

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

Complaint

42 F. T. C.

invoice price an amount equal, or approximately equal, to the commissions or brokerage fees paid to their brokers, or (b) selling to such buyers at a net price reflecting brokerage:

Held, That such payment or granting of brokerage, or commissions, discounts, or other compensation in lieu of brokerage, to buyers upon purchases made for the buyers' own account was violative of subsection (c) of section 2 of the Clayton Act, as amended.

Mr. Edward S. Ragsdale for the Commission.

Lovell & Richardson, of San Francisco, Calif., for respondents.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, since June 19, 1936, have violated and are 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 Parrott & Co. is a corporation organized and existing under the laws of the State of California, with its principal office and place of business located at 320 California Street, San Francisco, Calif. This respondent also maintains branch offices in Seattle and Spokane, Wash.; Portland, Oreg.; and in Los Angeles, Calif.

PAR. 2. Respondent Superior Fisheries, Inc., is a corporation organized and existing under the laws of the State of California, all of the capital stock of which is owned by respondent Parrott & Co., with its principal office and place of business located at 1709 West Eighth Street, Los Angeles, Calif. This respondent also maintains a branch office at 320 California Street, San Francisco, Calif.

PAR. 3. Respondents, since June 19, 1936, have been and are now engaged in the business of buying, selling, and distributing canned fish, canned fruits, and canned vegetables, and other commodities (all of which are hereinafter designated as "food products") for their own account for resale.

The respondents, since June 19, 1936, in the course and conduct of their said business, have sold and distributed a substantial portion of their food products, directly to buyers, and through brokers to buyers, some such buyers are located in States other than the State in which the respondents are located, and as a result of said sales and the respondents' instructions, such food products are shipped and transported across State lines to such buyers so located.

Complaint

155 .

PAR. 4. All food products sold by respondents bear a label upon which appears a brand, trade-mark, or trade name. Such labels are attached to such food products to identify them as the products of the persons owning the brands so that repeat sales may be centered upon such brand.

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 respondents 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 respondents, but to the person who owns the brand. That such is the purpose and effect of the use of brands is well known in the industry.

The respondents' food products are sold and distributed under two distinct brand classifications, namely, (1) sellers' brands and (2) distributors' brands.

A seller's brand may be defined as a brand, owned and controlled by the original seller, and as referred to herein designates brands owned and utilized by respondents in the promotion and sale of its products, which brand identifies the particular products for which respondents assume the responsibility all the way through the channels of distribution to the consumer, and whatever good will is established thereby accrues to respondents. Among the brands so used by respondents are: Bountiful, Fairplay, Natur Sweet, Redwood, Valley Belt, Lodi, Valera, Somoa, Canal, Coral, Dixie Prize, and Dixie Lee.

Distributors' brands may be defined as brands owned and controlled by other than the original sellers and as referred to herein 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 respondents; and distributors rather than respondents 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 the respondents. Distributors and not respondents determine the sales and price policies with reference to such food products.

PAR. 5. Respondents sell and distribute food products by two separate and distinct methods.

First. The first method is by selling to buyers through brokers of food products.

Complaint

42 F. T. C.

A broker of food products may be defined as a sales agent who negotiates the sale of food products for and on account of the seller as principal and whose compensation is a commission or brokerage fee paid by the seller. A broker of food products does not buy food products from his principal and sell such products for his own account.

Such brokers act as respondents' sales agents, soliciting and obtaining orders for respondents' food products at respondents' prices and on respondents' terms. Such brokers transmit such purchase orders to respondents who thereafter invoice and ship the food products to the customers. The respondents pay such brokers for their service in negotiating and making such sales for respondents' accounts, commissions, or brokerage fees, which are customarily based on a percentage of the invoice sales prices of the food product sold.

The food products so sold by brokers always bear the brand or label of the respondents, or of the buyers to whom respondents sell. Therefore, none of the good will established by the products accrues to the brokers. Such brokers are not traders for profit and do not take title to or have any financial interest in the product sold, and neither make a profit nor suffer a loss on the transaction.

