

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

Docket 6927. Complaint, Oct. 31, 1957—Decision, Mar. 22, 1960

Order requiring a large manufacturer of bathroom and facial tissue, household napkins and towels, to cease violating Section 2(d) of the Clayton

Decision

56 F.T.C.

Act by such practices as granting one customer, The Grand Union Co.—an eastern supermarket chain with some 340 outlets—the following discriminatory benefits not made available to competitors as a result of the \$1,000-a-month fee it paid a New York City outdoor advertiser to have its products advertised on the “Epok Panel” portion of the chain’s spectacular sign at 46th St. and Broadway, New York City, and for tied-in in-store promotions: (1) valuable advertising on the Broadway spectacular sign at nominal cost, (2) radio and television advertising worth approximately \$39,000 and newspaper advertising worth \$25,000 in exchange for the advertising time to which it was entitled on the Epok Panel, and (3) cash payments of more than \$14,600.

Mr. Donald R. Moore and *Mr. Charles J. Steele* supporting the complaint.

Arnold, Fortas & Porter, by *Mr. G. Daune Vieth*, of Washington, D.C., and *Moses & Singer*, of New York, N.Y., for respondent.

INITIAL DECISION OF JOHN LEWIS, HEARING EXAMINER

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondent on October 31, 1957, charging it with having violated the provisions of subsection (d) of Section 2 of the Clayton Act, as amended (15 U.S.C. Section 13). A copy of said complaint with notice of hearing was duly served upon respondent. Said complaint, in substance, charges respondent with having made discriminatory payments to or for the benefit of certain of its customers, which were not made available on proportionally equal terms to other competing customers, as compensation or in consideration for services or facilities furnished by or through the favored customers. Among the discriminatory payments charged is one involving The Grand Union Company, to which, or for whose benefit, it is alleged respondent paid substantial sums of money for services and facilities furnished in the form of advertising respondent’s products on an illuminated sign leased and controlled by Grand Union, and in the form of in-store promotional displays. Following service of the complaint upon it, respondent appeared by counsel and filed answer to such complaint denying, in substance, the violations charged.

Following the holding of a pre-trial conference on February 3, 1958, and a series of postponements to enable counsel for the parties to negotiate a stipulation covering the material facts in the proceeding, a hearing was held on June 19, 1958, in Washington, D.C. At said hearing a stipulation of facts was spread upon the record, in lieu of the calling of witnesses, and a number of documentary

1077

Findings

exhibits were offered, subject to objection by respondent as to the receipt of several documents on the grounds of relevancy and materiality. All of the documents were received in evidence, subject to a motion to strike three of said documents. Counsel for both sides rested their case at the conclusion of said hearing, after having participated in the hearing and being afforded full opportunity to be heard.

Pursuant to leave granted, proposed findings together with supporting briefs or memoranda were thereafter filed by counsel supporting the complaint and counsel for respondent. Counsel were also permitted to file replies to the proposals and briefs filed by opposing counsel. The examiner has carefully reviewed the proposed findings, briefs and replies filed by counsel. Proposed findings which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case, the hearing examiner makes the following:

FINDINGS OF FACT

1. Swanee Paper Corporation (formerly known as National Paper Corporation of Pennsylvania) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania. Its principal office and factory are located at Ransom, Pennsylvania. It is engaged in the business of manufacturing and selling certain paper products, including bathroom (toilet) tissue, household towels, facial (cleansing) tissue and napkins. It sells and distributes said products in commerce, as "commerce" is defined in the Clayton Act, as amended, to customers, including grocers and grocery chains located in the New York City metropolitan area, which includes the parts of New Jersey and Connecticut adjacent to New York City. Respondent's sales are substantial, exceeding \$7,000,000 in the fiscal year ending October 31, 1955.

2. Among respondent's customers is The Grand Union Company (herein called Grand Union) which operates a chain of approximately 340 retail food stores in New York, New Jersey, Connecticut, Pennsylvania, Vermont, and other states. Some of respondent's other customers located in the New York City metropolitan area compete with Grand Union in the sale of respondent's products. Net sales to Grand Union by respondent in the years from 1953 to 1956 were as follows:

	Findings	56 F.T.C.
<i>Year</i>		<i>Net sales to Grand Union</i>
1953	-----	\$222,752.45
1954	-----	226,284.75
1955	-----	285,178.58
1956	-----	221,119.66
Total	-----	\$995,335.44

3. Douglas Leigh, Inc. (hereinafter referred to as Douglas Leigh) is in the outdoor advertising business with its office located in New York, New York. Between 1952 and 1956 Douglas Leigh was the owner and operator of a "spectacular" advertising sign located on the northeast corner of Broadway and 46th Street in the Times Square area of New York City, and the owner of the leasehold on the realty on which the sign was located. The sign was in large part a fixed, illuminated sign. On its lower right-hand side was erected a novel and unusual panel consisting of a bank of timed electric lamps against a black background used for the projection and display of animated advertising cartoons. This panel was known as the "Epok Panel."

