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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

