

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS AND ORDERS, JULY 1, 1962, TO DECEMBER 31, 1962

IN THE MATTER OF

EXCHANGE DISTRIBUTING COMPANY

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

Docket 8061. Complaint, July 29, 1960—Decision, July 9, 1962

Order requiring a Birmingham, Ala., wholesale distributor of citrus fruit, vegetables, and produce, to cease receiving unlawful brokerage on purchases of citrus fruit from Florida packers for resale, such as allowances of 10¢ per box of 1½ bushels and 5¢ per carton of ¼ bushels, equal to the standard brokerage fee on sales made through brokers.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly described, has been and is 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. Respondent Exchange Distributing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its office and principal place of business located at 1019 First Avenue, North, Birmingham, Alabama, with mailing address as Post Office Box 1689, Birmingham, Ala.

PAR. 2. Respondent is now, and for the past several years has been, engaged in business primarily as a wholesale distributor, buying, selling and distributing citrus fruit and produce, and other food products, all of which are hereinafter sometimes referred to as food products. Respondent purchases its food products from a large number of suppliers located in many sections of the United States. The

annual volume of business done by respondent in the purchase and sale of food products is substantial.

PAR. 3. In the course and conduct of its business for the past several years, respondent has purchased and distributed, and is 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 respondent is located. Respondent transports or causes such food products, when purchased, to be transported from the places of business or packing plants of its suppliers located in various other States of the United States to respondent who is located in the State of Alabama, or to respondent's 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 respondent and its respective suppliers of such products.

PAR. 4. In the course and conduct of its business for the past several years, but more particularly since January 1, 1959, respondent has been and is now making substantial purchases of food products for its own account for resale from some, but not all, of its suppliers, and on a large number of these purchases respondent has received and accepted, and is 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, respondent makes substantial purchases of citrus fruit from a number of packers or suppliers located in the State of Florida, and receives 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 respondent receives a lower price from the supplier which reflects said commission or brokerage.

PAR. 5. The acts and practices of respondent 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).

Mr. Cecil G. Miles and *Mr. Basil J. Mezines* for the Commission.
Mr. Edward M. Friend, Jr., and *Sirote, Permutt, Friend & Friedman*, of Birmingham, Ala., for respondent.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

The complaint in this proceeding charges respondent with violating subsection 2(c) of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13),¹ by receiving and accepting from its suppliers of food products, especially citrus fruits, a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof. It also charges that, "more particularly since January 1, 1959, respondent has been and is now making substantial purchases of food products for its own account for resale from some, but not all, of its suppliers, and on a large number of these purchases respondent has received and accepted, from said suppliers a commission, brokerage, or other compensation, or allowance or discount in lieu thereof." Respondent's answer denied the charges of the complaint and stated that it "purchases, as a rule, from the shipper who gives Respondent the lowest price on the quality of merchandise they desire to purchase, and thereafter sells such merchandise at market price."

At hearings in Birmingham, Alabama, and Lakeland, Florida, counsel supporting the complaint completed their case-in-chief and at a hearing in Birmingham on October 23, 1961, respondent completed presentation of its evidence, the record was closed, and an order fixed December 8, 1961, as the date for the parties to file proposed findings, conclusions and suggested order. Such proposed findings, conclusions, and suggested order have been filed.

Respondent has maintained throughout this proceeding that, if a commission in lieu of brokerage were paid to it by its suppliers during the relevant period, such payments were made without its having requested them, and without its knowledge.

Based upon the entire record in this proceeding, including the exhibits which have been received in evidence, the examiner makes the findings of fact and conclusions hereinafter set forth. Findings proposed by the parties which are not made in the form in which they have been 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 con-

¹ "That it shall be unlawful for any person engaged in commerce, in the course of such 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 of 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."

sidered 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, the evidence, the exhibits, and the pleadings, the examiner makes the following:

FINDINGS OF FACT

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

2. Exchange Distributing Company, respondent, is a Delaware corporation with its principal and sole place of business located at 1019 First Avenue North, Birmingham, Ala. Respondent is now, and for several years last past, including the year 1959, has been engaged primarily as a wholesale distributor of food products, including citrus fruits, vegetables, and produce. Respondent was and is buying, selling and distributing the aforesaid citrus fruit and food products, which move to it across state lines. Respondent purchases its citrus fruit and other food products from a large number of suppliers located in many states of the United States other than the State of Alabama in which respondent is located and in different states thereof. Respondent transports or causes such food products, when purchased, to be transported from its suppliers' places of business or packing plants to respondent in the State of Alabama or to its customers located in said state or elsewhere.

