

IN THE MATTER OF
AMERICAN NEWS COMPANY, ET AL.

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

Docket 7396. Complaint, Feb. 5, 1959—Decision, Jan. 10, 1961

Order requiring the nation's largest retail newsstand operator to cease violating Sec. 5 of the Federal Trade Commission Act by knowingly inducing or receiving discriminatory promotional allowances from publishers of magazines it sold, which approximated \$890,000 in 1958, and which were not paid at any proportionally equal rate to a single retail competitor.

Mr. J. Wallace Adair and Mr. Jerome Garfinkel for the Commission.

Mr. Lester Lewis Jay and Roth and Riseman, by Mr. Eugene Frederick Roth, of New York, N. Y., for the respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

1. The Complaint

The complaint herein was issued February 5, 1959, charging the Respondents with having violated §5 of the Federal Trade Commission Act by inducing and coercing various of their suppliers, including publishers of magazines, pocket books and comic books, to make payments or grant allowances to Respondents in connection with the display and sale of such publications on Respondents' newsstands, when Respondents knew, or should have known, that such payments were not being offered or made available on proportionally equal terms to all customers of such suppliers who were in competition with Respondents. The complaint further alleges that Respondents knew, or should have known, that their suppliers' failure to make such payments equally available to all their competing customers was a violation by such suppliers of §2(d) of the Clayton Act.

The relevant provisions of those two Acts are as follows:

The Federal Trade Commission Act:

SEC. 5(a) (1) Unfair methods of competition in commerce, * * * * are hereby declared unlawful.

The Clayton Act:

SEC. 2(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.

The complaint further charges that Respondents also attempted to induce and coerce certain manufacturers of cigars, which were sold by the Respondents, into paying similar unlawful allowances to the Respondents, in violation of §5 of the Federal Trade Commission Act.

The complaint concludes that the effect of Respondents' acts and practices has been to increase their power and ability to induce and coerce their publishers and suppliers to make unlawful allowances, and also to lessen substantially the ability of news-stand operators throughout the country to compete with Respondents.

2. The Answer

Respondents entered a general denial of the charges alleged in the Commission's complaint, and in their amended answer listed several affirmative defenses. Particularly, Respondents asserted that the several publishers referred to in the complaint herein, and distributors and others unknown to the Respondents, have been and still are engaged in unlawful contracts and conspiracies to fix and maintain uniform, non-competitive prices for the publications of each publisher. Respondents further asserted that the payments received by them from publishers were not in violation of §5 of the Federal Trade Commission Act, but were obtained in an effort to defend against and defeat the unlawful conspiracy of the publishers and their distributors. Respondents also contended that such payments did not constitute discriminatory preferences to Respondents, as against other retail news-stand dealers in magazines, pocket books, comic books and similar articles, but, to the contrary, created lawful rights in Respondents' competitors to obtain equivalent or greater relief from the oppression of the several conspirators.

3. Ruling on Proposed Findings

Consideration has been given to the entire record herein, including particularly the proposed findings as to the facts and proposed conclusions submitted by counsel. Each proposed finding as to the facts and each proposed conclusion which has been accepted has been, in substance, incorporated into this initial decision. All proposed findings and conclusions not so incorporated herein are hereby rejected.

4. Identity and Organization of Respondent American News

The Respondent first named in the caption hereof, The American News Company, erroneously designated in the complaint as Ameri-

can News Company, and hereinafter referred to as Respondent American News, is a corporation organized and doing business under the laws of the State of Delaware, with its principal office and place of business located at 131 Varick Street, New York 13, New York. Prior to August 1, 1957, it operated a wholesale periodical division, through which it distributed magazines, paperback and comic books to various retail outlets located throughout the United States and Canada. During that time it also served as the exclusive distributor of such publications to the news-stands operated by Respondent The Union News Company. In 1957, however, Respondent American News discontinued the phase of its business just described, and since then it has limited itself to the operation of 27 wholesale distribution branches, through which it sells hardcover books and stationery to schools, libraries, institutions and booksellers located throughout the United States. It also distributes hardcover books to various news-stands operated by Respondent The Union News Company.

5. Identity and Organization of Respondent The Union News Company

The second Respondent, The Union News Company, hereinafter referred to as Respondent Union News, is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business at the same location as that of Respondent American News, of which it is a wholly-owned subsidiary.

Respondent Union News is the largest general retail news-stand operator in the United States. In 1958 it operated approximately 300 eating places, such as restaurants and snack bars, in 32 states and the District of Columbia. It also operates more than 1,200 news-stands, gift shops, book and tobacco shops located throughout the country. In April of 1958 it operated approximately 930 news-stand outlets, at which it sold newspapers, tobacco products, magazines, candy and other items, its total sales for that year amounting to approximately \$23,940,000. Its sales of magazines in that year amounted to approximately \$5,280,000. Respondent Union News operates concessions in important railroad, airport, bus and subway terminals throughout our nation. For example, the Union News Company operates the news-stand concessions in substantially all of the New York Central Railroad Company's stations, including those located at Utica, Syracuse, Rochester and Buffalo, New York; Detroit, Michigan; and Toledo, Ohio. It operates the news-stands in three of the largest railroad stations in the country, namely, the Grand Central Station and Pennsylvania Station in New York City,

and the LaSalle Street Station in Chicago, Illinois. It also operates subway concessions in three of our nation's largest cities, namely, New York, Boston and Philadelphia.

