

IN THE MATTER OF
THE GREAT ATLANTIC & PACIFIC TEA COMPANY

COMPLAINT, FINDINGS, "CONCLUSION," AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF PAR. (c) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT OF CONGRESS APPROVED JUNE 19, 1936

Docket 3031. Complaint, Jan. 13, 1937—Decision, Jan. 25, 1938

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2, PAR. (c)—BUYER "BROKERAGE" PAYMENTS—NET PRICES THROUGH DEDUCTION EQUIVALENT FORMER "BUYER", AND CURRENT SELLER, BROKERAGE, AS INVOLVING "ALLOWANCE OR DISCOUNT IN LIEU" OF.

The supposed distinction between a discount or allowance equivalent to brokerage made as a part of the price of goods and a discount or allowance in lieu of brokerage reflected by the price of goods, is too tenuous for approval, and, in view of plain and simple meaning of words "in lieu of," "discount," and "allowance," it is impossible to say that net price arrived at by deducting from regular price amount equal to brokerage formerly, but no longer to be, paid by sellers to buyer through latter's agents and employees, and to that by sellers' currently paid own brokers, is price which does not involve discount or allowance in lieu of brokerage.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2, PAR. (a) AND (c), (d), AND (e)—BUYER "BROKERAGE" PAYMENTS—BUYER AGENTS' SELLER "SERVICES" RE MARKETING CONDITIONS, ETC., INCIDENT SUCH AGENTS PURCHASING ACTIVITIES AND EMPLOYER DUTY—"EXCEPT FOR SERVICES RENDERED IN CONNECTION WITH THE SALE OF GOODS"—ACT'S SCOPE, AS AMENDED.

The Clayton Act, as amended by the Robinson-Patman Act, has a dual purpose apparent both from the act itself and from the Congressional committee reports, and was directed not only at price discriminations, but also at certain practices involving both such discriminations and unfair methods of competition, as there prohibited, and Congress intended to prescribe absolutely and unconditionally as an undesirable and unfair trade practice and method of competition payment of brokerage and granting of any allowance or discount in lieu thereof by sellers to buyers on latter's own purchases of goods, involving no savings to seller other than brokerage otherwise payable to independent broker as result of dealing direct through buyer's agent; said "services rendered" clause not being intended to set up a condition upon which such brokerage could be paid or such allowance or discount granted, but having relation to genuine seller brokerage services, and not, in any event, embracing activities of incidental benefit to seller, by buyer's employee agents in buyer's interest.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2, PAR. (c) AND (a)—BUYER "BROKERAGE" PAYMENTS—FORMER'S INHIBITIONS AS NOT PERMITTING SELLERS' BROKERAGE SAVING PAYMENTS TO BUYER UNDER LATTER'S "DUE ALLOWANCE" PROVISIO.

While paragraph (a), prohibiting both direct and indirect discrimination in price, and paragraph (c), containing certain inhibitions with respect to

payment or receipt of brokerage under certain conditions, as therein specified, have in common the purpose of eliminating unfair price discriminations, they were intended by Congress to be separately and independently applied, and it was not meant that paragraph (a), with its saving proviso that nothing therein contained should "prevent differentials which make only due allowance for differences in cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered," should limit or qualify the prohibition or application of the other, which is complete on its face and deals specifically with particular trade practice regarded by Congress as unfair method of competition and, *per se*, injurious to commerce, and therefore to be prohibited.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2, PAR. (c)—BUYER "BROKERAGE" PAYMENTS—ADVERSE COMPETITIVE EFFECT SHOWING AS NOT PREREQUISITE IN PROCEEDINGS UNDER.

While acceptance of discounts in lieu of brokerage by corporation respondent in proceeding under aforesaid paragraph was found to tend to injure competition between such corporation and its competitors and to injure competition between sellers who granted such discounts and allowances to it and those who did not, such fact was not considered by Commission in arriving at its conclusion of violation of said paragraph, for the reason that, as matter of law, it is unnecessary for injurious effect upon competition, in proceedings instituted thereunder, to be shown.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2, PAR. (c)—BUYER "BROKERAGE" PAYMENTS—NET PRICES AND "QUANTITY" DISCOUNTS IN LIEU OF—BENEFITS TO SELLERS INCIDENT TO BUYER-AGENTS' PURCHASING ACTIVITIES AND DUTIES, AND DIFFERENTIALS OR DISCOUNTS ASSERTEDLY REFLECTING COST DIFFERENCES UNDER PAR. (a), AS NOT SAVING.

Where corporation engaged, with affiliates, in ownership and operation of nearly 15,000 retail grocery stores in 38 States and in District of Columbia, in competition with many retail grocery concerns in every city in which it operated, and in purchasing for resale at its said stores through various, exclusively controlled, employee field buying agents, charged with finding it sources of supply, furnishing it market information, and purchasing, and

Who, (1) as incident to discharge of their said purchasing duties, and acting in its sole interest, advised, as customary, sellers as to market conditions, and as to improvement and quality of their products, containers, and routing, and relieved same, at times, and when not contrary to its interest, and with its authorization, of carry-overs or surpluses threatening markets' stability, or of large quantities of commodities to avoid acute financial embarrassment; and

Whom (2) it instructed, following said law's enactment, and fearing "brokerage" loss theretofore enjoyed, to purchase for it on either net price basis reflecting brokerage discounts theretofore paid it monthly through its said employee buying agents by sellers, and equivalent to brokerage paid by such sellers to brokers for bona fide selling services rendered, or on basis and pretext of "quantity discount agreements" reflecting aforesaid brokerage discounts, and, in case of those unwilling so to sell on either, to arrange for

payment in escrow, or treatment as "abeyance accounts" on sellers' books, of such brokerage theretofore paid;

And neither intending to, nor rendering, directly or by or through any of its said field buying agents or employees, any true brokerage or selling services whatsoever, or any other form of services in connection with purchase of commodities by, or sale thereof to, it, and following aforesaid enactment—

- (a) Made purchases and received and accepted, from many competitively selling in interstate commerce through brokers, allowances, and discounts in lieu of brokerage, through purchase, as aforesaid, of commodities in interstate commerce, for resale in its aforesaid retail grocery stores, on aforesaid net price basis, reflecting reduction from sellers' current prices to other customers or from general market prices at which commodities were being sold by said sellers, of amount of brokerage paid by sellers to its said field buying agents prior to law's enactment, and currently paid by sellers to own brokers, and concession not accorded, with negligible and immaterial exceptions, to sellers' other customer purchasers; and
- (b) Made purchases and received and accepted, from many competitively selling in interstate commerce through brokers, allowances, and discounts in lieu of brokerage, through purchases, as aforesaid, of commodities in interstate commerce, for resale in its aforesaid retail grocery stores, on basis and pretext of so-called and pretended quantity discount agreements, providing for monthly payment to it, as so-called quantity discount, of amount equal to and reflecting brokerage paid monthly by sellers in question to its said field buying agents prior to aforesaid law, and currently paid by sellers to own brokers, and concession not accorded, with negligible and immaterial exceptions, to sellers' other customer purchasers;

With result that effect of receipt by it of such allowances and discounts in lieu of said "brokerage" was and would continue to be to cause substantial injury to competition between those sellers who had granted and paid such allowances and discounts to it and those who had refused to do so, by reason of diversion of its business from latter to former, and there was a direct and immediate tendency substantially to injure, destroy, and prevent competition between it and its competitors in resale of commodities, upon purchase of which it received aforesaid allowances and discounts, through enabling it thereby to purchase commodities at prices substantially lower than those at which its competitors could and did purchase same from sellers, and thereby to resell such commodities at prices substantially lower than those at which competitors could so resell:

Held, That such acceptance of such net prices and quantity discounts, as aforesaid, constituted acceptance of discounts and allowances in lieu of brokerage, in violation of provisions of section 2 of an Act of Congress approved October 15, 1914, as amended by an Act of Congress approved June 19, 1936.

