

Decision

IN THE MATTER OF
HENRY BROCH AND OSCAR ADLER TRADING AS HENRY
BROCH & CO.

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

Docket 6484. Complaint, Jan. 11, 1956—Decision, Dec. 10, 1957

Order requiring Chicago brokers to cease violating section 2(c) of the Clayton Act by granting a buyer a percentage of their brokerage fee in connection with the purchase of apple concentrate; specifically accepting a 3-percent commission instead of the customary brokerage fee of 5 percent whereupon the seller lowered its established price to the buyer, recouping part of the reduction out of what respondent brokers would have earned at the normal brokerage fee.

Mr. Edward S. Raysdale supporting the complaint.

Mr. Harold Orlinsky and *Mr. Fred Herzog*, of Chicago, Ill., for respondents.

INITIAL DECISION OF JOHN LEWIS, HEARING EXAMINER

STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above-named respondents on January 11, 1956, charging them with having violated section 2(c) of the Clayton Act, as amended. Copies of said complaint and notice of hearing were duly served upon respondents. Said complaint charges, in substance, that respondents granted and allowed a percentage of their commission or brokerage fee to a buyer of food products, in connection with such buyer's purchase of such food products in commerce. Respondents appeared by counsel and filed answer to the complaint in which they denied, in substance, having engaged in the illegal conduct charged.

Hearings on the charges were held before the undersigned hearing examiner, theretofore duly designated to hear this proceeding, on various dates between May 8, 1956, and October 3, 1956, at Chicago, Ill., and Pittsburgh, Pa. The oral deposition of a witness for respondents was also taken on August 6, 1956, at Kentville, Nova Scotia, before a notary public, the undersigned being present at the taking of said deposition, by agreement of counsel.¹

¹ It was agreed by counsel that the undersigned could be present during the taking of said deposition, with the right to address appropriate questions to the witness, to observe his demeanor in testifying and to take such observation into account in determining the credibility of the witness. The deposition was made a part of the record as an exhibit on behalf of respondents, in lieu of being read into the record.

Findings

54 F.T.C.

At the hearings held herein, testimony and other evidence were offered in support of, and in opposition to, the allegations of the complaint, the same being duly recorded and filed in the office of the Commission. All parties were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard and to examine and cross-examine witnesses. At the close of the evidence in support of the complaint, counsel for respondents moved, on the record, to dismiss the complaint herein on the ground that upon the facts and the law the Commission had failed to show the right to relief. The undersigned denied said motion, on the record, without prejudice to its renewal at the close of the entire case. Said motion was renewed at the close of the case, and is disposed of in accordance with the findings, conclusions, and order hereafter made.

At the close of all the evidence, and pursuant to leave granted by the undersigned, proposed findings of fact, conclusions of law and order, together with supporting memoranda, were filed by counsel supporting the complaint, and counsel for respondents on November 15 and November 16, 1956, respectively. No request for formal oral argument was made by any of the parties, except for brief oral argument made on the record by counsel for respondents. Proposed findings which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as immaterial.

Upon consideration of the entire record herein and from his observation of the witnesses, including the witness whose deposition was taken at Kentville, Nova Scotia, the hearing examiner makes the following:

FINDINGS OF FACT

I. The Business of Respondents

Respondents Henry Broch and Oscar Adler are copartners trading as Henry Broch & Co., with their principal office and place of business in the Hyde Park National Bank Building, located at 1525 53d Street, Chicago, Ill.

Said respondents are now engaged and have engaged, since August 1942, in business as brokers or sales representatives of seller principals, negotiating the sale of frozen foods, frozen fruits, fruit juices, and other food products for and on account of approximately 25 or more sellers as principals. Respondents are compensated for making sales of their respective seller principals' food products by being paid a commission or brokerage fee by the respective seller principals. Such commissions or brokerage fees are fixed by agreement with their re-

spective seller principals, and usually range from 2 percent to 5 percent of the net purchase price of the food product sold. Said respondents sell such food products to buyers, located in various cities and towns in many of the States of the United States, who are chiefly engaged in business as food manufacturers or distributors of food products. Respondents' sales of such food products are substantial, amounting to approximately \$4 to \$5 million annually.²

II. The Interstate Commerce

In the course and conduct of their business, said respondents are now, and since August of 1942 have been, engaged in commerce, as "commerce" is defined in the Clayton Act, as amended by the Robinson-Patman Act. Said respondents, during the period stated, as brokers or sales representatives for their sellers as principals, have sold food products to buyers located in the various States of the United States and caused said food products so purchased to be transported from the respective sellers' places of business to destinations in other States where such buyers were located. Thus there is, and has been at all times mentioned herein, a continuous course of trade in commerce in said food products across State lines.

III. The Alleged Unlawful Practices

A. *The Issues*

1. The charges in this proceeding arise out of the sale of 500 steel drums of apple concentrate on October 27, 1954, by respondents, as brokers for Canada Foods Ltd. (herein referred to as Canada Foods) of Kentville, Nova Scotia, Canada, processors of apple concentrate and similar products, to The J. M. Smucker Co. (herein referred to as Smucker) of Orrville, Ohio, manufacturers of apple butter and preserves.

2. The complaint charges that the normal and customary commission or brokerage fee for sales on behalf of Canada Foods was 5 percent, but that instead of receiving such fee, respondents requested their seller principal to lower its established price of the apple concentrate, and to recoup part of such price reduction out of the brokerage fee which respondents would have earned at their normal brokerage fee of 5 percent. It is alleged that by giving up part of their commission

² Respondents have denied the allegation of the complaint that they are a substantial factor in the sale of food products. The undersigned finds it unnecessary to resolve this question since the allegation made in the complaint is immaterial in this respect. It is sufficient, for purposes of section 2(c), if the sales involved are of more than de minimis quantities and if respondents have engaged in the conduct charged. There is no requirement, as in the case of section 2(a), of a showing of probable substantial injury to competition or of tendency to monopoly. *Oliver Bros. v. FTC*, 102 F. 2d 763, 767 (C.A. 4, 1939).

so as to permit a lowering of the price to the buyer, respondents were granting or allowing a percentage of their commission or brokerage fee, directly or indirectly, to the buyer, thereby violating section 2(c) of the Clayton Act, as amended.

3. Respondents have admitted, in their answer, certain of the basic facts relied upon by counsel supporting the complaint. They admit that the seller principal, Canada Foods, first agreed to pay them a brokerage fee of 5 percent, but allege that this fee was based on contemplated sales of much smaller quantities than the sale in question. They admit also, that the seller lowered his price from the original quotation of \$1.30 per gallon to \$1.25 per gallon, and that they accepted a brokerage fee of 3 percent instead of 5 percent. They allege, however, that the reduction in the price was the result of competitive conditions and that the reduction in brokerage resulted from the unilateral action of the principal and not from any suggestion on their part. Respondents assert, in this connection, that there is no such thing as a customary or normal brokerage fee, but that the amounts vary from time to time, even for the same seller and with respect to the same product, depending on quantity and market conditions.

4. The basic question presented is whether the reduction of respondents' commission on the sale in question was part of an arrangement to grant or allow the buyer part of respondents' normal commission, or whether it was accomplished in accordance with a flexible brokerage arrangement between respondents and their principal in which brokerage varied with quantity and market conditions. Respondents have also raised a number of legal questions concerning the application of section 2(c) to them and its constitutionality as applied to the facts here.

B. Chronology of Events

1. Respondents were first appointed to represent Canada Foods in the spring of 1954, following an exchange of correspondence between them in the latter part of April and early part of May. The rate of commission agreed upon was 5 percent. There were apparently no extensive sales made prior to October 1954, since Canada Foods only had a few hundred barrels of concentrate on hand, these being the unsold balance of the pack which had been processed in the fall of 1953. In any event, no sales were made to Smucker from this pack.

