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Complaint

Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

ACE BOOKS, INC., ET AL.

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

Docket 8557. Complaint, Mar. 5, 1963—Decision, June 18, 1965

Order requiring a New York City publisher of paperback books, and its affiliate, to cease violating Sec. 2(d) of the Clayton Act, by paying or contracting for the payment of promotional or display allowances to some of their customers while failing to make such allowances available on proportionally equal terms to all other competing customers.

COMPLAINT

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

PARAGRAPH 1. Respondent Ace Books, Inc., is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 23 West 47th Street, New York, New York. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including paperback books under copy-righted titles. Respondent's sales of such publications have been and are substantial.

Respondent Ace News Company, Inc., formerly a division of respondent Ace Books, Inc., is now a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 23 West 47th Street, New York, New York. Said respondent, among other things, has been engaged and is presently engaged in the business of distributing

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various publications including magazines and paperback books for the accounts of a number of publishers of such publications, including respondent Ace Books, Inc. In the year 1960, sales by respondent Ace News Company, Inc., for the accounts of the publishers it represents exceeded five million dollars.

PAR. 2. Publications published by respondent Ace Books, Inc. (hereinafter referred to as Ace Books), and by several other companies engaged in the business of publishing various publications, are distributed by such publishers to customers through their national distributor, respondent Ace News Company, Inc. (hereinafter referred to as Ace News).

Ace News has acted and is now acting as national distributor for the publications of several publishers, including respondent Ace Books. Ace News, as national distributor of publications published by said publishers, has performed and is now performing various services for these publishers. Among the services performed and still being performed by Ace News for the benefit of these publishers are the taking of purchase orders and the distributing, billing and collecting for such publications from customers. Ace News also participated and now participates in the negotiation of various promotional and display arrangements with the retail customers of the publishers it represents, including respondent Ace Books.

In its capacity as national distributor for several publishers including respondent Ace Books, in dealing with the customers of said publishers, respondent Ace News served and is now serving as a conduit or intermediary for the sale, distribution and promotion of publications published by said publishers.

PAR. 3. Respondent Ace Books, through its conduit or intermediary, respondent Ace News, has sold and distributed and now sells and distributes its publications in substantial quantities in commerce, as "commerce" is defined in the Clayton Act, as amended, to competing customers located throughout various States of the United States and in the District of Columbia.

Respondent Ace News, for the accounts of the publishers it represents as national distributor, has sold and distributed and now sells and distributes the publications of such publishers in substantial quantities in commerce, as "commerce" is defined in the Clayton Act, as amended, to competing customers located throughout various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of their businesses in commerce respondents Ace News and Ace Books have paid or contracted for

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the payment of something of value to or for the benefit of some of their customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of publications sold to them by said respondents. Such payments or allowances were not made available on proportionally equal terms to all other customers of said respondents competing in the distribution of such publications.

PAR. 5. As an example of the practices alleged herein, respondent Ace News has made payments or allowances to certain retail customers, some of which operate chain retail outlets in railroad, airport and bus terminals, as well as outlets located in hotels and office buildings. Such payments were made with the approval of the publishers represented by respondent Ace News, including respondent Ace Books, and were charged by Ace News to the accounts of such publishers. Such payments or allowances were not offered or otherwise made available on proportionally equal terms to all other customers (including drug chains, grocery chains and other newsstands) competing with the favored customers in the sale and distribution of the publications of said publishers. Among the favored customers receiving such payments for promoting the publications of respondent Ace Books during the year 1960 and the first six months of 1961 were:

Customer:	Approximate amount received
Fred Harvey, Chicago, Illinois.....	\$3,101.86
A.I.O. Distributors, Boston, Mass.....	209.66
Marshall Field, Chicago, Illinois.....	132.99
Airport Canteen, Chicago, Illinois.....	272.61
Universal News, Washington, D.C.....	234.32

Respondent Ace News also made similar payments in substantial amounts on behalf of other publishers represented by it, which payments were charged by it to the accounts of such publishers.

Such payments were made by respondent Ace News to its favored customers on the basis of individual negotiations, and, even among the favored customers, such payments were not made on proportionally equal terms.

PAR. 6. The acts and practices of respondents as alleged above are in violation of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended.

Mr. Stanley M. Lipnick for the Commission.

Mr. Jerome N. Wanshel, Larchmont, N.Y., for the respondents.

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INITIAL DECISION BY WILMER L. TINLEY, HEARING EXAMINER

MARCH 31, 1964

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The Federal Trade Commission, on March 5, 1963, issued and subsequently served its complaint, charging the respondents named in the caption hereof with violations of subsection (d) of Section 2 of the Clayton Act, as amended. Answers to the complaint, filed on April 11, 1963, and subsequently amended in some respects, made limited factual admissions, but generally denied the violations charged, and included certain special defenses.

Another hearing examiner was originally designated in this proceeding, and substantially all of the prehearing procedures herein were before him. In addition to considering and disposing of a variety of motions during the prehearing procedures, the original hearing examiner held prehearing conferences on June 5 and 13, 1963, on the basis of which he entered a prehearing order on July 2, 1963; he certified to the Commission the necessity of holding hearings in more than one place, and leave to do so was granted by the Commission on July 5, 1963; and on July 15, 1963, he scheduled the initial series of hearings.

The present hearing examiner was substituted in the place and stead of the original hearing examiner on July 16, 1963, and a motion by counsel for respondents, filed July 22, 1963, to set aside the substitution, was denied by the Commission on July 26, 1963.

The hearings began in New York, New York, on July 30, 1963, and at the outset the present hearing examiner ordered that the record theretofore made in the proceeding be incorporated in, and made a part of, the record before him, and adopted as his own the orders and rulings made by the original hearing examiner (Tr. 188).

Counsel were afforded the opportunity to withdraw from any stipulations of fact into which they had theretofore entered, and to submit motions with respect thereto or otherwise with respect to altering or modifying any part of the record theretofore made (Tr. 193-7). Such motions were considered and disposed of in regular course. The transcript of the prehearing conferences (Tr. 1-182), which was incorporated in the record (Tr. 199-204), was subsequently stricken at the request of counsel (Tr. 964-76). Accordingly, it does not constitute a part of the record for consideration in this case, but the prehearing order of the original hearing examiner continued in effect, except for certain modifications which were required by developments in the course of the proceeding.

Hearings were held in New York, New York, on July 30 and 31, and August 1; in Chicago, Illinois, on August 5 and 6; in Washington, D.C., on August 8 and 9; and in New York, New York, on August 12 through 15, 1963. For reasons set out in a certificate of necessity to the Commission on August 21, 1963, it was necessary to grant an interval for the purpose of receiving further defense and rebuttal evidence, and, following the Commission's approval on August 27, 1963, the concluding hearings were held in New York, New York, on October 21 and 22, 1963.

The transcript of testimony, excluding the prehearing conference transcript which was stricken, covers 2100 pages. Certain facts were officially noticed at the request of counsel; and over 80 exhibits offered in support of the complaint and over 50 exhibits offered on defense, many consisting of multiple pages, were received in evidence, and a few exhibits were rejected. Extensive and comprehensive proposals, and replies thereto, were filed by counsel for the parties.

The record was closed for the reception of evidence on October 22, 1963, and under Section 3.21(a) of the Commission's Rules of Practice the initial decision was due on January 20, 1964. Pursuant to a request filed by the hearing examiner on December 16, the Commission, on December 20, 1963, extended the time for filing the initial decision to March 31, 1964.

After having carefully considered the entire record in this proceeding and the proposals and contentions of the parties, the hearing

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examiner issues this initial decision. Findings proposed by the parties, which are not adopted herein, either in the form proposed or in substance, are rejected as not being supported by the record, or as involving immaterial matter.

The limited specific references herein to the testimony and exhibits, and to other parts of the record, are intended to be convenient guides to the principal evidence supporting particular findings, do not represent complete summaries of the evidence which was considered in making such findings. Such references are made in parentheses, and the abbreviations used therein are intended to refer to parts of the record as indicated in the following list:

PHO—Pre-hearing Order of July 2, 1963, adopted in pertinent part at Tr. 239-42, 269-70, 740-3.

Tr.—Transcript of testimony.

CX—Commission exhibit.

RX—Respondents exhibit.

CB—Proposals and brief filed by counsel supporting the complaint on November 26, 1963.

RB—Proposals and brief filed by counsel for respondents on November 26, 1963.

CRB—Reply to respondents' proposals filed by counsel supporting the complaint on January 20, 1964.

RRB—Reply to proposals of counsel supporting the complaint filed by counsel for respondents on January 22, 1964.

Fi.—Numbered paragraphs in the Findings of Fact herein.

FINDINGS OF FACT

1. Respondent Ace Books, Inc. (hereinafter referred to as Ace Books), is a corporation organized under the laws of the State of New York in 1945, with its principal office and place of business presently located at 1120 Avenue of the Americas, New York, New York (PHO A-1-2).

2. Respondent Ace News Company, Inc. (hereinafter referred to as Ace News), is a corporation organized under the laws of the State of New York in 1956, with its principal office and place of business presently located at 1120 Avenue of the Americas, New York, New York (PHO A-1-2).

3. Since 1956, when Ace News was organized, the respondents have been owned by the same persons, have had the same officers, and have been located at the same addresses (PHO A-4). The president and controlling authority of the respondents is Aaron A. Wyn, who has long been engaged in the business of publishing books and in distributing books and magazines through various corporate enterprises. He has been in the industry more than thirty years (Tr. 236, 336), and during that period has been more actively engaged

in publishing (Tr. 247). Prior to 1951, the publications of corporations headed by Mr. Wyn had been distributed by Kable News Company, a national distributor independent of the respondents (Tr. 250-1). In that year, however, Mr. Wyn discontinued using Kable News Company, and entered the field of national distribution through one of his corporate enterprises, the business of which, after going through at least two corporate changes, became the respondent corporation, Ace News, in 1956 (PHO A-1 & 3; Tr. 237-50).

4. The complaint did not name Mr. Wyn as an individual respondent in this proceeding. In an order, filed September 25, 1963, the hearing examiner, for reasons there set out in detail, denied as untimely a motion to amend the complaint by adding Mr. Wyn as an individual respondent. The common direction and control of the respondent corporations by Mr. Wyn is, however, an important consideration in determining the extent of their interrelationship and the proper scope of any order which may be entered herein. It is abundantly clear from the record that, regardless of their corporate form, all of the past and present publishing and distributing enterprises headed by Mr. Wyn, including the present respondents, have operated under his direction and control, and that he has actively participated in their affairs. Ace Books and Ace News, accordingly, have constituted, and now constitute, parts of a single enterprise engaged in the conduct of the related business affairs of Mr. Wyn.

5. Ace Books, during the times involved herein, was and is engaged in the business of publishing paperback books, some under copyrighted titles (PHO A-3). Approximately 75% to 85% of the books published by it are distributed through Ace News (PHO A-6), some of the remainder apparently being sold by Ace Books directly to retail accounts (Tr. 387, 1805).

6. Ace News is engaged in the business of distributing paperback books and magazines as a national distributor. With one unidentified exception, all the paperback books distributed by it are published by Ace Books (Tr. 296, 1806), and approximately 15% to 20% of its total sales are represented by such books (PHO A-4). It distributes the magazines of a number of publishers. Four of the magazines, which it formerly distributed, were published by Ace Publications, Inc. (PHO A-3), a corporation headed by Mr. Wyn (Tr. 237-9), and during that period approximately 45% to 50% of the sales of Ace News were represented by the publications of Ace Books and Ace Publications, Inc. (PHO A-4). Ace Publica-

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tions, Inc., has gone out of business and no longer publishes magazines (PHO A-3). There is no contention that the other publishers, whose magazines are distributed by Ace News, are affiliated with it (also see CX 39A-B, and Tr. 1679-89).

7. It was stipulated that since 1960 the net sales of paperback books by Ace Books have been in excess of \$500,000 per year, and the net sales of all publications by Ace News have been in excess of \$3,500,000 per year (PHO A-5). A compilation of the net sales from the records of Ace News for 1960 and the first five months of 1961, however, suggests that the actual volume of sales was substantially in excess of these stipulated figures (CX 39A-B; Tr. 1679-88). In any event, it is evident from the stipulated figures that the business of the respondents involved in this proceeding is substantial.

Interstate Commerce

8. Respondents contend that Ace Books is engaged solely in intrastate commerce and, accordingly, that the Commission has no jurisdiction over its practices (RB 22-25).

9. The paperback books published by Ace Books are printed for it by independent printers in Buffalo, New York (Tr. 288, 1752, 1870). Ace News has the exclusive right to sell and distribute Ace Books, except for some sales by Ace Books directly to retail accounts. The contract between Ace Books and Ace News in effect prior to the latter part of 1961 is represented by CX 2, and thereafter by CX 3, but there was no substantial change in the manner of operation under the two contracts when the latter was adopted (Tr. 285, 296-8, 1805).

10. Under these contracts, it is the responsibility of Ace Books to deliver its books, or to cause its books to be delivered at its own cost, to the wholesalers in accordance with the shipping instructions of Ace News (CX 2 and 3). Ace News instructs the printer how many copies of each book to ship to each wholesaler supplied by Ace News. On the basis of such instructions, Ace Books are shipped by the printer from Buffalo, New York, directly to wholesalers located throughout the country (Tr. 288-90), including wholesalers located in Chicago, Illinois, and Washington, D.C.

11. In such circumstances, it is not necessary to determine precisely at what time or place Ace Books parts with title or possession of the books. It orders the printing of the books, and causes them to be delivered, upon the order of Ace News, to the wholesalers. The interstate shipment of the books in an essential part of the trans-

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actions, and in such transactions both of the respondents are engaged in interstate commerce. (*F.T.C. v. Pacific States Paper Trade Ass'n.*, 273 U.S. 52, 64 (1927). Also see *Shreveport Macaroni Mfg. Co. v. F.T.C.*, 321 F. 2d 404 *cert. denied* January 6, 1964.) Wholly apart from the fact that respondents constitute parts of a single enterprise, Ace Books is engaged in interstate commerce in the sale of paperback books and in their interstate shipment to wholesalers.

Consignment

12. Respondents also contend that all sales by Ace News are consignment sales, and are therefore outside the purview of Section 2(d) of the Clayton Act (RB 26-33). This is urged with great earnestness and warrants careful consideration. In this connection it is appropriate to discuss the method of distributing publications which generally prevails in this industry, and which is employed by Ace News.

13. With a few exceptions, there is only one wholesaler in a particular local territory (Tr. 370, 382), and that wholesaler handles the publications distributed by various national distributors (Tr. 754-5, 1968-70). In Washington, D.C., where there are two wholesalers, the publications distributed by Ace News are handled by only one of them (Tr. 1081). The wholesaler dominates and controls the distribution of publications in his local area, and, because of its relative size, Ace News sometimes has difficulty in getting the wholesaler to handle its line at all, or to handle its entire line (Tr. 1863-4).

14. The publications received from various national distributors are delivered to retail newsstands by the wholesalers. When deliveries are made, the wholesalers pick up "returns" from the retailers, that is, unsold copies of publications which have become obsolete. The retailers are credited with the returns, and are billed for the difference between that credit and the publications currently delivered. The returns received from retailers, together with obsolete publications which were not delivered to retailers, are returned by the wholesalers to the national distributors for credit, who, in turn, receive a credit for returns from the publishers (Tr. 756-8, 782-4). The return for credit of unsold publications is a universal practice of the industry at every level of distribution, and the ultimate responsibility for reimbursement or credit for returns is upon the publishers (CX 2, 3; Tr. 848-9).

15. The granting of credit for the return of unsold publications does not constitute any indication that sales or shipments in this

industry are on consignment, or that title is retained in the publisher, or any other shipper, until ultimate sale of the publication to the consumer. In fact it is urged by respondents that the publisher, Ace Books, sells its books outright to Ace News (RB 23, 29), and that such sales are not on consignment.

