

Complaint

IN THE MATTER OF
EMARD PACKING CO., INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2(c) OF THE CLAYTON ACT*Docket 7249. Complaint, Sept. 11, 1958—Decision, Feb. 12, 1959*

Consent order requiring packers of seafood products and their exclusive primary brokers in Seattle, Wash., to cease violating Sec. 2(c) of the Clayton Act by making payments, allowances, etc., in lieu of brokerage, or granting lower prices which reflected brokerage to certain favored customers.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have been and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Emard Packing Co., Inc., hereinafter sometimes referred to as corporate packer respondent, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal office and place of business located at 911 Lowman Building, Seattle, Wash.

Respondent Henry J. Emard, hereinafter sometimes referred to as individual packer respondent, is an individual and is president and treasurer of the corporate packer respondent. He owns a majority of the outstanding capital stock of the corporate packer respondent and directs and controls its business practices and policies, including its sales and distribution policies. His principal office and place of business is the same as that of corporate packer respondent.

The said packer respondents, both corporate and individual, have been for the past several years and are now engaged in the business of packing, selling and distributing canned salmon and other seafood products, hereinafter referred to as seafood products, to various buyers throughout the United States. Respondents' annual volume of business during the past several years has been substantial.

PAR. 2. Respondent Johnson Lincoln, hereinafter sometimes referred to as corporate broker respondent, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington with its principal office and place of business presently located at 911 Lowman Building, Seattle, Wash.

Respondent Forrest H. Johnson hereinafter sometimes referred to as individual broker respondent, is an individual and is president of said corporate broker respondent. Said individual respondent sometimes also trades as Forrest H. Johnson Co. He owns a majority of the outstanding capital stock of the said corporate broker respondent and directs its business practices and policies, including its sales and distribution policies as well as those of the Forrest H. Johnson Co.

Said broker respondents, both corporate and individual, have been for the past several years and are now engaged in the brokerage business representing a number of packer-principals, one of which is now the corporate packer respondent named herein, in connection with the sale of seafood products, to various buyers located throughout the United States. Respondents' annual volume of business during the past several years has been substantial.

PAR. 3. In the course and conduct of their business both packer and broker respondents, corporate and individual, for the past several years have sold and distributed and are now selling and distributing seafood products in commerce, as "commerce" is defined in the aforesaid Clayton Act, to buyers located in the several states of the United States, other than the State in which respondents are located. Said respondents transport or cause such seafood products when sold to be transported from their place of business, or from warehouses or terminals in the State of Washington to buyers, or to the buyers' customers, located in various other states of the United States. There has been at all times mentioned herein a continuous course of trade in commerce in said seafood products across State lines between respondents and the respective buyers of said products.

PAR. 4. The packer respondents, both corporate and individual, for the past several years and up until the time they entered into a joint venture with broker respondents, in the latter part of 1956, as described herein, sold their seafood products through primary brokers generally located in Seattle, Wash., and through field brokers in the various marketing areas to buyers located

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throughout the United States. From time to time during this period, the said packer respondents also sold direct to certain buyers without utilizing the services of either their primary or field broker. In other instances, they made sales to buyers where only one broker was utilized.

When selling through primary brokers the packer respondents paid said broker a commission or brokerage fee usually in the amount of 5% of the net selling price of the merchandise sold. When a field broker is utilized either by the packer or the primary broker, said field broker is usually compensated for his services at the rate of $2\frac{1}{2}\%$ of the net selling price of the merchandise.

PAR. 5. In the course and conduct of their business, respondents in or about August 1956, entered into an agreement or a joint venture arrangement, whereby the broker respondents named herein would have the exclusive right to represent the packer respondents as primary brokers in negotiating sales for them at the usual primary brokerage rate. Certain direct sales in which the packer respondents did not utilize a broker were excluded from said agreement. Under this arrangement the broker respondents utilized certain of the packer respondents' facilities and clerical personnel for such activities as invoicing, billing, etc., with the net brokerage earnings being shared equally between the packer respondents and the broker respondents. Beginning on or about January 1, 1957, the agreement or joint venture was extended whereby the broker respondents would have the exclusive right to represent the packer respondents as their primary brokers in negotiating the sale of the packer respondents' entire pack at the usual primary brokerage rate, under the name and style of Emard Packing Company—Sales Division. Under this agreement the broker respondents were also acting as primary brokers for other packers in the sale and distribution of seafood products. The sharing of facilities and brokerage earnings between the broker and the packer respondents remained the same.

PAR. 6. In the course and conduct of their business as aforesaid, respondents, both corporate and individual have in many instances made payments, grants, allowances or discounts by various means and in substantial amounts in lieu of brokerage, or have granted lower prices which reflect the payment of brokerage to certain favored buyers of seafood products.

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Among and including, but not necessarily limited to, the methods or means employed by respondents in so doing, are the following:

a. Granting or allowing to certain buyers direct and indirect reductions in price in various amounts in transactions where either a primary or field broker, or both, were not utilized.

b. Granting or allowing to certain buyers direct and indirect reductions in price in various amounts in transactions where the primary or field brokers, or both, took a reduction in their brokerage on the particular transactions.

c. Selling to certain buyers at net prices which were lower than those accounted for to the packer-principal.

PAR. 7. In making payments of commissions, brokerage fees, or granting discounts or allowances in lieu thereof, or by granting lower prices which reflect brokerage, to certain buyers as hereinabove alleged and described the respondents, and each of them, have violated and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended. (U.S.C., Title 15, Sec. 13).)

Mr. Cecil G. Miles for the Commission.

Mr. B. F. Reno, Jr., of Seattle, Wash., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding involves alleged violations of §2(c) of the Clayton Act, as amended (U.S.C., Title 15, §13), it being charged in the complaint, in substance, that the respondents named therein, in the course of their business of packing, selling and distributing canned salmon and other seafood products in commerce, operating under a joint venture arrangement entered into in or about August 1956, and extended on or about January 1, 1957, whereby respondents Johnson Lincoln and Forrest H. Johnson were to have the exclusive right to act as primary brokers in negotiating the sale of the entire pack of respondents Emard Packing Co., Inc., and Henry J. Emard as packer-principals, and in certain direct sales, excluded from said arrangement, as well as in some sales for other packer-principals, have made payments, grants, allowances or discounts by various means and in substantial amounts in lieu of brokerage, or have granted lower prices which reflect the payment of brokerage to certain favored buyers of seafood products.

On December 12, 1958, there was submitted to the undersigned

hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order to Cease and Desist," which had been entered into by and between respondents and the attorneys for both parties, under date of December 2, 1958, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with §3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent Emard Packing Co., Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 911 Lowman Building, in the city of Seattle, State of Washington.

Respondent Henry J. Emard is an individual and is an officer of respondent Emard Packing Co., Inc., with his office and principal place of business located at 911 Lowman Building, in the city of Seattle, State of Washington.

Respondent Johnson Lincoln is a corporation existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 911 Lowman Building, in the city of Seattle, State of Washington.

Respondent Forrest H. Johnson is an individual and is an officer of respondent Johnson Lincoln, and also trading as Forrest H. Johnson Co., with his office and principal place of business located at 911 Lowman Building, in the city of Seattle, State of Washington.

2. Pursuant to the provisions of §2(c) of the Clayton Act, as amended (U.S.C., Title 15, §13), the Federal Trade Commission, on September 11, 1958, issued its complaint in this proceeding against respondents, and a true copy was thereafter duly served on respondents.

3. Respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

4. This agreement disposes of all of this proceeding as to all parties.

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5. Respondents waive:

- (a) Any further procedural steps before the hearing examiner and the Commission;
- (b) The making of findings of fact or conclusions of law; and
- (c) All of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

9. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order to Cease and Desist," the latter is hereby approved, accepted and ordered filed, the same not to become a part of the record herein, however, unless and until it becomes part of the decision of the Commission. The hearing examiner finds from the complaint and the said "Agreement Containing Consent Order to Cease and Desist" that the Commission has jurisdiction of the subject matter of this proceeding and of each of the respondents herein; that the complaint states a legal cause for complaint under the provisions of §2(c) of the Clayton Act, as amended (U.S.C., Title 15, §13), against each of the respondents both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all of the issues in this proceeding as to all of the parties hereto; and that said order therefore should be, and hereby is, entered as follows:

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ORDER

It is ordered, That Emard Packing Co., Inc., a corporation, and its officers, and Henry J. Emard, individually and as an officer of said corporation; and Johnson Lincoln, a corporation, and its officers, and Forrest H. Johnson, individually and as an officer of said corporation, and also doing business as Forrest H. Johnson Co., and respondents' agents, representatives, or employees, directly or through any corporate, partnership or other device, in connection with the sale of seafood products in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

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

2. Paying, granting, or passing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of, or who is subject to the direct or indirect control of such buyer, brokerage earned or received by respondents on sales made for their packer-principals, by allowing to buyers lower prices which reflect all or any part of such brokerage, or by granting them allowances or rebates which are in lieu of such brokerage, or by any other method or means.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 12th day of February 1959, become the decision of the Commission; and, accordingly:

It is ordered, That the above-named respondents 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.

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IN THE MATTER OF
HELEN E. HINDE ET AL.
TRADING AS PUGET SOUND BROKERAGE CO.

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

Docket 7151. Complaint, May 20, 1958—Decision, Feb. 17, 1959

Order requiring primary brokers of seafood products in Seattle, Wash., to cease violating the brokerage section of the Clayton Act (Sec. 2(c)), by granting to certain buyers of canned salmon, deductions from price by way of allowances or rebates, a part or all of which was not charged back to their packer-principals, in such transactions as invoicing buyers, including buying agents of food chains, at a lower price per case than they accounted for to the packer-principals and absorbing the difference out of their brokerage; granting a 10¢ a case promotional allowance to the purchaser in the form of a freight rebate; and taking 3% brokerage instead of 5% on sales involving price concessions to certain buyers.

Mr. Cecil G. Miles for the Commission.

Evans, McLaren, Lane, Powell & Beeks, by *Mr. W. Byron Lane* and *Mr. Martin P. Detels, Jr.*, of Seattle, Wash., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The Complaint

On May 20, 1958, the Commission issued its complaint against Helen E. Hinde and Elizabeth B. Swenson, individually and as copartners trading as Puget Sound Brokerage Co., charging them with acts and practices violating §2(c) of the Clayton Act as amended (U.S.C., Title 15, §13). The complaint alleges that the respondents are now, and for the past several years have been, engaged in a course of trade in commerce, as "commerce" is defined in the Clayton Act, as amended. The complaint avers that in that course of trade respondents act as primary brokers for various packers of seafood products, including canned salmon, which respondents sell and distribute for their packer-principals by negotiating sales through field brokers located in various marketing areas to buyers located throughout the United States. The complaint further alleges that respondents are usually compensated for such services by deducting a brokerage or commission of 5% of the net selling price of the commodity sold. It is further alleged that respondents compensate their field brokers