

IN THE MATTER OF
HUDSON PULP AND PAPER CORP.

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

Docket 6599. Complaint, July 19, 1956—Decision, May 7, 1958

Order requiring a manufacturer of paper napkins and towels, and toilet and facial tissues, with principal office in New York City, to cease discriminating in price in violation of section 2(d) of the Clayton Act by paying broadcasting companies for time furnished to certain favored grocery chains for their own advertising purposes in return for which the participating chains gave in-store promotions to respondent's products in their stores located in the trade area reached by the radio or TV station utilized, without making compensation for such benefits available on proportionally equal terms to all the competitors of the favored customers.

Mr. William R. Tincher, Mr. J. Wallace Adair, Mr. Eugene Kaplan and Mr. Daniel A. Austin, Jr., for the Commission.

Appell, Austin & Gay, by Mr. Cyrus Austin, and Mr. Felix G. Langer and Mr. Emanuel E. Sternfield, all of New York, N.Y., for respondent.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE PLEADINGS

The complaint in this proceeding charges the respondent with having paid money to certain broadcasting companies for the benefit of certain of its chain-store customers, thereby providing broadcasting time "through such broadcasting companies to the favored customers for said customers' own advertising purposes." The payments thus made by respondent are alleged to have been made as compensation or in consideration for services or facilities furnished it by these favored customers in connection with the offering for sale and sale of respondent's products. It is further averred that the benefits so furnished to some of respondent's customers were not made available to respondent's other customers on proportionally equal terms, in violation of the provision of subsection (d) of section 2 of the Clayton Act, as amended.

The complaint then describes in some detail the sales-promotion plans through which respondent favored certain of its customers.

Respondent in its answer denies that any broadcasting company served as a medium or intermediary between respondent and any of

its grocery-chain customers; that any payments were made by the respondent to any broadcasting company for the benefit of any of respondent's customers; and that respondent's acts and practices have violated section 2(d) of the Clayton Act, as amended.

STIPULATION OF FACTS

In lieu of hearings and the presentation of evidence, counsel supporting the complaint and counsel for the respondent agreed upon, and submitted to the hearing examiner, a stipulation as to the facts involved in this controversy, with the understanding that such stipulation, together with the pleadings herein, was to constitute the entire evidentiary record. This stipulation has been duly incorporated into the record, and, together with the pleadings, does constitute the entire factual basis of this decision.

AMICI CURIAE

Subsequent to the submission of the stipulation as to the facts, Columbia Broadcasting System, Inc. and National Broadcasting Co., Inc. applied for and were granted permission to submit briefs as *amici curiae*. These briefs supplement the brief of counsel for the respondent, and request that the complaint herein be dismissed.

IDENTITY OF RESPONDENT

Respondent Hudson Pulp & Paper Corp. is a Maine corporation, with its principal office and place of business located at 477 Madison Avenue, New York, N.Y.

ACTS IN COMMERCE

For a number of years respondent has been engaged in the business of selling and distributing its products, including paper napkins and towels, toilet tissue and facial tissue, to competing customers, including independent grocers and grocery chains, located throughout some of the States of the United States and in the District of Columbia. Many of such competing grocery customers are located in the Chicago metropolitan area and in the New York City metropolitan area, which extends into the adjacent States of New Jersey and Connecticut. The quantity of the above-mentioned products sold by respondent in those areas during the past several years has been substantial. As a result of such sales, respondent is now, and has been for some time, engaged in commerce, as "commerce" is defined in the Clayton Act as amended.

ORIGIN OF THE SALES-PROMOTION PLAN

In 1950 and in 1951 the sale of broadcasting time had become difficult, and the American Broadcasting Co., Columbia Broadcasting System, Inc., and National Broadcasting Co., Inc., hereinafter referred to, respectively, as "ABC," "CBS," and "NBC," devised a plan to enable them to promote the sale of such time to manufacturers and sellers of grocery products by offering to them radio and television time at the regular current rate, supplemented by the promise of certain in-store promotion facilities as an added inducement. Although the various sales-promotion plans devised by the several broadcasting companies are substantially the same, each broadcasting company developed its own plan independently of the others.

THE SALES-PROMOTION PLAN

In initiating its sales-promotion plan, ABC negotiated contracts with certain grocery chains in the Chicago metropolitan area, and CBS and NBC in the New York City metropolitan area, whereby the broadcasting company agreed to furnish radio time or television time of a stated amount or value to each grocery chain each week during the term of the contracts. These contracts provided that the broadcasting time so furnished would be used by the chain stores only for their own advertising. In consideration for such broadcasting time, the chain stores agreed to conduct in their stores a specific number of promotional displays of products sold therein, each such promotion to be continued for the duration of 1 week. The contract did not specify the products to be displayed or the dates for their promotion, but provided that such products were to be agreed upon and the dates for their promotion fixed upon the suggestion or designation of the broadcasting company, subject to the approval of the chain, and also subject to the right of the chain to decline to promote any product not deemed by it to be suitable for promotion in its store. These contracts were made without any prior commitment or agreement involving anyone other than the broadcasting company and the grocery chain.

After the above-described contracts between the broadcasting companies and the grocery chains had been entered into, the broadcasting companies solicited respondent and other manufacturers and sellers of grocery products to purchase radio or television time from them, and, as an added inducement for such purchase, offered in-store promotion of respondent's products in the chain stores with which the broadcasting companies already had contracts. The CBS plan was called "Supermarketing;" the NBC plan, "Chain Lightning;" and

1538

Decision

the ABC plan, "Mass Merchandising" or "Sell-A-Vision." In support of these plans, brochures and circulars were disseminated from time to time by the broadcasting companies, which informed respondent and others that by purchasing radio or television time for certain periods in minimum amounts at the then regular station rate for such time, the advertiser would qualify, at no added cost, for one or more week-long promotional displays of its products in the stores of certain grocery chains. The brochure stated that the broadcasting company was able to furnish these displays by reason of the existing contracts which it had already negotiated with the grocery chains. Among other things, such brochures and circulars presented the advertising advantages of the several plans as follows:

HERE'S HOW IT WORKS * * * it's only available to WBKB food advertisers. * * * provides them with prime display space in 600 food stores in the Chicago area. * * * These 600 stores make up the two largest corporate chain groups in Chicago—A&P and National Tea. HERE'S WHAT YOU GET * * * Advertiser's product is featured exclusively during his particular week. * * * Qualifying advertisers receive either end or dump displays, whichever is most satisfactory to the individual product. In the case of cigarettes and refrigerated products a special display pattern must be worked out for each, since the end or dump style cannot be used. Bread cannot be featured in the plan. * * *

* * * Displays are set up by individual store managers who are directed by the executive officers of the chains who feature a specific product during a specific week.

* * * Retail newspaper lineage, window streamers and in-store promotion is not included in agreement, but in most cases to date both chains have cooperated fully and given *Shopper-Stopper* products these promotional benefits.

HERE'S WHAT "SHOPPER-STOPPER" DOES FOR ADVERTISERS * * *

* * * We moved out great quantities of both of these items and all retail outlets and the follow through by the chain stores in setting up in-island displays and getting us group dealer ad mentions was really phenomenal.

* * * Want to thank you and WBKB-TV for this excellent tie-up; and, certainly want to get in on any other tie-ups that you have arranged for the future * * *

J. W. SHARPE,
District Sales Manager,
Kellogg Sales Co.

Super Market displays increase your sales * * * but Super Market display space is scarce. The average Super Market has room for 10 displays, 6 of which are reserved for the retailer's own needs. This leaves 4 displays per week "up for grabs" for your product * * * and three thousand others. In 1953 the 76 leading nationally advertised food products were only able to win display space above normal selling space in stores accounting for a meager 3 percent of sales (Nielsen Food Index).

Supermarket display space is costly too! If the value of all of the CHAIN-LIGHTNING displays currently available were conservatively estimated at five dollars per store per week, the total worth would be over \$15,000 per week.

CHAIN LIGHTNING is the Radio merchandising plan that puts your product physically in front of the competition in more than three thousand supermarkets

Decision

54 F.T.C.

in the richest retail areas in the land. It combines the hard hitting selling power of local Radio advertising with the impact of point-of-sale displays to:

* * * Pre-sell your customers in their homes * * * Clinch the sale in the food food store * * *

The average Super Market carries over 3,000 items.

In this vast jungle of brands, sizes, packages, cans and jars, any single product has little chance of capturing the attention of retailer or shopper.

If the retailer divided his day equally among his 3,000 items—each would receive 10 seconds of his time!

If the shopper divided her 45-minute Super-Market visit among the 3,000 items—she'd give each less than a second of her attention!

Respondent participated in the above-described plans by entering into contracts with the broadcasting companies for the purchase of broadcasting time. These contracts contain no reference to in-store promotion. In fact, respondent's contracts with ABC and CBS contain the following clause or its equivalent:

This contract contains the entire agreement between the parties and is not subject to oral modification.

The NBC contract contains a similar clause, as follows:

This contract constitutes the entire agreement between the parties relating to the subject matter thereof.