16. Ace News distributes books and magazines to approximately 750 wholesalers located throughout the United States (PHO A-7; Tr. 290-1), under the terms of a written contract which it enters into with each of them (Tr. 323). It appoints each wholesaler to a designated territory, and agrees to "sell" the publications to the wholesaler in the quantities which, in the opinion of Ace News, are necessary to satisfy the requirements of that territory, at prices fixed by Ace News from time to time. It is agreed that the wholesaler will pay for the publications in accord with a fixed time schedule, and will be credited for the return of unsold copies. It is also agreed that title to all such publications shall remain in Ace News "until actually sold by the wholesaler" (CX 10; Tr. 234, 320-3).

17. Claims for loss of, or damage to, publications in the hands of wholesalers have been paid to Ace News by its insurance company, based upon the determination that Ace News had title to, or an insurable interest in, the publications (Tr. 2199-2253). Although there is evidence that the wholesalers purchase and sell the publications (Tr. 369, 371, 781, 809-10, 812-15, 821, 1868-9), this is not inconsistent with consignment "until actually sold by the wholesaler."

18. For the purposes of the issues here involved, therefore, it is assumed that Ace News has title to Ace-distributed publications in the hands of wholesalers "until actually sold by the wholesaler." With this assumption, it becomes crucial to resolve respondents' contention that the retailer is the agent of Ace News, and "that the wholesaler's distribution to the retailer is a part of the original consignment sale" (RRB 58).

19. The discriminatory payments involved in this proceeding are alleged to be granted to particular retailers, and not to wholesalers. Unless the wholesaler's distribution to the retailer is on consignment as an agent for Ace News, therefore, it is of small consequence for the purposes of the issues here involved whether or not sales by Ace News to wholesalers are on consignment. Primary attention must, accordingly, be focused on the evidence relating to the characteristics of the distribution to retailers.

20. There is no evidence of contracts between Ace News and retailers providing for the sale of publications by Ace News to or through retailers on consignment or otherwise (except in connection with

Union News Company, which will be discussed separately). If retailers receive such publications on consignment from Ace News, and sell them to consumers as agents for Ace News, such relationship must, therefore, be determined on the basis of evidence with respect to the course of dealing with retailers and collateral considerations.

21. Respondents contend that the evidence with respect to payment of insurance claims to Ace News demonstrates that title to the publications which it distributes is in Ace News while the publications are in the hands of the retailers, and, accordingly, that sales of such publications to retailers are on consignment (RB 30).

22. The policy under which Ace News insures publications specifically covers "completed books and similar merchandise . . . while in the custody of wholesale distributors" (RX 9K), but makes no specific reference to such publications in the possession of retailers. Evidence of losses paid by the insurance company relied upon by respondents relates only to merchandise in the hands of wholesalers (RB 30; RRB 54; RX 10-19). The testimony by the insurance company representative with respect to the payment of claims of Ace News related to loss or damage of merchandise while on the premises of the wholesalers (Tr. 2226, 2250).

23. It is apparent, therefore, that there is no evidence that insurance claims were paid to Ace News on publications in the hands of retailers. The evidence with respect to its insurance coverage, accordingly, lends no support to the contention that Ace News has title to publications in the hands of retailers.

24. Respondents contend, however, that in instances of nonpayment or insolvency by the retailer, Ace News picked up the publications it had shipped (RB 30, 31). Evidence to this effect is sparse and inconclusive.

25. Mr. Wyn testified that a number of times Ace News has recovered possession of unsold copies of its publications from retailers, stating:

We have always taken the position that these copies are our property. We own them until they are sold and paid for. (Tr. 339.)

This line of examination was not further pursued. The retailers involved were not identified, the circumstances under which recovery was made were not disclosed, and there is nothing to indicate whether recovery was based upon retained title, lien, chattel mortgage, or other considerations. Mr. Wyn's opinion, standing alone, does not establish that Ace News had title to publications in the hands of retailers.

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26. In an instance in which a wholesaler went out of business, Ace News picked up from 53 retailers supplied by the wholesaler their stocks of Ace books and Ace-distributed magazines (RX 20; Tr. 1785-91, 1874-76). The basis upon which Ace News asserted the right to repossess the publications from the retailers is not disclosed, and the evidence falls far short of establishing that in this instance, or generally, Ace News had title to publications in the hands of retailers. It is of some significance that even in this instance counsel for respondents took the position that the retailers were not customers of Ace News (Tr. 1875).

27. Respondents also urge that retailers testified that they were consignees dealing on a consignment sale basis, citing for support of this contention pages 889 and 1049 of the transcript (RRB 56-57). A retailer in Chicago testified that he obtains books and magazines from the local wholesaler and pays for them "on consignment" (Tr. 889). The retailer in this instance was a layman with no understanding of the legal significance of the term "on consignment." He was testifying that he paid the wholesaler every week for publications delivered to him, and consignment was the term he used to designate the practice under which he received credit for the return of unsold copies of publications. In the other record instance cited by counsel for respondents, a Chicago retailer testified that when his sales increased, the wholesaler increased deliveries to him (Tr. 1049). In another instance referred to by counsel for respondents (RRB 58), a wholesaler testified that his sales to retailers are "on consignment." He explained, however, that he actually meant "on a returnable basis" (Tr. 1086-88). None of these instances lends any support to the contention that retailers receive Ace-distributed publications on consignment from Ace News (also see Tr. 781).

28. Respondents also contend, for the first time in their reply brief, that the Ace symbol stamped upon the face of each publication conclusively establishes that such publications in the hands of retailers are the property of Ace News (RRB 28, 57). Such a contention is wholly in conflict with the evidence in this record.

29. Each national distributor uses an identifying symbol on the cover of publications which it distributes. The symbol identifies the distributor, and facilitates the assortment and return of unsold publications to the proper distributor for credit. For this purpose the Ace symbol appears on all publications distributed by Ace News (Tr. 287-88). In response to a question by counsel for respondents, Mr. Wyn testified that the Ace symbol has no other purpose (Tr. 356-57).

30. The Ace symbol serves to identify the source from which wholesalers receive the publications so marked, and is for their convenience in making returns. It does not carry with it any indicia of ownership or title to the publications at the various stages of distribution. The Ace symbol on the covers of publications distributed by Ace News, accordingly, lends no support to respondents' contention that retailers sell such publications as agents of Ace News.

31. The contention of counsel for respondents that retailers receive Ace publications on consignment and sell them as agents of Ace News is wholly inconsistent with the position which he took in the course of the hearings.

32. In an opening statement, counsel for respondents made it clear that he did not contend that the wholesaler is an agent of the distributor, but did contend that he is a purchaser on a consignment sale who buys the merchandise, and, "If he doesn't sell it he can sell it back." He contended that title passes from Ace News to the wholesaler when the wholesaler pays for the publications, and that the wholesaler then conveys title to the retailer (Tr. 223-4). Later, counsel for respondents stated that he did not contend that the sale from the wholesaler to the retailer is a consignment sale (Tr. 240-2).

33. The foregoing position of counsel for respondents is consistent with his position that retailers are not the customers of Ace News (Tr. 1875), and that the insurance of Ace News covers publications in the possession of wholesalers (Tr. 1314-15, 1775-6). It is also consistent with his position when, in examining Mr. Wyn, he characterized, with the approval of the witness, the wholesaler as an independent businessman who controls the distribution in his area (Tr. 370-1); and led the witness to say that Ace News has nothing to do with the negotiations between the wholesaler and the retailer (Tr. 369).

34. The foregoing position taken by counsel for respondents during the hearings tended to eliminate the question of consignment selling to retailers as an issue to be tried. Certain of the witnesses, who appeared and were in position to testify concerning the practice of the industry generally, and with particular reference to Ace publications, were not questioned as to whether retailers were purchasers of the publications they received, or were consignment agents of the national distributors or wholesalers.

35. Insofar as witnesses did testify on this point, their testimony was consistent with the conception that retailers are purchasers who resell for their own accounts. For example, the wholesaler in Chicago considered that the retailers to whom he supplied Ace publications were his customers, and that they purchased such publications from

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his company on a returnable basis (Tr. 814, 860; see also Tr. 781). There is also testimony that retailers ordinarily pay for a portion of the publications in their inventory, including Ace publications, before they are sold to consumers (Tr. 558, 760), and at least one retailer testified that he carried fire insurance on his stock (Tr. 1312).

36. Except to the extent that they may amount to stipulations, or otherwise result in the elimination of issues, statements by counsel do not constitute evidence, and should not be considered binding, particularly where they are in conflict or are inconsistent with evidence in the record. Statements by counsel of their positions and contentions in the course of hearings, however, should not be lightly made, and should constitute an accurate reflection of the position on which they intend to stand. This was fully recognized by counsel for respondents when, in stating his position, he said, "If there is anything that varies from what I am saying, I am cutting my own throat" (Tr. 223). When such statements are consistent with the direct evidence, or with its reasonable implications, they must, of course, be accorded considerable weight. This is especially true when, as in the present situation, they are inconsistent with contentions subsequently made by the same counsel.

37. Although Ace News retains title to the publications which it ships to wholesalers "until actually sold by the wholesaler," there is nothing in the arrangements which constitutes the wholesalers or the retailers as agents of Ace News. The purpose of Ace News in retaining title is for its financial security and safety (RB 26). It is clear from the whole record that, when sales are actually made by the wholesaler, title passes from Ace News to the wholesaler, and from the wholesaler to his customer, the retailer. The publications are sold by the wholesaler to the retailer, and such transactions do not constitute consignments to the retailer by or on behalf of Ace News.

The Payments In Issue

38. The complaint charged generally that the alleged unlawful payments were made by Ace News to "certain retail customers." It charged specifically that, among the favored customers receiving unlawful payments on Ace books during 1960 and the first six months of 1961, were: Fred Harvey, Chicago, Illinois, in the amount of \$3,101.86; A.I.O. Distributors, Boston, Massachusetts, in the amount of \$209.66; Marshall Field, Chicago, Illinois, in the amount of \$132.99; Airport Canteen, Chicago, Illinois, in the amount of \$272.61; and Universal News, Washington, D.C., in the amount of \$234.32.

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The complaint also charged, in effect, that similar unlawful payments were made by Ace News on magazines distributed by it (Par. 5).

39. No evidence was offered of payments to A.I.O. Distributors, and the allegations with respect to that company will, accordingly, be disregarded.

40. The evidence disclosed that display allowances were paid by or on behalf of Ace News during the period from January 1, 1960, to some time in June, 1961, to Fred Harvey, Chicago, Illinois, in the amount of \$4,493 (Tr. 500-3); and to Airport Canteen Service of Chicago, Illinois, in the approximate amount of \$272 (Tr. 500). In presenting his proposals, however, counsel supporting the complaint did not contend that the payments to Fred Harvey and to Airport Canteen were proved to be unlawful. It is unnecessary, therefore, to discuss the evidence concerning the allegations of the complaint with respect to these two retailers.

41. The evidence also discloses a special arrangement with Union News Company which counsel supporting the complaint contends is unlawful within the charges of the complaint. Further consideration herein will, accordingly, be confined to the evidence and issues concerning payments or allowances to Marshall Field, Universal News and Union News Company.

Marshall Field & Company

42. It was stipulated that, during the period from January 1, 1960, through some time in June, 1961, a display allowance totaling approximately \$132 was credited and directly paid by Ace News to Marshall Field & Company of Chicago, Illinois (hereinafter referred to as Marshall Field; Tr. 500). The only direct evidence in the record of the Ace-distributed publications, which were handled by Marshall Field, is an office memorandum of Ace News, dated July 18, 1959, which refers to a display allowance on Ace books (RX 59; Tr. 1983-86). It was offered in evidence by counsel for respondents in connection with the defense of meeting competition in good faith. It is inferred, therefore, that the stipulated allowance during the period from January 1, 1960, to some time in June, 1961, was also for the display of Ace books handled by Marshall Field.

43. Marshall Field and Carson, Pirie, Scott & Company (hereinafter referred to as Carson) each operates a large department store in downtown Chicago, Illinois. Those stores are located within two blocks of each other and compete generally in selling to the public at retail (Tr. 1014, 1017-20). The book department of Marshall

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Field is on its third floor, and is about five times larger than that of Carson. The book department of Carson is on two different floors, but Ace books are sold on the first floor which serves the mass market and impulse buyers of books (Tr. 1022-4). Although the locations and arrangements of the book departments of the two stores are different, they are both located in relatively high traffic areas of the stores, and there can be little doubt that they compete with each other to the extent that they handle the same lines of books (Tr. 1020-29).

44. Carson has handled Ace books regularly since 1959 (Tr. 1015), and it is found that, during the period from January 1, 1960, to some time in June, 1961, it competed with Marshall Field in selling them to the public. During that period Ace News paid an allowance totaling approximately \$132 to Marshall Field as compensation for displaying Ace books (Fi. 42), but did not pay any display or promotional allowance to Carson (Tr. 528, 1023).

Universal News

45. It was stipulated that, during the period from January 1, 1960, through some time in June, 1961, Ace News paid a display allowance to Universal News of Washington, D.C., totaling approximately \$234 (Tr. 498-9). This display allowance was on Ace books and not on magazines (Tr. 484-5).

46. The company referred to in the stipulation is Universal News and Book Store, Inc. (hereinafter referred to as Universal), which operates two retail stores in Washington, D.C., where it sells books, magazines and newspapers (Tr. 1266). It regularly sells books and magazines at the prices printed on the covers, commonly referred to as cover prices (Tr. 1278-9). Since at least the first of 1960, it has regularly handled in both of its stores Ace books and certain magazines distributed by Ace News which have been supplied to it by the local wholesaler of such publications, Atlantic Magazine Company, Inc. (Tr. 1266-75). Both of the stores of Universal are located on 14th Street, Northwest, one near New York Avenue, and the other near Pennsylvania Avenue, in areas of unusually heavy pedestrian traffic (Tr. 1277).

47. The Schrot Cosmopolitan News (hereinafter referred to as Schrot's), a retail newsstand and book store, is located at 603-15th Street, Northwest, Washington, D.C. (Tr. 1297). The business of Schrot's is similar to that of Universal, except that approximately one-third of Schrot's business is represented by foreign publications (Tr. 1298, 1325-6, 1347). Schrot's sells books and magazines at cover

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prices (Tr. 1307-8), and Ace books and magazines have been regularly supplied to Schrot's by Atlantic Magazine Company since at least the first of 1960 (Tr. 1134, 1298-1301).

48. Schrot's store and both of the Universal stores are located within about three blocks of each other in the heavy pedestrian traffic area of central downtown Washington, D.C., and derive a substantial portion of their business from transient, rather than regular, customers (Tr. 1277, 1279-80, 1293-4, 1304-7, 1347). It is the opinion of the operators of both companies, and of the wholesaler who supplies them with Ace books and magazines, that Schrot's competes with the stores of Universal in the sale of the products which they both carry (Tr. 1152, 1175, 1280, 1342, 1345-7). The record establishes, therefore, that Schrot's and Universal have competed with one another in the sale of Ace books since the first of 1960.

49. The evidence discloses that, on December 5, 1960, Ace News credited the account of the Atlantic Magazine Company in the amount of \$21.99 for display allowances in July, August and September by Atlantic to Schrot's; and that this was the only display payment or allowance by Ace News, directly or indirectly, to Schrot's during the period from January 1, 1960, to some time in June, 1961 (CX 30B-C; Tr. 530-36). Schrot's denied, however, that it received any payments or allowances for displaying Ace books and magazines during that period (Tr. 1309-11, 1315, 1323, 1332-3, 1353), and there is no evidence that the allowance of \$21.99 was actually passed on to Schrot's by Atlantic. In fact, in somewhat confusing testimony, the president of Atlantic testified that, prior to August, 1961, he did not receive anything over the regular discount from Ace News, and that he "did not have any discount program at all" (Tr. 1114; see also 1853-4). There is nothing to suggest that, even if the sum of \$21.99 had been passed on to Schrot's by Atlantic, it would have been proportionally equal on any basis to the sum of \$234 paid to Universal News during the period in question.

50. There is also considerable testimony with respect to a display discount of two cents per copy on Ace books to Schrot's, Universal, and others by Atlantic for which Atlantic was reimbursed by Ace News. The situation to which this testimony relates, however, began in the early part of August, 1961 (CX 36; Tr. 1098-1114, 1150, 1158-9, 1850-4). Accordingly, any such discounts were not made during the period here in question, which is from January 1, 1960, to some time in June, 1961.

