

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS AND ORDERS, JULY 1, 1962, TO DECEMBER 31, 1962

IN THE MATTER OF

EXCHANGE DISTRIBUTING COMPANY

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

Docket 8061. Complaint, July 29, 1960—Decision, July 9, 1962

Order requiring a Birmingham, Ala., wholesale distributor of citrus fruit, vegetables, and produce, to cease receiving unlawful brokerage on purchases of citrus fruit from Florida packers for resale, such as allowances of 10¢ per box of 1½ bushels and 5¢ per carton of ¾ bushels, equal to the standard brokerage fee on sales made through brokers.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly 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 Exchange Distributing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its office and principal place of business located at 1019 First Avenue, North, Birmingham, Alabama, with mailing address as Post Office Box 1689, Birmingham, Ala.

PAR. 2. Respondent is now, and for the past several years has been, engaged in business primarily as a wholesale distributor, buying, selling and distributing citrus fruit and produce, and other food products, all of which are hereinafter sometimes referred to as food products. Respondent purchases its food products from a large number of suppliers located in many sections of the United States. The

annual volume of business done by respondent in the purchase and sale of food products is substantial.

PAR. 3. In the course and conduct of its business for the past several years, respondent has purchased and distributed, and is now purchasing and distributing, food products in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, from suppliers or sellers located in several States of the United States other than the State of Alabama, in which respondent is located. Respondent transports or causes such food products, when purchased, to be transported from the places of business or packing plants of its suppliers located in various other States of the United States to respondent who is located in the State of Alabama, or to respondent's customers located in said State, or elsewhere. Thus, there has been at all times mentioned herein a continuous course of trade in commerce in the purchase of said food products across state lines between respondent and its respective suppliers of such products.

PAR. 4. In the course and conduct of its business for the past several years, but more particularly since January 1, 1959, respondent has been and is now making substantial purchases of food products for its own account for resale from some, but not all, of its suppliers, and on a large number of these purchases respondent has received and accepted, and is now receiving and accepting, from said suppliers a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, in connection therewith.

For example, respondent makes substantial purchases of citrus fruit from a number of packers or suppliers located in the State of Florida, and receives on said purchases, a brokerage or commission, or a discount in lieu thereof, usually at the rate of 10 cents per 1½ bushel box, or equivalent. In many instances respondent receives a lower price from the supplier which reflects said commission or brokerage.

PAR. 5. The acts and practices of respondent in receiving and accepting a brokerage or a commission, or an allowance or discount in lieu thereof, on its own purchases, as above alleged and described, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

Mr. Cecil G. Miles and Mr. Basil J. Mezines for the Commission.

Mr. Edward M. Friend, Jr., and Sirote, Permutt, Friend & Friedman, of Birmingham, Ala., for respondent.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

The complaint in this proceeding charges respondent with violating subsection 2(c) of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13),¹ by receiving and accepting from its suppliers of food products, especially citrus fruits, a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof. It also charges that, "more particularly since January 1, 1959, respondent has been and is now making substantial purchases of food products for its own account for resale from some, but not all, of its suppliers, and on a large number of these purchases respondent has received and accepted, from said suppliers a commission, brokerage, or other compensation, or allowance or discount in lieu thereof." Respondent's answer denied the charges of the complaint and stated that it "purchases, as a rule, from the shipper who gives Respondent the lowest price on the quality of merchandise they desire to purchase, and thereafter sells such merchandise at market price."

At hearings in Birmingham, Alabama, and Lakeland, Florida, counsel supporting the complaint completed their case-in-chief and at a hearing in Birmingham on October 23, 1961, respondent completed presentation of its evidence, the record was closed, and an order fixed December 8, 1961, as the date for the parties to file proposed findings, conclusions and suggested order. Such proposed findings, conclusions, and suggested order have been filed.

Respondent has maintained throughout this proceeding that, if a commission in lieu of brokerage were paid to it by its suppliers during the relevant period, such payments were made without its having requested them, and without its knowledge.

Based upon the entire record in this proceeding, including the exhibits which have been received in evidence, the examiner makes the findings of fact and conclusions hereinafter set forth. Findings proposed by the parties which are not made in the form in which they have been proposed, or in substantially that form, hereby are rejected. The fact that no finding in this opinion summarizes the evidence in the manner in which the parties have requested it to be summarized does not mean that the hearing examiner has not con-

¹ "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 either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation was so granted or paid."

Initial Decision

61 F.T.C.

sidered such evidence. It means merely that the examiner deems the evidence which is summarized in his findings to be sufficiently probative, substantial, and material to dispose of the issues. All motions made by the parties which have not previously been ruled upon, or which are not herein specifically ruled upon, hereby are overruled and denied.

