

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

Docket 8094. Complaint, Aug. 24, 1960—Decision, Nov. 14, 1962

Order requiring a large manufacturer of coffee—which it distributed to wholesalers and retailers, including voluntary retail groups, retail chains, inde-

pendents, and the restaurant trade, with sales in 1958 and 1959 approximating \$100,000,000—to cease violating Sec. 2(d) of the Clayton Act by such practices as paying \$150 in 1958 and again in 1959 to Benner Tea Company, a retail grocery chain, in connection with the latter's "Foodarama" anniversary sale promotions, while not making comparable payments available to Benner's competitors.

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, 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 J. A. Folger & Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of business located at 330 West 8th Street, Kansas City, Mo.

PAR. 2. Respondent is now and has been engaged in the manufacture, sale and distribution of coffee. Respondent sells and distributes its products to wholesalers and retailers, including voluntary retail groups and retail chain store organizations. Respondent's sales of its products are substantial, exceeding \$1,000,000 annually.

PAR. 3. Respondent sells and causes its products to be transported from its principal place of business in the State of Missouri to customers located in other States of the United States. There has been at all times mentioned herein a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 4. In the course and conduct of its business in commerce, and particularly since 1958, 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, in the year 1959, respondent contracted to pay and did pay to Benner Tea Company, a retail grocery chain with headquarters in Burlington, Iowa, the amount of \$150.00 as compensa-

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tion or as an allowance for advertising or other services or facilities furnished by or through Benner Tea Company in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not made available on proportionally equal terms to all other customers competing with Benner Tea Company 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, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. John Perry for the Commission.

Caldwell, Blackwell, Oliver & Sanders, by *Mr. Edward T. Matheny, Jr.*, and *Mr. Cornelius E. Lombardi, Jr.*, for respondent.

INITIAL DECISION BY MAURICE S. BUSH, HEARING EXAMINER

The issues herein are as follows. (1) Do two payments of \$150.00 each made by the respondent J. A. Folger Company to one of its customers, Benner Tea Company (hereinafter sometimes called Benner), in the years 1958 and 1959, respectively, under the facts stated below, constitute violations of Section 2(d) of the Clayton Act, as amended?¹ (2) Is the good faith meeting of competition defense expressly set forth in Section 2(b) of the Clayton Act, as amended,² also available to sellers charged with violations of Section 2(d) of that Act although Section 2(d) does not contain a similar defense provision? Assuming that the answer to the above is in the affirmative, the third issue is as follows. (3) Were the two aforementioned payments of \$150.00 each made by respondent to Benner (in the words of Section 2(b)) "made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor"?

¹ Section 2(d) reads: "That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

² Section 2(b) reads: "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

The complaint herein was issued on August 24, 1960, and the answer thereto was filed on October 5, 1960. An amended answer filed on October 17, 1961, raises the issues shown as two and three above with respect to the payment made in 1959 only. The same defenses will be deemed raised with respect to the 1958 payment as this appears from the record to be respondent's intent and as there is no statutory requirement for the filing of an answer to a complaint issued by the Federal Trade Commission. Hearing was held on October 17 and 18, 1961, at Kansas City, Missouri. Thereafter proposed findings of fact, conclusions of law, and arguments in support thereof were filed by the parties. These have been carefully reviewed and considered and such 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. The facts hereinafter set forth are based on the entire record.

FINDINGS OF FACT

Respondent J. A. Folger & Company is a corporation, existing and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of business located at 330 West 8th Street, Kansas City, Missouri. It has been engaged for many years in the manufacture, sale and distribution of coffee, including both the instant coffee and the regular vacuum pack coffee. It sells and distributes its coffee primarily to wholesalers, retailers, including voluntary retail groups, retail chain store organizations and independents. It also sells its products to restaurants.

Respondent as presently constituted is a merged entity. Sometime after the issuance of the complaint herein, it merged with a California corporation of the same name and became the surviving corporation. From the date of the merger, respondent's operations have been divided into two autonomous divisions. The former California corporation now functions as a division of respondent in the Western States which it previously served, and its headquarters and principal place of business continues to be in San Francisco, California. The territory served by the respondent prior to the merger is served by the second division. This area includes the States of Illinois, Indiana, Kentucky, Mississippi, Arkansas, Missouri, Iowa, Minnesota, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, New Mexico, Colorado, and portions of the States of West Virginia, Ohio, Wisconsin, Michigan, Florida, Tennessee, Alabama, Georgia, Louisiana and Wyoming. Each of the two divisions, hereinafter called the San Francisco and Kansas City Divisions, respectively, has its own execu-

tive heads, sales executives and organization and advertising executives; organization, and agency.

The "Folger" brand of coffee manufactured by respondent is the second largest selling brand of coffee in the United States. For the first nine months of 1961, respondent's net dollar sales of "Folger" coffee were \$118,675,830. In 1958 and 1959, respondent's sales, prior to the merger with the California corporation of the same name, were approximately \$100,000,000. Its Kansas City Division has about 25,000 accounts. In the course of its business, respondent sells and causes its products to be transported from its principal places of business in the States of Missouri and California to customers located in other States of the United States. There has been at all times mentioned herein a continuous course of trade in respondent's coffee products in commerce, as "commerce" is defined in the Act.

Respondent expends large sums of money for the advertisement and the promotion of the sales of its products. Its current annual expenditures for these purposes is \$22,000,000 of which \$16,000,000 is spent by the Kansas City Division and \$6,000,000 by the San Francisco Division. Of the \$16,000,000 disbursed by the Kansas City Division, about \$6,000,000 thereof is spent in brand-name advertising and about \$7,000,000 in specific sales promotions. For the first ten months of 1961, the Kansas City Division scheduled 152 promotions in various areas involving about 100,000 retail grocery stores operated by some 25,000 of respondent's direct customers. Respondent uses various in-store promotions for which it furnishes display materials and mats for reproduction in newspapers and handbill advertising. These in-store promotions are variously designated as "Big Top" and "Talk of the Town" sales and "Folger Guessing" and "Ribbon-Guessing" contests. A number of respondent's ribbon guessing contests were held in the trade territory of the Benner Tea Company.

It has been a company policy with respondent for many years to have all requests received from customers for respondent's participation in promotional plans proposed by such customers, reviewed by one of its top executives for the purpose of ascertaining whether the proposal involves something that respondent can offer equally to all competitors of the proposing customer, as required by the provisions of Section 2(d) of the Act. In case of doubt, the executive consults with counsel. Prior to the issuance of the complaint in the present proceeding, respondent had never been cited for a violation of the Robinson-Patman Act.

