

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS, JANUARY 1, 1964, TO MARCH 31, 1964

IN THE MATTER OF

FOSTER PUBLISHING COMPANY, INC., NOW KNOWN AS
NORTH AMERICAN PUBLISHING CO. ET AL.

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

Docket 7698. Complaint, Dec. 21, 1959—Decision, Jan. 7, 1964

Order dismissing complaint charging a Philadelphia publisher of two monthly newspapers for the graphic arts industry and its associate company engaged in the purchase and sale of printing equipment and supplies, with violating the Federal Trade Commission Act, by knowingly inducing and receiving discriminatory advertising allowances from suppliers of graphic arts equipment.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Foster Publishing Company, Inc., a corporation, and Foster Type and Equipment Company, Inc., a corporation, and Irwin J. Borowsky, individually and as an officer of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

COUNT I

PARAGRAPH 1. Respondents Foster Publishing Company, Inc., and Foster Type and Equipment Company, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with their principal office and place of

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business located at 13th and Cherry Streets in the city of Philadelphia, State of Pennsylvania.

Respondent Irwin J. Borowsky is president of each of the corporate respondents. He formulates, directs and controls the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondents.

PAR. 2. Respondent Foster Publishing Company, Inc., is now, and since 1958 has been, engaged in the publishing of two monthly trade newspapers for the graphic arts industry. These newspapers are known as "Printing Impressions National Edition" and "Delaware Valley Printing Impressions". The publishing company mails and has mailed copies of its "Delaware Valley" edition to prospective customers in the States of Pennsylvania, New Jersey and Delaware and also mails and has mailed copies of its "National Edition" to prospective customers throughout the nation. The respondent publishing company also solicits and sells advertising in both of its newspapers from customers throughout the United States, doing an annual business of approximately \$100,000.

Respondent Foster Type and Equipment Company, Inc., is now, and for many years has been, engaged in the purchase and sale of printing equipment and supplies to newspapers, printers and other members of the graphic arts industry. It solicits and sells customers in many parts of the country, but particularly in the States of Pennsylvania, New Jersey and Delaware, with approximate annual sales of \$750,000. Respondent Foster Type and Equipment Company, Inc., advertises the products which it sells, to create customer demand and acceptance therefor throughout the United States.

PAR. 3. Respondents, in the course and conduct of their business, have engaged, and are now engaging, in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent Foster Publishing Company, Inc., since 1958, has been selling advertising space in both its publications to advertisers located in the several States of the United States and has mailed copies of its publications to prospective customers throughout the nation. Respondent Foster Type and Equipment Company, Inc., for many years, has been purchasing products for resale from a number of suppliers located throughout the United States and it causes these products to be transported from the place of manufacture or purchase without the State of Pennsylvania to its place of business within said State and to its customers located in various States throughout the United States. The respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in com-

merce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as herein described, respondents have been for many years in competition in the sale and distribution of printing equipment and supplies in commerce between and among the various States of the United States, and in the District of Columbia, with other corporations, persons, firms and partnerships.

PAR. 5. In the course and conduct of their business in commerce, respondents have knowingly induced and received payment, or contracted for the payment of, something of value to respondents or for respondents' benefit as compensation or in consideration for services and facilities furnished by or through respondents in connection with respondents' offering for sale or sale of products sold to respondents by many of their suppliers, and which payments were not made available by such suppliers on proportionally equal terms to all other customers of such suppliers competing with respondents in the sale and distribution of such suppliers' products.

PAR. 6. For example, the respondents addressed letters to a number of their suppliers during 1958 stating in part as follows:

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 lines we sell in our Foster Type and Equipment Co.

Your ad in our publication will reach every printing plant, newspaper mechanical superintendent, newspaper business manager, printing school teacher and many private plants at 62% comparable costs.

Example:

Full page ad in Graphic Arts Monthly 1 time rate is \$375.00—Space $4\frac{1}{2} \times 6\frac{1}{2}$.

A slightly larger ad in PRINTING IMPRESSIONS would cost \$235.00 at special rate based on 5×7 ".

Circulation of both publications the same.

Another Example:

Full page Ad in Inland Printer or Printing Equipment Engineer is \$470.00 average. Circulation of above publication is approximately 13,700.

Above size ad 4 columns wide (8") by 10" deep is \$480.00. Circulation of PRINTING IMPRESSIONS is 4 times greater than above publication.

This is good for both of us and we want to represent successful manufacturers. Both of us will benefit from the business we can get for you in our local area.

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

We are flexible. You can bill us and we can bill you and exchange checks. Or, we can enter into a written agreement, guaranteeing advertising space for 12 ads, and you can ship display. Whichever suits your own accounting will be okay with us.

