

FEDERAL TRADE COMMISSION DECISIONS

IN THE MATTER OF

FRED MEYER, INC., ET AL.

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

Docket 7492. Complaint, May 15, 1959—Decision, July 9, 1963

Order requiring Portland, Oreg., distributors of retail merchandise including food, drug and variety and a limited line of clothing, to cease violating Sec. 2(f) of the Clayton Act by knowingly inducing or receiving from sellers a net price below the net price at which like products were sold to competitors of such distributors; and to cease violating the Federal Trade Commission Act by receiving from suppliers any compensation for services or facilities furnished in connection with the handling of the suppliers' products when they knew that such compensation was not made available to their competitors.

COMPLAINT

The Federal Trade Commission, having reason to believe that the respondents named above have violated and are now violating the provisions of Section 2(f) of the amended Clayton Act (15 U.S.C. Sec. 13) and Section 5 of the Federal Trade Commission Act (15 U.S.C. Sec. 45), and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint, stating its charges as follows:

COUNT I

PARAGRAPH 1. Fred Meyer, Inc., is a corporation organized, existing and doing business under the laws of the State of Oregon, with its principal office and place of business located at 721 Southwest Fourth Avenue, Portland, Oregon.

Respondents Fred G. Meyer and Earl A. Chiles are individuals and officers of the corporate respondent. These individual respondents maintain their offices and place of business at the same address as that of the corporate respondent. As officers of the corporate respondent, the individual respondents direct, manage and control the business activities of the corporate respondent, including the purchasing policies referred to in this complaint.

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PAR. 2. Respondents are principally engaged in the purchasing, distribution and sale of retail merchandise, including food, drug and variety and a limited line of clothing.

Fred Meyer, Inc., owns and operates 13 retail stores all located within Portland, Oregon, and the vicinity.

Gross sales of corporate respondent for the year ending December 31, 1957, were in excess of \$40 million.

PAR. 3. The respondents are now, and for many years have been, purchasing in commerce from sellers engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and the amended Clayton Act, numerous products and supplies for use, consumption and resale within the United States. In connection with such transactions, respondents are now, and have been, in active competition with other corporations, partnerships, firms and individuals also engaged in the purchase for use, consumption and resale of products and supplies of like grade and quality from the same or competitive sellers. These sellers are located in the several States of the United States, and the respondents and such sellers cause the products and supplies so purchased in manner and method and for purposes as stated, to be shipped and transported among and between the several States of the United States, from the respective State or States of location of said sellers to the respective State of location of respondents.

PAR. 4. In the course and conduct of their business in commerce, respondents have adopted, followed and pursued purchasing policies and practices which were knowingly designed and intended to and did induce from such of the aforesaid commodity sellers as acceded, discriminatory prices, discounts, allowances, rebates and terms and conditions of sale, favorable to respondents in the commodity purchase transactions described.

For example, for a 4-week period in September and October of each year, respondents sell to consumers, at the nominal price of 10 cents each, books containing 72 coupons, each of which features an article of merchandise sold by respondents. By redeeming the coupon in conjunction with the purchase of a featured article of merchandise, the consumer is able to buy at a specially reduced price or to obtain the merchandise free. As an example of the magnitude of such promotions, there were approximately 138,700 coupon books sold by respondents in 1956 and a total of 898,573 coupons, more or less, redeemed by customers.

Suppliers of respondents are aggressively solicited by respondents' buyers to participate in this coupon book program by selling to respondents at specially reduced prices quantities of merchandise

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necessary to cover total expected redemption or by giving free merchandise, or otherwise. Further, some participating suppliers redeem the coupons featuring the respective merchandise at face or other value, resulting in a lowered net price to respondents.

PAR. 5. The favorable discriminatory prices, discounts, rebates and terms and conditions of sale were not granted by said sellers to respondents' competitors nor received by respondents' competitors in connection with the like or similar purchase transactions of commodities of like grade and quality so purchased for consumption, use or resale.

Each and all of the aforesaid discriminatory purchase transactions so negotiated and made tend to and do establish the acceding suppliers therein as preferred sources of supply over competitive sellers not so acceding, for the purchase for consumption, use or resale by said respondents of the commodities concerned and give the respondents price advantages over non-favored buyers as described in the purchase for consumption, use or resale of the same or similar commodities of like grade and quality.

PAR. 6. When they knowingly induced or received the discriminatory net prices from their suppliers, as alleged, respondents knew or should have known that such discriminatory net prices were not being granted to competitors of respondents on goods of like grade and quality; that such net prices were not cost justified by savings to the suppliers in the cost of manufacture, distribution and sale; and that the net prices were not being granted by the suppliers in good faith to meet a competitive net price.

PAR. 7. The effect of each and all of the described discriminations in prices induced by respondents in each and all of the purchase transactions described made in the manner and method and for the purpose stated, and received in each and all of such transactions by respondents, has been, and may be, to substantially lessen competition in the lines of commerce in which the acceding sellers, said sellers' competitors, respondents, and respondents' competitors, as described, are engaged, or to injure, destroy or prevent competition with the acceding sellers and their competitors and respondents and their competitors.

PAR. 8. The foregoing alleged acts and practices of respondents are in violation of Section 2(f) of said amended Clayton Act.

COUNT II

PAR. 9. Each of the allegations contained in paragraphs 1 through 3 hereof, are hereby realleged and made part of this Count as fully and with the same effect as though herein again set forth in full.

