

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS AND ORDERS, JANUARY 1, 1962, TO JUNE 30, 1962

IN THE MATTER OF

WILLIAM BUEHL EIDSON ET AL. DOING BUSINESS AS
EIDSON PRODUCE COMPANY

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

Docket 8064. Complaint, Aug. 3, 1960—Decision, Jan. 3, 1962

Order requiring wholesale distributors of food products, including citrus fruits, vegetables, and produce, in Birmingham, Ala., to cease receiving from suppliers a commission on substantial purchases for their own account for resale, such as a discount, usually at the rate of 10¢ per 1½ bushel box of citrus fruit from a number of Florida packers.

COMPLAINT

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 now violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondents William Buehl Eidson, Annie Katherine Eidson, Marie Ponder, William C. Howard, Jr., and Bennie E. Crowe are individuals and are copartners trading and doing business as the Eidson Produce Company, with their office and principal place of business located at 2525 Third Place West, Birmingham Food Terminal, Birmingham 4, Ala. Each of these respondents, individually and as copartners, are hereinafter referred to collectively as respondents.

PAR. 2. Respondents are now, and for the past several years have been, engaged in business primarily as a wholesale distributor, buying, selling and distributing citrus fruit, produce, and other food products, all of which are hereinafter sometimes referred to as

food products. Respondents purchase their food products from a large number of suppliers located in many sections of the United States. The annual volume of business done by respondents in the purchase and sale of food products is substantial.

PAR. 3. In the course and conduct of their business for the past several years, respondents have purchased and distributed, and are now purchasing and distributing, food products in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, from suppliers or sellers located in several states of the United States other than the State of Alabama, in which respondents are located. Respondents transport or cause such food products, when purchased, to be transported from the places of business or packing plants of their suppliers located in various other states of the United States to respondents who are located in the State of Alabama, or to respondents' customers located in said state, or elsewhere. Thus, there has been at all times mentioned herein a continuous course of trade in commerce in the purchase of said food products across state lines between respondents and their respective suppliers of such food products.

PAR. 4. In the course and conduct of their business for the past several years, but more particularly since January 1, 1959, respondents have been and are now making substantial purchases of food products for their own account for resale from some, but not all, of their suppliers, and on a large number of these purchases respondents have received and accepted, and are now receiving and accepting, from said suppliers a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, in connection therewith. For example, respondents make substantial purchases of citrus fruit from a number of packers or suppliers located in the State of Florida, and receive on said purchases, a brokerage or commission, or a discount in lieu thereof, usually at the rate of 10 cents per 1½ bushel box, or equivalent. In many instances respondents receive a lower price from the supplier which reflects said commission or brokerage.

PAR. 5. The acts and practices of respondents in receiving and accepting a brokerage or a commission, or an allowance or discount in lieu thereof, on its own purchases, as above alleged and described, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

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Initial Decision

Mr. Cecil G. Miles and *Mr. Basil J. Mezines* for the Commission.

Mr. W. S. Pritchard, Jr., *Mr. Winston D. McCall*, and *Mr. R. Bruce Robertson, III*, of *Pritchard, McCall & Jones*, Birmingham, Ala., for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

PRELIMINARY STATEMENT

This complaint issued on August 3, 1960. It charges respondents with violating subsection 2(c)¹ of the Clayton Act, as amended (15 U.S.C. Sec. 13), by "receiving and accepting, from said suppliers a commission, a brokerage, or other compensation or an allowance or discount in lieu thereof," on their purchases of citrus products and other merchandise purchased by respondents, which moved in "commerce," as commerce is defined in said Act. Respondents answered the complaint and hearings were conducted at Birmingham, Alabama, on January 30, 1961, and in Tampa, Florida, on June 22 and 23, 1961. Respondents petitioned the Federal Trade Commission to enjoin the Florida hearings, but respondents' motion was denied. No one appeared on behalf of respondents at the Florida hearings even though ample notice of said hearings had been given. At the Tampa hearings counsel supporting the complaint introduced evidence into the record and completed the introduction of evidence in support of his case-in-chief. By order dated June 27, 1961, respondents were given until July 31, 1961, to designate the dates and places at which they desired hearings to offer evidence in their behalf. Thereafter respondents moved and were allowed an extension of time until August 7, 1961, in which to designate hearing dates and places. Respondents failed to file any request for hearing dates and places to introduce any evidence in their behalf, and an order was entered on August 17, 1961, fixing September 22, 1961, as the date for filing proposed findings, conclusions and order pursuant to the Commission's Rules of Practice for Adjudicative Proceedings. Such proposed findings, conclusions and order were filed by both parties.

Based upon the entire record in this proceeding, including the exhibits which have been received in evidence, the examiner makes the

¹ "That it shall be unlawful for any person engaged in commerce * * * to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation was so granted or paid."

findings and conclusions hereinafter set forth. Any findings proposed by the parties which are not hereinafter made in the form in which proposed, or in substantially that form, hereby are rejected. The fact that no finding in this opinion summarizes the evidence in the manner in which the parties have requested it to be summarized does not mean that the hearing examiner has not considered such evidence. It means merely that the examiner deems the evidence which is summarized in his findings to be sufficiently probative, substantial and material to dispose of the issues. All motions made by the parties which have not previously been ruled upon or which are not herein specifically ruled upon hereby are overruled and denied.

Based upon the entire record and the evidence, the examiner makes the following:

FINDINGS OF FACT

1. The complaint states a good cause of action against the respondents. The Federal Trade Commission has jurisdiction over the respondents and the subject matter of this proceeding; and this proceeding is in the public interest.

