

Complaint

IN THE MATTER OF

YAKIMA FRUIT & COLD STORAGE COMPANY

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

Docket 7718. Complaint, Jan. 5, 1960—Decision, Sept. 28, 1961

Order requiring a Yakima, Wash., packer-distributor of apples and other fresh fruit with annual sales approximating \$3,000,000, to cease violating Sec. 2(d) of the Clayton Act, by such acts as paying the Houston, Tex., operator of a large chain of retail stores in Texas, Louisiana, and Tennessee, sums of \$192.50 and \$100 in connection with periodic sales promotion campaigns, while making no comparable payments available to its customers competing with said chain.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly described, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Yakima Fruit & Cold Storage Company, is a corporation organized, 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 First North and West B Streets, Yakima, Washington.

PAR. 2. Respondent is now and has been engaged in the business of packing, selling and distributing apples and other fresh fruits to retail chain store organizations and through brokers to other independent retail grocery stores and produce wholesalers throughout the United States. Sales made by respondent are substantial and amount to approximately \$3,000,000 per annum.

PAR. 3. 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, in that respondent sells and causes its products to be transported from the respondent's principal place of business, located in Washington, to customers located in other states of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its 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 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.

PAR. 5. For example, during the year 1955 respondent contracted to pay and did pay to J. Weingarten, Inc., Houston, Texas, \$192.50, and during the year 1958, \$100 as compensation or as allowances for advertising or other services or facilities furnished by or through J. Weingarten, Inc., in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with J. Weingarten, Inc. in the sale and distribution of products of like grade and quality purchased from respondent.

PAR. 6. The acts and practices of respondent, as alleged above, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Messrs. Frederic T. Suss and Timothy J. Cronin, Jr., for the Commission.

Gavin, Robinson & Kendrick, Yakima, Wash., for respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

The respondent is charged with having made discriminatory payments to some of its customers in violation of section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13).

The case of the Commission and respondent's defense was put in at a one-day hearing held at Seattle, Washington, on May 6, 1960. At that hearing the only witness was Herbert L. Frank, secretary-treasurer and operational manager of the respondent corporation. In addition to his testimony, stipulation was agreed upon and included in the record and exhibits were received into evidence. The findings of fact and conclusions of law proposed by the parties, not hereinafter specifically found or concluded, are herewith rejected. The hearing examiner having considered the record herein, makes the following findings of fact and conclusions:

1. Respondent, Yakima Fruit & Cold Storage Company, is a corporation organized, 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 First North and West B Streets, Yakima, Washington.

2. Respondent is now and has been engaged in the business of packing, selling and distributing apples and other fresh fruits to retail chain store organizations and through brokers to other inde-

pendent retail grocery stores and produce wholesalers throughout the United States. Sales made by respondent are substantial and amount to approximately \$3,000,000 per annum.

3. 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, in that respondent sells and causes its products to be transported from the respondent's principal place of business, located in Washington, to customers located in other states of the United States and in the District of Columbia.

4. Upon solicitation by J. Weingarten, Inc. of Houston, Texas, respondent agreed to and did participate in the 1955 Anniversary Sale of J. Weingarten, Inc. in the amount of \$192.50 as payment for 1/16 page of newspaper advertising of respondent's products in newspapers distributed in Houston, Freeport, Baytown, Texas City and Bryan, Texas, in connection with Weingarten's offering for sale of products sold to Weingarten by respondent.

5. At approximately the same time during the year 1955, respondent sold fresh fruit, including apples of like grade and quality to J. Weingarten, Inc. and to the Great Atlantic and Pacific Tea Co., Henke & Pillot, a division of The Kroger Company, and Childs Grocery Co. all of whom were then in competition with J. Weingarten in the purchase, sale and distribution of respondent's fresh fruit including apples of like grade and quality.

6. Respondent has not offered, at any time during the year 1955, any cooperative advertising, promotional allowances of any kind to any of its aforesaid customers who were competing with J. Weingarten, Inc. in connection with the sale and distribution of fresh fruit, including apples.

