IN THE MATTER OF

ELLIOTT W. SASSBENDER, SR., ET AL. DOING BUSINESS AS J. SEGARI & CO., ETC.

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

Docket 8065. Complaint, Aug. 3, 1960—Decision, Jan. 6, 1961

Consent order requiring members of a partnership in New Orleans, La., to cease violating Sec. 2(c) of the Clayton Act by accepting brokerage or a discount in lieu thereof—usually at the rate of 10 cents per 1-3/5 bushel box or equivalent, or a lower price reflecting said commission—on purchases of citrus fruit for their own account from Florida packers.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly described, have been and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondents Elliott W. Sassbender, Sr., and Joseph O. Segari, are individuals and copartners doing business as J. Segari & Co., and Market Place Produce Company, under and by virtue of the laws of the State of Louisiana, with their offices and principal place of business located at 150 Poydras Street, New Orleans 12, Louisiana.

PAR. 2. Respondents, individually and as copartners doing business as J. Segari & Co., and Market Place Produce Company, hereinafter sometimes referred to jointly as respondents, are now, and for the past several years have been, engaged in business primarily as wholesale distributors and jobbers buying, selling and distributing

citrus fruit and produce, as well as other food products, all of which are hereinafter sometimes referred to as food products. Respondents purchase their food products from a large number of suppliers located in many sections of the United States, particularly in the State of Florida. The annual volume of business done by respondents in the purchase and sale of food products is substantial.

PAR. 3. In the course and conduct of their business for the past several years, but more particularly since January 1, 1959, respondents have purchased and distributed, and are now purchasing and distributing, food products in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, from suppliers or sellers located in several States of the United States other than the State of Louisiana, in which respondents are located. Respondents transport or cause such food products, when purchased, to be transported from the places of business or packing plants of their suppliers located in various other States of the United States to respondents who are located in the State of Louisiana, or to respondents, customers located in said State, or elsewhere. Thus, there has been at all times mentioned herein a continuous course of trade in commerce in the purchase of said food products across state lines between respondents and their respective suppliers of such products.

PAR. 4. In the course and conduct of their business for the past several years, but more particularly since January 1, 1959, respondents have been and are now making substantial purchases of food products for their own account for resale from some, but not all, of their suppliers, and on a large number of these purchases respondents have received and accepted, and are now receiving and accepting, from said suppliers a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, in connection therewith.

For example, respondents make substantial purchases of citrus fruit for their own account from a number of packers or suppliers located in the State of Florida, and receive on said purchases, a brokerage or commission, or a discount in lieu thereof, usually at the rate of 10 cents per 1-3/5 bushel box, or equivalent. In many instances respondents receive a lower price from the supplier which reflects said commission or brokerage.

PAR. 5. The acts and practices of respondents in receiving and accepting a brokerage or a commission, or an allowance or discount in lieu thereof, on their own purchases, as above alleged and described, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Section 13).

1 Decision

Cecil G. Miles, Esq., and *Ernest G. Barnes, Esq.*, supporting the complaint.

Respondents, for themselves.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

On August 3, 1960, the Federal Trade Commission issued a complaint against the above-named respondents, in which they were charged with violating § 2(c) of the Clayton Act, as amended (U.S.C. Title 15, §13), by, among other things, receiving and accepting a brokerage or commission or an allowance or discount in lieu thereof, on their own purchases of food products which are sold and transported in interstate commerce, as "commerce" is defined in the Federal Trade Commission and Clayton Acts. A true and correct copy of the complaint was served upon respondents and each and all of them, as required by law. Thereafter respondents agreed to dispose of this proceeding without a formal hearing, pursuant to the terms of an agreement dated November 8, 1960, containing consent order to cease and desist. The agreement was submitted to the undersigned hearing examiner on November 17, 1960, in accordance with §3.25 of the Commission's Rules of Practice for Adjudicative Proceedings. The agreement purports to dispose of this proceeding as to the respondents and each and all of them and contains the form of a consent cease and desist order which the parties have represented is dispositive of the issues involved in this proceeding. The agreement has been signed by the copartner respondents and by counsel supporting the complaint, and has been approved by the Associate Director and the Director of the Bureau of Litigation of the Federal Trade Commission. In said agreement respondents admit all of the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been made in accordance with such allegations. In the agreement the respondents waive: (a) any further procedural steps before the hearing examiner and the Commission; (b) the making of findings of fact or conclusions of law; and (c) all rights respondents may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

The parties further agree, in said agreement, that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Federal Trade Commission; that the order to cease and desist entered in this

proceeding by the Commission may be entered without further notice to the respondents, and when so entered such order will have the same force and effect as if entered after a full hearing. Said order may be altered, modified or set aside in the manner provided for other orders, and the complaint may be used in construing the terms of the order.

The parties have covenanted that the said agreement is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged in the complaint.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing consent order, and it appearing that the order which is approved in and by said agreement disposes of all the issues presented by the complaint as to all of the parties involved, said agreement is hereby accepted and approved as complying with §§3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings. The undersigned hearing examiner, having considered the agreement and proposed order and being of the opinion that the acceptance thereof will be in the public interest, makes the following findings and issues the following order:

FINDINGS

1. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding;

2. Respondents Elliott W. Sassbender, Sr., and Joseph O. Segari are copartners trading and doing business as J. Segari & Co. and Market Place Produce Company, with their office and principal place of business located at 150 Poydras Street, in the City of New Orleans, State of Louisiana.

3. Respondents are engaged in commerce as "commerce" is defined in the Federal Trade Commission Act.

4. The complaint filed herein states a cause of action against the respondents under §2(c) of the Clayton Act, as amended (U.S.C. Title 15, §13), and this proceeding is in the public interest. Now, therefore,

It is ordered That respondents Elliott W. Sassbender, Sr., and Joseph O. Segari, individually and as copartners doing business as J. Segari & Co. and Market Place Produce Company, and their agents, representatives, and employees, directly or through any corporate, partnership, sole proprietorship, or other device, in connection with the purchase of citrus fruit or other food products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any purchase of citrus fruit or other food products for respondents' own account, or where respondents are the agents, representatives, or other intermediaries acting for or in behalf, or are subject to the direct or indirect control, of any buyer.

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 6th day of January, 1961, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Elliott W. Sassbender, Sr., and Joseph O. Segari, individually and as copartners doing business as J. Segari & Co. and Market Place Produce Company, 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

ROUGH WEAR CLOTHING COMPANY, INC. ET AL.

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

Docket 8109. Complaint, Aug. 30, 1960—Decision, Jan. 6, 1961

Consent order requiring manufacturers in Middletown, Pa., to cease violating the Wool Products Labeling Act by labeling interlinings of men's jackets as "100% Reprocessed Wool" when they contained a substantial amount of non-woolen fibers, and by failing to label other wool products as required.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts the Federal Trade Commission, having reason to believe that Rough Wear Clothing Company, Inc., a corporation, and Meyer S. Jacobs and Edward Guiterman, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under said Wool Products Labeling Act, and it appearing to the Commission that a proceeding by

it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Rough Wear Clothing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Individual respondent Meyer S. Jacobs is President and individual respondent Edward Guiterman is Treasurer of said corporate respondent. The individual respondents formulate, direct and control the acts, policies and practices of the corporate respondent, including the acts and practices hereinafter referred to. The address of the office and principal place of business of all respondents is Wilson Street, Middletown, Pennsylvania.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since June 1, 1959, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce as "commerce" is defined in the Wool Products Labeling Act of 1939 wool products as "wool products" are defined therein.

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

Among such misbranded wool products were men's jackets labeled or tagged by respondents as having interlinings consisting of "100% Reprocessed Wool", whereas, in truth and in fact, said interlinings contained a substantial quantity of non-woolen fibers.

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

PAR. 5. The respondents in the course and conduct of their business, as aforesaid, were and are in competition, in commerce, with corporations, firms and individuals likewise engaged in the manufacture and sale of wool products similar to those sold by respondents.

PAR. 6. The acts and practices of the respondents as set forth in Paragraphs 3 and 4 above were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition,

in commerce, within the intent and meaning of the Federal Trade Commission Act.

Harry E. Middleton, Jr., Esq., supporting the complaint.
Gilbert Nurick, Esquire, McNees, Wallace & Nurick of Harrisburg, Pa. for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

On August 30, 1960, the Federal Trade Commission issued a complaint against the above-named respondents, in which they were charged with violating the Federal Trade Commission Act and the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder, by misbranding, and falsely and deceptively labeling and tagging wool products sold by the respondents in interstate commerce. The complaint alleges that respondents falsely and deceptively stamped, tagged, labeled, or identified such wool products as to the character or amount of the constituent fibers contained therein; and failed to affix labels to such products showing each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939. A true and correct copy of the complaint was served upon the respondents and each and all of them as required by law.

Thereafter respondents appeared by counsel and agreed to dispose of this proceeding without a formal hearing pursuant to the terms of an agreement dated October 25, 1960, containing consent order to cease and desist. The agreement was submitted to the undersigned hearing examiner on November 9, 1960, in accordance with §3.25 of the Commisssion's Rules of Practice for Adjudicative Proceedings. The agreement purports to dispose of this proceeding as to the respondents and each and all of them and contains the form of a consent cease and desist order which the parties have represented is dispositive of the issues involved in this proceeding. The agreement has been signed by the corporate respondent by its president, by the individual respondents individually and as officers of said corporation, by the attorneys for the respondents, by counsel supporting the complaint, and has been approved by the Assistant Director, Associate Director and Acting Director of the Bureau of Litigation of the Federal Trade Commission. In said agreement of October 25, 1960, respondents admit all of the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been made in accordance with such allegations. In the agreement the respondents waive: (a) any further

procedural steps before the hearing examiner and the Commission; (b) the making of findings of fact or conclusions of law; and (c) all rights respondents may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

The parties further agree, in said agreement, that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Federal Trade Commission; that the order to cease and desist entered in this proceeding by the Commission may be entered without further notice to the respondents, and when so entered such order will have the same force and effect as if entered after a full hearing. Said order may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

The parties have covenanted that the said agreement is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged in the complaint.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement of October 25, 1960, containing consent order, and it appearing that the order which is approved in and by said agreement disposes of all the issues presented by the complaint as to all of the parties involved, said agreement of October 25, 1960, is hereby accepted and approved as complying with §3.21 and §3.25 of the Commission's Rules of Practice for Adjudicative Proceedings. The undersigned hearing examiner, having considered the agreement and proposed order and being of the opinion that the acceptance thereof will be in the public interest, makes the following findings and issues the following order:

FINDINGS

1. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding;

2. The respondent Rough Wear Clothing Company, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at Wilson Street, Middletown, Pennsylvania.

3. The individual respondents Meyer S. Jacobs and Edward Guiterman are officers of the corporate respondent and have their

office and principal place of business at the same address as the corporate respondent.

4. Respondents are engaged in commerce as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939.

5. The complaint filed herein states a cause of action against the respondents under the Federal Trade Commission Act and under the Wool Products Labeling Act and the Rules and Regulations issued pursuant thereto; and this proceeding is in the public interest. Now, therefore,

It is ordered, That respondent, Rough Wear Clothing Company, Inc., a corporation, and its officers, and Meyer S. Jacobs and Edward Guiterman, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act, of clothing containing interlinings or other wool products, as "wool products" are defined in and subject to the Wool Products Labeling Act, do forthwith cease and desist from misbranding such products by:

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

2. Failing to affix labels to such products showing each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

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 6th day of January, 1961, become the decision of the Commission; and. accordingly:

It is ordered. That respondents Rough Wear Clothing Company, Inc., a corporation, and Meyer S. Jacobs and Edward Guiterman, individually and as officers of said corporation, 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

AMERICAN NEWS COMPANY, ET AL.

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

Docket 7396. Complaint, Feb. 5, 1959—Decision, Jan. 10, 1961

Order requiring the nation's largest retail newsstand operator to cease violating Sec. 5 of the Federal Trade Commission Act by knowingly inducing or receiving discriminatory promotional allowances from publishers of magazines it sold, which approximated $890,000 in 1958, and which were not paid at any proportionally equal rate to a single retail competitor.

Mr. J. Wallace Adair and *Mr. Jerome Garfinkel* for the Commission.

Mr. Lester Lewis Jay and *Roth and Riseman*, by *Mr. Eugene Frederick Roth*, of New York, N. Y., for the respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

1. The Complaint

The complaint herein was issued February 5, 1959, charging the Respondents with having violated §5 of the Federal Trade Commission Act by inducing and coercing various of their suppliers, including publishers of magazines, pocket books and comic books, to make payments or grant allowances to Respondents in connection with the display and sale of such publications on Respondents' newsstands, when Respondents knew, or should have known, that such payments were not being offered or made available on proportionally equal terms to all customers of such suppliers who were in competition with Respondents. The complaint further alleges that Respondents knew, or should have known, that their suppliers' failure to make such payments equally available to all their competing customers was a violation by such suppliers of §2(d) of the Clayton Act.

The relevant provisions of those two Acts are as follows:

The Federal Trade Commission Act:

SEC. 5(a)(1) Unfair methods of competition in commerce, * * * * are hereby declared unlawful.

The Clayton Act:

SEC. 2(d) That 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 products 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.

The complaint further charges that Respondents also attempted to induce and coerce certain manufacturers of cigars, which were sold by the Respondents, into paying similar unlawful allowances to the Respondents, in violation of §5 of the Federal Trade Commission Act.

The complaint concludes that the effect of Respondents' acts and practices has been to increase their power and ability to induce and coerce their publishers and suppliers to make unlawful allowances, and also to lessen substantially the ability of news-stand operators throughout the country to compete with Respondents.

2. The Answer

Respondents entered a general denial of the charges alleged in the Commission's complaint, and in their amended answer listed several affirmative defenses. Particularly, Respondents asserted that the several publishers referred to in the complaint herein, and distributors and others unknown to the Respondents, have been and still are engaged in unlawful contracts and conspiracies to fix and maintain uniform, non-competitive prices for the publications of each publisher. Respondents further asserted that the payments received by them from publishers were not in violation of §5 of the Federal Trade Commission Act, but were obtained in an effort to defend against and defeat the unlawful conspiracy of the publishers and their distributors. Respondents also contended that such payments did not constitute discriminatory preferences to Respondents, as against other retail news-stand dealers in magazines, pocket books, comic books and similar articles, but, to the contrary, created lawful rights in Respondents' competitors to obtain equivalent or greater relief from the oppression of the several conspirators.

3. Ruling on Proposed Findings

Consideration has been given to the entire record herein, including particularly the proposed findings as to the facts and proposed conclusions submitted by counsel. Each proposed finding as to the facts and each proposed conclusion which has been accepted has been, in substance, incorporated into this initial decision. All proposed findings and conclusions not so incorporated herein are hereby rejected.

4. Identity and Organization of Respondent American News

The Respondent first named in the caption hereof, The American News Company, erroneously designated in the complaint as Ameri-

can News Company, and hereinafter referred to as Respondent American News, is a corporation organized and doing business under the laws of the State of Delaware, with its principal office and place of business located at 131 Varick Street, New York 13, New York. Prior to August 1, 1957, it operated a wholesale periodical division, through which it distributed magazines, paperback and comic books to various retail outlets located throughout the United States and Canada. During that time it also served as the exclusive distributor of such publications to the news-stands operated by Respondent The Union News Company. In 1957, however, Respondent American News discontinued the phase of its business just described, and since then it has limited itself to the operation of 27 wholesale distribution branches, through which it sells hardcover books and stationery to schools, libraries, institutions and booksellers located throughout the United States. It also distributes hardcover books to various news-stands operated by Respondent The Union News Company.

5. Identity and Organization of Respondent The Union News Company

The second Respondent, The Union News Company, hereinafter referred to as Respondent Union News, is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business at the same location as that of Respondent American News, of which it is a wholly-owned subsidiary.

Respondent Union News is the largest general retail news-stand operator in the United States. In 1958 it operated approximately 300 eating places, such as restaurants and snack bars, in 32 states and the District of Columbia. It also operates more than 1,200 news-stands, gift shops, book and tobacco shops located throughout the country. In April of 1958 it operated approximately 930 news-stand outlets, at which it sold newspapers, tobacco products, magazines, candy and other items, its total sales for that year amounting to approximately $23,940,000. Its sales of magazines in that year amounted to approximately $5,280,000. Respondent Union News operates concessions in important railroad, airport, bus and subway terminals throughout our nation. For example, the Union News Company operates the news-stand concessions in substantially all of the New York Central Railroad Company's stations, including those located at Utica, Syracuse, Rochester and Buffalo, New York; Detroit, Michigan; and Toledo, Ohio. It operates the news-stands in three of the largest railroad stations in the country, namely, the Grand Central Station and Pennsylvania Station in New York City,

and the LaSalle Street Station in Chicago, Illinois. It also operates subway concessions in three of our nation's largest cities, namely, New York, Boston and Philadelphia.

6. Respondents' Relationship to Each Other

As stated above, Respondent Union News is the wholly-owned subsidiary of Respondent American News, and the two corporations have the same address. The evidence shows that Respondent American News, through its officers, has been and still is able to, and does, direct the policies and control the practices of Respondent Union News. Publishers whose magazines are sold by Respondent Union News often take up, for settlement, with the officials of Respondent American News, disputes involving the distribution of publications by the news-stands operated by Respondent Union News. Both oral testimony and exhibits show that the parent corporation, through its officers, forms the policies and directs the business affairs of the subsidiary.

It is clear that Respondent Union News is a mere agency and instrumentality of the parent organization, Respondent American News, and that Respondent American News is fully responsible for the acts and practices of its wholly-owned and controlled subsidiary, Respondent Union News.

7. Respondents' Chief Competitors

The Respondents' principal competitors in the operation of news-stands located in transportation centers throughout the country include ABC Vending Corporation; Commuter News Co., Inc.; Faber, Inc.; and Schermerhorn Cigar Stores, Inc. As of January 1, 1959, ABC Vending Corporation had 57 news-stands; in its fiscal year ending February 1, 1958, Faber, Inc., had 35 news-stands, with sales of approximately three million dollars; in the calendar year 1958, Schermerhorn operated 16 news-stands, with sales of approximately $950,000; and in 1958, Commuter News Co., Inc. operated 16 news-stands, with sales of approximately $420,000. In addition, their are many smaller competitors located in drug stores, hotels and similar places.

8. Interstate Commerce

The news-stands operated by Respondent Union News are located throughout the United States and in the District of Columbia. The individual news-stands are not separately incorporated in the various states or operated as individual organizations. In fact, all of the news-stands of the Respondent are grouped according to location into eight divisions. Each division is directed by a supervising manager,

whose principal duty is to oversee the operation of such news-stands by checking inventory, promoting sales and making a monthly report to the Respondents' home office in New York City.

In addition, the publications and other products purchased by Respondent Union News for sale through its news-stands are shipped to said news-stands by suppliers who are, in many instances, located in states other than those in which the news-stands are located. In numerous instances Respondent Union News is billed for such publications and products at its home office in New York City, by suppliers thereof who are located elsewhere than in the State of New York. The evidence clearly shows that the purchase and sale of Respondent's publications and other products involve the transaction of business between persons located in diverse states of the United States and in the District of Columbia. Accordingly, it must be concluded that Respondents are, in fact, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

9. Seller-Customer Relationship

The charges in the complaint that Respondents have coerced their suppliers, including the publishers of magazines, pocket books and comic books, into making payments to them in connection with the sale of such publications, which payments Respondents knew or should have known were not made on proportionally equal terms to Respondents' competitors, require that we examine carefully the business relationship between Respondents on the one hand and their suppliers and publishers on the other. The evidence shows that the publishers of the various magazines and other publications distributed to the public by Respondents' news-stands did not sell and deliver those publications directly to the Respondents, but employed two intermediaries in the making of such sales and deliveries. First, each publishing company employed as its agent a national distributor; and second the national distributor employed a local wholesale distributor, who delivered the publications to Respondents and their competitors.

One of such national distributors is Select Magazines, Inc., the stock of which is owned by six publishers, namely, McCall Corporation; Popular Science Publication, Inc.; The Reader's Digest Association, Inc.; Meredith Publishing Company; Street & Smith Publications, Inc.; and Time, Inc. Other national distributing companies performing similar functions for various publishing companies are the Curtis Circulation Company, Popular Publications, Inc., and Kable News Company. The contractual arrangements

between these distributors and the publishers they serve provide, in general, as follows:

1. that the national distributor shall make all the necessary arrangements for the distribution of each publisher's publications;

2. that the national distributor shall sell the publications of each publisher at a price fixed by such publisher;

3. that the national distributor is to reimburse each publisher for all moneys collected in connection with the sale of its publications, less a fee for the distributor's services;

4. that the national distributor may extend credit to wholesale distributors, retailers or other customers;

5. that losses suffered by the national distributor from uncollectible debts are borne by the publisher;

6. that the national distributor is to advise the publishers as to the estimated number of copies of magazines needed for distribution, to be used as a guide by each publisher in determining the number of copies of their publications to be distributed;

7. that shipping charges on its publications are paid by each publisher; and

8. that wholesalers and retailers are reimbursed by each publisher for the return of unsold copies of its publications.

The contracts between the national distributors and local wholesale distributors in various areas provide, in general, that:

1. the wholesalers shall sell to retailers at prices fixed by the national distributor;

2. the wholesale distributors shall be limited to specified areas;

3. the wholesale distributors shall distribute the various publications to retailers on a date specified by the national distributor;

4. each wholesale distributor shall make periodic check-ups in accordance with a schedule to be provided by the national distributor;

5. each wholesale distributor shall receive full credit for unsold publications returned to the national distributor; and

6. each wholesale distributor shall receive a commission for services performed.

Because of the above-described relationship, and particularly because the publishers retain control of all financial details affecting the sale of their publications to the Respondents, such as the price at which publications are to be sold, the terms and conditions of sale, and the granting of promotional payments and allowances, the national and local wholesale distributors must be regarded as mere instrumentalities of the publishers. Accordingly, the sale of magazines, pocket books and comic books to Respondents and other retail distributors of such publications must be regarded as, in substance,

a sale by said publishers to the Respondents. Because of this fact, the news-stand dealers, including Respondents, are customers of the publishers within the intent and meaning of §2(d) of the Clayton Act.

10. Publishers Coerced by Respondents to Grant Allowances

The evidence shows that both corporate Respondents, acting through their officials, have made demands upon various publishers for special payments. Respondents call these special payments a "display promotional allowance", and require the publishers to make such payments as a condition to the continued display and sale of their publications by Respondents on their news-stands. For example, a letter dated November 20, 1957, from Time, Inc. to Mr. Herbert Frilen, an official of Respondent American News, confirms the arrangement for the payment of such an allowance. This letter, it should be observed, is addressed to an official of the parent corporation, Respondent American News, rather than to an official of the subsidiary corporation, Respondent Union News. It states in part as follows:

This will confirm the agreement made in your office on November 18th for Time, Life, Sports Illustrated and Fortune on stands operated by the Union News Company.

In a letter dated June 1, 1956, Mr. Grunewald, vice president of Respondent Union News Company, wrote to Mr. Milton Gorbulen of Modern Photography, stating in part as follows:

Effective with the next issues and thereafter, it will be necessary for us to receive a sales rebate on the basis of 10% of the retail price for all publications handled by the Union News Company operations.