6. Respondents' Relationship to Each Other

As stated above, Respondent Union News is the wholly-owned subsidiary of Respondent American News, and the two corporations have the same address. The evidence shows that Respondent American News, through its officers, has been and still is able to, and does, direct the policies and control the practices of Respondent Union News. Publishers whose magazines are sold by Respondent Union News often take up, for settlement, with the officials of Respondent American News, disputes involving the distribution of publications by the news-stands operated by Respondent Union News. Both oral testimony and exhibits show that the parent corporation, through its officers, forms the policies and directs the business affairs of the subsidiary.

It is clear that Respondent Union News is a mere agency and instrumentality of the parent organization, Respondent American News, and that Respondent American News is fully responsible for the acts and practices of its wholly-owned and controlled subsidiary, Respondent Union News.

7. Respondents' Chief Competitors

The Respondents' principal competitors in the operation of news-stands located in transportation centers throughout the country include ABC Vending Corporation; Commuter News Co., Inc.; Faber, Inc.; and Schermerhorn Cigar Stores, Inc. As of January 1, 1959, ABC Vending Corporation had 57 news-stands; in its fiscal year ending February 1, 1958, Faber, Inc., had 35 news-stands, with sales of approximately three million dollars; in the calendar year 1958, Schermerhorn operated 16 news-stands, with sales of approximately \$950,000; and in 1958, Commuter News Co., Inc. operated 16 news-stands, with sales of approximately \$420,000. In addition, there are many smaller competitors located in drug stores, hotels and similar places.

8. Interstate Commerce

The news-stands operated by Respondent Union News are located throughout the United States and in the District of Columbia. The individual news-stands are not separately incorporated in the various states or operated as individual organizations. In fact, all of the news-stands of the Respondent are grouped according to location into eight divisions. Each division is directed by a supervising manager,

whose principal duty is to oversee the operation of such news-stands by checking inventory, promoting sales and making a monthly report to the Respondents' home office in New York City.

In addition, the publications and other products purchased by Respondent Union News for sale through its news-stands are shipped to said news-stands by suppliers who are, in many instances, located in states other than those in which the news-stands are located. In numerous instances Respondent Union News is billed for such publications and products at its home office in New York City, by suppliers thereof who are located elsewhere than in the State of New York. The evidence clearly shows that the purchase and sale of Respondent's publications and other products involve the transaction of business between persons located in diverse states of the United States and in the District of Columbia. Accordingly, it must be concluded that Respondents are, in fact, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

9. Seller-Customer Relationship

The charges in the complaint that Respondents have coerced their suppliers, including the publishers of magazines, pocket books and comic books, into making payments to them in connection with the sale of such publications, which payments Respondents knew or should have known were not made on proportionally equal terms to Respondents' competitors, require that we examine carefully the business relationship between Respondents on the one hand and their suppliers and publishers on the other. The evidence shows that the publishers of the various magazines and other publications distributed to the public by Respondents' news-stands did not sell and deliver those publications directly to the Respondents, but employed two intermediaries in the making of such sales and deliveries. First, each publishing company employed as its agent a national distributor; and second the national distributor employed a local wholesale distributor, who delivered the publications to Respondents and their competitors.

One of such national distributors is Select Magazines, Inc., the stock of which is owned by six publishers, namely, McCall Corporation; Popular Science Publication, Inc.; The Reader's Digest Association, Inc.; Meredith Publishing Company; Street & Smith Publications, Inc.; and Time, Inc. Other national distributing companies performing similar functions for various publishing companies are the Curtis Circulation Company, Popular Publications, Inc., and Kable News Company. The contractual arrangements

between these distributors and the publishers they serve provide, in general, as follows:

1. that the national distributor shall make all the necessary arrangements for the distribution of each publisher's publications;
2. that the national distributor shall sell the publications of each publisher at a price fixed by such publisher;
3. that the national distributor is to reimburse each publisher for all moneys collected in connection with the sale of its publications, less a fee for the distributor's services;
4. that the national distributor may extend credit to wholesale distributors, retailers or other customers;
5. that losses suffered by the national distributor from uncollectible debts are borne by the publisher;
6. that the national distributor is to advise the publishers as to the estimated number of copies of magazines needed for distribution, to be used as a guide by each publisher in determining the number of copies of their publications to be distributed;
7. that shipping charges on its publications are paid by each publisher; and
8. that wholesalers and retailers are reimbursed by each publisher for the return of unsold copies of its publications.

The contracts between the national distributors and local wholesale distributors in various areas provide, in general, that:

1. the wholesalers shall sell to retailers at prices fixed by the national distributor;
2. the wholesale distributors shall be limited to specified areas;
3. the wholesale distributors shall distribute the various publications to retailers on a date specified by the national distributor;
4. each wholesale distributor shall make periodic check-ups in accordance with a schedule to be provided by the national distributor;
5. each wholesale distributor shall receive full credit for unsold publications returned to the national distributor; and
6. each wholesale distributor shall receive a commission for services performed.

