

IN THE MATTER OF
COLUMBIA RIVER PACKERS ASSOCIATION, INC.

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

Docket 5033. Complaint, Aug. 20, 1943—Decision, Aug. 25, 1947

Where a corporation engaged in canning salmon, shad, tuna and other sea-food products, and in the interstate sale and distribution of such products (1) to and through intermediaries who acted as its sales agents and were paid brokerage fees or commissions in legitimate brokerage transactions, and (2) to distributors of food products at various points throughout the United States who obtained products concerned herein directly from said corporation, in their own names and for their own accounts, and who, while generally known in the trade as "merchandising brokers," did not in their transaction with it function as brokers, but performed any services in connection with the handling or distribution of the products involved, as services to themselves as purchasers, owners, and subsequent sellers of the products, and not as services rendered to it as the vendor—

Granted and allowed to purchasers of its said seafood products, brokerage fees or commissions which amounted usually to 5 percent of the net sales price of the sea-food products sold, and were accomplished, ordinarily, by deducting the amount thereof from the sales price of the products sold on the face of the invoice:

Held, That the paying and granting by it, under the circumstances set forth, of brokerage fees or commissions to buyers of its products on purchases for their own accounts, constituted violations by it of subsection (c) of section 2 of the Clayton Act as amended.

In a proceeding in which it was alleged that respondent corporation violated subsection (c) of section 2 of the Clayton Act as amended, through paying commissions to buyers of its sea-food products, upon purchases made for the buyers' own accounts, and in which it appeared that the corporation

- (1) Sold its products through sales agents whom it compensated for their services by payment of brokerage fees or commissions and who, in representing it, contacted the trade in their respective areas, accumulated orders and submitted the same to it for acceptance and delivery of the merchandise direct to the customer—who either paid the corporation directly or through bank draft—and who, among other things, maintained no storage facilities, carried no insurance on the merchandise, did not pay for or take title thereto but sold the same at such prices and upon such terms as the corporation might determine, and at no time had any financial interest therein except to the extent of their brokerage fees or commissions; and,
- (2) Also disposed of substantial quantities of its sea-food products directly to so-called merchandising brokers, or distributors at various points throughout the United States, usually invoicing the products as "sold to" the particular distributor and in his own name and under a procedure by which, following

Complaint

receipt of the proceeds of the draft attached to the bill of lading, any claim of said corporation thereon ended; any loss in value after shipment was borne not by said corporation but by the distributor; products shipped were shown on the seller's records as sold to such distributor just as products shipped to jobbers or chain stores pursuant to orders received through brokers were shown as sold to such jobbers or chain stores; and products were stored, insured, advertised, resold, and dealt with by the distributor as its own, and were the subject of profit or loss to it as the case might be:

The Commission was of the opinion that respondent corporation's contention that the relationship between it and each of such distributors or "merchandise brokers" was that of principal and broker, and that the distributor's payment of the full purchase price for the products, its provision of warehousing facilities, its sales efforts, collections, advertising, and other activities engaged in as herein set forth constituted services rendered to the respondent, as principal, in the sale and distribution of its products, was completely untenable; and that they did not function in said transactions as brokers or sales agents, but as direct buyers; and

Found further that any and all services performed by such distributors in connection with the handling or distribution of the products involved in such transactions were services rendered to the distributors themselves as purchasers, owners, and subsequent sellers of the products and not services rendered to the respondent from whom the products were purchased.

Before *Mr. John L. Hornor*, trial examiner.

Mr. Edward S. Ragsdale for the Commission.

Mr. Jay Bowerman, of Portland, Oreg., 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, Columbia River Packers Association, Inc., is a corporation organized and existing under the laws of the State of Oregon, with its principal office and place of business located at Astoria, Oreg.

PAR. 2. The respondent, Columbia River Packers Association, Inc., is now engaged and for many years prior hereto has engaged in the business of packing and canning salmon, shad, shad roe, tuna, tuna flakes and kippered sturgeon (all of which are hereinafter called sea-food products) and in the marketing, selling and distribution of

Complaint

44 F. T. C.

such sea-food products in its own name and for its own account for resale.

The respondent sells and distributes its sea-food products through two separate and distinct methods. First, through legitimate intermediaries who act as its agents in negotiating the sale of its sea-food products and for which services such intermediaries customarily are paid, directly or indirectly, as commissions or brokerage $2\frac{1}{2}$ percent of the net purchase price of the sea-food products sold. Second, through the sale of its sea-food products directly to buyers who are paid, directly or indirectly on their own purchases of sea-food products from the respondent commission or brokerage fees of 5 percent of the net purchase price of the sea-food products so purchased.