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During the period between July 1, 1958, and June 30, 1959, at least 14 of respondents' suppliers entered into contracts with respondents and as a result agreed to and did pay respondents a total amount exceeding \$30,000 for such advertising.

PAR. 7. Typical of the suppliers, the products which they supplied, and the amounts which they paid the respondents, are the following:

Name of supplier	Location	Products	Amount paid
Lanston Industries, Inc.---	Philadelphia, Pa.	Platemaking and photo-mechanical equipment.	\$6, 500
Wetter Numbering Machine Company, Inc.	Brooklyn, N.Y.	Typographical numbering machines.	1, 500
Anchor Chemical Company, Inc.	Brooklyn, N.Y.	Chemical specialties-----	2, 800
NuAre Company-----	Chicago, Ill---	Vacuum frames, layout tables and dark room lights.	1, 300

PAR. 8. Many of respondents' suppliers, including those listed above, did not offer or otherwise make available similar compensation, or things of value, or allowance for advertising or other service or facility to all of their other customers who were competing with respondents in the sale and distribution of the same suppliers' products. Respondents knew or should have known that they were inducing and receiving a payment or allowance for advertising or other services or facilities from their suppliers which their suppliers were not offering or otherwise making available on proportionally equal terms to other of such suppliers' customers who were competing with respondents in the sale and distribution of such suppliers' products.

PAR. 9. The acts and practices of respondents, as hereinbefore alleged, of inducing and receiving special payments or allowances from their suppliers which were not made available by such suppliers on proportionally equal terms to respondents' competitors, are all to the prejudice and injury of competitors of respondents and of the public; have the tendency and effect of obstructing, injuring and preventing competition in the sale and distribution of printing supplies and equipment and have the tendency to obstruct and restrain and have obstructed and restrained commerce in such merchandise; and constitute unfair methods of competition in commerce and unfair acts and practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

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COUNT II

Paragraphs 1 through 4, inclusive, and Paragraph 6 of Count I of this complaint are hereby incorporated into this Count II of this complaint to the same extent and with the same effect as though fully set out herein.

PAR. 10. In the course and conduct of their business, and for the purpose of inducing the sale of advertising space in their publication, "Printing Impressions National Edition", respondents have made certain statements with respect to the circulation of said publication in letters, advertisements and in said "Printing Impressions National Edition" of national circulation, of which the following are typical:

Circulation 60,000 and Circulation of both publications [Graphic Arts Monthly and Printing Impressions] the same.

PAR. 11. Through the use of the aforesaid statements, respondents represented that their circulation of the publication "Printing Impressions National Edition" was 60,000 for each month from September 1958 to September 1959 and that such circulation was the same as Graphic Arts Monthly.

PAR. 12. Said statements and representations were false, misleading and deceptive. In truth and in fact:

(a) The circulation of said "Printing Impressions National Edition" was substantially less than 50,000 for many months during this period.

(b) At all times mentioned herein the circulation of "Printing Impressions National Edition" was not the same as "Graphic Arts Monthly", the circulation of the latter being subject to audit by Business Publications Audit of Circulation, Inc., providing for publication circulation statements of average total qualified circulation and of territorial distribution.

PAR. 13. In the conduct of their business since 1958, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of advertising space in national publications of the same general kind and nature as that sold by respondents.

PAR. 14. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that these statements and representations were and are true and into the purchase of substantial amounts of advertising space in respondents' publication "Printing Impressions National Edition" by reason of

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said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 15. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Eugene Kaplan for the Commission.

Fox, Rothschild, O'Brien & Frankel, Philadelphia, Pa., for the respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

JANUARY 24, 1963

The Federal Trade Commission issued its complaint against the above-named respondents on December 21, 1959, charging that said respondents have engaged in unfair competition in violation of Section 5 of the Federal Trade Commission Act as alleged in Counts I and II thereof.

Paragraph 5, Count I, alleges that in the course and conduct of their business in commerce, respondents have knowingly induced and received payment, or contracted for the payment of something of value to respondents or for respondents' benefit as compensation or in consideration for services and facilities furnished by or through respondents in connection with respondents' offering for sale or sale of products sold to respondents by many of their suppliers, and which payments were not made available by such suppliers on proportionally equal terms to all other customers of such suppliers competing with respondents in the sale and distribution of such suppliers' products. This allegation is premised upon the contention that such allowances are violative of Section 2(d) of the Clayton Act, as amended,¹ and

¹ Counsel in support of the complaint also points out that on the question of Section 2(d) violations of the suppliers, there are striking parallels in the record facts 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 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.

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that such knowing receipt constitutes a violation of Section 5 of the Federal Trade Commission Act. *Grand Union Company*, FTC Docket 6973; *Giant Food Shopping Center, Inc.*, FTC Docket 6459; and the *American News Company, et al.*, FTC Docket 7396.

