

NEW ENGLAND FISH CO., ALVAH L. HAGER, DAVID F.
CHOATE, JAMES S. ECKMAN, HARALD SYNNESTVEDT,
AND WILLIAM J. RICH

COMPLAINT, MODIFIED 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 5471. Complaint, Mar. 28, 1947¹—Decision, Jan. 12, 1948²

Where a corporation engaged in packing sea-food products, including canned salmon, tuna, and crabmeat at its canneries in Alaska, and in selling and distributing such products along with similar products purchased from others for resale; together with its officers who formulated, controlled and directed its distribution and sales policies;

In marketing (1) a portion of their canned sea-food products through intermediaries who acted as their agents, were paid for their services, brokerage fees, or commissions in legitimate brokerage transactions, and otherwise had no financial interest in the products sold by them; and (2) substantial quantities of their said products to direct purchasers located at various points throughout the United States, who were generally known in the trade as "buying brokers" and who designated themselves as "brokers" but who did not, in their said buying transactions, function as brokers but paid the price of their said purchases as a condition precedent to delivery, filed claims against carriers and collected damages for their own accounts when products shipped to them were lost or damaged in transit, warehoused the goods upon receipt in their own or in public warehouses, insured them in their own names and at their own expense against contingent loss or damage, at times pledged the public warehouse receipts and insurance contracts as collateral for loans, resold the products in their own names and for their own accounts upon their own prices and terms, and reaped a profit or sustained a loss, as the case might be—

Granted and allowed to such purchasers brokerage fees or commissions ranging from 2½ to 5 percent of the sales price of the canned sea foods sold, making such payments or allowances usually either by deducting such amount, or allowing such deduction, from the invoice price, or remitting such amount to the purchaser by check after he had accepted and honored the sellers' draft for the purchase price:

Held, That such paying and granting of brokerage fees, commissions or allowances in lieu thereof to buyers of sea food products on purchases for their own accounts, constituted violations of subsection (c) of section 2 of the Clayton Act as amended.

¹ Amended.

² Pursuant to subsequent stipulation, the Commission, on February 18, 1948, made its modified findings in the matter and its conclusion drawn therefrom, as set forth herein, nunc pro tunc, to be in lieu of its original findings and conclusion and to be effective as of the same date thereof.

Complaint

Before *Mr. Everett F. Haycraft*, trial examiner.

Mr. Edw. W. Thomerson for the Commission.

Bogle, Bogle & Gates, of Seattle, Wash., for respondents.

AMENDED 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 amended complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, New England Fish Co., is a corporation organized, existing, and doing business under the laws of the State of Maine, with its office and principal place of business located at 1723 Smith Tower, Seattle, Wash., and is engaged in the business of packing, selling, and distributing sea-food products. The sea-food products distributed by said respondent corporation are sold fresh, frozen, cured, and canned. A substantial portion of the business of said respondent corporation is canned sea-food products, which account for about 50 percent of its annual gross sales, which average approximately \$7,000,000 per annum. Said corporate respondent's canned sea-food products consist principally of salmon, tuna, and crabmeat. Said respondent corporation owns and operates canneries in the towns of Orca, Chatham, Steamboat Bay, and Ketchikan, in the Territory of Alaska, where salmon is packed. In addition to the sea food packed in its own canneries, the respondent corporation buys such products from others for resale. Respondent's canned sea-food products since June 19, 1936, have been sold under a number of its own brands or labels and also under some of its buyers' brands or labels.

PAR. 2. Respondent, Alvah L. Hager, an individual residing in Vancouver, British Columbia, is the principal stockholder in said respondent corporation and, during the year 1945, served as president thereof.

PAR. 3. Respondent, David F. Choate, is an individual residing in Boston, Mass., and one of the principal stockholders in said corporate respondent and, during the year 1945, was one of the vice presidents thereof.

PAR. 4. James S. Eckman is an individual residing in Vancouver, British Columbia, and is one of the principal stockholders in said corporate respondent, and, during the year 1945, served as one of the vice presidents thereof.

Complaint

44 F. T. C.

PAR. 5. Harald Synnestvedt is an individual residing in Seattle, Wash., and is one of the principal stockholders in corporate respondent and, during the year 1945, served as one of the vice presidents thereof.

