

It is ordered, That David Feldman and Sidney Wicentowski, individually and as copartners trading as Norfolk Handkerchief Company, 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.

IN THE MATTER OF
VANITY FAIR PAPER MILLS, INC.

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

Docket 7720. Complaint, Jan. 5, 1960—Decision, Mar. 21, 1962

Order requiring a manufacturer of household paper products—distributing its products to retail and wholesale grocers, drug wholesalers, and retailers in Texas, Oklahoma, Arkansas, Mississippi, and Louisiana, and with sales in 1958 exceeding \$13,000,000—to cease discriminating in price in violation of Sec. 2(d) of the Clayton Act by such practices as making special payments of \$430 in excess of the usual allowances, for advertising or other services in connection with the sale of its products to J. Weingarten, Inc., without making comparable compensation available to all competitors of the latter.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more

particularly described, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Vanity Fair Paper Mills, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principle place of business located at 420 Lexington Avenue, New York, N.Y.

PAR. 2. Respondent is now and has been engaged in the business of manufacturing, selling and distributing household paper products to retail and wholesale grocers, drug wholesalers and retailers in the States of Texas, Oklahoma, Arkansas, Mississippi and Louisiana. Respondent's sales are substantial and exceeded \$13,000,000 during the year 1958.

PAR. 3. In the course and conduct of its business respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its products to be transported from the respondent's principal place of business, located in New York, to customers located in other states of the United States.

PAR. 4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

PAR. 5. For example, during the year 1958 respondent contracted to pay and did pay to J. Weingarten, Inc., special payments amounting to \$430, in excess of the usual and regular allowances, as compensation or as an allowance for advertising or other services or facilities furnished by or through J. Weingarten, Inc., in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with J. Weingarten, Inc., in the sale and distribution of products of like grade and quality purchased from respondent.

PAR. 6. The acts and practices of respondent, as alleged above, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Initial Decision

60 F.T.C.

Mr. Fredric T. Suss and Mr. Philip F. Zeidman for the Commission.
Olvine, Connelly, Chase, O'Donnell & Weyher, by *Mr. John Logan O'Donnell*, of New York, N.Y., for respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

The respondent is charged with having made discriminatory payments to some of its customers in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. The matter has been submitted to the Hearing Examiner for initial decision upon the pleadings and a stipulation of facts entered into by and between counsel supporting the complaint and counsel for the respondent.

The findings of fact and conclusions of law, proposed by the parties, not hereinafter specifically found or concluded, are herewith rejected. The Hearing Examiner, having considered the record herein, makes the following findings of fact and conclusions:

1. Respondent is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at Margaret Street, Plattsburgh, N.Y.

2. Respondent is now and has been engaged in the business of manufacturing, selling, and distributing household paper products to retail and wholesale grocers, drug wholesalers and retailers, located in the States of Texas, Oklahoma, Arkansas, Mississippi, and Louisiana. Its sales in the year 1958 totaled approximately \$15.4 million. Among its larger competitors, Scott Paper Company and Kimberly-Clark Corporation had sales of approximately \$285,000,000 and \$368,000,000, respectively. Respondent accounts for approximately 2.5% of sales of household paper products in the United States, ranking approximately 10th in this industry.

3. Respondent has engaged and is now engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its household paper products to be transported from its principal place of business, located in New York, to customers located in other States of the United States.

4. During the year 1958, respondent sold certain of its household paper products to J. Weingarten, Inc., a retail grocery chain (hereinafter called Weingarten). During the same period, it also sold certain of the same household paper products, including the product promoted by Weingarten in its Anniversary and Texas-Louisiana Products Sales of 1958, to other customers who competed with Weingarten in the resale of such products.

5. Respondent, during the period in question, entered into a standard contract with its said customers, to reimburse said customers for advertising services performed during the period, i.e., for maintaining good shelf displays of such products and for advertising such products in newspapers at least once during each quarter of 1958. This "cooperative advertising agreement" provides for reimbursement on a per-case basis.

