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Services Rendered Provision in the Brokerage Section of the Robinson--Patman Act

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THE "SERVICES RENDERED" PROVISION IN THE BROKERAGE SECTION OF THE ROBINSON-PATMAN ACT

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No expression in the Robinson-Patman Act has received more attention than the "for services rendered" provision in section 2(c).[1] For many years it has been an important issue in a considerable amount of litigation. Various efforts have been made to interpret the "services rendered" terminology as a general exception in the brokerage section, which permits buyers and their agents to receive brokerage in one form or another on their purchases. These attempts have not met with success, and some have concluded that the "services rendered" provision has been read out of the act.[2]

Section 2(c) applies to a buyer who receives brokerage or other compensation in its place from a seller, or his intermediary, on the buyer's purchases. It also relates to the paying of such brokerage by a seller. The question presented is whether the words "except for services rendered in connection with the sale or purchase of goods, wares, or merchandise" permit a buyer to receive (and a seller to grant) brokerage or any allowance or discount in place of brokerage on his purchases. Does section 2(c) *absolutely* prohibit a buyer or his agent from receiving "anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof" from a seller or his agent on the buyer's purchases? Can a buyer render services to a seller in connection with the buyer's purchases to justify his receiving brokerage from a seller?

To fully understand section 2(c) one must consider the legislature's intent in enacting the Robinson-Patman Act. It has been stated that the basic purpose of the act is

> to restore, so far as possible, equality of opportunity in business by strengthening antitrust laws and by protecting trade and commerce against unfair trade practices and unlawful price discrimination, and also against restraint and monopoly for the better protection of consumers, workers, and independent producers, manufacturers, merchants, and other businessmen.[3]

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1 Section 2(c) provides:

> [I]t 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. (Emphasis added.)

49 Stat. 1527 (1936), 15 U.S.C. § 13(c) (1964).

2 Att'y Gen. Nat'l Comm. Antitrust Rep. 188 (1955).

3 H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3 (1936).

The aim of section 2(c) is to prevent abuse of the brokerage function. Prior to enactment of the law it was the practice of certain buyers to demand the allowance of brokerage on their purchases.[4] Sometimes this involved payments to fictitious brokers who turned them over to their employers. This was deemed to be only one method of abusing the brokerage function. Section 2(c) is phrased broadly to cover all means by which brokerage could be used to effect price discrimination.[5]

I. Appellate Decisional Law

Appellate adjudications directly on this issue have, for almost three decades, unanimously held that section 2(c) expresses an absolute prohibition against a buyer — either directly or through one acting as his agent — receiving brokerage, or other compensation in lieu thereof, from a seller on the buyer's own purchases.[6] To interpret the "services rendered" provision as a general exception allowing buyers to receive brokerage was regarded as contrary to the purpose of the law. The Fourth Circuit contended:

> If it were a sufficient basis to bring the allowance of brokerage commissions within the [for services rendered] exception of the section, every purchasing agent for a chain of stores might lawfully receive such commissions; for he does for the stores of his chain precisely what is done by Oliver [in this case acting as an agent for a group of buyers] for the subscribers to its service and benefits the sellers in making sales in precisely the same way. We have no doubt that it was just this sort of thing that it was the purpose of the act to prevent.[7]

In interpreting section 2(c), the courts have adopted various modes of reasoning. One basis is that buyers and their agents have an interest in conflict with sellers[8] which prevents them from rendering services to sellers in such a manner as to justify buyers receiving brokerage on their own purchases.[9] Thus, one court held that a buyer may not be compensated for services rendered by

4 *Id.* at 15.

5 FTC v. Henry Broch & Co., 363 U.S. 166, 169 (1960).

6 Western Fruit Growers Sales Co. v. FTC, 322 F.2d 67 (9th Cir. 1963), *cert. denied,* 376 U.S. 907 (1964); Independent Grocers Alliance Distrib. Co. v. FTC, 203 F.2d 941 (7th Cir. 1953); Modern Marketing Servs., Inc. v. FTC, 149 F.2d 970 (7th Cir. 1945); FTC v. Herzog, 150 F.2d 450 (2d Cir. 1945); Southgate Brokerage Co. v. FTC, 150 F.2d 607 (4th Cir.), *cert. denied,* 326 U.S. 774 (1945); Fitch v. Kentucky-Tennessee Light & Power Co., 136 F.2d 12 (6th Cir. 1943); Quality Bakers of America v. FTC, 114 F.2d 393 (1st Cir. 1940); Webb-Crawford Co. v. FTC, 109 F.2d 268 (5th Cir.), *cert. denied,* 310 U.S. 638 (1940); Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667 (3d Cir. 1939), *cert. denied,* 308 U.S. 625 (1940); Oliver Bros. v. FTC, 102 F.2d 763 (4th Cir. 1939); Biddle Purchasing Co. v. FTC, 96 F.2d 687 (2d Cir.), *cert. denied,* 305 U.S. 634 (1938).

