INTERNATIONAL PAPER COMPANY

Docket 6676. Order, June 1, 1965

Order granting consent to respondent corporation to transfer 5,000 shares of Longview Fibre Company stock held in the voting trust.

ORDER CONSENTING TO THE TRANSFER OF 5,000 SHARES OF LONGVIEW FIBRE COMPANY STOCK HELD IN THE VOTING TRUST

Whereas, the Commission by order issued June 25, 1957 [53 F.T.C. 1192], in the above entitled matter ordered International Paper Company to divest itself absolutely, in good faith, within ten years, of all stock in Longview Fibre Company which was acquired through the merger of The Long-Bell Lumber Corporation and The Long-Bell Lumber Company with respondent; and

Whereas, pursuant to said order as an initial step in such divestiture International Paper Company with the Commission's approval transferred said stock, *viz.*, 160,000 shares to The Hanover Bank, as voting trustee under a Voting Trust Agreement dated August 29, 1957, between the International Paper Company and said Bank, in a form approved by the Commission; and

Whereas, said voting trust agreement provides for transfer of any or all of said shares to International Paper Company on the Commission consenting thereto or on certification by International Paper Company to said Bank that it has sold or contracted to sell the same in accordance with the terms of the order; and

Whereas, International Paper Company has petitioned the Commission to consent to the transfer to it (under appropriate safeguards for carrying out the requirements of the Commission's Order) of 5,000 shares of the 14,000 shares of capital stock of Longview Fibre Company now in the hands of the Voting Trustee, in connection with the donation of such shares to the International Paper Company Foundation, a nonprofit corporation incorporated in 1952 under the Membership Corporations Law of New York to receive funds exclusively for religious, charitable, scientific, literary and educational purposes;

Now therefore, upon consideration thereof,

It is ordered, That consent is hereby given to the transfer pursuant to the said Voting Trust Agreement, by The Hanover Bank to the International Paper Company, of 5,000 shares of capital stock of Longview Fibre Company held by said Bank as Voting Trustee under said Voting Trust Agreement upon the certification of International Paper Company to said Bank by an instrument signed by its president or vice president that it has assigned all its right, title and interest in said 5,000 shares to International Paper Company Foundation, a New

52, 55 (4th Cir. 1950). It can be avoided here; the hearings, having been delayed by litigation in the courts,[2] have not yet begun. Respondents will have ample opportunity to rebut any evidence Commission counsel might offer.

Respondents' position on these motions having been argued at great length in the voluminous papers already before us, nothing but further delay could be accomplished by an oral argument on them.

Commissioner A. Everette MacIntyre has withdrawn from any further participation in this proceeding. Respondents' motion that he be disqualified is therefore moot.

It is ordered, That the Commission's order of February 1, 1963, directing an investigation as to whether C. H. Robinson Company and Nash-Finch Company have complied with the order to cease and desist in Docket No. 4589 be, and it hereby is, amended to include an investigation as to whether Nash-Finch Company has complied with the order to cease and desist in Docket No. 3783.

It is further ordered, That respondents' motion to terminate the investigation in Docket No. 4589, for oral argument on Commission counsel's motion for amendment of the order directing that investigation, and on respondents' motion to terminate, be, and they hereby are, denied.

It is further ordered, That respondents' motion requesting that Commissioner A. Everette MacIntyre be disqualified from participation in this proceeding be, and it hereby is, dismissed as moot.

It is further ordered, That this matter be, and it hereby is, returned to the hearing examiner for expeditious hearings in accordance with the accompanying amended order directing an investigation as to whether C. H. Robinson Company and Nash-Finch Company have complied with the order to cease and desist in Docket No. 4589, and whether Nash-Finch Company has complied with the order to cease and desist in Docket No. 3783.

Commissioner MacIntyre not participating.

Order Amending Prior Order and Directing an Investigation as to Whether Nash-Finch Company and C. H. Robinson Company Have Complied With Orders To Cease and Desist

The Commission on February 1, 1963 [62 F.T.C. 1486], having issued an order directing an investigation as to whether C. H. Robinson Company and Nash-Finch Company have complied with an order to cease and desist issued by the Commission in Docket No. 4589 on January 6, 1947; and

[2] *Nash-Finch Co.* v. *Federal Trade Commission et al.*, 233 F. Supp. 910 (D.C. Minn. 1964) [7 S.&D. 973].

386, 407–409 (1943), *aff'd Modern Marketing Service, Inc.* v. *Federal Trade Commission*, 149 F. 2d 970 (7th Cir. 1945). This order was also issued under Section 2(c) of the amended Clayton Act, and prohibits, *inter alia*, Nash-Finch and other named buyers of fruit and vegetable products from receiving or accepting from suppliers, directly or indirectly, brokerage payments or discounts in lieu of such brokerage payments.

