

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.

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

61 F.T.C.

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

1437

Initial Decision

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.¹ All such

¹ 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.

Initial Decision

61 F.T.C.

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

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

² 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

1437

Initial Decision

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-

Initial Decision

61 F.T.C.

lishes that respondent was not acting as a distributor for the packers. The services and functions performed by him were for his own benefit. Exactly the same contention was rejected by the Court of Appeals in a case substantially on all fours with the situation present here. In the *Southgate Brokerage Company* case³ the Court stated:

It is argued that the section is not applicable here because the receipt by the company of brokerage from the sellers results in no discrimination against buyers, since the company sells only to wholesalers, who pay the prices that they would otherwise pay if the sales were made to them through brokers. It is said that a distributor, such as the company, renders to the wholesale trade the service that a broker ordinarily performs, and that no discrimination is involved in allowing such distributor the ordinary broker's commissions. The answer is that price discrimination, which is covered by section 2(a) of the Act . . . , is not necessary to a violation of section 2(c), quoted above, which specifically forbids the payment of brokerage by the seller to the buyer or the buyer's agent.

After noting that the services, substantially the same as those herein, performed by the company therein were for itself and not for those from whom it had purchased the products, the Court further stated:

The earnestness of counsel for the company in presenting its cause has led us to discuss its contentions at greater length than their merit seems to warrant. Stripped of verbiage, his position is that in acting as a distributor of the products of the sellers, the company performs for them the service of a broker and is entitled to the compensation of a broker. The fact is, however, that the company is not a broker but a purchaser with respect to the goods that it purchases for its own account. In selling these goods to others it acts, not for those from whom it has purchased them, but for itself. Any profits due to rise in the market belong to it and any losses, whether from decline in the market or other cause, fall upon it. It sells for itself, to whom it pleases and at prices which it determines. The fact that it purchases from the sellers is doubtless beneficial to them and may enable them to dispense with the services of a broker on such transactions; but this does not mean that it has rendered services to them within any fair meaning of that language as used in the statute.

For sellers to pay purchasers for purchasing, warehousing or reselling the goods purchased is to pay them for doing their own work, and is a mere gratuity.⁴

Respondent also argues that as a practical matter it is essential for him to receive a discount from the regular net price of packers in order to be able to resell to wholesalers in competition with brokers. Otherwise, he contends, it would necessitate his selling at the same price at which he purchased in order to meet the price quoted by the brokers. It is, of course, well settled that practical considerations do not consti-

³ *Southgate Brokerage Co. v. FTC*, 150 F. 2d 607 [4 S. & D. 403] (4th Cir. 1945).

⁴ Contrary to the suggestion of counsel for respondent that the doctrine of *Southgate* is outmoded, it is noted that the Supreme Court in its recent *Broch* decision cited *Southgate* with approval, in considering whether such discounts were for "services rendered" or reflected cost savings. *FTC v. Broch & Co.*, 363 U.S. 166, 80 S. Ct. 1158 [6 S. & D. 800] (1960).

tute legal defenses to specific violations of a statute.⁵ In addition, respondent has several other elections available. Assuming *arguendo* the validity of such practical considerations, as the Court in *Southgate, supra*, stated:

It is perfectly clear that this provision forbids the payment of brokerage on a sale or purchase of goods to the other party to the transaction. The seller may not pay the buyer brokerage on the latter's purchases for his own account.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce and engaged in the above-found acts and practices in the course and conduct of his business in commerce, as "commerce" is defined in the Act.

2. The acts and practices of respondent as above found are in violation of § 2(c) of the Act.

ORDER

It is ordered, That respondent, Edward Joseph Hruby, an individual doing business as Hruby Distributing Company, and his agents, representatives, and employees, directly or through any corporate, partnership, sole proprietorship, or other device, in connection with the purchase of food products, in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any purchase of food products for respondent's own account, or when respondent is the agent, representative, or other intermediary acting for or in behalf, or subject to the direct or indirect control, of any buyer.

OPINION OF THE COMMISSION

By Elman, *Commissioner*:

This is an appeal by respondent from the examiner's initial decision holding him in violation of Section 2(c) of the Robinson-Patman Act, 15 U.S.C. 13(c).¹ The complaint alleges that respondent Hruby is a distributor of food products who buys for his own account and

⁵ As the Supreme Court stated in *Broch, supra*: "Any doubts as to the wisdom of the economic theory embodied in the statute are questions for Congress to resolve."

¹ Section 2(c), the so-called "brokerage" provision of the Act, reads as follows:

"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, 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."

who in connection with such purchases unlawfully receives brokerage or other compensation in lieu thereof.

Respondent is an individual trading as Hruby Distributing Company, in Omaha, Nebraska. His business consists of purchasing foodstuffs for his own account from packers and other primary suppliers, which he, in turn, resells to food wholesalers.² The goods are shipped by common carrier in either carload or truckload lots and are priced and invoiced to the respondent. Total annual sales are estimated to be approximately one and three quarter million dollars.

Hruby takes title to the goods he handles, sets his own resale price thereon, and assumes the risks of collection and loss in transit. He maintains and operates a warehouse through which approximately 50% of the goods purchased and resold passes. The remaining 50% of the goods dealt in are drop-shipped directly to his customers. Respondent delivers goods from his warehouse to out-of-town customers but local customers generally pick up merchandise at his warehouse in their own trucks.

Hruby's operations place him at a functional level midway between the producers of foodstuffs and the wholesalers who serve retail grocery stores. At this level he competes with producers who market their goods through food brokers. As a matter of fact, many of Hruby's suppliers also sell through food brokers. It does not appear, however, that any of his suppliers made sales by this distribution method in the market area served by Hruby.

It is obvious that in order to remain in business, Hruby must be able to offer and sell to wholesalers at a price competitive with that offered to wholesalers by producers selling through food brokers. In spite of the warehousing, credit and small lot delivery services offered by respondent to his customers (services not usually offered by food brokers), he must also offer a competitive price, since in the highly competitive food field differences of a few cents on a case of goods will make or lose a sale. Thus, as an economic necessity, respondent must have a lower price than his suppliers' regular price to wholesalers.

In its Section 2(a) price discrimination cases the Commission has long recognized the legality of price differences based upon differences in the level of distribution of the customers who are charged disparate prices. The lawfulness of such functional price differences derives from the fact that they result in no adverse economic effects upon par-

² Respondent testified that he occasionally sells to the produce departments of grocery chains on a "fill-in" basis, but there is no evidence as to the extent of such sales or the prices charged or paid for the goods. All of the record evidence deals with Hruby's sales to wholesalers.

ticular competitors or competition in general. Thus, since Hruby operates at a higher competitive or functional level than wholesalers, the granting to Hruby or receipt by him of a lower price than afforded to wholesalers would ordinarily not be questioned. But the manner and form in which Hruby received his lower prices created the doubts concerning their validity which led to this complaint.

Hruby's suppliers, accustomed to selling their goods to wholesalers through food brokers and not through distributors of respondent's type, referred to or described the payments or discounts granted to Hruby as brokerage or discounts in lieu of brokerage. And therein lies the difficulty, for the receipt of brokerage, or discounts "in lieu thereof", by customers buying for their own account immediately presents the question of possible violation of Section 2(c). If the payments or discounts received by Hruby were in actual fact what they were labeled by some sellers, i.e., brokerage or discounts in lieu of brokerage, Section 2(c) would come into play. If, on the other hand, the payments, despite their labels, were in actual fact no more than functional discounts designed to permit Hruby to resell to wholesalers, they would not be barred by Section 2(c).

The initial decision rests its finding of violation on the grounds that: the discounts received by respondent Hruby on his purchases from citrus producers were in a few instances described as "brokerage"; that they were in the same amount as the producers' brokerage payments on sales made through brokers; and that they were listed by one producer in response to a Commission questionnaire requesting information concerning "discounts in lieu of brokerage" granted by it.

An examination of Hruby's business shows, however, that these discounts have no resemblance whatever to the practices at which Section 2(c) was aimed.³ Hruby is clearly not a "dummy" broker

³ The legislative history of Section 2(c) is set out in some detail in *Federal Trade Commission v. Henry Broch & Co.*, 363 U.S. 166, 80 S. Ct. 1158 [6 S.&D. 800] (1960). The *Broch* opinion summarized it as follows (pp. 168-69):

The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power. A lengthy investigation revealed that large chain buyers were obtaining competitive advantages in several ways other than direct price concessions and were thus avoiding the impact of the Clayton Act. One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act. But it was not the only means by which the brokerage function was abused⁵ and Congress in its wisdom phrased § 2(c) broadly, not only to cover the other methods then in existence but all other means by which brokerage could be used to effect price discrimination.

[Supreme Court's footnote 5.]

In the Final Report on the Chain-Store Investigation . . . Congress had before it examples not only of large buyers demanding the payment of brokerage to their agents but also instances where buyers demanded discounts, allowances, or outright price

controlled by a large buyer to whom he passes on phony brokerage payments. Equally clearly, he is not himself a powerful wholesaler or retail chain exacting from his suppliers false brokerage payments, to the competitive disadvantage of his smaller competitors. And, finally, it is clear that the discounts received by Hruby are not granted because on sales to him sellers could dispense with brokerage services regularly required on their sales, thus effecting savings of usual brokerage fees.

Consider the example of the producer who sells to the wholesale trade at \$1 per case, paying 5 cents to his brokers and keeping 95 cents for himself. If he avoids this brokerage payment by dispensing with a broker and selling direct to a large wholesaler, he cannot pass on this saving to the wholesaler by charging him only 95 cents. This would clearly violate Section 2(c), since it would be an allowance in lieu of brokerage, giving the large wholesaler a discriminatory advantage over his competitors. Suppose, however, the producer has an alternative method of distribution: In addition to selling to wholesalers through brokers, he sells to them through *intermediate* distributors who buy from the producer for their own account and resell to wholesalers. And suppose, further, this is done not as a subterfuge or device for violating the law, but because such intermediate distributors serve a legitimate and useful economic function in the channels of distribution of the particular industry. In such a situation the producer must of course give the intermediate distributors some discount from his own price to the wholesale trade in order to enable them to make a profit and stay in business. In its very nature, the purpose of a discount or allowance of this sort is not to pass on a saving in brokerage. Instead, it is the familiar "functional discount", which the Commission has recognized as involving no potential anti-competitive effect where the distributor who receives the lower price does not compete at the wholesale level.

Is Hruby, doing business as Hruby Distributing Company, just such a distributor who serves as a middleman between producer and wholesaler, buying from one and selling to the other? On this record, we must find that he is. Hruby performs much the same function that in other transactions is performed by a broker on direct sales from a producer to wholesalers. In addition to finding purchasers for the producer's goods, however, he assumes credit risks and in some in-

reductions based on the theory that fewer brokerage services were needed in sales to these particular buyers, or that no brokerage services were necessary at all. . . . These transactions were described in the report as the giving of "allowances in lieu of brokerage . . ." or "discount[s] in lieu of brokerage."

stances takes delivery of the goods himself, redistributing them in less than carload lots.

