

Complaint

52 F. T. C.

IN THE MATTER OF
FUELGAS CORPORATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 3 OF
THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket 6362. Complaint, June 7, 1955—Decision, Oct. 6, 1955

Consent order requiring a corporation with main office at Chester, N. Y., and branch offices in Pennsylvania and New Jersey, to cease selling liquefied petroleum gas, its "Homgas" steel containers for storage and transportation thereof, gas service equipment, and gas burning appliances, and leasing of its said steel containers and gas service equipment on condition that the purchaser-distributor or lessee not use or deal in competitors' goods; and to cease threatening to cancel, and actually canceling, distributors' contracts and otherwise intimidating distributors unless they rigidly adhered to such exclusive-dealing contracts.

Before *Mr. William L. Pack*, hearing examiner.

Mr. Andrew C. Goodhope for the Commission.

Levine & Levine, of Hurleyville, N. Y., for respondents.

COMPLAINT

Pursuant to the provisions of an Act of Congress commonly known as the Clayton Act, the Federal Trade Commission having reason to believe that Fuelgas Corporation, a corporation, Morris Birnbaum and Daniel Birnbaum, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of Section 3 of said Act (15 U.S.C.A. Sec. 14), and pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission having reason to believe that said respondents have violated the provisions of Section 5 of said Act (15 U.S.C.A. Sec. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint stating its charges as follows:

COUNT I

PARAGRAPH 1. Respondent Fuelgas Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, having its principal office and place of business located at Chester, New York, with branches located at Moosic, Pennsylvania; Frackville, Pennsylvania; Honesdale, Pennsylvania; and Clinton, New Jersey.

Respondent Morris Birnbaum, an individual, is president of Fuelgas Corporation. Respondent Daniel Birnbaum, an individual, is secretary-treasurer of respondent Fuelgas Corporation. Both said individual respondents at all times hereinafter mentioned have controlled and directed the policies and practices of corporate respondent, Fuelgas Corporation, including the methods, acts and practices mentioned herein.

PAR. 2. Respondents are now, and for many years have been, engaged in the purchase, sale and distribution of liquefied petroleum gas (hereinafter sometimes referred to as "gas"), steel containers for storage and transportation of liquefied petroleum gas, gas service equipment consisting of equipment necessary to distribute gas from gas cylinders to one or more gas burning appliances, and gas burning appliances such as stoves, refrigerators and hot water heaters. Such products are sold under respondents' trade name, "Homgas."

Respondents' business operations are carried on in southeastern New York State, eastern and northeastern Pennsylvania and northern and western New Jersey where all the distributors to whom its products are sold are located. Respondents' total sales are substantial, amounting to \$894,000 in 1952 and respondents are an important and substantial competitive factor in the area in which they carry on their business.

The distributors to whom respondents sell their products are small independent businesses which in turn sell the products purchased from the respondents to consumers located in each distributor's territory. Respondents' "Distributor Agreement" used in contracting with the majority of respondents' distributors provides as follows:

20. The Distributor agrees not to enter into any contract, undertaking or agreement of any kind as agent of the company, nor to incur any liability of any kind on behalf of the Company, nor directly or indirectly, to hold himself or itself out as the Company's agent, nor permit it to be understood directly or indirectly that the Distributor has any authority to act for the Company or has any connection with the Company other than as herein specifically set forth and described; it being specifically understood and agreed that the Distributor is not the agent or employee of the Company in any respect whatever.

31. Neither the Distributor nor any of the Distributor's servants, agents or employees, nor any individual whose compensation for services is paid by the Distributor, directly or indirectly, expressly or by implication, shall be deemed an employee of the Company, nor shall any of them be deemed to be employed by the Company for any purpose whatsoever * * *.

PAR. 3. Respondents now sell and distribute, and for many years have been selling and distributing, their above-described products to approximately 90 distributors of liquefied petroleum gas located throughout the States of New York, New Jersey and Pennsylvania

Complaint

52 F. T. C.

and respondents purchase these products, from sources without the State of New York and cause such products when sold or distributed by respondents to be transported from the place of purchase or storage to purchasers thereof located in States other than the place of purchase or storage and there is now and has been for many years a constant current of trade in commerce in said products between and among the various States of the United States.