2. William Buehl Eidson, Annie Katherine Eidson, Marie Ponder, William C. Howard, Jr., and Bennie E. Crowe are copartners doing business as Eidson Produce Company with their principal office and place of business located at 2525 Third Place West, Birmingham Food Terminal, Birmingham 4, Ala. Respondents are now and for several years last past, including the year 1959, have been engaged primarily as wholesale distributors of food products, including citrus fruits, vegetables, and produce. Respondents were and are buying, selling and distributing the aforesaid citrus fruit and food products, which move to them across state lines. Respondents purchase their citrus fruit and other food products from a large number of suppliers located in many sections of the United States and in different states thereof.

3. Respondents are engaged in "commerce" as that term is defined in the Clayton Act, as amended.

4. The annual business transacted by respondents for the year 1959 to the present time was substantial. They were one of four business concerns conducting a similar business in the Birmingham area who had substantially the same sales volume. William Buehl Eidson is the senior and managing partner of respondents' business. John W. Ponder, husband of respondent Marie Ponder, is respondents' general office manager. William Buehl Eidson, during the period covered by the complaint, purchased most of the citrus fruit on behalf of respondents. Most of such purchases were consummated by long dis-

tance telephone conversations with suppliers located in the State of Florida. Written office memoranda of the conversations which indicated the price at which purchases were made were kept by respondents in the usual and regular course of their business. Specimen copies of such memoranda are in evidence.

5. For a period of time respondents purchased citrus fruit through William Manis, a broker. However, when respondents ascertained that they could make their purchases direct and obtain the allowance in lieu of brokerage they abandoned the practice of purchasing through brokers and purchased their fruit directly. Mr. Eidson testified that he might receive as many as 10 calls in one day from sellers and that he wanted to be sure that his company was competitive; "we buy at the lowest price we can buy; and I am sure that if William Manis is making it a dime higher, he's not getting any business."

6. The allowances made in lieu of brokerage to respondents were sometimes paid by separate remittance, and sometimes paid by deduction from the market price stated on the invoices. Sometimes prices were quoted to respondents and negotiated on a net basis, i.e., the price quoted to respondents was the price which respondents would pay net, after the allowance in lieu of brokerage had first been deducted.

7. During the year 1959 one of respondents' suppliers, Newbern Groves, Inc., of Tampa, Florida, paid to respondents in lieu of brokerage the sum of \$409.78 (CX 86-J and 86-K). Although respondents deny that these payments or allowances constituted, or were in lieu of brokerage, the payments have been characterized in said exhibits as brokerage by the sellers, and the hearing examiner hereby finds that they were in lieu of brokerage.

8. During the relevant period the practice of the Florida citrus fruit producers of making an allowance in lieu of brokerage to their customers, including these respondents, was an accepted custom in that industry. The practice was generally known and followed. If the allowance were not made, the purchaser would take his business to a supplier who would make the allowance (Tr. 194).

9. In the course and conduct of their business for the past several years, but more particularly since January 1, 1959, respondents have been and are now making substantial purchases of food products including citrus fruit on their own account for resale. Respondents have received and accepted from their suppliers a commission, brokerage, or other compensation or an allowance or discount in lieu thereof, in connection therewith. Respondents either knew, or because of their many years of experience in, and knowledge of, the practices in the

produce industry should have known that they were receiving such brokerage or commission or a discount in lieu of brokerage.

10. During the relevant period the price of citrus fruit was quoted on the basis of a bruce box containing 1 $\frac{3}{4}$ bushels. The price fluctuated and was usually quoted in increments of 25 cents, i.e., \$2.50, \$2.75, or \$3 a bruce box. In the industry a carton would be half of a bruce box in content, and its price would be half the price of a bruce box. Occasionally the bruce box prices fluctuated 50 cents up or down.

11. Respondents in the course and conduct of their business during the year 1959 and thereafter received a commission, brokerage, or other compensation, or a discount in lieu thereof on their purchases of citrus fruit from the citrus fruit vendors in the State of Florida in contravention of Section 2(c) of the Clayton Act as amended.

12. The Federal Trade Commission as a part of its case-in-chief is not required to prove that these respondents had knowledge that they were being paid a commission, brokerage, or allowance in lieu thereof. However, the hearing examiner finds that these respondents knew that they were receiving a commission, brokerage, or an allowance in lieu thereof on the citrus fruit purchased by them from the Florida citrus fruit producers during the years covered by the complaint.

The acts and practices of respondents in accepting a commission, brokerage, other compensation, or allowance in lieu thereof did and does constitute a violation of Section 2(c) of the Clayton Act as amended (15 U.S.C. Sec. 13) and should be proscribed.

DISCUSSION

That section of the Clayton Act which has been invoked in this proceeding, Section 2(c), proscribes a practice which is entirely separate and distinct from the practices which are proscribed by Sections 2(a) and 2(d). It is the *receipt* or *acceptance* of the commission or allowance in lieu of brokerage which is declared to be unlawful by 2(c). Price discrimination, competitive injury, and *scienter* on the part of the person receiving the payment need not be proven.

Section 2(c) is totally independent of 2(a) of the Clayton Act. Section 2(c) creates a separate offense. The decisions in *Biddle Purchasing Co. v. FTC*, 96 F. 2d 687, and *Great Atlantic & Pacific Tea Co. v. FTC*, 106 F. 2d 667, have negated the legal duty of the Commission to make the same proof in a 2(c) proceeding as is required in a 2(a) proceeding. This examiner reads *Biddle* and *A & P* as holding that the payment or receipt of the brokerage is in itself the prohibited act; that Congress has made such prohibited act illegal per se; and the Federal Trade Commission need not prove either

