

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

Docket 8564. Complaint, Mar. 26, 1963—Decision, Feb. 26, 1965

Order requiring a Kansas City, Kans., wholesale purchaser and distributor of
fresh fruits and vegetables—with total annual sales of approximately

Complaint

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\$5.5 million—to cease violating Sec. 2(c) of the Clayton Act by receiving or accepting brokerage payments from suppliers on purchases of fresh fruit or produce for its own account or while acting in behalf of any buyer.

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, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Garrett-Holmes & Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 200 S. 5th Street, Kansas City 17, Kansas.

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 fresh fruit and produce, hereafter sometimes referred to as food products. Respondent purchases such 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 Missouri, in which respondent is located. Respondent transports or causes such 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 Missouri, 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 food products.

PAR. 4. In the course and conduct of its business for the past several years, but more particularly since July 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.

More particularly, respondent makes substantial purchases of food products from suppliers such as Bodine Produce Co., Phoenix, Arizona, The Garin Company, Salinas, California, National Cranberry Association, Hanson, California, and Earl Fruit Company, San Francisco, California, and receives on said purchases varying rates of brokerages. In other instances respondent receives a lower price from the suppliers 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, Section 13).

Mr. Basil J. Mezines and *Mr. Donald A. Surine* supporting the complaint.

Collier and Shannon, by *Mr. James F. Rill*, Washington, D.C., with *Mr. Frank Brockus*, of Kansas City, Missouri, for the respondent.

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

SEPTEMBER 29, 1964

By complaint issued on March 26, 1963, the Federal Trade Commission charged the respondent in the above-entitled matter with violation of the provisions of subsection (c) of Section 2 of the Clayton Act, as amended, 15 U.S.C. Sec. 13(c). Specifically, the respondent was charged with receiving and accepting a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, from some of its suppliers, in connection with its purchases of food products for its own account for resale. By answer timely filed, respondent denied that it had received or accepted any unlawful brokerage payment or allowance in lieu thereof, and averred that it is an independent distributor of fresh fruits and vegetables, operating at a position in the chain of distribution which is essential to the distribution of such merchandise.

Several prehearing conferences were held where the issues were narrowed, exhibits marked and identified, stipulations entered into, and time and places of hearings agreed upon. Thereafter, hearings were held in Washington, D.C., Phoenix, Arizona, and Kansas City, Missouri, where both parties were represented, examination and cross-examination permitted, and exhibits received in evidence. No defense hearings were asked for or held. Proposed findings and briefs were

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submitted and consideration given to such submissions. Proposed findings not adopted in this decision have been deemed unsupported by evidence or irrelevant to the issues. From the record thus constituted, the hearing examiner makes the following:

FINDINGS OF FACT

1. Respondent, Garrett-Holmes & Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri (Answer Par. 1).

2. Respondent is a family-type corporation engaged primarily in the purchase and resale of fresh fruits and vegetables. L. F. Garrett, Sr., is Chairman of the Board; his son, L. F. Garrett, Jr., is president. The total approximate annual volume of business is 5.5 million dollars (Tr. 1028-32).

3. Respondent maintains its principal place of business at 200 South 5th Street, Kansas City, Kansas, where it maintains a warehouse, including refrigerated storage, with facilities to bag or repack products. Respondent also maintains a number of tractor-trailer type trucks for delivery of produce sold to its customers (Tr. 1028-35).

4. Respondent purchases its fresh fruits and vegetables from suppliers located throughout the United States. This produce is resold to customers in a ten-state area, including Missouri, Kansas, Illinois, Iowa, South Dakota, Oklahoma, Arkansas, Minnesota, Nebraska and Wisconsin (Tr. 1030-31). Respondent also acts as a broker on some transactions with the National Cranberry Association, which will be discussed below.

