

Complaint

IN THE MATTER OF
GRUEN WATCH COMPANY

COMPLAINT, FINDINGS, ORDER, AND STATEMENT RE CONCURRENCE, AND ANSWER THERETO, IN REGARD TO THE ALLEGED VIOLATION OF SUBSEC. (d) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT APPROVED JUNE 19, 1936

Docket 5836. Complaint, Jan. 4, 1951—Decision, Mar. 17, 1952

Under the provisions of subsec. (d) of Sec. 2 of the Clayton Act, as amended by the Robinson-Patman Act, the seller has the free choice of making payments for advertising services furnished by the customer in connection with the sale or offering for sale of products made by said seller, or of not making such payments, and choice of the basis on which any such payments shall be made, subject to the requirement simply that such payments shall be available on proportionally equal terms to all customers who compete in distribution of said products.

Where a corporation long engaged in the manufacture and interstate sale of men's and women's watches to large numbers of customers throughout the United States, including retail jewelry stores and a few department stores and industrial houses, many in competition with each other in the resale thereof—

Paid or contracted to pay money to customers as compensation for advertising services furnished by them in connection with the sale or offer of its said watches, without making such payments available on proportionally equal terms to all of competing customers in that, due to the varying percentages allowed for the different annual purchase brackets, competing customers received varying percentages on their respective purchase volume; so that while no volume bracket of customers was excluded from participation, and there was equality of participation on the part of competing customers within a particular volume bracket, there was inequality among competing customers in different brackets:

Held, That such acts and practices, under the circumstances set forth, violated subsec. (d) of Sec. 2 of the Clayton Act as amended.

Before *Mr. Frank Hier*, hearing examiner.

Mr. William H. Smith and *Mr. Peter J. Dias* for the Commission.

Taft, Stettinius & Hollister, of Cincinnati, Ohio, and *Guggenheimer, Untermeyer, Goodrich & Amram*, of Washington, D. C., for respondent.

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The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more

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particularly designated and described, has violated and is now violating the provisions of subsection (d) 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, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. The Gruen Watch Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at Time Hill, Cincinnati 6, Ohio.

PAR. 2. Respondent is now and for many years has been engaged in the business of manufacturing and selling men's and women's watches, and has come to occupy an important position in that industry. It manufactures said watches in its factory located in the State of Ohio and sells them to a large number of customers with places of business located throughout the several States of the United States and in the District of Columbia for resale within the United States to consumers. Said customers are retail jewelry stores and a few department stores and industrial houses. During the year 1949 respondent's dollar volume of sales of said watches amounted to approximately \$12,190,000.

PAR. 3. In the course and conduct of said business respondent engaged in commerce, as commerce is defined in the Clayton Act as amended by the Robinson-Patman Act, having shipped said watches, or caused them to be transported, from said State in which its said plant is located to said purchasers with places of business located in the same and in other States and in the District of Columbia.

PAR. 4. In the course of its said business in commerce, respondent paid or contracted to pay money or other things of value to or for the benefit of some of its customers as compensation and in consideration for services and facilities furnished, or contracted to be furnished, by or through such customers, in connection with the sale, or offering for sale, of respondent's watches which it manufactures or offers for sale; and respondent did not make or contract to make such payments or considerations available on proportionally equal terms to all other of its customers competing in the distribution of respondent's said products.

PAR. 5. Among the payments alleged in Paragraph Four were those for advertising services or facilities, or advertising allowances. Said advertising allowances were available from respondent, and respondent paid or contracted to pay them, upon the following proportionally unequal terms:

Respondent classified its customers by size, from smallest to largest, into several groups on the basis of their respective volumes, volumes referring to the dollar amount of annual purchases of respondent's watches. Each of said groups consisted of those customers having volumes within the range of volumes, or volume bracket, specified for it; and the several volume brackets, respectively, covered ranges of progressively larger volumes.

Advertising allowances were available to customers in each volume bracket which, as between and among customers in the same volume bracket, amounted to the same percentage or an equal proportion of their respective volumes, but which, as between and among customers in different volume brackets, amounted to different percentages or unequal proportions of such volumes, for the reason that the larger the volume bracket the greater the percentage or proportion of volume which was available.

