restaurant or a small urban eating place has observed the at-home manner of procedure of the truck-delivery salesmen who carry in fresh supplies, rearrange sales racks, remove stale stock, and leave advertising material. That these services are appreciated by the small business operator is evident. That such services are not ordinarily performed by the conventional institution grocery wholesaler is admitted.

The respondent introduced evidence and urged by brief that the two federal agencies—the Office of Price Administration, during World War II, and the Office of Price Stabilization, during the Korean conflict, recognized ICWD services and made provision that "wagon wholesalers," within which classification ICWDs clearly fall,

be allowed a greater markup over cost than that permitted the conventional wholesaler, and that this followed a finding that wagon wholesalers' traditional markup margin had been substantially greater than that of other wholesalers. OPA and OPS recognition of wagon-distributor services, however, does not justify respondent's practice of making allowances to its ICWDs. Clearly the two government agencies believed that the extra services were performed by the wagon distributors for the benefit of their customers, who, under government regulations, could be required, because of the greater markup margins permitted, to pay higher prices for merchandise purchased from wagon distributors than they would have had to pay if they had purchased that same merchandise from conventional wholesalers. Had these price-regulating agencies been of the opinion that wagon-distributor services were for the benefit of the manufacturer, they would have made provision whereby the manufacturer would bear the cost of such services. This they did not do. Both agencies correlated the cost with the benefit by permitting the one rendering the services to recoup the cost of those services from the purchasers for whom the services were rendered. Respondent can get no solace or support for its contentions from the OPA or OPS practices and regulations.

Services rendered by a dealer for the benefit of his customers are services which the dealer must somehow pay for out of his profit, which is the difference between his cost price and his selling price. If those services are exceptional in nature, he is justified in selling his goods at higher prices than are charged in his less-accommodating competitors; or he may consider it good business practice to render such services at no increase in selling price, trusting that he will be adequately compensated by the good will and extra business which may be generated. In no event can he, under the law, be subsidized by or collect the cost of such services from the manufacturer or the distributor from whom his merchandise has been purchased.

A similar problem was presented in the Champion Spark Plug case.[3] Champion allowed certain of its dealers a "special sales service compensation" of 10%, which the Commission found to be in fact a reduction in price and in violation of § 2 (a) of the Act. Among the "sales service[s]" for which the allowance was made were the following—performing sales promotional work, serving franchise accounts satisfactorily, providing periodic reports of purchases by certain accounts, paying bills promptly and conducting business in a manner satisfactory to Champion. As in the instant case, the

[3] F.T.C. Docket No. 3977, in the matter of Champion Spark Plug Company, decided July 10, 1953, 50 F.T.C. 30.

services were performed in connection with goods which had been purchased for resale from a manufacturing respondent.

It is well established that a seller cannot justify allowances to purchasers which, in fact, constitute payment to them for doing their own work in the resale of goods purchased and owned by them. Sales activities of wholesaler customers in reselling respondent's merchandise redound, as hereinbefore pointed out, secondarily to respondent's advantage, but the respondent cannot, under the law, measure such advantage and give each such customer a proportionate allowance or payment therefor. The Act provides that different customers may be charged different prices, provided the price differentials "make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which said commodities are to such purchasers sold or delivered." No such cost differential was shown to exist or offered as a justification in this proceeding.

The fact that some customers have greater business costs than others has never been accepted as justification for price differentials. Respondent states in its brief that "the ICWD's added cost of doing business is, as a result of Respondent's ICWD program, passed backwards, to Respondent, rather than forward, to the ICWD's customer." This is exactly what the law says cannot be done. Otherwise respondent could appraise the cost of doing business of its customers, evaluate their efforts and efficiencies, subsidize their deficiencies, and have a different selling price for each—an end which the law was designed to prevent.

The net result of respondent's practices is that ICWDs get respondent's institution-pack grocery items for 10% less than the price paid by competing conventional wholesalers, and respondent's institution coffee at 2¢ per pound less. The products are of like grade and quality—in fact, identical. Price discrimination has been established by clear and convincing evidence.

The effect of respondent's price discrimination, on a nation-wide basis, has been to lessen competition and to injure, destroy and prevent competition.

Table I, above, in column 3 shows that from 1947 to 1951, respondent's sales of institution products to ICWDs increased 645%, while its civilian sales to all purchasers, column 1, increased but 149%, and its sales to others than ICWDs, column 2, decreased 13%. These statistics support the conclusion that the growth of ICWD business was at the expense of the conventional wholesalers, particularly since the growth of ICWD business has been substantially greater than the growth of respondent's overall institution business.

The ICWD has picked up considerable business, much of which must have come through business diverted from competing wholesalers. Table II shows that during this same period the institution grocery business of ICWDs increased 835% while their coffee business increased 596%, the greater increase being in the field in which there was the greater competition between ICWDs and conventional wholesalers, since many wholesalers are not granted the privilege of handling respondent's institution coffee. Between 1951 and 1953 Table I shows that ICWD business has continued to increase at a substantial rate—from 645% to 953%. It is reasonable, therefore, to assume that the conclusions reached on the basis of the 1947–1951 tabulations are valid for the later period also, and would be factually supported if pertinent figures were available. Respondent presented no statistics to justify any other assumption.

