

IN THE MATTER OF
SUNSHINE BISCUITS, INC.

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

Docket 6597. Complaint, July 19, 1956—Decision, May 7, 1958

Order requiring a manufacturer of cookies and crackers, with main office in Long Island City, N.Y., to cease discriminating in price in violation of section 2(d) of the Clayton Act by paying broadcasting companies for time furnished to certain favored grocery chains for their own advertising purposes in return for which the participating chains gave in-store promotions to respondent's products in their stores located in the trade area reached by the radio or TV station utilized, without making compensation for such benefits available on proportionally equal terms to all the competitors of the favored customers.

Mr. William R. Tincher, Mr. J. Wallace Adair, Mr. Eugene Kaplan and Mr. Daniel A. Austin, Jr., for the Commission.

Appell, Austin & Gay, by Mr. Cyrus Austin, of New York, N.Y., and Mr. A. W. DeBirny, of Long Island City, N.Y., for respondent.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE PLEADINGS

The complaint in this proceeding charges the respondent with having paid money to certain broadcasting companies for the benefit of certain of its chain-store customers, thereby providing broadcasting time "through such broadcasting companies to the favored customers for said customers' own advertising purposes." The payments thus made by respondent are alleged to have been made as compensation or in consideration for services or facilities furnished it by these favored customers in connection with the offering for sale and sale of respondent's products. It is further averred that the benefits so furnished to some of respondent's customers were not made available to respondent's other customers on proportionally equal terms, in violation of the provision of subsection (d) of section 2 of the Clayton Act, as amended.

The complaint then describes in some detail the sales-promotion plans through which respondent favored certain of its customers.

Respondent in its answer denies that any broadcasting company served as a medium or intermediary between respondent and any of its grocery-chain customers; that any payments were made by the respondent to any broadcasting company for the benefit of any of respondent's customers; and that respondent's acts and practices have violated section 2(d) of the Clayton Act, as amended.

STIPULATION OF FACTS

In lieu of hearings and the presentation of evidence, counsel supporting the complaint and counsel for the respondent agreed upon, and submitted to the hearing examiner, a stipulation as to the facts involved in this controversy, with the understanding that such stipulation, together with the pleadings herein, was to constitute the entire evidentiary record. This stipulation has been duly incorporated into the record, and, together with the pleadings, does constitute the entire factual basis of this decision.

AMICI CURIAE

Subsequent to the submission of the stipulation as to the facts, Columbia Broadcasting System, Inc. and National Broadcasting Co., Inc. applied for and were granted permission to submit briefs as *amici curiae*. These briefs supplement the brief of counsel for the respondent, and request that the complaint herein be dismissed.

IDENTITY OF RESPONDENT

Respondent Sunshine Biscuits, Inc. is a New York corporation, with its principal office and place of business located at 29-10 Thomson Street, Long Island City, N.Y.

ACTS IN COMMERCE

For a number of years respondent has been engaged in the business of selling and distributing its products, including cookies and crackers, to competing customers, including independent grocers and grocery chains, located throughout some of the States of the United States and in the District of Columbia. Many of such competing grocery customers are located in the Chicago metropolitan area and in the New York City metropolitan area, which extends into the adjacent States of New Jersey and Connecticut. The quantity of the above-mentioned products sold by respondent in those areas during the past several years has been substantial. As a result of such sales, respondent is now, and has been for some time, engaged in commerce, as "commerce" is defined in the Clayton Act as amended.

ORIGIN OF THE SALES-PROMOTION PLAN

In 1950 and in 1951 the sale of broadcasting time had become difficult, and the American Broadcasting Co., Columbia Broadcasting System, Inc., and National Broadcasting Co., Inc., hereinafter referred to, respectively, as "ABC," "CBS," and "NBC," devised a plan to enable them to promote the sale of such time to manufacturers

and sellers of grocery products by offering to them radio and television time at the regular current rate, supplemented by the promise of certain in-store promotion facilities as an added inducement. Although the various sales-promotion plans devised by the several broadcasting companies are substantially the same, each broadcasting company developed its own plan independently of the others.