7 Oliver Bros. v. FTC, 102 F.2d 763, 770 (4th Cir. 1939).

8 We may not be in as intimate touch with the ways of commerce as the Commission, but we would be naive indeed if we believed that buyers would have any great solicitude for the welfare of their commercial antagonists, sellers. The seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule.

Forster Mfg. Co. v. FTC, 335 F.2d 47, 55-56 (1st Cir. 1964).

9 The Report of the House Judiciary Committee explained the reasoning for this concept by pointing out that in a sales transaction

> the positions of buyer and seller are by nature adverse, and it is a contradiction in terms incompatible with his natural function for an intermediary to claim to be ren-

his agents who, it was claimed, acted also as agents of the seller.[10] The court said:

> It is obvious that dual representation by agents opens a wide field for fraud and oppression. Conflicting interests are always engaged when an attempt is made by buyers and sellers to arrive at a market price for commodities. We entertain no doubt that it was the intention of Congress to prevent dual representation by agents purporting to deal on behalf of both buyer and seller. For this reason paragraph (c) is framed by disjunctives. The edge of the paragraph cuts two ways, prohibiting the payment or receipt of commissions, discounts or brokerage to the adversary party by the other's agent. The phrase "except for services rendered" is employed by Congress to indicate that if there be compensation to an agent it must be for bona fide brokerage, viz., for actual services rendered to his principal by the agent. The agent cannot serve two masters, simultaneously rendering services in an arm's length transaction to both. While the phrase, "for services rendered," does not prohibit payment by the seller to his broker for bona fide brokerage services, it requires that such service be rendered by the broker to the person who has engaged him. In short, a buying and selling service cannot be combined in one person.[11]

The legislative history of the brokerage clause supports this view. Congressman Utterback, who was in charge of the legislation in the House of Representatives and submitted the House report on the bill for the Committee on the Judiciary stated:

> The bill prohibits payment or allowance of brokerage or commission except for services rendered. As explained more fully in the report of the House Committee on the Judiciary, this refers to true brokerage services rendered in fact for the party who pays for them, whether he be an agent employed and paid by the seller to find market outlets or one employed and paid by the buyer to find sources of supply.[12]

Thus, the "services rendered" provision in section 2(c) was interpreted to qualify the prohibition therein so as to allow a seller or a buyer to pay brokerage to his agent for services he actually renders to his principal.

According to informed commentators this construction has been approved by the appellate courts.[13] The courts have held that services rendered by buyers and their agents are in connection with their "own purchase, ownership or resale of the goods; and these services it renders, not to those from whom the goods are purchased, but to itself."[14] Such benefits as sellers receive are either

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dering services for the seller when he is acting in fact for or under the control of the buyer, and no seller can be expected to pay such an intermediary so controlled for such services unless compelled to do so by coercive influences in compromise of his natural interest.

H.R. REP. No. 2287, 74th Cong., 2d Sess. 15 (1936).

10 Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667 (3d Cir. 1939).

11 *Id.* at 674-75.

12 80 CONG. REC. 9418 (1936).

13 ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 188, 192 (1955).

14 Southgate Brokerage Co. v. FTC, 150 F.2d 607, 610 (4th Cir. 1945). See Western Fruit Growers Sales Co. v. FTC, 322 F.2d 67 (9th Cir. 1963); Modern Marketing Servs., Inc. v. FTC, 149 F.2d 970 (7th Cir. 1945); Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667 (3d Cir. 1939); Oliver Bros. v. FTC, 102 F.2d 763 (4th Cir. 1939).

rendered as a gratuity,[15] donated,[16] or incidental to the purchase and sale.[17]

One thread that runs through appellate interpretations of the "services rendered" provision is the fundamental concern of Congress to prevent the diversion of brokerage — or benefits derived therefrom — to buyers who would be able, because of their purchasing power, to gain an advantage over competitors. Such diversion would force a higher disproportionate share of the sellers' selling costs, on buyers who were discriminated against, with sales to favored buyers bearing less than their appropriate share. The courts have construed the provision so as to effectuate the act's primary purpose of preventing this result.

