

IN THE MATTER OF

FOOD FAIR STORES, INC., ET AL. D. 8786[•]
H. C. BOHACK CO., INC., ET AL. D. 8787
JEWEL COMPANIES, INC., ET AL. D. 8788
BORMAN FOOD STORES, INC. D. 8789*
FIRST NATIONAL STORES, INC., ET AL. D. 8790

ORDER OF DISMISSAL, ETC., IN REGARD TO THE ALLEGED
VIOLATIONS OF SEC. 2(C) OF THE CLAYTON ACT

Complaints, July 10, 1969—Decisions, Jan. 22, 1974

Orders dismissing the complaints issued against 10 corporations and certain individual officers thereof, engaged in various aspects of the food industry for alleged violations of Sec. 2(c) of the Clayton Act on the basis that the evidence relied upon by complaint counsel would not support the charges that respondent had violated Sec. 2(c) of the Clayton Act, amended.

Appearances

For the Commission: *Francis C. Mayer, James C. Donoghue, Martin A. Rosen, Lewis F. Parker, Louis R. Sernoff and Eliot G. Disner.*

For respondents: *Shipley, Akerman, Stein & Kaps, Wash., D.C. and Stein & Rosen, New York, N.Y. for Food Fair Stores, Inc. and World-Wide Produce Co., Inc. Subin, Shams & Rosenbluth, Orlando, Fla. for Hallee-Boy Sales, Inc. and Ivin Arost. Collier, Shannon, Rill & Edwards, Wash., D.C. for John P. Storm, a corporation.*

COMPLAINT IN DOCKET NO. 8786

The Federal Trade Commission, having reason to believe that th

* For complaint in D. 8789 see 81 F.T.C. 201. By Commission decision dated Aug. 3, 1972, the complaint was dismissed as to respondents P & R Brokerage Co. and Frank V. Condello.

FEDERAL TRADE COMMISSION DECISIONS

Complaint

83 F.T.C.

parties respondent named in the caption hereof, and hereinafter more particularly described, have been and are violating the provisions of Subsection (c) of Section 2 of the Clayton Act, as amended, (15 U.S.C. Section 13) hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Food Fair Stores, Inc., hereinafter referred to as "Food Fair," is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located at 3175 John F. Kennedy Boulevard, Philadelphia, Pa.

PAR. 2. Respondent World-Wide Produce Co., Inc., hereinafter referred to as "World-Wide," is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located at 10 Oregon Avenue, Philadelphia, Pa. Respondent World-Wide is a wholly-owned corporate subsidiary of respondent Food Fair.

PAR. 3. Respondent Food Fair has been and is now engaged primarily in the retailing of food products and other articles for personal and household use and operates a large number of retail stores, including supermarkets, discount supermarkets and department stores. Food Fair also manufactures and processes a variety of food products. In the operation of its retail food business, respondent Food Fair purchases directly and through respondent World-Wide large quantities of food products from numerous sellers located throughout the United States for resale to its customers. As of Apr. 27, 1968, Food Fair operated approximately 560 food units and 60 department stores in 16 States of the United States. Food Fair's volume of business is substantial, totaling in excess of \$1.3 billion annually, as of Apr. 27, 1968.

PAR. 4. Respondent World-Wide has been and is now engaged as a purchaser of food products solely on behalf of respondent Food Fair. Food products obtained for Food Fair by World-Wide are resold to consumers through Food Fair's retail outlets. Some of the officers and directors of respondent Food Fair have been and are now officers and directors of respondent World-Wide.

PAR. 5. In the course and conduct of its business for the past several years, respondent Food Fair has purchased, distributed and resold, and now purchasing, (both directly and through respondent World-Wide) distributing and reselling food products and other articles for personal and household use, including fresh fruits and vegetables, in commerce, "commerce" is defined in the Clayton Act, which it purchased from sellers located in several States of the United States other than the Commonwealth of Pennsylvania in which respondent Food Fair is located. Food Fair purchases these food products, including fresh fruits

and vegetables, and causes them to be transported from the growing areas or packing plants of sellers located in various States of the United States to Food Fair's warehouses and retail stores in the Commonwealth of Pennsylvania and various other States in the United States. Thus, there has been and is now a continuous course of trade in commerce in the purchase and resale of said food products by respondent Food Fair.

PAR. 6. In the course and conduct of its business for the past several years, respondent World-Wide has purchased and distributed and resold through respondent Food Fair, and is now purchasing and distributing and reselling through respondent Food Fair, food products and other articles for personal and household use, including fresh fruits and vegetables, in commerce, as "commerce" is defined in the Clayton Act, which it purchased from sellers located in several States of the United States other than the Commonwealth of Pennsylvania in which respondent World-Wide is located. World-Wide purchases these food products, including fresh fruits and vegetables, and causes them to be transported from the growing areas or packing plants of sellers located in various States of the United States to Food Fair's warehouses and retail stores in the Commonwealth of Pennsylvania and various other States in the United States. Thus, there has been and is now a continuous course of trade in commerce in the purchase of said food products by respondent World-Wide.

PAR. 7. *Respondent Hallee-Boy Sales, hereinafter referred to as "Hallee-Boy," is a partnership, composed of respondents Ivin Arost and Harold Arost, doing business under and by virtue of the laws of the State of Florida, with their office and principal place of business located at P.O. Box 7741, Orlando, Fla. These individual respondents formulate, direct and control the acts, practices and policies of the partnership, Hallee-Boy, including the acts and practices hereinafter described.

PAR. 8. Respondent Hallee-Boy has been and is now engaged in business primarily as a "ground" or "field" broker effecting sales of fresh fruits and vegetables by sellers located in the State of Florida and purchases by buyers located in various States of the United States other than the State of Florida. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of Hallee-Boy in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables is substantial.

*On June 5, 1973, the administrative law judge amended the complaint as follows: substituting Hallee-Boy Sales, Inc., the successor corporation for Hallee-Boy Sales, a dissolved partnership, as respondent; retaining Ivin Arost individually as a respondent; dismissing Harold Arost.

Complaint

PAR. 9. Respondent Hallee-Boy, in the course and conduct of its business as a "ground" or "field" broker, has been and is now effecting sales of fresh fruits and vegetables by sellers located in the State of Florida and purchases by buyers located in various States of the United States other than the State of Florida in commerce, as "commerce" is defined in the Clayton Act. Said respondent has transported or caused such products to be transported from the sellers' places of business to the buyers' places of business located in other states. Thus, there has been, at all times mentioned herein, a continuous course of trade in commerce in effecting purchases and sales of such products by said respondent Hallee-Boy.

PAR. 10. Respondent John P. Storm, a corporation, hereinafter referred to as "John Storm," is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 314 East John Street, Salinas, Calif.

Respondent John P. Storm, an individual, is president of corporate respondent and owns all or substantially all of its stock. He formulates, directs and controls the acts, practices and policies of said corporate respondent, including the acts and practice hereinafter described.

PAR. 11. Respondent John Storm has been and is now engaged in business primarily as a "ground" or "field" broker effecting sales of fresh fruits and vegetables by sellers located in the State of California and purchases by buyers located in various States of the United States other than the State of California. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of John Storm in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables is substantial.

PAR. 12. Respondent John Storm, in the course and conduct of its business as a "ground" or "field" broker, has been and is now effecting sales of fresh fruits and vegetables by sellers located in the State of California and purchases by buyers located in various States of the United States other than the State of California in commerce, as "commerce" is defined in the Clayton Act. Said respondent has transported or caused such products to be transported from the sellers' places of business to the buyers' places of business located in other states. Thus, there has been, at all times mentioned herein, a continuous course of trade in commerce in effecting purchases and sales of such products by said respondent John Storm.

PAR. 13. In the course and conduct of their business, respondents Food Fair and World-Wide have been and are now utilizing the services of respondent Hallee-Boy as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. Respondent Hallee-Boy performs valuable services for respondents Food Fair and World-Wide and other buyers by furnishing information concerning market conditions, by maintaining contact with various sellers, by inspecting and selecting specified qualities and quantities of fresh fruits and vegetables, by negotiating purchases of said products at the most favorable prices and by arranging pool car shipments from various sellers. Respondent Hallee-Boy, in performing the services enumerated above, has been and is now acting as an agent or representative of respondents Food Fair and World-Wide and other buyers. In such capacity, Hallee-Boy is subject to and under the direct or indirect control of Food Fair, World-Wide and other buyers of fresh fruits and vegetables in transactions with sellers. In connection with such transactions, respondent Hallee-Boy has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

PAR. 14. In the course and conduct of their business, respondents Food Fair and World-Wide have been and are now utilizing the services of respondent John Storm as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. Respondent John Storm performs valuable services for respondents Food Fair and World-Wide and other buyers by furnishing information concerning market conditions, by maintaining contact with various sellers, by inspecting and selecting specified qualities and quantities of fresh fruits and vegetables, by negotiating purchases of said products at the most favorable prices and by arranging pool car shipments from various sellers. Respondent John Storm, in performing the services enumerated above, has been and is now acting as an agent or representative of respondents Food Fair and World-Wide and other buyers. In such capacity, John Storm is subject to and under the direct or indirect control of Food Fair, World-Wide and other buyers of fresh fruits and vegetables in transactions with sellers. In connection with such transactions, said respondent John Storm has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

PAR. 15. In addition, respondents Food Fair and World-Wide have been and are now utilizing the services of Jack Stires, Inc., a Calif. corporation located at 795 Desert Gardens Drive, El Centro, Calif. as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. In such capacity, Jack Stires, Inc. performs the

same or substantially the same services for respondents Food Fair and World-Wide, as those performed by Hallee-Boy and John Storm for respondents Food Fair and World-Wide, described above in Paragraphs Thirteen and Fourteen, while acting as an agent or representative, and subject to the direct or indirect control, of respondents Food Fair and World-Wide in transactions with sellers. In connection with such transactions, Jack Stires, Inc. has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

PAR. 16. Respondents Food Fair and World-Wide and other buyers have received and are now receiving valuable "ground" or "field" broker services from respondent John Storm without paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, respondent John Storm has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondents Food Fair and World-Wide and other buyers, or has been and is now subject to the direct or indirect control of respondents Food Fair and World-Wide and other buyers.

Respondents Food Fair and World-Wide and other buyers have received and are now receiving valuable "ground" or "field" broker services from respondent Hallee-Boy without paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, respondent Hallee-Boy has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondents Food Fair and World-Wide and other buyers, or has been and is now subject to the direct or indirect control of respondents Food Fair and World-Wide and other buyers.

Moreover, respondents Food Fair and World-Wide have received and are now receiving valuable "ground" or "field" broker services from Jack Stires, Inc. without paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, Jack Stires, Inc. has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondents Food Fair and World-Wide or has been and is now subject to the direct or indirect control of respondents Food Fair and World-Wide.

PAR. 17. The aforesaid acts and practices of respondents and each of them in receiving and accepting, directly or indirectly, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof from sellers, are in violation of Subsection (c) of

Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Commissioners Elman and Nicholson dissented and filed dissenting statements.*

Commissioners Dixon and MacIntyre filed separate statements.*

INITIAL DECISION [IN DOCKET 8786] ON RESPONDENTS' MOTION
FOR SUMMARY DECISION
UNDER SECTION 3.24 OF THE COMMISSION'S RULES OF PRACTICE
BY RAYMOND J. LYNCH, ADMINISTRATIVE LAW JUDGE

JULY 30, 1973

PRELIMINARY STATEMENT

On July 10, 1969, the Federal Trade Commission issued a complaint^{1,2,3} in the above-entitled proceeding, charging the respondents with violations of Subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.⁴ Answers were filed by all the respondents named herein, denying the allegations contained in the complaint. Pretrial conferences and discovery proceedings were held both on and off the record from May 22, 1972 to May 14, 1973. On June 4, 1973, respondents filed a motion for summary decision pursuant to Section 3.24 of the Commission's Rules of Practice. Counsel supporting complaint, on June 18, 1973, filed a reply thereto. In addition, respondents' requests for admissions were answered by counsel supporting the complaint, briefs were filed and a stipulation entered into between the parties.

The Complaint

The complaint, as amended in the above-entitled proceeding, alleges that the respondent Food Fair Stores, Inc. engaged in a course of commerce, as commerce is defined in the Clayton Act, by purchasing from Hallee-Boy Sales, Inc., a corporation, Ivin Arost, an individual, and John P. Storm, a corporation, specified qualities and quantities of fresh fruits and vegetables, and that as a result of the transactions between Food Fair Stores, Inc., a buyer, and the other remaining respondent brokers, acted in such a manner as to violate Subsection (c)

* For reasons of economy, the text of the dissenting statements of Commissioners Elman and Nicholson, and the text of the separate statements of Commissioners Dixon and MacIntyre are not published herein. However, they appear at 81 F.T.C. 203-216, Docket 8789.

¹ By order of the administrative law judge, Hallee-Boy Sales, a partnership, was dismissed as a respondent and in lieu thereof, Hallee-Boy Sales, Inc., a corporation, was substituted.

² Harold Arost was dismissed as a respondent by order of the administrative law judge, based upon an agreement of the parties.

³ John P. Storm, individually, was dismissed as a respondent on motion of respondent's counsel because of his death in Dec. 1972.

⁴ This matter was pending in United States District Court for the Northern District of Illinois and the Seventh Circuit Court of Appeals from Aug. 11, 1969 to Mar. 29, 1972.

of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. The nature of the transactions between the parties will be discussed more fully in the following paragraphs.

Admissions by Counsel Supporting the Complaint

Pursuant to respondents' request for admissions of complaint counsel's contentions of law and fact, counsel supporting the complaint admit that:

1. Buyer respondent does not own or have any financial or other interest in the business of any of the broker respondents, and does not in any way share in the profits or losses of any of the broker respondents.

2. No director, officer or employee of buyer respondent owns all or any part of any of the broker respondents, or has any financial or other interest in the business of any of the broker respondents or shares in any way in the profits or losses of any of the broker respondents.

3. No broker respondent is a director, officer, manager or shareholder of buyer respondent or other buyers; and no director, officer or employee of buyer respondent is a director, officer, manager or shareholder of any of the broker respondents.

4. There are no common officers, directors, shareholders, employees or other personnel between respondent brokers and respondent sellers.

5. Broker respondents have not entered into any express contract or agreement to act as an agent, representative or other buyers.

6. The broker respondents were independently owned and managed direct or indirect control of buyer respondent or other buyers. The broker respondents performed *bona fide* brokerage functions of business entities which performed *bona fide* brokerage functions of benefit to both buyers and sellers; and were not so-called "dummy brokers." Except as to words "bona fide" and "and is not a so-called 'dummy broker'." Neither admit or deny "bona fide" because term is not defined with specificity with respect to the words "brokerage functions" which it modifies. Admit "is not a so-called 'dummy broker' " as that term is defined in *FTC v. Henry Broch & Co.*, 363 U.S. 166, 168-169 (1960).