Based upon the entire record, the evidence, the exhibits, and the pleadings, the examiner makes the following:

FINDINGS OF FACT

1. The complaint states a good cause of action against the respondent. The Federal Trade Commission has jurisdiction over the respondent and the subject matter of this proceeding; and this proceeding is in the public interest.

2. Exchange Distributing Company, respondent, is a Delaware corporation with its principal and sole place of business located at 1019 First Avenue North, Birmingham, Ala. Respondent is now, and for several years last past, including the year 1959, has been engaged primarily as a wholesale distributor of food products, including citrus fruits, vegetables, and produce. Respondent was and is buying, selling and distributing the aforesaid citrus fruit and food products, which move to it across state lines. Respondent purchases its citrus fruit and other food products from a large number of suppliers located in many states of the United States other than the State of Alabama in which respondent is located and in different states thereof. Respondent transports or causes such food products, when purchased, to be transported from its suppliers' places of business or packing plants to respondent in the State of Alabama or to its customers located in said state or elsewhere.

3. Respondent is engaged in "commerce" as that term is defined in the Clayton Act, as amended.

4. The business transacted by respondent for the year 1959 to the present time was substantial, being between \$3,000,000 and \$4,000,000 per annum. Respondent was one of four business concerns conducting similar business in the Birmingham area which had substantially the same sales volume. Tom Pippen is president of the respondent corporation, and has been with the company since June 1946. He has "general supervision over the buying, selling, accounting, warehousing, receiving, shipping, and credit." Mr. Pippen purchased all the citrus fruit for respondent, commencing in January 1959 and continuing to the dates of the hearing. His purchases were negotiated in long distance telephone conversations with the suppliers located

1

Initial Decision

in Florida, and averaged approximately 150 to 175 truckloads of fruit annually.

5. During the relevant period the price of citrus fruit was quoted to respondent by the growers on the basis of a "Bruce box" containing $1\frac{3}{8}$ bushels. The price was generally quoted, especially in trade journals, in increments of 25 cents, i.e., \$2.50, \$2.75, or \$3.00 a Bruce box. In the citrus fruit industry, a "carton" is half of a Bruce box and contents, and its price would be half the price of a Bruce box. Some suppliers made separate charges of 5 cents for a carton and 10 cents for a Bruce box, over and above the cost of the citrus, while other suppliers absorbed this cost. The wholesale citrus fruit industry is highly competitive and a difference of a few cents, i.e., 5 cents per carton or 10 cents per Bruce box constitutes a material price differential to the purchasers. When sales of citrus fruit were made through brokers, the standard brokerage fee was 10 cents per Bruce box of $1\frac{3}{8}$ bushels, or 5 cents per carton, or one-half box of $\frac{4}{8}$ bushel.

6. Although Mr. Pippen testified that he did not at any time make any request upon any supplier for any allowance in lieu of brokerage, nor was he offered any, and that all of the negotiations between respondent and its suppliers were carried on at arms' length in which the respondent was attempting to purchase citrus products at the very lowest possible price, Mr. Pippen knew that the citrus fruit growers who supplied respondent also employed brokers and that these brokers were paid a commission for their services.

7. During the relevant period respondent received and accepted "a commission, or brokerage, or other compensation or an allowance or discount in lieu thereof," on purchases of citrus fruit from, among others, Newbern Groves, Inc., of Tampa, Florida, Keen Fruit Corporation of Frostproof, Florida, and Orange Fruit Company of Maitland, Florida. The discount or allowances received from these packers was equal to the fee paid to brokers.

Packing house manifests of Orange Fruit Company, in which Exchange Distributing Company of Birmingham, Alabama, is the consignee, show an allowance of brokerage on the face of such manifests. When an allowance was made to compensate for "decay loss" the words "decay loss" appear. On these manifests the fruit was priced in 25-cent increments. On the manifests where the brokerage is deducted from the quoted price the net is shown, i.e., CX-152, where the fruit is priced at \$2.65 net or \$2.90 net.

Keen Fruit Corporation reported transactions in which it paid an allowance in lieu of brokerage.

Newbern Groves made an allowance in lieu of brokerage of 5 cents per carton and 10 cents per Bruce box to respondent on all its citrus fruit purchases during the relevant period. This allowance did not have to be and was not specifically negotiated because over the years such allowance had become a general practice and gradually became the "custom" in the industry. Newbern discontinued the allowances in July or August 1960 but did not inform the respondent that the practice was being discontinued, "because it was not necessary" (Tr. 101).