Second. The second method is by the sale of food products by the respondents direct to buyers. All such buyers referred to herein are "direct buyers." In transactions between respondents and such buyers, respondents do not use brokers.

There are in fact two separate and distinct classifications of direct buyers. One class is known as buying brokers (who designate themselves as brokers but who are not in fact brokers). The other class of direct buyers consists, among others, of chain stores, large wholesalers, and members of buying groups.

The food products sold by respondents to such direct buyers principally bear brands or labels owned by such buyers and as to such food products, all the good will established by the products accrues to such direct buyers.

Respondents also sell to other direct buyers (some of whom also incorrectly designated themselves as brokers) who purchase respondents' food products exclusively under respondents' brands or labels in their own respective names and for their own accounts for resale.

Respondents pay such buyers of their food products, directly or indirectly (regardless of whether such food products are purchased under respondents' labels or distributors' labels), commissions or brokerage fees, or allowances or discounts in lieu thereof on such purchases.

Such direct buyers transmit their own purchase orders for food

products directly to the respondents. The respondents thereafter invoice and ship such food products directly to such buyers from whom respondents collect the purchase price of the merchandise. The respondents, among their several methods of sales, pay such buyers commissions or brokerage fees on such purchases by deducting or allowing from the invoice price of the food products purchased an amount which is equal or approximately equal to the commissions or brokerage fees paid by the respondents to their brokers (as illustrated in method 1), or by selling to such buyers at a net price which reflects brokerage.

Contrary to the manner in which brokers operate (as described in method 1 above) such buyers are traders for profit purchasing and reselling such food products in their own names and for their own accounts, taking title to the food products and assuming all risk incident to ownership.

Such resales are not made at the prices, and on the terms dictated by respondents, but at the prices and on the terms determined by the buyer who makes a profit or suffers a loss thereon, as the case may be.

Said direct buyers shop the market and purchase food products from several sellers, including respondents, and purchase where they are able to secure the most favorable prices and terms, including the payment of commissions and brokerage fees.

Said buyers pay the price of the food products purchased from respondents as a condition precedent to delivery of such food products by the carrier to them. If the food products shipped by respondents to the buyers are lost or damaged in transit, such buyers file claim with the carrier and collect damages from the carrier for their own accounts.

Such buyers, upon receipt of such food products from respondents, warehouse them in their own warehouses or in public warehouses and insure the products at their own expense and in their own names and for their own accounts against contingent loss or damage. Subsequently, said buyers pledge warehouse receipts and insurance contracts covering these products they have purchased as security for loans from banks.

PAR. 6. The respondents, since June 19, 1936, in connection with the interstate sale of their food products by the second method set forth in paragraph 5, have paid or granted and are now paying or granting, directly and indirectly, commissions, brokerage, or other compensation, or discounts in lieu thereof, to buyers of their food products, and such acts and practices as set forth above are in violation of subsection (c) of section 2 of the Clayton Act as amended.

Findings

42 F. T. C.

REPORT, FINDING 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 (the Clayton Act), as amended by the Robinson-Patman Act, approved June 19, 1936 (15 U. S. C. sec. 13), the Federal Trade Commission on February 20, 1945, issued and thereafter served its complaint in this proceeding upon the respondents named in the caption hereof charging them with the violation of subsection (c) of section 2 of said Clayton Act, as amended. Subsequently, the respondents filed an answer admitting all of the material allegations of fact set forth in the complaint but denying that the acts and practices described in the complaint constituted a violation of said act as amended. In their answer the respondents waived all intervening procedure, including hearings as to the facts, the filing of briefs, the trial examiner's report, and oral argument. Thereafter, the proceeding regularly came on for final hearing before the Commission on the complaint and answer, and the Commission, having duly considered the matter and being now fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Parrott & Co. is a corporation organized and existing under the laws of the State of California, with its principal office and place of business located at 320 California Street, San Francisco, Calif. This respondent also maintains branch offices in Seattle and Spokane, Wash.; Portland, Oreg.; and Los Angeles, Calif.

PAR. 2. Respondent Superior Fisheries, Inc., is a corporation organized and existing under the laws of the State of California, all of the capital stock of which is owned by respondent Parrott & Co., with its principal office and place of business located at 1709 West Eighth Street, Los Angeles, Calif. This respondent also maintains a branch office at 320 California Street, San Francisco, Calif.

PAR. 3. Respondents, since June 19, 1936, have been and are now engaged in the business of buying, selling, and distributing canned fish, canned fruits, and canned vegetables, and other commodities (all of which are hereinafter designated as "food products") for their own account for resale.

The respondents, since June 19, 1936, in the course and conduct of their said business have sold and distributed a substantial portion of

their food products directly to buyers, and through brokers to buyers. Some of such buyers are located in States other than the State in which the respondents are located, and as a result of said sales and the respondents' instructions, such food products are shipped and transported across State lines to such buyers so located.

PAR. 4. All food products sold by respondents bear a label upon which appears a brand, trade-mark, or trade name. Such labels are attached to such food products to identify them as the products of the persons owning the brands so that repeat sales may be centered upon such brand.

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 respondents 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 respondents but to the person who owns the brand. That such is the purpose and effect of the use of brands is well known in the industry.

The respondents' food products are sold and distributed under two distinct brand classifications, namely, (1) sellers' brands and (2) distributors' brands.

A seller's brand may be defined as a brand owned and controlled by the original seller, and as referred to herein designates brands owned and utilized by respondents in the promotion and sale of their products, which brand identifies the particular products for which respondents assume the responsibility all the way through the channels of distribution to the consumer, and whatever good will is established thereby accrues to respondents. Among the brands so used by respondents are: Bountiful, Fairplay, Nature Sweet, Redwood, Valley Belt, Lodi, Valera, Somoa, Canal, Coral, Dixie Prize, and Dixie Lee,

Distributors' brands may be defined as brands owned and controlled by other than the original sellers and as referred to herein 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 respondents; and distributors rather than respondents 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 the respondents. Distributors and not

respondents determine the sales and price policies with reference to such food products.

PAR. 5. Respondents sell and distribute food products by two separate and distinct methods.

First. The first method is by selling to buyers through brokers of food products.

A broker of food products may be defined as a sales agent who negotiates the sale of food products for and on account of the seller as principal and whose compensation is a commission or brokerage fee paid by the seller. A broker of food products does not buy food products from his principal and sell such products for his own account.

Such brokers act as respondents' sales agents, soliciting and obtaining orders for respondents' food products at respondents' prices and on respondents' terms. Such brokers transmit such purchase orders to respondents who thereafter invoice and ship the food products to the customers. The respondents pay such brokers for their service in negotiating and making such sales for respondents' account, commissions or brokerage fees, which are customarily based on a percentage of the invoice sales prices of the food products sold.

The food products so sold by brokers always bear the brand or label of the respondents or of the buyers to whom respondents sell. Therefore, none of the good will established by the products accrues to the brokers. Such brokers are not traders for profit and do not take title to or have any financial interest in the product sold, and neither make a profit nor suffer a loss on the transaction.

Second. The second method is by the sale of food products by the respondents direct to buyers. All such buyers referred to herein are "direct buyers." In transactions between respondents and such buyers, respondents do not use brokers.

There are in fact two separate and distinct classifications of direct buyers. One class is known as buying brokers (who designate themselves as brokers but who are not in fact brokers). The other class of direct buyers consists, among others, of chain stores, large wholesalers, and members of buying groups.

The food products sold by respondents to such direct buyers principally bear brands or labels owned by such buyers, and as to such food products all the good will established by the products accrues to such direct buyers.

Respondents also sell to other direct buyers (some of whom also incorrectly designate themselves as "brokers") who purchase respondents' food products exclusively under respondents' brands or labels in their own respective names and for their own accounts for resale.

Respondents pay such buyers of their food products, directly or indirectly (regardless of whether such food products are purchased under respondents' labels or distributors' labels), commissions or brokerage fees, or allowances or discounts in lieu thereof on such purchases.

