
IN THE MATTER OF
THE NUARC COMPANY*

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

Docket 7848. Complaint, Mar. 28, 1960—Decision, Aug. 7, 1962

Order requiring a Chicago manufacturer of equipment used in printing, offset
printing, and lithography, to cease discriminating among customers in

*Erroneously named in the complaint as Nu Arc Company, Inc.

Complaint

61 F.T.C.

violation of Sec. 2(d) of the Clayton Act by paying advertising allowances such as payments of approximately \$3,000 for advertisements of its products in "Printing Impressions—National Edition", a newspaper owned by a customer.

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

PARAGRAPH 1. Respondent, Nu Arc Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 4110 West Grand Avenue, in the city of Chicago, State of Illinois.

PAR. 2. Respondent is now and has been engaged in the manufacture and sale of arc lamps, vacuum frames, light tables and dark room lights. Respondent markets these products throughout the United States through approximately 400 dealers who are sold on a non-exclusive basis and who resell these products in competition with each other. Total sales by respondent for its fiscal year ended August 31, 1959, were in excess of \$1,200,000.

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. Respondent causes its products to be transported to the customers of its distributors in various states throughout the United States and the District of Columbia.

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 said respondent and such payments were not made available on proportionally equal terms to all customers competing in the sale and distribution of respondent's products.

PAR. 5. For example, during the period between January 1, 1959 through February 1, 1960, respondent contracted to pay and did pay to Foster Type and Equipment Company, Inc., Philadelphia, Pennsylvania, in excess of \$3,000 as compensation or as an allowance for advertising or other service or facilities furnished by or through Foster Type and Equipment Company, 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 Foster Type and Equipment Company, Inc., in the sale and distribution of respondent's products.

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

Mr. Lynn C. Paulson for the Commission.

Mr. Eli E. Fink, of Chicago, Ill., for respondent.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondent on March 28, 1960, charging that said respondent has violated the provisions of subsection (d) of section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act. The crux of the charges set forth in paragraphs 4 and 5 of the complaint, which are as follows:

"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 said respondent and such payments were not made available on proportionally equal terms to all customers competing in the sale and distribution of respondent's products.

"For example, during the period between January 1, 1959, through February 1, 1960, respondent contracted to pay and did pay to Foster Type and Equipment Company, Inc., Philadelphia, Pennsylvania, in excess of \$3,000 as compensation or as an allowance for advertising or other service or facilities furnished by or through Foster Type and Equipment Company, 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 Foster Type and Equipment Company, Inc., in the sale and distribution of respondent's products."

In substance the respondent's defense to such charges is as follows:

1. The respondent has not violated Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, inasmuch as respondent did not make payments to or for the benefit of its customers with-

out making such payments available on proportionately equal terms to all other customers competing in the sale and distribution of respondent's products.

2. Payments by respondent to Foster Publishing Company, Inc., and/or its successor in name, North American Publishing Co., in consideration of advertisements of NUARC products placed in Printing Impressions was not a payment to or for the benefit of Foster Type and Equipment Company, Inc., for a service or facility furnished by or through Foster Type and Equipment Company, Inc.

Proposed findings of fact and conclusions of law were filed by counsel in support of the complaint and counsel for the respondent. The hearing examiner has carefully reviewed and considered same. Proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

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

FINDINGS OF FACT

1. Respondent, THE NUARC COMPANY,¹ is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 4110 West Grand Avenue, in the city of Chicago, State of Illinois.

2. Respondent is now, and has been, engaged in the manufacture and sale of arc lamps, vacuum frames, light tables and darkroom lights. Respondent markets these products throughout the United States through approximately four hundred dealers who are sold on a nonexclusive basis and who resell these products in competition with each other. Total sales for the respondent for its fiscal year ended August 31, 1959, were in excess of \$1,200,000.

3. Respondent causes its products to be transported to the customers of its distributors in various states throughout the United States and the District of Columbia.

4. Foster Type and Equipment Company, Inc. (hereinafter referred to as "Foster Type"), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office located in Philadelphia, Pennsylvania. Fos-

¹ The name of the corporation in the complaint is erroneously stated to be NU ARC COMPANY, INC. Its correct name as set forth in respondent's answer is THE NUARC COMPANY.

ter Type was incorporated in August 1955, and is, and has been, engaged since then in the purchase and sale of printing equipment and supplies to newspapers, printers and other members of the graphic arts industry, and was from January 1, 1959, through February 1, 1960, a dealer of respondent, reselling respondent's products on a nonexclusive basis in the Pennsylvania and New Jersey area.

5. Foster Type was a dealer of respondent purchasing \$11,037.46 of respondent's products in 1958, and \$8,876.10 in 1959, from respondent, and respondent sold a total of \$79,587.28 in 1958, and \$219,550.89 in 1959, of its products to its dealers located in Pennsylvania and New Jersey.

6. Foster Publishing Company, Inc., and/or its successor in name, North American Publishing Co. (hereinafter referred to as "North American"), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal offices in Philadelphia, Pennsylvania. Foster Publishing Company, Inc., was organized in April 1958, and on or about August 3, 1959, changed its corporate name to North American Publishing Co.

7. North American is now, and has, since 1958, been engaged primarily in the business of publishing two monthly newspapers designed for distribution to the graphic arts industry. One is a newspaper for distribution to the graphic arts industry in the Delaware Valley area of the United States and is called "Printing Impressions—Delaware Valley Edition". The other is a newspaper distributed to the national graphic arts industry and is called "Printing Impressions—National Edition".

8. During the years 1957, 1958, until May 1, 1959, the officers of Foster Type and Equipment Company, Inc., were Irvin J. Borowsky, President; Alex Borowsky (brother of Irvin), Vice President; Beverly Borowsky (wife of Irvin), Secretary. In the spring of 1959, Hans Weiss became vice president and secretary (replacing Alex and Beverly Borowsky), and Stephen Mucha became vice president, while Irvin J. Borowsky continued as president, owning 100% of the outstanding shares of stock of the company at all times until August 1, 1959, when he transferred 10% of the stock to Hans Weiss, and 10% of the stock to Stephen Mucha, retaining 80%.

9. Since the date of their incorporation, all of the outstanding shares of stock of Foster Publishing Company, Inc., and/or its successor in name, North American Publishing Co., have been owned entirely by Irvin J. Borowsky, president and treasurer of the publishing company. His wife, Beverly Borowsky, is secretary.

10. Irvin J. Borowsky, as president, has at all times exercised control of, supervision of and responsibility for the day to day, week to

week, and month to month operation of Foster Publishing Company, Inc., and/or its successor in name, North American Publishing Co. He has also formulated, directed, controlled and, as president, assumed responsibility for the acts and practices of Foster Type and Equipment Company, Inc., at least until February 1, 1960.²

11. On or about May 19, 1958, respondent received a letter dated May 19, 1958, from Printing Impressions, published by the Foster Publishing Company, Inc., signed by I. J. Borowsky, its president, which letter contained the following statements:

Printing Impressions was started for the purpose of diversifying our present operation and as a cooperative means of furthering our printing equipment business and the manufacturers we represent.

Advertising will not be accepted from anyone competitive to our equipment company, or from manufacturers we do not represent, and are in competition to the line we sell in our Foster Type and Equipment Co.

