

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
LIGGETT & MYERS TOBACCO COMPANY, INC.

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

Docket 6642. Complaint, Sept. 28, 1956—Decision, Sept. 9, 1959

Order requiring a manufacturer of cigarettes and other tobacco products, with nationwide distribution, to cease violating Sec. 2(d) of the Clayton Act by such practices as (1) making payments to a New York City tobacco wholesaler for promotional services but not making any such payments to its wholesale competitors; (2) paying money to vending machine operators for their services without making such payments available on any terms to competing over-the-counter retailers; and (3) paying point-of-sale allowances to some over-the-counter retailers through individual negotiation and not on a proportionally equal basis, while not making such allowances to others.

Mr. William J. Boyd, Jr., Mr. Jerome Garfinkel and Mr. Arthur J. Hessburg for the Commission.

Simpson Thacher & Bartlett, by Mr. Whitney North Seymour and Mr. Armand F. Macmanus, of New York, N.Y., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The respondent manufactures, sells and distributes tobacco products, including cigarettes. The charge is that in connection with its cigarette business respondent has violated §2(d) of the Clayton Act as amended by the Robinson-Patman Act (U.S.C. Title 15, §13); specifically, that during the three years prior to issuance of the complaint on September 28, 1956, the respondent

1. paid advertising allowances in varying amounts to some customers, but did not do so or offer to do so, in any amount, to other competing customers;

2. paid allowances to some customers, but did not make payments, or offer to make payments, to competing customers in amounts equal to the same percentage of such competing customers' net purchases, or proportionally equal upon any other basis or by any other test.

The complaint alleges that respondent granted allowances or made payments to certain retail customers for placing, in their business establishments, framed cards, posters, signs, change trays and counter displays advertising respondent's cigarettes; that such allowances were determined by individual negotiations between respondent's sales representatives and such customers, and were not made available to other customers who competed with such favored customers in the resale of respondent's cigarettes. Also it is alleged that respondent, through an agent, the Harrough Corporation, granted advertising allowances and made payments to certain cigarette vending-machine operator customers for the distribution, through their machines, of matches advertising respondent's cigarettes; and that such vending-machine operators compete with other vending-machine operators, with tobacco wholesalers and with retailers—customers of respondent—who have not been paid or offered this type of allowance by respondent.

By answer respondent admits the allegations of the complaint as to its corporate organization; the general nature of its business; that it engages in interstate commerce; that it has paid some retail customers during the past three years for space for the display of its advertising cards, posters, signs, trays and counter displays; and that the total of such payments to customers and non-customers in 1955 amounted to more than \$1,400,000. Respondent denies the other material allegations of the complaint, and denies violation of the Clayton Act as amended. Further, the respondent alleges seven "complete defenses" and three "partial defenses," as follows:

As "complete defenses":

1. §2(d) of the Clayton Act is unconstitutional and void for vagueness, in violation of the due-process clause of the Fifth Amendment;

2. §2(d) is unconstitutional and void because its provisions are unreasonable, arbitrary, and capricious, also in violation of the due-process clause of the Fifth Amendment;

3. §2(d) is unconstitutional and void in that the provisions thereof are an unwarranted and improper delegation of legislative power by Congress to administrative officials, in violation of §1 of Article I of the Constitution;

4. the attempted application of §2(d) to the acts and practices of respondent, within the subject-matter of the complaint, violates the due-process clause of the Fifth Amendment;

5. §2(d) is unconstitutional and void if construed to make unlawful the acts complained of without regard to whether the effect of such acts may substantially lessen competition, or tend to create a monopoly or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of the alleged discrimination, or with customers of either of them;

6. the complaint does not allege and the Commission has the burden of establishing that the effect of respondent's acts and practices may be substantially to lessen competition or may tend to create a monopoly, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of the alleged discrimination or with customers of either of them, and the effect of said acts and practices is not of that character; and

7. respondent's acts and practices have been engaged in, in good faith, to meet the similar acts and practices of its competitors.

As "partial defenses," respondent alleges that:

1. it sells cigarettes to customers who sell at retail, and to wholesaler and jobbers who, in turn, sell to their own customers who sell at retail. To the extent that payments have been made by respondent to customers of said wholesalers and jobbers, said payments were not made to customers of respondent within the meaning of §2(d);

2. the Harrough Corporation, referred to in the complaint, is not, and at no time mentioned was, a customer of respondent, but was employed as an independent contractor and not as an agent; its services did not involve the sale of cigarettes or any other commodity. Respondent's payments to it were not in the course of interstate commerce, nor were its services, or any payments made by it to others, in the course of interstate commerce. The transactions between respondent and the Harrough Corporation, and between the Harrough Corporation and others, are not within the provisions of §2(d), and the Federal Trade Commission is without jurisdiction with respect thereto; and

3. the acts and practices of respondent relating to vending-ma-

chine operators and operations were primarily to enable respondent to have its cigarettes in at least one dispensing column of each machine, and were reasonably and necessarily required for that purpose in the light of competitive practices. Such acts and practices are not advertising allowances, and do not come within the purview of §2(d).

Hearings were held in this proceeding in New York, Buffalo, and Boston, at which evidence was received as to respondent's acts and practices in those cities and in the surrounding areas, that being deemed adequate to show respondent's conduct generally as it relates to the matters charged in the complaint. After the close of the reception of evidence, counsel supporting the complaint and counsel for the respondent submitted proposed findings of facts, conclusions of law and legal memoranda in support thereof, and were heard in oral argument thereon. Upon the basis of the entire record, the following findings are made and conclusions reached:

FINDINGS OF FACT

1. Respondent, Liggett & Myers Tobacco Company, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of New Jersey, with its executive offices located at 630 Fifth Avenue, New York, New York.

2. Respondent is now and for a number of years past has been engaged in the business of manufacturing, selling and distributing cigarettes, cigarette tobacco, pipe tobacco and chewing tobacco. Said products are and have been sold to customers—wholesalers, jobbers and retailers—whose places of business are located in the several States of the United States and in the District of Columbia, for ultimate resale to the purchasing public. Respondent is a substantial factor in the tobacco industry; in 1955, it accounted for approximately 15 percent of the manufacture and sale of cigarettes in the United States, and ranked third in the industry. It has branch offices, factories, and warehouses located in a number of states. Its annual sales exceed \$500,000,000. Its principal competitors are American Tobacco Company, R. J. Reynolds Tobacco Company, Brown & Williamson Tobacco Company, Philip Morris, Inc., and P. Lorillard Co.

3. In the course and conduct of its business, respondent has engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, having shipped its products from the place or places where such products are manufactured to customers having places of business located in other States of the United States and in the District of Columbia. There is and has been a constant course of trade in

commerce in respondent's products. The approximately 70,000,000 cigarette-smokers in the United States have a variety of preferences as to cigarettes, to which cigarette manufacturers cater by manufacturing cigarettes of different blends of tobacco; different sizes such as the 70 mm. regular size, the 80 mm. hard-package size and 85 mm. king-size; different types such as non-filter, filter, menthol, and de-nicotinized; and different packages such as the soft and the crush-proof types. As a result there are more than fifty different brands and packages of cigarettes on the market.

4. The evidence in this proceeding was, in the main, confined to the period from January 1, 1953, to September 28, 1956. During this period, new brands and types of cigarettes were placed on the market by all manufacturers, including respondent, who made payments and allowances to promote their introduction to the public. Such payments and allowances are not material to the issues in this proceeding, since no issue is raised as to introductory allowances and payments. However, respondent made other types of payments in the regular course of its business.

Payments and Allowances to Respondent's Wholesaler Customers:

5. To one of its customers, Metropolitan Tobacco Company, a wholesale tobacco dealer of New York, under an agreement entered into February 13, 1956, and terminated February 13, 1957, respondent paid \$1,300 per week for promotional services in connection with the sale and distribution of Chesterfield and L & M cigarettes. The weekly payment was based upon \$6.50 per week per salesman. Metropolitan operated in the Greater New York area, which includes parts of Connecticut, New Jersey and Pennsylvania. It had 12 branches and approximately 200 salesmen who called on approximately 50,000 retail establishments weekly. Its purchases from respondent during the 12 months covered by the contract was in excess of ten million dollars; total payments by respondent amounted to \$67,600.

6. In return for this payment, Metropolitan agreed to, and did, issue a weekly bulletin to its branch managers, urging that all its salesmen push Chesterfield and L & M sales. Retailers' stocks were checked, the quality of respondent's brands was emphasized, respondent's consumer advertising program was explained, special displays of its brands were urged and wherever possible installed. Oral reports of the results were made to respondent by Metropolitan.

7. Although respondent had accounts with more than 4,500 wholesale distributors, no announcement of the Metropolitan arrangement was made to the trade, and none of respondent's other wholesaler customers were offered a similar agreement or payment, although

several operated competitively with Metropolitan in all or in some part of the geographical area served by Metropolitan;

Gotham Tobacco Company of New York operated in the Bronx and Manhattan districts, serving approximately 200 retail outlets, and did business with respondent amounting to about \$500,000 annually;

Samuel Sobel, Inc. of New York operated in the Manhattan, Brooklyn and Queens areas, serving 1,700 or 1,800 retail accounts through seven salesmen, and did business in excess of \$800,000 annually with respondent;

A. Oriel Company, of New York, operated primarily in the Bronx, Manhattan, Queens and Long Island areas, serving approximately 1,000 retail accounts through eight salesmen, and did business averaging about one million dollars per year with respondent;

Eagle Candy Company and West Side Tobacco Company, two other New York wholesalers, also operated within the trading area competitively with Metropolitan.