Even where it may be conceded that buyers or their agents rendered a service to sellers, courts have construed the prohibition as preventing buyers receiving brokerage from a seller or a seller's agent. Commenting on the contention that "except for services rendered" reflects congressional recognition that a buyer or his agent may perform services for a seller in a sales transaction for which a seller may pay and a buyer may receive brokerage, one court observed:

> The construction contended for makes much of its [brokerage section] language meaningless; it does violence to the purpose of the Act and has been explicitly rejected in other circuits. It is plain enough that the paragraph, [Section 2(c)] taken as a whole, is framed to prohibit the payment of brokerage in any guise by one party to the other, or the other's agent, at the same time expressly recognizing and saving the right of either party to pay his own agent for services rendered in connection with the sale or purchase.[18]

In *Oliver Bros. v. FTC,* the Fourth Circuit said:

> And even if it were true that Oliver rendered services to the sellers, we do not think that this would change the situation. No one would contend that, without violating this section, a broker representing the seller could give his commissions to the buyer; for in such case the action of the broker would be the action of his principal, the seller, and would amount to the allowance of commissions by the seller to the other party to the transaction in direct violation of the statutory provision. As we have seen, it constitutes a clear violation of the section for the buyer to receive commissions allowed an agent who represents him alone. If, therefore, the buyer may not receive commissions allowed either his own agent or the agent of the seller, it would seem to follow necessarily that he may not receive commissions allowed a broker who is the agent of both.[19]

Without a single contrary decision, the appellate courts have held that the exception in section 2(c) of payments "for services rendered" does not apply to services rendered by a buyer, or a buyer's representative, to a seller on the buyer's purchases.[20]

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15 Southgate Brokerage Co. v. FTC, 150 F.2d 607, 611 (4th Cir. 1945).
16 Oliver Bros. v. FTC, 102 F.2d 763, 766 (4th Cir. 1939).
17 Modern Marketing Servs., Inc. v. FTC, 149 F.2d 970, 978 (7th Cir. 1945).
18 Quality Bakers of America v. FTC, 114 F.2d 393, 398 (1st Cir. 1940).
19 102 F.2d 763, 770 (4th Cir. 1939).
20 One lower court has taken a contrary view. It held that jobbers who were also buyers rendered a brokerage service to the seller, *viz.,* bringing buyer and seller together, for which they

The dictum of the Supreme Court in the original *Broch* case dealing with the "services rendered" exception[21] has been interpreted as authority for holding that a buyer might render brokerage services to a seller to justify receiving a brokerage payment or discount.[22] However, the majority opinion emphasizes that section 2(c) covers all means by which brokerage could be used to effect price discrimination.[23] Moreover, in applying section 2(c) to direct as well as indirect allowances by a seller's broker to a buyer, the Court rejected a construction that would have removed one of the "absolute" bans of the section.[24] Thus, the use of the *Broch* case as authority for the doctrine that the "services rendered" exception allows buyers to receive brokerage on their purchases appears to be based on a strained construction. It was not a case where the buyer claimed or received any brokerage allowance or discount as compensation for services.

II. Identifying Cases Cognizable Under Section 2(c)

While appellate courts have consistently rejected attempts to construe the "services rendered" exception in section 2(c) as permitting the diversion of brokerage, or an allowance in lieu thereof, to buyers on their purchases, it is important to recognize that section 2(c) covers only anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof.[25] It does not apply to a payment which is not brokerage or to an allowance not given or received in the place of brokerage.

The primary question is not whether a buyer has rendered services — whatever they may be — to a seller, but whether the payment, allowance or discount amounted to a direct or indirect payment of brokerage by one party to the opposite party in a sale or purchase. The answer to this question is of crucial importance because buyers may receive payments or allowances from sellers, *e.g.*, cooperative merchandising payments permitted under section 2(d),

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can receive a commission from the seller. The court gave great weight to its finding that the jobber-buyers resell only at a price fixed by the seller. It developed the anomalous interpretation that the "for services rendered" exception applies to a buyer receiving brokerage on his purchases if the buyer resells the merchandise at a price fixed by the seller. The inevitable consequence of this theory is to promote price rigidity and uniformity. It raises a host of problems relating to resale price maintenance. Empire Rayon Yarn Co. v. American Viscose Corp., 238 F. Supp. 556 (S.D.N.Y. 1965). See also United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

21 There is no evidence that the buyer rendered any services to the seller or to the respondent nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge. We would have quite a different case if there were such evidence and we need not explore the applicability of § 2(c) to such circumstances.
FTC v. Henry Broch & Co., 363 U.S. 166, 173 (1960).

