

1065

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

Complaint

67 F.T.C.

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

1073

Complaint

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.

Initial Decision

67 F.T.C.

INITIAL DECISION BY WILMER L. TINLEY, HEARING EXAMINER

MARCH 31, 1964

INDEX

	<i>Page</i>
Interstate Commerce.....	1080
Consignment.....	1081
The Payments In Issue.....	1086
Marshall Field & Company.....	1087
Universal News.....	1088
Union News Company.....	1090
Consignment re Union News.....	1093
Competition Between Retailers.....	1094
Union Competitors—Chicago, Illinois.....	1095
Union Competitors—Washington, D.C.....	1097
Union and Faber, Coe & Gregg, Inc.....	1100
Availability.....	1102
Customers of Ace News.....	1103
Responsibility of Ace Books.....	1105
Defense of Meeting Competition.....	1105
Defense re Universal and Marshall Field.....	1106
Defense re Union.....	1108
Industry Position of Respondents.....	1111
Form of Order.....	1112

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

Initial Decision

67 F.T.C.

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

1073

Initial Decision

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-

Initial Decision

67 F.T.C.

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-

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.

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