None of these wholesaler customers received any payments or offers of payments for promoting respondent's brands of cigarettes.

8. Respondent says its payments to Metropolitan were on a temporary and experimental basis for special promotional service in the Greater New York area through the use of facilities which only this wholesaler was in a position to supply, and that they were discontinued in good faith under such circumstances that there is no likelihood of their revival. There is no evidence that similar payments have been made in the past to any other wholesale distributor, or are likely to be made to any wholesale distributor in the future. It would seem that all that can be accomplished in this respect by a cease and desist order has been accomplished. The record shows, and respondent offers in justification of its action, that for a period of time starting prior to the date of respondent's agreement with Metropolitan and continuing after the termination of that agreement, Metropolitan was paid \$50,000 per year by Philip Morris, Inc., for promoting its products; also that a similar arrangement between Metropolitan and P. Lorillard had existed prior to the Metropolitan-Liggett & Myers contract. During the concurrent periods of the dual arrangements, Metropolitan would promote the brands of the competing manufacturers during alternate weeks.

9. Since there is but the one instance of payment by respondent to a wholesaler, and since there has been good-faith discontinuance of the practice and no likelihood that it will be renewed, respondent urges that under all the circumstances this issue be considered as moot. The Commission has held that a cease-and-desist order will

not be issued if complete abandonment of the questioned practices has been established and if the special circumstances of the case indicate that in the public interest a cease-and-desist order is not required. The special circumstances shown to exist in the instant proceeding do not, in the hearing examiner's opinion, meet the requirements for dismissal after abandonment set by the Commission in its recent decisions. Respecting its relationship with its wholesaler customers, as shown by its payments to Metropolitan and to no others, respondent is found to have violated §2(d) of the Clayton Act. The fact that similar acts and practices had been or were engaged in by respondent's competitors does not constitute a defense.

Payments and Allowances to Vending-Machine Operator Customers:

10. Automatic merchandising machines for dispensing cigarettes came on the market in the 1920's. The growth of automatic merchandising has increased rapidly, especially since World War II. By the year 1955 there were in the United States approximately 526,000 cigarette-vending machines owned by more than 2,600 operators, of whom 215 were on the respondent's customer list. At that time approximately 15 percent of all cigarettes sold at retail were dispensed through automatic machines. These machines have columns which dispense cigarettes upon the insertion of a coin or combination of coins, but no machine has been designed or marketed with enough dispensing columns to provide one for each brand, size and type of package sold on the domestic market. As of January 1, 1953 the great majority of cigarette-vending machines had from seven to nine columns. There may as many as fifteen or more columns in the later models.

11. It was early established as a custom for cigarette-manufacturers, including the respondent, to make payments in kind or in cash to vending-machine operators for the right to have one or more of their brands represented in the columns of each machine. Such payments are frequently referred to as "placement payments."

12. When king-size cigarettes were introduced in 1953 by respondent and other manufacturers, a new difficulty arose in vending-machine operation because the columns in the machines were not large enough for the new size, and the increased price at which they were sold required an adjustment in the change-making mechanism. The conversion of the machines then being used, to accommodate the changing pattern, was a costly operation. More columns could not be added to the old machines; hence there was a need for larger and more modern machines. The problem of getting as many brands as possible in each machine became more acute for all the cigarette

manufacturers. In an attempt to overcome the competitive, economic and practical obstacles, and to obtain what it considered to be adequate representation in vending machines, the respondent on April 14, 1953, engaged The Harrough Corporation, of New York, New York, to obtain representation for it in vending machines.

13. Harrough neither purchased nor sold cigarettes, and was not a customer of respondent. Its April 14, 1953, contract with respondent provided that it was "to enter into appropriate arrangements, on its own behalf but not on behalf of Liggett" with various operators of cigarette vending machines, whereby each such operator would adjust his vending machines so that with each package of cigarettes sold there would be dispensed a book of matches advertising Chesterfield cigarettes. Respondent agreed to pay Harrough \$1.25 per month per machine dispensing the Chesterfield matches, up to a maximum of 100,000 machines, upon being furnished, subject to verification, a written statement of the number and locations of such machines. Payments to Harrough were made on a per machine basis, regardless of the identity of the operator and whether or not he was a customer of respondent. Harrough was not required to disclose the identity of the operators of the machines. Subsequently this agreement was renewed without limitation upon the number of machines, and in June of 1954 a similar arrangement was made for distribution of book matches advertising king-size L & M cigarettes, the monthly payment to Harrough to be one dollar per month per machine. Subsequently the contract was extended to cover the advertising of king-size Chesterfields. The agreements were canceled late in 1956.

14. Pursuant to the provisions of these agreements, respondent, as of March, 1956, was paying Harrough on the basis of arrangements effected as to machines carrying Chesterfield cigarettes and machines carrying L & M cigarettes. For that month respondent paid Harrough \$399,790 for distributing Chesterfield advertising matches in 319,832 machines at \$1.25 per month, and \$206,056 for distributing L & M advertising matches in 206,056 machines at one dollar per month. From the date of the first contract, April 14, 1953, to the end of 1953, respondent paid Harrough over \$590,000; for the calendar year 1954, over \$2,560,000; and for 1955, over \$5,270,000.

15. The Harrough Corporation effected its arrangements with vending-machine operators on a uniform contract and payment basis. Each operator received the same amount of payment per machine per month for the same brand. For carrying Chesterfield advertisements and dispensing Chesterfield cigarettes, payments were at the rate of \$1 per month per machine; for carrying and dispensing L & M cigar-

ettes, \$8.50 per machine per year. The vending-machine operator was obligated under his contract with Harrough to keep his machines stocked exclusively with respondent's matches, "and at all times stock each Machine with the brand and size of cigarettes advertised on the Advertising matches." The contract expressly provided that payments to the operator should "in any event cease to accrue as of such date when Company [Harrough] ceases to be entitled to receive any fees or payments from a match advertiser with respect to such Machine." The match advertiser was given the right to verify any statement of a vending-machine operator as to the number and location of machines in which the advertising matches were used.

16. In April, 1955, respondent entered into another agreement with Harrough relating to the exclusive use of advertising space provided by the manufacturer on Corsair cigarette-vending machines. Prior to this date a contract had been entered into between the manufacturer and Harrough giving Harrough the exclusive control of such space. Harrough agreed in its contract with respondent to enter into "appropriate arrangements on its own behalf but not on behalf of Liggett," with operators of such machines whereby respondent's advertising would be used exclusively. For this service respondent agreed to pay Harrough one dollar per month per machine up to a maximum of 30,000 machines, plus an initial fee of \$15 per machine. As in the other contracts, Harrough was required to furnish respondent a written statement of the number and locations of the machines bearing such advertising. As a part of this arrangement, the manufacturer was to install in its machines, up to 30,000 in number, advertising material submitted by Harrough and requested jointly by Harrough and the purchaser of such machine. Harrough paid the manufacturer \$15 for "the exclusive use and insertion of advertising material in each Corsair." The cigarette-vendors who purchased such machines were paid \$7.50 per year by Harrough for each such machine used in their operations. Under this arrangement, respondent paid Harrough for the month of February, 1956, \$3,852. The total amounts paid by Harrough to the operators of these machines is not disclosed in the record but it is established that such payments were on a uniform basis.

17. Respondent avers that Harrough, in its negotiations with the operators of vending machines, acted as an independent contractor, not as an agent of respondent, and that therefore the payments to the vending-machine operators were made by Harrough, not by respondent. This argument is fatuous. The money used by Harrough to pay the vending-machine operators came from respondent. The benefit accrued to respondent, and whether Harrough acted as agent

or in some other capacity is immaterial. Whether the payments to the vending-machine operators were paid directly or indirectly or by subterfuge is not important. The payments were by respondent. The applicability of the provision of §2(d) of the Clayton Act cannot so easily be averted. Furthermore, the record shows that since the respondent-Harrough contracts were canceled, payments to vending-machine operators have been made directly by respondent.

18. There is no contention by counsel supporting the complaint that respondent's vending-machine operator customers were not all treated alike. No discrimination is shown in this respect. Therefore the charge that respondent granted advertising allowances and made payments to certain cigarette vending-machine operator customers for services or facilities furnished by them, and did not grant such allowances or make such payments on the same or a proportionally equal basis to other such customers competing in the distribution of respondent's cigarettes is not established or supported by the record.

Competition between Vending-Machine Operators and Wholesaler Customers of Respondent:

19. Counsel supporting the complaint contend that cigarette vending-machine operator customers of respondent compete with respondent's wholesaler customers in the distribution of respondent's cigarettes and that payments were not made or offered to the competing wholesaler customers on the same or proportionally equal basis.