As to specific injury to competition resulting, actually or potentially, from respondent's price discriminations, the record shows that ICWDs have made sales to some customers at respondent's list prices, relying upon their contract allowances of 10% on institution grocery products, and 2¢ per pound on institution coffee, for recompense for their services and for profit. Instances of such sales are numerous enough to justify the conclusion that there are very few ICWDs who do not, on occasion, engage in this practice, although customarily they attempt to sell at prices which will give them margins of profit over and above respondent's list prices. When competition is keen, however, ICWDs take advantage of their ability to accept business at respondent's list prices and still make a satisfactory margin of profit. To meet such competition, the conventional institution wholesaler must also sell at respondent's list price, and is limited to such profit as he can realize by availing himself of the quantity and cash discounts which he is entitled to receive on the same basis as the ICWD. He suffers competitively, and is injured, therefore, to the extent that he receives from the respondent no 10% discount on institution grocery products, and no 2¢ per pound allowance on coffee. The operations of conventional wholesalers are on such a narrow margin that their annual profit often depends upon their ability to take advantage of cash and quantity discounts. Under these conditions a differential of 2% favoring their competitors is substantial, and one of 10% becomes vital.

In some instances, ICWDs have sold respondent's institution products at very small markups, forcing conventional wholesale grocers to reduce their customary markups, and consequently their profits, to meet ICWD competition. Because of his lower cost price, the ICWD is in a preferred position. Even if both the ICWD and the

conventional wholesaler resell respondent's products at the same price, the ICWD still has the competitive advantage of respondent's preferential allowances, giving him the larger profit.

The person who has to pay more than his competitor for the same grade and quality of merchandise will have less left as profit than his competitor, and therefore less with which to improve his facilities for better serving the requirements of his trade, to enlarge his promotional activities, to augment his sales force, or to expand his stock. The preferential price differential granted by respondent to the ICWD is available for whatever use he chooses to make of it. Clearly injury is done. Argument to the contrary is but to say that a lower price is not advantageous to the one receiving it, and therefore is not preferential, which is preposterous. The fact that a non-favored customer may achieve some sales expansion and business growth in spite of his handicap does not alter nor detract from the validity of this conclusion. Specific instances were shown in which trade was lost by conventional wholesalers to ICWDs because of the lower resale prices offered by ICWDs. When faced with ICWD price competition, the conventional wholesaler has no practical choice except to withdraw from that area of business, or operate at an extremely low rate of profit.

From all the facts of record, the conclusion is reached that respondent's discrimination in price between its ICWD customers and its conventional-wholesaler customers, who compete in the resale of its institution products, has had and will continue to have the effect of substantially lessening, or preventing, competition between these two types of customers, and of injuring the non-favored conventional-wholesaler customers.

Most food-serving establishments and retailers who use or handle respondent's products have no choice but to buy those products from wholesalers, while some competing food-serving establishments and retailers, usually large hotels, restaurants or chain stores, are recognized by respondent as direct-buying accounts and purchase respondent's products at its current list prices, which are substantially lower than the prices charged by wholesalers. This also is alleged to be in violation of § 2 (a) of the Act. But no further facts were introduced to bring this situation within the purview of the Act, and no pertinent cases were cited to support such a theory.

It was urged by counsel supporting the complaint that users of respondent's products who procure their goods from conventional wholesalers or from ICWDs upon orders procured by respondent's salesmen and turned over by them to such suppliers, are in fact "purchasers" from respondent and are discriminated against in that

they have to pay wholesalers' or ICWDs' prices instead of respondent's list prices.

Under the doctrine recognized in Commission cases and accepted by the courts, it is possible to consider a customer's customer as a "purchaser" within the meaning of § 2 (a) if in fact the original seller exercises such a degree of control over sales by its direct customer that the latter's sales are essentially sales by the original seller. However, the decided cases disclose no common requirement, the absence of which would fail to establish an indirect customer of a manufacturer to be a "purchaser" from such seller. No case goes so far as to hold that solicitation of orders by a respondent manufacturer and turning over those orders to an intermediate distributor for billing and handling is sufficient to establish a seller-purchaser relationship between the manufacturer and the persons from whom such orders were procured. The fact that respondent's representatives may have suggested billing prices in a few instances does not indicate a policy or practice on the part of the respondent, and in the absence of further facts, there is no basis in the present record for a finding that the users who thus procure respondent's merchandise fall within the "purchaser" category envisioned by § 2 (a) of the Act.

On the whole record, the conclusion is reached that there is insufficient reliable, probative and substantial evidence to support the conclusion that any of the users of respondent's products who procure those products indirectly through intermediate sources of supply are "purchasers" from respondent within the meaning of the Act.

The order which will be issued, based upon the conclusion that respondent has violated § 2 (a) of the Act by its ICWD program, will be applicable to every situation that has arisen or may arise violative of that section, and if any factual development occurs which will bring any other practices within the scope of the Act, that order will be fully adequate.

