

IN THE MATTER OF
MAIN FISH COMPANY, INC.

ORDER OF DISMISSAL IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (C)
OF THE CLAYTON ACT

Docket 6386. Complaint, June 30, 1955—Order, July 30, 1956

Order dismissing complaint charging a seller in Seattle, Wash., of fresh fish it purchased in boat-load quantities, filleted, and resold to retailers, restaurants, and wholesalers, with violating Sec. 2(a) of the Clayton Act by favoring one direct buyer with prices lower than those charged all other purchasers by the amount of the commissions paid brokers for effecting sales to its indirect customers.

Mr. Peter J. Dias for the Commission.

Jones & Grey, of Seattle, Wash., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

Respondent Main Fish Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal office and place of business located at Pier 49, Seattle, Washington. It is now and for a number of years last past has been engaged in the business of purchasing fresh fish in boatload lots, processing and selling them to retailers, restaurants and wholesalers. In the course and conduct of its business, the respondent has sold and transported or caused such fish to be transported from its place of business in the State of Washington to the places of business of said customers, many of which are located in various other States of the United States.

The complaint charges that respondent is now and for several years last past has been selling fish directly to one large customer, the Pacific California Fish Company of Los Angeles, California (hereinafter referred to as Pacific), at net prices lower than those charged other customers by the same or substantially the same amount as the 5% brokerage which respondent pays brokers for effecting sales to other of its customers, and that thereby respondent has granted to Pacific something of value as a commission, brokerage or other compensation or discount in lieu thereof, in violation of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13).

Respondent denied these charges, alleging in its answer that any lower price charged Pacific "was either justifiable because of cost

savings or made in an attempt to meet an equally low price of a competitor" and that "no discount in lieu of brokerage and no discount either equal to or substantially equal to the brokerage customarily paid brokers has ever been granted" to Pacific.

Hearings were held at which evidence in support of and in opposition to the allegations of the complaint was received, recorded and later filed in the office of the Commission. Counsel have submitted proposed findings, conclusions and orders with appropriate supporting memoranda of law.

Subsection (c) of Section 2 of the Clayton Act as amended is as follows:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

The language of subsection (c) of Section 2 is clear and unequivocal. The qualifying provisions of subsections (a) and (b) of the Clayton Act are not applicable to subsection (c), hence the defenses of cost justification and meeting competition are not available to the respondent in this proceeding. Subsection (c) constitutes a specific prohibition of a specific act—it expressly prohibits the payment of brokerage or compensation in lieu thereof to a buyer upon the buyer's own purchases.¹

If respondent has paid to Pacific a commission or brokerage on fish sold by it to Pacific, or if it has granted an allowance, discount or other compensation in lieu of brokerage, then respondent has violated subsection (c) of Section 2 of the Clayton Act as amended, and a cease-and-desist order should issue. The sole issue in this proceeding is whether or not respondent extended net prices, allowances or discounts to Pacific as, or in lieu of, brokerage. The issue is one of fact, not law.

The complaint alleges that many of respondent's sales are made to customers through brokers to whom respondent pays a brokerage fee "which varies with the type of fish sold but which is generally 5% of sales"; also that in some instances respondent sells its prod-

¹ *Biddle Purchasing Co., et al., v. FTC*, 96 F. 2d 687 (Cert. Den. 305 U.S. 634); *Oliver Bros., Inc., et al., v. FTC*, 102 F. 2d 763; *Great Atlantic & Pacific Tea Co. v. FTC*, 106 F. 2d 667 (Cert. Den. 308 U.S. 625).

ucts to a few customers directly and, with one exception, charges the same price for similar kinds of fish regardless of whether the customers buy directly or through a broker. These allegations are not supported by the evidence of record. A large portion of respondent's fish sales are made through brokers whose fees are always 5% and do not vary with the type of fish sold. Respondent sells directly to other customers, but prices are not uniform even for similar types of fish sold on the same day. This lack of uniformity exists whether sales are direct or by brokers.

To establish the allegations of the complaint, a tabulation was presented, compiled by a member of the Commission's staff from information appearing on respondent's invoices for twenty selected days during the months of July and December, 1954, and February, 1955. Not every invoice on each of the selected days was used in the tabulation, but the tabulation is accurate as to the invoices used. The tabulation shows that respondent sold, during the period covered, thirteen types or varieties of fish. On two days five different types of fish were sold, but the average was less than three per day. In ten instances, on seven of the twenty days covered by the tabulation, there were three or more prices for a single type or variety of fish; in three instances four different prices are shown. On each of the twenty days, Pacific enjoyed the lowest price on at least one type of fish; in twelve instances, on nine of the twenty days, Pacific's price on at least one type of fish was the same as that paid by one or more other purchasers.