6. During 1958, the foregoing standard contract constituted the only offer made by respondent to Weingarten and its competitors to compensate such customers for the furnishing of any services or facilities in connection with their offering for sale or selling respondent's products. During said period, respondent did not solicit or request from its customers the furnishing of any services or facilities in addition to those regularly furnished under the standard contract. Respondent did not have sufficient funds available for extensive advertising in various media and relied on the support of customers' promotions. It was its policy, therefore, to take under consideration any request made by any customer for respondent's participation in one-time special promotions conducted by that customer, such as anniversary sales, wherein respondent's products would be featured along with those of other suppliers. It was respondent's policy to participate in such promotions if payment requested for services rendered therein was in an amount reasonably related to the cost of the services to the customer. All sales representatives of respondent were advised of these policies and were instructed to inform respondent's customers thereof.

7. In or about January 1958, Weingarten sent a form letter to respondent requesting respondent to participate in Weingarten's 57th Anniversary Sale to be held in February 1958, and offering for such participation newspaper advertising and in-store displays featuring respondent's products. Attached thereto was a schedule of payments to be made for such services. The amount of said payments was in each instance for participation in the entire promotional program with the difference in prices being due to the different size advertisements in the various cities which were to be included in a newspaper section.

8. After considering Weingarten's aforementioned request, respondent elected to pay, and subsequently paid, Weingarten \$215.00 for a promotion of one of its products in February 1958. Respondent selected one of the least expensive promotions offered and received for this payment the entire promotional service with the display and resale of its product during the Anniversary Sale in all of the Wein-

garten stores located in Texas and Louisiana and with advertising consisting of 1/16 of a page in newspapers with distribution in Houston, Freeport, Baytown, and Texas City.

9. In or about October 1958, Weingarten requested respondent to participate in Weingarten's 20th Texas and Louisiana Products Sale to be held in November and offered precisely the same services at the same rates as offered in connection with its anniversary sale referred to above. After considering Weingarten's request, respondent elected to pay, and subsequently paid, Weingarten \$215.00 for a promotion of one of its products. Respondent, as it did in connection with the earlier anniversary sale, selected one of the least expensive promotions offered and received for this payment the entire promotional service with the display and resale of its product during the Texas and Louisiana Products Sale in all of the Weingarten stores located in Texas and Louisiana and with advertising consisting of 1/16 of a page in newspapers with distribution in Houston, Freeport, Baytown, and Texas City.

10. During 1958 respondent sold its said products to approximately 28 customers in the Houston, Beaumont, and Galveston, Texas, areas, and in the Lake Charles and Shreveport, Louisiana, areas. In each of these areas Weingarten does business and a substantial number of the said customers compete with Weingarten in the sale of respondent's said household paper products, including the product promoted by Weingarten in return for the said \$215.00 payments. Of these 28 customers, 9 received reimbursement for advertising services under the standard contract described in paragraph 5 hereof. Only two received, or were offered, special promotional allowances. These two included Weingarten and one other retail grocery chain. A tabulation of the sales and promotional allowances to these 28 customers during 1958 and the relationship between these sales and promotional allowances, reveals further that the said allowances received by Weingarten are proportionally in excess of those received by any other customer of respondent during the period in question.

CONCLUSIONS

11. The evidence of record supports the following conclusions:

(a) The respondent in 1958 paid to one of its customers something of value as compensation or in consideration for services furnished by such customer in connection with its offering for sale or sale of products sold to it by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of products purchased from respondent.

(b) Respondent's policy of participation in certain of its customers' special promotions, without making payments available on proportionally equal terms to all other competing customers, constitutes a plan of "separate and individual arrangement. * * * Such individualized and preferential treatment was the very thing Section 2(d) was designed to prevent." In the Matter of *Chestnut Farms Chevy Chase Dairy*, Docket No. 6465.

(c) The acts and practices of respondent, as proved, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson Patman Act.