COUNT II

Under Count II of the complaint it is charged that respondent has violated § 2 (d) of the Clayton Act by paying ICWDs for services and facilities furnished by or through them in connection with the handling, sale or offering for sale of respondent's products, without making such payments available on proportionally equal terms to other customers competing in the distribution of such products. Specifically in question are the payments or allowances by respondent to ICWDs of 10% for delivery of institution grocery products, and 3¢ per pound for delivery of institution coffee to

respondent's direct-buying customers—services rendered pursuant to subparagraph 10 of the ICWD contract. It is argued that such payments are actually reductions in price and constitute violation of § 2 (a) of the Act, but that contention is rejected. The payments are liberal, but, in the absence of some showing that they are grossly in excess of the cost or value of the services rendered, it cannot be found that they constitute any sort of a rebate or price reduction on other merchandise bought by the ICWD from respondent for resale. Table IV, above, shows, as to three areas, the amount of merchandise delivered by ICWDs and the amount of money paid by respondent for such deliveries, but no conclusion can be drawn from those figures, and no other evidence was offered, on this phase of the case.

Deliveries made pursuant to subparagraph 10 are made from merchandise which the ICWD carries in stock to accounts which purchase direct from, are billed by, and make payments to respondent. To recompense the ICWD for merchandise so delivered from his stock-in-trade, the respondent, each month, issues a stock transfer credit memo through which the ICWD's stocks may be and are replenished. The end result is that the ICWD has warehoused this merchandise from the time it came into his possession until the date of delivery. Payments made by respondent to him under this section of the contract are exclusively for warehousing and delivery services. They are not payments made to him as a customer, and do not relate to the resale of merchandise bought by him from respondent.

The public-feeding outlets receiving deliveries under this provision of the contract are direct-buying customers of respondent and entitled to delivery. Customarily they are given the choice of ICWD or other delivery, but that fact seems to be immaterial so long as the delivery service rendered is satisfactory to them, and no complaints were indicated in the record. Likewise, it is immaterial whether other than ICWD purchasers from respondent are given the opportunity to render and be paid for delivery service to these direct-buying public-feeding accounts.

It seems to be clear, from the record, that this method used by respondent for effecting delivery of merchandise sold directly by it to the public-feeding outlets is not the kind of practice which is within the prohibitions contemplated by § 2 (d) of the Act. The primary purpose of § 2 (d) is to prevent a seller from helping some purchasers through furnishing services and facilities, usually selling aids, sales help, advertising contributions, unless he offers competing purchasers comparable aids. No such problem arises in this case.

Respondent's practice of sending out salesmen at irregular intervals to solicit orders for prospective users of its products and turning such orders over to a supplier selected by the purchaser is questioned as being in violation of § 2 (d). It has hereinbefore been concluded that this practice does not give rise to a violation of § 2 (a). It is suggested that the supplier is not always selected by the purchaser, and that this is a device by which respondent can aid some of its customers without offering similar aid to other competing customers.

It is true that the device might be so used, but there is not sufficient evidence in the record to establish that it has been so used. There is evidence of one specific instance where respondent's salesman procured orders from prospective users and turned those orders over to a particular ICWD, but in this instance there was a family relationship, the salesman being the father of the ICWD. The particular instance stands out as an exception to an established rule rather than as proof of a practice. The record shows that such orders were referred both to ICWDs and to conventional wholesalers; except in this one instance, there is no contradiction of respondent's assertion that the choice of supplier was at the option of the purchaser. There is no basis for an inference that the orders were referred in a manner which would benefit one customer of respondent more than another.

Count II of the complaint must therefore be dismissed, because the charges therein set forth are not supported by reliable, probative and substantial evidence.

COUNT III

Under Count III the respondent is charged with having discriminated in favor of some purchasers and against other purchasers of commodities bought for competitive resale by contracting to furnish or furnishing services or facilities connected with the processing, handling, sale or offering for sale of such commodities upon terms not accorded to all competing purchasers on proportionally equal terms.

As illustrative of the discrimination charged, it is alleged that respondent furnishes its ICWDs with institution-size packaging of its products and institution blends of coffee, but does not make such packaging and blends available to competing conventional wholesalers.

The record shows that while some ICWDs sell respondent's entire line of institution products to some customers, there are other customers to whom they sell only coffee, and still others to whom they

sell all or most of respondent's other products exclusive of coffee. Likewise, the conventional wholesale grocers do not sell respondent's entire line of institution products to all their institution customers. Many wholesalers do not handle respondent's institution coffee at all, because it is unavailable to them due to the fact that in the area in which they operate, the competing ICWDs have exclusive right to distribute respondent's institution coffee. Frequently such wholesalers handle none of respondent's coffee, either institution pack or grocery pack. In such areas the conventional wholesalers and the ICWDs compete only in the resale of respondent's institution-pack grocery products. In other areas conventional wholesalers, who resell both to institutions and to retail grocers, sell all respondent's institution-pack products except coffee, and all respondent's grocery-pack products including coffee.

In such cases there is full competition, product-wise, between the ICWD and the conventional wholesaler, because the conventional wholesaler can sometimes sell, to an institution user, respondent's grocery-pack Maxwell House coffee in competition with respondent's institution-pack Maxwell House coffee offered by an ICWD. One such instance is shown in the record. The conventional wholesaler involved in this transaction stated that he had sold the grocery-pack Maxwell House coffee to one of his restaurant customers after having requested respondent to furnish him with Maxwell House coffee in the institution pack and blend, and being refused.