* * * * *

Furthermore, every dollar you spend in our publication, we will have our Foster Type & Equipment Co. buy back in your products as a NuArc display.³

12. During the period from January 1, 1959, through February 1, 1960, respondent placed fourteen monthly advertisements of its products in Printing Impressions—National Edition and paid to Foster Publishing and/or its successor North American, for said monthly advertisements a total of \$3,290.

13. THE NUARC COMPANY did not offer or otherwise make available such payments to its customers who were in competition with

² This is the date on which Irvin J. Borowsky and the two corporations filed their answers with the Commission and in substance made this admission re Foster, Docket 7698. In Lifetime Cutlery Corp., Docket 7292, it was stated by the hearing examiner in taking official notice of certain facts:

"Official notice * * * allows many facts to be recognized and adopted as true which are beyond the realm of common knowledge, and may well be disputed. Moreover, official notice comes to us not from the common law, but by sanction of the Administrative Procedure Act, and is specifically intended to meet the complex and widely-varying needs of the administrative agencies. Official notice is the act of a Governmental agency, or its hearing official, in recognizing facts which have been proved to be true in precedent proceedings, as presumptively true in a pending proceeding. The use of official notice is desirable because it avoids the necessity of re-proving that which had already been shown to be true and brings to bear upon the issue all the accumulated knowledge and expertise relating thereto. No undue abrogation of traditional rights results from the taking of official notice, because opportunity is given for the affected party to show the contrary of the facts officially noticed."

In the NUARC case there can be no prejudice in the taking of official notice since Borowsky testified fully in this case as well as in the Foster case on the subject of his supervision and control over these corporations. He now claims he delegated extensive authority to others, and that the independent identity and operation of both companies evolved. This evidence, however, must be probatively weighed with what appears to be his prior inconsistent admissions in answering the complaint in the Foster case, Docket 7698. (See answer of Foster and Borowsky to paragraph one of the complaint.)

³ Commission's Exhibit 17(A-D). See also Commission's exhibit 16(A-B) a follow-up letter of May 26, 1958.

Foster Type and Equipment Company, Inc. Customers of THE NUARC COMPANY who competed with Foster Type and Equipment Company, Inc., when the payments of \$3,290 were made, were T. J. Murphy Company; Roberts & Porter, Inc.; Penn Dell & Co.; R. W. Hartnett Co.; Phillips & Jacobs Co.; and Eastman Kodak Stores, Inc.

14. Respondent knew, or should have known, that the Foster Type and Equipment Company, Inc., the Foster Publishing Company, Inc., and/or its successor in name, North American Publishing Co., all continued to be under the management and control of Irvin J. Borowsky, as president, as well as under his proprietary control because of his 100% or majority interest in the capital stock of the foregoing corporations as hereinbefore set forth.

15. Respondent knew, or should have known, that there was no change in the mutually beneficial cooperative corporate relationship between the Foster Type and Equipment Company, Inc., and the Foster Publishing Company, Inc., or its successor in name, North American Publishing Co., following respondent's receipt of a letter dated May 19, 1958, heretofore quoted (in part), since the cooperative policy enunciated therein was never revoked formally in writing or in evidenced practice.⁴

16. Respondent knew, or should have known, that placing advertising with the Foster Publishing Company, Inc., and/or its successor in name, North American Publishing Co., was tantamount to the granting of advertising allowances to the Foster Type and Equipment Company, Inc., as evidenced in the May 19, 1958, letter received by respondent from "Printing Impressions".

DISCUSSION OF EVIDENCE AND APPLICABLE LAW

In the case of Foster Publishing Company, Inc., et al., Docket 7698, the examiner found that illegal payments were induced by the Foster companies or successors and, in addition, that the respondent herein made some of the illegal payments for advertising. Unless the evidence herein varies, the Foster case is substantially dispositive of the issues herein.

It was stipulated by counsel that the respondent sold its products to six companies in the Philadelphia area who were competitors of its

⁴ The only evidence of change is a claimed oral revocation and uncorroborated general statement that the publishing company and type and equipment company were operating independently although Borowsky continued his managerial control of both companies as president after the employment of a general manager for Foster Type and Equipment Company, Inc. See also footnote 2 re Lifetime Cutlery, Docket 7292.

customer, the Foster Type and Equipment Company, Inc., and that respondent did not make payments to these companies similar to those made to the Foster Type and Equipment Company, Inc.

However, in substance, respondent argues the evidence indicates it refused to purchase advertising from Foster Publishing Company, Inc., predecessor of North American Publishing Co., for the benefit of Foster Type and Equipment Company, Inc., its customer, when it was apprised by the written proposal of Foster Publishing Company, Inc., publisher of *Printing Impressions*, on or about May 19, 1958, that both companies were part of a joint venture, exclusively owned by Irvin J. Borowsky, and managed by him as president. Respondent concedes it did purchase advertising from North American Publishing Co., successor to Foster Publishing Company, Inc., when it was orally advised that the cooperative arrangement between the publishing company and type and equipment company was terminated, and that after June 1958, North American and Foster Type have operated as separate and independent corporate enterprises. Respondent therefore appears to claim, that having been assured its customer Foster Type would not be a benefactor, it advertised in "*Printing Impressions*", published by North American.

Respondent correctly asserts the general rule in regard to piercing the corporate veil as stated in *National Lead Company v. F.T.C.* 227 F. 2d 825 (7th Cir. 1955), *cert. den.* 351 U.S. 964 (1956) :

To come within the applicable rule, there must be evidence of such complete control of the subsidiary by the parent as to render the former a mere tool of the latter, and to compel the conclusion that the corporate identity of the subsidiary is a mere fiction.

Respondent, however, overlooks the fact that, as evidenced, Borowsky not only continued in control of both companies to the extent of owning 100% of the capital stock of one corporation and 80% of the other, but also continued to assume responsibility for the management control of these corporations by actively retaining his position as president of both. In the light of these facts, the previously conceded joint venture of these corporations makes their separate identities a mere fiction. Furthermore, there is no evidence having probative weight which would indicate the conceded cooperative relationship between the two companies had changed after May 19, 1958.⁵ Borowsky, as president and sole owner of the publishing company, had a very vital continuing interest in advertising for the benefit of the type and equipment company, which he also managed as president and controlled as 100% owner and then as 80% owner of the capital stock.

⁵ See Finding No. 11 herein.

Borowsky's original appraisal of the mutual interest of both companies in issuing the letter of May 19, 1958, is undoubtedly the correct one. Respondent knew, or should have known, that in the absence of facts indicative of a change of mutual interest, it could not assume that there was a complete severance of the dependence of the type and equipment company on the advertising devices of the publishing company under the same proprietorship and management unless there was in good faith a formal abrogation of the formally announced cooperative arrangement or joint venture set forth in the May 19 letter as distinguished from the casual and uncorroborated conversations claimed.

The recent cases of *P. Lorillard Co. v. F.T.C.*, 267 F. 2d 439 (3rd Cir. 1959), *cert den.*, 361 U.S. 927, and *Swanee Paper Company v. F.T.C.*, 291 F. 2d 833 (2d Cir. 1961) involve situations where a supplier made payments to a third party, and it was held that under the facts of each case such payments were actually to the benefit of a favored customer for facilities furnished by the favored customer. An examination of these opinions further substantiates the Commission's theory that if a benefit accrues to a favored customer a violation of Section 2(d) is apparent.

