

## Syllabus

IN THE MATTER OF  
ATLANTIC COMMISSION COMPANY

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

*Docket 3344. Complaint, Mar. 2, 1938—Decision, July 24, 1940*

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2 (C)—BROKERAGE OR COMMISSION  
PROVISIONS—SELLER TO BUYER PAYMENTS—SERVICES RENDERED CLAUSE.

The payment of brokerage to, and the receipt thereof by, a buyer upon his own purchases of commodities in interstate commerce is prohibited by paragraph (c) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U. S. C., sec. 13 (c)), and the services rendered clause of that paragraph sets up no condition upon which such brokerage may be paid or received. *Biddle Purchasing Co. v. Federal Trade Commission*, 96 F. (2d) 687 (C. C. A. 2d, 1938) 26 F. T. C. 1511, cert. denied 305 U. S. 634 (1938); *Oliver Brothers v. Federal Trade Commission*, 102 F. (2d) 763 (C. C. A. 4th, 1939) 28 F. T. C. 1926; *The Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. (2d) 667 (C. C. A. 3d, 1939) 29 F. T. C. 1591, cert. denied 308 U. S. 625, 60 S. Ct. 380 (1940), rehearing denied 309 U. S. 694, 60 S. Ct. 466 (1940); and *Webb-Crawford Co. v. Federal Trade Commission*, 109 F. (2d) 268 (C. C. A. 5th, 1940) 30 F. T. C. 1630, cert. denied 310 U. S. 638, 60 S. Ct. 1080 (1940).

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2 (C)—BROKERAGE OR COMMISSION  
PROVISIONS—SELLER TO BUYER PAYMENTS—BUYER BROKERAGE CONCERN ON OWN  
ACCOUNT PURCHASES—SERVICES RENDERED CLAUSE.

Where a corporate concern which (1) was a wholly owned subsidiary of a corporation engaged, through several other wholly owned corporate subsidiaries bearing same name, in retail grocery business and in operation of several thousand retail grocery stores owned by it and located in 38 States of the United States, and in the District of Columbia, and which (2) was engaged in buying, selling, and distributing fresh fruits and vegetables and other commodities on and for its own account and on and for the account of aforesaid corporations, and also in thus buying, selling, and distributing such various products and commodities as a broker and on consignment as a commission merchant for the accounts of other sellers and buyers, and which, along with aforesaid corporations, was in substantial competition with others engaged in like businesses;

In purchasing in interstate commerce from various sellers, on and for its own account, substantial quantity of fresh fruits and vegetables—

- (a) Received and accepted allowances and discounts in lieu of brokerage upon its own purchases of commodities in interstate commerce, and without the intervention of a broker, through practice of making such purchases at a "net price" or "net basis" reflecting a reduction from the prices at which sellers were currently selling commodities to other buyers, many of

## Complaint

31 F. T. C.

whom were engaged in competition with it, of an amount representing and reflecting, in whole in some instances and in part in others, amount of brokerage currently being paid by sellers to brokers representing them in effecting sales of their commodities to buyers other than it, and irrespective of whether quantity purchased by it from such sellers was large or small; and

- (b) Received and accepted allowances and discounts in lieu of brokerage upon its own purchases of commodities in interstate commerce, and without the intervention of a broker, through practice of negotiating with many sellers who did not sell to it at "net price" or on "net basis," so-called "quantity discount agreements" under which, without being obligated itself and generally irrespective of quantities purchased, there were paid to it so-called "quantity discounts," upon its purchases, of an amount which represented and reflected, in whole in some instances and in part in others, brokerage which sellers were currently paying to their brokers on sales of commodities made for them by latter:

*Held*, That, on basis of said facts, as a matter of law, no services in connection with the sale of commodities within the meaning of section 2 (c) were or could be rendered to sellers by it on its own purchases of such commodities, and that said concern, in thus accepting and receiving discounts and allowances in lieu of brokerage upon purchases of commodities for its own account in interstate commerce, as above set forth, violated provisions of section 2 (c) of an act of Congress approved October 15, 1914, as amended by an act of Congress approved June 19, 1936.

*Mr. J. J. Smith, Jr.*, for the Commission.

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

## COMPLAINT

The Federal Trade Commission having reason to believe that the Atlantic Commission 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 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 York and has its principal office and place of business at 102 Warren Street in the city of New York, N. Y.

PAR. 2. For several years prior to and on June 19, 1936, and ever since that date, the respondent was, has been, and is now engaged in the business of buying, selling, and distributing fresh fruits and vegetables and other commodities on and for its own account and in the business of selling fresh fruits and vegetables and other commodities as a broker for other sellers thereof.