51. Counsel for respondents contends that there is no proof that Universal ever received the \$234 payment (RRB 40). It was stipu-

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lated that Ace News paid the allowance to Universal (Tr. 498-9). That stipulation is controlling, and there is no countervailing evidence.

52. It is found, therefore, that, during the period from January 1, 1960, to some time in June, 1961, an allowance was paid by Ace News to Universal in the approximate amount of \$234 as compensation for displaying Ace books; that during the same period Schrot's competed with Universal in the retail sale of Ace books; and that during the same period Schrot's did not receive any payments or allowances for displaying Ace books.

Union News Company

53. Union News Company (hereinafter referred to as Union), which is a division of American News Company, operates approximately 500 retail newsstands in more than 20 cities throughout the country, located primarily in high traffic areas such as railroad and airport stations and hotels (Tr. 626-7, 630). Prior to proceedings by the Federal Trade Commission against publishers and national distributors, Union received an advertising allowance for every publication which it handled on its newsstands, and at the present time it is Union's policy not to handle any publication without an allowance. During a recent period of about eighteen months it handled a few well-known magazines without allowances, but that practice has been discontinued even with respect to those magazines (Tr. 718-20).

54. Union did not handle Ace books during 1960 and almost all of 1961, and during that period it handled only "Secrets," the top magazine distributed by Ace News, and possibly its next to top magazine (Tr. 691-2, 701). There is no contention that any unlawful allowance or payment was made by Ace News to Union during that, or any prior period (Tr. 2106-7, 2167).

55. Union had been approached many times by Ace News with respect to handling Ace books and Ace-distributed magazines, and had been offered the same allowances it had been receiving from others, but had rejected such offers because Union did not need the Ace-distributed publications (Tr. 701-2). Union accepted Ace-distributed publications generally for sale on its newsstands when other publishers and distributors would not make price arrangements with it (Tr. 702-3) because of proceedings against them by the Federal Trade Commission (Tr. 705-6).

56. On December 18, 1961, Ace News entered into two contracts with Union (CX 31 and 32) which are still in effect (Tr. 643; see

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61. From the foregoing, it is apparent that the 46% discount by Ace News to Union on Ace books was 26% in excess of the customary discount by wholesalers to retailers, and that at least 16% of that excess was specifically identified as compensation to Union for the display of Ace books on its newsstands. The discount to Union was also in excess of the 40% discount customarily given by Ace News to wholesalers on Ace books.

62. It is also apparent that the wholesale price given by Ace News to Union on magazines was from 20% to 25% less than the customary price by wholesalers to retailers on Ace-distributed magazines. Important among the considerations for that lower price, and clearly the controlling consideration, was the full cover display of Ace-distributed monthly magazines on Union newsstands, and the providing by Union of suitable facilities in high traffic areas for the sale of Ace-distributed magazines.

63. Under the contracts with Union, Ace-distributed publications are supplied to, and returned unsold copies are picked up from, the individual newsstands of Union at the expense of Ace News (Tr. 520-1). Deliveries and pickups of returns are made by the regular Ace News wholesalers in the various areas in which Union newsstands are located, and this method of delivery and service was contemplated when the contracts were entered into (Tr. 519). For this service the wholesalers are compensated by Ace News at rates substantially equivalent to their normal markups on their sales to other retailers (Tr. 522-3, 780-2, 1115-22).

64. Under these contracts monthly bills are ordinarily submitted by Ace News to Union on the basis of reports received from the whole-salers as to the quantity delivered and the quantity returned (Tr. 519-20). Deliveries are made from the regular stocks of the whole-salers from which they also make deliveries to other retailers (Tr. 784). The wholesalers are credited by Ace News for the publications which they deliver to Union plus the delivery or service charge (CX 51-53; Tr. 1727-30); and Union is billed by Ace News for the publications at the contract prices (CX 42-50; Tr. 1721-3).

65. The record discloses, therefore, that Ace-distributed publications are delivered to Union newsstands and to other retailers by the same wholesalers, in substantially the same manner, and with substantially the same service. For their deliveries and service to Union newsstands, the wholesalers are compensated by Ace News at rates substantially equivalent to their normal markups on sales to other retailers, without diminishing the discounts to Union. To the extent, therefore, that Ace News gives discounts to Union in excess of the

also Tr. 780-2). One of those contracts relates to Ace books (CX 31), and the other to magazines distributed by Ace News (CX 32). Although similar in many respects, these two contracts involve certain differences which warrant separate discussion.

57. Under the contract with respect to books, Ace News supplies Ace books to Union at 30% off cover prices (CX 31A), plus an additional 16%, amounting in the aggregate to 46%, in consideration of Union's devoting "a minimum of 25% of all facilities available at each retail outlet for the sale of paperback books to Ace books" (CX 31C). Under this contract each retail newsstand of Union displayed Ace books in 25% of the space available for paperback books (Tr. 517-18, 649-52, 677-9, 1866-7).

58. Under the contract with respect to magazines, those regularly distributed by Ace News, as listed in the contract, are supplied to Union at prices equivalent to the prevailing prices charged to the wholesalers in the same areas for the same publications (CX 32; Tr. 523). Among the considerations of the contract are the provisions that Union will provide suitable facilities in high traffic areas for the sale of the magazines, and that the full covers of the monthly magazines will be displayed on the Union newsstands (CX 32B). These provisions have been complied with (Tr. 677-9, 1866-7). These, together with the prices, were clearly the controlling provisions of the contract with respect to magazines, and the ones which influenced the parties to enter into it (Tr. 702-3).

59. It is customary in the industry for retailers to be billed by wholesalers at a discount of 20% off the cover prices of paperback books, and it is clear from the record that Ace books were billed to retailers by the wholesalers in Chicago, Illinois, and Washington, D.C., at that discount (Tr. 477, 639, 768-9, 1092, 1121-2). Since May 5, 1961, the published discount to wholesalers on Ace books, subject to some variations with certain wholesalers, has been 40% off the cover prices (RX 8; Tr. 1851-5, 1871).

60. It is customary in the industry for retailers to be billed by wholesalers at a discount of from 20% to 23% off the cover prices of magazines (Tr. 632-3, 771-2), but the normal discount to retailers on magazines is 20% off the cover price (Tr. 767-8). Ace-distributed magazines are billed to retailers by wholesalers in Chicago, Illinois, and Washington, D.C., at a discount of 20% off the cover price (Tr. 463-4, 767-8, 1092-3), and that is the discount suggested by Ace News (CX 15-18; Tr. 451). Discounts by distributors generally, and by Ace News specifically, to wholesalers is from 40% to 45% off the cover prices of magazines. (Compare magazines listed on CX 32 D and E with those listed on CX 15-18 and CX 51-53.)

discounts received by other retailers on Ace-distributed publications, it makes payments to Union as compensation or in consideration for the display of such publications on Union newsstands.

Consignment Re Union News

66. In his original proposals and brief, counsel for respondents characterizes the contracts with Union as direct retail customer consignment contracts (RB 51), and he characterizes a transaction under them as a "direct sale to a customer, without an allowance, on a consignment sale basis" (RB 52). He states that, "the ultimate sale to Union of each magazine and paperback book was specified" (RB 51). He also asserts that in their consignment provisions the contracts are "in essence basically similar to the usual Ace News consignment sale agreement vesting title in Ace News and applicable to all Ace News sales of magazines and paperbacks" (RB 51). In his reply brief, however, counsel for respondents urges that sales of Ace-distributed publications at the Union newsstands "are made pursuant to a consignment contract under which Union News is the agent of Ace News" (RRB 68). This seems inconsistent, on its face at least, with his position that the contracts specified "the ultimate sale to Union" of each magazine and paperback book.

67. Briefly stated, the contracts provide that title to the books and magazines supplied to Union shall remain in Ace News until full payment has been made for all copies sold by Union, excepting unsold copies returned for credit (CX 31B, CX 32C). Union usually pays all suppliers in thirty days, and it was the understanding, when these contracts were entered into, that payments would be made to Ace News in thirty days (Tr. 687, 709-10). In actual practice, however, Union does not pay Ace News for five months, and all books and magazines covered by such payments have by that time been sold or returned (Tr. 687). Since Union does not pay for Ace-distributed publications until after they are sold to consumers, literal application of the contract provisions would mean that Ace News retains title to each Ace book and Ace-distributed magazine sold by Union to unidentified consumers who purchase without notice of the interest of Ace News. No such unrealistic situation could have been intended by the parties, and such a construction of the contract provisions would be a legal mockery.

68. There is nothing in the contracts or in the operations of the parties under them, which constitutes or identifies Union as the agent of Ace News in selling Ace-distributed publications to consumers. All indications are to the contrary. The contracts identify

stand in the Morrison Hotel, 79 West Madison Street, Chicago, Illinois (Tr. 987, 1068-74; CB 36-37). Whether the display of Ace-distributed publications by these retailers on one day was experimental, or by chance, or represented a course of dealing is left for inference. Such limited evidence does not represent that degree of proof which will warrant a finding that these retailers competed with Union in the distribution of Ace-distributed publications during the period of the contracts between Ace News and Union.

75. Economy Book Store, Inc., 40 South Clark Street, Chicago, Illinois, is a large retail book store operating on six floors (Tr. 1006). It has been handling Ace books regularly for about 4 or 5 years. Formerly it was supplied directly by Ace News, but for the last two years Ace books have been obtained from the Chicago wholesaler (Tr. 994-5). Approximately 90% of its paperback books are sold on the first floor, and that is the only floor where it sells Ace books (Tr. 1007-8). It has never received any display or promotional allowances or payments on Ace books (Tr. 525-6, 1004-5).

76. Post Office News, 37 West Monroe Street, Chicago, Illinois, is a retail book store operated by Union during the period from June 1, 1961, through April 30, 1963 (Tr. 628-9). It sells books, magazines and newspapers, and its sales are all made on the first floor (Tr. 1006-7). It is located within a block and a half of Economy Book Store, Inc. (Tr. 986-7, 998) and competes with it in the sale of paperback books (Tr. 1000-3). It is found, therefore, that Economy Book Store, Inc., competed with the Post Office News store of Union in the sale of Ace books during the period of the Ace News-Union contract.

77. Post Office News is also located within a block and a half of Carson, Pirie, Scott & Company (Tr. 1022), a large department store, hereinabove referred to, with its book department on the first floor (Fi. 43). Carson has continuously carried Ace books during the period of the Ace News-Union contract (Tr. 1015), and during that period has received no display or promotional allowances on Ace books (Tr. 525-6, 1023). It is found that Carson competed with the Post Office News store of Union in the sale of Ace books during the period of the Ace News-Union contract.

78. Walgreen Drug Stores operate a store at 4 North State Street, Chicago, Illinois, which is located about a block and a half from Post Office News (CX 35B). It has carried the Ace-distributed magazine "Secrets" continuously since January 1962, and has not been offered any promotional or display allowance on that magazine (CX 35D). It was stipulated that Walgreen also handles "Revealing

occurs to the extent that the same customers or class of customers enter their stores or pass their stands.

72. Many purchasers of paperback books and magazines are impulse buyers who buy a particular publication without having previously planned to do so; others are browsers who may intend to buy, but who make their purchases after examining publications on display; and others go to the newsstand or store to purchase a particular publication. Obviously, with the first two of these groups, the display of the publications by retailers is the factor of prime importance in making sales to them; and even with the third group, display frequently results in the sale to them of publications in addition to, or other than, those which they intended to buy. The record discloses that paperback books and magazines are ordinarily sold to consumers at the cover prices, and that there is rarely any price competition among retailers in selling such publications.

73. In these circumstances, retailers located in areas where the same class of consumers may pass their stands or enter their stores are in competition with each other in selling paperback books and magazines. In the absence of demonstrated countervailing factors, there is a reasonable inference that retailers in areas of high pedestrian traffic located reasonably close together are engaged in competition with each other, and that, insofar as they handle the same paperback books and magazines, they compete in the sale of such publications. As in the case of resellers of cigarettes, "the reasonable proximity of such resellers is enough to establish competition." (*Liggett & Myers Tobacco Company, Inc.*, Docket No. 6642, 56 F.T.C. 221, 248.) These conceptions have general application in the appraisal of the specific competitive situations discussed herein.

Union Competitors—Chicago, Illinois

74. In support of his contention that Union competed with unfavored retailers in selling Ace books and Ace-distributed magazines, counsel supporting the complaint relies upon several instances in which the alleged unfavored retailer, although located in proximity to a Union newsstand, was shown by the evidence to have displayed one or more Ace-distributed publications on only one day during the Ace News-Union contract period. This is the situation with regard to Gills Book Store, 119 West Van Buren Street, Chicago, Illinois (Tr. 989; CX 33; CB 32-33); Van Buren Book Store, 72 West Van Buren Street, Chicago, Illinois (Tr. 990; CX 33; CB 33); Atlantic Hotel newsstand, 324 South Clark Street, Chicago, Illinois (Tr. 990-1, 1043, 1049-58; CB 35-36); and W. F. Monroe Company news-

82. Easterday Pharmacy, 700 New Jersey Avenue, Northwest, Washington, D.C., is a drug store which also sells sundries and operates a newsstand (Tr. 1234-5). Since at least 1960, its newsstand has regularly sold Ace books and several of the Ace-distributed magazines covered by the Ace News-Union contract (Tr. 1235-7, 1242-6, 1250-1; CX 37). It is located approximately two blocks from the Union Station railroad terminal, about a half block from the Government Printing Office, and about two or three blocks from the General Accounting Office (Tr. 1238-9). Among the regular customers of this store are persons from both the Government Printing Office and the General Accounting Office (Tr. 1239, 1246), and customers in this store are sometimes referred to the newsstand in the Union Station for magazines not in stock (Tr. 1239-40, 1241-2).

83. Plaza Fruit and News Stand, 634 North Capitol Street, Washington, D.C. (Tr. 1252), is a store with a direct entrance off the street (Tr. 1256). It sells a variety of items, including paperback books and magazines (Tr. 1253). During the years 1961, 1962 and 1963, it has regularly handled Ace books and several of the Ace-distributed magazines covered by the Ace News-Union contract (Tr. 1253-5, 1259-60, 1262-3; CX 37). It is located on a main artery, and traffic comes into the store from Union Station, the Government Printing Office, a large post office and several transient and residential hotels, all of which are located within a block and a half (Tr. 1257-8, 1264-5).

84. During the period of the Ace News-Union contracts, neither Easterday Pharmacy nor Plaza Fruit and News Stand has received any display or promotional allowance on Ace-distributed publications (Tr. 525-6, 1247, 1258). During the period from June 1, 1961, through April 30, 1963, Union operated newsstands in the Union Station in Washington, D.C. (Tr. 628-9). It is found that, during the period of the Ace News-Union contracts, both Easterday Pharmacy and Plaza Fruit and News Stand competed with the Union newsstands in the Union Station in the sale of Ace books and Ace-distributed magazines.

85. One of the stores of Universal, hereinabove referred to, which has handled Ace-distributed publications since the first of 1960, is located on 14th Street, Northwest, near Pennsylvania Avenue, an area of unusually heavy pedestrian traffic in central downtown Washington, D.C. (Fi. 46). That store is directly across the street from the Willard Hotel (Tr. 1292), in which Union operated a newsstand during the period from June 1, 1961, through April 30, 1963 (Tr. 628-30). It is found, therefore, that, during the period of the Ace

Romances," but that it has refused to handle Ace books and any other Ace-distributed magazines (Tr. 957-8).

79. Brief letters from representatives of Walgreen were received in evidence in lieu of their testimony (CX 35A-D; Tr. 954-9), and no one engaged in the actual operation of Post Office News testified. One of the Walgreen letters expressed the opinion, with a brief statement of reasons for it, that the Walgreen store does not compete with Post Office News (CX 35B). This is contrary to findings herein with respect to competition by Economy Book Store, Inc., and Carson with Post Office News under conditions of similar proximity and pedestrian traffic (Fi. 76, 77). Counsel supporting the complaint asks for a finding that the Walgreen store competes with Post Office News (CB 43).