ORDER

It is ordered, That respondent, Vanity Fair Paper Mills, Inc., a corporation, its officers, employees, agents, or representatives, directly or through any corporate or other device, in or in connection with the sale in commerce, as "commerce" is defined in the Clayton Act, as amended, of paper products or other merchandise, do forthwith cease and desist from:

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

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner*:

Respondent, Vanity Fair Paper Mills, Inc., has appealed from the hearing examiner's initial decision filed March 15, 1961, in which decision respondent was found to have violated subsection (d) of Section 2 of the amended Clayton Act, as charged, and was ordered to cease and desist such unlawful practices.

Respondent appeals from this initial decision on two grounds: (1) that it did not violate the law because the payments made to a certain customer in 1958 for special promotions were available on proportionally equal terms to all other customers of respondent competing with such customer, and (2) that the cease and desist order issued by the hearing examiner is unwarranted, vague and unduly broad.

This matter has come to us for decision upon a stipulated record. Most of the facts are not in dispute. Respondent is engaged in the

manufacture, sale and distribution of household paper products to grocery and drug retailers and wholesalers in Texas, Oklahoma, Arkansas, Mississippi and Louisiana. Its sales in 1958 totaled approximately \$15.4 million, and it ranks approximately tenth in the household products industry in the United States.

In 1958, respondent sold certain of its household paper products to J. Weingarten, Inc. (hereinafter referred to as Weingarten), a retail grocery chain, and to other customers who competed with Weingarten in the resale of such products in the areas of Houston, Beaumont, and Galveston, Texas, and Lake Charles and Shreveport, Louisiana. During this period respondent entered into a standard contract or "cooperative advertising agreement" with such customers to reimburse them for various advertising services. This agreement provided for payment on a per case basis.

Respondent also had a policy to take under consideration any request made by any customer for respondent's participation in one-time special promotions conducted by that customer, such as anniversary sales. Respondent's policy was to take part in such promotions if payment requested for the services rendered was in an amount reasonably related to the cost of the services to the customer. It was stipulated that a representative of respondent would testify that all sales representatives of respondent were advised of these policies and were instructed to inform respondent's customers of them.

Weingarten requested and received from respondent for newspaper advertising and in-store displays of respondent's products the amount of \$215.00 in connection with an anniversary sale in February 1958, and another payment of \$215.00 in connection with Weingarten's 20th Texas and Louisiana Products Sale in November 1958.

Of the approximately 28 customers to which respondent sold its products in the above-mentioned trade areas, a substantial number competed with Weingarten in the sale of respondent's household paper products, including the product or products promoted by Weingarten for the two \$215.00 payments. Of these customers, 9 received reimbursement under the standard contract; only 2 received or were offered special promotional allowances. The customers receiving special allowances were Weingarten and Childs Big Chain, an organization located in Shreveport, Louisiana. The first received the payments above indicated, the latter a payment in 1958 of \$152.00.

Availability of Payments on Proportionally Equal Terms

Respondent argues that where the record shows it took steps to appraise its customers of its policy, it then became incumbent upon

counsel in support of the complaint to show that not all customers were so informed. We reject this argument. The question of the availability on proportionally equal terms of payments to other customers competing in the sale of the product with the favored customer is a matter of defense to be established by the respondent upon the *prima facie* showing of a discriminatory payment. *Liggett & Myers Tobacco Company, Inc.*, Docket No. 6642 (September 9, 1959); Cf. *State Wholesale Grocers v. The Great Atlantic & Pacific Tea Co.*, 258 F.2d 831, 837-838 (1958).

The evidence on the question of the proportional availability of the challenged payments, for which respondent must carry the burden of proof, is contained in a stipulation of facts which is not entirely clear on all points. Respondent has failed to carry its burden if the showing made discloses that the payments were not proportionally available or if the showing is inadequate to support any determination.