Before *Mr. William C. Reeves*, trial examiner.

Mr. J. J. Smith, Jr. and *Mr. W. N. Baughman* for the Commission.

Watson, King & Brode and *Feldman & Kittelle*, of Washington, D. C. and *Mr. Caruthers Ewing*, of New York City, for respondent.

COMPLAINT

The Federal Trade Commission having reason to believe that the Great Atlantic and Pacific Tea Company, hereinafter called respondent, since June 19, 1936, has violated and is now violating the provisions of Section 2 (c) of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by Section 1 of the Act of Congress entitled "An Act to amend Section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), and for other purposes," approved June 19, 1936 (the Robinson-Patman Act), hereby issues this its complaint against respondent and states its charges with respect thereto as follows, to wit:

PARAGRAPH 1. Respondent is a corporation organized and existing under the laws of the State of New Jersey and has its principal office and place of business at number 420 Lexington Avenue in the city of New York, N. Y.

PAR. 2. For many years prior to and on June 19, 1936, and ever since that date, the respondent was, has been, and now is engaged in the retail grocery business as the owner and operator of 14,000, more or less, retail grocery stores located in about 30 of the States of the United States and in the District of Columbia, and in the course and conduct of its business the respondent has been and is now purchasing, shipping, and distributing and causing to be sold, shipped, and distributed in commerce from various States of the United States through, across, and into other States of the United States and the District of Columbia, goods, wares, and merchandise manufactured and packed and sold, shipped, and distributed in commerce from various States of the United States through, across, and into other States of the United States and the District of Columbia by divers corporations, partnerships, firms, and individuals unknown to the Federal Trade Commission and by the following-named persons and corporations, all of which said divers corporations, partnerships, firms, and individuals unknown to the Federal Trade Commission and the following-named persons and corporations will hereinafter be referred to as said Sellers, to wit:

Alton Canning Company, Inc., of Alton, N. Y. (a New York corporation); Fred B. Huxley, trading as F. B. Huxley & Son, of Alton, N. Y.; The H. J. McGrath Company, of Baltimore, Md. (a Maryland corporation); H. C. Roberts, trading as W. H. Roberts & Company, of Baltimore, Md.; R. J. Peacock Canning Com-

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pany, of Lubeck, Maine (a Maine corporation); Phillips Packing Company, Inc., of Cambridge, Md. (a Maryland corporation); Phillips Sales Company, Inc., of Cambridge, Md. (a Maryland corporation); and Phillips Commission Company of Maryland, Inc., of Baltimore, Md. (a Maryland corporation).

All of said sellers prior to, on, and since June 19, 1936, were, have been, and are now engaging in the business of manufacturing and packing and in selling, shipping, and distributing in commerce from various States of the United States through, across, and into other States of the United States and the District of Columbia, goods, wares, and merchandise to the respondent and to divers other corporations, partnerships, firms, and individuals unknown to the Federal Trade Commission.

PAR. 3. In the course and conduct of its business as aforesaid, since June 19, 1936, respondent has been and is now making purchases in commerce of goods, wares, and merchandise from said sellers, which said goods, wares, and merchandise the respondent has been and is now purchasing from said sellers, shipping, distributing, and causing to be sold, shipped, and distributed to it by said sellers in commerce from various States of the United States through, across, and into other States of the United States and the District of Columbia, and since June 19, 1936, in the course of making said purchases in commerce of said goods, wares, and merchandise from said sellers, purchased, shipped, and distributed and caused to be sold, shipped, and distributed in commerce by respondent from various States of the United States through, across, and into other States of the United States and the District of Columbia as aforesaid, the respondent has been and is now receiving and accepting from said sellers allowances or discounts in lieu of brokerage upon respondent's said purchases in commerce of said goods, wares, and merchandise from said sellers, for which said allowances and discounts upon respondent's said purchases in commerce of said goods, wares, and merchandise from said sellers no services whatsoever have at any time been rendered or are now being rendered by respondent or by any agent, representative, or intermediary subject to the direct or indirect control of respondent to, for, or on behalf of said sellers in connection with respondent's said purchases in commerce of said goods, wares, and merchandise from said sellers.

PAR. 4. The aforesaid acts of respondent constitute a violation of the provisions of Section 2 (c) of the above mentioned Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by Section 1 of the Act of Congress entitled "An Act to amend Section 2 of the Act entitled 'An

Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), and for other purposes," approved June 19, 1936 (the Robinson-Patman Act).

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (The Clayton Act), as amended by Section 1 of the Act of Congress entitled "An Act to amend Section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), and for other purposes," approved June 19, 1936 (the Robinson-Patman Act), the Federal Trade Commission on January 13, 1937, issued and served its complaint in this proceeding upon The Great Atlantic & Pacific Tea Company, respondent herein, charging it with violating the provisions of paragraph (c) of Section 2 of the said Act as amended. After the issuance of said complaint and the filing of respondent's answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by J. J. Smith, Jr., and W. N. Baughman, attorneys for the Commission, before William C. Reeves, an examiner for the Commission, theretofore duly designated by it, and in opposition to the allegations of the complaint by Caruthers Ewing, Watson, King & Brode and George J. Feldman, attorneys for the said respondent, and said testimony and other evidence were duly recorded and filed in the office of the Commission.

Thereafter the proceeding regularly came on for final hearing before the Commission on the said complaint, answer, testimony, and other evidence, briefs in support of the complaint and in opposition thereto, and the oral arguments of the said J. J. Smith, Jr., for the Commission, and the said Caruthers Ewing for the respondent, and the Commission having duly considered the same and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusions:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, The Great Atlantic & Pacific Tea Company, is a corporation organized and existing under the laws of the State of New Jersey, and maintains its principal office and place of business at 420 Lexington Avenue, in the city of New York, N. Y.

PAR. 2. The respondent is engaged in the retail grocery business, and, together with its affiliates, owns and operates more than 14,800

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retail grocery stores located in 38 States and in the District of Columbia.

PAR. 3. In the course and conduct of its business the respondent is engaged in competition with many retail grocery concerns in every city in which it operates a store or stores; and the respondent purchases for resale at its said stores commodities which it causes to be shipped in interstate commerce from the State in which said commodities are located at the time they are purchased by the respondent across State lines through and into States other than the State in which said commodities are located at the time they are purchased by the respondent, and the respondent ships commodities from its warehouses across State lines to its stores located in States other than the States in which its said warehouses are located.

PAR. 4. The respondent's organization is divided along geographical lines into a number of divisions, each division being composed of several units, a unit being the territory serviced by a central warehouse operated by the respondent and from which respondent's various retail stores in that territory obtain most of the commodities sold to the public by the respondent at its said stores. The purchasing operations of each division are under the general supervision and control of a purchasing director for that division. Each warehouse or unit, however, has a warehouse buyer, or unit buyer, hereinafter referred to as warehouse buyer, who is authorized to, and does, purchase commodities for distribution from that warehouse to the respondent's stores located in the territory serviced by it.