22 Empire Rayon Yarn Co. v. American Viscose Corp., 238 F. Supp. 556 (S.D.N.Y. 1965).

23 FTC v. Henry Broch & Co., 363 U.S. 166, 169 (1960).

24 An interesting and frequently ignored aspect of the *Broch* case on the question of whether buyers may render services to sellers and receive brokerage allowances as compensation for such services is that the minority opinion by four members of the court expressed the view that under the statutory scheme in section 2(c), neither a buyer nor his intermediary can perform legitimate brokerage services for a seller to provide an exemption under the "services rendered" provision. *Id.* at 181 (dissenting opinion).

25 "Section 2(c) is narrowly drawn to condemn the practice of exchanging brokerage between buyer and seller, whether the exchange be an open payment or disguised as a discount or allowance." Western Fruit Growers Sales Co. v. FTC, 322 F.2d 67, 69 (9th Cir. 1963).

which do not involve, directly or indirectly, any payment of brokerage.[26] A discriminatory preference may not be cognizable at all under section 2(c). The question as to whether a competitive advantage was given a buyer through the payment of brokerage, or an allowance in lieu thereof, must be determined by examination of the facts and circumstances in each case. One cannot presume the nexus between a preferential payment and the diversion of brokerage. Indeed, there must be substantial evidence in the record to support any inference that concessions received by a buyer were in lieu of brokerage.[27] The mere fact that a buyer's strong purchasing power enabled him to buy at favorable prices will not warrant finding a violation of 2(c).[28] Every reduction in price, coupled with a reduction in brokerage, does not compel the conclusion that an allowance in lieu of brokerage has been granted.[29] However, a fact of this importance cannot be overlooked, and where a price reduction is offset by the amount of reduced brokerage the coincidence must be satisfactorily explained by the one charged with a brokerage violation.[30] Where a price reduction is tantamount to a discriminatory receipt of brokerage by a buyer, the absolute ban of 2(c) may apply.[31]

The law does not allow the circumvention of the brokerage section by subterfuges involving indirect discounts in lieu of brokerage. The mere fact that the documents recording the sale make no mention of brokerage or compensation in lieu thereof will not prevent a finding that such an allowance was given when the facts surrounding the transaction support this conclusion.[32] The true character of the payment or allowance depends on all the facts involved, including the relationship of the parties, their customary business practices, deviations therefrom and their dealings with customers and suppliers. Self-serving notations on invoices stating the purpose of an allowance are not conclusive in this regard.[33]

The *Thomasville Chair* case[34] is important to consider at this point. It involved the application of section 2(c) to a manufacturer which granted a lower price to approximately four percent of its purchasers and accorded its salesmen a fifty percent lower commission on sales to these purchasers. The Fifth Circuit held that the reduction in commissions accompanied by a reduction in price could not result in a violation of section 2(c) unless the price reduction was shown to be unjustified under section 2(a) on the basis of differences in the costs of sales, including the commission differential, resulting from differing methods or quantities in which the goods were sold or delivered. Thus, in the context of this case, the court read the cost defense of section 2(a) into section

26 "There is no necessity for calling something brokerage that is not." Robinson v. Stanley Home Prods., Inc., 272 F.2d 601, 604 (1st Cir. 1959). The corollary to this is that there is no necessity for calling brokerage something that it is not. See FTC v. Washington Fish & Oyster Co., 282 F.2d 595 (9th Cir. 1960); *In re* Whitney & Co., 273 F.2d 211 (9th Cir. 1959).

27 Central Retailer-Owned Grocers, Inc. v. FTC, 319 F.2d 410 (7th Cir. 1963).

28 *Id.* at 414.

29 FTC v. Henry Broch & Co., 363 U.S. 166, 175 (1960).

30 FTC v. Washington Fish & Oyster Co., 282 F.2d 595 (9th Cir. 1960).

31 FTC v. Henry Broch & Co., 363 U.S. 166, 176 (1960).

32 *In re* Whitney & Co., 273 F.2d 211, 214 (9th Cir. 1959).