2. Canada Foods began to process the 1954 pack of apples during the latter part of September. When the season began, it was apparently represented in the United States by only two brokers, respondents and the Poole Co. of Boston. However, during the latter part of

September it also appointed as broker, Tenser & Phipps of Pittsburgh, Pa., who had previously represented its predecessor company. During October it appointed Otto W. Cuyler of Webster, N.Y., to also represent it. The brokers, other than respondents, were appointed with the understanding that their rate of commission would be 4 percent. Respondents received a higher rate of commission because they stocked merchandise in advance of sales.

3. The record discloses that the first attempt to sell Canada Foods' apple concentrate to Smucker was made, not by respondents, but by A. J. Phipps of Tenser & Phipps, which had been dealing with Smucker for many years on behalf of other sellers. Phipp's efforts to sell the concentrate to Smucker began several weeks prior to respondents' first contact, and are herein referred to because of the light which they shed on the transaction at issue.

4. By letter dated October 1, 1954, Phipps advised Smucker that Canada Foods was processing apple concentrate on a large scale and that they expected to receive the price within the next 5 or 6 days. Smucker was also advised that samples of the new pack were on the way and would be forwarded to Smucker as soon as they arrived.³

5. Canada Foods advised Tenser & Phipps by Western Union night letter, dated October 11, 1954, that the price of the new pack of apple concentrate would be \$1.30 per gallon, in 50-gallon steel drums. This price was confirmed in a letter from Canada Foods, dated October 13, 1954. The same price was also quoted to respondents by Canada Foods in a letter which was likewise dated October 13.

6. On October 14, apparently following an earlier telephone conversation with H. W. Kieffer, purchasing agent for Smucker, Phipps advised Smucker by letter that the price of Nova Scotia apple concentrate would be \$1.30 per gallon, delivered in steel drums. A copy of Canada Foods' price list was also sent to Smucker, as was a sample of the apple concentrate on October 15.

7. Following the receipt of price information and sample, Smucker's purchasing agent, Kieffer, discussed the matter by telephone with Phipps. From the correspondence which is in evidence, it would appear that this conversation took place sometime between October 15 and 18. Kieffer endeavored to obtain a more favorable price, indicating that he was interested in buying approximately 500-barrels of the concentrate. Phipps informed Kieffer that he would communicate with his principal to see what could be done about getting a better price.

³ The advice from Phipps to Smucker was in accordance with a letter from Canada Foods, dated September 29, 1954, advising Phipps that the price for the new season had not yet been settled but would be on hand in about 5 or 6 days, and that samples of the concentrate were being forwarded under separate cover.

8. Phipps talked to L. Koldinsky, manager of Canada Foods, about Kieffer's proposal by telephone on or about October 18, and discussed the matter further in person when Koldinsky came to Pittsburgh on October 19, 1954, on a business trip.⁴ Koldinsky informed Phipps that \$1.30 was his best price and that if not for the Canadian Government subsidy on apples, he would not even be able to sell at that price.

9. On October 19 Phipps telephoned Kieffer and advised him of his conversation with Koldinsky. This advice was confirmed by letter from Phipps to Smucker, dated October 19, stating that Koldinsky had informed him "there positively will be no lower price on apple concentrate" and that the "only reason for making the price of \$1.30 per gallon is the fact that it is a Government support proposition." Phipps urged Kieffer to place his order. Another letter from Phipps to Kieffer on October 20 advised Kieffer of the visit from Koldinsky and the latter's advice that when Canada Foods finished processing the Government subsidized apples "the price [of \$1.30] will no longer be available."

10. In an apparent effort to maintain the status quo while Kieffer made up his mind, Phipps wrote to Canada Foods on October 20, requesting a 10-day option for Smucker on 500 to 700 barrels of concentrate. Koldinsky replied by letter dated October 25 in which, after expressing his pleasure at meeting Phipps during his recent visit, he repeated that the price was still \$1.30 per gallon and concluded:

Further to your letter of October 20, I am sorry to advise you that I am unable to give you an option for 10 days for Smucker, covering 500 to 700 barrels. As I already informed you, the situation with regards to concentrate does not look to [sic] bright, and prices are liable to rise.

11. On or about October 26, while Phipps was in Orrville at the Smucker plant, Kieffer offered to purchase 500 gallons of concentrate at \$1.25 per gallon. Prior to that time Kieffer had endeavored to obtain a better price than \$1.30, but had not definitely indicated at what price he would be willing to buy. At the October 26 meeting he advised Phipps that he had another offer for apple concentrate at \$1.25 per gallon.⁵ Phipps thereupon wired Canada Foods on October 26 as follows:

⁴ Koldinsky corroborated Phipps' testimony that he had visited the latter on a business trip to the United States in the fall of 1954. A letter which Phipps wrote to Smucker on October 20, fixes the date of this meeting as October 19.

⁵ The record does not clearly establish who, if anyone, had made the offer of \$1.25 per gallon. Kieffer's testimony indicates that he had offerings of European concentrate at that price, but that it was of an inferior grade. As will appear, Kieffer had also talked to respondent Henry Broch at or about the same time and it may be that he had received the impression from Broch that he could buy the concentrate at \$1.25 per gallon.

SMUCKER ORVILLE OFFER \$1.25 PER GALLON FOR 500 DRUMS 36 BAUME CONCENTRATE LIKE SAMPLES SUBMITTED HAS BEEN OFFERED THIS PRICE SHIPMENT EARLY JANUARY

12. The following day, October 27, Koldinsky telephoned Phipps and advised him that Canada Foods could not sell the concentrate for less than \$1.30 per gallon, again indicating that it was only because of the Government subsidy that they could sell at that price. After some discussion, Koldinsky stated that the only way the price could be less than \$1.30 would be if the brokerage was cut. Phipps gave no indication of a willingness to accept a cut in brokerage, and the conversation was concluded. Phipps then telephoned Kieffer to advise him of his inability to obtain a lower price, and sent him a letter in confirmation of their conversation as follows:

As per my telephone conversation with you today, Mr. Koldinsky called from Kentville. He merely said that the price was a Government price and there was nothing that could be done about it.

He has a base price, plus freight to Eastern Seaboard, plus brokerage and that is it.

We could confirm the order at the price of \$1.25, but we are very much afraid that we would be right in the way of the Robinson-Patman Act and we might find our names in print.

It would be a feather in somebody's cap to decorate us with the violation and further, we do not believe that you are the kind of folks that would want to go along with a deal of this kind knowingly.

Frankly, we do not know how to handle the situation. We do hate to lose the business, but there is nothing that we can put together that will come up with the right answer and leave us with clean slates, all of which we regret exceedingly.⁶

13. Within a day or two prior to October 27, respondent Henry Broch also communicated with Kieffer of the Smucker organization

⁶ The above findings with respect to the conversation between Phipps and Koldinsky are based on Phipps' testimony. Phipps impressed the undersigned generally as being worthy of belief, and his testimony in many important respects was corroborated by letters written contemporaneously with the events at issue, while the details were still fresh in his mind. Koldinsky's version of this conversation was that he refused Phipps' offer because he had already made a deal with Henry Broch 3 or 4 days prior thereto and because Phipps' territory was limited to the State of Pennsylvania. He also denied suggesting that the only way the price could be reduced would be if Phipps took a lower commission. The undersigned cannot credit Koldinsky's version of the conversation. He impressed the undersigned as being confused concerning many of the facts about which he testified, having no correspondence or memoranda with him to refresh his recollection, and appeared to be engaging in some ex post facto rationalizing in order to justify his position. There is nothing in the record to substantiate his claim that Tenser & Phipps were restricted to Pennsylvania in their sales. His letter of September 29, designating the latter as broker, contains no such limitation. The correspondence and reliable testimony in the record indicates that Koldinsky was aware Phipps was negotiating with Smucker at least as early as October 19 when Koldinsky was in Pittsburgh, and yet he did not suggest to Phipps that he was acting outside of his assigned territory. His letter of October 25 to Phipps, turning down the Smucker proposal because "prices are liable to rise," hardly suggests that he had already made a deal to sell through Broch at \$1.25 per gallon. The fact that Kieffer on October 26 made Phipps a definite proposal for 500 drums at \$1.25 indicates that Smucker had not yet closed with Broch. The reference in the October 27 letter from Phipps to Smucker that Phipps could not confirm the order at \$1.25, without running afoul of the Robinson-Patman Act, tends to confirm Phipps' testimony that he had received some suggestion from Koldinsky with respect to reducing his commission as a condition for a reduction in price.