Under the rulings in the Luxor case[4] this refusal to furnish the conventional wholesaler with Maxwell House institution-pack coffee would support a finding that respondent had violated § 2 (e) of the Act, provided Maxwell House coffee in the two types of packages could be found to be of like grade and quality. Elsewhere herein it has been pointed out that Maxwell House institution coffee is a blend of six types of coffee beans, one added particularly for "staying qualities" to insure a longer freshness after the coffee has been brewed, while Maxwell House grocery-pack coffee is a blend of five types of beans. There are variations in the kinds of grind of both types of Maxwell House coffee—fine, regular, drip, glassmaker, pulverized—and a variety of packs suitable for convenient use in various sizes and types of coffee-making equipment. These are variations which are without relationship to and have no effect upon the grade and quality of the coffee. As stated in the findings of facts, paragraph 3, above, respondent sells other grades and types of coffee under other than the Maxwell House brand name.

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[4] In the Matter of Luxor, Ltd., 31 F.T.C. 658.

The question of like grade and quality as to respondent's Maxwell House coffee may therefore be resolved by a determination as to whether the addition of the extra type of coffee bean in the institution coffee changes its grade and quality. The conclusion reached on the basis of the evidence of record is that it does not. The two types of Maxwell House coffee can be and are sold for the same use, sometimes competitively. There is no requirement under the law that they be identical products. In fact, there are slight differences between different roastings of the same coffee blends, differences between blends of the same types of coffee beans if made from coffee shipped at different seasons or from different crops, and other differences due to other technical or crop variations.

The respondent has labeled the institution-pack and the grocery-pack coffee here involved as Maxwell House coffee, lending, at least, the presumption that the two packs are of like grade and quality. This presumption is strengthened by the fact that respondent sells other coffees under other brand names. Against this presumption is the fact that the institution-pack has the extra type of coffee bean in its blend, but that fact can be construed as proof that the two packs are not identical, and does not necessarily establish that the two packs are not of like grade and quality.

However, a finding that respondent has violated § 2 (e) does not rest alone upon the conclusion that the two packs of coffee are of like grade and quality. There are other products identical in grade and quality which are distributed by respondent in grocery-size packs and in institution packs. This is true of cereals, Jello, baking powder and dessert preparations. There are instances disclosed in the record where some conventional wholesalers could and did purchase these products in the institution pack for resale, but could not get the same merchandise from respondent in grocery-pack sizes. Other competing wholesalers did get these products in both packs. These facts are sufficient to bring this case within the ruling of the Luxor case, above. It differs in that the practice in the Luxor case involved a substantial quantity of the manufacturer's output, while in the instant proceeding there are no facts from which the extent of the practice and the volume of merchandise involved can be determined. However, such a determination is not a *sine qua non* to a finding that respondent has violated § 2 (e) of the Act.

Upon all the facts of record it is concluded that the respondent has discriminated in favor of some purchasers and against other purchasers of commodities bought for competitive resale by making available and furnishing certain sizes and packagings of merchandise to some purchasers without making available or furnishing the same

sizes and packagings to competitive purchasers of such commodities on proportionally equal terms.

CONCLUSION

Upon all the facts of record, the respondent is found to have violated the provisions of §§ 2 (a) and 2 (e) of the Act, as charged in Counts I and III of the complaint, as hereinabove more fully set forth. It is found, however, also as hereinabove more fully set forth, that the charge in Count II of the complaint, that respondent has violated § 2 (d) of the Act, is not supported by substantial, reliable and probative evidence.

The proceeding is found to be in the public interest. Therefore,

It is ordered, That the respondent, General Foods Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of food and grocery commodities in commerce as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. discriminating directly or indirectly in price between different purchasers of any such commodity of like grade and quality for use, consumption, or resale, by granting to its institution contract wagon distributor purchasers, or any other purchaser or purchasers, discounts or allowances in the guise of payments for services or in any other manner, which result in a lower and more favorable net price to such purchaser or purchasers than that at which it sells such commodity to another purchaser competing with said favored purchaser;

2. furnishing to any purchaser any such products packaged in containers of a certain size and style, unless all purchasers of such products competing in the resale thereof are accorded the opportunity to purchase such products, packaged in containers of like size and style, on proportionally equal terms.

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

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

The complaint charges respondent, in Counts I, II and III respectively, with violations of Sections 2 (a), 2 (d) and 2 (e) of the amended Clayton Act. The hearing examiner entered an order against respondent on Counts I and III and dismissed Count II. Both parties appeal.

Respondent is engaged in the manufacture, sale and distribution of grocery products. Its annual sales are in excess of $500 million dollars, making it one of the largest of its class in the country. Sales are to conventional wholesale grocers, Institution Contract Wagon Distributors (known as ICWDs), retail grocers and to certain customers known as Multiple Food Service Accounts (known as MFSAs).

Some of respondent's products, sold in sizes and styles of containers designed for household use and for retail distribution through grocery stores, are referred to as grocery pack products; others, known as institution pack products, are sold in units and containers particularly suitable for use by public feeding establishments such as restaurants, hotels, hospitals, schools and others engaged in feeding large numbers of people. As of March, 1951, respondent sold institution products to 239 ICWDs, to 301 wholesalers dealing exclusively in institution products, to 2,813 wholesalers who dealt in both institution and grocery pack products, and to numerous direct buying purchasers who operate public feeding establishments. The issues in this case have to do with the sale of institution pack products and particularly with the part played therein by the ICWDs.