As already noted, since Hruby cannot charge substantially higher prices to wholesalers than they are offered by producers selling through food brokers, he of necessity must be afforded a lower price than the producers' established price to the wholesale trade. Such lower price, no matter how labeled, reflects not a saving of brokerage by the seller (for there is none) but, rather, the difference in the functional-competitive level at which Hruby and his wholesaler customers operate. We must conclude that the lower net prices received by Hruby are not the result of the receipt of brokerage or discounts in lieu thereof and are not unlawful under Section 2(c).

The occasional characterization of these allowances to Hruby as "brokerage", or their listing by a producer in a Section 6 questionnaire under "discounts in lieu of brokerage", reveals nothing more than the not surprising fact that businessmen, in describing their actions, do not talk like lawyers expert in the niceties of the Robinson-Patman Act.

Accordingly, on the basis of our analysis of the facts of record here, an order vacating the initial decision and dismissing the complaint will issue.

Commissioner MacIntyre dissented from the decision of this matter and Commissioners Anderson and Higginbotham did not participate.

DISSENTING OPINION

By MacIntyre, *Commissioner*:

Circumstances present here do not permit me to join with the Majority in dismissing the complaint in this case. Under other circumstances applicable to other cases I would find no difficulty in agreeing with the Majority that Section 2(c) of the Robinson-Patman Act should not be utilized to preclude a businessman from engaging in any line or lines of business he chooses. I would agree that a businessman should be allowed to operate as a supplier, broker, wholesaler, or retailer. Also, I do not see anything in the law that would preclude him from engaging in two or more of such lines of commerce simultaneously. However, it is obvious that it would be a travesty to say that with respect to any particular business transaction a businessman was at the same time a supplier, broker, wholesaler and retailer. Particularly it is inappropriate to consider a businessman as a broker representing and rendering services to a supplier in a transaction when, in that transaction, the same businessman is a buyer.

Throughout the history of our commerce and trade we have held suspect the individual who has been found in situations where he purported to represent the two conflicting sides to transactions. Long have we followed the concept that no man is able to *serve* two masters. That concept is particularly applicable when the interests of the two masters are in conflict. In addition to the logic and merit of such concept, other factors prompted Congress to enact Section 2(c) of the Robinson-Patman Act in 1936. As pointed out in the Opinion of the Majority, this so-called "brokerage section" provides as follows:

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, 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.

On June 6, 1960 the Supreme Court in the case of *Federal Trade Commission v. Henry Broch & Company* (363 U.S. 166, 80 S. Ct. 1158 [6 S. & D. 800]) recognized some of the immediately pressing facts which prompted Congress to enact this so-called "brokerage section" of the Robinson-Patman Act. In the majority opinion in the *Broch* case, the Court said:

One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act. But it was not the only means by which the brokerage function was abused. Congress in its wisdom phrased § 2(c) broadly, not only to cover the other methods then in existence but all other means by which brokerage could be used to effect price discrimination.

The particular evil at which § 2(c) is aimed can be as easily perpetrated by a seller's broker as by the seller himself. The seller and his broker can of course agree on any brokerage fee that they wish. Yet when they agree upon one, only to reduce it when necessary to meet the demands of a favored buyer, they use the reduction in brokerage to undermine the policy of § 2(c). The seller's broker is clearly "any person" as the words are used in § 2(c)—as clearly such as a buyer's broker (id. 169-170).

Here the Majority has misread the record regarding the factual situation before us and has misconstrued the applicable law.

The respondent's business operations can be described very simply. The use of a name to describe those operations is more difficult. Apparently this difficulty was experienced by the respondent. In his

first Answer he filed to the complaint he claimed to be an "independent food broker." At the first hearing he was permitted to amend his answer to describe his business as that of an "independent food broker or car lot distributor." Whatever label is attached to respondent's operation, the facts are clear with respect thereto. His business consists of purchasing foodstuffs for his own account from packers and other primary suppliers, which he, in turn, resells to food wholesalers and retail chains. The goods are shipped by common carrier in either carload or truckload lots and are priced and invoiced to the respondent.

Respondent maintains a warehouse containing approximately 10,000 square feet of space but no more than 50% of the goods purchased and resold are ever stored therein. The remaining 50% of the goods are drop-shipped directly to his customers. He delivers goods from his warehouse to "out-of-town" customers but his local customers, that is, customers located in close proximity to the city of Omaha, pick up the goods at his warehouse in their own trucks.

Respondent takes title to the goods he handles, sets his own resale price thereon, and assumes the risks of collection and loss in transit. It is established beyond question that he is not a broker, "independent" or otherwise.

The record clearly shows that, in 1959, the respondent received brokerage, labeled or referred to as such, from three of his suppliers on purchases which totaled approximately \$41,000. Both the seller and the respondent considered the compensation granted to respondent as brokerage and Mr. Hrubby testified that he was acting as a broker in these transactions.

On the largest part of respondent's purchases he does not receive "brokerage" specifically labeled as such, but, as found by the hearing examiner, receives lower net prices which reflect a discount in lieu of brokerage. It appears that the hearing examiner's finding is based to a substantial extent upon the testimony of the general manager of one of respondent's principal suppliers of citrus fruit, Keen Fruit Corporation.¹ This witness testified that brokerage at the rate of 10 cents per box was paid to brokers representing Keen and that the net prices afforded to respondent reflected a reduction of 10 cents per box. Further, prior to this proceeding, in a special report to the Commission, Keen Fruit reported that Hrubby was allowed a discount in lieu of brokerage. A copy of this report is contained in this record. As I view it, the record adequately establishes the fact that respondent receives prices which reflect discounts in lieu of brokerage.

¹ The respondent testified that transactions had with this supplier were typical of his dealings with all "net price" suppliers.

Respondent argues that the receipt of discounts in lieu of brokerage is not unlawful unless it can be shown that the recipient was aware that he was receiving such discounts. It is urged that respondent did not have such knowledge and that the hearing examiner's finding to the contrary is in error.

The hearing examiner expressed his analysis of this question in the initial decision as follows:

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.

It would seem that the facts adduced force the conclusion that respondent, a buyer for his own account, has received both brokerage and discounts in lieu thereof and should be held in violation of Section 2(c). But respondent argues that there is an economic justification for the allowances received and that Congress did not intend that the Act should be applied in situations where the allowance of brokerage does not produce a price discrimination. It is contended that respondent is legally entitled to receive a functional discount from his suppliers' regular prices to wholesalers because respondent is not a wholesaler but a distributor who sells to wholesalers. Respondent argues that since he is in competition with food brokers in selling to wholesalers and stands at the same competitive level as food brokers, he should be entitled to the same compensation as a food broker. As an alternative but allied argument, respondent argues that even if the payments are considered as "brokerage" within the meaning of Section 2(c), they must be found valid under the "services rendered" provision of the statute. With respect to the issues thus raised, respondent states: "We are frank to concede that in seeking such a ruling, we face the heavy burden of dislodging the long encrusted authority of *Southgate Brokerage Company v. Federal Trade Commission*, 150 F. 2d 607 [4 S. & D. 403] (4th Cir. 1945), upon which the hearing examiner fully relied."

As respondent admits, each of his arguments were disposed of in the *Southgate* case and in the earlier decision by the same court in *Oliver Brothers, Inc. v. Federal Trade Commission*, 102 F. 2d 763 [3 S.&D. 86] (4th Cir. 1939). And so far as I am aware, these cases have been followed or favorably cited by all courts, including the Supreme Court. But respondent contends that the *Southgate* doctrine was "suspect in its inception" and has been rendered even more doubtful by subsequent court decisions. The Supreme Court opinion in which respondent finds comfort is *Federal Trade Commission v. Henry Broch*, 363 U.S. 166, 80 S. Ct. 1158 [6 S.&D. 800] (1960). It is urged that the language there employed raises doubts concerning the continued vitality of the *Southgate* doctrine insofar as the element of discrimination is concerned. The facts of the *Broch* case differ so widely from the facts in the instant matter that the applicability of any of the comments of the Supreme Court is at best questionable.

The respondent in the *Broch* case was a broker whose normal commission was 5%. In order to secure a large order from a single buyer the broker agreed to accept only a 3% brokerage on the transaction. The resultant savings in brokerage was passed on to the buyer in the form of a price concession. The court held that this was an indirect allowance of a payment in lieu of brokerage to the buyer. Respondent relies upon the comments made by the court in answering an argument that its decision would establish "an irrevocable floor under commission rates." The court pointed out that there is nothing in its opinion which would require Broch to charge 5% brokerage on sales to all customers. The court concluded by stating: "Here, however, the reduction in brokerage was made to obtain this particular order and this order only and therefore was clearly discriminatory." (Id. 176)

The respondent contends that the effect of the Supreme Court's opinion in the *Broch* case is to inject the element of price discrimination in 2(c) cases.

Had the Supreme Court desired to overturn the long-established rule that discrimination is immaterial in 2(c) cases, it would have used clearer language. As I interpret the *Broch* opinion, the court in pointing out that the reduction in brokerage was made to obtain a particular order was merely emphasizing the crucial fact which led it to conclude that the lower price was "an allowance in lieu of brokerage."

Respondent reads too much in the Supreme Court *Broch* opinion, a practice much indulged in by advocates but one which decisional bodies must eschew, for the Supreme Court itself has stated:

It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.²

Even if respondent's argument could be supported as a matter of law, it would fall under the force of facts because the record herein does not support the contention that no discrimination in violation of Section 2(a) could be present in the instant case.

It is well established that respondent did not sell exclusively to wholesalers. He also sold to large direct buying retailers, including the second largest corporate food chain. Smaller retailers competing against this chain bought from wholesalers. They were not given a discount in lieu of brokerage. Hence, because of the violation of Section 2(c) in this case, smaller retailers and their wholesalers have a competitive disadvantage compared with the retail food chain who bought from the respondent. It is simply not true that no (actionable) discrimination could have resulted from the facts in this case.

In view of these circumstances, I reiterate the assertion I made earlier in this Dissenting Opinion to the effect that the Majority has misread the record regarding the factual situation before us and has misconstrued the applicable law. The question of whether the respondent is a "dummy" broker controlled by a large buyer, is perhaps debatable on the facts of this record. The fact that respondent is a buyer and has received brokerage payments in connection with purchases made by him is beyond dispute. Likewise, it is beyond dispute that respondent has as one of his customers a large chain retail food distributor. The extent to which the favors shown to have been extended to him as a buyer have been passed on to this large chain food retailer is undetermined, but it is not necessary to make that determination in this case in order to hold that the respondent violated Section 2(c) as a buyer.