80. The letters from Walgreen were, by stipulation, received in evidence in lieu of testimony. In entering into that stipulation, counsel supporting the complaint waived any opportunity to examine the author more fully concerning the factors affecting the opinion which he expressed that his store does not compete with Post Office News; and counsel for respondents was entitled to have full weight accorded to that opinion with respect to the two particular stores to which it related, unless it was contradicted by other specific evidence. In these circumstances, the record does not warrant a finding that the Walgreen store at 4 North State Street competed with Post Office News in the sale of "Secrets."

Union Competitors—Washington, D.C.

81. The newsstand in the Trailways Bus Depot at 12th & I Streets, Northwest, Washington, D.C., handled two Ace-distributed magazines, "Secrets" and "Revealing Romances," regularly during the period from January 1, 1960, through April 30, 1963 (Tr. 1129-31, 1166-8). The Hotel Annapolis-Manger, 1111 H Street, Northwest, Washington, D.C. (CX 37), where Union operated a newsstand during the period from June 1, 1961, through April 30, 1963 (Tr. 628-30), is located within two blocks of the Trailways Bus Depot. During the period the Ace News-Union contract has been in effect, the operator of the newsstand in the Trailways Bus Depot has received no display or promotional allowance on the Ace-distributed publications which it handled (Tr. 525-6). It is found that the newsstand in the Trailways Bus Depot competed with the Union newsstand in the Hotel Annapolis-Manger in the sale of the Ace-distributed magazines, "Secrets" and "Revealing Romances" during the period of the Ace News-Union contract.

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1149-50, 1157-9, 1850-4). The owner of Schrot's, however, testified very definitely that since 1960 he has not received any payments or allowances for promoting or displaying Ace books, or anything supplied to him by Atlantic (Tr. 1309-11, 1315, 1323, 1332-3, 1353; also see RB 43-5, RRB 83). It is found, therefore, that during the period of the Ace News-Union contracts, Schrot's has not received any display or promotional allowance on Ace books or Ace-distributed magazines.

Union and Faber, Coe & Gregg, Inc.

90. Faber, Coe & Gregg, Inc. (hereinafter referred to as Faber), and its subsidiaries, which for present purposes need not be specifically identified (Tr. 554), operate retail stands, located in various cities, which sell magazines and paperback books, among other things (Tr. 546-8). During the period its contracts have been in effect with Union, Ace News has not paid any display or promotional allowances or discounts to Faber (Tr. 525).

91. It is not contended that Faber newsstands are located in such proximity to Union newsstands as to result in competition in the sale of paperback books and magazines. On the contrary, the only contention by counsel supporting the complaint with respect to competition between Faber and Union is competition for newsstand leases in hotels (CB 30-32). He relies upon the argument that competition for newsstand locations "is the only type of competition found to exist in the *American News* decisions," and, accordingly, that it constitutes competition in the distribution of the product involved within the meaning of Section 2(d) of the Clayton Act (CB 31-32).

92. In the course of its operations Faber competes with Union, among many others, for the lease of space for the operation of newsstands in hotels and office buildings. The identities of such competitors vary from city to city (Tr. 548-53). Except for specific competition for locations in the Statler-Hilton Hotel in Washington, D.C., and in six or seven unspecified hotels in the Eastern Division of the Hilton Corporation in 1956 or 1957, and in 1961 (Tr. 553-6, 591), the record is silent with respect to the extent and locations of this competition between Faber and Union.

93. The record discloses that on January 17 or 18, 1963, which was during the period of the Ace News contract with Union, an Ace-distributed magazine covered by such contract, "Revealing Romances," was on display at the Faber newsstand in the Palmer House, a Hilton hotel in Chicago, and at a Union newsstand in the LaSalle

News-Union contracts, Universal has competed with the Union newsstand in the Willard Hotel in the sale of Ace books and Ace-distributed magazines.

86. During the period of the Ace News-Union contracts, Ace News has not paid any display or promotional allowance directly to Universal (Tr. 525-7). During that period, however, at least until the end of 1962 (Tr. 1853-4), Ace News made payments to Atlantic Magazine Company, its wholesaler in Washington, D.C., as reimbursement to Atlantic for a rebate of 2¢ per copy to Universal, and certain other retailers, in connection with the sale of Ace books (CX 36; Tr. 1098-1114, 1149-50, 1157-9, 1850-5). Since the president of Atlantic has an interest in Universal (Tr. 1211-13), and since there is nothing in the record to the contrary, it is inferred that this 2¢ per copy rebate was actually received by Universal.

87. The cover prices of Ace books range from 35¢ to 75¢ each (CX 42-53). A rebate of 2¢ per copy on a 35¢ book would amount to approximately 6%, and on a 75¢ book to less than 3%. The discount to Union on Ace books was 26% in excess of the discount ordinarily received by retailers, and at least 16% of that excess was specifically identified as compensation to Union for the display of Ace books (Fi. 61). The rebate to Universal, accordingly, was not proportionally equal to the display allowance by Ace News to Union on Ace books; and Universal received no display or promotional allowance on Ace-distributed magazines.

88. Schrot's, hereinabove referred to, which has handled Ace books and Ace-distributed magazines since the first of 1960, and which is in the heavy pedestrian traffic area of central downtown Washington, D.C. (Fi. 47, 48), is located about a block and a third from the Willard Hotel (Tr. 1308). Schrot's competes with the Universal store which is directly across the street from, and which competes with, the newsstand in the Willard Hotel (Fi. 48, 85). It is found, therefore, that, during the period of the Ace News-Union contracts, Schrot's competed with the Union newsstand in the Willard Hotel in the sale of Ace books and Ace-distributed magazines.

89. Beginning in the early part of August 1961, Ace News made payments to Atlantic Magazine Company, its wholesaler in Washington, D.C., as reimbursement to Atlantic for a rebate of 2¢ per copy to Schrot's, and certain other retailers, in connection with the sale of Ace books. The president of Atlantic testified in very general terms, and with considerable uncertainty as to details, that, pursuant to arrangements with the retailers, including Schrot's, Atlantic gave them 2¢ for each Ace paperback book sold (CX 36; Tr. 1098-1114,

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period prior to the challenged Ace News contracts with Union. The evidence that Faber sells Ace-distributed publications at its newsstands is limited to a showing that on one day during the Ace News-Union contract period, one newsstand of Faber displayed one Ace-distributed publication covered by the contract. Whether this single incident was experimental, or by chance, or represented a course of dealing is left for inference. Such limited evidence does not constitute that degree of proof which will warrant a finding that Faber competed with Union in the sale to consumers of Ace-distributed publications during the period of the contracts between Ace News and Union.

Availability

97. The evidence that display or promotional allowances were not "available on proportionally equal terms" to certain retailers is limited generally to evidence that the allowances were not paid to, or were not received by, those retailers. Respondents have offered no evidence, and they do not contend, that display allowances were "available" in any of those instances in which they were not paid or received.

98. In its opinion in the matter of *Liggett & Myers Tobacco Co., Inc.*, Docket No. 6642, 56 F.T.C. 221, 250 (1959), the Commission stated:

The question of the availability of payments to others on proportionally equal terms is a matter of defense to be established by the respondent upon the prima facie showing of discriminatory payments as between customers competing in the distribution of respondent's products. Cf. *State Wholesale Grocers v. The Great Atlantic & Pacific Tea Co.*, 258 F. 2d 831 (1958).

And in *Vanity Fair Paper Mills, Inc. v. F.T.C.*, 311 F. 2d 480, 486 (1962), the Court said:

But proof that the special allowance was paid to Weingarten and one other chain, and that it was not paid to other customers, sufficed to shift the burden of producing evidence of "availability" to respondent and thus to permit the Commission to draw an inference from the weakness of the evidence offered to sustain it. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 225-226 (1939).

99. Proof that display or promotional allowances were made by or on behalf of Ace News to certain retailers and not to others competing with them in the sale of Ace-distributed publications, accordingly, shifted the burden of producing evidence of availability to respondents. The fact that such evidence was not produced warrants an inference that no such allowances were available. It is found, therefore, that, insofar as the evidence herein discloses that

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Street Railroad Station in Chicago (Tr. 553, 629, 988-9). Except for this single instance, there is no evidence that Faber has sold Ace-distributed publications at its newsstands (see Tr. 558-60, 578-81); and there is no showing or contention that newsstands in the Palmer House and in the LaSalle Street Station competed with each other in selling "Revealing Romances." The record also does not show that the Palmer House is one of the hotels in the Eastern Division of the Hilton Corporation involved in the Faber and Union competition for leases in 1956 or 1957 and in 1961, or that it was involved in any such competition after December 18, 1961, the effective date of the Ace News contracts with Union.

94. In the *American News* decisions upon which counsel supporting the complaint relies, the hearing examiner and the Commission recognized that the effect of the unlawful promotional allowances received by the respondents, which in the aggregate were very large, greatly enhanced their ability to compete for newsstand locations, and thus enhanced their ability to increase their margin of leadership over their competitors (58 F.T.C. 10). There was necessarily implicit in this factual situation the thought that the margin of leadership in newsstands was a measure of the advantage held by the respondents in competing in the sale of the publications.

95. The issue presented to the Court was not based upon competition for newsstand locations, as such, but, as emphasized by the Court, "these proceedings are primarily concerned with practices in connection with sales of certain publications, including magazines, comic books, and pocket books." (*American News Co., et al v. F.T.C.*, 300 F. 2d 104, 107.) There is nothing in these decisions which modifies the Commission's position in the *Liggett & Myers Tobacco Co., Inc.* case (56 F.T.C. 221), where it stated:

The proportional equality required by Section 2(d) relates to customers competing in the distribution of the products involved. There is no other basis in the subsection for classifying customers. (p. 248.)

* * * * *

And we need only mention that the concern of Section 2(d) is with competition in the distribution of products and not with rivalry for sales outlets, as such. (p. 252.)

96. The facts disclosed in this record are greatly different from those considered by the hearing examiner and the Commission in the *American News* case. The contention by counsel supporting the complaint that Faber is an unfavored competitor is based squarely upon the limited evidence of competition between Faber and Union in leasing newsstands, which, insofar as it is specific, relates to a

and off-sale dates are determined by the publishers, and prescribed to the wholesalers by Ace News. They are ordinarily adhered to by the wholesalers, particularly with respect to periodicals. With somewhat more variation, this is also generally true even with respect to paperback books and magazines which are not regularly issued (CX 10, 15-25; Tr. 328-32, 374-5, 762-6, 846-7, 1097-8). Through these dates, Ace News has substantial control of the time when the publications are offered for sale by retailers, the period during which they remain on sale, the time of their removal from the newsstands, and the frequency of their replacement with current publications.

104. Ace-distributed publications are delivered to retail newsstands, and unsold copies, designated "returns," are picked up from newsstands by wholesalers. The retailers are credited by the wholesalers, the wholesalers by Ace News, and Ace News by the publishers for the returns, such credit in each instance being at the original billing price at that level (Fi. 14; Tr. 401-7, 416-30, 1083-9). The rate of returns on Ace books averages about 30% to 35%, and on Ace-distributed magazines, about 20% to 30% (Tr. 422, 427-8), and the experience of wholesalers of Ace-distributed publications in Chicago, Illinois, and Washington, D.C., indicates that actual returns are at a somewhat higher rate in both categories (Tr. 842-3, 1089-91). Without the return privilege, the pricing structure and method of distribution and selling throughout the industry would be wholly changed (Tr. 849).

105. The record discloses, therefore, that, acting on its own behalf or on behalf of the publishers, Ace News effectively controls the prices at which Ace-distributed publications are sold by wholesalers to retailers, and by retailers to consumers; the time when such publications are put on the newsstands for sale at retail; the period during which they remain on sale; the time when they are removed from the newsstands; the frequency of their replacement with current publications; and the return of unsold copies by retailers. The display or promotional allowances or payments here in issue have all been made by Ace News directly to retailers.

106. It is found, therefore, that Ace News exercises substantial and extensive control over the prices, terms and conditions of sale of Ace-distributed books and magazines to and by retailers, and that it makes display or promotional allowances or payments to certain of them. In these circumstances, retailers of Ace-distributed publications, whether they purchase from wholesalers or directly from Ace News, are "customers" of Ace News within the meaning of

display or promotional allowances were not made by or on behalf of Ace News to certain retailers, such allowances were not available to those retailers.

Customers of Ace News

100. As discussed hereinabove, Ace News sells books and magazines as a national distributor to wholesalers, and the wholesalers resell such publications to retailers (Fi. 6, 37). In the case of Union, Ace News also sells directly to a retailer (Fi. 70). The discriminatory payments involved herein were granted to retailers, and not to wholesalers, and except for Union, both the favored and unfavored retailers were customers of the wholesalers, and not direct customers of Ace News. It is crucial to determine, therefore, whether or not the favored and unfavored retailers competing in the sale of Ace-distributed publications were "customers" of Ace News within the meaning of Section 2(d) of the Clayton Act.

101. Prices at which paperback books and magazines are intended to be sold at retail are printed on the covers, and are referred to as "cover prices" (Tr. 452). The cover prices are the prices at which such publications are consistently sold at retail, and there are rarely any deviations from those prices by retailers (Tr. 471-3, 556, 773-6, 1017, 1045, 1095-7, 1256, 1307-8). The cover prices on Ace-distributed publications are determined by the publishers, either with or without the advice or participation of Ace News (Tr. 286), but in all instances Ace News uses the cover prices as the basis of its price determinations with wholesalers and retailers.

102. Publications are sold by Ace News to wholesalers at "regular trade prices and terms" (CX 10, 11), which, subject to some variations with certain wholesalers, are 40% off cover prices on books, and 40% to 45% on magazines (Fi. 59, 60). In selling to wholesalers, Ace News designates a "suggested dealer price," which is 20% off the cover prices, at which each publication should be sold by wholesalers to retailers (CX 15-18; Tr. 451). The suggested dealer prices on Ace-distributed publications are consistently adhered to by wholesalers in Chicago, Illinois, and Washington, D.C. (Fi. 59), the only areas with respect to which such evidence was presented. While there is no contractual requirement that the suggested dealer prices shall be adhered to, Ace News actively discourages sales by wholesalers at different prices (Tr. 468-71).

103. Ace-distributed publications are delivered to, and returns are picked up from retail newsstands by wholesalers in accord with a time schedule, designated "on-sale" and "off-sale" dates. The on-sale

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ceded it (RRB 85). Extensive evidence with respect to this defense was offered and received.

111. Prior to the middle of 1961, it was a common practice, generally understood throughout the industry, to grant allowances and discounts for the display of paperback books and magazines to selected retailers with high traffic locations (Tr. 576-8, 687-8, 697, 876-8, 925-9, 932-3, 1209-17, 1435, 1505-9, 1623). This practice had been in existence for many years, and was well established in 1951 when the predecessor corporation of Ace News entered the industry as a national distributor (Tr. 1455, 1506, 1628, 1839-40, 2026, 2138, 2181). In some instances the retailers receiving the allowances would not handle paperback books or magazines if such allowances were not paid, and it was necessary to pay such allowances to those retailers in order to get paperback books or magazines in their stores or on their newsstands (Tr. 718-20, 878, 1511, 1903, 1913, 1919-20, 2026, 2139). The retailers receiving the allowances, however, did not all receive the same rate (Tr. 2125).

Defense re Universal and Marshall Field

112. As hereinabove found, Ace News paid display allowances on Ace books to Universal and to Marshall Field during the period from January 1, 1960, to some time in June, 1961 (Fi. 42, 45), and these are the only allowances by Ace News prior to June, 1961, which are challenged by counsel supporting the complaint (Fi. 38-41).

113. It is the position of respondents that these allowances were paid because others in the industry were paying allowances to the same retailers, and that they were made in good faith to meet competition (RB 60-70; RRB 72-97). When Ace News learned in mid-April, 1961 that display allowances to retailers by others in the industry were generally being discontinued as a result of Federal Trade Commission proceedings, it took steps as promptly as its business circumstances permitted to discontinue its allowances to these accounts (CX 71; Tr. 1928-31).

114. Prior to the middle of 1961, both Universal and Marshall Field received display allowances on paperback books from others in the industry (Tr. 1214, 1443, 1445, 1505-6, 1626, 1633, 2024-5). The record does not disclose when such allowances were first granted to each of those accounts, by whom or at what rate, but there is some indication that the rate may have ranged from 6% to 16% of cover prices (Tr. 1445, 1506, 1510). Nor does the record disclose the date

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Section 2(d) of the Clayton Act. (*American News Company, et al. v. F.T.C.*, 300 F. 2d 104, 109-10, 1962.)

