lated the provisions of an order to cease and desist issued April 26, 1954, 50 F.T.C. 932.

ORDER DIRECTING COMPLIANCE HEARINGS

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. 13, the Federal Trade Commission on February 23, 1944 [38 F.T.C. 213], after due process and proceedings of record herein and in accordance therewith, issued and served upon the respondent named in the caption hereof, an order to cease and desist under subsection (a) of Section 2, thereof; and

Whereas, by said order to cease and desist the respondent National Biscuit Company, a corporation, and its officers, directors, representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of bakery packaged food products in commerce for use or resale, do forthwith cease and desist:

1. From selling such commodities of like grade and quality to competing purchasers at uniform prices and thereafter granting varying discounts therefrom in the manner and under the circumstances found in paragraph four of the aforesaid findings as to the facts.

2. From continuing or resuming the discriminations in price referred to and described in paragraph four of the aforesaid findings as to the facts.

3. From otherwise discriminating in price between purchasers of bakery packaged food products of like grade and quality, in any manner or degree substantially similar to the manner and degree of the discriminations referred to in paragraph four of the aforesaid findings as to the facts; or in any other manner resulting in price discrimination substantially equal in amount to the aforesaid discriminations, except as permitted by Section 2 of the Clayton Act as amended.; and

Thereafter, the Federal Trade Commission, on April 26, 1954 [50 F.T.C. 932], having rendered its opinion and order granting motion, and reopening proceeding and modifying order to cease and desist, did order respondent National Biscuit Company, a corporation, its officers, directors, representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of bakery packaged food products in interstate commerce for use or resale, to forthwith cease and desist:

1. From selling such commodities of like grade and quality to competing purchasers at uniform prices and thereafter granting varying discounts therefrom in the manner and under the circumstances found in paragraph four of the aforesaid findings as to the facts.

2. From continuing or resuming the discriminations in price referred to and described in paragraph four of the aforesaid findings as to the facts.

3. From otherwise discriminating in price between purchasers of bakery packaged food products of like grade and quality where said purchasers in fact compete in the sale and distribution of such products.; and

Whereas, the said order to cease and desist has not at any time been modified or set aside and is now, and has at all times since April 26, 1954, been in full force and effect; and

Whereas, the Federal Trade Commission has reason to believe that respondent National Biscuit Company and its officers, directors, representatives, agents, and employees while engaged in commerce in connection with the offering for sale, sale, and distribution of bakery packaged food products for use or resale, may have violated the provisions of the said order to cease and desist 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 public investigational hearings be conducted for that purpose pursuant to § 1.35 and related provisions of the Commission's published Rules of Practice (16 CFR Chapter I, Subchapter A).

It is further ordered, That Chief Hearing Examiner shall designate the hearing examiner to preside at and conduct such public hearings with all the powers and duties provided in the Commission's Rules of Practice For Adjudicative Proceedings, except that of making and filing an initial decision, and upon completion of the hearing, the hearing examiner shall certify the record to the Commission with his report on the investigation; and that respondent National Biscuit Company shall have the right of due notice, cross-examination, and production of evidence in rebuttal.

It is further ordered, That the hearings shall be held at such times and places as may be necessary to be set by the hearing examiner: *Provided, however,* That the initial hearing shall not be held sooner than the thirtieth (30th) day after service of this order upon respondent National Biscuit Company.

It is further ordered, That the Secretary shall cause service of this order to be made upon respondent National Biscuit Company.

Commissioner Elman not concurring.

MODERN MARKETING SERVICE, INC., ET AL.

Docket 3783. Order and Opinion, Apr. 17, 1967

Order denying petition of Red & White Corporation that this proceeding be reopened and modified.