The respondent, to distinguish its sea-food products from the sea-food products sold by competitors and to facilitate sales, utilizes registered and unregistered trade-marks and brands for various sea-food products it sells, which brands are generally known as packers' or sellers' brands. Representative of respondent's brands are "Bumble Bee," "Kinney's Palm," "Clover Leaf," "White Star," "Holly," "Fishermen's," "Pine Burr," "Magnolia," "Blue Bird," "Violet," "Swiftwater," "Clifton," "Tuxedo," "Sovereign," "Rosebud," "Delmonico," "Gladiolus," "Golden Age," "Reliance," "Pride of Columbia," "Beacon," "Portrait," "Sunset," "Olympic," "Figaro," "Bon Bon," "Esquimaux," "Recruit," "Argonaut," "Harpoon," "Commerce," "West Coat," and "Stonewall Jackson." The respondent also sells its sea-food products unlabeled or unbranded, and also under the labels or brands of its buyers, which brands or labels are generally known to the trade as private or buyers' brands. Some of such buyers who incorrectly designate themselves as brokers also utilize registered and unregistered labels and brands, which labels and brands are utilized in selling such respective buyers' merchandise. Such buyers are primarily engaged in the purchase and sale of sea-food products in their own name and for their own account.

PAR. 3. The respondent in the course and conduct of its said business, since June 19, 1936, has sold and distributed a substantial portion of its sea-food products directly to buyers located in States other than the State in which the respondent is established, and as a result of said sales and the respondent's instructions, such sea-food products are shipped and transported across State lines to such buyers who are located in various States of the United States.

PAR. 4. The respondent, since June 19, 1936, in connection with the interstate sale and distribution of sea-food products in its own name

and for its own account for resale, has sold such sea-food products to numerous buyers located in the various States of the United States other than the State where respondent is established, and has been and is now paying or granting or has paid or granted, directly or indirectly, commissions, brokerage or other compensation or allowances or discounts in lieu thereof to numerous buyers of said sea-food products sold under its own labels, unlabeled and under buyers' labels.

A representative, but by no means complete, list of buyers who since June 19, 1936, have purchased sea-food products unlabeled or under the seller-respondent's labels or under such respective buyers' labels from the respondent for their own account for resale and who have received and accepted and who are now receiving and accepting from said seller-respondent on their respective purchases of sea-food products, directly or indirectly, commissions, brokerage fees or allowances and discounts in lieu of brokerage fees, are as follows:

Southgate Brokerage Co., Inc.,	Paul Pankey & Co., Birmingham,
Norfolk, Va.	Ala.
William H. Stanley, Inc., New	P. Duff & Sons, Inc., Pittsburgh,
York, N. Y.	Pa.
Max Rabinovitz, Boston, Mass.	H. E. Runyon Co., Des Moines,
Lincoln-McCallum Co., Minneap-	Iowa.
olis, Minn.	Elwood C. Boobar & Co., San
Fischer Brokerage Co., St. Louis,	Francisco, Calif.
Mo.	G. Y. Harry & Co., Portland, Oreg.

PAR. 5. The paying and granting by respondent, directly or indirectly, of commissions, brokerage or other compensation and allowances or discounts in lieu thereof to the buyers of said sea-food products, on their own purchases which are resold unlabeled or under either the buyers' or sellers' labels, and the acts and practices of the respondent in promoting sales of sea-food products by paying to buyers, directly or indirectly, commissions, brokerage or other compensation and allowances or discounts in lieu thereof, 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 (the Clayton Act), as amended by the Robinson-Patman Act, approved June 19, 1936 (15

Findings

44 F. T. C.

U. S. C. sec. 13), the Federal Trade Commission on August 20, 1943, issued and subsequently served its complaint in this proceeding upon the respondent, Columbia River Packers Association, Inc., a corporation, charging it with the violation of subsection (c) of section 2 of said Clayton Act, as amended. After the filing by respondent of its answer to the complaint, testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a trial examiner of the Commission theretofore duly designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission upon the complaint, answer, testimony and other evidence, report of the trial examiner upon the evidence and the exceptions to such report, briefs in support of and in opposition to the complaint, and oral argument; 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. The respondent, Columbia River Packers Association, Inc., is a corporation organized and existing under the laws of the State of Oregon with its principal office and place of business located in Astoria, Oreg. It is engaged in the business of canning salmon, shad, tuna, and other sea food products, and in the sale and distribution of such products.

