

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

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by paying them a brokerage or commission of $2\frac{1}{2}\%$ of the net selling price of the merchandise. It is charged that respondents have granted allowances, differentials, rebates and concessions in price, in substantial amounts, to certain buyers of said seafood products, a part or all of which was not charged back to the various packer-principals, but was taken from the brokerage or commission earnings of respondents and their field brokers. Specifically, the complaint alleges that respondents' methods of effectuating such concessions included:

(a) Selling to certain buyers at net prices which were less than those accounted for to their packer-principals;

(b) Granting to certain buyers deductions from price by way of allowances or rebates, a part or all of which were not charged back to their packer-principals;

(c) Taking reduced brokerage on sales which involved price concessions to certain buyers.

The complaint alleges, finally, that such acts and practices of the respondents constitute the alleged violations of §2(c) of the Clayton Act as amended.

The Answer

On August 6, 1958, respondents submitted their answer to the above-described complaint, admitting their identity and business organization and that they are engaged, as alleged, in the business of acting as primary brokers for seafood packers. They deny, however, the possession of sufficient knowledge to answer the allegations regarding the granting of allowances, differentials, concessions in price or rebates in lieu of brokerage by the methods alleged, or that such acts and practices are in violation of law.

The Proceedings

Following the joining of the issues by the complaint and answer thereto, a hearing was held in Seattle, Wash., on August 28, 1958, at which counsel supporting the complaint presented evidence and rested his case. The respondents then declined to present any evidence. Thereafter, both counsel submitted to the hearing examiner proposed findings as to the facts and proposed conclusions. The entire record herein, including such proposals, has been duly considered. Each of such proposals which has been accepted has been, in substance, incorporated into this initial decision. All proposals not so incorporated are hereby rejected.

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Identity and Business of Respondents

Respondents' identity, business organization and general operation, as hereinabove described, have been admitted and are found to be as alleged.

Acts and Practices Questioned

The evidence shows that on August 17, 1952, respondents sold 10 cases of 48 tall one-pound cans each of Chum salmon to Winsboro Wholesale, Winsboro, La., at \$19.00 per case. In accounting for this sale to their packer-principal, the Annette Island Canning Company, Metlakatta, Alaska, respondents represented this salmon as having been sold to the buyer at \$20.00 per case. Respondent Hinde testified that the difference between the invoice price to the purchaser and the price as accounted for to respondents' packer-principal was absorbed by respondents out of their brokerage; accordingly, \$1.00 per case of respondents' brokerage earnings on this transaction was passed on by them to the purchaser in the form of a lower price.

On September 14 and 18, 1953, respondents invoiced Bridgeport Canfish Co., the buying agent of Safeway, for 315 cartons of pink salmon at \$17.75 per case, but in accounting for this sale to the packer-principal, Annette Island Canning Co., respondents indicated that the price charged the purchaser was \$18.00 per case. Testimony shows that this 25¢-per-case difference was absorbed by respondents out of their 5% brokerage. Thus, in this instance, respondents passed on to their buyer a portion of their earned brokerage on this transaction in the form of a 25¢-per-case price concession.

Similarly, respondents on December 3, 1956, invoiced to American Stores, Philadelphia, Pa., 200 cartons of 48 1-pound cans of Chum salmon at \$20.50 per case, but accounted to their packer-principal, the Annette Island Canning Company, that this sale was made at \$21.00 per case, the difference of 50¢ per case being absorbed by respondents out of their brokerage.

In another instance, respondents on January 23, 1957, invoiced the American Stores Co., Philadelphia, Pa., for 500 cartons of 48 tall 1-pound cans of pink salmon at \$22.50 per carton, accounting for this sale to the packer-principal, the Annette Island Canning Company, as if made at the price of \$23.00 per carton, the 50¢ difference again being absorbed by respondents out of their brokerage.

Again, on February 18, 1957, respondents invoiced the same customer, among other things, for 500 cartons of 48 tall 1-pound cans of pink salmon at \$22.50 per case, and accounted for the sale to the same packer-principal at \$23.00 per case, absorbing out of their brokerage, and passing on to the customer as a price concession, the difference of 50¢ per case.

In view of the above-described evidence, we must find that respondents have, in fact, engaged in "selling to certain buyers at net prices which were less than those accounted for to their packer-principals," as alleged in the complaint herein.

The record contains an invoice dated September 30, 1952, covering a sale by respondents of 1,250 cases of 48 tall 1-pound cans of pink salmon to the C. F. Smith Company, Detroit, Mich. This invoice shows freight prepaid by respondents in the amount of \$1,168.17, whereas the freight actually paid by respondents to the Union Pacific Railroad for this shipment was \$1,293.17, or \$125 more, which represents 10¢ a case promotional allowance granted to the purchaser in the form of a freight rebate.

This further evidence compels the factual conclusion that the respondents have, as alleged, granted "to certain buyers deductions from price by way of allowances or rebates, a part or all of which were not charged back to their packer-principals."