OPINION OF THE COMMISSION

This matter is before the Commission on a petition to reopen and for other relief filed by Red & White Corporation pursuant to Section 3.28(b)(2) of the Commission's Rules of Practice and

Section 5(d) of the Administrative Procedure Act. Petitioner claims that changed conditions of fact and law and considerations of the public interest require that the order to cease and desist issued against respondents Modern Marketing Service, Inc., and Red and White Corporation in this matter be altered, modified or set aside. Specifically, the petition seeks in the alternative: (a) an order declaring all provisions of the cease and desist order in Docket 3783 which were applicable to respondents Modern Marketing Service, Inc. and Red and White Corporation to be inapplicable to petitioner and vacating and setting aside all such provisions; (b) an order modifying the order in Docket 3783 so that those provisions thereof which are applicable to respondents Modern Marketing Service, Inc. and Red and White Corporation will be "limited to prohibiting them from receiving or transmitting brokerage while under the direct or indirect control of purchasers, or while acting for or in behalf of purchasers"; and (c) an order modifying the order in Docket 3783 to exclude from the prohibitions applicable to respondents Modern Marketing Service, Inc. and Red and White Corporation "the furnishing of promotional services and facilities to purchasers."

The Director of the Bureau of Restraint of Trade has filed an answer opposing the petition. We note at the outset that the pleadings raise an issue of fact which we are unable to resolve on the basis of the information before us. Petitioner claims in connection with each request for modification of the order to cease and desist that it is an independent seller's broker, *i.e.*, that it is neither buyer owned, nor directly or indirectly controlled by buyers, nor acting in fact for or in behalf of buyers. The answer to the petition, while in effect conceding that petitioner as presently constituted is probably neither owned nor controlled by buyers, challenges the assertion that petitioner is not acting for or in behalf of buyers. While the factual issue thus raised would be material to a determination of whether petitioner's present or proposed activities may be in violation of the order to cease and desist, we are of the opinion that a ruling on the petition to reopen can be made without resolving this issue.

The proceeding which the petition seeks to have reopened originated with a complaint charging Modern Marketing Service, Inc., and Red and White Corporation and various other concerns, both sellers and buyers, with violating Section 2(c) of the Clayton Act. The pertinent facts concerning this proceeding are as follows:

Respondent Red and White Corporation (hereinafter sometimes referred to as old Red and White) was organized in 1927 by a group of wholesale grocers to act as a purchasing agent for such

wholesalers, as well as for other wholesalers or jobbers subsequently acquiring its stock. Upon its organization old Red and White acquired from its principal incorporator, a wholesaler, an exclusive license to the Red and White brand. It then entered into license or franchise agreements with its stockholders whereby the latter were granted the exclusive right to sell Red and White products within designated territories. These wholesalers in turn licensed retail grocers to deal in goods bearing the Red and White brand. Old Red and White also entered into agreements with numerous manufacturers and packers whereunder the latter agreed to pack commodities under Red and White labels and to pay brokerage to old Red and White on all sales made to that corporation's licensed wholesalers.

Old Red and White provided its wholesaler licensees with marketing and valuable advertising services for the purpose of promoting goods bearing the Red and White label. These promotional and advertising services were paid for primarily from brokerage funds received by old Red and White on sales from sellers to the wholesalers. The corporation continued to operate in this fashion until shortly after the passage of the Robinson-Patman Act. In September 1936 five individuals, including Leo J. Bushey, president of petitioner Red & White Corporation, who were connected with old Red and White, disassociated themselves from any official capacity with that company and formed a new organization known as Modern Marketing Service, Inc. (hereinafter sometimes referred to as Modern Marketing).

The new organization then entered into a licensing agreement with old Red and White whereby the brands, trademarks and labels owned or controlled by the latter were leased to Modern Marketing for a fee of $30,000 per year. Modern Marketing also entered into working agreements with manufacturers and packers under which the latter agreed to pay brokerage to Modern Marketing upon all purchases made by the wholesaler licensees of old Red and White. It also furnished to these wholesaler licensees substantially the same purchasing, marketing and advertising services which had been previously furnished to them by old Red and White.

On May 6, 1939, a complaint was issued against Modern Marketing, old Red and White and several of its wholesaler licensees, and certain suppliers charging them with violating Section 2(c) of the Clayton Act. On September 8, 1943, the Commission issued its decision holding that Modern Marketing, although not owned by the buyers to whom it sold, was subject to the control of old Red and White and its stockholders, the wholesaler licensees. The Com-

mission specifically found, in this connection, that Modern Marketing was the agent of "Red and White Corporation and its stockholders, who receive, through the payment of the annual license fee of $30,000 and through substantial and valuable market and advertising services, a large part of the brokerage fees and commissions paid to Modern Marketing Service, Inc., by the sellers." [1] It concluded that the transmission and payment of the brokerage fees by the seller respondents to Modern Marketing upon the purchases of the wholesaler licensees of old Red and White and the receipt and acceptance of such brokerage by Modern Marketing, old Red and White and the wholesaler licensees was violative of Section 2(c) of the Clayton Act and entered an order to cease and desist against all respondents. The provisions of this order which are relevant to the present petition are as follows:

3. *It is further ordered,* That respondent, Modern Marketing Service, Inc., a corporation, and its officers, agents, representatives, and employees, in connection with the purchase of commodities in commerce, as "commerce" is defined in said Clayton Act, as amended, by any of the buyer respondents named in paragraph 1 hereof, or by any other stockholder or jobber licensee of respondent, Red and White Corporation, do forthwith cease and desist from receiving or accepting, directly or indirectly, from the sellers of such commodities, any brokerage fee, commission, or other compensation, or any allowance or discount in lieu thereof; and from paying, transmitting, or delivering any such fee, commission, compensation, allowance or discount to such purchasers or to respondent, Red and White Corporation, either in the form of money or credits, or in the form of services or benefits provided or furnished by respondent, Modern Marketing Service, Inc., to respondent, Red and White Corporation, or to such purchasers through or by means of the use or expenditure of any such brokerage fee, commission, compensation, allowance, or discount.

4. *It is further ordered,* That respondent, Red and White Corporation, a corporation, and its officers, agents, representatives, and employers, in connection with the purchase of commodities in commerce, as "commerce" is defined in said Clayton Act, as amended, by any of the buyer respondents named in paragraph 1 hereof, or by any other stockholder or jobber licensee of respondent, Red and White Corporation, do forthwith cease and desist from receiving or accepting from the sellers of such commodities, or from respondent, Modern Marketing Service, Inc., any brokerage fee, commission, or other compensation on such purchases, or any allowance or discount in lieu thereof; and from paying, transmitting, or delivering any such fee, commission, compensation, allowance, or discount to such purchasers, either in the form of money or credits, or in the form of services or benefits provided or furnished by respondent, Red and White Corporation, to such purchasers through or by means of the use or expenditure of any such brokerage fee, commission, compensation, allowance, or discount.

This order of the Commission was affirmed and enforced on

[1] 37 F.T.C. 386, 406 (1943).

June 13, 1945, by the Court of Appeals for the Seventh Circuit.[2] Thereafter, old Red and White continued in existence owning various trademarks and trade names but not performing any purchasing service for the wholesaler grocers who owned it. Modern Marketing was formally dissolved as a corporate entity in September 1945. In that same month petitioner herein was organized under the name Bushey, Morea & Wright, Inc. by three of the five individuals who had founded Modern Marketing and who had been officers of that corporation.

According to the report of compliance filed by Modern Marketing, Leo J. Bushey, George O. Morea and Harmon J. Wright, the petitioner was to act exclusively as a seller's broker, entering into written and oral agreements with manufacturers and packers whereby it could be employed to solicit orders on their behalf for "unbranded merchandise, merchandise packed under the labels owned by the said manufacturers * * * and also merchandise packed under labels owned by jobbers, including Red & White brands." For this service petitioner was to receive brokerage from its seller principals. Petitioner was to have no brands of its own, would do no advertising, and none of its income was to be "paid directly or indirectly to any of its customers either in the form of advertising allocations or otherwise." However, petitioner was, at least initially, to solicit orders only from old Red and White jobber licensees inasmuch as "the present acquaintance of the officers and stockholders of the corporation is largely confined to such jobbers."

In 1955 petitioner purchased from old Red and White for $5,000 the Red and White brand or trademark and the name "Red & White Stores." Thereafter, petitioner entered into franchise agreements with certain wholesaler customers in various parts of the country whereby the latter were granted the exclusive right to utilize the trade name "Red & White Stores" in specified territories, to deal in merchandise bearing the Red and White brand and other brand names subsequently adopted by petitioner, and to sublicense retail food dealers to use such brand names and the trade name "Red & White Stores." Petitioner also engaged in national and local advertising under the Red and White brand.

In 1961 petitioner and old Red and White established an irrevocable charitable trust known as Red & White Foundation.[3] Old Red and White contributed to the Foundation all remaining trademarks and brand names which it owned or controlled and

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[2] 149 F. 2d 970 (7th Cir. 1945).