7. Upon solicitation by J. Weingarten, Inc. of Houston, Texas, respondent agreed to and did participate in the 1958 Anniversary Sale of J. Weingarten, Inc., in the amount of \$100 as payment for the advertisement of respondent's products in connection with J. Weingarten's offering for sale of said products sold to Weingarten by respondent.

8. At approximately the same time during the year 1958, respondent sold fresh fruit, including apples of like grade and quality, to J. Weingarten, Inc. and to Henke & Pillot, a division of The Kroger Company, and Childs Big Chain all of whom were then in competition with J. Weingarten in the purchase, sale and distribution of respondent's fresh fruit, including apples of like grade and quality.

9. Respondent has not offered, at any time during the year 1958, any cooperative advertising, promotional allowances of any kind to any of its aforesaid customers who were competing with J. Weingarten, Inc. in connection with the sale and distribution of fresh fruit, including apples.

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10. The evidence of record supports the following conclusions:

(a) The respondent has between 1955 and 1958 paid to one of its customers something of value as compensation and in consideration for services furnished by such customer in connection with its offering for sale or sale of products sold to it by respondent and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of products purchased from respondent.

(b) The acts and practices of respondent, as proved, are in violation of subsection (d) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

ORDER

It is ordered, That respondent, Yakima Fruit & Cold Storage Company, a corporation, its officers, employees, agents or representatives, directly or through any corporate or other device, in or in connection with the sale in commerce, as "commerce" is defined in the Clayton Act, as amended, of fresh fruits or other merchandise, do forthwith cease and desist from:

Making or contracting to make, to or for the benefit of J. Weingarten, Inc., or any other customer, any payment of anything of value as compensation or in consideration for advertising or other services or facilities furnished by or through such customer, in connection with the handling, offering for resale, or resale of the respondent's products, unless such payment is made available on proportionally equal terms to all other customers competing in the distribution or resale of such products.

OPINION OF THE COMMISSION

By TAIT, Commissioner:

This matter is before the Commission for review following the issuance on September 1, 1960, of its order extending the date on which the hearing examiner's initial decision otherwise would become the decision of the Commission. The complaint charges that respondent violated Section 2(d) of the Clayton Act, as amended. The evidence of record was received at a one-day hearing held May 6, 1960. The hearing examiner found the charges in the complaint to have been sustained and on July 20, 1960, issued his initial decision and an order to cease and desist.

The facts are uncomplicated and were to a substantial extent stipulated between counsel. In only one major area is there disagreement concerning a relevant fact but, as is so often the case, the thrust of the decision depends upon a resolution of the fact in dispute.

The respondent is a packer of apples and other fruits which it sells in commerce to produce wholesalers and to food retail chain stores. The fruit is shipped from respondent's place of business in the State of Washington to buyers throughout the United States. Respondent's total sales approximate \$3,000,000 per year.

Among respondent's retail chain store customers is J. Weingarten, Inc., whose area of operation includes the Houston and Richmond-Rosenberg areas of Texas. It was established that respondent, in response to solicitation, made payments to Weingarten of \$192.50 on March 2, 1955, and of \$100 on February 20, 1958. Payments or offers on proportionally equal terms were not made to respondent's other customers competing with Weingarten in these areas. The respondent's reason for making the payments or, put another way, its consideration for the payments is the fact in dispute referred to above.

Section 2(d) prohibits payments "* * * to or for the benefit of a customer * * * as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by * * *" the person making the payments unless the payments are made available on proportionally equal terms to all other competing customers. As we read the Act there must be a showing that the payment was made as consideration for "services or facilities" furnished by the customer in connection with the seller's product. Thus, payments made for other types of consideration or for which no tangible consideration was expected would not violate Section 2(d). Cf. *In the Matter of New England Confectionery Co.*, 46 F.T.C. 1041 (1949); *In the Matter of Champion Spark Plug Co.*, 50 F.T.C. 30 (1953); *In the Matter of General Foods Corporation*, 52 F.T.C. 798 (1956).