PAR. 3. In the course and conduct of its business as aforesaid, since June 19, 1936, the respondent has been and is now making purchases in commerce of fresh fruits and vegetables and other commodities on and for its own account from various sellers thereof, which said fresh fruits and vegetables and other commodities purchased on and for its own account the respondent has been and is now causing to be shipped to it in commerce by said sellers from various States of the United States through, across and into other States of the United States and the District of Columbia, and in the course of making said purchases of fresh fruits and vegetables and other commodities on and for its own account since June 19, 1936, the respondent has been and is now receiving and accepting thereon from said sellers allowances and discounts in lieu of brokerage, for which said allowances and discounts in lieu of brokerage no services whatsoever in connection with said purchases, or in connection with the sale to the respondent of said fresh fruits and vegetables and other commodities purchased by the respondent on and for its own account, have been rendered or are now being rendered to, for or on behalf of the sellers of said fresh fruits and vegetables and other commodities by the respondent or by any agent, representative or intermediary subject to the direct or indirect control of the respondent.

PAR. 4. The receipt and acceptance by the respondent of allowances and discounts in lieu of brokerage, as aforesaid, constitutes a violation of the provisions of section 2 (c) of the abovementioned 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 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 Clayton Act, approved October 15, 1914 (38 Stat. 730), as amended by the Robinson-Patman Act,

## Findings

31 F. T. C.

approved June 19, 1936 (49 Stat. 1526; 15 U. S. C., sec. 13) the Federal Trade Commission on March 2, 1938, issued and served its complaint in this proceeding upon the respondent, Atlantic Commission Co., charging it with violating the provisions of section 2 (c) of the Clayton Act. On March 30, 1938, the respondent filed its answer to said complaint. Thereafter, on June 26, 1940, a stipulation was entered into, signed, and executed by the executive vice president and general manager and by the general counsel of the respondent and by W. T. Kelly, chief counsel for the Federal Trade Commission, whereby it was stipulated and agreed, subject to the approval of the Commission, that a statement of facts set forth in said stipulation may be made a part of the record and taken as the facts in this proceeding in lieu of testimony in support of and in opposition to the charges stated in the complaint herein, and that the Federal Trade Commission, upon said statement of facts, may make and enter in this proceeding its report stating its findings as to the facts and conclusion based thereon, and enters its order disposing of this proceeding without the taking of testimony, presentation of argument, filing of briefs, or other intervening procedure. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint, answer and stipulation, said stipulation having been approved, accepted, and filed by the Commission, and the Commission, having duly considered the same, and being now fully advised in the premises, makes this its report, setting forth its findings as to the facts and conclusion.

## FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Atlantic Commission Co., is a corporation organized and existing under the laws of the State of New York and has its principal office and place of business at 102 Warren Street in the city of New York, N. Y.

PAR. 2. Respondent is a wholly owned subsidiary of The Great Atlantic & Pacific Tea Co. of America, a corporation organized and existing under the laws of the State of Maryland. The said The Great Atlantic & Pacific Tea Co. of America, through several wholly owned corporate subsidiaries bearing the name "The Great Atlantic & Pacific Tea Co." and incorporated, severally, under the laws of Arizona, Nevada, and New Jersey, is engaged in the retail grocery business, and owns and operates several thousand retail grocery stores located in 38 States of the United States and in the District of Columbia.

PAR. 3. For several years prior to, and since, June 19, 1936, the respondent was, has been, and is now, engaged in the business of buying, selling, and distributing in interstate commerce, fresh fruits and vegetables and other commodities on and for its own account, and on and for the accounts of the corporations above referred to in paragraph 2, and also in the business of buying, selling, and distributing in interstate commerce, fresh fruits and vegetables and other commodities as a broker and on consignment as a commission merchant for the accounts of other sellers and buyers thereof. For the purpose of conducting its said business the respondent has continuously maintained and does now maintain offices in various cities throughout the United States.

PAR. 4. In the course and conduct of their respective businesses the respondent and the corporations above referred to in paragraph 2 are engaged in substantial competition in interstate commerce with other persons, firms, and corporations engaged in like businesses in interstate commerce.