We believe the evidence shows that respondent failed to make the payments available on proportionally equal terms as required by Section 2(d). Respondent gave the payments to two customers and it did not offer these specific allowances, as stipulated, to any other customers. The reason is clear. Respondent's policy was to consider the customer's request for participation and take part therein in some instances. These allowances were arrived at by individual negotiation, a feature of the case to be discussed below in more detail, and by their nature would not have been presented to the competing customers. While respondent readily concedes they were not offered to the other customers, it is also clear in the context that other customers were not advised or informed as to the availability of these promotional allowances.

We have held that an allowance is not "available" within the meaning of Section 2(d) if it has not been offered or made known to the other customers competing with the favored customer in the distribution of the products involved. *Chestnut Farms Chevy Chase Dairy*, 53 F.T.C. 1050 (1957); *Kay Windsor Frocks, Inc., et al.*, 51 F.T.C. 89 (1954); *Rosenfeld, Inc., et al.*, 52 F.T.C. 1535 (1956); *Liggett & Myers Tobacco Company, Inc., supra*.

Notwithstanding the clear showing that competing customers were not informed of the special promotional allowances, respondent urges that the allowances were "available" within the meaning of Section 2(d) because respondent's general policy to participate in such promotions had been made known to all its customers. This argument depends upon an inference of fact because the record discloses only that the promotion policy was made known to respondent's represent-

atives who were instructed to pass the information on to respondent's customers. But it does not necessarily follow that the customers were so informed. In *Chestnut Farms Chevy Chase Dairy, supra*, although there was testimony that driver salesmen had always been instructed to advise every customer of the availability of the promotional allowances, the record otherwise showed that a number of customers had not received the information. In this case, aside from the stipulated fact of the failure to make the offer to competitors, the negative nature of the policy, i.e., the consideration of a request by the customer, and its vagueness would, in our view, tend to discourage its mention and negate any inference that all competitors had been informed.

It is our holding that in the circumstances the offer was not made known to competitors of the favored customer and that the allowances were not "available" to such customers on proportionally equal terms or on any terms.

The further contention made by respondent, that it should not be found to be violating Section 2(d) for failing to offer or give what customers did not want, is rejected. The case cited in support of this argument is *Liggett & Myers Tobacco Co., Inc., supra*. There is no evidence here, as in the case cited, that an offer would have been futile. Such an argument, furthermore, is most unconvincing in the same brief in which the primary contention is that the offer was made to all competing customers.

The Commission is additionally of the view that even if the evidence were adequate to support a finding that all competitors knew of respondent's promotion policy, respondent's payments for promotional allowances would nevertheless violate Section 2(d) because they were not granted on proportionally equal terms. There was no provision for graduating these allowances to the amount of goods purchased during a given period, nor were the allowances based on any other guiding factor. Respondent, in its brief, concedes that the special payments to Weingarten were given as a result of individual negotiation. Respondent's plan, if indeed it was a plan at all, was to make payments, in an amount reasonably related to the cost of the services, for one-time special promotions where the customer requested the allowance. Such an arrangement requires individual negotiation in each case, and necessarily results in a failure to proportionalize in accordance with the requirements of Section 2(d). *Chestnut Farms Chevy Chase Dairy, supra*. See also *Liggett & Myers Tobacco Company, Inc., supra*. Any policy which is no more than a general offer to grant allowances, and which requires the customer to seek

the allowance and to bargain as to the terms thereof, is not an adequate basis for compliance with the requirements of Section 2(d).

SCOPE OF THE ORDER

Respondent challenges the order principally as to its breadth or scope. It is asserted that because of the 1959 amendments to Section 11 of the Clayton Act (Public Law 86-107, 86th Cong., 73 Stat. 243), which legislation contains new provisions governing the finality status of Commission cease and desist orders under that Act, the terms of the order should be more specific. Respondent requests that we limit the order to the line of products involved in the special promotions, i.e., household paper products; and to the services purchased, i.e., in-store displays and newspaper advertising.