Typical variations in prices during a single day for fish of the same type are shown as follows:

On July 2, 1954, filet of true cod sold for 16½¢, 17¢ and 18¢;

On July 6, 1954, filet of true cod sold for 15¢, 16¢ and 17¢;

On July 26, 1954, filet of sole sold for 33¢, 34¢, 35¢ and 38¢;

On Feb. 11, 1955, filet of sole sold for 32¢, 33¢, 34¢ and 35¢.

All these variations are shown in the following recapitulation of the data contained in the tabulation of invoices. The dates are those of the invoices used in compiling the tabulation. In the second column are the prices at which various types of fish were sold to Pacific, one line being allotted to each type of fish sold on each of the various dates. The third column shows respondent's prices to customers other than Pacific for each type of fish, and the last column contains computed percentages showing by how much Pacific's prices were lower than those charged other customers. Percentages are computed to the nearest one-hundredth percent.

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Recapitulation of invoice data

Date	Price in cents		Percent of differences between Pacific and other buyers
	To Pacific	To Others	
7/2/54.....	16 1/2	18.....	8.33.
	16 1/2	17, 18.....	2.94, 8.33.
	12	12.....	0.
7/6/54.....	15	16, 17.....	6.25, 11.76.
	13	14.....	7.14.
7/9/54.....	16	17.....	5.88.
	33	34, 36.....	2.94, 8.33.
	28	28.....	0.
	12	13.....	7.69.
	18	19.....	5.26.
7/16/54.....	13	14.....	7.14.
7/23/54.....	16	17.....	5.88.
	12	12.....	0.
	34	35.....	2.86.
	28	28.....	0.
	16	17.....	5.88.
7/26/54.....	16	17, 18.....	5.88, 11.11.
	33	34, 35, 38.....	2.94, 5.71, 13.16.
	13	13.....	0.
	16	16, 17, 18, 19.....	0, 5.88, 11.11, 15.79.
7/30/54.....	15	16, 17.....	6.25, 11.76.
	33	35.....	5.71.
12/3/54.....	21	22.....	4.54.
	30	30.....	0.
	20	20.....	0.
	30	32.....	6.25.
12/6/54.....	20	22.....	9.09.
	30	30.....	0.
	18	20.....	10.00.
12/10/54.....	22	22.....	0.
	19	20.....	5.00.
12/13/54.....	19	20.....	5.00.
12/18/54.....	20	22.....	9.09.
12/23/54.....	19	20.....	5.00.
	17	18.....	5.56.
	29	30.....	3.33.
2/4/55.....	18	19, 20.....	5.26, 10.00.
2/7/55.....	21	22.....	4.54.
2/11/55.....	19	19, 20, 21.....	0, 5.00, 9.52.
	20	22.....	9.09.
	32	33, 34, 35.....	3.03, 5.88, 8.57.
2/14/55.....	18	20.....	10.00.
2/18/55.....	19	20.....	5.00.
	18	18.....	0.
	31	32.....	3.12.
2/21/55.....	18	19.....	5.26.
	35	36.....	2.78.
	19	20.....	5.00.
	20	21.....	4.76.
2/25/55.....	18	19.....	5.26.
	18	22.....	18.18.
	15	16.....	6.25.

In his testimony the president of respondent company said that price variations arise from many causes. If there is a large supply prices will be low; if during the course of a day more boats come in with large quantities of certain types of fish, or if fish from other markets, San Francisco, San Diego or San Pedro, become available, prices will drop immediately; fish of the same type may differ in size and quality; some fish are sold the same day as caught, other fish may be two or three days old, some may be frozen. The area in which fresh fish may be sold is more or less localized. Some customers buy in small quantities, 200 pounds or less; Pacific buys as much as 5,000 pounds at a time. All these are factors which

affect price. Furthermore, fish are a perishable product, the merchandising of which is not comparable to the merchandising of stable products which can be manufactured in pre-determinable quantities to meet current market requirements. Under these circumstances, the basic or exact cause of price variations is difficult to determine.

None of the price differences disclosed by respondent's invoices are shown to be in the nature of discounts from established list prices. They exist between customers who purchase direct and customers who purchase through brokers, and between customers within each of these two groups. The differences vary from day to day. The record in this proceeding is devoid of any direct proof of brokerage being paid by respondent to Pacific. The case rests entirely upon the price differences above referred to, counsel in support of the complaint urging that the differences favoring Pacific fall into such a pattern as to justify a conclusion that they constitute compensation, allowances or discounts in lieu of brokerage. Such a conclusion is not supported by the evidence.