Violations of Section 2(c) of the Robinson-Patman Act, unlike Section 2(a) and some other sections of the law, do not depend upon

² *Cohens v. Virginia* [Wheat. 264, 399 (1821)], 5 Sup. Ct. Law Ed. 264.

a showing of adverse effects flowing from the challenged transactions. Hence, the degree of control over the market by a respondent is irrelevant to a charge of a violation of Section 2(c). Therefore, such construction of the law undertaken by the Majority in this case to the transactions engaged in by the respondent would just as logically apply to like transactions engaged in by the largest and most powerful buyer in the United States.

The majority opinion in this case will produce harmful results of serious proportions for the business community. At best, it introduces uncertainty, imprecision and confusion in applying Section 2(c) of the Robinson-Patman Act, which, up to now at least, was definite, precise and clear. Worse than this, it also lays a basis for eventually depriving Section 2(c) of all substance.

Up until the decision in this case, it was the rule that Section 2(c) "expresses an absolute prohibition of the payment of brokerage or compensation in lieu thereof, to the buyer upon the buyer's own purchases." *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667, 673 (3d Cir. 1939), cert. den. 308 U.S. 625 [3 S.&D. 146] (1940). It was also established law prior to this case that Section 2(c) is independent of Section 2(a). *Federal Trade Commission v. Henry Broch & Company, supra*. And finally, until today the "except for services rendered" proviso in Section 2(c) was never considered as applying to a buyer purchasing for his own account. *Southgate Brokerage Company v. Federal Trade Commission, supra*.

Now, for the first time, and completely contrary to overwhelming legal precedent, the Commission holds that a buyer can accept a discount in lieu of brokerage on purchases for his own account. Apparently this is now permitted when such discount is treated as a so-called functional discount permitted under Section 2(a). Thus, we have what amounts to a "fusion" of Section 2(a) which permits a price difference to buyers in different noncompetitive functional classes with Section 2(c) which, up to now, did not do so where the difference in price amounted to a discount in lieu of brokerage given to a buyer on purchases for his own account. In other words, the rule now seems to be that a buyer can receive brokerage from a seller when such payment is not used to effect a price discrimination prohibited by Section 2(a). The injury standard in Section 2(a) is now read into Section 2(c), thereby removing the absolute character of the prohibition in Section 2(c). This is indeed a far-reaching change in the law.

It also appears from the majority opinion that where a buyer purchasing for his own account assumes credit risks and furnishes storage, warehousing and other distribution services, he may be considered to have furnished such services to his supplier, thereby entitling the buyer to a discount or payment from such supplier which represents an amount normally paid by the supplier as brokerage to his own sales agents.

The record in this case establishes beyond any reasonable doubt that the respondent received brokerage compensation on numerous purchases for his own account. Respondent admitted the receipt of brokerage on a number of his purchases. And the general manager of one of his suppliers testified that its net prices charged the respondent reflected a discount equal to and in lieu of the standard brokerage payments. It is clear that the respondent knowingly received a discount in lieu of brokerage on his own purchases.

There is no necessity in calling brokerage something it is not. But this is precisely what the Majority has done in this case. In doing so, it has followed the respondent's erroneous—if not fantastic—reasoning. He contends that the allowances or discounts given to him by his suppliers were functional discounts accorded in payment for services which he performed for his suppliers. According to this argument, such discounts or allowances were not in lieu of brokerage because the respondent occupies the same functional position as food brokers representing his suppliers who sell to wholesalers in competition with the respondent. Respondent asserts that no (actionable) discrimination resulted among competing buyers since he received no price concession or advantage over such food brokers selling to wholesalers in competition with him. On this basis, it is argued the discounts with which we are concerned here cannot be considered in lieu of brokerage because no competitive injury resulted. Since no (actionable) price discrimination was effected, Section 2(c) was not violated.

This is a clever line of argument, but it lacks any merit. The contention that the respondent, as a buyer for his own account, and food brokers representing respondent's suppliers share the same functional role disregards the role played by a true broker. They are sales representatives who act pursuant to authorization and instructions from their principals, which in this case are producers and also suppliers of the respondent. They act as agents of the producers and have no functional role independent and apart from the producers they represent. The role of true food brokers representing producers is to find buyers able and willing to purchase their principal's products at

the price fixed by them. Respondent who has title to the merchandise can sell for any price he wishes. He is selling for himself and can increase his resale price when favorable market conditions develop. He can speculate by buying from producers at a low price and selling at a much higher price when supply and demand conditions permit.

It is clear that in the circumstances of this case respondent competes with his suppliers. In view of this, it is absurd to contend that the respondent's warehousing, stocking and delivering services are rendered to and for the benefit of his suppliers, and that he is entitled to a discount equal to his suppliers' regular brokerage payments as compensation for such alleged services. Such a discount is a mere gratuity paid by the producer-supplier to a buyer who competes with him. To approve the payment of such a discount in lieu of brokerage on the theory that the respondent renders a service to his supplier is preposterous.

Respondent's argument that he is entitled to a discount equal to the commission normally paid by his suppliers to their brokers because no (actionable) price discrimination resulted is of course false. It is (or was) a clear legal principle that a person can violate Section 2(c) for having done that which is permitted under Section 2(a). *Federal Trade Commission v. Broch & Company, supra.*

ORDER DISMISSING COMPLAINT

The Commission having considered this case on the appeal of respondent from the initial decision of the hearing examiner, and having concluded for the reasons set forth in the accompanying opinion that the complaint should be dismissed,

It is ordered, That the complaint be, and it hereby is, dismissed.

By the Commission, Commissioner MacIntyre dissenting, and Commissioners Anderson and Higginbotham not participating.

IN THE MATTER OF

HOME FURNITURE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-288. Complaint, Dec. 27, 1962—Decision, Dec. 27, 1962

Consent order requiring Fargo, N.D., retailers of furniture to cease advertising falsely in newspapers and by radio that they are conducting a "quitting business" sale, offering merchandise at prices as much as 75% below usual prices, and representing excessive amounts as "Reg." prices.

Complaint

61 F.T.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Home Furniture, Inc., a corporation, and David E. Bullert, Henry Cruz and Dennis Erickson, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Home Furniture, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Dakota with its principal office and place of business located at 414-16 Main Avenue, in the city of Fargo, State of North Dakota.

Respondents David E. Bullert, Henry Cruz and Dennis Erickson are individuals and are officers of said corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is Northport Furniture, Northport Shopping Center, Fargo, N. Dak.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of furniture at retail to the purchasing public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said merchandise when sold, to be shipped from their place of business in the State of North Dakota to purchasers thereof located in various other States of the United States and the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business and for the purpose of inducing the purchase of their merchandise, respondents have made certain statements and representations with respect thereto in newspapers and in radio broadcasts of which the following are typical but not all inclusive:

Yes! Going out of Business
Quitting Business
Home Furniture is Quitting Business
Quitting Business Sale
We must Liquidate! Time Is Short!

1457

Complaint

Help!

Disaster Strikes! Due to circumstances beyond our control, we are forced to reduce our large stock at once.

Emergency Sale

We are forced to unload our vast stock.

Store wide Sacrifice of Definitely Better Furniture!

We Quit Forever

Every Item On Sale

You will actually save

48%—55%—70% and more

off our regular price

Stocks Must Go—Reductions to 75%

Save up to ½

5 Pc. Drop Leaf Table & 4 Chairs

Reg. \$99.50 now 59.97

Davenport & Chair..... Reg. 389.50.....289.97

PAR. 5. Through the use of the above said statements and representations, and others of similar import, but not specifically set out herein, respondents have represented, directly or by implication that:

1. Respondents are conducting a bona fide "quitting business" sale caused by circumstances beyond their control.

2. Respondents' merchandise is being offered for sale at reduced prices and that said reductions represent savings to the purchasers thereof of the differences between the selling prices of said merchandise and the prices at which said merchandise was usually and customarily sold at retail by the respondents in the recent regular course of their business.

3. Respondents have reduced the prices of their merchandise as much as 75% below the usual and customary prices at which such merchandise was sold in the recent regular course of their business and that said reductions represented savings to purchasers thereof from respondents' usual and customary retail prices.

4. The higher stated prices set out in said advertisements in connection with the term "Reg." are the prices at which the advertised merchandise had been usually and customarily sold by respondents at retail in the recent regular course of business and that the differences between the higher and lower prices represent savings, to purchasers from respondents' usual and customary retail prices.

PAR. 6. In truth and in fact:

1. The sale conducted by the respondents is not a bona fide "quitting business" sale conducted by them because of circumstances beyond their control and respondents are not actually quitting business but are merely conducting the same business from another location and under another name.

2. Certain of the advertised merchandise is not being offered for sale at reduced prices and the purchasing public is not afforded savings of the differences between the reduced prices and the prices at which said merchandise was usually and customarily sold at retail by respondents in the recent regular course of their business.

3. Respondents have not reduced the prices of their merchandise by 75% or any other such high percentage and the purchasing public is not afforded savings in such amounts from the prices at which such merchandise is usually and customarily sold at retail by the respondents in the recent regular course of their business.

4. The higher stated prices set out in said advertisements in connection with the term "Reg." were in excess of the prices at which the advertised merchandise had been usually and customarily sold by respondents in the recent regular course of business and the differences between the higher and lower prices did not represent savings to purchasers from respondents' usual and customary retail prices.

Therefore, the statements and representations referred to in paragraphs 4 and 5 are false, misleading and deceptive.

PAR. 7 In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as that sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice of the public and respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents

1457

Decision and Order

having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Home Furniture, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Dakota, with its office and principal place of business located at 414-16 Main Avenue, in the city of Fargo, State of North Dakota.

Respondents David E. Bullert, Henry Cruz and Dennis Erickson are officers of said corporation and their address is Northport Furniture, Northport Shopping Center, Fargo, N. Dak.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents, Home Furniture, Inc., a corporation, and its officers, and David E. Bullert, Henry Cruz and Dennis Erickson, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of furniture or any other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or indirectly that:

1. Such merchandise is distress merchandise or is from the stock of a business which is being liquidated or which is going out of business.

2. Any savings are afforded from the usual and customary retail price of merchandise, unless the price for which such merchandise is offered constitutes a reduction from the price

Complaint

61 F.T.C.

at which it has been sold by respondents in the recent regular course of business.

B. Using the words "regular price" or "Reg.," or any other word or words of similar import or meaning, to describe or refer to the retail prices of such merchandise, unless the prices so designated are those at which such articles of merchandise have been usually and customarily sold by respondents in the recent regular course of business.

C. Misrepresenting, in any manner, the savings available to purchasers of respondents' merchandise or the amount by which the price of such merchandise has been reduced.

D. Misrepresenting, in any manner, the type and kind of sale which they are conducting.

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.

