

Decision

IN THE MATTER OF
THE FIRESTONE TIRE & RUBBER COMPANYORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2(a) OF THE CLAYTON ACT*Docket 7141. Complaint, May 7, 1958—Decision, May 12, 1959*

Order requiring a manufacturer with nationwide distribution of its own tires and tubes and other related and non-related items, to cease granting to a favored few—actually less than 50 of its 12,000 to 14,000 direct franchise dealers, whom it classified as “warehouse dealers” and paid a commission for warehousing services based on the net prices of all tires and tubes warehoused and distributed—commissions on merchandise resold for their own account as well as preferential discounts, freight payments, and consignment shipments made without charge, in competition with other direct franchise dealers who were not accorded such benefits.

Mr. James S. Kelaher and Mr. Thomas P. Luscher supporting the complaint.

Gravelle, Whitlock & Markey, of Washington, D.C., for respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

Commission complaint was issued May 7, 1958, charging respondent with the violation of Section 2(a) of the Clayton Act as amended. After service of the complaint and the filing of answer thereto, counsel on February 20, 1959, agreed upon a stipulation in lieu of evidence. This stipulation includes certain exhibits that are referred to as Exhibits A, B, C and D.

The stipulation and the exhibits were by order of the hearing examiner, dated March 3, 1959, made a part of the record in this proceeding. Respondent's counsel, by motion dated February 26, 1959, requested that said Exhibits C and D be placed in a confidential file and not be made available for inspection by the public. The reason given for the request was that the information contained in said exhibits is of a confidential nature and considered a trade secret. Counsel supporting the complaint did not oppose this motion. Accordingly the order of March 3, 1959, directed that Exhibits C and D to the stipulation be kept confidential, safe from disclosure to persons other than the hearing examiner, members of the Commission and its staff.

On February 25, 1959 counsel supporting the complaint filed

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their proposed findings as to the facts, conclusions and order for the consideration of the hearing examiner. By letter to the hearing examiner, dated March 2, 1959, counsel for respondent acknowledges receipt of said proposed findings, etc., filed by counsel supporting the complaint. The same letter states that counsel for respondent does not intend to file any proposed findings of fact, conclusions of law or order.

This matter is now ready for an initial decision. The hearing examiner has given consideration to everything in the record. The provisions of the stipulation cover all the material allegations of the complaint. The proposed findings filed follow the stipulation and exhibits closely and the proposed conclusion is one that follows as a matter of course. For these reasons they have all been adopted with a few minor changes.

FINDINGS AS TO THE FACTS

1. Respondent, The Firestone Tire & Rubber Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 1200 Firestone Parkway, Akron, Ohio.

2. Respondent is now and for all prior years pertinent hereto has been engaged in the manufacture, sale, and distribution of tires and tubes and items related thereto in addition to items not related thereto, as well as the purchase, resale and distribution of many such other items. Its sales of such products for the fiscal year ended October 31, 1957, were \$1,158,884,304; annual sales for many years prior to 1957, and since, have also been very substantial.

3. In connection with the products it manufactures, sells and distributes nationwide, as well as the products it purchases, resells and distributes nationwide, respondent is and for all years pertinent hereto has been engaged in "commerce" as that word is defined in the Clayton Act (as amended by the Robinson-Patman Act).

4. In past years and presently respondent has engaged in nationwide tire and tube distribution through approximately 12,000 to 14,000 independent direct franchise dealers, 40,000 to 50,000 independent indirect or associate dealers, 600 to 770 company-owned stores, and 50 to 100 district office and company-operated warehouses.

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5. In past years and presently, respondent has entered into warehouse contracts with some of its direct franchise dealers, pursuant to which it has classified such dealers as "warehouse dealers." The number of Firestone warehouse agreements in past years and presently has never exceeded 50; some competitors have more, some have less. Under these contracts, respondent agrees to ship stocks of tires and tubes without charge to the warehouseman, who in turn agrees to warehouse and distribute the said tires and tubes for the benefit of respondent in serving other direct franchise dealers. For these services respondent agrees to pay a commission based on the net prices of all tires and tubes so warehoused and distributed.

