

THE AMERICAN TOBACCO COMPANY

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

Docket 6830. Complaint, July 8, 1957—Decision, Sept. 9, 1959

Consent order requiring a leading manufacturer of cigarettes and other tobacco products to cease violating Sec. 2(d) of the Clayton Act by such practices

Complaint

56 F.T.C.

as making allowances in varying amounts to some competing customers but not to others and not on a proportionally equal basis by any test but by individual negotiation resulting in different and arbitrary terms, and including payments to favored retail customers for point-of-sale and newspaper and radio advertising, and payments to vending machine operators.

COMPLAINT

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

PARAGRAPH 1. Respondent, The American Tobacco Company, 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 150 East 42nd Street, New York, New York.

PAR. 2. Respondent is now and for a number of years has been engaged in the business of manufacturing, selling and distributing cigarettes, cigars, and smoking tobaccos, hereinafter sometimes referred to as products. Said products are sold to customers with places of business located in the several States of the United States and in the District of Columbia, for resale to the purchasing public. Respondent is a substantial factor in the tobacco industry. It has branch offices, factories, and warehouses located in a number of states. Its net sales in 1955 exceeded \$1,000,000,000.

PAR. 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 places where such products are manufactured in various States of the United States to its 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 stream of trade and commerce in respondent's products among the various States and the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, as aforesaid, respondent has paid, or contracted to pay, money, goods, or other things of value to or for the benefit of some of its customers as compensation in consideration for services and facilities furnished, or contracted to be furnished, by or through such customers in connection with the processing, handling, sale, or offering for sale of the products which respondent manufactures, sells, or offers for sale; and respondent has not made or contracted to make such payments or considerations (hereinafter referred to as allowances) available on

proportionally equal terms to all its other customers competing in the sale and distribution of such products.

PAR. 5. Specifically, respondent during the past three years:

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

2. In paying such allowances to some competing customers, did so in amounts not equal to the same percentage of such competing customers' net purchases and not proportionally equal by any other test; and did not offer or otherwise accord or make available such allowances to all such competing customers in amounts equal to the largest of such percentages, or proportionally equal by any other test.

3. In paying such allowances to some competing customers, required some of them to comply with certain terms and to furnish or provide certain reciprocal services or facilities, but did not require others to do so in any manner or amount, or required them to do so in a less burdensome manner or in lesser amounts, and not proportionally equal by any test.

4. In determining allowances to be paid some competing customers, did so on the basis of individual negotiations with each such customer, which resulted in proportionally unequal, different, and arbitrary terms.

PAR. 6. Allowances, paid by respondent in the manner alleged in Paragraph 5, include those offered and granted to certain favored customers, but not to other competing customers, in consideration for the placement of posters, carton displays, signs, stickers, floor, window, and counter displays, change trays, and other like items advertising respondent's various brands of cigarettes in such customers' retail outlets, as well as in consideration for newspaper and radio advertising placed by such customers. Examples of such allowances paid by respondent during 1955 may be listed as follows:

<i>Customer</i>	<i>Allowance</i>
Union News Company, 131 Varick Street, New York, N.Y.-----	\$42,869
Interstate Company, Suite 1450 Merchandise Mart, Chicago 54, Illinois--	1,916
Fred Harvey, 212 South Canal Street, Chicago 6, Illinois-----	4,680
Borun Bros., 5051 Rodeo Road, Los Angeles 16, California-----	504
Cunningham Drug Stores, Incorporated, 1927 Twelfth Street, Detroit 16, Michigan-----	1,787
Associated Grocers Co-op, 3301 Norfolk Street, P.O. Box 3163, Seattle 14, Washington-----	6,920
United Cigar-Whelan, 82 39th Street, Brooklyn, N.Y.-----	5,850
Genovese Drug Stores, 21-12 Newtown Avenue, Long Island City, N.Y.-	612

PAR. 7. Allowances paid by respondent, in the manner alleged in Paragraph 5, also include those granted to certain customers who

operate vending or merchandising machines, in consideration for the distribution and promotion of respondent's brands of cigarettes by such customers in their machines. Under this program, during 1955, for example, respondent paid \$166,861.96, at the rate of \$8 per vending machine, to such customers for the promotion and distribution of its Herbert Tareyton cigarettes. The great majority of respondent's customers who receive allowances under this program compete in the trading areas where their machines are located with tobacco wholesalers and retailers who are likewise customers of respondent. These other customers have not been offered, nor have they received, this type of allowance from respondent.