PAR. 5. Several years prior to the filing of the complaint herein, the respondent established, and has since continuously maintained and now maintains, geographically convenient to important sources of supply, a number of central buying offices, located in Rochester, N. Y.; Baltimore, Md.; New Orleans, La.; San Francisco, Calif.; Milwaukee, Wis., and other cities. These central buying offices continuously have been and now are in charge of and operated by agents employed by the respondent. The duties of said agents continuously have been and now are to find sources of supply for the respondent, to furnish the respondent with market information, and to purchase commodities for the respondent.

PAR. 6. Both before and after June 19, 1936, the agents in charge of said central buying offices were, and now are, employed by the respondent on a salary basis, and all of their office expenses were and now are paid by the respondent. Prior to June 19, 1936, respondent called said agents "brokers," thereafter, "purchasing agents," "field buying agents," or "buyers," but this change in name involved no

change in said agents' aforesaid duties to the respondent or in their methods of operating in performing those duties. Said agents are hereinafter referred to as field buying agents.

PAR. 7. At all times during the period in which said field buying agents have been employed by respondent said field buying agents have been, and are now, employed solely by respondent, and by no individual, partnership, or corporation whatsoever other than respondent, and in all matters and transactions participated in by said field buying agents relative to or in connection with the business of respondent or the purchase of commodities by, or the sale thereof to, the respondent, said field buying agents acted, and now act, in fact for and in behalf, and as the agents and representatives of respondent only, and in such matters and transactions said field buying agents did not, and do not now, act in fact for or in behalf, or as the agents or representatives, of any individual, partnership, or corporation whatsoever other than respondent.

PAR. 8. At all times during the period in which said field buying agents have been employed by respondent said field buying agents were, and are now, subject to and under the sole control of respondent in all matters and transactions participated in by said field buying agents relative to or in connection with the business of respondent or the purchase of commodities by, or the sale thereof to, the respondent, and in such matters and transactions said field buying agents were not, and are not now, subject to or under the control of, or controlled by, any individual, partnership, or corporation whatsoever other than the respondent.

PAR. 9. The loyalty and allegiance of respondent's field buying agents are due solely to the respondent, and in all matters and transactions participated in by said field buying agents relative to or in connection with the business of respondent or the purchase of commodities by or the sale thereof to the respondent, said field buying agents devote their loyalty and allegiance solely to the respondent.

PAR. 10. The respondent is the sole direct and intended beneficiary of all activities of said field buying agents in connection with negotiations for the purchase and the purchase of commodities by, or the sale thereof to, the respondent, and the benefits to sellers from such activities are incidental to the services rendered by said field buying agents to the respondent.

PAR. 11. The field buying agents of the respondent operate as follows, to wit: From persons engaged in the business of manufacturing and selling commodities in the respective territories in which said field buying agents are located, such persons being hereinafter referred to as sellers, the field buying agents obtain prices on com-

modities being offered for sale by said sellers. If the price and quality of the commodities offered for sale by said sellers meet the approval of said field buying agents they communicate their information to the respondent's divisional purchasing directors, warehouse buyers, and others in the respondent's employ. If a field buying agent thinks that commodities offered for sale by sellers are not of proper quality or are not offered at a satisfactory price or that it would not be to the interest of the respondent to purchase said commodities, he either so informs the respondent's purchasing directors and warehouse buyers or he does not communicate those sellers' offerings to them. When a purchasing director or warehouse buyer desires any commodities concerning which he has received information from a field buying agent, or which he knows a field buying agent can purchase for him, he communicates that fact to the field buying agent whom he instructs to purchase the desired commodities. The field buying agent then negotiates with various sellers of said commodities for price and terms satisfactory to the respondent, and, if able to come to an agreement with a seller on such price and terms, purchases the desired commodities for the respondent. Having purchased commodities from a seller, the field buying agent usually confirms his purchase by executing a purchase order or contract which he signs for and on behalf of the respondent and as its agent and forwards to the seller.

PAR. 12. In the course of performing their duties to the respondent its field buying agents exchange with sellers, as is customary in the trade, information of all kinds affecting market conditions. At times said field buying agents visit the manufacturing establishments of sellers and advise sellers how to improve the quality of sellers' commodities and in what size containers said commodities should be packed. Said field buying agents also furnish sellers with traffic information concerning the routing of commodities purchased by the respondent. At times when sellers have made special drives to dispose of carry-overs or surplus commodities which have threatened to unstabilize markets, and at times when some sellers have needed immediately to dispose of large quantities of their commodities to avoid incipient bankruptcy or other acute financial embarrassment, the respondent's field buying agents, when not contrary to the interests of the respondent, have brought such matters to the attention of respondent's divisional purchasing directors and warehouse buyers, requesting them to cooperate with sellers in sellers' efforts to sell said commodities, and on instructions from said divisional purchasing directors and warehouse buyers have purchased for the respondent large quantities of commodities from such sellers. While

sellers benefit from the information and advice of respondent's field buying agents with respect to market conditions, routing of shipments, improving the quality of commodities, and size of containers, and the activities of said field buying agents in cases of carry-overs, surpluses, and financial distress, it is the duty of respondent's field buying agents, and it is to the interest of the respondent, to develop and maintain adequate sources of supply of commodities of good quality packed in popular size containers and to have shipments of commodities routed as desired by the respondent; it is also to the interest of the respondent to avoid carry-overs and surpluses which threaten to destabilize markets. [In] The activities of respondent's field buying agents in connection with furnishing information and advice to sellers, and in bringing to the attention of respondent's divisional purchasing directors and warehouse buyers sellers' desires or necessities in connection with disposing of large quantities of their commodities and requesting their cooperation with such sellers, said field buying agents are rendering services to, and promoting the interest of, the respondent and are not performing or rendering to sellers any selling or brokerage service or any services whatsoever in connection with the sale of goods by said sellers to the respondent or the purchase thereof by the respondent from said sellers.

PAR. 13. On said field buying agents' purchases of commodities for respondent prior to June 19, 1936, the sellers of such commodities paid monthly to said field buying agents brokerage in the same amount paid by said sellers to brokers who sold commodities as agents of and for said sellers, which brokerage the said field buying agents received for and on behalf of respondent, and as the property of respondent, and paid over to the respondent, said field buying agents neither having nor claiming any right, title, or interest therein whatsoever.

PAR. 14. Shortly after June 19, 1936, the respondent instructed its field buying agents to accept no more brokerage on their purchases of commodities for respondent, and to make all future purchases of commodities for respondent on one of the following bases, to which instructions said field buying agents conformed, to wit:

(a) To purchase commodities for respondent on a net basis reflecting a reduction from sellers' current prices to other customers, or from the general market prices at which commodities were being sold by said sellers, of the amount of brokerage paid by said sellers to said field buying agents prior to June 19, 1936, as aforesaid in paragraph 13, *supra*, and currently being paid by said sellers to their brokers.

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(b) To execute so-called "quantity discount agreements" with sellers upon the form appearing in the record herein as Respondent's Exhibit 18-C. Said agreement forms were filled in to provide for the payment to the respondent monthly, as a so-called "quantity discount," of an amount equal to the brokerage paid monthly by said sellers to said field buying agents prior to June 19, 1936, as aforesaid in paragraph 13, *supra*, and currently being paid by said sellers to their brokers. In some instances said agreements were made retroactive from the date of execution to June 19, 1936, and in some instances where said agreements purported to require the respondent to purchase a stipulated quantity of commodities during the existence of the agreement in order to earn the "discount" for which provision was therein made, it was understood and agreed between the respondent's said field buying agents and the sellers that the respondent was to receive said "discount" regardless of the provisions of said agreements with respect to the quantity of commodities to be purchased by the respondent thereunder.