PAR. 4. In the course and conduct of their business as herein described, respondents have been for many years in substantial competition in the sale and distribution of liquefied petroleum gas, cylinders for storing and transporting such gas, gas service equipment and gas burning appliances in commerce between and among the various States of the United States with other corporations, persons, firms and partnerships.

PAR. 5. In the course and conduct of their business in commerce, above described, the respondents have made sales and contracts for sale of their liquefied petroleum gas, steel containers for storage and transportation of said gas, gas service equipment and gas burning appliances, and have made leases of their steel containers for storage and transportation of said gas and gas service equipment, and is still making such sales, contracts for sale and leases, on the condition, agreement or understanding that the purchasers or lessees thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the respondents.

The respondents have entered into approximately 90 such contracts for sale and leases with independent dealers and distributors of such products. Typical of such contract provisions are those contained among others in respondents' standard "Distributor Agreement," pursuant to the terms of which respondents have contracted to sell their product to the majority of their distributors, as follows:

12. No liquefied petroleum gas shall be kept, stored, delivered or sold by the Distributor except in the Company's standard cylinders bearing the trade-mark "Homgas."

28. The Distributor shall, at no time, deliver, sell, cause, permit to be removed from inventory any Propane Liquefied Petroleum Gas, unless the same is contained in cylinders, containers, tanks, or receptacles bearing the trade-mark, "Homgas," plainly and conspicuously marked thereon, in a manner to be designated by the Company.

29. The Distributor shall not store, display, deliver, sell or offer for sale any gas or gas burning appliances intended, adapted or which may be adapted to the use of Propane, Butane or other natural or manufactured gas, unless the same is obtained from the Company, nor unless the Company shall desire or permit such articles to be marketed by the Distributor.

This "Distributor Agreement" provides that the contract shall be for a five-year term from the date of signing and is renewed for successive yearly periods unless either party at least 30 days prior to the expiration of the original or any renewal term, terminates the agreement as of the expiration of the term during which said notice was given.

In addition, respondents' "Commercial Propane Sales Contract" used by respondents in contracting to sell to other of their distributors contains, among others, the following provision:

Seller agrees to sell to Buyer, and Buyer agrees to purchase from Seller all of Buyer's liquefied petroleum gas requirements in Buyer's containers to be known and marked under the brand name and trade-mark, and Buyer's liquefied petroleum gas equipment, according to the terms and conditions hereinafter set forth.

PAR. 6. Competitors of respondents have been, and are now, unable to make sales of similar products to those sold or leased by respondents to respondents' customers which they could have made but for the conditions, agreements, and understandings described above in Paragraph 5. Customers of respondents who have entered into such contracts of sale or lease agreements have been restricted and hampered in their businesses as a result of being unable to purchase or lease similar commodities at lower prices, at more convenient locations, or upon other more favorable terms than those granted by respondents.

PAR. 7. The effect of such sales and contracts for sale, and leases on such conditions, agreements, or understandings, may be to substantially lessen competition in the line of commerce in which the respondents are engaged and in the line of commerce in which the customers, purchasers, and lessees of respondents are engaged; and may be to tend to create a monopoly in respondents in the line of commerce in which the respondents have been, and are now, engaged.

PAR. 8. The aforesaid acts and practices of respondents constitute a violation of the provisions of Section 3 of the Clayton Act.

COUNT II

PARAGRAPHS 1, 2, 3, 4 and 5 of Count I of this complaint are hereby incorporated into this Count II of this complaint to the same extent and with the same effect as though fully set out herein.

PAR. 6. Respondents in the course and conduct of their business in commerce have employed and now employ the following methods, acts, and practices in competition:

(a) Threatening their distributors with cancellation of their contracts with respondents and actually cancelling such contracts unless

Complaint

52 F. T. C.

such distributors rigidly adhere to their exclusive dealing contracts with respondents, described above in Paragraph 5.