6. Warehouse dealers continue to function also as direct franchise dealers. As such, they receive from respondent, stock in their warehouses, withdraw therefrom and then resell tires and tubes at the wholesale and/or retail level for their own account, and in competition with other direct franchise dealers. The warehouse agreement expressly provides that no commission is to be allowed on tires and tubes so withdrawn.

7. In past years respondent has classified and treated and does presently classify and treat its warehouse dealers as warehousemen with respect to tires and tubes withdrawn by them from warehouse stocks for resale on their own account, in some or all of the ways hereinafter described in paragraphs 8 to 12, inclusive. Such classification and treatment results in the conferring of certain benefits, described hereinafter, upon warehouse dealers, as to tires and tubes on which they are not acting as warehousemen, but as direct franchise dealers, which benefits are not accorded competing direct franchise dealers.

8. Respondent has granted and does grant to certain of its warehouse dealers, but not to others or to other direct franchise dealers, a commission on all tires and tubes purchased by them, including those purchased for resale or internal redistribution, in the amount of 5 percent of the net prices thereof. The payment of this commission as to tires and tubes internally redistributed by the said warehouse dealers is not only contrary to the provisions of the warehouse agreement, but also constitutes an indirect reduction in the prices of such tires and tubes, in the amount of 5 percent. The dollar amount paid thereon is substantial, and in some cases the volume of tires and tubes internally redistributed, as aforesaid, exceeds the volume warehoused to other dealers.

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9. Respondent ships stocks of tires and tubes to all warehouse dealers, without charge to the warehouse dealer. Such stocks include tires and tubes which are redistributed internally, as aforesaid, and are not paid for until after withdrawal from warehouse stock, and to that extent are in the nature of consigned stocks.

Other direct franchise dealers, numbering several hundred or more, many of whom are located in the trading areas of the said warehouse dealers require and receive the benefit of consigned stocks. Stocks of tires and tubes consigned to them by respondent are subject to a service charge of 5 percent per annum, based on the value of consigned inventory at hand at the end of each month.

10. Respondent has granted, and does presently grant, to its customers, including warehouse dealers, a 2 percent or 3 percent discount on the purchase of tires and tubes designated "truck or carload discount," which, in the case of dealers not classified as warehouse dealers, is based upon the size of individual quantity shipments ordered by them, and in accordance with other stated terms and conditions. Warehouse dealers, on the other hand, are granted this discount on the basis of their monthly dollar volume of purchases of tires and tubes, including purchases for resale for their own account, regardless of the size of individual quantity shipments received by them.

11. Respondent has granted, and does presently grant, to its customers, including warehouse dealers, a system of discounts ranging from 3 percent to 20-7½ percent on the purchase of certain tube types. These discounts, in the case of dealers not classified as warehouse dealers, are granted on the basis of the size of individual quantity shipments ordered by them, and in accordance with other stated terms and conditions. Warehouse dealers, on the other hand, are granted these discounts on the basis of their monthly volume of purchases of such tube types, including purchases for resale by them for their own account, regardless of the size of individual quantity shipments received by them.

12. Respondent has, and does presently prepay or allow to its customers who are not classified as warehouse dealers freight costs on single order shipments of tires and tubes from its factories or warehouses to one destination, which are in excess of 200 pounds. No freight costs are allowed such customers on re-shipments by them to their branches or customers.

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Warehouse dealers are allowed freight costs on all shipments received by them from respondent's factories or warehouses, regardless of the size thereof, or whether such shipments are made to more than one destination. Respondent bears freight costs on all shipments direct to warehouse dealers at their warehouse locations and to their branch outlets. As to certain warehouse dealers but not as to others, respondent also prepays or allows freight costs on reshipments from their warehouse locations to their branches for resale on their own account.