8. During the relevant period respondent purchased most of its citrus fruit requirements from Orange Fruit Company, Keen Fruit Corporation and Newbern Groves, Inc. Although Mr. Pippen contacted other suppliers of citrus fruit, he purchased most of respondent's requirements from these suppliers because they quoted him the lowest prices.

9. The allowances in lieu of brokerage to respondent were at times paid by deduction from the market price stated on invoices, and at other times prices were quoted to respondent and negotiated on a net basis, i.e., the price quoted to respondent was the price which respondent would pay net, after the allowance in lieu of brokerage had first been deducted.

10. In the course and conduct of its business for the past several years, but more particularly since January 1, 1959, respondent has been and is now making substantial purchases of food products for its own account for resale to its customers. On a large number of these purchases respondent has received and accepted from its suppliers a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, in connection therewith. The practice of the Florida citrus producers of making an allowance in lieu of brokerage to their customers, including this respondent, was an accepted custom in the industry. The practice was generally known and followed. If the allowance were not made, the purchaser would take his business to a supplier who would make the allowance. Respondent either knew, or because of its many years of experience in the produce industry should have known, that it was receiving such brokerage or commission or a discount in lieu thereof.

Applying the accepted court and commission decisions¹ to these facts, the examiner makes the following

¹ *Biddle Purchasing Co. v. FTC*, 96 F. 2d 687; *Great Atlantic & Pacific Tea Co. v. FTC*, 106 F. 2d 667; *FTC v. Broch & Co.*, 363 U.S. 166 (1960); *Thomasville Chair Company*, Docket No. 7273 (Commission opinion dated March 13, 1961); *Haines City Citrus Growers Assn., et al.*, Docket No. 7144 (Commission opinion dated May 19, 1961); and *William Buehl Eidson, et al.*, Docket No. 8064 (Commission opinion dated January 3, 1962).

Decision and Order

CONCLUSIONS OF LAW

1. The complaint filed herein states a good cause of action against the respondent; the Federal Trade Commission has jurisdiction over the respondent and over the subject matter of this proceeding. This proceeding is in the public interest. Respondent is engaged in commerce as "commerce" is defined in the Clayton Act, as amended.

2. Counsel supporting the complaint have proved the material and essential allegations thereof by reliable, substantial, probative and material evidence in this record.

3. During the time covered by this complaint, respondent received and accepted from its suppliers of food products, especially citrus fruits, a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof in connection with said purchases. Said acts by said respondent were and are in violation of, and are proscribed by, Section 2(c) of the Clayton Act, as amended (15 U.S.C. Sec. 13). Therefore,

It is ordered, That respondent, Exchange Distributing Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the purchase of citrus fruit or any other food products, in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from :

Receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any purchase of citrus fruit or any other food products for respondent's own account, or where respondents are the agents, representatives, or other intermediaries acting for or in behalf, or are subject to the direct or indirect control, of any buyer.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF
COMPLIANCE

This matter having been heard by the Commission upon respondent's exceptions to the hearing examiner's initial decision; and

The Commission having considered the entire record, including the briefs of counsel for respondent and counsel in support of the complaint, and having determined that the hearing examiner's findings and conclusions are fully substantiated on the record and that except for an inadvertent error to be corrected herein, the order contained in

the initial decision is appropriate in all respects to dispose of this matter:

It is ordered, That the initial decision be modified by striking from the order that part thereof beginning on the fifth line of indented paragraph on page 7 with the words "or where respondents" and ending on the last line of indented paragraph with the word "buyer" and substituting therefor the following:

"or where respondent is the agent, representative, or other intermediary acting for or in behalf, or is subject to the direct or indirect control, of any buyer."

It is further ordered, That respondent's exceptions to the initial decision be, and they hereby are, denied.

It is further ordered, That the hearing examiner's initial decision, filed January 18, 1962, as modified herein, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondent, Exchange Distributing Company, a corporation, shall, within sixty (60) days after service upon it of this decision, 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 contained in the aforesaid initial decision, as modified.

IN THE MATTER OF

JOHNSON PUBLISHING COMPANY, INC.

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

Docket C-157. Complaint, July 10, 1962—Decision, July 10, 1962

Consent order requiring the Chicago publisher of "Ebony", "Jet", "Tan", "Hue", and "Negro Digest" magazines to cease discriminating in price in violation of Sec. 2(d) of the Clayton Act by paying promotional allowances to certain retail customers—some of whom operated chain retail outlets in railroad, airport, and bus terminals, and outlets in hotels and office buildings, and others of whom furnished services in connection with the handling of respondent's publications such as taking purchase orders and distributing, billing, and collecting—while not making such payments available on proportionally equal terms to their competitors, including drug chains, grocery chains, and other newsstands.

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 violated and is now violat-

ing the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Johnson Publishing Company, Inc., is a corporation organized and doing business under the laws of the State of Illinois, with its office and principal place of business located at 1820 South Michigan Avenue, Chicago, Ill. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications, including magazines under copyrighted titles including "Ebony", "Jet", "Tan", "Hue" and "Negro Digest". Respondent's sales of publications during the calendar year 1960 exceeded four million dollars.

PAR. 2. Publications published by respondent are sold and distributed throughout various States and the District of Columbia by respondent through local wholesalers to retail outlets.

Each local wholesaler whose services are used by respondent has acted and is now acting as wholesaler for the publications of several independent publishers, including respondent publisher. These wholesalers, in dealing with the retail customers of respondent, have served and are now serving as conduits or intermediaries for the sale, distribution and promotion of publications published by respondent. "Ebony" and "Jet" are the two most popular and widely circulated Negro magazines in the United States and are sold and distributed throughout various States by respondent through local wholesalers to retail customers.

PAR. 3. Respondent, through its conduits or intermediaries, the local wholesalers, has sold and distributed and now sells and distributes its publications in substantial quantities in commerce, as "commerce" is defined in the Clayton Act, as amended, to competing customers located throughout various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent has 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, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of publications sold to them by respondent. Such payments or allowances were not made available on proportionally equal terms to all other customers of respondent competing in the distribution of such publications.

Decision and Order

61 F.T.C.

PAR. 5. As an example of the practices alleged herein, respondent has made payments or allowances to certain retail customers who operate chain retail outlets in railroad, airport and bus terminals, as well as outlets located in hotels and office buildings. Such payments or allowances were not offered or otherwise made available on proportionally equal terms to all other customers (including drug chains, grocery chains and other newsstands) competing with the favored customers in the sale and distribution of the publications of respondent publisher. Among the favored customers receiving payments in 1960, and during the first six months of 1961, which were not offered to other competing customers in connection with the purchase and sale of respondent's publications were:

Customer:		<i>Approximate Amount Received Jan. 1, 1960-June 30, 1961</i>
ABC Vending Corp., Long Island City, N.Y.	-----	\$3,599.92
Garfield News Co., New York, N.Y.	-----	484.22
Greyhound Post Houses, Forest Park, Ill.	-----	1,293.57
		<i>Jan. 1, 1960-May 31, 1961</i>
Union News Co., New York, N.Y.	-----	6,672.16

Respondent made said payments to its favored customers on the basis of individual negotiations. Among said favored customers such payments were not made on proportionally equal terms.

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

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Johnson Publishing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 1820 South Michigan Avenue, in the city of Chicago, State of Illinois.

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

ORDER

It is ordered, That respondent Johnson Publishing Company, Inc., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in connection with the distribution, sale or offering for sale of publications including magazines in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Paying or contracting for the payment of an allowance or anything of value to, or for the benefit of, any customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of publications including magazines published, sold or offered for sale by respondent, unless such payment or consideration is affirmatively offered and otherwise made available on proportionally equal terms to all of its other customers competing with such favored customer in the distribution of such publications including magazines.

The word "customer" as used above shall be deemed to mean anyone who purchases from Johnson Publishing Company, Inc., acting either as principal or agent, or from a distributor or wholesaler where such transaction with such purchaser is essentially a sale by such respondent, acting either as principal or agent.

It is further 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 this order.

Complaint

61 F.T.C.

IN THE MATTER OF
GERNSBACK PUBLICATIONS, INC.

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

Docket C-158. Complaint, July 10, 1962—Decision, July 10, 1962

Consent order requiring the New York City publisher of "Radio-electronics" magazine to cease discriminating in price in violation of Sec. 2(d) of the Clayton Act by paying promotional allowances to certain retail customers—some of whom operated chain retail outlets in railroad, airport, and bus terminals, and outlets in hotels and office buildings, and others of whom furnished services in connection with the handling of respondent's publications such as taking purchase orders and distributing, billing, and collecting—while not making such payments available on proportionally equal terms to their competitors, including drug chains, grocery chains, and other newsstands.

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 violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Gernsback Publications, Inc., is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 154 West 14th Street, New York, N.Y. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines under copyrighted titles including "Radio-Electronics". Respondent's sales of publications during the calendar year 1960 exceeded two hundred thousand dollars.

PAR. 2. Publications published by respondent are distributed by respondent to customers through its national distributor, Independent News Company, Inc., hereinafter referred to as Independent News.

Independent News has acted and is now acting as national distributor of publications of several independent publishers, including respondent publisher. Independent News, as national distributor of publications published by respondent and other independent publishers, has performed and is now performing various services for these publishers. Among the services performed and still being