(c) To make with sellers unwilling to sell on either of the two preceding bases an agreement providing that said sellers were to keep a record of all brokerage which but for the Robinson-Patman Act said sellers would have paid to said field buying agents as aforesaid in paragraph 13, *supra*, and to pay said brokerage in escrow, or set it up as an "abeyance account" on the sellers' books, said brokerage to be paid to the respondent when, as, and if, the legality of the payment thereof should be determined.

Since June 19, 1936, the respondent has purchased commodities in interstate commerce on each of said bases.

PAR. 15. Subsequent to the effective date of the Robinson-Patman Act the said field buying agents of the respondent knew the current prices at which sellers from whom they were purchasing commodities for the respondent, were selling those commodities to their customers other than respondent, and were at all times well posted and informed of the general market prices at which commodities being purchased by them for the respondent were being sold. In computing the net prices at which the said field buying agents purchased commodities for the respondent subsequent to the effective date of the Robinson-Patman Act, said field buying agents deducted from sellers' current prices to their customers other than respondent, or from the general market prices at which commodities were being sold, as the case might be, an amount equal to the brokerage which but for the Robinson-Patman Act said sellers would have paid to said agents as aforesaid in paragraph 13, *supra*.

PAR. 16. The respondent feared the loss of brokerage upon purchases of commodities made other than on the net basis, or on the quantity discount basis, as described respectively in sub-paragraphs (a) and (b) of paragraph 14, *supra*, and instructed its field buying agents to make all purchases possible on said net basis or on said quantity discount basis. On purchases of commodities made on said net basis or on said quantity discount basis the respondent did not request that brokerage be paid in escrow or set up as an "abeyance account" on sellers' books as aforesaid in sub-paragraph (c) of paragraph 14, *supra*, but on all purchases not made on one of said bases the respondent did request sellers to pay brokerage in escrow, or set brokerages up on their books as an "abeyance account" as aforesaid in sub-paragraph (c) of paragraph 14, *supra*.

PAR. 17. Not all of the net prices at which the said field buying agents purchased commodities for the respondent subsequent to June 19, 1936, reflected a reduction of the exact amount of brokerage which but for the Robinson-Patman Act said sellers would have paid to said field buying agents as aforesaid in paragraph 13, *supra*, because an exact reduction frequently resulted in a sale price involving fractions which were not used in the trade, and the respondent instructed its said field buying agents to avoid the use of such fractions wherever possible in agreeing upon the net price to be paid for commodities by the respondent so that said net prices would not appear to involve any allowance in lieu of brokerage.

PAR. 18. Other customers of sellers who sold commodities to the respondent on the bases outlined in paragraph 14, *supra*, purchased from those sellers in individual quantities as large as those in which the respondent purchased, but with extremely few exceptions, in no wise affecting the facts in this matter, the respondent was the only customer of said sellers to whom said sellers sold commodities on said bases, and the respondent's purchases from said sellers were made on one of said bases regardless of the quantity of commodities purchased by it.

PAR. 19. When the respondent's field buying agents purchase from sellers commodities for the respondent the services of no brokers are used or invoked by sellers or by the respondent, and said sellers do not receive or have the benefit of any selling or brokerage services rendered by any broker or by the respondent or by any agent or employee of the respondent, but in purchasing commodities on the net price and quantity discount bases above referred to in paragraph 14 the respondent obtains, receives, and accepts the equivalent of brokerage currently paid by sellers to their brokers for brokerage

services actually rendered to said sellers by their said brokers in selling commodities for said sellers.

PAR. 20. Some sellers effect savings other than brokerage on purchases made for the respondent by the respondent's field buying agents, but the only savings represented by the net prices and quantity discounts above referred to in paragraph 14 were brokerage savings accruing to sellers as a result of having themselves made sales to the respondent without invoking or using the selling or brokerage services of another, and no savings other than brokerage savings were intended to be, or were, passed on by sellers to the respondent or received by the respondent from sellers.

PAR. 21. The function of, and the services performed by, brokers representing sellers in connection with the sale of commodities is to find customers for sellers and, acting under and subject to the control of sellers, to sell commodities to those customers for and on behalf of sellers and as the agents of said sellers; the brokers' function in such cases is a selling function, and the service rendered by them is a selling service rendered to sellers.

PAR. 22. In all matters and transactions wherein the respondent's field buying agents purchase commodities for respondent or negotiate or deal with sellers in connection with the purchase of commodities by or the sale thereof to the respondent all of the services of said field buying agents are intended to be and in fact are rendered to the respondent solely, and in said matters and transactions said field buying agents intend to and in fact do represent the respondent solely as its purchasing agents and intend to and in fact do act for and in behalf of the respondent only and under its sole control, and in said matters and transactions said field buying agents do not intend to and in fact do not represent sellers as their agents or act for or in behalf or under the control of sellers and do not intend to and in fact do not render to sellers any brokerage or selling services whatsoever or any other form of services in connection with the sale of commodities to or the purchase thereof by the respondent.

PAR. 23. No brokerage or selling services whatsoever, or any other form of services in connection with the purchase of commodities by, or the sale thereof to, the respondent are intended to be or are rendered to sellers by the respondent or by any agents or employees of the respondent.

PAR. 24. Subsequent to June 19, 1936, for resale in its above-mentioned retail grocery stores, the respondent has purchased commodities in interstate commerce on the basis referred to in subparagraph (a) of paragraph 14, *supra*, from many sellers who are engaged in selling commodities through brokers in interstate com-

merce in competition with other sellers of similar commodities, and in so doing the respondent has received and accepted allowances and discounts in lieu of brokerage.

PAR. 25. Subsequent to June 19, 1936, for resale in its above-mentioned retail grocery stores, the respondent has made purchases of commodities in interstate commerce on the basis referred to in subparagraph (b) of paragraph 14, *supra*, from many sellers who are engaged in selling commodities through brokers in interstate commerce in competition with other sellers of similar commodities and has received and accepted on said purchases payment of the so-called "quantity discount" referred to in said subparagraph (b) of paragraph 14, *supra*, and in receiving and accepting payment of said so-called "quantity discounts" the respondent has received and accepted allowances and discounts in lieu of brokerage.

PAR. 26. The effect of the receipt of allowances and discounts in lieu of brokerage by the respondent has been, and will continue to be, to cause substantial injury to competition between those sellers who have granted and paid such allowances and discounts to the respondent and those sellers who have refused to do so, in that there has been and there will continue to be a diversion of respondent's business from the latter to the former, and the effect of the receipt of allowances and discounts in lieu of brokerage by the respondent has a direct and immediate tendency substantially to injure, destroy and prevent competition between respondent and respondent's competitors in the resale of commodities upon the purchase of which the respondent receives discounts and allowances in lieu of brokerage in that the respondent, by the receipt of such discounts and allowances in lieu of brokerage, is enabled to and does purchase commodities at prices substantially lower than the prices at which its competitors can and do purchase the same commodities from the same sellers and the respondent is thereby enabled to resell said commodities at prices substantially lower than the prices at which its competitors can resell said commodities.

CONCLUSION

The respondent takes the position: First—That it has accepted no discounts or allowances in lieu of brokerage. Second—That if it be held to have accepted allowances or discounts in lieu of brokerage it rendered to sellers services therefor within the meaning of paragraph (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. Third—That the provisions of Section 2 (c) of said act, as amended, must be held to be limited by the cost

proviso or differentials provisions of paragraph (a) thereof, which should be construed to permit the passing on of brokerage savings by way of a net price differential or quantity discount.