In 1946 the respondent, being dissatisfied with its share of the institution pack market, made a survey of the situation. As a result, it entered into contracts with various individuals for the sale and distribution of certain of its products to feeding institutions in a prescribed area. These contracts contain the following provisions:

(C) Distributor shall use its best efforts to promote the sales of such General Foods Sales Division Institution Products to the above-mentioned types of public feeding establishments in the Designated Territory by performing the following services, the performance of which shall qualify Distributor for the allowance referred to under item (D) of subject (2):

1. Aggressively sell customers General Foods Sales Division Institution Products;

2. Provide store-door delivery from wagon on all such products at time of sale;

3. Offer services generally offered by competitors in the Designated Territory;

4. Maintain adequate stocks;

5. Arrange to move older stocks first;

6. Handle damaged merchandise in accordance with General Foods policy;

7. Arrange for distribution and proper use of display and promotional material provided;

8. Maintain replacement parts for coffee-making equipment for resale by Distributor;

9. Arrange for appropriate displays of products in public feeding establishments;

10. Make deliveries, at General Foods request, of General Foods Sales Division Institution Products to individual units of multiple food service operators designated by General Foods, General Foods to handle billing, distributor to make deliveries and to be reimbursed by Credit memoranda for merchandise delivered.

Item (d) of subject (2), relating to allowances, is as follows:

All goods delivered hereunder by General Foods to be resold by Distributor shall be billed to Distributor on the basis of price lists attached to and made part of this agreement, which prices are (except as to coffee) subject to an allowance of ten (10) percent for services rendered hereunder, payable in cash or by credit memorandum at General Foods election, and which prices as to restaurant coffee are subject to an allowance of two (2¢) cents per pound of such coffee, said last named allowance to be deducted by General Foods on the invoices. Said price lists are subject to change by General Foods without prior notice to Distributor.

The ICWD is usually a relatively small operator making sales directly from his truck to the kitchen of the institution. Although selling chiefly respondent's products, he also handles supplementary products, such as guest checks, coffee urn supplies, etc. He distributes promotional and advertising material of various sorts which are furnished by respondent, and at times gives demonstrations, particularly in connection with coffee sales.

It also appears that respondent has set up a system for policing the work of the ICWDs and that the so-called wagon distribution method is used by many other firms engaged in businesses similar to that of respondent. Some of these firms use their own personnel and facilities for wagon distribution. It is estimated that 85% of all the coffee sold to public feeding establishments in the United States is distributed by the general method herein described.

RESPONDENT'S APPEAL

COUNT I

It is clear that the ICWD and the conventional wholesale grocer are in competition with each other for the feeding institution business; that they handle commodities of like grade and quality and that the ICWDs receive a discount in buying from respondent, which discount the conventional wholesaler does not receive. This discount amounts to 2¢ per pound on coffee (1¢ prior to November 22, 1948) and 10% on other products.

There is a difference of opinion on the question of competitive injury. Considerable testimony was introduced on this subject and the same is reviewed at some length in the Initial Decision from which we quote the following:

Table I, above, in column 3 shows that from 1947 to 1951, respondent's sales of institution products to ICWDs increased 645%, while its civilian sales to all purchasers, column 1, increased but 149%, and its sales to others than ICWDs, column 2, decreased 13%. These statistics support the conclusion that the growth of ICWD business was at the expense of the conventional wholesalers, particularly since the growth of ICWD business has been substantially greater than the growth of respondent's overall institution business. The ICWD has picked up considerable business, much of which must have come through business diverted from competing wholesalers. Table II shows that during this same period the institution grocery business of ICWDs increased 835% while their coffee business increased 596%, the greater increase being in the field in which there was the greater competition between ICWDs and conventional wholesalers, since many wholesalers are not granted the privilege of handling respondent's institution coffee. Between 1951 and 1953 Table I shows that ICWD business has continued to increase at a substantial rate—from 645% to 953%. It is reasonable, therefore, to assume that the conclusions reached on the basis of the 1947–1951 tabulations are valid for the later period also, and would be factually supported if pertinent figures were available. Respondent presented no statistics to justify any other assumption.

As to specific injury to competition resulting, actually or potentially, from respondent's price discriminations, the record shows that ICWDs have made sales to some customers at respondent's list prices, relying upon their contract allowances of 10% on institution grocery products, and 2¢ per pound on institution coffee, for recompense for their services and for profit. Instances of such sales are numerous enough to justify the conclusion that there are very few ICWDs who do not, on occasion, engage in this practice, although customarily they attempt to sell at prices which will give them margins of profit over and above respondent's list prices. When competition is keen, however, ICWDs take advantage of their ability to accept business at respondent's list prices and still make a satisfactory margin of profit. To meet such competition, the conventional institution wholesaler must also sell at respondent's list price, and is limited to such profit as he can realize by availing himself of the quantity and cash discounts which he is entitled to receive on the same basis as the ICWD. He suffers competitively, and is injured, therefore, to the extent that he receives from the respondent no 10% discount on institution grocery products and no 2¢ per pound allowance on coffee. The operations of conventional wholesalers are on such a narrow margin that their annual profit often depends upon their ability to take advantage of cash and quantity discounts. Under these conditions a differential of 2% favoring their competitors is substantial, and one of 10% becomes vital.

In some instances, ICWDs have sold respondent's institution products at very small markups, forcing conventional wholesale grocers to reduce their customary markups, and consequently their profits, to meet ICWD competition. Because of his lower cost price, the ICWD is in a preferred position. Even if both the ICWD and the conventional wholesaler resell respondent's products at the same price, the ICWD still has the competitive advantage of respondent's preferential allowances, giving him the larger profit.