107. Ace News has, accordingly, paid display or promotional allowances or discounts to some of its retailer customers in connection with the sale of Ace-distributed publications, which payments were not available on proportionally equal terms, or on any terms, to other customers competing in the sale of such publications. Such payments were in violation of Section 2(d) of the Clayton Act unless the defense that they were made in good faith to meet competition has been established.

Responsibility of Ace Books

108. Ace Books and Ace News are parts of a single enterprise (Fi. 4). Ace Books is engaged in the business of publishing paperback books. Approximately 75% to 85% of the books published by it are distributed by Ace News; and, with one unidentified exception, all of the paperback books distributed by Ace News are published by Ace Books (Fi. 5 and 6). Ace News was authorized by Ace Books to distribute its products and, in connection therewith, to make such display or promotional allowances as Ace News considered appropriate; and Ace Books agreed to, and did, reimburse Ace News for any such allowances (CX 2 and 3; Tr. 278-300, 1735-40).

109. In the circumstances disclosed by this record, sales of Ace paperback books by Ace News to its retailer customers, and the payment by Ace News of display or promotional allowances or discounts to any such customers in connection with the sale of Ace paperback books, were made by Ace News on its own behalf, and on behalf of Ace Books. They constituted sales and payments jointly made by Ace News and Ace Books. Any payments by Ace News to its retailer customers in connection with the sale of Ace paperback books which are herein found to be unlawful, therefore, also constituted violations of Section 2(d) of the Clayton Act by Ace Books.

Defense of Meeting Competition

110. Respondents contend that, if it should be determined that their display allowances were discriminatory, the proof establishes that each such allowance was made in good faith by Ace News to meet competition (RB 60-72; RRB 72-97). They also argue that the practice was common in the industry, and that the payments by Ace News were made to meet the existing competition of those that pre-

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their payments of display allowances on Ace books to Universal and Marshall Field were made in good faith to meet competition, and their defense on that basis fails.

Defense re Union

118. There is no contention that any unlawful allowance or payment was made by Ace News to Union prior to December 18, 1961 (Fi. 54, 56). Union had been approached many times by Ace News with respect to handling Ace books and Ace-distributed magazines, and had been offered the same allowances it had been receiving from others, but had rejected such offers because Union did not need those publications. Union accepted Ace-distributed publications generally for sale on its newsstands when other publishers and distributors would not make price arrangements with it because of proceedings against them by the Federal Trade Commission (Fi. 55).

119. On December 18, 1961, Ace News entered into contracts with Union under which it has since made payments to Union as compensation in consideration for the display of Ace books and Ace-distributed magazines on Union newsstands (Fi. 56, et seq.), which payments were not available to other customers competing with Union (Fi. 75-89).

120. Prior to the execution of the Ace News-Union contracts, Union had entered into contracts with The Hearst Corporation covering two lines of paperback books, Avon and Popular Library, distributed by Hearst. Under these contracts each of those lines received 25% of the display space available for paperback books at each Union newsstand. In other respects these contracts also contained essentially the same terms and conditions as those incorporated in the Ace News-Union contract with respect to books, except that the discount by Hearst to Union was 40% instead of the 46% in the Ace News contract (CX 31; RX 4; Tr. 655-61, 1514-16).

121. At the time Ace News negotiated its contract with Union on books (CX 31), it was shown one of the Hearst contracts with the discount figures obliterated (RX 2), but was given to understand by Union that the terms and conditions were the same as in the Ace News-Union contract. Although the obliteration of the figures should have raised some question in his mind, the Ace News representative who negotiated the contract was very definite in his testimony that it was his understanding from these negotiations with the Union representative that the terms and conditions, including the prices and discounts, were the same, and that he did not know that the Ace News discount to Union was larger than that of Hearst

when, or the circumstances under which the allowances were first paid by Ace News to each of those accounts, or the rate or basis of such allowances.

115. Based upon the record as a whole, however, it is inferred that when the challenged allowances on Ace books were originally made to Universal and to Marshall Field, each of those accounts was receiving comparable allowances on other paperback books. Because of the general understanding throughout the industry, it is also inferred that when the allowances were made by respondents, they had reason to believe that each of those accounts was receiving comparable allowances on other paperback books, and that neither of them would handle Ace books if the allowances were not paid.

116. The record also discloses that display allowances on paperback books and magazines by the industry generally were made only to selected retailers with high traffic locations, and were not made to nearby retailers who competed in the sale of such publications with the retailers who received the allowances (see references in Fi. 111). This was well known and commonly understood throughout the industry, and, because of their thorough familiarity with the industry, it is inferred that it was known to respondents. When respondents found it necessary to pay display allowances on Ace books to Universal and Marshall Field, and not to other retailers located in proximity to them in high traffic locations, respondents knew, or should have known, that such other retailers were in competition with Universal and Marshall Field, that they were not receiving display allowances on other paperback books, and that such allowances were not available to them.

When they paid display allowances on Ace books to Universal and Marshall Field during the period from January 1, 1960, to some time in June, 1961, therefore, respondents knew, or should have known, that comparable allowances then being received by each of those accounts on other paperback books were discriminatory. On this basis, they had reason to believe that the display allowances which they were meeting were not lawful allowances.

117. Accordingly, the record does not disclose that such allowances by respondents were made in good faith to meet comparable lawful allowances received by those accounts from competitors of respondents in connection with other paperback books. On the contrary, it is apparent that respondents made such allowances as were necessary to get Ace books into the stores of those retailers, without regard to whether or not the allowances which they were meeting were lawful. Respondents have failed, therefore, to establish that

tially the same as those incorporated in the Ace News-Union contract on magazines (CX 32); and the MacFadden contract and one of the Hearst contracts provided generally, but apparently with some deviation, for sales to Union at the prevailing wholesale prices (RX 5D, 61D).

125. At the time Ace News negotiated its contract with Union on magazines (CX 32), it was the understanding of the representative of Ace News that the terms on which its publications were to be represented on the Union newsstands were generally the same as the terms for other publications (Tr. 1860). He could not recall, however, that he was shown a copy of a contract with respect to other magazines (Tr. 1862-3), and he did not discuss with Union the prices it was paying for other magazines (Tr. 1962-3). While the record does not disclose a satisfactory price comparison, reference to the prices to Union listed in the contracts referred to, indicates that the Ace News prices on what appear to be the same types of magazines, for example those in the fields of romance, mechanics and sports, are consistently lower than those of Hearst and MacFadden (CX 32D, RX 5D, 61D).

126. The contracts between Hearst and Union on magazines were cancelled in February, 1962, and thereafter "Good Housekeeping" and "Cosmopolitan" were the only Hearst magazines which continued on the Union newsstands. Those two magazines were continued on the Union newsstands for some time, then were off for two or three months, and, together with a few other Hearst magazines, are now back on (Tr. 1562-3). The contract between MacFadden and Union, which was on magazines, was terminated during the early part of 1963, and thereafter for about six months the MacFadden magazines were not on the Union newsstands. Union now handles the MacFadden magazines under a new program, the details of which are not in evidence (Tr. 2081-2).

127. Because of their thorough familiarity with the customs and practices of the industry, the disappearance of the MacFadden magazines, and all but two of the Hearst magazines, from the Union newsstands should have put respondents on notice, insofar as they relied on Union's arrangements with those companies, that those arrangements may have been interrupted (see Tr. 1939-40). The Ace News-Union contract on magazines is, however, still in effect (Fi. 56).

128. The record discloses that in entering into the contract with Union on magazines, Ace News made no inquiry to determine the prices Union was then paying Hearst and MacFadden for magazines. It did not determine, therefore, that its display allowance to Union

(Tr. 1857-60, 1960-5). This testimony is accepted as accurately reflecting the understanding of the Ace News representative at the time he negotiated this contract.

122. The Hearst and Ace News contracts accounted for 75% of the available paperback book display space on each of the Union newsstands while they were in effect. The record does not show whether or not the other 25% of the space was committed under a similar contract. The contracts between Hearst and Union on paperback books were cancelled on March 27, 1963, and thereupon Union discontinued handling the Hearst-distributed paperback books on its newsstands (Tr. 1562-3). Because of their thorough familiarity with the customs and practices of the industry, the disappearance of the Hearst-distributed paperback books from 50% of the paperback book display space on the Union newsstands should have served to put respondents on notice that the display allowance from Hearst to Union may have been terminated (see Tr. 1939-40). The Ace News-Union contract on books is, however, still in effect (Fi. 56).

123. The record discloses, therefore, that Ace News entered into its contract with Union on December 18, 1961, with the understanding that it provided for the display of Ace books on Union newsstands under the same terms and conditions, and subject to the same discount, as each of two lines of Hearst-distributed books then on sale at Union newsstands. In entering into that contract, however, Ace News knew, or should have known from its prior experience with Union, and from its familiarity with industry practices, that Union entered into the contract with it because allowances to Union on other paperback books had been terminated as a result of Federal Trade Commission proceedings challenging their legality. It also knew, or should have known from its general knowledge of the industry and from its negotiations with Union, that the allowance by Hearst to Union was a special arrangement which was not available to other retailers competing with Union. When Ace News knew, or should have known, that the Hearst contract with Union was ended, it took no action to terminate its display allowance to Union on books.

124. Prior to the execution of the Ace News-Union contracts, Union had entered into a contract with MacFadden Publications, Inc., and two contracts with The Hearst Corporation, providing for the sale on Union newsstands of magazines distributed by those companies (RX 5, 6, 61). The provisions of those contracts with respect to the full cover display of monthly magazines, and to suitable facilities in high traffic areas for the sale of magazines, were essen-

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132. A predecessor corporation of Ace News entered the industry as a national distributor in 1951 (Fi. 3), at which time the practice here in issue was in general use throughout the industry (Fi. 111). There are thirteen national distributors, ten of which are larger than Ace News. The distribution of Ace News represents 21½% of the industry, and its distribution and that of two others, not in the top ten, in the aggregate represents 6% of the industry (Tr. 346-50, 1857). Since 1960 the net sales of Ace Books have been in excess of \$500,000 per year, and of Ace News, in excess of \$3,500,000 per year (Fi. 7).

133. Respondents recognize that the Commission has heretofore proceeded against the use of this practice by a large number of publishers and national distributors (RB 15-21). In decisions of July 6, 1960, the Commission issued consent orders requiring sixteen publishers and national distributors, including the leaders in the industry, to discontinue the practice against which respondents assert they were defending themselves (Dockets 7348 through 7394, and 7611 through 7615, 57 F.T.C. 1-75).

134. The sales of respondents are substantial, and their position in the industry and share of the national market constitute them as a substantial factor in the distribution of paperback books and magazines. Obviously there could be no justification for permitting them to continue the use of a practice which their principal competitors have heretofore been required to discontinue.

Form of Order

135. Counsel supporting the complaint proposes a form of order which differs from, and is more stringent in some respects than the form of order in the complaint (CB 89-95).

136. The order in the "Notice" portion of the complaint was adopted as "the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint." The facts found herein are essentially those which are alleged in the complaint. In these circumstances, the hearing examiner construes the quoted statement as a direction by the Commission that the form of order in the complaint should be entered herein unless the record, or a subsequent change in applicable legal authority, requires a different order.

137. It is proposed by counsel supporting the complaint that the order be directed against the "assigns" of the respondents, with a definition of "assigns" apparently designed to have substantially the same effect as an order directed against the present owners and

was the same as or equivalent to the display allowance then being granted to Union by Hearst, MacFadden or others, and the record does not disclose that those allowances were in fact equivalent. From its prior experience with Union, and from its familiarity with industry practices, Ace News knew, or should have known, that Union entered into the contract with it because allowances to Union on other magazines had been terminated as a result of Federal Trade Commission proceedings challenging their legality. Ace News knew, or should have known from its general knowledge of the industry, and from its negotiations with Union, that Union contracts with Hearst and MacFadden were special arrangements which were not available to other retailers competing with Union. Although it knew, or should have known, that the Hearst and MacFadden arrangements with Union were terminated, it took no action to end its contract with Union on magazines.

129. It is clear, therefore, that when Ace News entered into the contracts with Union, it had reason to believe that its payments to Union may be unlawful, but it entered into the contracts for the purpose of getting its publications on the Union newsstands. In doing so, it made such payments for display as were necessary to accomplish that purpose, without regard to whether or not its payments, or similar payments by others, were lawful; and it continued to make such payments after it knew, or should have known, that the arrangements between Union and others which it asserts it was meeting, had been discontinued.

130. The record, accordingly, does not disclose that the payments by Ace News to Union for the display of Ace-distributed publications were made in good faith to meet equal or comparable lawful allowances received by Union from other publishers or distributors of paperback books and magazines. Respondents have failed, therefore, to establish that their payments of display allowances to Union on Ace books and Ace-distributed magazines were made in good faith to meet competition, and their defense on that basis fails.

Industry Position of Respondents

131. Throughout, respondents have urged with great earnestness that Ace News is a small national distributor which entered the industry after its large competitors were well established, and that it must necessarily follow the established practices of the others in order to survive. It urges, in effect, that the Commission's efforts should be to protect it from the practices of its competitors, rather than to prevent it from using those practices (RB 7-19).

(Fi. 109). Although Ace Books is engaged in the business of publishing paperback books, its operations and those of Ace News are so closely interrelated that they constitute parts of a single enterprise (Fi. 4). It would, therefore, be unrealistic to limit the order against Ace Books to paperback books. On the contrary, the order should apply in all respects to both respondents, and to any publications sold by either or both of them. This will be accomplished by the form of order in the complaint, and the changes proposed by counsel supporting the complaint for that purpose are unnecessary.

142. The form of order in the complaint would prohibit display allowances unless they are "affirmatively offered *and* otherwise made available" (emphasis added) to other competing customers. In July, 1960, the Commission issued consent orders in 16 cases involving similar charges against members of the same industry (Dockets 7384 through 7394, and 7611 through 7615; 57 F.T.C. 1-75). The orders in seven of those cases prohibited allowances of the sort here involved unless they are "affirmatively made available," and in the other nine, unless they are "affirmatively offered *or* otherwise made available" (emphasis added). It appears that the effect of these two forms of the quoted provision is substantially the same. Neither of them requires both affirmative offers *and* additional means of availability, which may involve materially more difficult problems of compliance. (*Cf.* Docket 8516, *HMH Publishing Co., Inc.*, Order March 28, 1963 [62 F.T.C. 1036].)

143. The record herein contains facts and discloses competitive considerations which persuasively indicate that it would be inequitable, and may result in substantial competitive disadvantage, to impose upon these respondents heavier obligations in making display allowances available to competing customers than required of many of their larger competitors. It is the opinion of the hearing examiner, therefore, that the form of order in the complaint should be modified by changing "*and*" to "*or*" in its quoted provision so as to conform in this respect with the outstanding orders against other members of the industry.

144. With the foregoing modification, the form of order in the complaint is supported by the charges and the facts in this record, and, in the opinion of the hearing examiner, it represents an adequate and appropriate remedy to cope with the violations here presented.

CONCLUSIONS

1. The respondents are parts of a single enterprise engaged in interstate commerce in the sale and shipment of paperback books

officers of the respondents in their individual, as distinguished from their official, capacities. In an order, filed September 25, 1963, the hearing examiner, for reasons there set out in detail, denied as untimely a motion to amend the complaint by adding the President and controlling authority of the respondents as an individual respondent. For substantially the same reasons, it would be inappropriate to enter an order herein which would apply to respondents' officers in their individual capacities.

138. The form of order in the complaint is directed against the respondents "and their respective officers, employees, agents and representatives, directly or through any corporate or other device." It is believed that this language will prohibit the use of "any corporate or other device" to avoid the effect of the order, and that, short of placing responsibility on respondents' officers in their individual capacities, it will accomplish the results proposed by counsel supporting the complaint.