Findings

54 F.T.C.

in an effort to sell apple concentrate on behalf of Canada Foods. Kieffer advised Broch that he already had an offer of \$1.30 per gallon on Canada Foods' concentrate, but indicated he might be interested if he could get a better price. Broch asked Kieffer what quantity he had in mind and Kieffer told him it would be about 500 drums. Broch stated he would contact his principal and see what could be done.

14. On or about October 26, which was either the same day or the day following that on which he talked to Kieffer, Broch telephoned Koldinsky of Canada Foods and told him he could sell approximately 500 drums of apple concentrate to Smucker if he could get a price of \$1.25 per gallon. Broch indicated that Smucker was able to buy French concentrate in the United States at \$1.25 per gallon. Koldinsky told Broch he would take the proposition under advisement and call him back.⁷

15. The following day, October 27, Koldinsky telephoned Broch and informed him that he would be willing to make the sale at \$1.25 per gallon, provided that Broch would agree to reduce his commission from 5 percent to 3 percent. From the entire context of events it may be inferred that this call followed Koldinsky's telephone conversation the same day with Phipps, in which the latter declined to accept a cut in brokerage as a condition for a lower price. Broch agreed to Koldinsky's proposal and then telephoned Kieffer to advise him that his principal had agreed to sell at \$1.25 per gallon, due to the large size of the order. A sales contract was then prepared, dated October 27, 1954, for 500 steel drums of apple concentrate at \$1.25 per gallon.

16. Following the agreement to sell 500 drums to Smucker through Broch, Koldinsky of Canada Foods sent a wire to Phipps requesting the latter to stop selling concentrate for 1 week. To this, Phipps replied by letter dated October 29 stating, in part, as follows:

We do not know how to talk to you regarding this Smucker deal on the 500 barrels. We do hope the buyer's position is legal. The Robinson-Patman Act prohibits remittance of brokerage to the buyer and they are always looking for some publicity with larger concerns.

⁷ In an apparent effort to establish that Broch talked to Koldinsky about the Smucker order prior to the time Phipps did, counsel for respondents refer to Koldinsky's testimony as establishing that Broch called him about the Smucker proposal a week or 10 days before the order of October 27. However, it seems clear from the record as a whole that not more than about 2 days, if that much, elapsed between Broch's conversation with Kieffer, his submission of the Smucker proposal to Koldinsky, and the latter's approval. Broch prepared the order on October 27, when he received Koldinsky's approval. According to the latter's testimony he gave Broch his approval either the same day or the day following that on which Broch called him about Smucker. The testimony of both Broch and Kieffer indicates that only a few days elapsed between their telephone conversation and Koldinsky's approval of the deal. Koldinsky's letter of October 25 to Phipps, referring to the possibility of a price rise, suggests that as late as that date he was not thinking in terms of any proposal to reduce the price.

All we want to know is that your price quoted to other brokers was the same as that given to us.

We had hoped to do a great big business with you folks, but on the basis of what has happened on this deal, we feel that our hands are more-or-less tied, because it has not been our custom to work with unclean hands.

17. In a telephone conversation between Koldinsky and Phipps soon after the October 29 letter, Koldinsky advised Phipps that his price was still \$1.30 per gallon and that if anyone was selling the concentrate at less than \$1.30, they were giving up part of their brokerage.

18. About 2 weeks later, Koldinsky advised Phipps that he had a few hundred barrels of concentrate to sell and the latter, by letter dated November 15, requested a price quotation. Koldinsky replied by letter dated November 17, again quoting \$1.30 per gallon as the price of concentrate.

19. On December 8, 1954, respondents made another contract with Smucker on behalf of Canada Foods to sell an additional 50 steel drums of apple concentrate at \$1.25 per gallon. Shipments on the October 27 and December 8 contracts were made between December 9, 1954, and May 1, 1955, totalling 32,589.44 gallons which, at the invoice price of \$1.25 per gallon, amounted to \$40,736.80. Respondents received a commission of 3 percent on these sales to Smucker. During the same period respondents made sales to a number of other buyers of apple concentrate at a price of \$1.30 per gallon, said sales totalling approximately \$50,000. On the latter sales Broch received his regular commission of 5 percent.

20. Sales were also made during the same period by Canada Foods through its other brokers. The price of the concentrate in all such sales was \$1.30 per gallon and all the other brokers received their agreed commission of 4 percent.

C. The Agreement as to Commission

1. Although apparently conceding in their answer that there was an agreement between respondents and their seller principal to pay respondents a commission of 5 percent, respondents take the somewhat contradictory position that there was no such thing as a fixed rate of commission and that they sometimes had to negotiate with their seller principals separately on each sale. Respondents endeavored to establish through the testimony of respondent Henry Broch, that any understanding between Broch and his principals was, at best, of such a vague, uncertain and amorphous nature as to be almost meaningless. Thus, Broch testified that the sellers merely gave him an "indicated" or "approximate" rate of brokerage, but that this

could be changed "any day" as the seller "sees fit." He denied that there were any written agreements between broker and principal, or anything in writing concerning the rate of commission. However, he conceded that "there might be an indication" (without revealing where such indication could be found), but that this was "never anything specific; definitely specified."

When asked on cross-examination whether it was not true that the understanding as to brokerage was usually confirmed by correspondence between the parties, Broch testified that this was "not necessarily" true, that there were "very few letters" specifying brokerage, and that he was unable to recall having any such letters. When asked whether he meant to suggest that in going out to sell on behalf of some 25 or more sellers, he actually did not know what brokerage he was going to be paid, Broch at first replied: "That is correct." However, the absurdity of this position apparently occurred to him after further reflection and he later conceded that it "might not be as hazy" as suggested by counsel supporting the complaint, and that he had a "general idea" as to what his commission would be.

Broch's testimony was a masterpiece in circumlocution and evasion, was contrary to the probabilities inherent in the situation, and was contradicted by other reliable evidence in the record. Based on his evaluation of the testimony as a whole and his observation of the demeanor of the witness, the undersigned can give no weight to Broch's claims.

2. Whether or not it can be formally characterized as an agreement, there is no question but that there was a written understanding between Broch and his seller principal, Canada Foods. Such understanding originated in the correspondence which passed between them in the spring of 1954, to which reference has been heretofore made. In the letter of April 21, 1954, Canada Foods advised Broch that it was looking for an agent in the Central United States and, after quoting the selling price of the apple concentrate, stated: "In this price is included 5 percent commission for you." Respondents accepted the appointment, under the conditions indicated, by their letter of May 5, 1954, in which they stated, in part:

* * * we are very pleased that you are appointing us as your executive agents for the midwestern territories and rest assured that we will do the right kind of job for you.

Although not claiming that the arrangement reflected in the above correspondence had ever been rescinded, Broch testified that his agreement with Canada Foods was entirely oral and was made in the fall of 1954, when Koldinsky visited him in Chicago. It seems quite

likely that the arrangement made in the spring of 1954 was still in effect in the fall of that year and that Broch was mistaken in his testimony. Assuming, however, that the earlier arrangement was withdrawn, it is clear from the testimony of respondents' witness, L. Koldinsky, that any arrangement which he made with Broch in the fall of 1954 was confirmed in writing and provided for a commission of 5 percent.⁸

3. Respondents also endeavored to show that whatever arrangement as to commission might have been made initially, such arrangement was of no long range significance since each sale was "subject to confirmation." Both Broch and Koldinsky testified to this effect, and respondents also offered in evidence the sales contract used by them which recites that the sale is: "Subject to confirmation of the seller."

The undersigned is satisfied from the evidence as a whole that the "subject to confirmation" provision has nothing to do with the rate of brokerage, as between seller and broker, and does not contemplate renegotiation of the rate of brokerage on a sale-by-sale basis. To hold otherwise would be to assume that the parties intended to agree to a nullity when they fixed the rate of commission at 5 percent. As a matter of common sense, a provision that a sale is "subject to confirmation of the seller" merely constitutes notification to the buyer that the seller may refuse to confirm a sale made by his broker if he is not satisfied with the terms thereof, as between himself and the buyer, such as price, quantity, terms of payment, and delivery dates. That such was the meaning which was intended here seems evident from the context of the sales contract in which the cited language appears, and also from the testimony of Broch himself.⁹

It is significant that in none of the correspondence in evidence, either the letters from Canada Foods to Broch or to Tenser & Phipps, or any of the other brokers, is there any indication that the rate of commission specified is "subject to confirmation." From the manner in which the parties conducted themselves, it is clear that they understood they were proceeding on the basis of a definitely fixed rate of commission and not one which was subject to renegotiation from sale to sale.

4. In addition to the somewhat contradictory claims that there was no definite agreement as to commission, and that if there was one,

⁸ Koldinsky testified that it was his normal procedure to confirm brokerage arrangements in writing and that "in my correspondence I promised him [Broch] 5 percent."

⁹ Although Broch made the characteristically exaggerated claim that the term in question contemplated that there would be confirmation "as to everything," in giving an explanation of the matters to be confirmed he unwittingly testified that it involved confirmation "as to price; when he [the seller] wants to sell or when he wants to ship."

Findings

54 F.T.C.

it was subject to renegotiation, respondents advanced the additional contention that the agreement to pay a commission of 5 percent was based on contemplated sales of much smaller quantities than the sale in question. The testimony offered in support of this contention followed the same confused, contradictory and unconvincing pattern as some of the other testimony which has been referred to above. Thus, Broch testified that when he and Koldinsky discussed the arrangement in the fall of 1954, it was contemplated that he would sell approximately 1,000 drums a year to all his customers, but that there was no discussion concerning the amount which it was contemplated would be sold to any individual account. However, after a little prodding from his counsel, Broch finally testified that it was contemplated the sales to any one customer would not exceed 50 to 100 drums. Koldinsky, on the other hand, testified that Broch advised him that he could sell several thousand barrels of the concentrate but that there was no discussion as to the quantity to be sold to any individual account. While Koldinsky indicated that it had been his impression that no one in the United States could use more than 250 barrels, he definitely stated the matter of quantity was never discussed in fixing Broch's rate of commission.

The undersigned is satisfied from the evidence as a whole that whatever discussion there may have been with respect to the quantity of sales, the rate of commission agreed upon was fixed without reference to the quantity sold, either to all customers or to any individual customer. The record shows that when Smucker made another purchase in December 1954 for only 50 barrels, he still received the same favorable price which he had been given on the larger order of 500 barrels, and Broch received the same 3-percent commission. Conversely, another purchaser who made substantial purchases during the same period paid the \$1.30 price and Broch received his regular 5-percent commission.¹⁰

The fact that the rate of commission agreed upon with Canada Foods was a fixed percentage, without regard to the quantity involved, is further corroborated by a list of respondents' principals which was given to a Federal Trade Commission investigator by respondents prior to the issuance of the complaint, containing the rate of commission payable by each principal. The rate of commission specified in this document for Canada Foods is 5 percent. The same document indicates a fixed rate of commission payable by all of the other sellers represented by respondents with the exception of one seller, for whom

¹⁰ The record shows that during the period between October 1954 and March 1955, deliveries to Smucker amounted to \$25,904, while deliveries to another buyer represented by respondents, Squire Dingee Co., amounted to \$16,763. On the latter sales the rate of commission was 5 percent.

the document indicates a variation of commission from 1 percent to 3 percent, "according to volume and selling price of products."¹¹

Respondents contend that the rates of commission specified in the list given to the Commission investigator were merely "indicated" rates and offered evidence to show that there were variations from the rates reflected in the document. The evidence offered by respondents involved 4 out of approximately 25 sellers represented by respondents. Two of the sellers are not directly represented by respondents, but respondents act through a cobroker. The rate of commission with the sellers in those instances was established by the cobroker and not by respondents, and it is clear that the reasons for any changes or variations in commission as between the cobroker and his principals is a matter which does not lie within respondents' personal knowledge. In any event, the record contains no reasons as to the variations in commission nor is there any indication that such variations were geared to the quantity involved.

The third account cited by respondents is clearly inapposite since it involved a situation where after a particular date the rate of commission was reduced on all sales from 3 percent to 2 percent. The record does not indicate the reason for such change nor that it had anything to do with quantity. So far as appears from the record, respondents merely re-negotiated the rate of commission with their seller principal so that on all sales to all customers beginning in January 1956, a new rate of commission was applicable. The fourth instance cited by respondents involves the very account to which reference has been made, as being the only account in the list given to Commission investigator, where there was any indication of a variation in commission according to quantity.

These accounts do not appear to be typical, and hardly establish the existence of a loose, flexible practice as to commission or that the rate of commission customarily varies with quantity. It is possible that some of these transactions may be subject to the same vice as that here involved. In any event, whatever may have been respondents' arrangements with other sellers, the undersigned is satisfied from the record as a whole that in the case of the Canada Foods' account there was a definite arrangement that respondents would be paid a commission of 5 percent on sales, and that this arrangement was made without regard to the quantity involved in any particular sale.

¹¹ The Commission investigator testified that the document was prepared under the direction of Henry Broch and given to him. Broch was somewhat evasive and confused in his testimony as to whether his office had prepared the document or whether the investigator had prepared it from records in Broch's office. Broch conceded, however, that the information contained therein was correct.

D. The Legal Questions

Insofar as is here pertinent, subsection (c) makes it unlawful—

for any person engaged in commerce, in the course of such commerce, to pay or grant * * * anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, * * * 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.

In addition to taking issue with counsel supporting the complaint with respect to the facts surrounding the transaction at issue, counsel for respondents have also raised a number of legal questions. They contend that subsection (c) was not intended to apply to independent brokers such as respondents; that even if it was so intended, respondents' conduct does not fall within the section; and that in any event, the section would be unconstitutional if applied to the factual situation here involved. The examiner now turns to a consideration of these arguments.

1. The application of section 2(c) to independent brokers

Counsel for respondents contend that section 2(c) was intended to prevent so-called "dummy" brokerage, i.e., payments of brokerage to the buyer or to a broker or agent acting on behalf of the buyer, or subject to the buyer's control, but that Congress never intended the section to apply to so-called "pure" brokers, i.e., brokers who represent only the seller in a transaction and are not connected in any way with the buyer. Counsels' argument rests, in part, on the reference in the House Judiciary Committee Report to the practice of certain large buyers in demanding the allowance of brokerage, either directly to them or to an agent whom they set up in the guise of a broker.¹²

Counsels' argument overlooks the fact that the illustration referred to in the committee report is merely cited as being "among the prevalent modes of discrimination at which this bill is directed," and is by no means intended to be exhaustive of the methods by which the section in question may be violated. On the contrary, it is clear from the legislative history that subsection (c) was included in the bill as part of a broad congressional plan to shore up the avenues of evasion which had arisen under the earlier narrow prohibition on price discrimination in the original Clayton Act, one of the prominent modes of evasion from which was the use of brokerage as an indirect

¹² H.R. Rep. No. 2287, 74th Cong., 2d Sess. 15 (1936).

method of price discrimination. As stated in the very report cited by respondents, subsection (c) was intended to prevent "the abuse of the brokerage function for purposes of oppressive discrimination."