IN THE MATTER OF

CRANE CO.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF
THE CLAYTON ACT

Docket 7833. Complaint, Mar. 18, 1960—Decision, Dec. 23, 1962

Order dismissing—on motion of complaint counsel and after respondent had divested itself of the properties concerned—complaint charging one of the largest manufacturers of plumbing fixtures, heating apparatus, and fabricated steel pipe with acquiring, within a two-year period, all or part of the stock or assets of five competing producers of the same range of products.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Sec. 45), and Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18), as amended and approved December 29, 1950, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Crane Co. (hereinafter sometimes referred to as Crane), is a corporation doing business under and by virtue of the laws of the State of Illinois, with its principal offices and place of business located at 836 South Michigan Avenue, Chicago 5, Ill.

Crane Co. is the successor to a business established in 1865 under the name North Western Manufacturing Co. Following several changes in name during subsequent years, the name and style "Crane Co." was adopted in the year 1922.

Crane Co. is now, and for several years last past has been, directly and indirectly, engaged in the manufacture, sale and distribution of different categories of products in the plumbing fixture and heating apparatus field together with other kindred and related products including, among others, (1) valves and fittings; (2) plumbing fixtures and fittings; (3) heating equipment and auxiliary or related products; and (4) fabricated steel pipe.

Crane Co. is now, and for several years last past has been, one of the largest, if not the largest, manufacturer of a complete line of valves and fittings in the United States and is one of few companies in the United States equipped to manufacture, distribute and sell a complete, or virtually complete, line of these products.

Crane Co. is now, and for several years last past has been, a major and significant factor in the manufacture, distribution and sale of plumbing fixtures and equipment, and in the manufacture, distribution and sale of heating apparatus and auxiliary products. It is also a significant factor in the manufacture, distribution and sale of fabricated steel pipe.

As of December 31, 1958, Crane's products, and products available to Crane, either through purchase or otherwise, were handled by 1,312 independent wholesale establishments and by 175 company-owned branches located throughout the United States and Canada. As of the end of 1958, approximately one-half of the sales made by Crane and its domestic subsidiaries were of goods manufactured by Crane and its domestic subsidiaries and approximately one-half of such sales were of goods manufactured by others and handled by Crane and its domestic subsidiaries on a jobbing or agency basis.

Selected financial data for Crane Co. for the year ending December 31, 1958, is as follows:

Sales.....	\$336, 196, 279
Total assets.....	224, 073, 781
Net current assets.....	136, 163, 472
Net income.....	5, 475, 593

PAR. 2. Crane as a manufacturer and fabricator purchases some, if not all, of the necessary materials and supplies from sources located in States of the United States other than the State or States in which the manufacturing and fabricating processes take place and the ultimate products are then caused to be shipped or otherwise transported by Crane to various States of the United States other than the State in which such manufacturing and fabricating took place and to foreign countries.

In addition, Crane is a distributor for the various related and allied product lines set forth herein, including valves and fittings, fabricated steel pipe, plumbing fixtures and equipment, heating apparatus and auxiliary products.

The material purchased and used by Crane in the manufacture and fabrication of the various products listed herein, as well as the various products purchased and sold by Crane as a distributor thereof, are transported from one State or another to various other States of the United States and to foreign countries, and respondent, as a result thereof, is now, and has been, engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 3. In a series of transactions taking place within the past two years, Crane has acquired, directly or indirectly, all or part of the stock or assets of the certain corporations, hereinafter named, engaged in the purchase, manufacture, processing, fabrication or distribution of different categories of products in the valve, plumbing fixtures and equipment and heating apparatus industry, together with other kindred and related products, including, among others, (1) valves and fittings; (2) plumbing fixtures and fittings; (3) heating equipment and auxiliary or related products; and (4) fabricated steel pipe. All of the acquired corporations at the time of the said acquisitions, in the regular course of business, either purchased, manufactured, processed, fabricated or distributed the foregoing products in and throughout the various States of the United States or purchased and received shipments related to the manufacture, processing, fabrication or distribution of said products from other purchasers, suppliers, manufacturers, fabricators or processors located throughout the United States. All of the acquired corporations, prior to and at the time of the acquisitions, were engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

Respondent's acquisitions include, among others, all or part of the stock or assets of the following corporations:

(1) Chapman Valve Manufacturing Company, a Massachusetts corporation.

Complaint

- (2) Briggs Manufacturing Company, a Michigan corporation.
- (3) National-U.S. Radiator Corporation, a Maryland corporation.
- (4) Swartout Company, Inc., an Ohio corporation.
- (5) Pipe Fabricators, Inc. (Crane also acquired at this time Canadian Pittsburgh Piping, Ltd., a subsidiary of Pipe Fabricators, Inc.), an Indiana corporation.

PAR. 4. The effect of the aforesaid acquisitions by the respondent, individually and collectively, may be substantially to lessen competition or to tend to create a monopoly in the production, distribution and sale of (1) valves and fittings; (2) plumbing fixtures and fittings; (3) heating equipment and auxiliary or related products; and (4) fabricated steel pipe within the meaning of Section 7 of the Clayton Act as amended and approved December 29, 1950.

Specifically, the effects flowing from the acquisitions recited herein include the actual or potential lessening of competition or a tendency to create a monopoly in violation of Section 7 of the Clayton Act in the following ways, among others:

- (1) Chapman, National-U.S., the Autronic Division of Swartout, Pipe Fabricators, Inc., and Canadian Pittsburgh Piping, Ltd., have been or may be permanently eliminated as substantial independent competitive factors in their respective industries;
- (2) Briggs will either (a) be eliminated as a substantial independent competitive factor in its industry if Crane gains control or working control of Briggs, or (b) the competitive vigor of Briggs will be substantially impaired, lessened or eliminated should Crane elect one or more members to Briggs' Board of Directors;
- (3) Respondent's competitive position in the products or product lines hereinbefore named has been materially improved, or will be materially improved, to the actual or potential detriment of competition in these products or product lines;
- (4) Actual and potential competition between respondent and the corporations hereinbefore named has been or will be substantially decreased or entirely eliminated;
- (5) Actual and potential competition between wholesalers and distributors of the products or product lines hereinbefore named may be, or will be, substantially lessened or completely eliminated;
- (6) Actual and potential competition in the products or product lines hereinbefore named may be substantially lessened and industry-wide concentration in these products or product lines has been and may be substantially increased;
- (7) Respondent (a) has materially strengthened its financial position; (b) is better able, or will be better able, to arrange financial ac-

commodations; (c) has facilitated, or will have facilitated, its access to markets; (d) has increased the number and scope of technical and managerial skills available to it; (e) has become, or will become, better able to inhibit new producers from entering its markets; (f) is better able, or will become better able, through the decrease in unit costs of production and distribution or through other means, to drive existing producers and distributors from its markets.

PAR. 5. The foregoing acquisitions alleged and set forth hereinabove constitute a violation of Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18), as amended and approved December 29, 1950.

PAR. 6. The acquisitions hereinbefore described tending substantially to lessen competition or to create a monopoly are to the prejudice and injury of the public and constitute an unfair method of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 7. The foregoing acquisitions, acts and practices as hereinbefore alleged and set forth constitute a violation of Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Sec. 45).

Mr. Norman L. Holmes for the Commission.

Lord, Day & Lord, by *Mr. John D. Garrison*, *Mr. Thomas F. Daly*, and *Mr. Raymond L. Hays*, of New York, N.Y.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

The complaint in this proceeding, issued March 18, 1960, alleged that the effect of respondent Crane Co.'s acquisition of all or part of the stock or assets of (1) Chapman Valve Manufacturing Company, a Massachusetts corporation, (2) Briggs Manufacturing Company, a Michigan corporation, (3) National-U.S. Radiator Corporation, a Maryland corporation, (4) Swartout Company, Inc., an Ohio corporation, and (5) Pipe Fabricators, Inc., an Indiana corporation, individually and collectively, may be substantially to lessen competition or to tend to create a monopoly in certain lines of commerce, enumerated in the complaint, in violation of § 7 of the Clayton Act, as amended. Pursuant to a ruling of the hearing examiner, on December 14, 1961, respondent filed its "Supplemental Statement of Facts" giving the details of certain voluntary divestitures and acquisitions which had occurred after the complaint was filed.

Hearings were held at which formal background evidence was introduced. Respondent's Supplemental Statement contained other recitals bearing upon the alleged monopolistic effect, if any, of respondent's acquisitions and divestitures. On May 7, 1962, the exam-

iner entered an order for counsel supporting the complaint to show cause why this proceeding should not be dismissed for want of prosecution. This rule to show cause and the proceeding generally were set for October 15, 1962, in Washington, D.C. Thereafter complaint counsel sought by court action to obtain, and did obtain, additional information to help evaluate the monopolistic effects, if any, of respondent's acquisitions.¹

On September 17, 1962, complaint counsel filed his motion to dismiss these proceedings setting forth:

2. Respondent, Crane Co., has divested all of its substantial stock holdings in the Briggs Manufacturing Company, (Tr. 66-67) thereby restoring Briggs as a substantial competitor in the plumbing fixtures industry. Furthermore, respondent, on December 14, 1961, filed with the Hearing Examiner, a Supplemental Statement of Facts, wherein respondent states that it has voluntarily divested the following assets of the National-U.S. Radiator Corporation:

a. The Viking Products Division, which manufactured blowers, fans, humidifiers and components for air conditioning equipment.

b. The Drayer-Hanson Division, which manufactured central air conditioning and air handling equipment and heat transfer units.

c. The stock of Magnetic Powders, Inc., as well as the assets of the Powdered Metals Division.

d. Two plants in Illinois have been sold and a third plant in that state has been offered for sale.

3. In this same aforementioned Supplemental Statement of facts, respondent states that it has disposed of the physical inventories acquired from Pipe Fabricators, Inc., and has sold or has put up for sale, the remaining acquired property, equipment and plant.

4. Canadian Pittsburgh Piping, Ltd., was acquired by Crane, Ltd., a Canadian subsidiary of respondent. There is no indication in any of the various materials submitted by respondent and in the possession of counsel supporting the complaint that either Crane, Ltd., or Canadian Pittsburgh Piping, Ltd., made any sales of fabricated pipe in the United States.

5. Now therefore inasmuch as the aforementioned divestitures of stock and assets by respondent have served the public interest as concerns respondent's acquisition of such stock or assets, and whereas such divestiture has substantially vitiated the basis of the complaint as concerns the divested stock and assets, counsel supporting the complaint respectfully urge the dismissal of this matter without prejudice to the right of the Commission to undertake such further investigation or further proceedings to protect the public interest as may be warranted in the future on the basis of all the facts and circumstances pertinent to an evaluation of such matters.