Mr. Gorbulen replied to the aforesaid letter, in part, as follows:

I assume that if this new rate is unacceptable to us, our magazines would not be distributed on your outlets. In view of this situation we have no recourse but to say yes. In accepting this stiff rebate I believe it is only fair to expect the best possible service from the Union News Company in the way of sales and displays . . . . service that heretofore has been far from good.

On March 1, 1957, Mr. Grunewald wrote Popular Publications in part as follows:

We ask that you acknowledge the receipt of this letter [the February 11th letter] and, not having heard from you, we wish to reconfirm the fact that we will start billing you at the new promotional allowance rebate as stated in our letter.

By the above statements and others similar thereto, the Respondents have made clear, in unilateral demands upon various publishers, that such publishers must pay promotional allowances at a rate

determined, not by them, but by the Respondents. From the evidence in the record we must conclude that the Respondents have induced and coerced various publishers of magazines, paperback or comic books, directly or through the national distributor, to grant them promotional payments or allowances as compensation or in consideration for services or facilities furnished by or through Respondents in connection with the handling, sale or offering for sale of publications sold to Respondents by such publishers.

11. Amount of Payments

The record shows that during 1957 Respondents received from various publishers approximately $700,000 as compensation or in consideration for promotional displays on their news-stands in connection with the sale of the publications of said publishers, including the following:

Approximately	*From*
$ 34,900	Curtis Publishing Company;
31,000	The Hearst Corporation;
21,000	Fawcett Publications, Inc.;
19,000	MacFadden Publications, Inc.; and
13,000	Esquire, Inc.

In 1958 Respondents received approximately $890,000 of such promotional payments from various publishers.

12. Discrimination in Allowances Known to Respondents

As we have previously shown, the promotional allowances paid to the Respondents by various publishers were demanded by the Respondents and individually negotiated by them. In fact, the evidence shows that the amounts of the promotional allowances paid to the Respondents were determined, at least in several instances, unilaterally by officials of Respondent American News, and thereafter coercive demands were made upon publishers for the payment of such unilaterally-established allowances. Both testimony and exhibits show that Respondents' officials were informed by a number of publishers' officials that the promotional allowances demanded by Respondents were higher than any which the various publishing companies were paying to Respondents' competitors. We are compelled, therefore, to conclude that the promotional payments or allowances paid to Respondents by various publishers, directly or through their national distributors, were not offered or otherwise made available on proportionally equal terms to all other customers of such publishers competing with Respondents; and that Respondents had been informed by the publishers of that fact.

13. Effect of Discrimination in Allowances on Respondents' Competitors

Not only are the Respondents the leading news-stand operators in the United States in the number of news-stands operated and periodicals sold, but their margin of leadership over their competitors has been steadily increasing during the period of time here involved. Respondents and their competitors frequently bid or otherwise compete for the same news-stand location. In some instances, the difference in bids is slight. For example, in 1956 Respondents offered to pay the Statler Hotel chain approximately 15-1/2% of the gross sales to be earned through the news-stands in its hotels, while Faber, Inc., which had been operating in those locations, offered approximately 14% of such prospective gross sales. Respondents were awarded the Statler concessions. Likewise, in 1956 the ABC Vending Corporation lost to Respondents the franchise to operate the news-stands on the Boston subway system. In 1957 Respondents obtained 54 concessions for news-stands formerly occupied by their competitors.

The evidence shows, further, that as a general rule the profit from the operation of a news-stand is small, and that the difference in promotional allowances or payments received by a news-stand operator may well determine whether he will succeed or fail. We conclude that the effect of Respondents' receipt of unlawful promotional allowances has been a major factor in enabling Respondents to offer higher percentages of their gross receipts in order to secure news-stand locations, frequently from their competitors, and thereby to acquire an increasing number of such news-stand locations, which in turn enables Respondents to demand progressively higher promotional allowances from publishers, thereby completing a vicious circle.

14. Attempted Coercion of Cigar Manufacturers

Respondents' demands upon their suppliers for promotional payments or allowances was not limited to the sale of publications. They attempted likewise to induce and coerce certain cigar manufacturers to grant such payments. In 1955, Mr. Grunewald of Respondent American News requested a display allowance for Respondent Union News from Mr. Morton G. Myers, Assistant Vice President of General Cigar Company. Concerning this request, Mr. Myers testified as follows:

Q. What did you tell Mr. Grunewald?

A. I told Mr. Grunewald that our company couldn't give any display allowance because we don't give a display allowance to any of our customers. I also told him that we would be in violation of law if we did.

Mr. Myers further testified that for about a year thereafter, Respondents did not buy cigars from the General Cigar Company. This evidence, which was not controverted, justifies the conclusion that Respondents were attempting to coerce the General Cigar Company into paying the allowance demanded, but in this instance did not succeed in so doing.

15. Respondents' Defenses

(a) Respondents, in their amended answer as well as in their examination of witnesses and in their proposed findings as to the facts, have endeavored to justify the various promotional payments demanded and received by them from publishing companies on the theory that the publishing companies and their national distributors of magazines, paperbacks and comic books have been and are now in a conspiracy to fix and control prices of such publications, in violation of §1 of the Sherman Act. Respondents contend that such conspiracy is shown by the fixed prices at which such publications are sold to retail news-stands, and the fixed prices at which news-stand dealers are required to resell those publications. Respondents further contend that because of such fixed prices and unlawful conspiracy, they have been and are justified, as a defensive measure, in demanding discounts and allowances from the various publishers.

Although it is a fact that the publishing companies have fixed the wholesale and retail prices of their publications, Respondents have not established that the publishing companies have been or are engaged in a conspiracy in violation of §1 of the Sherman Act. Furthermore, the unlawful activities of one company, even if established, do not and cannot legally justify unlawful activities of another. In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc., et al.*, 340 U.S. 211, 214 (1951), the Supreme Court stated this principle as follows:

> If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured.

Plainly Respondents' defense that violation of the Sherman Act renders legal violation of the Clayton Act is without merit.

(b) As a second defense, Respondents have shown that the publications they sell are also sold by the publishing companies through subscriptions at prices lower than the news-stand prices, which are the cover prices on the magazines. Respondents argue that as a result of such fact, the publishers are in actual competition with the

news-stand dealers. Respondents further contend that because of such competition, Respondents are justified in seeking to meet such competition by securing promotional allowances from the publishing companies.

In considering this contention, we must remember that the gravamen of the complaint is the inducing of allowances by the Respondents from the publishers, to the prejudice of Respondents' news-stand competitors. The fact that a publisher is also, through its subscription sales, a competitor does not alter the fact that the inducement of a preferential allowance is a violation of law. Accordingly, Respondents' second defense is also without merit.

CONCLUSIONS

1. The allowances which were paid by suppliers of magazines, pocket books, paperback and comic books to Respondents, and which were not offered on proportionally equal terms to all the suppliers' other customers competing with Respondents, were paid, as alleged in the complaint, in violation of §2(d) of the Clayton Act.

2. Respondents' acts in inducing their suppliers of magazines, pocket books, paperback and comic books to pay something of value as compensation or in consideration for services or facilities furnished by or through Respondents in connection with the processing, handling, sale or offering for sale of said products, when they knew, or should have known, that such compensation was not affirmatively offered or otherwise made available on proportionally equal terms to all other of their suppliers' customers competing with Respondents in the distribution of such products, were and are an unfair method of competition in commerce, and constitute therefore, as alleged in the complaint, a violation of §5 of the Federal Trade Commission Act.

3. Respondents' attempts to induce and coerce certain cigar manufacturers to make preferential payments to Respondents as promotional allowances for the display and sale through Respondents' news-stands of certain tobacco products were an unfair method of competition in commerce, and constitute therefore, as alleged in the complaint, a violation of §5 of the Federal Trade Commission Act.

4. The Commission has jurisdiction over the Respondents, and over their said acts and practices.

5. This proceeding is in the public interest.

Accordingly,

It is ordered, That Respondents The American News Company and The Union News Company, corporations, their officers, employees, agents or representatives, directly or through any corporate or other

device, in or in connection with the purchase of products in commerce, as "commerce" is defined in the Federal Trade Commission Act, for resale on news-stands operated by Respondents, including magazines, pocket books, paperback and comic books, newspapers, cigars, candy, toys and sundry items, do forthwith cease and desist from:

1. Attempting to induce or inducing, by any means, any of their suppliers to pay anything of value to or for the benefit of Respondents as compensation or in consideration for any services or facilities furnished by or through Respondents in connection with the processing, handling, sale or offering for sale of any product, when Respondents know, or should have known that the compensation or consideration requested or demanded has not been and is not being affirmatively offered or otherwise made available on proportionally equal terms to all other of said suppliers' customers competing with Respondents in the distribution of such product;

2. Receiving anything of value from any of their suppliers as compensation or in consideration for any services or facilities furnished by or through Respondents in connection with the processing, handling, sale or offering for sale of any product, when Respondents know, or should have known, that such compensation or consideration has not been and is not being affirmatively offered or otherwise made available on proportionally equal terms to all other customers of said suppliers competing with Respondents in the distribution of such product.

OPINION OF THE COMMISSION

By SECREST, *Commissioner:*

The complaint in this matter charges that respondents have engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. Paragraph Four alleges that respondents have knowingly induced or coerced many of their suppliers to make discriminatory payments or allowances to them as consideration for services or facilities furnished by respondents in connection with the handling or sale of the suppliers' goods. Therefore, in effect, the complaint charges that respondents knowingly induced their suppliers to violate subsection (d) of Section 2 of the amended Clayton Act.

Paragraph Four, containing the principal charge of the complaint, is couched in general terms. Paragraph Five sets out "examples" of the specific types of unlawful conduct sought to be reached. The first "example" alleges the inducement and receipt by respondents of substantial sums of money from named magazine and book publishers during 1957. The second "example" does not appear to us

to be exemplary of the principal charge made in Paragraph Four, but constitutes what must be considered a separate and distinct charge. This "example" deals with respondents' alleged attempts to knowingly induce certain cigar manufacturers to grant them discriminatory payments which, if granted, would place such suppliers in violation of subsection (d) of Section 2 of the amended Clayton Act. The record indicates that this alleged activity was presented, defended and argued as a separate violation and not as a part of the general "inducing and receiving" charge of Paragraph Four, in spite of the inexact language describing it as an "example" of the general charge.

After hearings, the hearing examiner filed an initial decision in which he concluded that respondents had committed two distinct violations. He issued a two-part order to cease and desist, one part enjoining respondents from knowingly attempting to induce or inducing discriminatory payments, and the second part prohibiting the actual receipt of such payments. It is from this order that respondents have appealed.

Respondent, The Union News Company, is a corporation wholly owned by respondent, The American News Company. Union is the largest retail newsstand operator in the country. In April 1958, Union operated approximately 930 newsstands located, for the most part, in airports, railroad or subway stations and hotels. Its sales through these newsstands for the year 1958 were approximately $23,940,000. Of this amount a substantial portion, $5,280,000, was accounted for by the sale of magazines. The remainder was principally accounted for by sales of newspapers, tobacco products, candy, books and toys. Union also operates more than 300 restaurants or snack bars and approximately 200 gift, book or tobacco shops.

Respondent, The American News Company (erroneously named in the complaint American News Company), completely dominates and controls its wholly owned subsidiary, Union. Its president, secretary and treasurer hold the same positions in Union, and the directors of American, for the most part, serve as directors of Union. The two corporations have the same address. American appears to consider Union as one of its integral parts for its 1958 annual report to stockholders refers to Union as a "division" and to Union's activities as the acts of "your company." But more important than these considerations is the substantial evidence that officers of American, some of whom hold no official position with Union, actively participate in the management and conduct of the affairs of Union.

In fact, much of the very activity with which this matter is concerned was conducted by the officers of American. We feel that these facts are more than adequate to satisfy even the criterion of complete control applied in the *National Lead* [1] case and conclude that American is responsible for and does control the activities of its subsidiary, Union.

Respondents contend that Union, with respect to its dealings in magazines in the several states (excluding the District of Columbia) is not engaged in interstate commerce.[2] Respondents concede that the wholesalers who supply Union receive their supplies of magazines in interstate commerce but urge that the handling of these shipments by the wholesalers interrupts the flow of commerce and, therefore, that the subsequent deliveries by the wholesalers to Union were intrastate transactions. It would appear that the wholesalers break up the magazine shipments they receive into separate bundles containing a specified number of copies and deliver these bundles to each of their retailers, including the Union stands.

Three distinct grounds impel the rejection of respondents' contention. First, activities within the District of Columbia are in themselves sufficient to vest the Commission with jurisdiction over respondents. 15 U.S.C. § 44 (1958). Second, the warehousing and trans-shipment operations of the wholesalers are not of a character sufficient to halt the flow of commerce. *Holland Furnace Co.* v. *Federal Trade Commission*, 269 F.2d 203 (7th Cir. 1959), *cert. denied*, 361 U.S. 932 (1960) and cases cited therein; *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231 (1951). See *Stafford* v. *Wallace*, 258 U.S. 495 (1922). Third, Section 5 of the Federal Trade Commission Act in terms applies to "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." 15 U.S.C. § 45 (1958). Thus, the relevant jurisdictional issue is whether the practices subjected to challenge were employed in commerce, and not whether all operations of the entity employing the

[1] *National Lead Company* v. *Federal Trade Commission*, 227 F. 2d 825, 829 (7th Cir. 1955), rev'd. on other grounds, 352 U.S. 419 (1957).

[2] In support of their contention respondents cite *East Ohio Gas Co.* v. *Tax Commission*, 283 U.S. 465 (1931); *Lawson* v. *Woodmere, Inc.*, 217 F. 2d 148 (4th Cir. 1954); *Brosius* v. *Pepsi Cola Co.*, 155 F. 2d 99 (3rd Cir. 1946); *and Ewing-Von Allmen Dairy Co.* v. *C & C Ice Cream Co.*, 109 F. 898 (6th Cir. 1940). The basic issue in these cases is whether a business operating within a single state is engaged in interstate commerce solely because of the purchase in commerce of raw materials used in the intrastate manufacture and sale of finished products. The issue now before us is materially different. It is noteworthy that in the *Holland Furnace* case the Court of Appeals for the Seventh Circuit specifically distinguished the *Lawson, Brosius* and *Ewing-Von Allmen* cases. 269 F. 2d at 210–211.

methods, acts or practices were performed in interstate commerce.[3] The record in this case fully supports a finding that the practices challenged in the complaint were used "in commerce."

As noted above Union's plea of lack of commerce is confined to its dealings in magazines. It denies further that it is the customer of the out-of-state magazine publishers who made or authorized the payments to Union. Quite obviously, a finding for respondents on this point would defeat the complaint on more than jurisdictional grounds since it is an essential element of the alleged violation that Union is, in fact, a "customer" of the suppliers from which it induced payments. This is so since the complaint charges that respondents induced their suppliers to violate subsection (d) of Section 2 of the amended Clayton Act, which prohibits discriminatory payments "* * * to or for the benefit of a customer * * *." Thus, the complaint must fail if Union is not the "customer" of the magazine suppliers.

For the most part, leading magazine publishers distribute their publications through national distributors which redistribute to wholesalers who, in turn, distribute to retailers. These arrangements are generally on an exclusive basis, that is, the publisher uses only one national distributor to handle its magazines in the entire country, and wholesalers are granted exclusive rights within defined territories.

In certain cases the national distributor is owned by the publishers. For example, Select Magazines, Inc., which distributes the publications of McCall Corporation, Popular Science Publications, Inc., The Reader's Digest Association, Inc., Meredith Publishing Company, Street & Smith Publications, Inc., and Time, Inc., is owned in equal parts by these publishers. The Curtis Publishing Company distributes its magazines through its wholly owned subsidiary, Curtis Circulation Company. Both Select Magazines, Inc., and Curtis Circulation Company distribute additional important magazines not published by their owners.

Kable News Company is an important independent national distributor distributing the magazines, pocketbooks and comic books of approximately fifty publishers. Some publishers, such as Popular Publications, Inc., do not employ national distributors but distribute directly to wholesalers.

In every instance the agreements between the publishers and national distributors specify the prices which are to be charged

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[3] *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948); *Standard Container Manufacturing Association, Inc., et al.* v. *Federal Trade Commission*, 119 F. 2d 262 (5th Cir. 1941); *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission*, 13 F. 2d 673 (8th Cir. 1922). See also our interlocutory decision in *S. Klein Department Stores, Inc.* (D. 7891, November 18, 1960) which is directed solely to the nature of jurisdiction conferred by Section 5 of the Federal Trade Commission Act.

by the national distributor to the local wholesaler and by the local wholesaler to the retailer. Credits granted to wholesalers and retailers for unsold magazines are borne by the publishers. The publishers fix the date when the new issues of magazines will be distributed to retailers and the dates when unsold copies are picked up for credit. Neither the national distributor nor the local wholesaler has any control over the prices, terms and conditions of sale to retailers of the magazines they handle. These details are all determined by the publisher.

Respondents, themselves, apparently recognize the lack of authority of the local wholesaler, for all of their requests for payments or allowances were made to the publishers, either directly or through a national distributor. If made through a national distributor, it was understood that approval and payment of the requested allowance would come from the publisher.

In this situation we are not disposed to apply legal principles of the law of sales, contracts or agency to determine whether a customer-seller relationship exists between Union and the publishers. Where, as here, the seller fixes the prices, terms and conditions of sale and negotiates directly with a retailer, the relationship between them is that of customer-seller, irrespective of the fact that the goods, in their transit from seller to customer, pass through the hands of wholesalers. As we have stated:

> A retailer is none the less a purchaser because he buys indirectly if, as here, the manufacturer deals with him directly in promoting the sale of his products and exercises control over the terms upon which he buys.[4]

In none of the cases where a court has failed to find a seller-customer relationship has there been a showing of both price control and direct dealings. [5]

Thus, we conclude that Union is in fact the customer of the publishers which supply it with magazines. We hold also that there is a continuous and uninterrupted flow or stream of commerce from the publishers to Union's newsstands. The acts of respondents in soliciting and receiving payments or allowances from such suppliers were performed within said stream and were acts in "commerce" as that term is defined in the Federal Trade Commission Act.

Respondents do not deny that they induced and received payments of substantial sums from publishers. In the year 1958 monies received from this source totaled approximately $890,000. The man-

[4] In the matter of *Kraft-Phenix Cheese*, 25 F.T.C. 537, 546. See also *Elizabeth Arden Inc.* v. *Federal Trade Commission*, 156 F. 2d 132 (2d Cir. 1946).

[5] See e.g., *Klein* v. *The Lionel Corp.*, 138 F. Supp. 560 (D. Del. 1956), appeal denied 237 F. 2d 13 (3d Cir. 1956); *Baim & Blank, Inc.* v. *Philco Corp.*, 148 F. Supp. 541 (E.D.N.Y. 1957); *Skinner* v. *United States Steel Corp.*, 233 F. 2d 762 (5th Cir. 1956).

ner in which these payments were induced represents a classic example of the misuse of the economic power possessed by large buyers. For the most part, respondents did not bargain with or request payments from publisher suppliers but merely informed them that as of a certain date the publisher must make payments to Union at a rate specified by Union. A typical letter demanding payments reads in part:

Effective with the regular publications that go on sale after March 1, 1957, the promotional allowance rebate will be as follows:

2¢ for a 15¢ publication
3¢ " " 20¢ "
3¢ " " 25¢ "
5¢ " " 35¢ "
8¢ " " 50¢ "
10¢ " " 75¢ "

If the publishers refused to accede to the demands of respondents, its publications were dropped from all Union stands. For example, the circulation manager of Popular Mechanics refused respondents' demands in a letter which said in part:

> To us your demand is exorbitant and surprising. The allowance you are asking cannot be justified on a quantity basis inasmuch as the Union News Company stands have never made the sales for us that the management of American News regularly implied.

In a reply letter the vice president of Union informed this publisher:

> We are receiving a rebate of 6¢ per copy on all 35¢ publications and we cannot give you a cheaper rebate than any of the other publishers. Therefore, it will be necessary to discontinue handling this publication at our newsstands.

Respondents claim (1) that the payments they induced and received were price adjustments and not allowances for services rendered in connection with the publishers' magazines; (2) that they did not have knowledge that the payments were higher than those received by other retailers; (3) that the payments were induced in defense against the unlawfully fixed prices of the publishers; and (4) that even if proven in all respects, their acts did not violate Section 5 of the Federal Trade Commission Act.

In respondents' contention that the payments were price reductions and not promotional allowances, we find little merit. While it is true that in some cases respondents did not specifically agree to perform any services as consideration for the monies received, in other instances they did contract to afford publishers preferred display positions on Union newsstands. In many of their letters of

solicitation respondents' officials refer to the payments requested as "promotional allowances." The fact that respondents did not render promotional services to the full measure of the monies received, if anything, compounds the unfairness of their acts. [6]

We are not persuaded that respondents lacked knowledge that the payments induced and received were not afforded to competing retailers on proportionally equal terms. The record shows that not one retailer competing with Union received a payment or allowance from a publisher at a rate proportionally equal to that received by Union. There is direct evidence that publishers informed respondents of their regular promotional allowance rates which were considerably lower than the rates demanded and received by respondents. A buyer who induces a seller to depart from his customary pattern of allowances and grant a promotional payment two or three times greater than previously paid does so at his peril unless possessed of particular knowledge that the seller has granted like concessions to others similarly situated.

One of respondents' principal contentions in oral argument was that their demands on publishers were made defensively to offset the effects of an illegal vertical price fixing conspiracy which constricted respondents' magazine profit margin. The logical answer to this contention is that if such a conspiracy did exist it is no defense for respondents to engage in further unlawful activity in an attempt to offset or nullify the alleged trade restraining activities of the publishers. This principle as announced by the Supreme Court in the *Kiefer-Stewart* [7] case is to the effect that:

> * * * If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured. * * *

Obviously, respondents had legal processes available through which they could have challenged the alleged illegal actions of the publishers and the substitution of their actions for these legally established processes in no way immunizes them from proceedings by this Commission. Also, respondents apparently have overlooked the fact that the brunt and impact of their acts fall primarily on innocent

[6] The Senate Committee reporting on Section 2(d) said:

"Such an allowance becomes unjust when the service is not rendered as agreed and paid for, or when, if rendered, the payment is grossly in excess of its value, or when, in any case the customer is deriving from it equal benefit to his own business and is thus enabled to shift to his vendor substantial portions of his own advertising cost, while his smaller competitor, unable to command such allowances, cannot do so." S. Rep. No. 1502, 74th Cong., 2d Sess., p. 7, (1936).

[7] *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951).

third parties, and we would indeed be remiss to allow such acts to continue.

For the most part, newsstands are operated upon the premises of others under a lease granted by the owner of the premises. There is active competition for these locations between respondents and other operators of newsstands. Generally, when a location becomes available, the owner of the premises requests bids from newsstand operators and, of course, the operator able to bid the highest rental is allotted the location. Thus, it can be readily seen that the respondents' successful inducement of large payments from publishers greatly enhances their ability to outbid their competitors.

Union's great size in comparison with its newsstand operator competitors places it in a position of near dominance in the field.[8] Profit margins realized from the operation of newsstands are very small and the total newsstand sales of magazines has shown a substantial decline over the past ten years. On these facts it is patently obvious that to allow respondents to continue receiving large sums not received by their competitors would inevitably lead to the demise of the competitors and the attainment of a monopoly by respondents. This is too dear a price to pay as consideration for the doubtful benefits to be realized from a *laissez faire* approach to unlawful activity allegedly pursued for the purpose of combatting the alleged unlawful activity of others.