It must be remembered that a cease and desist order of the Federal Trade Commission does not punish or impose compensatory damages for past acts. Its purpose is to prevent illegal practices in the future. Thus, where a violation has been uncovered, it is reasonable and necessary that the order, if it is to have the desired preventative effect, be broad enough so that its terms may not be easily evaded. This proposition is supported by a long line of cases, including *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470 (1952); *E. Edelmann & Company v. Federal Trade Commission* 239 F. 2d 152, 156 (7th Cir. 1956), *cert. denied* 355 U.S. 941 (1958); *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 428-429 (1957); *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 392 (1959); *P. Lorillard Company v. Federal Trade Commission*, 267 F. 2d 439, 445 (3rd Cir. 1959), *cert. denied* 361 U.S. 923 (1959), and many others.

Notwithstanding this authority, the 1959 amendments to the Act, which will govern the enforcement of this order, introduce a new factor to be considered in the formulation of orders. The Supreme Court in its recent opinion in *Federal Trade Commission v. Henry Broch & Company*, 30 LW 4105 (January 15, 1962), stated that the severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application. See also, *Swanee Paper Corporation v. Federal Trade Commission*, 291 F. 2d 833 (2nd Cir. 1961) [7 S. & D. 175].¹

¹ Recent decisions ruling on the scope of the Commission's order to cease and desist in matters related to Section 2(d) are: *The Grand Union Company v. Federal Trade Commission*, 300 F. 2d 92 (2nd Cir. 1962), and *American News Company and The Union News Company v. Federal Trade Commission*, 300 F. 2d 104 (2nd Cir. 1962).

On the scope of the order in this case, we turn first to respondent's request that the order be limited as to the products covered. The order contained in the initial decision relates broadly to "paper products or other merchandise". The facts, as stipulated, disclose that respondent is engaged in the business of manufacturing, selling and distributing household paper products. The record does not reveal whether respondent makes or sells any other product, and no reason is apparent for applying the order generally to "other merchandise". We believe, therefore, that the order should be limited in this respect but that it should apply to "paper products". While the term "paper products" is more comprehensive than "household paper products", the former is justified in view of the difficulties which might develop in the future in attempting to determine the type of product defined by the latter term.

The other limitation sought is as to the kind of service purchased. Here, the violations shown involved in-store displays and newspaper advertising because it so happened that these were the services or facilities offered by the customer in the particular instances. Respondent's policy was to consider the customer's request for participation in a promotion. Such requests obviously can take many different forms. Respondent's policy also was to take part in the promotion if the service rendered was reasonably related to the cost of the service. Under such a policy, the service or facility which might be involved in possible future arrangements could take many forms. Customers might hereafter request participation in radio or television shows, billboard advertising, or in other forms of promotion, or payments for other types of services or facilities. In these circumstances, it is clear that the order should not be limited to the exact forms involved in the violations uncovered by the evidence.

Orders under the Clayton Act should be made as definitive as possible, but the fact remains that Section 2(d) of that Act is in itself a very narrow definition of an illegal trade practice. The court in *P. Lorillard Company v. Federal Trade Commission*, *supra*, observed that Section 2(d) is much narrower in scope than Section 2(a). Because Section 2(d) covers a limited area in which forms of violations are like or related, it appears that in most circumstances a Section 2(d) order should not be confined to the exact forms of the violations found. In *Shulton, Inc.*, Docket No. 7721 (July 25, 1961), a Section 2(d) case, we rejected an argument for limiting the order, stating that the narrow order requested would be virtually worthless since it would do little more than prohibit respondent from engaging in the illegal practice by the same means previously employed. The

narrow order requested in this proceeding as to the forms of violations to be prohibited would be objectionable for the same reason.

In the *Swanee Paper Corporation* case, *supra*, the court, in holding that the breadth of the Commission's order was not justified by the facts of the case, relied on the circumstances, among others, that the single violation found occurred in an uncertain area of law and was discontinued before the complaint was filed. This case is far different in such respects.

Here the several violations were not in an uncertain area of law. These were direct payments, clearly prohibited unless made available to competing customers on proportionally equal terms. Moreover, there has been no discontinuance in this case or any admission as to the illegality involved. In the circumstances, there could be recurrence not only in the exact form here found but in other ways as well.