(b) Threatening to enforce and actually enforcing provisions in the contract between respondents and their distributors to the effect that such distributors shall not re-enter the same business in a specified territory for a number of years following such cancellation or threatened cancellation, unless such distributors rigidly adhere to their exclusive dealing contracts with respondents, described above in Paragraph 5. The respondents' "Distributor Agreement" in this respect provides as follows:

26. The Distributor expressly covenants and agrees that he will not, during the term of this contract nor for five (5) years after the termination thereof, whether such termination results or is brought about by mutual agreement, under the terms of this contract, or otherwise, directly or indirectly, engage in the business, occupation or trade of selling, marketing, bottling, or otherwise dealing in Propane or Butane gas or gases, natural or manufactured, which is used, intended or designed for cooking, heating, or refrigeration, nor in the sale, distribution, marketing or servicing of any gas tank, gas stove, gas heater, gas range, gas regulator, gas cylinder, or any other appliance, fixture, or material whatever used or intended to be used in connection with distribution, marketing, consumption or use of such gas or gases, either as owner, partner, employer, employee, stockholder, director, officer, clerk, principal, agent, or in any other relation or capacity whatever, nor shall he perform similar services or be similarly engaged for himself or for any person, firm, or corporation engaged in a like or competing line of business as that in which the Company is now or may during the term of this agreement be engaged, in the territory assigned by this agreement to the Distributor as well as in the States of New York, New Jersey, Pennsylvania, and Maryland. During the term of this contract and during the period of five (5) years following its termination, the Distributor agrees and covenants that he shall and will not furnish or disclose to anyone the names of any consumer accounts with trade secrets of the Company nor of other information obtained by the Distributor during the period of this contract or in the course of the Distributor's performance and engagement therein.

Respondents' "Commercial Propane Sales Contract" provides in this respect as follows:

12. Upon such termination or cancellation or breach of this agreement as above provided, Buyer hereby agreed that he will not thereafter establish or conduct, manage, be employed in or be directly or indirectly financially or otherwise interested in the sale and the distribution of liquefied petroleum gases or equipment within a radius of fifty (50) miles from his place or places of business within the territory served under this contract for a period of three (3) years from date of such termination, cancellation or breach.

The result of these threats and actual enforcement have made respondents' distributors subservient to respondents' wishes and will as to the conduct of their businesses lest they be subjected to the

onerous and oppressive provisions of said contracts which if enforced result in the entire loss of their business and inability to continue such business with any other supplier or suppliers of similar products.

PAR. 7. The acts and practices of respondents, as herein alleged, are all to the injury and prejudice of competitors of respondents, of customers and purchasers of respondents, and of the public; have a tendency and effect of obstructing, hindering, and preventing competition in the sale and distribution of liquefied petroleum gas, steel containers used for storage and transportation of liquefied petroleum gas, gas service equipment and gas burning appliances, in commerce, within the intent and meaning of the Federal Trade Commission Act; have a tendency to and have obstructed and restrained such commerce in such merchandise, and constitute unfair methods of competition in commerce and unfair acts and practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges respondents with the use of certain practices in violation of the Clayton Act and the Federal Trade Commission Act. An agreement has now been entered into by respondents and counsel supporting the complaint which provides, among other things, that respondents admit all the jurisdictional allegations in the complaint; that the answer heretofore filed shall be considered as having been withdrawn, and that the complaint and agreement shall constitute the entire record in the proceeding; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission to which the respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if made after a full hearing, presentation of evidence and findings and conclusions thereon, respondents specifically waiving any and all right, power and privilege to challenge or contest the validity of such order; that the order may be altered, modified or set aside in the manner provided by statute for other orders of the Commission; and that the signing of the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an appropriate

Order

52 F. T. C.

basis for settlement and disposition of the proceeding, the agreement is hereby accepted and made a part of the record, the following jurisdictional findings made, and the following order issued:

1. Respondent Fuelgas Corporation is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business at Chester, New York. Respondents Morris Birnbaum and Daniel Birnbaum are respectively president and secretary-treasurer of the corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the interest of the public.