There remains for consideration respondents' contention that the knowing inducement and receipt of discriminatory promotional allowances is conduct outside the purview of the Federal Trade Commission Act. They argue that Congress by not including a sanction of such conduct in the Robinson-Patman Act must have intended to withhold it from condemnation. This same argument was made in the *Grand Union*[9] case, and since respondents' presentation of it contains nothing new, our opinion in that matter is dispositive of the issue.

The hearing examiner found, among other things, that respondents' unsuccessful attempts to induce discriminatory payments from suppliers are in themselves unfair methods of competition. There is little disagreement on the facts. The record evidence indicates that two large cigar manufacturers initiated a series of conferences

[8] In 1958 Union operated 930 newsstands. At approximately the same period its principal competitors were:

ABC Vending Corp.	57 newsstands
Commuter News Co., Inc.	16 newsstands
Schermerhorn Cigar Stores, Inc.	16 newsstands
Faber, Inc.	35 newsstands

[9] *The Grand Union Company,* Docket 6973, August 12, 1960.

for the purpose of requesting improved displays for their brands of cigars.[10] Respondents thereafter proposed that certain allowances be accorded them for promotional purposes, which request was refused, with both of the cigar companies advising that they did not accord promotional allowances to any of their customers for display purposes. Thereafter respondents discontinued or greatly curtailed their purchases of cigars from these companies.

A request for a promotional allowance does not necessarily constitute an inducement of a violation of Section 2(d). Respondents point out, quite correctly, we think, that the cigar manufacturers could have lawfully complied with their requests by simultaneously granting an allowance on proportionally equal terms to other retailers competing with Union. Union did not specify that the requested allowance must be granted to it alone. Thus, unless it can be inferred from the record facts that respondents were requesting preferred or discriminatory treatment, this charge of the complaint must fail. In our view the facts in evidence do not support counsel supporting the complaint's contention that respondents were seeking to induce a violation of Section 2(d). We do not, therefore, reach the issue of whether an attempt to induce preferred or discriminatory allowances or treatment would violate Section 5 of the Federal Trade Commission Act, but are confining our holdings here to the pleadings and the evidential facts of record. Accordingly we are granting respondents' appeal to this extent and that part of the hearing examiner's initial decision and proposed order dealing with and prohibiting respondents from attempting to induce discriminatory payments from their suppliers will be stricken. We feel that the public interest will be adequately served by an order prohibiting respondents from actually receiving discriminatory allowances from their suppliers, including cigar manufacturers.

From our examination of the record we conclude that respondents were accorded a fair hearing. An appropriate order to cease and desist, amended to conform with this opinion, will issue.

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[10] An official of one of the cigar companies testifying in support of the complaint described a typical meeting with Union as follows:

"A. We also at that conference talked about the display and sale of our brands. Mr. Van Brunt said, 'You know, Mr. Rynn, we get paid for display on our stands.' I said, 'Well, there is an exception to every rule. Our cigars are very good sellers. Perhaps you would like to give us a little break on the display.'

"He said, 'We will be glad to, if you pay for the display the same as the other manufacturers are doing.' I said, 'Do you mean to tell me, Mr. Van Brunt, that every cigar that is on display you are getting paid for?'

"His answer was, 'Yes, we are.' I said, 'Mr. Van Brunt, we cannot pay you for the display on our cigars. It is against company policy. Even if we wanted to, it is against company policy. We do not allow any display allowance to any chain or any of our distributors.'

"He said, 'Well, I guess things will have to stand the way they are.' That was about the end of the discussion."

Commissioner Mills did not participate in the decision herein for the reason he did not hear oral argument.

FINAL ORDER

This matter having been heard by the Commission upon the respondents' appeal from the initial decision of the hearing examiner and upon briefs filed in support of and in opposition to the appeal; and the Commission having rendered its decision denying in part and granting in part the appeal and having determined, for reasons stated in the accompanying opinion, that the initial decision should be modified:

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, modified by striking therefrom finding 14 headed "Attempted Coercion of Cigar Manufacturers" and paragraph numbered 3 under the heading "Conclusions"; and by substituting the following order for the order therein contained:

"*It is ordered*, That the respondents, The American News Company and The Union News Company, corporations, their officers, employees, agents or representatives, directly or through any corporate or other device, in or in connection with the purchase in commerce, as 'commerce' is defined in the Federal Trade Commission Act, of products for resale on newsstands operated by respondents, do forthwith cease and desist from:

"Inducing, receiving or contracting for the receipt of anything of value from any of their suppliers as compensation or in consideration for services or facilities furnished by or through respondents in connection with the processing, handling, sale or offering for sale of products purchased from any of their suppliers, when respondents know or should know that such compensation or consideration is not affirmatively offered or otherwise made available by such suppliers on proportionally equal terms to all of their other customers competing with respondents in the sale and distribution of such suppliers' products."

It is further ordered, That the initial decision, as so modified, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondents 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.

Commissioner Mills not participating for the reason he did not hear oral argument.

IN THE MATTER OF

J. FIDDELMAN & SON, INC., ET AL.

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

Docket 8043. Complaint, July 15, 1960—Decision, Jan. 10, 1961

Consent order requiring two affiliated New York City jewelry distributors to cease representing falsely in advertisements they furnished to jeweler-customers that jewelry offered for sale by said retailers consisted of respondents' overstocked merchandise, that its regular retail price was $300 or any other fictitious amount, and that it was offered for sale at one-half the usual price; and to cease attaching to their merchandise tags bearing fictitious amounts, represented thereby as the usual retail prices.

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 J. Fiddelman & Son, Inc., and Syndicate Diamonds, Inc., corporations, and Sidney Fiddelman and Donald H. Fiddelman, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents J. Fiddelman & Son, Inc., and Syndicate Diamonds, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York with their principal office and place of business located at 130 West 46th Street, in the City of New York, State of New York.

Respondents Sidney Fiddelman and Donald H. Fiddelman are officers of the corporate respondents. They formulate, direct and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents.

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

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other

States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business and for the purpose of inducing the sale of their jewelry by others, respondents have entered into promotions with respect to their said jewelry with jewelers located in various states and have provided said jewelers with various forms of advertising for use, and which has been used, in connection with such promotions, by some of said jewelers in newspapers.

Among and typical of the advertisements furnished by respondents to jewelers and used by them as aforesaid are the following:

Getz (a Cincinnati, Ohio, retail jeweler)
EXCLUSIVELY participate in a Great NATION-WIDE LIQUIDATION
$1,000,000 DIAMOND SALE
Over stocked Manufacturer enlists us among 75
Jewelers across the country to Liquidate Excess
Inventory at ½ off!

Among the various items offered were articles advertised as follows:

Your Choice
$149.95
Regularly
$300.00

PAR. 5. Through the use of the statements appearing in the aforesaid advertisements, respondents, directly or by implication represented:

1. That the jewelry purchased from respondents and sold by jewelers purchasing said merchandise, consisted of respondents' surplus or overstocked merchandise;

2. That $300.00 was the usual and customary retail price of the jewelers advertising said jewelry in the recent regular course of business;

3. That said jewelry was offered for sale by the advertising jewelers at one-half the price at which it was usually and customarily sold by said jewelers at retail in the recent regular course of business and that a savings of one-half was afforded to purchasers from the usual and customary retail price of said jewelers.

PAR. 6. The aforesaid statements and representations were false, misleading and deceptive. In truth and in fact:

1. The jewelry sold by repondents and purchased by jewelers did not consist of respondents' surplus or overstocked merchandise but was composed of items made up especially for said promotions.

2. Said jewelers had not sold the advertised jewelry at $300.00 or at any other price in the recent regular course of business.

3. Said jewelry offered for sale by the advertising jewelers was not at one-half the price at which it was usually and customarily sold by them in the recent regular course of business and if any saving was afforded to purchasers, it was substantially less than one-half from the usual and customary retail price of said jewelers.

PAR. 7. Respondents for the purpose of inducing the purchase of their jewelry, also engaged in the practice of using fictitious retail prices by attaching tickets or tags on which prices are printed, thereby representing, directly or by implication, that such prices are the usual and customary retail prices of said jewelry. In truth and in fact, said price figures are not the usual and customary retail prices at which said jewelry is sold at retail but are fictitious and greatly exaggerated prices.

PAR. 8. By engaging in the acts and practices set out in Paragraphs 4 and 7 hereof, respondents supply the means and instrumentalities through and by which retailers may mislead the purchasing public as to the nature of their jewelry, the usual and customary retail prices thereof, and the savings that are afforded to purchasers thereof.

PAR. 9. In the course and conduct of their business, at all times mentioned herein, respondents have been in substantial competition in commerce, with corporations, firms and individuals in the sale of jewelry of the same general kind and nature as that sold by respondents.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. DeWitt T. Puckett supporting the complaint.

Brozan and Holman by *Mr. Aaron Holman* of New York, N.Y. for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

On July 15, 1960 the Federal Trade Commission issued a complaint charging that the above-named respondents had violated the provisions of the Federal Trade Commission Act. The complaint alleged that respondents had made fictitious pricing and savings claims to promote the sale of the jewelry they distribute and sell.

After issuance and service of the complaint the respondents, their attorney, and counsel supporting the complaint entered into an agreement for a consent order. The agreement has been approved by the Director, Associate Director and the Assistant Director of the Bureau of Litigation. The agreement disposes of the matters complained about.

The pertinent provisions of said agreement are as follows: Respondents admit all jurisdictional facts; the complaint may be used in construing the terms of the order; the order shall have the same force and effect as if entered after a full hearing and the said agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission; the record herein shall consist solely of the complaint and the agreement; respondents waive the requirement that the decision must contain a statement of findings of fact and conclusions of law; respondents waive further procedural steps before the hearing examiner and the Commission, and the order may be altered, modified, or set aside in the manner provided by statute for other orders; respondents waive any right to challenge or contest the validity of the order entered in accordance with the agreement and the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

The undersigned hearing examiner having considered the agreement and proposed order, hereby accepts such agreement, makes the following jurisdictional findings, and issues the following order:

JURISDICTIONAL FINDINGS

1. Respondents J. Fiddelman & Sons, Inc., and Syndicate Diamonds, Inc. are corporations existing and doing business under and by virtue of the laws of the State of New York, with their office and principal place of business located at 130 West 46th Street, New York, New York.

2. Respondents Sidney Fiddelman and Donald H. Fiddelman are officers of the corporate respondents. Their address is the same as that of the corporate respondents.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents hereinabove named and the proceeding is in the public interest.

ORDER

It is ordered, That respondents J. Fiddelman & Son, Inc., and Syndicate Diamonds, Inc., corporations, and their officers, and Sidney Fiddelman and Donald H. Fiddelman, individually and as officers of said corporations, and their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of jewelry or any other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Furnishing advertising matter or any other means or instrumentality to others by and through which they may represent, directly or by implication:

(a) That the merchandise offered for sale by them is respondents' surplus or overstocked merchandise, unless such is the fact;

(b) That any amount is the usual and customary retail price of their merchandise when it is in excess of the price at which they have usually and customarily sold the merchandise in the recent and regular course of their business.

(c) That a saving is afforded to purchasers of their merchandise unless the price at which it is offered constitutes a reduction from the price at which they have usually and customarily sold the merchandise in the recent and regular course of business.

2. Preticketing merchandise sold to others for resale to the public which tickets set out prices which are in excess of the prices at which the merchandise is usually and customarily sold at retail.

3. Misrepresenting in any other manner the retail price of their merchandise or the amount of savings afforded to purchasers at retail from the usual and customary retail prices of their merchandise.

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 10th day of January, 1961, 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

CURTISS-WRIGHT CORPORATION

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

Docket 8072. Complaint, Aug. 9, 1960—Decision, Jan. 11, 1961

Order dismissing without prejudice—for the reason that respondent sold the part of its business concerned—complaint charging a manufacturer with making false soundproofing and noise control claims for its "Curon" accoustical wall covering.

Mr. John W. Brookfield, Jr., for the Commission.

Mr. Roger W. Mullin, Jr., of Wood-Ridge, N. J., and *Dewey, Ballantine, Bushby, Palmer & Wood*, of New York, N. Y., for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

Respondent has moved for dismissal of the complaint on the ground that the case is moot by reason of the fact that respondent has sold the entire division of its business to which the complaint relates.

It is clear from the motion and supporting papers not only that respondent is no longer engaged in the manufacture or sale of the products which form the subject matter of the proceeding, but also that respondent has bound itself not to engage in the manufacture or sale of any similar products for a period of five years.

Respondent's motion is not opposed by Commission counsel, although counsel does express the opinion that if the complaint is dismissed the dismissal should be without prejudice to the right of the Commission to take any further action in the matter in the future which may be warranted.

It is apparent that in the present circumstances no useful purpose would be served by proceeding further with the case. The dismissal should, however, be without prejudice.

ORDER

It is therefore ordered. That the complaint be, and it hereby is, dismissed, without prejudice to the right of the Commission to take any further action in the matter in the future which may be warranted by the then existing circumstances.

DECISION OF THE COMMISSION

The Commission having considered the hearing examiner's initial decision, filed November 23, 1960, wherein the complaint was dismissed without prejudice in response to a motion to dismiss theretofore filed by the respondent; and

It appearing that the basis for such action was the showing made in the motion and supporting papers that the respondent, prior to the issuance of the complaint, had entered into a contract for the sale of that part of its business relating to the manufacture and sale of the products with which this proceeding is concerned; and

The Commission being of the opinion that in the circumstances disclosed, dismissal of the complaint without prejudice is appropriate, but that the record does not support the examiner's unqualified statement that the respondent "is no longer engaged in the manufacture or sale of the products which form the subject matter of the proceeding"; and, accordingly;

It is ordered, That the initial decision be, and it hereby is, modified by striking therefrom the second paragraph and substituting the following:

"According to the motion and supporting papers, respondent, on August 23, 1960, entered into a contract with Reeves Brothers, Inc., a New York corporation, whereby respondent agreed to sell and Reeves Brothers, Inc., agreed to buy that part of respondent's busines having to do with the development, manufacture and sale of certain polyurethane products, including the wall covering product designated "Curon." As of October 27, 1960, the date of respondent's motion, the terms of the contract had not been completely executed, but the contemplated transfers of machinery, inventories, trademarks, trade names and personnel apparently were being made in orderly sequence, and it seems clear that following the sale respondent will have neither the machinery nor the technically qualified personnel to engage in any of the acts or practices complained of in the complaint. In addition, respondent has agreed in the contract not to engage in the United States or Canada in the business of

manufacturing, processing or selling any polyurethane products or any flexible foam developed by it for a period of five years."

It is further ordered, That the initial decision, as so modified, shall, on the 11th day of January, 1961, become the decision of the Commission.

IN THE MATTER OF

SAMUEL A. CANNON ET AL. DOING BUSINESS AS NATIONAL EMPLOYMENT INFORMATION SERVICE

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

Docket 7339. Complaint, Dec. 19, 1958—Decision, Jan. 12, 1961

Order requiring two individuals in Newark, N. J., engaged in selling publications concerning employment opportunities for which they charged $3.00, to cease advertising falsely—in magazines and newspapers, under "Help Wanted" and "Job Opportunities" columns, or otherwise or in follow-up circulars sent in answer to requests for the "free information" offered—that numerous jobs were available in the various occupations set out, both in the U.S. and in foreign countries; that they had knowledge of such jobs; that purchasers of their publications who applied for a job on any of the projects listed therein, could expect to obtain employment; and that information respecting employment opportunities was furnished free.

Mr. Garland S. Ferguson for the Commission.
Brodsky & Cuddy, of Washington, D. C., for respondents.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

This matter is before the hearing examiner for consideration of the complaint, answer thereto, the evidence and proposed findings as to the facts and conclusions presented by counsel. The findings of fact and conclusions of law proposed by the parties, not hereinafter specifically found or concluded, are herewith rejected. The hearing examiner having considered the record herein, makes the following findings of fact and conclusions.

When the Commission issued its complaint herein the respondents Samuel A. Cannon and Geraldine Cannon, individuals, were trading and doing business as National Employment Information Service, and their office and place of business was located at 1020 Broad Street, Newark, New Jersey. Shortly after the issuance of the complaint the respondents incorporated their business under the laws of

the State of New Jersey and since said time they have operated the business from the same location. The respondents are the owners of all of the stock, are the officers and direct and control all of the activities and policies of said corporation.

Respondents are now, and since approximately 1952 have been, engaged in the business of selling and distributing publications designated as "Job and Opportunity Digest" and "Project Listings" which contain information concerning alleged employment opportunities in foreign countries and in the United States.

Respondents have done, and are doing, business on a nation-wide scale and have caused the said publications, when sold, to be transmitted from the State of New Jersey to purchasers residing in other states of the United States, and have maintained a course of trade in said publications in commerce, as "commerce" is defined in the Federal Trade Commission Act. Their volume of trade in said commerce is, and has been, substantial.

To obtain leads to prospective purchasers of their publications, the respondents place advertisements in approximately 100 magazines and about 250 newspapers published and circularized in the various states of the United States. Among and typical of said advertisements which appeared under classified columns "Help Wanted", "Help Wanted Reports", "Job Opportunities", "Employment Opportunities" and "Male Help Special" are the following:

HIGH PAYING JOBS: Foreign, U.S.A. All trades. Travel paid. Information. Application forms write Dept 21N National, 1020 Broad Street, Newark, N. J.

FREE Information. Earn high pay. All trades. Foreign and U.S.A. Job Opportunities. Travel paid. Applications. Write Dept. 61L. National employment. Information 1020 Broad Street, Newark, N. J.

JOBS Earn High Pay Men-Women All Trades. Work in South America, the Islands, Europe, Canada, or other foreign countries. Also U.S.A. Mechanics, Truck Drivers, Laborers, Office Workers, Engineers, etc. Companies pay fare if hired. Many benefits. Tax free earnings. Make and save a fortune! Applications forms for FREE information. Write Dept. 67H

National Employment Information
1020 Broad St., Newark, New Jersey.

The respondents discontinued the practice of using the words "free information" in its advertisements approximately one year before the issuance of the complaint herein, but there is no assurance that there would be a permanent discontinuance.

The ads give the impression that an offer of employment is being made and that companies are seeking employees to work on projects in the United States and foreign countries.

Persons answering the advertisements receive from the respondents a form letter signed by S. A. Cannon, Director of Personnel which reads:

NATIONAL EMPLOYMENT INFORMATION SERVICE
1020 Broad Street, Newark, N. J., U.S.A.

Dear Friend:

We wish to acknowledge receipt of your request for information concerning employment opportunities in the U. S. A. as well as foreign countries overseas.

Each day *hundreds* of *opportunities* in most job classifications arise. There are many people, such as yourself, who, with proper information, could be started on the way to success.

Lack of knowledge of where . . . how . . . and when . . . may be the only obstacle in their path.

The information which we can furnish you will enable you to contact hundreds of privately owned American and foreign corporations *employing thousands* of personnel in good positions *in all parts of the world.* The United States Government also has many opportunities for employment in its various departments both inside and outside the United States.

It is of the utmost importance that all persons desiring or planning to work in foreign countries, whether for a short or extended period, have all the vital facts covering foreign employment. One must know where job opportunities exist and have such information as the *proper procedures* for applying for employment . . . *whom* to contact . . . *how* to do so . . . rate of *pay* . . . and *living accomodations.*

Because we recognize the great need for employment information, NATIONAL EMPLOYMENT INFORMATION SERVICE has found it necessary to publish the JOB and OPPORTUNITY DIGEST. This has been done in order to fulfill the great need for information and guidance by qualified personnel who are seeking jobs.

The research staff of the NATIONAL EMPLOYMENT INFORMATION SERVICE is constantly engaged in assembling data and helpful information to assist men and women who are *seeking* remunerative *employment* in all fields *in all parts of the world.*

The NATIONAL EMPLOYMENT INFORMATION SERVICE collects no placement fees or charges after you receive our information or if you obtain any job through information which we supply. We do not function as an employment agency. *All* the *valuable information* and *know-how* resulting from our extensive research . . . all procedures . . . all the pertinent *facts* which *you need* to *assist you* are contained in the latest copyrighted JOB and OPPORTUNITY DIGEST . . . plus the world-wide PROJECT LISTINGS and APPLICATION FORMS, which are available to you complete for the low fee of $3.00.

For your convenience, we are enclosing an order form and self-addressed envelope. Please print your name and address on the order form and mail it to us together with your remittance of $3.00 (or $4.00 if you wish it rushed to

you by airmail). We guarantee delivery of our complete and informative JOB and OPPORTUNITY DIGEST, together with our latest listings of projects started and to be started . . . These will be RUSHED to you the same day we receive your order . . . APPLICATION FORMS which you may submit directly to the firms and organizations on the project listings will be included.
The prompt filing of these application forms may result in your securing a job for which you are qualfied but of whose existence you are not aware. We trust that we will be able to *assist you* and *serve you* through our specialized employment information service.

Very truly yours,
NATIONAL EMPLOYMENT INFORMATION SERVICE
S. A. Cannon
Director of Personnel
(Please see other side for important information)

On the back page of the letter there is printed under the heading "Benefits Generally Existent for Men and Women Employed Overseas" the following statements:

HIGHER SALARIES AND WAGES: Qualified workers can earn substantial salaries on many overseas projects. Numerous projects allow their personnel to work overtime at time and a half pay after forty hours per week. Opportunities constantly arise for qualified employees such as engineers, superintendents and craftsman and many others to greatly increase their earning capacity by working overseas.

MEDICAL CARE: Furnished by employer at no cost to employee.

HOUSING: Board and lodging furnished at no cost to employee on many projects. On others, living accommodations furnished at minimum cost by company.

FAMILY ACCOMMODATIONS: At many overseas projects, family accommodations are available. Living costs are usually low, servants easily and cheaply obtained.

TRANSPORTATION: Paid by employer from point of hire to jobsite. Return transportation paid by employer, if you complete your contract.

TRAVEL PAY: You get paid while traveling, usually on an eight-hour-per-day basis.

INCOME TAX: The government allows exemptions under the "foreign residence" rule or "presence in a foreign country" rule. This is fully explained in the "JOB and OPPORTUNITY DIGEST".

ADVANCEMENT: Usually very good opportunities for advancement.

VACATION AND BONUS: Paid vacations. Generous bonuses paid by several companies upon completion of contract.

TRAVEL AND ADVENTURE: The thrill of being in fascinating, exotic, and exciting places and seeing the things you only dreamed about before.

A person who places his order with the respondents, accompanied by a remittance of $3.00 or $4.00, is sent a "Job and Opportunity Digest", a "Project Listings", and application forms which might be used to send to the firms set forth in the listing.

The "Job and Opportunity Digest" is a 28-page handbook and the title in the table of contents found therein is descriptive of the information contained. It reads:

TABLE OF CONTENTS

The "Project Listings", offered and received in evidence, is a 12-page booklet containing a list of firms to whom contracts have been awarded, and the type of work being done by each firm.