The greatest percentage or proportion of volume which was thus available to customers in the largest volume bracket was not available to competing customers in the next largest or in any of the other smaller volume brackets, and the same was true with respect to each of the successively smaller percentages or proportions.

Said advertising allowances were available as aforesaid to the extent that customers had made expenditures but not in excess of the percentage or proportion of volume offered by respondent and provided said advertising services were furnished through the media and in the manner specified by respondent.

PAR. 6. For a number of years past respondent has had in effect, and has now in effect, an advertising allowance plan substantially as set forth in Paragraph Five. As illustrative of respondent's advertising allowance practices, during the year 1949 said volume brackets and said percentages or proportions of volume available as said advertising allowances were as shown in columns one and two, respectively, of the table herein set forth. The third column in said table sets forth approximately the number of customers in each of said volume brackets, and the total number of customers in all of said volume brackets. The fourth column in said table sets forth approximately the total volumes of all customers in each of said volume brackets and the total volumes of all customers in all of said volume brackets. The fifth and last column in said table sets forth approximately the total dollar amount of said advertising allowances paid to all of the customers in each of said volume brackets and the total dollar amount of said advertising allowances paid to all of the customers in all of said volume brackets.

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(1) Volume Brackets	(2) Percent- ages	(3) Number of Customers	(4) Volumes	(5) Amount of Allowance
Up to \$14,999.....	2	1,021	\$2,840,113	\$51,118.16
\$15,000 to \$29,999.....	3	20	412,831	10,124.62
\$30,000 to \$49,999.....	4	6	225,099	7,733.53
\$50,000 to \$99,999.....	5	7	447,862	19,726.17
\$100,000 to \$249,999.....	6	1	103,811	5,980.00
\$250,000 to \$499,999.....	7	1	313,896	19,515.20
\$500,000 and over.....	8	0	0	0
		1,056	4,346,582	114,197.68

The above table includes approximately all of respondent's customers during said year and many of said customers, purchasing different volumes and receiving different percentages or proportions of volume as advertising allowances, were in competition with each other in the sale of respondent's watches to consumers.

PAR. 7. The acts and practices of the respondent, as above alleged, violate subsection (d) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U. S. C. Title 15, Sec. 13).

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF
COMPLIANCE

Pursuant to the provisions of the Clayton Act, as amended by the Robinson-Patman Act (15 U. S. C. Sec. 13), the Federal Trade Commission on January 4, 1951, issued and subsequently served its complaint in this proceeding upon The Gruen Watch Company, a corporation, charging said respondent with violation of subsection (d) of Section 2 of said Act, as amended. After the filing by respondent of its answer to the complaint, respondent filed motion to withdraw such answer and to file substitute answer annexed thereto admitting, solely for the purposes of this proceeding and the enforcement or review thereof, various allegations of material fact set forth in the complaint including reasonable inferences which may be drawn therefrom, waiving hearing on the complaint and consenting that the Commission may make and enter its findings as to the facts based on the complaint and such substitute answer and thereupon issue its order, which substitute answer was proffered on the condition, however, that no order to cease and desist be issued and served herein until orders are entered by the Commission disposing of the proceedings pending in Docket No. 5830, Bulova Watch Company, and in Docket No. 5337, Elgin National Watch Company. Respondent's motion, as aforesaid, was duly granted by a hearing examiner of the Commission theretofore designated by it to act in this proceeding, this proceeding was

closed for the taking of evidence and on May 25, 1951, the hearing examiner filed his initial decision.

Thereafter, within the time permitted by the Rules of Practice of the Commission, respondent appealed from the initial decision of the hearing examiner and this matter came on for final hearing before the Commission upon the complaint, the substitute answer, the initial decision of the hearing examiner and respondent's appeal therefrom, briefs in support of and in opposition to such appeal and oral arguments; and the Commission, having duly considered the record and ruled upon said appeal and being now fully advised in the premises, makes the following findings as to the facts, conclusion drawn therefrom and order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent The Gruen Watch Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at Time Hill, Cincinnati 6, Ohio.

PAR. 2. Respondent is now and for many years has been engaged in the business of manufacturing and selling men's and women's watches, and has come to occupy an important position in that industry. It manufactures said watches in its factory located in the State of Ohio and sells them to a large number of customers with places of business located throughout the several States of the United States and in the District of Columbia for resale within the United States to consumers. Said customers are retail jewelry stores and a few department stores and industrial houses. During the year 1939 respondent's dollar volume of sales of said watches amounted to approximately \$12,190,000.