Count II of the complaint in substance alleges that in the course and conduct of their business and for the purpose of inducing the sale of advertising space in their publication "Printing Impressions National Edition", respondents had made misrepresentations exaggerating the extent of circulation.

An initial decision was issued by the hearing examiner on July 17, 1961, pursuant to which a cease and desist order was issued as to Count I. Count II was dismissed.

The Commission, pursuant to an order dated July 26, 1962, [61 F.T.C. 1489-1491] vacated the initial decision and remanded the case for the purpose of taking additional evidence. Said order is as follows:

The Commission, for the reasons stated in the accompanying opinion, having determined that said initial decision should be vacated and the case remanded to the hearing examiner:

IT IS ORDERED that the aforesaid initial decision be vacated and set aside.

IT IS FURTHER ORDERED that this case be remanded to the hearing examiner for further proceedings in conformity with the views expressed in the aforesaid opinion.

IT IS FURTHER ORDERED that after such proceedings have been terminated the hearing examiner shall forthwith make and file, in accordance with the provisions of section 4.19 of the Commission's Rules of Practice, a new initial decision based on the record as then constituted.

The following remarks in the opinion formed the basis for the remand:

Since we find that the evidence adduced thus far is inadequate for an informed determination as to whether competition existed between Foster Type and other distributors in the resale of the goods involved in the alleged inducement of payments violative of section 2(d) and in view of our further finding that the testimony of certain distributors as to the non-availability of payments for advertising or other promotional services is deficient because of inadequate knowledge on the part of certain of such witnesses, the initial decision is vacated and remanded to the hearing examiner for the purpose of receiving additional evidence on these points.

The Commission ordered that:

Specifically, the examiner is directed to receive additional evidence identifying the products and lines of products purchased by Foster Type and its competitors from suppliers allegedly induced by respondents to make payments violative of section 2(d), as well as evidence bearing on the issue of competition between Foster Type and other distributors in the resale of goods involved in the alleged violation of law. The examiner is further directed to receive additional testimony on the availability or non-availability of payments for

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advertising or promotional services to distributors competing with Foster Type in the resale of such products.

Following hearings at which testimony and documentary evidence was received, proposed findings and briefs were filed by counsel supporting the complaint and counsel for respondents. Proposed findings which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters. Upon the entire record in the case the hearing examiner makes the following:

FINDINGS OF FACT

I

CORPORATE RESPONDENTS

1. Respondents Foster Publishing Company, Inc., and Foster Type and Equipment Company, Inc., are corporations organized, existing, and doing business under and by virtue of the laws of the State of Pennsylvania, with their principal office and place of business located at 13th and Cherry Streets in the city of Philadelphia, State of Pennsylvania. On or about August 3, 1959, Foster Publishing Company, Inc., changed its name to North American Publishing Company.²

2. Respondent Foster Publishing Company, Inc., is now, and since 1958 has been, engaged in the publishing of two monthly trade newspapers for the graphic arts industry. These newspapers are known as "Printing Impressions National Edition" and "Delaware Valley Printing Impressions". The publishing company mails and has mailed copies of its "Delaware Valley" edition to prospective customers in the States of Pennsylvania, New Jersey, and Delaware and also mails and has mailed copies of its "National Edition" to prospective customers throughout the Nation. The respondent publishing company also solicits and sells advertising in both of its newspapers from customers throughout the United States, doing an annual business of approximately \$100,000.³

3. Respondent Foster Type and Equipment Company, Inc., is now, and for many years has been, engaged in the purchase and sale of printing equipment and supplies to newspapers, printers, and other members of the graphic arts industry. It solicits and sells customers in many parts of the country, but particularly in the States of Pennsylvania, New Jersey, and Delaware, with approximate annual sales

² Admitted in answer of each respondent, p. 1.

³ Admitted in answers by each respondent at p. 1.

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of \$750,000. Respondent Foster Type and Equipment Company, Inc., advertises the products which it sells, to create customer demand and acceptance therefor throughout the United States.⁴

II

COMMERCE

4. Respondents, in the course and conduct of their business, have engaged, and are now engaging, in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent Foster Publishing Company, Inc., since 1958, has been selling advertising space in both its publications to advertisers located in the several States of the United States and has mailed copies of its publications to prospective customers throughout the nation. Respondent Foster Type and Equipment Company, Inc., for many years, has been purchasing products for resale from a number of suppliers located throughout the United States and it causes these products to be transported from the place of manufacture or purchase without the State of Pennsylvania to its place of business within said state and to its customers located in various States throughout the United States. The respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.⁵

III

OWNERSHIP AND OPERATIONAL CONTROL OF CORPORATE
RESPONDENTS BY INDIVIDUAL RESPONDENT

5. Respondent Irvin J. Borowsky (whose first name is incorrectly spelled in the complaint as "Irwin") is president of each of the corporate respondents. He formulates, directs, and controls the acts and practices of the corporate respondents, including the acts and practices set forth in the complaint. His address is the same as that of the corporate respondents.⁶

6. During the years 1957, 1958, and until May 1, 1959, the officers of Foster Type and Equipment Company were Irvin 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

⁴ Admitted in answers by each respondent at p. 1.