On March 16, 1953, respondents invoiced Chum salmon to a customer in Louisiana through Brown Brokerage Co., respondents' field broker, at \$16.00 per case, on which transaction respondents received 5% brokerage from their packer-principal, Annette Island Canning Co. On the same date, respondents invoiced Chum salmon to The Nakat Packing Corp., a buying subsidiary of the Great Atlantic & Pacific Tea Co., at \$15.25 per case, 75¢ less per case than the price charged the Louisiana customer. On this transaction, the respondents received a billing and handling charge of 20¢ per case from Nakat, in lieu of their usual 5% brokerage.

As shown by documentary evidence in the record, respondents had with the Nakat Packing Corp. a sales contract dated September 14, 1953, which specified that a 50¢-per-case differential in favor of Nakat was to be maintained on all items listed therein; and on all sales to Nakat, respondents received from their packer-principal, the Klawack Oceanside Packing Co., only 3% brokerage instead of their usual 5%. Instances thereof are substantiated in the record by invoices dated November 18, 1953, and February 16, 1954, respectively. Simultaneously, respondents

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were selling the same product to other customers through their field brokers at 50¢ a case over their price to Nakat, and were receiving from their packer-principals brokerage of 5%. In fact, the same packer-principal who paid respondents 3% brokerage on sales to Nakat paid to them, during the same period of time, 5% brokerage on similar sales to other customers. Under the terms of the above-mentioned contract with Nakat, the packer agreed "that the present ratio of 50¢ a case" (allowance to Nakat) "shall be maintained against a general market decline on all items listed * * *." Respondent Hinde, on the record, explained that the packer reduced both the price to Nakat and the brokerage to respondents as they probably considered that it was not too difficult to make the sale.

These acts of the respondents reveal that, as alleged, they have engaged in "taking reduced brokerage on sales which involve price concessions to certain buyers."

Applicable Precedents

The courts have consistently held that it is a violation of §2(c) of the Clayton Act to pay or to pass on brokerage to a buyer in any guise whatsoever.

In *The Great Atlantic & Pacific Tea Company* case, 106 F. 2d 667, 674 (C.A. 3, 1939), cert. denied 308 U.S. 625 (1940), the Court said:

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 Congress and thus we construe the statute. Any other result would frustrate the intent of Congress.

Also in *Oliver Bros., Inc., et al., v. Federal Trade Commission*, 102 F. 2d 763, 770 (C.A. 4, 1939), the Court said:

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 the 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 provisions.

Further, in *Quality Bakers of America v. Federal Trade Commission*, 114 F. 2d 393 (C.A. 1, 1940), the Court said:

It is plain enough that the paragraph [2(c)] taken as a whole, is framed to prohibit the payment of brokerage in any guise by one party to the other or the other's agent * * *.

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Conclusions

We must conclude, in the light of the authorities cited, and the facts as hereinabove found, that respondents, as alleged in the complaint, granted, directly and indirectly, price concessions, rebates and allowances in lieu of brokerage to certain buyers of seafood products, in violation of §2(c) of the Clayton Act as amended by the Robinson-Patman Act. Accordingly,

It is ordered, That respondents Helen E. Hinde and Elizabeth B. Swenson, individually and as copartners trading as Puget Sound Brokerage Co., and their agents, representatives and employees, directly or through any corporate, partnership, or other device, or trading under any other name, in connection with the sale of seafood products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Paying, granting, or passing on, either 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 in lieu of such brokerage, or by any other methods or means.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

The Commission having considered the hearing examiner's initial decision, filed December 9, 1958, in disposition of this matter; and

It appearing that except for one sentence, which is inaccurate, said initial decision is appropriate in all respects to dispose of the proceeding:

It is ordered, That the initial decision be, and it hereby is, modified by striking therefrom the last sentence of the first paragraph on page 3, reading as follows:

"This transaction shows that the respondents divided the 5% brokerage which they were legally entitled to collect from their packer-principal in half, and granted a price concession representing 2½% thereof to their customer, retaining only 2½% brokerage as compensation for their services."

It is further ordered, That said initial decision as so modified be, and it hereby is, adopted as the decision of the Commission.

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It is further ordered, That the respondents, Helen E. Hinde and Elizabeth B. Swenson, 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 aforesaid initial decision.

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IN THE MATTER OF
GREENWOOD FURS, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS*Docket 7189. Complaint, July 17, 1958—Decision, Feb. 17, 1959*

Consent order requiring a furrier in New York City to cease violating the Fur Products Labeling Act by setting out fictitious prices in invoicing and by failing to maintain adequate records as a basis for such pricing claims.

Mr. Charles W. O'Connell for the Commission.

Dewey, Ballantine, Bushby, Palmer & Wood, by *Mr. E. Deane Turner*, of New York, N.Y., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents with falsely and deceptively invoicing and advertising certain of their fur products, and with failing to maintain full and adequate records disclosing the facts upon which were based pricing and savings claims and representations as to said products, in violation of the Fur Products Labeling Act and the rules and regulations promulgated thereunder, and of the Federal Trade Commission Act.

After the issuance of the complaint, respondents, their counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the acting director and an assistant director of the Commission's Bureau of Litigation, and thereafter transmitted to the hearing examiner for consideration.

The agreement states that respondent Greenwood Furs, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 350 Seventh Avenue, New York, N.Y.; and that respondent Maury Green is president and treasurer of said corporation, his office and place of business being the same as that of the corporate respondent.

The agreement provides, among other things, that 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; that the record on which the initial decision and the de-