Respondent's brief calls attention to the fact that over a period (1947 to 1951) purchases of institution products by ICWDs rose from $2,400,000 to $17,600,000, while purchases of others than

ICWD's dropped only from $7,100,000 to $6,100,000. It is argued therefrom that much of the ICWDs' gains must have represented new business in respondent's products.

No issue of injury in the primary line was made by the pleadings and no attempt was made to show what, if any, gains were made at the expense of respondent's competitors or what, if any, may have been due to other causes such as increased consumer demand at feeding institutions, etc. Nevertheless, from a consideration of the whole record we agree with the finding of the hearing examiner that "the effect of respondent's price discrimination, on a nation-wide basis, has been to lessen competition and to injure, destroy and prevent competition."

Respondent argues that the discounts allowed their ICWDs were payments for substantial services actually rendered; that instead of a discrimination prohibited by Section 2 (a), they are payments properly made under Section 2 (d).

In construing Section 2 (d), consideration must be given to (1) the evil which it was designed to eliminate, and (2) its specific place in the overall purpose of the Robinson-Patman Act.

Legislative history indicates that the purpose of Section 2 (d) was to reach the evil of granting discriminations in the form of special allowances in purported payment of advertising and other sales promotional services. (See Senate Report No. 1502 and House Report No. 2287, 74th Congress, 2d Sess.) Congressman Utterback, in explaining Sections 2(d) and 2 (e), said:

> The existing evil at which this part of the bill is aimed is, of course, the grant of discriminations under the guise of payments for advertising and promotional services which, whether or not the services are actually rendered as agreed, results in an advantage to the customer so favored as compared with others who have to bear the cost of such services themselves. The prohibitions of the bill, however, are made intentionally broader than this one sphere, in order to prevent evasion in resort to others by which the same purpose might be accomplished, and it prohibits payment for such services or facilities, whether furnished "in connection with the processing, handling, sale or offering for sale of the products concerned." (80 Cong. Rec. 9418.)

The services for which payment may be made under Section 2 (d) must be of such a character that they can be made available on proportionally equal terms to all customers. The whole purpose was to bring about substantial equality of treatment based on services actually rendered rather than on the mere willingness or potentiality of rendering the services. As was said by Professor S. Chesterfield Oppenheim in *Price and Service Discriminations Under the Robinson-Patman Act*:

Proof of performance of specified services should be required before payments are made; payments should not be made if buyers have not actually rendered services.

In the past failure to furnish the services, or the pretended furnishing, was one of the principal reasons for adopting Section 2 (d). Thus in the matter of Colgate-Palmolive Peet Company, et al., Dockets 5585, 5586 and 5587, the Commission said:

Section 2 (d) permits payments for services or facilities actually furnished. Certainly payments for services or facilities not furnished are not authorized.

The same thought was expressed in the rules promulgated for the Corset, Brassiere and Allied Products Industry:

Note 1: Industry members giving advertising allowances to competing customers must exercise precaution and diligence in seeing that all of such allowances are used in accordance with the terms of their offers.

Note 2: When an industry member gives allowances to competing customers for advertising in a newspaper or periodical, the fact that a lower advertising rate for equivalent space is available to one or more, but not all, such customers, is not to be regarded by the industry member as warranting the retention by such customer or customers of any portion of the allowance for his or their personal use or benefit.

There must be a discernible relationship between the amounts paid and the cost or reasonable value of the services rendered. In other words, each type of service must be capable of having a price or value tag put on it.

The discounts given to ICWDs do not meet the requirements of Section 2 (d). In the first place, payments were not made for services actually rendered. The contract required the ICWD to perform certain enumerated services. It is obvious that all would not perform the same services, nor in the same amount, nor of the same quality. Some of the services could not be rendered unless the customer elected to receive them. Nevertheless, each ICWD receives the same allowances whether he actually furnishes all the services, none of them, or only a part. In the second place, some of the services required were of such a character that even if rendered in accordance with the contract, a price tag could not be put on them. This applies particularly to "(1) aggressively selling customers General Foods Sales Division Institution Products," and "(3) offer services generally offered by competitors in the Designated Territory."

The hearing examiner found that "the record showed generally, and it may be assumed, that these services have been performed conscientiously by each ICWD."

From none of these findings, or any others, can it be concluded that the requirement of payment for services actually rendered was

observed as required by law. Respondent was really contracting for willingness and potentiality to perform certain services. It was paying for a certain method of doing business rather than for specific services actually rendered.

The policing done by respondent was directed toward the general operation of a plan rather than toward checking services actually rendered as is usually done, for example, in advertising allowances. The contract with the ICWD provided that in case "of the substantial failure of a distributor to perform any one or more of the distributor's obligations under this agreement," respondent may terminate the agreement on five day's notice. Furthermore, the time and method of payments to the ICWDs are not related to actual services rendered and paid only after an accounting thereof. For example, the coffee allowance is paid by deducting the amount from the face of each invoice and remitting the balance subject to other allowances, such as cash discounts.

The payments involved here were not of a character intended by Section 2 (d). See in the Matter of *Champion Spark Plug Company* (1953), Docket 3977.