In the *Swanee* case the respondent paid money to the owner of an animated display sign under an arrangement whereby Grand Union, the favored customer, would receive a cash rebate and also valuable advertising space at a nominal cost. The court found that Swanee knew, or should have known, that it was, in fact, conferring a benefit upon its favored customer, and that facilities were furnished by the favored customer because Grand Union had leased the entire sign, had the right to select its participants and also gave in-store promotions of Swanee products in Grand Union Stores.

In *P. Lorillard Co.* case, the court upheld a violation of Section 2(d) where grocery chains signed contracts with broadcast networks to give the chains "free" broadcast time in consideration for the right of the networks to designate in-store promotional displays of the chains. The suppliers were induced to purchase broadcast time and the networks offered them the right to display their products in the in-store promotional displays granted to the networks by the grocery chains. The court held that the crucial question involved was whether the suppliers made payments to someone which actually were of benefit to their favored customers, and the court sustained the Commission's findings that the entire arrangement was a plan whereby the suppliers' payments to the networks benefited the chains with free adver-

tising, and were partially made in consideration of the furnishing of the in-store promotions by the chain.

As correctly urged by respondent's counsel, the *P. Lorillard* and *Swanee* cases also established the law with respect to the relevancy of a supplier's intention and knowledge in connection with the proof of a violation of Section 2(d). They held that the intention, purpose or motive of a supplier in making its payment for advertising is not relevant to a consideration of whether an advertising payment actually benefits a favored customer, but the fact that a supplier knew, or should have known, that an advertising payment in fact inured to the benefit of its favored customer is relevant to the proof of a violation of Section 2(d). Thus, even though a supplier intends to benefit a favored customer by the payment of advertising allowances, no violation of Section 2(d) can exist unless the allowance is in fact paid to or benefits the favored customer. In accord with this precedent the evidence in the within proceeding does establish a conceded benefit accruing to Foster Type and Equipment Company, Inc., because of the announced joint venture with the publishing company which advertised respondent's products that Foster Type and Equipment Company, Inc., had for sale. In fact, the Foster Publishing Company, Inc., sought the advertising on the basis of assuring purchases by Foster Type and Equipment Company, Inc., to meet the cost of advertising, as a guarantee of the cooperative arrangement.

It is difficult to believe respondent in good faith relied on the general statements of the disassociation of the two companies without corroborative factual details they knew they should acquire because of previous and continued dealings with Borowsky, as president of both companies.⁶

On the question of Section 2(d) violations of the suppliers, there are striking parallels in the evidence herein and the facts in *State Wholesale Grocers, et al. v. The Great Atlantic & Pacific Tea Co., et al.*, 258 F. 2d 831 (7th Cir. 1958) *cert. denied*, 358 U.S. 947 (1959). In that case, The Great Atlantic & Pacific Tea Co., a Maryland corporation, wholly owned and controlled the defendant The Great Atlantic & Pacific Tea Co., a New Jersey corporation, and owned as well all of the capital stock of defendant Woman's Day, Inc. Thus, under this complaint it was held that grocery suppliers who placed advertising in a magazine owned by corporate subsidiary of the national grocery company and distributed exclusively through such company stores thereby violated Section 2(d) of the Clayton Act proscribing payment for services or facilities for processing or sale unless they made similar

⁶ See Tr 249-250

payments available on proportionately equal terms to other grocery companies even though such companies did not publish magazines, and that the evidence failed to show that they so made payments available.

Respondent contends that the Atlantic & Pacific case, *supra*, is not in point. In this connection, it is reasoned in part that Printing Impressions was not a promotional operation of Foster Type and that it did not exist even partially for the benefit of Foster Type. To the contrary, the May 19, 1958, letter from Printing Impressions received by respondent, received in evidence, asserts "Advertising will not be accepted from anyone competitive to our equipment company * * *". That Foster Type and Equipment Company, Inc., was a benefactor of Printing Impressions must be unequivocally concluded.

CONCLUSIONS

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 one of its customers as compensation or in consideration for services or facilities furnished by or through 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 respondent's products, and respondent has therefore violated Section 2(d) of the Clayton Act, as alleged. 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.

It is further concluded that this proceeding is in the public interest, and that the following order shall issue:

ORDER

It is ordered, That the complaint be amended by changing the name of the corporate respondent from NU ARC COMPANY, INC., to THE NUARC COMPANY as set forth in the respondent's answer.

It is further ordered, That the respondent THE NUARC COMPANY, a corporation, and its officers, representatives, agents and employees, acting for or in behalf of respondent corporation, 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, of arc lamps, vacuum frames, light tables, darkroom lights and other products of respondent do forthwith cease and desist from paying or contracting for the payment of anything of value to or for the benefit of a customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with

the processing, handling, selling 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.

OPINION OF THE COMMISSION

By Kern, *Commissioner*:

This matter is before the Commission on the appeal of respondent from the initial decision sustaining the allegations of the complaint charging that respondent's payments to customers for services were violative of Section 2(d) of the Clayton Act, as amended.

Respondent, The Nuarc Company, erroneously named as Nu Arc Company, Inc., in the complaint, is engaged in the manufacture and sale of equipment used in printing, offset printing and lithography. The evidence in this proceeding relates to Nuarc's payments of approximately \$3,000 for advertising services allegedly made to its customer, the Foster Type and Equipment Company, Inc.,¹ in the period January 1959 to February 1960.

Respondent on appeal contends, in effect, that the payments in issue here were, in fact, made to the Foster Publishing Company, Inc.,² a third party insofar as the supplier-customer relationship is concerned, although the same individual was president of Foster Type and of Foster Publishing and held 100 per cent of the stock of each corporation at the time the payments challenged by this proceeding commenced. It is respondent's position that the payments challenged herein were made to an independent trade publication and not to a customer. On the basis of the foregoing contentions, respondent argues that its payments were not to or for the benefit of a customer for services or facilities furnished by the customer and, therefore, not within the ambit of Section 2(d).

The crucial issue here presented, therefore, is whether Nuarc's payments for advertisements placed in Foster Publishing Company's "Printing Impressions" were tantamount to payments to, or for the benefit of, its customer for services or facilities furnished. The resolution of this question requires an analysis of the relationship of the two corporations to each other as well as the relationship of both to Irvin J. Borowsky, their president and sole stockholder.³

¹ Hereinafter referred to as Foster Type.

² Foster Publishing Company, which was renamed North American Publishing Company on August 3, 1959, is hereinafter referred to as Foster Publishing.

³ Borowsky held 100 per cent of the stock in Foster Type till May of 1959 and thereafter 90 per cent of the stock in that corporation in the remainder of the period relevant to this proceeding.

We are persuaded that the record herein supports a finding that Foster Type and Foster Publishing, despite their separate incorporation, did in fact constitute one enterprise and that their separate corporate identity was fictitious. We further hold that this state of affairs was in effect during the period in which the payments challenged herein were made.

The record establishes beyond a doubt that Borowsky by two letters in May of 1958, soliciting advertisements for Foster Publishing's "Printing Impressions", documented the relationship between Foster Type and Foster Publishing and thereby in effect expressly informed respondent that the two corporations were to be considered as one for practical business purposes. Clearly, the proposals that competitors of Foster Type and its suppliers would not be permitted to advertise in "Printing Impressions" and that Foster Type would reciprocate the supplier's expenditures for advertising with purchases of equipment equivalent to the amount of such advertisements⁴ compel the inference that Borowsky so dominated the two corporations that he was in a position to manipulate the operations of each so that either could be maneuvered into a position where it would be forced to conduct its affairs in a manner not necessarily to its own best interest but rather to further Borowsky's business as a whole. The record herein, therefore, goes beyond the mere documentation of the fact that the same individual held office in both corporations or that these corporations were jointly owned by him. On the basis of this evidence, we hold that both corporations operated as an integrated enterprise or as the alter egos of Borowsky and that neither had an existence independent of him. Accordingly, on receipt of these letters, respondent could be under no illusion but that payment to one corporation was inevitably a payment to Borowsky or to his enterprise as a whole.