PAR. 3. In the course and conduct of its business, as aforesaid, and during all the times mentioned herein, respondent engaged in commerce, as "commerce" is defined in the Clayton Act, having shipped its watches, or caused them to be transported, from the State in which its plant is located to said purchasers with places of business located in Ohio and in other States and in the District of Columbia.

PAR. 4. In the course of its said business in commerce, respondent paid or contracted to pay money to its customers as compensation and in consideration for advertising services furnished by such customers in connection with the sale or offering for sale of watches manufactured and sold by respondent in accordance with the advertising allowance plan set out in Paragraphs Five and Six of these findings as to the facts. Such plan did not make or purport to make such pay-

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ments available on proportionally equal terms to all of respondent's customers competing in the distribution of its said products.

PAR. 5. Said advertising allowances were available from respondent and respondent paid or contracted to pay them upon the following proportionally unequal terms:

Respondent classified its customers by size, from smallest to largest, into several groups on the basis of their respective volumes, volumes referring to the dollar amount of annual purchases of respondent's watches. Each of said groups consisted of those customers having volumes within the range of volumes, or volume bracket, specified for it; and the several volume brackets, respectively, covered ranges of progressively larger volumes.

Advertising allowances were available to each customer in every volume bracket. As between and among customers in the same volume bracket, the advertising allowances available to them amounted to the same percentage or an equal proportion of their respective volumes. As between and among customers in different volume brackets, the advertising allowances available to them amounted to different percentages or unequal proportions of their respective volumes for the reason that, the larger the volume bracket, the greater the percentage or proportion of volume available thereunder as an advertising allowance.

The greatest percentage or proportion of volume which was thus available to customers in the largest volume bracket was not available to competing customers in the next smaller volume bracket or in any of the other smaller volume brackets, and the same was true with respect to each of the successively smaller percentages or proportions.

Said advertising allowances were available as aforesaid to the extent that customers had made expenditures, but not in excess of the percentage or proportion of volume offered by respondent and provided said advertising services were furnished through the media and in the manner specified by respondent.

PAR. 6. For a number of years past respondent has had in effect, until February 20, 1951, an advertising allowance plan substantially as set forth in Paragraph Five. As illustrative of respondent's advertising allowance practices, during the year 1949 said volume brackets and said percentages or proportions of volume available as said advertising allowances were as shown in columns one and two respectively, of the table hereinafter set forth. The third column in said table sets forth approximately the number of customers in each of said volume brackets availing themselves of all or part of the advertising allowances offered them under the plan. The fourth column in said table sets forth approximately the total volumes of customers in each of said

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volume brackets availing themselves of all or part of the advertising allowances offered them under the plan. The fifth and last column in said table sets forth approximately the total dollar amount of said advertising allowances paid to the customers in each of said volume brackets availing themselves of all or part of the advertising allowances offered them under the plan.

(1) Volume Brackets	(2) Percent- ages	(3) Number of Customers	(4) Volumes	(5) Amount of Allowance
Up to \$14,999.....	2	1,378	\$3,211,094	\$58,419.14
\$15,000 to \$29,999.....	3	27	510,647	13,734.21
\$30,000 to \$49,999.....	4	7	225,039	7,733.53
\$50,000 to \$99,999.....	5	8	517,059	23,186.02
\$100,000 to \$249,999.....	6	1	101,049	6,052.94
\$250,000 to \$499,999.....	7	(*)		
\$500,000 and over.....	8	0	0	0
		1,421		

*There was one customer in this bracket during 1949, but all its sales were made exclusively outside of the United States and its territories, hence figures thereon have been omitted.

The foregoing table includes only those of respondent's customers during said year who availed themselves of respondent's advertising allowance plan, although respondent had over 7,500 accounts during the year 1949. Many of the customers who purchased different volumes and received different percentages or proportions of volume as advertising allowances, were in competition with each other in the sale of respondent's watches to consumers.

CONCLUSION

1. Subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, gives respondent the free choice of making payments for advertising services furnished by the customer in connection with the sale or offering for sale of products manufactured or sold by it, or of not making payments, and the further choice of the basis on which any such payments shall be made. The statute simply requires that such payments shall be available on proportionally equal terms to all customers competing in the distribution of such products.