ORDER

It is ordered, That the respondents, Fuelgas Corporation, a corporation, Morris Birnbaum, Daniel Birnbaum, individually and as officers of said corporation, their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of liquefied petroleum gas, steel containers for such gas, gas service equipment, or gas burning appliances or in connection with the leasing of such gas containers or gas service equipment in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Selling or making any contract for sale or lease of any such products on the condition, agreement or understanding that the purchaser or lessee thereof shall not use, deal in or sell such products obtained or leased from any competitor or competitors of respondents;

2. Enforcing or continuing in operation or effect any condition, agreement or understanding in, or in connection with, any existing contract of sale or lease, which condition, agreement or understanding is that the purchaser of such products from respondents will deal in and sell or lease only such products supplied by respondents and not those of a competitor or competitors of respondents.

It is further ordered, That the respondents, Fuelgas Corporation, a corporation, Morris Birnbaum and Daniel Birnbaum, individually and as officers of said corporation, their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of liquefied petroleum gas, steel containers for such gas, gas service equipment, or gas burning appliances or in connection with the leasing of such gas containers or gas service equipment in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Selling or making any contract for sale or lease of any such products on the condition, agreement, or understanding that the pur-

chaser or lessee thereof shall not use, deal in, or sell such products obtained or leased from any competitor or competitors of respondents;

2. Enforcing or continuing in operation or effect any condition, agreement, or understanding in, or in connection with, any existing contract of sale or lease, which condition, agreement, or understanding is that the purchaser of such products from respondents will deal in and sell or lease only such products supplied by respondents and not those of a competitor or competitors of respondents;

3. Cancelling, or directly or by implication threatening the cancellation of, any contract or franchise or selling agreement with respondents' distributors, or with any other customers, for the sale or lease of said products, because of the failure of such purchasers to purchase or deal exclusively in the products sold and distributed by respondents.

4. Enjoining or threatening to enjoin any of respondents' distributors or customers from engaging in the liquefied petroleum gas business for the period of five years, three years or any other period, where such actions are taken by respondents for the purpose or having the effect either of coercing or intimidating such distributors into dealing in respondents' products to the exclusion of products of competitors or for the purpose or having the effect of retaliating against such distributors for their failure or refusal to purchase or deal exclusively in the products sold and distributed by respondents.

5. The performance of any act of intimidation or coercion either through statements, oral or written, made by representatives of respondents either at the time when a distributor agrees to purchase or lease any products from respondents or during the course of any calls made upon distributors or customers at their places of business or at any other time or place, or the use of any other plan, practice, system or method of doing business for the purpose or having the effect of intimidating or coercing the respondents' distributors or other customers to purchase or lease the products or merchandise in which they deal, exclusively from respondents.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 6th day of October, 1955, become the decision of the Commission; and, accordingly:

It is ordered, That the respondents herein shall within sixty (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 the order to cease and desist.

Complaint

52 F. T. C.

IN THE MATTER OF

NATIONAL FOOD BROKERS ASSOCIATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6363. Complaint, June 13, 1955—Decision, Oct. 7, 1955

Consent order requiring a trade association and its 1750 food broker members—including more than 40 per cent of all the food brokers in the United States, and more than 75 per cent of all whose business did not include buying and selling for their own account—to cease concertedly restraining competition by refusing to solicit business from each other's customers, disciplining members who did not cooperate, denying membership to outsiders for the same reason, and engaging in other restrictive practices.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Raymond L. Hays and *Mr. William W. Rogal* for the Commission.

Williams, Myers & Quiggle, of Washington, D. C., for respondents.

Howie & Robertson, of New York City, also represented John G. Paton Co., Inc.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents named and referred to in the caption hereof and hereinafter more specifically named, designated and described, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent National Food Brokers Association, sometimes hereinafter referred to as respondent NFBA or respondent Association, is a voluntary, unincorporated association with its office and principal place of business located at 527 Munsey Building, Washington 4, D. C.

The membership of respondent NFBA is composed of corporations, partnerships and individuals whose business consists of negotiating the sale of food and grocery products for and on account of the sellers of such merchandise and whose compensation is a commission or brokerage paid by the seller. The member corporations, partnerships and individuals are known as food brokers and the sellers for whom they act are referred to by the aforesaid food brokers as principals.