PAR. 6. William J. Rich is an individual residing in Boston, Mass., and is one of the principal stockholders in corporate respondent and, during the year 1945, served as secretary thereof.

PAR. 7. Said individual respondents have, since June 19, 1936, exercised, and still exercise, a substantial degree of authority and control over the business conducted by said corporation and formulate, control, and direct its distribution and sales policies.

PAR. 8. Respondent corporation, as aforesaid, is now and has been, since prior to June 19, 1936, engaged in the packing, sale, and distribution of sea-food products and said individual respondents, through said corporate respondent, have likewise been engaged in said business. Said respondents, in the course and conduct of their business, have sold and distributed, and now sell and distribute, their canned sea-food products to purchasers located in the several States of the United States other than the States of Washington and Oregon, and respondents cause such products, when sold, to be transported from their place of business in Seattle, Wash., or from the various canneries operated by them, to purchasers thereof located in the several States of the United States other than the States of Washington and Oregon, and there has been, since June 19, 1936, a constant current of trade and commerce conducted by said respondents in such products between and among the various States of the United States.

PAR. 9. Respondents, through said respondent corporation, now sell and distribute, and, since June 19, 1936, have sold and distributed their canned sea-food products in said commerce through 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 respondents' sales agents, soliciting and obtaining orders for respondents' canned sea-food products at respondents' prices, on respondents' terms. Such brokers customarily transmit such purchase orders to the respondents, who thereafter invoice

Complaint

and ship the canned sea-food products to the customers. The respondents pay such brokers for their service in negotiating and making such sales for the respondents' account, commissions or brokerage fees, which are customarily based on a percentage of the invoice sales prices of the canned sea-food product sold. Such brokers are not traders for profit and do not take title to or have any financial interest in the canned sea-food product sold except for their commissions or brokerage fees, and they neither make a profit nor suffer a loss on the transaction. This method of distributing respondents' canned sea-food products is not challenged by this complaint.

Second: A second method, which is challenged by this complaint, is the sale by the respondents of their canned sea-food products directly to buyers, who are paid by respondents, directly or indirectly, commissions or brokerage fees on such purchases.

All such buyers referred to herein are direct buyers. In transactions between respondents and such buyers the respondents do not use brokers. These buyers usually designate themselves as brokers, but are not in fact brokers, being generally known in the trade as buying brokers.

Such buyers transmit their own purchase orders for canned sea-food products directly to the respondents. The respondents thereafter invoice and ship such canned sea-food products directly to such buyers from whom the respondents collect the purchase price of the merchandise. The respondents, among their several methods of sale, pay such buyers commissions or brokerage fees on such purchases. The rate of commissions or brokerage fees paid by respondents to their buyers in general ranges from approximately $2\frac{1}{2}$ percent to approximately 5 percent of the purchase price of the canned sea-food products purchased. Some such buyers have been paid a substantially higher rate of commissions or brokerage fees than other of respondents' buyers on such buyers' purchases of respondents' canned sea-food products purchased under the same brand or label during the same time or the same approximate period of time.

The rate of commissions or brokerage fees paid by respondents to their most-favored buyers depends upon the ability of such buyers to secure treatment more favored than respondents accord other of their buyers.

Respondents pay their buyers such commissions or brokerage fees, directly or indirectly, usually by (a) deducting or allowing from the invoice price of the canned sea-food products purchased, an amount customarily designated as commissions or brokerage fees, which amount is approximately equal to the commissions or brokerage fees

Complaint

44 F. T. C.

paid by the respondents to some of their brokers (as illustrated in the first method); and (b) by remitting to the buyer by check, a sum designated as commissions or brokerage fees, which sum amounts to a definite percentage of the purchase price, usually from 2½ percent to 5 percent of the purchase price of the commodity, which sum is paid by respondents as commissions or brokerage fees, only after such buyer has accepted and honored respondents' 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 canned sea-food products in their own names and for their own accounts, taking title to the canned sea-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 buyers pay the price of the canned sea-food products purchased from respondents as a condition precedent to delivery of such canned sea-food products by the carrier to them. If the canned sea-food products shipped by the 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 canned sea-food products from the respondents, 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, some of said buyers pledge warehouse receipts and insurance contracts covering the canned sea-food products they have purchased from respondents as security for loans from banks.