2. Respondent, as a matter of business policy, determined to make such payments, selected as a basis therefor the annual dollar volume of purchases by each customer and classified its customers accordingly.

3. Upon the basis selected by respondent, all of its customers might receive payments but the payments were not made on a proportionally

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equal basis to all customers competing in the sale of respondent's products as required by law. This is true because many of respondents' customers received from respondent as payment or compensation for advertising services and facilities payments based on percentages or proportions of their annual dollar volume different from the percentages or proportions used by respondent in determining the payments received by other customers who were in competition with them in the sale of respondent's watches to consumers. Thus, while there has been no exclusion of any classification or volume bracket of customers from participation and while there has been equality of participation on the part of competing customers within a particular volume bracket, there has been inequality of possible and actual participation among competing customers in different classifications or brackets.

4. The acts and practices of the respondent, as herein found, have constituted violations of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That the respondent The Gruen Watch Company, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale or offering for sale of men's and women's watches in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

(1) Paying or allowing, or contracting to pay or allow, anything of value to, or for the benefit of, any customer, for advertising services or facilities furnished by or through such customer, as a percentage or proportion of the dollar volume of purchases by such customer, different from the percentage or proportion offered or granted any other customer where such customers compete in fact in the resale of said products and where such payments are based on the amount of purchases made.

(2) Paying or allowing, or contracting to pay or allow, anything of value to, or for the benefit of, any customer 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 manufactured or sold by respondent, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products.

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 this order.

STATEMENT TO ACCOMPANY COMMISSIONER MASON'S
CONCURRENCE IN THE ABOVE MATTER

Under the present administrative policy of the Commission there is nothing to do but enter the order herein.

Respondents asked that they be permitted to make a record of their willingness at all times to comply with the Commission's official interpretation of the law as was disclosed at various conferences with staff members regarding the interpretation of the particular section of the Clayton Act which is basis of the present litigation. At the time of the conferences it appears that the Commission had not advised them their method of granting discounts was contrary to the Commission's policy at that time. If that were true, then the particular issue involved is now clear enough since the Commission has enunciated its interpretation of the law through a formal complaint without an opportunity for the respondents to bring their discount structure in line with this interpretation.

How much easier, quicker and especially how much fairer it would be if we adopted a policy of never suing on an alleged offense which we were first unwilling to define. I do not believe an administrative agency should prosecute a businessman for a method, act or practice in interstate commerce if it is unwilling to first answer an inquiry as to the legality of the same in terms of specific submitted facts. A suit based on the uncertainty or obscurity of a statute with no prior indication from the agency as to its interpretation of the same should seldom be the basis for Government prosecution. We are guilty of equivocation when we are unwilling to first interpret what we are willing to sue on. This equivocation is litigious in character. Government plays hide and seek with its knowledge.

An economic democracy cannot properly function without administrative processes, but if we are to successfully accept the full consequences of administrative functions, we must expect to be explicit. It may be more expedient to do otherwise but it is not justice in the broad moral sense. Waiting to make law by a prosecution means that the time of the enunciation of that law is set by the court clerk's official date mark on the final decree. This, the date mark of the decree, may be from one to ten years after the act complained of has occurred. This is *ex post facto* in effect. What the businessman has done is not proclaimed illegal until after he has done it. This is calling the rules after the play is made.

Answering Statement

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We are caught in the inexorable machinery of a hard and fast policy statement adopted by the Commission on May 11, 1949:

"It is not the policy of the Commission to grant the privilege of settling cases through * * * stipulation agreements (for) * * * violations of the Clayton Act."

The whole purpose of the Federal Trade Commission was to make explicit obscure and difficult phases of the law merchant, but by an order such as this, we shut the door to those who have evidenced a willingness to follow our interpretations, and we serve notice on the business world that any inquiry to the Commission for the purpose of guidance which might disclose a technical violation can accomplish nothing for the respondent except prosecution and a cease and desist order.

I am against this policy, but as long as it is the policy of the Commission, there is nothing to do but concur in this order.

ANSWERING STATEMENT OF COMMISSIONER CARSON TO COMMISSIONER
MASON'S "CONCURRING" STATEMENT

Neither an opinion nor an interpretative statement would ordinarily be written in a case such as we have here before us. No new principle is established by the decision in this case. No novel facts are developed. The violation of the law was so obvious that counsel for the respondent offered only token opposition.