In this matter respondent contends that the payments to Weingarten were not made as compensation or consideration for services or facilities rendered by this customer but were made as "congratulatory good-will gestures" on the occasion of Weingarten's anniversaries. Counsel supporting the complaint contends that the payments were made to Weingarten for newspaper advertising of respondent's products.

There is no direct evidence in the record that respondent, in making the payments to Weingarten, either expected or requested that its products be advertised or that Weingarten render any other service or facility with respect to them. As a matter of fact, the only evidence on this crucial point is the testimony of the respondent's general manager that the payments were made as a "donation" to Weingarten's anniversary celebration and not in the expectation that respondent's

products would be advertised. At page 70 of the official transcript he summarized his earlier statements as follows:

We didn't think that we were buying any specific type of advertising. As I said before, it was more of just a goodwill gesture, and we had no idea of what was going in the space.

Actually, to repeat what I said, it could have said "Congratulations to Weingarten on its 55th Anniversary, a friend."

Respondent does no advertising, cooperative or otherwise, but relies completely upon the efforts of the Washington State Apple Advertising Commission, a state agency. This agency utilizes the proceeds of a tax or assessment of ten cents per hundredweight, levied against all growers, to engage in country-wide advertisement of Washington apples. No individual brand names are advertised but all media down to point of sale display materials are utilized.

Counsel supporting the complaint relies upon respondent's vouchers covering the payments and schedules of newspaper advertisement rates supplied to respondent by Weingarten prior to each payment¹ to support a finding that respondent's payments to Weingarten were made to compensate the customer for advertising respondent's products.

In our view a factual chasm of frightening width stands between the exhibits and the requested finding. On the voucher covering the \$192.50 payment of March 2, 1955, the disbursement description is " $\frac{1}{16}$ page—Section Houston Area." This reference is clarified by the schedule of newspaper advertising rates supplied to respondent at the time this payment was solicited. On the schedule a cost of \$192.50 is listed for $\frac{1}{16}$ of a page in the Houston area. With respect to this payment the evidentiary chain ends at this juncture. There is absolutely no evidence to show what, if anything, was advertised. The only evidence of what the parties intended is found in the testimony of respondent's general manager which was quoted above.

The voucher covering the \$100 payment of January 20, 1958, describes the payment simply "Advertisement." This exhibit also has a companion newspaper rate schedule supplied to respondent by Weingarten but no rate of exactly \$100 appears on the schedule. Thus, these two exhibits might be considered as corroboration of the testimony of respondent's general manager.

One further item of evidence merits discussion. On February 26, 1958, approximately one month after the last payment, a Weingarten anniversary sale advertisement in the Houston Chronicle utilized approximately two inches of space with this notation "HAPPY APPLE BRAND, Yakima Fruit & Cold Storage Company, Yakima, Wash-

¹ Commission Exhibits 7, 8, 12, 13.

ington." With respect to this advertisement, testimony disclosed that the trade or brand name "Happy Apples" had been discontinued by respondent sometime prior to 1958 and no apples were sold under that name during 1958. It was further testified that respondent in making the \$100 payment did not request the wording for the advertisement, "* * * had no idea what the context would be" and "* * * just presumed that it was for congratulations on their 55th anniversary."

Thus, there is no evidential connection between the advertisement and the payment upon which to base a finding that the payment was made in the expectation that respondent's name or product would appear in the advertisement. An inference or presumption of connection is not permissible in these circumstances for inferences must be based upon substantial evidence. The substantial evidence rule "* * * is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences." *Appalachian Electric Power Co. v. National Labor Relations Board*, 93 F. 2d 985, 989 (4th Cir. 1938).

In summary, we do not feel that the record establishes by reliable and probative evidence that the respondent's payments to Weingarten were made in consideration for a service or facility furnished in connection with the marketing of its products. The record shows no more than that in response to a solicitation to "participate" in a customer's anniversary sale respondent made payments to the customer. Such a showing is inadequate to support a finding that respondent has violated Section 2(d) and we so hold.