After complaint counsel filed the aforesaid motion to dismiss, counsel for respondent were requested to state whether respondent intended to file any paper responsive to said motion to dismiss, or in opposition thereto, and have represented that they do not intend to do so. The

¹ See Civil Action M 18-304 in the U.S. District Court for the Southern District of New York, *FTC v. Cooper*.

hearing set for October 15, 1962, on the Rule to Show Cause of May 7, 1962, and for further proceedings, has been canceled because the parties have indicated that they deem the pending motion to dismiss as dispositive of this proceeding, if allowed.

Rule 4.6(e) of this Commission's Rules of Practice, *inter alia*, provides:

When a motion to dismiss a complaint . . . is granted with the result that the proceeding before the hearing examiner is terminated, the hearing examiner shall make and file an initial decision in accordance with the provisions of § 4.19. . . .

In view of the recitals contained in the motion to dismiss complaint filed September 17, 1962, and it appearing that complaint counsel has therein admitted that the public interest does not require that this particular proceeding go forward,

It is ordered, That the Rule to Show Cause of May 7, 1962, be and hereby is discharged; and

It is further ordered, That this complaint and the proceeding thereunder be and hereby are dismissed without prejudice to the rights of the Federal Trade Commission to institute such further proceeding in the future as the facts and circumstances may at that time warrant.

FINAL ORDER

The Commission by its previous order having placed this case on its docket for review; and

The Commission now having concluded that the initial decision of the hearing examiner is appropriate in all respects to dispose of this proceeding:

It is ordered, That the initial decision of the hearing examiner filed October 17, 1962, be, and it hereby is, adopted as the decision of the Commission.

By the Commission, Commissioner MacIntyre not concurring.

IN THE MATTER OF

C-E-I-R, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-289. Complaint, Dec. 28, 1962—Decision, Dec. 28, 1962

Consent order requiring a Washington, D.C., company engaged in the measurement of television audiences and the publication and sale to broadcasters

and advertisers of data and reports based thereon, to cease representing falsely that the television station and program "ratings" and audience "totals" compiled by it—which did not disclose the number that failed to cooperate and included hearsay reports and estimates—were accurate measurements arrived at through the use of techniques and procedures free from error other than sampling error.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that C-E-I-R, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent C-E-I-R, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at One Farragut Square South, Washington, D.C.

PAR. 2. Respondent, through its American Research Bureau Division, is now, and since September 30, 1961, has been, engaged in the measurement of television audiences and in the compilation, analysis and publication of data and reports containing television audience size and composition information and in the sale of such data and reports to broadcasters, advertisers and advertising agencies.

PAR. 3. Respondent causes the said data and reports, when sold, to be transported from its places of business in the District of Columbia, and in the State of Maryland to purchasers thereof located in various states of the United States and in the District of Columbia. Respondent maintains and at all times mentioned herein has maintained a course of trade in said data and reports in commerce as "commerce" is defined in the Federal Trade Commission Act. Respondent's volume of business in such commerce is and has been substantial.

PAR. 4. In the course and conduct of its business, at all times mentioned herein, respondent has been and is in substantial competition in commerce with corporations, firms and individuals in the sale of data and reports containing television audience information.

PAR. 5. In the course and conduct of its business, as aforesaid, respondent publishes and sells data and reports compiled by it which include television station and program "ratings" expressed in mathe-

mathematical terms to the exactness of one per cent and audience "totals" in mathematical terms to the exactness of one hundred homes. Respondent represents directly or by implication that such "ratings" and "totals" are accurate measurements of television station and program audiences, arrived at through the use of techniques and procedures that are free from error other than sampling error when such "ratings" and "totals" are in fact estimates.

PAR. 6. In truth and in fact respondent uses techniques and procedures that result in bias or error other than sampling error which adversely affect the accuracy of its "ratings" and "totals". Among and typical of respondent's techniques and procedures are the following:

1. It fails to disclose the number or percentage of a sample that refuses or fails to respond or cooperate, or otherwise to account for the statistical effect of nonresponse.

2. It uses data derived from diaries, some of which contain hearsay reports and estimates of the diarykeeper.

3. It projects from a sample composed entirely of telephone homes to "all" television homes, both telephone and nontelephone.

The techniques and procedures above set forth result in bias or error and adversely affect the accuracy of respondent's "ratings" and audience "totals". Therefore, the representations that respondent's "ratings" and audience "totals" are other than estimates and that they are accurate to any precise mathematical value or definition are false, misleading or deceptive.

PAR. 7. In the further course and conduct of its business, as aforesaid, respondent has represented directly or by implication in its reports:

1. That its measurements are based upon a probability sample.

2. That the only error to which its data are subject is sampling error.

3. That the accuracy or reliability of its data can be fully determined by the use of a statistical reliability chart which is set forth in its reports.

4. That repeated contacts are made with diarykeepers for the purpose of assuring that the diary is understood and properly maintained by them.

5. That all viewing by all members of the family is recorded in diaries at the time of viewing.

6. That respondent's techniques and procedures produce measurements, data and reports that are accurate to a precise mathematical value or definition.

PAR. 8. In truth and in fact:

1. Respondent's measurements are not based upon a true probability sample.
2. Respondent's data are subject to errors in addition to sampling error.
3. The statistical reliability chart set forth in respondent's reports is applicable to data obtained by means of a probability sample, and since respondent does not use a true probability sample, the reliability of its data cannot be fully determined by the use of the aforesaid chart.
4. In some instances the only subsequent contact made with diary-keepers after the initial contact is to provide them with a diary.
5. All viewing by all members of the family is not always recorded in the diary at the time of the viewing.
6. Respondent's techniques and procedures do not produce measurements, data or reports that are accurate to any precise mathematical value or definition.

Therefore the representations contained in paragraph 7 above are false, misleading or deceptive.

PAR. 9. In the course and conduct of its business respondent by publishing and selling the aforesaid reports and data places instrumentalities in the hands of some television stations thereby enabling them to compete unfairly with other television stations.

PAR. 10. The use by respondent of the aforesaid false, misleading or deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead the purchasers and sellers of television time into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's data and reports by reason of said erroneous and mistaken belief. Said practices of respondent also have had, and now have, the capacity and tendency to mislead purchasers of television time into the purchase thereof because of the aforesaid erroneous and mistaken belief that the aforesaid statements and representations were and are true. As a consequence thereof, substantial trade in commerce has been and is being unfairly diverted to respondent, and to sellers of television time from their competitors, and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 11. The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public, of respondent's competitors and of sellers competing in the sale of television advertising time, and constituted and now constitute unfair

methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent C-E-I-R, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at One Farragut Square South, Washington, D.C.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent C-E-I-R, Inc., a corporation, its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the publication, offering for sale, sale or distribution of television or other audience measurements, whether in the form of reports, data or otherwise, in commerce as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

1. Representing directly or by implication:

(a) That its measurements, data or reports are based on a probability sample unless the term "probability sample" is properly qualified in immediate conjunction therewith, and

unless the difference between a probability sample and respondent's sample is clearly described in its reports.

(b) That sampling error or any other single error is the only error to which its measurements, data or reports are subject.

(c) That the accuracy or reliability of its measurements, data or reports can be fully determined by the use of any chart or formula which is not wholly applicable to such measurements, data or reports.

(d) That any steps or precautions are taken to assure the proper maintenance diaries unless such steps or precautions are in fact taken.

(e) That dairies used or relied upon by it reflect or contain all viewing by all members of a family as recorded at the time the viewing is done.

(f) That the numerical terms in which respondent's measurements, data or reports are expressed are other than estimates or that its techniques and procedures assure that its measurements, data or reports are accurate to any precise mathematical value or definition.

2. Failing to disclose the statistical effect of nonresponse unless the number or approximate percentage of a sample that refuses or fails to respond or cooperate is clearly disclosed in each report, together with a statement that such nonresponse may affect the accuracy of such report.

3. Using data derived from diaries without clearly disclosing in each report that the diaries may have been maintained in part on the basis of hearsay or the estimate of the diarykeeper.

4. Projecting samples to "all" television homes when certain of such homes have been excluded from the universe without clear disclosure in its reports that such projections have been made.

5. Misrepresenting in any manner the accuracy or reliability of its measurements, data or reports.

6. Using any technique or procedure in making measurements or compiling data or reports that impairs the accuracy or reliability of such measurements, data or reports unless the deficiencies or limitations of such technique or procedure of which respondent is, or should be, aware are clearly disclosed in its reports.

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

Complaint

61 F.T.C.

IN THE MATTER OF

A. C. NIELSEN COMPANY

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-290. Complaint, Dec. 28, 1962—Decision, Dec. 28, 1962*

Consent order requiring a Chicago company engaged in the measurement of radio and television audiences and the publication and sale to broadcasters and advertisers of data and reports based thereon, to cease representing falsely that the radio and television station and program "ratings" and audience "totals" compiled by it were accurate measurements arrived at through the use of techniques that were free from error other than sampling error.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that A. C. Nielsen Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent A. C. Nielsen Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 2101 Howard Street, Chicago 45, Ill.

PAR. 2. Respondent is now, and for more than one year last past has been, engaged in the measurement of radio and television audiences and in the compilation, publication and sale of data and reports containing radio and television audience size and composition information, and in the sale of such data and reports to broadcasters, advertisers and advertising agencies.

PAR. 3. Respondent causes the said reports, when sold, to be transported from its place of business in the State of Illinois to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said reports in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent's volume of business in such commerce is and has been substantial.

PAR. 4. In the course and conduct of its business, at all times mentioned herein, respondent has been and is in substantial competition in commerce with corporations, firms and individuals in the sale of reports containing radio and television audience information.

PAR. 5. In the course and conduct of its business, as aforesaid, respondent publishes and sells reports and data compiled by it which include radio and television station and program "ratings" expressed in mathematical terms to the exactness of one-tenth of one percent, and audience "totals" expressed in mathematical terms to the exactness of one hundred homes. Respondent represents directly or by implication that such "ratings" and "totals" are accurate measurements of radio and television station and program audiences, arrived at through the use of techniques and procedures that are free from error other than sampling error, when such "ratings" and "totals" are in fact estimates.

PAR. 6. In truth and in fact, respondent uses techniques and procedures that result in bias or error other than sampling error and which adversely affect the accuracy of its "ratings" and audience "totals". Among and typical of respondent's techniques and procedures are the following:

1. It excludes segments of the population from the universe without making full disclosure thereof.
2. In its Nielsen Station Index Reports it fails to disclose the number or percentage of a sample that refuses or fails to respond or cooperate, or to otherwise account for the statistical effect of nonresponse.
3. In connection with its Nielsen Station Index Reports it assigns equal statistical value to data secured by means of meters, diaries and ballots, each of which has a different statistical reliability, and over which respondent exerts a different degree of control.
4. In connection with its Nielsen Station Index Reports it bases station total audience partly upon measurement and partly upon projection based on obsolete ballot surveys.
5. In connection with its Nielsen Station Index Reports it bases area definition upon obsolete ballot surveys.
6. In connection with its Nielsen Station Index Reports it combines data secured at different times into consolidated rating and audience size values as though all of such data had been derived during the time period embraced by a given report when some of such data were derived during a different time period.
7. In its Nielsen Station Index Reports it uses data obtained from samples disproportionately dispersed through the universe.

8. In its Nielsen Station Index Reports it uses data derived from diaries containing hearsay reports and estimates of the diarykeeper.

9. In its Nielsen Station Index Radio Reports it publishes what purports to be complete radio audience data although it does not measure portable and transistor radio listening or tuning.

10. In its Nielsen Station Index Radio Reports it uses automobile radio listening data obtained from areas larger than the areas reported on.

The techniques and procedures above set forth result in bias or error and adversely affect the accuracy of respondent's "ratings" and "totals". Therefore the representations that respondent's "ratings" and audience "totals" are other than estimates, and that they are accurate to a precise mathematical value or definition are false, misleading or deceptive.

PAR. 7. In the further course and conduct of its business respondent has represented, directly or by implication:

1. That the sample sizes set forth in its reports are the effective sample sizes governing the data contained in such reports, and that all data obtained from such samples are of equal statistical value.

2. That data contained in its Nielsen Station Index Radio Reports are based upon the "Base Cases" figures set forth therein and that such "Base Cases" figures are respondent's sample sizes for such reports.

3. That its measurements are based upon a probability sample.

4. That the only error to which its data are subject is sampling error.

5. That the accuracy or reliability of its data can be fully determined by the use of a sampling error formula which is set forth in its reports.

6. That all data contained in its Nielsen Station Index Reports were derived within the time period embraced by such reports.

7. That the data contained in its Nielsen Station Index Reports are based upon information obtained from diaries and an approximately equal number of meters.

PAR. 8. In truth and in fact:

1. The sample sizes set forth in respondent's reports are larger than the effective sample sizes governing the data contained in such reports, and all of the data obtained from such sample sizes are not of equal statistical value. In some of respondent's reports the data contained therein are obtained from diaries and ballots and have less statistical value than do the data contained therein which are obtained from a few meters.

1474

Complaint

2. The data contained in respondent's Nielsen Station Index Radio Reports are not based upon the "Base Cases" figures set forth therein, but instead are based upon sample sizes smaller than the stated "Base Cases" figures.

3. Respondent's measurements are not based upon a probability sample.

4. Respondent's data are subject to errors in addition to sampling error.

5. The sampling error formula set forth in respondent's reports is applicable to data obtained by means of a probability sample, and since respondent does not use a probability sample, the accuracy or reliability of its data cannot be fully determined by the use of the aforesaid formula.

6. Not all of the data contained in respondent's Nielsen Station Index Reports were derived within the time period embraced by such reports.

7. While the data contained in respondent's Nielsen Station Index Reports are based upon information obtained from diaries and meters, the number of meters from which such information is obtained is substantially smaller than the number of diaries from which such information is obtained.

Therefore the representations contained in paragraph 7 above are false, misleading or deceptive.

PAR. 9. In the course and conduct of its business respondent, by publishing and selling the aforesaid reports and data, places instrumentalities in the hands of some radio and television stations thereby enabling them to compete unfairly with other radio and television stations.

PAR. 10. The use by respondent of the aforesaid false, misleading or deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead the purchasers and the sellers of radio and/or television time into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's data and reports by reason of said erroneous and mistaken belief. Said practices of respondent also have had, and now have, the capacity and tendency to mislead purchasers of radio and/or television time into the purchase thereof because of the aforesaid erroneous and mistaken belief that the aforesaid statements and representations were and are true. As a consequence thereof, substantial trade in commerce has been and is being unfairly diverted to respondent, and to sellers of radio and/or television time from their competitors, and substantial

injury has thereby been, and is being, done to competition in commerce.

PAR. 11. The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public, of respondent's competitors and of sellers competing in the sale of radio and television advertising time, and constituted and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5(a) (1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, A. C. Nielsen Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 2101 Howard Street, in the city of Chicago, State of Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent A. C. Nielsen Company, a corporation, its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the publication, offering for sale, sale or distribution of radio or television audience measurements, whether in the form of data, reports or otherwise, in commerce, as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from:

1. Representing, directly or by implication:
 - (a) That the numerical terms in which its measurements, data or reports are expressed are other than estimates, or otherwise representing that such measurements, data or reports are accurate to any precise mathematical values or definitions.
 - (b) That all data obtained from a sample that is made up of diaries and/or ballots and meters are derived from sources which are of equal statistical reliability.
 - (c) That its measurements, data or reports are based upon a probability sample.
 - (d) That sampling error, or any other single error is the only error to which its measurements data or reports are subject.
 - (e) That the accuracy or reliability of its measurements, data or reports can be fully determined by the use of any chart or formula which is not wholly applicable to such measurements, data or reports.
 - (f) That the data contained in any report are based upon information obtained from diaries and meters unless such diaries and meters are approximately equal in number or unless the approximate percentage of each is clearly disclosed in such report.
2. Misrepresenting the size of its effective sample through the use of "Base Cases" figures or otherwise.
3. Using data or information gathered by it as a basis for reports, which data or information is not reliable due to the lapse of time.
4. Using data in a report that were derived during a time period other than the time period embraced by said report unless the time period during which such data were derived is clearly disclosed in its reports.
5. Using in report automobile radio listening data that were obtained from an area larger than the area covered by said report without clearly disclosing such fact and without clearly disclosing when such is the case, that such automobile radio listening data are not measurements of individual station shares of automobile radio listening.
6. Publishing radio audience measurements without disclosing that such measurements do not include portable and/or transistor radio listening or tuning, if it be a fact.

7. Using data derived from diaries without clearly disclosing in each report that the diaries may have been maintained in part on the basis of hearsay or the estimate of the diarykeeper.

8. Using data obtained from diaries disproportionately dispersed throughout the universe, without clear disclosure thereof.

9. Failing to disclose the statistical effect of nonresponse, unless the number or approximate percentage of a sample that refuses or fails to respond or cooperate is clearly disclosed in each report, together with a statement that such nonresponse may affect the accuracy of such report.

10. Excluding segments of the population from the universe, unless each category of the population excluded from measurement is clearly disclosed in each report.

11. Misrepresenting in any manner the accuracy or reliability of its measurements, data or reports.

12. Using any technique or procedure in making measurements or compiling data or reports that impairs the accuracy or reliability of such measurements, data or reports unless the deficiencies or limitations of such technique or procedure of which respondent is, or should be, aware are clearly disclosed in its reports.

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

IN THE MATTER OF
THE PULSE, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

*Docket C-291. Complaint, Dec. 28, 1962—Decision, Dec. 28, 1962**

Consent order requiring a New York City company engaged in the measurement of radio and television audiences and the publication and sale to broadcasters and advertisers of data and reports based thereon, to cease representing falsely that the radio and television station and program "ratings" and audience "shares" compiled by it were accurate and reliable measurements arrived at through the use of techniques that were free from error other than sampling error.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal

*Published as modified by order of Oct. 23, 1963.

Trade Commission, having reason to believe that The Pulse, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, The Pulse, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Its office and principal place of business is located at 730 Fifth Avenue, New York, N.Y.

PAR 2. Respondent is now and for more than one year last past has been engaged in the measurement of radio and television audiences and in the compilation, analysis and publication of data and reports containing radio and television audience size and composition information and in the sale of such data and reports to broadcasters, advertisers and advertising agencies.

PAR 3. Respondent causes said reports, when sold, to be transported from its place of business in the State of New York to purchasers thereof located in the various other States of the United States and in the District of Columbia. Respondent maintains and at all times mentioned herein has maintained a course of trade in said reports in commerce as "commerce" is defined in the Federal Trade Commission Act. Respondent's volume of business in said reports in such commerce is and has been substantial.

PAR 4. In the course and conduct of its business, at all times mentioned herein, respondent has been and is in substantial competition in commerce with corporations, firms and individuals in the sale of reports containing radio and television audience size and composition data.

PAR 5. In the course and conduct of its business, as aforesaid, respondent publishes and sells reports containing data compiled by it which include radio and television station and program "ratings" expressed in mathematical terms to the exactness of one-tenth of one per cent and audience "shares" expressed in mathematical terms to the exactness of one per cent. By so doing respondent represents directly or by implication that such "ratings" and audience "shares" are accurate and are reliable measurements of radio and television station and program audiences, arrived at through the use of techniques and procedures that are free from error other than sampling error.

PAR 6. In truth and in fact, respondent uses techniques and procedures that result in bias or error other than sampling error, and

Complaint

61 F.T.C.

which adversely affect the accuracy and reliability of its "ratings" and audience "shares". Among and typical of respondent's techniques and procedures are the following:

1. It includes all "Not-At-Homes" in its sample base.
2. It credits listening or viewing to "Not-At-Homes" according to a formula that has not been validated by adequate research.
3. It adjusts "Sets-In-Use" figures upward by 20% for morning programs and 40% for afternoon and evening programs without research to justify such adjustments.
4. Its sample is clustered which has the effect of reducing the sample size.
5. It uses data from reports containing interviewees' general preferences as opposed to what they actually listened to or viewed during the period covered by the survey.
6. It uses hearsay data given by those interviewed.
7. It uses data obtained from individuals or households not a part of the preselected sample.
8. It conducts special surveys wherein the area surveyed is defined by one of the stations being measured and in which the resulting audience levels or ratings of said station and of competing stations are controlled by the signal pattern or area of popularity of the station defining the area to be surveyed.
9. It uses data obtained by interviewers over whom respondent exercises a degree of supervision and control insufficient to assure the accuracy or reliability of such data.

10. In some reports, it has combined the ratings and audience shares of two or more stations into a single rating and share, while other stations, not serving the entire area served by the combined stations, are listed therein with their individual ratings and audience shares as though they were competing with such combination of stations for the audience in the entire area covered by said reports.

The techniques and procedures above set forth result in bias or error and adversely affect the accuracy or reliability of respondent's "ratings" and "shares". Therefore, the representation that respondent's "ratings" and audience "shares" are accurate to the degree indicated by the precise mathematical terms in which they are expressed, and that they are reliable are false, misleading and deceptive.

PAR. 7. In the future course and conduct of its business, as aforesaid, respondent has represented, directly or by implication:

1. That the sample size for each survey is the number of quarter hour reports upon which such survey is purportedly based.

2. That all of its measurement data are obtained by the use of rosters.

3. That the measurement data contained in its reports are all based exclusively upon actual listening or viewing.

4. That its employment of a "Time-Line" technique eliminates the inflation of its measurements.

5. That its interviewers are provided with a preassigned plan as to where to conduct interviews and that such interviewers do not deviate from such plan.