Respondent next claims that the ICWDs constitute a class that is functionally distinct from respondent's other customers, and that because they perform their selling in a different manner than the conventional wholesaler, the lower prices to them are justified.

Over the years in the chain of distribution from the producer to the ultimate consumer, various groups have come into being, each having a particular status and performing its particular function. Familiar examples are wholesalers and retailers. Prices to these groups take into account their status and the part they play in distribution by virtue of that status. Characteristically, the members of each group compete with each other but not with the members of a different group.

While the Robinson-Patman Act does not mention functional pricing, it was written nevertheless against the background of the distribution system then in effect. As pointed out by respondent, a seller is not forbidden to sell at different prices to buyers in different functional classes and orders have been issued permitting lower prices to one functional class as against another, provided that injury to commerce as contemplated in the law does not result. For example, in the Matter of *Albert L. Whiting and Lucille D. Whiting, trading as Urbana Laboratories*, 26 F.T.C. 312, the Commission found that the functional classification made by the seller resulted in differences in prices to various customers all engaged competi-

tively in the selling to consumers and entered an order against the practice. In *FTC v. The Ruberoid Company* (1951) 343 U.S. 470, the Supreme Court said:

> The roofing material customers of Ruberoid may be classified as wholesalers, retailers, and roofing contractors or applicators. The discriminations found by the Commission were in sales to retailers and applicators. The Commission held that there was insufficient evidence in the record to establish discrimination among wholesalers, as such. Ruberoid contends that the order should have been similarly limited to sales to retailers and applicators. But there was ample evidence that Ruberoid's classification of its customers did not follow real functional differences. Thus some purchasers which Ruberoid designated as "wholesalers" and to which Ruberoid allowed extra discounts in fact competed with other purchasers as applicators. And the Commission found that some purchasers operated as both wholesalers and applicators. So finding, the Commission disregarded these ambiguous labels, which might be used to cloak discriminatory discounts to favored customers, and stated its order in terms of "purchasers who in fact compete."

The ICWD and the conventional grocer both sell to the feeding institutions. They are in competition with each other. As already pointed out, the special discounts to the ICWDs cause injury to that competition. It is true that by virtue of the contract with respondent, the ICWD performs his function of reselling in a different manner than most of the conventional wholesalers. He furnishes certain services specified in the contract. The law permits the seller to pay for services or facilities furnished in the resale of goods. If he elects to do so, however, the payments must be in accordance with the terms and conditions laid down in Section 2 (d). To hold that the rendering of special services ipso facto gives him a separate functional classification would be to read Section 2 (d) out of the Act.

COUNT III

This count charges respondent with the violation of section 2 (e) of the Clayton Act in selling certain products to some purchasers in packs and sizes not accorded to all competing purchasers on proportionally equal terms.

There is considerable variation in the selling practices of ICWDs and conventional wholesalers in the selling of institution products. For example, the hearing examiner found that:

> The record shows that while some ICWDs sell respondent's entire line of institution products to some customers, there are other customers to whom they sell only coffee, and still others to whom they sell all or most of respondent's other products exclusive of coffee. Likewise, the conventional wholesale grocers do not sell respondent's entire line of institution products to all their institution customers. Many wholesalers do not handle respondent's institution coffee at all, because it is unavailable to them due to the fact that in the area

in which they operate, the competing ICWDs have exclusive right to distribute respondent's institution coffee. Frequently such wholesalers handle none of respondent's coffee, either institution pack or grocery pack. In such areas the conventional wholesalers and the ICWDs compete only in the resale of respondent's institution-pack grocery products. In other areas conventional wholesalers, who resell both to institutions and to retail grocers, sell all respondent's institution-pack products except coffee, and all respondent's grocery-pack products including coffee.

In such cases there is full competition, product-wise, between the ICWD and the conventional wholesaler, because the conventional wholesaler can sometimes sell, to an institution user, respondent's grocery-pack Maxwell House coffee in competition with respondent's institution-pack Maxwell House coffee offered by an ICWD.

One conventional wholesaler testified that Maxwell House coffee (respondent's product) in institution size and type packaging had not been made available to him in spite of his request for it. On one occasion at least he filled an order to a feeding institution with grocery-pack coffee. Other instances as to other products also appear in the record.

Section 2 (e) prohibits the furnishing by a seller of "any services or facilities" connected with the sale or offering for sale of a commodity purchased for resale upon terms not accorded to all purchasers on proportionally equal terms. Respondent first argues that the matter of varied packaging is not included within the purview of this section for the reason that proportionality in such cases is not practical. In the matter of Luxor, Limited (1940), 31 F.T.C. 658, the products involved were cosmetics, certain ones of which were put up in a "Junior" package size, retailing for 10¢, and also in a "Regular" package size retailing for 49¢. The Junior size was retailed through 5¢ and 10¢ stores and the Regular size through drug stores, to which class of customers, respondents refused to sell the Junior size package. The Commission found that the 5¢ and 10¢ stores and the drug stores were in competition with each other, that the smaller packaging was an aid in selling, and that the furnishing of the "Junior" size package constituted a service or facility supplied in connection with the handling, sale or offering to sell of such commodities.

