

Decision

IN THE MATTER OF
FLORIDA CITRUS EXCHANGE

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

Docket 6255. Complaint, Oct. 25, 1954—Decision, Nov. 26, 1956

Order requiring a Florida cooperative corporation, acting as selling agent for its 45 member cooperative associations and their member growers or packers of citrus fruits, to cease paying brokerage fees on sales of citrus fruit made to buyers direct or through the buyer's wholly owned subsidiary, the instant case involving pool-car sales to buying groups.

Mr. Edward S. Ragsdale and Mr. Cecil G. Miles for the Commission.

Mr. Counts Johnson, of Tampa, Fla., for respondent.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE COMPLAINT

On October 25, 1954, the Federal Trade Commission issued its complaint in this proceeding, charging the above-named Respondent with having violated Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act (U.S.C., Title 15, Section 13) by paying or allowing brokerage fees or commission or discount in lieu thereof to various buyers of citrus fruit in commerce, who buy either for their own accounts, as brokers for other buyers, or through a wholly-owned subsidiary for their own accounts.

The Respondent is described in the complaint as a cooperative corporation organized under the laws of the State of Florida, with its principal office and place of business at Tampa, Florida. The complaint also alleges that Respondent acts as selling agent for its membership of about forty-five packers of citrus fruit, who are located at various places in the State of Florida. Respondent is also described as being a substantial factor in the distribution of citrus fruits, effecting annual sales of approximately \$25,000,000.

THE ANSWER

On November 19, 1954, Respondent submitted its answer admitting its corporate identity as a cooperative corporation, but asserting that its membership consists, not of forty-five packers of citrus fruit, as alleged, but of fruit-packing organizations, which, with their packer members, number in the aggregate approximately forty-five coopera-

tive associations and growers engaged in the packing and marketing of citrus fruit. Respondent further admits that it has been engaged in business as charged, except that it denies that it has been so engaged since September 1, 1954. Respondent further denies that in any of the transactions referred to in the complaint the broker involved represented anyone other than Respondent, or, to Respondent's knowledge, rendered to anyone other than Respondent a service for which Respondent paid the customary brokerage or commission, or that Respondent has engaged in any other violation of law. Respondent also specifically denies that it has ever, prior to September 1, 1954, caused any such fruit products, when sold, to be transported from its place of business in Tampa, Florida.

Respondent affirmatively states that prior to September 1, 1954, that portion of its business which the complaint herein purports to challenge "had to do with" pool-car or drugstore sales of citrus fruit, which is a wide-spread method of sale in the citrus fruit industry. Respondent explains that a pool-car sale of citrus fruit is simply a transaction wherein two or more relatively small buyers in a given market collectively buy from Respondent through Respondent's broker the contents of a car or truck of citrus fruit and take their agreed pro rata share thereof. Having effected such a pool-car sale, Respondent's broker notifies Respondent as to the various and varying grades, sizes, varieties and containers required in the car or truck to meet the various and varying needs and demands of the multiple buyers involved. When the order is filled by Respondent, the car is shipped to the broker, who, as Respondent's agent, attends to distribution of the contents among the buyers involved, and remits to Respondent the sales price for the fruit, less the customary brokerage; or, in the alternative, remits to Respondent the entire sales price for the fruit, and Respondent pays such broker the customary brokerage due him.

Respondent further avers that it is without knowledge as to whether any of its brokers, in connection with such pool-car sales, has ever rendered any service to any buyer or buyers of a pool-car of fruit from Respondent, for which such broker was entitled to and received from such buyer or buyers any brokerage, commission or other thing of value. Respondent denies that it has any right or duty to police or regulate any relationship or transaction between such broker and such buyer or buyers, so long as Respondent confines its transactions with brokers to the paying of brokerage, commission or other thing of value for a service actually rendered by such brokers to Respondent.

In conclusion, Respondent states that at no time and in no respect, prior to September 1, 1954, did it ever pay or allow to anyone brokerage, commission or other thing of value or discount in lieu thereof, except to a responsible and duly licensed broker for services actually rendered to Respondent in connection with the sale of its citrus fruit. Respondent further alleges that, such being the case, it is clearly within the exception contained in subsection (c) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, and therefore has not violated Section 2(c) of the Clayton Act as amended.