We deem unmeritorious the suggestion that the Commission would be shifting to the courts the burden of administering the section in possible subsequent contempt proceedings. In *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 54 (1948), the Court decided that responsibility in an enforcement proceeding in trying issues of possible injury to competition as to certain differentials of less than 5% could not be shifted to the courts since these were issues which Congress primarily entrusted to the Commission. We have no such question in this proceeding.

Respondent's other contentions as to the unwarranted nature of the order do not merit particular discussion and are rejected.

Respondent's appeal is granted to the extent indicated in this opinion and it is otherwise denied. It is directed that the initial decision be modified in accordance with the views herein expressed and that, thereafter, the initial decision, as so modified, be adopted as the decision of the Commission. It is directed that an appropriate order be entered.

Commissioner Elman dissented in part to the decision herein.

OPINION, DISSENTING IN PART

By ELMAN, *Commissioner*:

I agree that the record supports a finding of violation of Section 2(d).¹ I do not agree, however, that the order entered by the Com-

¹ To the extent that the Commission's decision rests on an affirmative finding of a clear showing that competing customers were not advised or informed as to the availability of the special promotional allowances (opinion, pp. 574, 575), it lacks support in the sketchy four-page stipulation that comprises the entire record in this case. However, this does not alter the result. As the Commission states, a *prima facie* violation of Section 2(d) is made out on a showing of discriminatory payments; the respondent then must bear the burden of proving that those payments were available on proportionally equal terms to all

mission constitutes the most effective and appropriate remedy for dealing with the violation found.

I

The general principles governing the scope and content of Commission orders have been stated many times by the Supreme Court in a long series of decisions, culminating in *Federal Trade Commission v. Broch*, decided January 15, 1962. The Commission has "wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices". *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 611; *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470; *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 428-429. "Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices." *Ruberoid Co., supra*, 343 U.S. at 473. In exercising its "specialized, experienced judgment * * * in the shaping of its remedies" (*Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411, 413), the Commission not only may "appraise the facts of the particular case" but also may "draw from its generalized experience" (*Siegel Co., supra*, 327 U.S. at 614).

The Commission is "not required to limit its prohibition to the specific" violation found but "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Ruberoid Co., supra*, 343 U.S. at 474; *National Lead Co., supra*, 352 U.S. at 429. For "those caught violating the Act must expect some fencing in." *National Lead Co., supra*, 352 U.S. at 431. A Commission order, like a decree in equity, should be effective to "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance" (*United States v. United States Gypsum Co.*, 340 U.S. 76, 88). Thus, "as a prophylactic and preventive measure," the Commission may enjoin not only practices found to be violations but also other "like and related" practices. *Federal Trade Commission v. Mandel Bros., Inc.*, 359 U.S. 385, 393; and see *Colgate-*

competing buyers. See *Liggett & Myers Tobacco Co.*, Docket No. 6642, Sept. 9, 1959, p. 6; *Austin, Price Discrimination and Related Problems under the Robinson-Patman Act*, 2d Rev. Ed. (1959), pp. 122-123. Cf. *Corn Products Refining Co. v. Federal Trade Commission*, 144 F. 2d 211, 219 (C.A. 7), aff'd 324 U.S. 726. Respondent's only showing on this point is the recital that it had a "policy" to "take under consideration" and "participate in" special "one-time promotions" if the requested payment was "reasonably related to the cost of the services to the customer," and that "all sales representatives of respondent were advised of these policies and were instructed to inform respondent's customers thereof." (Stipulation, p. 2.) This falls short of meeting its burden of proof that its special payments to two customers were made known and available to their numerous competitors.

Palmolive Co., et al., Docket No. 7736, decided by the Commission, December 29, 1961, opinion pp. 22-24.

In the *Broch* case, the Court emphasized "the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application." (Slip op., p. 8.) The principle thus declared was not novel. "A party is entitled to a definition as exact as the circumstances permit of the acts which he can perform only on pain of contempt of court." *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 322, 341. The mere fact that a violation of law has been found by an agency "does not justify an injunction broadly to obey the statute," *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426, 435; it is also necessary "that the decree be as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know their duties and unintended contempts may not occur", *International Salt Co. v. United States*, 332 U.S. 392, 400.