20. The respondent has on its customer list approximately 215 operators of cigarette-vending machines and 4,853 wholesale distributors who handle its brands and the brands of all manufacturers which they resell to sub-jobbers and retailers for ultimate resale to the public. The wholesalers are not ordinarily in a position to favor the brands of any one manufacturer. Retailers, for convenience, frequently get their supplies of cigarettes from more than one distributor. Because of this arrangement it has been the practice in the cigarette business for each manufacturer, rather than the wholesaler or the retailer, to create consumer demand for its particular brands. This is done by employing various advertising media, including radio, television, newspaper and magazine advertising, as well as billboard advertising and point-of-sale (display) advertising. Point-of-sale advertising includes the placement of placards, signs, change trays, counter displays and the like, in or at premises where cigarettes are available to the smoking public.

21. Counsel supporting the complaint contend that within the framework of §2(d) the cigarette vending-machine operator customers of respondent are in competition with its cigarette wholesaler customers in that both classes of customers are engaged in the busi-

ness of distributing the same products in the same geographical areas and through the same general class of retail locations or outlets. They urge that the retail outlet is the objective of both; that they are "seeking to gain the same goal, the favor of the owner or proprietor of retail outlets, as to the method to be employed in the distribution of cigarettes at such outlets."

22. In support of their proposition, counsel supporting the complaint cite the Commission's decision in the cases of *Fruitvale Canning Company*, Docket 5989, and *The Curtiss Candy Co.*, Dockets 4556 and 4673, saying that in those cases the Commission determined competition by using geographical trading areas as a guide. But the fact of competition is determined not entirely by geography. Manufacturers, wholesalers, and retailers may operate in adjacent buildings or even in the same building but that does not establish that they are competitors. They do not cater to the same class of customers and the functions that they perform are significantly different.

23. The 215 vending-machine operators on the respondent's customer list purchase cigarettes in quantity and accept bulk delivery thereof from the manufacturer. They process the merchandise by breaking the bulk shipment, affixing appropriate state and city tax stamps to each package, and inserting in each package the approximate number of coins to make change where required; their service-men then distribute the cigarettes to the machines which are out on location, taking care that each machine is stocked with an adequate supply of the various brands which the operator wishes to dispense; their sales are to the consuming public. They do not resell to others who then retail the cigarettes to the public.

24. The function of vending machines in the cigarette distribution process is the day-to-day sale and delivery of cigarettes, in individual packages, to ultimate consumers. The machines are used strictly in the retail phase of the distribution of cigarettes. The bulk delivery of cigarettes by vending machines is an impossibility, as those machines are currently constructed.

25. The function of wholesale distributors is the more or less regular sale and delivery of cigarettes in bulk, by cases, half-cases or in carton lots, to proprietors of stores or stands or to the operators of vending machines, or to both, for subsequent resale by those proprietors and operators to the ultimate consumers. The two functions are different, and those who perform one of these functions cannot be said to be in competition with those who perform the other. Only when they both exercise the same functions and seek the trade of the same class of customers do they become competitive. This occurs only when they engage in both types of operations.

26. The evidence shows that from time to time owners of bars and grills, luncheonettes, factories and other business establishments, where cigarettes have theretofore been sold over-the-counter, conclude that it would be to their advantage to go out of the cigarette selling business and to have all cigarettes sold on their premises through vending machines. They find a vending-machine operator who is willing to install and operate such machines. They accept from him, for furnishing location, a commission based on the amount of sales made through the machines. Thus the vending-machine operator replaces the owner of the establishment as the retailer of cigarettes at that location. Under these circumstances, if the wholesaler is to retain a customer at such a location, he must now sell the machine operator who has superseded the owner of the over-the-counter operation. No competition exists between the machine operator and the wholesaler. The situation is as simple as this. If the machine operator procures his cigarettes through wholesalers then the wholesaler is still in competition with other wholesalers who serve the area; if the machine operator is a direct-buying customer of respondent then the wholesaler's business at that location will have been lost to respondent. In neither instance does the machine operator become a competitor of the wholesaler.

27. The evidence in this proceeding does not establish that cigarette vending-machine operator customers of respondent are engaged competitively with wholesaler customers of respondent in distributing respondent's products within the intent and meaning of §2(d) of the Clayton Act as amended. Since such competition does not exist, respondent is under no obligation to make payments or offer to make payments or allowances to its wholesaler customers merely because some payments or allowances are made to its cigarette vending-machine operator customers.

28. Cigarette vending-machines are freely available on the market, and in some instances wholesalers also perform retail functions through ownership and operation thereof. In connection with such vending-machine operations they receive payments from respondent on the same basis as other vending-machine operators. Like all wholesalers who do not also operate machines, they receive no payments in connection with their wholesale operations. There is therefore no discrimination under §2(d) in this respect as between competing customers of respondent.

"Indirect Customers":

29. Counsel supporting the complaint contend and ask a finding that the "indirect retailer customers" of respondent are customers within the meaning of §2(d) and are in competition with the direct-

buying vending-machine operators and with other direct-buying retailers who make over-the-counter sales, "indirect customers" being defined as those retailers who purchase respondent's products from wholesalers or jobbers. It is urged that these "indirect customers" are entitled to payments and allowances the same as, or proportionally equal to, those paid by respondent to its direct-buying vending-machine operators, and to other direct-buying retailers. These contentions require an examination of the status of these "indirect customers."

30. There were in the United States approximately 873,750 such "indirect customers" in 1955—proprietors of stores and stands at which respondent's cigarettes and those of other manufacturers were sold at retail. These stores and stands constitute the last link between manufacturer and consumer in the chain of cigarette distribution. Their supplies were procured from one or more of the 4,853 concerns which then were distributing cigarettes at wholesale. None of the 873,750 proprietors was carried on its books or listed as a customer by respondent. The price at which they purchased their cigarettes was determined by the wholesale distributors from whom their purchases were made and by whom their accounts were carried and served. Each retailer determined the price at which he sold cigarettes to the public.

31. The term "indirect customer" does not appear in §2(d) of the Clayton Act, nor in any other part of the Act.¹ The obligations imposed by §2(d) are expressly limited to transactions with "customers." The term is used three times in the section, which may have some significance in view of the fact that in §2(a) and §2(e) the obligations imposed relate to transactions in which "purchasers" are involved. Respondent urges that the term "purchaser" is specifically applicable where a single transaction may be involved, whereas "customer" carries the connotation of a continuing relationship. This distinction is not particularly applicable or necessary to be noted in this proceeding, except as it may aid in interpreting the decisions upon which reliance is placed by counsel.

32. The cases in which it has been decided that those who procured a respondent's products through an intermediate source were actually customers of or purchasers from such respondent within the meaning

¹ §2(d) of the Clayton Act, as amended, provides:

"(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."

Findings

56 F.T.C.

of the Clayton Act are not numerous, and most of them have involved §2(a) or §2(e) violations. All have been decided upon the principle that where such purchases were so made, the respondent must have exercised such a degree of control over the transaction that the sales were actually sales by respondent.

33. In the Matter of *Dentists' Supply Co.*, 37 F.T.C. 345 (1943), the Commission, at page 358, said:

Respondent through its sales representatives not only personally solicits such dental laboratories for both regular teeth orders and for bonus contract agreements, but also makes effective its special price policies and schedules as applied to them, which price policies and schedules are reduced to writing and formally executed by both respondent and such dental laboratories.

Under these circumstances the dental laboratories were found to be purchasers from respondent within the meaning of §2(a).

34. In the matter of *Luxor Limited*, 31 F.T.C. 658 (1940), retail druggists who procured respondent's products through drug jobbers were held to be purchasers within the meaning of §2(e) where respondent's salesmen called on such retail druggists and respondent fixed and controlled prices "in the same manner in which they are maintained in the case of druggists who are under contract to maintain prices and receive direct shipments from respondent."

35. In the matter of *Kay Windsor Frocks, Inc.*, 51 F.T.C. 89 (1954), a §2(d) proceeding, merchandise was shipped directly from the manufacturer to the retailers, invoiced by the manufacturer to the retailers, and paid for by the retailers directly to the manufacturer. Such retailers were found to be the manufacturer's customers.

36. In the matter of *Kraft-Phenix Cheese Corporation*, 25 F.T.C. 537 (1937), a §2(a) proceeding, it was found that the respondent had exercised control over the distributive channel through which the products moved, until they came into the hands of the retailer. The Commission said:

A retailer is nonetheless 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.

37. In the *General Motors Corporation* matter, 50 F.T.C. 54 (1953), at pages 62 and 63, the Commission said, in discussing price-discrimination charges,

The prices and terms and conditions applicable to such indirect purchasers were fixed and controlled by respondent. Representatives of respondent personally solicited the business of such indirect accounts and sales to such accounts were essentially sales by respondent.

38. In a related price-discrimination case, the *Electric Auto-Lite Co.* matter, 50 F.T.C. 73 (1953), the Commission found that

Respondent exercised such a degree of control over sales * * * (even though made through an intermediate distributor) that such sales were essentially sales by respondent. Such indirect customers are considered as "purchasers" within the meaning of the Clayton Act.

39. The foregoing cases are those most favorable to the position taken by counsel supporting the complaint, but none are applicable as precedents to the instant proceeding, because the facts are different. No finding is made herein, nor can be made upon substantial, reliable, probative evidence of record, that respondent has exercised such a degree of control over the transactions in which these "indirect customers" were involved as to warrant a conclusion that they were at any time customers of respondent within the intent and meaning of §2(d). The other cited cases have also been examined, and do not lend support to counsel's contentions.

