

IN THE MATTER OF
THOMASVILLE CHAIR COMPANY

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

Docket 7273. Complaint, Oct. 7, 1958—Decision, Mar. 15, 1961

Order requiring a manufacturer of household furniture with factory at Thomasville, N. C., with gross sales in 1956 exceeding \$22,000,000, to cease violating Sec. 2(c) of the Clayton Act by passing on to some of its retail furniture dealer customers a discount or lower price in lieu of a commission or brokerage; specifically, dividing its dealer customers into two groups and charging those on its "Jobber" price list—presumably making annual purchases in excess of \$50,000—five per cent less than the "Carload" list, and paying a commission of 6% on sales to the latter group, while paying only 3% on "Jobber" sales and unlawfully passing on the 3% difference to customers as part of their 5% lower price.

Before *Mr. Frank Hier* and *Mr. William L. Pack*, hearing examiners.

Mr. William W. Rogal for the Commission.

Mr. Raymond S. Smethurst, of Washington, D. C., for respondent.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

Pursuant to the provisions of an Act of Congress, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" approved October 15, 1914 (the Clayton Act), as amended by the Robinson-Patman Act, approved June 19, 1936 (15 U.S.C., Sec. 13), the Federal Trade Commission on October 7, 1958, issued and subsequently served upon the respondent named in the caption hereof its complaint in this proceeding, charging said respondent with having violated subsection (c) of Section 2 of said Clayton Act, as amended. The respondent's answer to the

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complaint was filed on November 20, 1958. Hearings were thereafter held before duly designated hearing examiners of the Commission and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. In an initial decision filed August 12, 1960, the hearing examiner found that the charge had not been sustained by the evidence and ordered that the complaint be dismissed.

The Commission having considered the appeal of counsel supporting the complaint from the initial decision and the entire record in this proceeding and having determined that the appeal should be granted and that the initial decision should be vacated and set aside, now makes this its findings as to the facts, conclusions drawn therefrom and order to cease and desist which, together with the accompanying opinion, shall be in lieu of the findings, conclusions and order contained in the initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, Thomasville Chair Company, is a corporation organized, existing and doing business under and by virtue of the State of North Carolina, with its principal office and place of business located at Thomasville, North Carolina. Respondent is engaged in the business of manufacturing and selling household furniture, including bedroom and dining room furniture.

2. In the course and conduct of its business, respondent, in the sale of said furniture, has been and now is engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

3. In the sale of its furniture to retail furniture dealer customers, respondent utilizes the services of sales agents who are compensated by the payment of a commission upon sales of such merchandise.

4. In selling its bedroom and dining room furniture, respondent utilizes two different price lists, known as the "Jobber" or "J" list and the "Carload" or "CL" list. The prices on the "Jobber" list are approximately 5% lower than the prices on the "Carload" list. On sales to "Carload" or "CL" accounts, respondent pays its sales agents a commission of 6% of the amount of the sale and on sales to the "Jobber" or "J" accounts respondent pays its sales agents a commission of 3% of the amount of the sale.

5. Respondent claims that dealers that purchase at least \$50,000 worth of bedroom and dining room furniture per year are classed as "Jobber" accounts and that all other customers are "Carload" accounts. It further claims that because the "Jobber" accounts' annual volume of purchases is larger than that of the "Carload" accounts, there is a difference in respondent's costs of at least 5%, not includ-

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ing the difference in sales commissions, in serving the two classes of customers. The purchases of many of the "Jobber" accounts, however, have amounted to substantially less than \$50,000 per year. Consequently, it would appear that annual volume of purchases of at least \$50,000 has not been the criterion used by respondent in determining which customer will receive the 5% price reduction.

6. Cost data introduced by respondent establishes that any difference that may exist in respondent's costs in serving the two classes of customers, aside from the difference in sales commissions, was less than the 5% reduction in respondent's price on sales to the "Jobber" accounts. The lower price to these favored customers was therefore based in part on a saving in the sales commission.

7. On the basis of the foregoing evidence, the Commission finds that respondent, in connection with its sale of bedroom and dining room furniture in interstate commerce, has passed on or granted to some of its retail furniture customers a discount or lower price in lieu of a commission or brokerage.

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent. The aforesaid acts and practices of respondent, as herein found, constitute violations of subsection (c) of Section 2 of the Clayton Act, as amended.

ORDER

It is ordered, That respondent, Thomasville Chair Company, a corporation, and its officers, agents and employees, directly or indirectly, or through any corporate or other device, in connection with the sale of household furniture in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying, granting or allowing, directly or indirectly, to any buyer, or to any one acting for or on 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, by selling household furniture to any buyer at prices lower than the prices at which such furniture is sold to any other buyer, where such reduction in price reflects any saving in any sales commission or fee, or any part or percentage thereof.