PAR. 8. The acts and practices of the respondent, as above alleged, violate subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Section 13).

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

Chadbourn, Parke, Whiteside & Wolff, by Mr. Horace G. Hitchcock, of New York, N.Y., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint alleges that respondent has paid or contracted to pay money, goods, or other things of value to some of its customers as compensation for services and facilities furnished or contracted to be furnished by or through such customers, in connection with the sale and distribution in commerce of respondent's cigarettes and other tobacco products.

The complaint further alleges that respondent has also granted allowances to certain of its customers who operate vending machines, in consideration for the distribution and promotion by such customers of respondent's brands of cigarettes.

The complaint charges that such compensation and allowances were not made available on proportionally equal terms to all of respondent's other customers who compete with such favored customers in the sale and distribution of respondent's said products, in violation of §2(d) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, §13).

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

Respondent The American Tobacco Company is identified in the agreement as a New Jersey corporation, with its office and principal place of business located at 150 East 42nd Street, New York, New York.

The agreement provides, among other things, that respondent admits all the jurisdictional facts alleged in the complaint, and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; and that the order to cease and desist, as contained in the agreement, may be entered in this proceeding by the Commission, without further notice to respondent. All parties agree that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

The agreement is entered into subject to the condition that the effective date of the initial decision based thereon shall be stayed by the Commission, and that such initial decision shall not become the decision of the Commission in this matter unless and until the Commission issues an order to cease and desist in the Matter of *Liggett & Myers Tobacco Company, Inc.*, Docket 6642. All parties further agree that in the event the order of the Commission to cease and desist in said Docket 6642 should be more favorable in any respect than the order herein is to respondent, as a result of action by the Commission or a final order by the Courts, then, on application by respondent to the Commission, the order to cease and desist herein shall be modified or set aside in accordance with such order in said Docket 6642; and that if said order in Docket 6642 should be more favorable by reason of any findings of facts or conclusions of law in that proceeding, then the order herein shall likewise be construed in the light of such findings of fact or conclusions of law.

The agreement further provides that the complaint herein may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondent waives any further procedural steps before the Hearing Examiner and the Commission, except as hereinabove set forth; the making of findings of fact or conclusions of law; and all of the rights it may have to challenge or contest the validity of the order

to cease and desist entered in accordance with the agreement, except the right to move for postponement of compliance with said order.

The order agreed upon fully disposes of all the issues raised in the complaint, and adequately prohibits the acts and practices charged therein as being in violation of §2(d) of the Clayton Act as amended by the Robinson-Patman Act (U.S.C., Title 15, §13). Accordingly, the hearing examiner finds this proceeding to be in the public interest, and accepts the agreement containing consent order to cease and desist as part of the record upon which this decision is based. Therefore,

It is ordered, That respondent, The American Tobacco Company, a corporation, 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.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

The hearing examiner, on July 31, 1958, having filed his initial decision in this proceeding accepting an agreement containing a consent order to cease and desist theretofore executed by respondent and by counsel supporting the complaint, which agreement specified, among other things, that said initial decision was not to become the decision of the Commission until and unless the Commission issued an order to cease and desist in the matter of *Liggett & Myers Tobacco Company, Inc.*, Docket No. 6642; and

The Commission, on the 9th day of September, 1959, having adopted as its own the order to cease and desist contained in the initial decision of the hearing examiner in said matter of *Liggett & Myers Tobacco Company, Inc.*, Docket No. 6642:

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

It is further ordered, That respondent, The American Tobacco Company, a corporation, shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing,