4. Sometime in 1952 Douglas Leigh made a proposal to Grand Union with respect to the use and occupancy of the electric spectacular sign on Broadway. The exact date when negotiations were entered into does not appear from the record. However, it does appear that on August 6, 1952, Grand Union accepted a written proposal submitted by Douglas Leigh offering to Grand Union "the use and occupancy of our combined electric spectacular and animated cartoon display located at 1552-1554 Broadway, New York City." For purposes of this proceeding the following are the material portions of the offer made by Douglas Leigh and accepted by Grand Union.

a. The display which was being offered for the "use and occupancy" of Grand Union was described as being composed of "three units," (1) an illuminated roof bulletin, (2) a north panel and (3) a south panel, including an "electronic animated cartoon panel." The agreement stated that the "entire three-part display * * * would constitute the display as considered herein."

b. The consideration to be paid by Grand Union was the sum of \$50.00 and the securing of "the agreements and consents of fifteen (15) participating advertisers to use the south panel animated cartoon part of the display, hereinafter referred to as the 'Epok Panel,' for their advertising on this display, such advertising to be approved by you."

c. The term of the agreement was stated to be for a period of one year from the date of its full operation (which was estimated to begin within 60 days from the date of the execution of the agree-

ment), with an option on the part of Grand Union to renew the agreement for two additional periods of one year.

d. The agreement was subject to cancellation by Douglas Leigh on or before August 15, 1952, in the event Grand Union was not successful in securing signed contracts from fifteen participating advertisers for the use of the Epok panel.

e. The illuminated roof bulletin was reserved for the advertising of a Grand Union for the term of the agreement. The north panel and the Epok panel were to be developed in accordance with layout and copy plans prepared by Douglas Leigh for the approval of Grand Union.

f. The Epok panel was to be in use for participating advertisers 75 percent of the hours of its operation and the remaining 25 percent was to be reserved for the advertising of Grand Union. During each 20-minute period of operation of the panel, participating advertisers were to have 15 minutes and Grand Union five minutes. Grand Union could use its five minutes for its own individual advertising or could elect to use it to advertise a brand of merchandise in which it had an interest, or could exchange the time allotted to it for radio or television advertising.

g. All design, layout and copy to be used on the entire display were to be submitted for approval of Grand Union and would not be used unless approved in writing by Grand Union. The cost of operation of the entire display was to be borne by Douglas Leigh.

5. At or about the time that negotiations were going on between Douglas Leigh and Grand Union with respect to the use and occupancy of the spectacular sign by Grand Union, negotiations were undertaken with respondent regarding its participation in the Epok panel. An agreement for respondent's participation in the sign was signed by it on July 30, 1952 and by Douglas Leigh on August 4, 1952. Respondent's agreement to become a participating advertiser followed conferences, conversations and correspondence between its representatives and those of both Grand Union and Douglas Leigh. The agreement and later renewals thereof were entered into by respondent after discussions with representatives of Grand Union concerning the desirability of using the sign, and were made with the knowledge and approbation of Grand Union. However, it has been stipulated that respondent had no knowledge of the terms of the arrangement between Grand Union and Douglas Leigh at the time it entered into its own contract with the latter, except as revealed in that contract, and that the contract between Grand Union and Douglas Leigh was entered into without any prior commitment, authorization or agreement of respondent.

Findings

56 F.T.C.

Pursuant to its agreement with Douglas Leigh respondent agreed "to undertake a participation in the Advertising Service arranged for and to be rendered to The Grand Union Company by Douglas Leigh, Inc." The agreement recited that Grand Union had "leased from Douglas Leigh, Inc., an Electric Spectacular Display located at the northeast corner of 46th Street and Broadway," one part of which it stated was known as the "Epok Panel." The agreement provided for the "use and occupancy of this Epok Panel by and for Participating Advertisers" in accordance with specified conditions, which were:

a. Each participating advertiser would have one period of one minute's duration in each 20-minute period for its advertising.

b. All copy-messages and cartoons to be exhibited on the panel for participating advertisers were "to be approved in advance of being used by Grand Union and only such copy-messages and/or cartoons approved by Grand Union shall be used on the Epok Panel."

c. The term of the agreement was for one year commencing from the first day of full operation of the display. However, the agreement was "[c]onditioned upon the basis that Grand Union Company will have secured fifteen (15) contracts from participating advertisers for the use of the EPOK Panel * * *." In the event fifteen signed contracts for participating advertisers were not secured by August 15, 1952, Douglas Leigh had the right to cancel any contracts of participating advertisers that may have been signed.

d. For its services rendered under the agreement the participating advertisers agreed to pay Douglas Leigh the sum of \$1,000 a month.

6. Prior to the expiration of the agreement between Douglas Leigh and Grand Union, Douglas Leigh advised Grand Union, by letter dated August 20, 1953, that the "first year of your existing Grand Union combined spectacular display on the northeast corner of 46th and Broadway expires on December 9, 1953," and proposed that the original contract be renewed for a second year upon the same terms and conditions as the existing contract, except for certain modifications, which Grand Union accepted. The modifications were:

a. Instead of there being fifteen participating advertisers having one minute of advertising, each, per 20 minutes, with five minutes being reserved for Grand Union's advertising, there would be twenty participating advertisers, each to have a minute of advertising for each twenty minutes.

b. In lieu of the five minutes of advertising available for Grand Union's use under the original agreement (which it had the right

to use for its own advertising or to trade for television or radio advertising) Grand Union was to receive monetary compensation on the basis of five percent of all monies which Douglas Leigh received as monthly rental from the first fifteen participating advertisers, and all monthly rentals paid by the remaining five advertisers (after deducting Douglas Leigh's commission).