It is further ordered, That respondent, Thomasville Chair Company, 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.

OPINION OF THE COMMISSION

By Secrest, Commissioner:

The complaint herein charges respondent with violating subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. The hearing examiner held in his initial decision that the charge was not sustained by the evidence and ordered that the complaint be dismissed. The matter is now before the Commission upon the appeal of counsel supporting the complaint from this decision.

The following facts are not in dispute: Respondent is a manufacturer of bedroom, dining room, and upholstered furniture which it sells to retail stores throughout the United States. The bedroom and dining room furniture, sold under the name "Thomasville", accounts for approximately 87% of respondent's total sales, and the upholstered furniture, sold under the name "Finch Furniture Company", accounts for the remainder. In selling the bedroom and dining room furniture, respondent utilizes two different price lists, known as the "Jobber" or "J" list and the "Carload" or "CL" list. The prices on the "Jobber" list are approximately 5% lower than those on the "Carload" list. On sales to "Carload" or "CL" accounts, respondent pays its salesmen a commission of 6% of the amount of the sale and on sales to the "Jobber" or "J" accounts respondent pays its salesmen a 3% commission. The Finch furniture is sold at the same price to all customers and a 6% commission is paid the salesmen on all sales.

The complaint alleges, in substance, that the difference between the 6% commission on sales made to "CL" customers and the 3% commission on sales made to "J" customers is withheld by respondent and is passed on to the "J" customer as part of that customer's 5% lower price.

At the conclusion of the case in chief, respondent moved the hearing examiner to dismiss the complaint on the ground that a *prima facie* case had not been established, and further argued that the hearing examiner had erred in refusing to admit certain cost data proffered by respondent. The hearing examiner denied this motion, reaffirmed the exclusionary rulings to which respondent had taken exception and held that a *prima facie* case had been made. We denied an appeal taken by respondent from the rulings, and in an opinion, issued May 11, 1959, we stated that respondent could not as a matter of law cost justify a discount or allowance granted to a buyer in lieu of brokerage, but indicated that respondent should be permitted to introduce any evidence which would tend to rebut the

prima facie case, including evidence that respondent claimed would show that the lower prices charged certain buyers did not result from a passing on of a part of the salesmen's commissions. The matter was then remanded to afford respondent an opportunity to present its defense.

This evidence having been received, the hearing examiner has now filed his initial decision, holding therein that the evidence adduced by counsel supporting the complaint during the case in chief did not support an inference that respondent's lower price to "J" customers was based in part on the saving in sales commissions, and further holding that even if such an inference had been warranted, it would have been rebutted by the evidence introduced by respondent in its defense.

The first question raised on the appeal is whether this matter is cognizable under Section 2(c), respondent having contended that its salesmen are employees rather than brokers and that its payment for their services is not brokerage within the meaning of the subsection. The hearing examiner found it unnecessary to rule on this question in view of his conclusion that there had been no passing on of the sales commission. Although the legislative history of the Robinson-Patman Act discloses that in enacting Section 2(c) Congress was concerned with the abuse of the brokerage function as a means of effecting discrimination, the subsection as drafted does not relate solely to the payment or receipt of "brokerage". It provides in pertinent part "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, *anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof*, except for services rendered in connection with the sale or purchase of goods, wares or merchandise . . ." (Emphasis supplied.) In view of this broad language, there is no burden on counsel supporting the complaint to show that respondent's representatives are "brokers" within the generally accepted meaning of that term. Whatever may be the characterization of their function, these representatives render services to respondent in connection with the sale of respondent's merchandise and they are compensated by a commission on sales of such merchandise. We are of the opinion, therefore, that the payment made by respondent for the services of these representatives is a "commission, brokerage or other compensation," the payment or granting of which to a customers instead of to the representative is prohibited by Section 2(c).

The next question raised by the appeal is whether it may be inferred from the evidence adduced that the saving in sales com-

mission has been passed on to the "J" customers. In holding that the circumstances of this case do not support this inference, the hearing examiner regarded as highly significant the fact that there is a mathematical difference between the saving in sales commission and the amount of the price reduction. While we do not attach the same importance to this fact, it is, of course, one which must be considered since it suggests that the price reduction to favored customers may be attributed to some factor or factors having no connection with the seller's saving in sales commissions. If it appears from the facts of record, however, that the lower price cannot be accounted for in whole or in part except by a saving in sales commissions, we think it may be inferred that the lower price is based in part on this saving even though such saving is not arithmetically commensurate with the price reduction.