Because of the above-described relationship, and particularly because the publishers retain control of all financial details affecting the sale of their publications to the Respondents, such as the price at which publications are to be sold, the terms and conditions of sale, and the granting of promotional payments and allowances, the national and local wholesale distributors must be regarded as mere instrumentalities of the publishers. Accordingly, the sale of magazines, pocket books and comic books to Respondents and other retail distributors of such publications must be regarded as, in substance,

a sale by said publishers to the Respondents. Because of this fact, the news-stand dealers, including Respondents, are customers of the publishers within the intent and meaning of §2(d) of the Clayton Act.

10. Publishers Coerced by Respondents to Grant Allowances

The evidence shows that both corporate Respondents, acting through their officials, have made demands upon various publishers for special payments. Respondents call these special payments a "display promotional allowance", and require the publishers to make such payments as a condition to the continued display and sale of their publications by Respondents on their news-stands. For example, a letter dated November 20, 1957, from Time, Inc. to Mr. Herbert Frilen, an official of Respondent American News, confirms the arrangement for the payment of such an allowance. This letter, it should be observed, is addressed to an official of the parent corporation, Respondent American News, rather than to an official of the subsidiary corporation, Respondent Union News. It states in part as follows:

This will confirm the agreement made in your office on November 18th for Time, Life, Sports Illustrated and Fortune on stands operated by the Union News Company.

In a letter dated June 1, 1956, Mr. Grunewald, vice president of Respondent Union News Company, wrote to Mr. Milton Gorbulen of Modern Photography, stating in part as follows:

Effective with the next issues and thereafter, it will be necessary for us to receive a sales rebate on the basis of 10% of the retail price for all publications handled by the Union News Company operations.

Mr. Gorbulen replied to the aforesaid letter, in part, as follows:

I assume that if this new rate is unacceptable to us, our magazines would not be distributed on your outlets. In view of this situation we have no recourse but to say yes. In accepting this stiff rebate I believe it is only fair to expect the best possible service from the Union News Company in the way of sales and displays . . . service that heretofore has been far from good.

On March 1, 1957, Mr. Grunewald wrote Popular Publications in part as follows:

We ask that you acknowledge the receipt of this letter [the February 11th letter] and, not having heard from you, we wish to reconfirm the fact that we will start billing you at the new promotional allowance rebate as stated in our letter.

By the above statements and others similar thereto, the Respondents have made clear, in unilateral demands upon various publishers, that such publishers must pay promotional allowances at a rate

determined, not by them, but by the Respondents. From the evidence in the record we must conclude that the Respondents have induced and coerced various publishers of magazines, paperback or comic books, directly or through the national distributor, to grant them promotional payments or allowances as compensation or in consideration for services or facilities furnished by or through Respondents in connection with the handling, sale or offering for sale of publications sold to Respondents by such publishers.

11. Amount of Payments

The record shows that during 1957 Respondents received from various publishers approximately \$700,000 as compensation or in consideration for promotional displays on their news-stands in connection with the sale of the publications of said publishers, including the following:

<i>Approximately</i>	<i>From</i>
\$ 34,900-----	Curtis Publishing Company;
31,000-----	The Hearst Corporation;
21,000-----	Fawcett Publications, Inc.;
19,000-----	MacFadden Publications, Inc.; and
13,000-----	Esquire, Inc.

In 1958 Respondents received approximately \$890,000 of such promotional payments from various publishers.

12. Discrimination in Allowances Known to Respondents

As we have previously shown, the promotional allowances paid to the Respondents by various publishers were demanded by the Respondents and individually negotiated by them. In fact, the evidence shows that the amounts of the promotional allowances paid to the Respondents were determined, at least in several instances, unilaterally by officials of Respondent American News, and thereafter coercive demands were made upon publishers for the payment of such unilaterally-established allowances. Both testimony and exhibits show that Respondents' officials were informed by a number of publishers' officials that the promotional allowances demanded by Respondents were higher than any which the various publishing companies were paying to Respondents' competitors. We are compelled, therefore, to conclude that the promotional payments or allowances paid to Respondents by various publishers, directly or through their national distributors, were not offered or otherwise made available on proportionally equal terms to all other customers of such publishers competing with Respondents; and that Respondents had been informed by the publishers of that fact.

13. Effect of Discrimination in Allowances on Respondents' Competitors

Not only are the Respondents the leading news-stand operators in the United States in the number of news-stands operated and periodicals sold, but their margin of leadership over their competitors has been steadily increasing during the period of time here involved. Respondents and their competitors frequently bid or otherwise compete for the same news-stand location. In some instances, the difference in bids is slight. For example, in 1956 Respondents offered to pay the Statler Hotel chain approximately 15-1/2% of the gross sales to be earned through the news-stands in its hotels, while Faber, Inc., which had been operating in those locations, offered approximately 14% of such prospective gross sales. Respondents were awarded the Statler concessions. Likewise, in 1956 the ABC Vending Corporation lost to Respondents the franchise to operate the news-stands on the Boston subway system. In 1957 Respondents obtained 54 concessions for news-stands formerly occupied by their competitors.

The evidence shows, further, that as a general rule the profit from the operation of a news-stand is small, and that the difference in promotional allowances or payments received by a news-stand operator may well determine whether he will succeed or fail. We conclude that the effect of Respondents' receipt of unlawful promotional allowances has been a major factor in enabling Respondents to offer higher percentages of their gross receipts in order to secure news-stand locations, frequently from their competitors, and thereby to acquire an increasing number of such news-stand locations, which in turn enables Respondents to demand progressively higher promotional allowances from publishers, thereby completing a vicious circle.