40. Respondent's only contact with the 873,750 retail outlets was through its "missionary men," who called upon most of them three or four times a year to build good will, to encourage them to stock and handle adequate quantities of respondent's cigarettes, and otherwise to be more alert in promoting the sale thereof. Whenever possible these "missionaries" placed point-of-sale advertising and arranged store displays. If stocks of respondent's brands were low, so that there might not be enough to meet consumer demand until the retailer's wholesale supplier would make his next delivery, respondent's representative supplied the retailer, at the prices fixed by the retailer's supplier, with a limited quantity of cigarettes which he himself had purchased at that price from a local wholesaler. If the retailer did not desire to pay cash for this merchandise, the account was handled by his own wholesale supplier, to whom the transaction was reported, and by whom the retailer was billed. Such transactions were not frequent and involved only small quantities of cigarettes. Respondent did not fix or control in any way the prices at which its 4,853 wholesale distributors sold their products to the retailers, nor limit in any respect the manner in which or the persons to whom their sales were made.

Competition Between Cigarette Vending-Machine Operators and Over-the-Counter Cigarette Retailers:

41. Automatic merchandising is a comparatively recent innovation in retailing, and is increasing in effectiveness. It has been estimated that sales through vending-machines now exceed a billion dollars annually. The automatic vending industry has its own distinctive characteristics, its own national trade association, its own trade magazine, its own business terminology, and its own problems relating to licensing, taxation, machine maintenance and other matters. That

the sale of cigarettes through vending machines is a retail operation is not disputed.

42. Automatic merchandising of cigarettes is different in many respects from traditional store or stand retailing. Stores and stands have permanent locations with storage and display facilities; they have, or may have, many items other than cigarettes to offer, and may sell cigarettes in single packs or in quantity; salesmen make personal contact with customers, anticipate their needs, make change and otherwise encourage their trade; prices may be altered as frequently as desired to meet competition or to increase sales. On the other hand, cigarette-vending machines are not permanent fixtures, but may be moved from place to place; are not conspicuous; have little space for storage and can stock only small quantities of a limited number of brands of cigarettes, the only items which they can sell; can dispense single packs only; afford no opportunity for personal contact with customers; price changes are embarrassing because each price change requires mechanical adjustment of all machines or the insertion of change coins in every package of cigarettes offered; are subject to mechanical breakdowns and difficulties which require the services of skilled technicians. These and other differences affect operational costs, frequently to the advantage of the over-the-counter retailer, and have a bearing upon the suitability of vending-machine locations.

43. Operators of cigarette vending machines frequently locate their machines in places where it would be uneconomic or impracticable to have over-the-counter sales. They tend to avoid putting machines in close proximity to attended stores and stands. If possible, they select locations where potential customers constitute a captive group, as in factories, institutions, theatres, gas stations, bars and grills, restaurants, luncheonettes, department stores, clubs, rest-rooms, apartment houses, and the like, where the impulse purchaser of a package of cigarettes is likely to be unable or unwilling to leave the premises because it would be inconvenient, uneconomic or against company rules for him to do so.

44. Respondent contends that the automatic merchandising industry "is so distinctly different, in organization and merchandising methods and techniques, from the over-the-counter retail merchandising industry, that compliance with §2(d) does not require that their display advertising and promotional payment fates be inexorably linked together by manufacturers and wholesalers who sell to them in common"; and that these differences "warrant their consideration as separate classes for purposes of compliance with §2(d)." It is sug-

gested that the role of the vending machine is supplementary to rather than competitive with the store or stand operation.

45. These two contentions are not identical. The first ignores the question of competition and adopts the position that the two types of operations are separate classes just as are manufacturers, wholesalers and retailers, who operate at different competitive levels. Respondent's first contention is untenable. Two manufacturers may engage in widely different types of manufacturing processes and marketing methods, but if they have comparable products which they offer to the same groups of purchasers, they are competitively engaged and subject to the restrictions of the antitrust statutes. Two wholesalers, likewise, may vary widely in organizational and marketing characteristics, but if competition exists between them, the provisions of the statutes are nevertheless applicable. Likewise, two retailers—a vending-machine operator retailer and an over-the-counter retailer—if they offer the same or comparable products to the same groups of purchasers and therefore compete with each other, are equally entitled to the protective provisions of §2(d) of the Clayton Act if they are customers of the same manufacturer.

46. Respondent's second contention raises the suggestion, and respondent contends, that it has not been established that vending-machine operator customers of respondent competed with over-the-counter retailing customers of respondent in the distribution of respondent's cigarettes. The evidence with respect to such competition is mostly of a general nature—that a cigarette-vending machine in a subway station will compete with over-the-counter selling in a store or stand at the surface entrance to the subway; that one in an office-building entrance will compete with selling in a next-door restaurant, drugstore or cigar counter; that there will be competition between a vending machine and any nearby over-the-counter operation where the two are reasonably equal in accessibility to a cigarette-smoker whose supply is exhausted.

47. Instances of such situations were shown without specific data as to ownership of the over-the-counter operations or as to whether or not the proprietors were customers of respondent—this under the assumption, hereinabove found to be false, that "indirect customers" were actually customers of respondent within the intent and meaning of §2(d). There was evidence also that some customers of respondent operated vending machines in the same geographical trading areas that were served by other customers of respondent who engaged in over-the-counter selling of cigarettes, often in the same shopping center, sometimes in adjacent buildings. More specifically, the record shows that in the New York area A & P and Rexall Drug, both

customers of respondent, sold cigarettes through many retail outlets located in the same areas where Herald Vending Corporation, New York Service, and Long Island Tobacco Company, Inc., all customers of respondent, sold cigarettes through vending-machines. In the Boston-New Haven area, A & P had stores next door, within one city block and within three city blocks of cigarette-vending machines operated by Obie-Elm Sales Corporation and Cochin Tobacco Corporation, customers of respondent. In Buffalo, A & P and Loblaw, Inc. had stores selling cigarettes in the same trading areas where cigarette-vending machines were operated at one time by Empire Vending Company, respondent's customer.

48. There is substantial, reliable, probative evidence that some vending-machine operator customers of respondent competed with other customers of respondent who were engaged through over-the-counter operations in the distribution of respondent's cigarettes. Under and through the Harrough arrangement, respondent made payments to all vending-machine operator customers for carrying one or more brands of its cigarettes in the vending columns of their machines, but respondent did not make nor offer to make equal or proportionally equal payments to the competing over-the-counter retailing customers, including those named in the preceding paragraph, for similar services, to wit, the carrying of respondent's cigarettes on their counters, or in their display racks. In this respect respondent failed to comply with §2(d) of the Clayton Act. As hereinafter shown, such payments as were made by respondent to its over-the-counter customers were for point-of-sale advertising displays or services.

Payments and Allowances to Respondent's Retailer Customers Who Did Not Operate Vending Machines:

49. Respondent sold cigarettes to approximately 355 cutomers who resold such cigarettes at stores or stands to consumers. Primarily these customers were operators of chain grocery-stores, chain drugstores, news-stand chains, and other like organizations which purchased and resold large quantities of merchandise at one location or at several stores in scattered locations. Through its sales organization respondent negotiated individual agreements with some of these customers whereby, for a consideration to be paid by respondent, they agreed to advrtise and promote the sale of respondent's cigarettes through the use of posters, signs, change trays, counter displays and other point-of-sale promotional aids.

50. The record shows specifically that among these customers (full names given later) there was, in the New York area, competition in the sale of respondent's cigarettes between A & P on the one hand

and Rexall, Union News and Bohack on the other, and competition between Rexall and Union News; in the Buffalo area, Loblaw and A & P competed with each other and with Quality, Lee Drugs, and Harvey & Carey, who also competed with each other; and at Dunkirk, Cease and A & P were in competition; in the Boston-New Haven area, Stop & Shop competed with Daniel Frank Co., Estabrook & Eaton, and ABC Vending Co. in its stand operations. To some extent the latter three competed with each other; and at some points, particularly at the railroad stations where there were also subway stations, Union News competed with ABC.

51. In the New York area during the period involved in this proceeding, payments were made by respondent to various retailer customers as follows:

H. C. Bohack Company, Inc., in 1953, was paid 50c per carton per store for a one-week display of two cartons of cigarettes on a display device furnished by respondent. There were about twelve separate like arrangements in each of the years 1953, 1954 and 1955. Bohack is a food chain having 184 retail outlets in Kings, Queens, Nassau and Suffolk counties, New York. Under the display arrangement it received from respondent in 1954, \$2,050; in 1955, \$3,000; amounts for other years are not in the record. Between 1953 and 1956 its tobacco business with respondent exceeded one million dollars annually.

Union News Company, which operates news-stand and cigar counters chiefly in railroad and subway stations in New York and throughout the United States, also did in excess of one million dollars' business with respondent annually. In 1954, it entered into an agreement with respondent whereby it received \$18,500 for advertising space used by respondent in a company magazine and for carton displays of respondent's products on the counters of each of its 2,000 retail stands. The contract was not in effect in 1955 and 1956, and no payments were made by respondent to this company during those years. The reason for the abandonment of the payments is not clear, but the strong inference is that it was by agreement of parties.

