

IN THE MATTER OF
ROCKY MOUNTAIN WHOLESALE COMPANY ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (c) OF THE
CLAYTON ACT

Docket 6230. Complaint, June 30, 1954—Decision, June 7, 1956

Order requiring a wholesaler of sundries, candy, and tobacco products in Albuquerque, New Mexico, to cease receiving unlawful allowances or brokerage in violation of Sec. 2 (c) of the Clayton Act as amended, through sharing, as partner in two brokerage companies, brokerage received by them on purchases made for respondent's own account.

Mr. Rice E. Schrimsher and Mr. Peter J. Dias for the Commission.
Mr. Louis C. Lujan, of Albuquerque, N. Mex., for respondents.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents charging them with violating Section 2 (c) of the Clayton Act, (U.S.C. Title 15, Section 13), as amended by the Robinson-Patman Act, approved June 19, 1936, which complaint was duly served upon the respondents. The respondent, Jack Beatty was named as such in his individual capacity as well also as President of the corporate respondent, and owner of the controlling interest thereof, and as a partner in the partnership firms of Consolidated Brokerage Company and G & Z Brokerage Company. No testimony or other evidence was received on behalf of any party to this proceeding, this Initial Decision being rendered upon motion of the attorneys in support of the complaint on the basis of admissions contained in the formal answer of respondents to the complaint herein. Specifically, the respondents Rocky Mountain Wholesale Company and Jack Beatty are charged with receiving and accepting payment of commissions in lieu of brokerage in connection with purchases of products made by them for their own account.

On August 2, 1954, respondents filed answer to the complaint admitting:

1. The status of the corporate respondent and the representative and individual connections of the individual respondent, as alleged in the complaint;
2. Interstate commerce; and
3. The payment and acceptance by respondents of brokerage, or other compensation in lieu thereof, in connection with purchases of products made by the respondents on their own account.

In and by said answer it was admitted that such brokerage payments were made to the G & Z Brokerage Company, in which the individual respondent Jack Beatty participated as a copartner, but specifically denies that he has ever received any brokerage or other compensation from Consolidated Brokerage Company. By way of further answer to the complaint the individual respondent alleges, with respect to the G & Z Brokerage Company and the Consolidated Brokerage Company, both being copartnerships, in which the individual respondent owns respectively 51% interest of the former and 50% interest of the latter, that he, the said Jack Beatty, during the period herein referred to, has performed the type of services referred to in Subsection (c) of Section 2 of the Clayton Act through the instrumentality of the corporate respondent Rocky Mountain Wholesale Company, in that he furnishes all of the bookkeeping services for Consolidated and for G & Z he furnishes office space, stenographic help, bookkeeping, and telephone service on all items handled by that firm and that he also warehouses the goods, furnishes the services of receiving and shipping and carries advertising on all his trucks for both concerns; that the value of the said services is in excess of any compensation which he receives in lieu of brokerage as aforesaid. And by way of affirmative defense, under the legal maxim *de minimis non curat lex*, sets up that the purchases made from the vendors represented by the G & Z Brokerage Company total but 2.15% of his, the individual respondent's, total purchases per year and that from vendors represented by Consolidated Brokerage Company such purchases amounted to but .84% of his total business; that the total purchases for the year 1953 amounted to \$695.21 on which the commission received by Consolidated Brokerage Company was \$34.76 from which he, Jack Beatty, received nothing.

On the basis of the foregoing answer containing the admissions set forth, the attorneys in support of the complaint filed a motion requesting the Hearing Examiner to issue an initial decision and cease and desist order based thereon. Thereafter the Hearing Examiner cancelled the date of the original hearing and accorded the respondents approximately 30 days within which to answer the aforesaid motion, and in said order extended to the respondents the privilege of supplementing their reply by filing a brief in support thereof or, in the alternative, extending an opportunity for oral argument, neither of which tenders was availed of by the respondents. Thereafter, on motion of respondents, the Hearing Examiner granted them an additional 30 days within which to answer, upon expiration of which time, that is to say October 19, 1954, the respondents filed a motion to dismiss the complaint on various grounds, among such being:

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(1) that at no time did they "knowingly and intentionally operate in violation of the Clayton Act * * * but that any transgression was entirely through lack of proper information on their part"; (2) that respondents believed that the rendition of services to Consolidated Brokerage Company and G & Z Brokerage Company was sufficient to comply with the exemption clause covering "services rendered" as set forth in the Act and thus to relieve them from the impact of Subsection "C" of Section 2 of the Clayton Act as amended; (3) that "upon complete and thorough study of the matters presented in the complaint * * * the respondents came to the conclusion that they must make certain changes in their operations in order to come into compliance with the said Act." Said motion goes on to delineate the steps which the respondents have taken to enable them to "come into compliance," wherefore it was prayed that the complaint be dismissed. To the foregoing motion to dismiss the attorneys in support of the complaint did, on October 25, 1954, file an answer in opposition and renewing the motion for initial decision containing an order to cease and desist.

