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Richard C. Clark

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LEGISLATION AND ADMINISTRATION

UNFAIR TRADE PRACTICES—PACKERS AND STOCKYARDS ACT—FEDERAL TRADE COMMISSION LACKS JURISDICTION OVER GROCERY CHAIN OWNING MEAT PACKING PLANT. — Respondent is a retail supermarket organization, operating in 7 states along the Atlantic seaboard with 238 retail outlets and annual gross sales approximating \$475,000,000. In 1945, respondent acquired a meat packing plant in New Jersey, from which it derived \$25,000,000 for the fiscal year ending April, 1956. In addition to its packing activities, respondent sells a complete line of grocery and household products, including fresh and canned meats. In 1955, a complaint was filed by the Federal Trade Commission against the respondent, alleging that it was engaged in unfair trade practices by inducing and receiving discriminatory advertising allowances from its suppliers under a “co-operative advertising” scheme. 22 Consumer Reports 347 (July, 1957). Respondent moved that the complaint be dismissed for lack of jurisdiction. *Held*, complaint dismissed. Inasmuch as respondent is the owner and operator of a meat packing plant, the whole of its activity in interstate commerce, including that unrelated to meat packing, is under the exclusive jurisdiction of the Secretary of Agriculture. *In the Matter of Food Fair Stores, Inc.*, F.T.C. Docket No. 6458 (April 11, 1957).

By virtue of the Packers and Stockyards Act, 1921, 42 STAT. 159, 7 U.S.C. §§ 181-231 (1952), control and regulation of the meat packing industry is vested exclusively in the Secretary of Agriculture. The act enumerates several unlawful practices, dealing chiefly with methods of unfair competition and restraint of trade. 42 STAT. 161, 7 U.S.C. § 192 (1952). Respondent maintains that if any prohibitions be brought against it, they must be those set forth in the Packers and Stockyards Act, 1921, for the reason that it is a “packer” within the meaning of 42 STAT. 160, 7 U.S.C. § 191 (1952).

The FTC asserted jurisdiction over all respondent's activities except those relating to its meat packing plant, conceding that these activities were within the exclusive domain of the Secretary of Agriculture. The claimed jurisdiction extended to respondent's chain store operations, including the retailing of food and home products.

The jurisdictional question arises from statutory provisions found in the Packers and Stockyards Act, 1921, and in the Federal Trade Commission Act, 38 STAT. 717 (1914), 15 U.S.C. §§ 41-77 (1952). The former restricts the power of the FTC by declaring that it shall have no jurisdiction over any of the matters set forth in the act vesting jurisdiction in the Secretary of Agriculture. See Packers and Stockyards Act, 1921, 42 STAT. 169, 7 U.S.C. § 227 (1952). The latter statute provides that the Commission has authority to prevent unfair methods of competition in commerce by persons, partnerships, and corporations, *with the exception of persons, partnerships, and corporations subject to the Packers and Stockyards Act, 1921.* 15 U.S.C. § 45a (6) (1952), *amending* 38 STAT. 714 (1914) (emphasis added). Congress placed control of the meat packing industry under the Secretary of Agriculture, and excluded the FTC from exercising direct jurisdiction. The only avenue through

which the FTC can exercise jurisdiction over a meat packer is by specific request from the Secretary of Agriculture to the FTC for an investigation and report. Packers and Stockyards Act, 1921, 42 STAT. 169, 7 U.S.C. § 227 (1952).

The decision by the Hearing Examiner stressed *United Corp. v. FTC*, 110 F.2d 473 (4th Cir. 1940), where jurisdiction was claimed over activities of a corporation engaged in the marketing of canned meat products. The acquisition of 20% of the capital stock of a meat packing company sufficiently constituted the corporation a "packer," and removed all of its commercial activities from FTC jurisdiction. This decision is squarely within the statute; the mere acquisition of 20% of the voting power of a packing company renders the acquiring corporation a packer within the terms of the act. Packers and Stockyards Act, 1921, 42 STAT. 160, 7 U.S.C. § 191(4) (1952).

