

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-

Complaint

42 F. T. C.

fornia, with its principal office and place of business located at 820 Ways Street, Terminal Island, Calif.

PAR. 2. Respondent, since June 19, 1936, has been and is now engaged in the business of buying, packing, selling, and distributing canned tuna, canned mackerel, canned sardines, and other sea-food products (all of which are hereinafter referred to as food products) for its own account for resale.

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

PAR. 3. All food products sold by respondent 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 person 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 respondent sells goods which bear its 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 respondent, 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 respondent's 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 respondent in the promotion and sale of its products, which brand identifies the particular products for which respondent assumes the responsibility all the way through the channels of distribution to the consumer, and whatever good will is established thereby accrues to respondent. Among the brands so used by respondent are: Avalon and Top Form.

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 respondent; and distributors rather than respondent 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 respondent. Distributors and not respondent determine the sales and price policies with reference to such food products.

PAR. 4. Respondent sells and distributes 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 the respondent's sales agents, soliciting and obtaining orders for respondent's food products at respondent's prices and on respondent's terms. Such brokers transmit such purchase orders to the respondent who thereafter invoices and ships the food products to the customers. The respondent pays such brokers for their service in negotiating and making such sales for the respondent's account, 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 respondent, or of the buyers to whom the respondent sells. 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 respondent direct to buyers. All such buyers referred to herein are "direct buyers." In transactions between respondent and such buyers, the respondent does 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 the respondent to such direct buyers

Complaint

42 F. T. C.

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

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

The respondent pays such buyers of its food products, directly or indirectly (regardless of whether such food products are purchased under respondent's 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 respondent. The respondent thereafter invoices and ships such food products directly to such buyers from whom respondent collects the purchase price of the merchandise. The respondent, among its 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 respondent to its 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 respondent, 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 respondent, 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 respondent, as a condition precedent to delivery of such food products by the carrier to them. If the food products shipped by the respondent 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 the respondent, 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. 5. The respondent, since June 19, 1936, in connection with the interstate sale of its food products by the second method set forth in paragraph 4, 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.

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 21, 1945, issued and subsequently served its complaint in this proceeding upon the respondent, South Coast Fisheries, Inc., a corporation, charging it 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, the respondent filed an answer thereto 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 answer thereto; 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, South Coast Fisheries, Inc., is a corporation organized and existing under the laws of the State of California, with its principal office and place of business located at 820 Ways Street, Terminal Island, Calif.

PAR. 2. The respondent is now engaged, and for many years prior

Findings

42 F. T. C.

hereto has been engaged, in the business of packing, and in the sale and distribution of, canned tuna, canned mackerel, canned sardines, and other sea-food products, all of which are hereinafter referred to as "food products."

PAR. 3. Respondent causes said food products, when sold by it, to be transported from its aforesaid place of business in the State of California to purchasers thereof located in various other States of the United States. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said food products in commerce among and between the various States of the United States.

PAR. 4. Respondent sells said food products through legitimate intermediaries who act as its agents and to whom are paid commissions and brokerage fees for the services so rendered. In addition, the respondent also sells its food products to direct buyers, who may be either so-called "buying brokers" or chain stores, large wholesalers, and members of buying groups. In so selling its food products the respondent uses its own brand names, such as "Avalon" and "Top Form." and, in addition, also sells such food products under brands of its buyers, which brand names are different from those of the respondent's brands and which identify the food products with the particular buyer or distributor.

PAR. 5. The respondent, since June 19, 1936, in connection with the sale of its food products in interstate commerce, has sold its food products under its own brands or under the brands of its buyers to direct buyers who purchase respondent's food products in their own names and for their own accounts for resale. During the time mentioned herein respondent has paid or granted to such direct buyers, directly or indirectly, commissions, brokerage, or other compensation, or allowances or discounts in lieu thereof, on such purchases made in their own names and for their own accounts for resale.

Such direct buyers transmit their own purchase orders for food products direct to respondent, who invoices and ships such food products direct to such buyers and collects the purchase price from them. The respondent, among its several methods of sales, pays 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 respondent to its brokers or by selling such buyers at a net price which reflects brokerage. Contrary to the manner in which brokers operate, 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

the risk incident to ownership. The resale of such merchandise is not made at prices and on terms dictated by respondent 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. Such direct buyers shop the market and purchase food products from several sellers, including respondent, and purchase where they are able to secure the most favorable prices and terms, including the payment of commissions and brokerage fees. If the food products shipped by the respondent to the buyers are lost or damaged in transit, such buyers file claim with the carrier and collect damage from such carrier for their own accounts. Such buyers, upon receipt of such food products from respondent, 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 and pledge warehouse receipts and insurance contracts covering these products they have purchased as security for loans from banks.

CONCLUSION

The paying and granting by the respondent, directly or indirectly, of commission, brokerage, or other compensation, and allowances or discounts in lieu thereof, to buyers of its food products who purchase such food products in their own names and for their own accounts for resale, as hereinabove 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 answer of the respondent, which 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).

It is ordered, That the respondent, South Coast Fisheries, Inc., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device in connection with

Order

42 F. T. C.

the sale and distribution of canned tuna, canned mackerel, canned sardines, and other sea-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 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

WILLIAM R. HILL & CO.

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 5295. Complaint, Mar. 16, 1945—Decision, Mar. 25, 1946

Where an individual engaged (1) as a food broker in soliciting and obtaining orders for fish products, canned fruits and vegetables and other commodities at the respective seller-principals' prices and terms, and with no financial interest in products concerned other than receipt of commission or fee involved: and (2) as "direct buyer" thereof from the various packers, processors, canners, and other sellers located in other States, shopping the market, taking title, warehousing, assuming risks of ownership, filing claims, etc., and invoicing customers in his own name, and, as a "trader for profit" 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, from the respective sellers from whom he purchased food products as such "direct buyer," commissions or brokerage fees, customarily paid by permitted deduction by him from invoice price of such purchases of 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 discount or allowance in lieu thereof, upon purchases for his own account as aforesaid, was violative of the provisions 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., 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 William R. Hill is an individual doing business as William R. Hill & Co. with his principal office and place of business located at 114 Virginia Street, Richmond, Va., and is also vice president and a large stockholder in Chas. E. Brauer Co., Inc., a wholesale grocery and confectionery firm, located at 19 South Fourteenth Street, Richmond, Va. The respondent since June 19, 1936, has