The Commission is unable to adopt this reasoning, and concludes and finds that the respondent has received discounts and allowances in lieu of brokerage in violation of said paragraph (c) of Section 2 of the Clayton Act, as amended.

The respondent contends that there is a vast difference and valid distinction between a differential which merely reflects or is the equivalent of brokerage savings and a discount or allowance in lieu of brokerage; that a discount or allowance made as a part of the price of goods can not come within the scope of paragraph (c), although equivalent to brokerage and intended to reflect it. .

We cannot accept this argument. The supposed distinction between a discount or allowance equivalent to brokerage, made as a part of the price of goods, and a discount or allowance in lieu of brokerage reflected by the price of goods appears to us as too tenuous for approval.

The argument assumes one of the fundamental issues in this case, namely, whether or not brokerage may be passed on to buyers as a savings in cost under the cost proviso or differentials provisions of paragraph (a) of Section 2 of the act.

If that may not be done, it cannot successfully be contended that there is any difference between a price reflecting an allowance in lieu of brokerage and a price reflecting brokerage savings—in each instance the price is mathematically the same, and the lower price is lower, by an amount wholly or partly equivalent to brokerage, for no other reason than that that price is given instead of brokerage being paid on the basis of a higher price.

The words “in lieu of,” “discount,” and “allowance,” are well understood and there can be no dispute as to their respective definitions.

“In lieu of” means instead of, in place of, or in substitution for.

“Allowance” means abatement, deduction, or concession.

“Discount” means deduction, allowance from a price asked, or deduction from the usual price made for some special reason.

Taking the plain and simple meaning of these words, it seems impossible to say that a net price arrived at by deducting from a regular price an amount equal to brokerage formerly paid, and now currently paid to brokers, because that brokerage is no longer to be paid, is a price which does not involve a discount or allowance in lieu of brokerage.

If and insofar as intent is an element of an allowance or discount in lieu of brokerage, the intent necessary to characterize as such the respondent's net prices and quantity discounts, referred to in paragraph 14, *supra*, existed here. The net price differentials and the quantity discounts in question were generally equal in amount to brokerage paid to the respondent's field buying agents prior to June 19, 1936, and currently being paid by sellers to independent brokers and were passed on by the sellers and accepted by the respondent to take the place of, and in substitution for, brokerage paid to the respondent's field buying agents prior to that date. Counsel for the respondent conceded in their brief that the net prices and quantity discounts allowed respondent did not represent any form of savings to sellers whatsoever other than the brokerage savings accruing to sellers as a result of having themselves made sales to the respondent without incurring any obligation to pay brokerage thereon to an independent broker. The Commission concludes that such net price differentials and quantity discounts were allowances and discounts in lieu of brokerage and were affirmatively intended as such by both sellers and the respondent.

The Clayton Act, as amended by the Robinson-Patman Act, has a dual purpose which is apparent both from the form of the Act itself and from the reports of the several Congressional Committees which considered and commented upon it. The Act was directed not only at price discriminations but also at certain practices which involved both price discriminations and unfair methods of competition.

Paragraph (a) generally prohibits both direct and indirect discriminations in price. If discriminations in price were the only evils sought to be terminated by the Act there was no necessity for including in it paragraphs (c), (d), or (e), because the practices thereby condemned, themselves involving indirect price discriminations, could have been terminated under paragraph (a) insofar as they could be shown injuriously to affect competition in particular cases. By directing those particular paragraphs at those particular practices, it is believed that Congress manifested a purpose and intent to condemn and proscribe such practices, not merely and simply because they involved price discriminations, but because they were considered by Congress to be inherently unfair methods of competition which were *per se* injurious to commerce.

As stated by the report of the House Committee on the Judiciary in reporting the Robinson-Patman Act, its purpose was

* * * to restore, so far as possible, equality of opportunity in business
* * * by protecting trade and commerce against unfair trade practices and unlawful price discrimination, and also against restraint and monopoly for the

better protection of consumers, workers, and independent producers, manufacturers, merchants, and other businessmen.

To accomplish its purpose, the bill amends and strengthens the Clayton Act
* * *

More than 20 years' experience and observation with respect to the operation of the Clayton Act, together with new methods of trade and industrial organization that have since developed, have convinced your committee of the shortcomings of existing legislation, and of the need for strengthening existing laws and of fitting them more perfectly to the methods and needs of today. This your committee has striven to do with a careful regard to the preservation of full freedom and sound and honest business methods * * * but with a firm resolve not to permit the desire of privilege to masquerade under the claim of right. (Report of House Committee on the Judiciary 74th Congress, 2nd Session, House of Representatives Report Number 2287, Pages 3, 6.)

It is thus apparent that the act is directed at a multiplicity of evils which may be classified generally as price discriminations and unfair trade practices.

The Commission concludes that it was the intention of Congress to proscribe absolutely and unconditionally as an undesirable and unfair trade practice and method of competition, the payment of brokerage and the granting of any allowance or discount in lieu thereof by sellers to buyers on the latter's own purchases of goods, and that the inclusion in paragraph (c) of the clause "except for services rendered in connection with the sale of goods" was not intended to set up a condition upon which such brokerage could be paid or such an allowance or discount be granted. This conclusion is sustained and, indeed, required by the reports of the various committees which dealt with the Act.

As originally introduced in the House and Senate, paragraph (c) (paragraph (b) at that time) unqualifiedly prohibited the payment of brokerage by a seller to any intermediary acting for the buyer or subject to the buyer's control. It did not prohibit the payment of brokerage directly to a buyer, however, or make any reference to "services rendered." The paragraph then read:

(b) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation to an agent, representative, or other intermediary in connection with the sale or purchase of goods, wares, or merchandise, where such intermediary is acting therein for or in behalf or is subject to the direct or indirect control, of any party to such purchase and sale transaction other than the person by whom such compensation is so granted or paid.

Upon being referred to the Committee on the Judiciary of the respective houses the paragraph was amended to read exactly as it now reads, except that the "services rendered" clause was not inserted by the Senate Committee.

The Senate amendment merely added to the existing prohibition of paragraph (c) an additional prohibition against the payment of brokerage direct to the buyer, reinforcing the paragraph with a provision that no discount or allowance in lieu of brokerage should be permitted. The paragraph as thus amended was reported to the Senate on February 3, 1936, as follows:

In section (b) the phrases "or any allowance or discount in lieu thereof," and "either to the other party to such transaction" are added by your committee's recommendation. As so revised, this section forbids the payment or allowance of brokerage, either to the other principal party, or to an intermediary acting in fact for or under the control of the other principal party, to the purchase and sale transaction.

Among the prevalent modes of discrimination at which this bill is directed, is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made. Whether employed by the buyer in good faith to find a source of supply, or by the seller to find a market, the broker so employed discharges a sound economic function and is entitled to appropriate compensation by the one in whose interest he so serves. But to permit its payment or allowance where no such service is rendered, where in fact, if a "broker," so labeled, enters the picture at all, it is one whom the buyer points out to the seller, rather than one who brings the buyer to the seller, is but to permit the corruption of this function to the purposes of competitive discrimination. The relation of the broker to his client is a fiduciary one. To collect from a client for services rendered in the interest of a party adverse to him, is a violation of that relationship; and to protect those who deal in the streams of commerce against breaches of faith in its relations of trust, is to foster confidence in its processes and promote its wholesomeness and volume. (74th Congress, 2nd Session, Senate Report Number 1502, Page 7.)