5. Respondent also maintains a "City Market" outlet at 311 Walnut Street, Kansas City, Missouri, at which produce is sold to anyone regardless of the amount. Sales are made there to wholesalers, retailers, chain stores, peddler, jobbers, etc. (Tr. 1053, 1084-85; CX 1799). Approximately 10 per cent of respondent's total business is done at the City Market outlet. In 1960, about \$443,000, in 1961, \$430,000, and in 1962, \$441,000 of produce were sold through that outlet (CX 2139; Tr. 1053-54). Respondent's customer classification has been set out in CX 1799, a document prepared by officials of the respondent. This shows:

Garrett-Holmes & Co., Inc., Customers

Service wholesalers	56
Group Stores	13
Chain Stores	5
Home Owned Stores	6

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City Market Customers

Retail Stores	24
Government	2
Service Wholesalers	17
Jobbers	3
Prepack	3
Vender	1

6. The record is somewhat confused regarding the distribution of respondent's sales to these various classes of customers. It appears, and the examiner so finds, that sales from the City Market outlet to service wholesalers represent 85 percent of the total City Market outlet sales (Tr. 1086). Total company sales to customers shown as "group stores," "chain stores," and "home owned stores" are also substantial. Although Mr. Garrett, Sr., defined "substantial" as "good customers," he also defined "good" as "quantity buyers and good pay" (Tr. 1089). These "group stores" include independently owned retail stores, small retail chain stores, as well as national retail chain stores (Tr. 1078-81). Mr. Garrett, Sr., testified that more than a million dollars in total company sales are represented by sales to "group stores" (Tr. 1090-91). He further stated that a similar amount of business was involved in sales to service wholesalers. It is, therefore, concluded that much, if not a predominate share, of respondent's business involves sales to wholesalers or others performing wholesaling functions in the redistribution of the merchandise to retail stores. Nonetheless, respondent's sales to retail stores directly, as shown by CX 1799, cannot be ignored as insignificant.

7. Respondent's officers stated that its principal competitors are brokers (Tr. 113-19). Originally, respondent purchased through brokers. When the brokers started selling to respondent's customers, however, respondent was "forced" to compete with the broker by buying direct from the supplier (Tr. 1489-90). This was corroborated by Mr. Yankee, an officer of a local brokerage firm (Tr. 1316). On the other hand, officials from local wholesaling firms, L. Yukon & Sons, Inc., and A. Reich & Sons, Incorporated, testified that they, as well as the respondent, sell to the same types of customers (institutions, restaurants, hotels, retailers, jobbers, national chains), have similar facilities for warehousing, refrigerating and delivery, and even buy from and sell to each other on a fill-in basis when they run short (Tr. 1092, 1204, 1211, 1224, 1234-35, 1282-83, 1323-24). Mr. Davis, an official of a brokerage firm, Brown & Loe, Inc., stated that the respondent, as well as Yukon and Reich were considered jobbers,

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and that all jobbers in the Kansas City, Missouri, area were competitive (Tr. 1188-90; 1206).

8. It is concluded and found that respondent is in active competition with wholesalers in its sales to some classes of customers such as retailers, as well as in active competition with brokers in its sales to some classes of customers such as wholesalers. Respondent warehouses some of its purchases, but also engages in drop shipments to a large extent. In the latter situation, respondent directs its supplier to deliver the respondent's purchases to designated customers of the respondent at intermediate points along the delivery route so that respondent finds it unnecessary to warehouse all of its purchases (Tr. 1114, 1477-78, 1481).

9. Jessie Thomas has been a broker representing various buyers of produce since 1955. Since 1960 he has been a paid employee of the respondent at an annual salary of \$6,500 (Tr. 784-87, 794-95; CX 2138). As a buyer for the respondent his duty is to keep respondent informed of market conditions and to buy at the best possible price (Tr. 800).

10. When Mr. Thomas purchases for the respondent, he submits a "Confirmation of Purchase" (CX 2106-D), showing respondent as the purchaser and also showing the name of the seller, the commodity purchased, the quantity, and the price. On many of these transactions, the Confirmation of Purchase shows a deduction from the price, labeled "protection" or "protection for brokerage." At times it was shown as "distribution" (Tr. 825-29, 955). The amount thus deducted was usually 10 cents per unit, which is the usual amount for brokerage when paid by the supplier (Tr. 726). Mr. Thomas testified:

* * * My state of mind at the time was to protect Garrett-Holmes & Co. 10 cents per carton and protect Garrett-Holmes 10-cent brokerage, the terms are synonymous * * * (Tr. 827).

Q. Mr. Thomas, actually, in fact, isn't the words when you use "protection for brokerage," you using it yourself, did not you understand that that was a deduction of brokerage?

A. In some instances, yes.

Q. And you asked, after bargaining on price, you then asked the seller if it were in a buyer's market, particularly, for a deduction for brokerage?