139. An order directed against the "assigns" of respondents, as defined in the proposal of counsel supporting the complaint, would inject an issue which has not been tried, and would embrace the future activities of parties not privy to this proceeding. Respondents were warranted in relying upon the order in the complaint as marking the outer limits of the remedy which would be imposed, and they had no opportunity or obligation to show factually or otherwise why the remedy should not be extended beyond those limits. It is, accordingly, the opinion of the hearing examiner that the proposed order, which would go beyond the charges of the complaint, could not be supported on the pleadings or the record herein.

140. Counsel supporting the complaint also proposes a change in the definition of the word "customer" so that it would "include all retailers handling publications published, distributed, sold or offered for sale by respondents." This definition would include retailers who acquire respondents' publications in transactions in which no control is exercised by respondents. In *American News Company, et al. v. F.T.C.*, the Court made it clear that the "indirect customer" doctrine applies only as long as the seller exercises control over the terms of a transaction (300 F. 2d 104, 109-10). The definition of the word "customer" in the form of order in the complaint conforms to this standard, and the change proposed by counsel supporting the complaint does not.

141. It is found hereinabove that sales by Ace News of Ace books, and payments of display allowances in connection therewith, constituted sales and payments jointly made by Ace News and Ace Books

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uted, sold or offered for sale by respondents, unless such payment or consideration is affirmatively offered or otherwise made available on proportionally equal terms to all of their customers competing with such favored customer in the distribution of such publications, including magazines and paperback books.

The word "customer" as used above shall be deemed to mean anyone who purchases from a respondent, acting either as principal or agent, or from a distributor or wholesaler where such transaction with such purchaser is essentially a sale by such respondent, acting either as principal or agent.

OPINION OF THE COMMISSION

JUNE 18, 1965

By DIXON, *Commissioner*:

This matter is before the Commission on cross appeals filed by complaint counsel and respondents. The complaint charged that respondents violated Section 2(d) of the Clayton Act, as amended,¹ by paying or contracting for the payment of promotional or display allowances to some of their customers while simultaneously failing to offer or otherwise make available allowances on proportionally equal terms to other competing customers. The examiner found that the evidence established a violation. Respondents assert that the evidence does not support the examiner's findings, while complaint counsel requests that the Commission broaden in several respects the order issued by the examiner.

Respondent Ace Books, Inc., publishes a series of paperback or pocket books commonly observed on newsstands. Respondent Ace News Company, Inc., is a national distributor of publications. Approximately 20 percent of its volume consists of books published by Ace Books, while the remainder is composed of magazines of non-affiliated publishers. The evidence in this case deals with promotional allowances granted by respondents to particular retailers located in Chicago, Illinois, and Washington, D.C. The purpose of the allowances is to require retailers located in transportation terminals and in other high traffic areas to give prime display space on their newsstands and full-cover display to Ace-distributed publications. Strategically located retailers receive the allowances on disproportional terms, while many small retailers located off the beaten path receive no allowances at all. Some retailers are large depart-

¹ 49 Stat. 1526 (1936), 15 U.S.C. 13 (1958).

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and magazines. Their business is substantial, and their position in the industry and share of the national market constitute them as a substantial factor in the distribution of paperback books and magazines.

2. Respondents sell Ace-distributed publications to wholesalers, who resell them to retailers, and in dealing with Union News Company, respondents also sell directly to a retailer. Retailers purchasing such publications from wholesalers or directly from respondents are customers of respondents within the meaning of subsection (d) of Section 2 of the Clayton Act.

3. Respondents have paid allowances to Marshall Field & Company and to Universal News and Book Store, Inc., as compensation for displaying Ace books, and to Union News Company as compensation for displaying Ace books and Ace-distributed magazines, in connection with offering such publications for sale. Such allowances were not available on proportionally equal terms to other customers competing in the sale of such publications.

4. The record does not disclose that the display allowances paid by respondents to Marshall Field, Universal and Union were made in good faith to meet equal or comparable lawful allowances received by those customers from a competitor of respondents, and respondents' defense of meeting competition in good faith has not been sustained.

5. The discriminatory payments of display allowances by respondents, as found herein, were in violation of the provisions of subsection (d) of Section 2 of the Clayton Act.

ORDER

It is ordered, That respondents Ace Books, Inc., and Ace News Company, Inc., each a corporation, and their respective officers, employees, agents and representatives, directly or through any corporate or other device, in connection with the distribution, sale or offering for sale of publications, including magazines and paperback books, in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Paying or contracting for the payment of an allowance or anything of value to, or for the benefit of, any customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of publications, including magazines and paperback books, published, distrib-

the allowance to Cosmopolitan,⁸ the owner testified that he did not receive allowances on Ace publications either through the wholesaler or from respondents.⁹ Thus, both in Chicago and in Washington, the respondents' products were distributed prior to mid-1961 through a particular wholesaler to two similarly situated retailers, one of which was favored by the respondents with allowances.

Respondents contend that none of the above-mentioned retailers are their customers within the purview of Section 2(d) of the Clayton Act, as amended, for two reasons. First, they contend that all retailers of their products are consignees and thus do not have legal title to the Ace-distributed publications displayed and sold. Relying on *Students Book Co. v. Washington Law Book Co.*, 232 F. 2d 49 (D.C. Cir. 1955), respondents take the position that a consignee cannot be a "customer" for purposes of Section 2(d).¹⁰ In the alternative, they contend that the retailers acquiring distribution of their publications through wholesalers are not "customers" as that term was defined in *American News Co. v. Federal Trade Commission*, 300 F. 2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962), since in their opinion the evidence fails to establish sufficient control by respondents over the retailers' terms of purchase and does not show that there were instances of direct dealing or other direct contact between respondents and these retailers. The examiner held that the retailers acquiring respondents' publications from the wholesalers were not consignees, and concluded that they were customers of respondents for purposes of Section 2(d) because respondents controlled and established the majority of terms upon which the wholesalers sold the products to the retailers and favored some of these retailers with allowances.¹¹

We turn first to the question of consignment. A *bona fide* consignment of products imports an agency relationship between the consignor and the consignee. The agency required appears to be an agency for the limited purpose of selling the consignor's goods. Thus, an independent wholesaler or retailer dealing in the goods

⁸ See CX 30.

⁹ Tr. 1307-1310, 1315. Since respondents were unquestionably the grantors of the allowances, we think that they may be held responsible for any disproportionate distribution of the allowances by the wholesalers, their agents for the purpose of transmitting the allowances to the selected retailers. Moreover, as will be demonstrated, *infra*, the wholesalers were respondents' agents in other respects.

¹⁰ In that case, the Court of Appeals, in rejecting the petitioner's contention that the District Court was in error in its charge to the jury, indicated that a *bona fide* consignee is not a "purchaser" or a "customer" for purposes of Section 2 of the Clayton Act. There are now some indications to the contrary. See *Federal Trade Commission v. Simplicity Pattern Co.*, 360 U.S. 55 (1959); *Ludwig v. American Greetings Corp.*, 264 F. 2d 286 (6th Cir. 1959); Comment, 5 CCH Trade Reg. Rep., Par. 50, 125.

¹¹ Initial Decision, Findings of Fact, pars. 37, 106.

ment stores and drug chains, while others are small drugstores or newsstands located in hotels, transportation terminals and on street corners. Prior to December of 1961, all of these retailers acquired respondents' publications through local wholesalers. Thus, the initial problem is determining whether the retailers which acquire respondents' products from wholesalers may be considered to be customers of respondents for purposes of Section 2(d). Solution of this problem requires an analysis of respondents' distributional system in Chicago and Washington.

The wholesaler through which Ace News distributes its publications in Chicago is Charles Levy, Inc. Two of the retailers handling Ace-distributed publications in that city are Marshall Field & Co. and Carson, Pirie, Scott & Co., both of which are large department stores. Each not only acquires Ace-distributed publications from Levy but also is billed by and submits its remittances to that wholesaler. It was stipulated that Marshall Field received an allowance for display purposes directly from Ace News on an unspecified date between January 1, 1960, and June of 1961.² It appears that allowances were granted to Marshall Field during this period for the display of Ace paperback books,³ thus permitting the inference that the stipulated allowance was granted for this purpose. Carson, Pirie, Scott, on the other hand, was not offered, and did not receive either directly or indirectly during this period display or promotional allowances from Ace News.⁴

Atlantic Magazine Co. is the Ace wholesaler in Washington, D.C.⁵ Universal News and Book Store, Inc., which operates two retail stores in the downtown business section of Washington, acquires Ace-distributed publications through Atlantic.⁶ The parties stipulated that Ace News paid allowances to Universal on a continuing basis between January of 1960 and June of 1961 for the display of Ace paperback books.⁷ The Schrot Cosmopolitan News, which also acquires Ace-distributed publications from Atlantic, is located in the same neighborhood with both Universal stores. Although Ace News credited Atlantic's account with a small allowance on one occasion in 1960 with the understanding that Atlantic would convey

² Tr. 500.

³ CX 70(b), (g); tr. 1749-50.

⁴ The general manager of Ace News testified that during the period from January 1, 1960, through June 1961 his company did not pay or arrange for the payment of any display or promotional allowances to Carson, Pirie, Scott & Co. Tr. 528-529.

⁵ Atlantic is smaller of the two wholesalers in Washington and is primarily engaged in distributing "girlie" magazines and "risque" paperback books. Tr. 1146-1148.

⁶ Respondents' counsel stated in oral argument before the Commission that Atlantic owns "outright" the Universal stores. See also tr. 1213, 1342.

⁷ Tr. 498-499, 1743.

hands of the wholesalers and that they do not relinquish that title when the wholesalers delivered the publications to the retailers. The "Wholesale Distributors Contract"¹⁶ provides that the wholesalers will pay for all publications delivered at a specified price and that they will be permitted to return to respondents all unsold publications collected from retailers for full credit. The final clause in the contracts provides that title will be retained by respondents until the publications are sold by the wholesalers, and that the amounts due respondents from the funds collected by the wholesalers are to be held in trust for respondents.¹⁷ These contracts are consistent with respondents' contention that the wholesalers are consignees, and although the examiner did not so characterize the wholesalers, he held that respondents retained title until the publications were sold by the wholesalers.¹⁸

Moreover, it appears that both parties to these contracts treat the publications as though title has been retained by respondents. Respondents carry insurance against loss of and damage to the publications in the hands of the wholesalers,¹⁹ and, on occasion, have filed claims with the insurer for such damage which has occurred.²⁰ In addition, the wholesalers function as respondents' agents in several respects. First, the contract requires the wholesalers to furnish to respondents lists of retailers with information concerning their line of business and standing orders and to render such other reports as may be requested by the company. Secondly, the wholesalers agree to devote the necessary time and effort to promoting the best interests of respondents, to cooperate with respondents in enlarging and extending the circulation of respondents' publications and distributing their advertising materials, and to conform to all rules and regulations promulgated by respondents. Further, with respect to unsold copies, the contracts require the wholesalers to recover such copies whole from retailers and, at the option of respondents, to return either the whole copy or only a part of the cover to respondents.²¹ In addition, the wholesalers acted as agents

¹⁶ CX 10, 11.

¹⁷ That clause states: "Anything hereinabove contained to the contrary notwithstanding, the WHOLESALER agrees that the title to all publications delivered to it pursuant to this Agreement shall remain in the COMPANY until actually sold by the WHOLESALER and, thereafter, the proceeds of such sales shall constitute a trust fund in the hands of the WHOLESALER for the use of the COMPANY up to the full amount due to the COMPANY hereunder." CX 10, 11.

¹⁸ Initial Decision, Findings of Fact, par. 37. The examiner also held that title vested momentarily in the wholesaler prior to passing to the retailer, a finding with which the Commission does not agree.

¹⁹ RX 9.

²⁰ See RX 10-19.

²¹ See CX 10, 11.

of several suppliers may receive the goods of one supplier on consignment and purchase outright the goods of other suppliers. In addition to retention of title by the consignor, a *bona fide* consignment relationship will normally contain several of the following elements—deferral of payment on the part of the consignee until after the products have been sold, the privilege of return of all unsold products, receipt of a commission by the consignee for his efforts in selling the products, insurance coverage by the consignor of the goods while on the premises of the consignee, payment by the consignor of property taxes levied on the goods while in the hands of the consignee, periodic accounting by the consignee for sales and inventory on hand, liability of the consignor for the consignee's misrepresentation and negligence in selling the products to consumers, and segregation of the consignor's products from those of other manufacturers or suppliers.¹² In the normal consignment relationship, title is retained by the consignor until the goods are sold by the consignee. Where such is the case, it appears that title is transferred directly from the consignor to the purchaser acquiring possession from the consignee and never vests in the consignee.¹³ On the other hand, where title is retained by the seller for a lesser time—*i.e.*, until the buyer pays for the goods—the relationship may not be a true consignment but instead may be a sale with temporary retention of title for security purposes.¹⁴ The written agreement between the parties usually determines whether or not a consignment relationship exists and at what point title passes. However, where that agreement is unclear or self-contradictory, resort may be had to the acts and practices of the parties and other surrounding circumstances in determining the true relationship between the parties.¹⁵

In the present case, the respondents entered into written contracts with the local wholesalers, but did not contract with the retailers acquiring Ace-distributed publications from the wholesalers. The contention that the retailers are consignees is predicated upon the assumption that respondents retain title to the publications in the

¹² See *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); *United States v. General Electric Co.*, 272 U.S. 476 (1926); *Federal Trade Commission v. Curtis Publishing Co.*, 260 U.S. 568 (1923); *Atlantic Refining Co. v. Federal Trade Commission*, 344 F. 2d 599 (6th Cir. 1965); "Consignment Device for Retail Price Maintenance Invalidated by Supreme Court," 17 *Stanford L. Rev.* 519 (1965); Baker, "Agency and Consignment Selling," 9 *The Antitrust Bulletin* 299 (1964); Klaus, "Sale, Agency and Price Maintenance," 28 *Columbia L. Rev.* 312 (1928); 46 Am. Jur., *Sales*, Par. 484.

¹³ See *United States v. General Electric Co.*, *supra* at 484.

¹⁴ See 77 C.J.S., *Sales*, Par. 262; 46 Am. Jur., *Sales*, Pars. 446-449.

¹⁵ *Fowler v. Pennsylvania Tire Co.*, 326 F. 2d 526 (3d Cir. 1964); *Edgewood Shoe Factories v. Stewart*, 107 F. 2d 123 (5th Cir. 1939); 46 Am. Jur., *Sales*, Par. 19.

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Moreover, we think that these retailers are respondents' customers. The wording of the wholesaler contracts and the surrounding circumstances indicate that title does not vest in the wholesalers at any time. *A fortiori*, the title passes directly from respondents to the retailers. See *United States v. General Electric Co.*, 272 U.S. 476, 484 (1926). Although the record fails to show that the retailers negotiated directly with respondents, they negotiated directly with the wholesalers, respondents' consignees. In addition, the favored retailers received their allowances directly from respondents in the period prior to mid-1961. Thus, there were instances of direct contact between the retailers and respondents or their agents. Moreover, the retailers were subject to various terms of purchase established and controlled by respondents. As previously noted, the respondents established the cover price of Ace paperback books and, through May of 1962, suggested the price which the wholesalers charged the retailers. They administered the terms by which the retailers returned unsold copies for full credit, and determined the number of publications to be shipped to many of the retailers. In addition, it appears that respondents made the ultimate decision to grant or deny allowances to the various retailers. Such factors support a conclusion that the retailers—both favored and nonfavored—acquiring distribution of respondents' books and magazines through wholesalers are respondents' customers for purposes of Section 2(d), of the Clayton Act, as amended. *American News Co. v. Federal Trade Commission*, 300 F. 2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962). *K.S. Corp. v. Chemstrand Corp.*, 198 F. Supp. 310 (S.D. N.Y. 1961); *Dentists' Supply Co. of New York*, 37 F.T.C. 345 (1943); *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937). As a result, respondents' failure in the period prior to mid-1961 to offer or otherwise make available to the nonfavored retailers—Carson, Pirie, Scott in Chicago and Cosmopolitan in Washington—allowances which were proportionally equal to those accorded the favored retailers—Marshall Field in Chicago and Universal News in Washington—constitutes a violation of the statute. Moreover, since the evidence shows that the type of discrimination practiced prior to mid-1961 did not abate thereafter,²⁶ respondents' assertion of abandonment is rejected.

In December of 1961, respondents contracted directly with Union News Co., a large retail chain organization with outlets in many public transportation terminals and hotels, for the distribution of

²⁶ Initial Decision, Findings of Fact, pars. 86-89.

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for respondents in conveying allowances to selected retailers.²² Finally, it appears that respondents to a large extent controlled the amount of compensation received by the wholesalers for performing the distribution function. Respondents establish the cover price of Ace pocket books—the price paid by the ultimate consumer. Through May of 1962, they suggested the price which the wholesalers should charge the retailers for all Ace-distributed publications—approximately 20 percent less than the cover price. This resale price was almost universally adhered to by wholesalers.²³ The wholesaler collected this amount from the retailers and, pursuant to the terms of the contract, held in trust for respondents the sum due them, an amount also established by respondents.²⁴ Thus, there are many factors in addition to retention of title which indicate that the wholesalers, when distributing respondents' publications to retailers, operate under terms and conditions established by respondents and in addition act as respondents' agents. The over-all combination of factors convinces us that the wholesalers receive Ace-distributed publications on consignment, and, as a result, are respondents' agents for the purpose of distributing these publications to all retailers and transmitting allowances to the favored retailers. Thus, we adopt respondents' contention that the wholesalers with which this case is concerned are respondents' consignees.

There is no support for the assertion that retailers acquiring respondents' publications from wholesalers are also consignees. There were no written agreements establishing such a relationship and no other evidence which would indicate that the retailers acquired the publications on consignment. Evidence offered to show that respondents insured the publications while in the hands of retailers was inconclusive.²⁵ The assertion that respondents did not relinquish title when the wholesalers delivered the publications to the retailers must be rejected in light of the fact that the clause in the wholesaler contract operated to retain title until the wholesaler sold the publications, but no longer. Since there is no other indication that respondents attempted to retain title after the wholesalers sold the publications, we hold that the retailers acquiring distribution through wholesalers are not consignees.

²² See CX 30.

²³ Tr. 451, 459, 462, 476-477, 767-770, 1092-1093; CX 15-18.

²⁴ Since May of 1961, the wholesaler has been given a 40 percent "discount" from the cover price of the particular publication. Tr. 1755-1756; RX 8.

²⁵ Respondents' contracts of insurance do not purport to insure merchandise delivered to retailers. See RX 9(k).

equivalent to the compensation received by the wholesalers for distribution to other retailers.³³

Respondents take the position that Union is a consignee and, again relying on *Students Book Co. v. Washington Law Book Co.*, *supra*, assert that Union may not be considered to be a customer for purposes of Section 2(d) of the Clayton Act. The contracts with Union are entitled "Direct Customer Contract" and "Direct Retail Customer Contract."³⁴ Union is referred to throughout as a "customer" and agrees to "pay" for all publications delivered. Although the contract covering Ace paperback books does not specify a payment date, the contract for magazines provides that such payment is to occur by the twentieth day of each month for publications included in the previous month's invoice. Both contracts contain an ambiguously worded clause which appears to be an attempt to retain title in respondents until full payment has been made for all publications.³⁵ The only logical explanation for the contract as a whole, giving effect to all of its provisions, is that both parties contemplated that payment for the publications would occur prior to their sale to ultimate consumers by Union and that title was to vest in Union at the time of payment. Such an interpretation would be consistent with the remainder of the contract, which, but for the clause purporting to retain title, appears to be a contract for sale with the privilege or option of return of unsold copies.³⁶ In practice, Union did not pay for the publications until several months after delivery when the publications had already been acquired by the ultimate consumers.³⁷ The examiner noted that a literal reading of the contract would require the unrealistic holding that respondents kept title after the ultimate consumer had purchased the periodicals, and concluded that respondents retained title until Union sold the publications, but no longer.³⁸

There is a distinction between a consignment as heretofore defined and a sale in which passage of title is conditioned upon payment for goods already delivered.³⁹ In the latter instance, payment for the

³³ Tr. 519-522; 1120-1122.

³⁴ See CX 31, 32.

³⁵ That clause states: "Anything herein contained to the contrary notwithstanding, all Books supplied hereunder by the Company, shall be and remain the sole and exclusive property of the said Company, and title thereto shall remain in the said Company until full payment has been made for all copies of said Ace Books sold by the Customer, excepting only such unsold copies returned for credit as hereinbefore provided." CX 31(b).

³⁶ See Am. Jur., *Sales*, Par. 484; cf. *Students Book Co. v. Washington Law Book Co.*, *supra*.

³⁷ Tr. 687.

³⁸ Initial Decision, Findings of Fact, pars. 67, 71.

³⁹ See n. 14.

their publications.²⁷ The contracts permitted Union to acquire Ace-distributed paperback books at 30% off the cover price, plus an additional 16% off the cover price for a display and promotional allowance. As a result, the total profit realized by Union on the resale of Ace paperback books exceeded the retailers' total profit coupled with the wholesalers' compensation. As previously noted, other retailers purchased the publications at 20 percent less than the cover price. The wholesalers received as their commission the difference between 20 percent off the cover price and 40 percent off the cover price.²⁸ Thus, on a hypothetical publication having a cover price of \$1.00, Union's gross profit upon resale, including the promotional allowance, would be 46¢. On the same publication, the wholesaler's commission would be 20¢ and the retailer's profit would be an equal amount. Ace-distributed magazines were acquired by Union at the price normally paid by wholesalers—40 percent less than the cover price.²⁹ A substantial portion of the difference between the 40 percent discount and the price normally paid by other retailers is attributable to Union's agreement to give Ace-distributed monthly magazines prime display space and full cover display on Union newsstands.³⁰ There is no indication that other retailers received allowances of such magnitude on either Ace paperback books or Ace distributed magazines at any time, and the evidence specifically shows that no such allowances were granted to the retailers with which this case is concerned during the period after the Union contracts were consummated.

Although Union contracted with respondents for the right of distributing their publications on the retail level and remitted payment for the publications to respondents, Union did not receive delivery of the publications directly from respondents. Instead, respondents shipped the publications to the local wholesalers and the wholesalers distributed them to all retailers, including the Union outlets.³¹ The wholesalers also collected unsold copies from Union newsstands for return to respondents.³² In compensation for performing this pickup and delivery service, the wholesaler received a commission from respondents for each copy actually sold by Union. There is some indication that the amount of this commission was

²⁷ CX 31, 32.

²⁸ See tr. 476-477; 767-770; 1755-1756; RX 8.

²⁹ CX 32; Initial Decision, Findings of Fact, par. 58.

³⁰ Tr. 1866, 1867; CX 32(b).

³¹ Tr. 784-785; 1116.

³² Tr. 1730-1734.

Since such action is entirely inconsistent with the terms providing for retention of title until payment is made, we think that this provision of the contract has been waived. See 77 C.J.S., *Sales*, Par. 262; 17 Am. Jur., *Sales*, Par. 448. In these circumstances title would vest in Union upon delivery of the publications. Accordingly, we hold that Union is a customer for purposes of Section 2(d) of the Clayton Act, as amended.

Respondents' argument that the nonfavored retailers located within a few blocks of the various Union outlets do not compete with Union is predicated on the theory that Union attracts impulse buyers, while the nonfavored retailers attract a different segment of the purchasing public. However, the evidence does not support such a theory. In Chicago, Post Office News, the Union outlet, is a retail book store selling paperback books and magazines on the first floor. Economy Book Store, a nonfavored retailer located within a block and a half of Post Office News is also a retail book store selling paperback books on the first floor. Carson, Pirie, Scott, a nonfavored department store located a block and a half from Post Office News, maintains its book department on the first floor and sells paperback books. It is not disputed that each carried Ace paperback books during the relevant period. There is some indication that all catered to impulse buyers.⁴⁴ Thus, the similarity in their paperback book sections, their close physical proximity, and their exposure to some of the same types of customers amply establish the requisite competition. *Federal Trade Commission v. Simplicity Pattern Co.*, 360 U.S. 55 (1959); *Sunbeam Corp.*, Docket No. 7409 [p. 20 herein] (January 11, 1965); *Liggett & Myers Tobacco Co.*, 56 F.T.C. 221 (1959).

The evidence dealt with three Union outlets in Washington. The Union newsstand located in the Hotel Annapolis-Manger is two blocks from the nonfavored newsstand located in the Trailways Bus Depot. Both are newsstands and both handle on a regular basis some of the same Ace-distributed magazines.⁴⁵ The bus depot newsstand caters to impulse buyers.⁴⁶ The Union outlet in the Washington railroad terminal is located two blocks from Easterday Pharmacy, a drugstore which sells Ace-distributed books and magazines, and within a block and a half of Plaza Fruit and News Stand, a small variety store selling Ace paperback books and magazines. Neither Easterday nor Plaza received allowances for the display of Ace-

⁴⁴ Tr. 1000-1003; 1023.

⁴⁵ Tr. 1166-1168; CX 42-50.

⁴⁶ Tr. 1167.

goods is made a condition precedent to passage of title and the seller, by the terms of the contract or agreement, retains title to the goods until payment has occurred. In such a situation, the party acquiring the goods from the seller is considered to be a buyer or purchaser rather than a consignee and both parties to the agreement contemplate that title will vest in the purchaser before the goods are resold. The clause retaining title in the seller until full payment has been made is considered waived if the parties engage in acts and practices which are inconsistent with its terms.⁴⁰ Where such is the case, it follows that title would vest in the buyer upon delivery of the goods.

The contracts between respondents and Union differ significantly from the contracts establishing the consignment of respondents' publications to the wholesalers. The title retention clause in the wholesaler agreement provides that title remains in respondents until the publications are sold by the wholesalers, while the clause in the contract with Union attempts to retain title until Union has paid in full for the publications. Unlike the contracts with the wholesalers, there are no provisions that Union will hold a portion of the proceeds collected from consumers in trust for respondents, nor are there agreements that Union will perform other acts of agency for respondents. Union is referred to in the contract as a "customer," whereas this term is never applied to the wholesalers. Sample invoices indicate that the goods were "sold" to Union.⁴¹ The evidence offered to show that respondents insured the publications against damage after delivery to Union was inconclusive.⁴²

A consideration of all of these factors convinces us that Union is not a consignee as that term was used by the court in *Students Book Co. v. Washington Law Book Co.*, *supra*. Instead, it is our conclusion that the transaction is a sale with the option or privilege of return. Passage of title is conditioned upon payment, with title remaining in respondents until Union pays for the publications. It appears that respondents' billings were not always prompt and, as previously noted, Union's payments were tardy.⁴³ Apparently respondents did not require payment by the twentieth of the month, pursuant to the contract, and continued to ship publications even though payment had lagged five months or more behind schedule.

⁴⁰ *Ibid.*

⁴¹ See CX 42-50.

⁴² In any event, it would appear that insurance coverage by respondents for as long as they retained title to the publications after delivery to Union would not be inconsistent with a sale in which title passage is conditioned upon payment.

⁴³ Tr. 687; see CX 42-53.

that this individual controls and actively participates in their management. In addition, the examiner found that the contract between Ace Books and Ace News provides that Ace Books is charged with the responsibility of shipping its books or causing them to be shipped to wholesalers in other States and that Ace Books assumes responsibility for all shipping expenses.⁵⁰ Further, he found that Ace Books agreed to reimburse Ace News for any allowances paid. On the basis of all of these facts, the examiner concluded that Ace Books was engaged in the interstate shipment of books and that it was engaged jointly with Ace News in the payment of promotional allowances on books which it published.⁵¹

We agree with the examiner's conclusions that Ace Books is engaged in commerce and is accountable for the allowances granted, but in so doing we do not disregard the separate corporate status of each of the two companies. Instead, we think the fact that the two companies are related through the broader business interests of their mutual president strongly suggests joint action on the part of both companies in distributing paperback books published by Ace Books. Such joint action is further indicated by the fact Ace Books pays various expenses incurred while the books are in transit. For example, the contract provides that Ace Books is responsible for any loss, damage, or destruction of the publications while in transit to the wholesaler. The contract further provides that Ace Books will pay any damages or fines that may be assessed against Ace News on a charge that the publications are libelous or obscene. We note also that under the contract Ace Books is responsible for any claims of shortage made by wholesalers and retailers, and for any other liens or fees levied against Ace News. Thus, Ace Books has assumed responsibility for a multitude of variable expenses incurred after the books have entered the stream of commerce. Although the precise point at which title passes from Ace Books to Ace News is not clear, it is our conclusion that Ace Books is engaged in the interstate shipment of paperback books, and that it is acting jointly with Ace News in the payment of promotional allowances in connection with Ace paperback books. Thus, Ace Books is properly a party in this proceeding.

Respondents seek to excuse their acts of discrimination by invoking the meeting competition defense of Section 2(b) of the amended Clayton Act. Turning first to the allowances granted in the period prior to mid-1961, respondents established that other

⁵⁰ See tr. 294; CX 2, 3.

⁵¹ Initial Decision, Findings of Fact, pars. 11, 109.

distributed publications during the applicable period. There was testimony that some of the same type of customers—government employees from offices in the neighborhood and guests in nearby hotels—frequented Easterday and Plaza and were referred to the Union outlet in the railroad terminal when these small retailers were unable to fill their requests.⁴⁷ The third Union outlet, located in the Willard Hotel, is situated within a block of the Schrot Cosmopolitan News and directly across the street from one of the Universal stores in a business section with unusually heavy pedestrian traffic.⁴⁸ These three outlets market some of the same magazines.⁴⁹ In all of the above-mentioned instances, the nonfavored retailers are located within a few blocks of the Union outlets and have opportunity for access to the same types of consumers. These factors are, we think, sufficient to establish the requisite competition in the absence of countervailing evidence that the varying physical characteristics of the retailers resulted in patronage by completely different categories of customers. *Sunbeam Corp., supra*. Accordingly, we reject respondents' contention that the evidence is insufficient to establish competition between the nonfavored retailers and the Union outlets. Since these nonfavored retailers received distribution of respondents' publications through wholesalers in essentially the same manner as was utilized prior to mid-1961, they are for the same reasons respondents' customers in the period after the Union contracts were consummated. Thus, respondents' failure to offer or make available to these nonfavored retailers allowances on terms which were proportionally equal to those accorded the Union News outlets constitutes a violation of Section 2(d) of the Clayton Act, as amended.

Respondents argue that title to paperback books published in the State of New York by Ace Books passes to Ace News, the distributor, in that State and that Ace News thereafter ships the books to wholesalers in other States. In addition, respondents contend that Ace News, rather than Ace Books, pays the allowances. It is their position, therefore, that Ace Books is not engaged in interstate commerce and that it did not participate in the granting of allowances. The examiner, without determining the exact point at which title passes, found that Ace News and Ace Books were related parts of the business interests of the individual who has been the president of both companies since their incorporation, and

⁴⁷ Initial Decision, Findings of Fact, pars. 82-84.

⁴⁸ Tr. 1277.

⁴⁹ Tr. 1167-1168; 1327-1329; CX 42-50.

themselves initiated the practice. The record fails to establish the rates used by respondents' competitors to compute their allowances or the amounts of such allowances. No conclusive determination can be made with regard to the rates used by respondents. Respondents failed to show any of the circumstances surrounding the initiation of their allowances to these retailers and made no effort to establish that their allowances did not in fact exceed those of competitors, by reference either to the rates or the total amounts of these allowances.⁵⁴ Without evidence of a more specific nature, the Commission is unable to make an informed determination on the various questions which must be resolved and, as a result, is compelled to reject respondents' contention that they have met their burden in establishing the defense.

Nor does the evidence establish that respondents' agreements with Union News, entered into in December of 1961, are protected by the good faith meeting competition defense. The Ace officer who negotiated the Union contracts testified that the Union official with whom he was dealing assured him that at least two other publishers—Hearst and MacFadden Bartel—were granting allowances of similar magnitude.⁵⁵ MacFadden-Bartel had entered into a contract with Union for the sale and display of magazines, while Hearst had contracts for the sale and display of paperback books and for magazines.⁵⁶ Respondents' allowances on paperback books in fact exceeded those of Hearst.⁵⁷ The Hearst and MacFadden contracts were canceled prior to trial,⁵⁸ but respondents have continued to grant allowances to Union pursuant to the 1961 contracts. At the time of trial, Ace was the only national distributor with which Union had such contracts.⁵⁹ Prior to entering into the contracts with Union, respondents were aware that Union would not deal with publishers and distributors unless it received unusually favorable terms and allowances and knew that space was then available on Union newsstands only because others were prohibited from granting such allowances by Federal Trade Commission orders.⁶⁰

⁵⁴ RX 59 indicates that, in 1959, the buyer for Marshall Field requested an increase in the allowance granted on Ace Books because the Ace allowance granted at that time was the smallest one received. However, no information on the size of competitors' allowances in 1960 and 1961 is present in the record.