In considering the proposed legislation Congress had before it statements such as the following, which was made by a representative of the Associated Grocery Manufacturers of America, one of the proponents of the legislation:¹³

This association supports a valid, sound, and constructive amendment of section 2, *effective to strengthen its protective application against price discrimination* offensive to the competitive principle; that is, an amendment (a) which broadens the section's prohibitory jurisdiction to the extent permitted and consistent in the circumstances, (b) which tightens its exemptions against their misuse to defeat the law, (c) *which makes the section expressly prohibit indirect price discrimination by brokerage diversion to a trade buyer*, and (d) which makes the section expressly and reasonably regulate distribution-service payments to prevent their degeneration into an indirect price discrimination violative of the section and thus nip its violation in the bud. [Emphasis supplied.]

Further reflecting the broad purpose of subsection (c) is the statement made by Representative Patman during the legislative debates that the section was—

directed against the corruption of the true brokerage function as a real and valuable servant of commerce, into a subterfuge for those unfair and coercive price discriminations which constitute such a real menace to commerce.¹⁴

The undersigned entertains no doubt that subsection (c) was intended not only to reach "dummy" brokerage payments made to a buyer or his representative, but also to prevent a so-called "pure" broker, who represents only the seller in the transaction, from splitting his commission, directly or indirectly, with the buyer in the transaction. That subsection (c) was intended to prevent the splitting of commissions by a seller's broker has been the commonly accepted understanding of the statute almost from the beginning. Thus, Congressman Patman in his book entitled "The Robinson-Patman Act," published soon after the passage of the act, gives the following answer to the specific question whether the act "prohibits a broker from splitting his brokerage with a buyer" (p. 108):

Yes. It applies to any person. The intent of Congress, the reports of committees, and the act are all specific on this point. The payment of *any* brokerage by the seller to the buyer is prohibited. The relationship of the broker to his principal is a fiduciary one. He is, in fact, representing the seller in this instance and would be liable.

In the book entitled "The Robinson-Patman Act, Its History and Probable Meaning," published by The Washington Post of Washing-

¹³ Hearings before subcommittee of Committee on Judiciary on S. 4171, 74th Cong. 2d Sess. 62 (1936).

¹⁴ 79 Cong. Rec. 9079 (June 11, 1935).

Findings

54 F.T.C.

ton, D.C., in October 1936, the following statement appears with respect to the basic structure and interrelation of the various subdivisions of section 2 (p. 6):

The final enactment contains, in the first instance, a prohibition of price discrimination in sweeping terms. Next, it specifically prohibits a series of practices (*such as split and bogus brokerage*, individualized advertising and service allowances, etc.) which, whether within or without the basic prohibition [of section 2], are made unlawful because their use may lead to discrimination. [Emphasis supplied.]

Addressing itself specifically to the subject of the splitting of commissions, the same work states that subsection (c) (p. 38)—

prohibits the splitting of brokerage where the seller or the buyer is aware of the practice. For where a broker passes a portion of his commission back to the buyer, it would appear that he is acting, at least in part, "for or in behalf" of such buyer.

In 1940, The American Institute of Food Distribution, Inc., prepared a booklet for use in the industry entitled "Robinson-Patman Guide Book." This work expresses the following opinion on the question of whether the Robinson-Patman Act "prevents any splitting of brokerage" (p. 74):

Seller's broker cannot legally pass any of his commission to the buyer. This would be the same as the seller making the payment. If the broker does split, the seller would be held liable, particularly if he knew about the practice.¹⁵

It seems apparent from the foregoing that subsection (c) has been generally accepted as prohibiting the splitting of commission by independent brokers, as well as the granting of "dummy" brokerage to the buyer or someone controlled by or affiliated with a buyer. That this should be so is not surprising in view of the fact that the paying or granting of commission, under the indicated circumstances, is made unlawful for "any person," and not merely for the seller to the buyer or the latter's affiliate.

In further support of their argument that section 2(c) was not intended to apply to "pure" brokers, counsel for respondents claim that the Commission has failed to issue any complaint against brokers not affiliated with a buyer, except in one case, *D. J. Easterlin*, Docket No. 6587, and that the complaint there was dismissed by the Commission before hearing, without any reason for its action being specified (33 F.T.C. 1639). Counsel apparently regard the paucity of decisions on the point and the action taken in the *Easterlin* case as indicative of the Commission's belief that it lacks jurisdiction over "pure" brokers.

Counsel's argument in this respect is not correct since the Commission has issued complaints in at least two other cases, involving

¹⁵ The opinion above quoted purports to be based on instructions issued by the Great Atlantic & Pacific Tea Co. to its buyers.

the splitting of commissions by brokers representing sellers only, and has in both instances issued orders against the brokers. In *W. E. Robinson & Co., Inc.*, 32 F.T.C. 370, the seller's broker was charged with passing on approximately 50 percent of his brokerage to certain purchasers and was ordered to cease and desist from such practice. In *Custom House Packing Corp.*, 43 F.T.C. 164, a broker having no connection with the buyers, was found to have violated section 2(c) by passing on part of his commission to such buyers.

The Court of Appeals for the Fourth Circuit has also made it clear that it upholds the Commission's position that section 2(c) applies to the seller's broker, in *Oliver Brothers, Inc. v. F.T.C.*, 102 F. 2d 736. Although that case involved a payment of brokerage by a seller to a broker representing the buyer, the court in addressing itself to the argument that the broker was rendering a service to the seller and was therefore entitled to a commission, stated (p. 770):

And even if it were true that Oliver rendered services to the sellers, we do not think that this would change the situation. *No one would contend that, without violating this section, a broker representing the seller could give his commissions to the buyer; for in such case the action of the broker would be the action of his principal, the seller, and would amount to the allowance of commissions by the seller to the other party to the transaction in direct violation of the statutory provision.* As we have seen, it constitutes a clear violation of the section for the buyer to receive commissions allowed an agent who represents him alone. If, therefore, the buyer may not receive commissions allowed either his own agent or the agent of the seller, it would seem to follow necessarily that he may not receive commissions allowed a broker who is the agent of both. [Emphasis supplied.]

It is accordingly concluded that section 2(c) prohibits an independent broker who represents a seller from splitting with, or passing on to, the buyer any part of the commission or brokerage to which he is entitled under his agreement with the seller.

2. Application of section 2(c) to respondents' reduction in commission

Counsel for respondents advance the alternative argument that even if section 2(c) does apply to the splitting of commission by independent brokers, it is not applicable to the facts here since (a) it does not apply to "indirect" payments or allowances to a buyer and (b) respondents' acceptance of a reduction in commission can, in no event, be considered a payment or allowance of brokerage, either direct or indirect.

a. Counsels' argument that the statute does not apply to indirect payments or allowances to a buyer by a broker is based on the fact that the statute, in declaring it to be illegal for any person "to pay or grant" anything of value as a commission to the other party to the transaction does not use the words "directly or indirectly" after

the phrase "to pay or grant." Counsel point out, in this connection, that when Congress wanted to prohibit payments to brokers or agents under the indirect, as well as the direct, control of the other party to the transaction, it was careful to use the expression "subject to the direct or indirect control" of such party. Counsel apparently regard the omission of a similar phrase, in connection with the prohibition on the payment or granting of brokerage, as significant.