Upon consideration of the formal record as hereinabove recited, the Examiner is of the opinion that the motion of the attorneys in support of the complaint for the issuance of a cease and desist order, predicated of the admissions contained in the respondents' answer and also contained in the respondents' later motion to dismiss the complaint, should be granted, wherefore he makes the following findings of fact, conclusions, and order.

FINDINGS OF FACT

1. Respondent Rocky Mountain Wholesale Company is a corporation organized and existing under the laws of the State of New Mexico, with its principal office and place of business located at 314 South Second Street, Albuquerque, New Mexico, and with branch offices located in the cities of Roswell, Santa Fe and Farmington, New Mexico. The controlling stock interest in the respondent corporation is held by respondent Jack Beatty who directs, controls and is responsible for its acts and practices. Said respondent corporation is engaged in the business of buying sundries, candy and tobacco products from manufacturers and reselling such products to retailers.

Respondent Jack Beatty is an individual residing in Albuquerque, New Mexico, and is president of respondent Rocky Mountain Wholesale Company. He is also a partner in Consolidated Brokerage Company and G & Z Brokerage Company, having a 51% interest in the former company and a 50% interest in the latter. These two com-

panies located in Albuquerque, New Mexico, are engaged in business as brokers of sundries, food and candy products, in connection with the sale of such products to wholesalers.

2. In the course and conduct of their business as wholesalers, respondents are and have been engaged in commerce, as "commerce" is defined in the Act, purchasing products from vendors, whose places of business are located in states other than New Mexico, and causing them to be shipped to their places of business within the State of New Mexico.

3. In the course and conduct of said wholesale business in commerce, said vendors pay or grant to respondents and respondents receive or accept commissions, brokerage, or other compensation, or allowances or discounts in lieu thereof, in connection with said purchases of products made on their own account.

4. For example, during 1953, one method by which respondents received or accepted the commissions, brokerage, or other compensation, or allowances or discounts in lieu thereof alleged in Paragraph Three involves Consolidated Brokerage Company and G & Z Brokerage Company. These companies act as brokers for vendors making sales of candy products and sundries to respondent Rocky Mountain Wholesale Company. The money received as brokerage by these companies on such sales is shared by respondent Jack Beatty as a partner in said companies. Thus, as a buyer through his control of Rocky Mountain Wholesale Company, Jack Beatty receives brokerage on purchases made for his own account.

CONCLUSIONS

1. From the foregoing it will be seen that the receipt of brokerage on purchases on their own account through the G & Z Brokerage Company are specifically admitted by the corporate and individual respondents, while denying that any such were received from the Consolidated Brokerage Company. However, in view of the admission that respondent Jack Beatty is the owner of a 51% interest in the Consolidated copartnership, and the admission in the answer that Rocky Mountain made purchases from Consolidated Brokerage on which the latter received brokerage fees, and the further fact that respondent Jack Beatty is the controlling owner and factor in Rocky Mountain, it is clear that the buyer received unlawful allowances or brokerages and that no weight can be accorded this attempted defense.

2. Referring to the allegations of the answer that respondent Beatty performs services through the respondent Rocky Mountain on behalf of the G & Z Brokerage Company and Consolidated Brokerage and that the amounts paid him are insufficient compensation for the serv-

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ices performed, in addition to which that such services come within the "except for services rendered" clause of Section 2 (c): It is concluded that because of the relationships of the parties such a defense is unavailing to take the charges without the statute under the "exception clause," and in this connection the following excerpt from the Circuit Court of Appeals (*Great A. & P. Tea Co. v. F.T.C.*, 106 F. 2d 667. S&D 1939, p. 146, 154, 156) is given:

We entertain no doubt that it was the intention of Congress to prevent dual representation by agents purporting to deal on behalf of both buyer and seller. * * * The phrase 'except for services rendered' is employed by Congress to indicate that if there be compensation to an agent it must be for bona fide brokerage, viz., for actual services rendered to his principal by the agent. The agent cannot serve two masters, simultaneously rendering services in an arm's length transaction to both. While the phrase "for services rendered," does not prohibit payment by the seller to his broker for bona fide brokerage services, it requires that such service be rendered by the broker to the person who has engaged him. *In short, a buying and selling service cannot be combined in one person* * * *. [Emphasis supplied.]

