

Complaint

42 F. T. C.

IN THE MATTER OF

PAUL PANKEY & COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SUBSEC. (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 5282. Complaint, Feb. 16, 1945—Decision, Mar. 25, 1946

Where an individual engaged both as a broker, and as a direct buyer, of food products and, in latter capacity, in buying and selling from various packers, producers, canners, and other sellers located in other States, canned fish products, canned fruits, and vegetables and other commodities for his own account for resale, as a direct buyer and trader for profit, shopping the market, taking title, warehousing, assuming risks of ownership, filing claims, etc., and invoicing customers in his own name and making a profit or sustaining a loss, as case might be, on such buying and selling at his own prices and terms—

Received and accepted, directly or indirectly on such purchases for his own account from such sellers, commissions or brokerage fees customarily paid by them by permitted deduction by him from the invoice price of the food products purchased, of an amount equal to, or approximately equal to, the commissions or brokerage fees they paid their brokers:

Held, That such receipt and acceptance by said individual of commissions or brokerage, or compensation, allowance, or discount in lieu thereof from sellers of food products on purchases made for his own account as above set forth, were in violation of subsection (c) of section 2 of the Clayton Act as amended.

Mr. Edward S. Ragsdale for the Commission.

Mr. William P. Smith, of Washington, D. C., and *Mr. Francis H. Hare*, of Birmingham, Ala., for respondent.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, since June 19, 1936, has violated and is now violating the provisions of subsection (c) of section 2 of the Clayton Act (U. S. C., title 15, sec. 13) as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Paul M. Pankey, is an individual, doing business as Paul Pankey & Co. with his principal office and place of business located at 2413 First Avenue, North, Birmingham, Ala. Respondent since June 19, 1936, has been and is now engaged in business as a broker of food products, and as a direct buyer of food products. The respondent as a direct buyer of food products has engaged in the busi-

ness of buying and selling canned fish products, canned fruits and vegetables and other commodities (all of which are hereinafter designated as food products) for his own account for resale. The respondent operates warehouses in Birmingham, Ala., in which he stores and from which he thereafter sells substantial quantities of such food products.

PAR. 2. In the course and conduct of his said business since June 19, 1936, respondent has bought in his own name and for his own account for resale food products from various packers, processors, canners, and other sellers, who are located in States other than the State in which respondent is located, and as a result of respondent's purchases and his instructions, such food products are shipped and transported by the respective sellers thereof across State lines to the respondent.

PAR. 3. The respondent operates his business by the use of two separate and distinct methods, namely, (1) as "broker" of food products, and (2) as "direct buyer" of food products.

First. Respondent's business as a "broker" of food products may be described as follows: Respondent in such capacity acts as sales agent which negotiates the sale of food products for and on account of seller-principals, and respondent's only compensation is a commission or brokerage fee paid by such seller-principals.

The respondent solicits and obtains orders for such food products at the respective seller-principals' prices and on such seller-principals' terms of sale. The respondent as a food broker transmits purchase orders to his several seller-principals who thereafter invoice and ship such food products to the customer.

The respondent as broker of food products has no financial interest in the food products he sells. His only financial interest is the commission or brokerage fee he receives and accepts from the seller-principal for making the sale. Such commissions or brokerage fees are customarily based on a percentage of the invoice sales price of the food products sold.

The respondent in this capacity is a broker and not a trader for profit. The respondent does not take title to, or have any financial interest in, the food products sold and neither makes a profit nor suffers any loss on the transaction. This phase of respondent's business is not challenged by the complaint.

Second. Respondent's business as a "direct buyer" of food products may be described as follows: The respondent transmits his own purchase orders for food products directly to the various interstate sellers from whom he buys. Such sellers invoice and ship such food products directly to respondent. The respondent receives and accepts, directly or indirectly, from the respective sellers from whom he

Complaint

42 F. T. C.

buys commissions or brokerage fees. Such commissions or brokerage fees are customarily paid to the respondent by various sellers by permitting the respondent to deduct from the invoice price of the food products purchased an amount which is equal to, or approximately equal to, the commissions or brokerage fees such sellers pay their brokers.

The respondent in connection with such purchases is a direct buyer and as such is a trader for profit, purchasing and reselling such food products in his own name and for his own account and at his own prices and on his own terms, taking title to such food products and assuming all the risk incident to ownership.

The respondent before purchasing, shops the market, purchasing where he is able to secure the most favorable prices and terms, including the payment of commissions or brokerage fees.