While it is true that Congress, out of an abundance of caution, might have inserted the phrase "directly or indirectly" after the language "to pay or grant," the undersigned does not consider its omission to be of any significance. Considering that it was the basic intent of Congress in adding subsections (c), (d), and (e) to the act to circumvent indirect forms of price discrimination, and in the light of the expressed intent of Congress in the case of subsection (c) to prevent the "abuse of the brokerage function for purposes of oppressive [price] discrimination," the undersigned cannot believe that Congress intended to give section 2(c) the narrow scope for which respondents argue. On the contrary, the very portion of the legislative history cited by respondents contains the statement that section 2(c) "prohibits the *direct or indirect* payment of brokerage except for such services rendered."¹⁶ It is inconceivable that Congress intended to prohibit the seller's broker from making a direct payment of part of his commission to the buyer, but intended to permit the broker to remit such sum to the seller and have the latter, in turn, transmit it to the buyer. Merely to state the proposition is to demonstrate its absurdity.

b. Counsel for respondents further argue that even if the statute applies to indirect, as well as direct, payments, the conduct of respondents here cannot be deemed to fall within either category. Counsels' argument, in substance, is that since the seller was under no obligation to pay respondents the 5-percent commission for any specified period of time, and made it a condition of its approval of the sale that they accept a reduction of commission to 3 percent, respondents actually "earned" only 3 percent on the sale, and accordingly they cannot be deemed to have paid, granted, or allowed any part of their commission to the buyer.¹⁷ Counsel also argue that it was a

¹⁶ H.R. Rep. No. 2951, 74th Cong., 2d Sess. (1936).

¹⁷ Counsel for respondents point out in the memorandum filed by them that while the complaint charges, as the violation, the "granting or allowing" of a percentage of their brokerage to the buyer, the act does not use the word "allowing" in referring to the illegal conduct, but uses the expression "pay or grant." Counsel apparently do not urge this variance between the complaint and the statute as the basis for any serious argument. It may be noted, however, that the word "allow" is defined as "to grant as a deduction or an addition" (Webster's New Collegiate Dictionary, 1949 Edition). Consequently, the charge that respondents granted or allowed a part of their brokerage to the buyer is clearly synonymous with the language used in the act.

sine qua non, in establishing respondents' connection with the payment or granting of brokerage to the purchaser, to show that respondents had requested the seller to recoup part of its loss out of their commission.

By arguing that they only "earned" 3-percent commission and, consequently, did not pass on any of their commission to the buyer, respondents are in effect seeking to lift themselves by their own bootstraps. They seek to escape the application of the statute by the very conduct which makes it operative. As has been found above, it was agreed between respondents and their principal that respondents would receive a commission of 5 percent on sales made by them. This agreement was in effect on October 27, 1954, and, except for sales to Smucker, is still in effect. By accepting a commission of 3 percent, under the circumstances here present, respondents were giving up part of what they were entitled to receive, with full knowledge of the fact that their contribution would redound to the benefit of the buyer in the form of a price concession. It may be, as counsel for respondents argue, that there is no proof that respondents actually requested the seller to recoup part of the price reduction out of their commission. However, in the light of the economic realities of the situation, this is immaterial.

Respondents were fully mindful of the fact that the going price of Canada Foods' apple concentrate was \$1.30 per gallon. This was the price at which they sold concentrate to every purchaser except Smucker. This was the price which Tenser & Phipps had already quoted to Smucker, to respondents' knowledge, when the latter intervened in the situation and induced Canada Foods to lower its price. Irrespective of whether respondents actively urged Canada Foods to recoup part of the price reduction out of the commission to which they would otherwise have been entitled, they were fully cognizant of the fact that their acceptance of a reduced rate of commission was a material factor in making possible the sale to Smucker at a reduced price. As the agent for Canada Foods, respondents are equally guilty with their principal of contributing to the price concession which the latter gave to the purchaser. The fact that the principal is beyond the jurisdiction of the Federal Trade Commission, by reason of its situs in Canada, does not absolve the agent from liability for his participation in the transaction.

It may be, as argued by counsel for respondents, that the original agreement between respondents and Canada Foods was not for any specified duration and could have been terminated or modified. However, what is involved here is not merely a modification of an

Findings

54 F.T.C.

existing agreement with respect to commission, but a dropping of commission on sales to a single purchaser, combined with a reduction in price to that purchaser under circumstances where it is clear that the reduction in commission was a concomitant of, in fact was the quid pro quo for, the reduction in price. Respondents' acceptance of a lower commission, under such circumstances, is as much a payment of part of their commission to the purchaser as if respondents had directly paid 2 percent of their commission to the purchaser.

It may also be, as argued by counsel for respondents, that had they not accepted the 3 percent they might not have made the sale. However, the choice with which respondents were confronted was largely of their own making since had they not intervened in the situation, it seems quite probable that Tenser & Phipps would have made the sale at the going price and at their agreed rate of commission. Respondents' conduct, under these circumstances, tends to point up the vice involved in the splitting of commissions as a competitive weapon. In any event, the fact that respondents' conduct was motivated by economic reasons cannot be deemed a legal justification for what they did.¹⁸

c. Counsel for respondents argue, finally, that whatever benefit the buyer may have received when respondents accepted a 3-percent commission instead of 5 percent, it did not involve the granting or allowing of commission or brokerage or of any sum in lieu thereof. Counsels' argument appears to be that because a portion of respondents' commission reached the purchaser in the form of a price concession, it cannot be deemed to fall within the proscription of section 2(c). This argument is wholly without merit.

What the statute prohibits is the payment or allowance to the buyer of "anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof." Under this broad language it is not necessary that the payment be labeled as commission or brokerage. In the instant case the price reduction to the purchaser involved partly an actual price reduction by the seller and partly a portion of the brokerage commission which respondents permitted the seller to retain in order to make possible the full reduction sought by the buyer. Certainly the portion of the price concession to which respondents contributed may be deemed an allowance or discount in lieu of commission or brokerage, within the meaning of the statute. In fact, if not for such concession on respondents' part, it appears unlikely that there would have been any price reduction to the purchaser.

¹⁸ *Fashion Originators' Guild v. F.T.C.*, 312 U.S. 457, 468; *Wholesale Dry Goods Institute v. F.T.C.*, 139 F.2d 230 (C.A. 2, 1943), cert. den. 321 U.S. 770.

In both the *Custom House Packing Corp.* case and the *W. E. Robinson & Co.* case, *supra*, the splitting of commission took the form not merely of the transmission of part of the broker's commission to the purchaser, but also was effected indirectly through equivalent price reductions. The latter practice was also considered to be in violation of section 2(c) and, in the *Robinson* case, the order specifically prohibited a reduction in price which reflected the part of the brokerage payment to which the broker was entitled.

CONCLUDING FINDING

Based on the facts hereinabove found, it is concluded and found that respondents, and each of them, have since October 27, 1954, granted and allowed, and are now granting and allowing, directly or indirectly, a portion of the commission or brokerage fee to which they are entitled from their seller principal, Canada Foods Ltd., to The J. M. Smucker Co., a buyer of food products in commerce, in connection with such buyer's purchase of food products in commerce.

3. The question of constitutionality

Counsel for respondents contend that section 2(c), as applied to the acts and practices here involved, is in violation of the due process clause of the fifth amendment because it constitutes an arbitrary discrimination against them. When reduced to its essence, respondents' argument is that by denying them the right to meet the competition of other brokers who charge a lower rate of commission, section 2(c) discriminates against them and hence violates the fifth amendment.