In deciding this matter, we are not unmindful of the fact that during the period from 1955 to 1960 the two payments in question were the only payments made by respondent to Weingarten or any other customer and rather than increasing in amount with the passage of time showed a decrease. While certainly not controlling, the sporadic and apparently diminishing nature of the payments should be given some weight especially when, as here, the other facts are in substantial conflict.

In keeping with the foregoing, an order will issue vacating the initial decision and dismissing the complaint.

Commissioners Anderson and Kern concur in the result.

ORDER VACATING INITIAL DECISION AND DISMISSING COMPLAINT

This matter having been considered by the Commission upon its review of the hearing examiner's initial decision filed July 20, 1960, which found the respondent in violation of Section 2(d) of the Clayton Act, as amended; and

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The Commission, for the reasons stated in the accompanying opinion, having concluded that said initial decision should be vacated and the complaint dismissed:

It is ordered, That the hearing examiner's initial decision be, and it hereby is, vacated and set aside.

It is further ordered, That the complaint be, and it hereby is, dismissed.

By the Commission, Commissioners Anderson and Kern concurring in the result.

OCTOBER 10, 1960.

ORDER REOPENING PROCEEDING AND REMANDING CASE TO HEARING
EXAMINER

The Commission, by order entered November 30, 1960, having afforded the respondent an opportunity to file an appropriate memorandum or brief setting forth the reasons, if any there be, why this proceeding should not be reopened and the Commission's order of October 10, 1960, vacated and the case remanded to the hearing examiner; and

The respondent, by letter dated December 5, 1960, having noted its objection but having set forth no specific reason, either legal or factual, why the proposed action should not be taken; and

The Commission having determined that its order of October 10, 1960, may not be appropriate to dispose of this proceeding and that the public interest requires that the case be reopened:

It is ordered, That the Commission's order of October 10, 1960, vacating the hearing examiner's initial decision and dismissing the complaint be, and it hereby is, vacated and set aside.

It is further ordered, That the case be, and it hereby is, remanded to the hearing examiner for the purpose of receiving such additional evidence as may be offered by counsel in support of the complaint and such evidence in rebuttal thereof as may be offered by the respondent.

It is further ordered, That after the receipt of such evidence, the hearing examiner shall make and file a new initial decision in accordance with the provisions of § 3.21 of the Commission's Rules of Practice.

By the Commission. Commissioner Mills not participating.

DECEMBER 28, 1960.

Messrs. Frederic T. Suss, Timothy J. Cronin, Jr., and Philip F. Zeidman, for the Commission.

Gavin, Robinson & Kendrick, Yakima, Wash., for respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

In the complaint, which was issued on January 5, 1960, the respondent is charged with having made discriminating payments to some of its customers in violation of Section 2(d) of the Clayton Act as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13).

The case of the Commission and the respondent's defense were put in at a one-day hearing held at Seattle, Washington, on May 6, 1960. Thereafter the parties submitted proposed findings and on July 21, 1960, the hearing examiner issued his initial decision, finding the acts and practices of the respondent to be violative of the statute.

The initial decision was not appealed but the Commission placed the case on its own docket for review, and on October 10, 1960, the Commission, for reasons stated in its opinion, ordered that the hearing examiner's initial decision be vacated and the complaint dismissed.

On November 8, 1960, counsel supporting the complaint filed a motion to reopen the proceeding, stating, among other things, that the opinion of the Commission contains findings which are not in accord with the evidence of record and was issued without affording counsel supporting the complaint an opportunity to be heard. It was further requested that the order vacating the initial decision and dismissing the complaint be vacated and one of the following alternative courses of action be taken: (1) Enter a final order adopting the initial decision; (2) Permit the submission of briefs and oral arguments to the Commission, or (3) Remand the case to the hearing examiner for the offering of additional evidence.

