

Decision

IN THE MATTER OF

ATALANTA TRADING CORPORATION

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

Docket 6464. Complaint, Nov. 21, 1955—Decision, Dec. 20, 1956

Order requiring a seller of meat products, principally imported hams, under the trade name "Unox," through territorial salesmen and food brokers and direct to grocer retailers including retail chains, approximating sales during 1954 of \$24,000,000, to cease making payments for advertising furnished by a customer which were the result of private negotiations tailored exclusively to fit the desires of the two interested parties, and which were not based on and did not result in a general plan for payment which could be offered to competitors in accordance with Sec. 2(d) of the Clayton Act.

Mr. Andrew C. Goodhope and Mr. Fredric T. Suss for the Commission.

Steptoe & Johnson, of Washington, D.C., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Complaint in this matter issued November 21, 1955, and charged respondent with granting advertising allowances to some but not to all of its customers competitively engaged in the resale of respondent's products in violation of subsection (d) of section 2 of the Clayton Act (15 U.S.C. 13) as amended by the Robinson-Patman Act. Answer was filed December 21, 1955, admitting jurisdictional and descriptive facts and the payment of promotional allowances to some of its customers but denying that such promotional allowances were not made available on proportionally equal terms to all of its customers competing in the resale of all its products. After various postponements one hearing was held April 3, 1956, at which the entire case was presented, and the transcript, consisting of 58 pages accompanied by seven exhibits, and the case closed for proof taking the same day. Thereafter proposed findings of fact were submitted by all counsel and the case formally closed on May 17, 1956. Only two witnesses testified, one, the vice president and co-owner of respondent, for the Commission, and the other, respondent's salesman for the Washington territory, for the respondent. Upon consideration of the proposed findings and conclusions submitted by counsel and the entire record in this proceeding, the hearing examiner makes the following:

FINDINGS OF FACT

1. Respondent Atalanta Trading Corporation 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 77 Hudson Street, New York, New York.

2. Respondent is now and has for several years past been engaged in the business of selling and distributing meat products, principally imported hams, under the trade name "Unox," and also frozen sea food. Since no advertising allowances were made in connection with the sale of its frozen sea food products that branch of its business is not here involved. Respondent sells its products largely through territorial salesmen, through food brokers, and direct to grocery retailers, including retail chain store organizations. The total sales made by respondent are substantial and were approximately \$24,000,000 during the year 1954.

3. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act as amended. Respondent sells its products and causes them to be transported across state lines from its principal place of business in the State of New York to customers located in the same and other states of the United States and the District of Columbia, most of its business being on the East Coast.

4. Proof in this case is confined by agreement of counsel to the sale of meat products for the year 1954 and the first six months of 1955 and to the metropolitan trading areas of Philadelphia, Baltimore, and Washington. However, since respondent made no promotional advertising allowances to any customers in the Philadelphia and Baltimore metropolitan trading areas, the evidence is necessarily confined to the Washington metropolitan trading area.

5. During the period involved, and in the Washington area, respondent sold its products to seven customers including Giant Food Shopping Center, Inc. Three of these customers, however, were strictly wholesalers who resold to retailers and were therefore not in competition with Giant Food Shopping Center, Inc. The remaining three of respondent's customers, however, were and are in competition with Giant Food Shopping Center, Inc. Sales during 1954 to these latter three customers totaled roughly \$350 in one instance, \$631 in the second instance, \$6,600 in the third instance, whereas sales to Giant Food Shopping Center, Inc. approximated one-quarter million dollars.

6. For the first six months of 1955, sales to Giant Food Shopping Center, Inc. were approximately \$75,000, whereas sales to two of its

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Findings

competitors amounted to something less than \$300 in one instance and approximately \$1,400 in the second instance.

7. None of these customers were paid advertising allowances in the period in question by the respondent with the exception of Giant Food Shopping Center, Inc., which concern received from respondent as an advertising allowance \$500 on July 15, 1954, \$2,000 on December 24, 1954, and \$1,000 on May 2, 1955. The first two of these advertising allowances were paid pursuant to arrangements made at the instance of respondent who persuaded the recipient to enter into an agreement. The third payment on May 2, 1955, was made in accordance with arrangement sought and solicited by the recipient and pursuant to a contract entitled "Giant Food Department Stores 19th Anniversary Sale Contract of Participation."

8. All of these agreements were individually negotiated arrangements between respondent and Giant Food Shopping Center, Inc. None of them are geared to any commercial standard such as dollar or unit volume of purchases, traffic count or counter space, or any other indicia of a buyer-seller relationship. They represent simply so much money for so much advertising. There is no discernible relationship between them.