Thus, there are essentially three problems in fashioning administrative orders. To some extent these problems overlap and merge, but each may involve separate and distinct considerations:

1. The *breadth* of the order. Should the order be limited to the particular acts or practices found illegal? Or, do the circumstances justify a broader order covering other "like and related" practices? If so, which practices should be included?

2. The *justification* for a broad order. If the agency determines that the public interest would not be served by a limited order directed only to the particular acts or practices in the record found to be unlawful, it should say so and give the reasons for its conclusion. Since "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist" (*Siegel Co., supra*, 327 U.S. at 613), the "reasonable relation" of the order to the facts should be shown. If the Commission is relying on its special or generalized experience and expertise, such reliance should be explicit and reasoned. The practice of entering broad orders in the terms of the statute, routinely and automatically without citing need or justification therefor, is indefensible as a matter of law and sound administration; and I would assume it to be a thing of the past.² Respondents, Commission counsel, reviewing courts, the bar, and the business community have as much right to, and as great a need for, an explanation of the reasons for the remedy selected as for the finding of violation.

² Compare *Swanee Paper Corp. v. Federal Trade Commission*, 291 F. 2d 833 (C.A. 2); *Bankers Securities Corporation v. Federal Trade Commission* (C.A. 2), decided December 18, 1961.

3. The *formulation* of the order. This is essentially a matter of drafting the order so that it meets the requirements of clarity and precision set forth in *Broch* and other cases. Respondents, who will be subject to severe penalties for disobedience or contempt, should be able to read the order and know, as clearly and specifically as language can convey, what conduct is, and is not, proscribed. The agency should avoid the easy "solution" of simply incorporating *haec verba* general statutory prohibitions couched by Congress, and justifiably so, in broad, indefinite, and ambiguous terms, raising questions of interpretation and application that have not yet been resolved.³

This is, I repeat, a separate question from determining how broad or narrow the order should be. Having concluded, for example, that the order should be broader than the practices found unlawful, and having stated the reasons for that conclusion, the agency must draft the order in language which is as specific, clear, and understandable as possible. I do not minimize the difficulties of draftsmanship that this task may entail. But that is no reason for not undertaking it. Elementary fairness forbids imposition of penalties without clear prior notice of the circumstances in which they may be incurred.⁴

II

In the instant case, the hearing examiner's order prohibited respondent, in connection with the sale of any "paper products or other merchandise," from

Making or contracting to make, to or for the benefit of J. Weingarten, Inc., or any other customer, any payment of anything of value as compensation or in consideration for advertising or other services or facilities furnished by or through such customer, in connection with the handling, offering for resale or resale of the respondent's products, unless such payment is offered or otherwise affirmatively made available on proportionally equal terms to all other customers competing in the distribution or resale of such products.⁵

Respondent argues that this order is too broad, and proposes that it be limited to "the line of product involved in the special promotions, *i.e.*, household paper products and to the services purchased, *i.e.*, in-store displays and newspaper advertising."⁶ The Commission's re-

³ See *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 53-55.

⁴ Compare *Musser v. Utah*, 333 U.S. 95, 97: "Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused." This principle applies equally to a decree or order which, like legislation, undertakes to control future conduct on pain of punishment for violating its prohibitions.

⁵ Initial Decision, at p. 5, filed March 15, 1961, see p. 573 herein.

⁶ Respondent's Appeal Brief, at p. 10.

sponse is a compromise; it pares the order to "paper products" but restricts it no further, as to services or otherwise.