⁵ Admitted in answers by each respondent at p. 2.

⁶ Admitted in answers by each respondent at p. 1.

respondent Irvin 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 retained 90%.⁷

7. Since the date of its incorporation, Foster Publishing Company's outstanding shares of stock have been owned entirely by respondent Irvin Borowsky, president and treasurer of the publishing company. His wife Beverly Borowsky is secretary.⁸

8. Respondent Irvin Borowsky has at all times exercised control and supervision of the day to day, week to week, and month to month operation of Foster Publishing Company, Inc. Respondent also formulated, directed, and controlled the acts and practices of Foster Type and Equipment Company at least until February 1, 1960, the date on which he and the two corporate respondents filed their answers with the Commission and made this admission.⁹

IV

THE PUBLICATION "PRINTING IMPRESSIONS"

9. The publication known as "Printing Impressions" was created by respondents and existed for the purpose of being used as a corporate means of furthering the printing equipment business of Foster Type and Equipment Company and of the manufacturers and suppliers whose products are bought and resold by said Foster Type and Equipment Company. Respondents gave notice to their suppliers of the above-stated purpose in letters signed by respondent Irvin J. Borowsky who signed such letters sometimes as president of Foster Type and Equipment Company, Inc.,¹⁰ and at other times as president of Foster Publishing Company, Inc.¹¹

10. In some instances suppliers of respondent Foster Type and Equipment Co., Inc., in written replies to respondents, expressed their understanding that the publication Printing Impressions was being used by respondent Irvin Borowsky for the benefit of Foster Type and Equipment Company, Inc.

The Wetter Numbering Machine Company writing to I. J. Borowsky stated in part as follows:¹²

* * * Thank you for your letters of May 14 and 26 [CX 12 and 13] outlining the plans and policies that have been established for your new publication Printing Impressions.

⁷ CX 2A, Tr. 144-145; Tr. 300, 482, CX 2A.

⁸ CX 2A, Tr. 303.

⁹ Tr. 304; answers, p. 1.

¹⁰ CX 15A-B; 19A-C.

¹¹ CX 6A-F; 7A-F; 8A-F; 9A-F; 10A-F; 12A-B; 13A-D; 14A-D; 17A-C; 18A-B; 22A-B.

¹² CX 11A-B.

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The several details that were not entirely clear have now been clarified through the additional information that you gave us during our recent telephone conversations, and we would appreciate your reserving for us space for 12 Wetter ads 4' x 5' * * * net cost for the twelve issues of \$1,584,000.

We understand that it will be your policy not to accept advertising from any competitive manufacturer of typographic numbering machines whom you do not represent, and further that the Foster Type Equipment Company will order from us within a reasonable period of time, machines, parts, or accessories in the amount equal to our net cost for the advertising for which we are contracting * * *.

This exchange arrangement was proposed by respondent I. J. Borowsky in the following words:¹³

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

Mr. Borowsky also stated:¹⁴

* * * Will you please send us * * * Photos of your products for our Type and Equipment Co. ads * * * In "these tight" money times our proposal to buy back every dollar you spend in advertising should be most beneficial to you * * *.¹⁵

11. In some cases the exchange arrangement of advertising in Printing Impressions in return for purchases of merchandise for resale by Foster Type and Equipment Company was actually consummated.¹⁶

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MERGER OF IDENTITY OF ALL RESPONDENTS

12. Consequently, the suppliers of Foster Type and Equipment Co., Inc., were on notice that Irvin Borowsky was actually operating that company and Foster Publishing Co., Inc., as parts of the same enterprise or as a joint venture for the benefit of both corporate participants. The publishing company, in its solicitations for advertising, committed the equipment company to buy merchandise from suppliers in return for their agreements to advertise in Printing Impressions and at times the equipment company solicited the suppliers to advertise in the publishing company's Printing Impressions.

The evidence does not adequately support respondents' position that the joint venture was revoked shortly after a formal announcement thereof and that a cease and desist order is not, therefore, in the public interest. It does not seem reasonable to assume that after a formal written announcement of the joint venture to secure adver-

¹³ CX 13C.

¹⁴ CX 12A.

¹⁵ CX 19A-C; CX 20; CX 22.