Also in the case of *Quality Bakers of America v. F.T.C.*, 114 F. 2d 393, the Court said:

The petitioners contend that by the language in paragraph (c), above quoted, reading "except for services rendered in connection with the sale or purchase of goods," the Congress recognizes that a buyer, or his agent, may perform services for the seller in connection with the transaction for which the seller may pay and the buyer or his agent receive compensation by way of a brokerage fee or commission on the sale. We do not take such a view of the paragraph. The construction contended for makes much of its language meaningless; it does violence to the purpose of the Act and has been explicitly rejected in other circuits. *It is plain enough that the paragraph, taken as a whole, is framed to prohibit the payment of brokerage in any guise by one party to the other, or the other's agent, at the same time expressly recognizing and saving the right of either party to pay his own agent for services rendered in connection with the sale or purchase.* [Emphasis supplied.] (See also: *Biddle Purchasing Co. v. FTC*, 96 F. 2d 687, certiorari denied, 305 U.S. 634; *Oliver Brothers v. FTC*, 102 F. 2d 763; *Webb-Crawford Co. v. FTC*, 109 F. 2d 268).

3. Referring to the unsupported asseveration of respondents' counsel, as contained in his motion to dismiss, that respondents have abandoned the practice complained of and are now in a state of compliance: It is well settled law that discontinuance does not render the controversy moot and thus bar an order to cease and desist. This is true whether the discontinuance is effected before or after issuance of the complaint. For the former see *Sears, Roebuck & Co. v. FTC*, 258 Fed. 307-310, and for the latter see *FTC v. Goodyear Tire & Rubber Co.*, 304 U.S. 257. This conclusion is not intended nor designed to impugn the good faith of respondents in their abandonment of the practices but, under the facts found, and bearing in mind that

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the function of the Commission is not only in nature injunctive but as well prophylactic, it is concluded that an order to cease and desist is indicated and required.

4. Concerning the attempted defense of *de minimis* it is concluded that such is unavailing. It is the character of the acts charged and admitted which the law denounces, not the extent thereof, be it small or great. (*Louisiana Farmers Protective Union v. Great A. & P. Tea Co.*, 131 F. 2d 419, 422. *White Bear Theatre Corp. v. State Theatre Corp.*, 120 F. 2d 600-605.)

Certain it is that the machinery for violating the Act was all set up and operating; that commissions or brokerages were actually paid and received, and it is no defense that such was done unwittingly, without intent to violate the Act and in ignorance of the law.

5. The acts and practices of the respondents, as above found, violate Subsection (c) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (U.S.C. Title 15, Section 13).

ORDER

It is ordered, That the respondents Rocky Mountain Wholesale Company, a corporation, and Jack Beatty, individually and as President of Rocky Mountain Wholesale Company, and as a partner of Consolidated Brokerage Company and G & Z Brokerage Company and their respective representatives, agents and employees, directly or through any corporate or other device in connection with the purchase by respondents, or either of them, of sundries, candy and tobacco products in commerce as "commerce" is defined in the Clayton Act, do forthwith cease and desist from receiving or accepting, directly or indirectly, from any seller anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof, upon purchases of sundries, candy and tobacco products made by respondents or for their account.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Sec. 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 7th day of June 1956, 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.

IN THE MATTER OF
GEORGE M. VOSS TRADING AS VOSS HAIR EXPERTS
OF GEORGIA

Docket 6498. Order and opinion, June 7, 1956

Order granting respondent's appeal from hearing examiner's *ex parte* ruling on complaint counsel's motion to amend complaint.

Before *Mr. James A. Purcell*, hearing examiner.

Mr. Harold A. Kennedy for the Commission.

Frank E. & Arthur Gettleman, of Chicago, Ill., for respondent.

ORDER RULING ON INTERLOCUTORY APPEAL OF RESPONDENT

Counsel for respondent having filed an interlocutory appeal May 3, 1956, from the order of the hearing examiner, filed April 19, 1956, among other things, denying respondent's motion to vacate an order amending the complaint; and

The Commission, for the reasons stated in the accompanying opinion, having concluded that the appeal should be granted in part and denied in part as there noted:

It is ordered, That the orders of the hearing examiner filed March 13, 1956, and April 19, 1956, respectively, be, and they hereby are, vacated and set aside.

It is further ordered, That respondent's request that the hearing examiner be required to rule on its motion of April 11, 1956, be, and it hereby is, denied.

OPINION OF THE COMMISSION

Per Curiam:

This case has come on for hearing before the Commission upon the interlocutory appeal filed May 3, 1956, by respondent, through counsel, from the order of the hearing examiner filed April 19, 1956, among other things, denying respondent's motion to vacate an order amending the complaint. No hearings have been held.

A motion was filed, by counsel supporting the complaint, March 6, 1956, requesting that the complaint be amended. Respondent filed an answer to this motion on March 14, 1956, but the hearing examiner had on March 13, 1956, ruling *ex parte*, filed his order granting the motion and allowing respondent thirty days after service of the order within which to file its answer. Subsequently, on March 29, 1956, respondent, through counsel, filed a motion to vacate the order amending the complaint. Counsel supporting the complaint filed an answer