A consequence of this statutory definition of packer is that a corporation may avoid FTC jurisdiction, although the bulk of its business is other than meat packing or marketing. In the present case, respondent's sales from its packing activities represented only about 5% of its total sales.

Prior to 1921, meat packers were under the control of the FTC, but in that year Congress was persuaded that packers should be placed under the control of the Department of Agriculture. It was believed that since the meat packing industry was so large, the specialized control of a separate agency was required. *See* 103 CONG. REC. 2252 (daily ed., Feb. 25, 1957). Through the passage of time, an anomalous situation has arisen. The act, originally passed for purposes of keeping a closer watch on the meat packing industry, has become a shield behind which new and unforeseen abuses are protected from effective governmental control, as the Department of Agriculture has failed to enforce the provisions of the act. *See* 103 CONG. REC. 2251 (daily ed. Feb. 25, 1957).

The dissatisfaction with present jurisdictional arrangements is reflected in legislation introduced during the last session of Congress. In introducing his bill, S. 1356, Senator Watkins stated on the floor of the Senate, February 25, 1957:

. . . I believe it is in the public interest that FTC control be extended over packers which enter into other sideline businesses — businesses which now escape such control because of Department of Agriculture inaction, but whose competitors are subject to FTC control. The same need for public control applies to food firms, especially food chains, which now can acquire packing plants, or a substantial interest in one, and thus escape FTC supervision over their entire operations. 103 CONG. REC. 2250 (daily ed. Feb. 25, 1957).

The first session of the 85th Congress failed to enact the proposed bill.

In refusing to assume jurisdiction over respondent, the Hearing Examiner's initial decision helps open the way for unchecked abuses in the retail food business. A 1920 Consent Decree (*Decrees and Judgments in Civil Federal Anti-Trust Cases*, Vol. 2, p. 962), which prohibits the five largest packers from engaging in retail food operations, has helped to prevent the situation from becoming intolerable for small grocery store

organizations. *See* N. Y. Times, Dec. 15, 1956, p. 32, col. 7. Notwithstanding the restraint on the large packing companies, the jurisdictional policy now in effect could liberate huge portions of the retail food business from FTC control.

Given the provisions of the Packers and Stockyards Act as it presently exists, the instant decision is the only one that could have been made. The definition of "packer" found in the act at 42 STAT. 160 (1921), 7 U.S.C. § 191 (1952) is far too broad. The fault lies not with the FTC but with the legislation. Despite the strong penalties which the act prescribes for corporations engaged in unfair methods of competition, the Department of Agriculture has been slow and ineffective in enforcing these sanctions. *See* 22 Consumer Reports 251 (May, 1951). At present, the Washington office of the Department of Agriculture, Packers and Livestock Branch, is staffed by a total of 3 people — supposedly responsible for the control of a nationwide industry. *See* 103 CONG. REC. 2251 (daily ed. Feb. 25, 1957).

The Hearing Examiner's decision represents the proper application of an inadequate law. Three courses of action now remain: (1) legislative redefinition of "packer" within narrower limits; (2) extension of FTC jurisdiction over the meat packing industry; or (3) greater utilization of the heretofore ignored provision of the Packers and Stockyards Act that authorizes the Secretary of Agriculture to request FTC assistance if it be needed. 42 STAT. 169 (1921), 7 U.S.C. § 227 (1952). Any of these measures will result in a more realistic and effective scheme of laws to deal with unfair trade practices in the meat packing and food marketing industries.*

Richard C. Clark

* Subsequent to the completion of this writing, the Federal Trade Commission affirmed the initial decision of the Hearing Examiner, thus reaching the result the writer indicated would be proper under existing law. FEDERAL TRADE COMMISSION, NEWS SUMMARY No. 42 (Oct. 7, 1957).