THE SALES-PROMOTION PLAN

In initiating their sales-promotion plans, ABC and CBS each negotiated contracts with certain grocery chains in the Chicago metropolitan area, and NBC in the the Chicago and New York City metropolitan areas, whereby the broadcasting company agreed to furnish radio time or television time of a stated amount or value to each grocery chain each week during the term of the contracts. These contracts provided that the broadcasting time so furnished would be used by the chain stores only for their own advertising. In consideration for such broadcasting time, the chain stores agreed to conduct in their stores a specific number of promotional displays of products sold therein, each such promotion to be continued for the duration of one week. The contract did not specify the products to be displayed or the dates for their promotion, but provided that such products were to be agreed upon and the dates for their promotion fixed upon the suggestion or designation of the broadcasting company, subject to the approval of the chain, and also subject to the right of the chain to decline to promote any product not deemed by it to be suitable for promotion in its store. These contracts were made without any prior commitment or agreement involving anyone other than the broadcasting company and the grocery chain.

After the above-described contracts between the broadcasting companies and the grocery chains had been entered into, the broadcasting companies solicited respondent and other manufacturers and sellers of grocery products to purchase radio or television time from them, and, as an added inducement for such purchase, offered in-store promotion of respondent's products in the chain stores with which the broadcasting companies already had contracts. The CBS plan was called "Supermarketing"; the NBC plan, "Chain Lightning"; and the ABC plan, "Mass Merchandising" or "Sell-A-Vision." In support of these plans, brochures and circulars were disseminated from time to time by the broadcasting companies, which informed respondent and others that by purchasing radio or television time for certain periods in minimum amounts at the then regular station rate for such time, the advertiser would qualify, at no added cost, for 1 or more week-long

promotional displays of its products in the stores of certain grocery chains. The brochure stated that the broadcasting company was able to furnish these displays by reason of the existing contracts which it had already negotiated with the grocery chains. Among other things, such brochures and circulars presented the advertising advantages of the several plans as follows:

WBKB'S SHOPPER-STOPPER plan can create week-long displays for a clients product in 300 A&P and/or 300 National Tea stores. This exciting sales impact can be utilized by advertisers whose budgets during a 13-week period are at least \$900 per week. * * *

WBKB IS CHICAGO'S MOST MERCHANDISING T.V. STATION!!

Merchandising!—personal contact with Chicago's top food executives! Merchandising!—mailings to the trade. Merchandising!—displays in Chicago's largest chain stores. Merchandising!—free product promotion in TV programs. Merchandising!—prize awards of client's products.

Supermarket displays increase your sales * * * but Supermarket display space is scarce. The average Supermarket has room for ten displays, six of which are reserved for the retailers' own needs. This leaves four displays per week "up for grabs" for your product * * * and three thousand others. In 1953, the 76 leading nationally advertised food products were only able to win display space over and above normal selling space in stores accounting for a meager 3 percent of sales (Nielsen Food Index).

Supermarket display space is costly too! If the value of all of the CHAIN-LIGHTNING displays currently available were conservatively estimated at five dollars per store per week, the total worth would be over \$15,000 per week.

CHAIN LIGHTNING is the Radio merchandising plan that puts your product physically in front of the competition in more than three thousand supermarkets in the richest retail areas in the land. It combines the hard hitting selling power of local Radio advertising with the impact of point-of-sale displays to: * * * pre-sell your customers in their homes * * * clinch the sale in the food store * * *.

The average Super Market carries over 3,000 items.

In this vast jungle of brands, sizes, packages, cans and jars, any single product has little chance of capturing the attention of retailer or shopper.

If the retailer divided his day evenly among his 3,000 items—each would receive 10 seconds of his time!

If the shopper divided her 45-minute super-market visit among the 3,000 items—she'd give each less than a second of her attention!