7. Complaint counsel expect to prove that the broker respondents acted as agent or representative for, or in behalf of or subject to the direct or indirect control of respondent buyer and other buyers by inference from the following.

(a) That respondent buyer and other buyers have "utilized" the service of the respondent brokers as "ground" or "field" brokers in the purchase of fresh fruits and vegetables and usually not the services of other "ground" or "field" brokers.

(b) That the respondent brokers perform services which are valuable to respondent buyer and other buyers by (i) furnishing information concerning market conditions; (ii) maintaining contact with various sellers; (iii) inspecting and selecting specified qualities and quantities of fresh fruits and vegetables; and (iv) negotiating purchases of specified qualities and quantities of fresh fruits and vegetables.

8. Respondent buyer and other buyers have not paid brokerage or other compensation to the broker respondents and such brokerage has been paid by sellers.

9. Complaint counsel do not contend that the buyer respondent has received or accepted any monetary payments or anything of value other than benefits complaint counsel contend arise from broker respondents' performance of the functions referred to in Paragraph 7, *supra*.

10. Complaint counsel expect to offer no evidence that the acts and practices of respondents alleged in the complaint in this matter have resulted in price discrimination or may be substantially to lessen competition or tend to create a monopoly or injure, destroy or prevent competition. Complaint counsel do contend that the acts and practices alleged are unfair.

Stipulation of the Parties

In addition to the agreement of the parties with respect to the respondents' request for admissions and counsel supporting the complaint's reply thereto, for the purpose of presenting the legal issue, it was agreed that a stipulation would be entered into, which follows:

A. If, as a matter of law, complaint counsel must prove any one or more of the matters set forth in Paragraphs 1 through 6, then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

B. If, as a matter of law, complaint counsel must prove that buyer respondent has received or accepted any monetary payments or anything of value other than the services described in Paragraph 7(b) then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

C. If, as a matter of law, complaint counsel must prove that the acts and practices of respondents have resulted in price discrimination or may be substantially to lessen competition or tend to create a monopoly or injure, destroy or prevent competition, then the proposed evidence of referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

D. If, as a matter of law, the proposed evidence of complaint counsel set forth in Paragraph 7 of the admissions of complaint counsel does not establish that the broker respondents acted as agent, representative or

other intermediary for, or in behalf of, or subject to the direct or indirect control of buyers, then there is no genuine issue as to material facts in this matter.

Contention of the Parties

Counsel supporting the complaint contend that Section 2(c) should be extended to apply to any situation in which it can be concluded, after analysis of the details of a broker's business and of the businesses of the sellers and buyers with whom he has done business, that the buyer realized greater benefits from the broker's services than did the seller. Complaint counsel contend that, on the basis of such a conclusion, it can be further implied that the broker was "acting in fact for or in behalf" of the buyer within the meaning of the statute and that, therefore, unless the buyer has paid any fee charged by the broker, the statute was violated.

Respondents' counsel contend that to establish a Section 2(c) violation, complaint counsel must show that one aspect of the transactions at issue was for the respondent buyer "to receive or accept" something of value "as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof." Complaint counsel, however, do not assert that the buyer has received or accepted any allowance or discount in lieu of brokerage commission or other compensation. Rather, they simply contend that the buyer receives benefits from various brokerage functions performed by the respondent brokers.

As a matter of statutory construction, the benefits inherent in the performance of brokerage functions cannot constitute something of value as "a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof." The "thing of value" referred to in Section 2(c) means something paid as *compensation* for brokerage services, not the benefits of the performance of the brokerage function or the brokerage services themselves. If the brokerage services themselves can constitute the "thing of value," then the whole clause is a meaningless redundancy because that "thing of value" is inherent in every transaction. To adopt complaint counsel's view would be to hold that Congress wrote a meaningless clause into Section 2(c).

The Issue

There is no dispute as to the *material facts* that prevent a determination of the legal issue to wit: based upon counsel supporting the complaint's admissions with respect to respondents' actions, would respondents' conduct be in violation of the Clayton Act?

FINDINGS OF FACT

Respondent Food Fair Stores, Inc., hereinafter referred to as "Food Fair," is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located at 3175 John F. Kennedy Boulevard, Philadelphia, Pa.

Respondent World-Wide Produce Co., Inc., hereinafter referred to as "World-Wide," is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located at 10 Oregon Avenue, Philadelphia, Pa. Respondent World-Wide is a wholly-owned corporate subsidiary of respondent Food Fair.

Respondent Food Fair has been and is now engaged primarily in the retailing of food products and other articles for personal and household use and operates a large number of retail stores, including supermarkets, discount supermarkets and department stores. Food Fair also manufactures and processes a variety of food products. In the operation of its retail food business, respondent Food Fair purchases directly and through respondent World-Wide large quantities of food products from numerous sellers located throughout the United States for resale to its customers. As of Apr. 27, 1968, Food Fair operated approximately 560 food units and 60 department stores in 16 States of the United States. Food Fair's volume of business is substantial, totalling in excess of \$1.3 billion annually, as of Apr. 27, 1968.

Respondent World-Wide has been and is now engaged as a purchaser of food products solely on behalf of respondent Food Fair. Food products obtained for Food Fair by World-Wide are resold to consumers through Food Fair's retail outlets. Some of the officers and directors of respondent Food Fair have been and are now officers and directors of respondent World-Wide.

In the course and conduct of its business for the past several years, respondent Food Fair has purchased, distributed and resold, and is now purchasing (both directly and through respondent World-Wide), distributing and reselling food products and other articles for personal and household use, including fresh fruits and vegetables, in commerce, as "commerce" is defined in the Clayton Act, which it purchased from sellers located in several States of the United States other than the Commonwealth of Pennsylvania in which respondent Food Fair is located. Food Fair purchases these food products, including fresh fruits and vegetables, and causes them to be transported from the growing areas or packing plants of sellers located in various States of the United States to Food Fair's warehouses and retail stores in the Commonwealth of Pennsylvania and various other States in the United States.

Thus, there has been and is now a continuous course of trade in commerce in the purchase and resale of said food products by respondent Food Fair.

In the course and conduct of its business for the past several years, respondent World-Wide has purchased and distributed and resold through respondent Food Fair, and is now purchasing and distributing and reselling through respondent Food Fair, food products and other articles for personal and household use, including fresh fruits and vegetables, in commerce, as "commerce" is defined in the Clayton Act, which it purchased from sellers located in several States of the United States other than the Commonwealth of Pennsylvania in which respondent World-Wide is located. World-Wide purchases these food products, including fresh fruits and vegetables, and causes them to be transported from the growing areas or packing plants of sellers located in various States of the United States to Food Fair's warehouses and retail stores in the Commonwealth of Pennsylvania and various other States in the United States. Thus, there has been and is now a continuous course of trade in commerce in the purchase of said food products by respondent World-Wide.

Respondents Hallee-Boy Sales, Inc., a corporation, and Ivin Arost, individually, have been doing business under and by virtue of the laws of the State of Florida, with their office and principal place of business located at P.O. Box 7741, Orlando, Fla.

Respondent Hallee-Boy Sales, Inc., has been and is now engaged in business primarily as a "ground" or "field" broker effecting sales of fresh fruits and vegetables by sellers located in the State of Florida and purchases by buyers located in various States of the United States other than the State of Florida. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of Hallee-Boy Sales, Inc. in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables is substantial.

Respondent Hallee-Boy Sales, Inc., in the course and conduct of its business as a "ground" or "field" broker, has been and is now effecting sales of fresh fruits and vegetables by sellers located in the State of Florida and purchases by buyers located in various States of the United States other than the State of Florida in commerce, as "commerce" is defined in the Clayton Act. Said respondent has transported or caused such products to be transported from the sellers' places of business to the buyers' places of business located in other states. Thus, there has been, at all times mentioned herein, a continuous course of trade in

commerce in effecting purchases and sales of such products by said respondent Hallee-Boy Sales, Inc.

Respondent John P. Storm, a corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 314 East John Street, Salinas, Calif.

Respondent John P. Storm, a corporation, has been and is now engaged in business primarily as a "ground" or "field" broker effecting sales of fresh fruits and vegetables by sellers located in the State of California and purchases by buyers located in various States of the United States other than the State of California. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of John P. Storm, a corporation, in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables is substantial.

Respondent John P. Storm, a corporation, in the course and conduct of its business as a "ground" or "field" broker, has been and is now effecting sales of fresh fruits and vegetables by sellers located in the State of California and purchases by buyers located in various States of the United States other than the State of California in commerce, as "commerce" is defined in the Clayton Act. Said respondent has transported or caused such products to be transported from the sellers' places of business to the buyers' places of business located in other states. Thus, there has been, at all times mentioned herein, a continuous course of trade in commerce in effecting purchases and sales of such products by said respondent John P. Storm, a corporation.

Performance of Normal Brokerage Services

From the very adoption of the section, it has been recognized that both buyers and sellers benefit from performance of normal brokerage services by independent brokers and that the existence of such benefits is no legal or factual basis for inferring the existence of a relationship of agency between the broker and a buyer receiving such benefits. As the Commission said in *Great Atlantic and Pacific Tea Co.*, 26 F.T.C. 486, 506-507 (1930):

In the course of conducting his business a broker must and does also render services to buyers—but those services, unlike the services rendered to the respondent by its field buying agents, are not buying services. A broker is not employed by buyers. He is employed and paid by sellers as their selling agent and he represents his seller-principals only. His activities in connection with his representation of his seller-principals are controlled by them, but, paradoxically, because of the broker's anomalous position as an independent sales agent in business for himself, he does act for buyers in a sense and he is subject to a degree of control on their part.

This results from requests by buyers that brokers report complaints to their seller-principals, that brokers communicate cancellations of orders to their seller-principals, that brokers submit to their seller-principals offers of buyers to purchase commodities at prices stipulated by buyers, that brokers endeavor to make up "pool" cars of merchandise among several buyers so that the buyers may obtain the advantage of quantity prices and carload rates of freight, that brokers obtain quotations of prices from their seller-principals for the consideration of buyers, and, perhaps, in other ways. Naturally it is to the mutual interest and advantage of brokers and sellers to maintain the good will of their common customers, and brokers generally endeavor to comply with the reasonable requests of buyers along the lines indicated. In the course of negotiating sales from seller to buyer and bringing them into agreement brokers are necessarily guided somewhat by instructions from each, but in the essential particular of selling commodities and consummating sales they act for and are controlled by the latter alone, who in the absence of a contract may discharge them and substitute new brokers in their places at any time.

Complaint counsel contend that respondent buyer usually uses the services of the respondent brokers rather than the services of other brokers in the purchase of fresh fruits and vegetables. This fact, if true, hardly establishes agency. It is certainly not unusual for a buyer to do business more frequently with one supplier than another and the fact that he does so does not establish that the supplier he selects is his agent. It certainly was not the intention of the statute to require a buyer to spread his business among several brokers. In fact, in *Tillie Lewis Foods, Inc., et al.*, 65 F.T.C. 1099, 1136 (1964), the Commission expressly approved the seller's payment of brokerage to a broker, Bushey & Wright, on sales to a large buyer with whom the broker had had a "personal relationship" for many years dating back to the time when the buyer and broker were the same entity.

The "field broker" aspect of *Tillie Lewis Foods, supra*, is particularly enlightening as to the lack of probity, for the purpose of establishing agency, of the facts relied on by complaint counsel. The Commission, in holding that seller payment of brokerage did not violate Section 2(c), described the broker's activity in a discussion which shows that brokerage services which benefit both buyers and sellers do not establish a violation of Section 2(c):

* * * the local broker and the purchaser are generally located at considerable distances from the canners. A small canner, with a limited or no sales force, is thus unable to make known to these potential purchasers information concerning his production capabilities and the stock which he has available. On the other hand, the field broker, by reason of his location and constant contact with all canners in his area, maintains this information on a current basis. Through bulletins, letters and principally by telephone, he relays this information regularly to numerous local brokers. The field broker, upon receipt of an order from a local broker or direct purchaser, may split the order up among several small canners and coordinate the pooling of each canner's share in shipment to the purchaser. The seller compensates the field broker for these services by a commission which is usually indicated as a deduction on the invoice. [65 F.T.C. at 1132]

These findings as to the legitimate brokerage functions of shipping point

brokers which are not violative of Section 2(c) are sufficiently close to a number of the admitted contentions of Paragraph 7 of the admissions as to demonstrate that the contentions themselves, even if established, would not, under Commission precedents, carry the burden necessary to sustain a violation here.

In short, the facts by which complaint counsel seek to establish agency of the broker respondents for buyers are nothing more than a description of the functions necessarily and historically performed by brokers acting as independent intermediaries bringing buyer and seller together. It is the essence of the business operations of independent brokers that they negotiate sales transactions and, in the course of such negotiations, perform acts beneficial to both buyer and seller. But, in the absence of circumstances evidencing the kind of control by the buyer over the broker contemplated by Section 2(c), the factual contentions of complaint counsel set forth in Paragraph 7 of the request for admissions are totally inadequate to establish that a broker is either an agent of a buyer or in violation of Section 2(c).

Complaint counsel's approach to proof of an agency relationship which violates Section 2(c) is highly unrealistic and ignores the economic realities of the brokerage business. Because it is unrealistic, it would be impossible to apply the approach fairly and predictably. As a result, the threat of a 2(c) proceeding against any buyer or seller who deals with an independent broker would cause buyers and sellers to cease to do business with independent brokers.

Complaint counsel's approach to proof of a 2(c) violation ignores the essential economic character of brokers as intermediaries who promote trade by bringing buyers and sellers together and who act for their own interest in earning a fee and not as the representative of either party to the transaction. In some transactions, the broker may first be approached by a seller to find an outlet for the seller's goods; in others, the broker may be first approached by a buyer seeking a source of supply. In all instances, both buyers and sellers will benefit from the transaction. Both will receive information concerning conditions in the market and the availability of goods. Both will, by utilizing the services of the broker, save expense which they would otherwise have borne. The seller, for example, will have saved the expense of making his own sales calls and the buyer will have saved the expense of making his own buying calls direct to the sellers. Both will benefit from any negotiation the broker may have carried on to bring about a price favorable to both parties. Thereafter, both will benefit in the event of claims by one or the other; the broker, in the interest of protecting the fee which he has earned and of protecting his relationships with both parties for the future, will mediate and seek to resolve the controversy to the satisfac-

tion of both parties. In every aspect of the brokerage function, the point is the same; both parties benefit from the services of an independent broker, but the broker performs the services for his own purpose, which is to consummate the transaction and obtain his commission.

It is no answer to suggest that independent brokers drop the contested services. The services are intrinsic to the brokerage function. Other types of middlemen engaged in distribution provide a variety of services to benefit both buyers and sellers and thereby encourage them to do business with them. These include all of the same types of benefit complaint counsel allege in this case to be the basis for implying agency. If, because of the rule of law being proposed by complaint counsel, these broker respondents and other independent brokers could not provide such benefits, they, of course, would not be competitive with other forms of distribution such as commission merchants, wholesalers, the seller's own sales force and the like, and would, in time, disappear from the competitive arena.