¹⁶ CX 67; 68; 69; 11A-C; 15A-B; 16; 18A-B; 19A-C; 20; 63; 64.

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tising for the benefit of the respondent participants that informal telephone calls alone to a few suppliers of Foster should be construed as vitiating the joint plan as to all suppliers, or that there was even a bona fide intention to do so. In fact, there is no evidence having substantial probative weight indicative of a change in the joint relationship of Foster Type and Equipment and Foster Publishing preceding the filing of the complaint and after the announcement of the joint relationship except the self-serving statements of Foster representatives.¹⁷

13. Since the publication *Printing Impressions* was represented to the suppliers by respondents Borowsky and Foster Publishing Company as "a cooperative means of furthering our printing equipment business and the manufacturers we represent" and because of the high degree of control obviously exercised by respondent Irvin Borowsky over both corporate respondents, any payments made to Foster Publishing Company, Inc., for advertising services were payments *for the benefit of* all respondents including Foster Type and Equipment Company, Inc., if not actually payments to the equipment company.

VI

THE SOLICITATION

14. Payments for advertising services were solicited by each and all of the respondents from the suppliers of Foster Type and Equipment Company. The answers of respondents admit that the "*Foster [Type and Equipment Company, Inc.]* sent out [to its suppliers] the letter set out in Paragraph Six of the complaint". Many of said letters were signed by the other two respondents.¹⁸

15. In their letters of solicitation, respondents offered advertising in return for payments from manufacturers represented by them and whose "lines we sell in our Foster Type and Equipment Co." Consequently, any such advertising payments were made in connection with respondents' offering for sale or sale of products bought from their suppliers or manufacturers.

VII

THE DISCRIMINATORY PAYMENTS

16. As a result of respondents' inducement, twenty-nine of the suppliers of Foster Type and Equipment Company, Inc., between

¹⁷ See also comments of Commissioner Kern in the Nuarc case Docket 7848 relating to identically proved facts at pages 3 through 8, and Tr. 882 re Foster, Docket 7698.

¹⁸ CX 6A-F; 7A-F; 8A-F; 9A-F; 10A-F; 12A-B; 13A-D; 14A-D; 17A-C; 18A-B; 22A-B.

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June 1958 and December 1959, made payments to respondents for advertising services in a total amount exceeding \$47,500.

17. Many of the suppliers who made payments for such advertising services to or for the benefit of Foster Type and Equipment Company, Inc., did not offer or otherwise make available such payments to their customers who were in competition with Foster Type and Equipment Company, Inc.¹⁹

VIII

KNOWLEDGE

18. Respondents knew or should have known that the payments for advertising services which they solicited and received were not offered or made available to the competitors of Foster Type and Equipment Company. Respondent Irvin Borowsky testified that none of the suppliers of the equipment company made offers of cooperative advertising since Foster Publishing Company went into business in 1958.²⁰ He also testified that during 1955, 1956, and 1957, out of its 400 to 500 suppliers, only five offered cooperative advertising allowances or payments to Foster Type and Equipment Company.²¹ Not one of the competitors of Foster Type and Equipment Company received any kind of offer of payment or allowance for advertising services from any of the suppliers listed in Appendix A hereof. A buyer who induces a seller to depart from his customary pattern of granting no allowances and obtains a payment for advertising services does so at his peril in the absence of evidence indicative of reasonable inquiry to assure the buyer that his competitors who are customers of the sellers, are receiving a proportionally equal allowance to that granted him. See *F.T.C. v. American News Company*, Docket No. 7396, Commission's decision of January 10, 1961; see also, opinion of United States Circuit Court of Appeals, Second Circuit, in deciding this case on review, February 7, 1962. If anything, the evidence circumstantially suggests that respondents knew Foster Type and Equipment Company was receiving a preferential allowance. There is certainly no evidence of inquiry which would meet the requirements of the *American News Company* case *supra*.

19. The respondents have knowingly induced and received payments of money and credits in consideration for advertising services furnished by respondents in connection with respondents offering for sale and sale of products sold to respondents by many of their sup-

¹⁹ See the attached enumeration (Appendix A) [p. 18 herein] accurately setting forth as evidenced, some of these suppliers.

²⁰ Tr. 151-152.

²¹ Tr. 197-199.

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pliers. Furthermore, they knew or should have known such payments were not made available on proportionally equal terms to all other customers of such suppliers competing with respondents in the sale and distribution of such suppliers' products.

Respondents request the hearing examiner to reconsider the decision of the U. S. Court of Appeals for the Seventh Circuit in *State Wholesale Grocers v. The Great Atlantic & Pacific Tea Co.*, 258 F. 2d 831, which formed the basis for the legal position of counsel in support of the complaint, in light of the wholly different facts in the instant case.

