

WESTERN FRUIT AND VEGETABLES CO.
ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(c) OF THE
CLAYTON ACT

Docket 8194. Complaint, Nov. 29, 1960—Decision, Sept. 18, 1962

Order requiring Fullerton, Calif., packers of citrus fruit and avocados to cease violating Sec. 2(c) of the Clayton Act by granting allowances or discounts on a large number of sales to brokers and direct buyers purchasing for their own accounts for resale.

Complaint

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 Western Fruit Growers Sales Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at Fullerton, Calif., with mailing address as Post Office Box 171, Fullerton, Calif.

PAR. 2. Respondent is now and for the past several years has been engaged in the business of packing, selling and distributing citrus fruit, such as oranges, tangerines and grapefruit, all of which are hereinafter sometimes referred to as citrus fruit or fruit products. Respondent sells and distributes its citrus fruit through brokers, wholesalers, jobbers, and commission merchants, as well as direct to customers located in many sections of the United States. When brokers are utilized in making sales for it, respondent pays them for their services a brokerage or commission, usually at the rate of 10 cents per 13½ bushel box, or equivalent. Respondent's annual volume of business in the sale and distribution of citrus fruit is substantial.

PAR. 3. In the course and conduct of its business over the past several years, respondent has sold and distributed and is now selling and distributing its citrus fruit in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, to buyers located in the several states of the United States other than the State of California in which respondent is located. Respondent transports, or causes such citrus fruit, when sold, to be transported from its place of business or packing plant in the State of California, or from other places within the State, to such buyers or to the buyers' customers located in various other states of the United States. Thus there has been, at all times mentioned herein, a continuous course of trade in commerce in such citrus fruit across state lines between said respondent and the respective buyers of such citrus fruit.

PAR. 4. In the course and conduct of its business as aforesaid, respondent has been and is now making substantial sales of citrus fruit to some, but not all, of its brokers and direct buyers purchasing in their own name and for their own account for resale, and on a

Initial Decision

61 F.T.C.

large number of these sales respondent paid, granted or allowed, and is now paying, granting or allowing to these brokers and direct buyers on their own purchases, a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, in connection therewith.

PAR. 5. The acts and practices of respondent in paying, granting or allowing to brokers and direct buyers a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, on their 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.
Wadsworth, Fraser & McClung, by *Mr. E. L. Fraser*, of Los Angeles, Calif., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding is brought under § 2(c) of the Clayton Act as amended by the Robinson-Patman Act (U.S.C. Title 15, § 13). The complaint charges, in substance, that respondent, for some years past, in the course and conduct of its business of making substantial sales of citrus fruit in commerce, has paid and is paying commissions, brokerages or other compensations or allowances or discounts in lieu thereof in connection with the sale (1) to some but not all of its brokers; and (2) to direct buyers who purchase such citrus fruits in their own names and for their own accounts for resale. Respondent, in its answer, admits that in the course and conduct of its business it has been and is now making substantial sales of citrus fruit to some but not all of its brokers and direct buyers purchasing in their own names, but denies that said sales were made for the brokers' own accounts, and claims, upon information and belief, that while such purchases were in such brokers' names, they were for customers of such brokers on a pool basis. Respondent further denies, in substance, the granting or allowance of any commissions, brokerages or other compensation to such purchasers in violation of § 2(c) of the Clayton Act. In this initial decision, the charges of the complaint are found to be sustained, and a cease-and-desist order is issued.

The complaint was issued November 29, 1960, and respondent, after service, filed its answer on December 30, 1960. On April 10, 11 and 12, 1961, hearings were held in Los Angeles, California, at which both parties presented their evidence and rested except for the negotiation of a stipulation proposed by counsel supporting the complaint. Such stipulation was never agreed upon, however, and on Septem-

ber 19, 1961, counsel supporting the complaint filed their motion to close the record, which was duly granted by the hearing examiner. Pursuant to order of the hearing examiner, counsel supporting the complaint filed their proposed findings, conclusions and order on October 23, 1961, and those of the respondent were filed on October 30, 1961. All proposed findings of fact and conclusions of law submitted by the parties which are not incorporated herein, either verbatim or in substance and effect, are hereby rejected. The proposed order submitted by counsel supporting the complaint is herein adopted.

The hearing examiner has carefully and fully analyzed the whole record, taking into consideration his observation of the appearance, conduct and demeanor of the sole witness who appeared before him. All proposals and briefs of counsel have been studied in the light of the entire record. Upon the whole record the hearing examiner finds generally that the Commission has fully sustained the burden of proof incumbent upon it, and has established by reliable, probative and substantial evidence and the fair and reasonable inferences to be drawn therefrom, all the material allegations of the complaint; and further finds that the evidence submitted by respondent fails to establish facts constituting any valid defense to the charges of violation contained in the complaint. More specifically, upon due consideration of the whole record, the hearing examiner makes the following:

FINDINGS OF FACT

Respondent Western Fruit Growers Sales Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at Fullerton, Calif., with mailing address as Post Office Box 171, Fullerton, Calif.

Respondent is now and for the past several years has been engaged in the business of packing, selling and distributing citrus fruit, such as oranges, tangerines, and grapefruit, all of which are sometimes hereinafter referred to as citrus fruit or fruit products. It also so deals in avocados. Respondent acts as a consignment shipper for some twenty-two packing houses in California and Arizona, which packing houses in turn represent hundreds of growers. Respondent sells and distributes its citrus fruit and avocados through brokers, wholesalers, jobbers and commission merchants, as well as direct to customers located in many sections of the United States. Respondent transports, or causes such products, when sold, to be transported from its place of business or packing plant in the State of California, or from other

places within that State, to such buyers or to the buyers' customers located in various other States of the United States. Thus, respondent is now and for the past several years has been engaged in commerce as "commerce" is defined in the aforesaid Clayton Act.

One of the two real issues contested in this case is whether or not respondent violated § 2(c) on a number of occasions by invoicing some of the brokers with whom it dealt, instead of the customers to whom such brokers sold the citrus fruit in question. Respondent contends that it was compelled to bill such brokers directly in order to avoid prohibitive costs of invoicing and collecting from many separate customers on a multitude of small shipments. The other real issue contested herein involved the contention of respondent that volume discounts given to national chain-grocery organizations buying fifty or more cars per year were justified by cost savings.

The law is now well settled that § 2(c) of the Clayton Act is an absolute prohibition of the payment of brokerage by sellers either to buyers or to buyers' representatives, agents or brokers. See *The Great Atlantic & Pacific Tea Company v. FTC* (C.C.A. 3 (1939)), 196 F. 2d 667, particularly pages 674 and 678. Many scholars of antitrust laws have sharply criticized, not only the language of § 2(c) as adopted by Congress, but the interpretation placed upon it both by the Courts and by the Federal Trade Commission, and it is claimed that the Commission uses § 2(c) proceedings more than proceedings under other sections of the Robinson-Patman amendment to the Clayton Act, because, as a learned critic has very recently put it,

It is easy to understand why § 2(c) is invoked. That section is a *per se* statute with a vengeance: there is no requirement of proof of any likelihood of injury, and there are no defenses (Milton Handler, "Recent Antitrust Developments," *Yale Law Journal*, Vol. 71, pp. 75 et seq., especially p. 104).

In § 2(c) litigation, however, although the statute may be a *per se* one, the facts are never self-operative and must be proved, and "the decision depends on the circumstances of each case". *FTC v. Henry Broch & Company* (1960), 363 U.S. 166, 175-176, reversing C.A. 7 (1958), 261 F. 2d 725, and reinstating the Commission's decision and order against respondent (1959), 54 FTC 673. The evidence in the case at bar has therefore been given full and fair consideration, as already stated.

At the very beginning of the case respondent's counsel conceded (R. 7-8):

The position of Western Fruit Growers Sales in this matter, charged with the violation of § 2(c), is simply this: that sales were made to brokers and discount was allowed upon the representation by the brokers that these sales were for

the broker's customers and would be in turn sold on a pool basis to the broker's customers or in small lots. * * * Under the provisions of the Act, we could stipulate that the Government has a *prima facie* case and that all it needs to do is to introduce one sales jacket containing documents showing the sale to a broker and a commission deduction to that particular broker. * * * That would be a *prima facie* case under 2(c), and the burden would shift to us to prove the fact and circumstances surrounding it, which we are entitled to do.

The case was defended on this theory. If respondent's evidence were to establish a valid defense, the burden of proof, of course, was upon respondent. *FTC v. Washington Fish & Oyster Company, Inc.* (C.A. 9, 1960), 282 F. 2d 595, 597. Respondent has not sustained this burden of proof. Only one witness testified, Thomas Frees, sales manager of respondent. This company was organized on or about October 1, 1957, by a group of persons, each of whom had had considerable experience in the fruit selling and distribution business. By their enterprise and activities, including the practices complained of herein, they had established a substantial business by the time their affairs were investigated over two years later by the Federal Trade Commission. On March 8, 1960, the Commission adopted a resolution entitled "Resolution Directing Investigation of the Payment of Brokerage or Commissions or Allowances or Discounts in Lieu Thereof by Corporations Engaged in the Sale and Shipment of Fresh Citrus Fruit". Pursuant thereto, among many other citrus-fruit dealers in Florida, Texas and California, the respondent was ordered to file a special report setting forth information pertaining to its activities in the business (Commission's Exhibit 1-A). Official notice is taken that the Commission, after considerable negotiation, has entered cease-and-desist orders based upon consent agreements, which orders are identical with the one requested and entered herein, in some seventy-five or more § 2(c) cases against various of such citrus-fruit dealers.

Respondent complied with the Commission's order by a special sworn report dated September 28, 1960, which, together with the annexed exhibits, was transmitted to the Commission (Commission's Exhibit 1). The several sales jackets or files produced and submitted by respondent are in evidence in this proceeding as Commission's Exhibits 2-A through 20-J, and, together with the testimony of the witness Frees, constitute the entire trial record herein. It would serve no useful purpose to discuss all of these sales documents in detail. It was testified by Mr. Frees, in substance, that a substantial part of respondent's business from the time of its organization consisted of transactions with various corporations, partnerships, and individuals designated by respondent as its brokers, among which were Brown

and Loe and Tom Lange, Inc., both of St. Louis, Missouri, and Russell Ward Company, Inc., of Seattle, Washington, whose dealings, it is agreed upon the record, were representative of respondent's transactions with such brokers. The record discloses that during 1959 the respondent sold, shipped and invoiced a substantial quantity of citrus fruit to Brown and Loe at St. Louis; each and all of the invoices sent to this concern by respondent indicate that a brokerage or commission was allowed. Invoices from Brown and Loe to the ultimate customers in each of these transactions were also offered in evidence to show the final distribution of the fruit, and were received with the other documents relevant to the particular several transactions. Such invoices disclosed definitely, in many instances, that Brown and Loe had invoiced their customers at prices which were either higher or lower than the price charged by the respondent to Brown and Loe before the brokerage was deducted. There are many such examples in the record, but a few will suffice to illustrate the practice. Commission's Exhibits 3-A and 3-C show that in respondent's invoice of March 12, 1959, to Brown and Loe, twenty cartons of lemons were purchased for \$2.25 a carton less brokerage, which same lemons were then invoiced by Brown and Loe to a customer, Raith Brothers Company, at \$2.40 per carton, a 15¢ profit. Other exhibits (Commission's Exhibits 7-A and 7-B show that respondent, on September 17, 1958, invoiced to Brown and Loe twenty cartons of oranges at \$3.00 per carton, and twenty-five cartons of another size of oranges at \$2.75 per carton. These oranges were then invoiced by Brown and Loe to Raith Brothers Company at \$3.25 and \$3.00, respectively, a 25¢ profit per carton in each instance. In one unusual transaction (Commission's Exhibits 11-A and 11-B) it appears that Russell Ward was invoiced citrus fruit at \$3.50 per carton, which it resold at \$3.00 per carton, sustaining a loss of 50¢ per carton on some twenty-five cartons. It is urged by counsel supporting the complaint that this type of transactions, which are admittedly typical of many with the several brokerage firms above named, would show that these purchases were by the brokers for their own account for resale, and that they unlawfully received brokerage on these transactions from the respondent.

The respondent, while insisting that these transactions were billed to the brokers merely as a matter of convenience and were actually sales to the ultimate consumer rather than to the brokers, nevertheless admitted that insofar as the respondent was concerned, at the time it delivered the merchandise to the broker and billed him, "it was a completed transaction" (R. 10, 11, 25 through 27, 113 and 114). As already indicated, respondent has conceded that this would constitute a

prima facie case against it. Its defense consisted of an attempt to show how it could not afford to deal directly with buyers of small quantities of citrus fruit because of the additional cost of 1¾¢ per carton to it, which was more than double the ⅙ of one cent per carton which it claimed was the highest profit it could make on such shipments. It is claimed that respondent cannot "police" such transactions clear through to the broker's buyer. It is urged that judicial notice be taken that the citrus market is extremely competitive, and that immediate sales of fruit must be effected when the crops mature, and that, to accomplish its distribution of these products, respondent's network of some one hundred brokers must be reached by immediate communication through telephone, telegraph, or teletype, as prices fluctuate rapidly. It is further urged:

In the light of these circumstances and the additional costs involved in separate billing and collecting, respondent could not conduct its business in any other manner. The effect of a Commission decision against respondent most certainly would eliminate mixed load direct broker billings to the ultimate hardship of the grocers, respondent and purchasers. The Commission would not only eliminate one important channel of distribution, but favor the larger purchasers.

This claim of respondent's, in essence, was the basis for the Seventh Circuit's dismissal of the *Broch* case (261 F. 2d at p. 729), but, as the Supreme Court said in *Federal Trade Commission v. Broch & Company, supra*, 363 U.S. at page 177, in reversing such dismissal:

If we held that § 2(c) is not applicable here, we would disregard the history * *, overturn a settled administrative practice, and approve a construction that is hostile to the statutory scheme—one that would leave a large loophole in the Act. Any doubts as to the wisdom of the economic theory embodied in the statute are questions for Congress to resolve.

The testimony of Frees, bulwarked by after-the-fact letters of hearsay character from several brokers, indicates that it was the understanding between respondent and its several brokers that these direct broker billings were not considered sales between them, but were made in order to avoid the additional costs above referred to. It is unnecessary to determine here whether this position taken by respondent and its brokers was true or false. In *Modern Marketing Service, Inc. v. FTC*, CCA. 7 (1945), 149 F. 2d 970, it was held that motive and good faith were immaterial to a violation of § 2(c) (pages 976, 978). See also *Webb-Crawford Co. v. FTC*, C.C.A. 5 (1940), 109 F. 2d 268, 269. In short, § 2(c) of the Act is a *malum prohibitum* statute, and mental conditions and reasons are insufficient to avoid the statute's mandate. The law is against the practice rather than the intent, wherever brokerage is paid by a seller to a buyer or a buyer's agent, representative or broker.

While dual representation by a broker, with both the seller and the buyer, "was not prohibited by the common law if this dual status was disclosed fully" to both principals,

It is obvious that dual representation by agents opens a wide field for fraud and oppression * * We entertain no doubt that it was the intention of Congress to prevent dual representation by agents purporting to deal on behalf of both buyer and seller. * * The agent cannot serve two masters, simultaneously rendering services in an arm's-length transaction to both. *The Great Atlantic & Pacific Tea Company v. FTC*, *supra*, 196 F. 2d at pp. 675, 676.

The evidence here clearly establishes that these brokers were in fact acting for themselves and selling to others at a profit to themselves (or, in only the one instance above referred to, at a loss). Their acts were inconsistent with the claim that they were respondent's brokers. When they collected from their buyers, they remitted, at most, only what they, the brokers, were billed for by respondent, and respondent never indicated any interest in a further accounting from such brokers, who took both a brokerage from respondent and either a brokerage or a profit in such cases from those to whom they sold. Whether they be considered as buyers selling for themselves or as brokers for their buyers, in either event the respondent has violated § 2(c). "A seller may not pay the broker brokerage on the latter's purchases for his own account." *Southgate Brokerage Co. v. FTC* (C.C.A. 4, 1945), 150 F. 2d 607. Nor may a broker for a retail buyer receive commissions from the seller. *FTC v. Herzog, et al.* (C.C.A. 2, 1945), 150 F. 2d 450, and numerous cases cited.

The evidence further discloses that respondent granted a fluctuating discount of up to 15¢ per carton to purchasers of fifty or more cars of citrus fruit per year. Such discounts were granted to National Grocers, The Great Atlantic & Pacific Tea Company, National Tea Company, Eisner Grocery Company and Topco Associates, all of which were and are large chain supermarket concerns, who bought many carload lots between November 1, 1959, and September 30, 1960. Mr. Frees testified that this discount reflected substantial savings in communications, billing, accounting and collections, and that the average cost of a transaction was \$30.00, whether the transaction involved five hundred cartons or five thousand cartons. Respondent objected to inquiry by counsel supporting the complaint on the subject of volume discounts on the ground that such matters involved a violation of § 2(a) rather than § 2(c), under which respondent was charged. Respondent nevertheless contends that its discounts to these large buyers were fully justified by cost savings, and further argues that this volume discount of up to 15¢ per carton had no relationship to

the regular 5¢-per-carton brokerage usually allowed, concluding that such volume discounts could not be considered as granted in lieu of brokerage. Counsel supporting the complaint contend, however, that respondent's policy of granting these substantial volume discounts, in any view of the evidence, cannot be reconciled with the small 6/10-of-one-percent average profit per carton on shipments allegedly consigned to brokers, as claimed by respondent; and contend further that no inference can be drawn except that the discounts granted to these large direct buyers must have been based, in part at least, on respondent's savings in the payment of brokerage. They argue that the testimony of Frees, respondent's sales manager, that the 15¢-per-carton quantity discount to the chain groups saved respondent all major cost factors incurred in selling through brokers, and the numerous substantial brokerage charges shown by the exhibits, prove conclusively that respondent passed on brokerage savings to such chain group buyers. We agree with counsel supporting the complaint, and it is found that, to that extent, such discounts or allowances to such chain group buyers were in lieu of brokerage and in violation of § 2(c) of the Clayton Act, as alleged in the complaint.

It is ordered, That respondent Western Fruit Growers Sales Co., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of citrus fruit or any other food products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Paying, granting, or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, 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 of citrus fruit or any other food products, to such buyer for his own account.

DECISION AND ORDER

This matter having been heard by the Commission upon the appeal of respondent from the hearing examiner's initial decision; and

It appearing to the Commission, upon review of the record, that the allegations of the complaint are substantiated by the evidence; and

It further appearing that the facts of the instant case are substantially similar to those involved in a large number of cases in which Commission orders have been issued in terms identical with those

Complaint

61 F.T.C.

contained in the initial decision herein; and that in the interest of uniform and equitable treatment of competitors, the entry of such an order against respondent is warranted by the facts presented (the Commission specifically not relying on the evidence referred to on pages 594, 595 of the initial decision relating to volume discounts granted to large direct buyers by respondent) :

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent 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.

By the Commission, Commissioner Elman not concurring.