Aside from the fact that an administrative agency is required to assume the constitutionality of the laws it administers, the short answer to counsels' contention is that it was laid at rest many years ago in the *Oliver Brothers* case, *supra*. In that case it was contended that section 2(c) violated the fifth amendment because it did not permit the use of the defensive measures provided with respect to section 2(a), such as the meeting of competition. In response to this argument the Court of Appeals stated (p. 768):

And we are not impressed with the argument that when construed without the limitation prescribed by 2(a) section 2(c) is violative of the due process clause of the fifth amendment. It is addressed to a definite evil in interstate trade and commerce which Congress has full power to regulate. It is uniform in operation and applies to all persons alike. It is not arbitrary or unreasonable, but is directed toward the elimination of hidden discriminations in price which are thought to be injurious to the proper operation of a free competitive system of trade and

Order

54 F.T.C.

commerce and to have a tendency to promote unreasonable restraints and monopolization.

To this it need only be added that section 2(c) does not require any broker to charge any particular rate of commission. If respondents desire to reduce their rate of commission, they are not denied the right to do so under section 2(c), except insofar as they use such reduction as a vehicle for granting or allowing something to the buyer to which Congress has stated the buyer is not entitled.

CONCLUSION OF LAW

It is concluded that respondents, and each of them, by engaging in the acts and practices hereinabove found have violated, and are now, violating, the provisions of subsection (c) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That respondents Henry Broch and Oscar Adler, co-partners trading as Henry Broch & Co., their representatives, agents, or employees, directly or through any corporate or other device, in connection with the sale of food or food products for Canada Foods Ltd., or any other seller principal, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

(1) Paying, granting or allowing, directly or indirectly, to The J. M. Smucker Co., or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, any allowance or discount in lieu of brokerage, or any part or percentage thereof, by selling any food or food products to such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for Canada Foods Ltd. or any other seller principal, as the case may be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage services; or

(2) In any other manner, paying, granting or allowing, directly or indirectly, to The J. M. Smucker Co., or to any other 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 food or food products to such buyer for its own account.

OPINION OF THE COMMISSION

By Anderson, Commissioner:

Respondents have appealed from the hearing examiner's initial decision which, on the basis of findings of fact therein made, concluded that respondents had violated section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act.¹ The initial decision contains an order to cease and desist which would prohibit respondents from:

(1) Paying, granting, or allowing, directly or indirectly, to The J. M. Smucker Co., or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, any allowance or discount in lieu of brokerage, or any part or percentage thereof, by selling any food or food products to such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for Canada Foods Ltd. or any other seller principal, as the case may be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage services; or

(2) In any other manner, paying, granting or allowing, directly or indirectly, to The J. M. Smucker Co., or to any other 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 food or food products to such buyer for its own account.

The gravamen of the complaint is that respondents granted and allowed a buyer, The J. M. Smucker Co., referred to in the above-quoted order, a percentage of respondents' commission or brokerage fee in connection with such buyer's purchase of apple concentrate from Canada Foods. The complaint charges that in making such sale, respondents, as brokers, earned their normal and customary commission, or brokerage fee, of 5 percent but did not receive all of such normal brokerage, accepting instead a 3-percent commission, and that respondents' seller principal thereupon lowered its established price, recouping part of the reduction out of the brokerage fee which respondents would have earned at their normal brokerage fee of 5 percent. It is further alleged that such transaction resulted in the granting or allowing by respondents (brokers) of a percentage of

¹ Section 2(c) provides 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."

their commission or brokerage fee, directly or indirectly, to a buyer of food products, thus breaching the statute.

The record discloses, respondents admit and the hearing examiner found, that the seller principal, Canada Foods, first agreed to pay respondents a brokerage fee of 5 percent, but respondents contend that this was based on much smaller quantities than the sale in question of 500 steel drums of apple concentrate. Respondents also admit that their seller-principal originally quoted to the buyer a price of \$1.30 per gallon, which subsequently was reduced and the sale to the buyer consummated at a lower price of \$1.25, with respondents accepting a brokerage fee of 3 percent instead of 5 percent. It appears to be respondents' further position that the reduced price obtained because of competitive conditions and that the reduction in brokerage resulted from the unilateral action of the principal and not by reason of any request by respondents.

In view of the disposition we make of the case, we find it unnecessary to pass on any questions except the legal issues involved in this appeal. We have reviewed the whole record herein and are satisfied that the hearing examiner's findings as to the facts are fully supported by the record made. Some of those findings are based on conflicting testimony and evidence. As to those, giving proper weight to the hearing examiner's findings, based as they are on the complete record in the case, including all exhibits and testimony, and considering especially that the hearing examiner had full opportunity to observe the bearing and demeanor of the witnesses, we are constrained to conclude from our view of the record that he correctly weighed and resolved the conflicting evidence. We will, therefore, refer but briefly to the salient ultimate facts found wherever necessary by way of explanation of our disposition of the legal points raised on this appeal.

The principal issue presented is whether subsection 2(c) of the Clayton Act, as amended, encompasses the passing on of all or part of brokerage commissions by a seller's broker to the buyer. The respondent contends that the brokerage clause reaches only illicit grants made *directly* to buyers and that in the transaction involved here, where the broker "acquiesced" in a lower rate of commission by his seller principal, it is not a payment or a grant of brokerage allowance on respondent broker's part and in no event runs to the buyer in the transaction.

Respondents in this connection argue that a price reduction to a buyer by a seller cannot constitute an allowance "in lieu of brokerage"

within the meaning of section 2(c) unless directly correlated with a brokerage commission in both conception and amount and cites that principle as the rationale of the Commission's decision in the matter of *Main Fish Company, Inc.*, Docket No. 6386 (decided July 30, 1956).

Directing attention first to respondents' contention that subsection 2(c) relates only to discriminatory practices on the part of sellers and buyers and enacts no liability for independent seller's brokers, we have first to ascertain the overall legislative objective of the Robinson-Patman amendment to the Clayton Act. Section 2 of the Clayton Act, which was the section amended, merely interdicted generally discrimination in price where the effect thereof was substantially to lessen competition or tend to create monopoly. As was said by the U.S. Court of Appeals, Fourth Circuit, in *Oliver Bros., Inc., et al. v. Federal Trade Commission*, 102 F. 2d 763, 676:

The Robinson-Patman Act broadened the scope of this provision, conferred upon the Federal Trade Commission power to establish quantity differentials for the purpose of determining discrimination, and cast the burden of proof upon one charged with discrimination to justify any discrimination shown. Receipt of price discrimination was made unlawful for the first time, section 2(f), 15 U.S.C.A. § 13(f); and three specific matters were forbidden as unfair trade practices by subsections (c), (d), and (e), viz: *the granting of commission or brokerage, or any allowance in lieu thereof, to the other party to the transaction or his agent*, the making of discriminatory payments by seller to buyer for services rendered by the latter and discrimination by the seller in the rendering of services to the buyer.

* * * * *

No one would contend that, without violating this section, a broker representing the seller could give his commissions to the buyer; for in such case the action of the broker would be the action of his principal, the seller, and would amount to the allowance of commissions by the seller to the other party to the transaction in direct violation of the statutory provision. [Emphasis supplied.]