CONCLUSIONS

The legislative history of Section 2(c) demonstrates conclusively that the only purpose of the statute is to prevent price discrimination among customers of the same seller which arises when the seller pays brokerage direct to a buyer or indirectly to the buyer through a dummy or nominee broker of the buyer. The effect of this legislative history upon the proper construction of the statute has, furthermore, been confirmed by the United States Supreme Court in *Federal Trade Commission v. Henry Broch & Co.*, 363 U.S. 166 (1960). That case involved a preferential allowance granted by a seller direct to a buyer in lieu of brokerage. The allowance was found to have resulted in a price discrimination in favor of the buyer and to be, therefore, within the prohibitive scope of Section 2(c). With respect to the proper construction of Section 2(c), the Court affirmed that:

The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power. [363 U.S. at 168]

It further affirmed with respect to Section 2(c) that:

One of the favorite means of obtaining an indirect concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act. But it was not the only means by which the brokerage function was abused and Congress in its wisdom phrased § 2(c) broadly, * * * to cover * * * all other means by which brokerage could be used to effect price discrimination. [363 U.S. at 169]

A summary decision for respondents is appropriate even though

complaint counsel state in response to the request for admissions that they intend to claim that payment of brokerage by sellers in the circumstances of this case is unfair. The basis for this claim is unclear, although apparently complaint counsel believe buyers receive greater benefits from the services of these brokers than do sellers. This belief is, in the opinion of the administrative law judge, unfounded. In any event, it is quite immaterial to this proceeding because this proceeding is brought under Section 2(c) of the Robinson-Patman Act, not under Section 5 of the Federal Trade Commission Act. Section 2(c) is not and was never intended to be a vehicle through which the Federal Trade Commission would substitute its judgments for those of the market place to determine when independent brokers should be paid and by whom. The Commission's only function under Section 2(c) is to determine whether an abuse of brokerage exists which results or is likely to result in price discrimination; there is no such result or likelihood of such a result involved in this proceeding.

To establish a Section 2(c) violation, complaint counsel must show that one aspect of the transactions at issue was for the respondent buyer "to receive or accept" something of value "as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof." Complaint counsel, however, do not assert that the buyer has received or accepted any allowance or discount in lieu of brokerage commission or other compensation. Rather, they simply contend that the buyer receives benefits from various brokerage functions performed by the respondent brokers. The "thing of value" referred to in Section 2(c) means something paid as *compensation* for brokerage services, not the benefits of the performance of the brokerage function or the brokerage services themselves. If the brokerage services themselves can constitute the "thing of value," then the whole clause is a meaningless redundancy because that "thing of value" is inherent in every transaction.

Review of the full range of cases decided under Section 2(c) reveals no support for complaint counsel's theory. For example, in *Webb-Crawford Co., et al. v. FTC*, 109 F.2d 268 (5th Cir. 1940), the brokerage services provided by Daniel Brokerage Company to Webb-Crawford were not the consideration as to which a violation was found; brokerage partnership distributions were the illegal considerations. In *Independent Grocers Alliance Distributing Co. v. FTC*, 203 F.2d 941 (7th Cir. 1953), dividends and advertising allowances were found illegal. In *Broch, supra*, of course, the illegal consideration was a cash discount. But in none of the adjudicated 2(c) cases is the brokerage service itself the illegal consideration. In the more than 37 years since the enactment of Section 2(c), the Commission has litigated hundreds of cases charging violations of that section. In none of those cases has a buyer or seller

been held to violate the section on the theory that the brokerage services themselves could be the "thing of value" received "as a commission, brokerage, or other compensation, or * * * allowance or discount in lieu thereof."

In prior Section 2(c) litigation, the Commission consistently has regarded the "thing of value" as the payment received or entitled to be received by the broker as compensation for his services and has found a violation only where that thing of value was passed on to the buyer. As complaint counsel can point to no such passing on from respondent brokers to respondent buyer of anything of value outside the legitimate brokerage function, another essential element of proof of a 2(c) violation is absent.

The Federal Trade Commission has jurisdiction of and over respondents and the subject matter of this proceeding.

ORDER

It is ordered, That respondents' motion for summary decision be, and the same hereby is, granted.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed in its entirety.

Appearances

For the Commission: *Lewis F. Parker, Francis C. Mayer, James C. Donoghue, Martin A. Rosen, Louis R. Sernoff and Eliot G. Disner.*

For the respondents: *Simpson Thacher & Bartlett*, New York, N.Y. for H. C. Bohack Co., Inc. *Beverly & Frates*, West Palm Beach, Fla. for Henderson Distributing Co., Inc. and Vinson Henderson.

COMPLAINT IN DOCKET NO. 8787

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly described, have been and are violating the provisions of Subsection (c) of Section 2 of the Clayton Act, as amended, (15 U.S.C. Section 13) hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent H. C. Bohack Co., Inc., hereinafter referred to as "Bohack," is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 4825 Metropolitan Avenue, Brooklyn, N.Y.

PAR. 2. Respondent Bohack has been and is now engaged primarily in the retailing of food products and articles for personal and household use and operates a large number of retail supermarkets. As of Jan. 27, 1968,

Bohack operated approximately 166 supermarkets. Bohack's volume of business is substantial, totalling in excess of \$207 million annually.

PAR. 3. Respondent Henderson Distributing Co., Inc., hereinafter referred to as "Henderson Dist.," is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its office and principal place of business located at State Farmers Market, Pahokee, Fla.

Respondent Vinson Henderson, an individual, is president of corporate respondent Henderson Dist., and is located at the same address as said corporate respondent and owns all or substantially all of its stock. He formulates, directs and controls the acts, practices and policies of said corporate respondent, including the acts and practices hereinafter described.

PAR. 4. Respondent Henderson Dist. has been and is now engaged in business primarily as a "ground" or "field" broker effecting sales of fresh fruits and vegetables by sellers located in the State of Florida, and purchases by buyers located in various States of the United States other than the State of Florida. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of Henderson Dist., in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables, is substantial.

PAR. 5. Respondent Henderson Dist., in the course and conduct of its business as a "ground" or "field" broker, has been and is now effecting sales of fresh fruits and vegetables by sellers located in the State of Florida and purchases by buyers located in various States of the United States other than the State of Florida in commerce, as "commerce" is defined in the Clayton Act. Said respondent has transported or caused such products to be transported from the sellers' places of business to the buyers' places of business located in other states. Thus, there has been, at all times mentioned herein, a continuous course of trade in commerce in effecting purchases and sales of such products by said respondent Henderson Dist.

PAR. 6. In the course and conduct of its business for the past several years, respondent Bohack has purchased, distributed and resold, and is now purchasing, distributing and reselling, food products and other articles for personal and household use, including fresh fruits and vegetables, in commerce, as "commerce" is defined in the Clayton Act, which it purchased from sellers located in several States of the United States other than the State of New York in which respondent Bohack is located. Bohack purchases these food products, including fresh fruits and vegetables, and causes them to be transported from the growing

areas or packing plants of sellers located in various States of the United States to Bohack's warehouses and retail stores in the State of New York. Thus, there has been and is now a continuous course of trade in commerce in the purchase and resale of said food products by respondent Bohack.

PAR. 7. In the course and conduct of its business, respondent Bohack has been and is now utilizing the services of respondent Henderson Dist. as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. Respondent Henderson Dist. performs valuable services for respondent Bohack and other buyers by furnishing information concerning market conditions, by maintaining contact with various sellers, by inspecting and selecting specified qualities and quantities of fresh fruits and vegetables, by negotiating purchases of said products at the most favorable prices and by arranging pool car shipments from various sellers. Respondent Henderson Dist., in performing the services enumerated above, has been and is now acting as an agent or representative of respondent Bohack and other buyers. In such capacity, Henderson Dist. is subject to and under the direct or indirect control of Bohack and other buyers of fresh fruits and vegetables in transactions with sellers. In connection with such transactions, respondent Henderson Dist. has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

PAR. 8. Respondent Bohack and other buyers have received and are now receiving valuable "ground" or "field" broker services from respondent Henderson Dist. without paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, respondent Henderson Dist. has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondent Bohack and other buyers, or has been and is now subject to the direct or indirect control of respondent Bohack and other buyers.

PAR. 9. The aforesaid acts and practices of respondents and each of them in receiving and accepting, directly or indirectly, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof from sellers, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Commissioners Elman and Nicholson dissented and filed dissenting statements.*

Commissioners Dixon and MacIntyre filed separate statements.*

* For reasons of economy, the text of the dissenting statements of Commissioners Elman and Nicholson and the text of the separate statements of Commissioners Dixon and MacIntyre are not published herein. However, they appear at 81 F.T.C. 203-216, Docket 8789.

INITIAL DECISION [IN DOCKET 8787] ON RESPONDENTS' MOTION
FOR SUMMARY DECISION UNDER SECTION 3.24 OF THE COMMISSION'S
RULES OF PRACTICE BY RAYMOND J. LYNCH, ADMINISTRATIVE LAW JUDGE

JULY 30, 1973

PRELIMINARY STATEMENT

On July 10, 1969, the Commission issued a complaint in the above-entitled proceeding, charging the respondents with violations of Subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.¹ On June 26, 1972, respondents filed their answer to the complaint and denied the allegations contained therein. Pretrial conferences and discovery proceedings were held both on and off the record from May 22, 1972 to May 14, 1973. On June 4, 1973, respondents filed a motion for summary decision pursuant to Section 3.24 of the Commission's Rules of Practice. Counsel supporting the complaint, on June 18, 1973, filed a reply thereto. In addition, respondents' requests for admissions were answered by counsel supporting the complaint, briefs were filed and stipulation entered into between the parties.

The Complaint

The complaint alleges that:

In the course and conduct of its business, respondent Bohack has been and is now utilizing the services of respondent Henderson Dist. as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. Respondent Henderson Dist. performs valuable services for respondent Bohack and other buyers by furnishing information concerning market conditions, by maintaining contact with various sellers, by inspecting and selecting specified qualities and quantities of fresh fruits and vegetables, by negotiating purchases of said products at the most favorable prices and by arranging pool car shipments from various sellers. Respondent Henderson Dist., in performing the services enumerated above, has been and is now acting as an agent or representative of respondent Bohack and other buyers. In such capacity, Henderson Dist. is subject to and under the direct or indirect control of Bohack and other buyers of fresh fruits and vegetables in transactions with sellers. In connection with such transactions, respondent Henderson Dist. has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

Respondent Bohack and other buyers have received and are now receiving valuable "ground" or "field" broker services from respondent Henderson Dist. without paying, either directly, or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, respondent Henderson Dist. has been and is now collecting

¹ This matter was pending in United States District Court for the Northern District of Illinois and the Seventh Circuit Court of Appeals from Aug. 11, 1969 to Mar. 29, 1972.

and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondent Bohack and other buyers, or has been and is now subject to the direct or indirect control of respondent Bohack and other buyers, and that as a result of these business practices, respondents have violated Subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Admissions by Counsel Supporting the Complaint

Pursuant to respondents' request for admissions of complaint counsel's contentions of law and fact, counsel supporting the complaint admit that:

1. Buyer respondent does not own or have any financial or other interest in the business of either of the broker respondents, and does not in any way share in the profits or losses of either of the broker respondents.
2. No director, officer or employee of buyer respondent owns all or any part of either of the broker respondents, or has any financial or other interest in the business of either of the broker respondents or shares in any way in the profits or losses of either of the broker respondents.
3. No broker respondent is a director, officer, manager or shareholder of buyer respondent or other buyers; and no director, officer or employee of buyer respondent is a director, officer, manager or shareholder of either of the broker respondents.
4. There are no common officers, directors, shareholders, employees or other personnel between respondent brokers and respondent sellers.
5. Broker respondents have not entered into any express contract or agreement to act as an agent, representative or other intermediary of buyer respondent or other buyers or for or in behalf of, or subject to the direct or indirect control of buyer respondent or other buyers.
6. The broker respondents were independently owned and managed business entities which performed *bona fide* brokerage functions of benefit to both buyers and sellers; and were not so-called "dummy brokers." Except as to words "bona fide" and "and is not a so-called 'dummy broker' ." Neither admit or deny "bona fide" because term is not defined with specificity with respect to the words "brokerage functions" which it modifies. Admit "is not a so-called 'dummy broker' " as that term is defined in *FTC v. Henry Broch & Co.*, 363 U.S. 166, 168-169 (1960).
7. Complaint counsel expect to prove that the broker respondents acted as agent or representative for, or in behalf of or subject to the

direct or indirect control of respondent buyer and other buyers by inference from the following:

(a) That respondent buyer and other buyers have "utilized" the services of the respondent brokers as "ground" or "field" brokers in the purchase of fresh fruits and vegetables and usually not the services of other "ground" or "field" brokers.

(b) That the respondent brokers perform services which are valuable to respondent buyer and other buyers by (i) furnishing information concerning market conditions; (ii) maintaining contact with various sellers; (iii) inspecting and selecting specified qualities and quantities of fresh fruits and vegetables; and (iv) negotiating purchases of specified qualities and quantities of fresh fruits and vegetables.

8. Respondent buyer and other buyers have not paid brokerage or other compensation to the broker respondents and such brokerage has been paid by sellers.

9. Complaint counsel do not contend that the buyer respondent has received or accepted any monetary payments or anything of value other than benefits complaint counsel contend arise from broker respondents' performance of the functions referred to in Paragraph 7, *supra*.

10. Complaint counsel expect to offer no evidence that the acts and practices of respondents alleged in the complaint in this matter have resulted in price discrimination or may be substantially to lessen competition or tend to create a monopoly or injure, destroy or prevent competition. Complaint counsel do contend that the acts and practices alleged are unfair.

Stipulation of the Parties

In addition to the agreement of the parties with respect to the respondents' request for admissions and counsel supporting the complaint's reply thereto, for the purpose of presenting the legal issue, it was agreed that a stipulation would be entered into, which follows:

A. If, as a matter of law, complaint counsel must prove any one or more of the matters set forth in Paragraphs 1 through 6, then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

B. If, as a matter of law, complaint counsel must prove that buyer respondent has received or accepted any monetary payments or anything of value other than the services described in Paragraph 7(b) then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

C. If, as a matter of law, complaint counsel must prove that the acts and practices of respondents have resulted in price discrimination or may be substantially to lessen competition or tend to create a monopoly

or injure, destroy or prevent competition, then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

D. If, as a matter of law, the proposed evidence of complaint counsel set forth in Paragraph 7 of the admissions of complaint counsel does not establish that the broker respondents acted as agent, representative or other intermediary for, or in behalf of, or subject to the direct or indirect control of buyers, then there is no genuine issue as to material facts in this matter.