The purchaser does not receive any information of anyone who is offering any employment or the names of any companies who are seeking employees to work on projects in the United States or foreign countries. In the foreword of "Job and Opportunity Digest"

he reads: "National Employment Information Service IS NOT AN EMPLOYMENT AGENCY AND HAS NO CONNECTION WHATSOEVER WITH ANY OF THE FIRMS OR ORGANIZATIONS HEREIN LISTED."

By the use of the statements appearing in the aforesaid advertisements and letters sent to prospective purchasers, respondents represented, directly or by implication:

1. That numerous jobs are available in the various occupations set out in their advertisements and literature, both in the United States and in foreign countries.

2. That respondents have knowledge of available jobs in the various occupations set out in their advertisements and literature.

3. That information respecting employment opportunities is furnished free to persons requiring such information.

The aforesaid statements, representations, and implications arising therefrom were, and are, false, misleading and deceptive. In truth and in fact:

1. Jobs are seldom available in any occupation, either in the United States or in foreign countries, listed in respondents' advertisements and literature.

2. Respondents have no knowledge whatsoever of any job that may be available on any project.

3. There is no information concerning employment opportunities in the letter or literature which is sent free to those who request it. The information which purports to relate to such opportunities is set out in the publications for which a charge of $3.00 or $4.00 is made.

The use by respondents of the foregoing false and misleading statements, representations and implications, has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the public into the mistaken and erroneous belief that said statements, representations and implications were, and are, true and to induce the purchase of their publications because of such mistaken and erroneous belief.

The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitutes, unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Samuel A. Cannon and Geraldine Cannon, individually and trading and doing business as National

Employment Information Service, or trading under any other name, their agents, representatives or employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of their publications, "Job and Opportunity Digest" and "Project Listings", or any similar publication, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication:

1. That are jobs available in the various occupations set out in their advertisements and literature.

2. That they have knowledge of available jobs in the various occupations set out in their advertisements and literature.

3. That information respecting employment opportunities is furnished free to persons requesting such information.

B. Using any advertisement which does not clearly and conspicuously disclose:

1. That respondents do not operate an employment agency.

2. That respondents are not offering employment.

C. Placing any advertisement for the publications in "Help Wanted", "Job Opportunities", or similar columns in newspapers or periodicals.

OPINION OF THE COMMISSION

By SECREST, *Commissioner:*

The complaint in this matter charges respondents with violation of Section 5 of the Federal Trade Commission Act. The hearing examiner in his initial decision held that the allegations of the complaint were sustained by the evidence and ordered respondents to cease and desist from the practices found to be unlawful. Respondent has appealed from this decision.

Respondents are engaged in the sale of publications which relate to the hiring of personnel by private concerns and the United States Government for overseas and domestic employment. Included in their literature is a publication entitled "Project Listings", which purports to set out various construction and development projects which have been undertaken in this country and abroad, together with names of the firms engaged in working on such projects.

In substance the complaint alleges that respondents, in order to induce the purchase of their publications, have falsely and deceptively represented that numerous jobs in various occupations are available on the listed projects, that they have knowledge of available jobs on such projects, that persons who purchase their publications and apply for jobs on the listed projects can expect to obtain

employment, and that information respecting employment opportunities is furnished free to persons requesting such information.

We will consider first respondents' arguments that they did not represent that jobs were available on the various projects listed in the aforementioned publication or that they had knowledge of available jobs. In contacting prospective job seekers respondents placed advertisements of the following type in numerous magazines and newspapers:

> High Paying Jobs: Foreign, U.S.A. All trades. Travel paid. Information. Application forms write Dept 21N National, 1020 Broad Street, Newark, N.J.

> Jobs . . . Earn High Pay . . . Men-Women . . . All Trades . . . Work in South America, the Islands, Europe, Canada or other foreign countries. Also U.S.A. Mechanics, truck drivers, laborers. office workers, engineers, etc. Companies pay fare if hired. Many benefits. Tax free earnings. Make and save a fortune. Application forms.
>
> For free information write Department 202 National Employment Information, 1020 Broad Street, Newark, New Jersey.

In some instances these advertisements appeared in classified columns under such headings as "Help Wanted" and "Job Opportunities."

We think it clear from our own reading of these advertisements that respondents have not only represented that numerous jobs are available and that they possess information concerning jobs which would be of material assistance to a person seeking employment but that they are in some way connected with firms that are seeking employees or are themselves offering employment. The record discloses that the contact advertising created similar impressions in the minds of various witnesses who had purchased respondents' publications.

A form letter sent by respondents to persons answering the aforementioned advertising refers to "hundreds of opportunities" which arise in most job classifications every day and points out that lack of knowledge of where, how and when to take advantage of these opportunities may be the only obstacle in the path of the job seeker. The letter also notifies the reader that all of the required information, particularly with respect to employment on projects in foreign countries, is set forth in respondents' publications "Job & Opportunity Digest," "Project Listings" and "Application Forms." Except for the statement that respondents "do not function as an employment agency", which appears in the text thereof, the letter serves to enhance rather than correct the misconceptions created by the contact advertising.

The next question raised by the appeal is whether numerous job opportunities as advertised by respondents are in fact available to purchasers of respondents' publications. The evidence on this point includes the testimony of job seekers concerning their unsuccessful attempts to obtain employment with companies listed in respondents' literature and the testimony of representatives of these companies concerning the policies of the companies with respect to the hiring of employees. It appears from this testimony that it is virtually impossible for a nonskilled or semiskilled worker to obtain employment on an overseas project and that workers of this type needed for construction projects in the United States are hired locally at the site of the construction. It further appears that for the most part the companies ordinarily use their own skilled employees on both foreign and domestic projects. Publications prepared by the Chamber of Commerce of the United States and the United States Department of Commerce, which were introduced into evidence by respondents, also emphasize the difficulty encountered by both skilled and nonskilled workers in obtaining employment abroad. We are of the opinion, therefore, that the evidence clearly supports the allegation that respondents have falsely represented that numerous jobs are available on the various projects listed in their publications.

Respondents also take exception to the hearing examiner's ruling that they had not abandoned the practice of falsely representing that information respecting employment opportunities would be furnished free to persons requesting such information. They contend in this connection that their practice of using the words "free information" in advertising had been discontinued two or three years prior to the issuance of the complaint, not "approximately one year" as stated in the initial decision. We find no error in the hearing examiner's finding on this point nor in his ruling that there was no assurance that the practice would not be resumed.

The contention is also made by respondents that the initial decision does not comply with §3.21(b) of the Commission's Rules of Practice in that it does not contain the reasons or basis for the hearing examiner's conclusions. It is noted in this connection that the hearing examiner has failed to set forth the evidentiary basis for his conclusion that the representations made by respondents are misleading and deceptive. Moreover, certain of the conclusions which he has reached are not entirely accurate. We will therefore modify the initial decision by striking therefrom certain of the conclusions and substituting therefor our own findings and conclusions.

Respondents also object to the order to cease and desist contained in the initial decision, contending that it is unduly drastic and

not in the public interest. While we do not agree with the argument made by respondents we believe that the order should be modified for other reasons. Paragraph (B) of the order would require respondents to disclose in their advertisements that they do not operate an employment agency and that they are not offering employment. The complaint, however, does not allege that an affirmative disclosure of the type required by Paragraph (B) is necessary to prevent deception nor has any showing been made that respondents' publications cannot be advertised truthfully and nondeceptively without such disclosure.

The complaint does allege, however, and the record shows that respondents have falsely and deceptively represented that they have knowledge of available jobs and that persons purchasing their publications can expect to obtain employment. In view thereof, any order to be fully effective should prohibit respondents from using representations which create these erroneous impressions, including representations which may lead the reader to believe that respondents are offering employment or are operating an employment agency.

Respondents' appeal is denied and the initial decision, modified to conform with this opinion, will be adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and directing modification of the decision:

It is ordered, That the initial decision be modified by striking therefrom the conclusions beginning on page 7 with the words "The purchaser does not receive" and ending on page 8 with the words "for which a charge of $3.00 or $4.00 is made" and substituting therefor the following:

Respondents have represented directly and by implication through use of their contact advertising and form letter that numerous jobs in various occupations are available, that they have knowledge of available jobs, that persons who purchase their publications and apply for jobs on projects listed therein can expect to obtain employment, and that information respecting employment opportunities is furnished free to persons requesting such information.

Representatives of five companies engaged in projects listed in respondents' publication "Project Listings" testified that their firms do not hire nonskilled or semiskilled workers in the United States

for projects located in foreign countries and that employees of this type needed for construction projects in this country are hired locally at the site of the construction. They also testified that these firms ordinarily use their own skilled employees on projects in the United States and in foreign countries. Persons who had purchased respondents' publications testified that they had made numerous attempts to obtain employment with companies listed in respondents' publication "Project Listings" but had been unsuccessful. Publications prepared by the Chamber of Commerce of the United States and the United States Department of Commerce emphasize the difficulty encountered by persons seeking employment with American firms in foreign countries and explain why such employment is difficult to obtain. One of the respondents admitted that her firm did not know of any specific jobs which were available on the various projects listed in the aforementioned publication and that the firm did not have any contact with the companies engaged in these projects. The testimony of this respondent also discloses that respondents do not know of specific jobs which are available with any company.

It appears from the foregoing evidence that workers for the various projects listed by respondents are for the most part hired locally, both in this country and abroad. Such jobs therefore would ordinarily not be available to the reader of respondents' advertising unless he happened to reside at the site of the project. Most of the projects listed are located outside of the United States or in Alaska or Hawaii. Consequently, it is most unlikely that a person can obtain employment by purchasing respondent's publications and making application for a job on any of the various projects listed therein. Respondents have no knowledge of any job that may be available on such projects or of any other available job. Respondents do not furnish free information respecting employment opportunities to persons requesting such information.

It is further ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision:

It is ordered, That respondents Samuel A. Cannon and Geraldine Cannon, individually and trading and doing business as National Employment Information Service, or trading under any other name, their agents, representatives or employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of their publications, "Job and Opportunity

Digest" and "Project Listings", or any similar publication, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing directly or by implication:

1. That they have knowledge of available jobs in any occupation or that numerous jobs are available on the projects listed in said publications.

2. That persons answering respondents' advertising or purchasing said publications may expect to obtain employment.

3. That information respecting employment opportunities is furnished free to persons requesting such information.

B. Placing any advertisement in "Help Wanted", "Job Opportunities", or similar columns in newspapers or periodicals, or representing in any manner that they are offering employment or are operating an employment agency.

It is further ordered, That the initial decision of the hearing examiner, as so modified, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents 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

ARNOLD CONSTABLE CORPORATION

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

Docket 7657. Complaint, Nov. 16, 1959—Decision, Jan. 12, 1961

Order requiring the operator of specialty stores in New York City and suburbs to cease making, in newspaper advertising, deceptive pricing and savings claims for its merchandise, such as use of the abbreviation "Reg." preceding a price figure for which they had never sold the ladies' luggage advertised, and representing a fictitious figure as "customary retail value" for cashmere coats copied from more expensive coats and specially made for the sale from fabrics which were "seconds".

Charles W. O'Connell, Esq., supporting the complaint.

Melvin D. Kraft, Esq., of *Klein and Opton* of New York, N.Y., for respondent.

681-237—63——5

Initial Decision by Leon R. Gross, Hearing Examiner

PRELIMINARY STATEMENTS

The Federal Trade Commission filed its complaint in this proceeding on November 16, 1959, in accordance with authority vested in it by the Federal Trade Commission Act, and therein charged the respondent, Arnold Constable Corporation, a Delaware corporation, doing business under the name of Arnold Constable, with promulgating false and misleading advertisements for ladies' luggage and ladies' cashmere coats, which respondent sold in "commerce" as that term is defined in and understood in relation to the Federal Trade Commission Act. A prehearing conference was held on December 18, 1959. Respondent's answer was filed on January 19, 1960. Hearings were conducted on February 8, 1960, in New York, New York, and on March 10, 1960, in New York, New York. The transcript contains 349 pages. Forty (40) exhibits were offered by counsel supporting the complaint, and exhibits through 18A were offered by respondent. At the conclusion of the hearing on March 10, 1960, respondent requested and was given leave to file a motion to dismiss the proceeding for failure of the evidence to prove the legally essential allegations of the complaint. The hearing examiner held that a ruling on this motion would, under Rule 3.8(e) of this Commission's Rules of Practice for Adjudicative Proceedings, necessitate an evaluation of all of the evidence in the record, and the examiner, therefore, ordered the parties to file proposed findings, conclusions, and order. By May 27, 1960, such findings were filed, and on June 15, 1960, an order was entered closing the hearing record.

The hearing examiner finds that counsel supporting the complaint has proven the legally essential allegations of the complaint by preponderant, reliable, probative, and substantial evidence in the record, and an order is herein entered granting to counsel supporting the complaint the relief which he has requested.

Findings requested by counsel which are not specifically adopted and incorporated herein are rejected and refused. The fact that the examiner has not incorporated in this initial decision, nor rejected, nor dismissed specifically, evidence which is in the record, should not be construed as indicating that such evidence has not been fully considered by the hearing examiner in preparing this initial decision. It indicates merely that the evidence which the examiner has specifically incorporated in his findings of fact is sufficiently relevant, preponderant, reliable, probative, and substantial for a proper adjudication of the issues presented by this record.

Respondent's motion of April 11, 1960, to dismiss the complaint after the close of the hearing is hereby overruled and denied.

The hearing examiner makes the following

FINDINGS OF FACT

Respondent, Arnold Constable Corporation, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at Fifth Avenue and Fortieth Street in New York, New York. It does business under the name of Arnold Constable. Respondent is now and has for some time last past been engaged in advertising, offering for sale, selling and distributing merchandise in interstate commerce, which merchandise consists, among other things, of ladies' luggage and cashmere coats. In the course and conduct of its business, the respondent now causes, and for some time last past has caused, its products, when sold, to be shipped from its place of business in the State of New York to purchasers thereof located in various other states of the United States. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in its said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding and this proceeding is in the public interest.

The Ladies' Luggage:

On July 20, August 13, and August 20, 1958, respondent ran newspaper advertisements in New York City daily newspapers, of which Commission's exhibit 1 (CX 1) is a sample, for the purpose of publicizing a special sale of ladies' light weight vinyl-covered nesting luggage at a price of $11.00 per unit, "regardless of size". This luggage was specially manufactured for the sale by Reliable Luggage Company of West Pittsburg, Pennsylvania.

Respondent's merchandise manager visited Reliable's plant in early 1958, and, after examining samples of Reliable's merchandise, and discussing its quality and price said, "Sam, this is a special occasion. I have got to have something different," referring to the ladies' luggage promotion which respondent was then planning. Respondent's representative requested Reliable to make up its regular 6600 "Travel Joy" line of luggage at a special price, but Reliable replied that it could not cut the price of its regular line in fairness to its other customers, who purchased and sold the 6600 line in New York City and throughout the country. Reliable finally agreed to

"copy" the line, with some changes, and to "work close" and "cut corners" as much as it could.

As a result the luggage which Reliable made up for respondent's luggage sale was not the same luggage which Reliable had previously sold to respondent and which respondent had been selling under the name "Travel Joy". The linings, bindings, locks, and handles were different from the regular 6600 series which respondent had previously sold under the name "Travel Joy". Reliable's unit price to respondent for the specially constructed luggage was $6.30. Respondent sold between 1,300 and 1,400 pieces of the luggage at $11.00 per unit, and its witnesses testified that not a single customer had complained about the luggage.

Respondent advertised the specially constructed luggage for sale as follows (see CX 1):

in time for back-to-school
NESTING LUGGAGE by Travel Joy
(regardless of size!) $11.00
(in advertisement here appeared
illustrations of the different
types of luggage)

21"Overnight case reg. $16.50 — 24" Jr. Pullman reg. 18.50
Train cases reg. 17.50 — 26" Pullman reg. 22.50
29" Oversize Pullman reg. 29.50

The words "reg. 16.50, reg. 18.50, reg. 17.50, reg. 22.50 and reg. 29.50" in CX 1 were calculated by respondent to convey the impression to the buying public, and did so convey the impression, that the identical luggage had previously been regularly sold by respondent at the prices indicated in CX 1. The identical luggage, constructed as it was, and manufactured as it was, had never before been sold by respondent. Respondent's direct or implied representation that the identical luggage had previously been sold at the prices indicated was false, misleading and deceptive. In the context of this proceeding respondent's representations in CX 1 are proscribed by, and are false, misleading and deceptive under the Federal Trade Commission Act proscriptions.

Ladies' Cashmere Coats:

Sometime prior to the fall of 1958, respondent decided to embark on a growth program for its Town and Country Shop for the approaching season. Accordingly, it began to shop the market for ladies' cashmere coats for sale at a low price. It selected for this sale ladies' cashmere coats manufactured by the firm of Bernard Drobes of New York, New York.

Bernard Drobes who testified concerning the coats and handled the transaction with respondent appeared to be a hard working, cons-

cientious and honorable businessman. In conducting his business he and his brother eliminate, or materially reduce, many over-head costs which their competitors have. This includes substantial reductions in the cost of styling, cutting, finishing and delivery, among others, and administrative expenses, as well. It also includes using "seconds" in fabrics. This permits Drobes to undersell his competitors. In making the cashmere coats for respondent, Drobes "copied" more expensive coats manufactured by his competitors. He styled the coats personally. By holding his out of pocket costs to approximately $32.00, and cutting his profit to a minimum, Drobes sold the coats to respondent for $39.75 In some instances he received as much as $47.75.

Respondent advertised the coats as a $119.00 value and sold approximately 1,000 of them for $58.00.

These ladies' cashmere coats, even as the luggage, were specially made up by Drobes for respondent to enable respondent to resell the coats at an attractively low price.

Respondent ran a series of seven advertisements in October and November, 1958, in the New York City daily newspapers as follows (CX 2):

Pure cashmere coats $58.00 value 119.00
Milium lined
imported Chinese cashmeres
famous name cashmeres

The trade territory in this case was and is included in a fifteen mile radius from respondent's store at Fifth Avenue and Fortieth Street, New York, New York.

The chief issue of fact with reference to the ladies' coats is whether respondent's representation in its advertisements that these were $119.00 values was false, misleading and deceptive. The examiner finds that such type of representations in respondent's advertisement was and would continue to be false, misleading and deceptive, and proscribed by the Federal Trade Commission Act and decisions interpretive of the Act.

The only evidence contrary to this conclusion is that of respondent's own witnesses who testified that the coats compared favorably with more expensive coats being sold by respondent's competitors.

Even though this were true, which it is not, the testimony of Jack L. Plavnick, general manager of Ash's Inc., Bronx, New York, which is in the retail market area served by respondent was that Ash's purchased similar cashmere coats from Drobes in the fall of 1958, at a wholesale price of $47.74 and sold them in that same season for around $80.00. Philip Brous, downstairs buyer for Bloomingdale

Brothers, New York, New York, testified that his store bought 13 coats from Drobes and Company at about the same time at a wholesale cost of $64.75. Those coats had a mink collar, estimated to cost $25.00, making the cost of the coat without the mink collar $39.75. The coat with the mink collar was offered for sale by Bloomingdale for $78.00. Mr. Brous stated that the coat would have retailed without the mink collar for about $69.95, with the store's normal retail mark up of forty per cent of the retail price.

The normal retail mark up generally in the New York City trade area involved in this proceeding on ladies' coats, such as here involved was and is approximately forty per cent on the selling price.

Seymour Flesser, manager of the ladies' coat department for Saks' 34th Street, New York, New York, in respondent's general retail sales area, examined copies [1] of the Drobes coat at the hearing and testified that in his opinion RX 15 would retail for around $70.00 and RX 16 would retail between $60.00 and $65.00 (tr. 329). Herbert Wolf, ladies' coat buyer for Stern Brothers, a New York City department store, in respondent's general retail sales area, examined RX 15 and RX 16 at the hearing and testified that in his opinion, the coat, RX 15 would sell at retail for not more than $69.00-$79.00, and RX 16 would sell for not more than $69.00. (tr. 315).

The retail price of ladies' cashmere coats in the New York City trade area served by respondent, including coats purchased from Drobes was approximately the same at the time of the hearing as at the time of the respondent's sale under the challenged advertisement, CX 2.

In addition to the testimony of Messrs. Plavnick, Brous, Wolf and Flesser, the testimony of Bernard Drobes, who made the coats, was that the coats which he sold to respondent would retail in the New York trade area of respondent at the time of CX 2 for $88.00. (tr. 90, 91, 92).

The dominant item of cost in the manufacture of these coats was the cost of the cashmere. One of the principal reasons why the Drobes firm was able to make up the coats to sell at such a low price was because Drobes used "seconds" in cashmere fabrics.

Respondent's representations that the coats had a retail market value of $119.00 in that market area, at the time of the advertisement, was false, misleading and deceptive. The testimony of Eric Ullman who is an admitted expert in the field of textiles, was not particularly pertinent to the basic issue: the Drobes coat's retail value at the time of CX 2.

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[1] These coats, RX 15 and RX 16, had been made up especially for the hearing by Drobes, at the request of respondent, in order to approximate or typify the coats actually sold by means of the challenged advertisement, CX 2.

The testimony of Herman Schulman, production manager of Country Tweeds, 250 West 39th Street, New York, New York, whose company makes a ladies' cashmere coat which sells at considerably more, although interesting, did not bear directly on the retail value of the Drobes coat. One of the Country Tweeds coats was in evidence and Mr. Schulman testified that the Country Tweeds garment involved much more labor costs; had a hand made bottom; that the hems were done by hand; the linings were put in by hand; and the coat had more yardage of material and "a larger sweep in the coat".

Respondent sold approximately 1,000 of the Drobes coats for $58.00 and testified that it had received no complaints from any customers concerning said coats.

In the conduct of its business, the respondent at all times pertinent to the issues in this proceeding, was and is in substantial competition in commerce with corporations, firms, and individuals in the sale of merchandise which includes luggage and ladies' cashmere coats of the same general kind and character as those which respondent sold by means of the challenged advertisements, CX 1 and CX 2.

Respondent was and is engaged in interstate commerce as that term is understod and defined in the Federal Trade Commission Act and decisions interpretative of the Act. Substantial commerce in ladies' luggage and cashmere coats was affected by the respondent's deceptive advertisements: between 1,300 and 1,400 pieces of ladies' luggage, and approximately 1,000 ladies' cashmere coats were sold.

The use by the respondent of the false, misleading, and deceptive statements, typified in CX 1 and CX 2 has had, now has, and will have the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements were and are true, and, as a result thereof, to induce the purchase of substantial quantities of respondent's merchandise by reason thereof. As a consequence, substantial trade in commerce has been, and will be, unfairly diverted to respondent from its competitors unless said advertising practices are prohibited by order of this Commission.

The Federal Trade Commission Act prohibits the false and deceptive advertising which respondent employed to sell the luggage and ladies' cashmere coats in the instant proceeding.

Substantial injury has been and will continue to be done to respondent's competition, in commerce, unless respondent's said false and misleading advertising typified by CX 1 and CX 2 are proscribed and prohibited.

RESPONDENT'S ALLEGED ABANDONMENT OF THE CHALLENGED PRACTICES

The luggage advertisement ran on three dates in 1958, the last of which was August 20, 1958, and had not been repeated up to the time that this record was closed. The cashmere coat advertisement ran for a few dates in October and November, 1958, the last of which was November 28, 1958. The coat advertisement had not been repeated since. The cessation of the advertisements on November 28, 1958, was not related to the commencement of the instant proceeding.