7. By letter-agreement dated December 13, 1954, the arrangement between Douglas Leigh and Grand Union was renewed for a third year to run from January 1, 1955 through December 31, 1955. The agreement was renewed on the same terms as the original agreement of August 6, 1952, as modified by Douglas Leigh's letter of August 20, 1953. The December 1954 agreement gave Grand Union a further option to renew the arrangement for one year at a time for the next five years, from 1956 through 1960.

8. In December 1953 respondent advised Douglas Leigh that it did not intend to renew its participation on the sign. Douglas Leigh advised Grand Union of this fact and suggested that Grand Union might be successful "in securing a reversal" of this decision. There were contacts thereafter between representatives of respondent and representatives of Douglas Leigh and of Grand Union, following which respondent did enter into a contract to participate in the sign for another year, and did so participate. The renewal agreement was signed by respondent on February 16, 1954, and was substantially the same as the original agreement entered into with Douglas Leigh. The only change which need be noted is that made necessary by the fact that the contract between Douglas Leigh and Grand Union had been modified so as to provide for twenty participating advertisers on the Epok panel, instead of fifteen. The renewal agreement stated that it was "[c]onditioned upon the basis that Grand Union will have secured agreements from twenty (20) participating advertisers for the use of the Epok Panel," and that in the event the twenty signed contracts were not secured from participating advertisers by January 1, 1954, Douglas Leigh would have a right to cancel any existing contracts with participating advertisers.

9. Sometime prior to September 8, 1955, respondent advised Grand Union that "because of pressure from other concerns," including customers of respondent who were competing with Grand Union, that it would be unable to renew its participation on the sign for another year. However, following further contacts between representatives of respondent and representatives of Douglas Leigh and of Grand Union, respondent did agree to participate on the sign for another year. The third agreement was signed by respondent-

Findings

56 F.T.C.

ent on February 16, 1956. The new agreement was substantially the same as the earlier two agreements, except that the reference in the earlier agreements to the fact that Grand Union had leased the sign from Douglas Leigh and that all copy-messages, cartoons, etc., to be exhibited on the Epok panel had to be approved in advance by Grand Union, were eliminated from the agreement. The agreement provided for approval of copy by Douglas Leigh, instead of by Grand Union. The reference to the agreement's being conditioned on Grand Union's securing of a specified number of participating advertisers was also dropped and provided for the securing of participating advertisers by Douglas Leigh instead.

10. Although the original agreement between Grand Union and Douglas Leigh, which was entered into on August 6, 1952, estimated that the sign would go into operation within 60 days, and the agreement between respondent and Douglas Leigh provided that the sign would begin operating between August 15 and September 30, 1952, the sign did not actually go into operation until December 1952. The record does not indicate whether this was due to the difficulty of obtaining the requisite number of participating advertisers or what the reason for the delay was. In any event, prior to the commencement of the operation of the sign, on November 28, 1952, Grand Union issued a statement, purporting to be a joint press release by it and Douglas Leigh, describing the arrangement as: "A new venture in cooperative advertising * * * to promote Grand Union and fifteen different food products." The release described the sign as including a "30-foot replica of the Grand Union identification tower" and "an electronic animated cartoon panel." Among the fifteen products listed as "cooperating in the plan" were "Swanee Tissues." The release further referred to the fact that the "joint effort with fifteen of our manufacturers is a natural step which follows the success of cooperative radio and television show * * *." Reference was also made in the release to the fact that Douglas Leigh was "already working on cooperative signs for food chains in other key cities."

11. An advertising brochure with reference to the sign was also prepared by or under the direction of Douglas Leigh. The brochure referred to the sign as "The Grand Union Spectacular" and contained reprints of a number of newspaper articles, some of which referred to the sign as a "Grand Union Sign," or as part of a "new cooperative outdoor advertising program." While respondent did not specifically authorize or participate in the preparation, circularization or distribution of the Grand Union release or of the advertising brochure, it did receive a copy of the brochure from

Douglas Leigh in February 1953. Its representatives were familiar with the appearance of the entire sign throughout the period of its participation thereon.

12. A copy of the advertising brochure was also sent to respondent's broker, Frederick Gash who, on February 11, 1953, addressed a letter to Douglas Leigh stating that he found the brochure "objectionable in every respect." The primary basis of the objection was stated to be that the sign "is not a Grand Union sign—it is a Douglas Leigh sign with participating sponsors including Grand Union." The writer objected to the fact that Douglas Leigh's brochure "has now established the sign as a Grand Union Co-op deal and not a straight advertising proposition comparable to NBC's chain lightning or Storecast." The letter further stated that as a result of the publicity "every sponsor is now being put on the carpet by Grand Union's competition. And they are right because it has now been made as clear as daylight that Grand Union has given a preference." The letter concluded with the statement that Grand Union "was having trouble getting sponsorship because of the co-op angle" and that the writer's four sponsors on the sign, including respondent, were "now in jeopardy."

It has been stipulated that Gash was not specifically authorized, on behalf of respondent, to write the letter or to make any of the statements contained therein and that respondent did not ratify the letter and had no knowledge of its existence. Gash is an independent food broker and not an employee of respondent. The sales of respondent's products in the New York metropolitan area are negotiated by Gash. Gash also represents a number of other suppliers of products sold in grocery stores.