One of respondent's customers in its Kansas City Division is the aforementioned Benner Tea Company. Benner at all times herein

material was a retail grocery chain with headquarters in Burlington, Iowa and operated one or more stores in 14 towns in Iowa, 9 towns in Illinois, and 2 towns in Missouri. During the year 1958 and 1959, respondent sold a substantial amount of both "Folger" regular coffee and "Folger" instant coffee to Benner. Benner stocked the "Folger" coffees in all of its retail stores but also stocked and sold in the same stores other nationally advertised brands, including a brand called "Butternut" manufactured by Paxton & Gallagher to which further reference will be made below. In addition, Benner featured and sold at each of its stores its own private brand of vacuum packed regular coffee under the private labels of "Benner" and "Cascade Inn" which it imported through brokers and processed for sale by blending, roasting, sampling and bagging. The Benner retail stores in 1958 and 1959 allotted one-third of their total shelf space to its own private brands of coffees and the remaining shelf space to all of the competing national brands. In the same period more than one-half of its total coffee sales were of its private brands of "Benner" and "Cascade Inn" coffees. Since about 1957, Benner in its advertisements has advertised some of the national brand coffees it sells in its stores as well as its own private brands, with somewhat greater emphasis on its own branded coffee than on national brands. Prior to about 1957, Benner's advertisements in newspapers and handbills advertised only its private brand coffees.

Respondent ships the "Folger" coffee it sells to Benner primarily to the Benner warehouse in Burlington from which it is distributed by Benner to its individual retail stores and also to some of the independent retail grocery stores to which Benner sells as a broker or wholesaler. During the years 1958 and 1959, respondent also sold a substantial amount of the same regular and instant "Folger" coffee it sells to Benner to other customers located in the same towns or cities in the heretofore indicated States in which Benner has retail stores.

Benner has been a vigorous advertiser for many years. At the times herein material, it ran advertisements in newspapers each week of the year which were at times supplemented by the distribution of handbills known as "Tabloid Mailers" bearing such titles as "King Size Bargains", "Springarama" and "Foodarama".

In June of 1958 and 1959, Benner staged an anniversary sales promotion called a "Foodarama". It solicited a large number of its suppliers and others to participate in such "Foodaramas". It also sent a brochure to such persons describing the advertising and promotional activities which were to take place during the "Foodaramas".

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These Benner brochures contained statements of the anticipated advertising and promotion activities as follows:

Tabloid mailing to 135,000 homes! To every home in the Benner trade area featuring your product PLUS a special section in 19 leading local newspapers [names of cities are listed] plus big space ads in seven smaller towns [names of these towns are also listed] PLUS a big super foodarama display booth * * * AND the whole promotion will be backed up by * * * signs and displays * * * special bulletins * * * special meetings * * * radio spots.

The Benner brochures also offered participants in the Benner "Foodaramas" a choice of six different advertising and promotional "deals" as follows:

SUPER FOODARAMA DEAL #1	
8' x 10' Display Booth <i>plus</i> mention in Tabloid and Ad-----	\$150
SUPER FOODARAMA DEAL #2	
8' x 10' Display Booth <i>plus</i> $\frac{1}{16}$ page in Tabloid and mention in Ad----	\$250
SUPER FOODARAMA DEAL #3	
8' x 10' Display Booth <i>plus</i> $\frac{1}{8}$ page in Tabloid and mention in Ad----	\$350
SUPER FOODARAMA DEAL #4	
8' x 10' Display Booth <i>plus</i> $\frac{1}{4}$ page in Tabloid and mention in Ad----	\$450
SUPER FOODARAMA DEAL #5	
8' x 10' Display Booth <i>plus</i> $\frac{1}{2}$ page in Tabloid and mention in AD----	\$550
SUPER FOODARAMA DEAL #6	
8' x 10' Display Booth <i>plus</i> $\frac{1}{2}$ page in Tabloid, prominent position in coupon Ad (2nd week) and Giant 2 week Display in every store-----	\$650

Included with each of the Benner "Foodarama" brochures was a "Reservation Form". The form set forth each of the above-described "deals" and provided a place for the recipient to indicate his choice of "deals" and a place for an "Authorized Signature". The reservation form at the bottom thereof contained the following note: "We will want to work with you in tailor-making this promotion for *maximum presentation and sales of your products*. A follow up questionnaire will follow, and we will be glad to work out any special problems or details. (For example, you may want to reserve extra booth space or larger size booth *or* you may want to use only booth space *or* only newspaper or tabloid space, etc.)" (The italic shown is as in the reservation form.)

The "Foodarama" was a sales promotion device used by Benner to increase the volume of sales of all products, including respondent's, handled in its retail stores. Included in the "Foodarama" was a Sunday afternoon event called an "Open House" at the Burlington warehouse of Benner where various suppliers who participated in the "Foodarama" displayed and advertised their respective products in the booths assigned to them by Benner. The booths were used by

supplier-participants for the advancement of the sale of their products in the Benner retail stores and more generally for the advertisement of their products to all persons who attended the "Foodaramas". The "Open House" for both years was publicized by newspaper articles, handbills and cards. The 1958 open house attracted between 12,000 and 15,000 people and the one in 1959 was attended by some 15,000 to 20,000 persons. Included in the attendance, predominantly of consumers, were customers of respondent, some of which were wholesale and retail competitors of Benner. Although the open house events were used to advertise various products of supplier-participants, none of these products were offered for sale at the two open houses. There were a few exhibits at the open houses which were unrelated to the Benner retail food business such as an exhibit of a certain model car and of farm equipment. Entertainment features and attractions at the open houses included a welcoming address by the mayor of Burlington, music by a high school band, a display of a rail locomotive and mail car, and a demonstration of outdoor barbecuing of meat.

Between 70 and 80 Benner suppliers participated in the "Foodaramas" of 1958 and 1959. Proceeds in the amount of about \$20,000 were received by Benner from participants in the "Foodaramas" in each year for "deals" as described above offered by Benner and accepted by the participants or variations thereof as agreed upon by Benner and participants, but the bulk of the individual payments from suppliers were for "deals" as shown above. A few of the participants in the "Foodaramas" did not have booths at the "Open Houses" in the Benner warehouse, but participated in other features of the "Foodaramas".