[3] Continental Illinois National Bank and Trust Company of Chicago is the trustee and the beneficiary is the University of Chicago.

petitioner sold the Red and White brand to the Foundation for a nominal sum. The Foundation then granted to petitioner a license to use the trademarks and trade names it had thus acquired on a royalty basis.

At the time of the establishment of the Foundation petitioner purchased all of the outstanding shares of stock of old Red and White. Thereafter, petitioner dissolved old Red and White and changed its own name to Red & White Corporation. It also took over several service functions which had been performed by old Red and White, including the sale to its buyers of: (1) advertising mats and art work for use in ads featuring products sold by petitioner; (2) labels and cartons bearing petitioner's trademarks for use by buyers that wanted to use a different source of supply for a particular item carrying one of the brands licensed to petitioner; and (3) signs identifying Red and White stores. Petitioner also sponsored a self-liquidating medical and life insurance plan for its buyers.

On June 30, 1965, petitioner requested, pursuant to Rule 3.26(b) of the Commission's Rules of Practice, that it be advised whether a proposed course of action would constitute compliance with the cease and desist order in Docket 3783. The specific inquiry was whether the order in question would permit petitioner to use part of its general funds (consisting of brokerage fees paid by shippers) to initiate a promotion of merchandise carrying brand names owned or licensed by it, which promotion would entail the furnishing of advertising materials to buyers and advertising materials and merchandise men to buyers' customers. The Commission responded to this inquiry advising that in its opinion the proposed program would "in substance constitute the passing on of brokerage fees in the form of services or benefits in violation of Section 2(c) of the amended Clayton Act and probably the order in Docket No. 3783."

The present petition to reopen is primarily a request for reconsideration of this ruling. Petitioner contends at the outset, however, that it is not bound by the order issued against Modern Marketing and old Red and White since both of these concerns have been dissolved and since neither petitioner nor any of its officers, directors, agents, employees or shareholders were parties to this proceeding. It further states that it was incorporated in 1945, subsequent to Court of Appeals' decree of enforcement of the order to cease and desist, and that it has since operated exclusively as a seller's broker. We find this contention to be without merit.

The Commission's finding of a 2(c) violation in this matter was based principally on the showing of control exercised by old Red

and White over Modern Marketing. Consequently, it was incumbent upon these two respondents to sever their relationship of principal and agent in order to bring themselves into compliance with the order to cease and desist. This was accomplished in part by the dissolution of Modern Marketing. At the time that corporation was dissolved, however, three of its officers and founders organized a new corporation (petitioner herein) to take over Modern Marketing's brokerage business. It is clear that at that time and for a number of years thereafter both old Red and White and the founders of the new corporation considered the latter to be bound by the order as successor to Modern Marketing. In this connection, old Red and White stated in its report of compliance filed September 7, 1945, that "said Respondent would not have connected with it in any capacity any person who is connected with or has any interest whatsoever in Bushey, Morea & Wright, Inc., [petitioner herein] a brokerage firm to be established as set forth in said report of compliance of Respondent Modern Marketing Service, Inc." In a report of compliance supplemental to that submitted by Modern Marketing Service, Inc., Messrs. Bushey, Morea and Wright informed the Commission that they owned all of the capital stock of the new corporation, Bushey, Morea, & Wright, Inc., and that "none of said stockholders are or will be in any way financially interested in the Red & White Corporation, any Red & White jobber or any wholesaler grocer." Inasmuch as these three former officers of Modern Marketing Service, Inc., were not individually liable under the order, as pointed out in petitioner's brief, it is apparent that they considered the new corporation to be bound by the order as the successor to Modern Marketing.