13. By interoffice memorandum dated November 2, 1953, respondent's broker, Gash, submitted to respondent's president an analysis of respondent's sales to Grand Union in the ten-month period ending October 31, 1953, as compared with the ten-month period ending October 31, 1952. The memorandum and an attachment thereto indicated that respondent had increased its sales to Grand Union by some 13,400 cases of tissue "since you went into the Broadway Sign deal and because of the various merchandising display deals." The memorandum also referred to the amount which respondent had paid out for the sign and "in various display and cooperative advertising deals," and expressed the opinion that the Grand Union account "is too costly for the amount of business we are doing with them." It suggested that the solution was not to cut down on the amount of money being spent on the Grand Union account but to increase the amount of business so as to justify the expense.

A copy of the above memorandum was sent to Grand Union by Gash in a letter dated November 2, 1953, preparatory to a conference between respondent's president and an official of Grand Union. The letter referred to the fact that Grand Union "today is the costliest account that National Paper has on its books. It costs them too much money for the amount of business they get." It was suggested that the solution was to increase the amount of business from Grand Union, rather than to cut down on the program with Grand Union.

14. As already indicated, the so-called spectacular sign consisted of three portions. The first, which was referred to as the "illuminated roof bulletin," was a stationary sign containing an illuminated replica of a Grand Union store with the illuminated legend "Save at Grand Union Food Markets." It hung directly over the so-called south panel containing the Epok panel. The second part of the sign, referred to as the "north panel," contained the fixed illuminated legend "Your Dollar Buys More at Your Grand Union Store." The third portion of the sign, which was referred to as the "south panel," contained the electronic animated cartoon panel known as the "Epok Panel" in the center thereof, above which was a stationary panel bearing the legend "For Grand Values," and below which was another panel with the illuminated legend "Grand Union Food Markets." The entire sign gave the appearance of being a single display.

15. The animated cartoon advertisements of respondent's products on the Epok Panel were concerned only with the products themselves and respondent's trade name, and did not mention or show the name or place of business of any customer of respondent which sold the product. However, as indicated above, other portions of the south panel as well as other portions of the sign above and adjacent to the Epok panel made it apparent that such products were for sale at "Grand Union Food Markets."

16. During the period when respondent's products were advertised in animated cartoons on the Epok panel, the products and services of a number of other firms were also advertised by similar animated cartoons. With the exception of advertisers with whom Grand Union had traded portions of its allotted five-minute periods, as provided under its contract with Douglas Leigh, all of the firms which participated in the panel were firms which manufactured or sold products commonly sold in or through grocery stores, and which were, in fact, sold in Grand Union stores. All such grocery advertisers using animated cartoon advertising on the Epok panel paid to Douglas Leigh the same rate as paid by respondent.

17. The total amount paid by respondent to Douglas Leigh under the three contracts referred to above was \$47,500. These payments were made by respondent to its advertising agency and were transmitted by that agency to Douglas Leigh. This was the same procedure that respondent followed in connection with payments on its advertising contracts with other advertising media. It has been stipulated that if an official of respondent had been called as a witness he would have testified that the advertising benefits to respondent from the animated cartoon advertising on the Epok panel were, in respondent's judgment, equal to the payments of \$1,000 per month therefor.

18. The last contract which was entered into by respondent with Douglas Leigh in February 1956 was cancelled, effective December 31, 1956, and since that date respondent has not been a party to any contract or arrangement providing for the advertising of its products on the spectacular sign, and its products have not been so advertised. Respondent's products were advertised on the spectacular sign throughout the period from December 10, 1952, to December 31, 1956, except for the period from January 1 to February 15, 1954.

19. There was no similar sign in the Times Square area bearing the name of any other of respondent's customers on which respondent could have contracted for advertising during the period from 1952 through 1956, and respondent did not enter into similar contracts with respect to, or make payments for, advertising on signs which bore the names of any of its other customers. Respondent's participation in the Broadway spectacular sign was something entirely apart from its other advertising and promotional program, and the money paid for participation in the sign was not charged against the amounts that Grand Union would qualify for under respondent's established advertising and promotional program. Customers of respondent competing with Grand Union did not receive and were not offered the advertising and payments received by Grand Union, as hereinafter found, or anything of value in lieu thereof.

20. As a result of the operation of the sign under the contract with Douglas Leigh, Grand Union received from Douglas Leigh, between July 1954 and February 1955, \$14,633.28. In addition, time and space trades were made by Grand Union with other advertisers, pursuant to its original contract permitting Grand Union to exchange its five-minute advertising period with others. Such trades were made with WCBS-TV, Il Progresso Newspaper, and WRCA-TV. In the case of WCBS-TV and WRCA-TV, Grand Union

Findings

56 F.T.C.

received, in exchange for the use of parts of the five one-minute periods to which Grand Union was entitled, broadcasting time at "card rates" (standard rates) equivalent to the spectacular sign time, the value of which was computed at the rate of \$1,000 for one-minute per twenty-minute cycle per month. The computed value of the spectacular sign time was about \$39,000, and Grand Union received at "card rates" approximately \$39,000 worth of broadcasting time.

In the case of *Il Progresso*, an arrangement was made under which Grand Union was to receive, in exchange for use of part of the one-minute periods to which Grand Union was entitled, a credit against the cost of advertising space in *Il Progresso*, taken at the rate of 30¢ a line. The arrangement was that *Il Progresso* should receive one minute of the twenty-minute cycle, the value of which was computed at the rate of \$1,000 a month, and in exchange Grand Union was to receive 1,000 lines of advertising space a week, paying approximately \$50.00 a week to *Il Progresso* to make up for the difference between the values exchanged.