PAR. 2. In the course and conduct of its business, respondent sells and distributes a substantial portion of its canned sea-food products to buyers located in various States of the United States and causes such products, when sold, to be shipped and transported from its place of business in Astoria, Oreg., to the purchasers thereof at their respective points of location in States other than the State of Oregon. In the sale and distribution of its products, respondent maintains, and at all times mentioned herein has maintained, a course of trade in such products in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 3. The respondent markets a portion of its sea-food products through intermediaries who act as respondent's sales agents in negotiating the sale of its products and who are paid for such services brokerage fees or commissions in legitimate brokerage transactions. In representing the respondent in such transactions the sales agent contacts the trade in his area, accumulates orders and submits such orders

to the respondent for acceptance and delivery of the merchandise directly to the customer, and the customer renders his payment either to a bank to which the respondent sends a draft drawn on the customer or to the respondent. The sales agent operating in this manner does not maintain a warehouse or other storage facilities; he does not insure the merchandise in his own name; he does not pay for or take title to any of the products; he sells the goods at such prices and upon such terms as the respondent may determine, assuming none of the credit risk that may be involved; and he does not at any time have any financial interest in the products he sells except to the extent of the brokerage fees or commissions the respondent pays him. This phase of the respondent's business operations is not involved in the present proceeding.

PAR. 4. In addition to selling through brokers or sales agents as aforesaid, the respondent, since June 19, 1936, also has disposed of substantial quantities of its sea-food products to distributors of food products located at various points throughout the United States who have obtained such products directly from the respondent in their own names and for their own accounts. Among the distributors who have so obtained sea-food products from respondent are Wm. H. Stanley, Inc., 103 East One Hundred and Twenty-fifth Street, New York, N. Y.; Southgate Brokerage Co., Inc., 249 West Tazewell Street, Norfolk, Va.; A. C. Bowie, 127 East Bay Street, Charleston, S. C.; Paul Pankey & Co., 2413 First Avenue, North, Birmingham, Ala.; and P. Duff & Sons, Inc., 920-922 Duquesne Way, Pittsburgh, Pa. These and other distributors of food products who obtain canned sea foods directly from the respondent for their own accounts are generally known in the trade as "merchandising brokers," and ordinarily designate themselves as "brokers," but they do not in such transactions with the respondent function as brokers, and they are referred to hereinafter for clarity as distributors.

PAR. 5. It is the respondent's practice, upon receiving orders for canned salmon and other sea-food products from the distributors named in paragraph 4, to fill the orders by shipping the products ordered directly to such distributors either by steamship or by railway common carrier. The products so shipped are usually invoiced on respondent's stationery showing that they have been "sold to" the distributor to whom they are shipped, and are consigned to the order of respondent, with a notation on the bill of lading that the distributor is to be notified upon arrival of the products at destination. Attached to the original bill of lading is a draft, payable at sight, drawn by the respondent against the distributor for the full purchase price of the sea foods

shipped, and upon arrival of the goods at destination and payment of the draft, but not before, the shipment is released to the distributor.

At the time the respondent ships its products it has no knowledge or interest in whether or not the distributor has sold all or any of the products to others. Upon receipt of the proceeds of the draft attached to the bill of lading, the respondent has no further claim on, or dominion over, the products shipped, and any loss or reduction in value of the products after they have been delivered to the carrier for shipment is borne not by the respondent, but by the distributor. Upon shipment of the products to the distributor the products are shown on the respondent's records as having been sold to such distributor just as products shipped to jobbers or chain stores pursuant to orders received through brokers are shown on such records as having been sold to such jobbers or chain stores, and each of the transactions is included in the gross sales reported by the respondent on its corporation income tax returns.

PAR. 6. After the sea-food products obtained as aforesaid are paid for and received by the distributor, such products are subject to the distributor's full and complete control and are in all respects the distributor's own property. If the merchandise is lost or damaged while in transit from the respondent to the distributor the distributor files claim against the carrier in its own name and for its own benefit for such loss or damage. The products are stored in the distributor's warehouse or in public warehouses in the distributor's name and at its expense, and public warehouse receipts issued therefor are used by the distributor, whenever necessary, as collateral for loans from banks on the distributor's own account. The distributor insures the merchandise in its own name and at its own expense, pays such taxes as may be levied thereon, resells the merchandise in its own name and at such prices and upon such terms of sale as it desires, sometimes reaping a profit and at other times sustaining a loss on the transaction, and it is the regular practice of the distributors involved in these transactions to include in their corporation income-tax returns as purchases and sales the acquisitions and dispositions of sea-food products as herein described. At least one of the distributors named in paragraph 4 obtains substantial quantities of canned sea-food products from the respondent and advertises and sells such products to its own customers under its own private brand names, and three of such distributors qualified with the Office of Price Administration as primary distributors of canned salmon and other sea-food products obtained from the respondent, thus enabling themselves to set their maximum selling

prices for such products in accordance with OPA regulations, upon their certifications that the products were purchased and sold by such distributors exclusively for their own accounts.