14. Attempted Coercion of Cigar Manufacturers

Respondents' demands upon their suppliers for promotional payments or allowances was not limited to the sale of publications. They attempted likewise to induce and coerce certain cigar manufacturers to grant such payments. In 1955, Mr. Grunewald of Respondent American News requested a display allowance for Respondent Union News from Mr. Morton G. Myers, Assistant Vice President of General Cigar Company. Concerning this request, Mr. Myers testified as follows:

Q. What did you tell Mr. Grunewald?

A. I told Mr. Grunewald that our company couldn't give any display allowance because we don't give a display allowance to any of our customers. I also told him that we would be in violation of law if we did.

Mr. Myers further testified that for about a year thereafter, Respondents did not buy cigars from the General Cigar Company. This evidence, which was not controverted, justifies the conclusion that Respondents were attempting to coerce the General Cigar Company into paying the allowance demanded, but in this instance did not succeed in so doing.

15. Respondents' Defenses

(a) Respondents, in their amended answer as well as in their examination of witnesses and in their proposed findings as to the facts, have endeavored to justify the various promotional payments demanded and received by them from publishing companies on the theory that the publishing companies and their national distributors of magazines, paperbacks and comic books have been and are now in a conspiracy to fix and control prices of such publications, in violation of §1 of the Sherman Act. Respondents contend that such conspiracy is shown by the fixed prices at which such publications are sold to retail news-stands, and the fixed prices at which news-stand dealers are required to resell those publications. Respondents further contend that because of such fixed prices and unlawful conspiracy, they have been and are justified, as a defensive measure, in demanding discounts and allowances from the various publishers.

Although it is a fact that the publishing companies have fixed the wholesale and retail prices of their publications, Respondents have not established that the publishing companies have been or are engaged in a conspiracy in violation of §1 of the Sherman Act. Furthermore, the unlawful activities of one company, even if established, do not and cannot legally justify unlawful activities of another. In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., et al.*, 340 U.S. 211, 214 (1951), the Supreme Court stated this principle as follows:

If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured.

Plainly Respondents' defense that violation of the Sherman Act renders legal violation of the Clayton Act is without merit.

(b) As a second defense, Respondents have shown that the publications they sell are also sold by the publishing companies through subscriptions at prices lower than the news-stand prices, which are the cover prices on the magazines. Respondents argue that as a result of such fact, the publishers are in actual competition with the

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news-stand dealers. Respondents further contend that because of such competition, Respondents are justified in seeking to meet such competition by securing promotional allowances from the publishing companies.

In considering this contention, we must remember that the gravamen of the complaint is the inducing of allowances by the Respondents from the publishers, to the prejudice of Respondents' news-stand competitors. The fact that a publisher is also, through its subscription sales, a competitor does not alter the fact that the inducement of a preferential allowance is a violation of law. Accordingly, Respondents' second defense is also without merit.

CONCLUSIONS

1. The allowances which were paid by suppliers of magazines, pocket books, paperback and comic books to Respondents, and which were not offered on proportionally equal terms to all the suppliers' other customers competing with Respondents, were paid, as alleged in the complaint, in violation of §2(d) of the Clayton Act.

2. Respondents' acts in inducing their suppliers of magazines, pocket books, paperback and comic books to pay something of value as compensation or in consideration for services or facilities furnished by or through Respondents in connection with the processing, handling, sale or offering for sale of said products, when they knew, or should have known, that such compensation was not affirmatively offered or otherwise made available on proportionally equal terms to all other of their suppliers' customers competing with Respondents in the distribution of such products, were and are an unfair method of competition in commerce, and constitute therefore, as alleged in the complaint, a violation of §5 of the Federal Trade Commission Act.

3. Respondents' attempts to induce and coerce certain cigar manufacturers to make preferential payments to Respondents as promotional allowances for the display and sale through Respondents' news-stands of certain tobacco products were an unfair method of competition in commerce, and constitute therefore, as alleged in the complaint, a violation of §5 of the Federal Trade Commission Act.

4. The Commission has jurisdiction over the Respondents, and over their said acts and practices.

5. This proceeding is in the public interest.

Accordingly,

It is ordered, That Respondents The American News Company and The Union News Company, corporations, their officers, employees, agents or representatives, directly or through any corporate or other

device, in or in connection with the purchase of products in commerce, as "commerce" is defined in the Federal Trade Commission Act, for resale on news-stands operated by Respondents, including magazines, pocket books, paperback and comic books, newspapers, cigars, candy, toys and sundry items, do forthwith cease and desist from:

1. Attempting to induce or inducing, by any means, any of their suppliers to pay anything of value to or for the benefit of Respondents as compensation or in consideration for any services or facilities furnished by or through Respondents in connection with the processing, handling, sale or offering for sale of any product, when Respondents know, or should have known that the compensation or consideration requested or demanded has not been and is not being affirmatively offered or otherwise made available on proportionally equal terms to all other of said suppliers' customers competing with Respondents in the distribution of such product;

2. Receiving anything of value from any of their suppliers as compensation or in consideration for any services or facilities furnished by or through Respondents in connection with the processing, handling, sale or offering for sale of any product, when Respondents know, or should have known, that such compensation or consideration has not been and is not being affirmatively offered or otherwise made available on proportionally equal terms to all other customers of said suppliers competing with Respondents in the distribution of such product.