Respondent argues that in any case the separate corporate identity of Foster Type and Foster Publishing should have been recognized at least in the period when the payments challenged herein were made, on

⁴ Borowsky's letter of May 19, 1958, states in part:

"PRINTING IMPRESSIONS was started for the purpose of diversifying our present operation and as a cooperative means of furthering our printing equipment business and the manufacturers we represent.

"Advertising will not be accepted from anyone competitive to our equipment company, or from manufacturers we do not represent and are in competition to the line we sell in our Foster Type & Equipment Co.

* * * * *
"Furthermore, every dollar you spend in our publication, we will have our Foster Type & Equipment Co. buy back in your products as a Nuarc display."

And his letter of May 26, 1958, states in pertinent part as follows:

"In these 'tight money' times our proposal to buy back every dollar you spend in advertising should be most beneficial to you.

"We will certainly have to sell your products, otherwise we will not be able to meet our \$5,000.00 per month publishing costs."

the ground that the proposals embodied in the May 1958 correspondence had not been put into effect and that each company, in all respects, operated as a separate and independent concern. The contention is without merit for at best the evidence shows that the announced program had not been put into effect because it did not accomplish what it was supposed to do, namely, attract supplier advertising. The admission of Lou Page, general manager of Foster Publishing, that a demand by a supplier for reciprocal purchases by Foster Type on the basis of the offers made in Borowsky's letters would be honored, despite the decision that this represented the wrong approach, compels the conclusion that the two corporations had not regained a viable identity of their own, which would, in the case of each concern, permit it to formulate policy in its own best interest. It is inconceivable that Foster Publishing could compel such performance by Foster Type if the two concerns were, in fact, independent of each other. In short, although the record does not disclose that the proposals overtly manifesting the subservience of the two corporations to Borowsky were the direct cause for the payments by Nuarc, the evidence does justify the conclusion that at the time of the payments, Borowsky's domination of the two concerns continued uninterrupted, depriving each of the opportunity to formulate its business policies independently.

It may be true that the two concerns did preserve some of the external indicia of separate corporate existence such as separate payrolls, tax returns, etc. However, if the separate exercise of certain corporate functions is to be the determining factor in a decision as to whether two corporations in fact exist independently so as to preclude the application of Section 2(d), even in those cases where the crucial element of decision-making does not repose separately in such corporations, the effectiveness of the statute in preventing discriminatory practices may well be largely eroded. We do not think the Congressional intent can be so readily subverted. Where, as here, the outward manifestations are not a true reflection of internal business operations and policies, the Commission may, and indeed is required to, disregard external appearances.

We now turn to consider in detail the respondent's effort to establish with the testimony of its president, and secretary, as well as that of Irvin Borowsky and Lou Page, the general manager of Foster Publishing, that the joint venture between Foster Type and Foster Publishing manifested in Borowsky's letters of May 19 and May 26, 1958, had been abrogated, that the two concerns were, in fact, independent of each other, and that Nuarc's officials had reason to believe

in good faith that the two corporations were transacting their business separately and independently before the payments challenged herein commenced.

Respondent claims on appeal that the hearing examiner disregarded the testimony of its witnesses on this point. The contention is without merit for it is clear from the initial decision that the hearing examiner considered but found the evidence wanting in credibility. The Commission, as a general rule, accepts the hearing examiner's evaluation of the credibility of witnesses whose demeanor he has had the opportunity of observing during the course of the hearings. In this instance, from our review of the testimony in question, we are persuaded by certain inconsistencies and the manner in which certain of the testimony was presented, that the hearing examiner correctly evaluated the probative worth of the evidence.

The testimony of Borowsky and Page does not support respondent's position despite their assertion in general terms that "Printing Impressions" was independent of Foster Type, for on the crucial issue of this case their testimony does not support a finding that Borowsky had abandoned the commanding position through which he exercised the control permitting him to disregard the corporate entities and treat the two corporations as one. On the contrary, certain admissions by the witnesses permit only the opposite conclusion.

In concrete terms their testimony reveals little more than that the unfavorable reaction of potential advertisers to the offers to exclude competitors from the publication and to buy back an amount of merchandise equal to the amount of advertising placed decided them not to continue such offers. The admission of Page cited above that requests for reciprocal purchasing on the basis of Borowsky's letters would be honored is inconsistent with the contention of these witnesses that the two corporations were, in fact, independent of each other.

As to the position of Borowsky, the record is clear that in the period with which we are primarily concerned, i.e., January 1959 to February 1960, Borowsky was ultimately responsible for the policies and practices followed by Foster Publishing, and it is equally clear on Borowsky's express statement in this proceeding that he was responsible for the affairs of Foster Type until at least May of 1959,⁵ when two individuals, Weiss and Mucha, were brought into the latter corporation on the agreement, according to Borowsky, that they would take responsibility for operating the business. It is to be noted that the hearing examiner erred in finding that 10 per cent of Foster Type's

⁵ The payments challenged herein, it may be noted, commenced well before that date.

stock was transferred to Mucha. The stock was never transferred on the company's books, and he subsequently recovered the partial payment he had made therefor. Borowsky testified that after May 1959, Foster Type's operations were controlled by Weiss and Mucha despite his retention of that concern's presidency and 90 per cent of its stock. However, this contention of the witness is vitiated by his admission that after disagreement between Weiss and Mucha, he determined which of the two was to stay with the corporation. Finally, Borowsky's disclaimer of responsibility for the operations of Foster Type is not worthy of belief, as the hearing examiner found, in the light of his prior inconsistent statement in his answer to the Commission's complaint in *Foster Publishing Company, Inc., et al.*, Docket 7968, filed February 1, 1960, of which official notice was taken in the initial decision. In that answer, Borowsky admitted that he formulated, controlled and directed the acts and practices of both Foster Type and Foster Publishing.

The hearing examiner in this instance correctly refused to deliberate in a vacuum when relevant facts concerning the witnesses' testimony were available to him in a related proceeding of which he properly might take official cognizance. Respondent does not on appeal except to the official notice taken in the initial decision in this connection, and, considering all the circumstances surrounding this procedure, we find that respondent was not prejudiced thereby. Although, in general, it is preferable for the examiner to announce his intention of taking official notice prior to closing the record, the procedure followed herein complies with the requirement of Section 7(d) of the Administrative Procedure Act that opportunity be afforded on timely request to show the contrary of the facts officially noted. Such requests may be made on appeal to the Commission from the hearing examiner's initial decision which, of course, does not finally dispose of the proceeding in any case prior to action by the Commission. In this instance, on oral argument, respondent's counsel expressly informed the Commission that he failed to raise the point because he felt it unnecessary. Counsel is undoubtedly correct in this position, for the record shows that respondent was aware of the pleadings in the *Foster* case prior to putting Borowsky on the stand to testify precisely on the issue of which official notice was taken, i.e., the relationship of the two corporations to each other and to Borowsky.