The Charlie Landau Company operated a single cigarette-selling retail outlet at 132 Nassau Street, Manhattan, and between 1953 and 1956 did business in excess of \$40,000 annually with respondent, from whom it received payments at the rate of \$25 per month for permitting respondent to place inside its store a sign, and outside the store two posters, advertising respondent's brands of cigarettes. The payments amounted to \$300 in each of the years 1954 and 1955, but were subsequently discontinued. During the period involved this dealer had similar arrangements with Philip Morris, Brown &

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Williamson, and occasionally with Lorillard. It is not established that Landau competed to any substantial extent with other over-the-counter selling customers of respondent.

52. In the Buffalo area, payments were made as follows:

Quality Cash Stores, Inc., operating 44 stores in Jamestown and Salamanca, New York, averaged, during the period involved in this proceeding, \$50,000 annual business with respondent, and received for displaying respondent's window posters \$504 in 1954, \$450 in 1955. Similar sums were received in 1953 and 1956.

Cease Commissary Service, Inc., Dunkirk, New York, is an industrial caterer operating cafeterias and canteens in and around Buffalo. Most of its trade is captive. Its business with respondent amounted to about \$8,000 annually, and between January 1, 1953, and June, 1955, it was paid \$2 per month for each sign it displayed advertising respondent's brands of cigarettes. The arrangement was discontinued just before June, 1955. The record shows only that Cease was paid \$100 in 1954. Shortly thereafter Cease discontinued being a customer of the respondent and procured its cigarettes from a wholesale distributor. Since Cease, as a customer, competed only for a short period and only with A & P at one point, Dunkirk, the Cease situation may be considered as *de minimis*. At Dunkirk it had a public restaurant close to an A & P store.

Harvey & Carey, Incorporated, operated 25 drugstores in the Buffalo metropolitan area and did business with respondent from 1953 to 1955 in excess of \$97,000 annually. It was paid during this period \$3 per store per month for displaying a framed card advertising respondent's cigarettes in four retail outlets; \$144 in 1954 and \$144 in 1955; 1953 figures not available. The offer was open but not accepted as to the other Harvey & Carey stores. In March, 1956, this company was taken over by Lee Drug Stores, Inc., to whom payments had been made by respondent at the same rate for eleven stores in 1953, twelve stores in 1954 and thirteen in 1955. The payments were \$432 in 1954, \$468 in 1955, and \$685 (approximately) in 1956. Lee Drug's business with respondent was over \$240,000 annually.

William A. Mathias, Incorporated, with four retail outlets, consisting of a specialty tobacco store in downtown Buffalo and three stands in hotels and clubs, received payments from January 1, 1953, through September, 1956, at the rate of \$2 per month, \$24 per year, for displaying an advertising card in its specialty store. The three stands enjoyed a select or captive trade and were not paid. Its annual business with respondent averaged over \$14,000.

R. J. Seidenberg Company, a wholesaler with two retail outlets located in the same building in downtown Buffalo, was paid \$10 per

month, \$120 for each of the years 1953, 1954, 1955 and 1956, for displaying respondent's advertising sign in its two outlets. Its business with respondent was over \$40,000 annually. To some extent Seidenberg also enjoyed a select if not a captive trade. It cannot be found that the three stands of Mathias, or the two outlets of Seidenberg, were operating competitively to any substantial extent with other of respondent's customers.

Loblau, Inc., operated from 144 to 160 stores, some of which were in the Buffalo area. Its purchases from respondent averaged over \$700,000 annually. It received for point-of-sale display and advertising for a six-weeks' period in 1953, \$690.

53. In the Boston area payments were made as follows:

Estabrook & Eaton, who operated five or six concessions, some of which were located in chain stores, was paid \$600 in 1954 and again in 1955 for using respondent's change trays and displaying advertisements featuring respondent's cigarettes. It was not a regular customer of respondent. In 1953 it purchased directly from respondent merchandise amounting to \$2,505; in 1954 it purchased nothing; in 1955 it purchased only during one two-months' period, merchandise amounting to \$473; in 1956 (first ten months) it made no purchases. It is obvious that during most of the period involved respondent's cigarettes were procured by this operator other than by direct purchases, and it was not a customer of respondent.

Daniel Frank Company was a wholesaler who operated a retail specialty store and a stand in downtown Boston. Its average annual business with respondent was \$7,000. It received through Associated Greater Boston Tobacco Retailers, Incorporated, \$9 per month for displaying respondent's advertising material in its two retail outlets.

ABC Vending Corporation operated 50 to 55 news-stand concessions throughout the Boston subway system under an exclusive arrangement, and for 1954 and 1955 received payments of \$1,296 yearly for displaying respondent's advertising materials—at the rate of \$2 per news-stand per month. Similar payments were received in 1953 and 1956. Its annual business with respondent averaged approximately \$100,000.

54. Payments were not made by respondent in the New York area to the following customers:

The Great Atlantic & Pacific Tea Company, which has a number of retail grocery outlets in each of the geographical areas in which evidence was taken, received no payments whatsoever from respondent for point-of-sale advertising or for any other services of the type involved in this proceeding. A & P sells a large number of products under its own brand names. It has a consistent policy, widely

known, that it will not use point-of-sale display material advertising merchandise which was not manufactured by or for it. There is no evidence in the record that any manufacturer of cigarettes or of any other merchandise sold by A & P ever succeeded in breaking or modifying this policy. Under these circumstances respondent asserts, and we believe rightly, that it was not obligated to make offers of payments, similar to those it made to other customers, for services or accommodations of the character involved in this proceeding.

Liggett-Rexall Drug Company also has stores throughout the United States, including the areas involved in this proceeding. It purchased merchandise from respondent amounting to approximately \$400,000 annually, but received no payments from respondent. That display advertising arrangements were offered Liggett-Rexall Drug Company by respondent for the period covered by the complaint, but not accepted, is established. The evidence shows that, during the period involved, Rexall had an exclusive display advertising agreement with the Philip Morris Tobacco Company, which precluded it from accepting arrangements similar to those respondent had with other customers.

55. In the Buffalo area, besides A & P and Rexall, which have already been discussed, payments were not made to the following:

Loblaw, Inc., received no payments from respondent, except for the six-weeks' period heretofore mentioned. It was a commonly-known policy of the company not to accept, or place in its stores, point-of-sale display-advertising materials such as that supplied by respondent and most other tobacco manufacturers. For in-store advertising, Loblaw used a Beamcast system which part of the time played music and part of the time made advertising announcements. The only cigarette advertisements used over the system were those of Philip Morris, and, in connection therewith, Loblaw displayed Philip Morris cards and Philip Morris cigarettes. Although Loblaw was called upon by one of respondent's division managers, no arrangement was entered into. The conclusion is that respondent's point-of-sale display advertising arrangements were offered to Loblaw, but that the Philip Morris arrangement was exclusive.

56. In the Boston area, excluding again A & P and Rexall, no payments were made to the following:

The Stop & Shop Corporation, in 1953, was offered an advertising arrangement by respondent which was not accepted. Respondent's representative stated that up to the time of hearing he was still calling on and had close connections with Stop & Shop, and had been informed that they wanted no posters. During his visits he had seen no manufacturer's cigarette advertising whatsoever. It was an estab-

lished policy of the Stop & Shop Corporation not to utilize the types of point-of-sale display advertising materials offered by the respondent. Further offers under the circumstances would have been useless gestures. Stop & Shop operated over 90 retail stores in the Boston area, and did business with the respondent in excess of \$314,000 annually.

57. The fact that respondent did not make payments for point-of-sale advertising to some of its over-the-counter retailing customers is not conclusive that such payments were not available. In some instances offers were made and not accepted; in other instances there were well-known established policies against the acceptance and use of such types of advertising; in still other instances the customer had exclusive arrangements with one of respondent's competitors. In such cases the making of an offer or the repeated repetition of an offer previously made would have been embarrassing as well as futile. The law does not require a useless gesture.

58. It has not been established that point-of-sale display advertising arrangements were not available to all of respondent's customers who were engaged competitively in the over-the-counter distribution of its cigarettes. However, it is clear that respondent's payments or offers of payments for the type of services involved in this proceeding, so far as its customers were concerned, excluding vending-machine operators, were not made on a uniform or proportionally equal basis. They were arranged through individual negotiations between respondent and its various customers. Such payments were not based on number and size of stores, on amount of advertising or space used, on amount of purchases or sales, or upon any other basis through which uniformity or proportional equality might be accomplished as between customers who were in competition with each other in the distribution of respondent's cigarettes. In this respect respondent has not met the requirements of §2(d).

59. Respondent's contention is that "it has related its point-of-sale display advertising payments to the correct single standard, to wit, the value of the advertising." It is alleged that the substitution of any other standard such as those mentioned in the preceding paragraph would be an unwarranted perversion of the intent of the framers of §2(d), and would result in the sanctioning of payments which would be in fact discriminatory and potentially subject to the provisions of §2(a) of the Act. The record does not support a conclusion that advertising value was the controlling standard applied in determining amounts of payment. The negotiations in each instance were carried on in behalf of respondent by one or more of its sales representatives, and the strong inference from the evidence of

record is that the amounts arrived at were those which were necessary to meet competition and to keep the good will of the particular customer. Respondent's contentions in this respect are theoretically plausible, but cannot be accepted on the basis of the facts disclosed by the record in this proceeding.