The compliance reports submitted to the Commission also reveal that petitioner did in fact take over and carry on the brokerage business which had been operated by Modern Marketing. It continued to conduct the business at the same localities, Chicago, Illinois, San Francisco, California, and Buffalo, New York, and it continued to solicit the same customers as had Modern Marketing, *i.e.*, the Red and White wholesale grocers. Like Modern Marketing, petitioner has "enjoyed its greatest success in the sale to Red and White wholesalers of merchandise packed under the trademark known as the 'Red & White brand' and the major part of its business has consisted of dealings with respect to such merchandise." [4]

We are of the opinion, therefore, that petitioner became the successor to Modern Marketing when it took over the business affairs

[4] Supplemental report of Bushey & Wright, Inc., June 15, 1955, pp. 4, 5.

of that corporation. *Walling* v. *Reuter,* 321 U.S. 671 (1944); *NLRB* v. *O'Keefe & Merritt Mfg. Co.,* 178 F. 2d 445 (9th Cir. 1949); *NLRB* v. *Tempest Shirt Manufacturing Co.,* 285 F. 2d 1 (5th Cir. 1960). There has been no subsequent changed condition of fact which would indicate that the order should not be enforceable against petitioner as the successor to Modern Marketing. Certainly the acquisition of old Red and White by petitioner, contrary to the assurances of petitioner's president that he would not "be in any way financially interested in the Red & White Corporation," does not support petitioner's argument that there has been such a change. As pointed out in the answer filed by the Bureau of Restraint of Trade, petitioner, under the aegis of its president, has step by step substantially reconstructed the business enterprise conducted by old Red and White prior to the passage of the Robinson-Patman Act and now combines brokerage, licensing, advertising, promotional and service functions in one corporate entity. Despite its attempts to divorce itself from the ownership of the Red and White brand, petitioner still controls that brand and is still in a position to utilize brokerage to confer discriminatory benefits on buyers purchasing merchandise so branded. This is the evil which the order was intended to prevent. Should petitioner in fact act for or on behalf of buyers in its brokerage transactions such activities will be considered to come within the purview of the order to cease and desist.

Petitioner's second alternative request is in effect a request that the order to cease and desist be modified so that it will apply only where petitioner is under the direct or indirect control of purchasers or where it is acting in fact for or in behalf of purchasers. The petition specifically requests in this connection an order "modifying the cease and desist order, for the purpose of clarifying the scope of paragraphs 3 and 4 thereof, by inserting in each of such paragraphs, immediately preceding the words 'do forthwith cease and desist,' a provision stating: 'and while said respondent Modern Marketing Service, Inc. [Red & White Corporation], is under the direct or indirect control of purchasers, or is acting in fact for or in behalf of purchasers.' " As grounds for this relief petitioner argues that it is now operating exclusively as a seller's broker and that this claimed changed condition of fact warrants the requested modification of the order.

We agree that the order should be construed in the manner suggested by petitioner but we fail to see the necessity for reopening the matter to so modify the order. As petitioner points out in its brief, it was advised in 1954 by the General Counsel of the Commission that the prohibitions of the order in question apply only

where the broker-respondent is under the control of buyers or is acting in their behalf.[5] This is the interpretation requested by petitioner and we agree that it is correct. The first portion of paragraphs 3 and 4 of the order prohibits the intermediaries (Modern Marketing and Red and White) from receiving brokerage from sellers in connection with purchases made by buyers who either own or control such intermediaries or buyers in whose behalf such intermediaries are acting. If this part of the order would be interpreted as forbidding either of the intermediaries, Modern Marketing or Red and White, from receiving brokerage on purchases made by buyers other than those for whom it is in fact acting or those by whom it is owned or controlled, it would be prohibiting conduct beyond the reach of Section 2(c) of the Act and would effectively prohibit either of these concerns from engaging in a bona fide brokerage business. Consequently, it cannot be interpreted so broadly nor has it been so interpreted by the Commission. The second portion of each of the above paragraphs merely prohibits the intermediaries from transmitting any "such fee" to "such purchasers." As so worded, it does not prohibit the transmission of brokerage to any buyers other than those referred to in the first provision.

As a third alternative request petitioner seeks modification of the order to cease and desist to permit it to furnish services or facilities to purchasers for the purpose of promoting its trade name and brands when petitioner "is not under the ownership of purchasers, nor functioning under the direct or indirect control of purchasers, nor acting in fact for or in behalf of purchasers." As we have held above, the order applies only to petitioner's operations when it is acting for or in behalf of buyers or is subject to the buyers' control. Consequently, the order does not prohibit petitioner from furnishing services or facilities to buyers when it is acting exclusively as a seller's broker.