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

4. The business transacted by respondent for the year 1959 to the present time was substantial, being between \$3,000,000 and \$4,000,000 per annum. Respondent was one of four business concerns conducting similar business in the Birmingham area which had substantially the same sales volume. Tom Pippen is president of the respondent corporation, and has been with the company since June 1946. He has "general supervision over the buying, selling, accounting, warehousing, receiving, shipping, and credit." Mr. Pippen purchased all the citrus fruit for respondent, commencing in January 1959 and continuing to the dates of the hearing. His purchases were negotiated in long distance telephone conversations with the suppliers located

1

Initial Decision

in Florida, and averaged approximately 150 to 175 truckloads of fruit annually.

5. During the relevant period the price of citrus fruit was quoted to respondent by the growers on the basis of a "Bruce box" containing $1\frac{3}{8}$ bushels. The price was generally quoted, especially in trade journals, in increments of 25 cents, i.e., \$2.50, \$2.75, or \$3.00 a Bruce box. In the citrus fruit industry, a "carton" is half of a Bruce box and contents, and its price would be half the price of a Bruce box. Some suppliers made separate charges of 5 cents for a carton and 10 cents for a Bruce box, over and above the cost of the citrus, while other suppliers absorbed this cost. The wholesale citrus fruit industry is highly competitive and a difference of a few cents, i.e., 5 cents per carton or 10 cents per Bruce box constitutes a material price differential to the purchasers. When sales of citrus fruit were made through brokers, the standard brokerage fee was 10 cents per Bruce box of $1\frac{3}{8}$ bushels, or 5 cents per carton, or one-half box of $\frac{4}{8}$ bushel.

6. Although Mr. Pippen testified that he did not at any time make any request upon any supplier for any allowance in lieu of brokerage, nor was he offered any, and that all of the negotiations between respondent and its suppliers were carried on at arms' length in which the respondent was attempting to purchase citrus products at the very lowest possible price, Mr. Pippen knew that the citrus fruit growers who supplied respondent also employed brokers and that these brokers were paid a commission for their services.

7. During the relevant period respondent received and accepted "a commission, or brokerage, or other compensation or an allowance or discount in lieu thereof," on purchases of citrus fruit from, among others, Newbern Groves, Inc., of Tampa, Florida, Keen Fruit Corporation of Frostproof, Florida, and Orange Fruit Company of Maitland, Florida. The discount or allowances received from these packers was equal to the fee paid to brokers.

Packing house manifests of Orange Fruit Company, in which Exchange Distributing Company of Birmingham, Alabama, is the consignee, show an allowance of brokerage on the face of such manifests. When an allowance was made to compensate for "decay loss" the words "decay loss" appear. On these manifests the fruit was priced in 25-cent increments. On the manifests where the brokerage is deducted from the quoted price the net is shown, i.e., CX-152, where the fruit is priced at \$2.65 net or \$2.90 net.

Keen Fruit Corporation reported transactions in which it paid an allowance in lieu of brokerage.

Newbern Groves made an allowance in lieu of brokerage of 5 cents per carton and 10 cents per Bruce box to respondent on all its citrus fruit purchases during the relevant period. This allowance did not have to be and was not specifically negotiated because over the years such allowance had become a general practice and gradually became the "custom" in the industry. Newbern discontinued the allowances in July or August 1960 but did not inform the respondent that the practice was being discontinued, "because it was not necessary" (Tr. 101).

8. During the relevant period respondent purchased most of its citrus fruit requirements from Orange Fruit Company, Keen Fruit Corporation and Newbern Groves, Inc. Although Mr. Pippen contacted other suppliers of citrus fruit, he purchased most of respondent's requirements from these suppliers because they quoted him the lowest prices.

9. The allowances in lieu of brokerage to respondent were at times paid by deduction from the market price stated on invoices, and at other times prices were quoted to respondent and negotiated on a net basis, i.e., the price quoted to respondent was the price which respondent would pay net, after the allowance in lieu of brokerage had first been deducted.

10. In the course and conduct of its business for the past several years, but more particularly since January 1, 1959, respondent has been and is now making substantial purchases of food products for its own account for resale to its customers. On a large number of these purchases respondent has received and accepted from its suppliers a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, in connection therewith. The practice of the Florida citrus producers of making an allowance in lieu of brokerage to their customers, including this respondent, was an accepted custom in the 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. Respondent either knew, or because of its many years of experience in the produce industry should have known, that it was receiving such brokerage or commission or a discount in lieu thereof.

Applying the accepted court and commission decisions¹ to these facts, the examiner makes the following

¹ *Biddle Purchasing Co. v. FTC*, 96 F. 2d 687; *Great Atlantic & Pacific Tea Co. v. FTC*, 106 F. 2d 667; *FTC v. Broch & Co.*, 363 U.S. 166 (1960); *Thomasville Chair Company*, Docket No. 7273 (Commission opinion dated March 13, 1961); *Haines City Citrus Growers Assn., et al.*, Docket No. 7144 (Commission opinion dated May 19, 1961); and *William Buehl Eidson, et al.*, Docket No. 8064 (Commission opinion dated January 3, 1962).