Some of said buyers, for taxation purposes, have treated their transactions with respondents as purchases and sales made for their own account.

A representative, but by no means complete list of respondents' buying brokers or direct buyers, are:

Britt-McKinney Co., Greenville, S. C.	Frank D. Powers Co., Jacksonville, Fla.
Haas-Guthman Co., Savannah, Ga.	Southgate Brokerage Co., Norfolk, Va.
C. B. Ponder Co., Atlanta, Ga.	J. T. Jarrell Co., Little Rock, Ark.
Davis Brokerage Co., Birmingham, Ala.	Spence-Tomlin Co., Albany, Ga.

Respondents' buyers have not all purchased respondents' canned sea-food products throughout the entire period since June 19, 1936. However, all such buyers have purchased substantial quantities of said products since said date. For example, Britt-McKinney Co., Haas-Guthman Co., and Davis Brokerage Co. purchased very substantial quantities of respondents' canned sea-food products throughout the period subsequent to January 1, 1939. Some or all of such buyers also purchased certain quantities of respondents' canned sea-food products prior to said date. More specifically, Spence-Tomlin Co. purchased for their own account more than \$30,000 worth of canned sea-food products from respondents for the 1-year period ending April 28, 1942, and have made substantial purchases since said date. During the same period, C. B. Ponder Co. also purchased for their own account more than \$5,000 worth of respondents' canned sea-food products, and also have made substantial purchases since said date.

PAR. 10. The respondents, since June 19, 1936, in connection with the sale of their canned sea-food products in said commerce, as aforesaid, have been and are now paying, or granting, and have paid and granted, directly or indirectly, commissions, brokerage, or other compensation or allowances and discounts in lieu thereof, to buyers on their own purchases of respondents' canned sea-food products. Such buyers have, as aforesaid, purchased respondents' canned sea-food products in their own names and for their own respective accounts for resale.

PAR. 11. The acts and practices of the respondents in promoting the sale of their canned sea-food products by paying to buyers, directly or indirectly, commissions, brokerage, or other compensation or 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, MODIFIED 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 U. S. C., Sec. 13), the Federal Trade Commission on November 25, 1946, issued and subsequently 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 the said Clayton Act, as amended. The respondents filed their joint answers to the complaint on January 13, 1947. Thereafter, on March 28, 1947, the Commission issued and subsequently

served upon the aforesaid respondents its amended complaint, charging them with the violation of said subsection (c) of section 2 of the Clayton Act, as amended, and the respondents filed their joint answers to the amended complaint on April 30, 1947. A trial examiner of the Commission was duly designated and appointed to take testimony and receive evidence in the proceeding, and during a hearing held on July 29, 1947, for the purpose of receiving testimony, the trial examiner granted the respondents' motion for leave to withdraw their answer to the amended complaint and to substitute therefor an amended answer admitting all the material allegations of the amended complaint, but stating that the practices charged as violative of the law had been discontinued. Said amended answer also waived all intervening procedure, including hearings as to the facts, the trial examiner's report, the filing of briefs and oral argument before the Commission. Subsequently, the proceeding regularly came on for final consideration by the Commission upon the amended complaint and the amended answer thereto, and the Commission having duly considered the matter on January 12, 1948, made and issued its findings as to the facts and its conclusion drawn therefrom.

Counsel in support of the complaint and counsel for the respondents having now submitted a stipulation to the effect that said findings as to the facts may be modified in certain respects pertaining to the period of time during which the record shows the respondents engaged in the practices complained of, and the Commission having considered the stipulation and the record herein and being of the opinion that said findings as to the facts should be modified *nunc pro tunc*, the Commission makes this its modified findings as to the facts and its conclusion drawn therefrom, the same to be in lieu of its said original findings as to the facts and conclusion and to be effective as of the same date thereof, to wit, January 12, 1948:

MODIFIED FINDINGS AS TO THE FACTS

PARAGRAPH 1. (a) Respondent, New England Fish Co., is a corporation organized, existing, and doing business under the laws of the State of Maine, with its office and principal place of business located at 1723 Smith Tower, Seattle, Wash. Said respondent is engaged in the business of packing, selling, and distributing sea-food products, including canned salmon, canned tuna, and canned crab meat, hereinafter referred to as canned sea foods. This respondent owns and operates canneries in the towns of Orca, Chatham, Steamboat Bay, and Ketchikan, in the Territory of Alaska, where salmon is packed, and in addition to sea foods packed in its own canneries

respondent corporation also buys such products from others for resale.