A. I don't know that I asked —

Q. (Interposing) As a practice you have done that many times?

A. Yes, I would say so.

Q. Did you consider that the deduction was in lieu of brokerage?

A. By that you mean what?

Q. Well, allowance or brokerage granted to your employer of ten cents?

A. Yes.

Q. You considered that to be?

A. Yes. (Tr. 828-29).

11. The sales manager of Bodine Produce Co., a supplier, stated that "brokerage" and "distribution" meant the same thing. Moreover, the words "less brokerage" and the deduction of 10 cents were entered on the invoices by the respondent in its office and the deduction was allowed by the supplier as a discount from the total price to cover the respondent's expense in selling the produce to somebody else (Tr. 955-57, CX 1834).

12. An officer of another supplier, Garin Company, stated that the deduction, denominated "less brokerage" upon the invoices, was charged by the supplier on the books of the supplier as brokerage expense (Tr. 731). This same officer testified that the 10-cent allowance, denominated "less brokerage" on the invoice, was not entered on the invoice by the supplier when it prepared the document (Tr. 732, 736; CX 1919, 2119b). Mr. Garrett, Jr., admitted that this was entered by the respondent after it received the invoice from the suppliers and that the brokerage was deducted from the invoice price (Tr. 1475-76).

13. The record contains other explanations for the apparent deductions for brokerage shown on a number of invoices. One such explanation made by the respondent's president was that the practice was merely "puffing"; that the price was artificially inflated by the amount of the so-called brokerage so that the deduction for brokerage brought the net price back to normal market levels (Tr. 817, 959). As counsel for the respondent states, "The rationale behind this record keeping is difficult to understand" (Proposed Findings, p. 17). The testimony supporting this theory is not credible. If such alleged "puffing" happened only rarely, it could be plausible. But Mr. Garrett's testimony supporting this explanation admits that it did not happen infrequently. It is not at all credible that the artificial inflation of a price coupled with a fictitious brokerage deduction, resulting in a net price that is exactly equal to a current normal level for all buyers, would be a regular business practice. Moreover, the respondent's theory of "puffing" as an explanation for the practice engaged in was contradicted by the testimony of various individuals cited in the foregoing findings. The conclusion is inescapable that "puffing" in this particular instance cannot be accepted as a fact, particularly when the deduction is often made by the respondent after it receives an invoice from the supplier showing a net price, and not by the supplier in arriving at his net price. Presumably, if the deduction represents a restoration to the

normal market level, it would have been negotiated and settled between respondent and the supplier when the sale was made, not afterwards, when respondent received the invoice, and not unilaterally by the respondent alone. Even Mr. Thomas admitted that on some occasions the discount or protection represented a reduction from actual market price, not a restoration to actual market price (Tr. 824).

14. According to an official of the Bodine Produce Company, one of respondent's suppliers, the respondent is given "preferred treatment" both as to the quality of the produce purchased and as to the price paid (Tr. 966). The price preference was illustrated by the witness in an example where the respondent and the supplier's broker had been invoiced at the same price for similar merchandise. The wholesaler buying from the broker, however, would pay 10 cents more than the respondent (Tr. 963-64). This was almost a constant practice; there were only a few instances shown where customers of the broker paid less than the respondent (RX 2, 3, 4, and 5).

15. Respondent notes that it does not appear that Bodine sold to local competitors of the respondent during the time period involved here and argues no competitive harm possible on Bodine's sales. There is nothing in the record, however, to indicate any unlikelihood of such sales in the future. In fact, the testimony of the Bodine official would indicate the existence of customers in the Kansas City area and their disadvantaged position:

Q. If any of your other customers in the Kansas City area that buy through your broker or buy direct, if they could furnish you with the same kind of service that Garrett-Holmes furnishes, would you give them the preferred price?

A. Definitely. If they had the amount of volume and amount of customers and could show us where they could do as good a job as Garrett, certainly they would receive the same treatment. (Tr. 969-70).

16. An official of the Garin Company, another of respondent's suppliers, stated that the brokerage allowed the respondent was not given to the Reich Company or the Yukon Company. Sales to the latter were made through a brokerage firm who would have received any brokerage involved, rather than Yukon (Tr. 738). As a matter of fact, the Yukon testimony indicates that Yukon never received any brokerage allowance (Tr. 1328). Garin sales to the Reich Company were direct without any brokerage allowance.