Respondent also contends that it only placed advertisements in "Printing Impressions" on assurance to its president given to him at a trade show in October 1958, by Lou Page, general manager of the publication, that the two companies were absolutely divorced, that

each was operated as a free and independent business venture and that he, Page, was in charge of the publication. However, Nuarc's president, Weisman, during his first appearance on the stand, and its secretary, Shultheis, merely testified vaguely that Page had assured them that the "policy" had changed.⁶ At this point the testimony of the two witnesses who had apparently both conferred with Page on this subject at the trade show was not inconsistent.⁷ This evidence, however, throws no light on the critical question of whether the business of Foster Type had in actuality been divorced from that of Foster Publishing prior to the payments which are the subject of this proceeding. On the contrary, despite rather leading questions by Nuarc's counsel, the witness Shultheis stated that Page had said nothing concerning the connection between Foster Type and "Printing Impressions".⁸ This testimony, therefore, flatly contradicts the claim made on appeal that Page had given assurances that the two corporations were divorced. It should be noted that upon completion of Shultheis' testimony and a recess, Weisman, who had preceded Shultheis on the stand, was recalled by respondent's counsel and at that time proceeded to testimony that Page had assured him the two companies were absolutely divorced and there was no connection between them. At this juncture, apparently in an attempt to drive his point further home, respondent's counsel asked the witness:

Q. Just to confirm the character of this testimony, do you recall, Mr. Weisman, that we walked over here this morning from my office on Jackson Boulevard, and on the way over I asked you——

* * * * *

⁶ E.g., Shultheis testified:

"* * * he [Page] advised us of the fact that the policy had changed completely, that he was running the publication, and what had gone on in the past was no longer in vogue.

"HEARING EXAMINER BUTTLE: Did he explain what he meant by that?

"THE WITNESS: No, he didn't. He just said, 'From here on in,' he said 'I am running the publication, and this is what we have to offer. This is our circulation and the rates, and we would like to have you as an advertiser.'"

⁷ It may be noted that Weisman stated that Shultheis could corroborate him as to the nature of the assurances given by Page on this point.

⁸ "Q. Did he say anything about Foster Type and Equipment Company Incorporated?

"A. No.

* * * * *

"Q. You don't recall whether or not he indicated that Foster Type and Equipment Company was no longer a part of Printing Impressions that was indicated in the letter which you examined, which you state was rather foolish in substance?

* * * * *

"A. As I recall, I don't believe it was mentioned at all. He just intimated to us that he was running the publication. But as far as I recall, offhand I don't recall that.

By Mr. Fink:

"Q. He didn't say anything about the connection between Foster Type and Equipment Company and Printing Impressions?

"A. No, as I recall, he did not."

(Continuing)—I asked you if Mr. Page told you or didn't tell you at the Show in New York in 1958 that there was or was no connection between Printing Impressions and Foster Type and Equipment Company. Do you remember that I asked you—

* * * * *

Q. Do you recall that?

A. Yes, he guaranteed me there would be no connection whatever.

Q. Isn't that what you told me this morning coming over here, on Jackson Boulevard?

A. Those very words.

The examiner, after that response, stated, as well he might, that if, in fact, the witness had made such statements to counsel previously that morning, he did not understand how the witness could have failed to make this response his first time on the stand. We share the examiner's incredulity.

The hearing examiner found that respondent did not offer or otherwise make available payments such as those challenged herein to its customers competing with Foster Type and that finding is not in dispute here. The evidence fails to show that respondent's other customers competing with Foster Type operated publications such as "Printing Impressions" as part of their over-all business or that any alternative form of promotional allowance was made available to them. However, another issue requiring consideration on this appeal is the question of whether or not the advertising furnished by Foster Publishing is a service coming within the scope of the statute. In view of the fact that we have found that the two corporations must be considered as one enterprise, it is immaterial that the publication's entire operations did not redound to the benefit of Foster Type in its resale of respondent's equipment. Furthermore, although "Printing Impressions" may have acquired some of the characteristics of an independent trade paper by virtue of the fact that it accepted advertising from and ran features about Foster Type's and its supplier's competitors, the fact remains that "Printing Impressions" did run advertising of respondent's equipment sold by Foster Type. The statute does not require that either the advertisement or the publication in which it is run specify the customer by whom the service is furnished. The language of the Act pertinent to the facts of this case states:

* * * it shall be unlawful for any person * * * to pay or contract for the payment of anything of value to * * * a customer of such person * * * for any services or facilities furnished by or through such customer in connection with the * * * sale * * * of any products * * * sold * * * 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 * * *

We accordingly hold that the requirements of the Act have been met and that the advertising furnished here was a service within the scope of the statute.

The ruling herein, of course, is not to be construed as holding that a supplier's payments for advertising come within the statutory scope of Section 2(d) in any and all cases where such advertising is placed in media connected by corporate or other relationship to the seller's customer. The question of whether the corporate entity is to be respected or whether the service performed is one coming within the scope of the statute must be decided on the facts of each case.

Respondent finally contends that, in the event the Commission concludes the allegations of the complaint have been sustained, it should nevertheless vacate the order entered in the initial decision as too broad and substitute therefor an order limited to the particular practices found to have violated the Act.

The contention is without merit for contrary to respondent's argument, Nuarc's payments involved herein, unlike those in *Swanee Paper Corporation v. Federal Trade Commission*, 291 F. 2d 833 (2nd Cir. 1961), *cert. denied*, 368 U.S. 987 (1962), do not involve an uncertain area of the law insofar as enforcement of Section 2(d) is concerned. The instant case lacks the distinguishing feature of *Swanee*, viz., payments to a third party not related to the seller's customer. Nuarc's payments, as we have found, were made to the Borowsky enterprises as a whole and not to an isolated segment thereof, despite respondent's assertion of separate corporate identity for its component parts. These payments, therefore, were necessarily made to the respondent's customer and the more complex considerations governing a determination as to whether payments were for the benefit of the customer are not relevant here. The proposition that the trier of fact may go beyond the corporate entity where the circumstances of the case so warrant is, of course, not a novel proposition either in the law generally, the antitrust field or specifically in the area of the Robinson-Patman Act.

Where, as in this instance, the practice found to have violated Section 2(d) is clearly unlawful and where that statute itself constitutes a very narrow definition of the illegal practices prohibited, incorporating the applicable statutory language in the order will not shift to the courts the burden of deciding issues whose resolution has been entrusted to the Commission.

The views expressed in *Vanity Fair Paper Mills, Inc.*, Docket No. 7720 (1962), and *Shulton, Inc.*, Docket No. 7721 (1961), *rev'd on other grounds*, 305 F. 2d 36 (7th Cir. 1962), as to the proper framing of Sec-

tion 2(d) orders in light of the Clayton Act Finality Act (P.L. 86-107, 86th Cong., July 23, 1959) apply here.

Respondent, despite its plea that the order be revised to limit the prohibitions to the precise practice found to have violated the law, has not submitted a proposed order for our consideration, and we cannot envisage an effective order in this instance prohibiting only the exact method by which respondent violated the statute. However, in order to clarify respondent's obligations under the order to the greatest extent possible consistent with an effective remedy, we will limit the scope of its prohibitions to arc lamps, vacuum frames, light tables and dark room lights as well as to other equipment used for printing, offset printing, and lithography, and further limit its application to advertising services or facilities furnished by its customers.

The appeal of respondent is denied and the initial decision as modified in accordance with the views expressed in this opinion is adopted as the decision of the Commission.