Respondent's prices to its customers, including Pacific, were on a purchase-by-purchase, cents-per-pound basis. No conscious or subconscious pattern of price-fixing appears to have entered into the determination of prices by respondent. It is established that Pacific bought at prices frequently lower than those paid by other customers, but it is not established that the fish which were sold at different prices were of the same grade and quality, or that market conditions were identical. However, it will be assumed that in some cases such were the facts, and the conclusions reached herein will be on that basis.

As shown by the recapitulation above, the overall variance of price differences was from 2.78% to 18.18%. On one day, July 26, 1954, where there were price differences they varied from 2.94% to 15.79%; on one type of fish there was no variance whatsoever; and on another type one other customer paid the same low price as Pacific. By no stretch of imagination or mathematical ingenuity can such differences be translated into brokerage or into payments or compensation in lieu of brokerage. An examination of the fourth column of the recapitulation clearly shows that no 5% pattern or any other pattern of price differences existed.

The impossibility of developing any pattern of price differentials is further demonstrated in computations submitted by opposing counsel, based on invoice information, introduced into the record by respondent, covering all sales in California to customers who purchased the same types of fish as were sold to Pacific on ninety-five

major sales days—usually Mondays and Fridays—during the twelve months of 1954. Counsel supporting the complaint concluded that Pacific's "apparent discounts" varied, by months, from 2.80% to 6.35%, with an average for the year of 4.42%. Respondent's counsel concluded that price variance by months was from 1.67% to 4.0%, with an average for the year of 2.92%.

There is no reason to attempt to resolve the inconsistencies between the computations of opposing counsel. Neither shows a pattern of price differences referable to brokerage, either at 5% or any other percent. Variances appear which are as wide as those shown in the recapitulation above, and demonstrate that the price differences between Pacific and respondent's other customers throughout the entire period covered by the evidence in this proceeding have been irregular in the extreme.

To establish the charges of the complaint some uniformity of price differences must be established at a level approximating the 5% brokerage which respondent pays brokers for effecting sales to customers other than Pacific. That is the standard specifically spelled out in Paragraph Four of the complaint. This is a reasonable standard that should be met in cases such as this wherein there is no direct proof and the charge of violating Section 2(c) of the Clayton Act, as amended, rests entirely upon inferences arising out of differences in purchase prices. The mere fact that there are price differences is not enough to justify a conclusion that they have been granted in lieu of brokerage, especially since there are numerous other factors, as hereinabove indicated, which may cause such price differences.

The Administrative Procedure Act, in Section 7(c), provides that no order shall be issued except upon the whole record and as "supported by and in accordance with the reliable, probative, and substantial evidence." "Substantial evidence" has been defined in *Carlay v. F.T.C.*, 153 F. 2d 493, 496, 42 F.T.C. 897, 901, as follows:

Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. It must be of such character as to afford a substantial basis of fact from which the fact in issue can be reasonably inferred. It excludes vague, uncertain or irrelevant matter. It implies a quality and character of proof which induces conviction and makes a lasting impression on reason. *Consolidated Edison Company v. National Labor Relations Board*, 305 U.S. 197; *National Labor Relations Board v. Columbian Enameling and Stamping Company*, 306 U.S. 292, 299; *National Labor Relations Board v. Thompson Products, Inc.*, 97 F. 2d 13, 15 (C.C.A. 6). The rule of substantial evidence is one of fundamental importance and marks the dividing line between law and arbitrary power; and the requirement that a finding must be supported by substantial evidence does not go so far as to justify orders without a basis in

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evidence having rational, probative force. *Consolidated Edison Company v. National Labor Relations Board, supra, National Labor Relations Board v. Thompson Products, supra.*

The evidence in this proceeding falls short of meeting these standards. These charges of the complaint are not established by the reliable, probative, substantial evidence of record, and the conclusion cannot be reached that respondent has violated Section 2(c) of the Clayton Act, as charged. Therefore,

It is ordered, That the complaint herein be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

By SECRET, Commissioner.

The initial decision filed by the hearing examiner held that the allegations of the complaint were not supported by the greater weight of the evidence, and its order provided for dismissal of the complaint. Counsel supporting the complaint has appealed.