However, respondent changed the coats' declared value from $119.00 to $99.00 after a Commission representative called upon him. Although respondent has not repeated the precise luggage and cashmere coat advertisements represented by CX 1 and CX 2, this record does not justify a finding that the particular advertising practice will not be resumed or used again by respondent.

There is no convincing proof in the record that the form of deception practiced by means of CX 1 and CX 2 will not hereafter be repeated. Testimony that some official of respondent made respondent's employees conscious of the Federal Trade Commission's *Guides Against Deceptive Pricing* falls far short of the proof required to support a dismissal under the rationale *Sheffield Merchandise Inc., et al.*, Docket No. 6627, or any other decisions in which dismissal has been sustained by this Commission, on grounds that the challenged practice has been abandoned and there is substantial proof that it will not be repeated or resumed. As a matter of fact, a dismissal of this proceeding on such ground might be interpreted by respondent as an indirect condonation of such practices.

DISCUSSION

To support a cease and desist order by the Federal Trade Commission in a proceeding such as this under the Federal Trade Commission Act there is no need to show injury to the purchasing public.[2]

"***Capacity to deceive and not actual deception is the criterion by which practices are tested under the Federal Trade Commission Act." [3]

The buying public does not weigh each word in an advertisement or representation. It is important to ascertain the impression that is likely to be created upon the prospective purchaser.[4] It is in the public interest to prevent the sale of commodities by the use of false and misleading statements and representations.[5] Advertisements are

[2] Jacob Siegel v. FTC, 150 F. 2d 751, 755.
[3] Goodman v. FTC, 244 F. 2d 584, 604 CA 9th (1957).
[4] Kalwajtys v. FTC, 237 F. 2d 654, 656 (Cert. den. 352 US 1025).
[5] Parke Austin & Lipscomb v. FTC, 142 F. 2d 437.

not to be judged by their effect upon the scientific or legal mind, which will dissect and analyze each phrase but rather by their effect upon the average member of the public who more likely will be influenced by the impression gleaned from a first glance at the most legible words. [6]

The "impression gleaned from a quick glance at the most legible words" in respondent's advertisement of the ladies' luggage (CX 1) is that the *identical* luggage had previously been *regularly* sold by respondent at the prices quoted in the advertisement. This is so contrary to fact as not to require any laboring of the point. For the luggage, constructed identically as that made up for the sale had never, regularly or otherwise, been offered for sale by respondent. Respondent asked for, and the luggage manufacturer gave him, a substitute piece of luggage in which the manufacturer "cut corners" and "worked close". The luggage had been purposely made up to sell at the special $11.00 price.

No inference should be drawn (for none is intended) that the luggage was not worth the price at which it was sold, but this does not mitigate the fact that respondent's advertisement (CX 1) falsely and deceptively represented that the identical luggage had *regularly* sold at higher prices. This representation in CX 1 was simply not true. The meaning of the word "regular" in reference to price is well settled under Commission decision as being the sellers usual and customary price for identical merchandise in the same trade area. [7]

Respondent's advertisements for the luggage (CX 1) represented directly or by implication that the higher prices set out in said advertisements were respondent's "regular" retail prices for the identical luggage advertised. The "regular" price for an article is the price at which the seller customarily sells it in the trade area involved. Respondent had not previously sold the identical luggage at any price and it was, and is false, misleading and deceptive for respondent and any other vendor to contrast a current price with a price at which similar merchandise, even though manufactured by the same manufacturer, has previously been sold unless the prior sale was of identical products.

Respondent's advertising in CX 2 was false, misleading and deceptive in that it was calculated to convey, and did convey the impression to a person reading it, that the ladies' cashmere coats therein advertised for sale had a "value" of $119.00. The use of the word

[6] Ward Laboratories, Inc., et al. v. FTC, 276 F. 2d 952 (CA 2—April 14, 1960).

[7] See the Commission's opinion of January 7, 1960, in *Bond Stores, Inc.*, Docket No. 6789, which, incidentally refers to another proceeding involving the same respondent, *Arnold Constable* in Docket No. 7109.

"value" in such context, measured against pertinent decisions, [8] is that the Drobes coats ordinarily sold in respondent's retail market area for $119.00. The precise coats had been, even as the luggage, made up specially for the sale, and had never before been sold in the trade area.

The manufacturer of the coats, who should be best qualified to set a value for them, fixed their retail value at $88.00. Four other well qualified expert witnesses also testified that their retail value was considerably under $119.00. Respondent itself reduced the value stated on the price tags from $119.00 to $99.00 when it learned that the Commission was questioning justification for the "value" figure.

The Federal Trade Commission's *Guides Against Deceptive Pricing* adopted October 2, 1958, inter alia, proscribe the use of the word "regularly" or any abbreviation thereof unless the saving or reduction is from the advertisers usual and customery retail price for the *same specific* article offered for sale as distinguished from similar or comparable merchandise. Inasmuch as the same specific luggage offered for sale by respondent's advertisements (CX 1) had never previously been offered for sale by respondent, the representation that the $11.00 advertised price was a reduction from former prices of $16.50, $17.50, $18.50, $22.50, and $29.50 for the same and identical luggage was and is patently false, misleading and deceptive, and proscribed by Section 5 of the Federal Trade Commission Act. The testimony of the luggage manufacturer and respondent's buyer is unambiguous and clear to the effect that the manufacturer refused to furnish the regular 6600 series, Travel Joy, which respondent had previously sold, for this particular sale.

Respondent's advertisement of that luggage as its "reg." or regular luggage was false, misleading and deceptive and violative of the Commission's *Guides Against Deceptive Pricing*, with which respondent is certainly now familiar.

Similarly, the *Guides* make it unmistakably clear that the word "value" is deceptive unless it is a true and accurate representation of an article's usual and customary retail price in the trade area involved. The retail value of the ladies' coats, which respondent advertised in CX 2 at $119.00 was considerably less than that figure according to the testimony of four qualified disinterested coat buyers, plus the testimony of the man who manufactured the coats.

THE "ABANDONMENT" DEFENSE

In order to justify the dismissal of a proceeding on the grounds that the proscribed practice has been discontinued, or abandoned,

[8] See the *Bond Stores* opinion, supra (Note 7) Docket No. 6789 for a limited discussion of the use of the word "value".

there must be in the record sufficient evidence from which the examiner may find that there is no reasonable likelihood that the practice will be resumed.[9] One of the most recent Commission decisions discussing this defense is in *Sheffield Merchandise, Inc., et al.*, Docket No. 6627 (March 4, 1960). As recently as May 23, 1960, the Commission affirmed a dismissal in a false and misleading advertising case: *Charles Pfizer Co., Inc.*, Docket No. 7487. In *Pfizer* the examiner found, inter alia, "It is believed that the practice charged has been completely abandoned and because of the circumstances of its abandonment that it is improbable that it will ever be resumed by the present management of respondent, or any successor." The record in this proceeding will not support such finding.

The application of the pertinent statutes, decisions, and precedents to this record, compels the following:

CONCLUSIONS

The complaint filed herein states a good cause of action against respondent under the Federal Trade Commission Act and this proceeding is in the public interest.

The Federal Trade Commission has jurisdiction over and of the parties to this proceeding and the subject matter thereof.

Respondent is engaged in "commerce" as "commerce" is defined in the Federal Trade Commission Act.

Counsel supporting the complaint has proven the legally material allegations of the complaint by a preponderance of relevant, probative, substantial and material evidence in the record; and

The acts and practices of the respondent so proven, were and are to the prejudice and injury of the public, and of respondent's competitors, and did, and now constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act;

Now, therefore,

It is ordered, That respondent Arnold Constable Corporation, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of luggage, wearing apparel, or any other merchandise in commerce, as "commerce" is

[9] See Wildroot Company, Inc., Docket No. 5929 (1953); Argus Camera, Inc., Docket No. 6199 (1954); Bell and Howell Co., Docket No. 6729 (1957); Bohn Aluminum, et al. Docket No. 5720 (1955); Stokely-Van Co. v. FTC, 246 F. 2d 458 (1957); New Standard Publishing Co. v. FTC, 194 F. 2d 181; Sheffield Merchandising Inc. Docket No. 6627 (1960). See July 7, 1958, opinion of Commission.

defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication:

1. That any amount is respondent's usual and customary retail price of merchandise when it is in excess of the price at which said merchandise is usually and regularly sold by respondent in the recent regular course of its business.

2. That any amount is the retail value or price of an article of merchandise when it is in excess of the price at which said merchandise is usually and customarily sold at retail by respondent in the trade area, or areas, where the representation is made.

3. That any savings are afforded in the purchase of merchandise from respondent's usual and regular prices unless the prices at which it is offered constitute reductions from the prices at which said merchandise is usually and customarily sold by respondent in the normal course of its business.

4. That any savings are afforded in the purchase of merchandise from the price at which said merchandise is usually and customarily sold at retail in the trade area or areas where the representations are made unless the price at which it is offered constitutes a reduction from the price at which said merchandise is usually and customarily sold at retail by respondent in such trade area or areas.

B. Misrepresenting in any manner the amount of savings available to purchasers of respondent's merchandise, or the amount by which the price of said merchandise is reduced from the price at which it is usually and customarily sold by respondent in the recent regular course of its business, or from the price at which said merchandise is usually and customarily sold in the trade area, or areas, where the representation is made.

OPINION OF THE COMMISSION

By SECREST, *Commissioner*:

The hearing examiner found that the complaint's charges that the respondent had engaged in deceptive pricing practices were sustained by the evidence. The respondent has appealed from the initial decision filed by the hearing examiner which contains his findings in those respects and order to cease and desist from such practices.

The respondent operates a specialty store in New York City and branches in its suburbs. It is undisputed that respondent advertised certain luggage at $11.00 per unit, which advertisements included illustrations of the different sizes offered and described them as "reg." $16.50, $17.50, $18.50, $22.50 and $29.50. It also is undisputed that other advertising used by respondent featured cashmere coats

for $58.00 "value 119.00." The luggage offered in the sale represented a special purchase from the manufacturer who had supplied luggage previously sold by the respondent at the higher prices. However, such promotional merchandise varied from the original luggage in certain respects, including locks and handles. The price of $6.30 per case paid by respondent for the sale luggage was specially negotiated, whereas respondent's costs for the similar vinyl-covered luggage formerly sold had ranged from $8.75 up to $16.50 depending on size.

The hearing examiner found, among other things, that the luggage advertisements featuring the higher prices or amounts and their designation "reg." falsely represented and implied that respondent had previously sold such merchandise at those higher prices in regular course of business. In contending error, respondent states that the only representation implicit in the advertisement is that its stores had sold substantially the same or similar luggage at the higher prices indicated; and it also argues that the hearing examiner erred in excluding testimony to that effect by respondent's luggage buyer and also improperly excluded evidence showing that any differences between the promotional luggage and that previously sold at the higher prices were inconsequential. Substitution is unlawful, however, even though qualitative equivalence be shown. *F.T.C.* v. *Algoma Lumber Co.*, 291 U.S. 67, 77 (1934). One of respondent's representatives conceded that the term "reg." as used in the advertisement for designating the higher prices or amounts meant "regularly." Use of this word in merchandising, of course, extends back to antiquity and it was not an abuse of discretion for the hearing examiner to exclude opinion testimony by such trade witness ascribing an added import or meaning to "regularly" contrary to its traditional one. The hearing examiner correctly found that respondent's advertisements designating certain prices as regular ones and offering its luggage for a specified lesser price reasonably have served to engender impressions and beliefs that the higher amounts were the customary and usual prices of the respondent for such luggage in regular course of business.

In this connection, respondent further argues that a "fatal omission" of proof is presented because no witness expressly testified that respondent competed with others in the sale of luggage of the "same general kind and nature" as that offered in the advertisements. Respondent, however, maintained during the hearings and now maintains that the sale luggage, notwithstanding its departures as to locks and handles from that previously sold at the higher prices, was generally comparable to that sold by it at the higher or regular

prices. Furthermore, a representative of the luggage manufacturer testified that its regular line of luggage was being supplied to stores all over the country, including stores in New York. Respondent's contention that the record does not establish that it has been competitively engaged with others selling luggage of the same general kind and nature, therefore, is rejected.

Respondent additionally excepts to a statement in the initial decision that the luggage advertisements were "violative of the Commission's *Guides Against Deceptive Pricing*." The hearing examiner also expressly found, however, that such advertisements were violative of the Federal Trade Commission Act; and as respondent recognizes in its brief, the question for adjudication is not whether the advertising departed from criteria announced in the Guides but whether violation of the Act itself was shown. Those administrative interpretations as to the application of the statute to various categories of pricing representations were formulated for use by the Commission's staff in evaluating such matters, and their release to the public looked to obtaining voluntary and prompt cooperation by those whose activities were subject to the Act.

To such extent as the initial decision's reference to violation of guides may suggest or imply their force and effect as substantive law, such statement is patently erroneous. On the other hand, a statement that the advertising practices found violative of the Act also departed from basic criteria in the guides clearly would not imply such substantive force and effect. The initial decision shall be so amended.

We also have carefully considered the matters argued by respondent in support of its contention that the hearing examiner erred in finding that the record established that the cashmere coats being offered for sale at $58.00 did not have a customary and regular retail value of $119.00 in the respondent's trading area as represented in the advertisements. Detailed discussion of the evidence relevant to this issue would unduly lengthen this opinion. It suffices instead to say that we find no error and think that the hearing examiner's conclusions that such garments had not been regularly and usually sold at $119.00 in respondent's trading area as represented and implied by the advertisements had sound record basis.

Part of the evidence relating to the aforementioned issue of alleged deceptive value claims for the cashmere coats was received at a hearing held on March 10, 1960, and respondent requests that such evidence be stricken. At the first hearing held on February 8, 1960, counsel supporting the complaint presented seven witnesses including two of the respondent's officials, and then announced that he had no

further witnesses present for examination, but was not, however, resting his case. As directed by the hearing examiner but under protest, respondent proceeded with its presentation of the case on defense. At the second hearing, counsel supporting the complaint introduced additional evidence and the record was closed for the taking of testimony after counsel for the parties stated they had no further evidence to offer. Respondent argues that convening of the second hearing violated its constitutional rights of fair and speedy hearing and that the evidence so received must be stricken. In administrative proceedings, due regard for the convenience of the parties and the presentation of evidence necessary for informed decision frequently require that the hearings be held at intervals. Moreover, respondent has shown no facts indicative that the second hearing in New York, the city in which its principal place of business is located, was unduly burdensome or otherwise prejudiced the respondent. The request to strike is wholly without merit and is denied.

The challenged luggage advertisements appeared in July and August, 1958, the last being August 20, 1958, and those for the cashmere coats ran in October and November, 1958, the last appearing on November 28, 1958. The complaint issued November 16, 1959. Respondent contends that the complaint should be dismissed inasmuch as the advertising was discontinued long prior to institution of this proceeding. In this connection, respondent also emphasizes that its general manager discussed the previously mentioned Guides Against Deceptive Pricing with members of the staff of the store and in December, 1958, distributed a memorandum directing that they be adhered to. An affidavit in kindred vein executed on November 15, 1960, by Mr. Dingivan, one of respondent's officers, and expressing its intention never to resume the practices complained of also was proffered by counsel at the oral argument and hereby is received and filed. Such showing of self-instituted voluntary compliance with the Commission's published administrative interpretations or guides, respondent argues, indicate likelihood that the challenged practices will not be resumed.

The record includes testimony that an investigational representative of the Commission contacted the respondent in December, 1958, for the purpose of inquiring into the luggage advertising and made inquiry the next month respecting the advertising for the cashmere coats. Notice to respondent shortly following such advertising as to the Commission's hand upon its shoulder accordingly must be inferred from the record. In cases of asserted abandonment, the Commission is vested with broad discretion in its determinations as

to whether a practice has been surely stopped and whether an order to cease and desist is proper. *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321 (7th Cir., 1944); *Automobile Owners Safety Insurance Co.* v. *Federal Trade Commission*, 255 F. 2d 295 (8th Cir., 1958). The dismissal of complaints in abandonment cases is not the usual procedure and should be limited to truly unusual situations. In the matter of *Ward Baking Company*, Docket No. 6833 (Decision on appeal June 23, 1958).

In the cited cases involving such dispositions by the Commission, it has had assurances by reason of changed industry-wide business conditions or other circumstances that the challenged practices would not be resumed. Here, the respondent expresses its intention to continue the use of the words "value" and "regular" in the advertising of its prices and promises to make only such savings claims, value claims or comparative value claims as are warranted by the true facts. Its promise notwithstanding, respondent for compelling competitive reasons would be free to adopt the same or similar practices absent effective legal restraint. Nor has the respondent unequivocally receded from its position that no capacity to mislead inhered in certain of the advertisements. In our view, the circumstances attending the respondent's discontinuance of the challenged advertising do not warrant dismissal of the complaint, and we believe that the public interest requires issuance in this proceeding of appropriate order to cease and desist.

Respondent's objections to the order to cease and desist insofar as they except to inclusion of the words "by respondent" in paragraphs A(2) and A(4) of such order are being granted. Such language of limitation renders the order unduly restrictive and it is being appropriately modified. On the other hand, the respondent's companion contention that the scope of the order is unduly broad because its proscriptions against deceptive pricing are not limited to sales of light-weight luggage and cashmere coats is rejected. The order's inclusion of the words "other merchandise" looks only to preventing respondent from continuing past unlawful practices in reference to merchandise other than luggage and women's coats. The Commission may properly close the door to future sales of other products by the same deceptive sales method; and to be of value a Commission order must proscribe the unfair method as well as the specific acts by which it was manifested. *Hershey Chocolate Corp.* v. *Federal Trade Commission*, 121 F. 2d 968 (3rd Cir., 1941); *Consumer Sales Corp.* v. *Federal Trade Commission*, 198 F. 2d 404 (2nd Cir., 1952).

To the extent noted hereinbefore, the appeal of the respondent is granted but denied in all other respects. The initial decision, modified in the respects previously mentioned, is being adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon the respondent's appeal from the initial decision of the hearing examiner; and the Commission having rendered its decision granting the appeal in part but denying such appeal in all other respects and having determined, for reasons stated in the accompanying opinion, that the order to cease and desist should be modified:

It is ordered, That the order to cease and desist contained in the initial decision be, and it hereby is, modified by striking the words "by respondent" from line 4 of paragraph A(2) and from line 8 of paragraph A(4) of said order.

It is further ordered, That the respondent 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 as modified.

It is further ordered, That the initial decision, as modified herein, be, and it hereby is, adopted as the decision of the Commission.

IN THE MATTER OF

PERFECT EQUIPMENT CORP.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(*a*) OF THE CLAYTON ACT

Docket 7707. Complaint, Dec. 22, 1959—Decision, Jan. 12, 1961

Consent order requiring a manufacturer in Kokomo, Ind., selling automobile repair parts, supplies, and tools for replacement purposes, to cease discriminating in price in violation of Sec. 2(a) of the Clayton Act by granting cumulative annual rebates based on volume of purchases to independent jobbers and group jobbers, as a result of which practice independent jobbers buying in lesser volume were charged higher and less favorable net prices than their competitors buying greater quantities.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions 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), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Perfect Equipment Corp., respondent herein, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana with its office and principal place of business located at 804 West Morgan Street, Kokomo, Indiana.

PAR. 2. Respondent is engaged in the manufacture and sale of automobile repair parts, supplies and tools including wheel weights, knee action shims, idler arm kits, coil spacers and tools for installing the parts produced. Respondent's total annual sales in 1957 exceeded $1,800,000.

PAR. 3. Respondent, at all times referred to herein, manufactured its products in its plant in Indiana and sold and shipped products to customers located in each of the States of the United States and in the District of Columbia. Respondent has at all times relevant herein been, and is now, engaged in commerce as "commerce" is defined in the amended Clayton Act.

PAR. 4. The principal purchasers of respondent's products are automobile repair parts wholesalers, who are commonly referred to in the trade as jobbers. Such jobbers normally and principally resell to retailers such as repair garages, car dealers and gasoline service stations. Respondent sells its products to more than 2,000 such jobbers.

Among respondent's jobber customers are many who are banded together into organizations commonly referred to as "buying groups". Such customers are hereinafter referred to as "group jobbers" and those not affiliated with a buying group are referred as as "independent jobbers".

PAR. 5. In the sale and distribution of its products, respondent is, and at all times mentioned herein, has been, in substantial and continuous competition with other sellers of smiliar products.

In many trade areas respondent's independent jobber customers compete with each other and with respondent's group jobber customers.

PAR. 6. In the course and conduct of its business in commerce respondent has been, and is now, in each of several trading areas, discriminating in price in the sale of its products of like grade and quality by selling them to some independent jobbers at higher and less favorable prices than it sells them to other independent jobbers and group jobbers with whom the non-favored independent jobbers compete.

More particularly, during 1956 and 1957, respondent effected discriminations between independent jobbers by granting or paying to such purchasers a cumulative, fully retroactive volume rebate in accordance with the following schedule:

Annual Purchases	*Rebate*
$ 100 to $ 999	0
1000 to 1999	2%
2000 to 2999	3%
3000 to 3999	4%
4000 to 4999	5%
5000 to 5999	6%
6000 and over	7%

Through the operation of respondent's pricing and rebate system as above described, independent jobbers buying in lesser volume were charged higher and less favorable net prices than other competing independent jobbers buying in greater volume.

Moreover, during 1956 and 1957 respondent effected discriminations in price between its group jobber customers and many of its independent jobber customers by paying or granting to said group jobbers a rebate in accordance with the schedule set out above but computed upon the aggregated total annual purchases of all members of each particular group. Thus, all of respondent's group jobber customers were allowed the maximum rebate of 7% without regard to their individual annual purchase volume.

PAR. 7. In further particularity, respondent, in 1958, revised its pricing policies and placed into effect the unlawful program currently in use. The volume rebate pricing system, hereinbefore described, was discontinued as of January 1958, but all customers who received the top volume bracket rebate of 7% in 1957 were granted, and still receive, a 7% discount from published list prices. Such favored customers are allowed to deduct the 7% discount from their remittances. Customers who did not receive the 7% rebate in 1957 are not allowed any discount and must pay the higher prices contained on respondent's published price lists. Through the operation of this phase of respondent's pricing program many of its independent jobber customers are required to pay higher net prices than other larger independent jobber customers and all group jobber customers.

PAR. 8. Moreover, respondent's revision of its pricing program in 1958 included the institution of an additional unlawfully discriminatory pricing method. It designated many of its larger independent jobber customers and the "group headquarters" maintained by many of its group jobber customers as "Warehouse Distributors." Customers designated as "Warehouse Distributors" are allowed discounts from published list prices of no less than 20%. The customers

selected by respondent as "Warehouse Distributors" are not true warehouse distributors as that term is understood in the automotive after-market and do not, for the most part, redistribute or resell goods purchased from respondent to other jobbers but resell them in competition with other jobber customers of respondent.

PAR. 9. The effect of respondent's discriminations in price, as above alleged, may be substantially to lessen, injure, destroy or prevent competition between respondents and competing sellers of similar automotive products and between and among respondent's independent and group jobber customers.

PAR. 10. The acts and practices of respondent, Perfect Equipment Corp., as above alleged, constitute violations of subsection (a) of Section 2 of the Clayton Act (U.S.C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936.

