

F. Fails to set forth separately in advertisements relating to fur products composed of two or more sections containing different animal furs the information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder with respect to the fur comprising each section.

G. Represents directly or by implication that the regular or usual prices of any fur product is any amount which is in excess of the prices at which respondent has usually and customarily sold such products in the recent and regular course of its business.

H. Represents directly or by implication that the prices of fur products have been reduced when such is not the case.

I. Misrepresents in any manner the savings available to purchasers of respondents' fur products.

*It is further ordered,* That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

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IN THE MATTER OF

EDWARD JOSEPH HRUBY DOING BUSINESS AS  
HRUBY DISTRIBUTING COMPANY

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

*Docket 8068. Complaint, Aug. 4, 1960—Decision, Dec. 26, 1962*

Order dismissing by a two-to-one decision, complaint charging an Omaha, Nebr., distributor with violating Sec. 2(c) of the Clayton Act by receiving commissions or brokerage on purchases of food products for its own account, the majority holding that the allowances concerned were functional discounts made to an intermediate distributor to enable him to sell to other wholesalers at a price competitive with that offered by producers selling through food 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:

## Complaint

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PARAGRAPH 1. Edward Joseph Hruby is an individual doing business as Hruby Distributing Company, under and by virtue of the laws of the State of Nebraska, with his office and principal place of business located at 312 North 10th Street, Omaha, Nebr.

PAR. 2. Respondent is now, and for the past several years has been, engaged primarily in the business of buying, selling and distributing for his own account, citrus fruit and produce and other food products, all of which are hereinafter sometimes referred to as food products. Respondent purchases his food products from a large number of suppliers located in many sections of the United States, particularly in the State of Florida. 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 his 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 Nebraska, 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 his suppliers located in various other States of the United States to respondent who is located in the States of Nebraska, 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 his respective suppliers of such products.

PAR. 4. In the course and conduct of his 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 his own account for resale from some, but not all, of his 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  $1\frac{3}{5}$  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

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in lieu thereof, on his 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.  
*Wald, Harkrader & Rockefeller*, by *Mr. Robert L. Wald*, of Washington, D.C.; with *Mr. Ben F. Shrier*, of Omaha, Nebr., for respondent.

## INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

## PRELIMINARY STATEMENT

On August 4, 1960, the Federal Trade Commission issued its complaint against Edward Joseph Hruby (hereinafter called respondent), an individual doing business as Hruby Distributing Company, alleging that respondent had violated § 2(c) of the Clayton Act (hereinafter called the Act), 15 U.S.C. 12, *et seq.*, as amended by the Robinson-Patman Act. Copies of said complaint together with a notice of hearing were duly served on respondent.

The complaint alleges in substance that respondent has received and accepted from his suppliers a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, upon purchases for his own account. Respondent appeared by counsel and filed an answer, as amended, denying the commerce and all other allegations of the complaint except his name, business and address. In addition, the answer affirmatively alleged that respondent was a "car lot distributor purchasing for his own account, not acting for or in behalf of any party to the transactions." Pursuant to notice, hearings were thereafter held before the undersigned hearing examiner, duly designated by the Commission to hear this proceeding, at Omaha, Nebraska; Lakeland, Florida; and Washington, D.C.

Both parties were represented by counsel, participated in the hearings and afforded full opportunity to be heard, to examine and cross-examine the witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. Both parties filed proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof.<sup>1</sup> All such

<sup>1</sup> After both parties had filed, counsel for respondent moved the receipt of a supplemental proposed finding. Counsel supporting the complaint opposed, and alternatively proposed an additional supplement. Both proposals are received and have been considered. Thereafter, counsel for respondent requested the undersigned to take official notice of the decision of the Commission in *William Buehl Eidson*, 60 F.T.C. 1, Docket 8064 (January 3, 1962), which was opposed by counsel supporting the complaint. It goes without saying that the undersigned takes into consideration all relevant decisions of the Commission, including the *Eidson* case.

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findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded are herewith specifically rejected.<sup>2</sup>

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

## FINDINGS OF FACT

*I. The Business of Respondent*

Respondent is an individual doing business as Hruby Distributing Company, under and by virtue of the laws of the State of Nebraska, with his office and principal place of business located at 312 North Tenth Street, Omaha, Nebraska.

*II. Interstate Commerce*

Respondent is now, and for several years has been, engaged in the purchase and resale, as a distributor for his own account, of food products, primarily fruit, vegetables and other produce. Respondent purchases his food products from a number of suppliers located in many sections of the United States, including Florida, Texas and Colorado. In the course and conduct of such business, respondent transports or causes such food products, when purchased, to be transported from the places of business of his suppliers in such States to respondent in the State of Nebraska, or to respondent's customers located in said State or elsewhere. There is now and has been at all times mentioned herein a continuous course of trade in interstate commerce in said food products between respondent and his respective suppliers of said products.

*III. The Unlawful Practices—The Receipt of Brokerage or Discounts in Lieu Thereof**A. The Issue*

As noted above, the complaint alleges that respondent, in connection with the purchase of food products for his own account, has received and accepted from his suppliers a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof. Section 2(c) of the Act provides:

(c) 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

<sup>2</sup> 5 U.S.C. § 1007(b).

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 is so granted or paid.

#### B. Direct Brokerage

Respondent personally handled his own purchases, primarily by long distance telephone. His suppliers are located in many states, including Florida, Texas and Colorado. The annual volume of business done by respondent in the purchase and resale of food products is substantial. Respondent testified that his annual volume of business was approximately one and three quarter million dollars. Respondent conceded that the industry was highly competitive and that the difference of a few cents on a case of produce can make a material difference.