Commission counsel argue, in effect, that respondents are attempting to prevent the introduction of evidence showing respondents are continuing to violate Section 2(c) of the amended Clayton Act, and the earlier 1943 order, by urging upon the hearing examiner and unduly narrow construction of the 1947 order. Commission counsel, therefore, seek to have respondents' compliance or noncompliance with the 1943 order added as a subject of the investigation "before actual hearings commenced to avoid possible endless arguments and bickering as to the proper questioning of witnesses and the propriety of introducing certain relevant evidence."

The Commission need not review the elaborate arguments advanced by respondents as to why it should not inquire into the question of whether they are complying with the 1943 order, but should, instead, terminate this inquiry as to their compliance with the 1947 order. The substance of those contentions is that (1) "no violation of law can be proven in regard to these matters," [1] and (2) the Commission, having once started an investigation of respondents' compliance with one of the two cease and desist orders, is barred or "estopped" from investigating their compliance with the order. Both of these arguments are plainly without merit. The question of whether respondents have in fact violated one or more orders of this Commission is to be determined after an investigation, not before it. Moreover, that is a question to be decided by the courts, not the Commission.

Respondents' "estoppel" argument is equally ill-conceived. There can be no doubt that the Commission, had it so desired at the time this investigation was ordered in 1963, could have directed it to respondents' compliance with either or both of the cease and desist orders in question. *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950). And even if it be assumed that the Commission made a "mistake" of some sort in not anticipating that the investigation of the one order might disclose violations of the other, "it is unthinkable that the public interest should be allowed to suffer as a result of inadvertence or mistake on the part of the Commission or its counsel where this can be avoided." *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F. 2d

[1] Respondents' Answer to Commission Counsel's Request for Amendment of Order, etc., April 26, 1965, p. 14, n. 1.

acting under the control of and in fact for and on behalf of said respondent Nash-Finch Company.

2. Receiving or accepting from any seller, directly or indirectly, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, on or in connection with purchases made for respondent's own account or while acting for or in behalf of a purchaser as an intermediary or agent or subject to the direct or indirect control of such purchaser.

3. Paying, transmitting, or delivering to or for the benefit of any purchaser, either directly or in the form of money or credits or indirectly in the form of dividends, or otherwise, any commission or brokerage, or any compensation, allowance, or discount in lieu thereof, received from any seller while acting as an intermediary or agent for such purchaser or while subject to the direct or indirect control of such purchaser; and

Whereas by the said order to cease and desist in said Docket No. 4589 the respondent Nash-Finch Company and its officers, agents, representatives and employees, directly or through any corporate or other device in connection with the purchase of fruits, vegetables, and other commodities in commerce, as "commerce" is defined in the aforesaid Clayton Act, were ordered to forthwith cease and desist from—

1. Receiving or accepting from any seller, directly or indirectly, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, on or in connection with purchases made for respondent's own account, either directly or by or through respondent C. H. Robinson Company.

2. Receiving or accepting from respondent C. H. Robinson Company, either directly in the form of money or credits or indirectly in the form of dividends, or otherwise, any commission or brokerage, or any compensation, allowance, or discount in lieu thereof, received by said C. H. Robinson Company from any seller while acting for or in behalf of said respondent Nash-Finch Company as an intermediary or agent for said respondent or while subject to the direct or indirect control of said respondent; and

Whereas the said orders to cease and desist have not at any time been modified or set aside and are now, and have for many years last past been in full force and effect; and

Whereas the Commission has reason to believe that respondent Nash-Finch Company and its officers, agents, representatives and employees, while engaged in commerce in the purchase of certain fruit and other products, may have violated the provisions of the said order

The Commission on June 2, 1965 [p. 1382 herein], having issued an order granting Commission counsel's motion that said order of February 1, 1963, be amended to direct, in addition to an investigation as to whether C. H. Robinson Company and Nash-Finch Company have complied with the order to cease and desist issued by the Commission in Docket No. 4589, an investigation as to whether Nash-Finch Company has complied with an order to cease and desist issued by the Commission in Docket No. 3783 on September 8, 1943:

It is ordered, That the said order of February 1, 1963, be, and it hereby is, amended to read as follows:

Whereas, pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. Sec. 13, the Federal Trade Commission on September 8, 1943, after due process and proceedings of record in Docket No. 3783 and in accordance therewith, issued and served upon respondent Nash-Finch Company an order to cease and desist under subsection (c) of Section 2, thereof, and on January 6, 1947, after due process and proceedings of record in Docket No. 4589 and in accordance therewith, issued and served upon respondents C. H. Robinson Company and Nash-Finch Company an order to cease and desist under the said subsection (c) of Section 2, thereof; and