6. That its measurements are based upon a probability sample.

7. That respondent's sampling method is statistically accurate.

PAR. 8. In truth and in fact:

1. Respondent's sample size for each survey is smaller than the number of quarter hour reports upon which each such survey is purportedly based.

2. Rosters are not always employed by respondent in obtaining measurement data.

3. Some of the measurement data contained in respondent's reports are based upon general listening or viewing preferences as opposed to actual listening or viewing as of a specific time.

4. Respondent does not always use a "Time-Line" technique.

5. In conducting interviews respondent's interviewers sometimes deviate from the preassigned plan and conduct interviews elsewhere.

6. Respondent's measurements are not based upon a probability sample.

7. Respondent's sampling method is not completely accurate either statistically or otherwise.

Therefore, the representations contained in paragraph 7 above are false, misleading and deceptive.

PAR. 9. In the course and conduct of its business respondent, by publishing and selling the aforesaid reports and data, places instruments of deception in the hands of some radio and television stations thereby enabling them to compete unfairly with other radio and television stations.

PAR. 10. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead the purchasers and the sellers of radio and/or television time into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's data and reports by reason of said erroneous and mistaken belief. Said practices of respondent also have had, and now have, the ca-

Decision and Order

61 F.T.C.

capacity and tendency to mislead purchasers of radio and/or television time into the purchase thereof because of the aforesaid erroneous and mistaken belief that the aforesaid statements and representations were and are true. As a consequence thereof, substantial trade in commerce has been and is being unfairly diverted to respondent from its competitors, and to sellers of radio and/or television time from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 11. The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public, of respondent's competitors and of sellers competing in the sale of radio and television advertising time, and constituted and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER*

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, The Pulse, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 730 Fifth Avenue, in the city of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

*As modified Oct. 23, 1963.

ORDER

It is ordered, That the Pulse, Inc., a corporation, its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the publication, offering for sale, sale or distribution of radio or television audience measurements, whether in the form of data, reports or otherwise, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:
 - (a) That such measurements, data or reports are accurate to any precise mathematical value or definition.
 - (b) That the number of quarter hour reports upon which a survey is based is the sample size for any report of survey.
 - (c) That all of its measurement data are obtained by the use of rosters.
 - (d) That it eliminates inflation of measurements, by the use of a "Time-Line" technique or otherwise.
 - (e) That its interviewers do not deviate from a preassigned plan in conducting interviews.
 - (f) That it uses any form of probability sample.
 - (g) That its sampling method is accurate statistically or otherwise.
2. Using data based upon general listening or viewing preferences as opposed to actual listening or viewing without clearly disclosing in each report that such data may have been based upon general listening or viewing preferences as opposed to actual listening or viewing.*
3. Including "Not-At-Homes" in a sample base by any formula not validated by research.
4. Crediting listening or viewing to "Not-At-Homes" by any formula that has not been validated by research.
5. Adjusting "Sets-In-Use" or other figures unless justification therefor has been validated by adequate research.
6. Using clustered samples unless such fact and the extent thereof is clearly and conspicuously disclosed in each report.
7. Using data based upon hearsay reports, estimates or guesses without clearly disclosing in each report that such data may have been based upon hearsay reports, estimates or guesses.*
8. Using data obtained from individuals or households not a part of a preselected sample.

*As modified Oct. 23, 1963.

9. Publishing or selling reports containing the results of special or other surveys wherein the area surveyed is defined by one of the stations being measured or surveyed and in which the resulting audience levels or ratings of this station and of competing stations are determined by the signal pattern or area of popularity of the station defining the area to be surveyed, unless such reports are distinguished by format and title from all regular metro and county reports and the identity of the station or stations defining the area covered by such special reports is prominently disclosed.

10. Using data obtained by interviewers over whom respondent does not maintain supervision and control sufficient to assure the accuracy or reliability of such data.

11. Misrepresenting in any manner the size of the effective sample used in any measurement.

12. Misrepresenting in any manner the accuracy or reliability of its measurements, data or reports.

13. Publishing or selling reports in which the ratings and audience shares of two or more stations are combined into a single rating and audience share and in which other stations, not serving the entire area served by the combined stations, are listed with their individual ratings and audience shares as though they were competing with such combination of stations for the audience in the entire area covered by said reports.

14. Using any technique or procedure in making measurements or compiling data or reports that impairs the accuracy or reliability of such measurements, data or reports unless the deficiencies or limitations of such technique or procedure are clearly and conspicuously disclosed.

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

**INTERLOCUTORY, VACATING, AND MISCELLANEOUS
ORDERS**

SWIFT & COMPANY

Docket 8304. Order and Opinion, July 11, 1962

Interlocutory order denying motion to disqualify Commissioner MacIntyre from participating in proceeding.

**MEMORANDUM OF COMMISSIONER MACINTYRE IN REGARDS TO RESPONDENT'S
MOTION THAT HE WITHDRAW FROM THIS PROCEEDING**

Respondent, by Motion filed herein July 3, 1962, has requested that I withdraw from this proceeding and that I not participate or advise the Commission regarding its decision herein.

Respondent's Motion refers to the fact that I was Chief of the Commission's Division of Investigation and Litigation during the period from 1951-1954 and that before the end of that period an investigation had been made of respondent's practices, the results of which were transferred to the Department of Agriculture for a proceeding there. Apparently respondent considers that the investigation made of Swift & Company in the period of 1951-1954 served as a basis for and out of which developed the present proceeding in Federal Trade Commission Docket 8304. Moreover, respondent takes the position that it would be improper for me to have been responsible for the conduct of an investigation of Swift & Company at that time and to now participate in a decision by the Commission in a formal case which the respondent believes developed out of that investigation.

There are pertinent facts not publicized heretofore regarding my connection or lack of connection with the present proceeding in Federal Trade Commission Docket 8304. I am informed that an investigation of Swift & Company was undertaken by the Commission under its informal investigational File No. 1-24619 prior to 1952. In 1954 the file number of that particular investigation became File No. 541 0207. Also, I am informed that the Commission's investigation of that matter and the files in connection therewith were discontinued and marked "Closed" November 15, 1955. Considerably in advance of that date, February 15, 1955, I resigned from the staff of the Federal Trade Commission and had no connection with the activi-

ties of the Commission, either at staff level or at the Commission level, until I took the oath of office as a Member of the Federal Trade Commission on September 26, 1961. I am informed that in the meantime, in 1959, the Commission docketed for investigation under File No. 591 0158 a new investigation of Swift & Company, and that out of the ensuing investigation has developed the proceedings involved in Federal Trade Commission Docket No. 8304. With that investigation and the present formal proceedings I have had no connection nor responsibility. I was not a Member of the Commission in 1961 at the time it issued its complaint in this matter. Therefore, I was not informed, as were the other Commissioners, regarding the results of the investigation conducted commencing in 1959 into the activities of Swift & Company. Consequently, I was not in a position to conclude, as were the other Commissioners, that there was reason to believe that Swift & Company was engaging in unfair acts and practices in violation of the laws administered by the Commission. In view of these circumstances, to the extent that I should participate in any decision by the Commission in Docket No. 8304, I would do so without as much information regarding the underlying background of the proceeding as evidently is possessed by each of the other Commissioners who participated in the decision to issue the complaint in Docket No. 8304.

In view of the foregoing and other facts and circumstances known to me, I am aware of no reason why I should withdraw from the proceeding and refrain from participating with the Commission in any decision in this proceeding. One thing is clear: I am determined that whatever I do in this proceeding shall be without bias or prejudice, but on the contrary, be expressive of sound and fair judgment.

ORDER DENYING MOTION TO DISQUALIFY

Respondent, by motion filed July 3, 1962, having requested that Commissioner MacIntyre withdraw from this proceeding, or, in the alternative, that the Commission determine that Commissioner MacIntyre is disqualified with respect to any and all proceedings in this matter; and

The Commission being of the opinion for the reasons set forth in the accompanying memorandum that the grounds stated in respondent's motion are insufficient to support a determination that Commissioner MacIntyre be disqualified:

It is ordered, That the motion directed to the Commission requesting that it disqualify Commissioner MacIntyre from participating in this proceeding be, and it hereby is, denied.

By the Commission, Commissioners Elman and MacIntyre not participating.

FOSTER PUBLISHING COMPANY, INC., ET AL.

Docket 7698. Order and Opinion, July 26, 1962

Interlocutory order vacating initial decision and remanding case to hearing examiner for additional testimony as to products and product lines purchased by respondents and their competitors and as to competition in the resale of such goods—in proceeding charging illegal inducing of discriminatory advertising allowances from suppliers.

OPINION OF THE COMMISSION

By Dixon, *Commissioner*:

Respondents herein are charged with violating Section 5 of the Federal Trade Commission Act by knowingly inducing and receiving payments from suppliers for services and facilities in connection with respondents' offering for sale or sale of goods not available to all of their competitors on proportionally equal terms. In short, the complaint charges in effect that respondents have knowingly induced their suppliers to make payments violative of Section 2(d) of the Robinson-Patman Act. The matter is now before us on the appeal of respondents from the initial decision wherein the hearing examiner sustained the allegations of the complaint.

Of the several issues presented by respondents in their brief, we are here concerned with their argument that the record does not support a finding that respondent Foster Type and Equipment Company, Inc.,¹ and other distributors of printing equipment and supplies, whose representatives testified in this proceeding, did in fact compete in the resale of goods with respect to which the payments in issue were made, as well as with respondents' contention that the evidence herein will not support a finding that such payments for services were not made available on proportionally equal terms to respondent Foster Type's competitors.

A review of the record convinces us that the evidence identifying the products of particular suppliers with respect to which Foster Type and other distributors allegedly competed is so uncertain that any determination based thereon could not rise above the level of conjecture.² For this reason alone it is impossible to make any find-

¹ Hereinafter referred to as Foster Type.

² The record is replete with the testimony of distributors allegedly competing with Foster Type who stated merely that they purchased "products" from various suppliers also selling to Foster Type. Even in the few instances where a more explicit response was elicited from representatives of such distributors the evidence is too vague for any informed conclusion on the crucial issue of competition in the resale of goods involved in the alleged inducement of payments violative of Section 2(d). For example, one witness testified his concern purchased "platemaking equipment" from The Nuarc Co., whereas the evidence with respect to Foster Type's purchases from that supplier indicates merely that this respondent purchased "photo mechanical equipment" from Nuarc; there is no additional evidence in this record permitting a determination as to whether the designations "platemaking" and "photo mechanical equipment" are in fact synonymous.

ing as to whether or not the requisite competition existed between Foster Type and other competitors in the resale of products involved in the alleged inducement of payments violative of Section 2(d). Furthermore, it would be mere speculation to infer that Foster Type and other distributors competed in the resale of products of the same supplier in the case of those distributor witnesses testifying merely in general terms that competition existed between them and Foster Type but whose testimony contains no reference to the supplier whose product was involved in such competition.