By so ruling, however, we do not mean to imply that petitioner's proposed program of furnishing promotional services financed by brokerage fees would not come within the purview of Section

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[5] In a letter to petitioner's attorney dated Aug. 23, 1954, the General Counsel stated as follows: "The scope of the Commission's order, as affirmed by the United States Court of Appeals for the Seventh Circuit on June 13, 1945, is confined to those functions of Modern Marketing (hereinafter sometimes referred to as the broker) which are performed by it while under the direct or indirect control of the buyers or while acting in fact for or in behalf of the buyers. The broker is prohibited from the receipt or acceptance of brokerage upon buyers' purchases when acting in that capacity, and is further prohibited from transmitting any part of the brokerage to the buyers whether in the form of money, credits, benefits or services."

2(c) of the Clayton Act.[6] The principal basis for petitioner's requested modification of the order is that there has been a change in the law since 1945 when this case was decided and that under present law "the furnishing by an independent seller's broker of services and facilities to buyers solely for the purpose of promoting the resale of products bearing the broker's own brands is not within the cognizance and prohibitions of Section 2(c) since its economic justification is brand promotion, instead of brokerage or savings of brokerage, and it is connected with the resale of products." Stated somewhat differently, petitioner contends that some of the more recent decisions, including *Hruby,*[7] *Empire Rayon,*[8] *Whitney,*[9] and *Broch,*[10] establish the principle that a payment, discount, allowance or service is not cognizable under Section 2(c) if its economic justification is something other than brokerage services or savings of brokerage.

In making this argument petitioner concedes that the promotional services and facilities it proposes to furnish would be financed out of income received from brokerage. It also admits that it is unlawful for a seller's broker to pass on brokerage to buyers. It contends, however, that the transmission by a broker of its commission to a buyer in the form of a promotional service or facility is not a "passing on" of brokerage and is therefore not cognizable under Section 2(c).

None of the cases cited by petitioner, nor any other case of which we are aware, even remotely suggests that the practice proposed by petitioner would not be governed by Section 2(c). With the exception of *Broch,* none of the cases relied upon by petitioner involved the issue of whether brokerage may lawfully be transmitted to the buyer. They were concerned only with the *factual* question of whether brokerage or a discount in lieu of brokerage had been transmitted to the other party to a transaction, *i.e.,* was a certain discount, allowance, or price reduction received by a buyer in fact brokerage or a discount in lieu thereof.

As we pointed out in our brief filed as amicus curiae in *Empire Rayon Co., Inc., supra:* "The crucial question in every case brought

[6] Nor do we mean to imply that the course of action proposed by petitioner may not violate the order to cease and desist in this matter. As stated above, the issue of whether petitioner is in fact acting for or on behalf of buyers cannot be resolved on the basis of the facts presently before us. The Bureau of Restraint of Trade claims that there is evidence that petitioner is so acting. It seems obvious that petitioner's proposed program of furnishing services for the benefit of buyers would provide an additional evidentiary basis for concluding that petitioner is in fact acting for or on behalf of such buyers.

[7] *Hruby Distributing Company,* D. 8068, 1962 [61 F.T.C. 1437].

[8] *Empire Rayon Co., Inc.* v. *American Viscose Corp.,* 364 F. 2d 491 (2d Cir. 1966).

[9] *In re Whitney & Co.,* 273 F. 2d 211 (9th Cir. 1959).

[10] *F.T.C.* v. *Henry Broch & Co.,* 363 U.S. 166 (1960).

under Section 2(c) is whether the buyer is receiving preferential treatment effected through the payment of 'brokerage, or other compensation, or any allowance or discount in lieu thereof.' The answer requires the resolution of a question of fact and must be determined on the basis of all the circumstances prevailing in each case." If it is determined that brokerage or a discount in lieu thereof has been transmitted to the other party to a transaction, 2(c) is applicable. We attempted to make this crystal clear in *Hruby, supra,* by stating the issue in the following manner:

> 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).