9. Up until July 30, 1955, respondent had no advertising or promotional allowance plan with definitely formulated terms uniform as to quantity or product.

10. Although respondent's vice president and co-owner and his Washington area salesman, sole witnesses in this proceeding, both testified that they tried to introduce their unknown product in the various sales outlets without success because the product was unknown and that they offered to enter into advertising allowance arrangements with any likely outlet, also without success, either because the outlet solicited was already handling one brand of ham or because in a self-service outlet customers tend to buy nationally or locally advertised products with which they are already familiar, the record clearly shows that each such solicitation was on a vague and unformulated basis contemplating individual negotiation with the outlet in each instance without reference to any proportional terms, or any effort to proportionize payments to a selected or fixed standard, such as purchases. This does not comply with the law as the hearing examiner understands it.

11. It follows, therefore, that even though the record shows affirmative solicitation of all customers competitively engaged in the resale of respondent's imported meat products, such solicitation for co-operation in local advertisement of such products was not the offer

of a plan formulated by respondent with proportionally equal terms uniform to all. It was, on the contrary, simply to enter into co-operative advertising arrangements on any terms which might be secured and which inevitably would vary from customer to customer and which inevitably, because of a lack of a selected standard, such as purchase volume, would not be on proportionally equal terms.

12. Respondent also raises the defense that these payments to Giant Food Shopping Center, Inc. were made to promote products, not offered or sold to any competing customer, and therefore there was no legal obligation upon respondent to offer or pay any other customer. In the first place, this is factually inaccurate. The payment of \$500 to Giant on July 15, 1954, was, according to testimony, for "pork shoulder picnics," although the invoice was for "hams." Whatever it was, the same product was six months later sold to a competitor of Giant's, Shirley Stores, which received no advertising allowance. The second payment of \$2,000 to Giant on December 28, 1954, was to promote gift wrapped $2\frac{1}{4}$ and 5 lb. hams, and the same product was sold in the following April to a nonrecipient customer, but without the gift wrapping. The third payment of \$1,000 to Giant on May 17, 1955, was made to promote respondent's products generally, with particular emphasis on a new product, a 4 lb. tin of Canadian bacon, cooked and ready to eat. Canadian bacon had previously been sold raw, smoked, and sliced. None of this was sold by respondent to any of its customers, who competed with Giant.

13. All of these products were pork, and to the hearing examiner, ham is ham, regardless of whether sold in 2 or 5 lbs., or whether wrapped in grocery paper or gift box. These "differences" amount to no more than the distinction between sizes of the same shoe or the same dress, and certainly the paper meat is wrapped in does not create a competitive difference. This is a distinction without a difference, more fanciful than real. All of these products were sold under respondent's brand name of "Unox" and all were of "like grade and quality." *In the matter of Golf Ball Manufacturers' Association*, 26 F.T.C., 824, 830; *In the matter of General Foods Corporation*, Docket 6018; *In the matter of Luxor, Limited*, 31 F.T.C. 658. This defense is rejected.

14. Respondent, therefore, has paid substantial sums of money to one of its customers as compensation or in consideration for services or facilities furnished by such customer in connection with the resale of respondent's products sold by such customer without making such payments available on proportionally equal terms to all other of respondent's customers competing in the resale of respondent's products.

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15. Accordingly, respondent's motion to dismiss the complaint herein, made at the conclusion of the case, is denied.

CONCLUSIONS

Such a practice is in violation of subsection (d) of section 2 of the Clayton Act as amended by the Robinson-Patman Act.

ORDER

It is ordered, That respondent, Atalanta Trading Corporation, a corporation, its officers, employees, agents, and representatives, directly or through any corporate or other device, in or in connection with the sale of grocery products in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, do forthwith cease and desist from:

Making or contracting to make, to or for the benefit of any customer, any payment of anything of value as compensation or in consideration for any advertising or other services or facilities furnished by or through such customer, in connection with the handling, offering for resale, or resale of products sold to him by respondent, unless such payment is affirmatively offered or otherwise made available on proportionally equal terms to all other customers competing in the distribution or resale of such products.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

Respondent appeals from a decision and order against it under Section 2(d) of amended Clayton Act.

The controversy grows out of allowances made to Giant Food Shopping Center, Inc., in connection with the sale to it of certain canned meat products. The evidence is limited to the year 1954 and the first half of 1955, and is confined to the metropolitan area of Washington, D.C.