The respondent's principal place of business is in Seattle, Washington. It purchases fresh fish in boat-load quantities. These are filleted and resold by it in commerce to retailers, restaurants and wholesalers. To six of such customers, including Pacific California Fish Company, of Los Angeles, California, the respondent sells directly rather than through brokers. The remainder buy their fish through sales agents or brokers to whom the respondent pays a brokerage fee or commission of 5%.

The complaint under which this proceeding was instituted alleges that the respondent charges the same prices to all its direct and indirect customers with the exception of one direct purchaser and that the prices accorded such favored buyer have been lower than those charged all other purchasers by amounts which are the same or substantially the same as the brokerage fees which the respondent pays to its brokers for effecting sales to its indirect customers. The complaint additionally alleges that the lower prices thus charged to the favored customer constitute the payment or granting by respondent of something of value as a brokerage, or discount in lieu thereof, to the other party to those transactions. Subsection (c) of Section 2 of the Clayton Act, as amended, prohibits the payment by a seller of commission or brokerage, or any allowance or discount in lieu thereof, to his buyer or an agent of the buyer. The complaint charges that the respondent's practices when selling to its favored buyer as noted above have been in violation of this subsection.

At the hearing below, two tabulations of invoices relating to the respondent's sales of fish to various purchasers, including Pacific

California Fish Company, the allegedly favored customer, were introduced into the record. Its purchases from the respondent constitute approximately 10% of the respondent's total volume of business. The tabulations offered by counsel supporting the complaint cover a portion of the sales made on 20 selected days during the months of July and December 1954 and February 1955. The other tabulations were presented by the respondent and related to purchases by all its California customers over a recent period of approximately one year. These exhibits attest that Pacific California Fish Company, hereinafter referred to as Pacific, frequently purchased fish at prices less than those paid for the same species by other customers on the same day. They further indicate, however, that the respondent's prices varied on many days between and among other purchasers.

It is clear that the respondent's sales have been made in each instance on a purchase-by-purchase and cents-per-pound basis. No evidence in the form of documentary exhibits or otherwise was received expressly identifying the prices charged to Pacific as prices reflecting allowances or discounts in lieu of brokerage. Decision as to their status in that regard, therefore, must rest entirely on the inferences to be drawn from comparisons of the prices paid by the respondent's customers and an evaluation of such differences as have existed in various instances between the prices paid by Pacific and other purchasers.

The hearing officer expressed the view that in the situations where Pacific's prices were lower than those of other customers, the price differences were irregular in the extreme. It was held in the initial decision that there was no pattern discernible in the amounts of those differences and that they could not be regarded as substantially commensurate with the 5% brokerage which the respondent pays to its brokers for effecting sales to indirect customers. The appeal challenges these conclusions as erroneous and calls attention to the fact that in the initial decision's recapitulation of sales listing 52 purchases by Pacific and 67 by other customers, Pacific's prices in one-third of those transactions were lower by amounts ranging between 4% and 6%. Appellant further states that another method of recapitulation shows price differentials in the same range as to approximately one-half of that company's purchases and argues that these matters evidence a forbidden pattern commensurate with brokerage.

The fact that, depending on the method of recapitulation adopted, approximately one-third or one-half of the instances of comparable purchases shown by certain of the exhibits indicates Pacific's prices

were approximately 4% to 6% below the prices paid by others does not, however, detract from the validity of the hearing examiner's conclusion that there is no discernible pattern in respondent's price differences nor do they, in the circumstances here, adequately support determinations by us that the prices accorded Pacific reflected allowances in lieu of brokerage. In situations where sales prices per pound were not uniform, the variance occurring most frequently among all customers represented 1¢. The majority of the varieties of fish which the respondent handles often were priced at around 20¢ per pound. Hence, price differences or changes of 1¢ per pound at those approximate market levels necessarily reflect differentials in the area of 4% to 6%.

In the transactions shown in the initial decision's recapitulation furthermore, the variances among purchasers ranged from 2.78% to 18.18%. The pattern which counsel supporting the complaint would identify becomes even less discernible when other relevant evidence is considered. On several sales days, for example, all of the respondent's customers, including Pacific, paid the same prices on their purchases and on more than one-fourth of the sales days out of 97 selling days to which certain tabulations relate, one or more transactions occurred in which other customers of the respondent purchased fish at prices below those being paid by Pacific for the same species of fish. We think that the contentions advanced by counsel in support of this aspect of his appeal are without merit.

