

Complaint

42 F. T. C.

IN THE MATTER OF
DEL MAR CANNING 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 5297. Complaint, Mar. 22, 1945—Decision, Mar. 25, 1946

Where a corporation engaged in the packing and in the interstate sale and distribution of canned squid, canned mackerel, canned sardines, and other sea-food products, under its own brand name and under the brands of its buyers, (1) through legitimate intermediaries who acted as its agents and received commissions and brokerage fees for the services so rendered and, (2) to direct buyers, some of whom were known as "buying brokers," and who, contrary to the manner in which brokers operate, were traders for profit, purchasing and selling in their own names and accounts, shopping the market, and taking title and assuming risks incident to ownership, etc.;

Paid or granted to such direct buyers, directly or indirectly, commissions or brokerage, or other compensation, allowance, or discount in lieu thereof, on such purchases made in their own names and for their own accounts for resale, by means, among others, of invoice deductions, sale at net cost reflecting its customary brokerage payments, or by separate remittance:

Held, That such paying and granting of commissions or brokerage, or compensation, allowances or discount in lieu thereof, to purchasers of food products in their own name and for their own account 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.

Pillsbury, Madison & Sutro, of San Francisco, 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 Del Mar Canning 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 756 Ocean View Avenue, Monterey, California.

PAR. 2. Respondent, since June 19, 1936, has been and is now engaged in the business of buying, packing, selling, and distributing canned squid, 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 July 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 direct 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.

Representative of respondent's buyers are:

Lloyd A. Gray Co., Jacksonville, Fla.; Haas Guthman Co., Savannah, Ga.; J. T. Jarrell Co., Little Rock, Ark.; P. B. Smith, Charleston, S. C.

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, or 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 it; whereas, when it sells 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) private 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: Rio del Mar, Ready Meal.

Private 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

brands 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, on respondent's terms, and largely on the reputation for quality of respondent's products. 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.

One class of such direct buyers is known to the trade, and generally, as "buying brokers." These buyers designate themselves as brokers, but are, not in fact brokers.

The food products sold by the respondent to some such direct buyers bear brands or labels owned by such buyers, and as to such food prod-

ucts so branded, all the good will established by the quality of respondent's food products accrues to such direct buyers. For the purpose of assuring themselves of the quality of the products so purchased and branded with their own labels, such buyers do not rely upon the reputation for quality of respondent's branded products, or upon the reputation for quality of the branded products of other packers; but such buyers have established certain quality standards of their own for each of their several brands, and purchase products at the lowest available price from respondent and other packers which most nearly approach or exceed their own quality standards on the basis of independent tests by disinterested graders.

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 private 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 the respondent collects the purchase price of the merchandise. The respondent, among its several methods of sales, pays such buyers commissions or brokerage fees on such purchases (*a*) 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 the first method); (*b*) or by selling to such buyers at a net price which reflects brokerage customarily paid its brokers, and (*c*) by remitting to the buyer by check for the brokerage after such buyer has accepted and honored respondent's draft for the purchase price.

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 highest grade product at the most favorable prices and terms, including the direct or indirect payment of commissions or 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 warehouse 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 March 22, 1945, issued and subsequently served its complaint in this proceeding upon the respondent, Del Mar Canning Co., 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 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 reg-

ularly 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, Del Mar Canning 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 756 Ocean View Avenue, Monterey, Calif.

PAR. 2. The respondent is now engaged, and for many years prior hereto has been engaged, in the business of packing, and in the sale and distribution of, canned squid, canned mackeral, 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, some of whom are known as "buying brokers." In so selling its food products the respondent uses its own brand names, such as Rio del Mar and Ready Meal, 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 or brokerage, or other compensation, allowance, or discount in lieu thereof, on such purchases made in their own names and for their own accounts for resale.

Such direct buyers (some of whom also incorrectly designate themselves as "brokers") transmit their own purchase orders for food products direct to the 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 sale, 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 approximately to the commissions or brokerage fees paid by the respondent to its brokers or by selling such buyers at a net price which reflects brokerage customarily paid its brokers or by remitting to the buyer, by check, for the brokerage after such buyer has accepted and honored respondent's draft for the purchase price.

Contrary to the manner in which brokers operate, such buyers are traders for profits, purchasing and selling such food products in their own names and for their own accounts and 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 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 as security for loans from banks.

CONCLUSION

The paying and granting by the respondents, directly or indirectly, of commissions or brokerage, or any compensation, allowance, or discount 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 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):

It is ordered, That the respondent, Del Mar Canning Co., a corporation, and its officers, agents, representatives, and employees directly or through any corporate or other device in connection with the sale and distribution of canned squid, 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

42 F. T. C.

IN THE MATTER OF

HOVDEN FOOD PRODUCTS CORPORATION

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO 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 5303. Complaint, Apr. 10, 1945—Decision, Mar. 25, 1946

Where a corporation engaged in packing and in the interstate sale and distribution of canned sardines, canned mackerel, and canned squid, (1) through legitimate intermediaries who acted as its agents and received commissions and brokerage fees therefor, and (2) direct to large buyers who, masking their buying operations under such fictionalized designations as "broker" "merchandise broker," or "primary distributor," in fact purchased in their own names and for their own accounts, shopping the market, taking title, assuming risks, filing claims, warehousing, etc.—

Paid and granted to such direct buyers, directly or indirectly, commissions or brokerage fees or other compensation, allowance, or discount in lieu thereof, upon such purchases made in their own names and for their own account:

Held, That such paying or granting, directly or indirectly, of commissions or brokerage, or compensation, allowance or discount in lieu thereof, to purchasers of its food products in their own names and for their own accounts for resale, were in violation of subsection (c) of section 2 of the Clayton Act as amended.

Mr. Edward S. Ragsdale for the Commission.

Pillsbury, Madison & Sutro, of San Francisco, 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, Hovden Food Products Corp., is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal office and place of business located at Ocean View and David Streets, Monterey, Calif.

PAR. 2. Respondent is now engaged, and for many years prior hereto has been engaged, in the business of packing sardines, mackerel, and squid, and selling such canned sea-food products to numerous buyers, including the buyers hereinafter named.

The respondent sells and distributes its canned sea-food products by two separate methods. The first method is by utilizing intermedi-