SUBSEQUENT PROCEDURE

Following the joining of issues by the complaint and answer thereto, a motion for a bill of particulars, presented by Respondent, was denied by the Hearing Examiner. Hearings were thereafter held in Tampa, Florida; Birmingham, Alabama; and Winston-Salem, North Carolina, at which evidence was presented in support of the complaint. A motion by Respondent to dismiss the complaint herein was denied, and hearings were held on behalf of Respondent in Tampa, Florida, and Washington, D.C. In due course proposed findings as to the facts and proposed conclusions were submitted by counsel for both parties.

IDENTITY AND BUSINESS OF THE RESPONDENT

1. Respondent Florida Citrus Exchange is a cooperative corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at Tampa, Florida. Respondent's members, together with their members, aggregate approximately forty-five cooperative associations, each of which is engaged in growing or packing citrus products. Respondent acts as selling agent for its members and their members, who are located in various cities and towns in the State of Florida.

Respondent is now engaged, and continuously for many years last past has been engaged in the business of selling citrus fruits, principally grapefruit, oranges and tangerines, produced in the State of Florida and packed by its various members and by their members.

2. Respondent's sales are now made and have been made since September 1, 1954, either in Respondent's name or in that of its wholly-owned subsidiary, Seald Sweet Sales, Incorporated, which corporation is operated from the same office and by the same officials who formerly operated exclusively as, and in the name of, Florida Citrus Exchange. The subsidiary's sales methods are the same as

those formerly used by Florida Citrus Exchange. Seald Sweet Sales, Incorporated, was created and functions for the purpose of capitalizing on Respondent's brand-name, Seald-Sweet.

Respondent is a substantial factor in the sale and distribution of citrus fruit, its sales approximating twenty-five million dollars annually.

3. Respondent, in the course and conduct of its business since January 1, 1951, has sold and distributed, and now sells and distributes its fruit products to buyers located in the several states of the United States. Said Respondent, however, since on or about September 1, 1954, has also sold and distributed its fruit products to such buyers in the name of its wholly-owned subsidiary Seald Sweet Sales, Incorporated.

Respondent, directly or indirectly, causes such fruit products, when sold, to be transported from the packing plants and places of business of its members and their members, located in various cities and towns in the State of Florida, to buyers located in various other states of the United States. There is and has been, at all times mentioned herein, a continuous course of trade in commerce in said fruit products between Respondent and the respective buyers thereof.

TRANSACTIONS WITH SPADA DISTRIBUTING COMPANY, PORTLAND, OREGON

4. During the 1951-52 citrus season, Respondent sold to Spada Distributing Company, Portland, Oregon, forty-three carloads of citrus fruit, and, during the season of 1952-53, it sold thirty-two carloads of such fruit. Mr. Fred S. Johnson, General Sales Manager of Seald Sweet Sales, Incorporated, the selling subsidiary of Respondent, hereinabove discussed, testified that these sales to Spada Distributing Company were sales to pool-car buyers. He testified, however, that he did not know when the fruit which was billed to Spada Distributing Company was delivered to the pool-car buyers, nor the price which such buyers may have paid for it. Furthermore, the fruit was invoiced to Spada Distributing Company, and Respondent drew drafts for the amount of such invoice on Spada. After these drafts were paid, Respondent paid Spada Distributing Company a brokerage fee of 9¢ for each box of fruit involved in the transaction.

Since Respondent actually delivered the fruit to Spada Distributing Company, billed that company for the fruit so delivered instead of invoicing the so-called pool-car buyers, and thereafter remitted a brokerage commission to Spada on such purchase, it is apparent that Respondent has paid a brokerage fee to Spada Distributing

Company on purchases for its own account. Witness Johnson professed no knowledge of any of the details of the subsequent disposition of the fruit by Spada in these so-called pool-car sales, and no interest in such facts. Such an attitude is natural and to be expected in a seller selling to a direct buyer for the buyer's own account, but is completely incompatible with the customary interest of a seller in the disposition of the product he sells to a buyer through a broker.

In this instance, there is no intermediary because only the seller, Respondent, and the buyer, Spada, appear. Respondent's interest in the ultimate disposition of the fruit sold to Spada is shown to have ended with the delivery of the fruit to Spada and receipt of payment therefor from Spada. No service could therefore have been rendered by Spada to Respondent, for the reason that Spada's disposition of the fruit after its purchase from Respondent was accomplished merely in the ordinary conduct of Spada's own business, and did not constitute service rendered to anyone except itself.

TRANSACTIONS WITH F. C. BLOXOM & COMPANY, SEATTLE, WASHINGTON

5. During the 1951-52 citrus season, Respondent sold, shipped and invoiced to F. C. Bloxom & Company, Seattle, Washington, eighty-six cars of citrus products, and during the 1952-53 citrus season, eighty-one cars. Respondent drew drafts on said buyer for the invoice price of the citrus fruit sold, and when such drafts had been paid, Respondent remitted to F. C. Bloxom & Company a brokerage fee of 7¢ to 9¢ per box thereon.

TRANSACTIONS WITH H. C. NEWMAN COMPANY, INC.

6. From the organization of H. C. Newman Company, Inc., of Winston-Salem, North Carolina, in 1951, until it was adjudged a bankrupt in August of 1953, it purchased substantial quantities of citrus fruits from Respondent. During the 1951-52 citrus season it purchased 100 cars of citrus products, and during the following season of 1952-53 it purchased fifty-six cars of such products. In addition to purchases which were shipped in carload lots by rail, approximately 50% of H. C. Newman's purchases were accepted for delivery in that company's own privately-owned trucks at different points of origin in Florida, from which such fruit was transported to Newman's warehouse in Winston-Salem, North Carolina.

The record shows for this buyer two distinct methods of purchasing citrus fruit. By the first method, A. C. Newman acted as a legitimate broker for a disclosed buyer whom Respondent billed

direct for the amount of the purchase and thereafter paid H. C. Newman Company a brokerage fee thereon. By the second method, H. C. Newman Company bought either for itself or for undisclosed pool-car buyers. By this latter method, H. C. Newman ordered citrus fruit from Respondent, accepted delivery thereof either by rail or by its own trucks to its warehouse, where the produce remained for periods of time varying from one day to three weeks, and was thereafter sold by Newman to various purchasers at varying prices. On all such shipments, Respondent billed Newman for the purchase price of the citrus fruit, and thereafter, upon receipt from Newman of payment therefor, paid Newman a brokerage fee thereon. Respondent did not know, and, from the testimony of its General Sales Manager, showed no interest in knowing the details of the disposition of the fruit, nor to whom it was sold by Newman after its delivery to that company by Respondent.

Fruit stored in the H. C. Newman Company warehouse was insured by that company in its own name. The buyers of this citrus fruit from Newman made payment therefor to H. C. Newman Company, Inc., and if Newman sustained a financial loss on the transaction, that fact was duly reflected in its income tax returns, and no claim therefor was made by Newman on Respondent. In many instances, however, Newman realized substantial profits on these transactions, over and above the brokerage paid it therefor by Respondent.

After H. C. Newman Company, Inc. went into bankruptcy in August, 1953, Respondent submitted to Newman's receiver in bankruptcy a claim of indebtedness in the sum of \$6,645.80 for citrus fruit sold by Respondent to Newman during 1953. Of this sum, Respondent was awarded by the receiver in bankruptcy the amount of \$1,096.56 from the assets of H. C. Newman Company, Inc.

From all the above facts, it is apparent that Respondent paid H. C. Newman Company, Inc. brokerage fees on purchases made by Newman for its own account.

TRANSACTIONS WITH NORTHERN PRODUCE EXCHANGE

7. In 1952 and 1953 Respondent sold citrus fruit to the Northern Produce Exchange, Rockford, Illinois. Such sales were made ostensibly through the agency of the Northern Brokerage Company, which was located at the same address as the Northern Produce Exchange. The orders for such purchases came from Mr. Krischel of the Northern Brokerage Company, and the checks in payment therefor were also signed by the same person for the Northern

Produce Exchange. Subsequently, however, to the above dates, the Northern Brokerage Company has notified the Respondent that in view of the common ownership existing between the Northern Produce Exchange and the Northern Brokerage Company, the Northern Brokerage Company had agreed to the issuance of an order to cease and desist by the Federal Trade Commission, and would no longer accept brokerage fees from the Respondent for sales of citrus fruit to the Northern Produce Exchange.

The above facts show that during 1952 and 1953 Respondent was paying brokerage fees to a firm that was in fact buying citrus fruit for its own account through a wholly-owned subsidiary rather than as an agent or broker for independent buyers.

TRANSACTIONS WITH ADAMS BROS. PRODUCE CO., BIRMINGHAM, ALABAMA

8. The Adams Bros. Produce Co., Birmingham, Alabama, is a partnership engaged in the sale and distribution of fresh fruits and vegetables throughout the State of Alabama, and to some extent in Georgia and Tennessee, and has been so engaged for many years. The total annual volume of sales by this firm for the past several years has been in excess of \$4,000,000. This partnership is licensed by the City of Birmingham as a wholesaler of fruit and vegetables, and has been so licensed annually for many years. Its name also appears in the classified telephone directory of Birmingham as a wholesaler of fruit and vegetables. This partnership further maintains space in a warehouse in Birmingham where it stores a substantial amount of the produce it purchases until a market is found and the merchandise is sold. Among the commodities so stored are citrus fruits purchased from Respondent. County taxes are paid on its inventory by Adams Bros. Produce Co., where such inventory is listed as that company's own property. When merchandise is received in a damaged condition and it is believed to be the fault of the carrier, Adams Bros. Produce Co. has, in the past, filed claims against the carrier in its own name and for its own account to recover for such damage.

These facts clearly demonstrate that Adams Bros. Produce Co., for many years, has been and is now a wholesaler buying for its own account and reselling at a profit the merchandise thus bought.

The evidence shows that Adams Bros. Produce Co. purchases annually from Respondent from \$100,000 to \$150,000 worth of citrus fruit. During the 1951-52 citrus season, it purchased 217 cars of citrus fruit from Respondent, and during the 1952-53 season, 152 cars. On all such purchases Adams Bros. Produce Co. was granted

by Respondent a brokerage fee in the form of a discount of 7¢ per box of citrus fruit, which Respondent permitted Adams Bros. Produce Co. to deduct from the purchase price of the fruit when making remittance therefor to Respondent. The citrus fruit so purchased by Adams Bros. Produce Co. was thereafter resold by that firm on its own terms and at its own prices, which varied with various customers of Adams Bros. Produce Co. Such customers were invoiced by Adams Bros. Produce Company in its own name, and never by Respondent. For example, the record contains freight bills and journal sheets whereon are recorded transactions wherein, in one instance, Adams Bros. realized a profit of \$155.04, including brokerage in the amount of \$24.15; in another instance, Adams Bros.' profit of \$153.40 included brokerage of \$24.50; and in a third instance, Adams Bros. profited to the extent of \$210.12, of which \$27.30 was brokerage. In each instance the brokerage was paid by Respondent.

RESPONDENT'S DEFENSE RELATING TO POOL-CAR SALES

9. As hereinabove shown, Respondent, as an affirmative defense, claims, in its answer, on the one hand, to have sold citrus fruit to pool-car buyers through its broker, and, on the other hand, avers that such fruit is ordered by its broker, delivered to its broker, paid for by its broker, and that the broker either deducts from the purchase price of such fruit a discount in lieu of brokerage, or that Respondent, after receiving payment for the fruit from its broker, remits to the broker a brokerage fee. The claim that Respondent sells to pool-car buyers is contradicted by Respondent's description of the elements, not of a sale to pool-car buyers, but of an outright sale by Respondent to the person or organization which Respondent calls its "broker."

In addition, Respondent claims that the persons or organizations referred to by it as its "brokers" are its agents; but, in contradiction thereof, Respondent disclaims any knowledge of or right or duty to regulate any relationship or transaction that might take place between such "agents" and the pool-car buyers of Respondent's citrus fruits. Respondent, in its contentions, ignores the rule of law that a principal does have a right and a duty to regulate the transactions conducted on its behalf by its agent, and that a principal is presumed to have knowledge of such transactions. Obviously, Respondent's contentions as to pool-car sales and the functions of its "brokers" are contradictory within themselves, and therefore devoid of merit as a defense.

CONCLUSIONS

As hereinabove set forth, the record herein establishes, by reliable, probative and substantial evidence, many instances of transactions wherein Respondent, while engaged in commerce subsequent to January 1, 1951, has, directly or indirectly, granted and allowed commissions or brokerage fees, or other compensation or discounts in lieu thereof, to buyers who were in fact purchasers of Respondent's citrus fruit for their own accounts, for resale at a profit. Each such transaction constitutes a violation by Respondent of Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act. Accordingly,

It is ordered, That the Respondent, Florida Citrus Exchange, a corporation, and its officers, directors, agents or employees, directly or indirectly, or through any corporate or other device, in connection with the sale of citrus fruit or other fruit products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Paying, granting, or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of its citrus fruit, or other fruit products to such buyer for his own account.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

The complaint charges a violation of Section 2(c) of the amended Clayton Act in the payment or allowance of brokerage fees, or commissions or discounts in lieu thereof, to parties who were, in fact, purchasers of respondent's citrus fruit for their own accounts, as brokers for other buyers, or through a wholly-owned subsidiary for their own accounts. From a decision and order against it, respondent has appealed.

Respondent is a cooperative corporation, operating under the laws of Florida and with its principal place of business at Tampa, Florida. Its members are cooperative associations which, together with their members, are engaged in growing or packing citrus products. Respondent sells the products of these members either in its own name or, since September 1, 1954, in the name of its wholly-owned subsidiary, Seald Sweet Sales, Inc. Sales are substantial, approximately \$25 million annually.

The evidence has to do largely with transactions of respondent with five different parties in which the facts may be summarized as follows:

Spada Distributing Company
Portland, Oregon

1. The amount of citrus fruit involved during the 1951-1952 season was 43 carloads, and during the 1952-1953 season, 32 carloads.
2. In all cases, the shipments were billed and invoiced to Spada and respondent drew drafts for the amounts of invoices on Spada, which drafts were paid by it.
3. After the drafts were paid, respondent paid Spada a brokerage fee of 9¢ per box of fruit.
4. Respondent claims (which claim is not disputed) that all the fruit in question went to "pool car buyers." Respondent did not know who the pool car buyers were, when deliveries were made to them by Spada or the prices the latter received.

F. C. Bloxom and Company
Seattle, Washington

The transactions here were substantially the same, except that the amount of fruit was 86 cars during the 1951-1952 citrus season and 81 cars during the 1952-1953 season, and that the amount of brokerage was from 7¢ to 9¢ per box.

H. C. Newman Company, Inc.
Winston-Salem, North Carolina

1. 100 cases of produce were involved in the season of 1951-1952, and 56 in 1952-1953.
2. About 50% of the fruit was transported in Newman's trucks from different points of origin in Florida to Newman's warehouse in Winston-Salem, N.C.
3. In some instances, Newman acted as a broker for disclosed purchasers whom respondent billed direct. A brokerage fee was thereafter paid to Newman.
4. Sometimes, Newman bought for himself or for undisclosed pool car buyers. Such purchases were sometimes stored in Newman's warehouse for periods varying from one day to several weeks and were sold to varying purchasers at varying prices. On all such shipments, Newman was billed for the purchase price and upon receipt of payment, respondent paid Newman a brokerage fee. Buyers of the fruit made payments to Newman and it reflected its gains or losses in its income tax returns. It also insured fruit being held in the warehouse in its own name.

5. In 1953, Newman was adjudged bankrupt and respondent filed a claim with the receiver for \$6,645.80 based on the balance due for produce delivered, and received a proportional payment thereon.

Northern Produce Exchange
Rockford, Illinois

Respondent sold fruit to Northern Produce Exchange ostensibly through the agency of the Northern Brokerage Company located at the same address. The hearing examiner found that, "During 1952 and 1953, respondent was paying brokerage fees to a firm that was in fact buying citrus fruit for its own account through a wholly-owned subsidiary rather than as an agent or broker for independent buyers."

Adams Brothers Produce Co.
Birmingham, Alabama

The above-named firm is engaged in the sale and distribution of fruits and vegetables in Alabama, Georgia and Tennessee. It is licensed by the city of Birmingham as a wholesaler of fruits and vegetables and is so listed in the telephone directory. It is also in the brokerage business. It maintains storage space in a Birmingham warehouse for the produce it purchases and sells. It lists such produce (including at times some of respondent's fruit) as its own property and pays local taxes thereon. When occasion requires it, it files claim for damages against carriers in its own name.

The firm's transactions with respondent are set out in the initial decision as follows:

"The evidence shows that Adams Bros. Produce Co. purchases annually from Respondent from \$100,000 to \$150,000 worth of citrus fruit. During the 1951-52 citrus season, it purchased 217 cars of citrus fruit from Respondent, and during the 1952-53 season, 152 cars. On all such purchases Adams Bros. Produce Co. was granted by Respondent a brokerage fee in the form of a discount of 7¢ per box of citrus fruit, which Respondent permitted Adams Bros. Produce Co. to deduct from the purchase price of the fruit when making remittance therefor to Respondent. The citrus fruit so purchased by Adams Bros. Produce Co. was thereafter resold by that firm on its own terms and at its own prices, which varied with various customers of Adams Bros. Produce Co. Such customers were invoiced by Adams Bros. Produce Co. in its own name and never by Respondent. For example, the record contains freight bills and journal sheets whereon are recorded transactions wherein, in one instance, Adams Bros. realized a profit of \$155.04, including

brokerage in the amount of \$24.15; in another instance, Adams Bros.' profit of \$153.40 included brokerage of \$24.50; and in a third instance, Adams Bros. profited to the extent of \$210.12, of which \$27.30 was brokerage. In each instance the brokerage was paid by Respondent."

There is evidence in the record as to the various methods employed by respondent in the sale of its products. At times it employs a broker and pays him a fee for finding a buyer to whom respondent sells, and from whom it collects in the usual way. It has sometimes sold in certain cities at public auction under the direction of its salaried employees. Again, it operates through pool car shipments which is the method claimed to have been employed in the five illustrations heretofore given.

Under the pool car method, a car or truck of fruit is shipped to a certain person and the shipment is charged to him. He, in turn, distributes the shipment in smaller lots to one or more buyers. This method has some distinct advantages and has been used extensively by respondent and others in the distribution of citrus fruit. It permits the economical use of shipping facilities, particularly trucks, and enables buyers to obtain fresh fruit regularly in small quantities rather than buying and keeping on hand larger shipments, such as a truck load or a car load.

Section 2(c) of the amended Clayton Act provides 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."

Its purpose, as pointed out in the Congressional Committee reports and in court decisions, is to prevent the giving of discriminatory prices to favored buyers under the guise of a brokerage fee. (See, for example, *Quality Bakers of America v. F.T.C.* (1940), 114 F. 2d 393.)

The hearing examiner in effect held that the five parties to whom respondent paid brokerage fees were in fact buying on their own account for the purpose of resale in their own way with the hope of making a profit.

This finding is supported by proof of what the parties did in individual transactions. Produce was invoiced to the alleged brokers

and sight drafts sometimes drawn on them for payment. The fruit was treated by these consignees as their own property, sometimes stored in their own warehouses, insured at their own expense, included in their inventories for tax purposes, and sold to persons whose names were unknown to respondent, under conditions of sale also unknown. These consignees made sales at varying prices and treated resulting profits and losses as their own.

The facts are similar to those in *Southgate Brokerage Company, Inc. v. F.T.C.* (1945), 150 F. 2d 607, in which the court upheld an order of the Commission issued under Section 2(c) of the amended Clayton Act.

Respondent argues that it did not know what the alleged "broker" did with the produce after he received it and particularly did not know that the broker was "upcharging" the person to whom he made delivery. No claim is made here that legally paid brokerage fees were secretly passed on by the broker to the buyer. The complaint is to the effect that the persons to whom the brokerage fees were paid were actually buying on their own account. Respondent certainly did know the facts of its own transactions with its own consignees. The fact that its knowledge and interest did not go beyond that is strong proof that the transaction was a sale and not a brokerage deal.

In its brief, respondent cites as error certain acts and conclusions of the hearing examiner, some of which are claimed to be arbitrary and capricious. A careful examination of the record discloses no arbitrary and capricious acts and no error preventing respondent from having a fair hearing. The motion by respondent for a bill of particulars was properly overruled. The complaint set out clearly the nature of the charges which respondent must answer. It named the cities in which alleged illegal transactions took place. There is no showing that respondent was prejudiced by the hearing examiner's ruling either in preparing its answer or in the actual trial.

The introduction of the testimony of the witnesses Freeman and Peer who testified as experts concerning the general method of operation of brokers was in accordance with established practices of the Commission. (See *In the Matter of Whitney and Company*, Docket 5279.) The courts have held that a witness having special knowledge and experience may testify as to the general usage or practices in the particular field of business. (See 32 C.J.S. *Evidence*, Sec. 526 et seq., and *Wigmore on Evidence*, Vol. 7, Sec. 1954, et seq.)

Respondent introduced evidence to the effect that competitors had in some instances followed practices similar to those charged in the complaint. Court decisions have pointed out that Section 2(c)

clearly prohibits payment of brokerage fees to a person buying for his own account. When the evidence establishes that practice against a respondent, it is no defense that others are doing the same thing.

Respondent also contends that by the adoption of the Perishable Agricultural Commodities Act of 1930, Congress "has vested in the Secretary of Agriculture of the United States the sole and exclusive authority and responsibility to regulate and police the activities of brokers handling perishable commodities such as fresh citrus fruit * * *". This Act (U.S.C. 1946 ed., Title 7, Chapt. 20A) provides regulation of perishable agricultural commodities "received, bought, sold, shipped or handled in interstate or foreign commerce" and includes a provision for licensing of "commission merchants, dealers or brokers." Section 499o provides:

"This chapter shall not abrogate nor nullify any other statute, whether State or Federal, dealing with the same subjects of this chapter; but it is intended that all such statutes shall remain in full force and effect except insofar only as they are inconsistent herewith or repugnant hereto."

The provisions of the Perishable Agricultural Commodities Act are not inconsistent with nor repugnant to those of the original Clayton Act. In the amendment of the Clayton Act by the Robinson-Patman Act, no exception of perishable agricultural commodities from the brokerage provisions was made.

The appeal of respondent is denied. The findings, conclusions and order of the hearing examiner are adopted as the findings, conclusions and order of the Commission, and it is directed that an order issue accordingly.

Commissioner Tait did not participate in the decision in this matter.

FINAL ORDER

This matter having been heard upon the appeal of respondent, Florida Citrus Exchange, from the hearing examiner's initial decision, and briefs and oral argument of counsel in support thereof and in opposition thereto; and

The Commission having rendered its decision denying the appeal and adopting the findings, conclusions, and order contained in the initial decision:

It is ordered, That respondent, Florida Citrus Exchange, shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order contained in the initial decision.

Commissioner Tait not participating.

Decision

IN THE MATTER OF

JOHN D. MARTIN ET AL. DOING BUSINESS AS
INVISIBLE REWEAVING INSTITUTEORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 6541. Complaint, Apr. 4, 1956—Decision, Nov. 30, 1956*

Consent order requiring sellers in La Mesa, Calif., of a correspondence course purportedly designed to prepare students for work as commercial reweavers, including French reweaving and overweaving or patch reweaving, to cease misrepresenting in advertising the ease of learning reweaving by anyone, the financial returns and security assured those completing the course, and opportunities and demand for their services, among other things; representing falsely in advertisements in the "Help Wanted" classified sections of newspapers—inserted to obtain leads for the sale of their courses—that they were offering employment at specific hourly wages; and using the term "Field Registrars" for their salesmen and the word "Institute" in their trade name.

Mr. George E. Steinmetz for the Commission.

Mr. John D. Martin and *Mr. Otto A. Silberman*, *pro se*.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on April 4, 1956, charging them with having violated the provisions of the Federal Trade Commission Act through the making of false, misleading and exaggerated statements and representations with respect to a correspondence course of study and instruction, purportedly designed to prepare students thereof for work as commercial reweavers. After the issuance of said complaint and the filing of their answer thereto, the respondents entered into an agreement with counsel supporting the complaint, dated August 24, 1956, providing for the entry of a consent order disposing of all the issues in this proceeding, which agreement was duly approved by the Director and the Assistant Director of the Bureau of Litigation, and transmitted to the undersigned October 5, 1956.

By the terms of said agreement, the respondents admitted all the jurisdictional facts alleged in the complaint and each of them agreed that the record herein may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Respondents in the agreement expressly waived any further procedural steps before the hearing examiner and the Commission;