To advertise its "Foodaramas", Benner mailed to some 135,000 homes in its trade area its handbills, described as "Tabloid Mailers" by the parties, in the indicated years. The handbills advertised the various products being promoted at the "Foodaramas". In the same years, Benner ran advertisements in 16 Iowa, 10 Illinois and 2 Missouri local newspapers featuring its "Foodarama" sales and the products of the suppliers it was promoting. Respondent's coffees received space in both the Benner handbills and the Benner newspaper advertisements.

Respondent was one of the supplier-participants in the Benner "Foodarama" for the years 1958 and 1959. The precise degree of respondent's participation in each of these "Foodaramas" is in dispute. Respondent contends that it participated only to the extent of renting a booth at the open house conducted by Benner at its ware-

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house in connection with the "Foodarama" for each year. Counsel supporting the complaint contends that respondent was a participant in both the 1958 and 1959 "Foodarama" to the full extent involved in the Benner proposed "Deal No. 1" which, as heretofore shown, entailed the renting of an "8' x 10' Display Booth *plus* $\frac{1}{16}$ page in Tabloid and mention in Ad". Certain facts however, hereinafter set forth, with respect to respondent's participation in the involved "Foodaramas" are not in dispute. Respondent in each of the years 1958 and 1959 paid Benner \$150 in connection with its participation in the "Foodaramas" for those years. The parties are agreed that the \$150 "Foodarama" payments were separate and distinct from the regular cooperative advertising and promotional allowances granted by respondent to Benner and all its competitors in connection with the sale or offering for sale of respondent's regular and instant coffee. Although respondent in 1958 and 1959 received from Benner announcements of its forthcoming "Foodaramas" and reservation forms, it never returned the latter to Benner. The reservation form for the year 1958 retained by respondent in its files is marked with an "X" along the line on the form reading "SUPER-FOODARAMA DEAL NO. 1" and a penned arrow leading down from that line to the unprinted space at the bottom of the form leads to a penned note reading: "Draw up a contract including Ribbon Game. No mention of ad." The written contract referred to was never prepared.

Respondent in connection with Benner's 1958 "Foodarama" under date of June 5, 1958, wrote the following letter to Benner: "At the request of our representative, Mr. L. C. Dodge, we are enclosing our check in the amount of \$150.00 for the booth at your Foodarama Promotion. We know that this will be a splendid production and send along our best wishes for every success."

In connection with Benner's 1959 "Foodarama," a district representative of respondent addressed an interoffice memorandum, dated May 25, 1959, to persons in respondent's advertising and sales departments, reading as follows: "Here is the deal that I worked out with Benner, on that promotion that we discussed on the phone. Benner will feature Folger's 6 oz. instant coffee in the Tabloid and newspaper advertising the week of June 15th thru June 21. We will rent a booth from them at their food a rama open house to be held Sunday June 21, at a cost to us of \$150.00. This is for the booth rent and not an advertising allowance. I did not sign anything to this effect. I told Mr. Clark their Vice President in charge of sales that Folger's word was as good as their signature and therefore I would not sign anything that could be taken to mean an advertising allowance. That

all we would buy is booth space and we were not buying any advertising. He said it was ok and that they would feature our 6 oz. instant coffee on their tabloid and newspaper. Also they will run a chain wide ribbon contest the weeks of July 9th thru July 18. Giving Folger's Coffee the big feature in their ad and playing up the ribbon contest. We will furnish to them at this time the following premiums. (For each of their stores, or a total of 10 prizes per store, making a grand total of 340 prizes to be given away by them [there follows a list of the prizes]. Total cost per store \$35.20. Also I am returning to you with this letter Benner's brochure on their Food A. Rama for your records, also last years Folger Way telling of the promotion. If there is any questions concerning this please let me know."

The 1959 payment of \$150 by respondent to Benner in connection with Benner's 1959 "Foodarama" is shown on one of respondent's interoffice "memo" invoices, dated May 28, 1959, as being: "For booth at annual Foodarama."

Benner maintained in its records lists of the participants in its 1958 and 1959 "Foodaramas" and the amounts contributed by each, with some indications of variations from its proffered "deals," such as "No booth" in its 1958 list, the contribution in such instances being sometimes \$150 and sometimes a lesser amount. The 1959 list does not go into this type of detail but lists simply the contribution of each participant. Respondent's name is listed in the list for each year as a contributor in the amount of \$150, with no indication on the lists as to the precise consideration it was to receive from Benner for its contributions.

In each of the involved "Foodarama" years, respondent was the recipient of advertising space for its coffee products in both the Benner "Tabloid Mailers" and in the Benner newspaper advertisements featuring the "Foodarama" sales.

Respondent for a number of years has offered to its customers an in-store promotion called a "ribbon-guessing contest." The promotion was offered to all of respondent's customers in the Benner trade area in the years 1957 through 1959. In connection with such promotions, respondent supplies to the retailer a kit with materials for holding the contest, display material, and prizes. Benner participated in respondent's in-store ribbon-guessing contest promotions in each of the years 1957 to 1959, inclusive, and featured Folger coffee advertisements in either their handbills or newspaper advertising or both, but in this period only one advertisement specifically mentioned the Folger ribbon contest. The 1957 in-store ribbon contest featured by Folger in the Benner stores was not related to a Benner "Foodarama"

sale as Benner did not have a "Foodarama" in 1957. Similarly the Folger 1959 ribbon contest in Benner stores was unrelated to the 1959 "Foodarama" as it was held subsequent to the 1959 "Foodarama." But in 1958, respondent sponsored a ribbon-guessing contest in the Benner stores at a time which by prearrangement with Benner coincided with Benner's 1958 "Foodarama." The examiner finds that respondent's participation in Benner's 1958 "Foodarama" advertisements was solely in connection with respondent's ribbon-guessing promotion contests in the Benner stores and is unrelated to the aforementioned payment of \$150 made by respondent to Benner in connection with respondent's participation in the Benner 1958 "Foodarama."