The Commission, by order entered November 30, 1960, afforded respondent opportunity to set forth reasons why this proceeding should not be reopened and remanded to the hearing examiner. The respondent by letter dated December 5, 1960, requested the Commission to adhere to its order setting aside the examiner's initial decision but did not set forth specific reasons, legal or otherwise, why the proposed action should not be taken.

On December 28, 1960, the Commission set aside its order of October 10, 1960, and directed that the case be remanded to the hearing examiner for the purpose of receiving such additional evidence as might be offered by the parties.

Pursuant to notice given to the parties, a hearing was held at Houston, Texas, on February 22, 1961, at which time additional testimony was received in support of the complaint. No appearance was made by the respondent or its attorneys. One of the attorneys for the Commission stated on the record at the outset of said hearing that he

had talked to the respondent by telephone and was advised no appearance would be made by it in any further hearings. Due to such absence, the hearing examiner, on the record at such hearing and by subsequent written order which was served upon respondent, directed the respondent, on or before March 10, 1961, to file notice of intention to present evidence in rebuttal, and if no such notice was filed, the record would be closed for the receipt of evidence and the parties would be allowed to file proposed findings on or before April 7, 1961. The respondent did not file such a notice and did not offer additional evidence. Counsel in support of the complaint filed proposed findings to supplement proposals previously submitted. The findings of fact and conclusions of law proposed by the parties, not hereinafter specifically found or concluded, are herewith rejected. The hearing examiner having considered the record herein, makes the following findings of fact and conclusions:

Respondent, Yakima Fruit & Cold Storage Company, is a corporation organized, 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 First North and West B Streets, Yakima, Washington.

Respondent is now and has been engaged in the business of packing, selling and distributing apples and other fresh fruits to retail chain store organizations and through brokers to other independent retail grocery stores and produce wholesalers through the United States. Sales made by respondent are substantial and amount to approximately \$3,000,000 per annum.

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, in that respondent sells and causes its products to be transported from the respondent's principal place of business located in Washington, to customers located in other states of the United States and in the District of Columbia.

One of respondent's customers, J. Weingarten, Inc., of Houston, Texas, is engaged in the operation of a large chain of retail stores located in the States of Texas, Louisiana, and Tennessee. For a number of years Weingarten has been having anniversary sales and in connection with such sales its suppliers are requested to participate by making payments in return for which they are to receive newspaper advertising and other promotional services. A typical letter sent by Weingarten to its suppliers is one received by the respondent early in February of 1958 which reads (CX 10):

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Yakima Fruit & Cold Storage Co.
P.O. Box 91
Yakima, Wash.

Weingarten's is on the move! Your products are now getting greater distribution through more units, serving more people than at any time in our history.

We are highlighting this progress with our great annual event this year . . . the 57TH ANNIVERSARY SALE. Thirty-nine great big units are taking part, and we are sure that you will want to avail yourself of the opportunity to participate.

We will use proven advertising, merchandising and promotional facilities to create maximum traffic during this mammoth sales concentration. There will be newspaper coverage, radio and television employed, plus personnel enthusiasm and carefully laid plans for presentation of all merchandise to insure success on an overall basis.

Many of our suppliers have asked us concerning this event, and we are, therefore, extending to you an opportunity to participate.

The attached sheet shows the prices of participation in the entire promotional program with the differences in prices being due to the different size ads in the various cities which will be included in a newspaper section.

Please mail the attached card indicating your intentions, and we would appreciate it if it would reach us no later than February 3rd, so we may formulate our plans accordingly.

Thanks very much in advance for your consideration.

Most sincerely,
s/ R. A. Plummer
R. A. Plummer

RAP;bjm
Encls.

On the top right hand corner of said letter (CX 10) respondent's broker in Houston penned a memorandum: "This is regular annual request and being sent only to their regular suppliers. Felt you'd want to participate in some limited way, say, around \$100.00. Please advise promptly to what extent. Thanks Morris."

In response to such letters, respondent made payments to Weingarten in the sums of \$192.50 on March 2, 1955, and \$100.00 on February 20, 1958.