17. Hy-Klas Food Products, Inc., of St. Joseph, Missouri, operates as a purchaser for some 340 retail stores. An official of that company testified that he did not buy from the Reich or Yukon

firms, but did buy from the respondent because the Yukon and Reich prices were not comparable to respondent's (Tr. 1413-14).

18. The amount of the so-called "protection," "brokerage" or "distribution," usually 10 cents per unit, was a significant factor in the respondent's purchases as well as in the produce business (Tr. 972, 956, 1284).

19. Various witnesses testified that prices charged by suppliers vary for a number of reasons such as the quality of the produce, the volume involved, the rejection policy of the buyer, and his prompt payment (Tr. 893, 1017, 901, 950). In such respects, respondent appears to qualify for favorable price treatment (Tr. 903, 975, and preceding citations). It further appears that respondent often received such favored prices exclusive of brokerage, as for example, in a purchase from Garin where respondent's price was \$1.35 exclusive of "protection" although Garin sold all others at \$1.50 (CX 2107-E; Tr. 1158-59). It is not the \$1.35 price that this proceeding is concerned with; it is the 10-cent "protection" given the respondent by Garin in addition to the \$1.35 net price. Moreover, it does not appear that the preferred price given because of respondent's buying practices can satisfactorily explain the respondent's deduction of an additional allowance after receipt of the merchandise and the invoice covering same showing the net price.

Cranberry Sales

20. Ocean Spray Cranberries, Inc., is a corporation selling cranberries under the brand name "Ocean Spray" for approximately 1100 to 1200 growers of cranberries located in the States of Massachusetts, New Jersey, Wisconsin, Washington, Oregon, and Connecticut (Tr. 617-20). These cranberries are sold through exclusive brokers located in various areas of the United States and Canada (Tr. 623). There are about 90 such brokers, one of which is the respondent, the exclusive broker in Kansas City, Missouri, since 1957 (Tr. 624-25). Ocean Spray Cranberries, Inc., pays its brokers, including respondent, 10 cents per case of cranberries for acting as brokers in their respective areas (Tr. 625, 627).

21. Acting as a broker, respondent locates customers, and arranges the sale and the delivery of the cranberries involved. Ocean Spray sets the price and respondent is not permitted to deviate from that price. Once a sale is made, respondent sends Ocean Spray a "standard memorandum of sale" which informs the latter of all the details involved in the transaction (Tr. 627-29). Ocean Spray then

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sends an invoice direct to the customer based on the information submitted by the respondent (Tr. 631; see also CX 1 for a typical memorandum of sales). Respondent is paid 10 cents brokerage on every case sold and an additional 15 cents in the event respondent is required to warehouse the cranberries. Respondent is paid by monthly brokerage statements (CX 1789-91; Tr. 632).

22. In 85 per cent of the sales, the merchandise is drop-shipped directly by Ocean Spray to its customers. Ocean Spray bills such customers directly and respondent submits a memorandum of sale (Tr. 1093). In these transactions, respondent receives a distribution or brokerage fee of 10 cents per case for negotiating these sales (Tr. 1096).

23. The remaining 15 per cent of the transactions involve cases shipped into respondent's warehouse and redistributed by respondent to Ocean Spray customers on respondent's trucks. For its services respondent receives a warehousing fee of 15 cents per unit, in addition to the 10-cent distribution fee. A number of the cases which move through respondent's warehouse, however, are shipped there without a prior order from a specific customer being communicated to Ocean Spray. As to these transactions, the Ocean Spray invoice shows the respondent as the buyer and also as broker. In such cases the respondent deducts from the charge thus made, the 25-cent brokerage and warehousing fees (CX 424-70, 1760, 1761, 532-52, 1540, 747-79, 1785, 825-57, 1787, 858-93, 1789, 602-26, 1544, 1772-73, 894-946, 1223-42, 1270-90, 1668). In CX 1796-B, Ocean Spray reported these case sales through Garrett-Holmes as broker:

1960	-----	53,183
1961	-----	51,999
1962	-----	52,800

Of these, the following number of cases were billed to Garrett-Holmes' account:

1960	-----	18,365
1961	-----	9,552
1962	-----	8,234

In each transaction where respondent is shown as the purchaser, Ocean Spray never inquires as to the price at which the goods are resold, nor does it know the identity of the ultimate customer, nor look for payment from anyone except the respondent (Tr. 642-43).