Commissioner Anderson concurred in the result of the decision of this matter, and Commissioner Elman dissented.

DISSENTING OPINION

By Elman, *Commissioner*:

I.

An understanding of the issues in this proceeding requires description of the relationships of the corporations and individuals involved. The Commission and the respondent differ in their interpretations of some of the facts, but there is also a substantial area of agreement.

Among the facts not in dispute are these. The respondent is The Nuarc Company (hereinafter "Nuarc"), a firm engaged in the manufacture and sale of arc lamps, vacuum frames, light tables, and dark-room lights. Among Nuarc's customers is a firm called Foster Type and Equipment Company (hereinafter "Foster Type"), which is a dealer in the products Nuarc makes. The third corporate entity involved is the Foster Publishing Company (renamed North American Publishing Company and hereinafter called "Foster Publishing"), which publishes trade newspapers for distribution to the graphic arts industry. The nexus between Foster Type and Foster Publishing is provided by Mr. Irvin J. Borowsky who, during the period here relevant, was president of both firms and owned 100% of the stock of Foster Publishing and never less than 80% of the stock of Foster Type.

This case arises out of the placing of advertising by respondent Nuarc in the National Edition of Foster Publishing's newspaper, "Printing Impressions". The context and significance of this action are in controversy. Respondent contends that it was an ordinary advertising transaction whereby it simply placed advertisements in a trade paper catering to ultimate users of its products, and paid the standard rate for the advertising service rendered. The Commission has determined, however, that the relationship between Nuarc and Foster Publishing constituted a violation of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act (38 Stat. 730, as amended, 15 U.S.C. 13(d)), which makes it 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.

Admittedly, Foster Publishing is not a customer of Nuarc, but Foster Type is. The Commission concludes that, because Borowsky is the principal shareholder, president and controlling figure in both, Nuarc's payments for advertising in "Printing Impressions" are payments "to or for the benefit of a customer", and that the advertising obtained for these payments was a service "furnished by or through such customer". Respondent disputes these conclusions, arguing that, despite Borowsky's control of both Foster Type and Foster Publishing, they are operated as unrelated entities.

The Commission supports its position primarily by reference to a proposal made by Borowsky to Nuarc in May of 1958. Borowsky there explained that "Printing Impressions" was started as a means of promoting Foster Type's printing equipment business; that "Printing Impressions" would not accept advertising from competitors of Foster Type or from manufacturers whose lines Foster Type did not carry; and that Foster Type would buy enough equipment from Nuarc to reimburse it for advertising in "Printing Impressions". Respondent replies that it refused to advertise in "Printing Impressions" on this basis. It asserts that it began advertising in January 1959 only after securing assurances that "Printing Impressions" would accept advertising from anyone in the industry, and that it would be operated independently of Foster Type. The hearing examiner and the Commission find respondent's evidence on this alleged policy revision on the part of Foster Publishing unconvincing.

Thus, as the Commission views the facts: Borowsky has at all times pertinent to this proceeding been the owner and guiding spirit of both Foster Publishing and Foster Type; Foster Publishing's "Printing Impressions" was conceived as a promotional satellite of Foster Type; and respondent's evidence offered to prove that Foster Publishing and Foster Type were independently operated and that respondent had reason so to believe in good faith is not credible.

II.

The Commission's finding of a violation of Section 2(d) rests squarely on its determination that Foster Publishing and Foster Type were "operated as an integrated enterprise or as the alter egos of Borowsky and that neither had an existence independent of him."¹ (Opinion, p. 387.) In the Commission's view this is "the crucial issue of this case". (Opinion, p. 389.) I would suggest, however, that the Commission is altogether too occupied with the role of Mr. Borowsky in these enterprises. Of course, his influence over Foster Type and Foster Publishing is important in appraising the relationship of the companies, but it is hardly a sufficient basis for issuance of an order. There remain the questions—but briefly and sketchily mentioned by the Commission—whether respondent paid anything "to or for the benefit of a customer" in return for a "service" "furnished by or through such customer".

Certainly the mere fact that Borowsky derives the ultimate profit from both businesses is no basis for a determination that the statute has been violated. This may be illustrated with a hypothetical situation. Let us suppose that Nuarc manufactures not only printing equipment but also bakery equipment, and that Borowsky sells printing equipment through his company, Foster Type, and also publishes a trade paper for the bakery equipment industry through his other company, Foster Publishing. If Nuarc were to place ads in his bakery trade paper, Borowsky would reap the profit, but Section 2(d) would not be violated because Nuarc's bakery equipment ads would have no "connection with" (to use the language of Section 2(d)) Borowsky's sale of Nuarc's printing equipment. In this context, it would make no legal difference if the Commission were to find that Borowsky operated both businesses as "an integrated enterprise" in which "neither had an existence independent of him". (Opinion, p. 387)

¹ The Commission elsewhere characterizes the "separate corporate identity" of each firm as "fictitious". (Opinion, p. 387.) I take it that no more is meant than that both corporations were, as indicated in the quotation from page 388 of the Commission's opinion, largely controlled by a single person in matters of policy.

The difference between that hypothetical case and the one before us, of course, is that the bakery publication can never be operated to further the sale of printing equipment. But the point of the example is that it also applies in instances in which the necessary connection could be proved but has not. That is to say, the Commission is no nearer to showing a violation in this case than it is in the hypothetical if it does not show how Nuarc paid something "for the benefit of a customer" of its printing equipment in return for a service "furnished by or through" that customer "in connection with" the sale of Nuarc's equipment. *Cf., General Foods Corp.*, 52 F.T.C. 798, 828.

The Commission's evidence on these central questions consists of Borowsky's proposal in May of 1958 to operate "Printing Impressions" solely for the benefit of Foster Type and its suppliers. I agree that proof of an illegal motive is a good beginning. I agree also that the examiner and the Commission have a right to disbelieve witnesses who say that this motive changed. But there is tangible evidence that this purpose was never carried into effect, whether or not it was subjectively abandoned. The Commission specifically finds (opinion, p. 389) that the unfavorable reaction of potential advertisers caused discontinuance of the plan to exclude competitive advertisers and to tie advertising to equipment sales. And this is the entire content of Borowsky's May 1958 proposal.

On this state of proof, we have a standoff. Commission counsel's evidence shows that Borowsky intended to obtain a "benefit" for Foster Type in return for a service "furnished by" Foster Type to Nuarc "in connection with" the sale of Nuarc's equipment. But respondent's evidence shows, as the Commission finds, that this intention could not be brought to realization. Proof of an illegal objective is one thing; proof of an illegal objective that failed is quite another. At this point the burden shifts back to Commission counsel to show evidence of some other illegal aim, or, better yet, of some illegal conduct.

Everything the Commission has to say on this subject is summed up in its observation "that 'Printing Impressions' did run advertising of respondent's equipment sold by Foster Type." (Opinion, p. 392.) From this single fact, coupled with Borowsky's control of both businesses, the Commission concludes "that the requirements of the Act have been met and that the advertising furnished here was a service within the scope of the statute." (*Ibid.*) Thus, mere publication in Borowsky's trade paper of advertising placed by a supplier of Borowsky's printing equipment business constitutes a violation of the statute. I cannot believe either that this is so, or that the Commission believes

it to be so. If it really so believed, it surely would have omitted from the opinion its extended discussion of Borowsky's May 1958 proposal, since that proposal is totally unnecessary to a decision needing no more support than the objective facts of central control of the two businesses by Borowsky plus publication of respondent's advertising.