Another defect on the face of this record is the fact that representatives of certain distributors allegedly competing with Foster Type apparently did not have the knowledge to qualify them to testify with certainty as to whether Foster Type's suppliers involved in the alleged inducement of payments violative of Section 2(d) had made available to them payments for advertising or other promotional services.

Since we find that the evidence adduced thus far is inadequate for an informed determination as to whether competition existed between Foster Type and other distributors in the resale of the goods involved in the alleged inducement of payments violative of Section 2(d) and in view of our further finding that the testimony of certain distributors as to the nonavailability of payments for advertising or other promotional services is deficient because of inadequate knowledge on the part of certain of such witnesses, the initial decision is vacated and remanded to the hearing examiner for the purpose of receiving additional evidence on these points. Specifically, the examiner is directed to receive additional evidence identifying the products and lines of products purchased by Foster Type and its competitors from suppliers allegedly induced by respondents to make payments violative of Section 2(d), as well as evidence bearing on the issue of competition between Foster Type and other distributors in the resale of goods involved in the alleged violation of law. The examiner is further directed to receive additional testimony on the availability or nonavailability of payments for advertising or promotional services to distributors competing with Foster Type in the resale of such products.

Inasmuch as this case is being remanded for the purposes outlined above, no decision will be made at this time on the other issues presented in the appeal.

ORDER VACATING INITIAL DECISION AND REMANDING CASE TO
HEARING EXAMINER

This matter having come on to be heard upon the appeal of respondents from the hearing examiner's initial decision, filed July 17, 1961; and

The Commission, for the reasons stated in the accompanying opinion, having determined that said initial decision should be vacated and the case remanded to the hearing examiner:

It is ordered, That the aforesaid initial decision be vacated and set aside.

It is further ordered, That this case be remanded to the hearing examiner for further proceedings in conformity with the views expressed in the aforesaid opinion.

It is further ordered, That after such proceedings have been terminated the hearing examiner shall forthwith make and file, in accordance with the provisions of § 4.19 of the Commission's Rules of Practice, a new initial decision based on the record as then constituted.

By the Commission.

L. G. BALFOUR COMPANY ET AL.

Docket 8435. Order and Opinion, Oct. 5, 1962

Interlocutory order remanding to hearing examiner for reasons for his recommended disposition, certification of motion for order permitting inspection and copy of documents in Commission's files.

OPINION AND ORDER REMANDING RESPONDENTS' MOTION TO INSPECT AND
COPY DOCUMENTS

The hearing examiner, by his order dated September 12, 1962, has certified to the Commission for its determination respondents' motion, filed August 27, 1962, for an order directing counsel supporting the complaint to permit respondents to inspect and copy certain documents in the possession of the Commission. The documents requested by respondents' motion include: (1) documents obtained by the Commission from respondents; (2) four specific documents; (3) documents prepared or received by respondents which were obtained by the Commission from sources other than respondents; and (4) correspondence between respondents and the Commission.

The examiner's order, citing the order of the Commission in *Union Bag-Camp Paper Corp.*, Docket 7946, certifies respondents' motion, together with his recommendation, to the Commission. The examiner recommends that the only part of respondents' motion which should be

granted is the request to examine certain documents submitted to the Commission by the respondents. He further recommends that the remaining documents "fall within the privileged category and should not be disclosed". The examiner gives no explanation for these recommendations.

This disposition by the examiner of the respondents' motion misconceives the purpose and purport of the Commission's order in *Union Bag-Camp Paper Corp.*, which provided, inter alia,

. . . that any future requests for confidential information in the possession of the Commission which may be filed by respondent in this proceeding shall be addressed initially to the hearing examiner who shall consider and initially determine whether good cause for the release and disclosure to respondent of such information has been shown; and if he shall make such an affirmative initial determination, the examiner shall thereupon certify the matter to the Commission, which retains exclusive authority under Rules 1.163 and 1.164 to release confidential information upon good cause shown.

This procedure was adopted because the determination of good cause for the release of documents in the Commission's files entails, primarily, consideration of issues of fact which require for their determination a detailed knowledge of the issues of the proceeding which, at this stage of the case, is possessed by the examiner.

In making his initial determination of such a matter, an examiner should in the first instance hear both sides relative to the merits of the demand. The material sought by the request (or representative samples thereof) should usually be submitted to him for his examination and study in the light of the contentions by the proponent and opponent.

Naturally, situations may arise where the papers in question relate to strictly internal affairs of the Commission, or where the documents are plainly confidential, such as minutes of Commission meetings. In those or similar circumstances, the examiner should decline to examine the material and should forthwith forward the request for release to the Commission, without any further consideration on his part.

In analyzing the relevance of the papers involved, the examiner should be governed by the charges made in the complaint. It is respondent's burden to show why, and how, the requested documents will aid in meeting these charges.

In considering the issues raised by applications for the release of documents, examiners should find it helpful, and frequently even necessary for guidance, to consult judicial decisions and precedents under the Federal Rules of Civil Procedure concerning the scope and justification of motions for discovery. It is emphasized, however, that the Federal Rules as such do not control Commission proceedings. Prob-

lems emerging from the assertion either of privilege or of the right to "work product" should be examined in the light of principles established by the federal courts, especially in those cases in the antitrust field dealing with the validity of the claim of privilege or the application of the "work product" rule.

The examiner, after having received memoranda or briefs, and having heard oral argument (if he deems it necessary), should forward his certification accompanied by a written statement, in which he should set forth, in as much detail as appropriate, his reasons for the recommended disposition of the demand by the Commission. Thereafter, either side may submit to the Commission a further memorandum, expressing assent or dissent, under the applicable Rules of Practice.

The examiner's order herein fails to satisfy the requirements of this procedure, since it gives no explanation whatsoever for the recommendation that certain documents be released or for the conclusion that others are privileged and should not be released. Thus, the Commission is in no better position to determine whether the documents requested by respondents should be released pursuant to Section 1.164 of its Rules than it would have been had the request been initially addressed to the Commission. Accordingly,

It is ordered, That respondents' motion for the inspection and copying of documents in the possession of the Commission be, and it hereby is, remanded to the hearing examiner for further consideration and disposition in accordance with this opinion and order.

By the Commission, Chairman Dixon dissenting, and Commissioner MacIntyre concurring in the result, with the understanding that it does not provide for the release of documents which are confidential by operation of law or which otherwise the Commission is required by the public interest to keep confidential.

CHAS. PFIZER & CO., INC.

Docket 7780. Order and Opinion, Oct. 10, 1962

Denial of respondent's motion to disqualify the Chairman because of his association with the Senate Subcommittee on Antitrust and Monopoly.

MEMORANDUM OF CHAIRMAN DIXON IN RESPONSE TO RESPONDENT'S MOTION
THAT HE WITHDRAW FROM THIS PROCEEDING

By motion filed September 14, 1962, this respondent has moved that I withdraw from this proceeding or, in the event that I should refuse to withdraw, that the Commission enter an order disqualifying me

from further participation. The motion is founded upon Sections 5(c) and 7(a) of the Administrative Procedure Act (5 U.S.C. §§ 1004(c) and 1006(a)), and "principles of law applicable to the disqualification of judicial officers generally; and the right of a respondent to a fair and impartial hearing guaranteed by the due process clause of the Constitution. . . ." The motion is supported by the affidavit of John E. F. Wood, of the law firm Dewey, Ballantine, Bushby, Palmer & Wood, of New York City, attorneys for respondent.

In substance, the affiant deposes that I am disqualified in this proceeding because, prior to becoming a member of the Commission, I served in an investigative capacity in a proceeding involving the facts now before the Commission. The affidavit correctly states that, shortly after the Commission entered its formal complaint herein, the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary of the United States Senate held public hearings at which it received evidence relevant to the charges made in this complaint. It is also true that I participated in said hearings as Counsel and Staff Director of the Subcommittee. However, as indicated by the public record, my participation consisted solely of rendering some slight assistance to the Chairman of the Subcommittee in the numbering of exhibits. The record does not show, and I do not recall, taking any more of an active role in the presentation of this matter to the Subcommittee.

It seems to me that this motion is founded upon a misconception of the role played by a Congressional investigating committee. Proceedings before such a committee are not in any sense adversary in nature. As everyone knows, the hearings are conducted for the sole purpose of supplying Congress with information so that it may determine the need for and the form of legislation. To that end it is the clear duty of the committee staff, including its counsel, to present to the committee all information available and pertinent to any question under investigation including the opposing views of both sides in any controversial matter. The committee's staff counsel is definitely not an advocate of any side of any question but acts properly only as the conduit whereby relevant material is presented to the committee.

Thus, it is my view that the Administrative Procedure Act has no proper application in these premises and I reject respondent's argument that I am disqualified from further proceedings herein as a matter of law.

But more important to me than respondent's legal argument is the implication implicit in this motion that I have prejudged the issue in this matter and am incapable of rendering an impartial decision. This respondent is entitled to a fair and impartial hearing and a de-

cision based solely upon the evidence in the record. And certainly if I should, for any reason, be unable to approach this decision completely free of bias I would be morally and ethically disqualified to participate. But if such were the circumstances and I had formed any sort of definite opinion concerning the facts in this matter, a motion to disqualify would be unnecessary as I would have, before this time, *sua sponte* withdrawn from participation. However, I have not formed any opinion with respect to this matter and can honestly state that I have a free and open mind with respect thereto. Therefore, I shall not withdraw and shall cast my vote in accordance with a decision to be arrived at after a careful study of the entire record.

In view of the circumstances, I shall not participate in the Commission's deliberation and decision upon the respondent's motion that the Commission enter an order directing that I be disqualified from further participation in this proceeding.

ORDER DENYING MOTION TO DISQUALIFY

Respondent filed a motion on September 14, 1962, to disqualify Commissioner Dixon from participating in this proceeding. The motion was addressed primarily to Commissioner Dixon, and alternatively to the Commission in the event that he should determine not to disqualify himself.

In an accompanying memorandum, filed this date Commissioner Dixon has determined, for reasons stated in such memorandum, not to withdraw from participation in this proceeding. To the extent that respondent's motion is addressed to the Commission, it fails to make a sufficient showing to justify so extraordinary an action by the Commission as would be involved in requiring one of its members to withdraw from participation in a proceeding on the ground of personal disqualification. See Order Denying Motions to Disqualify in *American Cyanamid Company*, Docket No. 7211, dated December 20, 1961.

It is ordered, That the motion directed to the Commission requesting the disqualification of Commissioner Dixon from participation in this proceeding be, and it hereby is, denied.

By the Commission, Commissioner Dixon not participating.

FOSTER PUBLISHING COMPANY, INC., ET AL.

Docket 7698. Order, Nov. 13, 1962

Interlocutory order broadening scope of remand and directing hearing examiner to receive allegedly new evidence.