24. Respondent regularly, since 1960, billed Ocean Spray for brokerage and warehousing on its own purchases (Tr. 651-56). Respondent locates customers for the cranberries it has so purchased

and maintains warehouse facilities and truck delivery services to expedite the distribution of the cranberries (Tr. 673). As a result, Ocean Spray can and does send full truck loads to the Kansas City area via respondent, without waiting for specific orders, covering the whole load, to be received from the ultimate customers (Tr. 676). Respondent assumes the credit risks in these instances.

25. Ocean Spray exhibits a continuing interest in the cranberries, whether invoiced to the respondent or billed directly to the customer (Tr. 679). On occasion, Ocean Spray absorbed the loss on cranberries invoiced to the respondent (CX 372). Similarly, complaints received by the respondent following its sale of the cranberries which had been invoiced to the respondent were adjusted by Ocean Spray (CX 825, 827, 939; Tr. 688-90).

26. Competitors of the respondent in the Kansas City area must purchase Ocean Spray cranberries from Ocean Spray Cranberries, Inc., through respondent, acting as a broker. Respondent, however, sells some of these cranberries through its City Market outlet to its customers in the Kansas City area. These customers are wholesalers and retailers. On such sales, respondent's cost is 10 to 25 cents lower than the cost incurred by other wholesalers in the Kansas City area who must purchase from the respondent, because of the warehouse and brokerage deductions allowed by Ocean Spray to the respondent on such purchases (Tr. 1281-84). This cost differential gives the respondent a significant advantage over other wholesalers.

27. The amount of money involved in the respondent's total cranberry sales is relatively small and only 15 percent of such transactions are warehoused by the respondent, and even as to some of these warehoused cranberries, the customer is billed directly by Ocean Spray. It cannot be ignored, however, that on the warehoused cranberries which are invoiced to the respondent as purchaser and sold by it through its City Market outlet to retailers and wholesalers, the respondent enjoys a competitive advantage on a regular basis over other wholesalers in the Kansas City area who are also selling to similar purchasers.

The Hy-Klas Arrangement

28. One of respondent's better customers is Hy-Klas Food Products Company, Inc., St. Joseph, Missouri. This firm is a wholesaler which regularly sells to a number of independent retailers on a voluntary basis (Tr. 1357, 1382). Hy-Klas purchases approximately one third of its total produce requirements from the respondent, or

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about one million dollars' worth (Tr. 1407). On some of Hy-Klas' purchases from the respondent the procurement services of Jessie Thomas are utilized.

29. The arrangements between respondent and Hy-Klas with respect to this portion of the produce Hy-Klas purchases from the respondent was negotiated between L. F. Garrett, Sr., and the Assistant Sales Manager of Hy-Klas. Respondent was to bill Hy-Klas for an amount equal to the respondent's cost of acquisition, plus a charge of 10 cents per unit (which charge, as described above, was labelled variously "discount," "protection" or "brokerage") plus 1 cent per unit. The 1-cent charge was specifically for the services of Mr. Thomas whose total salary, however, was borne by the respondent. Thus, where the produce was invoiced to the respondent at \$1.50 per case, less 10 cents "protection," Hy-Klas would purchase from the respondent for \$1.50 plus 1-cent procurement (Tr. 1147, 1100-03, 1392, 1473).

30. Hy-Klas prefers to pay for part of the respondent's expense in employing Mr. Thomas because it feels that it can secure preferred merchandise as a result, something with which it had difficulty prior to the engagement of Mr. Thomas. It further felt that it had insufficient volume to obtain a buyer for itself (Tr. 1424-26).

DISCUSSION

Section 2(c) of the Clayton Act, as amended, prohibits the receipt by a buyer not only of brokerage, but also of any allowances or discounts in lieu thereof. This prohibition was incorporated in the Act as a corollary and supplement to the original Section 2 prohibition of preferential price concessions, there being a realization that brokerage could be and was being employed as a means of price discrimination. Section 2(c), therefore, prohibits brokerage payments to one of the parties in a transaction, as well as allowances or discounts in lieu of brokerage, where no services are rendered or where such allowances or discounts were not justified by any services rendered. This provision has long been described as a *per se* provision of the statute. Cost justification, meeting competition, and lack of competitive injury have been considered irrelevant. *Southgate Brokerage Co. v. F.T.C.*, 150 F. 2d 607 (4th Cir. 1945); *Great Atlantic & Pacific Tea Co. v. F.T.C.*, 106 F. 2d 667 (3d Cir. 1939).