It is pointed out by respondents that, irrespective of the initial decision in this matter, new evidence demonstrates that any payments to Foster Type are not disproportionate since all competitors of Foster Type testified they had received without limit costly direct mail and other promotional materials from all suppliers.

This evidence fails to negate any inference which may be reasonably drawn from the evidence that respondents knew or should have known that any payments which they received for advertising services were not offered or made available to competitors of Foster Type on proportionally equal terms or that equivalent allowances were in fact granted on proportionally equal terms.

The Commission has established that specific discriminatory advances for advertising were made by suppliers to Foster Equipment via Foster Publishing, its joint venturer. The burden is then upon the respondents if they wish to take advantage of the exception to show that the promotional materials were not disproportionate to the advertising allowances proved. Respondents' evidence in this respect is too vague and conjectural in establishing the dollar value of the promotional material to justify a conclusion that such promotional material is the dollar equivalent of payments for the benefit of Foster Equipment.

IX

CIRCULATION REPRESENTATIONS

20. In the course and conduct of their business, and for the purpose of inducing the sale of advertising space in their publication, "Printing Impressions National Edition", respondents have made certain statements with respect to the circulation of said publication in letters, advertisements and in said "Printing Impressions National Edition" of national circulation, of which the following are typical:

Circulation 60,000 and Circulation of both publications [Graphic Arts Monthly and Printing Impression] the same.

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21. Said statements and representations were true and not misleading or deceptive as evidenced by the following:

CIRCULATION ANALYSIS OF PRINTING IMPRESSIONS, NATIONAL EDITION,
SEPTEMBER 1958 TO DECEMBER 1959

Date	Billed from printer	Mailed 3d class	Mailed 1st class, Europe and Canada	Total circulated
Sept. 1958.....	66,000	64,103	1,897	66,000
Oct. 1958.....	60,000	55,094	*2,956	60,000
Nov. 1958.....	60,000	53,402	**5,398	60,000
Dec. 1958.....	60,000	58,513	1,487	60,000
Jan. 1959.....	61,000	53,276	7,724	61,000
Feb. 1959.....	61,000	56,945	4,055	61,000
Mar. 1959.....	61,000	60,973	27	61,000
April 1959.....	61,000	59,933	1,067	61,000
May 1959.....	63,000	62,271	729	63,000
June 1959.....	60,000	56,659	3,341	60,000
July 1959.....	60,000	56,569	3,431	60,000
Aug. 1959.....	59,000	58,192	***2,808	61,000
Sept. 1959.....	85,000	60,588	****1,812	78,400
Oct. 1959.....	61,500	60,329	1,171	61,500
Nov. 1959.....	62,300	59,451	2,849	62,300
Dec. 1959.....	61,500	59,257	2,243	61,500

*1,950 copies of Printing Impressions were distributed at Business Show in New York City.

**1,200 copies of Printing Impressions were distributed at Canadian Graphic Arts Conference in Montreal.

***Printer had large spoilage. Billed for 59,000 copies but gave 2,000 lesser quality copies at no charge.

****16,000 copies of Printing Impressions were distributed at 7th Graphic Arts Exposition at New York City.

22. During the period September 1958 through September 1959 the average circulation of Printing Impressions was equal to or in excess of 60,000.

23. The representation that the circulation of the National Edition of Printing Impressions was the same as Graphic Arts Monthly was substantially true.

24. In the conduct of their business since 1958, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of advertising space in national publications of the same general kind and nature as that sold by respondents.

X

CONCLUSIONS

As charged in Count I of the complaint the acts and practices of respondents, as hereinbefore alleged, of inducing and receiving special payments or allowances from their suppliers which were not made available to competitors, are all to the prejudice and injury of competitors of respondents and of the public; have the tendency and effect of obstructing, injuring and preventing competition in the sale and distribution of printing supplies and equipment and have the tendency to obstruct and restrain and have obstructed and restrained commerce in such merchandise; and constitute unfair methods of

competition in commerce and unfair acts and practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

Contrary to the charges in Count II of the complaint the respondents have not used false, misleading and deceptive statements, representations and practices which have had and now have the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that these representations were and are true and into the purchase of substantial amounts of advertising space in "Printing Impressions National Edition" by reason of any erroneous and mistaken belief. As a consequence thereof substantial trade in commerce has not been, and is not deemed, unfairly diverted to the respondents from their competitors and substantial injury has not thereby been, and is not being, done to competition in commerce.