60. Without discussion, respondent's seven "complete defenses" set forth in its answer are rejected. §2(d) is not unconstitutional, as alleged in "complete defenses" 1, 2, 3 and 5. The application of §2(d) to the acts and practices of respondent which have hereinabove been found to be in violation of said section is not in violation of the due-process clause of the Fifth Amendment. Under §2(d) it is not necessary that it be established that the effect of the acts and practices found to be in violation thereof may be substantially to lessen competition or may tend to create a monopoly, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit thereof, or with customers of either of them. That respondent's acts and practices may have been engaged in "in good faith" to meet the similar acts and practices of respondent's competitors is not a defense. The law in all these respects is well settled. The partial defenses set forth in respondent's answer have heretofore been fully discussed and ruled upon.

SUMMARY OF FINDINGS AND CONCLUSIONS

61. The substantial, reliable, probative evidence in this proceeding does not establish

(a) that respondent has made payments to some cigarette vending-machine operator customers for services or facilities furnished by or through them without having made such payments available on the same or proportionally equal terms to all other vending-machine operator customers competing in the distribution of its cigarettes;

(b) that cigarette vending-machine operator customers of respondent are engaged competitively with wholesaler customers of respondent in the distribution of its cigarettes;

(c) that retailers who purchase respondent's cigarettes from wholesalers or jobbers are in fact customers of respondent within the intent and meaning of §2(d) of the Clayton Act;

(d) that payments or allowances made by respondent to some of its customers who were engaged in selling its cigarettes in stores and stands over the counter were not available to all its other customers who were engaged competitively in over-the-counter distribution of its cigarettes.

62. There is substantial, probative evidence in this proceeding to establish—

(a) that by making payments to its wholesaler customer, Metropolitan Tobacco Company, for services rendered by or through such customer in connection with the sale of its cigarettes without making such payment available on proportionally equal terms to all its other wholesaler customers competing in the distribution of its cigarettes, respondent violated the provisions of §2(d) of the Clayton Act—the fact that respondent's competitors engaged in the same practice by making payments to the same wholesaler does not constitute a defense; nor do the facts and circumstances of abandonment negate the requirements or necessity of issuance of a cease-and-desist order under the policy announced by the Commission in its decisions in substantially similar cases;

(b) that operators of cigarette-vending machines who are customers of respondent are engaged in retail operations and some are in competition in the distribution of respondent's cigarettes with other customers of respondent who sell cigarettes over the counter in stores or stands;

(c) that respondent made payments to its cigarette vending-machine operator customers for services or facilities furnished by them in connection with the sale of its cigarettes without making such payments available on proportionally equal terms to all its other competing customers who sold its cigarettes over the counter, in violation of §2(d) of the Clayton Act;

(d) that respondent made payments to some of its customers who sold its cigarettes over the counter for services or facilities furnished by them in connection with such sales without making such payments available on proportionally equal terms to other over-the-counter selling customers who competed in the distribution of respondent's cigarettes, in violation of §2(d) of the Clayton Act;

(e) that this proceeding is in the public interest; the Federal Trade Commission does have jurisdiction; and respondent has violated §2(d) of the Clayton Act as above set forth.

Upon the basis of all the facts of record and findings made, the following order is issued:

It is ordered, that respondent, Liggett & Myers Tobacco Company, Inc., a corporation, and its officers, agents, representatives, or employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of its cigarettes (hereinafter called "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 any 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.

OPINION OF THE COMMISSION

By Tarr, *Commissioner*:

The complaint in this proceeding alleges that respondent violated 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).

The hearing examiner in his initial decision filed November 26, 1958, found and concluded that respondent had violated Section 2(d) in several respects, but not in each respect asserted by the complaint. The initial decision includes an order directing respondent to cease and desist the practices found to be unlawful. The parties have taken cross-appeals from this initial decision.

Respondent, Liggett & Myers Tobacco Company, Inc., a corporation, is engaged in the business of manufacturing, selling and distributing cigarettes and other tobacco products. These products are sold to customers, including wholesalers and retailers, located in the several states of the United States and in the District of Columbia, for ultimate resale to the purchasing public. Respondent, in 1955, accounted for approximately fifteen percent of the manufacture and sale of cigarettes in the United States and ranked third in the industry. Its annual sales exceed \$500,000,000.

On April 30, 1957, respondent had 5902 accounts, of which 4853 were wholesalers, 355 retailers, 215 vending machine operators and the balance institutions and military installations.

The hearing examiner held that respondent had violated Section 2(d): (1) by making payments to Metropolitan Tobacco Company, a wholesaler customer, for services rendered by or through such customer in connection with the sale of its cigarettes, without making such payments available on proportionally equal terms to all other wholesaler customers competing with Metropolitan in the distribution of its cigarettes, (2) by making payments to its cigarette vending machine operator customers for services or facilities furnished by them in connection with the sale of its cigarettes [the payments include sums paid directly or indirectly to the vending machine operators for the placing of respondent's cigarettes in the machines and for the furnishing of other services or facilities], without making such payments available on proportionally equal terms to all other

competing customers who sold its cigarettes over the counter in stores or stands, and (3) by making payments to some of its customers who sold its cigarettes over the counter for services or facilities furnished by them in connection with such sales, without making these payments available on proportionally equal terms to other over-the-counter selling customers competing with the favored customers in the distribution of respondent's cigarettes. The payments to the favored customers in this last instance include the consideration given for the advertising and promotion of the sale of respondent's cigarettes through the use of posters, signs, change trays, counter displays and other point-of-sale promotional aids.

The examiner additionally found, among other things, that Section 2(d) was not shown to have been violated in the following connections: (1) through payments made to cigarette machine operator customers and not made to wholesaler customers, it having been determined by the examiner that vending machine operator customers of respondent are not competitively engaged with wholesaler customers of the respondent, and (2) through payments made to some customers such as vending machine operators and not made on proportionally equal terms to certain retailers [the so-called "indirect customers"] purchasing respondent's cigarettes from wholesalers or jobbers, for the reason that such retailers were not shown to be customers of the respondent within the meaning of Section 2(d).

RESPONDENT'S APPEAL

The respondent appeals from the hearing examiner's holding that the vending machine operator customers compete with the over-the-counter retail customers and that respondent has violated Section 2(d) by granting promotional payments to the former and not making such payments available to the latter on any terms. Respondent argues that the over-the-counter selling and automatic vending are separate and distinctly different modes of retail selling and should be given, therefore, a separate functional classification. The following are among the differences in the two operations pointed out by the respondent; the proprietor leases a store or stand, the machine operator sells through a vending machine; the proprietor can spread his costs over a number of items, the machine operator is limited to cigarettes; the proprietor can carry a variety of cigarettes, the machine operator is limited by dispensing columns; the proprietor can make change for bills, the machine operator cannot; the proprietor can sell in cartons, the machine operator cannot; and the proprietor usually sells at a lower price than the machine operator.

The proportional equality required by Section 2(d) relates to customers competing in the distribution of the products involved. There is no other basis in the subsection for classifying customers. Consequently, we reject respondent's contention for a separate functional classification solely because of the differences between the two operations such as in organization and selling methods.

Respondent argues, however, that even if no distinctions in classification are recognized, the record still will not support a finding of competition on an individual basis as between vending machine operators on the one hand and over-the-counter retailers on the other. This argument is likewise rejected. The record clearly shows generally as well as with particularization the competition in the resale of respondent's cigarettes between the two groups of retailers. It is conceded by the respondent that vending machine operators and over-the-counter retailers are both retailers of respondent's cigarettes. The distance between retailers selling the identical product may not always be the sole determinative of competition. In this case, however, where it has been clearly shown that both groups seek to retail respondent's cigarettes to substantially the same class of trade or segment of the public, the reasonable proximity of such resellers is enough to establish competition. See *Simplicity Pattern Co., Inc. v. Federal Trade Commission*, 258 F. 2d 673 (1958). The hearing examiner found and the record shows specific examples of over-the-counter retailer customers, who were not favored, doing business in the same locality as the favored vending machine operator customer locations. In some instances, the outlets were within a block of or next door to each other. We believe that competition between the groups has been sufficiently demonstrated.

There are two additional points raised by the respondent which are to some extent related. They concern the proportionalizing of payments among retailer customers, including vending machine operators, competing in the distribution of respondent's cigarettes.

The first point involves the question of alleged alternative payments. According to the respondent, the hearing examiner in substance found that the availability of point-of-sale display advertising payments to over-the-counter customers was qualitatively an incompetent alternative to a placement payment made to a vending machine operator customer. Respondent cites the case of *Lever Brothers Company*, 50 F.T.C. 494 (1953), for the proposition that the law does not prohibit a seller from paying for services of various types. In *Lever Brothers*, the newspaper advertising allowance was only part of a comprehensive plan of payment for promotional services. The respondent therein offered alternative promotional allowances

for the customers who did not for any reason use advertising allowances, and it made its several plans known to all.

Since respondent had no alternative allowance program, the principle of the *Lever Brothers* matter is not controlling here. The evidence shows that respondent had a specific plan for paying allowances to vending machine operator customers for the placement of its cigarettes in the vending machines and for other services or facilities. These were made under and through arrangements with Harrough Corporation. The system or plan for the making of placement payments was designed particularly for vending machine operator customers, and the payments thereunder were confined to this customer group. On the other hand, respondent made payments to certain over-the-counter customers for point-of-sale advertising displays or services. Such allowances, however, were not alternatively available to the respective customer groups. There was no comprehensive plan, for example, whereby a customer in either group could avail himself of one type of payment or the other depending upon which suited him best. To the contrary, the allowance programs were separate and distinct. In the circumstances, we think the hearing examiner could properly consider the several allowances individually and apart from other allowances and determine whether each meets the test of "availability" under Section 2(d).