It is clear that paragraph (c), as it then stood, prohibited the payment of brokerage by a seller to a buyer, and the grant of any discount or allowance in lieu thereof, under all circumstances and without regard to any question of services rendered, and that the Senate so construed it.

On March 31, 1936, the House Committee on the Judiciary, having amended paragraph (c) to conform to the Senate amendment and added the services rendered clause thereto, reported the bill to the House with the following comments, the underscored parts of which were adopted word for word from the Senate report quoted above:

Section (b) deals with the abuse of the brokerage function for purposes of oppressive discrimination. The true broker serves either as representative of the seller to find him market outlets, or as representative of the buyer to find him sources of supply. In either case he discharges functions which must otherwise be performed by the parties themselves through their own selling or buying departments, with their respective attendant costs. Which method is chosen depends presumptively upon which is found more economical in the particular

case; but whichever method is chosen, its cost is the necessary and natural cost of a business function which cannot be escaped. It is for this reason that, when free of the coercive influence of mass buying power, discounts in lieu of brokerage are not usually accorded to buyers who deal with the seller direct since such sales must bear instead their appropriate share of the seller's own selling cost.

Among the prevalent modes of discrimination at which this bill is directed is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made. But the positions of buyer and seller are by nature adverse, and it is a contradiction in terms incompatible with his natural function for an intermediary to claim to be rendering services for the seller when he is acting in fact for or under the control of the buyer, and no seller can be expected to pay such an intermediary so controlled for such services unless compelled to do so by coercive influences in compromise of his natural interest. Whether employed by the buyer in good faith to find a source of supply, or by the seller to find a market, the broker so employed discharges a sound economic function and is entitled to appropriate compensation by the one in whose interest he so serves. But to permit its payment or allowance where no such service is rendered, where in fact, if a "broker," so labeled, enters the picture at all, it is one whom the buyer points out to the seller, rather than one who brings the buyer to the seller, would render the section a nullity. The relation of the broker to his client is a fiduciary one. To collect from a client for services rendered in the interest of a party adverse to him, is a violation of that relationship; and to protect those who deal in the streams of commerce against breaches of faith in its relations of trust, is to foster confidence in its processes and promote its wholesomeness and volume.

Section (b) permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other. (74th Congress, 2nd Session, House of Representatives Report Number 2287, Pages 14, 15.) [Italics supplied.]

This report shows on its face that paragraph (c) as it now stands, containing the "services rendered" clause, was given the same construction by the House Committee as it had theretofore been given by the Senate Committee before that clause was inserted. This in itself seems sufficient to require the conclusion that the House did not intend the "services rendered" clause to be construed as a condition upon which brokerage could be paid by sellers to buyers. Definite support for this conclusion is found in the Conference Report of the Committee of Conference of the House and Senate which considered

the bills passed by each and reported out the Robinson-Patman Act in the form in which it was enacted. That report states:

Subsection (c) deals with brokerage. It is the same as subsection (b) in the House bill, which in turn is the same as subsection (c) in the Senate amendment, except that the words "except for services rendered," as contained in the House bill, do not appear in the Senate amendment. In the conference report these words are retained * * * With the words of the House bill thus retained, this subsection permits the payment of compensation by a seller to his broker * * * for services actually rendered in his behalf; * * * but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance * * * by the seller direct to the buyer * * * (74th Congress, 2nd Session, House of Representatives Report Number 2951, Page 7).

In line with this report Representative Utterback, one of the House managers of the Conference Committee, said of paragraph (c) in reporting the act from that Committee to the House:

* * * it prohibits the payment or allowance of * * * brokerage on the purchase * * * of goods * * * to the other party to the transaction * * * that is, the party other than the one who pays the * * * brokerage * * * (74th Congress, 2nd Session, 80 Congressional Record, Part 9, Page 9418).

He further stated:

* * * where sales are made from buyer to seller, in the nature of the case no brokerage services are rendered by either, and no payment or allowance on account thereof can be made * * * (*Id.*)

It thus seems entirely clear that paragraph (c) was intended by Congress to prohibit without qualification the payment of brokerage, and the granting of any allowance or discount in lieu thereof, by a seller to a buyer on the latter's purchases, and that the "services rendered" clause was not meant to limit that prohibition in any manner or to any degree whatsoever.

Legislative intent notwithstanding, however, it is urged that this clause must be construed to permit the payment of brokerage to a buyer in return for services rendered to a seller. The arguments are that since paragraph (c) as originally drawn, without the words "except for services rendered," prohibited only the payment of brokerage by sellers to buyers' agents, the exception to that limited prohibition must be held not to extend the prohibition but to relax it within its original limitations; and, as urged by the respondent, by writing the exception into paragraph (c) Congress in fact asserted a belief that a buyer could render services to a seller because the exception of a particular thing from general words proves that, in the opinion of the legislature, the thing excepted would be within the general clause had the exception not been made.

In the light of clear congressional intent to the contrary, the Commission cannot accept these arguments. Moreover, they ignore the well-established rule of statutory construction that exceptions are to be strictly construed, all doubts being resolved in favor of general provisions rather than exceptions, and the premise of the argument first stated is not entirely accurate.

It will be recalled that paragraph (c) as originally drawn, without the "services rendered" exception, prohibited the payment of brokerage not simply to anyone acting for the buyer but to any "intermediary * * * acting * * * for or in behalf of * * * subject to the direct or indirect control" of the buyer.

The Commission, in the exercise of its knowledge of the manner in which ordinary business affairs are transacted, knows that the language quoted was susceptible of a construction which might have prohibited in many cases the payment of brokerage by a seller to an independent broker for brokerage services actually rendered. A broker (and the reference is to selling brokers, as distinguished from buying brokers, so to speak) occupies an anomalous position in commerce and in law. He is an independent businessman in the sense that he is engaged in business for himself. But the business in which he is engaged is that of acting as a local sales representative for manufacturers. A broker pays the expenses of operating his business and is dependent for his income upon a commission, called "brokerage," paid to him on and measured by sales which he makes for the manufacturers whom he represents. The essential service which he performs for manufacturers, and the only service for which he is paid, is a selling service, although he renders many other services.

In the course of conducting his business a broker must and does also render services to buyers—but those services, unlike the services rendered to the respondent by its field buying agents, are not buying services. A broker is not employed by buyers. He is employed and paid by sellers as their selling agent and he represents his seller-principals only. His activities in connection with his representation of his seller-principals are controlled by them, but, paradoxically, because of the broker's anomalous position as an independent sales agent in business for himself, he does act for buyers in a sense and he is subject to a degree of control on their part.

This results from requests by buyers that brokers report complaints to their seller-principals, that brokers communicate cancellations of orders to their seller-principals, that brokers submit to their seller-principals offers of buyers to purchase commodities at prices

stipulated by buyers, that brokers endeavor to make up "pool" cars of merchandise among several buyers so that the buyers may obtain the advantage of quantity prices and carload rates of freight, that brokers obtain quotations of prices from their seller-principals for the consideration of buyers, and, perhaps, in other ways. Naturally it is to the mutual interest and advantage of brokers and sellers to maintain the good will of their common customers, and brokers generally endeavor to comply with the reasonable requests of buyers along the lines indicated. In the course of negotiating sales from seller to buyer and bringing them into agreement brokers are necessarily guided somewhat by instructions from each, but in the essential particular of selling commodities and consummating sales they act for and are controlled by the latter alone, who in the absence of a contract may discharge them and substitute new brokers in their places at any time.