13. Respondent's classification or treatment of certain direct franchise dealers as warehouse dealers with respect to tires and tubes internally redistributed for resale by them for their own account, including the benefits described in paragraphs numbered 8 through 12, has the effect of reducing the prices charged such warehouse dealers on tires and tubes so resold, and constitutes a discrimination in price and goods of like grade and quality within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

14. Respondent is now and for all prior years pertinent hereto has been in substantial competition with other corporations, partnerships, individuals and firms engaged in the sale and distribution of tires and tubes and other related and nonrelated products of the same types and quality as those manufactured, sold and distributed, as well as those purchased, resold and distributed by respondent. Such substantial competition does exist and has existed for all prior years pertinent thereto as to warehouse dealers.

Respondent's direct franchise dealers are competitively engaged with each other and with respondent's warehouse dealers, within the various trading areas in which said direct franchise and warehouse dealers are engaged in business, in the resale of respondent's products at the wholesale level to automobile dealers, service stations, garages, and others. Some of the said direct franchise dealers are competitively engaged with each other and with the said warehouse dealers at the retail level.

15. The effect of such discriminations in price as set forth herein may be substantially to lessen competition in the lines of commerce in which respondent's customers are respectively engaged; or may be to injure, destroy or prevent competition with purchasers who receive the benefits of such discrimination.

16. Respondent also paid, but only to one warehouse dealer, a

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warehouse commission or allowance on its purchases of products designated in the complaint as Home and Auto Supplies, in the amount of 5 percent of its net purchases thereof. The payment of this commission or allowance was terminated more than one year prior to issuance of the complaint, and there is reason to believe that it will not be resumed. Furthermore, according to the stipulation, there is presently available no evidence of substantial adverse competitive effects, or the probability thereof, attributable to the payment of such commission or allowance.

CONCLUSION OF LAW

Respondent has violated the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, as to the sale of tires and tubes to warehouse dealers.

ORDER

It is ordered, That respondent The Firestone Tire & Rubber Company, a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in or in connection with the sale of tires and tubes and related items in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to any purchaser at a net price higher than the net price charged any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale or distribution of the respondent's products.

For the purpose of determining "net price" as used in this order, there shall be taken into account rebates, allowances, commission, discounts, terms and conditions of sale, and other forms of direct or indirect price reductions, by which net prices are affected.

It is further ordered, That the allegation of the complaint with regard to the payment of a 5 percent warehouse commission or allowance to warehouse dealers on their purchases of Home and Auto Supplies be, and the same hereby is, dismissed.

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

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12th day of May 1959, become the decision of the Commission; and, accordingly:

It is ordered, That the respondents herein 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
NEW ORLEANS SHRIMP COMPANY, INC.

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

Docket 7274. Complaint, Oct. 8, 1958—Decision, May 12, 1959

Consent order requiring a New Orleans processor of fresh and frozen shrimp and shrimp products, which handled some 60% of its sales without brokers, to cease violating Sec. 2(c) of the Clayton Act by such practices as granting allowances in the approximate amount of normal brokerage on direct sales to customers, and by selling its shrimp to certain customers at reduced prices reflecting the brokerage normally paid its brokers.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has been and is 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 New Orleans Shrimp Company, hereinafter sometimes referred to as Shrimp Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Louisiana with its principal offices and place of business located at 3800 Tchoupitoulas Street, New Orleans, La.

PAR. 2. Respondent Shrimp Company is now engaging, and since 1956 has been engaged, in the business of processing and selling fresh and frozen shrimp, breaded shrimp and other shrimp products, hereinafter referred to as shrimp. Respondent, in selling certain of its shrimp, is represented by brokers in various states of the United States. Such brokers are normally paid for their services by respondent at the rate of approximately 2% of the selling price of such shrimp or at approximately $\frac{1}{2}\phi$ to 1ϕ per pound on shrimp sales.

Of respondent's sales, which amount to more than \$1,000,000 annually, approximately 60% are made direct to certain of its customers without utilizing the services of the aforesaid brokers.

PAR. 3. Respondent Shrimp Company is now engaging, and since 1956 has been engaged in the sale of shrimp, in commerce,

as "commerce" is defined in the Clayton Act, as amended. Respondent, during the period stated, has sold shrimp to buyers located in various States of the United States.

PAR. 4. Respondent, in the course and conduct of selling and distributing its shrimp, has paid, granted or allowed, and is now paying, granting or allowing, something of value as a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, in connection with the sale and distribution of its shrimp to certain customers purchasing for their own accounts, or to agents or intermediaries who are, in fact, acting for or in behalf of, or who are subject to the direct or indirect control of said customers. Among and including, but not necessarily limited to the methods or means employed by respondent in so doing are the following:

(a) Selling its shrimp to customers, without utilizing the services of its brokers, and granting an allowance, discount or rebate in the approximate amount of the brokerage normally paid its brokers;

(b) Selling its shrimp to certain customers at reduced prices, which reflect all or a part of the brokerage normally paid its brokers.

PAR. 5. The acts and practices of the respondent as alleged and described herein, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 13).

Mr. Daniel A. Austin, Jr., for the Commission.

McCloskey & Dennery, of New Orleans, La., by *Mr. Joseph McCloskey*, for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondent with violation of Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. An agreement has now been entered into by respondent and counsel supporting the complaint which provides, among other things, that respondent admits all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may

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be entered in disposition of the proceeding, such order to have the same force and effect as if entered after a full hearing, respondent specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified, or set aside in the manner provided for other orders of the Commission; that the complaint may be used in construing the terms of the order; and that the agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an adequate basis for appropriate disposition of the proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent, New Orleans Shrimp Company, Inc. (erroneously referred to in the complaint as New Orleans Shrimp Company), is a corporation existing and doing business under and by virtue of the laws of the State of Louisiana, with its office and principal place of business located at 3800 Tchoupitoulas Street, in the city of New Orleans, State of Louisiana.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That respondent, New Orleans Shrimp Company, Inc., a corporation, and respondent's officers, representatives, agents or employees, in connection with the sale of its fresh shrimp, frozen shrimp, breaded shrimp or other shrimp products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying, granting, or allowing, directly or through any corporate or other device, to any buyer, or to an agent or intermediary who is, in fact, 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 to such buyer for his own account.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Prac-

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tice, the initial decision of the hearing examiner shall, on the 12th day of May 1959, become the decision of the Commission; and accordingly:

It is ordered, That the respondent herein 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.

IN THE MATTER OF
ALLEN V. TORNEK COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 6344. Complaint, May 5, 1955—Decision, May 13, 1959

Order requiring a New York City distributor of "Tornay" watches to cease preticketing the watches with tags bearing fictitious prices greatly in excess of usual retail prices; representing falsely in advertisements and on the face of the watches that said watches contained "21 JEWELS" each of which served a mechanical purpose as a frictional bearing; and that the "Resevoil" device in the watches provided "twice as much oil to the vital parts."

A charge that said device significantly increased the amount of oil to vital parts of the watch and assured longer life expectancy was dismissed.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on May 5, 1955, issued and subsequently served upon the respondent Allen V. Tornek, an individual trading as Allen V. Tornek Company, its complaint, charging said respondent with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the provisions of the Federal Trade Commission Act.

An answer was filed by the respondent on July 1, 1955, and thereafter hearings were held in due course. The hearing examiner filed his initial decision on September 24, 1958, in which he held that certain of the charges of the complaint were sustained by the record and that others were not sustained. He included in his decision an order prohibiting the practices which he found to be unlawful and dismissing the allegations of the complaint which he found had not been sustained.

Within the time permitted by the Commission's Rules of Practice, counsel in support of the complaint and the respondent filed cross-appeals from the said initial decision, and the Commission, after considering the appeals, the briefs and oral argument in support of and in opposition thereto, including briefs filed by Hamilton Watch Company and Elgin National Watch Company, Bulova Watch Company, Inc., and American Watch Association, Inc., as *amici curiae*, and the entire record herein, rendered its