Respondent contends in this connection and its officials testified that the lower prices to "J" customers reflect cost savings to respondent, other than the saving in sales commission. According to this testimony, the classification of respondent's customers as "J" or "CL" accounts is made on the basis of the volume of the customers' annual purchases. "J" accounts are those whose purchases amount to at least \$50,000 per year, and "CL" accounts are those that purchase less than that amount. Because of the "J" customer's larger volume of purchases, as distinguished from the quantity purchased on individual orders, respondent's officials assert that there is a difference in costs of at least 5%, not including saving in sales commission, in serving the two classes of customers. This testimony, if accepted as true, would rebut any inference created by other evidence of record that the saving in sales commission is not retained by respondent, but is passed on to the "J" customers. In view of this testimony, therefore, it is important to determine whether respondent has adhered to the criterion of volume purchases in classifying its customers. The hearing examiner found that respondent has deviated from this criterion in only a few isolated instances and has, in good faith, sought to maintain the integrity of the "J" and "CL" classifications.

We do not agree with this finding. The record contains information with respect to sales by respondent in four trade areas: Philadelphia, Pennsylvania, Washington, D. C., Chicago, Illinois, and New York City. In 1955, nine out of ten customers in the Philadelphia area who were charged the lower price purchased less than \$50,000 worth of respondent's bedroom and dining room furniture. Four of these customers purchased less than \$10,000 worth of furniture during that year. In 1956, only one "J" customer in Philadelphia

purchased in excess of \$50,000. In the Washington, D. C., area, one customer received the lower price in 1956 and 1957 when its purchases amounted to \$16,000 and \$5,682. Another customer in that area received the lower price in 1955, 1956 and 1957 although its volume did not reach the \$50,000 minimum during these years. Another customer was charged the "J" price although its purchases amounted to only \$17,393 in 1954 and did not reach \$50,000 in 1955 or 1956. In the four trade areas mentioned above, only 12 out of 28 "J" customers purchased in excess of \$50,000 worth of respondent's products during the year 1955 and, in 1956, only 12 out of 30 "J" customers purchased in excess of the \$50,000 minimum.

Despite the testimony that respondent classified its customers on the basis of volume purchases, we think the record clearly demonstrates that the purchases of a large percentage of the favored customers have amounted to substantially less than \$50,000 a year. Consequently, there would appear to be no valid basis for distinguishing between this group of "J" customers and the "CL" customers. Applying respondent's criterion of volume purchases, there would be no demonstrable savings in costs to respondent in dealing with the one as opposed to the other. As to these "J" customers, at least, the price reduction cannot be accounted for by any savings in costs other than the saving in the salesmen's commissions. We think it may be inferred, therefore, that the saving in commission on sales to such "J" customers was not retained by respondent, but was passed on to the customer.

In reaching the conclusion that a case in support of the complaint had not been established, the hearing examiner was also influenced by testimony of respondent's officials that respondent did not intend to grant an allowance or discount in lieu of brokerage. On the basis of this testimony, the hearing examiner found, in effect, that respondent has always regarded its lower price as a volume price based upon lower costs aside from sales commissions, and its sales commissions as representing fair compensation to the salesmen for selling to the respective classes of purchasers, without regard to any difference in price.

Although Section 2(c) does not require a showing of knowledge or intent on the part of the person charged with violation thereof, evidence with respect to the intent of such person may be relevant in a proceeding under the subsection. Where, as here, the case in chief rests upon an inference that part of the sales commission has been passed on, evidence that respondent intended to pass on savings in costs other than in the sales commission would be relevant, but only as a factor bearing on the issue of whether the price reduction

was in fact based on the saving in the sales commission. We need not decide whether a showing that there was no intent to pass on the saving in sales commission would have been sufficient to rebut the inference established by counsel supporting the complaint, since we are of the opinion that the hearing examiner erred in finding that such a showing had been made.

The testimony on which the hearing examiner's findings is based is undeniably self-serving. Moreover, the statements by respondent's officials that the lower price has always been regarded as a volume price is weakened by other testimony to the effect that they were uncertain why the pricing system was established in the manner in which it presently exists. The testimony relied on by the hearing examiner is further weakened by the showing that respondent has not adhered to the criterion on which the lower price was purportedly based. But perhaps most damaging to respondent's position is the fact that respondent had not made any cost studies prior to the investigation of this matter. Certainly it would seem that if respondent had intended to pass on savings in cost other than the saving in the sales commission it would have had some accurate information as to the amount of such savings.

Considering the entire record at the conclusion of the case in chief, we are of the opinion that the evidence adduced by counsel supporting the complaint at that point in the proceeding, if not rebutted, would be sufficient to sustain the charge that respondent had violated Section 2(c) of the Clayton Act.