⁵⁵ Tr. 1860, 1961-1965.

⁵⁶ RX 3, 4, 5, 6.

⁵⁷ Initial Decision, Findings of Fact, par. 120.

⁵⁸ The Hearst contracts on Magazines were canceled in February of 1962, and the contract for paperback books was canceled in March of 1963. The MacFadden-Bartel contract on magazines was canceled early in 1963. Initial Decision, Findings of Fact, pars. 122, 126.

⁵⁹ Tr. 725, 1443, 1453, 1632, 2172.

⁶⁰ Tr. 701-708, 1931-1933, 2162-2163.

publishers had been paying allowances on magazines to transportation terminal accounts for approximately thirty years and on paperback books for about ten years prior to 1961.⁵² Neither Marshall Field nor Universal News is a "terminal account" and the record fails to show when they began to receive allowances either from respondents or their competitors. However, representatives of several publishers testified that they granted allowances to these two retailers during the period of time with which this case is concerned. The examiner noted that the record fails to show when such allowances were first granted or the rate used to calculate the allowances and, in addition, does not indicate the circumstances surrounding respondents' initiation of its allowances to these accounts or the rates used to determine the allowances. The examiner held, on the basis of the record as a whole, however, that each of these accounts was receiving comparable allowances from competitors when respondents' allowances were begun and that respondents had reason to believe that neither of these accounts would handle their publications in the absence of allowances.⁵³ We do not think that the evidence clearly establishes these latter findings, since none of the witnesses upon whom respondents rely for their Section 2(b) defense were able to testify concerning the circumstances surrounding the initiation of allowances to these two retailers. We note, however, that there is general evidence in the record that the allowances of most distributors were comparable and that some retailers would not handle publications or provide adequate display space in the absence of accompanying allowances.

It has been recognized that the burden of establishing the Section 2(b) defense is upon the proponent. *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505 (1963). Since the defense has the effect of exculpating a discrimination which would otherwise be forbidden, the evidence upon which the defense is predicated must be of sufficient preciseness to permit an informed determination. See *Callaway Mills Co.*, Docket No. 7634, 64 F.T.C. 732 (February 10, 1964); *Cabin Crafts, Inc.*, Docket No. 7639, 64 F.T.C. 799 (February 10, 1964); cf. *Continental Baking Co.*, Docket No. 7630, 63 F.T.C. 2071 (December 31, 1963); *Ponca Wholesale Mercantile Co.*, Docket No. 7864, 64 F.T.C. 937 (February 24, 1964). We think the evidence presented here does not permit such a determination. The evidence does not show when respondents' competitors began granting allowances to Universal News or Marshall Field or when respondents

⁵² Tr. 1628.

⁵³ Initial Decision, Findings of Fact, par. 115.

a good faith attempt to meet competition. The evidence shows that the competitors whose allowances respondents allegedly met discontinued their allowances prior to the trial of this case. Respondents have offered nothing to show that they are currently meeting other allowances comparable to those which they are now granting to Union. We think it clear, therefore, that respondents may not now claim the shelter of the meeting competition defense,⁶³ and we so hold.

Finally, respondents contend that error was committed when a new hearing examiner was appointed to relieve the hearing examiner who presided at the prehearing conference. The substitution occurred after the original examiner had issued a prehearing order, but before formal evidentiary hearings had begun. Respondents' argument is predicated upon Section 5(c) of the Administrative Procedure Act,⁶⁴ which states in pertinent part that the "same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the * * * initial decision * * * except where such officers become unavailable to the agency." Respondents contend that the prehearing order, which governed the trial proceedings and embodied stipulations reached at the prehearing conference, constitutes evidence introduced before the original examiner, and that he may not be replaced in the absence of a showing that he is "unavailable." Without reaching this question, we hold that all of the evidence upon which the initial decision in this case is predicated was received by the substituted examiner and that respondents thus had in essence a trial *de novo* before the substituted examiner. At the beginning of the evidentiary hearings, counsel for both sides were given but did not take the opportunity to withdraw from the stipulations of fact reached during the prehearing conference. The substituted examiner expressly adopted the prehearing order as his own and subsequently modified it in several particulars. Thus, if the stipulations contained in the prehearing order are considered to be evidence, their adoption by the substituted examiner, after both sides had been offered the chance to withdraw from or modify them, qualifies them as evidence received by the substituted examiner. By agreement of counsel, the transcript of the prehearing conference was stricken from the record. The substituted examiner presided at the evidentiary hearings, heard the testimony of all witnesses who appeared, and ruled on

⁶³ *Champion Spark Plug Co.*, 50 F.T.C. 30, 42 (1953); *Carpel Frosted Foods, Inc.*, 48 F.T.C. 581, 597-598 (1951).

⁶⁴ 60 Stat. 239 (1946); 5 U.S.C. 1001, 1004(c).

We think that respondents' failure to take any steps to verify the Union official's assurances that the unusually large allowances on books and magazines requested by Union were no larger than allowances already being granted by other publishers militates strongly against respondents' assertion that their allowances were granted in good faith to meet competition. As the Supreme Court noted in *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945):

* * * The Commission commented on the tendency of buyers to seek to secure the most advantageous terms of sales possible, and upon the entire lack of a showing of diligence on the part of respondents to verify the reports which they received, or to learn of the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact be meeting the equally low price of a competitor. The Commission thought that respondents' allowance of discretionary prices, in circumstances which strongly suggested that the buyers' claims were without merit, as well as respondents' readiness to grant discriminatory prices without taking any steps to verify the existence of a lower price of competitors, and the entire absence of any showing that respondents had taken any precaution to conduct their business in such manner as to prevent unwarranted discriminations in price, all taken together, required the conclusion that respondents had not sustained the burden of showing that their price discriminations were made in good faith to meet the lower prices of competitors. (324 U.S. at 759.)

Moreover, the allowances granted Union by respondents' competitors permit Union, a retailer, to acquire competitors' publications at a price equal to or less than that normally paid by wholesalers.⁶¹ Respondents were aware that Union always demanded excessive allowances and that it had recently refused to handle the publications of some distributors which had been prevented by Federal Trade Commission orders from granting such allowances. Respondents continued their allowances to Union after those of their competitors had been stopped. These factors support a conclusion that respondents were seeking to acquire certain prime display space on Union newsstands which was available only because Union would not deal with distributors which would not grant large allowances, and that respondents were willing to pay almost any price for these rights.⁶² If such is the case, respondents' initiation of the allowances was not in good faith. However, we find it unnecessary to reach this question, since we think the allowances are not protected by the Section 2(b) defense even if they were initiated in

⁶¹ See RX 3(d), 4(c), 5(d).

⁶² Respondents not only gave Union favorable prices and promotional allowances which together permitted Union to purchase the publications at somewhat less than the wholesale price, but also paid the wholesalers a commission of approximately 20 percent of the cover price to distribute the publications to the Union outlets.

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cipal or agent, or from a distributor or wholesaler where such transaction with such purchaser is essentially a sale by such respondent, acting either as principal or agent." Complaint counsel appealed from the examiner's order, arguing that for the sake of clarity, and to prevent evasion, it should require respondents, if they grant an allowance to any retailer, to give every competing retailer distributing their publications a proportionally equal allowance, whether or not he is a "customer" of respondents within the definition contained in the examiner's order. The Commission in its decision (p. 1133) denies the appeal of complaint counsel without any discussion. I do not concur.

1. The examiner's order, which in its terms applies only where there is a seller-purchaser relationship between respondents and their retail distributors, is premised on a view of the scope of Section 2(d) that the Commission, in a recent decision issued after the initial decision in this case, has rejected. *Sunbeam Corp.*, F.T.C. Docket 7409 (decided January 11, 1965) [p. 20 herein]. On facts basically similar to those of the present case, the Commission in *Sunbeam* held that Section 2(d) was violated by the payment of discriminatory advertising allowances directly to a retailer who was not a purchaser from the discriminating supplier but bought from an intermediate distributor:

In the present case * * * respondent itself, not its wholesalers, granted the advertising and promotional allowances in question, and granted them directly to the allegedly disfavored retailers. Even though the latter purchased respondent's merchandise from wholesalers, the wholesalers played no significant part in the transactions alleged to violate Section 2(d). As the direct and intended recipients of payments by respondent for the promotion of respondent's goods under a plan devised and implemented by respondent, these retailers were, we think, "customers" of respondent within the meaning of the statute. Any other construction would defeat the plain intent of Congress in enacting Section 2(d)—to prevent sellers from discriminating between competing resellers in the granting of advertising and other promotional allowances. [p. 56 herein]

The present respondents are obligated by Section 2(d) to make promotional assistance available on proportionally equal terms to all competing retailers, not because all or any of these retailers are purchasers from respondents, but because respondents granted assistance directly to some of them under a plan devised and implemented by respondents, thereby making the recipients their "customers" for Section 2(d) purposes under the *Sunbeam* ruling. In view of our ruling in *Sunbeam*, that in the circumstances involved there (and here as well) a retailer may be the supplier's customer

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the admissibility of all documentary evidence. This examiner subsequently prepared the initial decision. As a result, the Commission concludes that the requirements of Section 5(c) of the Administrative Procedure Act have been fully satisfied. *CF Gamble-Skogmo, Inc. v. Federal Trade Commission*, 211 F. 2d 106 (8th Cir. 1954).

Complaint counsel's requests to amend the order have been considered, but are rejected. The initial decision of the hearing examiner is adopted in all respects except where it is not in accord with the views of the Commission as expressed herein. In adopting the order of the hearing examiner, the Commission is aware that respondent Ace Books does not now distribute or sell magazines. However, the examiner held that both respondents were parts of the single publication and distribution enterprise of their mutual president, who has been active in their management and control.⁶⁵ Moreover, the evidence shows a certain amount of corporate manipulation in the formation and dissolution of a series of corporations over a period of several years.⁶⁶ It appears that the distributional function was at one time performed by one of the preceding publishing companies.⁶⁷ To prevent the circumvention of the order to cease and desist by the transfer of the distribution of magazines to Ace Books, the Commission is of the opinion that the order should apply in its entirety to both respondents.

Commissioner Elman's views on the scope of the order are set forth in a separate opinion.

Commissioner Jones did not participate for the reason that oral argument was heard prior to her taking the oath of office.

SEPARATE OPINION

JUNE 18, 1965

By ELMAN, *Commissioner*:

The cease and desist order entered by the hearing examiner and adopted by the Commission forbids respondents to grant advertising or promotional allowances to any "customer" unless such allowances are made available on proportionally equal terms to all other competing "customers." The order defines customer "to mean anyone who purchases from a respondent, acting either as prin-

⁶⁵ Initial Decision. Findings of Fact, par. 4.

⁶⁶ Respondents' mutual president and his wife own all of the stock of both respondent corporations, and they have owned all of the stock of each of the preceding corporations. Respondents' Brief in Answer to Commission Counsel's Brief on Appeal From Initial Decision, p. 7.

⁶⁷ Tr. 270-272.

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respondents' past conduct, and from what we know of distribution and promotional practices in this industry as disclosed in numerous Commission proceedings similar to the present one (e.g., *American News Co. v. F.T.C.*, 300 F. 2d 104 (2d Cir. 1962)), there would appear to be a real, and not merely theoretical, danger that respondents may seek to evade the order by altering their relationship with the retailers. They might, for example, change to a consignment method of distribution, making the retail distributors consignees rather than their purchasers. Or they might relax somewhat their control over redistribution of their publications by wholesalers in an effort to render the "indirect purchaser" doctrine inapplicable and thereby deprive the Commission of authority under the order to require that they give proportionally equal treatment to competing retailers.

The danger is sufficiently clear and present to justify, and indeed require, an order that would impose on respondents the obligation of treating with proportional equality *all* retailers of their publications who compete with retailers to whom respondents give promotional assistance. Certainly such an order, involving no more than a necessary "fencing in" of a firm found to have violated the law, *F.T.C. v. National Lead Co.*, *supra*, at 431, would be far more effective in informing respondents of their obligations under the order and in preventing its circumvention than one requiring determination whether a transaction is "essentially a sale" by respondents to the retailer. See generally Long, *The Administrative Process: Agonizing Reappraisal in the FTC*, 33 Geo. Wash. L. Rev. 671 (1965).

FINAL ORDER

This matter having been heard by the Commission on cross appeals filed both by complaint counsel and by respondents from the initial decision of the hearing examiner, and upon briefs and argument in support thereof and in opposition thereto; and

The Commission having rendered its decision determining that the appeals should be denied and that the initial decision of the hearing examiner should be modified in accordance with the views and for the reasons expressed in the accompanying opinion, and, as so modified, adopted as the decision of the Commission:

It is ordered, That the initial decision as modified by the accompanying opinion be, and it hereby is, adopted as the decision of the Commission.

for Section 2(d) purposes even though he buys not from the supplier but from the supplier's distributor, I do not agree that it is proper to limit the order to purchasers from respondents. At a minimum, the order should reach all of respondents' customers, whether or not they are also respondents' purchasers.

2. Complaint counsel contend for a broader order—one that would apply to all retail distributors of respondents' publications, whether or not they are purchasers or customers. In the circumstances, I agree that such an order is both necessary and proper.

In formulating a cease and desist order, the Commission is "not limited to prohibiting the illegal practice in the precise form" found; it may properly "close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *F.T.C. v. Ruberoid Co.*, 343 U.S. 470, 473. This does not mean that the Commission should routinely enter boilerplate orders, expressed in the statutory language and prohibiting every conceivable violation of the statute, on the theory that only such an order can really close all roads to the prohibited goal. Such an order, besides being unduly vague and general, may sweep within its prohibitions many acts and practices not "related to the proven unlawful conduct." *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426, 433.

It does mean, however, that the Commission may go beyond the terms of the statute in fashioning relief. See *F.T.C. v. National Lead Co.*, 352 U.S. 419, 431. It is often necessary, "as a prophylactic and preventive measure" (*F.T.C. v. Mandel Bros., Inc.*, 359 U.S. 385, 393) to assure that the unlawful conduct will not recur and that its harmful effects have been fully dissipated, to enjoin not only the precise acts found to be unlawful but also "like and related acts" (*ibid.*) regardless whether they are themselves forbidden by the statute involved, or by a related statute, or by no statute.

In short, the Commission's duty to draft orders that will effectively prevent respondents from attaining the prohibited ends is not discharged by looking to the language of the statutory section or subsection violated. Statutes, at least in the antitrust field, are not written as injunctions, but as broad legislative mandates; and an order cast routinely and uncritically in the language of such a statute is likely to be at once too limited, too broad, and too general, either to comply with practically or to enforce effectively. The present order is a case in point.

It appears that at present all of respondents' retail distributors are respondents' customers within the meaning both of Section 2(d) and of the examiner's order. But from what the record discloses of

acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are retailers of fur products, textile fiber products and wool products with their office and principal place of business located at 1519 Douglas, Omaha, Nebraska.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Respondents have removed and mutilated and have caused and participated in the removal and mutilation of, prior to the time fur products subject to the provisions of the Fur Products Labeling Act were sold and delivered to the ultimate consumer, labels required by the Fur Products Labeling Act to be affixed to such products, in violation of Section 3(d) of said Act.

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products without labels, and fur products with labels which failed:

1. To show the true animal name of the fur used in the fur product.
2. To show the name, or other identification issued and registered by the Commission, of one or more of the persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale, in commerce, or transported or distributed it in commerce.
3. To show the country of origin of the imported furs contained in the fur product.

PAR. 5. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth on labels in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

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Complaint

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

Commissioner Elman's views on the scope of the order are set