Under the plan proposed by petitioner herein, the advertising and promotional services and facilities furnished to buyers would be paid for by brokerage commissions. Thus the practice would be governed by Section 2(c).[11]

As stated above, of the various cases cited by petitioner, only *Broch* involved the issue of whether a seller's broker can lawfully transmit or pass on brokerage to the buyer. The Commission stated in that case that "subsection (c) was intended not only to reach 'dummy' brokerage payments made to a buyer or his representative, but also to prevent a so-called 'pure' broker, who represents only the seller in the transaction, from splitting his commission, directly or indirectly, with the buyer in the transaction." 54 F.T.C. 673, 687. The Commission also concluded "that Section 2(c) prohibits an independent broker who represents a seller from splitting with, or passing on to, the buyer any part of the commission or brokerage to which he is entitled under his agreement with the seller." *Id.* at 689. In upholding the Commission's decision, the Supreme Court stated that if the respondent broker had "merely paid over part of his commission to the buyer, he clearly would have violated the act" and the Court concluded that "the statute clearly applies to payments or allowances by a seller's broker to the buyer, whether made directly to the buyer or indirectly through the seller."

This holding applies squarely to the program proposed by petitioner. The transmission of all or part of a broker's commission

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[11] As one leading authority has stated: "The prohibitions in paragraph (c) extend not only to cash payments or credits but also to anything of value made available for the beneficial use of the buyer by means of the brokerage commissions. Obviously, even an independent broker cannot split his commissions with the buyer." Oppenheim, *Administration of the Brokerage Provision of the Robinson-Patman Act,* 8 Geo. Wash. L. Rev., 511, 544.

to a buyer in the form of advertising or promotional services and facilities would come within the purview of Section 2(c), not 2(e) as petitioner seems to suggest.[12] Since the "evil" at which 2(c) was directed was the "transmission of brokerage commissions to the buyer * * * to permit the buyer to get the same thing under [2(e)] in another form and name would be to deprive 2(c) of all substance." [13]

For the foregoing reasons, the Commission is of the opinion that petitioner, Red & White Corporation, has failed to establish that changed conditions of fact or law or public interest considerations warrant reopening of this proceeding for the purpose of altering, modifying or setting aside the order to cease and desist. The petition to reopen will therefore be denied. Petitioner's request for oral argument is also denied.

Commissioner Elman dissented.

ORDER DENYING PETITION TO REOPEN

This matter having come before the Commission on the petition of Red & White Corporation filed July 29, 1966, pursuant to Section 3.28(b)(2) of the Commission's Rules of Practice requesting that this proceeding be reopened for the purpose of altering, modifying or setting aside the order to cease and desist, and the Director, Bureau of Restraint of Trade, having filed an answer in opposition to said petition; and

The Commission for the reasons set forth in the accompanying opinion having determined that the petition should be denied:

It is ordered, That the petition to reopen filed by Red & White Corporation be, and it hereby is, denied.

Commissioner Elman dissenting.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order and Opinion, Apr. 17, 1967

Order granting complaint counsel's motion that complaint be amended by adding a new allegation of violating Section 7 of the Clayton Act.

OPINION OF THE COMMISSION

This matter is before the Commission on the hearing examiner's certification of complaint counsel's motion to amend the complaint

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[12] *Brief in Support of Petition to Reopen and For Other Relief*, pp. 17–21.

[13] *F.T.C. v. Henry Broch & Co.*, 363 U.S. 166, 173 n. 14 (1960).

herein to add a new paragraph alleging that sometime after July 1965, respondent acquired the stock or assets of Cement Block Industries of Miami, Inc. (CBI), a corporation alleged to be a substantial consumer of Portland cement, engaged in the production and sale of ready-mixed concrete, cement blocks, and masonry materials in the greater Miami area, and operating a ready-mixed concrete plant there.

Complaint counsel's motion seeks also to add to the complaint allegations that the effects of the acquisition of CBI by Lehigh may be substantially to lessen competition or tend to create a monopoly in the manufacture and sale of Portland cement and ready-mixed concrete in the United States as a whole and various parts thereof, including the State of Florida and the Miami area in that, *inter alia*, Lehigh's competitors may be foreclosed from a substantial segment of the market for Portland cement, the ability of Lehigh's non-integrated competitors to compete in the sale of Portland cement and ready-mixed concrete may be substantially impaired, the entry of new Portland cement and ready-mixed concrete competitors may be inhibited or prevented, and the production and sale of ready-mixed concrete, now a locally controlled, small business industry, may become concentrated in the hands of a relatively few manufacturers.