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PAR. 10. In the course and conduct of their business in commerce, and particularly since 1955, respondents have knowingly induced and received from many of their suppliers payments, allowances, services and facilities granted to them or for their benefit, including money, goods or other things of value. These payments, allowances, services and facilities have been made, or contracted to be made, as compensation or in consideration for promotional activities furnished by or through respondents in connection with the sale or offering for sale of products sold to them by these suppliers. Such payments, allowances, services and facilities were not made available by these suppliers on proportionally equal terms to all other customers of such suppliers competing with respondents in the sale and distribution of such products.

For example, respondents publish annually a book of 72 coupons as hereinbefore described. Each coupon features a product of one of respondents' suppliers. Merchandise buyers of respondents are instructed to and do solicit suppliers' participation in such coupon book promotion. The cost of participation to the buyer is a sum such as \$350 cash for a page or coupon to be included in the book, plus reimbursement to respondents for redemption of such coupons, or the allowances to respondents of a specially reduced price to offset the cost of the promotional activities involved in the use of such coupons, or free goods, services or facilities to respondents.

Further, respondents at times during the year feature other special promotions such as "gift days" or "thrift days" during which merchandise buyers of respondents solicit suppliers for cash payments, allowances, services and facilities, in return for which respondents agree to render special promotional services to each supplier.

Among and typical of the suppliers who participated in the promotional activities of respondents and made payments and supplied benefits to respondents during the promotional periods were:

Supplier	Address	Product
Tri-Valley Packing Association.....	San Francisco, Calif.....	Canned fruits.
Burlington Industries, Inc.....	Greensboro, N.C.....	Hosiery.

PAR. 11. Many of respondents' suppliers, including particularly those listed in the above paragraph, did not offer or otherwise make available to all their customers competing with respondents in the sale and distribution of their products, any similar payments as

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compensation or consideration for advertising or other services and facilities, on terms proportionally equal to those granted respondents.

When such benefits, payments, goods, services and facilities were induced or received from the suppliers, as alleged, respondents knew or should have known that such payments, allowances, goods, services and facilities were not offered or otherwise made available on proportionally equal terms to other customers competing with respondents in the sale and distribution of products of like grade and quality of such suppliers.

PAR. 12. In knowingly inducing or receiving such special payments, benefits, goods, services and facilities from suppliers which were not made available on proportionally equal terms to respondents' competitors, respondents have engaged in acts and practices which are to the prejudice and injury of the competitors of the respondents and the public. Such acts and practices have the tendency and effect of obstructing, hindering, lessening and restraining competition in the purchasing, distribution and sale of food, drug, variety and clothing products. Such acts have the tendency to obstruct and restrain and have obstructed and restrained commerce in such products and accordingly, constitute unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. Sec. 45).

Mr. Jerome Garfinkel for the Commission.

Mr. George W. Mead, Portland, Oreg., for respondent.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

JANUARY 23, 1962

On May 15, 1959, the Federal Trade Commission issued its complaint¹ in this proceeding (Docket No. 7492) against the respondents charging them with violation of Section 2(f) of the amended Clayton Act (15 U.S.C., Sec. 13), and Section 5 of the Federal Trade Commission Act (15 U.S.C., Sec. 45).

THEORY OF COMMISSION'S CASE

The crux of the 2(f) charges is that respondents unlawfully engaged in commerce by knowingly inducing or receiving a discrimination in price prohibited by Section 2(a) of the Clayton Act, as amended. The crux of the charges under Section 5 of the Federal Trade Commission Act is that similarly and otherwise respondents

¹ Earle A. Chiles erroneously referred to in the complaint as Earl A. Chiles.

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have knowingly induced and received from many of their suppliers payments, allowances, services and facilities granted to them for their benefit, including money, goods, or other things of value, which practices of the respondents constitute unfair methods of competition.

In connection with the 2(f) charges, paragraph 4, Count I of the complaint, states as follows:

In the course and conduct of their business in commerce, respondents have adopted, followed and pursued purchasing policies and practices which were knowingly designed and intended to and did induce from such of the aforesaid commodity sellers as acceded, discriminatory prices, discounts, allowances, rebates and terms and conditions of sale, favorable to respondents in the commodity purchase transactions described.

and paragraph 10, Count II thereof in charging respondents under Section 5 of the Federal Trade Commission Act with inducing a violation of Section 2(d) of the Clayton Act, states as follows:

In the course and conduct of their business in commerce, and particularly since 1955, respondents have knowingly induced and received from many of their suppliers payments, allowances, services and facilities granted to them or for their benefit, including money, goods or other things of value. These payments, allowances, services and facilities have been made, or contracted to be made, as compensation or in consideration for promotional activities furnished by or through respondents in connection with the sale or offering for sale of products sold to them by these suppliers. Such payments, allowances, services and facilities were not made available by these suppliers on proportionally equal terms to all other customers of such suppliers competing with respondents in the sale and distribution of such products.

The concept enunciated by the Section 5 charges of the complaint appears to be sustained by the United States Supreme Court in *Federal Trade Commission v. Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392 (1953) [5 S. & D. 498]. The court in a Section 5 proceeding involving exclusive dealing arrangements concludes that the "unfair methods of competition," which are condemned by Section 5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act, *Federal Trade Commission v. Keppel & Bro., Inc.*, 291 U.S. 304 [2 S. & D. 259], and that Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business. It has also been indicated by the Supreme Court that the Federal Trade Commission Act was designed to supplement and bolster the Clayton Act and similar acts (see *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441, 453) [1 S. & D. 170, 177]. This also includes stopping in their incipency acts and practices which, when full blown, would violate