(b) Respondent, Alvah L. Hager, is an individual residing in Vancouver, British Columbia. He is the principal stockholder of the New England Fish Co., and during the year 1945 served as president of said corporation.

(c) Respondent, David F. Choate, is an individual residing in Boston, Mass. He is one of the principal stockholders of the New England Fish Co., and during the year 1945 was one of the vice presidents of said corporation.

(d) Respondent, James S. Eckman, is an individual residing in Vancouver, British Columbia. He is one of the principal stockholders of the New England Fish Co., and during the year 1945 served as one of the vice presidents of said corporation.

(e) Respondent, Harold Synnestvedt, is an individual residing in Seattle, Wash. He is one of the principal stockholders of the New England Fish Co., and during the year 1945 served as one of the vice presidents of said corporation.

(f) Respondent, William J. Rich, is an individual residing in Boston, Mass. He is one of the principal stockholders of the New England Fish Co., and during the year 1945 served as secretary of said corporation.

These individual respondents, since June 19, 1936, have exercised and still exercise a substantial degree of authority and control over the business conducted by the corporate respondent, New England Fish Co., and said individual respondents formulate, control, and direct the distribution and sales policies of said corporate respondent. Said individual respondents, acting through the corporate respondent, are also engaged in the business of packing, selling, and distributing sea-food products.

PAR. 2. In the course and conduct of their business respondents sell and distribute their canned sea foods to purchasers located in various States of the United States, and respondents cause such products, when sold, to be shipped and transported from their place of business in Seattle, Wash., or from one of their various canneries, to purchasers thereof at their respective points of location in States other than the State of Washington. In the sale and distribution of their canned sea foods respondents maintain, and at all times mentioned herein have maintained, a constant course of trade and commerce in said products among and between the various States of the United States.

PAR. 3. Respondents market a portion of their canned sea foods through intermediaries who act as respondents' sales agents in negotiating the sale of their products and who are paid for such services brokerage fees or commissions in legitimate brokerage transactions. Such intermediaries customarily solicit and obtain orders for respondents' canned sea foods at respondents' prices and upon respondents' terms, and transmit such purchase orders to the respondents, who thereafter invoice and ship the canned sea foods to the customers. Such intermediaries are not traders for profit, and they do not take title to or have any financial interest in the canned sea foods sold by them, except for their brokerage fees or commissions. This phase of respondents' business operations is not involved in the present proceeding.

PAR. 4. In addition to selling through brokers or sales agents as aforesaid, respondents, since June 19, 1936, have also disposed of substantial quantities of their canned sea foods to distributors of food products located at various points throughout the United States, who have obtained such products directly from the respondents in their own names and for their own accounts. These distributors are generally known in the trade as buying brokers, and they ordinarily designate themselves as brokers, but they did not in their transactions with respondents function as brokers, and they are referred to hereinafter, for clarity, as direct purchasers. Among the direct purchasers to whom respondents since June 19, 1936, have sold their canned sea foods in substantial quantities are the following: Britt-McKinney Co., Greenville, S. C.; Haas-Guthman Co., Savannah, Ga.; C. B. Ponder Co., Atlanta, Ga.; Davis Brokerage Co., Birmingham, Ala.; Frank D. Powers Co., Jacksonville, Fla.; Southgate Brokerage Co., Norfolk, Va.; J. T. Jarrell Co., Little Rock, Ark., and Spence-Tomlin Co., Albany, Ga.