Section 2(c) appears to have three elements:

The first is a sale or purchase of goods. Here there can be no doubt that the various suppliers of produce sold various lots of

vegetables direct to the respondent without the use of any intermediary and that such transactions constituted a sale and purchase between them.

The second element of a Section 2(c) violation is the payment or receipt of brokerage, or compensation in lieu of brokerage, by the parties to the transaction, or an agent for such party. Here the facts are clear. On many transactions between the respondent and its suppliers, a price reduction was allowed the respondent by the suppliers and was labelled by both parties as brokerage.

The third element of a Section 2(c) violation is the absence of services performed by a party to the transaction, justifying the price concession obtained. The *A & P* case, *supra*, had decided that a buyer's agent could not, as a matter of law, render services compensable by the seller within the meaning of the section (106 F. 2d at 673-75; see also *Beleaguered Brokers: The Evisceration of Section 2(c) of the Robinson-Patman Act*, 77 Harvard Law Review, 1308 at 1312). In *F.T.C. v. Henry Brock and Co.*, 363 U.S. 166 (1960), the Supreme Court, while rejecting the cost justification defense of Section 2(a) (363 U.S. at 170-72, 176) did state:

[The A & P] interpretation of the "services rendered" exception in § 2(c) has been criticized * * *. There is no evidence [in this case] that the buyer rendered any services to the seller * * * nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge. We would have quite a different case if there were such evidence * * * (363 U.S. at 173).

Two things should be noted: 1. The Court did not decide the answer in a situation where there was a significant difference between services rendered and the price reduction. 2. The Court emphasized that this was an *ad hoc* discriminatory preference to a single buyer, implying that a 2(c) violation requires discrimination:

* * * 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* (363 U.S. at 169). (Emphasis added.)

Here respondent argues that it performed valuable services for its suppliers which justified the brokerage or discount obtained. It points to the fact that it acted as a central point for redistribution of the suppliers' produce, rejected few of the purchases made, bought in large quantities, and paid promptly. These "services," however, are not characteristically those of a broker, but are rather characteristically those of any intermediary in the line of distribution. To allow such "services" to constitute justification for brokerage would negate 2(c) completely. Price discrimination among com-

peting wholesalers buying from the same supplier would be condoned by mere generalities of superior efficiency of some such buyers, converting 2(c) from a *per se* provision to one permitting blatant price discriminations under the guise of brokerage.

What must be convincingly shown is respondent's services above and beyond those rendered by efficient wholesalers in the chain of distribution. This has not been demonstrated. The services which the respondent performed might justify the price reduction which Mr. Thomas was able to effect in those instances where he reported that he had bought at a price lower than the current market level. They do not, however, explain the additional 10-cent brokerage which he obtained or which the respondent retained. Moreover, the allowance of such 10-cent brokerage to the respondent by the suppliers without a similar allowance to the respondent's wholesaler-competitors clearly raises the evil of discriminatory preference emphasized by the Supreme Court in the *Broch* decision.

Respondent argues, nevertheless, that under recent decisions of the Commission the complaint must be dismissed. It points to *Matter of Edward Joseph Hruby*, Docket No. 8068, where, by order dated December 26, 1962 [61 F.T.C. 1437], the complaint was dismissed. In that case, as in this, the respondent purchased foodstuffs from suppliers for his own account and resold to wholesalers. Some of his purchases were sold from his own warehouse and in his sales to wholesalers he competed with brokers. The compensation the respondent received was labelled brokerage. The Commission stressed the fact that Hruby was "not himself a powerful wholesaler or retail chain exacting from his suppliers false brokerage payments, to the *competitive disadvantage* of his smaller competitors." (Emphasis added.) It considered Hruby's function in the channel of distribution and deemed the discount or allowance as a "'functional discount' which the Commission has recognized as involving no potential anticompetitive effect where the distributor who receives the lower price does not compete at the wholesale level." It is at this point that the similarities between the *Hruby* case and this case disappear. The lack of "record evidence" of sales to retailers in the *Hruby* case sets it apart from this case, where there is uncontradicted evidence of substantial sales by the respondent to retailers and where the harm to competition which the *Hruby* case finds essential to a Section 2(c) violation is obvious by reason of the higher cost incurred by respondent's wholesaler-competitors not receiving the 10-cent brokerage. See also *Western Fruit Growers Sales Co.*, Docket No. 8194, September 18, 1962 [61 F.T.C. 586].