The record establishes beyond dispute that respondent received direct brokerage on numerous purchases for his own account. Although respondent's answer affirmatively alleged that he was a car lot distributor purchasing for his own account, not acting for or in behalf of anyone else, and respondent originally testified that all of his purchases were for his own account, when specific invoices from three of his suppliers, Mission Citrus Growers, Inc., Gordon Butler, and Schmieding Bros., Inc., were called to his attention, which revealed brokerage payments to him identified as such thereon, respondent then testified, contrary to his earlier testimony and formal answer, that in those instances he was acting as a broker for those respective suppliers.

Mission, Butler and Schmieding specifically deducted brokerage. Mission itemized brokerage on its invoices. On the Butler invoice, respondent himself deducted the brokerage on the face of the invoice because Butler had failed to do so. With respect to Schmieding, the record contains a letter from that company advising respondent that they would pay the brokerage by check at the end of the transaction instead of deducting it from each invoice. In all of these transactions, unlike situations where a billing is net and may or may not reflect a discount in lieu of brokerage, specific brokerage was itemized or acknowledged by the seller and respondent admitted receipt thereof.

In addition to the fact that respondent originally testified that all of his purchases were for his own account and so alleged in his answer to the complaint, additional undisputed evidence of record establishes

that in these specific transactions, contrary to respondent's changed testimony, the purchases were for his own account and he was not acting as a broker for the sellers. In each instance, respondent took title to the property. He selected his own resale price, in some instances higher and in some lower than the invoice price, thus realizing a profit or sustaining a loss, as the case might be, independently of his receipt of brokerage. As respondent himself testified, a broker merely receives a commission and must sell the product at the price established by his principal. In addition, respondent was billed directly by the shipper and was liable for the payment regardless of whether he collected from his purchasers, contrary to the situation which would have existed if he had been acting as a broker. He also assumed liability for any losses to the products, thus further evidencing transfer of title. In the event of any damage in transit, respondent sought and collected, for his own account, reimbursement from the carrier.

Patently there can be no valid defense other than that respondent was in fact a bona fide broker. A broker is an agent, does not take title, does not fix the resale price, and does not sustain a loss or realize a profit in the transaction other than his brokerage commission. The record establishes beyond question the transfer of title from the shippers to respondent and hence establishes, as alleged and originally admitted, that the purchases were for his own account. Since the record also establishes and respondent admitted the receipt of brokerage on these purchases, this is clearly a violation of § 2(c) of the Act.

#### C. Discounts in Lieu of Brokerage

Some of respondent's suppliers submitted invoices setting forth a net price, either f.o.b. or delivered. Such net prices did not itemize brokerage as in the transactions considered above. Respondent testified, and the record establishes, that the usual or standard brokerage on citrus fruit transactions was 10 cents a box of  $1\frac{3}{5}$  bushels,  $7\frac{1}{2}$  cents a master carton ( $\frac{3}{4}$  of a box) and 5 cents a carton ( $\frac{1}{2}$  of a box).

Reliable, probative and substantial evidence in the record establishes that the packers' prices for citrus normally fluctuated in increments of 25 cents, i.e., prices would be in amounts such as \$2, \$2.25 or \$2.75 a box, and half as much for a carton. Respondent purchased citrus fruit from, among others, Keen Fruit Corporation in Florida. Numerous invoices concerning these transactions were received in evidence.

The invoices from Keen Fruit contain in each instance a net delivered price. Respondent claimed that he never discussed brokerage

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with such sellers, purchased on a net price basis, and did not know that the price reflected a discount in lieu of brokerage. However, deducting the freight charges from the Keen invoices and adding the standard brokerage for boxes or cartons reveal a net price in increments of 25 cents per box. In other words, the net price reflected a discount exactly equal to the standard brokerage on the products in question. The general manager of the Keen Fruit Corporation testified that these net prices reflected a discount equal to and in lieu of the standard brokerage payments. Thus there can be no question but that respondent received a net price which included a discount in lieu of brokerage. Respondent, however, contends that he did not know that these transactions reflected such a discount.

Respondent has been engaged in the business for twenty years, and himself testified as to the standard brokerage amounts. Necessarily he was familiar with the usual and customary prices of packers. In addition, he testified several times that inasmuch as he sold exclusively to wholesalers, he would be unable to compete with brokers if he had to buy at the same price as they were selling, i.e., the price of the packer, and hence it was imperative for him to receive a lower price or discount from the regular wholesale price. Many of his other transactions were f.o.b. and hence he knew the customary freight charges. Knowing the price of his competitors (brokers selling to wholesalers), knowing the delivery charges, and knowing the standard brokerage rates, he necessarily knew or should have known that the discount he received, or net price, exactly reflected the standard brokerage and was in lieu thereof. It is concluded and found that in such transactions respondent received and accepted an allowance or discount in lieu of brokerage.

Respondent testified that the transactions involving net billing, not disclosing on their face the payment of brokerage, represented the greatest volume of his business. He contends that such discounts in lieu of brokerage were not in violation of § 2(c) because they were justified by the distributional function performed by him, namely, a car lot distributor selling to wholesalers, and hence had no adverse effect upon such wholesalers because respondent was not in competition with them, but in fact was in competition with brokers, whose brokerage fees equaled the discounts received by respondent. Respondent contends that as a car lot purchaser reselling to wholesalers he performed a distributional function or service in connection with the resale of the goods, consisting of storage, warehousing and distribution, which entitled him to a discount or lower price than other purchasers not performing these functions. The record clearly estab-