Respondent, finally, takes issue with the hearing examiner's ruling to the effect that payments for point-of-sale display advertising to over-the-counter retail customers engaged competitively in the distribution of respondent's cigarettes were not made on a uniform or proportionally equal basis. The hearing examiner held that such payments were not given on any basis upon which proportional equality might be accomplished; they were arranged through individual negotiations between respondent and its various customers.

The examiner in his initial decision describes in detail the arrangements made with various retailer customers for over-the-counter advertising in the several markets covered. It appears evident from this showing that respondent made such allowances at random and on the basis of individual negotiation. As an example, Union News Company, which operates newsstands and cigar counters, in 1954 entered into an agreement with respondent whereby it received \$18,500 for advertising space used by respondent in a company magazine and for carton displays at the counters of its stands. Union News came to respondent to make the arrangement. This was a deal expressly tailored for the Union News Company. It was one in which there was no basis or standard other than the seller's discretion or favor.

Respondent argues, however, that it did employ a standard: the value of the advertising as allegedly determined by the forces at play in the market place. Stated otherwise, the position apparently is that a facility or service such as a counter space has a value determined by what various competitors will pay for it and that such value is an adequate standard for proportionalizing under Section 2(d).

The question of the availability of payments to others on proportionally equal terms is a matter of defense to be established by the respondent upon the prima facie showing of discriminatory payments as between customers competing in the distribution of respondent's products. *Cf. State Wholesale Grocers v. The Great Atlantic & Pacific Tea Co.*, 258 F. 2d 831 (1958). To put it simply, it is not enough for respondent to assert only that there is a basis for proportional equality. Respondent must also prove that the payments were in fact available on proportionally equal terms to other customers competing with the favored customers in the distribution of its product, and this it has not done. Thus, regardless of the validity of any standard which might have existed, respondent has not met its burden of showing the proportional equality as required by Section 2(d).

APPEAL OF COUNSEL IN SUPPORT OF THE COMPLAINT

The principal ground for the appeal of counsel in support of the complaint is the hearing examiner's failure to find that respondent violated Section 2(d) in making certain promotional payments to vending machine operator customers without making such payments available on proportionally equal terms to wholesaler customers distributing respondent's cigarettes in the same market area. Counsel asserts that the wholesaler customers are competing with the vending machine operator customers in the distribution of respondent's cigarettes within the meaning of Section 2(d) because there is competition for the various sales outlets.

In support of their position, counsel rely heavily on the language of Section 2(d) reading: "unless such payment or consideration is available on proportionally equal terms to all other customers *competing in the distribution* of such products or commodities." [Emphasis supplied.] Aforesaid counsel aver, in substance, that while the vending machine operators and wholesalers are not competing in the sale of respondent's cigarettes, they are competing in the distribution of such products; that wholesalers lose business when an over-the-counter retailer determines to use vending machines to sell cigarettes which are not supplied by the former wholesaler.

It is obvious that vending machine operators and wholesalers are engaged in different operations. They do not cater to the same class of customer: the vending machine operator sells to the ultimate consumer, whereas the wholesaler sells to the retailer who in turn sells to the ultimate consumer. Since they do sell to different classes of customers, the functions they perform in the distribution of cigarettes are different.

The function of the vending machine operator in the cigarette distribution process is the day-to-day sale and delivery of cigarettes through machines, in individual packages, to ultimate consumers. The machines are used strictly in the retail phase of such distribution. The function of wholesale distributors is the more or less regular sale and delivery of cigarettes in bulk, by cases, half cases or in carton lots, to proprietors of stores and stands or to the operators of vending machines, or to both, for subsequent resale by those proprietors and operators to the ultimate consumers.

In view of the different functions performed by the two groups, the question arises as to whether there can be competition between them within the meaning of Section 2(d). It is immediately obvious that the view pressed upon us by counsel in support of the complaint, that is, that retailing, vending machine operators and wholesalers may be in competition within the meaning of Section 2(d) is one which has no precedent in prior Commission cases brought under the subsection. *Cf. Lever Brothers Company*, 50 F.T.C. 494 (1953); *Kay Windsor Frocks, Inc., et al.*, 51 F.T.C. 89 (1954); *Henry Rosenfeld, Inc., et al.*, 52 F.T.C. 1535 (1956); *Atalanta Trading Corporation*, Docket No. 6464 (1956); *Chestnut Farms Chevy Chase Dairy*, Docket No. 6465 (1957); *General Foods Corporation*, 52 F.T.C. 798 (1956). In the latter case, the Commission recognized that the Robinson-Patman Act was written against the background of the distribution system then in effect, including groups having particular status and performing particular functions, such as wholesalers and retailers.

In the matter of *Curtiss Candy Company*, 44 F.T.C. 237 (1947), with respect to the Section 2(a) charge, there is a reference to competition between jobbers and vending machine operators. This citation is not necessarily controlling here. There was no development of the nature of this competition in the pertinent findings in the case, and in any event it does not appear that it was essential to the outcome of the case to find such competition.

To construe Section 2(d) as requested by counsel in support of the complaint clearly would have far-reaching effects in the cigarette

industry and indirectly in other segments of the economy as well.² We would hesitate to adopt an interpretation resulting in such a change, with its partly unforeseeable impact upon the economy, without more convincing evidence.

In this case there are complicating factors. The record indicates and the hearing examiner found that cigarette vending machines are freely available on the market. In some instances wholesalers also perform retail functions through the ownership and operation of such machines. It is not clear here to what extent wholesalers, either directly or through affiliated companies, engage in the sale of cigarettes through vending machines.

In addition, we note that the chief argument of counsel in support of the complaint is that there is competition between wholesalers and vending machine operators in vying for sales outlets. In support of this position, counsel refers to the fact that each time a retailer permits the installation in his store of a vending machine to replace the over-the-counter selling of cigarettes, the wholesaler who formerly supplied the retailer loses a customer. This, however, fails to fully point up the competitive realities. And we need only mention that the concern of Section 2(d) is with competition in the distribution of products and not with rivalry for sales outlets, as such.

In the circumstances, we are of the opinion that the record does not support a conclusion that the respondent has violated Section 2(d) by making promotional allowances to vending machine operators and not to wholesalers. There is no necessity, therefore, to decide whether a seller need make its promotional allowances available only to those of its customers who are operating at the same functional level. To the extent that the initial decision indicates that there is no violation of Section 2(d) as regards this issue for reasons other than those mentioned above, it is to that extent rejected.

The other point raised by counsel in support of the complaint concerns the meaning of the word "available" in Section 2(d). As above noted, the examiner ruled that respondent violated Section 2(d) in not granting point-of-sale advertising allowances to its over-the-counter retail customers competing in the resale of its products on a proportionally equal basis. Certain customers, such as the Great Atlantic & Pacific Tea Company, Liggett-Rexall Drug Company, Loblaw, Inc., and The Stop & Shop Corporation, received no payments and the examiner found that in some of these instances offers

² Reference is made to pending companion matters, as follows: In the Matter of *R. J. Reynolds Tobacco Company*, Docket No. 6848; In the Matter of *The American Tobacco Company*, Docket No. 6830; In the Matter of *Philip Morris, Inc.*, Docket No. 6750. See also In the Matter of *P. Lorillard Company*, Docket No. 6600, affirmed *P. Lorillard Company v. Federal Trade Commission*, United States Court of Appeals for the Third Circuit (June 4, 1959).

were made and rejected; in other instances, there were well known policies against the acceptance of such allowances and, in still other instances, the customer had exclusive arrangements with one of respondent's competitors. The respondent has stated in effect that, in such cases, the making of an offer or the repeating of an offer previously made would be futile and that the law does not require a useless gesture.

The question in this connection is whether, in the circumstances disclosed by this record, the point-of-sale allowances were "available" within the meaning of Section 2(d) to the Great Atlantic & Pacific Tea Company and other such customers. In some cases, we have held that a customer must be informed of an allowance before it can be deemed to be available. *Kay Windsor Frocks, Inc., et al.*, 51 F.T.C. 89 (1954); *Henry Rosenfeld, Inc., et al.*, 52 F.T.C. 1535 (1956); *Chestnut Farms Chevy Chase Dairy*, Docket No. 6465 (1957).

We do not believe, however, that it is necessary to make known a promotional plan where such would be a useless or futile gesture. The question of whether the gesture would be futile is one of fact. Where it is disclosed that a seller generally does not want promotional allowances, it may be shown by the party charged with the violation that in such a case to offer an allowance would be a futile act. In this instance, the examiner has found that such a gesture would have been futile. He has had an opportunity to see and hear the witnesses. We cannot say that his findings on this issue are in error.

The appeal of counsel in support of the complaint and the appeal of the respondent are both denied. The findings, conclusions and order contained in the initial decision are adopted as those of the Commission, except to the extent modified by the views expressed in this opinion. It is directed that an appropriate order issue herewith.

Chairman Kintner and Commissioner Secrest did not participate in the decision of this matter.

Commissioner Kern dissents in part.