Such direct buyers transmit their own purchase orders for food products directly to the respondents. The respondents thereafter invoice and ship such food products directly to such buyers, from whom respondents collect the purchase price of the merchandise. The respondents, among their several methods of sales, pay such buyers commissions or brokerage fees on such purchases by deducting or allowing from the invoice price of the food products purchased an amount which is equal or approximately equal to the commissions or brokerage fees paid by the respondents to their brokers (as illustrated in method one), or by selling to such buyers at a net price which reflects brokerage.

Contrary to the manner in which brokers operate (as described in method one above) such buyers are traders for profit, purchasing and reselling such food products in their own names and for their own accounts, taking title to the food products and assuming all risk incident to ownership.

Such resales are not made at the prices and on the terms dictated by respondents, but at the prices and on the terms determined by the buyer who makes a profit or suffers a loss thereon, as the case may be.

Said direct buyers shop the market and purchase food products from several sellers, including respondents, and purchase where they are able to secure the most favorable prices and terms, including the payment of commissions and brokerage fees.

Said buyers pay the price of the food products purchased from respondents as a condition precedent to delivery of such food products by the carrier to them. If the food products shipped by respondents to the buyers are lost or damaged in transit, such buyers file claim with the carrier and collect damages from the carrier for their own accounts.

Such buyers, upon receipt of such food products from respondents, warehouse them in their own warehouses or in public warehouses and insure the products at their own expense and in their own names and for their own accounts against contingent loss or damage. Subsequently, said buyers pledge warehouse receipts and insurance contracts covering these products they have purchased as security for loans from banks.

PAR. 6. The respondents, since June 19, 1936, in connection with

Order

42 F. T. C.

the interstate sale of their food products by the second method set forth in paragraph 5, have paid or granted and are now paying or granting, directly or indirectly, commissions, brokerage, or other compensation, or discounts in lieu thereof, to buyers of their food products.

CONCLUSION

The paying or granting by respondents of brokerage, or commissions, discounts, or other compensation, in lieu of brokerage, to buyers upon purchases made for the buyers' own account, is violative of subsection (c) of section 2 of the aforesaid 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 the answer of the respondents, in which answer respondents admit all of the material allegations of fact set forth in the complaint and waive all intervening procedure, and the Commission having made its findings as to the facts and its conclusion that the respondents have 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 the Robinson-Patman Act, approved June 19, 1936 (15 U. S. C., sec. 13).

It is ordered. That the respondents, Parrott & Co., a corporation, and Superior Fisheries, Inc., a corporation, and their officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the sale and distribution of food products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Paying or granting, directly or indirectly, to any buyer anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, upon purchases made for such buyer's own account.

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

Complaint

IN THE MATTER OF

SOUTH COAST FISHERIES, INC.

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 5285. Complaint, Feb. 21, 1945—Decision, Mar. 25, 1946

Where a corporation engaged in the packing, and in the interstate sale and distribution, under its own brand names and also under brands of its buyers, of canned tuna, canned mackerel, canned sardines, and other sea food products, (1) through legitimate intermediaries who acted as its agents and to whom it paid commissions for the services so rendered, and, (2) to direct buyers including so-called "buying brokers" or chain stores, large wholesaler, and members of buying groups, who purchased and resold on their own names and for their own accounts at prices and terms dictated by them and who, contrary to brokers, were traders for profit, shopping the market, taking title, assuming risks, filing claims, etc., and making a profit or suffering a loss, as case might be;

Paid or granted to such direct buyers, directly or indirectly, commissions, brokerage, or other compensation, or allowances or discounts in lieu thereof, on purchases made in their own names and for their own accounts for resale; through permitting, among other things, deduction or allowing from the invoice price amount equal or approximately equal to the commissions or brokerage fees paid by it to its brokers, or by selling such buyers at a net price which reflected brokerage:

Held, That such paying and granting by said corporation, directly or indirectly, of commissions, brokerage or other compensation, and allowances or discounts in lieu thereof, to buyers of its food products who purchased in their own names and for their own accounts for resale, under the circumstances 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. Arch E. Ekdale and *Mr. Gordon P. Shallenberger*, of San Pedro, Calif., 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 South Coast Fisheries, Inc. is a corporation organized and existing under the laws of the State of Cali-