If, as respondent plausibly contends, the difficulty is that the order "has shifted to respondent the task of correctly interpreting and applying subsection 2(d) in myriad situations,"⁷ this difficulty is not obviated by merely restricting the order's prohibitions to paper products. Here, it seems to me, the problem is not so much that of determining the breadth of the order as it is of achieving clarity and precision in formulating its prohibitions, whether they be broad or narrow. Concentration on the line of product or type of service alone overlooks the truly perplexing questions posed by application of Section 2(d), *e.g.*, when is a payment "compensation" or "in consideration" for "services or facilities" furnished "by or through" a customer, when is a payment "available," and what are "proportionally equal terms"? The modifications urged by respondent, and partially adopted by the Commission, do little or nothing by way of adding specificity and certainty to the broad statutory language. And it is the use of that language, to define respondent's obligations under the order, which remains its basic vice.

I suggest, however, that at least some progress towards certainty and specificity in orders might be made by abandoning the "statutory language" route, which has not gotten us very far. Instead, orders should be framed in terms of defining those actions which the respondent must take in order to assure compliance with the law. The objective of cease-and-desist orders is the prevention of future misconduct of the kind found to have occurred in the past. Thus, inquiry should commence with an analysis of the nature of the respondent's violation of the statute.

The statute here—Section 2(d) of the Robinson-Patman Act—is concerned not with preventing promotional allowances, but, rather, with preventing their being made on a discriminatory basis to favored customers. The order would succeed in its purpose if it compelled action resulting in all customers having an opportunity to participate equally in whatever promotional scheme respondent may devise. This could be accomplished by requiring respondent affirmatively to establish and maintain prescribed procedures whereby all customers of its products are informed of the terms of any promotional payment made to one or some of them, and all are given an opportunity to receive the same benefits, or a fair equivalent, on the same terms. In short, the order should spell out the actions, or kind of actions,

⁷ *Id.*, at p. 8.

Final Order

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which respondent is obliged to take so as to conform its business practices to the requirements of the law.

This case provides a fruitful opportunity for such an approach. Respondent claims to have a "policy" of participating in special promotions if the cost is reasonable. It should have no objection, therefore, to a Commission order requiring that it inform its customers of this policy in a way that will insure common knowledge of it, *e.g.*, by registered mail or by special visits from respondent's salesmen. Nor should it object to regular use of these and other suitable devices for spreading the word to all customers that its policy has been revised, for announcing the grant of a special payment when it is made, and so on. If, as the stipulation states, promotional allowances are respondent's substitute for "extensive advertising in various media" (at p. 2), this type of order would sharpen and formalize respondent's main advertising activity, rather than hamper or curtail it as the Commission's order seems likely to do. Further, it would minimize future controversy over compliance, since it would enable respondent to accumulate detailed records of its actions in complying with the order's commands.⁸ Even more important perhaps, such an order could be drafted without repetition of the broad and ambiguous statutory language that only shifts to the courts the determination of major questions of interpretation and application entrusted by Congress to the Commission's expert judgment based on unfolding experience in dealing with the changing problems of a dynamic competitive economy.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having granted in part and denied in part the respondent's appeal and having directed that the initial decision be modified in accordance with its views expressed in the opinion and that, thereafter, such decision, as modified, be adopted as the decision of the Commission:

It is ordered, That the order contained in the initial decision be, and it hereby is, modified by striking out the words "or other merchandise" in the sixth line thereof.

⁸ The Commission's authority to issue orders embodying affirmative requirements, rather than merely negative prohibitions, has been upheld in a number of cases involving advertising disclosures. See *e.g.*, *Keele Hair & Scalp Specialists v. Federal Trade Commission*, 275 F. 2d 18 (C.A. 5); *Mohawk Refining Corp. v. Federal Trade Commission*, 263 F. 2d 818 (C.A. 3), cert. denied, 361 U.S. 814; *New American Library of World Literature, Inc. v. Federal Trade Commission*, 213 F. 2d 143 (C.A. 2); *Aronberg v. Federal Trade Commission*, 132 F. 2d 165 (C.A. 7).

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

It is further ordered, That respondent, Vanity Fair Paper Mills, Inc., 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 to cease and desist contained in the initial decision as modified.

By the Commission, Commissioner Elman dissenting in part.