OPINION OF COMMISSIONER KERN DISSENTING IN PART

I am unable to agree with what has been said by Commissioner Tait in his opinion and I differ from the majority in their disposition of the appeal of counsel in support of the complaint. I particularly disagree with the opinion of the majority in sustaining the hearing examiner's failure to find that the respondent has violated Section 2(d) of the Clayton Act as amended by the Robinson-Patman Act by making promotional payments to vending machine

operator customers without making such payments available to wholesaler customers in the same market area. It seems to me that the opinion of the majority issued this day blinks at the facts of record, misinterprets the section of the act in question and seriously weakens the effectiveness of the act in a very critical and important area.

The record shows that vending machine operators who are customers of the respondent have received from the respondent substantial promotional payments on a sustained basis. It further shows that during the same period of time wholesalers who are also customers of the respondent in the same market area have not been paid or offered any payments on proportionally equal terms. This obviously constitutes a violation of the statute if the vending machine operators and the wholesalers are, in the words of the statute, "competing in the distribution" of the respondent's cigarettes. And they are so competing, counsel in support of the complaint argues, because they seek the same outlet. Almost invariably when a vending machine operator places a vending machine in a retail store, that store discontinues selling cigarettes over the counter. Thus the wholesaler who formerly supplied it loses the business. The facts are quite clear on this. The record is replete with instances of wholesalers losing retail accounts because vending machines have been installed. To me a situation where vending machine operators destroy over-the-counter selling with the result that the business is lost to the wholesaler constitutes not only competition, but competition of a singularly vigorous nature.³

Moreover unlike the majority, I find persuasive the case of *In the Matter of Curtiss Candy Co.*, 44 F.T.C. 237 (1947) where the hearing examiner and the Commission found that vending machine operators and wholesalers in a given area do in fact compete with each other in the distribution of a product. Nothing in the present record suggests justification for the repudiation of this previous sound exercise of the Commission's expertise. And this is especially true where the initial decision of the hearing examiner is predicated upon the fallacious legal conclusion that "the two functions are different and those who perform one of these functions cannot be said to be in competition with those who perform the other. Only when they both exercise the same functions and seek the same trade of the same class of customers do they become competitive." The prop-

³ The primary definition of competition in Webster's New International Dictionary (2d Ed.) is "Act of competing, esp. of seeking, or endeavoring to gain, what another is endeavoring to gain at the same time. * * *" It is apparent that the relationship existing between wholesalers and vending machine operators is competition in the ordinary sense of the word.

osition that functional labels determine the existence or absence of competition has been urged and rejected by the Commission and the courts on several occasions. See *In the Matter of General Foods Corp.*, 52 F.T.C. 798, 824 (1956); *Federal Trade Commission v. The Ruberoid Company*, 343 U.S. 470, 474-475 (1951). Yet the majority opinion only repudiates this grave error on the part of the hearing examiner by indirection.

My difference with the majority likewise rests on a slightly different and somewhat broader basis. Section 2(d) must be read in the light of the objectives sought to be accomplished by it. The purpose of the Robinson-Patman amendments and the specific place of Section 2(d) in this purpose was discussed in the opinion of the Supreme Court in the case of *Federal Trade Commission v. Simplicity Pattern Company*, 360 U.S. 55, 69 (1959). Among other things, the Court stated:

A lengthy investigation conducted in the 1930's by the Federal Trade Commission disclosed that several large chain buyers were effectively avoiding §2 by taking advantage of gaps in its coverage * * *. "Advertising allowances" were paid by the sellers to the large buyers in return for certain promotional services undertaken by the latter. Some sellers furnished special services or facilities to the chain buyers. Lacking the purchasing power to demand comparable advantages, the small independent stores were at a hopeless competitive disadvantage.

The Robinson-Patman amendments were enacted to eliminate these inequities. * * *

It is apparent that such inequities cannot be eliminated if Section 2(d) is interpreted in such a way as to prevent discrimination only as among different wholesalers on the one hand or as among different vending machine operators on the other. If the wholesaler may be disregarded in the granting of promotional allowances to the vending machine operators, then the small independent stores who purchase through the wholesaler are entirely without recourse.

Moreover, a construction of the statute which in effect limits its application to customers competing at the same level of distribution renders Section 2(d) inconsistent with other provisions of the Act. Congress intended by Section 2(d) to prevent the circumvention of the prohibitions of Section 2(a) by the employment of alternatives for price concessions. "The Commission's Chain Store Investigation Report found that some buyers were securing price advantages concealed as brokerage advertising allowances and services, and Congress in enacting these subsections [Sections 2(c), (d) and (e)] directed specific provisions against such practices." *In the Matter of Henry Rosenfeld, Inc.*, Docket No. 6212 (1956). In view of the interrelationship of these subsections, it seems reasonable to conclude

that circumstances amounting to a violation of Section 2(a) if they involved a direct price discrimination violate Section 2(d) if the discrimination takes the form of disproportionate allowances or services.

This means that Section 2(d) is violated where the facts show a discrimination by the payment of an advertising allowance to a large retailer and the failure to make such payment to wholesalers whose customers compete with the favored retailer. *Krug v. International Telephone & Telegraph Corp.*, 142 F. Supp. 230 (D.C.N.J., 1956), and see *State Wholesale Grocers, v. The Great Atlantic & Pacific Tea Company*, 258 F. 2d 831 (7 Cir., 1958), *cert. denied sub nom. General Foods Corp. v. State Wholesale Grocers*, 358 U.S. 947 (1959). Any other construction, it seems to me, permits businessmen to so manipulate their concessions to selected customers as to completely frustrate the nondiscriminatory objectives of the statute.

The following language in the *Krug* case, *supra*, 142 F. Supp. at 236-237, in my view is peculiarly apposite:

The second cause of action avers that I.T. & T. granted or paid allowances to "favored retailers," particularly Vim, for alleged advertising and promotional purposes, but denied such allowances to Krug or its customers.

Again, defendant I.T. & T. emphasizes that Krug was not in competition with Vim or any other retailer and that consequently there can be no violation of the Act since I.T. & T. did not discriminate between "customers competing in the distribution" of its products. The answer already given above to this argument will suffice here, if the meaning and scope of Section 2(d) is similar to that of Section 2(a). On the one hand, it would, upon first reading, seem that the language chosen by Congress for Section 2(d) is more limited than that for Section 2(a). The latter embraces within the area of competitive protection "different purchasers * * * or * * * of either of them," while the former uses the phrase "customers competing in the distribution" of a particular product. On the other hand, it would seem that Congress intended by Section 2(d), as well as by Sections 2(c) and (e) for that matter, to prevent circumvention of the prohibitions of Section 2(a) by the employment of alternatives for price concessions.

As observed by the Supreme Court in *Automatic Canteen Co. v. Federal Trade Commission*, 1953, 346 U.S. 61, 65, 78, 73 S. Ct. 1017, 1020, 97 L. Ed. 1454, "precision of expression is not an outstanding characteristic of the Robinson-Patman Act." And, as in that case, although a "confident answer cannot be given; some answer must be given." The conclusion reached by the Supreme Court was arrived at by reading the "infelicitous language * * * as enacting what we take to be its purpose." That approach will be followed here.

It is concluded that the purpose of Section 2(d) is to place discriminatory allowances on the same basis as price discriminations prohibited by Section 2(a) and that consequently the same set of circumstances give rise to a cause of action under Section 2(d), if the discrimination takes the form of unequal allowances or services, as would be the case if the discrimination were a direct price discrimination under Section 2(a). This means that violation of

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Section 2(d) may occur when a manufacturer gives a retailer an allowance not given to a wholesaler whose customers compete with such retailer * * *.

The facts in this record show that vending machine operator customers are retailers and that they compete with other retailers who are supplied with the respondent's cigarettes by wholesaler customers who do not receive the placement payments made to the favored vending machine operator customers. It would be my conclusion that by failing to make the payments available to the wholesalers the respondent has violated Section 2(d) and that the findings of the hearing examiner should be modified accordingly.

With respect to whether the respondent has made its point-of-sale allowances "available" to all of its over-the-counter customers competing in the resale of its products, the Commission in its opinion states that a seller need not offer an allowance to a particular customer where it is shown that the offer would, in any event, be a useless or futile gesture. Accepting this by way of argument as correct, nevertheless it is well established, on the other hand, that ordinarily an allowance cannot be considered to be "available" to a customer unless the customer is made aware of it. Thus, the burden of demonstrating the futility of the offer rests squarely on the party charged with a violation of the statute. In this case it seems clear to me that this burden has not been met. The vague, general testimony to the effect that certain of the customers had policies against the use of point-of-sale advertising and that others had exclusive arrangements with the respondent's competitors, relied on by the hearing examiner and accepted by my colleagues, is not convincing. As I view the record, it is the respondent, and not the customers, who has determined that offering its allowances would be futile, and on this point also I would reverse the hearing examiner.

FINAL ORDER

This matter having been heard by the Commission upon the cross-appeals of respondent and counsel supporting the complaint from the hearing examiner's initial decision, and upon briefs and oral argument in support of and in opposition to the appeals; and

The Commission, for reasons stated in the accompanying opinion, having denied the appeals and having adopted the initial decision as the decision of the Commission, except to the extent modified by views expressed in the opinion:

It is ordered, That the respondent, Liggett & Myers Tobacco Company, Inc., a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing,