OPINION OF THE COMMISSION

By SECRET, *Commissioner*:

The complaint in this matter charges that respondents have engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. Paragraph Four alleges that respondents have knowingly induced or coerced many of their suppliers to make discriminatory payments or allowances to them as consideration for services or facilities furnished by respondents in connection with the handling or sale of the suppliers' goods. Therefore, in effect, the complaint charges that respondents knowingly induced their suppliers to violate subsection (d) of Section 2 of the amended Clayton Act.

Paragraph Four, containing the principal charge of the complaint, is couched in general terms. Paragraph Five sets out "examples" of the specific types of unlawful conduct sought to be reached. The first "example" alleges the inducement and receipt by respondents of substantial sums of money from named magazine and book publishers during 1957. The second "example" does not appear to us

to be exemplary of the principal charge made in Paragraph Four, but constitutes what must be considered a separate and distinct charge. This "example" deals with respondents' alleged attempts to knowingly induce certain cigar manufacturers to grant them discriminatory payments which, if granted, would place such suppliers in violation of subsection (d) of Section 2 of the amended Clayton Act. The record indicates that this alleged activity was presented, defended and argued as a separate violation and not as a part of the general "inducing and receiving" charge of Paragraph Four, in spite of the inexact language describing it as an "example" of the general charge.

After hearings, the hearing examiner filed an initial decision in which he concluded that respondents had committed two distinct violations. He issued a two-part order to cease and desist, one part enjoining respondents from knowingly attempting to induce or inducing discriminatory payments, and the second part prohibiting the actual receipt of such payments. It is from this order that respondents have appealed.

Respondent, The Union News Company, is a corporation wholly owned by respondent, The American News Company. Union is the largest retail newsstand operator in the country. In April 1958, Union operated approximately 930 newsstands located, for the most part, in airports, railroad or subway stations and hotels. Its sales through these newsstands for the year 1958 were approximately \$23,940,000. Of this amount a substantial portion, \$5,280,000, was accounted for by the sale of magazines. The remainder was principally accounted for by sales of newspapers, tobacco products, candy, books and toys. Union also operates more than 300 restaurants or snack bars and approximately 200 gift, book or tobacco shops.

Respondent, The American News Company (erroneously named in the complaint American News Company), completely dominates and controls its wholly owned subsidiary, Union. Its president, secretary and treasurer hold the same positions in Union, and the directors of American, for the most part, serve as directors of Union. The two corporations have the same address. American appears to consider Union as one of its integral parts for its 1958 annual report to stockholders refers to Union as a "division" and to Union's activities as the acts of "your company." But more important than these considerations is the substantial evidence that officers of American, some of whom hold no official position with Union, actively participate in the management and conduct of the affairs of Union.

In fact, much of the very activity with which this matter is concerned was conducted by the officers of American. We feel that these facts are more than adequate to satisfy even the criterion of complete control applied in the *National Lead*¹ case and conclude that American is responsible for and does control the activities of its subsidiary, Union.

Respondents contend that Union, with respect to its dealings in magazines in the several states (excluding the District of Columbia) is not engaged in interstate commerce.² Respondents concede that the wholesalers who supply Union receive their supplies of magazines in interstate commerce but urge that the handling of these shipments by the wholesalers interrupts the flow of commerce and, therefore, that the subsequent deliveries by the wholesalers to Union were intrastate transactions. It would appear that the wholesalers break up the magazine shipments they receive into separate bundles containing a specified number of copies and deliver these bundles to each of their retailers, including the Union stands.

Three distinct grounds impel the rejection of respondents' contention. First, activities within the District of Columbia are in themselves sufficient to vest the Commission with jurisdiction over respondents. 15 U.S.C. § 44 (1958). Second, the warehousing and trans-shipment operations of the wholesalers are not of a character sufficient to halt the flow of commerce. *Holland Furnace Co. v. Federal Trade Commission*, 269 F.2d 203 (7th Cir. 1959), *cert. denied*, 361 U.S. 932 (1960) and cases cited therein; *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951). See *Stafford v. Wallace*, 258 U.S. 495 (1922). Third, Section 5 of the Federal Trade Commission Act in terms applies to "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." 15 U.S.C. § 45 (1958). Thus, the relevant jurisdictional issue is whether the practices subjected to challenge were employed in commerce, and not whether all operations of the entity employing the

¹ *National Lead Company v. Federal Trade Commission*, 227 F. 2d 825, 829 (7th Cir. 1955), *rev'd.* on other grounds, 352 U.S. 419 (1957).

² In support of their contention respondents cite *East Ohio Gas Co. v. Tax Commission*, 283 U.S. 465 (1931); *Lawson v. Woodmere, Inc.*, 217 F. 2d 148 (4th Cir. 1954); *Brosius v. Pepsi Cola Co.*, 155 F. 2d 99 (3rd Cir. 1946); and *Ewing-Von Allmen Dairy Co. v. C & C Ice Cream Co.*, 109 F. 898 (6th Cir. 1940). The basic issue in these cases is whether a business operating within a single state is engaged in interstate commerce solely because of the purchase in commerce of raw materials used in the intrastate manufacture and sale of finished products. The issue now before us is materially different. It is noteworthy that in the *Holland Furnace* case the Court of Appeals for the Seventh Circuit specifically distinguished the *Lawson*, *Brosius* and *Ewing-Von Allmen* cases. 269 F. 2d at 210-211.

methods, acts or practices were performed in interstate commerce.³ The record in this case fully supports a finding that the practices challenged in the complaint were used "in commerce."