Aside from other reasons heretofore discussed, respondents urge that the instant proceeding should be dismissed for lack of public interest since on June 18, 1962, the assets of Foster Type and Equipment Company, Inc., were purchased by Phillips & Jacobs, Inc., and a restrictive covenant under the terms of a purchase agreement prohibits Foster Type and Borowsky from competing as set forth in Respondents' Exhibit 70, for identification. This document, as well as other evidence, was rejected by the hearing examiner since his authority pursuant to the order of remand was specifically limited to the receipt of "additional evidence identifying the products and lines of products purchased by Foster Type and its competitors from suppliers allegedly induced by respondents to make payments violative of Section 2(d), as well as evidence bearing on the issue of competition between Foster Type and other distributors in the resale of goods involved in the alleged violation of law." The examiner was also specifically directed "to receive additional testimony on the availability or unavailability of payments for advertising or promotional services to distributors competing with Foster Type in the resale of such products."

Respondents' evidence relating to public interest concerning events which occurred subsequent to the issuance of the hearing examiner's initial decision on July 17, 1961, was received by the hearing examiner as a proffer of proof only so that the Commission could have a complete record before it in the event they wish to take cognizance of the rejected proof offered by respondents suggesting that a cease and desist order would only resolve an academic issue.

Since the hearing examiner's decision is premised upon adducible evidence as limited by the Commission order, it is concluded that this

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proceeding is in the public interest and that the following order shall issue:

ORDER

It is ordered, That the respondents Foster Publishing Company, Inc., and/or its successor in name, North American Publishing Co., and Foster Type and Equipment Company, Inc., corporations, and Irvin J. Borowsky, individually and as an officer of the corporate respondents, their officers, employees, agents or representatives, directly or through any corporate or other device, in or in connection with the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of printing equipment and supplies and graphic arts equipment and supplies for resale by respondents, do forthwith cease and desist from:

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

It is further ordered. That Count II of the complaint is herein and hereby dismissed for lack of evidence supporting the allegations thereof.

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APPENDIX A
Respondent's sales area: *The Delaware Valley, which encompasses Eastern Pennsylvania, Southern New Jersey and the State of Delaware; also certain areas in Maryland and Western Penn.* (TR. 669)

Competitors of respondent to whom no advertising, or payment, offer, or anything in lieu thereof was made by suppliers	Suppliers paying Foster and not competitors	Product lines involved	Sales area	Amount paid Foster in 1958-1959 (C.X.A.&B)	Competitor-distributor named by witness selling same line of products in same area
Franklin Printers Supply Company (TR. 715).	American Type Foundry Company (TR. 715). Anchor Chemical Company (TR. 719). Nolan Corporation (TR. 722). Nix-ARC Company (TR. 723). Pioneer Toledo Company (TR. 727). W. A. Brown Manufacturing Company (TR. 747). Craftsman Line-up Table Company (TR. 748). Mark Specialty Company (TR. 749). Nix-ARC Company (TR. 753). Leedal Company (TR. 755).	Printing machinery, book binding machinery (TR. 716). Type wash, cleaning chemicals; TR-228 Solution (cleaning rollers); Numbers and ink cleaner; Round base (cleaner for Linotype and offset presses) (TR. 719; Resp. TR. 685); electric units for heating lead. (TR. 728; Resp. TR. 695). Photomechanical equipment (machines needed to make photo engravings and lithographs) (TR. 698 Resp.; TR. 725). Paper drilling machinery (TR. 727-8; Resp. TR. 706). Photomechanical equipment (entire line) (TR. 747-Resp. TR. 678). Line-up tables used in photo engraving field (TR. 748 Resp. TR. 681). hundreds of miscellaneous items for printing industry such as razor blades, knives, wood cutting tools, etc. (TR. 749; Resp. TR. 692). Photomechanical equipment such as sinks, tables, X-rays for developing and other uses (TR. 753; Resp. TR. 698). tanks, sinks, trays used in photo developing (TR. 755; Resp. TR. 700).	Middle Atlantic States Pennsylvania, New Jersey, Delaware, New York, including Philadelphia (TR. 715). Same. Same. Same. Same. Same. Pennsylvania, New Jersey and Delaware (Phil. office covers eastern Penn.) (TR. 746). Same. Same. Same. Same.	\$1,677.90 2,757.20 150.00 2,320.86 1,359.00 1,006.72 2,484.00 120.00 2,320.86 142.80	<i>Poster Type and Equipment</i> , Northern Machinery Works, Michael Carlson (TR. 716). <i>Poster Type and Equipment</i> ; H. David Siegfried; Bingham Roller (TR. 720). <i>Poster Type and Equipment</i> ; Michael Carlson, Northern Machine Works R.W. Hartnett (TR. 723). <i>Poster Type and Equipment</i> ; Northern Machine, Michael Carlson; R.W. Hartnett; American Type Foundry (TR. 725). <i>Poster Type and Equipment</i> ; Michael Carlson and Northern Machine; R.W. Hartnett (TR. 727-8). <i>Poster Type and Equipment</i> ; Eastman Kodak Stores (TR. 748). <i>Poster Type and Equipment</i> ; Eastman Kodak (TR. 749; TR. 681). <i>Poster Type and Equipment</i> ; Roberts and Porter; Eastman Kodak (TR. 750). <i>Poster Type and Equipment Company</i> (TR. 698). <i>Poster Type and Equipment</i> ; Eastman Kodak Stores (TR. 756; Resp. TR. 700).