21. As part of the discussions with Grand Union concerning respondent's becoming a participant on the Broadway spectacular sign a schedule of in-store promotions was arranged with Grand Union to tie in with respondent's use of the spectacular sign. Such promotions continued during the period of respondent's participation on the sign. There was no separate charge by Grand Union for such in-store promotions, nor was any separate payment therefor made to Grand Union by respondent.

CONTENTIONS AND CONCLUSIONS

In order to establish a violation of Section 2(d) it is necessary to show (1) that respondent in the course of commerce made a payment "to or for the benefit of a customer," (2) that such payment was "compensation or in consideration for any services or facilities furnished by or through such customer" in connection with the handling of respondent's products, and (3) that such payment was not made "available on proportionally equal terms" to other customers competing with the favored customer. Respondent contends that there has been no showing that the payments which it made to Douglas Leigh were "for the benefit of" its customer, Grand Union, or that such payments were "compensation or in consideration for any services or facilities furnished by or through" Grand Union. No question has been raised as to the third element of the offense, nor with respect to the existence of interstate commerce.

Respondent's argument consists largely of an attempt to distinguish this case from the so-called *Chain Lightning* cases (nine companion cases, Dockets 6592-6600), in which the Commission held a somewhat similar arrangement to be a violation of Section 2(d). Like the instant proceeding, those cases also involved two separate sets of contracts, one between various broadcasting companies and certain grocery chains, and the other between the broadcasting companies and various suppliers of the grocery chains. The contracts between the broadcasting companies and the grocery chains provided for the furnishing of radio and television broadcast time to the chains, in return for their agreement to conduct promotional displays of the products of various manufacturers to be named by the broadcasting companies. The contracts between the broadcasting companies and the manufacturers provided for the purchase of broadcasting time by the manufacturers. While there was nothing in the latter contracts with regard to in-store promotions, separate brochures issued by the broadcasting companies advised prospective advertisers that they would receive such promotions because of the separate contracts with the chains. The Commission held, in essence, that despite the existence of separate contracts, the entire arrangement was part of a single, unified plan in which the suppliers' payments were made for the benefit of the grocery chains, in that they paid for the broadcast time received by the chains from the broadcasting companies, and were made not only in consideration of the advertising received by the suppliers from the broadcasting companies, but in return for the in-store promotions which the grocers had undertaken to supply in their contracts with the broadcasting companies.

Respondent seeks to distinguish this case from the *Chain Lightning* cases mainly on the ground that the brochures which the broadcasting companies furnished to the suppliers gave them notice of the fact that they would receive the benefit of the in-store promotions, which the chains were obligated to furnish under their separate contracts with the broadcasting companies, and that it was clear from such brochures that the supplying of the in-store promotions was a part of the consideration for the suppliers' entering into their contracts with the broadcasting companies. Respondent contends that in this case it had no knowledge of the separate arrangements between Grand Union and Douglas Leigh, that "so far as respondent knew, Grand Union was paying full rates in cash" for its space on the "stationary parts of the sign," that respondent was paying only for what it considered to be the advertising value of its space on the Epok panel, and that Grand Union was under

no legal obligation to furnish the in-store displays but did so because of an alleged practice in the grocery industry for retailers to capitalize on the special advertising campaigns of their suppliers in order to increase their own sales.

Respondent's argument, in essence, is that since it had no knowledge of the terms of the separate arrangements between Douglas Leigh and Grand Union, the payments which it made were not made with the intent of benefiting Grand Union but were, rather, made for the purpose of paying for its own advertising, and that Grand Union furnished no service to respondent in consideration of respondent's payments because it was under no legal obligation to respondent to furnish the in-store promotions. The short answer to respondent's argument is that since the filing of its proposed findings and briefs in this case a similar argument, which was addressed to the Third Circuit Court of Appeals in two of the *Chain Lightning* cases, (*P. Lorillard Co. v. FTC*, and *General Foods Corp. v. FTC*, June 4, 1959, 27 Law Week 2635), has been held to be without merit. In addressing itself to what it understood to be the argument of petitioners, viz., that a payment cannot be considered for the benefit of a third person "unless the seller makes it with the intention of benefiting the customer or has reason to know that some direct benefit to the customer will proximately result therefrom," the court stated:

This section of the Act does not concern itself with motive or intention. It is only concerned with the consequences which flow from an act. If those consequences eventuate, the act from which they result is forbidden.

Cited with approval by the court in the *P. Lorillard* case was the earlier decision of the Seventh Circuit in *State Wholesale Grocers v. The Great Atlantic & Pacific Tea Co.*, 258 F. 2d 831, 837 (C.A. 7, 1958), cert. denied, sub nom. *General Foods Corp. v. State Wholesale Grocers*, 358 U.S. 947 (1959), in which the district court (154 F. Supp. 471) had dismissed the complaint on the ground that the advertisement paid for by the supplier was purchased primarily for the supplier's own benefit and not for that of the grocery chain. The circuit court, in reversing, stated (at 837):

The fact of paying or contracting for the payment for the services or facilities referred to is proscribed * * *. It is apparent that Congress has not made relevant the motive or intent of him who thus pays or contracts to pay. * * * We believe that the district court erred in relying upon the fact that it found that there was no evidence of any ulterior motive on the part of defendant suppliers * * * nor that said suppliers had intended to favor A & P over other customers.