The latest pronouncement of the Commission with respect to Section 2(c) violations is *Flotill Products, Inc.*, Docket No. 7226, June 26, 1964 [65 F.T.C. 1099]. In that case the respondent sold food products to field brokers to whom it looked for payment, but to whom it also paid brokerage. Chairman Dixon concluded that "none of the indicia of actual ownership of the goods by the field brokers are present * * *. [T]echnical title passage * * * would not be conclusive but would be merely incidental to the services performed by the field broker for the canner * * *. The facts in this record establish that these field brokers do not purchase for their own account but function as intermediaries on behalf of Flotill in its sales to other parties." Commissioner Elman, in agreeing that the complaint should be dismissed with respect to the transactions involving field brokers, felt that the extent to which the field broker acquired title to the goods was immaterial, relying on the *Hruby* case. Instead, he considered the lack of competitive harm, asking:

Who, in this case, are the favored, and who the unfavored, buyers? Who is, or could be, injured by the field brokers' method of doing business? Where is there any threat to competition, or danger of monopoly?

In this case the respondent's direct purchases on which brokerage was received from its suppliers are culpable under either Chairman Dixon's view or Commissioner Elman's. The respondent's purchases from suppliers such as the Garin Co. and the Bodine Co. do not involve merely "technical title passage." Unlike the *Flotill* field broker, Garrett-Holmes does not pass on all discounts and allowances granted by the canner and price adjustments due to market fluctuations; nor does it bill the ultimate purchaser at the same price it paid the suppliers; nor does it call its sale to the ultimate purchaser an "accommodation billing for account of seller." On the cranberry sales, however, its transactions might be considered more like the field brokerage situation by reason of the continuing interest in the product manifest by Ocean Spray. Even here, however, the test laid down by Commissioner Elman would make such transactions culpable because of the competitive injury created when the respondent realizes a substantially lower cost for cranberries that it sells to retailers in competition with other wholesalers who also try to sell to retailers despite their higher cost.

The *Flotill* case also involved the granting by Flotill of discounts to Nash-Finch, a wholesale grocer. These discounts were equivalent to normal brokerage fees but were called promotional allowances by the parties. Chairman Dixon however with Commissioner MacIn-

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tyre concurring, concluded that the promotional allowances could not be sustained as an exception under the "services rendered" clause of Section 2(c), stating:

. . . the evidence discloses no economy to Flotill in its method of selling to Nash-Finch other than selling directly without brokerage expense. Moreover, the evidence negates a finding that in return for the allowance, Nash-Finch actually performed any services other than those which it usually performed for itself.

As stated before, Garrett-Holmes performed no special services for its suppliers. It was paid a warehouse fee when it warehoused a commodity. It secured special prices through the efforts of its buyer, Mr. Thomas, as evidenced by the contracts made below market levels. These reductions in price presumably reflected its purchasing power. Unlike the Nash-Finch situation, the additional 10-cent protection or brokerage was not even labelled as anything other than brokerage, the parties apparently recognizing the fact that the additional 10 cents were not payment for special services but only the savings in brokerage expense effected by this method of doing business.

Commissioner Elman, dissenting, felt that Flotill had received a "*quid pro quo* (i.e., promotional efforts on behalf of its products) for granting the allowance." Here there is no such *quid pro quo*. As Commissioner Elman recognized:

. . . A variation of this would be where the dummy, in an attempt to mask a violation of the statute, performs only *slight or nominal services* which do not entitle him to brokerage. In the second type of transaction to which 2(c) applies, the dummy is dispensed with entirely. The seller grants directly to the buyer an allowance or discount for, on account of, or in lieu of, brokerage, and no services are rendered by the buyer to the seller *justifying the allowance*, and no savings in distribution costs are effected. (Emphasis added.)

The additional 10-cent fee obtained by Mr. Thomas after negotiating the best price possible in view of respondent's preferred buying habits, or simply deducted from the net invoiced price by respondent after completion of sale, has little or no connection with any substantial savings in distribution costs to the supplier other than the elimination of brokerage.