Contention of the Parties

Counsel supporting the complaint contend that Section 2(c) should be extended to apply to any situation in which it can be concluded, after analysis of the details of a broker's business and of the businesses of the sellers and buyers with whom he has done business, that the buyer realized greater benefits from the broker's services than did the seller. Complaint counsel contend that, on the basis of such a conclusion, it can be further implied that the broker was "acting in fact for or in behalf" of the buyer within the meaning of the statute and that, therefore, unless the buyer has paid any fee charged by the broker, the statute was violated.

Respondents' counsel contend that to establish a Section 2(c) violation, complaint counsel must show that one aspect of the transactions at issue was for the respondent buyer "to receive or accept" something of value "as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof." Complaint counsel, however, do not assert that the buyer has received or accepted any allowance or discount in lieu of brokerage commission or other compensation. Rather, they simply contend that the buyer receives benefits from various brokerage functions performed by the respondent brokers.

As a matter of statutory construction, the benefits inherent in the performance of brokerage functions cannot constitute something of value as "a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof." The "thing of value" referred to in Section 2(c) means something paid as *compensation* for brokerage services, not the benefits of the performance of the brokerage function or the brokerage services themselves. If the brokerage services themselves can constitute the "thing of value," then the whole clause is a meaningless redundancy because that "thing of value" is inherent in every transaction. To adopt complaint counsel's view would be to hold that Congress wrote a meaningless clause into Section 2(c).

The Issue

There is no dispute as to the *material facts* that prevent a determina-

tion of the legal issue to wit: based upon counsel supporting the complaint's admissions with respect to respondents' actions, would respondents' conduct be in violation of the Clayton Act?

FINDINGS OF FACT

Respondent H. C. Bohack Co., Inc., hereinafter referred to as "Bohack," is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 4825 Metropolitan Avenue, Brooklyn, N.Y.

Respondent Bohack has been and is now engaged primarily in the retailing of food products and articles for personal and household use and operates a large number of retail supermarkets. As of Jan. 27, 1968, Bohack operated approximately 166 supermarkets. Bohack's volume of business is substantial, totalling in excess of \$207 million annually.

Respondent Henderson Distributing Co., Inc., hereinafter referred to as "Henderson Dist.," is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its office and principal place of business located at State Farmers Market, Pahokee, Fla.

Respondent Vinson Henderson, an individual, is president of corporate respondent Henderson Dist. and is located at the same address as said corporate respondent and owns all or substantially all of its stock. He formulates, directs and controls the acts, practices and policies of said corporate respondent, including the acts and practices hereinafter described.

Respondent Henderson Dist. has been and is now engaged in business primarily as a "ground" or "field" broker effecting sales of fresh fruits and vegetables by sellers located in the State of Florida, and purchases by buyers located in various States of the United States other than the State of Florida. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of Henderson Dist., in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables, is substantial.

Respondent Henderson Dist., in the course and conduct of its business as a "ground" or "field" broker, has been and is now effecting sales of fresh fruits and vegetables by sellers located in the State of Florida and purchases by buyers located in various States of the United States other than the State of Florida in commerce, as "commerce" is defined in the Clayton Act. Said respondent has transported or caused such products to be transported from the sellers' places of business to the

buyers' places of business located in other states. Thus, there has been, at all times mentioned herein, a continuous course of trade in commerce in effecting purchases and sales of such products by said respondent Henderson Dist.

In the course and conduct of its business for the past several years, respondent Bohack has purchased, distributed and resold, and is now purchasing, distributing and reselling, food products and other articles for personal and household use, including fresh fruits and vegetables, in commerce, as "commerce" is defined in the Clayton Act, which it purchased from sellers located in several States of the United States other than the State of New York in which respondent Bohack is located. Bohack purchases these food products, including fresh fruits and vegetables, and causes them to be transported from the growing areas or packing plants of sellers located in various States of the United States to Bohack's warehouses and retail stores in the State of New York. Thus, there has been and is now a continuous course of trade in commerce in the purchase and resale of said food products by respondent Bohack.

Performance of Normal Brokerage Services

From the very adoption of the section, it has been recognized that both buyers and sellers benefit from performance of normal brokerage services by independent brokers and that the existence of such benefits is no legal or factual basis for inferring the existence of a relationship of agency between the broker and a buyer receiving such benefits. As the Commission said in *Great Atlantic and Pacific Tea Co.*, 26 F.T.C. 486, 506-507 (1930):

In the course of conducting his business a broker must and does also render services to buyers—but those services, unlike the services rendered to the respondent by its field buying agents, are not buying services. A broker is not employed by buyers. He is employed and paid by sellers as their selling agent and he represents his seller-principals only. His activities in connection with his representation of his seller-principals are controlled by them, but, paradoxically, because of the broker's anomalous position as an independent sales agent in business for himself, he does act for buyers in a sense and he is subject to a degree of control on their part.

This results from requests by buyers that brokers report complaints to their seller-principals, that brokers communicate cancellations of orders to their seller-principals, that brokers submit to their seller-principals offers of buyers to purchase commodities at prices stipulated by buyers, that brokers endeavor to make up "pool" cars of merchandise among several buyers so that the buyers may obtain the advantage of quantity prices and carload rates of freight, that brokers obtain quotations of prices from their seller-principals for the consideration of buyers, and, perhaps, in other ways. Naturally it is to the mutual interest and advantage of brokers and sellers to maintain the good will of their common customers, and brokers generally endeavor to comply with the reasonable requests of buyers along the lines indicated. In the course of negotiating sales from seller to buyer and bringing them into agreement brokers are necessarily guided somewhat by instructions from each, but in the essential particular of selling commodities and consum-

inating sales they act for and are controlled by the latter alone, who in the absence of a contract may discharge them and substitute new brokers in their places at any time.

Complaint counsel contend that respondent buyer usually uses the services of the respondent brokers rather than the services of other brokers in the purchase of fresh fruits and vegetables. This fact, if true, hardly establishes agency. It is certainly not unusual for a buyer to do business more frequently with one supplier than another and the fact that he does so does not establish that the supplier he selects is his agent. It certainly was not the intention of the statute to require a buyer to spread his business among several brokers. In fact, in *Tillie Lewis Foods, Inc., et al*, 65 F.T.C. 1099, 1136 (1964), the Commission expressly approved the seller's payment of brokerage to a broker, Bushey & Wright, on sales to a large buyer with whom the broker had had a "personal relationship" for many years dating back to the time when the buyer and broker were the same entity.

The "field broker" aspect of *Tillie Lewis Foods, supra*, is particularly enlightening as to the lack of probity, for the purpose of establishing agency, of the facts relied on by complaint counsel. The Commission, in holding that seller payment of brokerage did not violate Section 2(c), described the broker's activity in a discussion which shows that brokerage services which benefit both buyers and sellers do not establish a violation of Section 2(c):

* * * the local broker and the purchaser are generally located at considerable distances from the canners. A small canner, with a limited or no sales force, is thus unable to make known to these potential purchasers information concerning his production capabilities and the stock which he has available. On the other hand, the field broker, by reason of his location and constant contact with all canners in his area, maintains this information on a current basis. Through bulletins, letters and principally by telephone, he relays this information regularly to numerous local brokers. The field broker, upon receipt of an order from a local broker or direct purchaser, may split the order up among several small canners and coordinate the pooling of each canner's share in shipment to the purchaser. The seller compensates the field broker for these services by a commission which is usually indicated as a deduction on the invoice. [65 F.T.C. at 1132]

These findings as to the legitimate brokerage functions of shipping point brokers which are not violative of Section 2(c) are sufficiently close to a number of the admitted contentions of Paragraph 7 of the admissions as to demonstrate that the contentions themselves, even if established, would not, under Commission precedents, carry the burden necessary to sustain a violation here.

In short, the facts by which complaint counsel seek to establish agency of the broker respondents for buyers are nothing more than a description of the functions necessarily and historically performed by brokers acting as independent intermediaries bringing buyer and seller together. It is the essence of the business operations of independent brokers that they negotiate sales transactions and, in the course of such

Initial Decision

negotiations, perform acts beneficial to both buyer and seller. But, in the absence of circumstances evidencing the kind of control by the buyer over the broker contemplated by Section 2(c), the factual contentions of complaint counsel set forth in Paragraph 7 of the request for admissions are totally inadequate to establish that a broker is either an agent of a buyer or in violation of Section 2(c).

Complaint counsel's approach to proof of an agency relationship which violates Section 2(c) is highly unrealistic and ignores the economic realities of the brokerage business. Because it is unrealistic, it would be impossible to apply the approach fairly and predictably. As a result, the threat of a 2(c) proceeding against any buyer or seller who deals with an independent broker would cause buyers and sellers to cease to do business with independent brokers.

Complaint counsel's approach to proof of a 2(c) violation ignores the essential economic character of brokers as intermediaries who promote trade by bringing buyers and sellers together and who act for their own interest in earning a fee and not as the representative of either party to the transaction. In some transactions, the broker may first be approached by a seller to find an outlet for the seller's goods; in others, the broker may be first approached by a buyer seeking a source of supply. In all instances, both buyers and sellers will benefit from the transaction. Both will receive information concerning conditions in the market and the availability of goods. Both will, by utilizing the services of the broker, save expense which they would otherwise have borne. The seller, for example, will have saved the expense of making his own sales calls and the buyer will have saved the expense of making his own buying calls direct to the sellers. Both will benefit from any negotiation the broker may have carried on to bring about a price favorable to both parties. Thereafter, both will benefit in the event of claims by one or the other; the broker, in the interest of protecting the fee which he has earned and of protecting his relationships with both parties for the future, will mediate and seek to resolve the controversy to the satisfaction of both parties. In every aspect of the brokerage function, the point is the same; both parties benefit from the services of an independent broker, but the broker performs the services for his own purpose, which is to consummate the transaction and obtain his commission.

It is no answer to suggest that independent brokers drop the contested services. The services are intrinsic to the brokerage function. Other types of middlemen engaged in distribution provide a variety of services to benefit both buyers and sellers and thereby encourage them to do business with them. These include all of the same types of benefit complaint counsel allege in this case to be the basis for implying agency. If, because of the rule of law being proposed by complaint counsel, these

broker respondents and other independent brokers could not provide such benefits, they, of course, would not be competitive with other forms of distribution such as commission merchants, wholesalers, the seller's own sales force and the like, and would, in time, disappear from the competitive arena.

CONCLUSIONS

The legislative history of Section 2(c) demonstrates conclusively that the only purpose of the statute is to prevent price discrimination among customers of the same seller which arises when the seller pays brokerage direct to a buyer or indirectly to the buyer through a dummy or nominee broker of the buyer. The effect of this legislative history upon the proper construction of the statute has, furthermore, been confirmed by the United States Supreme Court in *Federal Trade Commission v. Henry Broch & Co.*, 363 U.S. 166 (1960). That case involved a preferential allowance granted by a seller direct to a buyer in lieu of brokerage. The allowance was found to have resulted in a price discrimination in favor of the buyer and to be, therefore, within the prohibitive scope of Section 2(c). With respect to the proper construction of Section 2(c), the Court affirmed that:

The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power. [363 U.S. at 168]

It further affirmed with respect to Section 2(c) that:

One of the favorite means of obtaining an indirect concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act. But it was not the only means by which the brokerage function was abused and Congress in its wisdom phrased § 2(c) broadly, * * * to cover * * * all other means by which brokerage could be used to effect price discrimination. [363 U.S. at 169]

A summary decision for respondents is appropriate even though complaint counsel state in response to the request for admissions that they intend to claim that payment of brokerage by sellers in the circumstances of this case is unfair. The basis for this claim is unclear, although apparently complaint counsel believe buyers receive greater benefits from the services of these brokers than do sellers. This belief is, in the opinion of the administrative law judge, unfounded. In any event, it is quite immaterial to this proceeding because this proceeding is brought under Section 2(c) of the Robinson-Patman Act, not under Section 5 of the Federal Trade Commission Act. Section 2(c) is not and was never intended to be a vehicle through which the Federal Trade Commission would substitute its judgments for those of the market place to determine when independent brokers should be paid and by whom. The Commission's only function under Section 2(c) is to deter-

mine whether an abuse of brokerage exists which results or is likely to result in price discrimination; there is no such result or likelihood of such a result involved in this proceeding.

To establish a Section 2(c) violation, complaint counsel must show that one aspect of the transactions at issue was for the respondent buyer "to receive or accept" something of value "as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof." Complaint counsel, however, do not assert that the buyer has received or accepted any allowance or discount in lieu of brokerage commission or other compensation. Rather, they simply contend that the buyer receives benefits from various brokerage functions performed by the respondent brokers. The "thing of value" referred to in Section 2(c) means something paid as *compensation* for brokerage services, not the benefits of the performance of the brokerage function or the brokerage services themselves. If the brokerage services themselves can constitute the "thing of value," then the whole clause is a meaningless redundancy because that "thing of value" is inherent in every transaction.

Review of the full range of cases decided under Section 2(c) reveals no support for complaint counsel's theory. For example, in *Webb-Crawford Co., et al. v. F.T.C.*, 109 F.2d 268 (5th Cir. 1940), the brokerage services provided by Daniel Brokerage Company to Webb-Crawford were not the consideration as to which a violation was found; brokerage partnership distributions were the illegal considerations. In *Independent Grocers Alliance Distributing Co.*, 203 F.2d 941 (7th Cir. 1953), dividends and advertising allowances were found illegal. In *Broch, supra*, of course, the illegal consideration was a cash discount. But in none of the adjudicated 2(c) cases is the brokerage service itself the illegal consideration. In the more than 37 years since the enactment of Section 2(c), the Commission has litigated hundreds of cases charging violations of that section. In none of those cases has a buyer or seller been held to violate the section on the theory that the brokerage services themselves could be the "thing of value" received "as a commission, brokerage, or other compensation, or* * * allowance or discount in lieu thereof."

In prior Section 2(c) litigation, the Commission consistently has regarded the "thing of value" as the payment received or entitled to be received by the broker as compensation for his services and has found a violation only where that thing of value was passed on to the buyer. As complaint counsel can point to no such passing on from respondent brokers to respondent-buyer of anything of value outside the legitimate brokerage function, another essential element of proof of a 2(c) violation is absent.

The Federal Trade Commission has jurisdiction of and over respondents and the subject matter of this proceeding.

ORDER

It is ordered, That respondents' motion for summary decision be, and the same hereby is, granted.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed in its entirety.

Appearances

For the Commission: *Louis R. Sernoff, Lewis F. Parker, Francis C. Mayer, Martin A. Rosen, James C. Donoghue and Eliot G. Disner.*

For the respondents: *McDermott, Will & Emery, Chicago, Ill. for Jewel Companies, Inc. Collier, Shannon, Rill & Edwards, Wash., D.C. for Jack Stires, Inc. and John C. Stires II.*

COMPLAINT IN DOCKET NO. 8788

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly described, have been and are violating the provisions of Subsection (c) of Section 2 of the Clayton Act, as amended, (15 U.S.C. Section 13) hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Jewel Companies, Inc., hereinafter referred to as "Jewel" is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 135 South LaSalle Street, Chicago, Ill.