It is the opinion of the Commission that the language of subsection (c) is so clear that it is unnecessary to resort to the reports of Congress to ascertain what was intended, *Oliver Bros. v. Federal Trade Commission*, *supra*, and that it is the office of that subsection to outlaw the diversion of brokerage to buyers, or any form of commission or sales compensation, to buyers in any manner, directly or indirectly, from any source. Reflection upon the climate which produced the Clayton Act, as amended by the Robinson-Patman Act, leads but to the conclusion that the intendment of that legislation is to establish the public policy of eliminating as a violation of law the practice of discriminating

Opinion

54 F.T.C.

in price, whether it be done directly or indirectly.² It is our view that this public policy prohibits a broker, acting solely for the seller and not controlled by the buyer, from passing on, directly or indirectly, to the buyer any part of his brokerage. The words of the statute are plain and mean what they say in aid of effectuating the general overall intent of the Robinson-Patman amendment of the Clayton Act. In the *Great Atlantic & Pacific Tea Co.* case (106 F. 2d 667, 674), the court said succinctly:

At each stage of its enactment, paragraph (c) was declared to be an absolute prohibition of the payment of brokerage to buyers or buyers' representatives or agents. *Such is the plain intent of the Congress and thus we construe the statute. Any other result would frustrate the intent of Congress.* [Emphasis supplied.]

The Commission, in view of the foregoing, rejects the contention, implicit in respondents' argument in support of their appeal, that subsection 2(c) of the Clayton Act, as amended, does not reach the situation disclosed by the record in this proceeding. In this connection, the hearing examiner found in effect, and we think correctly, that respondent Henry Broch & Co. had a 5-percent brokerage agreement with Canada Foods, Ltd., under which it received 5 percent brokerage on all other transactions except those with Smucker; that by acquiescence, ratification, confirmation, agreement, or other wise, respondent Broch accepted a reduction in brokerage from 5 percent to 3 percent on Smucker transactions; that this brokerage reduction was contemporaneous with the price reduction by Canada Foods to Smucker and amounted to a sharing of the price reduction by Broch and Canada Foods. The only reasonable inference possible to be drawn from those facts established of record is that drawn by the hearing examiner to the effect that respondents' acceptance of a reduced brokerage in such circumstances constitutes a payment of

² Invoice prices by Canada Foods, Ltd., on sales of apple concentrate through its broker, respondent Henry Broch & Co., is disclosed by reference to Comm. Ex. 5-9, incl., 11 and 13, in summary, as follows:

Date	Drums	Customer	Per gal.
12/3/54.....	50	Owen & Mowrey, Inc.....	\$1.30
12/3/54.....	50	Adler Foods Co.....	1.30
12/9/54.....	50	J. M. Smucker Co.....	1.25
1/8/55.....	75	do.....	1.25
1/26/55.....	75	do.....	1.25
2/15/55.....	75	do.....	1.25
3/30/55.....	75	do.....	1.25
5/1/55.....	200	do.....	1.25

Also, Comm. Ex. 16A, 16B and 17 disclose that in 1954-55, brokerage commissions were paid to respondent Henry Broch & Co. by Canada Foods, Ltd., for sales to 18 customers other than J. M. Smucker Co. at the rate of 5 percent and for sales to J. M. Smucker Co. during that time at the rate of 3 percent.

part of their commission to the buyer exactly as though respondents had paid 2 percent of their commission to the buyer direct.

Turning next to respondents' contention that the Commission's decision in the *Main Fish Co.* case, *supra*, is dispositive here and that the decision there cannot logically coexist with the initial decision in this proceeding, we can find no merit in that argument. The two cases are obviously distinguishable.

Respondents correctly summarize our holding in *Main Fish* to be that the simultaneous presence of a reduced price and an eliminated "brokerage" fee could not, in the factual situation there present, generate a presumption that the lower price reflected an "allowance in lieu of brokerage" and that, in the circumstances there found, "the pricing variations were not shown to be arithmetically commensurate with the pattern of brokerage" in other transactions. In so holding, however, the Commission carefully noted that in a given situation it would be possible to infer from surrounding circumstances that the payment of brokerage monies or sums in lieu thereof was the fact. We think that this latter situation obtains here and that the matrix of the factual situation projected by the record presently before us in the instant case clearly gives rise to the inference that respondent Broch instigated and granted payments in lieu of brokerage to the buyer Smucker. In other words, we find here that the price reductions convincingly are shown to be commensurate with the pattern of brokerage involved. The *Main Fish Co.* case, *supra*, is not controlling here.

Respondents, while admitting that Canada Foods first agreed to pay them a brokerage fee of 5 percent, contend that this was based on much smaller quantities than the principal sale involved here of 500 steel drums of apple concentrate. If respondents are seeking to resort to the cost differential provisos of subsection (a) of section 2 of the act, we hold that such contention is without merit. The complaint in this proceeding was issued under subsection 2(c), not under subsection 2(a), and the several defenses available to price discrimination charges under subsection 2(a) are not applicable to a proceeding under subsection 2(c). The latter is complete on its face and establishes a convention or principle of illegality entirely separate from and independent of the remaining subsections of section 2 of the statute. The Commission and the courts have consistently so held.³

Respondents finally argue that the proceeding here is not in the public interest and must be dismissed because it is a private contro-

³ *Biddle Purchasing Co., et al. v. Federal Trade Commission*, 96 F. 2d 687 (C.A. 2, 1938); *Oliver Bros. v. Federal Trade Commission*, 102 F. 2d 763 (C.A. 4, 1939); *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667 (C.A. 3, 1939).

Order

54 F.T.C.

versy between Broch & Co. and the broker who allegedly lost to respondent a sale to a potential buyer; in other words, that a private wrong is involved instead of an injury to the public. The answer to this is that such contention ignores the changes made in the Clayton Act by the passage of the Robinson-Patman Act. As the court said in the *Nashville Coal Co.* case:⁴

The Clayton Act (now section 2(a)) required a showing of injury to the public. The additions made by the Robinson-Patman Act (sections 2(c), 2(d), and 2(e)), do not require any such showing in order to make the act illegal.

Respondents' contention that this is a private controversy and, as such, requires dismissal of the proceeding is rejected.

Respondents' appeal is denied and the findings as to the facts, conclusion and order to cease and desist contained in the initial decision are adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal of respondents and adopting the initial decision as the decision of the Commission:

It is ordered, That respondents Henry Broch and Oscar Adler 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 contained in the initial decision.

⁴ *Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co.*, 37 F. Supp. 728, 735 (D.C. W.D. Ky., 1941), order enforced *sub nomine Fitch v. Kentucky-Tennessee Light & Power Co.*, 130 F. 2d 12 (C.A. 6, 1943). And see cases cited n. 3, *supra*.

Decision

IN THE MATTER OF

B. SCHOOLSKY & SON, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket 6763. Complaint, Apr. 4, 1957—Decision, Dec. 10, 1957

Consent order requiring manufacturers in Manville, R.I., to cease violating the Wool Products Labeling Act by failing to label wool stock as required and by representing in sales invoices and other shipping memoranda that certain stock contained various amounts of wool when in fact the fiber content was "reprocessed wool" and "reused wool."

Mr. Morton Nesmith and *Mr. John J. Mathias* for the Commission.
Mr. Samuel Shapiro, of New York 7, N.Y., and *Mr. Barnett Warner*, of Princeton, N.J., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

The complaint in this proceeding charges that B. Schoolsky & Son Inc., a corporation, Benjamin Schoolsky, and Robert Schoolsky, individually and as officers of said corporation, hereinafter called respondents, have violated the provisions of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939, and the rules and regulations promulgated under the last-named act by misbranding and mislabeling wool products.

After issuance and service of the complaint, the respondents, their counsel, and counsel supporting the complaint entered into an agreement for a consent order. The order disposes of the matters complained about. The agreement has been approved by the director and assistant director of the Bureau of Litigation.

The pertinent provisions of said agreement are as follows: Respondents admit all jurisdictional facts; the complaint may be used in construing the terms of the order: the order shall have the same force and effect as if entered after a full hearing and the said agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission; respondents waive the requirement that the decision must contain a statement of findings of fact and conclusion of law; respondents waive further procedural steps before the hearing examiner and the Commission, and the order may be altered, modified, or set aside in the manner provided by statute for other orders; respondents waive any right to challenge or contest the validity of the order entered in accordance