Thus, whether considered in the light of old precedents such as the *Southgate* and *A & P* cases or in the light of more recent Commission decisions such as the *Hruby* and *Flotill* cases, the receipt of the so-called protection or brokerage by Garrett-Holmes from its suppliers in the circumstances stated was a violation of Section 2(c).

As respects the transactions between the respondent and Hy-Klas Food Products Company, Inc., the relation is obviously that of a

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supplier or seller (the respondent) and a buyer (Hy-Klas). The complaint, however, is quite clear in charging the respondent with a violation of Section 2(c) of the Clayton Act only with respect to its *purchases* of food products from some of its suppliers. It makes no mention of any practices of the respondent with respect to its *sales* to anyone. It must be concluded, therefore, that the evidence in this proceeding relating to the Hy-Klas purchases from the respondent is not within the coverage of the complaint without an appropriate amendment to that complaint. No such amendment has been made or proposed.

ORDER

It is ordered, That respondent Garrett-Holmes & Co., Inc., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the purchase of fresh fruit or produce in commerce, as "commerce" is defined in the Clayton Act, as amended, 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 fresh fruit or produce for respondent's own account, 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.

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BY MACINTYRE, *Commissioner*:

My decision to uphold the hearing examiner's findings of fact and order is based upon the clear evidence that the respondent, as a buyer, received brokerage or discounts in lieu thereof on purchases for its own account. Congress has decreed that such a showing is all that is necessary to prove a violation of 2(c). 15 U.S.C. 13(c) (1958 ed.); *Western Fruit Growers Sales Co. v. Federal Trade Commission*, 322 F. 2d 67 (9th Cir. 1963), *cert. denied*, 376 U.S. 907 (1964); *Modern Marketing Service, Inc. v. Federal Trade Commission*, 149 F. 2d 970 (7th Cir. 1945); *Southgate Brokerage Co. v. Federal Trade Commission*, 150 F. 2d 607 (4th Cir. 1945); *Webb-Crawford Co. v. Federal Trade Commission*, 109 F. 2d 268 (5th Cir. 1940); *Biddle Purchasing Co. v. Federal Trade Commission*, 96 F. 2d 687 (2d Cir. 1938); *Quality Bakers of America v. Federal Trade Commission*, 114 F. 2d 393 (1st Cir. 1940).

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The Majority, in holding that the brokerage payments were discriminatory prices unjustified by services rendered to the seller, applies a Section 2(a) test where it does not belong and misinterprets through misapplication here the Supreme Court's *Broch* decision wherein it was clearly held:

* * * By striking the words "other than brokerage" from § 2(a) we think Congress showed both an intention that "legitimacy" of brokerage be governed entirely by § 2(c) and an understanding that the language of § 2(c) was sufficiently broad to cover allowances to buyers in the form of price concessions which reflect a differential in brokerage costs. * * *

Consequently, the Majority's injection of references to "Services rendered to a seller" and "a discriminatory price" into this decision is confusing, wholly unnecessary and unwarranted. Although this time the Majority reaches the correct result, its reasoning is no less erroneous than that which led to the dismissal of *Edward Joseph Hruby* (Docket No. 8068, December 26, 1962) [61 F.T.C. 1437], and the partial dismissal of *Flotill Products, Inc.* (Docket No. 7226, June 26, 1964) [65 F.T.C. 1099].

FINAL ORDER

This matter has been heard by the Commission upon the appeal of respondent from the initial decision of the hearing examiner, and the Commission has concluded:

(1) The findings of fact contained in the initial decision are correct and proper and are hereby adopted by the Commission.

(2) Here, as in *F.T.C. v. Henry Broch & Co.*, 363 U.S. 166, 173 (1960), "There is no evidence that the buyer rendered any services to the seller[s] * * * nor that anything in its method of dealing justified its getting a discriminatory price" as "brokerage" or discounts in lieu thereof. On the basis of the findings of fact, the examiner was correct in concluding that the payments received by respondent violated Section 2(c) of the Clayton Act, as amended.

(3) The cease and desist order contained in the initial decision is an appropriate disposition of this proceeding and is hereby adopted as the order of the Commission. Accordingly,

It is 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 contained in the initial decision and adopted as the order of the Commission.

Commissioner MacIntyre concurring in the result but disagreeing with the Commission's use of some parts of its statement in paragraph