PAR. 2. Respondent Jewel has been and is now engaged primarily in the retailing of food products and other articles for personal and household use and operates a large number of retail stores, including supermarkets, grocery stores, drugstores, department stores, retail pantries and home service routes. As of January 29, 1968, Jewel operated approximately 364 grocery stores in various States of the United States. Respondent Jewel is also engaged in the wholesale food business. Jewel's volume of business is substantial, totalling in excess of \$1.2 billion annually.

PAR. 3. Respondent Jewel, in the operation of its retail and wholesale food business, purchases large quantities of fresh fruits and vegetables from numerous sellers located throughout the United States for resale to its customers. Most of these fresh fruits and vegetables are purchased by J.E. Perishables, a division of respondent Jewel, with offices located at 1955 West North Avenue, Melrose Park, Ill.

PAR. 4. Respondent Jack Stires, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State

of California with its office and principal place of business located at 795 Desert Gardens Drive, El Centro, Calif.

Respondent John C. Stires II, an individual, is president of corporate respondent Jack Stires, Inc., and is located at the same address as said corporate respondent and owns all or substantially all of its stock. He formulates, directs and controls the acts, practices and policies of said corporate respondent, including the acts and practices hereinafter described.

PAR. 5. Respondent Jack Stires, Inc. has been and is now engaged in business primarily as a "ground" or "field" broker effecting sales of fresh fruits and vegetables by sellers located in the States of California and Arizona, and purchases by buyers located in various States of the United States other than the States of California and Arizona. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of Jack Stires, Inc. in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables is substantial.

PAR. 6. Respondent Jack Stires, Inc., in the course and conduct of its business as a "ground" or "field" broker, has been and is now effecting sales of fresh fruits and vegetables by sellers located in the States of California and Arizona and purchases by buyers located in various States of the United States other than the States of California and Arizona in commerce, as "commerce" is defined in the Clayton Act. Said respondent has transported or caused such products to be transported from the sellers' places of business to the buyers' places of business located in other states. Thus, there has been, at all times mentioned herein, a continuous course of trade in commerce in effecting purchases and sales of such products by said respondent Jack Stires, Inc.

PAR. 7. In the course and conduct of its business for the past several years, respondent Jewel has purchased, distributed and resold, and is now purchasing, distributing and reselling, food products and other articles for personal and household use, including fresh fruits and vegetables, in commerce, as "commerce" is defined in the Clayton Act, which it purchased from sellers located in several States of the United States other than the State of Illinois in which respondent Jewel is located. Jewel purchases fresh fruits and vegetables and causes them to be transported from the growing areas or packing plants of sellers located in various States of the United States to Jewel's warehouses and retail stores in the State of Illinois and various other States in the United States. Thus, there has been and is now a continuous course of

trade in commerce in the purchase and resale of said food products by respondent Jewel.

PAR. 8. In the course and conduct of its business, respondent Jewel has been and is now utilizing the services of respondent Jack Stires, Inc. as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. Respondent Jack Stires, Inc. performs valuable services for respondent Jewel and other buyers by furnishing information concerning market conditions, by maintaining contact with various sellers, by inspecting and selecting specified qualities and quantities of fresh fruits and vegetables and by negotiating purchases of said products at the most favorable prices. Respondent Jack Stires, Inc., in performing the services enumerated above, has been and is now acting as an agent or representative of respondent Jewel and other buyers. In such capacity, Jack Stires, Inc. is subject to and under the direct or indirect control of Jewel and other buyers of fresh fruits and vegetables in transactions with sellers. In connection with such transactions, respondent Jack Stires, Inc. has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

In addition, respondent Jewel has been and is now utilizing the services of John P. Storm, a California corporation, located at 314 E. John Street, Salinas, Calif., as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. In such capacity, John P. Storm performs the same or substantially the same services for respondent Jewel as those performed by Jack Stires, Inc. for respondent Jewel, described above, while acting as an agent or representative of respondent Jewel and subject to and under the direct or indirect control of respondent Jewel in transactions with sellers. In connection with such transactions, John P. Storm has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

PAR. 9. Respondent Jewel and other buyers have received and are now receiving valuable "ground" or "field" broker services from respondent Jack Stires, Inc. without paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, respondent Jack Stires, Inc. has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondent Jewel and other buyers, or has been and is now subject to the direct or indirect control of respondent Jewel and other buyers.

Moreover, respondent Jewel has received and is now receiving valuable "ground" or "field" broker services from John P. Storm without

paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, John P. Storm has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondent Jewel or has been and is now subject to the direct or indirect control of respondent Jewel.

PAR. 10. The aforesaid acts and practices of respondents and each of them in receiving and accepting, directly or indirectly, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof from sellers, are in violation of Subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Commissioners Elman and Nicholson dissented and filed dissenting statements.*

Commissioners Dixon and MacIntyre filed separate statements.*

INITIAL DECISION [IN DOCKET 8788] BY ANDREW C. GOODHOPE,
ADMINISTRATIVE LAW JUDGE

AUGUST 1, 1973

PRELIMINARY STATEMENT

The complaint in this matter was issued by the Commission on July 10, 1969. Thereafter extended litigation took place both in the courts and before the Commission itself. On June 2, 1972, respondents filed answers to the complaint in which they admitted certain allegations in the complaint but denied that they had violated Section 2(c) of the Robinson-Patman Act as alleged in the complaint. The matter was assigned to the undersigned administrative law judge on Apr. 13, 1973. Extensive pretrial preparations have been made and on June 4, 1973, the respondents filed a motion for summary decision pursuant to Section 3.24 of the Rules of Practice of the Commission. This motion was predicated upon respondents' request for admissions of complaint counsel's contentions of law and fact, the response of complaint counsel to such request and a stipulation entered into between complaint counsel and counsel for the respondents, all of which are a part of the record herein. The respondents' motion for summary decision and opposition thereto have been fully briefed. Based upon the complaint, respondents' answers thereto, the request for admissions and the response thereto and the stipulation entered into between the parties, the administrative law judge makes the following findings of fact.

*For reasons of economy, the text of the dissenting statements of Commissioners Elman and Nicholson and the text of the separate statements of Commissioners Dixon and MacIntyre are not published herein. However, they appear at 81 F.T.C. 203-216, Docket 8789.

FINDINGS OF FACT

1. Respondent Jewel Companies, Inc. (Jewel) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 135 S. LaSalle Street, Chicago, Ill.

2. Respondent Jewel is primarily engaged in the retailing of food products and other articles for personal and household use which it sells through a large number of retail stores, including supermarkets, grocery stores, drug stores, department stores, retail pantries and home service routes. As of Jan. 29, 1968, Jewel operated approximately 364 grocery stores in the United States. It is also engaged in the wholesale food business. Its volume of business is substantial, totaling in excess of one billion dollars annually.

3. Respondent Jewel purchases large quantities of fresh fruits and vegetables from numerous sellers throughout the United States for resale through its retail stores and to other retailers. Most of these purchases are made by J.E. Perishables, a division of Jewel, located in Melrose Park, Ill.

4. Respondent Jack Stires, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal place of business located at 795 Desert Gardens Drive, El Centro, Calif.

5. Respondent John C. Stires II is an individual and president of corporate respondent Jack Stires, Inc., owns substantially all of its stock and formulates, directs and controls the acts, practices and policies of Jack Stires, Inc., including the acts and practices hereinafter described.

6. Respondent Jack Stires, Inc. has been and is now engaged in business primarily as a "ground" or "field" broker effecting sales of fresh fruits and vegetables by sellers located in the States of California and Arizona, and purchases by buyers located in various States of the United States other than the States of California and Arizona. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of Jack Stires, Inc. in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables is substantial.

7. Respondent Jewel and respondent Jack Stires, Inc. are both engaged in commerce as "commerce" is defined in the Clayton Act.

Admissions

As a result of respondents' request for admissions and complaint counsel's response thereto:

1. Buyer respondent does not own or have any financial or other interest in the business of either of the broker respondents, and does not in any way share in the profits or losses of either of the broker respondents.

2. No director, officer or employee of buyer respondent owns all or any part of either of the broker respondents, or has any financial or other interest in the business of either of the broker respondents or shares in any way in the profits or losses of either of the broker respondents.

3. No broker respondent is a director, officer, manager or shareholder of buyer respondent or other buyers; and no director, officer or employee of buyer respondent is a director, officer, manager or shareholder of either of the broker respondents.

4. There are no common officers, directors, shareholders, employees or other personnel between respondent brokers and respondent buyers.

5. Broker respondents have not entered into any express contract or agreement to act as an agent, representative or other intermediary of buyer respondent or other buyers or for or in behalf of, or subject to the direct or indirect control of buyer respondent or other buyers.

6. The broker respondents were independently owned and managed business entities which performed *bona fide* brokerage functions of benefit to both buyers and sellers; and were not so-called "dummy brokers."

7. Complaint counsel expect to prove that the broker respondents acted as agent or representative for, or in behalf of or subject to the direct or indirect control of respondent buyer and other buyers by inference from the following:

(a) That respondent buyer and other buyers have "utilized" the services of the respondent brokers as "ground" or "field" brokers in the purchase of fresh fruits and vegetables and usually not the services of other "ground" or "field" brokers.

(b) That respondent brokers perform services which are valuable to respondent buyer and other buyers by (i) furnishing information concerning market conditions, (ii) maintaining contact with various sellers, (iii) inspecting and selecting specified qualities and quantities of fresh fruits and vegetables and (iv) negotiating purchases of specified qualities and quantities of fresh fruits and vegetables.

8. Respondent buyers and other buyers have not paid brokerage or other compensation to the broker respondents and such brokerage has been paid by sellers.

9. Complaint counsel does not contend that the buyer respondents have received or accepted any monetary payments or anything of value other than benefits complaint counsel contend arise from broker respondents' performance of the functions referred to in Paragraph 7, *supra*.

10. Complaint counsel expect to offer no evidence that the acts and practices of respondent alleged in the complaint in this matter have resulted in price discrimination or may be substantially to lessen competition or tend to create a monopoly or injure, destroy or prevent competition. Complaint counsel do contend that the acts and practices alleged are unfair.

At the same time as making the admissions set forth above, complaint counsel entered into a stipulation with counsel for the respondents as follows:

A. If, as a matter of law, complaint counsel must prove any one or more of the matters set forth in Paragraphs 1 through 6, then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

B. If, as a matter of law, complaint counsel must prove that buyer respondent has received or accepted any monetary payments or anything of value other than the services described in Paragraph 7(b) then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

C. If, as a matter of law, complaint counsel must prove that the acts and practices of respondents have resulted in price discrimination or may be substantially to lessen competition or tend to create a monopoly or injure, destroy or prevent competition, then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

D. If, as a matter of law, the proposed evidence of complaint counsel set forth in Paragraph 7 of the admissions of complaint counsel does not establish that the broker respondents acted as agent, representative or other intermediary for, or in behalf of, or subject to the direct or indirect control of sellers, then there is no genuine issue as to material facts in this matter.

Paragraphs 8 and 9 of the complaint charge the two corporate respondents and the individual respondent with violations of Section 2(c) of the Clayton Act as follows:

PARAGRAPH EIGHT: In the course and conduct of its business, respondent Jewel has been and is now utilizing the services of respondent Jack Stires, Inc. as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. Respondent Jack Stires, Inc. performs valuable services for respondent Jewel and other buyers by (1) furnishing information concerning market conditions, by (2) maintaining contact with various sellers, (3) by inspecting and selecting specified qualities and quan-

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ties of fresh fruits and vegetables and by (4) negotiating purchases of said products at the most favorable prices. Respondent Jack Stires, Inc., in performing the services enumerated above, has been and is now acting as an agent or representative of respondent Jewel and other buyers. In such capacity, Jack Stires, Inc. is subject to and under the direct or indirect control of Jewel and other buyers of fresh fruits and vegetables in transactions with sellers. In connection with such transactions, respondent Jack Stires, Inc. has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

In addition, respondent Jewel has been and is now utilizing the services of John P. Storm, a California corporation, located at 314 E. John Street, Salinas, California, as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. In such capacity, John P. Storm performs the same or substantially the same services for respondent Jewel as those performed by Jack Stires, Inc. for respondent Jewel, described above, while acting as an agent or representative of respondent Jewel and subject to and under the direct or indirect control of respondent Jewel in transactions with sellers. In connection with such transactions, John P. Storm has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

PARAGRAPH NINE: Respondent Jewel and other buyers have received and are now receiving valuable "ground" or "field" broker services from respondent Jack Stires, Inc. without paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, respondent Jack Stires, Inc. has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondent Jewel and other buyers, or has been and is now subject to the direct or indirect control of respondent Jewel and other buyers.

Moreover, respondent Jewel has received and is now receiving valuable "ground" or "field" broker services from John P. Storm without paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, John P. Storm has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondent Jewel or has been and is now subject to the direct or indirect control of respondent Jewel.

Discussion

Complaint counsel assert that a violation of Section 2(c) occurs whenever a broker paid by a seller performs brokerage functions of benefit to buyer as well as seller. They assert that the brokerage functions themselves as described in Paragraph 7 of the request for admissions can supply each of the necessary elements to prove a violation.

Complaint counsel have admitted that they have no proof of price discrimination or competitive injury and that there are no contractual, financial or employment ties between respondent Jewel and respondent Jack Stires, Inc.

With this as a starting point, complaint counsel apparently argue that there is some sort of a fiduciary or agency relationship between Jewel and Jack Stires, Inc. which is violated in some fashion by Jack Stires, Inc. performing certain brokerage functions which have some value to

the respondent Jewel. Complaint counsel cite no cases to support such a theory and there is nothing in the legislative history or in the actual language of Section 2(c) itself to support such a theory.

In short, complaint counsel have asserted that the performance of normal brokerage functions can itself establish that brokers are acting on behalf of buyers and that therefore the respondent Jewel should pay any fees, brokerage or salary that such brokers earn rather than the sellers of the products in question. If they do not, it is urged that Jewel and Jack Stires, Inc. both have violated Section 2(c) of the Clayton Act, as amended.

Complaint counsel rely heavily on *Rangen, Inc. et al. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), and *Fitch v. Kentucky-Tennessee Light and Power Co.*, 136 F.2d 12 (6th Cir. 1943). Neither of these cases is in point since each involves commercial bribery and is decided in terms of breach of fiduciary obligation. Indeed both of these cases were decided on the basis of a particular breach of obligation which was the very form of misconduct Section 2(c) was enacted to prevent.