As noted above Union's plea of lack of commerce is confined to its dealings in magazines. It denies further that it is the customer of the out-of-state magazine publishers who made or authorized the payments to Union. Quite obviously, a finding for respondents on this point would defeat the complaint on more than jurisdictional grounds since it is an essential element of the alleged violation that Union is, in fact, a "customer" of the suppliers from which it induced payments. This is so since the complaint charges that respondents induced their suppliers to violate subsection (d) of Section 2 of the amended Clayton Act, which prohibits discriminatory payments "* * * to or for the benefit of a customer * * *." Thus, the complaint must fail if Union is not the "customer" of the magazine suppliers.

For the most part, leading magazine publishers distribute their publications through national distributors which redistribute to wholesalers who, in turn, distribute to retailers. These arrangements are generally on an exclusive basis, that is, the publisher uses only one national distributor to handle its magazines in the entire country, and wholesalers are granted exclusive rights within defined territories.

In certain cases the national distributor is owned by the publishers. For example, Select Magazines, Inc., which distributes the publications of McCall Corporation, Popular Science Publications, Inc., The Reader's Digest Association, Inc., Meredith Publishing Company, Street & Smith Publications, Inc., and Time, Inc., is owned in equal parts by these publishers. The Curtis Publishing Company distributes its magazines through its wholly owned subsidiary, Curtis Circulation Company. Both Select Magazines, Inc., and Curtis Circulation Company distribute additional important magazines not published by their owners.

Kable News Company is an important independent national distributor distributing the magazines, pocketbooks and comic books of approximately fifty publishers. Some publishers, such as Popular Publications, Inc., do not employ national distributors but distribute directly to wholesalers.

In every instance the agreements between the publishers and national distributors specify the prices which are to be charged

³ *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948); *Standard Container Manufacturing Association, Inc., et al. v. Federal Trade Commission*, 119 F. 2d 262 (5th Cir. 1941); *Chamber of Commerce of Minneapolis v. Federal Trade Commission*, 13 F. 2d 673 (8th Cir. 1922). See also our interlocutory decision in *S. Klein Department Stores, Inc.* (D. 7891, November 18, 1960) which is directed solely to the nature of jurisdiction conferred by Section 5 of the Federal Trade Commission Act.

by the national distributor to the local wholesaler and by the local wholesaler to the retailer. Credits granted to wholesalers and retailers for unsold magazines are borne by the publishers. The publishers fix the date when the new issues of magazines will be distributed to retailers and the dates when unsold copies are picked up for credit. Neither the national distributor nor the local wholesaler has any control over the prices, terms and conditions of sale to retailers of the magazines they handle. These details are all determined by the publisher.

Respondents, themselves, apparently recognize the lack of authority of the local wholesaler, for all of their requests for payments or allowances were made to the publishers, either directly or through a national distributor. If made through a national distributor, it was understood that approval and payment of the requested allowance would come from the publisher.

In this situation we are not disposed to apply legal principles of the law of sales, contracts or agency to determine whether a customer-seller relationship exists between Union and the publishers. Where, as here, the seller fixes the prices, terms and conditions of sale and negotiates directly with a retailer, the relationship between them is that of customer-seller, irrespective of the fact that the goods, in their transit from seller to customer, pass through the hands of wholesalers. As we have stated:

A retailer is none the less 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.⁴

In none of the cases where a court has failed to find a seller-customer relationship has there been a showing of both price control and direct dealings.⁵

Thus, we conclude that Union is in fact the customer of the publishers which supply it with magazines. We hold also that there is a continuous and uninterrupted flow or stream of commerce from the publishers to Union's newsstands. The acts of respondents in soliciting and receiving payments or allowances from such suppliers were performed within said stream and were acts in "commerce" as that term is defined in the Federal Trade Commission Act.

Respondents do not deny that they induced and received payments of substantial sums from publishers. In the year 1958 monies received from this source totaled approximately \$890,000. The man-

⁴ In the matter of *Kraft-Phenix Cheese*, 25 F.T.C. 537, 546. See also *Elizabeth Arden Inc. v. Federal Trade Commission*, 156 F. 2d 132 (2d Cir. 1946).

⁵ See e.g., *Klein v. The Lionel Corp.*, 138 F. Supp. 560 (D. Del. 1956), appeal denied 237 F. 2d 13 (3d Cir. 1956); *Baim & Blank, Inc. v. Philco Corp.*, 148 F. Supp. 541 (E.D.N.Y. 1957); *Skinner v. United States Steel Corp.*, 233 F. 2d 762 (5th Cir. 1956).

ner in which these payments were induced represents a classic example of the misuse of the economic power possessed by large buyers. For the most part, respondents did not bargain with or request payments from publisher suppliers but merely informed them that as of a certain date the publisher must make payments to Union at a rate specified by Union. A typical letter demanding payments reads in part:

Effective with the regular publications that go on sale after March 1, 1957, the promotional allowance rebate will be as follows:

2¢	for a 15¢ publication
3¢	" " 20¢ "
3¢	" " 25¢ "
5¢	" " 35¢ "
8¢	" " 50¢ "
10¢	" " 75¢ "

If the publishers refused to accede to the demands of respondents, its publications were dropped from all Union stands. For example, the circulation manager of Popular Mechanics refused respondents' demands in a letter which said in part:

To us your demand is exorbitant and surprising. The allowance you are asking cannot be justified on a quantity basis inasmuch as the Union News Company stands have never made the sales for us that the management of American News regularly implied.