The various payments made by Respondent to the several broadcasting companies from 1952 through 1956 were, as follows:

Year	Broadcasting company	Station	Amount paid	Yearly total
1952	CBS	WCBS (New York)	\$27,676.00	\$27,676.00
	ABC	WBKB (Chicago)	9,500.00	
1953	CBS	WCBS (New York)	62,595.64	72,095.64
	ABC	WBKB (Chicago)	38,500.00	
1954	CBS	WCBS (New York)	36,764.20	154,619.20
	NBC	WNBC (New York)	79,355.00	
	ABC	WBKB (Chicago)	26,250.00	
1955	CBS	WCBS (New York)	43,691.38	100,422.09
	NBC	WNBC (New York)	30,480.71	
1956	CBS	WCBS (New York)	36,584.50	36,584.50

The three plans under which the above-listed payments were made all required of the respondent a minimum payment over a minimum period of time, to qualify for a minimum amount of in-store promotion. There were a number of variations of all of these three plans. A recounting of the many details of such variations is here deemed unnecessary.

After the respondent had contracted with the broadcasting companies, as above described, the respondent was notified by such broadcasting companies that some of the respondent's products would be displayed in the stores of certain grocery chains on certain dates.

In many instances, the respondent thereupon contacted the designated chain store for the purpose of arranging the type and details of the in-store promotional displays.

All of respondent's customers who received radio or television advertising time from the broadcasting companies, pursuant to the contract described herein, were grocery chains who have been and are in competition in the resale of respondent's products with other grocery chains and independent customers of respondent who did not receive and who were not offered such broadcasting time or anything of value in lieu thereof.

THE ISSUE

The section of the Clayton Act, as amended, under which this proceeding is brought provides,^F as follows:

§2.(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Since the complaint alleges and the answer denies that respondent paid money to said broadcasting companies for the benefit of certain of respondent's chain-store customers as compensation or in consideration for services or facilities furnished respondent by those customers, and that the benefits so furnished to some of respondent's customers were not made available to respondent's other customers on proportionally equal terms, in violation of the above-quoted provision of the Clayton Act, the issue herein is as follows:

Did respondent pay or contract for the payment of something of value to any of the three broadcasting companies named herein "for the benefit of a customer" and "as compensation or in consideration" for in-store sales promotion furnished by such customer to respondent, without making the same benefit available on proportionally equal terms to all its other customers competing with the customers so favored, within the meaning of section 2(d) of the Clayton Act as amended?

THE ISSUE RESOLVED

Counsel supporting the complaint, in effect, contends that the facts herein stipulated show that the respondent, by adopting and using the sales-promotion plan of the broadcasting companies, attempted

to escape legal accountability by doing indirectly that which respondent knew it could not lawfully do directly; that is, procure in-store promotion for its products by providing benefits in the form of broadcasting time for the use of a few favored customers without making the same or similar benefits available to its other competing customers. Counsel further contends that the several transactions heretofore described, instead of being unrelated business operations as they may appear when considered separately, constitute, in fact and in reality, one complete transaction, which can be properly evaluated only as a whole.

Counsel for respondent vigorously contradicts the above-stated contentions, and affirmatively asserts that the facts show that respondent did not pay or contract for the payment of anything of value to any of the broadcasting companies for the broadcasting time furnished to respondent's customers, and that the respondent did not pay or contract to pay anything of value as "compensation or in consideration" for promotional services furnished to the respondent by any of its customers.

Let us re-examine the facts in the light of these contentions. The facts show that the sales-promotion plan in question, like the issue herein, is composed of three elements. First, we have a separate contract between the broadcasting company and a chain store, promising such store certain broadcasting time for its own purposes in return for in-store promotion of certain products to be later designated by the broadcasting company. Second, we have a separate contract, of a later date, between the broadcasting company and the respondent, providing for the purchase by the respondent of certain broadcasting time for its own advertising purposes, at the standard rate of payment then current. This contract is expressly limited to the provisions contained therein. Third, we have brochures and circulars disseminated by the broadcasting company for the purpose and with the effect of inducing the respondent to enter into the contract with the broadcasting company. We also have correspondence between and among the various parties to both contracts, relative to the various phases of the sales-promotion plan and the details of the in-store displays.

When the above transactions are considered in their interrelationship with each other, the true significance of the several phases of the sales-promotion plan, and the true relationship established between the parties thereto, become apparent. Thus we see that the in-store promotion feature of the plan, although astutely excluded from the narrow specifications of the contract between respondent and the broadcasting company, was actually the primary cause and the chief