All of the remaining cases involving Section 2(c) are cases where it was proven or admitted that the broker was the actual agent of the buyer or was owned by the buyer or under contract to the buyer and consequently under the buyer's control. In *FTC v. Herzog*, 150 F.2d 450 (2d Cir. 1945), the broker there involved admitted that he was acting as an agent of buyers while receiving brokerage from sellers. Likewise, in *Biddle Purchasing Co. v. FTC*, 96 F.2d 687 (2d Cir. 1938), the broker there involved had entered into a written contract with the buyers to act for them as purchasing agent and to represent their best interests in all dealings with sellers.

In these proceedings, there is no allegation that the brokers are agents or employees of the buyer; rather they are admittedly independent. Furthermore, there is no intention on the part of complaint counsel to prove that brokerage was passed on to the buyer as brokerage or by any subterfuge designed to deliver brokerage to the buyer. Complaint counsel propose to offer no evidence whatsoever that the brokers acted for or in behalf of or under the control of the buyer pursuant to any prearrangement of any kind or any contract, ownership, employment or other contractual relationship between the brokers and the buyer. Instead, it is admitted by complaint counsel that the brokers are independent intermediaries, that they render services of benefit to both buyer and sellers and that the only basis for inferring either that they acted for or under the control of buyer or that brokerage was passed on to the buyer is the fact that the buyer realized certain benefits from doing business with them. Such benefits always occur

when one businessman does business with another and does not raise any factual inference either of agency or of a passing on of brokerage directly or indirectly as a subterfuge. The lack of probative value and the total legality of such benefits was recognized by the Commission as early as the *A&P* decision and as recently as *Tillie Lewis Foods*.¹

These two cases are dispositive of the issue presented by respondents' motion for summary decision. The factual situations in both cases were virtually identical to the situation in this proceeding. In 1930, the Commission said in the *A&P* case:

In the course of conducting his business a broker must and does also render services to buyers—but those services, unlike the services rendered to the respondent by its field buying agents, are not buying services. A broker is not employed by buyers. He is employed and paid by sellers as their selling agent and he represents his seller-principals only. His activities in connection with his representation of his seller-principals are controlled by them, but, paradoxically, because of the broker's anomalous position as an independent sales agent in business for himself, he does act for buyers in a sense and he is subject to a degree of control on their part.

This results from requests by buyers that brokers report complaints to their seller-principals, that brokers communicate cancellations of orders to their seller principals, that brokers submit to their seller-principals offers of buyers to purchase commodities at prices stipulated by buyers, that brokers endeavor to make up "pool" cars of merchandise among several buyers so that the buyers may obtain the advantage of quantity prices and carload rates of freight, that brokers obtain quotations of prices from their seller-principals for the consideration of buyers, and, perhaps, in other ways. Naturally it is to the mutual interest and advantage of brokers and sellers to maintain the good will of their common customers, and brokers generally endeavor to comply with the reasonable requests of buyers along the lines indicated. In the course of negotiating sales from seller to buyer and bringing them into agreement brokers are necessarily guided somewhat by instructions from each, but in the essential particular of selling commodities and consummating sales they act for and are controlled by the latter alone, who in the absence of a contract may discharge them and substitute new brokers in their places at any time.

Again in 1964, the Commission affirmed the propriety of the activities of field brokers in the *Tillie Lewis Foods* case as follows:

* * * the local broker and the purchaser are generally located at considerable distances from the canners. A small canner, with a limited or no sales force, is thus unable to make known to these potential purchasers information concerning his production capabilities and the stock which he has available. On the other hand, the field broker, by reason of his location and constant contact with all canners in his area, maintains this information on a current basis. Through bulletins, letters and principally by telephone, he relays this information regularly to numerous local brokers. The field broker, upon receipt of an order from a local broker or direct purchaser, may split the order up among several small canners and coordinate the pooling of each canner's share in shipment to the purchaser. The seller compensates the field broker for these services by a commission which is usually indicated as a deduction on the invoice.

Complaint counsel's approach to proof of a Section 2(c) violation ignores the character of brokers as intermediaries who promote trade

¹ In the *Matter of Great Atlantic and Pacific Tea Co.*, FTC Docket 3031, 26 F.T.C. 486 (1930); In the *Matter of Tillie Lewis Foods, Inc.*, FTC Docket 7226, 65 F.T.C. 1099, 1131 (1964).

by bringing buyers and sellers together and who act for their own interest in earning a fee and not as the representative of either party to the transaction. In some transactions, the broker may first be approached by a seller to find an outlet for the seller's goods; in others, the broker may be first approached by a buyer seeking a source of supply. In all instances, both buyers and sellers will benefit from the transaction. Both will receive information concerning conditions in the market and the availability of goods. Both will, by utilizing the services of the broker, save expense which they would otherwise have borne. The seller, for example, will have saved the expense of making his own buying calls direct on the buyers. Both will benefit from any negotiation the broker may have carried on to bring about a price favorable to both parties. Thereafter, both will benefit in the event of claims by one or the other. The broker, in the interest of protecting the fee which he has earned and of protecting his relationships with both parties for the future, will mediate and seek to resolve the controversy to the satisfaction of both parties. In every aspect of the brokerage function, the point is the same; both parties benefit from the services of an independent broker, but the broker performs the services for his own purpose, which is to consummate the transaction and obtain his commission.

It is no answer to suggest that independent brokers drop the contested services. The services are intrinsic to the brokerage function. Other types of middlemen engaged in distribution provide a variety of services to benefit both buyers and sellers and thereby encourage them to do business with them. These include all of the same types of benefit complaint counsel allege in this case to be the basis for implying agency. If, because of the rule of law being proposed by complaint counsel, Jack Stires, Inc. and other independent brokers could not provide such benefits, they, of course, would not be competitive with other forms of distribution such as commission merchants, wholesalers, the seller's own sales force and the like and would, in time, disappear from the competitive arena.

The contention of complaint counsel that the "thing of value" referred to in Section 2(c) includes the brokerage services which the brokers performed constitutes something as compensation which was given to the respondent must be rejected. A review of the cases decided under Section 2(c) supplies no support for this theory. In every case, the "thing of value" paid as compensation was actual cash which could be computed from the transactions there involved. In no case has the "thing of value" been equated in terms of activities inherently incidental to the performance of the brokerage function.

Furthermore, the legislative history of Section 2(c) as pointed out by the Supreme Court in *FTC v. Brock & Co.*, 363 U.S. 166 (1960), makes

it clear that the thrust of the section was to prevent price discrimination among customers of the same seller which arises when the seller pays brokerage direct to a buyer or indirectly to a buyer through a dummy broker or other representative of the buyer. In *Broch*, the Court stated (p. 168) that:

The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.

And further, the Court affirmed with respect to Section 2(c) (p. 169) that:

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

As recently as 1967, the Commission has pointed out in an opinion, *In the Matter of Modern Marketing Services, Inc.*, FTC Docket 3783, 71 F.T.C. 1676 (1968):

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

Complaint counsel have admitted that in this case there is neither price discrimination nor competitive injury.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the respondents and over the subject matter involved in this proceeding.
2. From the above discussion, it is concluded that respondents' motion for summary decision must be granted and the complaint dismissed.

ORDER

It is ordered, That respondents' motion for summary decision be, and the same hereby is, granted.

It is further ordered, That the complaint herein be, and the same thereby is, dismissed.

It is further ordered, That request for oral argument upon this motion for summary decision be denied.

DOCKET NO. 8789—BORMAN FOOD STORES, INC.

Appearances

For the Commission: *Louis R. Sernoff, Lewis F. Parker, Francis C. Mayer, Martin A. Rosen, James C. Donoghue and Eloit G. Disner.*

For the respondent: *Arent, Fox, Kintner, Plotkin & Kahn*, Wash., D.C. and *Friedman, Meyers & Keyes*, Detroit Mich.

INITIAL DECISION BY ANDREW C. GOODHOPE, ADMINISTRATIVE
LAW JUDGE

JULY 30, 1973

PRELIMINARY STATEMENT

The complaint in this matter was issued by the Commission on July 10, 1969. Thereafter extended litigation took place both in the courts and before the Commission itself. On June 2, 1972, respondent filed an answer to the complaint in which it admitted certain allegations in the complaint but denied that it had violated Section 2(c) of the Robinson-Patman Act as alleged in the complaint. The matter was assigned to the undersigned administrative law judge on Apr. 13, 1973. Extensive pretrial preparations have been made and on June 4, 1973, the respondent filed a motion for summary decision pursuant to Section 3.24 of the Rules of Practice of the Commission. This motion was predicated upon respondent's request for admissions of complaint counsel's contentions of law and fact, the response of complaint counsel to such request and a stipulation entered into between complaint counsel and counsel for the respondent, all of which are a part of the record herein. The respondent's motion for summary decision and opposition thereto have been fully briefed. Based upon the complaint, respondent's answer thereto, the request for admissions and the response thereto and the stipulation entered into between the parties, the administrative law judge makes the following findings of fact.

FINDINGS OF FACT

1. Respondent Borman Food Stores, Inc. (Bormans) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan with its office and principal place of business located at 12300 Mark Twain, Detroit, Mich.

2. Bormans is primarily a food retailer and sells other articles for personal and household use through a substantial number of retail stores, including supermarkets, drugstores and department stores. Its total volume of business was in excess of 300 million dollars as of Jan. 1968.

3. Bormans is engaged in commerce, as "commerce" is defined in the Clayton Act.

4. The P & R Brokerage Co. (P & R) is a California partnership located in Salinas, Calif.

5. P & R was and is now engaged in business primarily as a ground and field broker effecting sales of fresh fruits and vegetables by sellers located in California and purchased by buyers in various States of the United States. In such capacity, P & R has been paid commissions, brokerage or other compensation in connection with the effecting of purchases and sales of fresh fruits and vegetables by the sellers of such products.

Admissions

As a result of respondent's request for admissions and complaint counsel's response thereto:

1. The respondent Bormans does not own or have any financial interest in the business of P & R and does not in any way share in the profits or losses of P & R.

2. No director, officer or employee of Bormans owns all or any part of P & R, or has any financial or other interest in the business of P & R or shares in any way in the profits or losses of P & R.

3. Neither P & R nor any person associated with P & R is a director, officer, manager or shareholder of Bormans or any other buyer and no director, officer or employee of Bormans is a director, officer, manager or shareholder of P & R.

4. There are no common officers, directors, shareholders, employees or other personnel between Bormans and P & R.

5. P & R has not entered into any express contract or agreement to act as an agent, representative or other intermediary for or in behalf of, or subject to the direct or indirect control of, Bormans or any other buyer.

6. P & R is an independently owned and managed business entity which performed brokerage functions of benefit to both buyers and sellers and is not a so-called "dummy broker."

7. Complaint counsel expect to prove that P & R acted as an agent or representative for or in behalf of or subject to the direct or indirect control of Bormans and other buyers by interference from the following:

(a) That Bormans and other buyers have "utilized" the services of P & R as "ground" or "field" brokers in the purchase of fresh fruits and vegetables and usually not the services of other "ground" or "field" brokers.

(b) That P & R has performed services which are valuable to Bormans and other buyers by (i) furnishing information concerning market conditions, (ii) maintaining contact with various sellers, (iii) inspecting and selecting specified qualities and quantities of fresh fruits and vegetables and (iv) negotiating purchases of specified qualities and quantities of fresh fruits and vegetables.

8. Bormans and other buyers have not paid brokerage or other compensation of P & R and such brokerage has been paid by sellers.

9. Complaint counsel do not contend that Bormans has received or accepted any monetary payments or anything of value other than benefits complaint counsel contend arise from P & R's performance of the functions referred to in Paragraph 7(b), *supra*.

10. Complaint counsel expect to offer no evidence that the acts and practices of either Bormans or P & R alleged in the complaint in this matter have resulted in price discrimination or may be substantially to lessen competition or tend to create a monopoly or injure, destroy or prevent competition. Complaint counsel do contend that the acts and practices alleged are unfair.

At the same time as making the admissions set forth above, complaint counsel entered into a stipulation with counsel for the respondent as follows:

A. If, as a matter of law, complaint counsel must prove any one or more of the matters set forth in Paragraphs 1 through 6, then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

B. If, as a matter of law, complaint counsel must prove that buyer respondent has received or accepted any monetary payments or anything of value other than the services described in Paragraph 7(b) then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

C. If, as a matter of law, complaint counsel must prove that the acts and practices of respondent have resulted in price discrimination or may be substantially to lessen competition or tend to create a monopoly or injure, destroy or prevent competition, then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

D. If, as a matter of law, the proposed evidence of complaint counsel set forth in Paragraph 7 of the admissions of complaint counsel does not establish that the broker respondent acted as agent, representative or other intermediary for, or in behalf of, or subject to the direct or indirect control of buyers, then there is no genuine issue as to material facts in this matter.¹

Paragraph 7 of the complaint in this matter charges Bormans with violation of Section 2(c) of the Clayton Act as follows:

In the course and conduct of its business, respondent Borman has been and is now utilizing the services of P & R as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. P & R performs valuable services for

¹ On Aug. 3, 1972 the Commission dismissed the complaint in this matter as to P & R Brokerage Co. and Frank V. Condello, [81 F.T.C. 201]

respondent Borman by furnishing information concerning market conditions, by maintaining contact with various sellers, by inspecting and selecting specified qualities and quantities of fresh fruits and vegetables, and by negotiating purchases of said products at the most favorable prices. P & R, in performing the services enumerated above, has been and is now acting as an agent or representative of respondent Borman. In such capacity, P & R is subject to and under the direct or indirect control of Borman of fresh fruits and vegetables in transactions with sellers. In connection with such transactions, P & R has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

DISCUSSION

Complaint counsel assert that a violation of Section 2(c) occurs whenever a broker paid by a seller performs brokerage functions of benefit to buyer as well as seller. They assert that the brokerage functions themselves as described in Paragraph 7 of the request for admissions can supply each of the necessary elements to prove a violation.

Complaint counsel have admitted that they have no proof of price discrimination or competitive injury and that there are no contractual, financial or employment ties between respondent Borman and the P & R Brokerage Co.

With this as a starting point, complaint counsel apparently argue that there is some sort of a fiduciary or agency relationship between the sellers and the P & R Brokerage Co. which is violated in some fashion by the P & R Brokerage Co. performing certain brokerage functions which have some value to the respondent Borman. Complaint counsel cite no cases to support such a theory and there is nothing in the legislative history or in the actual language of Section 2(c) itself to support such a theory.

In short, complaint counsel have asserted that the performance of normal brokerage functions can itself establish that brokers are acting on behalf of buyers and that therefore the respondent Borman should pay any fees, brokerage or salary that such brokers earn rather than the sellers of the products in question. If they do not, it is urged that Borman has violated Section 2(c) of the Clayton Act, as amended.

Complaint counsel rely heavily on *Rangen, Inc. et al. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), and *Fitch v. Kentucky-Tennessee Light and Power Co.*, 136 F.2d 12 (6th Cir. 1943). Neither of these cases is in point since each involves commercial bribery and is decided in terms of breach of fiduciary obligation. Indeed both of these cases were decided on the basis of a particular breach of obligation which was the very form of misconduct Section 2(c) was enacted to prevent.