PAR. 5. It has been respondents' practice, upon receiving orders for canned sea foods from the purchasers named in paragraph 4, and from others, to fill the orders by shipping the products ordered directly to the purchasers. Such purchasers during the 1942 marketing season and prior thereto paid the price of the canned sea foods purchased as a condition precedent to delivery. When the products which were shipped to them were lost or damaged in transit, the purchasers filed claims against the carriers and collected damages for their own accounts. The purchasers, upon receiving the goods, warehoused such goods in their own or in public warehouses. They insured the merchandise in their own names and at their own expense against contingent loss or damage, at times pledged the public warehouse receipts

and insurance contracts as collateral for loans, and they resold the products in their own names and for their own accounts at such prices and upon such terms of sale as they desired, sometimes reaping a profit and at other times sustaining a loss on the transaction.

PAR. 6. In connection with the direct sales in commerce of canned sea foods as described in paragraphs 4 and 5 hereof, it has been the practice of respondents to grant and allow, and respondents have granted and allowed, to the purchasers of such products brokerage fees or commissions. The amounts of such brokerage fees or commissions paid to such direct purchasers have ranged from approximately $2\frac{1}{2}$ percent to approximately 5 percent of the sales price of the canned sea foods sold. The payments or allowances have usually been made by (1) deducting, or allowing such an amount to be deducted, from the invoice price of the canned sea foods sold; or by (2) remitting such amount to the purchaser by check after the purchaser had accepted and honored the respondents' draft for the purchase price of the canned sea foods sold.

CONCLUSION

The paying and granting by respondents herein, under the circumstances and in the manner aforesaid, of brokerage fees, commissions, or allowances in lieu thereof, to purchasers of sea-food products on purchases for their own accounts, constituted violations by respondents 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 amended complaint of the Commission and the amended answer of the respondents, which answer admits the material allegations of fact set forth in said amended 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 respondents have violated the provisions of subsection (c) of section 2 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) :

It is ordered, That the respondents New England Fish Co., a corporation, and its officers, and Alvah L. Hager, David F. Choate, James S. Eckman, Harald Synnestvedt, and William J. Rich, individually,

Order

44 F. T. C.

and as officers of said corporation, and respondents' 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 purchaser, anything of value as brokerage, or any commission, compensation, allowance, or discount in lieu thereof, upon purchases made for such purchaser'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.

Syllabus

IN THE MATTER OF

MINNEAPOLIS-HONEYWELL REGULATOR CO.

COMPLAINT, FINDINGS, ORDER, OPINION OF THE COMMISSION, AND OPINION DISSENTING IN PART AND CONCURRING IN PART, IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF SUBSEC. (a) OF SEC. 2, AND SEC. 3, OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT OF CONGRESS APPROVED JUNE 19, 1936

Docket 4920. Complaint, Feb. 23, 1943—Decision, Jan. 14, 1948

Section 2 (b) of the Clayton Act, as stated in *Federal Trade Commission v. Staley Mfg. Co.*, 324 U. S. 746, at 753, "does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. This section speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor.' The act thus places emphasis on individual competitive situations rather than upon a general system of competition." Accordingly, the defense is not available as a justification either for a challenged practice of allowing off-scale prices, or for certain prices, challenged as unlawfully discriminatory, as made available by certain quantity brackets and not shown as justified by differences in cost of manufacture, sale, or delivery resulting from the differing quantities in which the products involved are sold or delivered to purchasers.

Cost studies of the sort involved in an effort to justify quantity price differentials, based upon annual quantity purchases graduated according to various brackets, and challenged as unlawfully discriminatory under the provisions of section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act, ordinarily do not afford precise accuracy, but must necessarily embrace a number of conjectural factors and allocations, and there is inherent in them a reasonable margin of allowable error. Where they are made in good faith and in accordance with sound accounting principles, they should be given a very great weight, and a respondent in such a proceeding, whose burden under the act is very great, should have a liberal measure of consideration when it becomes apparent that it has made sincere and extensive efforts to discharge that burden.

As respects attempted cost justifications of quantity price differentials based upon annual quantity purchases graduated according to various brackets, and the contention that there is necessarily a failure of cost justification where the quantities purchased by two competing customers at applicable price differentials are nearly the same, with one being just below and the other being at or slightly above the minimum quantity for a particular bracket, the argument may be persuasive in a case where such a situation is actually shown and where there is some indication that it is a matter of competitive importance. Any annual quantity system of pricing is vulnerable to such an argument and it may be controlling where it has practical aspects, but where it is purely theoretical it does not constitute a satisfactory basis for disallowing the whole effort at cost justification.