The sparseness of the evidence relied on here is illustrated by contrasting it with the evidence present in the leading cases in point—cases cited by the hearing examiner in support of the order against respondent but conspicuously absent from the Commission's discussion of this problem. In the first of these, *State Wholesale Grocers v. Great Atlantic & Pacific Tea Company*, 258 F. 2d 831 (C.A. 7), the court determined that Section 2(d) was violated when certain suppliers of "A & P" grocery stores ran advertisements in "Woman's Day", a magazine published and distributed by A & P at a price far below that of comparable publications. In reaching this conclusion, the court found that: (1) "Woman's Day" was obtainable only at A & P stores; (2) since its inception "Woman's Day" was identified as the A & P magazine; (3) for a time it carried the words "The A & P Magazine" on its cover; (4) all of its food advertising was of products sold by A & P stores; (5) it was an effective medium for advertising A & P stores themselves and for creating good will for A & P; (6) it existed "solely for competitive benefit of A & P's retail stores." (258 F. 2d, at 834) In other words, the tie between A & P and "Woman's Day" was patent and complete. It thus directly benefited A & P and indirectly benefited its suppliers, who were enabled by A & P's cut-price, mass distribution of "Woman's Day" to reach millions in the very stores where their products were sold.

In *P. Lorillard Co. v. Federal Trade Commission*, 267 F. 2d 439 (C.A. 3), commonly known as the "Chain Lightning" cases, the violation arose out of an advertising scheme concocted by certain national radio and television broadcasting companies. The broadcasting companies contracted to give certain grocery chains free advertising time in return for the promise of in-store promotional displays for products to be agreed upon. Then the broadcasting companies solicited manufacturers and sellers of grocery products to purchase radio and television time, offering as an inducement the in-store promotional displays arranged under the contracts with the grocery chains. Thus, the food manufacturers in effect purchased advertising time for the grocery chains and in return received promotional displays of their products in the stores operated by the chains.

A similar exchange of benefits is apparent in *Swanee Paper Corp. v. Federal Trade Commission*, 291 F. 2d 833 (C.A. 2). There the

Grand Union Co., a grocery chain, arranged with an advertising agency to take space on a "spectacular" advertising sign at a very low rate on condition that it find other paying customers who would also use the sign. Swanee Paper Corp., a supplier of Grand Union, was among those solicited. The court found that the advertising outlay by Swanee was for the benefit of Grand Union since the latter thereby obtained valuable space on the sign at a nominal cost, plus valuable advertising elsewhere and cash fees from the agency that operated the sign. That the advertising service was provided to Swanee by Grand Union was shown, first, by the fact that Grand Union leased the entire sign, parceling out a portion of it to Swanee, and, second, that as part of the arrangement, Grand Union provided in-store displays for Swanee's products.

These cases illumine the area of necessary proof in a Section 2(d) case involving a supplier-advertising medium-customer arrangement of the sort here in question. Unless the facts of this case show a similar flow of benefit from supplier to customer, and of service from customer to supplier, in connection with the sale of the supplier's goods, it is not governed by these other cases. The Commission's case is incomplete without a showing that the "benefit" conferred by Nuarc's advertising somehow passed through Foster Publishing to Foster Type and that the advertising service provided to Nuarc by Foster Publishing was somehow "furnished by or through" Foster Type.

As I read the record, the evidence is all to the contrary. Certainly no tangible benefits could have moved from Nuarc through Foster Publishing to Foster Type, because the latter two firms had virtually no business dealings with one another. The companies filed separate tax returns, maintained separate payrolls, books, and records, and leased separate office space. They did not loan funds to each other. They did not borrow employees from each other. Foster Type advertised in "Printing Impressions", but only on payment of a standard rate, equally available to its competitors and others. Thus, the advertising advantage so significant in *P. Lorillard* and *Swanee Paper* is not present here.

Nor is this a case, like *A&P*, in which the merchandiser obtained good will through association with the publication. "Printing Impressions" was not distributed from Foster Type's premises and it was not billed as Foster Type's newspaper. Indeed, the paper never bore Foster Type's name and its mast-head proclaimed: "Printing Impressions is a completely independent monthly newspaper dedicated to helping the vast industry of the graphic arts—its progress and development—by the factual reporting of all news, trends and events

of national and international interest to the trade." If anything, ill will rather than good will for Foster Type was generated by Borowsky's initial solicitation letter to Nuarc and a few other companies. The reaction was uniformly unfavorable, and some of the firms approached were so displeased that they never did place advertising in "Printing Impressions". Further, to correct any mistaken impressions as to Foster Publishing's dependence upon Foster Type, the name of the former was changed to North American Publishing Co.

It is equally difficult to see what service was provided to Nuarc by Foster Type. Nuarc paid the standard fee for its advertising in "Printing Impressions". Unlike the advertisers in *P. Lorillard* and *Swanee Paper*, Nuarc received no special promotion in connection with Foster Type's sales of its equipment.² It obtained no special advantage in its dealings with Foster Type by advertising in "Printing Impressions". Conversely, Nuarc obtained no favors from "Printing Impressions" by reason of its role as a supplier of Foster Type. Advertising of, and stories about, its competitors were published by "Printing Impressions", from its first issue forward, whether or not they were suppliers of Foster Type.

The conclusion is inescapable that this case has none of the essential features of the leading cases in point or of the practice prohibited by the statute. The only service provided to Nuarc was the creation of the newspaper in which to place its advertising. The only benefit conferred by Nuarc was that by advertising its own products it promoted their sale through all its outlets, of which Foster Type happened to be one. In other words, Foster Publishing—or, if the Commission prefers, Borowsky—did no more for Nuarc than if Foster Type had not existed at all, while Nuarc did no more for Foster Type—*i.e.*, for Borowsky's printing equipment sales business—than if it had advertised not in "Printing Impressions" but in some trade paper having no connection whatever with Borowsky or Foster Type. The advertising expenditures by Nuarc that eventually made their way into Borowsky's pocket were paid to him solely in his role as a publisher. It is fair to say here, as the Commission held in *General Foods Corp.*, 52 F.T.C. 798, 828, that "These payments do not violate Section 2(d) for the reason that they are not payments made to [Borowsky] as a customer and are not made in connection with the resale of goods bought by him from respondent."

Thus, neither the supplier of the goods (Nuarc) nor its customer (Foster Type, or, in the Commission's eyes, Borowsky d/b/a Foster

² It seems fair to conclude that this special promotion factor was present in the A & P case as well, since the advertisers in "Woman's Day" got the benefit of the sale of the low-priced magazine in the same store where their products were sold.

Type) received any special advantage over competitors of the sort that the statute was designed to prevent. For, as the House Judiciary Committee Report on Section 2(d) explained, an allowance for advertising services "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." H.R. Rep. No. 2287, 74th Cong., 2nd Sess. 7 (1936). No one has suggested that Nuarc's advertising involves the first two evils mentioned in the Report, and, as I have shown, the facts of record in this proceeding disprove the presence of the third. It appears, therefore, that respondent's conduct is not among the practices which Section 2(d) was intended to forbid.