In a reply letter the vice president of Union informed this publisher:

We are receiving a rebate of 6¢ per copy on all 35¢ publications and we cannot give you a cheaper rebate than any of the other publishers. Therefore, it will be necessary to discontinue handling this publication at our newsstands.

Respondents claim (1) that the payments they induced and received were price adjustments and not allowances for services rendered in connection with the publishers' magazines; (2) that they did not have knowledge that the payments were higher than those received by other retailers; (3) that the payments were induced in defense against the unlawfully fixed prices of the publishers; and (4) that even if proven in all respects, their acts did not violate Section 5 of the Federal Trade Commission Act.

In respondents' contention that the payments were price reductions and not promotional allowances, we find little merit. While it is true that in some cases respondents did not specifically agree to perform any services as consideration for the monies received, in other instances they did contract to afford publishers preferred display positions on Union newsstands. In many of their letters of

solicitation respondents' officials refer to the payments requested as "promotional allowances." The fact that respondents did not render promotional services to the full measure of the monies received, if anything, compounds the unfairness of their acts.⁶

We are not persuaded that respondents lacked knowledge that the payments induced and received were not afforded to competing retailers on proportionally equal terms. The record shows that not one retailer competing with Union received a payment or allowance from a publisher at a rate proportionally equal to that received by Union. There is direct evidence that publishers informed respondents of their regular promotional allowance rates which were considerably lower than the rates demanded and received by respondents. A buyer who induces a seller to depart from his customary pattern of allowances and grant a promotional payment two or three times greater than previously paid does so at his peril unless possessed of particular knowledge that the seller has granted like concessions to others similarly situated.

One of respondents' principal contentions in oral argument was that their demands on publishers were made defensively to offset the effects of an illegal vertical price fixing conspiracy which constricted respondents' magazine profit margin. The logical answer to this contention is that if such a conspiracy did exist it is no defense for respondents to engage in further unlawful activity in an attempt to offset or nullify the alleged trade restraining activities of the publishers. This principle as announced by the Supreme Court in the *Kiefer-Stewart*⁷ case is to the effect that:

* * * If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured. * * *

Obviously, respondents had legal processes available through which they could have challenged the alleged illegal actions of the publishers and the substitution of their actions for these legally established processes in no way immunizes them from proceedings by this Commission. Also, respondents apparently have overlooked the fact that the brunt and impact of their acts fall primarily on innocent

⁶ The Senate Committee reporting on Section 2(d) said:

"Such an allowance becomes unjust when the service is not rendered as agreed and paid for, or when, if rendered, the payment is grossly in excess of its value, or when, in any case the customer is deriving from it equal benefit to his own business and is thus enabled to shift to his vendor substantial portions of his own advertising cost, while his smaller competitor, unable to command such allowances, cannot do so." S. Rep. No. 1502, 74th Cong., 2d Sess., p. 7, (1936).

⁷ *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951).

third parties, and we would indeed be remiss to allow such acts to continue.

For the most part, newsstands are operated upon the premises of others under a lease granted by the owner of the premises. There is active competition for these locations between respondents and other operators of newsstands. Generally, when a location becomes available, the owner of the premises requests bids from newsstand operators and, of course, the operator able to bid the highest rental is allotted the location. Thus, it can be readily seen that the respondents' successful inducement of large payments from publishers greatly enhances their ability to outbid their competitors.

Union's great size in comparison with its newsstand operator competitors places it in a position of near dominance in the field.⁸ Profit margins realized from the operation of newsstands are very small and the total newsstand sales of magazines has shown a substantial decline over the past ten years. On these facts it is patently obvious that to allow respondents to continue receiving large sums not received by their competitors would inevitably lead to the demise of the competitors and the attainment of a monopoly by respondents. This is too dear a price to pay as consideration for the doubtful benefits to be realized from a *laissez faire* approach to unlawful activity allegedly pursued for the purpose of combatting the alleged unlawful activity of others.

There remains for consideration respondents' contention that the knowing inducement and receipt of discriminatory promotional allowances is conduct outside the purview of the Federal Trade Commission Act. They argue that Congress by not including a sanction of such conduct in the Robinson-Patman Act must have intended to withhold it from condemnation. This same argument was made in the *Grand Union*⁹ case, and since respondents' presentation of it contains nothing new, our opinion in that matter is dispositive of the issue.