Respondent paid Giant allowances as follows:

July 15, 1954.....	\$500. 00
December 24, 1954.....	2, 000. 00
May 2, 1955.....	1, 000. 00

The first two payments were made at the solicitation of respondent; the last was made at the solicitation of Giant and was in accordance with a contract (Comm. Ex. 6) entitled "Giant Food Department Stores 19th Anniversary Sale Contract of Participation."

The first payment was made after receiving an invoice from Giant from which the following is quoted: "For newspaper advertising in

Washington Post and Evening Star publication, and use of end displays in 26 markets. Preparation of window signs and give-away leaflets—Unox Hams—\$500.00.”

The second payment was on an invoice (Comm. Ex. 3(a)) from which the following is quoted: “For advertising in the Washington Post and Evening Star publications. Window signs prepared in our own shop. Counter cards prepared in our own shop. End displays arranged for in 25 markets. Premiums purchased for employees as an incentive contest in conjunction with the promotion of Unox Products. Live demonstrations conducted by our personnel. Samples used, at our expense—\$2,000.”

The invoice (Comm. Ex. 4(a)) for the final payment was for “Advertising and promotional services rendered during Giant’s 19th Anniversary Sale, April 18 through April 30, 1955—\$1,000.00.”

It appears from the record that all these payments were the result of negotiations between respondent and Giant. In this connection, the vice-president of respondent, who represented it in the negotiations, testified:

Q. As I understand your testimony, these payments that you made to Giant were negotiated payments?

A. Absolutely.¹

During the times in question, respondent had other customers in the Washington area who were retailing respondent’s products in competition with Giant. Respondent called on these customers and attempted to negotiate allowances with them but without success. It did the same with other retailers who were not customers.

Section 2(d) makes it unlawful to pay a customer for services or facilities furnished by him unless such payment is available on proportionally equal terms to all other customers competing in the distribution of such products. It was adopted to prevent discriminations in favor of certain customers in the matter of advertising and other allowances.

The payments here did not comply with the law. They are the result of private negotiations which finally resulted in Giant’s agreeing to perform certain services and in respondent’s agreeing to pay a lump sum of money. It was a plan tailored exclusively to fit the desires of the two parties negotiating. It could not have been made available on proportionally equal terms to competitors who may have rendered a greater or lesser amount of services or who may have sold a greater or lesser amount of product. The reason is that there is no basis by which the mandate of proportionalization could be carried out. The negotiations were not based on nor did they result in a general plan for payment which could be offered

¹ Published as modified by Commission order of March 28, 1957.

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to competitors in accordance with the law. No such plan was in fact offered. The respondent simply called on the competitors and offered to negotiate terms with each individually. No attempt was made to present a plan offering payments on proportionally equal terms to those that were to be paid to Giant. After July 30, 1955, respondent did have a promotional allowance plan with definitely formulated terms uniform as to quantity or product.

Respondent argues, first, that the payments to Giant were made to promote new products not sold to any competing customers and therefore there was no legal obligation to offer allowances to other competitors selling respondent's canned meats generally, and, second, that the promotional allowances were offered for special occasions and for a limited time and that allowances need not be offered for sales made thereafter.

Respondent's vice-president testified that the \$500 payment of July 15, 1954, was for a July Fourth weekend promotion of "Pork Shoulder Picnics." One competitor of Giant, on December 13, 1954, bought five cases of this same product. The witness also testified that the December 24, 1954, payment of \$2,000 was for the promotion of gift packages of Unox family-size hams (2¼ and 5 lbs.) including a 32-page recipe book, all suitably wrapped for mailing. In April, 1954, respondent made one sale of this product, but not gift wrapped, to another retailer in the area.

Although the contract for the \$1,000 payment made May 17, 1955, does not so specify, the witness testified that the promotion was of Unox Canadian Style Bacon in 4 lb. tins. It was an item that had not previously been sold to the public in a tin, but had always been merchandised sliced and sold by the quarter pound or the half pound. This product was a fully cooked product, whereas other Canadian Style Bacon previously sold was not cooked but was only smoked.

It thus appears that on at least two occasions, substantially identical products were sold to competitors of Giant within six or eight months of the date of the sales to Giant under the allowances complained of. However, Section 2(d) is not limited to sales of identical products. That construction would make the section very easy of evasion. It is the real competitive situation which is to be considered. See *In the Matter of Luxor, Ltd.*, 31 F.T.C. 658. Commission Exhibit 7(a) lists the meat products upon which respondent was paying promotional allowances in 1954 and 1955. They were all pork products, namely, hams of varying sizes, "picnics" (pork shoulders), loin roll, cottage butts, and chopped ham. With apparently one exception, they were all sold under the trade name Unox. In the

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general field of pork products, they were in competition with each other. Commission Exhibit 1 shows that during the times in question, competitors of Giant bought from respondent pork products in a substantial total and that the individual purchases occurred in a majority of the months in each yearly or semi-yearly period involved.