The appeal also contends in effect that the prices paid by Pacific generally have been lower than those paid by all other customers of the respondent, most of whom buy through brokers, and that the respondent's prices to that customer must therefore be presumed, as a matter of law, to represent payment, allowances or discount in lieu of brokerage. According to one group of invoice tabulations, one or more of the respondent's customers paid prices either lower than or equally as low as those charged Pacific for the same species of fish on more than 85% of the sales days to which those tabulations relate. It appears too that there were eleven sales days in which no customer was charged a higher price by the respondent than that paid by Pacific and some of the prices paid by it on certain of those days were higher than those paid by other customers. In the light of these matters, the validity of the appeal's assumption as to all customers generally paying higher prices than Pacific obviously is open to grave doubt.

We believe too that the hearing examiner correctly regarded the issues presented here as primarily issues of fact to be resolved on the basis of the greater weight of the evidence, rather than by a

formula entailing presumptions. In the initial decision, reference is made to factors having marked impact on the prices of fish. It is apparent that either the arrival or absence of substantial quantities of fish in any of the West Coast primary markets may materially affect prices previously commanded for supplies on hand in other markets. Because so many factors normally influence the prices of this perishable commodity, its merchandising differs considerably from the sale of stable commodities.

There is unrefuted testimony also that it has been the respondent's practice to charge an additional amount per pound over its current prices to an undisclosed number of customers who customarily do not make prompt payment for their purchases. While the legal status of those arbitrarily higher or discriminatory prices under subsection (a) of Section 2 of the Act is not in issue in this proceeding, possibilities are not excluded that a significant number of sales made at prices higher than those paid by Pacific were attributable to the respondent's pricing practices with that category of customers. In view of the foregoing and other record matters and giving due regard to the circumstance that the pricing variations were not shown to be arithmetically commensurate with the pattern of brokerage specified under the charges of the complaint, we do not believe that the greater weight of the evidence supports determinations that the lower prices frequently charged by the respondent to Pacific have constituted payments or allowances or discounts in lieu of brokerage.

In rejecting the contention that price concessions by respondent to its direct purchaser were payments in lieu of brokerage because others had to buy from respondent through brokers who collected a fee of 5%, we do not exclude the possibility of inferring the payment of brokerage monies or sums in lieu thereof from surrounding circumstances, even though the parties to the sales do not openly employ the terminology of brokers' dealings. We only hold that on the facts of this record such an inference does not appear warranted.

We have considered the appeal's additional objections to the decision below, which are generally related in vein to the exceptions discussed above. We deem the initial decision to be free from substantial error and the appeal is denied accordingly. The initial decision, therefore, is adopted as the decision of the Commission.

FINAL ORDER

Counsel supporting the complaint having filed an appeal from the hearing examiner's initial decision in this proceeding and the matter having come on to be heard upon the record, including the briefs;

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and the Commission having rendered its decision denying said appeal and adopting the initial decision as the decision of the Commission:

It is ordered, That the complaint herein be, and it hereby is, dismissed.

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IN THE MATTER OF
WERNET DENTAL MANUFACTURING COMPANY, INC.,
ET AL.

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

Docket 6473. Complaint, Nov. 21, 1955—Decision, July 31, 1956

Consent order requiring distributors in Jersey City, N.J., to cease advertising falsely that their drug preparation "Sentrol" was a new and different kind of pain-relieving preparation, would relieve headaches and pains other analgesics could not relieve, was three times more effective than aspirin, and could not cause stomach upset, and that its ingredient salicylamide was the most amazing pain-relieving discovery in modern medicine.

Mr. Daniel J. Murphy for the Commission.

Breed, Abbott & Morgan, of New York City, and *Mr. Aaron M. Weinstein*, of Jersey City, N.J., for respondents.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The Federal Trade Commission issued its complaint November 21, 1955, against respondents Wernet Dental Manufacturing Company, Inc., a corporation existing under and by virtue of the laws of the State of Delaware, trading as Hudson Products, and Melvin A. Block, Leonard Block, and Alfred Roberts, individuals and as officers of the respondent corporation, charging them with unfair and deceptive acts and practices in commerce in the sale of a drug preparation designated "Sentrol," in violation of the Federal Trade Commission Act.

After the issuance of the said complaint and the filing of their answer thereto, respondents entered into an agreement for consent order with counsel in support of the complaint, disposing of all the issues in this proceeding, which agreement was duly approved by the Director of Litigation. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

By the terms of said agreement, the respondents admitted all the jurisdictional allegations of the complaint and agreed that the record herein may be taken as though findings of jurisdictional facts had been made in accordance with such allegations. By said agreement, the answer heretofore filed by respondents was withdrawn and the parties expressly waived a hearing before the Hearing Examiner or