The justification for this answering statement is that a "concurring" statement has been filed for the record by one Commissioner. Were it not for that fact, the record would rest, as it should, on the findings of fact and the order of the Commission. But we are compelled, in the public interest, to answer the "concurring" statement. If it remained unanswered, the result might be, and we fear it would be, that the public and the respondent might be misled as to facts and law, and as to the authority and the procedures of this Commission. Thus this Commission and its ability to serve the public interest would be impaired, and the public interest would be injured.

My colleague states in his "concurring" statement that "under the present administrative policy of the Commission there is nothing to do but enter the order herein." The fact is that "under the law there is nothing to do but enter the order herein." And we are here to obey and enforce the law. There is obviously no provision of law which authorizes this Commission to adopt a policy which would be wholly outside the boundaries of the basic enabling Acts we are ordered to enforce.

Let us look at the law. It is so clear that he who runs may read.

Paragraph 2 of Section 11 of the Clayton Act, as amended by the Robinson-Patman Act, reads as follows:

"Whenever the Commission, authority, or board, vested with jurisdiction thereof, shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven or eight of this Act, it shall issue and serve upon such persons a complaint * * *."

The law which we have solemnly pledged we will enforce states that the Commission "shall" do just what the Commission did in this case, and what it must do in all similar cases. The Commission had every "reason to believe" the law was being violated. The Commission issued a complaint which resulted in the presentation of evidence and a trial of the issues.

It is well to look again at Paragraph 2 of Section 11 of the Clayton Act, as amended. After a complaint has been issued, the law directs the Commission to provide for hearing and trial of the issues and then adds that "if the Commission shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations."

The law again states that the Commission "shall" state its findings of fact and issue and serve an order to cease and desist. The Commission made its findings of fact and issued its order. It fulfilled the obligations it had assumed under a solemn oath of office.

Could it be that the author of the "concurring" statement is actually only intent upon opposing the Clayton Act, as amended by the Robinson-Patman Act? It would seem that that was his purpose, even though the nebula within the words and phrases of the "concurring" statement might justify the casual reader in assuming that he intended to criticism his colleagues. It is probable they would be justified in so believing. It is unfortunate that they might thus misinterpret the intent of the words and phrases. Of course, the answer to our colleague, the author of the "concurring" statement, and to anyone who is attacking the law, is that their cause should be presented to the Congress.

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IN THE MATTER OF
ELGIN NATIONAL WATCH COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SUBSEC. (d) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914,
AS AMENDED BY AN ACT APPROVED JUNE 19, 1936

Docket 5837. Complaint, Jan. 4, 1951—Decision, Mar. 17, 1952

Under the provisions of subsec. (d) of Sec. 2 of the Clayton Act as amended by the Robinson-Patman Act the seller has the free choice of making payments for advertising services furnished by customers in connection with the sale or offer of the seller's products, or not making such payments, and the further choice as to the basis on which any of such payments shall be made, subject simply to the statutory requirement that such payment if made shall be available on proportionally equal terms to all customers who compete in the distribution of such products.

Where a corporation which was engaged in the manufacture and interstate sale of men's and women's watches to some 15,000 customers throughout the United States, which included single retail jewelry stores, chain retail jewelry stores, mail order houses and premium houses, in competition with each other in the resale of its said watches to consumers;

Paid or contracted to pay money to some of its customers as compensation for advertising services furnished by them in connection with the sale or offer of its watches without making such payments available on proportionally equal terms to all competing customers in that, no advertising allowance was available to customers classified in the smallest annual purchase volume bracket, and customers in all of the other volume brackets had available to them greater percentage allowances on their respective purchase volumes than were available to customers in the next lower bracket:

Held, That such acts and practices, under the circumstances set forth, violated subsec. (d) of Sec. 2 of the Clayton Act as amended.

Before *Mr. Frank Hier*, hearing examiner.

Mr. William H. Smith and *Mr. Peter J. Dias* for the Commission.

Gardner, Carton & Douglas, of Chicago, Ill., for respondent.

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 (U. S. C. Title 15, sec. 13) as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Elgin National Watch Company, is a corporation organized, existing and doing business under and by vir-