Respondent in the period between May 27 and July 6, 1959, which includes the June week of 1959 in which the Benner 1959 "Foodarama" took place, conducted a special promotion of its six ounce Instant Folger Coffee. Under the promotion, respondent offered to all of its customers in Iowa, including Benner, an allowance of \$1.20 per case on six ounce Instant Folger Coffee purchased between May 27 and July 6, 1959, "providing the grocer places a retail advertisement on six ounce Instant Folger's Coffee in his regular media of newspapers, handbills or shopping papers within 30-days after date of purchase". The offer further provides that: "To qualify, advertisement must: 1. Be a week end ad. 2. Feature six ounce Instant Folger's Coffee exclusively, excepting only retailer's own brands. 3. Cover all of customer's stores in states of Iowa and Nebraska." (Nebraska is not pertinent here because in the involved years Benner did not operate any stores in Nebraska.) Respondent's offer did not apply to the stores of its customers located in the States of Illinois and Missouri in which Benner also operated retail grocery stores. Benner, by meeting the conditions of the described offer as related to its stores in Iowa received a cash advertising allowance of \$120 from respondent. Benner met the advertising requirements of respondent's offer through the media of handbills distributed in Iowa and advertisements inserted in Iowa newspapers as part of its 1959 "Foodarama" advertising. The examiner finds that respondent's participation in the Benner 1959 "Foodarama" advertising was due solely to Benner's desire to receive the described advertising allowance from respondent which the latter made available to all of its customers operating stores in Iowa. (The examiner does not deem it significant that the Benner handbills besides being distributed in Iowa were also distributed in Illinois and Missouri because the printing of separate handbills for the latter States would have entailed additional printing costs not otherwise warranted and for the further

reason that more than one-half of the Benner stores in 1959 were located in Iowa.)

From all evidence of record, it is found that respondent's payments of \$150 each to Benner in the years 1958 and 1959, respectively, were made solely as payments for the rental of a booth for the display and advertisement of respondent's coffee at the "Open House" held at the Benner warehouse in each of the said years and that respondent's primary purpose in renting the booths was to advance the sale of its coffee in the Benner retail grocery stores. It is further found that respondent in the involved years did not offer to make similar payments available to Benner's competitors on proportionally equal terms. The evidence on this latter finding is uncontroverted.

Other coffee manufacturing participants at the two "Foodaramas" were the aforementioned Paxton & Gallagher, manufacturers of Butternut coffee, and Benner, itself, which as seen manufactured and sold its own private brand coffees under the names of "Benner" and "Cascade Inn". In addition to selling its private label coffees in its own stores, Benner also supplied the same private label coffees to independent grocers located at 16 towns in Iowa and 4 towns in Illinois. These independent grocers also handled nationally advertised brands of coffee which they generally bought directly from the coffee manufacturer, including the respondent. At each of the "Foodaramas", Benner maintained a booth about twice the size of the booths rented to others where Benner displayed various products and served its own private brand coffees, either hot or cold, to all desiring to be served. Paxton & Gallagher also maintained a booth at each of the "Foodaramas" for the display of Butternut coffee under Benner's above-described "Deal No. 1". Both Butternut and Benner coffees were advertised (as was the Folger coffee) in Benner's "Tabloid Mailers" and in Benner's newspaper advertisements in connection with its "Foodarama" sales. Benner's private brand coffee and Butternut coffee were in the years here involved in competition with the coffee sold by respondent. Respondent had advance notice that both the Benner and Butternut coffees would be displayed and advertised at the "Open House" feature of the "Foodaramas". From the record as a whole it is found that this advance knowledge played an incidental and subordinate part in inducing respondent to rent a booth at each of the "Foodaramas" for the display and advertisement of its coffee.

DISCUSSION AND CONCLUSION

The facts as to the consideration respondent bargained for and received from Benner for its two payments of \$150 each have been set

forth in considerable detail above. No particular purpose would be served by an attempt to rationalize or to set forth the reasons, not already apparent from the findings of fact, for the conclusion reached from these facts that the payments were made exclusively for booth rentals as contended by respondent and not for a combination of booth rental and advertisement as contended by counsel supporting the complaint inasmuch as the examiner is of the opinion that the respondent must in any event be deemed in violation of the provisions of Section 2(d) of the Act, even under the finding that the payments in question were made exclusively for booth rentals, there being no dispute that similar payments on proportionately even terms were not made available by respondent to Benner's competitors. This legal conclusion appears to be controlled by *State Wholesale Grocers v. The Great Atlantic & Pacific Tea Company*, 258 F. 2d 831 (7th Cir. 1958), *cert. denied*, 358 U.S. 947 (1959). That case will hereinafter be referred to as the A&P case and The Great Atlantic & Pacific Tea Company, one of the named defendants therein, will be called the A&P in the discussion below. The matter was a private suit by the plaintiffs therein against A&P, operator of chain grocery stores, and certain grocery suppliers of A&P, arising out of alleged violations of Section 2(d).

The Court of Appeals in the A&P case held that grocery suppliers who placed advertising in a magazine known as "Woman's Day" published by an A&P subsidiary corporation solely for the competitive advantage of A&P retail stores but otherwise operated basically the same way as any other nationally distributed woman's magazine, except for distribution, violated the provisions of Section 2(d) proscribing payment for services or facilities for processing or sale unless they made similar payments available on proportionately equal terms to other grocery companies, even though such companies did not publish magazines, because the suppliers had failed to make such payments available to other grocery companies in competition with A&P. The Court emphasizes that Section 2(d) contains a rigid definition of acts constituting "unlawfulness." In that connection the Court stated: "The *fact* of paying or contracting for the payment for the services or facilities referred to is proscribed, subject to the exception contained in the clause commencing 'unless'. (The under-scoring is the Court's.) It is apparent that Congress has not made relevant the motive or intent of him who thus pays or contracts to pay. * * * We believe that the district court erred in relying upon the fact that it found that there was no evidence of any ulterior *motive* on the part of defendant suppliers in advertising in Woman's

Day nor that said suppliers had *intended* to favor A&P over other customers." (The emphasis is the Court's.)

The evidentiary facts in the A&P case, although of course different than those in the instant case, fall into categories which closely parallel those present in the instant case. In the A&P case the instrumentality used by the suppliers was the customer's magazine (although operated by a subsidiary corporation); the magazine was identified in the public mind as the A&P magazine; all of the foods advertised in the magazine were products sold in A&P stores; the magazine is the promotional operation of A&P. In the instant case, the instrumentality used by the supplier-respondent was the "Open House" conducted by the customer (Benner) at its own warehouse; the "Open House" was identified in the consumer's mind as a Benner attraction through advertisements by Benner; all or most of the foods displayed by suppliers at booths at the "Open House" were sold at the Benner grocery stores; and the "Open House" at the Benner warehouse was a promotional operation of Benner.