The respondent pays the price of the food products purchased from such sellers as a condition precedent to the delivery of such food products by the carrier to him. If such food products shipped to the respondent by such seller are lost or damaged in transit, the respondent files claim with the carrier and collects damages from the carrier in his own name and for his own account.

The respondent enters into formal contracts with his sellers or with some of his sellers whereby respondent contracts to buy, and the sellers contract to sell, definite quantities of certain food products at a stated price. Many of such contracts require the seller to deliver to the respondent such food products over an extended period of time at a stated price.

The respondent, upon receipt of such food products from his various sellers, warehouses such products in his own warehouses and insures the food products at his own expense and in his own name and for his own account against contingent loss or damage. Subsequently respondent pledges warehouse receipts and insurance contracts covering the products he has warehoused and insured as security for loans from banks.

The respondent in his annual tax returns sets out the value of the food products he has purchased for a stated year, and the amount of profit he has received on the sale of such products or the losses he has sustained on such sales. On the basis of respondent's declaration, respondent's taxes are assessed and paid.

When respondent sells such food products, he invoices the products to his customers in his own name and for his own account and at prices and on terms he determines. The respondent assumes full and

complete credit risk on such transactions, reaping a profit or sustaining a loss thereon, as the case may be.

PAR. 4. The receipt and acceptance, since June 19, 1936, by respondent Paul M. Pankey, an individual doing business as Paul Pankey & Co., of commissions, brokerage, or other compensation; or discounts in lieu thereof, as set forth under method 2 in paragraph 3 hereof, and such acts and practices as hereinabove set forth are in violation of the provisions of subsection (c) of section 2 of the Clayton Act as amended.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an act of Congress entitled, "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by an act of Congress approved June 19, 1936 (Robinson-Patman Act), and by virtue of the authority vested in the Federal Trade Commission by the aforesaid act, the Federal Trade Commission on February 16, 1945, issued and subsequently served its complaint in this proceeding upon the respondent, Paul M. Pankey, an individual doing business as Paul Pankey & Co., charging him with the violation of subsection (c) of section 2 of the Clayton Act as amended by the Robinson-Patman Act. After the issuance of said complaint and the filing of respondent's answer thereto, the respondent withdrew said answer and filed in lieu thereof an answer admitting all the material allegations of fact set forth in said complaint and waiving intervening procedure and further hearing as to said facts. Thereafter, this proceeding regularly came on for final hearing before the Commission upon said complaint and substitute answer filed by the respondent; and the Commission, having duly considered the matter 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 conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Paul M. Pankey, is an individual doing business as Paul Pankey & Co., with his principal office and place of business located at 2413 First Avenue North, Birmingham, Ala. Respondent, since June 19, 1936, has been, and is now, engaged in business as a broker of food products and as a direct buyer of food products. The respondent as a direct buyer of food products has engaged in the business of buying and selling canned fish products,

canned fruits and vegetables, and other commodities (all of which are hereinafter designated as "food products") for his own account for resale. The respondent operates warehouses in Birmingham, Ala., in which he stores, and from which he thereafter sells, substantial quantities of such food products.

PAR. 2. In the course and conduct of his said business since June 19, 1936, respondent has bought in his own name and for his own account for resale, food products from various packers, processors, canners, and other sellers who are located in States other than the State in which respondent is located, and, as a result of respondent's purchases and his instructions, such food products are shipped and transported by the respective sellers thereof across State lines to the respondent.

PAR. 3. In the course and conduct of his said business and in connection with the purchase of food products in interstate commerce for his own account as a direct buyer, the respondent, since June 19, 1936, has received and accepted commissions and brokerage, or compensation, allowances, and discounts in lieu thereof.

The respondent, when purchasing for his own account, transmits his own purchase orders for food products directly to the various interstate sellers from whom he buys. Such sellers invoice and ship such food products directly to respondent. The respondent receives and accepts, directly or indirectly, from the respective sellers from whom he buys, commissions or brokerage fees. Such commissions or brokerage fees are customarily paid to the respondent by various sellers by permitting the respondent to deduct from the invoice price of the food products purchased, an amount which is equal to, or approximately equal to, the commissions or brokerage fees such sellers pay their brokers.

The respondent in connection with such purchases is a direct buyer and as such is a trader for profit, purchasing and reselling such food products in his own name and for his own account and at his own prices and on his own terms, taking title to such food products and assuming all the risk incident to ownership. If such food products shipped to the respondent by such seller are lost or damaged in transit, the respondent files claim with the carrier and collects damages from the carrier in his own name and for his own account.