PAR. 5. In the course and conduct of its business since June 19, 1936, respondent has purchased in interstate commerce from various sellers on and for its own account substantial quantities of fresh fruits and vegetables on the following bases, to wit:

(a) At a price or on a basis, commonly referred to in the food and produce industry as a "net price" or "net basis," reflecting a reduction from the prices at which sellers were currently selling commodities to other buyers, many of whom were engaged in competition with the respondent, of an amount representing and reflecting, in whole in some cases and in part in others, the amount of brokerage which was currently being paid by sellers to brokers representing them in effecting sales of their commodities to buyers other than respondent. For example, in many instances where commodities were being sold by a seller at a price of \$1 and the rate at which brokerage was currently being paid by the seller to brokers representing him in effecting sales of commodities for him was 5 percent, respondent purchased said commodities direct from the seller without the intervention of a broker at a price of 95 cents net. The 5-cent differential between these two prices in a substantial number of instances represented and reflected, and was granted and received in lieu of, brokerage which the seller was currently paying to his brokers on sales of commodities made by them for him. Where respondent was able to effect a net price or a net basis arrangement with a seller, respondent's purchases of commodities were made from such seller at such a price or on such basis irrespective of whether the quantity purchased was large or small.

Findings

31 F. T. C.

(b) With many sellers who did not sell to respondent at a net price or on a net basis, as above referred to, respondent negotiated and executed so-called "quantity discount agreements," a typical form of which is as follows:

## QUANTITY DISCOUNT AGREEMENT

PURCHASER: THE ATLANTIC COMMISSION COMPANY, INC.

ADDRESS: -----  
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SELLER: -----

ADDRESS: -----  
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THE PURCHASER HAS OBLIGATED ITSELF TO BUY FROM THE SELLER A LARGE QUANTITY OF MERCHANDISE AND, IN VIEW OF THE PURCHASES IN LARGE QUANTITY, PRESENT AND PROSPECTIVE, THE SELLER AGREES TO ALLOW THE FOLLOWING QUANTITY DISCOUNT ON AMOUNTS BOUGHT BY THE PURCHASER, BEGINNING ----- AND CONTINUING UNTIL CANCELLED BY EITHER PARTY.

THE SELLER AVOWS ITS WILLINGNESS TO MAKE THE SAME AGREEMENT AS IS HERE MADE WITH ANY OTHER PURCHASER SIMILARLY SITUATED AND ON PROPORTIONALLY EQUAL TERMS.

----- SELLER  
By -----

ATLANTIC COMMISSION COMPANY, INC.,  
Purchaser.

By -----

Such agreements in many instances provided for the payment to the respondent, as a so-called "quantity discount" upon respondent's purchases, of an amount to be computed on the basis of the rate at which the contracting-seller was currently paying brokerage to his brokers representing him in effecting sales of commodities to buyers other than respondent, many of which buyers were engaged in competition with the respondent. Such agreements did not obligate the respondent to purchase any commodities from the contracting-sellers, and respondent had no obligation apart from such agreements to purchase any commodities from the contracting-sellers. Pursuant to the terms of many of such agreements contracting-sellers paid to the respondent, and the respondent received and accepted from contracting-sellers, on purchases of commodities made direct from the sellers for respondent's own account, without the intervention of a broker, sums of money which represented and reflected, in whole in some cases and in part in others, and were paid and received in lieu of, brokerage which the sellers were currently paying to their brokers on sales of commodities

made for them by their brokers. Generally such sums were paid to the respondent monthly upon the purchases made by the respondent during the preceding month and irrespective of whether the quantity of commodities purchased by the respondent was large or small.

PAR. 6. In purchasing commodities for its own account at prices reflecting reductions of amounts representing, in whole or in part, brokerage which was currently being paid by sellers to brokers, as referred to in subparagraph (a) of paragraph 5, *supra*, the respondent received and accepted allowances and discounts in lieu of brokerage upon its own purchases of commodities in interstate commerce.

PAR. 7. In receiving and accepting upon purchases of commodities made for its own account so-called "quantity discounts" representing and reflecting, in whole or in part, brokerage which was currently being paid by sellers to brokers, as referred to in subparagraph (b) of paragraph 5, *supra*, the respondent received and accepted allowances and discounts in lieu of brokerage upon its own purchases of commodities in interstate commerce.

#### CONCLUSION

The payment of brokerage to, and the receipt thereof by, a buyer upon his own purchases of commodities in interstate commerce is prohibited by paragraph (c) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U. S. C. sec. 13 (c)), and the services rendered clause of that paragraph sets up no condition upon which such brokerage may be paid or received (*Biddle Purchasing Co. v. Federal Trade Commission*, 96 F. (2d) 687 (C. C. A. 2d, 1938), [26 F. T. C. 1511], cert. denied 305 U. S. 634 (1938); *Oliver Brothers v. Federal Trade Commission*, 102 F. (2d) 763 (C. C. A. 4th, 1939), [28 F. T. C. 1926]; *The Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. (2d) 667 (C. C. A. 3rd, 1939), [29 F. T. C. 1591], cert. denied 308 U. S. 625, 60 S. Ct. 380 (1940), rehearing denied 309 U. S. 694, 60 S. Ct. 466 (1940); and *Webb-Crawford Co. v. Federal Trade Commission*, 109 F. (2d) 268 (C. C. A. 5th, 1940), [30 F. T. C. 1630], cert. denied 310 U. S. 638, 60 S. Ct. 1080 (1940)). Moreover, on the basis of the facts above found, the Commission concludes as a matter of law that no services in connection with the sale of commodities within the meaning of section 2 (c) were or could be rendered to sellers by the respondent on the respondent's own purchases of such commodities.