It is therefore apparent that paragraph (c) of the Robinson-Patman Act, as originally drawn, broadly prohibiting the payment of brokerage to anyone "acting * * * for or in behalf or * * * subject to the direct or indirect control" of buyers, without qualification as to the manner of acting or the degree or importance of control, and irrespective of services rendered to the seller, might possibly have been given a construction prohibiting the payment of brokerage to *bona fide* independent brokers—a construction which Congress manifestly did not intend it to be given.

Thus it is seen that paragraph (c) was susceptible of a construction extending its prohibitions to others than persons acting for and as agents of buyers. The insertion of the "except for services rendered" clause therein, it is believed, was intended by Congress not to permit the payment of brokerage to a buyer, but to make it clear that payment of brokerage to a bona fide broker in return for selling services rendered was not proscribed, thereby performing a legitimate function of a proviso "to exclude some possible ground of misinterpretation."

This view finds affirmative and authoritative support in the above-cited Conference Committee report on the Robinson-Patman Act and in the remarks of Representative Utterback in reporting the act to the House.

The Conference report, after referring to the retention of the words "except for services rendered," stated:

With (these) words of the House bill thus retained, this subsection permits the payment of compensation by a seller to his broker * * * for services actually rendered in his behalf * * *

Mr. Utterback said:

The bill prohibits payment or allowance of brokerage * * * except for services rendered * * * this refers to true brokerage services rendered in fact for the party who pays for them * * * (74th Congress, 2nd Session, 80 Congressional Record, Part 9, Page 9418).

It does not appear that Congress thought a buyer capable of rendering "services" to a seller in connection with the buyer's own purchases of goods. In writing the "services rendered" clause into paragraph (c) Congress clearly had in mind true brokerage services rendered by bona fide independent brokers employed by sellers as their selling agents. In the opinion of the Commission that clause was inserted not by way of relaxing the limitations of paragraph (c) insofar as they applied to buyers or buyers' agents, but by way of excluding a possible misinterpretation that the paragraph might be held to prohibit the payment of brokerage for true brokerage services rendered by bona fide independent brokers.

Even if it were possible to hold that the payment of brokerage to buyers or the granting of any discount or allowance in lieu thereof is permissible under the "services rendered" clause, the services referred to therein, as plainly appears from the Committee reports heretofore quoted, are brokerage or selling services rendered to the seller, and the Commission finds and concludes that no such services were rendered to sellers by the respondent or by any agent or employee of the respondent. Whatever character may be ascribed to the various activities of the respondent's agents from which benefits were derived by sellers, those activities were not selling services nor were any services in connection with the sale of goods to the respondent rendered to sellers. The respondent's field buying agents and other employees acted in every case as agents of the respondent, having in mind and intending to serve and promote its interests, and not acting except when, and as they felt those interests could be served and promoted. The services thus rendered by the respondent's field buying agents and other employees were not selling services in character, nor were they rendered to sellers; their services were rendered to the respondent and to no one other than the respondent, and the benefits derived by sellers from such services were purely incidental.

Passing now to the third point made by the respondent, the Commission does not believe that Congress intended to permit brokerage savings to be passed on by sellers to buyers under that part of para-

graph (a) of Section 2 of the Clayton Act, as amended, which provides as follows:

Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.

While paragraphs (a) and (c) have in common the purpose of eliminating unfair price discriminations, the Commission is of the opinion that the paragraphs were intended by Congress to be separately and independently applied, and that the former was not meant to limit or qualify the prohibitions or application of the latter.

Paragraph (c) is complete on its face. It contains no ambiguous language necessitating reference to paragraph (a) for the purpose of determining its meaning. It deals specifically with a particular trade practice which was regarded by Congress as an unfair method of competition, *per se* injurious to commerce, and therefore to be prohibited. The intention of Congress to treat paragraph (c) as independent of paragraph (a) is apparent from both the form of the Robinson-Patman Act and from its legislative history.

As heretofore mentioned, since paragraph (a) prohibits both direct and indirect discrimination in price, if discrimination in price as such, were the only evils at which the act was directed there was no necessity for Congress to have enacted paragraphs (c), (d), or (e). Looking at the act as a whole it seems evident that the purpose of Congress was not merely to terminate the price discriminations effected by the practice of paying brokerage to buyers, but to terminate the practice itself because it was an undesirable practice and constituted an inherently unfair method of competition. Paragraph (c) is expressly limited in its application solely to transactions occurring in the course of interstate commerce, while paragraph (a) is not so limited. In addition to this, paragraph (b), relating to the burden of proof applies to proceedings instituted under paragraphs (a), (d), and (e) but, significantly, does not apply to proceedings under paragraph (c).

There is more than mere form, however, to indicate the independence of paragraph (c).

Upon reference to the Senate Committee on the Judiciary, the act was amended in Committee by the addition to paragraph (a) of the words "other than brokerage" following the above-quoted language therein permitting differentials based on differences in cost. In reporting the bill the Senate Committee stated that the quoted words

had been added to "harmonize this subsection (paragraph (a)) with (the) subsection * * * which deals directly with the question of brokerage" (74th Congress, 2nd Session, Senate Report Number 1052, page 5). It is noted that it was paragraph (a) which was amended to harmonize it with the provisions of paragraph (c), and that the latter was referred to as the subsection which dealt directly with brokerage. By thus adding to paragraph (a) an amendment having no other purpose whatsoever than expressly to exclude the cost proviso or differentials provision thereof from application to paragraph (c), the Committee evidenced an unmistakable intention to subordinate the former to the latter, leaving paragraph (c) to deal with the question of brokerage irrespective of and unaffected by the contents of paragraph (a).

Additional affirmative evidence of this legislative intent is found in the action taken by the Committee of Conference of the House and Senate. That Committee struck from the bill as passed by the Senate the words "other than brokerage" inserted in paragraph (a) as just mentioned. Its reason for doing so was that "the matter of brokerage is dealt with in a subsequent subsection of the bill" (74th Congress, 2nd Session, House of Representatives Report Number 2951, page 6).

The words "other than brokerage" had never been inserted in paragraph (a) of the House bill. Paragraph (c) standing alone clearly was not open to a construction permitting brokerage to be passed on to buyers by way of an allowance or discount based on savings in cost. By striking from paragraph (a) of the Senate bill the words "other than brokerage" for the reason stated in the Conference report, it appears to the Commission that Congress thereby exhibited not only a plain intention that paragraph (c) exclusively should govern questions of brokerage without regard to the contents of paragraph (a) but also the view that the words of paragraph (c) were, in themselves alone, sufficiently broad without the aid of the Senate amendment of paragraph (a) to prevent brokerage from being transmitted to buyers in the form of allowances based on savings in cost. Thus the Senate amendment was struck, in the opinion of the Commission, not for the purpose of changing the meaning of either paragraph (a) or paragraph (c), but because it was tautological. This legislative construction of paragraphs (a) and (c) as mutually independent is binding upon the Commission as a clear manifestation of legislative intent.

The Commission has not overlooked the fact that in reporting the Robinson-Patman Act to the Senate, after the Senate Committee on

the Judiciary had amended paragraph (a) by the insertion of the words "other than brokerage," Senator Logan said:

In the second section of the Committee amendment there is a provision that in making discriminations or differentials, or whatever we may choose to call them, all costs other than brokerage shall be allowed; and it has been said that the words "other than brokerage" in that section ought to go out.

I have thought a good deal about that suggestion. I think perhaps legitimate brokerage ought to be allowed as a part of the costs; and I think when the bill was drafted * * * perhaps in the amendment which was inserted by the Judiciary Committee of the Senate we had in mind dummy brokerage, sham brokerage (74th Congress, 2nd Session, 80 Congressional Record, part 6, page 6285).