Complaint counsel's motion seeks to amend the allegations of the complaint further by adding to the complaint's delineation of the alleged marketing areas Broward County and Palm Beach County after Dade County in describing "the Miami area," and by adding Brevard County to Orange and Seminole Counties in describing "the Orlando area."

Respondent filed an answer to complaint counsel's motion arguing that the hearing examiner must certify the motion to the Commission and that counsel's motion to amend the complaint's definitions of the Miami and Orlando areas does not state the grounds therefor. The hearing examiner has certified the motion to the Commission. On the basis of the matters alleged in complaint counsel's motion, the Commission finds reason to believe that the alleged acquisition of Cement Block Industries of Miami, Inc., was in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act and that the addition of that alleged acquisition to the complaint herein is in the public interest. Respondent has not yet filed an answer to the original complaint, and thus will have sufficient time in which to respond to the amended complaint.

The CBI acquisition is alleged to be similar in type to those challenged in the original complaint and in the same geographical

location as the Acme Concrete Corp. acquisition. Complaint counsel allege that evidence adduced with respect to this acquisition will be related to evidence bearing upon the acquisitions challenged in the original complaint. Clearly, in these circumstances, it would not be in the public interest, nor would it be in respondent's interest, for the Commission to issue a separate complaint embracing the alleged CBI acquisition.

Amendment of the alleged relevant market areas is in no way prejudicial to respondent at this early stage of the proceeding and appears necessary to facilitate trial of the case. We find sufficient grounds for amendment in complaint counsel's motion and supporting memorandum.

We deny complaint counsel's motion for an order requiring respondent to answer the complaint within ten (10) days. In view of our amendment of the complaint, respondent is entitled to have the usual thirty (30) days after service of the amended complaint within which to file an answer thereto.

Commissioner MacIntyre did not participate.

ORDER AMENDING COMPLAINT

Upon consideration of the hearing examiner's certification, dated March 27, 1967, of complaint counsel's motion to amend the complaint by adding a new allegation charging that an acquisition by respondent of Cement Block Industries of Miami, Inc., violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, and by adding to the complaint's designation of alleged market areas specified adjacent counties; and of complaint counsel's motion for an order requiring respondent to answer the complaint within ten (10) days after the examiner's ruling on these motions, and for the reasons set forth in the accompanying opinion of the Commission,

It is ordered, That complaint counsel's motion to amend the complaint be, and it hereby is, granted; and that the complaint be, and it hereby is, amended accordingly.

It is further ordered, That complaint counsel's motion for an order requiring respondent to answer be, and it hereby is, denied.

It is further ordered, That respondent shall have thirty (30) days from the date of service upon it of the amended complaint within which to file an answer thereto.

Commissioner MacIntyre not participating.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order and Opinion, Apr. 17, 1967

Order denying respondent's motion that complaint be dismissed or suspended on grounds that Commission's broad survey of cement industry prejudices respondent's right to a fair hearing.

OPINION OF THE COMMISSION

The hearing examiner has certified to the Commission respondent's motion to dismiss the complaint or suspend the proceeding with the recommendation that the motion be denied. Respondent's motion presents essentially the same arguments which it has made to the Commission in support of two prior motions in this case. In our opinion of February 6, 1967 [p. 1618 herein], denying respondent's motion to vacate the complaint herein, we rejected its claim that the Commission acted improperly by conducting a general industrywide inquiry into vertical mergers in the cement industry while the complaint against respondent was pending. We made clear in that opinion that the background information acquired by the Commission as a result of its broad survey of vertical mergers in the cement industry would in no way prejudice respondent's right to a fair hearing and decision. We also said in that opinion, and we reiterate here, that the burden of proving the allegations of the complaint remains with complaint counsel, and that adjudication by the hearing examiner and the Commission will be made on the record, in accordance with due process and the Administrative Procedure Act. We see no reason either to dismiss the complaint or to suspend this proceeding. Accordingly, respondent's motion is denied in its entirety.

Commissioner MacIntyre did not participate.

ORDER DENYING MOTION TO DISMISS COMPLAINT

Upon consideration of the hearing examiner's certification of respondent's motion to dismiss the complaint or suspend this proceeding, and for the reasons set forth in the accompanying opinion of the Commission,

It is ordered, That respondent's motion be, and it hereby is, denied.

Commissioner MacIntyre not participating.