All of the remaining cases involving Section 2(c) are cases where it

was proven or admitted that the broker was the actual agent of the buyer or was owned by the buyer or under contract to the buyer and consequently under the buyer's control. In *FTC v. Herzog*, 150 F.2d 450 (2d Cir. 1945), the broker there involved admitted that he was acting as an agent of buyers while receiving brokerage from sellers. Likewise, in *Biddle Purchasing Co. v. FTC*, 96 F.2d 687 (2d Cir. 1938), the broker there involved had entered into a written contract with the buyers to act for them as purchasing agent and to represent their best interests in all dealings with sellers.

In these proceedings, there is no allegation that the brokers are agents or employees of the buyers; rather they are admittedly independent. Furthermore, there is no intention on the part of complaint counsel to prove that brokerage was passed on to the buyers as brokerage or by any subterfuge designed to deliver brokerage to the buyers. Complaint counsel propose to offer no evidence whatsoever that the brokers acted for or in behalf of or under the control of the buyers pursuant to any prearrangement of any kind or any contract, ownership, employment or other contractual relationship between the brokers and the buyers. Instead, it is admitted by complaint counsel that the brokers are independent intermediaries, that they render services of benefit to both buyers and sellers and that the only basis for inferring either that they acted for or under the control of buyers or that brokerage was passed on to the buyers is the fact that the buyers realized certain benefits from doing business with them. Such benefits always occur when one businessman does business with another and does not raise any factual inference either of agency or of a passing on of brokerage directly or indirectly as a subterfuge. The lack of probative value and the total legality of such benefits was recognized by the Commission as early as the *A&P* decision and as recently as *Tillie Lewis Foods*.²

These two cases are dispositive of the issue presented by respondent's motion for summary decision. The factual situations in both cases were virtually identical to the situation in this proceeding. In 1930, the Commission said in the *A&P* case:

In the course of conducting his business a broker must and does also render services to buyers—but those services, unlike the services rendered to the respondent by its field buying agents, are not buying services. A broker is not employed by buyers. He is employed and paid by sellers as their selling agent and he represents his seller-principals only. His activities in connection with his representation of his seller-principals are controlled by them, but, paradoxically, because of the broker's anomalous position as an independent sales agent in business for himself, he does act for buyers in a sense and he is subject to a degree of control on their part.

² In the *Matter of Great Atlantic and Pacific Tea Co.*, FTC Docket 3031, 26 F.T.C. 486 (1930); In the *Matter of Tillie Lewis Foods, Inc.*, FTC Docket 7226, 65 F.T.C. 1099, 1131 (1964).

This results from requests by buyers that brokers report complaints to their seller-principals, that brokers communicate cancellations of orders to their seller-principals, that brokers submit to their seller-principals offers of buyers to purchase commodities at prices stipulated by buyers, that brokers endeavor to make up "pool" cars of merchandise among several buyers so that the buyers may obtain the advantage of quantity prices and carload rates of freight, that brokers obtain quotations of prices from their seller-principals for the consideration of buyers, and, perhaps, in other ways. Naturally it is to the mutual interest and advantage of brokers and sellers to maintain the good will of their common customers, and brokers generally endeavor to comply with the reasonable requests of buyers along the lines indicated. In the course of negotiating sales from seller to buyer and bringing them into agreement brokers are necessarily guided somewhat by instructions from each, but in the essential particular of selling commodities and consummating sales they act for and are controlled by the latter alone, who in the absence of a contract may discharge them and substitute new brokers in their places at any time.

Again in 1964, the Commission affirmed the propriety of the activities of field brokers in the *Tillie Lewis Foods* case as follows:

* * * the local broker and the purchaser are generally located at considerable distances from the canners. A small canner, with a limited or no sales force, is thus unable to make known to these potential purchasers information concerning his production capabilities and the stock which he has available. On the other hand, the field broker, by reason of his location and constant contact with all canners in his area, maintains this information on a current basis. Through bulletins, letters and principally by telephone, he relays this information regularly to numerous local brokers. The field broker, upon receipt of an order from a local broker or direct purchaser, may split the order up among several small canners and coordinate the pooling of each canner's share in shipment to the purchaser. The seller compensates the field broker for these services by a commission which is usually indicated as a deduction on the invoice.

Complaint counsel's approach to proof of a Section 2(c) violation ignores the character of brokers as intermediaries who promote trade by bringing buyers and sellers together and who act for their own interest in earning a fee and not as the representative of either party to the transaction. In some transactions, the broker may first be approached by a seller to find an outlet for the sellers' goods; in others, the broker may be first approached by a buyer seeking a source of supply. In all instances, both buyers and sellers will benefit from the transaction. Both will receive information concerning conditions in the market and the availability of goods. Both will, by utilizing the services of the broker, save expense which they would otherwise have borne. The seller, for example, will have saved the expense of making his own buying calls direct on the buyers. Both will benefit from any negotiation the broker may have carried on to bring about a price favorable to both parties. Thereafter, both will benefit in the event of claims by one or the other. The broker, in the interest of protecting the fee which he has earned and of protecting his relationships with both parties for the future, will mediate and seek to resolve the controversy to the satisfaction of both parties. In every aspect of the brokerage function, the point

is the same; both parties benefit from the services of an independent broker, but the broker performs the services for his own purpose, which is to consummate the transaction and obtain his commission.

It is no answer to suggest that independent brokers drop the contested services. The services are intrinsic to the brokerage function. Other types of middlemen engaged in distribution provide a variety of services to benefit both buyers and sellers and thereby encourage them to do business with them. These include all of the same types of benefit complaint counsel allege in this case to be the basis for implying agency. If, because of the rule of law being proposed by complaint counsel, P & R Brokerage Co. and other independent brokers could not provide such benefits, they, of course, would not be competitive with other forms of distribution such as commission merchants, wholesalers, the seller's own sales force and the like and would, in time, disappear from the competitive arena.

The contention of complaint counsel that the "thing of value" referred to in Section 2(c) includes the brokerage services which the broker P & R performed constitutes something as compensation which was given to the respondent must be rejected. A review of the cases decided under Section 2(c) supplies no support for this theory. In every case, the "thing of value" paid as compensation was actual cash which could be computed from the transactions there involved. In no case has the "thing of value" been equated in terms of activities inherently incidental to the performance of the brokerage function.

Furthermore, the legislative history of Section 2(c) as pointed out by the Supreme Court in *FTC v. Brock & Co.*, 363 U.S. 166 (1960), makes it clear that the thrust of the section was to prevent price discrimination among customers of the same seller which arises when the seller pays brokerage direct to a buyer or indirectly to a buyer through a dummy broker or other representative of the buyer. In *Brock*, the Court stated (p. 168) that:

The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.

And further, the Court affirmed with respect to Section 2(c) (p. 169) that:

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

As recently as 1967, the Commission has pointed out in an opinion, *In*

the Matter of Modern Marketing Services, Inc., FTC Docket 3783, 71 F.T.C. 1676 (1968):

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

Complaint counsel have admitted that in this case there is neither price discrimination nor competitive injury.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the respondent and over the subject matter involved in this proceeding.
2. From the above discussion, it is concluded that respondent's motion for summary decision must be granted and the complaint dismissed.

ORDER

It is ordered, That respondent's motion for summary decision be, and the same hereby is, granted.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed.

It is further ordered, That request for oral argument upon this motion for summary decision be denied.

Appearances

For the Commission: *Louis R. Sernoff, Lewis F. Parker, Francis C. Mayer, Martin A. Rosen, James C. Donoghue* and *Eliot G. Disner*.

For the respondents: *Lyne, Woodworth & Evarts*, Boston, Mass. for First National Stores, Inc. *Counihan, Casey & Loomis*, Wash., D.C. for Ruby Produce Company, Inc. and Samuel Harry Rubenstein.

COMPLAINT IN DOCKET NO. 8790

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly described, have been and are violating the provisions of Subsection (c) of Section 2 of the Clayton Act, as amended, (15 U.S.C. Section 13) hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent First National Stores, Inc., hereinafter referred to as "First National," is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with its office and principal place of business located at 5 Middlesex Avenue, Somerville, Mass.

PAR. 2. Respondent First National has been and is now engaged primarily in the retailing of food products and other articles for personal

and household use and operates a large number of retail stores, including supermarkets. As of March 30, 1968, First National operated approximately 481 grocery stores in 8 States of the United States. First National's volume of business is substantial, totalling in excess of \$640 million annually as of March 30, 1968.

PAR. 3. Respondent Ruby Produce Company, Inc., hereinafter referred to as "Ruby," is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its office and principal place of business located at Cherry Street, Pedricktown, N.J.

Respondent Samuel Harry Rubenstein, an individual, is president of corporate respondent Ruby and is located at the same address as said corporate respondent and owns all or substantially all of its stock. He formulates, directs, and controls the acts, practices and policies of Ruby, including the acts and practices hereinafter described.

PAR. 4. Respondent Ruby has been and is now engaged in business as a "ground" or "field" broker effecting sales of fresh fruits and vegetables by sellers located in the State of Florida, and purchases by buyers located in various States of the United States other than the State of Florida. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of Ruby, in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables is substantial.

PAR. 5. Respondent Ruby, in the course and conduct of its business as a "ground" or "field" broker, has been and is now effecting sales of fresh fruits and vegetables by sellers located in the State of Florida, and purchases by buyers located in various States of the United States other than the State of Florida in commerce, as "commerce" is defined in the Clayton Act. Said respondent has transported or caused such products to be transported from the sellers' places of business to the buyers' places of business located in other states. Thus, there has been, at all times mentioned herein, a continuous course of trade in commerce in effecting purchases and sales of such products by said respondent Ruby.

PAR. 6. In the course and conduct of its business for the past several years, respondent First National has purchased, distributed and resold, and is now purchasing, distributing and reselling, food products and other articles for personal and household use, including fresh fruits and vegetables, in commerce, as "commerce" is defined in the Clayton Act, which it purchased from sellers located in several States of the United States other than the Commonwealth of Massachusetts in which respondent First National is located. First National purchases these food

products, including fresh fruits and vegetables, and causes them to be transported from the growing areas or packing plants of sellers located in various States of the United States to First National's warehouses and retail stores in the Commonwealth of Massachusetts and various other States in the United States. Thus, there has been and is now a continuous course of trade in commerce in the purchase and resale of said food products by respondent First National.

PAR. 7. In the course and conduct of its business, respondent First National has been and is now utilizing the services of respondent Ruby as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. Respondent Ruby performs valuable services for respondent First National and other buyers by furnishing information concerning market conditions, by maintaining contact with various sellers, by inspecting and selecting specified qualities and quantities of fresh fruits and vegetables, by negotiating purchases of said products at the most favorable prices and by arranging pool car shipments from various sellers. Respondent Ruby, in performing the services enumerated above, has been and is now acting as an agent or representative of respondent First National and other buyers. In such capacity, Ruby is subject to and under the direct or indirect control of First National and other buyers of fresh fruits and vegetables in transactions with sellers. In connection with such transactions, respondent Ruby has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

PAR. 8. Respondent First National and other buyers have received and are now receiving valuable "ground" or "field" broker services from respondent Ruby without paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, respondent Ruby has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondent First National and other buyers, or has been and is now subject to the direct or indirect control of respondent First National and other buyers.

PAR. 9. The aforesaid acts and practices of respondents and each of them in receiving and accepting, directly or indirectly, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof from sellers, are in violation of Subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Commissioners Elman and Nicholson dissented and filed dissenting statements.*

* For reasons of economy, the text of the dissenting statements of Commissioners Elman and Nicholson are not published herein. However, they appear at 81 F.T.C. 203-214, Docket 8789.

Commissioners Dixon and MacIntyre filed separate statements.*

INITIAL DECISION [IN DOCKET 8790] BY ANDREW C. GOODHOPE,
ADMINISTRATIVE LAW JUDGE

AUGUST 3, 1973

PRELIMINARY STATEMENT

The complaint in this matter was issued by the Commission on July 10, 1969. Thereafter extended litigation took place both in the courts and before the Commission itself. On June 5, 1972, respondents filed answers to the complaint in which they admitted certain allegations in the complaint but denied that they had violated Section 2(c) of the Robinson-Patman Act as alleged in the complaint. The matter was assigned to the undersigned administrative law judge on Apr. 13, 1973. Extensive pretrial preparations have been made and on June 4, 1973, the respondents filed a motion for summary decision pursuant to Section 3.24 of the rules of practice of the Commission. This motion was predicated upon respondents' request for admissions of complaint counsel's contentions of law and fact, the response of complaint counsel to such request and a stipulation entered into between complaint counsel and counsel for the respondents, all of which are a part of the record herein. The respondents' motion for summary decision and opposition thereto have been fully briefed. Based upon the complaint, respondents' answers thereto, the request for admissions and the response thereto and the stipulation entered into between the parties, the administrative law judge makes the following findings of fact.

FINDINGS OF FACT

1. Respondent First National Stores, Inc. (First National) is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with its office and principal place of business located at 5 Middlesex Avenue, Somerville, Mass.
2. Respondent First National has been and is now engaged primarily in the retailing of food products and other articles for personal and household use and operates a large number of retail stores, including supermarkets. As of Mar. 30, 1968, First National operated approximately 481 grocery stores in eight States of the United States. First National's volume of business is substantial, totaling in excess of 640 million dollars annually as of Mar. 30, 1968.
3. Respondent Ruby Produce Company, Inc. (Ruby) is a corporation

*For reasons of economy, the text of the separate statements of Commissioners Dixon and MacIntyre are not published herein. However, they appear at 81 F.T.C. 214-215, Docket 8789.

organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its office and principal place of business located at Cherry Street, Pedricktown, N.J.

4. Respondent Samuel Harry Rubenstein, an individual, is president of corporate respondent Ruby and is located at the same address as said corporate respondent and owns all or substantially all of its stock. He formulates, directs and controls the acts, practices and policies of Ruby, including the acts and practices hereinafter described.

5. Respondent Ruby has been and is now engaged in business as a "ground" and "field" broker effecting sales of fresh fruits and vegetables by sellers located in the State of Florida and purchases by buyers located in various States of the United States other than the State of Florida. In such capacity, respondent has demanded and received commissions, brokerage or other compensation in connection with effecting purchases and sales of fresh fruits and vegetables. The annual volume of business of Ruby, in its capacity as a "ground" or "field" broker in effecting purchases and sales of fresh fruits and vegetables, is substantial.

6. Respondent First National and respondent Ruby are both engaged in commerce as "commerce" is defined in the Clayton Act.

Admissions

As a result of respondents' request for admissions and complaint counsel's response thereto:

1. Buyer respondent does not own or have any financial or other interest in the business of the broker respondent, and does not in any way share in the profits or losses of the broker respondent.