Whereas by the said order to cease and desist in Docket No. 3783 the respondent Nash-Finch Company and its officers, agents, representatives, and employees, in connection with the purchase by such respondent of commodities in commerce, as "commerce" is defined in said Act, were ordered to forthwith cease and desist from—

> "receiving or accepting from the sellers of such commodities, directly or indirectly, any brokerage fee, commission, or other compensation, or any allowance or discount in lieu thereof; * * *" and

Whereas by the said order to cease and desist in Docket No. 4589 the respondent C. H. Robinson Company and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the purchase of fruits, vegetables, and other commodities in commerce, as "commerce" is defined in the aforesaid Clayton Act, were ordered to forthwith cease and desist from—

> 1. Receiving or accepting from any seller, directly or indirectly, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, on or in connection with purchases made by respondent Nash-Finch Company while

ORDER DENYING RESPONDENT'S MOTION FOR ISSUANCE OF ORDERS UNDER SECTION 6(b) OF THE FEDERAL TRADE COMMISSION ACT

The hearing examiner has certified to the Commission a motion by respondent that the Commission issue a large number of orders to file special reports under Section 6(b) of the Federal Trade Commission Act for the purpose of acquiring information respondent alleges to be relevant and necessary to its defense. The examiner included with his certification a recommendation that the motion be denied. The Commission granted respondent leave to file a supplementary statement in support of its motion, and has also considered an answer in opposition filed by complaint counsel and respondent's reply thereto.

The complaint in this proceeding alleges that respondent violated Section 7 of the Clayton Act by the acquisition of a competitor, S. K. Wellman Company. Paragraph 9 of the complaint alleges that "the relevant product markets for the purposes of this complaint are the production, distribution, and sale of friction materials in general, and sintered metal friction material in particular, exclusive of friction materials used by the railroad industry." During the course of the prehearing conference and in the present motion, respondent has indicated an intention to challenge this definition of the relevant market. Respondent takes the position that the probable competitive effects of the acquisition must be viewed within the framework of all "systems, devices, and/or components for the transmission, conversion, and/or retardation of motion."

The survey that respondent seeks to have the Commission conduct by means of Section 6(b) orders is largely premised upon respondent's view of the relevant market. As the first part of the survey, respondent would have the Commission issue Section 6(b) orders upon some 309 companies which respondent believes to be engaged in manufacturing and selling "systems, devices and/or components for the transmission, conversion and/or retardation of motion." Principally each company would be required to specify the nature of the products of this type that it produces and the dollar value of sales of each such product. Additional and more detailed information would be sought from the relatively few firms within the relevant market defined by the complaint. As the second part of its survey, respondent would have the Commission issue Section 6(b) orders upon some 259 companies which are believed to be purchasers of systems, devices or components within the relevant market asserted by respondent. Purchasers would be required to indicate the specific type of such components purchased and the dollar value of the purchases of each such type. Finally, respondent wishes to survey all those companies (the number of which

to cease and desist in Docket No. 3783, and that respondents C. H. Robinson Company and Nash-Finch Company and their officers, agents, representatives and employees, while engaged in the purchase of such fruit and other products, may have violated the provisions of the said order to cease and desist in Docket No. 4589, as heretofore set forth; and

Whereas it is deemed by the Commission to be in the public interest to ascertain the extent to which such violations may have occurred:

Now, therefore, it is ordered, That a public investigational hearing be conducted for this purpose pursuant to Rule No. 1.35 and related rules of the Commission's Rules of Practice.

It is further ordered, That the Chief Hearing Examiner shall appoint and designate a hearing examiner to preside at such hearing with all the powers and duties as provided by Section 3.15 of the Commission's Rules of Practice, except that of making and filing an initial decision; that upon completion of the hearing, the hearing examiner shall certify the record to the Commission with his report on the investigation; that respondents C. H. Robinson Company and Nash-Finch Company shall have the right of due notice, of cross-examination, of production of evidence in rebuttal; and that the hearing shall be conducted in accordance with the Commission's Rules of Practice for adjudicative proceedings insofar as such rules are applicable.

It is further ordered, That the hearings shall be held at such time and at such places as may be necessary, the initial hearing to be held at a place to be fixed by the said hearing examiner on a day occurring at least thirty (30) days after the service of notice thereof upon respondents C. H. Robinson Company and Nash-Finch Company.

It is further ordered, That the proceedings heretofore conducted pursuant to the Commission's order of February 1, 1963, have the same force and effect as though conducted under that order as amended herein.

It is further ordered, That the Secretary shall cause service of this order to be made on said respondents C. H. Robinson Company and Nash-Finch Company.

Commissioner MacIntyre not participating.

AMERICAN BRAKE SHOE COMPANY

Docket 8622. Order, June 2, 1965

Order denying respondent's motion for orders requiring special reports authorized by Sec. 6(b) of the Federal Trade Commission Act.