Respondent participated in the above-described plans by entering into contracts with the broadcasting companies for the purchase of broadcasting time. These contracts contain no reference to in-store promotion. In fact, respondent's contracts with ABC and CBS contain the following clause or its equivalent:

This contract contains the entire agreement between the parties and is not subject to oral modification.

The NBC contract contains a similar clause, as follows:

This contract constitutes the entire agreement between the parties relating to the subject matter thereof.

The various payments made by respondent to the several broadcasting companies from 1954 through 1956 were, as follows:

Year	Broadcasting company	Station	Amount paid	Yearly total
1954	ABC	WBKB (Chicago)	\$49,450.00	\$88,406.25
	NBC	WMAQ (Chicago)	38,956.25	
1955	ABC	WBKB (Chicago)	55,685.00	132,775.50
	NBC	WNBC (New York)	36,920.50	
	NBC	WMAQ (Chicago)	40,170.00	
	CBS	WBBM (Chicago; Apr. 4 to June 30, 1956)	13,824.00	
1956	NBC	WNBC (New York; to June 30, 1956)	29,350.00	56,434.00
	NBC	WMAQ (Chicago; to June 30, 1956)	13,260.00	

The three plans under which the above-listed payments were made all required of the respondent a minimum payment over a minimum period of time, to qualify for a minimum amount of in-store promotion. There were a number of variations of all of these three plans. A recounting of the many details of such variations is here deemed unnecessary.

After the respondent had contracted with the broadcasting companies, as above described, the respondent was notified by such broadcasting companies that some of the respondent's products would be displayed in the stores of certain grocery chains on certain dates. In many instances, the respondent thereupon contacted the designated chain store for the purpose of arranging the type and details of the in-store promotional displays.

All of respondent's customers who received radio or television advertising time from the broadcasting companies, pursuant to the contract described herein, were grocery chains who have been and are in competition in the resale of respondent's products with other grocery chains and independent customers of respondent who did not receive and who were not offered such broadcasting time or anything of value in lieu thereof.

THE ISSUE

The section of the Clayton Act, as amended, under which this proceeding is brought provides, as follows:

SEC. 2. (d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Since the complaint alleges and the answer denies that respondent paid money to said broadcasting companies for the benefit of certain of respondent's chain-store customers as compensation or in consideration for services or facilities furnished respondent by those customers, and that the benefits so furnished to some of respondent's customers were not made available to respondent's other customers on proportionally equal terms, in violation of the above-quoted provision of the Clayton Act, the issue herein is as follows:

Did respondent pay or contract for the payment of something of value to any of the three broadcasting companies named herein "for the benefit of a customer" and "as compensation or in consideration" for in-store sales promotion furnished by such customer to respondent, without making the same benefit available on proportionally equal terms to all its other customers competing with the customers so favored, within the meaning of section 2(d) of the Clayton Act as amended?

THE ISSUE RESOLVED

Counsel supporting the complaint, in effect, contends that the facts herein stipulated show that the respondent, by adopting and using the sales-promotion plan of the broadcasting companies, attempted to escape legal accountability by doing indirectly that which respondent knew it could not lawfully do directly; that is, procure in-store promotion for its products by providing benefits in the form of broadcasting time for the use of a few favored customers without making the same or similar benefits available to its other competing customers. Counsel further contends that the several transactions heretofore described, instead of being unrelated business operations as they may appear when considered separately, constitute, in fact and in reality, one complete transaction, which can be properly evaluated only as a whole.

Counsel for respondent vigorously contradicts the above-stated contentions, and affirmatively asserts that the facts show that respondent did not pay or contract for the payment of anything of value to any of the broadcasting companies for the broadcasting time furnished to respondent's customers, and that the respondent did not pay or contract to pay anything of value as "compensation or in consideration" for promotional services furnished to the respondent by any of its customers.

Let us re-examine the facts in the light of these contentions. The facts show that the sales-promotion plan in question, like the issue herein, is composed of three elements. First, we have a separate contract between the broadcasting company and a chain store, promising

such store certain broadcasting time for its own purposes in return for in-store promotion of certain products to be later designated by the broadcasting company. Second, we have a separate contract, of a later date, between the broadcasting company and the respondent, providing for the purchase by the respondent of certain broadcasting time for its own advertising purposes, at the standard rate of payment then current. This contract is expressly limited to the provisions contained therein. Third, we have brochures and circulars disseminated by the broadcasting company for the purpose and with the effect of inducing the respondent to enter into the contract with the broadcasting company. We also have correspondence between and among the various parties to both contracts, relative to the various phases of the sales-promotion plan and the details of the in-store displays.

When the above transactions are considered in their inter-relationship with each other, the true significance of the several phases of the sales-promotion plan, and the true relationship established between the parties thereto, become apparent. Thus we see that the in-store promotion feature of the plan, although astutely excluded from the narrow specifications of the contract between respondent and the broadcasting company, was actually the primary cause and the chief consideration for the execution of that contract. The respondent was required, not merely to purchase radio or television time in order to acquire the right to in-store promotions, but was required to purchase a specified minimum amount of such time in order to so qualify. It is reasonable to conclude, since the plan in question resulted from the difficulty of selling broadcasting time, that it was continued for the same reason, and that respondent would not have purchased broadcasting time at all, or would have purchased it only at a reduced price or in a lesser amount, except for the inducement of the in-store promotion. We also see that the respondent made the only money payment involved in the whole transaction, and was therefore the sole financial support of the plan. Without such support, it is reasonable to assume that the plan would not have matured, but would have proven financially unprofitable and therefore of short duration. It follows, therefore that the respondent, as the sole financial supporter of the plan, paid for the broadcasting time granted the chain-store for in-store promotional displays, as well as for the broadcasting time purchased for respondent's own use.

The facts show clearly that the responsible officials of the respondent knew, or should have known, when they entered into the plan presented to respondent by the broadcasting company, that respond-

ent, in adopting such plan, would be supplying the consideration which would constitute compensation for the benefits to be received by a few favored customers, to the prejudice of their competitors. The fact that the payment for the broadcasting time furnished to the favored chain stores was indirect rather than direct does not alter its legal or practical effect; neither does the fact that the respondent made the payment in question primarily in its own behalf and without a prior agreement with the chain store. On these points, counsel supporting the complaint very aptly quotes from the statement of counsel for the respondent, in his book entitled "Price Discrimination and Related Problems Under the Robinson-Patman Act," revised edition, 1953, page 116, as follows:

It is no defense for a seller charged with a violation of either of these sections [section 2(d) and section 2(e)] to show that he furnished or paid for a service solely in his own interest and not pursuant to any prior understanding with the purchaser. These sections prohibit discrimination in merchandising allowances or services irrespective of whether the making of the payment or furnishing of the service was a term or condition of sale, or amounted to an indirect price discrimination.

Respondent also contends, as do the broadcasting companies as *amici curiae*, that respondent's payment to the broadcasting company was in fulfillment of a separate, individual contract, and was in no wise a consideration for the in-store promotions later supplied. In fact, respondent contends that the supplying of the in-store promotions to the respondent was a gratuity, and was "free" within the interpretation of the Commission in the matter of *Walter J. Black, Inc.*, Federal Trade Commission docket No. 5571 (1953). This contention is fallacious, because we are not here concerned, as was the Commission in the case cited, with the question of whether a certain advertisement was misleading. On the contrary, we are here concerned with determining, from all the relevant facts, whether the payment made by the respondent to the broadcasting company was in reality compensation only for the broadcasting time purchased by the respondent for its own use, or whether such payment was made for a broader purpose, and did actually serve also as compensation for in-store displays furnished to respondent by some of its chain-store customers. We are persuaded by the facts that the payment by the respondent included the larger purpose, and was actually not only a self-serving payment, but also a payment on behalf of a few favored customers. We must conclude, therefore, that the case cited is in no way a precedent for the decision in the present proceeding.

Counsel for the respondent further contends that the consideration received by the chain stores in the form of broadcasting time was not

contingent or dependent on any act of the respondent, but was dependent solely on the contract between the broadcasting company and the chain store. He points out that this contract provides for the furnishing of broadcasting time to the chain store in compensation for in-store promotions of products to be later designated by the broadcasting company. The facts reveal that such designation was not made by the broadcasting company until after the signing of its contract with respondent for the purchase of broadcasting time. From these facts the conclusion is inescapable that the broadcasting company, when entering into the contract with the chain store, contemplated completing the overall plan, of which that contract was merely a part, only after successful negotiation of a second contract with some manufacturer for the purchase of broadcasting time, which would enable the broadcasting company, thereafter, to designate that manufacturer's products as those to be promoted in the in-store displays. We must conclude, therefore, that the contention stressing the independent character of the first contract is altogether unrealistic, and disregards the fact that the first contract was only preliminary to the contract with respondent, both contracts being, not independent transactions, but parts of a larger plan.

Counsel for the respondent seeks, in his brief, to invoke the rules of private contract law governing third-party beneficiaries. In connection with this argument, he states that

Most of the States recognize the right of a third person to sue upon a contract made for such person's benefit. Under that doctrine as applied by the courts a contract is not regarded as made for the benefit of a third party unless the intent to benefit that person clearly appears. Benefit resulting incidentally from a contract made by others is not sufficient. By these tests, the station contracts here in evidence plainly were not contracts for the benefit of the chains, whether or not the terms of the merchandising plans are read into them.

This argument is specious. We are not here concerned with an application of the rules of private contract law, but with the broader and more realistic principles of public law, which require an examination of the entire plan in question in all its related parts. As hereinbefore stated, the omission from respondent's contract of the benefit intended to be conferred, in the form of broadcasting time, upon the chain store in consideration of the in-store displays promised to respondent as an inducement to purchase broadcasting time for its own use appears, particularly in the light of the contentions herein made by counsel for respondent, to have been intentional, for the purpose of shielding the respondent from the force and effect of the Clayton Act. Such omission appears to be, palpably, an attempt to circumvent that act by effectuating, indirectly through the agency

of the broadcasting company, a practice which could not lawfully be effectuated directly.

The fact that this sales-promotion plan was instigated by the broadcasting company rather than by the respondent does not alter the fact that respondent, by accepting it, became a party thereto, and cannot now evade full responsibility therefor. Respondent's acceptance of the broadcasting company's tempting offer of in-store promotion would, of course, have become lawful, had the respondent required, as a condition for its acceptance, that the benefit of broadcasting time given in return for such in-store promotion be made equally available to all respondent's customers. Extension of the offer to all respondent's customers might have proved impracticable because of their number; but that factor offers no justification for respondent's unlawful conduct.

Counsel for the respondent cites the case of *State Wholesale Grocers v. The Great Atlantic and Pacific Tea Co.* (C.C.H. 1957 Trade Cases, pp. 73145, 73148-9, 73175) as condemning the contention of counsel supporting the complaint that the broadcasting companies would not continue to offer merchandising plans without the participation therein of manufacturers of grocery products, and that respondent, by its participation in the plan here involved, is contributing to and making possible the continuance thereof. Counsel, in quoting that decision, has disregarded the several basic, factual differences between that case and the instant proceeding. Lengthy analysis of such differences is here deemed unnecessary. Counsel for the respondent has wisely refrained from stating that the case cited is a valid precedent upon which to base a decision herein. We agree with that omission; the case cited is not a precedent nor a parallel to the instant proceeding, and can be of no assistance in the adjudication thereof.

CONCLUSION

In reaching our conclusion in this proceeding, we recognize that the section of the Robinson-Patman Act amending the Clayton Act with which we are presently concerned was designed by Congress to protect small, independent merchants against unfair and discriminatory competitive advantages, in the form of payments, rebates or advertising allowances, granted by manufacturers and distributors to the larger chain stores with which the small stores must compete at the retail level. In other words, as applied to the facts of the present proceeding, the provision of section 2(d) of the Clayton Act as amended was specifically designed to protect the small businessman buying respondent's products from the competitive injury resulting

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from respondent's large chain-store customers receiving advertising allowances in the form of broadcasting time in return for in-store sales promotion in which the smaller merchants were never given an opportunity to participate.

We recognize also, that section 2(d) of the Clayton Act as amended makes no distinction between a benefit conferred directly and one conferred indirectly, but expressly forbids the conferring of any discriminatory benefit, by providing that no payment shall be made "for the benefit of a customer" unless the opportunity to share in that benefit is equally bestowed upon all competing customers.

In the light of these principles, we must conclude that, in the present proceeding, the respondent, by its payment to the broadcasting company, paid or contracted to pay something of value for its own benefit and also for the benefit of certain chain-store customers in consideration for in-store promotional facilities furnished to respondent by such favored customers, without making the same or similar-benefits available on proportionally equal terms to all respondent's other customers who compete in the retail distribution of respondent's products with the customers so favored. These acts and practices clearly violate section 2(d) of the Clayton Act as amended. Accordingly,

It is ordered, That respondent, Sunshine Biscuits, Inc., a corporation, its officers, agents, representatives, or employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of grocery products, including cookies and crackers, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of any of respondent's said products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

DECISION OF THE COMMISSION

Respondent, Sunshine Biscuits, Inc., having filed an appeal from the hearing examiner's initial decision finding that said respondent has violated the provisions of section 2(d) of the Clayton Act, as amended, and ordering it to cease such violation; and

The Commission having considered the entire record, including the briefs and oral arguments of counsel for respondent and counsel

in support of the complaint and the briefs of Columbia Broadcasting System, Inc., and National Broadcasting Co., Inc., as *amici curiae*, and having determined that the findings and conclusions in the initial decision are fully substantiated on the record and that the order contained therein is appropriate in all respects to dispose of this matter:

It is ordered, That respondent's appeal be, and it hereby is, denied.

It is further ordered, That the hearing examiner's initial decision filed October 9, 1957, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent, Sunshine Biscuits, Inc., a corporation, 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.

IN THE MATTER OF

PIEL BROS., INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 2(d) OF THE CLAYTON ACT*Docket 6598. Complaint, July 19, 1956—Decision, May 7, 1958*

Order requiring a distributor of grocery products including beer, with principal place of business in Brooklyn, N.Y., to cease discriminating in price in violation of section 2(d) of the Clayton Act by paying broadcasting companies for time furnished to certain favored grocery chains for their own advertising purposes in return for which the participating chains gave in-store promotions to respondent's products in their stores located in the trade area reached by the radio or TV station utilized, without making compensation for such benefits available on proportionally equal terms to all the competitors of the favored customers.

Mr. William R. Tincher, Mr. J. Wallace Adair, Mr. Eugene Kaplan and Mr. Daniel A. Austin, Jr., for the Commission.

Appell, Austin & Gay, by Mr. Cyrus Austin, and Sullivan & Cromwell, by Mr. John F. Dooling, Jr., all of New York, N.Y., for Respondent.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE PLEADINGS

The complaint in this proceeding charges the respondent with having paid money to certain broadcasting companies for the benefit of certain of its chain-store customers, thereby providing broadcasting time "through such broadcasting companies to the favored customers for said customers' own advertising purposes." The payments thus made by respondent are alleged to have been made as compensation or in consideration for services or facilities furnished it by these favored customers in connection with the offering for sale and sale of respondent's products. It is further averred that the benefits so furnished to some of respondent's customers were not made available to respondent's other customers on proportionally equal terms, in violation of the provision of subsection (d) of section 2 of the Clayton Act, as amended.

The complaint then describes in some detail the sales-promotion plans through which respondent favored certain of its customers.

Respondent in its answer denies that any broadcasting company served as a medium or intermediary between respondent and any of its grocery-chain customers; that any payments were made by the respondent to any broadcasting company for the benefit of any of