This statement, however, appears to support rather than to oppose the view that paragraph (c) is not susceptible of a construction permitting the passing on of brokerage savings as differentials in cost. It demonstrates effectively that the obvious intention and only purpose of the Senate Committee on the Judiciary in adding the words "other than brokerage" to paragraph (a) was to refute any possible contention that the differentials provisions of that paragraph could be read into paragraph (c). That action was thus affirmatively taken by the Committee is clearly indicative of the fact that it was not ever intended that the differentials provisions of paragraph (a) should be construed as qualifying the scope and application of paragraph (c). Recognizing an ambiguity inherent in the incompatibility of those paragraphs, the Committee acted to resolve that ambiguity in favor of their incompatibility. Had it been intended originally that paragraphs (a) and (c) were to be construed as interdependent, it seems clear that the Committee would have left the former unaltered or would have taken action to confirm, rather than to refute, their mutuality.

In addition to this primary evidence that Congress intended paragraph (c) as absolute, a further, and perhaps in itself sufficient and controlling, reason why that paragraph must be so construed lies in the duty of the Commission to apply a simple and fundamental rule of statutory construction. That rule is that as between general and specific provisions, in apparent contradiction, whether in the same or different statutes, the specific qualifies and overrules the general, that special provisions prevail over general ones which, in the absence of the special provisions, would control.

As heretofore stated, paragraph (a) is the general paragraph of the Robinson-Patman Act. Paragraph (c) is a special paragraph dealing with the matter of brokerage only. Unquestionably the provisions of paragraph (c) prohibit without qualification, and without reference to competition or differentials based on savings in cost,

Conclusion

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every form of concession whatsoever based on brokerage. To the extent that paragraph (a) requires a showing of injury to competition and permits all differentials based on savings in cost it obviously conflicts, and is inconsistent, with paragraph (c). That being true, under the rule just stated, paragraph (a) must be held to be subordinate to paragraph (c), and the conflicts and inconsistencies between them must be resolved in favor of the enforcement of the special provisions of the latter unqualified by the general provisions of the former.

If this construction of paragraphs (a) and (c) as mutually independent and absolute were not adopted, paragraph (c) would be deprived of all substance. Manifestly there is no difference between paying brokerage to a buyer and giving him credit for it, by way of a net price, on the purchase price of the commodities which he buys. Sellers ordinarily selling through brokers who do their own selling in particular cases always save brokerage in such cases, because no one else having performed a selling service which entitles him to receive brokerage the sellers incur no obligation to pay it. If they are permitted to pass that saving on to buyers paragraph (c) will be completely eviscerated, and the efforts of Congress to protect commerce against a practice by which it found that price concessions were being transmitted to buyers by way of an inherently unfair method of competition will be rendered vain and useless.

While the Commission finds as a fact in this proceeding that the acceptance of discounts in lieu of brokerage by the respondent tends to injure competition between the respondent and its competitors and does injure competition between sellers who grant such discounts and allowances to the respondent and those who do not, that fact has not been considered by the Commission in arriving at its conclusion herein, for the reason that the Commission concludes as a matter of law that it is unnecessary for an injurious effect upon competition to be shown in proceedings instituted under paragraph (c).

The Commission concludes that in accepting net prices and quantity discounts, as heretofore referred to in paragraph 14. *supra*, the respondent The Great Atlantic & Pacific Tea Company, has been and is now accepting discounts and allowances in lieu of brokerage in violation of paragraph (c) of Section 2 of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", as amended by an Act of Congress approved June 19, 1936, entitled "An Act to amend Section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies,

and for other purposes', approved October 15, 1914, as amended (U. S. C., Title 15, Sec. 13), and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of The Great Atlantic & Pacific Tea Company, respondent, testimony and other evidence, taken before William C. Reeves, an examiner for the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed in support of said complaint and in opposition thereto and the oral arguments of J. J. Smith, Jr., counsel for the Commission, and Caruthers Ewing, counsel for the respondent, and the Commission having made its findings as to the facts and its conclusion that the said respondent has violated, and is now violating, the provisions of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" as amended by an Act of Congress approved June 19, 1936, entitled "An Act to amend Section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes' approved October 15, 1914, as amended (U. S. C., Title 15, Sec. 13), and for other purposes."

It is ordered, That in purchasing commodities in interstate commerce from sellers who are engaged in selling commodities in interstate commerce to the respondent, The Great Atlantic & Pacific Tea Company, and to purchasers thereof other than the respondent, the said respondent, The Great Atlantic & Pacific Tea Company, do forthwith cease and desist from:

1. Making purchases of commodities, and the policy and practice of making purchases of commodities, at a so-called net price, and every other price, which reflects a deduction or reduction, or is arrived at or computed by deducting or subtracting, from the prices at which sellers are selling said commodities to other purchasers thereof any amount representing, in whole or in part, brokerage currently being paid by sellers to their brokers on sales of said commodities made for said sellers by, or by said sellers through, their said brokers, and:

2. Accepting, and the policy and practice of accepting, on its purchases of commodities from sellers any so-called quantity discounts and payments of all kinds representing, in whole or in part, brokerage currently being paid by sellers to their brokers on sales of said

Order

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commodities made for said sellers by, or by said sellers through, their said brokers, and:

3. Accepting, and the policy and practice of accepting, on its purchases of commodities from sellers prices reflecting, and all allowances and discounts representing, brokerage savings effected by sellers on their sales of commodities to the respondent.

4. Accepting, and the policy and practice of accepting, on its purchases of commodities all allowances and discounts in lieu of brokerage, in whatever form said allowances and discounts may be allowed, granted, paid or transmitted to the respondent.

It is further ordered, That the respondent shall, within 60 days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

Complaint

IN THE MATTER OF

NATIONAL MANUFACTURERS DISTRIBUTING COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 3053. Complaint, Feb. 10, 1937—Decision, Jan. 25, 1938

Where a corporation engaged in sale and distribution of rotary clocks, automatic vibro shavers, cameras, and various other articles of merchandise—
Furnished and distributed to members of the general public in practically all States and in the District of Columbia, push cards, order blanks, and advertisements depicting particular items of its said merchandise and instructions for sale thereof under plans by which chance purchaser paid for chance varying amount, dependent upon number disclosed within various disks of aforesaid cards, and received article of merchandise or nothing other than push, dependent upon success or failure in selecting girl's name corresponding to that concealed under card's master seal, and it compensated by merchandise its operator or representative, and thereby placed in hands of others means of conducting lotteries, games of chance, or gift enterprises in distribution of its said merchandise, with knowledge and intent that said cards had been, were, and would be, used in sale and distribution of its said products to public by lot or chance, contrary to public policy, and in competition with many who are opposed to use of such cards in sale and distribution of their merchandise and refrain from furnishing same;

With result that sale of similar or like merchandise by aforesaid competitors was thereby injuriously affected and trade was diverted from them to it by reason of said furnishing of such cards or like devices, and there was a restraint upon and detriment to the freedom of sale and legitimate competition; to the prejudice and injury of the public and competitors:
Held, That such acts and practices were to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. Miles J. Furnas*, trial examiner.

Mr. Henry C. Lank and *Mr. P. C. Kolinski* for the Commission.
Nash & Donnelly, of Chicago, Ill., for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that National Manufacturers Distributing Company, a corporation, hereinafter referred to as respondent, has been and is using unfair methods of