The hearing examiner found, among other things, that respondents' unsuccessful attempts to induce discriminatory payments from suppliers are in themselves unfair methods of competition. There is little disagreement on the facts. The record evidence indicates that two large cigar manufacturers initiated a series of conferences

⁸ In 1958 Union operated 930 newsstands. At approximately the same period its principal competitors were:

ABC Vending Corp.	57 newsstands
Commuter News Co., Inc.	16 newsstands
Schermerhorn Cigar Stores, Inc.	16 newsstands
Faber, Inc.	35 newsstands

⁹ *The Grand Union Company*, Docket 6973, August 12, 1960.

for the purpose of requesting improved displays for their brands of cigars.¹⁰ Respondents thereafter proposed that certain allowances be accorded them for promotional purposes, which request was refused, with both of the cigar companies advising that they did not accord promotional allowances to any of their customers for display purposes. Thereafter respondents discontinued or greatly curtailed their purchases of cigars from these companies.

A request for a promotional allowance does not necessarily constitute an inducement of a violation of Section 2(d). Respondents point out, quite correctly, we think, that the cigar manufacturers could have lawfully complied with their requests by simultaneously granting an allowance on proportionally equal terms to other retailers competing with Union. Union did not specify that the requested allowance must be granted to it alone. Thus, unless it can be inferred from the record facts that respondents were requesting preferred or discriminatory treatment, this charge of the complaint must fail. In our view the facts in evidence do not support counsel supporting the complaint's contention that respondents were seeking to induce a violation of Section 2(d). We do not, therefore, reach the issue of whether an attempt to induce preferred or discriminatory allowances or treatment would violate Section 5 of the Federal Trade Commission Act, but are confining our holdings here to the pleadings and the evidential facts of record. Accordingly we are granting respondents' appeal to this extent and that part of the hearing examiner's initial decision and proposed order dealing with and prohibiting respondents from attempting to induce discriminatory payments from their suppliers will be stricken. We feel that the public interest will be adequately served by an order prohibiting respondents from actually receiving discriminatory allowances from their suppliers, including cigar manufacturers.

From our examination of the record we conclude that respondents were accorded a fair hearing. An appropriate order to cease and desist, amended to conform with this opinion, will issue.

¹⁰ An official of one of the cigar companies testifying in support of the complaint described a typical meeting with Union as follows:

"A. We also at that conference talked about the display and sale of our brands. Mr. Van Brunt said, 'You know, Mr. Rynn, we get paid for display on our stands.' I said, 'Well, there is an exception to every rule. Our cigars are very good sellers. Perhaps you would like to give us a little break on the display.'

"He said, 'We will be glad to, if you pay for the display the same as the other manufacturers are doing.' I said, 'Do you mean to tell me, Mr. Van Brunt, that every cigar that is on display you are getting paid for?'

"His answer was, 'Yes, we are.' I said, 'Mr. Van Brunt, we cannot pay you for the display on our cigars. It is against company policy. Even if we wanted to, it is against company policy. We do not allow any display allowance to any chain or any of our distributors.'

"He said, 'Well, I guess things will have to stand the way they are.' That was about the end of the discussion."

Order

58 F.T.C.

Commissioner Mills did not participate in the decision herein for the reason he did not hear oral argument.

FINAL ORDER

This matter having been heard by the Commission upon the respondents' appeal from the initial decision of the hearing examiner and upon briefs filed in support of and in opposition to the appeal; and the Commission having rendered its decision denying in part and granting in part the appeal and having determined, for reasons stated in the accompanying opinion, that the initial decision should be modified:

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, modified by striking therefrom finding 14 headed "Attempted Coercion of Cigar Manufacturers" and paragraph numbered 3 under the heading "Conclusions"; and by substituting the following order for the order therein contained:

"It is ordered, That the respondents, The American News Company and The Union News Company, corporations, their officers, employees, agents or representatives, directly or through any corporate or other device, in or in connection with the purchase in commerce, as 'commerce' is defined in the Federal Trade Commission Act, of products for resale on newsstands operated by respondents, do forthwith cease and desist from:

"Inducing, receiving or contracting for the receipt of anything of value from any of their suppliers as compensation or in consideration for services or facilities furnished by or through respondents in connection with the processing, handling, sale or offering for sale of products purchased from any of their suppliers, when respondents know or should know that such compensation or consideration is not affirmatively offered or otherwise made available by such suppliers on proportionally equal terms to all of their other customers competing with respondents in the sale and distribution of such suppliers' products."

It is further ordered, That the initial decision, as so modified, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

Commissioner Mills not participating for the reason he did not hear oral argument.

IN THE MATTER OF

J. FIDDELMAN & SON, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 8043. Complaint, July 15, 1960—Decision, Jan. 10, 1961*

Consent order requiring two affiliated New York City jewelry distributors to cease representing falsely in advertisements they furnished to jeweler-customers that jewelry offered for sale by said retailers consisted of respondents' overstocked merchandise, that its regular retail price was \$300 or any other fictitious amount, and that it was offered for sale at one-half the usual price; and to cease attaching to their merchandise tags bearing fictitious amounts, represented thereby as the usual retail prices.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that J. Fiddelman & Son, Inc., and Syndicate Diamonds, Inc., corporations, and Sidney Fiddelman and Donald H. Fiddelman, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents J. Fiddelman & Son, Inc., and Syndicate Diamonds, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York with their principal office and place of business located at 130 West 46th Street, in the City of New York, State of New York.

Respondents Sidney Fiddelman and Donald H. Fiddelman are officers of the corporate respondents. They formulate, direct and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of jewelry to retailers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other