For the Commission to draw the opposite conclusion is particularly puzzling in light of its disposition of *United Cigar-Whelan Stores Corp.*, 53 F.T.C. 102. There the complaint charged that a firm which operated a large chain of retail drug stores and tobacco shops had knowingly induced or received unlawful advertising allowances from many of its suppliers in that it had accepted compensation from those suppliers for placing television advertising for them through an advertising agency which it also owned. The order of the hearing examiner, adopted by the Commission, prohibited knowing receipt or inducement by the store chain and its advertising subsidiary of unlawful allowances from the chain's suppliers in connection with television or radio programs which were either sponsored by the store chain or which advertised or promoted the store chain. The order specifically exempted from its coverage advertising placed with the advertising agency subsidiary of the store chain by the chain's suppliers which was not sponsored by the chain and did not advertise or promote it. In *United Cigar*, therefore, the Commission recognized and even preserved by order precisely the distinction between arrangements having a special discriminatory mutuality of benefit to supplier and customer (as in *A & P*, *P. Lorillard*, and *Swanee Paper*, *supra*) and the straightforward, harmless use by a supplier of a customer-owned advertising medium such as we have in this case. The distinction was a sound one at the time of the *United Cigar* case and nothing has happened since to impair its validity.³

³ The *United Cigar* case was disposed of by consent agreement, but that does not detract from its precedent value for purposes of this proceeding. In the first place, it still represents assent by the Commission to the proposition that the distinction here rejected by the Commission is appropriate. Further, it goes beyond the simple expedient, common in

III.

In finding a violation on the state of facts, or lack of facts, before us in this proceeding, the Commission establishes a rule that cannot help but have sweeping consequences of a highly disruptive nature for American advertising and journalism. Even in the limited sphere of trade papers, the reverberations are bound to be considerable, but there is nothing in this case that restricts its effect to such publications. The principle adopted here cannot help but apply in every case in which a newspaper, magazine, radio station, television station, or other medium of advertising is owned and controlled by a person who also owns and controls some other enterprise engaged in selling goods. Those who supply such enterprise with products that it markets will be unable to advertise those products in the newspaper, magazine, or other medium without violating Section 2(d), except in the highly unlikely event that they can work out advertising arrangements with competing customers "on proportionally equal terms". This interference with general advertising appears to run contrary to an express congressional desire not to inhibit advertising activity that did not bring about disguised customer favoritism. H. R. Rep. No. 2287, 74th Cong., 2nd Sess. 16 (1936), states that "there is nothing in this section or elsewhere in the bill . . . to limit the freedom of newspaper or periodical advertising generally, so long as not employed in ways calculated to defeat the purposes of this bill."

The Commission's caveat that each case must turn on its facts (opinion, p. 393) is small consolation. On the one hand, it creates confusing uncertainty as to the reach of the Commission's ruling, and on the other it detracts not one whit from the principle established by the case, *i.e.*, that a medium of communication cannot carry advertising by an advertiser who is also a supplier of goods for resale by a firm owned and controlled by the owner and operator of the advertising medium.

I can only hope that no owner of a newspaper, magazine, radio or television station, etc., also happens to own a department store! Since a supplier of any item sold in his department store would violate the law by advertising in his newspaper, magazine, or other medium, the Commission's decision here—in what might seem to be an unimportant, technical Section 2(d) case—will have upon him an effect equivalent to a divestiture decree. Certainly that is the effect it must

consent settlements, of simply omitting to cover certain aspects of the practices alleged in the complaint to be unlawful. Instead, it affirmatively permits them to continue. The Commission would have been without authority to take such action unless it had considered the practices condoned to be lawful.

have upon Mr. Borowsky, even though he is not a party to the proceeding. If no supplier of Foster Type can advertise in "Printing Impressions" while Borowsky's hand is on both tillers, he has no recourse but to loosen his grasp on one of them. One feels reasonably sure that such a strange and disturbing result was not within the contemplation of Congress when it enacted the Robinson-Patman Act.

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 denied the appeal of respondent and modified the initial decision to the extent necessary to conform to the views expressed in the said opinion:

It is ordered, That the initial decision be modified by striking from paragraph number 8 on page 379 thereof the phrase "and 10% of the stock to Stephen Mucha, retaining 80%" and adding the sentence: "Mucha made partial payment for 10% of the stock, which, however, was not transferred on the company's books to him and he subsequently recovered such part payment."

It is further ordered, That the initial decision be modified by striking paragraphs 14, 15, and 16 of the Findings of Fact on page 381 and substituting therefor the following:

14. Their president and sole or majority stockholder, Irvin J. Borowsky, dominated Foster Type and Equipment Company, Inc., and Foster Publishing Company, Inc., to the extent that they were unable to formulate policy independently and their separate corporate identity was no more than a sham.

15. Respondent was put on notice that the two corporations in fact constituted one enterprise by Borowsky's letters of May 1958 (heretofore referred to in paragraph 11 of the Findings). The two corporations had not attained a true separate corporate identity at the time respondent's payments for advertising in Printing Impressions commenced, and respondent must have been aware of that fact since it could not in good faith rely on the vague and uncorroborated statements documented by this record to the effect that the two corporations were independent of each other.

16. Since the corporate identities of Foster Publishing Company, Inc., and Foster Type and Equipment Company, Inc., were fictitious, a payment to the former was a payment to Borowsky's

business as a whole, including that segment thereof, Foster Type and Equipment Company, Inc., which purchased and resold respondent's goods.

It is further ordered, That the initial decision be modified by striking therefrom that portion entitled "DISCUSSION OF EVIDENCE AND APPLICABLE LAW".

It is further ordered, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That respondent The Nuarc Company, a corporation, erroneously named as NU ARC COMPANY, INC., in the complaint, and its officers, employees, agents and representatives, directly or through any corporate or other device in or in connection with the offering for sale, sale or distribution of arc lamps, vacuum frames, light tables, dark room lights, and other of respondent's products manufactured for printing, offset printing or lithography, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to or for the benefit of a customer of respondent as compensation for or in consideration of any advertising services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of said products, unless such payment or consideration is affirmatively made available on proportionally equal terms to all other customers competing in the distribution of such products.

It is further ordered, That the hearing examiner's initial decision, as modified by this order and supplemented by the accompanying opinion, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent, The Nuarc Company, a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist contained in the initial decision as modified.

Commissioner Anderson concurring in the result, and Commissioner Elman dissenting.

Complaint

IN THE MATTER OF

GOLF DIGEST, INC.

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

Docket C-203. Complaint, Aug. 7, 1962—Decision, Aug. 7, 1962

Consent order requiring the Evanston, Ill., publisher of "Golf Digest" magazine, to cease violating Sec. 2(d) of the Clayton Act by making payments—and on the basis of individual negotiation and not proportionally equal—to certain operators of chain retail outlets in railroad, airport, and bus terminals and outlets in hotels and office buildings, while not offering such allowances on proportionally equal terms to all competitors of such outlets, including drug and grocery chains and other newsstands.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Golf Digest, Inc. is a corporation organized and doing business under the laws of the State of Illinois, with its office and principal place of business located at 1236 Sherman Avenue, Evanston, Ill. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines under copyrighted titles including "Golf Digest". Respondent's sales of publications during the calendar year 1960 exceeded five hundred thousand dollars.

PAR. 2. Publications published by respondent are distributed by respondent to customers through its national distributor, Publishers Distributing Corporation, hereinafter referred to as PDC.

PDC has acted and is now acting as national distributor for the publications of several independent publishers, including respondent publisher. PDC, as national distributor of publications published by respondent and other independent publishers, has performed and is now performing various services for these publishers. Among the services performed and still being performed by PDC for the benefit of these publishers are the taking of purchase orders and the