Respondent's invoice (CX 8) in connection with a check issued for the 1955 payment reads: "1/16 page—Section Houston Area \$192.50" and the invoice (CX 13) for the 1958 payment reads "Advertisement \$100.00."

Respondent admits and the evidence show that no payments of any amount were paid or made available at any time upon any terms whatsoever to respondent's customers who compete with Weingarten.

By the testimony of the vice president of Weingarten it is established that in consideration of payment made by its suppliers in connection with the anniversary sales, Weingarten agreed to and did give

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its suppliers an "entire merchandising package" which includes advertising and promotional services of them and their products.

In the original answer to the complaint, respondent stated in part ". . . all payments referred to in said PARAGRAPH FIVE were made as Respondent's cost incurred in connection with periodic sales promotion campaigns carried on by J. Weingarten, Inc. for which Respondent received full value."

The amounts paid by the respondent in the instant case may in themselves be regarded as small but considering the various payments made to Weingarten by its many suppliers, the effect cannot be regarded as inconsequential.

The evidence of record supports the following conclusions:

(a) The respondent has between 1955 and 1958 paid to one of its customers something of value as compensation and in consideration for services furnished by such customer in connection with its offering for sale or sale of products sold to it by respondent and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of products purchased from respondent.

(b) The acts and practices of respondent, as proved, are in violation of subsection (d) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

ORDER

It is ordered, That respondent, Yakima Fruit & Cold Storage Company, a corporation, its officers, employees, agents or representatives, directly or through any corporate or other device, in or in connection with the sale in commerce, as "commerce" is defined in the Clayton Act, as amended, of fresh fruits or other merchandise, do forthwith cease and desist from:

Making or contracting to make, to or for the benefit of J. Weingarten, Inc., or any other customer, any payment of anything of value as compensation or in consideration for advertising or other services or facilities furnished by or through such customer, in connection with the handling, offering for resale, or resale of the respondent's products, unless such payment is made available on proportionally equal terms to all other customers competing in the distribution or resale of such products.

OPINION OF THE COMMISSION

By the Commission:

The complaint in this proceeding was issued on January 5, 1960. It charged that respondent had made discriminatory payments to one of its customers in consideration for advertising services furnished by

such customer, in violation of Section 2(d) of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. 13).

On July 21, 1960, the hearing examiner issued his initial decision finding the charges of the complaint to have been sustained. This decision was vacated by the Commission, which had on October 10, 1960, placed the case upon its own docket for review. The Commission found that the record failed to establish that the payments in question were made in consideration for services furnished in connection with the marketing of its products.

Upon motion of counsel in support of the complaint, the proceeding was subsequently reopened by order of the Commission dated November 30, 1960. After the taking of additional evidence, the examiner on August 15, 1961, issued a new initial decision in which he found that the payments made by respondent to its customer, J. Weingarten, Inc., were made in consideration for advertising services performed by the latter in connection with the sale of respondent's products.

Within 10 days of service upon it of the examiner's initial decision and order, respondent requested the Commission, by a letter addressed to the Chairman, to review this matter and to dismiss the proceeding. This request for review was not made in the form of a brief as required by § 3.22 of the applicable Rules of Practice, and was not served upon the Commission in the manner prescribed by § 3.4(b) of such Rules. Noting, however, that respondent was not at this stage of the proceeding represented by counsel, we have thought it appropriate to review the case in accordance with its request.

Upon this review, we conclude that the record adequately supports the finding of the examiner upon the only issue remaining in the proceeding, i.e., whether the payments in question were made in consideration for advertising services rendered by J. Weingarten, Inc.

The initial decision and order are adopted as the decision and order of the Commission.

ORDER

This matter having come on to be heard upon respondent's request for the Commission to review the initial decision and order of the hearing examiner entered on August 15, 1961;

And, the Commission having examined the record in this proceeding, and having concluded for the reasons set forth in its opinion that the initial decision and order are adequately supported by the record:

It is ordered, That the initial decision and order are adopted as the decision and order of the Commission.

It is further ordered, That respondent, Yakima Fruit & Cold Storage Company, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth

