

Decision

IN THE MATTER OF
CROSSE & BLACKWELL CO.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d)
OF THE CLAYTON ACT*Docket 6463. Complaint, Nov. 21, 1955—Decision, May 8, 1958*

Order requiring a producer of a wide variety of food products, with annual sales amounting to approximately \$14 million, to cease violating section 2(d) of the Clayton Act by making payments for advertising or other services in connection with the sale of its products to certain food chains without making such allowances available on proportionally equal terms to all their competitors.

Mr. Andrew C. Goodhope, Mr. Fredric T. Suss and Mr. Alvin D. Edelson for the Commission.

Niles, Barton, Yost & Dankmeyer, of Baltimore, Md. and Mr. James W. Cassedy, of Washington, D.C. for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER.

This proceeding began with complaint, which issued November 21, 1955, charging the respondent with having made payments of advertising allowances to some of its customers while neither offering or paying similar or proportionate advertising allowances to others of its customers competitively engaged with the recipients in the resale of respondent's products, all in violation of subsection (d) of section 2 of the Clayton Act (U.S. Title 15, sec. 13). Thereafter, initial hearing having been scheduled February 6, 1956, and subpoena duces tecum having been served upon respondent's appropriate official for production of books and records indicating the advertising payments alleged, respondent moved to quash said subpoena, which the undersigned denied on January 20, 1956, and thereafter on January 23, 1956, respondent filed a motion for a bill of particulars and dismissal of the complaint. Both of these motions were denied by the undersigned hearing examiner on January 25, 1956, whereupon respondent appealed the denial of its motion to quash subpoena duces tecum to the Commission, which appeal the Commission, on March 15, 1956, denied. On February 7, 1956, respondent filed its answer to the complaint, and hearing for the reception of testimony and evidence was again fixed for March 28, 1956, the subpoena previously served being made returnable at that time.

At this hearing the president of respondent appeared in response to the subpoena but refused to produce the documents, books and records

called for therein, asserting that the Federal Trade Commission had no authority under its act or under the Clayton Act to issue and require the production of documentary evidence in a case involving alleged violation of the Clayton Act.

Thereafter counsel supporting the complaint, in the name of the Commission, brought an original action in the United States District Court of Baltimore against the president of the respondent, in accordance with the appropriate provisions of the Federal Trade Commission Act, which action resulted in a decision upholding the authority of the Federal Trade Commission to issue a subpoena duces tecum for the enforcement of the Clayton Act (*F.T.C. v. Menzies*, 145 F. Supp. 164). Thereafter the defendant in that case appealed to the United States Circuit Court of Appeals for the Fourth Circuit for reversal of the judgment of the District Court which, after argument, consideration, briefs and facts, affirmed the judgment below on March 7, 1957. Thereafter, within the time allowed, petition for certiorari to the Supreme Court of the United States was filed by defendant in this case and denied.

Hearing was again set June 18, 1957, but prior thereto, on May 27, 1957, respondent filed a motion to dismiss the entire proceeding on the ground that it was subject to the exclusive jurisdiction of the Secretary of Agriculture by virtue of exclusionary provisions of both section 5(a)(6) of the Federal Trade Commission Act (15 U.S.C. sec. 45) and the Packers and Stockyards Act of 1921 (7 U.S.C. sec. 227). After a brief hearing on facts in support of this motion only, and consideration of briefs and arguments, complaint was dismissed by the undersigned in an initial decision dated August 2, 1957. Prompt appeal to the Commission was there upon filed and prosecuted by counsel in support of the complaint, and the Commission on consideration of the record, briefs, and arguments, on November 13, 1957, reversed the dismissal and remanded the proceeding to the undersigned for further proceedings in accordance with that opinion.

Thereafter the case was set down for the fourth time for trial to begin February 17, 1958, but prior thereto, on January 30, 1958, in order to avoid the expense and time incident to trial on the merits, counsel in support of the complaint and counsel for respondent entered into a stipulation on the record at a special hearing held for that purpose which stipulation provides in substance that counsel supporting the complaint has available substantial evidence, both testimonial and documentary, which if received in evidence would sustain all of the factual allegations of the complaint, and that respondent does not contradict such proof, respondent expressly reserving, however, its

claim that it is under the exclusive jurisdiction of the Secretary of Agriculture and that the Federal Trade Commission has no jurisdiction of the cause of action. In addition it was stipulated that without further notice the undersigned and the Commission could proceed to make findings of fact draw conclusions and enter an appropriate order as though such evidence was in the record. In accordance with this stipulation, and on the entire record, the hearing examiner makes his following findings of fact.

FINDINGS OF FACT

Respondent Crosse & Blackwell Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 6801 Eastern Avenue, Baltimore, Md.