Furthermore, even assuming that the allowances paid to Giant covered only brief promotional periods, the obligation would still be upon respondent to make them available during that period on proportionally equal terms to all other customers competing in the distribution of such products or commodities. It is clear that this was not done.

Respondent's appeal is denied. The findings of fact in the initial decision, except as to Paragraphs 14 and 15 thereof, are adopted as the findings of fact of the Commission.

It is directed that an order issue as follows:

ORDER

It is ordered, That respondent Atalanta Trading Corporation, a corporation, its officers, employees, agents, and representatives, directly or through any corporate or other device, in or in connection with the sale of grocery products in commerce, as "commerce" is defined in the aforesaid Clayton Act as amended, do forthwith cease and desist from:

Making or contracting to make, to or for the benefit of any customer, any payment of anything of value as compensation or in consideration for any advertising or other services or facilities furnished by or through such customer, in connection with the handling, offering for resale, or resale of products sold to him by respondent, unless such payment is affirmatively offered or otherwise made available on proportionally equal terms to all other customers competing in the distribution or resale of such products.

Paragraph 14 of the initial decision contains a list of "principles or interpretations" of the law relating to advertising or other promotional allowances. Except as they may be involved in the issues presented in this case, this opinion is not to be construed as expressing any views thereon.

Commissioner Tait did not participate in the decision in this matter.

FINAL ORDER

This matter having been heard on the respondent's appeal from the hearing examiner's initial decision, and the Commission having concluded that said respondent has violated the provisions of subsec-

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tion (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, and having rendered its opinion denying the appeal; and

The Commission in its opinion having adopted as its own the findings of fact in the initial decision, excepting paragraphs 14 and 15 thereof, and having set forth the order to cease and desist to be issued in lieu of that contained in said initial decision:

It is ordered, That respondent Atalanta Trading Corporation, a corporation, its officers, employees, agents, and representatives, directly or through any corporate or other device, in or in connection with the sale of grocery products in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, do forthwith cease and desist from:

Making or contracting to make, to or for the benefit of any customer, any payment of anything of value as compensation or in consideration for any advertising or other services or facilities furnished by or through such customer, in connection with the handling, offering for resale, or resale of products sold to him by respondent, unless such payment is affirmatively offered or otherwise made available on proportionally equal terms to all other customers competing in the distribution or resale 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 said order.

Commissioner Tait not participating.

Complaint

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IN THE MATTER OF
ANAHIST CO., INC.

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

Docket 6524. Complaint, Mar. 6, 1956—Decision, Dec. 20, 1956

Consent order requiring a corporate manufacturer of medicinal preparations including "Anahist Tablets," in Yonkers, N.Y., to cease violating Sec. 2(d) of the Clayton Act by paying sums of money to sponsors of television programs for services and facilities furnished in the form of television advertising of Anahist products, while not making such payments available on proportionally equal terms, or any terms, to all other customers competing in the sale of Anahist products.

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

Mr. Donald R. Moore for the Commission.

Goldstein,, Judd & Gurfein, Mr. Nathaniel L. Goldstein and Mr. Morris A. Wirth of counsel, of New York City, for respondent.

COMPLAINT

This complaint is issued by the Federal Trade Commission against the respondent, Anahist Co., Inc., a corporation because the Commission has reason to believe the corporation has violated the provisions of subsection (d) of Section 2 of the Clayton Act, as amended (15 U.S.C., Section 13). The charges are as follows:

PARAGRAPH 1. Anahist Co., Inc., is a corporation organized, existing, and doing business under the laws of the State of New York. It has its manufacturing plant and principal office at 21 Gray Oaks Avenue, Yonkers, New York.

PAR. 2. Anahist is engaged in the manufacture and sale of medicinal preparations, including Anahist Tablets, Anahist Atomizer, and Hist-O-Plus. These products are sold to 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. Among these customers are retail drug chains, independent retail drug stores and department stores.

PAR. 3. Anahist is now, and for many years has been, engaged in commerce, as that term is defined in the Clayton Act. It transports, or causes to be transported, its products from the state of manufacture to purchasers located in other states and the District of Columbia, as well as to purchasers in the state of manufacture. There is and has been a constant stream of trade and commerce in these products among various states and the District of Columbia.