Richard B. Mathias, Esq., supporting the complaint.

John C. Butler, Esq., of *Kirkland, Ellis, Hodson, Chaffetz, and Masters*, of Chicago, Ill., for respondent.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

The complaint was issued in this proceeding on December 22, 1959 charging respondent with violating §2(a) of the Clayton Act as amended by the Robinson-Patman Act (U.S.C. Title 15, §13) by discriminating in the price at which it sells its products, of like grade and quality, in interstate commerce, by selling them to some independent jobbers at higher and less favorable prices than it sells them to other independent jobbers and group jobbers with whom the non-favored independent jobbers compete. A true and correct copy of the complaint was served upon respondent as required by law. Thereafter respondent appeared by counsel and agreed to dispose of this proceeding without a formal hearing pursuant to the terms of an agreement dated October 31, 1960, containing consent order to cease and desist. The agreement was submitted to the undersigned hearing examiner on November 18, 1960, in accordance with §3.25 of the Commission's Rules of Practice for Adjudicative Proceedings. The agreement purports to dispose of this proceeding as to the respondent and contains the form of a consent cease-and-desist order which the parties have represented is dispositive of the issues involved in this proceeding. The agreement has been signed by the secretary-treasurer of respondent corporation and by the attorneys for the parties and has been approved by the Associate Director and the Director of the Bureau of Litigation of the Federal Trade Commission. In said agreement respondent admits all of the jurisdictional facts alleged in the complaint and agrees that the record

may be taken as if findings of jurisdictional facts had been made in accordance with such allegations. In the agreement the respondent waives: (a) any further procedural steps before the hearing examiner and the Commission; (b) the making of findings of fact or conclusions of law; and (c) all rights respondent may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

The parties further agree, in said agreement, that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Federal Trade Commission; that the order to cease and desist entered in this proceeding by the Commission may be entered without further notice to respondent, and when so entered such order will have the same force and effect as if entered after a full hearing. Said order may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

The parties have covenanted that the said 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.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing consent order, and it appearing that the order which is approved in and by said agreement disposes of all the issues presented by the complaint as to all of the parties involved, said agreement is hereby accepted and approved as complying with §§3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings. The undersigned hearing examiner, having considered the agreement and proposed order and being of the opinion that the acceptance thereof will be in the public interest, makes the following findings and issues the following order:

FINDINGS

1. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding;

2. Respondent Perfect Equipment Corp. is a corporation existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 804 West Morgan Street, in the City of Kokomo, State of Indiana;

3. Respondents are engaged in commerce as "commerce" is defined in the Federal Trade Commission and the Clayton Acts;

4. The complaint filed herein states a cause of action against the respondent under both the Federal Trade Commission and the Clayton Acts; and this proceeding is in the public interest. Now, therefore,

It is ordered, That respondent Perfect Equipment Corp., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale for replacement purposes of automobile repair parts, supplies and tools in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale or distribution of respondent's products.

It is further ordered, That the term "purchaser" as used in this order shall include any purchaser buying directly or indirectly from respondent by means of group buying or any related device, but shall not be construed in this proceeding to include original equipment manufacturers purchasing automotive parts from respondent for replacement use or sale.

It is further ordered, That the allegation in the complaint that the effect of respondent's discriminations in price may be substantially to lessen, injure, destroy or prevent competition between respondent and competing sellers of similar automotive products, be dismissed.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The Commission having considered the hearing examiner's initial decision, filed November 23, 1960, accepting an agreement containing a consent order to cease and desist, theretofore executed by the respondent and counsel in support of the complaint; and

It appearing that although the respondent is charged only with having violated subsection (a) of Section 2 of the Clayton Act, as amended, the initial decision recites that the complaint states a cause of action under both the Federal Trade Commission Act and the Clayton Act, and further, that the respondent is engaged in commerce, as "commerce" is defined in both of said Acts; and

The Commission being of the opinion that these misstatements should be corrected:

It is ordered, That the initial decision be, and it hereby is, modified by striking therefrom paragraphs "3" and "4" of the section entitled "Findings."

It is further ordered, That the initial decision as so modified shall, on the 12th day of January, 1961, become the decision of the Commission.

It is further ordered, That the respondent, Perfect Equipment Corp., a 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 to cease and desist contained in the aforesaid initial decision.

IN THE MATTER OF

STANLEY PERKIS TRADING AS MURRAY HILL HOUSE

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

Docket 7748. Complaint, Jan. 18, 1960—Decision, Jan. 12, 1961

Order requiring a distributor of unwoven cotton and rayon fiber towels in Farmingdale, Long Island, N.Y., to cease representing falsely in newspaper, magazine, and other advertising that such products had the appearance, thickness, and texture of towels customarily used in the home.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

The Federal Trade Commission issued its complaint against the above-named respondent on January 18, 1960, charging him with violation of the Federal Trade Commission Act in connection with the advertising and offering for sale of certain unwoven cotton and rayon fiber products. A hearing was held before a duly designated hearing examiner of the Commission and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. In an initial decision filed July 19, 1960, the hearing examiner found that the charges had not been sustained by the evidence and ordered that the complaint be dismissed.

The Commission having considered the appeal of counsel supporting the complaint from the initial decision of the hearing examiner and the entire record in this proceeding and having determined that the appeal of counsel supporting the complaint should be granted and that the initial decision should be vacated and set aside, the Commission further finds that this proceeding is in the interest of the public and now makes its findings as to the facts, conclusions drawn therefrom and order to cease and desist which, together with

the accompanying opinion, shall be in lieu of the findings, conclusions and order contained in the initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, Stanley Perkis, is an individual trading as Murray Hill House, with his office and place of business located at 25 Roxbury Street, Farmingdale, Long Island, New York. Respondent is engaged in the business of selling by mail order unwoven cotton and rayon fiber products.

2. In the course and conduct of his business, respondent has been engaged in the sale and distribution of said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. Respondent at all times mentioned herein has been in substantial competion in commerce with other corporations, firms and individuals in the sale of towels.

4. In the course and conduct of his business, and for the purpose of inducing the sale of said products, respondent has made certain statements with respect to said products in advertisements in magazines and newspapers of national circulation of which the following are typical:

24 LARGE NEW TOWELS Less than 5¢ ea.

That's right! Two dozen large soft fluffy white towels for only $1.00 * * * Think of it — LARGE SIZE unwoven cotton and rayon towels for less than a nickel apiece. Terrific value you've got to to see to believe.

5. Four public witnesses called by counsel supporting the complaint testified that respondent's advertising led them to believe that the product described therein was a bath towel or large cloth towel, similar to a terry cloth or turkish towel. Another public witness testified to the effect that his first impression from the advertisement was that large bath towels were being offered for sale but that because of the low selling price he would expect to receive hand towels or face cloths that could be used as towels.

6. An official of the firm that has supplied respondent with said products testified that they are made by a paper mill and that the same process is used as in making paper except that fibers are used instead of pulp. The product is designated in the supplier's literature as "154 Open Mesh" and is described as "Non-Woven Cheesecloth." An examination of the product discloses that it can be easily torn or shredded and that it closely resembles soft paper toweling in appearance, thickness and texture.

7. On the basis of the foregoing evidence, the Commission finds that respondent, through use of the aforesaid advertising, has represented that he is offering for sale large cloth towels which have the appearance, thickness and texture of cloth towels customarily used in the home, whereas, in truth and in fact, said products closely resemble soft paper toweling, and do not have the appearance, thickness or texture of cloth towels customarily used in the home.

8. The practice of the respondent, as hereinbefore found, has had and now has the tendency and capacity to mislead and deceive purchasers of this unwoven cotton and rayon fiber products with respect to the appearance, composition and quality of such products and thereby induce the purchase of substantial quantities thereof. As a result, substantial trade in commerce may be unfairly diverted to respondent from his competitors and substantial injury has been done to competition in commerce.

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent. The aforesaid acts and practices of respondent, as herein found, were all to the prejudice and injury of the public and of respondent's competitors and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent, Stanley Perkis, trading as Murray Hill House or under any other name or names, and respondent's agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of unwoven cotton and rayon fiber products, or any other like merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, directly or by implication, that such product has the appearance, thickness or texture of cloth towels or misrepresenting in any manner the appearance, thickness or texture of such product.

It is further ordered, That respondent, Stanley Perkis, 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.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner:*

The complaint in this matter charges respondent with violation of Section 5 of the Federal Trade Commission Act. The hearing examiner held in his initial decision that the charges were not sustained by the evidence and ordered that the complaint be dismissed. The matter is now before the Commission on the appeal of counsel supporting the complaint from this decision. Oral argument was not had.

The complaint challenges certain advertising used by respondent in connection with the sale by mail order of certain unwoven cotton and rayon fiber products. The following representations are typical of those used in the advertising of such products:

24 LARGE NEW TOWELS Less than 5¢ ea.

That's right! Two dozen large soft fluffy white towels for only $1.00 * * * Think of it — LARGE SIZE unwoven cotton and rayon towels for less than a nickel apiece. Terrific value you've got to see to believe.

The following allegations with respect to this advertising were made in the complaint:

"PAR. 5. Through the use of the aforementioned statements, respondent represented directly and by implication, that the product offered for sale is a large cloth towel which has the appearance, thickness and texture of towels customarily used in the home.

"PAR. 6. Said statements and representations were false, misleading and deceptive. In truth and in fact, said so-called towel is not of the type customarily used in the home but is an unwoven product which does not have the appearance, thickness or texture of towels customarily used in the home and is not large compared to household towels since its dimensions are 12 inches wide by 18 inches long."

The first question raised on the appeal concerns the hearing examiner's interpretation of the complaint. Although he assumed that respondent's advertising would be interpreted by the public in the manner indicated in Paragraph 5, he ruled in effect that the principal issue framed by Paragraph 6 was whether respondent's product is a towel of the type customarily used in the home and that it was incumbent upon counsel supporting the complaint, therefore, to show what type or types of towels are customarily used in the home and that respondent's product is not of such type or types. He then found that respondent's product falls within the definition of the term "towel", which includes "absorbent paper" as well as "cloth",

and that there are many types of towels customarily used in the home. Since the record failed to show that respondent's product was not one of these types, the hearing examiner held that the charge had not been sustained.

We agree with counsel supporting the complaint that the hearing examiner erred in his interpretation of this charge. In construing the complaint, Paragraphs 5 and 6 must be read together. Paragraph 5 contains the allegation that respondent had represented that the product offered for sale is a large cloth towel having the appearance, thickness and texture of towels customarily used in the home. When read in context, the phrase "towels customarily used in the home" means cloth towels customarily used in the home, not paper towels or some other non-woven products. Paragraph 6 negates the representation made by respondent, stating in effect that the product is not a cloth towel of the type customarily used in the home and that it is not large compared to such towels. The issues raised, therefore, are whether respondent's advertisements create the impression that th product described therein is a large cloth towel having certain physical characteristics of cloth towels customarily used in the home, whether it is a towel of this particular type, and whether it is large compared to household towels.

Five public witnesses were called by counsel supporting the complaint for the purpose of testifying as to their understanding of respondent's advertising. Four of the witnesses stated that they would be led to believe by such advertising that the products offered for sale were bath towels, such as turkish towels, and one witness stated that he believed that the advertised products would be hand towels or face cloths. Although the testimony of these witnesses fully supports the allegation in Paragraph 5, the hearing examiner made no finding to that effect but merely assumed that the advertising created the impression as alleged. He ruled, however, that the evidence given by these witnesses was entitled to little weight since "their testimony and demeanor was such as to indicate that their statements were influenced by the interview" with the Commission's investigator. Counsel supporting the complaint has taken exception to this ruling.

While we will ordinarily accept a hearing examiner's evaluation of the testimony of witnesses who have appeared before him, we believe that the record in this matter clearly discloses that the examiner was not justified in holding that the statements made by the public witnesses were not worthy of credence. In the first place, we find nothing in the testimony of these witnesses to indicate that they had been influenced by an interview with the Commission's

investigator. It is also obvious from the remarks made by the hearing examiner during the hearing that his determination with respect to the credibility of these witnesses was based on a preconceived notion that any public witness who is interviewed prior to giving testimony will be unduly influenced by the interview. In this connection, the hearing examiner made the following observations on the record prior to giving testimony will be unduly influenced by the interview. In this connection, the hearing examiner made the following observations on the record prior to hearing the testimony of all of the public witnesses:

> . . . I have said repeatedly in these cases and I think I might as well repeat it, I am not thrilled with these witnesses who are brought in after having been interviewed and talked to by somebody connected with one side or the other of the case.
>
> You just can't help be somewhat influenced by what took place and I think the testimony is worth very little. I am not talking for your benefit. I am talking for the benefit of the lawyer and I just can't get excited about it and I would base very little finding upon their opinion. . . .
>
> * * *
>
> Now, if you are going to read the ad and interpret the ad as a whole, your interpretation is not acceptable, and I have told you, Mr. O'Connell, before we came here that I had very little reliance on public witnesses, and this is an example of why I cannot as a Hearing Examiner rely on their testimony.
>
> They look at a thing. They have been given the notion of what the case is about. They get some idea what they have to say and they say it. I say that from experience, because I have had witnesses on the stand that had not been told by anybody what they were to say, but they knew when they were interviewed first that there was some case involved, some funny advertising involved, and they tried to make a case out for what they thought was wanted. . .

We do not subscribe to the position taken by the hearing examiner, nor do the courts. *Gulf Oil Corporation* v. *F.T.C.*, 150 F. 2d 106 [4 S. & D. 374] (5th Cir. 1945); *Stanley Laboratories* v. *F.T.C.*, 138 F. 2d 388 [3 S. & D. 596] (9th Cir. 1943); *Rhodes Pharmacal Co., Inc.* v. *F.T.C.*, 208 F. 2d 382 [5 S. & D. 582] (7th Cir. 1953). On the basis of the testimony of the public witnesses and from our own reading of respondent's advertising, it is our opinion that the public may be led to believe by such advertising that the products described therein are cloth towels having the appearance, thickness and texture of cloth towels customarily used in the home. The use of the words "soft fluffy" in its advertisements would certainly contribute to this mistaken belief.

The final questions presented for our determination are whether respondent's product is a cloth towel of the type customarily used in the home and whether the product is large compared to household towels. With respect to the latter point, the complaint alleges that the product is not large since its dimensions are 12 inches wide and

18 inches long. As found by the hearing examiner, however, respondent's product measures 17 inches by 47 inches. Consequently, the allegation that respondent had misrepresented the size of his product has not been sustained.

There can be no doubt, however, that respondent's product is not a cloth towel having the appearance, thickness and texture of towels customarily used in the home. This is obvious from an inspection of the product and from the testimony of one of the officials of the firm that supplied the product to respondent. The product is designated in the supplier's literature as "No. 154 Open Mesh" and is described as "Non-Woven Cheesecloth." The president of this firm testified that the process used in making the product is the same as that used in making paper towels except that cotton and rayon fibers are used instead of pulp. He also testified that the product will disintegrate if washed and that it is used as a disposable towel. From our own examination of the product, we find that it can be torn or shredded without difficulty and that it closely resembles soft paper toweling in appearance, thickness and texture. It may well be that respondent's product may be considered to be a type of towel, as found by the hearing examiner, but it is not a cloth towel of the type used in the home nor does it resemble such towels.

For the foregoing reasons, it is our conclusion that respondent's advertising of unwoven cotton and rayon fiber products constitutes an unfair trade practice in that such advertising has the capacity and tendency to mislead the public into believing that the product offered for sale is a cloth towel of the type customarily used in the home. We are, therefore, issuing our own findings, conclusions and order to cease and desist in lieu of the intitial decision of the hearing examiner, which is vacated and set aside.

In The Matter Of

THE GRAHAM COMPANY, INC.

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

Docket 7994. Complaint, June 24, 1960—Decision, Jan. 12, 1961

Consent order requiring a New York City distributor of dried peas and beans and other products, mainly under the trade name of "Redbow", to cease discriminating in price in violation of Sec. 2(a) of the Clayton Act, by such practices as use of a quantity discount schedule, the maximum discounts of which were based upon quantities so large as to make them unavailable to many of its wholesaler-purchasers.

COMPLAINT

The Federal Trade Commission having reason to believe that The Graham Company, Inc., a corporation, hereinafter referred to as respondent, has violated and is now violating the provisions of Section 2(a) of the Clayton Act (15 U.S.C. Section 13), as amended by the Robinson-Patman Act, hereby issues it complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 39 Clarkson Street, New York, New York.

PAR. 2. Respondent is engaged in the business of purchasing, packaging and selling dried peas and beans of various classifications (i.e., Lentils, Red Kidney, etc.) and other products to wholesaler-purchasers and retailer-purchasers located in states other than the State of New York. Respondent's total annual sales volume is between $3,000,000 and $4,000,000. Its annual sales volume of dried peas and beans is in excess of $1,000,000. Said sales of dried peas and beans are, in the majority of instances, made under the trade name of Redbow.

Respondent has sold and is now selling and distributing its dried peas, beans and other products in New York State to wholesaler-purchasers who resell said products in states other than New York. Said products are sold and delivered by respondent in New York in anticipation of shipment and subsequent resale outside the State of New York.

PAR. 3. Respondent, in the carrying on of its business operations and in the performance of various acts and practices connected therewith, as hereinbefore and hereinafter alleged, has been and is now engaged in a constant current of commerce, as "commerce" is defined in the Clayton Act.

PAR. 4. Respondent, in the course of its business in commerce as set forth in Paragraphs Two and Three, has sold and is now selling its dried peas, beans and other produce to wholesalers as well as to retailers. Respondent's wholesaler-purchasers resell to retailers, and its retailer-purchasers resell to consumers. Many of respondent's wholesaler-purchasers were or are now in competition with other wholesaler-purchasers of respondent.

Respondent itself, in the sale of said products to wholesaler and retailers, is in competition with other sellers of said products.

PAR. 5. Since in or about January, 1958, in the course and conduct of its business in commerce, respondent has discriminated, and is now discriminating, in price in the sale of dried peas, beans and

its other products by having sold or now selling such products of like grade and quality at different prices to different and competing purchasers.

PAR. 6. Included in, but not limited to, the discriminations in price as above alleged, respondent has discriminated in price in the sale of dried peas and beans to wholesaler-purchasers located in the States of New Jersey and New York. Respondent has and does consistently disseminate from time to time a list setting forth the price of its dried peas and beans on a case basis. However, the actual price per case that is charged wholesalers by respondent varies according to the number of cases purchased. Respondent employs a quantity discount schedule which is discriminatory in favor of a few larger wholesalers in that it provides them with a purchase price substantially lower than the price which respondent charges other competing wholesaler-purchasers. The maximum discounts allowed by respondent to wholesaler-purchasers is based upon quantities so large as to make them in fact unavailable to some, if not the majority, of its wholesaler-purchasers.

One example of such a quantity discount schedule previously and presently publicized, utilized and employed by respondent in the sale of its dried peas and beans is hereinafter set forth:

On a purchase of 100 cases, there is a discount from the list price of 5 cents per case; 250 cases, 10 cents; and 1,000 cases, 15 cents.

PAR. 7. The effect of such discriminations in price by respondent in the sale of dried peas, beans and other products of like grade and quality has been or may be substantially to lessen, injure, destroy or prevent competition:

1. Between respondent and its competitors.

2. Between wholesalers paying higher prices and competing wholesalers paying lower prices for respondent's products.

Mr. Robert G. Cutler for the Commission.

House, Grossman, Vorhaus & Hemley, by *Naomi Ranson*, of New York, N.Y., for respondent.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondent on June 24, 1960, charging it with discrimination in price in the sale of products of like grade and quality to different and competing purchasers, and with discrimination in quantity discounts in favor of a few larger wholesaler-purchasers, in violation of §2(a) of the Clayton Act (15 U.S.C. §13), as amended by the Robinson-Patman Act.

On November 23, 1960, there was submitted to the undersigned hearing examiner an agreement between respondent, its counsel, and counsel supporting the complaint providing for the entry of a consent order.

Under the terms of the agreement, the respondent admits the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease-and-desist order there set forth may be entered without further notice and have the same force and effect as if entered after a full hearing and the document includes a waiver by the respondent of all rights to challenge or contest the validity of the order issuing in accordance therewith. The agreement further recites that it is for settlement purposes only and does not constitute an admission by the respondent that it has violated the law as alleged in the complaint.

The hearing examiner finds that the content of the agreement meets all of the requirements of §3.25(b) of the Rules of the Commission.

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, hereby accepts the agreement, and it is ordered that said agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission. The following jurisdictional findings are made and the following order issued:

1. Respondent The Graham Company, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 39 Clarkson Street, New York, New York.

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

ORDER

It is ordered, That respondent The Graham Company, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale of dried peas, beans and other related products, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Discriminating in the price of such products of like grade and quality by selling to any purchaser at prices higher than those charged any other purchasers where respondent, in the sale of such products, is in competition with any other seller;

2. Discriminating in the price of such products of like grade and quality by selling to any purchaser at prices higher than those charged any other purchaser who competes in the resale and distribution of such products with the purchaser paying the higher price.

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 12th day of January, 1961, become the decision of the Commission; and, accordingly:

It is ordered, That respondent The Graham Company, Inc., a 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 to cease and desist.

IN THE MATTER OF

CHUN KING SALES, INC.

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

Docket 8093. Complaint, Aug. 24, 1960—Decision, Jan. 12, 1961

Consent order requiring a Duluth, Minn., manufacturer of American and Oriental food products, to cease violating Sec. 2(d) of the Clayton Act by making payments for advertising or other services in connection with the sale of its products to some customers but not on proportionally equal terms to their competitors, such as an allowance of $450 made to the Brenner Tea Company, a retail grocery chain with headquarters in Burlington, Iowa.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Chun King Sales, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal

place of business located at 200 North 50th Avenue West, Duluth, Minnesota.

PAR. 2. Respondent is now and has been engaged in the manufacture, sale and distribution of food products, both American and Oriental. Respondent sells its products to wholesalers and retailers, including retail chain store organizations. Respondent's sales of its products are substantial, exceeding $12,000,000 annually.

PAR. 3. Respondent sells and causes its products to be transported from its principal place of business in the State of Minnesota to customers located in other States of the United States. There has been at all times mentioned herein a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 4. In the course and conduct of its business in commerce, and particularly since 1958, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

PAR. 5. For example, in the year 1959, respondent contracted to pay and did pay to Benner Tea Company, a retail grocery chain with headquarters in Burlington, Iowa, the amount of $450.00 as compensation or as an allowance for advertising or other services or facilities furnished by or through Benner Tea Company in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not made available on proportionally equal terms to all other customers competing with Benner Tea Company in the sale and distribution of products of like grade and quality purchased from respondent.

PAR. 6. The acts and practices of respondent, as alleged, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. John Perechinsky for the Commission.

Mr. John D. Jenswold, of Duluth, Minn., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) on August 24, 1960, issued its complaint herein, charging the respondent, The Chun King Corporation (named in the complaint and formerly known as Chun King

Sales, Inc.)[1] with having violated the provisions of §2(d) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, §13), and respondent was duly served with process.

On November 18, 1960, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order To Cease and Desist", which had been entered into by and between respondent, its counsel, and counsel supporting the complaint, under date of October 24, 1960, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with §3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent The Chun King Corporation (named in the complaint and formerly known as Chun King Sales, Inc.) is a corporation existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 200 North 50th Avenue West, Duluth, Minnesota.

2. Respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

3. This agreement disposes of all of this proceeding as to all parties.

4. Respondent waives:

a. Any further procedural steps before the hearing examiner and the Commission;

b. The making of findings of fact or conclusions of law; and

c. All of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

5. 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.

6. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

[1] The complaint was amended on motion of counsel supporting the complaint to accord to the true name of the respondent corporation, both as to caption and in Paragraph ONE. The caption, however, has not been physically changed in accordance with the Commission's practice in such regard.

7. This 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.

8. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondent. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order To Cease And Desist", the latter is hereby approved, accepted and ordered filed. The hearing examiner finds from the complaint and the said "Agreement Containing Consent Order To Cease And Desist" that the Commission has jurisdiction of the subject-matter of this proceeding and of the respondent herein; that the complaint states a legal cause for complaint under the Clayton Act, as amended by the Robinson- Patman Act, against the respondent, both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all of the issues in this proceeding as to all of the parties hereto; and that said order therefore should be, and hereby is, entered as follows:

It is ordered, That respondent The Chun King Corporation (named in the complaint and formerly known as Chun King Sales, Inc.), a corporation, and its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of any of its products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rule of Practice, the initial decision of the hearing examiner shall, on the 12th day of January, 1961, become the decision of the Commission; and, accordingly:

It is ordered, That respondent Chun King Sales, Inc., a 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 to cease and desist.

IN THE MATTER OF

WELLS ELECTRONICS CO., INC., ET AL.

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

Docket 8105. Complaint, Aug. 29, 1960—Decision, Jan. 12, 1961

Consent order requiring a manufacturer in Cedarhurst, Long Island, N. Y., of rebuilt television tubes containing used parts, to cease representing falsely on labels and by other media that certain of its said tubes were "Brand New" and "All New", and to disclose clearly on tubes, cartons, invoices, and in advertising, that the tubes were rebuilt and contained used parts.

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 Wells Electronics Co., Inc., a corporation, and Sam Bluman, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Wells Electronics Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 208 Rockaway Turnpike, Cedarhurst, Long Island, New York.

Respondent Sam Bluman is an individual and officer of said corporation. He formulates, controls and directs the policies, acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacture, offering for sale, sale and distribution of rebuilt television picture tubes containing used parts to distributors for resale to the public.

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

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of their products, respondents made certain statements concerning their products on labels and by other media. Among and typical of such statements are the following:

This is a Brand New
ATLANTIC
Television Picture Tube
This is a Brand New
TRIAD
Television Picture Tube
All New
CAROUSEL
Television Picture Tube

PAR. 5. Through the use of the aforesaid statements, respondents represented that certain of their television picture tubes were new in their entirety.

PAR. 6. Said statements and representations were false, misleading and deceptive. In truth and in fact, the television picture tubes represented as being "new" are not new in their entirety.

PAR. 7. The television picture tubes sold by respondents are rebuilt and contain used parts. Respondents do not disclose on the tubes, or on invoices, or in an adequate manner on the cartons in which they were packed, or in any other manner that said television picture tubes are rebuilt and contain used parts.

When television picture tubes are rebuilt containing used parts, in the absence of any disclosure to the contrary, or in the absence of an adequate disclosure, such tubes are understood to be and are readily accepted by the public as new tubes.

PAR. 8. By failing to disclose the facts as set forth in Paragraph Seven, respondents place in the hands of uninformed or unscrupulous dealers the means and instrumentalities whereby they may mislead and deceive the public as to the nature of their said television picture tubes.

PAR. 9. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in

commerce, with corporations, firms and individuals engaged in the sale of television picture tubes.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements and representations and the failure of respondents to disclose on their television picture tubes, on invoices, in an adequate manner on the cartons in which they are packed, or in any other manner that they are rebuilt containing used parts, had, and now have, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' tubes by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Michael J. Vitale for the Commission.

Respondents, *pro se.*

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

In the complaint dated August 29, 1960, the respondents are charged with violating the provisions of the Federal Trade Commission Act.

On November 2, 1960, the respondents entered into an agreement with counsel in support of the complaint for a consent order.

Under the foregoing agreement, the respondents admit the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and have the same force and effect as if entered after a full hearing and the document includes a waiver by the respondents of all rights to challenge or contest the validity of the order issuing in accordance therewith. The agreement further recites that it is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged in the complaint.

The hearing examiner finds that the content of the agreement meets all of the requirements of section 3.25 (b) of the Rules of the Commission.

The hearing examiner being of the opinion that the agreement and the proposed order provide an appropriate basis for disposition of this proceeding as to all of the parties, the agreement is hereby accepted and it is ordered that the agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission. The following jurisdictional findings are made and the following order issued.

1. Respondent Wells Electronics Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 208 Rockaway Turnpike, Cedarhurst, Long Island, New York.

Respondent Sam Bluman is an officer of said corporation. He formulates, directs and controls the acts and practices of the corporate respondent. His address is the same as that of the corporate respondent.

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

ORDER

It is ordered, That respondents Wells Electronics Co., Inc., a corporation, and its officers, and Sam Bluman, individually and as an officer of said corporation, and said respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of rebuilt television picture tubes containing used parts, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication, that said television picture tubes are new.

2. Failing to clearly disclose on the tubes, on the cartons in which they are packed, on invoices and in advertising, that said tubes are rebuilt and contain used parts.

3. Placing any means of instrumentality in the hands of others whereby they may mislead the public as to the nature and condition of their television picture tubes.

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 12th day of January, 1961, become the decision of the Commission; and accordingly:

It is ordered, That 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

THE PROVIDENCE IMPORT CO., INC., ET AL.

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

Docket 8137. Complaint, Oct. 12, 1960—Decision, Jan. 12, 1961

Consent order requiring New York City distributors of domestic and imported rugs and floor coverings to cease referring to their "Hamilton" and "Ridgewood" tubular rugs as braided rugs, in price lists and sales literature; and to cease setting out two sizes, one incorrect and the other approximately correct (e.g., 'Appr. size 2x3, actual size 20x30''), for their rugs in advertising and price lists.

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 Providence Import Co., Inc., a corporation, and Lupa Diamond and Samuel Milgrim, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The Providence Import Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and place of business located at 10 West 33rd Street, New York, New York. Individual respondents Lupa Diamond and Samuel Milgrim are officers of said corporation. They formulate, direct and control the policies of the corporate respondent. The address of the individual respondent is the same as that of the corporate respondent.

PAR. 2. The respondents are now, and for some time last past have been, engaged in the sale and distribution of rugs and floor coverings some of which are imported from foreign countries. Such imported rugs are labeled and advertised under various names such as Princeton, Ridgewood and Hamilton. Respondents sell and have

sold said rugs and floor coverings to wholesalers and retailers for resale to the public.

PAR. 3. In the course and conduct of their business respondents cause, and have caused, said rugs and floor coverings, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other states, and maintain, and have maintained, a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents in the conduct of their business, have been, and are, engaged in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale and distribution of rugs and floor coverings.

PAR. 5. In the course and conduct of their business and for the purpose of inducing the purchase of their rugs and floor coverings, respondents through advertisements appearing upon price lists and sales literature have referred to and now refer to their "Hamilton" and "Ridgewood" rugs as braided rugs. By such reference respondents have represented, and now represent, that such rugs are true braided rugs as "braided rugs" are known in the rug industry.

In truth and in fact, the aforementioned rugs of the respondents are not true braided rugs as known in the rug industry, but are known as tubular rugs and are constructed by a process of strands of material being wrapped around and sewn to a core or tube. The true braided rug, on the other hand, is made by the process of strands of material being braided around a single or double core.

PAR. 6. Respondents have engaged in the practice of setting out the sizes of their various rugs in advertising and price lists. For example, their "Hamilton" and "Ridgewood" rugs are described as "Appr. size 2x3, actual size 20x30," and their "Princeton" rugs as "Appr. size 2x3, actual size 22x34". The practice of setting out two sizes, one incorrect and the other correct or approximately correct, is confusing and misleading, and has the tendency to cause dealers to misrepresent the size of respondents' rugs sold by them.

PAR. 7. The use by respondents of the false, misleading, and deceptive statements, representations and practices has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that such statements and representations were and are true, and into the purchase of substantial quantities of respondents' products because of such erroneous and mistaken belief. As a result thereof, substantial trade in commerce has been unfairly directed to respondents from

their competitors and substantial injury has been done to competition in commerce.

PAR. 8. The aforesaid acts and practices of the respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Garland S. Ferguson, supporting the complaint.

Respondents, *pro se*.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

The complaint in this matter dated October 12, 1960 charges that the above-named respondents had violated the provisions of the Federal Trade Commission Act. The complaint alleged that in the course and conduct of their business and for the purpose of inducing the purchase of their rugs and floor coverings, respondents through advertisements appearing upon price lists and sales literature, had made false, misleading and deceptive statements in connection with the construction and size of their products. An agreement has now been entered into by respondents and counsel supporting the complaint which provides, among other things, that respondents admit all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if entered after a full hearing, respondents specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified, or set aside in the manner provided for other orders of the Commission; that the complaint may be used in construing the terms of the order; and that the agreement is for settlement purposes only; does not constitute an admission by respondents that they have violated the law as alleged in the complaint and shall not become part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an adequate

basis for appropriate disposition of the proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent The Providence Import Co., Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New York, with its office and place of business located at 10 West 33rd Street, New York, New York.

2. Individual respondents Lupa Diamond and Samuel Milgrim are officers of said corporation. They formulate, direct and control the practices of the corporate respondent. Their address is the same as that of the corporate respondent.

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

ORDER

It is ordered, That respondents The Providence Import Co., Inc., a corporation, and its officers, and Lupa Diamond and Samuel Milgrim, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of rugs and floor coverings, or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "braided" to describe or designate any rug which is not constructed by a braiding process or misrepresenting in any manner the manner of construction of their rugs.

2. Using two or more sets of figures to represent the size of their products which are at variance, or in conflict, or representing directly or indirectly the size of said products to be of larger dimensions than is the fact.

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 12th day of January, 1961, 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

ABRAHAM POLLACK AND WILLIAM POLLACK TRADING AS REGAL FUR MANUFACTURING COMPANY

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

Docket 8111. Complaint, Sept. 14, 1960—Decision, Jan. 18, 1961

Consent order requiring furriers in Albany, N.Y., to cease violating the Fur Products Labeling Act by failing to comply with labeling, invoicing, and advertising requirements; and, in advertising in newspapers, failing to disclose the names of animals producing certain furs, representing falsely that they manufactured all their products by such statements as "Low overhead factory prices direct to you", and failing to maintain adequate records as a basis for price and value claims.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Abraham Pollack and William Pollack, individuals and copartners trading as Regal Fur Manufacturing Company, hereinafter referred to as respondents, have violated the provisions of said Act and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Abraham Pollack and William Pollack are individuals and copartners trading as Regal Fur Manufacturing Company with their office and principal place of business located at 86 Central Avenue, Albany, New York.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products, and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

PAR. 4. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was mingled with non-required information, in violation of Rule 29(a) of said Rules and Regulations.

(b) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in handwriting on labels, in violation of Rule 29(b) of said Rules and Regulations.

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

PAR. 6. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that respondents caused the dissemination in commerce, as "commerce" is defined in said Act, of certain newspaper advertisements, concerning said products, which were not in accordance with the provisions of Section 5(a) of the said Act and the Rules and Regulations promulgated thereunder; and which advertisements were intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products.

PAR. 7. Among and included in the advertisements as aforesaid, but not limited thereto, were advertisements of respondents which appeared in issues of the Albany Times Union, a newspaper published in the City of Albany, State of New York, and having a wide circulation in said State and various other States of the United States.

By means of said advertisements and others of similar import and meaning, not specifically referred to herein, respondents falsely and deceptively advertised fur products in that said advertisements:

(a) Failed to disclose the name or names of the animal or animals that produced the fur contained in the Fur product as set forth in the Fur Products Name Guide, in violation of Section 5(a)(1) of the Fur Products Labeling Act.

(b) Contained information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder which was not set forth in type of equal size and conspicuousness and in close proximity with each other, in violation of Rule 38(a) of said Rules and Regulations.

PAR. 8. In advertising fur products for sale as aforesaid respondents falsely and deceptively advertised such fur products in violation of Section 5(a)(5) of the Fur Products Labeling Act by representing in newspapers through such statements as "Low overhead factory prices direct to you" and "Save—Factory prices direct to you" that respondents are manufacturers of all the fur products retailed by them when in truth and in fact a substantial portion of the fur products retailed by the respondents are purchased from distinct and separate sources of supply.

PAR. 9. In advertising fur products for sale as aforesaid respondents made claims and representations respecting the prices and values of fur products. Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based in violation of Rule 44(e) of said Rules and Regulations.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

Mr. Harry E. Middleton for the Commission.

Respondents for themselves.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents with misbranding and falsely and deceptively invoicing and advertising certain of their fur products, and with failing to maintain full and adequate records disclosing the facts upon which certain claims and representations respecting the prices and values of fur products were based, in violation of the Federal Trade Commission Act, and the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder.

After the issuance of the complaint, respondents and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Director, Associate Director, and Acting Assistant Director of the Commission's Bureau of Litigation, and thereafter transmitted to the Hearing Examiner for consideration.

The agreement states that respondents Abraham Pollack and William Pollack are individuals and copartners trading as Regal Fur Manufacturing Company, with their office and principal place of business located at 86 Central Avenue, Albany, New York.

The agreement provides, among other things, that respondents admit all the jurisdictional facts alleged in the complaint, and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; 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; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondents waive 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 they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

The Hearing Examiner has determined that the aforesaid agreement containing the consent order to cease and desist provides for an appropriate disposition of this proceeding in the public interest, and such agreement is hereby accepted. Therefore,

It is ordered, That Abraham Pollack and William Pollack, individually and as copartners trading as Regal Fur Manufacturing Company or under any other trade name, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the sale, advertising or offering for sale, transportation or distribution of fur products in commerce, or in connection with the sale, manufacture for sale, advertising, offering for sale, transportation or distribution of fur products which have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Failing to affix labels to fur products showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of § 4(2) of the Fur Products Labeling Act;

2. Setting forth on labels affixed to fur products:

(a) Information required under § 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder mingled with nonrequired information;

(b) Information required under § 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in handwriting;

B. Falsely or deceptively invoicing fur products by failing to furnish to purchasers of fur products invoices showing all the information required to be disclosed by each of the subsections of §5(b)(1) of the Fur Products Labeling Act;

C. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote or assist, directly or indirectly, in the sale or offering for sale of fur products, and which:

1. Fails to disclose the name or names of the animal or animals producing the fur or furs contained in the fur product, as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

2. Fails to set forth the information required under §5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in type of equal size and conspicuousness and in close proximity with each other;

3. Represents, directly or by implication, through such terms as "factory prices direct to you" and "low overhead factory prices direct to you" or words or terms of similar import, or in any other manner, that respondents are manufacturers of fur products sold by them, unless such fur products are actually manufactured by them;

D. Making claims and representations respecting prices and values of fur products unless respondents maintain full and adequate records disclosing the facts upon which such claims and representations are based.

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 18th day of January, 1961, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Abraham Pollack and William Pollack, individuals and copartners trading as Regal Fur Manufacturing Company, 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

THE TIMKEN ROLLER BEARING COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 3 OF THE CLAYTON ACT

Docket 6504. Complaint, Feb. 13, 1956—Decision, Jan. 24, 1961

Order requiring the nation's largest manufacturer of tapered roller bearings, with principal office in Canton, O., to cease making sales and contracts for sale of "Timken" tapered roller bearings for replacement purposes on the condition that the purchasers—a large number of automotive parts distributors and jobbers located throughout the U.S.—not use or deal in similar products sold by its competitors.

Before *Mr. William L. Pack*, hearing examiner.

Mr. Andrew C. Goodhope, *Mr. Frederic T. Suss*, *Mr. Alvin D. Edelson* and *Mr. John Perechinsky* for the Commission.

Day, *Cope*, *Ketterer*, *Raley & Wright*, of Canton, Ohio, for respondent.

Findings As To The Facts, Conclusions And Order

The Federal Trade Commission issued its complaint against the above-named respondent on February 13, 1956, charging it with having made sales and contracts for the sale of its tapered roller bearings on the condition, agreement or understanding that the purchasers thereof should not use or deal in similar products of a competitor or competitors, in violation of Section 3 of the Clayton Act (15 U.S.C. Sec. 14). In its answer, respondent denied the charges.

At the close of the introduction of evidence in support of the complaint, respondent filed a motion to dismiss the complaint for failure of proof. In an initial decision filed October 14, 1957, the hearing examiner granted the motion and ordered that the complaint be dismissed. Upon appeal to the Commission by counsel supporting the complaint, the Commission on May 27, 1958, with former Chairman Gwynne dissenting, held that a prima facie case had been

established and issued its order vacating the initial decision and remanding the case to the hearing examiner for further proceedings. Thereafter, further hearings were held before the hearing examiner and testimony and other evidence in opposition to the allegations of the complaint, together with certain rebuttal evidence introduced by counsel supporting the complaint, were received into the record. In an initial decision filed March 21, 1960, the hearing examiner found that the charges had not been sustained by the evidence and again ordered dismissal of the complaint.

Counsel supporting the complaint filed an appeal from said initial decision and the Commission, after considering said appeal and the entire record, has determined that the appeal should be granted and that the initial decision should be vacated and set aside. The Commission now makes its findings as to the facts, conclusions drawn therefrom and order to cease and desist, which, together with the accompanying opinion, shall be in lieu of the findings, conclusion and order contained in the initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, The Timken Roller Bearing Company, is a corporation organized under the laws of the State of Ohio, with its principal office and place of business located at Canton, Ohio.

2. Respondent is now and for many years last past has been engaged in the manufacture, sale and distribution of tapered roller bearings, alloy steels, and rock bits. Respondent sells a substantial portion of its tapered roller bearings to distributors and jobbers who handle and sell said products for replacement purposes in automobiles, trucks, buses, tractors, farm machinery and other types of industrial machinery. Respondent also sells its tapered roller bearings for use in original equipment, but these sales are not involved in this proceeding.

3. Respondent causes its tapered roller bearings, when sold, to be shipped from its manufacturing plants located in Canton, Gambrinus, Bucyrus, Columbus, New Philadelphia and Zanesville, all of which are located in the State of Ohio, to purchasers thereof, including distributors and jobbers, who are located in the various other states of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said tapered roller bearings in interstate commerce.

4. In the course and conduct of its business, respondent is now, and during the times mentioned herein, has been, in substantial competition in interstate commerce with persons, firms, partnerships and

other corporations in the sale and distribution of its tapered roller bearings.

5. Numerous documents introduced in evidence by counsel supporting the complaint show a policy on the part of respondent to sell its tapered roller bearings for replacement purposes on the condition, agreement or understanding that the purchasers thereof shall not deal in similar products sold by respondent's competitors.

These documentary exhibits fully support a finding that respondent has followed a consistent policy of requiring said purchasers to discontinue handling similar products sold by respondent's competitors; that respondent regularly checked said purchaser's stock for the purpose of assuring adherence to its policy, and that the contracts of purchasers who deviated from respondent's policy by purchasing from a competitor were cancelled for that reason.

6. Respondent based its defense principally on the testimony of numerous witnesses who had participated in the preparation of each of the aforesaid documents or who had direct knowledge with respect thereto, in an effort to explain, rebut and contradict that evidence. The Commission, after giving full consideration to that testimony, together with certain other testimony and exhibits entered by respondent, is of the opinion that respondent has failed to weaken the probative value of the documentary evidence adduced in support of the complaint.

7. Respondent's total sales of tapered roller bearings in the replacement market run between $10,000,000 and $20,000,000 a year. Its closest competitor, Federal-Mogul-Bower Bearings, Inc., does a yearly business of between $1,000,000 and $2,000,000 in tapered roller bearings, and the next competitor, Tyson Bearing Corporation, only between $400,000 and $800,000. Respondent manufactures more than 11,000 different items in its line of tapered roller bearings; its closest competitor, only 780; and the next competitor only 586. Respondent has over 7,500 dealers who handle its tapered roller bearings for replacement purposes; its nearest competitor has about 2,000 customers and the next competitor has 1,000 customers. Thus, the Commission finds that respondent is the leading supplier of tapered roller bearings for replacement purposes, the volume of business affected by its exclusive dealing policy is significant and substantial, and its maintenance of said policy has foreclosed competitors from a substantial market.

The record also shows and the Commission further finds that distributors and jobbers who have executed contracts with respondent suffer substantial injury to their respective business because they are

forcelosed by respondent's aforesaid policy from making any independent judgment or decision as to what products they will handle and sell in their business enterprises and lose substantial sales because they are unable to carry and sell competitive tapered roller bearings.

8. The effect of respondent's restrictive policy, as found herein, may be substantially to lessen competition in the lines of commerce in which respondent and its customers are engaged, and may be to tend to create a monopoly in respondent in the manufacture, sale and distribution of tapered roller bearings.

CONCLUSION

Respondent's policy of requiring its distributors and jobbers to handle and sell its tapered roller bearings exclusively and its acts and practices to enforce this policy, as hereinbefore found, are in violation of Section 3 of the Clayton Act.

ORDER

It is ordered, That the respondent, The Timken Roller Bearing Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution for replacement purposes of tapered roller bearings in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Selling or making any contract or agreement for the sale of any such products on the condition, agreement or understanding that the purchaser thereof shall not use, deal in, sell or distribute similar products supplied by any competitor or competitors of respondent.

2. Enforcing, or continuing in operation or effect, any condition, agreement or understanding in, or in connection with, any existing contract of sale, which is to the effect that the purchaser of such products shall not use, deal in, sell or distribute similar products supplied by any competitor or competitors of respondent.

It is further ordered, That respondent, The Timken Roller Bearing Company, 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 compiled with this order to cease and desist.

Commissioner Mills not participating for the reason he did not hear oral argument herein.

OPINION OF THE COMMISSION

By KERN, *Commissioner:*

Respondent, The Timken Roller Bearing Company, is charged with violation of Section 3 of the Clayton Act by selling its tapered roller bearings on the condition, agreement or understanding that the purchaser will not deal in similar products of respondent's competitors. The hearing examiner in his initial decision filed on March 21, 1960, held that the allegations were not sustained by the evidence and ordered dismissal of the complaint. Counsel supporting the complaint have appealed from that decision.

In a previous initial decision, the hearing examiner granted respondent's motion filed at the conclusion of the case in chief in support of the complaint, and dismissed the complaint for failure of proof. Upon appeal by counsel supporting the complaint, we decided that the hearing examiner had erred in discounting the probative value of the documentary evidence introduced in support of the complaint and in refusing to admit into evidence numerous other documents of similar import. We concluded that a prima facie case had been established and by our order of May 27, 1958, the initial decision was vacated and the case remanded to the hearing examiner for further proceedings. Although ostensibly for a different reason, the hearing examiner has persisted in his previous erroneous evaluation of the documentary evidence relied on by counsel supporting the complaint.

Respondent is the largest manufacturer and seller of tapered roller bearings in the United States. This proceeding is concerned only with respondent's sales of such bearings for replacement and repair purposes. Its sale of bearings for use as original equipment is not involved. Its two principal competitors in the replacement market are Federal-Mogul-Bower Bearings, Inc., and Tyson Bearing Corporation.