In accepting and receiving discounts and allowances in lieu of brokerage upon purchase of commodities for its own account in interstate

Order

31 F. T. C.

commerce as set forth in paragraphs 5, 6, and 7 of the foregoing findings as to the facts, the respondent, Atlantic Commission Co., violated the provisions of section 2 (c) of the Clayton Act, as amended by the Robinson-Patman Act.

## 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 respondent, Atlantic Commission Co., and a stipulation as to the facts executed by the executive vice president and general manager and by the general counsel of the said respondent and by W. T. Kelley, chief counsel for the Federal Trade Commission, which said stipulation waived the taking of testimony, presentation of argument, and filing of briefs and provided that without further intervening procedure the Commission may make and enter in this proceeding its report stating its findings as to the facts and conclusion based thereon and its order disposing of this proceeding, and said stipulation having been approved by the Commission, and the Commission having made its findings as to the facts and its conclusion that the respondent violated the provisions of section 2 (c) of the Clayton Act, as amended by the Robinson-Patman Act. (15 U. S. C. sec. 13 (c)).

*It is ordered*, That in purchasing commodities in interstate commerce and the District of Columbia the respondent, Atlantic Commission Co., its officers, representatives, agents, and employees, do forthwith cease and desist from:

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

2. Accepting from sellers on purchases of commodities made for the respondent's own account any so-called quantity discounts and payments of all kinds representing or reflecting, in whole or in part, brokerage currently being paid by sellers to their brokers on sales of commodities made for said sellers by, or by said sellers through, their said brokers; and

3. Accepting from sellers directly or indirectly on purchases of commodities made for the respondent's own account any brokerage and

625

## Order

any allowances and discounts in lieu of brokerage, in whatever manner or form said allowances and discounts may be offered, allowed, granted, paid or transmitted; and

4. Accepting from sellers in any manner or form whatever, directly or indirectly, anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof upon purchases of commodities made for respondent's own account.

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

IN THE MATTER OF  
WILLIAM VORUNION AND BENJAMIN VORUNION,  
DOING BUSINESS UNDER THE TRADE NAMES OF  
HOWARD SALES COMPANY AND BERWICK PEN  
COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION  
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914

*Docket 3514. Complaint, July 27, 1938—Decision, July 24, 1940*

Where two individuals engaged in assembling fountain pens and pencils and in sale and distribution thereof and in regularly advertising, offering, and selling said pens at 59 cents and pencils at 29 cents, through various retail outlets and under special sales promotion scheme which included the shipping to various retailers and merchants of such pens and pencils, shipping charges prepaid, the supplying of advertising material, the payment by them of retailers' expense in advertising in the local papers, the remission to them by retailers and merchants of the proceeds, after deducting 30 percent of gross sales and all advertising costs, and the returning of all unsold goods at expense of said individuals, and which further included pretended special sale as below more fully set forth—

- (a) Represented through statements in their advertising material which they thus disseminated and which was in turn communicated or distributed among purchasers and prospective purchasers by retail sales dealers and customers, that customary and usual retail price at which said pens were sold was \$5 and that at which pencils were sold was \$1.50, and that they were being sold at 59 cents and 29 cents, respectively, for 1 or 2 days only and for purpose of introducing said articles, and that after special sale, prices thereof would be as above set forth; facts being pens in question were not \$5 vacuum filler, sackless fountain pens and such price was greatly exaggerated and fictitious, and much in excess of customary price at which products in question were intended to be and were customarily sold; and pencils likewise had no such regular market price of \$1.50, which was also greatly exaggerated and fictitious and much in excess of contemplated and customary selling price thereof, and "Sale" was not an introductory one for 1 or 2 days only, nor a special one at which said products were sold at reduced prices, but they conducted other sales through same dealers short time after, offering same merchandise at same alleged special prices, and using same type of advertising;
- (b) Represented that said pens and pencils were of quality and character different from or superior to those offered and sold by competitors at comparable prices and that pen held 200 percent more ink than any of the fountain pens on the market; facts being that they did not have any such capacity as claimed, and that such statements and representations were false and misleading;
- (c) Represented that pens in question had been tested and were guaranteed by the factory to be unbreakable for life, and that in case of breakage or other unsatisfactory service they would be repaired free of charge or exchanged