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R. W. Hartnett Company (TR. 780).	Macbeth Lamp Company (TR. 756). H. S. Royd Company (TR. 758).	A-R-C Lamps and Carbons used in photo lamps for bulbs (TR. 756; Resp. TR. 701). (TR. 755; Resp. TR. 700).	Same	334.90	Poster Type and Equipment Company (Resp. TR. 702).
	American Wood Type Company (TR. 782).	hundreds of miscellaneous printing supplies for graphic arts industry (TR. 685; TR. 782).	Pennsylvania, New Jersey and Delaware (Phil. office covers eastern Penn.) (TR. 746).	354.45	Poster Type and Equipment Company; Roberts and Porter (TR. 758).
	Challenge Machinery Company (TR. 784).	Drills, drill blocks, paper cutters, drilling machines. (TR. 784; Resp. TR. 704).	Philadelphia, eastern Pennsylvania Camden, Phil. suburbs. (TR. 784).	364.65	Poster Type and Equipment, Franklin Printing Supplies. (TR. 782).
	Wetzel Numbering Machine Company (TR. 787).	Numbering Machines (TR. 787).	Same	147.05	Poster Type and Equipment Company; Northern Machine Works; (TR. 785 Resp. TR. 704).
The Bingham Brothers Company (TR. 801).	Anchor Chemical Company (TR. 802).	Solvents used around type room, type wash, press, wash, roller cleaners (carried complete line) (TR. 803; Resp. TR. 686).	Same	2,206.50	Poster Type and Equipment Company (TR. 705).
	Anchor Chemical Company (TR. 841).	press room equipment on chemical, blanket wash-up roller wash-up sprays; cleaning chemicals (TR. 842; Resp. TR. 686).	Pennsylvania, east of Altoona to the New York State line north; in Jersey South of Trenton, and the State of Delaware. (TR. 802).	2,757.20	Poster Type and Equipment Company; H. David Siegfried Company, International Chemical Company, Pennel; T. J. Murphy (TR. 803, 808; Resp. TR. 686).
T. J. Murphy Company (TR. 840).	Nu-A-R-C Company (TR. 846).	Plate-making equipment; makeup tables (TR. 846; Resp. TR. 698).	Eastern Pennsylvania, Southern Jersey and New Castle County, Delaware (TR. 841).	2,757.20	Poster Type and Equipment Company; Poundell Company. (TR. 842).
	Challenge Machinery Company (TR. 848).	paper cutters and paper drills; drill bits (TR. 848; Resp. TR. 704).	Same	2,320.86	Poster Type and Equipment Company; Pendell (TR. 847; Resp. TR. 698).
	H. S. Royd Company (TR. 849).	Perf rules; thin metal strip that attaches to a printing press to perforate while printing (TR. 849; Resp. TR. 706).	Same	354.45	Poster Type and Equipment; Lithograph Multigraph (TR. 849; Resp. TR. 704).
Pendell & Co. (TR. 859).	Macbeth Lamp Company (TR. 859).	Carbons for arc lamps to expose offset plates; (TR. 860; Resp. TR. 701).	Same		Poster Type and Equipment Company (Resp. TR. 707).
	Anchor Chemical Company (TR. 861).	Blanket washes; type wash; line of cleaning chemicals (TR. 861; Resp. TR. 686).	Philadelphia, Wilmington, Reading, Lancaster, Easton, Allentown, Bethlehem and a small section of Jersey. (TR. 859).	334.90	Poster Type and Equipment Company; Phillips & Jacobs; Roberts & Porter; T. J. Murphy (TR. 860).
	Nu-A-R-C Company (TR. 862).	machines needed to make photo engravings (TR. 862; Resp. TR. 698).	Same	2,757.20	Poster Type and Equipment Company; Roberts & Porter, (TR. 861).
			Same	2,320.86	Poster Type, Phillips & Jacobs, Roberts and Porter (TR. 863).

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FINAL ORDER

This matter having been heard by the Commission upon respondents' exceptions to the initial decision after remand and upon briefs in support thereof and in opposition thereto; and

The Commission having considered said exceptions and briefs and the record herein, and having determined that the exceptions should be granted:

It is ordered, That the initial decision of the hearing examiner, filed January 24, 1963, be, and it hereby is, set aside.

It is further ordered, That the complaint be, and it hereby is,