2. No director, officer or employee of buyer respondent owns all or any part of the broker respondent, or has any financial or other interest in the business of the broker respondent or shares in any way in the profits or losses of the broker respondent.

3. The broker respondent is not a director, officer, manager or shareholder of buyer respondent or other buyers; and no director, officer or employee of buyer respondent is a director, officer, manager or shareholder of the broker respondent.

4. There are no common officers, directors, shareholders, employees or other personnel between respondent broker and buyers with whom respondent broker deals.

5. Broker respondent has not entered into any express contract or agreement to act as an agent, representative or other intermediary of buyer respondent or other buyers or for or in behalf of, or subject to the direct or indirect control of buyer respondent or other buyers.

6. The broker respondent was an independently owned and managed

business entity which performed bona fide brokerage functions of benefit to both buyers and sellers; and was not a so-called "dummy broker."

7. Complaint counsel expect to prove that the broker respondent acted as agent or representative for, or in behalf of or subject to the direct or indirect control of respondent buyer and other buyers by inference from the following:

(a) That respondent buyer and other buyers have "utilized" the services of the respondent broker as a "ground" or "field" broker in the purchase of fresh fruits and vegetables and usually not the services of other "ground" or "field" brokers.

(b) That the respondent broker performs services which are valuable to respondent buyer and other buyers by (i) furnishing information concerning market conditions, (ii) maintaining contact with various sellers, (iii) inspecting and selecting specified qualities and quantities of fresh fruits and vegetables, and (iv) negotiating purchases of specified qualities and quantities of fresh fruits and vegetables.

8. Respondent buyer and other buyers have not paid brokerage or other compensation to the broker respondent and such brokerage has been paid by sellers.

9. Complaint counsel does not contend that the buyer respondent has received or accepted any monetary payments or anything of value other than benefits complaint counsel contend arise from broker respondent's performance of the functions referred to in Paragraph 7, *supra*.

10. Complaint counsel expect to offer no evidence that the acts and practices of respondents alleged in the complaint in this matter have resulted in price discrimination or may be substantially to lessen competition or tend to create a monopoly or injure, destroy or prevent competition. Complaint counsel do contend that the acts and practices alleged are unfair.

At the same time as making the admissions set forth above, complaint counsel entered into a stipulation with counsel for the respondents as follows:

A. If, as a matter of law, complaint counsel must prove the contrary of any one or more of the matters set forth in Paragraphs 1 through 6, then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

B. If, as a matter of law, complaint counsel must prove that buyer respondent has received or accepted any monetary payments or anything of value other than the services described in Paragraph 7(b) then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

C. If, as a matter of law, complaint counsel must prove that the acts

and practices of respondents have resulted in price discrimination or may be substantially to lessen competition, then the proposed evidence referred to in Paragraphs 7 and 8 of the admissions of complaint counsel does not raise a material issue of fact.

D. If, as a matter of law, the proposed evidence of complaint counsel set forth in Paragraph 7 of the admissions of complaint counsel does not establish that the broker respondent acted as agent, representative or other intermediary for, or in behalf of, or subject to the direct or indirect control of buyers, then there is no genuine issue as to material facts in this matter.

Paragraphs 7. and 8. of the complaint charge the two corporate respondents and the individual respondent with violations of Section 2(c) of the Clayton Act as follows:

PAR. 7. In the course and conduct of its business, respondent First National has been and is now utilizing the services of respondent Ruby as a "ground" or "field" broker in the purchase of fresh fruits and vegetables from numerous sellers. Respondent Ruby performs valuable services for respondent First National and other buyers by furnishing information concerning market conditions, by maintaining contact with various sellers, by inspecting and selecting specified qualities and quantities of fresh fruits and vegetables, by negotiating purchases of said products at the most favorable prices and by arranging pool car shipments from various sellers. Respondent Ruby, in performing the services enumerated above, has been and is now acting as an agent or representative of respondent First National and other buyers. In such capacity, Ruby is subject to and under the direct or indirect control of First National and other buyers of fresh fruits and vegetables in transactions with sellers. In connection with such transactions, respondent Ruby has been and is now collecting and receiving brokerage, commissions or other compensation from sellers of fresh fruits and vegetables.

PAR. 8. Respondent First National and other buyers have received and are now receiving valuable "ground" or "field" broker services from respondent Ruby without paying, either directly or indirectly, any brokerage, commissions or other compensation to said broker. At the same time, respondent Ruby has been and is now collecting and receiving, directly or indirectly, brokerage, commissions or other compensation from sellers, when, in fact, it has been and is now acting for or in behalf of respondent First National and other buyers, or has been and is now subject to the direct or indirect control of respondent First National and other buyers.

Discussion

Complaint counsel assert that a violation of Section 2(c) occurs whenever a broker paid by a seller performs brokerage functions of benefit to buyer as well as seller. They assert that the brokerage functions themselves as described in Paragraph 7 of the request for admissions can supply each of the necessary elements to prove a violation.

Complaint counsel have admitted that they have no proof of price discrimination or competitive injury and that there are no contractual, financial or employment ties between respondent First National and respondent Ruby.

With this as a starting point, complaint counsel apparently argue that there is some sort of a fiduciary or agency relationship between First National and Ruby which is violated in some fashion by Ruby performing certain brokerage functions which have some value to respondent First National. Complaint counsel cite no cases to support such a theory and there is nothing in the legislative history or in the actual language of Section 2(c) itself to support such a theory.

In short, complaint counsel have asserted that the performance of normal brokerage functions can itself establish that brokers are acting on behalf of buyers and that therefore the respondent First National should pay any fees, brokerage or salary that such brokers earn rather than the sellers of the products in question. If they do not, it is urged that First National and Ruby both have violated Section 2(c) of the Clayton Act, as amended.

Complaint counsel rely heavily on *Rangen, Inc. et al. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), and *Fitch v. Kentucky-Tennessee Light and Power Co.*, 136 F.2d 12 (6th Cir. 1943). Neither of these cases is in point since each involves commercial bribery and is decided in terms of breach of fiduciary obligation. Indeed both of these cases were decided on the basis of a particular breach of obligation which was the very form of misconduct Section 2(c) was enacted to prevent.

All of the remaining cases involving Section 2(c) are cases where it was proven or admitted that the broker was the actual agent of the buyer or was owned by the buyer or under contract to the buyer and consequently under the buyer's control. In *FTC v. Herzog*, 150 F.2d 450 (2d Cir. 1945), the broker there involved admitted that he was acting as an agent of buyers while receiving brokerage from sellers. Likewise, in *Biddle Purchasing Co. v. FTC*, 96 F.2d 687 (2d Cir. 1938), the broker there involved had entered into a written contract with the buyers to act for them as purchasing agent and to represent their best interests in all dealings with sellers.

In these proceedings, there is no allegation that the brokers are agents or employees of the buyer; rather they are admittedly independent. Furthermore, there is no intention on the part of complaint counsel to prove that brokerage was passed on to the buyer as brokerage or by any subterfuge designed to deliver brokerage to the buyer. Complaint counsel propose to offer no evidence whatsoever that the brokers acted for or in behalf of or under the control of the buyer pursuant to any prearrangement of any kind or any contract, ownership, employment or other contractual relationship between the brokers and the buyer. Instead, it is admitted by complaint counsel that the brokers are independent intermediaries, that they render services of

benefit to both buyer and sellers and that the only basis for interfringing either that they acted for or under the control of buyer or that brokerage was passed on to the buyer is the fact that the buyer realized certain benefits from doing business with them. Such benefits always occur when one businessman does business with another and does not raise any factual inference either of agency or of a passing on of brokerage directly or indirectly as a subterfuge. The lack of probative value and the total legality of such benefits was recognized by the Commission as early as the *A&P* decision and as recently as *Tillie Lewis Foods*.¹

These two cases are dispositive of the issue presented by respondents' motion for summary decision. The factual situations in both cases were virtually identical to the situation in this proceeding. In 1930, the Commission said in the *A&P* case:

In the course of conducting his business a broker must and does also render services to buyers—but those services, unlike the services rendered to the respondent by its field buying agents, are not buying services. A broker is not employed by buyers. He is employed and paid by sellers as their selling agent and he represents his seller-principals only. His activities in connection with his representation of his seller-principals are controlled by them, but, paradoxically, because of the broker's anomalous position as an independent sales agent in business for himself, he does act for buyers in a sense and he is subject to a degree of control on their part.

This results from requests by buyers that brokers report complaints to their seller-principals, that brokers communicate cancellations of orders to their seller principals, that brokers submit to their seller-principals offers of buyers to purchase commodities at prices stipulated by buyers, that brokers endeavor to make up "pool" cars of merchandise among several buyers so that the buyers may obtain the advantage of quantity prices and carload rates of freight, that brokers obtain quotations of prices from their seller-principals for the consideration of buyers, and, perhaps, in other ways. Naturally it is to the mutual interest and advantage of brokers and sellers to maintain the good will of their common customers, and brokers generally endeavor to comply with the reasonable requests of buyers along the lines indicated. In the course of negotiating sales from seller to buyer and bringing them into agreement brokers are necessarily guided somewhat by instructions from each, but in the essential particular of selling commodities and consummating sales they act for and are controlled by the latter alone, who in the absence of a contract may discharge them and substitute new brokers in their places at any time.

Again in 1964, the Commission affirmed the propriety of the activities of field brokers in the *Tillie Lewis Foods* case as follows:

* * * the local broker and the purchaser are generally located at considerable distances from the canners. A small canner, with a limited or no sales force, is thus unable to make known to these potential purchasers information concerning his production capabilities and the stock which he has available. On the other hand, the field broker, by reason of his location and constant contact with all canners in his area, maintains this information on a current basis. Through bulletins, letters and principally by telephone, he relays this information regularly to numerous local brokers. The field broker, upon receipt of an order from a local broker or direct purchaser, may split the order up among several small

¹ *In the Matter of Great Atlantic and Pacific Tea Co.*, FTC Docket 3031, 26 F.T.C. 486 (1930); *In the Matter of Tillie Lewis Foods, Inc.*, FTC Docket 7226, 65 F.T.C. 1099, 1131 (1964).

canners and coordinate the pooling of each canner's share in shipment to the purchaser. The seller compensates the field broker for these services by a commission which is usually indicated as a deduction on the invoice.

Complaint counsel's approach to proof of a Section 2(c) violation ignores the character of brokers as intermediaries who promote trade by bringing buyers and sellers together and who act for their own interest in earning a fee and not as the representative of either party to the transaction. In some transactions, the broker may first be approached by a seller to find an outlet for the seller's goods; in others, the broker may be first approached by a buyer seeking a source of supply. In all instances, both buyers and sellers will benefit from the transaction. Both will receive information concerning conditions in the market and the availability of goods. Both will, by utilizing the services of the broker, save expense which they would otherwise have borne. The seller, for example, will have saved the expense of making his own buying calls direct on the buyers. Both will benefit from any negotiation the broker may have carried on to bring about a price favorable to both parties. Thereafter, both will benefit in the event of claims by one or the other. The broker, in the interest of protecting the fee which he has earned and of protecting his relationships with both parties for the future, will mediate and seek to resolve the controversy to the satisfaction of both parties. In every aspect of the brokerage function, the point is the same; both parties benefit from the services of an independent broker, but the broker performs the services for his own purpose, which is to consummate the transaction and obtain his commission.

It is no answer to suggest that independent brokers drop the contested services. The services are intrinsic to the brokerage function. Other types of middlemen engaged in distribution provide a variety of services to benefit both buyers and sellers and thereby encourage them to do business with them. These include all of the same types of benefit complaint counsel allege in this case to be the basis for implying agency. If, because of the rule of law being proposed by complaint counsel, Ruby and other independent brokers could not provide such benefits, they, of course, would not be competitive with other forms of distribution such as commission merchants, wholesalers, the seller's own sales force and the like and would, in time, disappear from the competitive arena.

The contention of complaint counsel that the "thing of value" referred to in Section 2(c) includes the brokerage services which the brokers performed constitutes something as compensation which was given to the respondent must be rejected. A review of the cases decided under Section 2(c) supplies no support for this theory. In every case, the "thing of value" paid as compensation was actual cash which could be computed from the transactions there involved. In no case has the

"thing of value" been equated in terms of activities inherently incidental to the performance of the brokerage function.

Furthermore, the legislative history of Section 2(c) as pointed out by the Supreme Court in *FTC v. Broch & Co.*, 363 U.S. 166 (1960), makes it clear that the thrust of the section was to prevent price discrimination among customers of the same seller which arises when the seller pays brokerage direct to a buyer or indirectly to a buyer through a dummy broker or other representative of the buyer. In *Broch*, the Court stated (p. 168) that:

The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.

And further, the Court affirmed with respect to Section 2(c) (p. 169) that:

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

As recently as 1967, the Commission has pointed out in an opinion, *In the Matter of Modern Marketing Services, Inc.*, FTC Docket 3783, 71 F.T.C. 1676 (1968):

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

Complaint counsel have admitted that in this case there is neither price discrimination nor competitive injury.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the respondents and over the subject matter involved in this proceeding.
2. From the above discussion, it is concluded that respondents' motion for summary decision must be granted and the complaint dismissed.

ORDER

It is ordered, That respondents' motion for summary decision be, and the same hereby is, granted.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed.

It is further ordered, That request for oral argument upon this motion for summary decision be denied.

DOCKETS 8786, 8787, 8788, 8789 AND 8790

[COMBINED] ORDER DISMISSING COMPLAINTS

The administrative law judges filed their initial decisions in these matters on July 30, 1973, August 1, 1973, and August 3, 1973, ordering that respondents' motions for summary decisions be granted and that the complaints herein be dismissed. No appeals were taken from the initial decisions, and on September 11, 1973, the Commission ordered that the effective dates thereof be stayed until further order of the Commission.

The Commission has now determined that the administrative law judges were correct in finding on the basis of admissions made by complaint counsel that the evidence which complaint counsel intended to offer in support of the complaints would not sustain the essential factual allegations that the brokers were acting for or in behalf of the buyers or subject to the buyers' direct or indirect control. Consequently, the dismissals of the complaints were proper. The Commission, however, does not consider the initial decisions appropriate in all respects to dispose of these matters and has determined that they should be adopted only to the extent that they hold that the evidence relied upon by complaint counsel would not support the charges that respondents had violated Section 2(c) of the Clayton Act, as amended.

It is ordered, That the initial decisions, modified as indicated herein, be, and they hereby are, adopted as the decisions of the Commission.

It is further ordered, That the complaints be, and they hereby are, dismissed.

IN THE MATTER OF

IMPERIAL OF OHIO, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATIONS
OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING
ACTS

Docket 8906. Complaint, Dec. 11, 1972—Decision, Jan. 22, 1974

Consent order requiring two affiliated Cleveland, Ohio, firms engaged in the retail sales of wall-to-wall carpeting and home improvements, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with their sales, the fact that the firms were not licensed by Regulation Z.