The next question presented for our determination, therefore, is whether the showing that respondent's lower prices reflect a saving in sales commission has been overcome or rebutted by evidence adduced by respondent in its defense. This evidence consists primarily of three studies which had been made to determine respondent's costs in dealing with the "J" and "CL" customers. Two of the cost studies were prepared by respondent itself and covered different periods of time, and a third was prepared by an independent accounting firm. The hearing examiner considered only the latter cost study and respondent's own study covering the first six months of 1959. On the basis of this evidence, he found that there are substantial differences in respondent's costs in serving "J" and "CL" customers, aside from the matter of sales commissions, and "that the differences probably approximate the five percent difference in price." He also found as favorable to respondent that "It was recognized by the Commission's accountant that the cost studies do show at least some difference in cost, possibly 1.4 percent."

It is apparent from a review of these findings that the hearing examiner believed that the purpose of the cost studies was merely to corroborate the testimony that respondent regarded its lower price as a volume price and that evidence showing any savings accruing to respondent by reason of the "J" customers' volume purchases would rule out the possibility that the price reduction was based in part on a saving in sales commission. What he has overlooked, however, is that a showing of savings in costs of less than 5% would conclusively establish that the price reduction was not in fact based entirely on savings in costs other than the saving in sales commission.

We agree with counsel supporting the complaint that the record does not support the finding that the difference in respondent's costs in serving the different classes of customers approximates the 5% difference in price. The two cost studies prepared by respondent are completely lacking in probative value. In making these studies, respondent allocated its costs to the different customer classes on an invoice line basis. It computed its total cost over a period of time and divided this amount by the total number of lines on the invoices used during the same period. This figure was then multiplied by the number of additional invoice lines which would have been used if the "J" customers had purchased in the same quantities per invoice line as the "CL" customers. The resulting amount is claimed to be savings due to larger orders of the "J" accounts.

The results of such a procedure are unacceptable for several reasons. In the first place, they do not show actual savings to respondent, but merely an estimate of what respondent's costs would have been if all customers had purchased in the same amounts as the "CL" customers. No showing was made, however, and we have no reason to believe, that under such conditions the additional invoice lines would cost as much per line as the lines actually used. But more important, we believe, is that except for a few expense items, respondent has failed to show any relationship between its costs and the number of invoice lines used. Certainly, there is no reason to believe that respondent's expenses for such items as insurance, pensions, advertising, plant depreciation and taxes would increase or decrease in direct proportion to the number of invoice lines used. These studies are also defective in other respects, but since we are of the opinion that they are invalid for the reasons stated above, a discussion of the other deficiencies is not required.

According to the third cost study which has been prepared by a professional accountant, respondent's costs in serving its "J" customers, aside from the difference in sales commissions, are approxi-

mately 4% less than its costs in serving the "CL" customers. This study, therefore, even when viewed in the light most favorable to respondent, demonstrates that part of the 5% price reduction reflects a saving in sales commission. A more critical examination of the study reveals that many of the major expense items involved have been allocated in such a manner as to exaggerate whatever difference may exist in the costs to respondent in serving the two classes of customers. For example, one of the largest of these items is the expense incurred by respondent in exhibiting its merchandise to retailers at furniture shows held in various markets several times each year. Respondent's officials have testified that these shows are attended predominantly by "J" customers and that most of the sales at these markets are made to "J" customers. According to respondent's own estimate, about three-fourths of the "J" customers' total purchases in 1958 were made at these markets and purchases by this customer class represented approximately 80% of respondent's total sales at the October, 1958, market. Despite the evidence that the shows are primarily for the mutual benefit of respondent and the "J" customers, 90.7% of the expense of these shows was assigned to the "CL" accounts.

Two other major expense items which were improperly allocated by customer class are the cost of designing furniture and the cost of producing samples. Under the facts of this case, both of these expenses are part of respondent's cost of production and should have been allocated to each article of furniture produced. Respondent, however, allocated these items to the customer classes on the basis of estimated attendance at furniture shows and assigned 90.7% of both costs to the "CL" customers.

Counsel supporting the complaint has attacked other aspects of the cost study in question and while there is considerable merit to his arguments, we believe that further discussion of respondent's defense is unnecessary. The evidence introduced by respondent does not support its contention that the price reduction to "J" customers can be accounted for by savings in costs other than the saving in sales commission. Not only does the cost data placed in the record by respondent fail to rebut the case in support of the complaint, but it substantiates the charge that the lower price to favored customers was in fact based, in part at least, on a saving in sales commission.

It is our conclusion, therefore, that respondent has violated subsection (c) of Section 2 of the amended Clayton Act by granting to its "Jobber" accounts a discount or lower price based in part on the saving resulting from the different rates of commission paid

THE BALTIMORE LUGGAGE COMPANY ET AL.

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