In the *Lorillard* case the court also made the following pertinent observation with respect to the argument that the legality of the

arrangement must be determined on the basis of the principles of private contract law and the separateness of each of the agreements:

The petitioners' position is bottomed on the assumption that in deciding whether a violation of the statute has occurred the Commission must restrict itself to an assessment of the consequences which flow from a written contract by the application of formal principles which a court would be required to apply in an action between the contracting parties. If, however, we keep in focus *the real question involved*, that is *whether the petitioners have made payments to someone which actually are of benefit to their customers and not whether they have bound themselves to do so by a legally enforceable contract*, it is readily apparent that petitioners' position is untenable. [Emphasis supplied.]

On this basis it seems clear that respondent has violated Section 2(d). The payments made by respondent (and the other participating advertisers) to Douglas Leigh were actually of substantial benefit to Grand Union, irrespective of whether respondent intended to benefit Grand Union or made them because it thought the advertising value of having its products flashed on the Epok panel was worth the \$1,000-a-month fee which it paid. The benefits received by Grand Union included (1) valuable advertising on the Broadway spectacular sign at nominal cost, (2) valuable advertising in other media (in exchange for the advertising time to which it was entitled on the Epok panel) consisting of radio and television advertising worth approximately \$39,000, and newspaper advertising worth approximately \$25,000, and (3) cash payments amounting to \$14,633.28. The services or facilities furnished by or through Grand Union to respondent, as compensation or in consideration for the payments made by respondent, were (1) advertising on the Epok panel and (2) in-store promotions in Grand Union retail stores. In connection with Grand Union's furnishing of the latter, it makes little difference whether, as stated by the court in the *Lorillard* case, they had "bound themselves to do so by a legally enforceable contract."

The foregoing conclusions, based on the logic of the holding of the courts of appeals in two of the *Chain Lightning* cases and in the *State Wholesale Grocers* case, are made without regard to whether respondent had any knowledge of the separate arrangement between Grand Union and Douglas Leigh or intended to benefit Grand Union. However, it is noted that in the *Chain Lightning* decision the court, while observing that the Commission had gone "further than required" in finding that respondent knew or should have known that it was supplying the consideration for the benefits received by the favored chain stores, nevertheless, considered the Commission's findings as to knowledge and, by way of dicta, up-

held such findings. While it would appear to be unnecessary in this case to make any specific findings on the question of knowledge and intent, in view of what the examiner considers to be the essential holding in the *Chain Lightning* case, the examiner will, nevertheless, make specific findings in this regard in order to avoid any doubt which may exist. The examiner entertains no doubt as to respondent's notice or knowledge in this case, or of its intention to confer a benefit on Grand Union. To a consideration of the reasons for this conclusion the examiner now turns.

There is no question but that the Broadway spectacular sign was a Grand Union sign, that it was understood by respondent as being a Grand Union sign, that respondent knew it was contributing to a cooperative advertising arrangement from which Grand Union was receiving a substantial benefit, and that it entered the arrangement in part at least because of its expectation of receiving the benefit of in-store promotions. The very contract between respondent and Douglas Leigh spelled out the fact that Grand Union had leased the entire sign, and not merely the "stationary portion" thereof as respondent contends. The agreement recited that Grand Union had leased "an electric spectacular display" and identified it as having one section "known as the Epok Electronic Animated Cartoon Panel" on which respondent would participate. The fact that respondent's advertisements were to appear on the Epok panel in no way detracts from the fact that the entire sign had been leased to Grand Union, nor does it indicate that the latter would not have dominion over the Epok panel. On the contrary, the agreement entered into by respondent specifically stated that all messages on the panel were to be approved in advance by Grand Union and that only such messages as had been approved by Grand Union could be used on the panel. The publicity with regard to the sign identified it as a Grand Union sign, including the brochure prepared by Douglas Leigh which described the sign as "The Grand Union Spectacular."¹ The very appearance of the sign cried out to all who observed it that it was a Grand Union sign. The name Grand Union dominated all three panels of the sign. The products advertised on the Epok panel were unmistakably identified as products which were on sale in Grand Union Food Markets.

Since the sign was, to respondent's knowledge, a Grand Union sign, it is self-evident that it knew its contribution was helping to support, in part at least, an advertising project from which

¹ While respondent may not have seen the Douglas Leigh brochure until after it had signed the first contract, it was undoubtedly familiar with it by the time it had entered into the second and third contracts renewing the arrangement.

Grand Union was benefiting. In fact, it knew that but for its contribution and that of the other participating advertisers the project would not go into operation. This is clear from the provision in its contract with Douglas Leigh that Grand Union had undertaken to secure signed contracts from fifteen (later twenty) advertisers, and that its own contract with Douglas Leigh would not take effect unless and until Grand Union had secured the cooperation of the prescribed number of other suppliers. While it may not have known all of the terms of the separate contract between Grand Union and Douglas Leigh, it certainly knew that Grand Union would receive valuable advertising benefits from being on the sign, and that such benefits were dependent on the support it received from respondent and other suppliers whom it sought to interest in the sign. In addition to the wording of its contract, the active participation by Grand Union in respondent's negotiations with Douglas Leigh and the fact that it twice induced respondent to renew its arrangement with Douglas Leigh in the face of respondent's obvious reluctance to do so, must have made it clear to respondent that Grand Union was receiving substantial benefits under the arrangement.

The examiner is not unaware that in the last renewal of the contract between Douglas Leigh and respondent there was a modification in the wording of the contract, so that all reference to Grand Union was dropped. This is not surprising, however, in the face of the publicity which had been given to the sign as a Grand Union sign and to the fact that the arrangement was being referred to in the industry as a cooperative deal.² In the light of the criticism received by both Douglas Leigh and respondent regarding the arrangement, it is not surprising that those references in the contract which tended to identify the sign as a Grand Union sign and pointed up the cooperative nature of the arrangement were dropped. This does not, however, detract from the notice and knowledge which

² Respondent objected to the receipt in evidence of, and has moved to strike, the letter from respondent's broker to Douglas Leigh expressing concern that the publicity issued by Douglas Leigh had "established the sign as a Grand Union Co-op deal and not a straight advertising proposition." Respondent contends that since there is no showing that the broker was authorized to write the letter, it is not admissible as a vicarious admission by respondent. While the stipulation between counsel reserved the right to object to documents only on the grounds of relevancy and materiality and not on the grounds of hearsay and competency, the examiner is not receiving the document as being in the nature of a vicarious admission, but as a document which was received by Douglas Leigh expressing concern that the true nature of the arrangement had been revealed and which, presumably, Douglas Leigh took into account in the later revision of the contract. It is also noted that respondent had also been reluctant to renew the arrangement because of the pressure from other customers who apparently viewed the arrangement as one benefiting Grand Union. It may be assumed that both Douglas Leigh and respondent took such criticism into account in the last revision of the contract. The motion to strike is accordingly denied.

respondent already had but, on the contrary, is indicative of an intent to cover up the visible indicia of such knowledge.

Even assuming, arguendo, that Grand Union may be deemed to have leased only the stationary parts of the sign, and that respondent intended to pay only for its own advertising on the Epok panel and considered the advertising benefit received by it to be worth what it paid, this does not change the essential nature of the arrangement as a cooperative advertising venture. Grand Union received the benefit of the sign as a whole even if, as respondent contends it thought, Grand Union was paying the going rate in cash for its advertising on the stationary portions of the sign. The entire display was a single advertisement from which respondent received a substantial benefit, and it is unrealistic and artificial to attempt to segregate the benefits as between the stationary portions and the Epok panel. The situation would be no different than the usual cooperative newspaper advertising arrangement, in which the grocer and supplier both contribute to the cost of a single advertisement featuring the name of the store and the products of the supplier. In such instances the advertisement is considered to be a unitary advertisement and the grocer is considered to be receiving a benefit from the entire advertisement. An advertising allowance is no less for the benefit of a customer because the supplier receives a substantial, or even the primary, benefit from the advertisement. *State Wholesale Grocers v. The Great Atlantic & Pacific Tea Co., supra*. The only difference in this case from the usual cooperative advertising situation is that the supplier made his payment to a third person, rather than to the grocer for transmission to a third person (either a newspaper, a magazine or a broadcasting company). However, this difference is immaterial since the statute does not require that the payment be made "to" the customer. It is sufficient if it is made "for the benefit of" the customer.

It is also clear that respondent was aware that the payment which it was making would yield to it services or facilities furnished by or through Grand Union, viz., the right to advertise its products on the Grand Union sign and to receive the benefit of in-store promotions. The fact that it would receive the former is self-evident and needs no further discussion. Respondent's argument as to the latter, that Grand Union was under no legal obligation to furnish the in-store promotions, places a premium on form over substance. It is clear from the discussions between respondent and Grand Union, which took place prior to respondent's entering into the contract, regarding the furnishing of in-store promotions to

1077

Findings

respondent, and from the fact that a schedule of such promotions was actually arranged to tie in with the advertisements on the Epok panel, that such in-store promotions were an actual part of the arrangement whether spelled out in legally binding form or not. There is no evidence of the so-called custom to which respondent makes reference of grocers permitting suppliers to set up displays without charge, and even if there were, it is clear that the arrangement made here had nothing to do with any such custom but was part of the warp and woof of respondent's agreement to go on the sign.

When reduced to its essence, respondent's argument, as in the *Chain Lightning* cases, is based on the technicalities of private contract law and seeks to make the form of the arrangement, rather than its substance, the crucible for testing its legality. It seems clear from what the parties were trying to accomplish that a Section 2(d) violation was inevitable, irrespective of what form the agreement took (unless the suppliers made equivalent arrangements with other customers). If Douglas Leigh had leased the sign to Grand Union and the latter had undertaken the responsibility of entering into contracts with its suppliers for the use of the panel, there would have been an obvious violation of law since the payments by the suppliers would clearly be to Grand Union and would be in return for advertising services received by the suppliers. Presumably such an arrangement would not have been acceptable to Grand Union since it would have been saddled with the initial and primary financial responsibility for the sign. An alternative was to lease the sign to Grand Union for a nominal consideration and have it procure suppliers to participate on the sign but have them make payment to Douglas Leigh, thus relieving Grand Union of any substantial financial obligation. Had a single contract been entered into among all parties, the nature of the arrangement as a cooperative advertising venture for Grand Union's benefit would have been revealed, even though payments by the suppliers were made to Douglas Leigh. Consequently the idea of splitting the arrangement into two separate groups of contracts suggested itself as the apparent solution. Presumably the parties thought that what would otherwise be illegal would become legal by the magic of using separate contracts. However, no amount of legal obfuscation can hide the basic purpose or effect of the arrangement as a cooperative advertising venture between Grand Union and its suppliers. The examiner entertains no doubt from the entire context of events that respondent was aware of, and understood, the basic nature of the arrangement into which it entered.

The only issue remaining is that with regard to whether an order should issue in view of respondent's discontinuance of the practices involved 10 months before the issuance of the complaint herein. While not urging this as a ground for dismissal at the hearing or in its proposed findings or brief filed in support thereof, respondent has raised it in its reply brief in apparent response to an argument made in the brief of counsel supporting the complaint (who apparently anticipated that respondent might urge dismissal on this ground). Counsel supporting the complaint oppose dismissal on such ground for the reason that the practice was not discontinued until after investigation was begun, and that there has been no showing of facts of an unusual nature which require a dismissal of the complaint in the interests of justice.

While the record does not disclose when the practice was discontinued with reference to the date of investigation, respondent apparently concedes that it did so after investigation of the practice had begun, and bases its argument for dismissal on the ground of the lack of likelihood that the practice will be resumed. In the opinion of the hearing examiner there has been no showing of such unusual or exceptional circumstances by respondent, as to warrant a dismissal of the complaint on the ground that respondent has discontinued the practices alleged therein. *Sheffield Merchandise, Inc.*, Docket 6627, July 7, 1958; *Ward Baking Co.*, Docket 6833, June 23, 1958.

CONCLUDING FINDINGS

It is concluded and found that (1) respondent has in the course of commerce paid or contracted to pay something of value for the benefit of a customer, to wit, Grand Union; (2) such payment was for the benefit of Grand Union, in that as a result thereof Grand Union received valuable advertising on the Broadway "spectacular" sign, valuable advertising in other media in exchange therefor and substantial cash returns; (3) such payment was compensation or in consideration for services or facilities furnished by or through Grand Union to respondent, in connection with the handling, sale or offering for sale of products manufactured by respondent, such services or facilities consisting of the advertising of respondent's products on the Broadway "spectacular" sign and in-store promotions in Grand Union stores; and (4) the payments or consideration made or furnished by respondent were not available on proportionally equal terms to all other customers of respondent competing in the distribution of its products with Grand Union.

CONCLUSION OF LAW

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

ORDER

It is ordered, That respondent Swanee Paper Corporation, a corporation, its officers, employees, agents or representatives, directly or through any corporate or other device, in connection with the sale or offering for sale in commerce (as "commerce" is defined in the Clayton Act) of paper products, do forthwith cease and desist from:

Paying or contracting to pay to or for the benefit of any customer anything of value as compensation or in consideration for any advertising, promotional displays or other services or facilities furnished by or through such customer in connection with the handling, processing, sale or offering for sale 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

This matter having been heard by the Commission on the respondent's appeal from the hearing examiner's initial decision; and

The Commission having considered the entire record, including the briefs and oral arguments of counsel for respondent and counsel in support of the complaint, and having determined that the hearing examiner's findings and conclusions are fully substantiated on the record and that the order contained in the initial decision is appropriate in all respects to dispose of this matter:

It is ordered, That respondent's appeal be, and it hereby is, denied.

It is further ordered, That the hearing examiner's initial decision filed August 18, 1959, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondent, Swanee Paper Corporation, a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order contained in said initial decision.

Commissioner Tait not participating.

IN THE MATTER OF
THE DAHLBERG COMPANY, ET AL.

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

Docket 7455. Complaint, Mar. 31, 1959—Decision, Mar. 22, 1960

Consent order requiring Minneapolis manufacturers to cease representing falsely in advertising in newspapers, magazines, etc., and by advertising mats, brochures, and other promotional material supplied to their dealers, that their "Miracle Ear," "Solar Ear," and "Optic Ear" hearing aids were buttonless, cordless, and invisible; and that the "Miracle Ear" device provided equally good hearing from all directions and was smaller than was the fact.

Mr. Morton Nesmith for the Commission.

Levitt, Palmer and Rogers, by *Mr. John M. Palmer*, of Minneapolis, Minn., for respondents.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

On March 31, 1959, the Federal Trade Commission issued its complaint against the above-named respondents charging them with violating the provisions of the Federal Trade Commission Act in connection with the manufacture, sale and distribution of hearing aids, including those designated as "Miracle Ear," "Optic Ear," and "Solar Ear."

On July 9, 1959, a hearing was held in Minneapolis, Minnesota, to take testimony in support of the allegations of the complaint. On December 28, 1959, respondents and their counsel and counsel supporting the complaint entered into an agreement containing a consent order to cease and desist, which disposes of the allegations of the complaint in accordance with Section 3.25(a) of the Rules of Practice and Procedure of the Commission.

It is set out in the agreement that respondent Ralph Campagna who was, until September 18, 1959, an officer of respondent corporation, resigned and severed his connections with respondent corporation. It is agreed that the complaint should be dismissed as to this respondent in his official capacity or as an officer of said corporation, but not individually.

It is also set out in the agreement that the charge contained in the complaint in subparagraph 7 of paragraph 5, viz:

7. "Respondents were the first to introduce the heat powered hearing aid such as the Solar Ear" cannot be sustained, and that