Respondent is now and has been engaged in the business of producing and selling a wide variety of food products. Respondent sells approximately 150 products under the brand name "Crosse & Blackwell" and approximately 35 products under the brand name "Keiller." The principal items produced and sold by respondent are canned nut rolls, marmalades, soups, tomato products, pickles, and relishes. Respondent sells its products through food brokers and distributors, and, in addition, sells its products direct to customers who sell at retail, including retail chain store organizations. Sales made by respondent of its products are substantial, amounting to approximately \$14 million annually.

In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended. Respondent ships its products, or causes them to be transported, from its principal place of business located in the State of Maryland to customers located in the same and other States of the United States and the District of Columbia.

In the course and conduct of its business in commerce, respondent has paid, or contracted for payment of, something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

For example, during the year 1955 respondent contracted to pay and did pay \$100 to the Giant Food Shopping Center, Inc., Washington, D.C., and \$2,100 to the Food Fair Stores, Inc., Philadelphia,

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Pa., as compensation or as an allowance for advertising or other service or facility furnished by or through Giant Food Shopping Center, Inc., and Food Fair Stores, Inc., in connection with their offering for sale or sale of products sold to them by respondent. Such compensation or allowance was not offered or otherwise made available by respondent on proportionally equal terms to all other customers competing with Giant Food Shopping Center, Inc., or Food Fair Stores, Inc., in the sale and distribution of respondent's products.

CONCLUSION

The acts and practices of the respondent, as alleged above, violate subsection (d) of section 2 of the Clayton Act, amended by the Robinson-Patman Act.

ORDER

It is ordered, That respondent Crosse & Blackwell Co., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the sale of canned nut rolls, marmalades, soups, tomato products, pickles, relishes and other products in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, do forthwith cease and desist from:

Making or contracting to make, to or for the benefit of any customer, any payment of anything of value as compensation or in consideration for any advertising or other services or facilities furnished by or through such customer, in connection with the handling, offering for resale, or resale of canned nut rolls, marmalades, soups, tomato products, pickles, relishes, and other products sold to him by respondent, unless such payment is affirmatively offered or otherwise made available on proportionally equal terms to all other customers competing in the distribution or resale of such canned nut rolls, marmalades, soups, tomato products, pickles, relishes, and other products.

OPINION OF THE COMMISSION

By Gwynne, Chairman:

Respondent is charged with violation of section 2(d) of the amended Clayton Act by the giving of illegal advertising allowances.

During the proceedings herein, respondent filed a motion to dismiss the case on the ground that it was subject to the exclusive jurisdiction of the Secretary of Agriculture by virtue of section 5(a)(6) of the Federal Trade Commission Act and the Packers and Stockyards Act of 1921. The hearing examiner sustained the motion and dismissed the complaint.

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On appeal, the Commission reversed the holding of the hearing examiner and remanded the case for further proceedings. Counsel for both parties have now entered into a stipulation disposing of the case without a trial on the merits and making it unnecessary to introduce evidence in support of the complaint. The hearing examiner accordingly made findings of fact, conclusion of law and entered an order against respondent.

Respondent's appeal raises only the issue as to whether jurisdiction over the acts and practices charged against respondent in the complaint is exclusively in the Secretary of Agriculture, and that the Federal Trade Commission is without jurisdiction. The Commission considered this question in the previous appeal of respondent and the opinion filed therein sets out our views.

The findings, conclusion and order of the hearing examiner are adopted as the findings, conclusion and order of the Commission.

For the reasons set out in our previous opinion, respondent's appeal is denied, and it is directed that an order issue accordingly.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision filed February 6, 1958, including briefs in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and adopting the initial decision as the decision of the Commission:

It is ordered, That respondent 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 to cease and desist contained in the aforesaid initial decision.

Complaint

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IN THE MATTER OF
SUNKIST GROWERS, INC.

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

Docket 6595. Complaint, July 19, 1956—Decision, May 8, 1958

Consent order requiring a Los Angeles producer of fresh and frozen fruit juices 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. J. Wallace Adair and Mr. William R. Tincher for the Commission.

Pope, Ballard & Loos, by Mr. Karl D. Loos, Mr. Dickson R. Loos and Mr. P. C. King, Jr., of Washington, D.C., for respondent.

COMPLAINT

The Federal Trade Commission having reason to believe that Sunkist Growers, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of subsection (d) of section 2 of the Clayton Act (U.S.C., title 15, sec. 13), as amended by the Robinson-Patman Act, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Sunkist Growers, Inc., is a corporation organized, existing, and doing business under the laws of the State of California with its principal office and place of business located at 707 West Fifth Street, Los Angeles, Calif.

PAR. 2. Respondent is now and for a number of years has been engaged in the business of selling and distributing its products, including fresh and frozen juices, in commerce, as "commerce" is defined in the Clayton Act, as amended, to competing customers, including independent grocers and grocery chainstores, located throughout some of the States of the United States and in the District of Columbia.

PAR. 3. In the course of said business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers