

Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

EDWARD JOSEPH HRUBY DOING BUSINESS AS
HRUBY DISTRIBUTING COMPANY

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

Docket 8068. Complaint, Aug. 4, 1960—Decision, Dec. 26, 1962

Order dismissing by a two-to-one decision, complaint charging an Omaha, Nebr., distributor with violating Sec. 2(c) of the Clayton Act by receiving commissions or brokerage on purchases of food products for its own account, the majority holding that the allowances concerned were functional discounts made to an intermediate distributor to enable him to sell to other wholesalers at a price competitive with that offered by producers selling through food 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:

Complaint

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PARAGRAPH 1. Edward Joseph Hruby is an individual doing business as Hruby Distributing Company, under and by virtue of the laws of the State of Nebraska, with his office and principal place of business located at 312 North 10th Street, Omaha, Nebr.

PAR. 2. Respondent is now, and for the past several years has been, engaged primarily in the business of buying, selling and distributing for his own account, citrus fruit and produce and other food products, all of which are hereinafter sometimes referred to as food products. Respondent purchases his food products from a large number of suppliers located in many sections of the United States, particularly in the State of Florida. 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 his 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 Nebraska, 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 his suppliers located in various other States of the United States to respondent who is located in the States of Nebraska, 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 his respective suppliers of such products.

PAR. 4. In the course and conduct of his 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 his own account for resale from some, but not all, of his 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 13½ 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

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in lieu thereof, on his 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.

Wald, Harkrader & Rockefeller, by *Mr. Robert L. Wald*, of Washington, D.C.; with *Mr. Ben F. Shrier*, of Omaha, Nebr., for respondent.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

PRELIMINARY STATEMENT

On August 4, 1960, the Federal Trade Commission issued its complaint against Edward Joseph Hruby (hereinafter called respondent), an individual doing business as Hruby Distributing Company, alleging that respondent had violated § 2(c) of the Clayton Act (hereinafter called the Act), 15 U.S.C. 12, *et seq.*, as amended by the Robinson-Patman Act. Copies of said complaint together with a notice of hearing were duly served on respondent.

The complaint alleges in substance that respondent has received and accepted from his suppliers a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, upon purchases for his own account. Respondent appeared by counsel and filed an answer, as amended, denying the commerce and all other allegations of the complaint except his name, business and address. In addition, the answer affirmatively alleged that respondent was a "car lot distributor purchasing for his own account, not acting for or in behalf of any party to the transactions." Pursuant to notice, hearings were thereafter held before the undersigned hearing examiner, duly designated by the Commission to hear this proceeding, at Omaha, Nebraska; Lakeland, Florida; and Washington, D.C.

Both parties were represented by counsel, participated in the hearings and afforded full opportunity to be heard, to examine and cross-examine the witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. Both parties filed proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof.¹ All such

¹ After both parties had filed, counsel for respondent moved the receipt of a supplemental proposed finding. Counsel supporting the complaint opposed, and alternatively proposed an additional supplement. Both proposals are received and have been considered. Thereafter, counsel for respondent requested the undersigned to take official notice of the decision of the Commission in *William Buehl Eidson*, 60 F.T.C. 1, Docket 8064 (January 3, 1962), which was opposed by counsel supporting the complaint. It goes without saying that the undersigned takes into consideration all relevant decisions of the Commission, including the *Eidson* case.

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findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded are herewith specifically rejected.²

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. The Business of Respondent

Respondent is an individual doing business as Hruby Distributing Company, under and by virtue of the laws of the State of Nebraska, with his office and principal place of business located at 312 North Tenth Street, Omaha, Nebraska.

II. Interstate Commerce

Respondent is now, and for several years has been, engaged in the purchase and resale, as a distributor for his own account, of food products, primarily fruit, vegetables and other produce. Respondent purchases his food products from a number of suppliers located in many sections of the United States, including Florida, Texas and Colorado. In the course and conduct of such business, respondent transports or causes such food products, when purchased, to be transported from the places of business of his suppliers in such States to respondent in the State of Nebraska, or to respondent's customers located in said State or elsewhere. There is now and has been at all times mentioned herein a continuous course of trade in interstate commerce in said food products between respondent and his respective suppliers of said products.

*III. The Unlawful Practices—The Receipt of Brokerage or Discounts in Lieu Thereof**A. The Issue*

As noted above, the complaint alleges that respondent, in connection with the purchase of food products for his own account, has received and accepted from his suppliers a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof. Section 2(c) of the Act provides:

(c) 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

² 5 U.S.C. § 1007(b).

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 is so granted or paid.

B. Direct Brokerage

Respondent personally handled his own purchases, primarily by long distance telephone. His suppliers are located in many states, including Florida, Texas and Colorado. The annual volume of business done by respondent in the purchase and resale of food products is substantial. Respondent testified that his annual volume of business was approximately one and three quarter million dollars. Respondent conceded that the industry was highly competitive and that the difference of a few cents on a case of produce can make a material difference.

The record establishes beyond dispute that respondent received direct brokerage on numerous purchases for his own account. Although respondent's answer affirmatively alleged that he was a car lot distributor purchasing for his own account, not acting for or in behalf of anyone else, and respondent originally testified that all of his purchases were for his own account, when specific invoices from three of his suppliers, Mission Citrus Growers, Inc., Gordon Butler, and Schmieding Bros., Inc., were called to his attention, which revealed brokerage payments to him identified as such thereon, respondent then testified, contrary to his earlier testimony and formal answer, that in those instances he was acting as a broker for those respective suppliers.

Mission, Butler and Schmieding specifically deducted brokerage. Mission itemized brokerage on its invoices. On the Butler invoice, respondent himself deducted the brokerage on the face of the invoice because Butler had failed to do so. With respect to Schmieding, the record contains a letter from that company advising respondent that they would pay the brokerage by check at the end of the transaction instead of deducting it from each invoice. In all of these transactions, unlike situations where a billing is net and may or may not reflect a discount in lieu of brokerage, specific brokerage was itemized or acknowledged by the seller and respondent admitted receipt thereof.

In addition to the fact that respondent originally testified that all of his purchases were for his own account and so alleged in his answer to the complaint, additional undisputed evidence of record establishes

that in these specific transactions, contrary to respondent's changed testimony, the purchases were for his own account and he was not acting as a broker for the sellers. In each instance, respondent took title to the property. He selected his own resale price, in some instances higher and in some lower than the invoice price, thus realizing a profit or sustaining a loss, as the case might be, independently of his receipt of brokerage. As respondent himself testified, a broker merely receives a commission and must sell the product at the price established by his principal. In addition, respondent was billed directly by the shipper and was liable for the payment regardless of whether he collected from his purchasers, contrary to the situation which would have existed if he had been acting as a broker. He also assumed liability for any losses to the products, thus further evidencing transfer of title. In the event of any damage in transit, respondent sought and collected, for his own account, reimbursement from the carrier.

Patently there can be no valid defense other than that respondent was in fact a bona fide broker. A broker is an agent, does not take title, does not fix the resale price, and does not sustain a loss or realize a profit in the transaction other than his brokerage commission. The record establishes beyond question the transfer of title from the shippers to respondent and hence establishes, as alleged and originally admitted, that the purchases were for his own account. Since the record also establishes and respondent admitted the receipt of brokerage on these purchases, this is clearly a violation of § 2(c) of the Act.

C. Discounts in Lieu of Brokerage

Some of respondent's suppliers submitted invoices setting forth a net price, either f.o.b. or delivered. Such net prices did not itemize brokerage as in the transactions considered above. Respondent testified, and the record establishes, that the usual or standard brokerage on citrus fruit transactions was 10 cents a box of $1\frac{3}{5}$ bushels, $7\frac{1}{2}$ cents a master carton ($\frac{3}{4}$ of a box) and 5 cents a carton ($\frac{1}{2}$ of a box).

Reliable, probative and substantial evidence in the record establishes that the packers' prices for citrus normally fluctuated in increments of 25 cents, i.e., prices would be in amounts such as \$2, \$2.25 or \$2.75 a box, and half as much for a carton. Respondent purchased citrus fruit from, among others, Keen Fruit Corporation in Florida. Numerous invoices concerning these transactions were received in evidence.

The invoices from Keen Fruit contain in each instance a net delivered price. Respondent claimed that he never discussed brokerage

with such sellers, purchased on a net price basis, and did not know that the price reflected a discount in lieu of brokerage. However, deducting the freight charges from the Keen invoices and adding the standard brokerage for boxes or cartons reveal a net price in increments of 25 cents per box. In other words, the net price reflected a discount exactly equal to the standard brokerage on the products in question. The general manager of the Keen Fruit Corporation testified that these net prices reflected a discount equal to and in lieu of the standard brokerage payments. Thus there can be no question but that respondent received a net price which included a discount in lieu of brokerage. Respondent, however, contends that he did not know that these transactions reflected such a discount.

Respondent has been engaged in the business for twenty years, and himself testified as to the standard brokerage amounts. Necessarily he was familiar with the usual and customary prices of packers. In addition, he testified several times that inasmuch as he sold exclusively to wholesalers, he would be unable to compete with brokers if he had to buy at the same price as they were selling, i.e., the price of the packer, and hence it was imperative for him to receive a lower price or discount from the regular wholesale price. Many of his other transactions were f.o.b. and hence he knew the customary freight charges. Knowing the price of his competitors (brokers selling to wholesalers), knowing the delivery charges, and knowing the standard brokerage rates, he necessarily knew or should have known that the discount he received, or net price, exactly reflected the standard brokerage and was in lieu thereof. It is concluded and found that in such transactions respondent received and accepted an allowance or discount in lieu of brokerage.

Respondent testified that the transactions involving net billing, not disclosing on their face the payment of brokerage, represented the greatest volume of his business. He contends that such discounts in lieu of brokerage were not in violation of § 2(c) because they were justified by the distributional function performed by him, namely, a car lot distributor selling to wholesalers, and hence had no adverse effect upon such wholesalers because respondent was not in competition with them, but in fact was in competition with brokers, whose brokerage fees equaled the discounts received by respondent. Respondent contends that as a car lot purchaser reselling to wholesalers he performed a distributional function or service in connection with the resale of the goods, consisting of storage, warehousing and distribution, which entitled him to a discount or lower price than other purchasers not performing these functions. The record clearly estab-

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lishes that respondent was not acting as a distributor for the packers. The services and functions performed by him were for his own benefit. Exactly the same contention was rejected by the Court of Appeals in a case substantially on all fours with the situation present here. In the *Southgate Brokerage Company* case³ the Court stated:

It is argued that the section is not applicable here because the receipt by the company of brokerage from the sellers results in no discrimination against buyers, since the company sells only to wholesalers, who pay the prices that they would otherwise pay if the sales were made to them through brokers. It is said that a distributor, such as the company, renders to the wholesale trade the service that a broker ordinarily performs, and that no discrimination is involved in allowing such distributor the ordinary broker's commissions. The answer is that price discrimination, which is covered by section 2(a) of the Act . . . , is not necessary to a violation of section 2(c), quoted above, which specifically forbids the payment of brokerage by the seller to the buyer or the buyer's agent.

After noting that the services, substantially the same as those herein, performed by the company therein were for itself and not for those from whom it had purchased the products, the Court further stated:

The earnestness of counsel for the company in presenting its cause has led us to discuss its contentions at greater length than their merit seems to warrant. Stripped of verbiage, his position is that in acting as a distributor of the products of the sellers, the company performs for them the service of a broker and is entitled to the compensation of a broker. The fact is, however, that the company is not a broker but a purchaser with respect to the goods that it purchases for its own account. In selling these goods to others it acts, not for those from whom it has purchased them, but for itself. Any profits due to rise in the market belong to it and any losses, whether from decline in the market or other cause, fall upon it. It sells for itself, to whom it pleases and at prices which it determines. The fact that it purchases from the sellers is doubtless beneficial to them and may enable them to dispense with the services of a broker on such transactions; but this does not mean that it has rendered services to them within any fair meaning of that language as used in the statute.

For sellers to pay purchasers for purchasing, warehousing or reselling the goods purchased is to pay them for doing their own work, and is a mere gratuity.⁴

Respondent also argues that as a practical matter it is essential for him to receive a discount from the regular net price of packers in order to be able to resell to wholesalers in competition with brokers. Otherwise, he contends, it would necessitate his selling at the same price at which he purchased in order to meet the price quoted by the brokers. It is, of course, well settled that practical considerations do not consti-

³ *Southgate Brokerage Co. v. FTC*, 150 F. 2d 607 [4 S. & D. 403] (4th Cir. 1945).

⁴ Contrary to the suggestion of counsel for respondent that the doctrine of *Southgate* is outmoded, it is noted that the Supreme Court in its recent *Broch* decision cited *Southgate* with approval, in considering whether such discounts were for "services rendered" or reflected cost savings. *FTC v. Broch & Co.*, 363 U.S. 166, 80 S. Ct. 1158 [6 S. & D. 800] (1960).

tute legal defenses to specific violations of a statute.⁵ In addition, respondent has several other elections available. Assuming *arguendo* the validity of such practical considerations, as the Court in *Southgate, supra*, stated:

It is perfectly clear that this provision forbids the payment of brokerage on a sale or purchase of goods to the other party to the transaction. The seller may not pay the buyer brokerage on the latter's purchases for his own account.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce and engaged in the above-found acts and practices in the course and conduct of his business in commerce, as "commerce" is defined in the Act.

2. The acts and practices of respondent as above found are in violation of § 2(c) of the Act.

ORDER

It is ordered, That respondent, Edward Joseph Hruby, an individual doing business as Hruby Distributing Company, and his agents, representatives, and employees, directly or through any corporate, partnership, sole proprietorship, or other device, in connection with the purchase of 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 food products for respondent's own account, or when respondent is the agent, representative, or other intermediary acting for or in behalf, or subject to the direct or indirect control, of any buyer.

OPINION OF THE COMMISSION

By Elman, *Commissioner*:

This is an appeal by respondent from the examiner's initial decision holding him in violation of Section 2(c) of the Robinson-Patman Act, 15 U.S.C. 13(c).¹ The complaint alleges that respondent Hruby is a distributor of food products who buys for his own account and

⁵ As the Supreme Court stated in *Broch, supra*: "Any doubts as to the wisdom of the economic theory embodied in the statute are questions for Congress to resolve."

¹ Section 2(c), the so-called "brokerage" provision of the Act, reads as follows:

"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 is so granted or paid."

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who in connection with such purchases unlawfully receives brokerage or other compensation in lieu thereof.

Respondent is an individual trading as Hruby Distributing Company, in Omaha, Nebraska. His business consists of purchasing foodstuffs for his own account from packers and other primary suppliers, which he, in turn, resells to food wholesalers.² The goods are shipped by common carrier in either carload or truckload lots and are priced and invoiced to the respondent. Total annual sales are estimated to be approximately one and three quarter million dollars.

Hruby takes title to the goods he handles, sets his own resale price thereon, and assumes the risks of collection and loss in transit. He maintains and operates a warehouse through which approximately 50% of the goods purchased and resold passes. The remaining 50% of the goods dealt in are drop-shipped directly to his customers. Respondent delivers goods from his warehouse to out-of-town customers but local customers generally pick up merchandise at his warehouse in their own trucks.

Hruby's operations place him at a functional level midway between the producers of foodstuffs and the wholesalers who serve retail grocery stores. At this level he competes with producers who market their goods through food brokers. As a matter of fact, many of Hruby's suppliers also sell through food brokers. It does not appear, however, that any of his suppliers made sales by this distribution method in the market area served by Hruby.

It is obvious that in order to remain in business, Hruby must be able to offer and sell to wholesalers at a price competitive with that offered to wholesalers by producers selling through food brokers. In spite of the warehousing, credit and small lot delivery services offered by respondent to his customers (services not usually offered by food brokers), he must also offer a competitive price, since in the highly competitive food field differences of a few cents on a case of goods will make or lose a sale. Thus, as an economic necessity, respondent must have a lower price than his suppliers' regular price to wholesalers.

In its Section 2(a) price discrimination cases the Commission has long recognized the legality of price differences based upon differences in the level of distribution of the customers who are charged disparate prices. The lawfulness of such functional price differences derives from the fact that they result in no adverse economic effects upon par-

² Respondent testified that he occasionally sells to the produce departments of grocery chains on a "fill-in" basis, but there is no evidence as to the extent of such sales or the prices charged or paid for the goods. All of the record evidence deals with Hruby's sales to wholesalers.

ticular competitors or competition in general. Thus, since Hruby operates at a higher competitive or functional level than wholesalers, the granting to Hruby or receipt by him of a lower price than afforded to wholesalers would ordinarily not be questioned. But the manner and form in which Hruby received his lower prices created the doubts concerning their validity which led to this complaint.

Hruby's suppliers, accustomed to selling their goods to wholesalers through food brokers and not through distributors of respondent's type, referred to or described the payments or discounts granted to Hruby as brokerage or discounts in lieu of brokerage. And therein lies the difficulty, for the receipt of brokerage, or discounts "in lieu thereof", by customers buying for their own account immediately presents the question of possible violation of Section 2(c). If the payments or discounts received by Hruby were in actual fact what they were labeled by some sellers, i.e., brokerage or discounts in lieu of brokerage, Section 2(c) would come into play. If, on the other hand, the payments, despite their labels, were in actual fact no more than functional discounts designed to permit Hruby to resell to wholesalers, they would not be barred by Section 2(c).

The initial decision rests its finding of violation on the grounds that: the discounts received by respondent Hruby on his purchases from citrus producers were in a few instances described as "brokerage"; that they were in the same amount as the producers' brokerage payments on sales made through brokers; and that they were listed by one producer in response to a Commission questionnaire requesting information concerning "discounts in lieu of brokerage" granted by it.

An examination of Hruby's business shows, however, that these discounts have no resemblance whatever to the practices at which Section 2(c) was aimed.³ Hruby is clearly not a "dummy" broker

³ The legislative history of Section 2(c) is set out in some detail in *Federal Trade Commission v. Henry Broch & Co.*, 363 U.S. 166, 80 S. Ct. 1158 [6 S.&D. 800] (1960). The Broch opinion summarized it as follows (pp. 168-69):

The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power. A lengthy investigation revealed that large chain buyers were obtaining competitive advantages in several ways other than direct price concessions and were thus avoiding the impact of the Clayton Act. One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act. But it was not the only means by which the brokerage function was abused⁵ and Congress in its wisdom phrased § 2(c) broadly, not only to cover the other methods then in existence but all other means by which brokerage could be used to effect price discrimination.

[Supreme Court's footnote 5.]

In the Final Report on the Chain-Store Investigation . . . Congress had before it examples not only of large buyers demanding the payment of brokerage to their agents but also instances where buyers demanded discounts, allowances, or outright price

controlled by a large buyer to whom he passes on phony brokerage payments. Equally clearly, he is not himself a powerful wholesaler or retail chain exacting from his suppliers false brokerage payments, to the competitive disadvantage of his smaller competitors. And, finally, it is clear that the discounts received by Hruby are not granted because on sales to him sellers could dispense with brokerage services regularly required on their sales, thus effecting savings of usual brokerage fees.

Consider the example of the producer who sells to the wholesale trade at \$1 per case, paying 5 cents to his brokers and keeping 95 cents for himself. If he avoids this brokerage payment by dispensing with a broker and selling direct to a large wholesaler, he cannot pass on this saving to the wholesaler by charging him only 95 cents. This would clearly violate Section 2(c), since it would be an allowance in lieu of brokerage, giving the large wholesaler a discriminatory advantage over his competitors. Suppose, however, the producer has an alternative method of distribution: In addition to selling to wholesalers through brokers, he sells to them through *intermediate* distributors who buy from the producer for their own account and resell to wholesalers. And suppose, further, this is done not as a subterfuge or device for violating the law, but because such intermediate distributors serve a legitimate and useful economic function in the channels of distribution of the particular industry. In such a situation the producer must of course give the intermediate distributors some discount from his own price to the wholesale trade in order to enable them to make a profit and stay in business. In its very nature, the purpose of a discount or allowance of this sort is not to pass on a saving in brokerage. Instead, it is the familiar "functional discount", which the Commission has recognized as involving no potential anti-competitive effect where the distributor who receives the lower price does not compete at the wholesale level.

Is Hruby, doing business as Hruby Distributing Company, just such a distributor who serves as a middleman between producer and wholesaler, buying from one and selling to the other? On this record, we must find that he is. Hruby performs much the same function that in other transactions is performed by a broker on direct sales from a producer to wholesalers. In addition to finding purchasers for the producer's goods, however, he assumes credit risks and in some in-

reductions based on the theory that fewer brokerage services were needed in sales to these particular buyers, or that no brokerage services were necessary at all. . . . These transactions were described in the report as the giving of "allowances in lieu of brokerage . . ." or "discount[s] in lieu of brokerage."

stances takes delivery of the goods himself, redistributing them in less than carload lots.

As already noted, since Hruby cannot charge substantially higher prices to wholesalers than they are offered by producers selling through food brokers, he of necessity must be afforded a lower price than the producers' established price to the wholesale trade. Such lower price, no matter how labeled, reflects not a saving of brokerage by the seller (for there is none) but, rather, the difference in the functional-competitive level at which Hruby and his wholesaler customers operate. We must conclude that the lower net prices received by Hruby are not the result of the receipt of brokerage or discounts in lieu thereof and are not unlawful under Section 2(c).

The occasional characterization of these allowances to Hruby as "brokerage", or their listing by a producer in a Section 6 questionnaire under "discounts in lieu of brokerage", reveals nothing more than the not surprising fact that businessmen, in describing their actions, do not talk like lawyers expert in the niceties of the Robinson-Patman Act.

Accordingly, on the basis of our analysis of the facts of record here, an order vacating the initial decision and dismissing the complaint will issue.

Commissioner MacIntyre dissented from the decision of this matter and Commissioners Anderson and Higginbotham did not participate.

DISSENTING OPINION

By MacIntyre, *Commissioner*:

Circumstances present here do not permit me to join with the Majority in dismissing the complaint in this case. Under other circumstances applicable to other cases I would find no difficulty in agreeing with the Majority that Section 2(c) of the Robinson-Patman Act should not be utilized to preclude a businessman from engaging in any line or lines of business he chooses. I would agree that a businessman should be allowed to operate as a supplier, broker, wholesaler, or retailer. Also, I do not see anything in the law that would preclude him from engaging in two or more of such lines of commerce simultaneously. However, it is obvious that it would be a travesty to say that with respect to any particular business transaction a businessman was at the same time a supplier, broker, wholesaler and retailer. Particularly it is inappropriate to consider a businessman as a broker representing and rendering services to a supplier in a transaction when, in that transaction, the same businessman is a buyer.

Throughout the history of our commerce and trade we have held suspect the individual who has been found in situations where he purported to represent the two conflicting sides to transactions. Long have we followed the concept that no man is able to *serve* two masters. That concept is particularly applicable when the interests of the two masters are in conflict. In addition to the logic and merit of such concept, other factors prompted Congress to enact Section 2(c) of the Robinson-Patman Act in 1936. As pointed out in the Opinion of the Majority, this so-called "brokerage section" provides as follows:

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 is so granted or paid.

On June 6, 1960 the Supreme Court in the case of *Federal Trade Commission v. Henry Broch & Company* (363 U.S. 166, 80 S. Ct. 1158 [6 S. & D. 800]) recognized some of the immediately pressing facts which prompted Congress to enact this so-called "brokerage section" of the Robinson-Patman Act. In the majority opinion in the *Broch* case, the Court said:

One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act. But it was not the only means by which the brokerage function was abused. Congress in its wisdom phrased § 2(c) broadly, not only to cover the other methods then in existence but all other means by which brokerage could be used to effect price discrimination.

The particular evil at which § 2(c) is aimed can be as easily perpetrated by a seller's broker as by the seller himself. The seller and his broker can of course agree on any brokerage fee that they wish. Yet when they agree upon one, only to reduce it when necessary to meet the demands of a favored buyer, they use the reduction in brokerage to undermine the policy of § 2(c). The seller's broker is clearly "any person" as the words are used in § 2(c)—as clearly such as a buyer's broker (id. 169-170).

Here the Majority has misread the record regarding the factual situation before us and has misconstrued the applicable law.

The respondent's business operations can be described very simply. The use of a name to describe those operations is more difficult. Apparently this difficulty was experienced by the respondent. In his

first Answer he filed to the complaint he claimed to be an "independent food broker." At the first hearing he was permitted to amend his answer to describe his business as that of an "independent food broker or car lot distributor." Whatever label is attached to respondent's operation, the facts are clear with respect thereto. His business consists of purchasing foodstuffs for his own account from packers and other primary suppliers, which he, in turn, resells to food wholesalers and retail chains. The goods are shipped by common carrier in either carload or truckload lots and are priced and invoiced to the respondent.

Respondent maintains a warehouse containing approximately 10,000 square feet of space but no more than 50% of the goods purchased and resold are ever stored therein. The remaining 50% of the goods are drop-shipped directly to his customers. He delivers goods from his warehouse to "out-of-town" customers but his local customers, that is, customers located in close proximity to the city of Omaha, pick up the goods at his warehouse in their own trucks.

Respondent takes title to the goods he handles, sets his own resale price thereon, and assumes the risks of collection and loss in transit. It is established beyond question that he is not a broker, "independent" or otherwise.

The record clearly shows that, in 1959, the respondent received brokerage, labeled or referred to as such, from three of his suppliers on purchases which totaled approximately \$41,000. Both the seller and the respondent considered the compensation granted to respondent as brokerage and Mr. Hruby testified that he was acting as a broker in these transactions.

On the largest part of respondent's purchases he does not receive "brokerage" specifically labeled as such, but, as found by the hearing examiner, receives lower net prices which reflect a discount in lieu of brokerage. It appears that the hearing examiner's finding is based to a substantial extent upon the testimony of the general manager of one of respondent's principal suppliers of citrus fruit, Keen Fruit Corporation.¹ This witness testified that brokerage at the rate of 10 cents per box was paid to brokers representing Keen and that the net prices afforded to respondent reflected a reduction of 10 cents per box. Further, prior to this proceeding, in a special report to the Commission, Keen Fruit reported that Hruby was allowed a discount in lieu of brokerage. A copy of this report is contained in this record. As I view it, the record adequately establishes the fact that respondent receives prices which reflect discounts in lieu of brokerage.

¹ The respondent testified that transactions had with this supplier were typical of his dealings with all "net price" suppliers.

Respondent argues that the receipt of discounts in lieu of brokerage is not unlawful unless it can be shown that the recipient was aware that he was receiving such discounts. It is urged that respondent did not have such knowledge and that the hearing examiner's finding to the contrary is in error.

The hearing examiner expressed his analysis of this question in the initial decision as follows:

Respondent has been engaged in the business for twenty years, and himself testified as to the standard brokerage amounts. Necessarily he was familiar with the usual and customary prices of packers. In addition, he testified several times that inasmuch as he sold exclusively to wholesalers, he would be unable to compete with brokers if he had to buy at the same price as they were selling, i.e., the price of the packer, and hence it was imperative for him to receive a lower price or discount from the regular wholesale price. Many of his other transactions were f.o.b. and hence he knew the customary freight charges. Knowing the price of his competitors (brokers selling to wholesalers), knowing the delivery charges, and knowing the standard brokerage rates, he necessarily knew or should have known that the discount he received, or net price, exactly reflected the standard brokerage and was in lieu thereof. It is concluded and found that in such transactions respondent received and accepted an allowance or discount in lieu of brokerage.

It would seem that the facts adduced force the conclusion that respondent, a buyer for his own account, has received both brokerage and discounts in lieu thereof and should be held in violation of Section 2(c). But respondent argues that there is an economic justification for the allowances received and that Congress did not intend that the Act should be applied in situations where the allowance of brokerage does not produce a price discrimination. It is contended that respondent is legally entitled to receive a functional discount from his suppliers' regular prices to wholesalers because respondent is not a wholesaler but a distributor who sells to wholesalers. Respondent argues that since he is in competition with food brokers in selling to wholesalers and stands at the same competitive level as food brokers, he should be entitled to the same compensation as a food broker. As an alternative but allied argument, respondent argues that even if the payments are considered as "brokerage" within the meaning of Section 2(c), they must be found valid under the "services rendered" provision of the statute. With respect to the issues thus raised, respondent states: "We are frank to concede that in seeking such a ruling, we face the heavy burden of dislodging the long encrusted authority of *Southgate Brokerage Company v. Federal Trade Commission*, 150 F. 2d 607 [4 S. & D. 403] (4th Cir. 1945), upon which the hearing examiner fully relied."

As respondent admits, each of his arguments were disposed of in the *Southgate* case and in the earlier decision by the same court in *Oliver Brothers, Inc. v. Federal Trade Commission*, 102 F. 2d 763 [3 S.&D. 86] (4th Cir. 1939). And so far as I am aware, these cases have been followed or favorably cited by all courts, including the Supreme Court. But respondent contends that the *Southgate* doctrine was "suspect in its inception" and has been rendered even more doubtful by subsequent court decisions. The Supreme Court opinion in which respondent finds comfort is *Federal Trade Commission v. Henry Broch*, 363 U.S. 166, 80 S. Ct. 1158 [6 S.&D. 800] (1960). It is urged that the language there employed raises doubts concerning the continued vitality of the *Southgate* doctrine insofar as the element of discrimination is concerned. The facts of the *Broch* case differ so widely from the facts in the instant matter that the applicability of any of the comments of the Supreme Court is at best questionable.

The respondent in the *Broch* case was a broker whose normal commission was 5%. In order to secure a large order from a single buyer the broker agreed to accept only a 3% brokerage on the transaction. The resultant savings in brokerage was passed on to the buyer in the form of a price concession. The court held that this was an indirect allowance of a payment in lieu of brokerage to the buyer. Respondent relies upon the comments made by the court in answering an argument that its decision would establish "an irrevocable floor under commission rates." The court pointed out that there is nothing in its opinion which would require *Broch* to charge 5% brokerage on sales to all customers. The court concluded by stating: "Here, however, the reduction in brokerage was made to obtain this particular order and this order only and therefore was clearly discriminatory." (Id. 176)

The respondent contends that the effect of the Supreme Court's opinion in the *Broch* case is to inject the element of price discrimination in 2(c) cases.

Had the Supreme Court desired to overturn the long-established rule that discrimination is immaterial in 2(c) cases, it would have used clearer language. As I interpret the *Broch* opinion, the court in pointing out that the reduction in brokerage was made to obtain a particular order was merely emphasizing the crucial fact which led it to conclude that the lower price was "an allowance in lieu of brokerage."

Respondent reads too much in the Supreme Court *Broch* opinion, a practice much indulged in by advocates but one which decisional bodies must eschew, for the Supreme Court itself has stated:

It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.²

Even if respondent's argument could be supported as a matter of law, it would fall under the force of facts because the record herein does not support the contention that no discrimination in violation of Section 2(a) could be present in the instant case.

It is well established that respondent did not sell exclusively to wholesalers. He also sold to large direct buying retailers, including the second largest corporate food chain. Smaller retailers competing against this chain bought from wholesalers. They were not given a discount in lieu of brokerage. Hence, because of the violation of Section 2(c) in this case, smaller retailers and their wholesalers have a competitive disadvantage compared with the retail food chain who bought from the respondent. It is simply not true that no (actionable) discrimination could have resulted from the facts in this case.

In view of these circumstances, I reiterate the assertion I made earlier in this Dissenting Opinion to the effect that the Majority has misread the record regarding the factual situation before us and has misconstrued the applicable law. The question of whether the respondent is a "dummy" broker controlled by a large buyer, is perhaps debatable on the facts of this record. The fact that respondent is a buyer and has received brokerage payments in connection with purchases made by him is beyond dispute. Likewise, it is beyond dispute that respondent has as one of his customers a large chain retail food distributor. The extent to which the favors shown to have been extended to him as a buyer have been passed on to this large chain food retailer is undetermined, but it is not necessary to make that determination in this case in order to hold that the respondent violated Section 2(c) as a buyer.

Violations of Section 2(c) of the Robinson-Patman Act, unlike Section 2(a) and some other sections of the law, do not depend upon

² *Cohens v. Virginia* [Wheat. 264, 399 (1821)], 5 Sup. Ct. Law Ed. 264.

a showing of adverse effects flowing from the challenged transactions. Hence, the degree of control over the market by a respondent is irrelevant to a charge of a violation of Section 2(c). Therefore, such construction of the law undertaken by the Majority in this case to the transactions engaged in by the respondent would just as logically apply to like transactions engaged in by the largest and most powerful buyer in the United States.

The majority opinion in this case will produce harmful results of serious proportions for the business community. At best, it introduces uncertainty, imprecision and confusion in applying Section 2(c) of the Robinson-Patman Act, which, up to now at least, was definite, precise and clear. Worse than this, it also lays a basis for eventually depriving Section 2(c) of all substance.

Up until the decision in this case, it was the rule that Section 2(c) "expresses an absolute prohibition of the payment of brokerage or compensation in lieu thereof, to the buyer upon the buyer's own purchases." *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667, 673 (3d Cir. 1939), cert. den. 308 U.S. 625 [3 S.&D. 146] (1940). It was also established law prior to this case that Section 2(c) is independent of Section 2(a). *Federal Trade Commission v. Henry Broch & Company, supra*. And finally, until today the "except for services rendered" proviso in Section 2(c) was never considered as applying to a buyer purchasing for his own account. *Southgate Brokerage Company v. Federal Trade Commission, supra*.

Now, for the first time, and completely contrary to overwhelming legal precedent, the Commission holds that a buyer can accept a discount in lieu of brokerage on purchases for his own account. Apparently this is now permitted when such discount is treated as a so-called functional discount permitted under Section 2(a). Thus, we have what amounts to a "fusion" of Section 2(a) which permits a price difference to buyers in different noncompetitive functional classes with Section 2(c) which, up to now, did not do so where the difference in price amounted to a discount in lieu of brokerage given to a buyer on purchases for his own account. In other words, the rule now seems to be that a buyer can receive brokerage from a seller when such payment is not used to effect a price discrimination prohibited by Section 2(a). The injury standard in Section 2(a) is now read into Section 2(c), thereby removing the absolute character of the prohibition in Section 2(c). This is indeed a far-reaching change in the law.

It also appears from the majority opinion that where a buyer purchasing for his own account assumes credit risks and furnishes storage, warehousing and other distribution services, he may be considered to have furnished such services to his supplier, thereby entitling the buyer to a discount or payment from such supplier which represents an amount normally paid by the supplier as brokerage to his own sales agents.

The record in this case establishes beyond any reasonable doubt that the respondent received brokerage compensation on numerous purchases for his own account. Respondent admitted the receipt of brokerage on a number of his purchases. And the general manager of one of his suppliers testified that its net prices charged the respondent reflected a discount equal to and in lieu of the standard brokerage payments. It is clear that the respondent knowingly received a discount in lieu of brokerage on his own purchases.

There is no necessity in calling brokerage something it is not. But this is precisely what the Majority has done in this case. In doing so, it has followed the respondent's erroneous—if not fantastic—reasoning. He contends that the allowances or discounts given to him by his suppliers were functional discounts accorded in payment for services which he performed for his suppliers. According to this argument, such discounts or allowances were not in lieu of brokerage because the respondent occupies the same functional position as food brokers representing his suppliers who sell to wholesalers in competition with the respondent. Respondent asserts that no (actionable) discrimination resulted among competing buyers since he received no price concession or advantage over such food brokers selling to wholesalers in competition with him. On this basis, it is argued the discounts with which we are concerned here cannot be considered in lieu of brokerage because no competitive injury resulted. Since no (actionable) price discrimination was effected, Section 2(c) was not violated.

This is a clever line of argument, but it lacks any merit. The contention that the respondent, as a buyer for his own account, and food brokers representing respondent's suppliers share the same functional role disregards the role played by a true broker. They are sales representatives who act pursuant to authorization and instructions from their principals, which in this case are producers and also suppliers of the respondent. They act as agents of the producers and have no functional role independent and apart from the producers they represent. The role of true food brokers representing producers is to find buyers able and willing to purchase their principal's products at

the price fixed by them. Respondent who has title to the merchandise can sell for any price he wishes. He is selling for himself and can increase his resale price when favorable market conditions develop. He can speculate by buying from producers at a low price and selling at a much higher price when supply and demand conditions permit.

It is clear that in the circumstances of this case respondent competes with his suppliers. In view of this, it is absurd to contend that the respondent's warehousing, stocking and delivering services are rendered to and for the benefit of his suppliers, and that he is entitled to a discount equal to his suppliers' regular brokerage payments as compensation for such alleged services. Such a discount is a mere gratuity paid by the producer-supplier to a buyer who competes with him. To approve the payment of such a discount in lieu of brokerage on the theory that the respondent renders a service to his supplier is preposterous.

Respondent's argument that he is entitled to a discount equal to the commission normally paid by his suppliers to their brokers because no (actionable) price discrimination resulted is of course false. It is (or was) a clear legal principle that a person can violate Section 2(c) for having done that which is permitted under Section 2(a). *Federal Trade Commission v. Broch & Company, supra.*

ORDER DISMISSING COMPLAINT

The Commission having considered this case on the appeal of respondent from the initial decision of the hearing examiner, and having concluded for the reasons set forth in the accompanying opinion that the complaint should be dismissed,

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

By the Commission, Commissioner MacIntyre dissenting, and Commissioners Anderson and Higginbotham not participating.

IN THE MATTER OF

HOME FURNITURE, INC., ET AL.