The Court of Appeals in the A&P case deemed it immaterial that any of the plaintiffs or wholesalers in that case owned or published a magazine of any kind, quoting with approval the following statements from the Report of the Attorney General's National Committee to Study the Anti-trust Laws, of March 31, 1955, at page 189: "The [Federal Trade] Commission's recent clarification of 2(d) and 2(e) also recognizes that not all customers entitled to participation in a seller's promotional plan can effectively utilize each type of promotional service tendered, or perform that form of service which the seller desires to reward with an allowance under his plan. However, to ensure appropriate benefits to all qualified customers, the Commission expects the seller to offer *bona fide* alternative means enabling all buyers to participate in some form."

In the instant matter the record does not disclose whether Benner's competitors had warehouses in which to conduct "Open Houses" such as the Benner affairs or whether the holding of such "Open Houses" in their warehouses, if they had them, was feasible. Under the holding in the A&P case this is immaterial as it was incumbent upon respondent to make a similar offer of a payment for booth space to Benner's competitors or a feasible alternative and this was not done in the instant case.

Our analysis compels the conclusion under the holding of the Court of Appeals in the A&P case that the acts of respondent in making the two payments here in question to Benner without offering similar payments to Benner's competitors on proportionately equal terms are acts

in violation of Section 2(d) unless respondent has established its defense plea of meeting competition in good faith, described in Section 2(b) of the Act. This raises the preliminary question of whether such a defense is available in response to a charge of violating Section 2(d). The Court in the A&P case has indicated that "the motive of him who thus pays or contracts to pay" is immaterial. But since the precise question here under consideration was not before the Court in the A&P case, the quoted statement must be regarded as being in the nature of *obiter dictum* in the present context of the question.

The question, however, was recently directly decided in *Exquisite Form Brassiere, Inc. v. Federal Trade Commission*, 30 U.S.L. Week 2238 (D.C. Cir. Nov. 22, 1961) [7 S.&D. 259], where in a carefully considered opinion it was held that the defense of meeting competition in good faith as described in the proviso of Section 2(b) is available in response to a charge of violating Section 2(d). Pursuant to that opinion, the examiner concludes that the Section 2(b) defense proviso is available to respondent as a response to the charge made in the complaint of the Section 2(d) violation. Since respondent was not precluded at the hearing from introducing any evidence it desired under the Section 2(b) proviso, such evidence as the respondent introduced thereunder into the record is now available for analysis.

The examiner is of the opinion that respondent has not established on the merits a defense under the Section 2(b) proviso. In arriving at this opinion, the examiner's inquiry has been limited to that portion of the proviso which relates to "the furnishing of services or facilities to any purchaser or purchasers * * * made in good faith to meet the services or facilities furnished by a competitor" as it does not appear from the evidence and the respondent's memorandum thereon that respondent is asserting or can assert a defense under that portion of the proviso which pertains to lowering prices "to meet an equally low price of a competitor".

The specific "service or facility" here involved is the booth rented by respondent from Benner at the latter's warehouse for the advertisement of its coffee products at the Benner "Foodarama" open houses held in 1958 and 1959 at the said warehouse. Benner also had a booth at each of the open houses which it used in part at least for the advertisement of its private label coffees. Similarly the manufacturer of Butternut coffee also had a rented booth at the same open house events for the advertisement of its coffee. It is respondent's contention that its booth rentals from Benner "was made in good faith to meet * * * the services or facilities furnished by a competitor", namely, Benner itself, and the manufacturer of Butternut. This contention poses an

issue of fact as to what the respondent's "good faith" intention was in renting the booths in question.

The examiner has concluded from all of the evidence in the record that respondent's advance knowledge that both Benner and the Butter-nut coffee manufacturer would have booth space at the two open houses played only an incidental and subordinate part in its decision to rent booths at the Benner open houses.

The examiner has also found from all of the evidence of record that respondent's primary purpose in renting the booths was to advance the sale of its coffee in the many Benner retail stores. The evidence makes it quite clear that the Benner open houses presented respondent with an opportunity to advertise its coffees which it could not miss, irrespective of competition at the open houses from other coffee suppliers, including Benner in its coffee manufacturing capacity. The Benner open house in each of the indicated years was widely advertised by Benner. It partook in part the nature of a civic event. The mayor of Burlington spoke at one or both of the open houses. A high school band played at the open houses. Between 12,000 and 20,000 people attended each of the events. Respondent regardless of the fact that there would be other coffees than their own advertised at the open houses, could hardly afford to miss the opportunity to be represented at the events. The aim of the Benner open houses was to advance the sale of the products of participating suppliers at the many Benner retail grocery stores and thereby to increase the volume of sales in the Benner stores. There can be but little doubt that respondent participated in the events for the principal purpose of advancing the sale of their products at the Benner stores. It is likewise clear that respondent insofar as it benefited from participation in the Benner open houses received such benefits primarily through the advertising of their products to actual or potential Benner consumer purchasers in attendance at the open houses. Any additional benefits that respondent may have received from its participation in the open houses, such as the advertisement of its products to non-Benner consumer purchasers, in attendance at the events or the meeting of competition, must be regarded as purely incidental.

Under these circumstances, the examiner is of the opinion that there is a failure of the "good faith" showing required by the Section 2(b) proviso for the establishment of respondent's contention that it rented the booth facilities of its customer Benner for the purpose of meeting "the services or facilities furnished by a competitor".

Two other matters require consideration. Respondent urges as an alternative, in the event it is found that it is in violation of Section

2(d), that a cease and desist order is "not warranted in this case because the illegal \$150 payments in 1958 and 1959 were inconsequential when related to the magnitude of respondent's business volume, and sales and advertising program, and to the effect on competition * * *". While it is true that the two \$150 payments are insignificant in size compared to the millions of dollars respondent expends annually on advertising, that is not the proper measurement of a *de minimus* infraction of the law. The true measure of a *de minimus* infraction is the scope of its effect on competition. When looked at from that aspect, it is readily apparent that the two payments cannot be considered "inconsequential", as argued by respondent, "on the effect on competition". For proper perspective, the trade area in which Benner and its competitors operate should be noted. This area consists of some 25 relatively small towns, none of which from cursory examination of population indices, seem to have a population as great as 50,000. It is at once evident that \$150 would buy a not insignificant amount of newspaper advertising space in the local or county wide newspapers in the trade area in which Benner and its competitors advertise and accordingly, cannot be regarded as *de minimus*. Such an amount had it been offered by respondent to Benner's competitors on proportionally equal terms would have offered "a *bona fide* alternative means enabling all buyers to participate in some form", to again quote from the Report of the Attorney General's National Committee to Study the Anti-trust Laws, *supra*.

The other matter requiring consideration is the scope of the order to be entered in this proceeding. Counsel supporting the complaint requests a broad, sweeping order couched generally in the language of Section 2(d) to reach each and every conceivable type of act prohibited by the statute. Respondent, on the other hand, requests an order, in the event it is found in violation, limited "to a violation of Section 2(d) by payment for a facility furnished by a customer in connection with a special event organized by that customer and taking place at a location other than its regular place of retail business". (The further request by respondent that the order be limited to its Kansas City Division on the ground that its San Francisco Division was a separate corporation at the time of the violations here under consideration is dismissed from consideration as being palpably untenable.) Respondent argues that any broader order would go beyond what is necessary to bring an end to the practices in question, and would bear no reasonable relation thereto.

The scope of an order for an infraction of a statute within the jurisdiction of the Commission is largely a matter of discretion to

be exercised within the general objective of bringing an end to the unfair practices or price discrimination found to exist. *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 428 [6 S. & D. 193] (1957); *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 54, [4 S. & D. 716, 729] (1948).

There are many factors in the instant case which indicate that the type of order requested by respondent would be adequate to bring the type of infraction here involved to an end. As the second largest coffee manufacturer in the United States, respondent sells its products to about 100,000 retail grocery stores, has sales in excess of 100 million dollars a year and expends 22 million dollars annually on advertising and promotional expenses. Notwithstanding this volume of sales and expenditures for advertising and sales promotion, respondent has never been cited for a violation of any of the provisions of the Robinson-Patman Act, until the present proceeding.

This record is due to respondent's constant policy over the years to have all customer requests for respondent's participation in a customer advertising or promotion scheme checked by one of its top executives for clearance of possible infraction of the provisions of the Robinson-Patman Act before the customer plan may be approved for respondent's participation therein. The likelihood of future violations of any kind by respondent seems unlikely. Geographically the present infractions involved a relatively small part of respondent's trading area as the second largest coffee selling company in the United States. The two described \$150 payments represent a minute fraction of the 22 million dollars respondent expends annually for advertising and promotional expenditures. Under these circumstances, the examiner is of the opinion that the narrower type of order requested by respondent, with some adjustments, is warranted, particularly in view of the fact that a broad order in statutory language would unnecessarily subject the manifold advertising and promotional activities of respondent to the possible severe penalties in the recently enacted Section 11 of the Clayton Act for inadvertent or unwitting violations of the Act. The Commission has very recently indicated its preference in the way of orders for "a more narrow and specific prohibition" to a "broad and indefinite command" in a violation involving Section 5 of the Federal Trade Commission Act which is indicative of the Commission's current thinking on the subject. *Colgate Palmolive Company*, No. 7736, FTC, Dec. 29, 1961 [59 F.T.C. 1452].

From the findings of the evidentiary facts as heretofore set forth, the examiner reaches the following ultimate findings of fact and law:

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1. That respondent in 1958 and 1959 contracted to pay and did pay to one of its customers something of value as compensation or in consideration for services or facilities furnished by such customer, consisting of booth space for the advertisement of respondent's products at a public exhibition controlled by the customer, in connection with the customer's offering for sale or sale of products sold to the customer by respondent.
2. The above-described payments were not made available on proportionally equal terms to all other customers competing in the sale or distribution of such products purchased from respondent.
3. The said payments by respondent to the said customer for the furnishing of services or facilities were not made in good faith to meet the services or facilities furnished by a competitor.
4. The said payments by respondent to the said customer are practices 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 J. A. Folger & Company, a corporation, 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 any of its products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

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

OPINION OF THE COMMISSION

By MacIntyre, *Commissioner*:

The complaint charges respondent with violating Section 2(d) of the Robinson-Patman Act. The hearing examiner in his initial decision filed January 10, 1962, as amended by his order filed January 18, 1962, found that respondent had engaged in practices violating Section 2(d), as charged, and ordered respondent to cease and desist such practices.

Respondent and counsel supporting the complaint have filed cross-appeals. Respondent contends (a) that it was not violating Section 2(d) because the challenged payments were made in connection with respondent's sale of its own products, a contention expressed in several different ways; (b) that respondent was acting in good faith to meet competition; (c) that an order should not issue because of the alleged smallness of the payments; and (d) that the order should not extend to respondent's San Francisco division. Complaint counsel, in his appeal, argues that the examiner erred (a) in entering a "limited" Section 2(d) order, and (b) in holding that the Section 2(b) defense is available in a Section 2(d) matter.

Respondent is engaged solely in the manufacture, sale and distribution of coffee. It sells and distributes Folger's brand coffee to wholesalers and retailers, including voluntary retail groups, retail chain store organizations, independents, and to the restaurant trade. Its sales of coffee in 1958 and 1959 were approximately \$100,000,000.

The case concerns payments made in 1958 and 1959 to Benner Tea Company (Benner) in connection with such company's anniversary sale promotions. In those years, Benner staged events called the "Foodarama", and it solicited a large number of persons to participate therein, sending them "Foodarama" brochures. The brochures for 1958 and 1959 are similar. Those distributed in 1959 contain statements as to the anticipated advertising and promotional activity in connection with the "Foodarama" in part as follows:

Tabloid mailing to 135,000 homes! To every home in the Benner trade area featuring your product PLUS a special section in 19 leading local newspapers (names of cities given) plus big space ads in seven smaller towns (names of cities given). . . . AND the whole promotion will be backed up by . . . signs and displays . . . special bulletins . . . special meetings . . . radio spots . . . PLUS a big anniversary foodarama Display Booth during the open house party at Benner's giant food distribution center . . . Over 16,000 Benner customers and friends will have the opportunity to view your products.

In addition, the brochures offered, for the varying costs given, six different advertising and promotional deals for participants (i.e., combinations of advertising and display booth arrangements).

At the end of each of Benner's "Foodarama" brochures was a "Reservation Form" which a person signed and returned to Benner if he wanted to participate in the "Foodarama". Such person also designated on the "Reservation Form" the "deal" in which he wanted to participate.

In 1958, a large number of persons, including some eighty Benner suppliers, participated in Benner Company's "Foodarama". That year proceeds to Benner from booth rentals, advertising, and "deals"

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(as described above) totaled \$20,327.50. Again in 1959, there were a large number of Foodarama participants, including some seventy Benner suppliers. That year proceeds to Benner from booth rentals, advertising, and "deals" totaled \$19,500.

In 1958 and 1959, respondent rented a booth at the "Foodarama open house" in the Benner warehouse in Burlington, Iowa. The product which respondent promoted at its booth in 1958 was the 2 pound can of regular Folger's coffee. In 1959, respondent promoted both regular and instant coffee at its booth. In 1958, and again in 1959, respondent paid Benner \$150.00 in connection with "Foodarama". The hearing examiner has found that this was solely for booth rental at the "open house".

During the years 1958 and 1959, respondent also offered to Benner and all its competitors regular cooperative advertising and promotional allowances in connection with the sale or offering for sale of respondent's regular and instant coffee. The \$150.00 "Foodarama" payments were separate and distinct from the regular cooperative advertising and promotional allowances granted to Benner and its competitors. Respondent did not make the "Foodarama" payments available to Benner's competitors on proportionally equal terms, a fact about which there appears to be no controversy.

Respondent's payments of \$150.00 both in 1958 and 1959 were but part of the total of approximately \$20,000 contributed in each of these years by various Benner suppliers and others toward the "Foodarama" promotions. Such payments, while only \$150.00, were significant and substantial when viewed in the light of the whole Benner activity because it was these amounts plus the contributions of others which permitted Benner to engage in its large "Foodarama" promotional efforts. It is this type of favoritism to a customer such as a chain organization, even in relatively small individual contributions, which the law exactly proscribes. Respondent's argument, therefore, that no order to cease and desist should be entered because the amounts paid by respondent were each \$150.00 is rejected.

Respondent's contention that it was solely promoting its own products in connection with the "open house" at the Benner warehouse in Burlington, Iowa, is not persuasive in the circumstances shown. Paul H. Kuenzle, former president of Benner Tea Company, testified that the "Foodarama" was "merely a sales gimmick that the company would use to obtain more retail sales." This was a Benner promotion, in which different media were used to promote and encourage greater sales at its retail stores, and the "open house", conducted in the Benner warehouse, was a part of the general scheme. The "tabloid mailer"

advertising food sales at Benner retail stores (Commission Exhibit 3-A), distributed in connection with the 1958 "Foodarama", states in part:

What is Foodarama! It's our big annual week long sale that ends with a giant open house party at our Food Distribution Center in Burlington.

The nub of respondent's argument on this score seems to be, as expressed in its brief, that its payments were made to "Benner the food show promoter" rather than "Benner the grocer". That is an artificial distinction which we do not accept. The payments were made to the retailer, and they were made in connection with the retailer's sales promotion activity. The mere fact that sales were not made on the day of the "open house" is of little significance. The purpose of the "open house" was to whet the appetites of prospective purchasers so that they would go later to Benner stores to make their purchases. In this respect, the promotion is little different from a newspaper advertisement which also solicits the patronage of the consumer at some time in the future. In the circumstances, we reject the argument that the respondent was solely promoting its own products at the Benner "open house". It is clear that the payments were compensation or consideration for services or facilities furnished by the customer, i.e., the warehouse space, "in connection with the . . . handling, sale or offering for sale" of the product manufactured and sold by respondent.

The argument that respondent, in this instance, acted in good faith to meet competition is based on the alleged showing that Benner Tea Company, as a producer of its own brand of coffee, and Paxton & Gallagher, manufacturer of Butternut Coffee, are in competition with respondent, and that respondent had knowledge of their participation in the "open house" in advance of its own decision to participate.

The question of whether the Section 2(b), meeting competition, defense is available in a Section 2(d) matter had been decided in the affirmative in the recent decisions. *Exquisite Form Brassiere, Inc. v. Federal Trade Commission*, 301 F. 2d 499 [7 S. & D. 259] (D.C. Cir. 1961); *Shulton, Inc. v. Federal Trade Commission*, 305 F. 2d 36 [7 S. & D. 472] (7th Cir. 1962). The Commission's petition for certiorari in the *Exquisite Form Brassiere* matter was denied by the United States Supreme Court. *Federal Trade Commission v. Exquisite Form Brassiere, Inc.*, 369 U.S. 888 [7 S. & D. 259, footnote] (1962).

The examiner, having received evidence on the question of respondent's asserted defense under Section 2(b) and having concluded in his initial decision that the defense was available to respondent, found

and concluded that respondent's advance knowledge of the participation of Benner and Paxton and Gallagher Co. played only an incidental and subordinate part in its decision to rent booths at the "open houses," that the primary purpose was to advance the sale of respondent's coffee in the Benner stores and that, in all the circumstances, the respondent had not met in "good faith" the promotional payments of a competitor. He treated the contention on meeting competition as an issue of fact on what the respondent's "good faith" intention was in renting the booths. We concur in the examiner's holding that respondent has not sustained its burden under the statute.

The United States Supreme Court in *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 242 [5 S. & D. 221, 228] (1951), stated that the core of the Section 2(b) defense "consists of a provision that wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price." The Commission's views as to a respondent's burden in proving its defense under Section 2(b) are expressed in the following recent Commission decisions: *Tri-Valley Packing Association*, Docket No. 7225 and Docket No. 7496 [60 F.T.C. 1134] (May 10, 1962); *American Oil Company*, Docket No. 8183 [60 F.T.C. 1786] (June 27, 1962).

In this case, respondent has shown that it had advance knowledge of the participation of competition in the "open house", but this is far from sufficient to establish that it was meeting in "good faith" the promotional payments of a competitor.¹ The examiner found, in effect, that respondent would have rented the "Foodarama" booths irrespective of competition at the open houses from other coffee suppliers. The fact that respondent participated to the same extent as Paxton and Gallagher Co. was simply accidental. Here the showing is that the primary purpose of the discriminatory allowance was not to meet competition, but to advance the respondent's sales through the buyer's retail stores. In view of this, we do not believe that the examiner erred in finding that respondent failed to make out a defense under Section 2(b) of the statute. Accordingly, we reject respondent's appeal as well as the appeal of complaint counsel on this question.

Respondent's final argument is that a cease and desist order, if one is entered, should not extend to its San Francisco division. The claim is that respondent operates two autonomous divisions, each covering the territory served by it prior to the merger (which took place after

¹ Respondent had knowledge of the participation of Benner itself, as a coffee producer, as well as the participation of Paxton and Gallagher Co. It appears doubtful that a seller would be found to be meeting competition in good faith where the competitor, such as Benner in this case, is also a customer of the seller, but we need not decide this point.

the complaint issued with a California corporation of the same name), and each with its own executive heads, sales executives and organizations, and advertising executives, organization and agency.

This matter deals with a single corporate entity, i.e., J. A. Folger & Company, a Nevada corporation. We believe the order should apply to all the divisions of that company. The alleged "autonomous" nature of the several divisions at this time, if true, is no assurance that such will be continued in the future. The two divisions are dealing with the same product, and, no doubt, will engage in similar methods of sale and distribution. Accordingly, there is no sound basis for excluding from the order one of the company's divisions. If the order is to be effective in preventing future violations, it must include the whole of respondent's organization.

We will lastly consider the contention of counsel in support of the complaint in his appeal that the examiner erred in limiting the order by inserting the phrase "at a public exhibition controlled by the customer." We believe that such limitation in the order is inappropriate and unduly restricts the order as to the prevention of violations in the future. See the Commission's opinions in *Vanity Fair Paper Mills, Inc.*, Docket No. 7720 (1962) [60 F.T.C. 568, 573]; and *The Quaker Oats Company*, Docket No. 8119 (1962) [60 F.T.C. 798, 807], for our general views on the scope of a Section 2(d) order.

The appeal of the respondent is denied and the appeal of counsel supporting the complaint is denied in part and granted in part. It is directed that the initial decision be modified in accordance with the views expressed in this opinion and that it be adopted, as so modified, as the decision of the Commission. An appropriate order will be entered.

Commissioner Elman dissented from the decision herein.

DISSENTING OPINION

By Elman, *Commissioner*:

As the Commission has again been recently reminded, its "wide discretion" in framing orders "does not permit an injunction of all violations of the statute just because a single violation has been found." *Grand Union Company v. Federal Trade Commission*, 300 F. 2d 92, 100 [7 S. & D. 329] (C.A. 2, 1962). An agency, like a court, is bound by the rule that the finding of a single violation "does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged." *NLRB v. Express Publishing Company*, 312

U.S. 426, 435 (1941). The order issued by the Commission here has the effect, so far as respondent is concerned, of making Section 2(d) of the Clayton Act, as amended, a criminal statute—for any violation of which it may be fined up to \$5,000 a day. Yet, if there were any violations here, they were marginal, isolated, and in an uncertain area of the law.

There is no claim that respondent has not complied fully with Section 2(d) in its general promotional and advertising activities, in which it expends about \$22,000,000 a year. The order is based solely upon payments of \$150 made by respondent to Benner Tea Company in 1958, and again in 1959, as rental for booth space at a Sunday afternoon "Foodarama" open house sponsored by Benner at its warehouse in Burlington, Iowa. No merchandise was offered for sale at each of these two exhibitions which, as the hearing examiner found, were in "the nature of a civic event." Participants in the "open house", which in 1958 attracted over 12,000 people and in 1959 over 15,000 people, included the United States Department of Agriculture, state and local agencies, the Red Cross, Iowa State College, the Iowa Dairy Association, and numerous other individuals and organizations which were not Benner's suppliers. The general atmosphere was that of a county fair. "Entertainment features and attractions at the open houses", the examiner found, "included a welcoming address by the mayor of Burlington, music by a high school band, a display of a rail locomotive and mail car, and a demonstration of outdoor barbecuing of meat."

As Commission counsel conceded at the oral argument,¹ Section 2(d) requires a showing not only that payments have been made by a supplier to a customer, but that they were made "as compensation or in consideration for any services or facilities furnished by or through such customer in connection with" the resale of the supplier's products by such customer. In other words, if, as respondent contends, its \$150 payments merely compensated Benner for furnishing booth space at the public exhibitions, and were not made to Benner as a *customer* and not in connection with the *resale* by Benner of merchandise bought by it from respondent, Section 2(d) was not violated. *General Foods Corporation*, 52 F.T.C. 798, 828. The question of fact thus raised is a close one, which both the hearing examiner and the Commission have resolved against respondent.

¹ "COMMISSIONER ELMAN: Do you think these \$150 payments were illegal simply because they were made to the customer?"

MR. PERRY: No.

COMMISSIONER ELMAN: The statute requires more than that, doesn't it?

MR. PERRY: Sure it does."

(Transcript of oral argument, pp. 19-20.)

Assuming that these payments constituted violations of Section 2(d), they certainly do not justify the broad order now being entered, covering any and all violations of Section 2(d) no matter how unrelated to the acts here found. If there has been any transgression of the law by respondent, it was not within the general area of promotional and advertising allowances. Rather, it was in connection with a clearly separate and distinct type of activity—namely, payment for a facility furnished at a public exhibition controlled by a customer. If an order is to issue, it certainly should be limited, in the manner provided by the hearing examiner in the initial decision, to that distinct kind of payment.

My views on the general questions raised by this type of case have previously been stated by me, and need not be repeated here. See dissenting opinions in *Shulton, Inc.*, Docket 7721, July 25, 1961 [59 F.T.C. 106, 114]; *Vanity Fair Paper Mills, Inc.*, Docket 7720, March 21, 1962 [60 F.T.C. 568, 579]; *Quaker Oats Company*, Docket 8119, April 25, 1962 [60 F.T.C. 798, 812]; *Tri-Valley Packing Association*, Dockets 7225, 7496, May 10, 1962 [60 F.T.C. 1134, 1175]; *American Oil Co.*, Docket 8183, June 27, 1962 [60 F.T.C. 1786, 1814]; and *Nuarc Company*, Docket 7848, August 7, 1962 [pp. 375, 394 herein]

FINAL ORDER

Respondent having filed, under Section 4.22(c) of the Commission's Rules of Practice, exceptions to the proposed final order, reasons in support thereof and a proposed alternative form of order, and counsel supporting the complaint having filed a reply in opposition thereto; and

The Commission having determined that respondent's objections to the proposed final order are without merit and that said order should be entered as the final order of the Commission:

It is ordered, That respondent's objections to the proposed final order be, and they hereby are, denied.

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 J. A. Folger & Company, a corporation, 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 any of its products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation

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or in consideration for any advertising or any other services or facilities furnished by or through such customer, in connection with the offering for sale, sale or distribution of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

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 J. A. Folger & Company 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 as set forth herein.

By the Commission, Commissioner Elman dissenting and Commissioner Higginbotham not participating.