The respondent, before purchasing, shops the market, purchasing where he is able to secure the most favorable prices and terms, including the payment of commissions or brokerage fees.

The respondent enters into formal contracts with his sellers or with some of his sellers whereby respondent contracts to buy, and the sellers

148

Order

contract to sell, definite quantities of certain food products at a stated price. Many of such contracts require the seller to deliver to the respondent such food products over an extended period of time at a stated price.

The respondent, upon receipt of such food products from his various sellers, warehouses such products in his own warehouses and insures the food products at his own expense and in his own name and for his own account against contingent loss or damage and pledges warehouse receipts and insurance contracts covering the products he has warehoused and insured as security for loans from banks.

The respondent in his annual tax returns sets out the value of the food products he has purchased for a stated year, and the amount of profit he has received on the sale of such products or the losses he has sustained on such sales. On the basis of respondent's declaration, respondent's taxes are assessed and paid.

When respondent sells such food products, he invoices the products to his customers in his own name and for his own account and at prices and on terms he determines. The respondent assumes full and complete credit risk on such transactions, reaping a profit or sustaining a loss thereon, as the case may be.

CONCLUSION

The receipt and acceptance by the respondent, directly or indirectly, of commissions or brokerage, or compensation, allowances, or discounts in lieu thereof, from sellers of food products on purchases made for his own account, as herein found, are in violation of subsection (c) of section 2 of the Clayton Act as amended.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and substitute answer of the respondent, which substitute answer admits all the material allegations of fact set forth in said complaint and waives all intervening procedure and further hearing as to said facts, and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of subsection (c) of section 2 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 an act of Congress approved June 19, 1936 (Robinson-Patman Act).

Order

42 F. T. C.

It is ordered, That the respondent, Paul M. Pankey, an individual, trading as Paul Pankey & Co. or trading under any other trade name, and his representatives, agents, and employees, directly or through any corporate or other device in connection with the purchase of canned fish products, canned fruits and vegetables, and other commodities in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Receiving or accepting from any seller, directly or indirectly, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, on or in connection with purchases made for respondent's own account.

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

Syllabus

IN THE MATTER OF
PARROTT & CO. ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SUBSEC. (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 5284. Complaint, Feb. 20, 1945—Decision, Mar. 25, 1946

A brand, trade-mark, or trade name may be defined as a symbol of business good will. Good will is an attitude in people which causes them to continue to patronize a certain place or person or to purchase a definite commodity. Upon the brand used depends to whom the good will created by the product accrues. Thus, when sellers sell goods which bear their own brand, the good will accrues to them; whereas, when they sell goods bearing the brand of another, the good will accrues not to the sellers but to the person who owns the brand.

A seller's brand may be defined as a brand owned and controlled by the original seller, and designates brands owned and utilized by particular sellers in the promotion and sale of their products, which brand identifies the particular products for which said sellers assume the responsibility all the way through the channels of distribution to the consumer, so that whatever good will is established thereby accrues to them.

Distributors' brands may be defined as brands owned and controlled by other than the original sellers and designate brands utilized by distributors other than the original sellers which identify the food products with the particular seller and permit such distributors to promote the sale of those food products independently of the original sellers, so that distributors rather than original sellers assume the responsibility all the way through the channels of distribution to the consumer, and whatever good will is established accrues to the distributors and not to said sellers.

Where a corporation and its subsidiary, with a number of branch offices, engaged in the interstate purchase, sale, and distribution of canned fish, canned fruits, canned vegetables, and other commodities, under their customer sellers' brands, trade names and labels, (1) through brokers, through whom they sold such products under their own particular brands or labels or those of the particular buyer and whom they compensated for obtaining orders for their said products at their own prices and terms; and, (2) to direct buyers, including "buying brokers" and such direct buyers as chain stores, large wholesalers and members of buying groups, under such buyer's own brands or labels principally, and including also certain direct buyers who purchase said sellers' brands and labels for their own account for resale, and incorrectly designate themselves as brokers; and who, i. e., said direct buyers, contrary to brokers, are traders for profit, shopping the market, taking title, assuming risks, filing claims, warehousing, etc., and who, buying and selling at their own prices and terms, make a profit or suffer a loss, as the case might be;

Paid or granted, directly or indirectly, to such direct buyers of food products for their own accounts, commissions or brokerage fees, or allowance of discounts in lieu thereof, on such purchases by, (a) deducting or allowing from the