Respondent next argues that the goods involved were not of like grade and quality. Although this requirement is not expressly stated in either Section 2 (d) or 2 (e), nevertheless, in the Matter of *Golf Ball Manufacturers Association*, 26 F.T.C. 824 (under 2 (d)), the words "such products or commodities" were construed as referring to goods of like grade and quality. In any event, the essence of the hearing examiner's finding is that the products (while in all cases not identical) were of like grade and quality.

Another argument is that respondent's institution pack and its grocery pack product are sold in different markets and are therefore non-competitive. Nevertheless, the fact remains that, in many instances, conventional grocers and the ICWDs were in competition for the feeding institution business and that the services and facilities in the matter of containers were not accorded to all on the basis required by Section 2 (e).

In *Corn Products Refining Co.* v. *FTC* (1944), 142 F. 2d 212, the court said:

> There is no requirement in Section 2 (e) that there be proof of actual substantial benefit to one, or substantial injury to another, of two or more competitors. This paragraph does not require even probability of adverse effect upon competition as does Section 2 (a). We think it is satisfied by proof of special services rendered one purchaser not rendered to similar competing purchasers engaged in the same business and using the commodity for the same purpose.

APPEAL OF COUNSEL SUPPORTING THE COMPLAINT

Appeal by counsel supporting the complaint is based on the dismissal of the charge in Count II that respondent had violated Section 2 (d) of the Clayton Act. The appeal is based on:

1. The legal conclusion that Section 2 (d) is inapplicable to the charge of Count II of the complaint, and the failure to hold that the record facts establish a violation of Section 2 (d).
2. The failure to hold upon dismissing Count II, that the record facts establish a violation of Section 2 (a) under the charge of Count I of the complaint.
3. The failure to hold that the record facts establish a violation of Section 2 (e) under the charge of Count III of the complaint, in that respondent furnishes certain sales services to some favored purchasers on terms not accorded other purchasers of its products for competitive resale.

It appears that in some instances, respondent sells institution-pack products to a class of customers (MFSAs), such as hotels and drug store chains operating food serving establishments, usually in several different locations). These sales are made through respondent's own representatives, are charged to the buyers, and payment is remitted directly to respondent. If requested by the buyer, respondent often directs an ICWD to make delivery of the amount purchased out of stock which he has on hand and belonging to him. Deliveries are sometimes also made in a similar manner by conventional wholesalers. So far as the ICWD is concerned, this service is one which respondent has bargained for in (C) 10 of its contract with the ICWD. The ICWD is reimbursed for the product delivered by a stock credit memorandum (issued once each month) through which the stock is replaced. For the service of storage and delivery, the

ICWD receives payment of 3¢ per pound for coffee and 10% on other products.

These payments do not violate Section 2 (d) for the reason that they are not payments made to the ICWD as a customer and are not made in connection with the resale of goods bought by him from respondent. The respondent has already made the sale and simply calls on the ICWD to make delivery as provided in his contract.

As to the alternative claim that the payments are actually reductions in price in violation of Section 2 (a), the hearing examiner in refusing such contention had this to say:

> It is argued that such payments are actually reductions in price and constitute violation of Sec. 2 (a) of the Act, but that contention is rejected. The payments are liberal, but, in the absence of some showing that they are grossly in excess of the cost or value of the services rendered, it cannot be found that they constitute any sort of a rebate or price reduction on other merchandise bought by the ICWD from respondent for resale. Table IV, above, shows as to three areas, the amount of merchandise delivered by ICWDs and the amount of money paid by respondent for such deliveries, but no conclusion can be drawn from those figures, and no other evidence was offered, on this phase of the case.

Complaint is next made that respondent's practices of securing orders direct from MFSAs and turning them over to the ICWDs or a conventional grocer is a violation of Section 2 (e), on the ground that it is the furnishing of merchandising services not proportionalized as required by law. On this phase of the case, the hearing examiner said:

> It is suggested that the supplier is not always selected by the purchaser, and that this is a device by which respondent can aid some of its customers without offering similar aid to other competing customers.
>
> It is true that the device might be so used, but there is not sufficient evidence in the record to establish that it has been so used. There is evidence of one specific instance where respondent's salesmen procured orders from prospective users and turned those orders over to a particular ICWD, but in this instance there was a family relationship, the salesmen being the father of the ICWD. The particular instance stands out as an exception to an established rule rather than as proof of a practice. The record shows that such orders were referred both to ICWDs and to conventional wholesalers; except in this one instance there is no contradiction of respondent's assertion that the choice of supplier was at the option of the purchaser. There is no basis for an inference that the orders were referred in a manner which would benefit one customer of respondent more than another.

We conclude that the hearing examiner correctly dismissed Count II.

ORDER

Finally, respondent contends that the breadth of the hearing examiner's order is unwarranted, and is not justified by the findings

made. We conclude that the order is in accordance with orders previously made by the Commission in similar cases and is within the directions laid down by the Supreme Court in *FTC v. The Ruberoid Company*, 343 U.S. 470.

The findings and order of the hearing examiner are adopted as the findings and order of the Commission. Both appeals are denied and it is directed that an order issue in accordance herewith.

FINAL ORDER

This matter having been heard by the Commission upon cross appeals by respondent and counsel in support of the complaint, briefs in support of and in opposition to said appeals, and upon oral argument before the Commission; and

The Commission having rendered its decision denying both appeals and adopting the findings, conclusion, and order contained in the initial decision:

It is ordered, That respondent, General Foods Corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order contained in said initial decision.