Respondent maintains 17 sales offices throughout the country, each in charge of a branch manager. It distributes its bearings through two general classes of customers designated as Auhtorized Distributors and Authorized Jobbers. The principal distinction between these two is that the distributors buy directly from respondent, whereas the jobbers buy only from the distributor. Prior to 1955, the discount rate to distributors was higher than that to jobbers. Since that time, both pay the same price but respondent allows a specified credit to distributors on sales which they make to jobbers.

Respondent enters into sales contracts with both its distributors and jobbers. These contracts are subject to cancellation by either

party upon ten days' written notice. Neither type of contract contains any provision expressly requiring purchasers not to deal in the bearings of respondent's competitors. It is well settled, however, that express written agreements are not needed to prove exclusive dealing. *Carter Carburetor Corporation* v. *Federal Trade Commission*, 112 F. 2d 722 [3 S. & D. 232] (8th Cir. 1940).

As proof of the charge that respondent follows a consistent policy of requiring exclusive dealing, counsel supporting the complaint relied almost entirely upon documentary evidence obtained from respondent's files. These documents can be divided into two general types. The first group, about 120 documents, include salesmen's reports of calls on distributors and jobbers, copies of which went to respondent's home office; correspondence between branch managers and home office officials; and memoranda authorizing cancellation of respondent's agreements with its customers.

Typical of the statements by salesmen in this first group are the following:

> Today I was of course greeted with a very strong bid for a direct appointment and in checking their stock we found approximately $100 worth of new Bower Bearings mixed in with the Timken. This was the first indication that they had bought Bower Bearings in the past five years. * * * He further stated that he made a survey of some of these dealers on the acceptance of Bower Bearings and he found out that they would accept Bower Bearings. He added that for that class of trade, he buys Bower but for his fleet trade and garage type of trade, he will buy Timken. He further added that he knows that we would not countenance that sort of dual buying and it would only be a question of time when we would cancel his contract or put him on direct. * * * (Commission Exhibit 26A and B)

> * * * They are going to go Timken 100%. He told us they had made some progress in liquidating their stock of Tyson bearings and would continue to exert every effort to liquidate this stock 100%. (Commission Exhibit 30)

> Inasmuch as it would be desirable to get rid of their entire Bower stock at one time I suggested they put a price on it from 10/20% under cost and sell it to a present Bower account or dispose of it in that manner and to best compensate them for the loss we would sign them direct and let them purchase their Glendale Timken stock at Authorized Distributors' prices. (Commission Exhibit 37)

> Called here for further talks with these people about their going Timken 100%. Commission Exhibit 38)

* * * Mr. Shaw told me that they will get Tyson out immediately and completely, if we can work something out for them. He is waiting to hear something from us in the near future regarding this matter. (Commission Exhibit 40)

I pointed this drop in volume out to Mr. Cox today and he stated that he could not continue to buy at 58 from Indiana Bearings (respondent's distributor) and had accordingly decided to buy from ABC Bearing Company. I explained to Mr. Cox that he was committing an act which we considered disloyal. * * *

* * * * * * *

I told Cox that since his purchases were made through the Indiana Bearings Company that a matter of this nature should be direct with Indiana Bearings and that our position was one of not wishing Timken Jobbers to handle a competitive line of roller bearings.

Cox insists that if this is our attitude he will discontinue Timken and under the circumstances, feel that we have no choice but to cancel his Timken Jobber contract. (Commission Exhibit 103B)

When this jobber was signed as a Timken contract jobber in April of 1947, his initial stock order was for $354.42. Since that time his purchases have been almost nothing. Reason—he had been buying Bower tapered roller bearings from Ahlberg and now from Federal Mogul.

We have been patient long enough! Dual distribution is not profitable or worthwhile to us. I suggest we cancel this account as a Timken contract jobber immediately. (Commission Exhibit 158)

The following statements are taken from correspondence from the branch managers to Timken officials:

* * * Recently, for the reasons outlined in Deen Jones' attached report of March 27, they fell for the Bower warehouse deal due to their close association with the F-M salesman * * *.

I would appreciate your authority to write them the usual cancellation letter * * *. (Commission Exhibit 12)

About eight months ago subject A.D. started picking up Bower bearings from the local Indianapolis Federal Mogul Warehouse.

You doubtless have noticed from our representative's Dave Mitchell's reports that this matter has been discussed at length with these people.

Additionally, I have discussed the matter with their management on several occasions. On my last call two weeks ago, I tried to bring the matter to a conclusion one way or the other and was refused the courtesy of a discussion.

This account has never been of any consequence and due to the circumstances involved we request management's approval for immediate cancellation. (Commission Exhibit 13)

I naturally approached him on the idea of going 100% Timken in all of his stores. Further that our only requirement was that he confine his tapered roller bearing purchases to us exclusively in the future and could dispose of his present inventory in the manner he found best fit but could not palm them off on the trade as substitutes for business promoted through the prestige and completeness of our line.

He wants about thirty days to pressure Tyson into converting his obsolescence into faster moving merchandise that will enable him to sell out his entire stocks in a one package deal. Naturally Tyson would not 'fall' for such a deal if they knew he planned to do this. Failing in this he will pull all of this stock into his main store and attempt to dispose of them in this manner. (Commission Exhibit 29A and B)

In addition to the information contained in this report, we definitely suspect that these people are already availing themselves of another source of supply for a portion of their requirements whereas we are confident that we can depend upon their 100% loyalty with direct recognition. (Commission Exhibit 91B)

I learned today that subject purchased a quantity of surplus bearings just a short while ago, and I think this act of disloyalty is justification for our cancelling the account. Would like to have your authority to cancel this firm. (Commission Exhibit 107)

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* * * Previously this account had been buying in the open market and to satisfy us I personally called on them and felt reasonably sure at that time they would discontinue this practice. As it is they have not borne out this belief for they continue to buy on the open market * * *.

It is my recommendation they be cancelled and I would like to have the authorization to do so. (Commission Exhibit 138A)

Finally, there are documents prepared by Mr. E. H. Austin, then General Manager of respondent's Service Sales Division and, as such, the highest official in the division which directed sales and supervised distribution in the replacement market. His statements include the following:

In view of the fact that this account has decided to go 'Bower' we are agreeable to your effecting cancellation, immediately. (Commission Exhibit 11)

Since they apparently are not loyal to us as a source of supply, I think we should do one of two things—either get their support or eliminate this account. (Commission Exhibit 90A)

I have noted Mitchell's report of March 13. It looks to me as though we are going to have to do one of two things—either appoint the subject company

on a direct basis if that is what it takes to eliminate Bower or cancel them as a Contract Jobber if they continue to purchase Bower bearings. Let's not delay on this but endeavor to settle this satisfactorily to our best interests. (Commission Exhibit 109B)

This has reference to your letter of June 11 and our conversation about this subject.

* * * * * * *

Of course, if they are going to handle Bower bearings we will want to cancel them but, in the meantime, as I indicated to you, I am taking a look at our Contract Jobber policy and we may find it to our advantage to withhold this cancellation and take a look a little later. (Commission Exhibit 115A)

This refers to our previous correspondence under this subject, last of which was my note of June 27 answering yours of June 11. If this company is still handling Bower bearings as a distributor through Federal-Mogul, then I think that you should take the necessary action to bring about their cancellation as a Contract Jobber. I suggest this since I have decided, at least for the present, that we will not take any action to change our present Contract Jobber policy. (Commission Exhibit 115B)

In addition to the inter-office correspondence and memoranda, counsel supporting the complaint relied on a second group of documents comprised of reports of cancellation of approximately 100 distributors and jobbers. These reports are on a form, copies of which were sent to the home office, on which appears the question, "Why is this account being cancelled?" In all of these reports, the answers are "Have taken on Bower through Federal Mogul." "Took on Bower," "Not loyal," "Handling a competitive bearing," or similar expressions denoting that the customer was buying from a competitor.

This documentary evidence implicates individuals throughout respondent's entire replacement sales organization, from salesmen through home office executives. They cover the activities of the sales organization in all parts of the country and relate to transactions well within the period of time contemplated by the complaint. The hearing examiner's ruling that these documents represent only a relatively small number of isolated instances is clearly in error.

At hearings held after remand, respondent called 80 witnesses, 38 of whom were their customers and 42 of whom were personnel in the Service and Sales Division. These witnesses testified with respect to every written exhibit placed in evidence by counsel supporting the complaint. It is on the basis of this testimony that the hearing examiner has found that in every instance evidenced by the cancellation reports, the initiative in severing the relationship was taken by the customer rather than by the respondent.

One of the reasons advanced by the witnesses and accepted by the hearing examiner as a basis for his ruling was that the contracts were terminated because of the customers' low volume of purchases. Documentary evidence introduced by respondent indicates that in some instances, customers had made very few purchases of Timken bearings for several months or a year prior to cancellation. With respect to these accounts, however, it appears that respondent had been aware of their purchase records but did nothing to cancel them until they started purchasing from a competitor. One of respondent's branch managers, after receiving a salesman's report that a jobber had decided to buy from the ABC Bearing Company, stated in a letter to the home office:

> You will note that this Timken Jobber's purchase history is very poor. They should be cancelled due to lack of volume and now since they have been disloyal it seems the best thing to do is cancel their contract. (Commission Exhibit 103A)

To the same effect are Commission Exhibits 100, 106A and Respondent Exhibit 126. The fact that low volume of purchases contributed to respondent's decision to cancel is not the controlling factor. As the court has recently stated in the *Osborn*[1] case:

> As to the termination of the second lease, the Judge concluded that both the plaintiff's failure to sell sufficient gasoline and his refusal to purchase more Goodyear TBA contributed to Sinclair-Sherwood's decision to cancel, neither of the two factors being predominant. The District Judge correctly pointed out that such combination of factors would not defeat the plaintiff's claim as long as the illegal motive substantially contributed to the decision to cancel.

Respondent introduced into evidence by the purchase records of each of the accounts covered by the cancellation reports. An examination thereof discloses that, in many instances, any appreciable decrease in purchase volume occurred just one or two quarters prior to cancellation. In our opinion, this decrease did not supply the motive for termination but was the natural result of the purchaser's action stated on the report as the basis for cancellation, that is, that the purchaser had commenced buying from a competitor.

There is testimony that certain customers decided to purchase from competitors and asked to be cancelled. However, it appears that at least in certain instances, these customers "asked" in the sense that they were familiar with the inevitable result of their decision. One salesman, after stating in his report that a jobber, Mr. Meadows, had informed him that he had decided to buy from Federal-Mogul-Bower, added: "Meadows advised that he would expect our cancellation notice at any time, therefore I think we should oblige him and

[1] *Osborn* v. *Sinclair Refining Co.*, 286 F. 2d 832 (4th Cir. 1960).

immediately cancel his contract." He was cancelled within two weeks upon authority of Mr. Austin.

Counsel supporting the complaint content that the hearing examiner erred in ruling that the record affords no basis for an inference that the salesmen's practice of checking the stock constituted policing of customers indicative of a policy of exclusive dealing. In substance, the hearing examiner found that the reason salesmen checked customers' stock was to insure an adequate inventory, to supervise respondent's obsolescence policy and to check shortages in stock to obtain an order.

Most of the correspondence exhibits disclose that it was the salesmen's practice to include in their reports a reference to the competitive stock on the dealers' shelves. It is obvious from these references that the salesmen went far beyond the mere observance of competitors' products while checking Timken bearings. In many instances, the actual number or dollar amount of competitive bearings was reported, such as "However, his stock indicates that he has already bought $100-150 of Bower, * * *" (Commission Exhibit 109A), and "on this call there were 132 pieces of Bower * * *" (Commission Exhibit 162). In other instances the reference was even more specific, as "We noticed 6-898-892B and 6-71450-71750 Bower bearings in stock" (Commission Exhibit 94) and "* * * I was truly disheartened to find an additional 40 Bower bearings in his stock which represented a $59.56 additional purchase from Gibson Company" (Commission Exhibit 108A). Finally, the statement by one salesman that "We will keep close check on this stock and, if additional L & S bearings are purchased, we will take necessary action" (Commission Exhibit 97A) hardly reflects the action of a person interested only in a dealer's stock of Timken bearings. Moreover, there are instances where customers were called on to explain the presence of a competitor's product on their shelves. We think the evidence fully supports a finding that rspondent policed its customers for the purpose of enforcing its exclusive dealing policy.

The hearing examiner found that the probative value of the correspondence is materially weakened as the result of the testimony giving the circumstances under which the correspondence took place. Typical of the statements appearing in the correspondence and the explanations relied on by the hearing examiner are the following:

Commission Exhibit 10—Meadows (jobber) advised that he would expect our cancellation notice at any time,***. Explained as meaning that account asked to be cancelled.

Commission Exhibit 29A—* * * going 100% Timken in all of his stores. Explained as meaning that the distributor was going to handle Timken in all its stores and not just the main store.

Commission Exhibit 39—I told him we would not condone his carrying Tyson bearings in his Laurinburg store as long as he was a Timken jobber. Explained by the writer, a salesman, as a gross exaggeration on his part as he knew they were already doing this.

Commission Exhibit 96—We have been assured of Brown's complete loyality to Timken. Explanation of this statement is that because of large initial purchase from Timken, there was no need for Brown (jobber) to buy competitive bearings.

Commission Exhibit 133—Of course, they have Bower which they are willing to throw out for Timken. Explained as a figure of speech by the writer.

Commission Exhibit 144—* * * he *agreed* that he would buy all his tapered bearings in the future from us. (Emphasis supplied.) Explained as a statement made by an official of the buyer.

Commission Exhibit 155—Because this firm had become involved in the purchase of A.B.C. tapered roller bearings, a cancellation of their jobber contracts was effected June 24, 1954. Explained as meaning that the jobber had been cancelled at the request of the distributor who had difficulty collecting from this account.

Commission Exhibit 115B—(Letter from General Manager Austin to a branch manager) If this company is still handling Bower bearings as a distributor through Federal-Mogul, then I think that you should take the necessary action to bring about their cancellation as a Contract Jobber. Explained as meaning that the jobber should be cancelled because of his low purchase volume.

There is obviously a variance between the statements quoted above and the explanation given by respondent's witnesses. Similar statements are too numerous in the inter-office correspondence to be explained as imprecise language by the writers. Where, as here, oral testimony given several years later, is not consistent with contemporaneous written statements, such oral testimony can be given little weight. *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948). Although it is true that certain language standing alone may be susceptible of different meanings, we find that the varied explanations given by respondent fail to rebut the inference arising from the consistent use by respondent's representatives in all parts of the country, of such terminology as "100% loyalty," "go Timken 100%" and "We have their assurance" that an account will dispose of a competitor's stock. The hearing examiner's ruling that the correspondence has little probative value is clearly in error.

From our examination of the entire record, we are convinced that it is respondent's policy to sell its tapered roller bearings on the understanding or agreement that purchasers will handle Timken products exclusively; that dealers who contracted with respondent immediately proceeded to rid their shelves of competitive products and replace them with Timken; that respondent policed its dealers for the purpose of assuring adherence to its policy; that reports of deviations were received by the home office; and that those dealers who deviated were cancelled for that reason with the knowledge and

authority of the home office. It is obvious that respondent's conduct goes far beyond that of a seller who merely announces a policy and declines to sell to those who do not follow it. *Cf. United States* v. *Parke, Davis and Co.*, 362 U.S. 29 (1960).

Respondent has placed some reliance on the district court's decision in *United States* v. *J. I. Case Co.*, 101 F. Supp. 856 (D.C. Minn., 1951). However, the court in that case relied in part upon a bulletin emanating from Case company officials directing its representatives not to attempt to dictate or coerce any dealer with respect to the handling of competitive merchandise and found that Case executives adhered to and fairly endeavored to sustain this policy. The evidence in this proceeding discloses no such concern on the part of Timken executives. In fact, as we have stated above, the evidence clearly indicates that key Timken executives supervised and actively participated in the company's exclusive dealing policy. The extent to which Timken's management was involved in enforcing this policy is apparent from the fact that documents in evidence implicate, among others, the general manager of the company's Service Sales Division and managers of branch offices in the following cities: Atlanta, Boston, Canton, Chicago, Cincinnati, Dallas, Detroit, Los Angeles, Memphis, Minneapolis, New York, Philadelphia, Pittsburgh, San Francisco, St. Louis, and Seattle. Also, many of the dealers cancelled by Case were those who had taken on Case products temporarily as a side line during the last World War so that Case would have an outlet for its allotment of the supply of farm machinery granted to Case by the government. Moreover, the evidence disclosed that dealers in farm machinery carry only one major line, one of the reasons being that it requires an investment of $50,000 excluding real estate, to be a successful operator. The handling of a competitor's product obviously would require additional inventory. Timken customers are established dealers in replacement parts, and tapered roller bearings are only a small item in their inventory. The facts upon which the court made its decision in the *Case* matter clearly differ from those present in this proceeding.

Much reliance has been placed by respondent in this case upon the fact that its tapered roller bearings are interchangeable with those of its two closest competitors. All three use the same numbering system. Therefore, a bearing made by any one of the three may be replaced by a bearing of the same number by either of the other two. Respondent's argument is that distributors and jobbers are therefore inclined to carry only one line or brand of bearings, the inference being that accounts are cancelled if they decide to purchase a com-

petitive line for any reason, since their purchases of Timken bearings would then cease entirely or decline to an insignificant volume.

While there is evidence that certain replacement parts dealers elect to handle only one line, we are not convinced that this is the practice generally followed by all members of the industry. One of respondent's own jobbers stated that:

> You should have more than one brand on the shelves. * * * I believe it is a good idea to have more than one variety because you make more sales.

Additionally, there are reasons evidenced in this record as to why a dealer would elect to handle a competitor's product together with Timken's. These reasons include higher discounts and better service, in certain instances, from competitors who manufacture a portion of the different types of tapered roller bearings produced by respondent and who sell to any dealer who chooses to purchase from them. Moreover, respondent's policing practices are inconsistent with a finding that dealers of their own accord carry only one line of tapered roller bearings. Regardless, however, of the tendency of some dealers to handle only one line, we think it clear that respondent cancelled its accounts in furtherance of its policy of exclusive dealing. Any other inference must be rejected.

The hearing examiner was impressed with respondent's witnesses. We cannot, of course, accept the conclusion of respondent's officials and salesmen that Timken had no policy of requiring exclusive dealing. However, the testimony of these witnesses that all respondent expects of its purchasers is that they devote the principal sales effort to the Timken line and that Timken purchasers handle competing bearings without interference on the part of Timken, is not inconsistent with our conclusion. It is clear from the record that the "principal effort" required by respondent is exclusivity. It is also clear that respondent allows its customers to purchase competing brands only on an emergency basis when there is a delay in obtaining Timken bearings or to accommodate an insignificant number of customers. The fact that respondent acquiesced in "emergency" or "accommodation" purchases is no defense in this proceeding where the evidence shows that respondent could and did exercise its power to cancel at any time it deemed necessary to implement its policy of exclusive dealing.

The testimony of respondent's current distributors and jobbers discloses that in practically all instances, they were carrying Timken products to the exclusion of competitors' products except for the "emergency" or "accommodation" purchases above mentioned.

Naturally, these dealers would cause the respondent no concern. We, as did the hearing examiner, can accept their testimony that they have not been threatened with cancellation by respondent.

There remains the question of whether respondent's exclusive dealing requirement, as evidenced by this record, "may be substantially to lessen competition or tend to create a monopoly in any line of commerce" as required by Section 3. The evidence received herein discloses that respondent's sales in the replacement market run between $10,000,000 and $20,000,000 a year; that it has more than 11,000 different items in its line of tapered roller bearings, and that its contracts cover over 7,500 different outlets. Respondent's nearest competitor does a yearly business of between $1,000,000 and $2,000,000 in the sale of tapered roller bearings; has 780 different items in this line; and has 2,000 customers for its tapered roller bearings. The next competitor's sales of tapered roller bearings amount to between $400,000 and $800,000 yearly; it has a mere 586 items in its line, and, at most, 1,000 customers. Thus, it is obvious that respondent is the leading supplier of tapered roller bearings in the replacement market and that a substantial share of that market is affected by its policy of exclusive dealing. That the probable effect of this policy is to substantially lessen competition is thus fully established.[2] *Standard Oil Co.* v. *United States*, 337 U.S. 293 (1949); *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821 [5 S. & D. 707] (2d Cir. 1954), *cert. denied* 349 U.S. 940 (1955); *Anchor Serum Company* v. *Federal Trade Commission*, 217 F. 2d 867 [5 S. & D. 718] (7th Cir. 1954).

Moreover, the record supports a finding of actual injury to respondent's competitors as a result of respondent's exclusive dealing policy. In many instances, competitors' products were on the shelves of distributors and jobbers at the time they entered into a contract with respondent. These dealers then proceeded to dispose of the competitive stock and replace it with Timken exclusively. As an example, one of respondent's branch managers, in a letter to Mr. Austin, stated in part:

> Their Bower inventory in two stores runs about $5500 and we feel they should be good for about six or seven thousand a year on Timken once they get their Bower stock cleared out. (Commission Exhibit 71)

[2] Although respondent introduced certain evidence in an effort to show the economic advantages to a dealer in handling only one supplier's line of tapered roller bearings, this evidence has no bearing on the question of the competitive effect of respondent's exclusive dealing policy. As we held in the matter of *Mytinger & Casselberry, Inc.*, Docket 6962, September 28, 1960, such economic considerations are irrelevant in a proceeding under Section 3 where, as here, the respondent has clearly foreclosed competition in a substantial share of the relevant market by its exclusive dealing requirement.

It is evident that as a result of respondent's policy competitors were foreclosed from selling to over 7,500 established dealers in the replacement market.

As previously found, there are several reasons why dealers prefer to handle several lines or brands of tapered roller bearings. Because of respondent's policy, its dealers are not permitted to exercise any discretion as to the brands they will carry and sell. As a result, respondent's dealers are injured by not being able to take advantage of higher discounts offered by some competitors and lose substantial sales because they are unable to carry competitive bearings. This is illustrated by the statement of one of respondent's salesmen who, in reporting a conversation with an authorized jobber, stated:

> He further stated that he made a survey of some of these dealers (car and truck dealers) on the acceptance of Bower Bearings and he found out that they would accept Bower Bearings. He added that for that class of trade, he buys Bower but for his fleet trade and garage type of trade, he will buy Timken. He further added that he knows that we would not countenance that sort of dual buying * * *. (Commission Exhibit 29 A and B)

Under the foregoing circumstances, the appeal of counsel supporting the complaint is granted. The initial decision is set aside, and we are entering our own findings as to the facts, conclusion and order to cease and desist in conformity with this opinion.

Commissioner Mills did not participate in the decision of this matter for the reason he did not hear oral argument.

In The Matter Of

NICHOLS & COMPANY, INC., ET AL.*

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

Docket 7659. Complaint, Nov. 17, 1959—Decision, Jan. 24, 1961

Order requiring an individual engaged in garnetting wool stocks on commission for other firms, to cease violating the Wool Products Labeling Act by labeling as "80% Camel Hair, 20% Wool", wool stocks which contained in part reprocessed woolen fibers, and by failing in other respects to comply with labeling requirements.

*Settled as to all other respondents by consent order dated Mar. 25, 1960 (56 F.T.C. 1122).