PAR. 7. The respondent denies that any of the transactions herein referred to constitute sales by the respondent or purchases by the distributors, contending that the relationship between the respondent and each of such distributors is that of principal and broker, and that the distributor's payment of the full purchase price for the products, its provision of warehousing facilities, its sales efforts, collections, advertising, and other activities engaged in as herein set forth constitute services rendered to the respondent, as principal, in the sale and distribution of its products. The Commission is of the opinion, however, that this position is completely untenable, and the Commission finds that since June 19, 1936, the respondent has sold directly to a number of distributors of sea-food products, including those named in paragraph 4, for their own accounts, in transactions in which such distributors did not function as brokers or sales agents, substantial quantities of canned salmon and other canned sea-food products. The Commission further finds that any and all services performed by such distributors in connection with the handling or distribution of the products involved in such transactions have been services rendered to the distributors themselves as purchasers, owners, and subsequent sellers of the products and not services rendered to the respondent from whom the products have been purchased.

PAR. 8. In connection with the sale in commerce of canned salmon and other sea-food products as herein described, it has been the regular practice of the respondent to grant and allow to the purchasers thereof, and the respondent has granted and allowed to such purchasers, brokerage fees or commissions. Such brokerage fees or commissions have usually amounted to 5 percent of the net sales price of the sea-food products sold, and the payment of such fees or commissions has been accomplished ordinarily by deducting the amount thereof from the sales price of the products sold on the face of the invoice.

CONCLUSION

The paying and granting by the respondent herein, under the circumstances and in the manner aforesaid, of brokerage fees, commissions or allowances in lieu thereof to buyers of sea-food products on purchases for their own accounts constitute violations by the respondent of subsection (c) of section 2 of the Clayton Act, as amended.

Commissioner Mason not participating.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, testimony and other evidence taken before a trial examiner of the Commission theretofore duly designated by it, the report of the trial examiner upon the evidence and the exceptions to such report, briefs in support of and in opposition to the complaint, and oral argument; and the Commission having made its findings as to the facts and its conclusion that the 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 the Robinson-Patman Act, approved June 19, 1936 (15 U. S. C. sec. 13) :

It is ordered, That the respondent, Columbia River Packers Association, Inc., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the sale of sea-food products or other merchandise in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, do forthwith cease and desist from :

Paying or granting, directly or indirectly, to any buyer, anything of value as brokerage, or any commission, 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.

Commissioner Mason not participating.

Syllabus

IN THE MATTER OF
PUBLISHERS SERVICE COMPANY, INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SECTION 5 OF AN ACT OF CONGRESS APPROVED SEPTEMBER 26, 1914

Docket 5357. Complaint, July 21, 1945—Decision, Aug. 25, 1947

Where a corporation engaged in the interstate sale and distribution of books and publications through use of a sales plan involving puzzle contests which included—

(1) The initiation of the contest by advertisements in newspapers published throughout the United States, in none of which was there any indication that the advertisements were appearing concurrently in other newspapers;

(2) Inclusion in such advertisements, along with solicitation to the public to join in the contest, of a statement of the alleged controlling rules, and the first 6 of 120 rebus-type puzzles for which solutions were to be sent in by mail;

(3) Provision usually in such advertisements for (a) award of cash prizes ranging from \$10,000 down or other prizes for the payment of 15 cents to it to cover the purchase price of books or publications with each six puzzle solutions mailed, for (b) conduct of a first and second tie-breaking contest under the same terms and conditions as for the original contest, and for (c) the submission to it of an essay on a selected subject, upon the conclusion of the second tie-breaking contest;

(4) Mailing and transmitting to participants successfully completing the original contest of congratulatory messages by special delivery letter informing the contestant that he or she was tied with others for the highest award;

(5) Solicitation from persons still engaged in said contests of letters and writings commendatory of the contest and the manner in which it was conducted;

(6) Requesting of certificates and affidavits concerning the identity and originality of essays of contestants by registered letter in which it referred to the alleged high standing of the contestant in the contest, and offered to double the amount or value of the prize to be received by the contestant, if he purchased an additional set of its books or publications; and

(7) Further solicitation, before any announcement of the winners, of the purchase of additional books or publications by telegrams and other special means of communication—

(a) Falsely represented, directly or by implication, that the opportunities of winning by a participant in a puzzle contest were enhanced, or were greater than was actually the fact, through representing that at the close of the original contest only a small number of persons were tied for the award of the first prize; when in fact many thousands were thus tied;

(b) Falsely represented that the scarcity of contestants competing in the so-called first tie-breaking contest greatly enhanced the prospect that the contestant participating therein and continuing to purchase its books or