33 FTC v. Washington Fish & Oyster Co., 282 F.2d 595 (9th Cir. 1960); Flotill Prods., Inc., 3 TRADE REG. REP. ¶ 16970 (F.T.C. June 26, 1964).

34 Thomasville Chair Co. v. FTC, 306 F.2d 541 (5th Cir. 1962).

2(c). It did this notwithstanding a clear holding by the Supreme Court in the *Broch* case that: "Section 2(c) . . . is independent of § 2(a) and was enacted by Congress because § 2(a) was not considered adequate to deal with abuses of the brokerage function."[35] Furthermore, the majority opinion in the *Broch* case specifically disapproved fusing the provisions of 2(a), which permits the defense of cost justification, with those of 2(c), which does not.[36] Despite this, the court in the *Thomasville Chair* case found that on the facts of the case before it no violation of section 2(c) would result unless the price differences involved were not justified under the cost defense proviso in section 2(a).

This case is important because of the Federal Trade Commission's memorandum accompanying its dismissal of the complaint. The memorandum contained the following statement:

> We read the Court of Appeals' decision as holding that the Commission, in a case in which it is alleged that a seller has violated Section 2(c) of the Clayton Act by passing on a reduction in brokerage to favored buyers in the form of a discriminatory price reduction, may not rely solely on the fact that the seller has paid less brokerage on the sales at the lower price, but must establish a causal relationship between the reduced brokerage and the reduced sales price. The Commission does not, however, acquiesce in the opinion of the Court of Appeals as such, which contains dicta with which the Commission does not necessarily agree. Since the Commission does not believe that the public interest would be advanced by a further proceeding to establish whether respondent has violated Section 2(c), the complaint must be dismissed.[37]

Although the Commission did not acquiesce in the opinion of the court, there is some basis for questioning the assertion that the court's decision was based on a requirement that there be "a causal relationship between the reduced brokerage and the reduced sales price." It appears more reasonable to conclude that the court was not concerned with what caused the reduced prices involved, but rather whether they were justified under the cost defense of section 2(a). It seems to have taken the position that, because section 2(a) permits price differentials based on savings in selling costs resulting from differing methods of distribution, a seller may be free to pass on to selected buyers, in the form of a price reduction, any differential between his ordinary brokerage expense and the brokerage expense which he pays on sales to such buyers. It was precisely this contention with respect to a seller's broker that the Supreme Court rejected in the *Broch* case.[38] Thus, although Congress intended that section 2(c) prohibit the transmission of brokerage to buyers, the court in *Thomasville* would allow the same thing to be accomplished under 2(a). This would deprive 2(c) of any substance. On this basis, the opinion in this case actually offers little constructive guidance in construing section 2(c). It certainly lacks any precedential authority.

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35 363 U.S. 166, 171 (1960).
36 *Id.* at 176.
37 3 TRADE REG. REP. ¶ 16624 (F.T.C. Oct. 22, 1963).
38 363 U.S. 166 (1960).

III. Federal Trade Commission Interpretations

The most recent and conclusive indication that the FTC does not interpret the "services rendered" provision as a general exception in section 2(c) permitting buyers to receive brokerage on their purchases is contained in its Trade Practice Rules for the Fresh Fruit and Vegetable Industry, which were promulgated April 15, 1965.[39]

Section 74.2 (a)(1), (b) and (c), entitled Prohibited Brokerage, provides as follows:

> (a)(1) The foregoing provision [section 2(c)] prohibits, in connection with the sale of goods, the payment of a brokerage fee or the granting of an allowance or discount in lieu of a brokerage fee—
>
> (i) By the seller to the buyer; and
>
> (ii) By the buyer to the seller; and
>
> (iii) By the seller or the buyer to an agent, representative or other intermediary who is working for or in behalf of the other party to the sales transaction, or is subject to such other party's direct or indirect control; and
>
> (iv) By an agent of the seller to the other party to the sales transaction, either through paying such other party all or a portion of his fee or through accepting a reduced fee which results in a reduction in the price by the seller.
>
> The provision of this paragraph (a) also prohibits the receipt of such a commission, brokerage fee, discount or allowance under the conditions prescribed.
>
> (b) The paying or granting or receiving or accepting of any commission, brokerage fee, or allowance or discount in lieu thereof, such as is proscribed by paragraph (a) of this section is unlawful without regard to whether or not the practice—
>
> (1) Causes or is likely to cause competitive injury as described in paragraph (a) of § 74.1;
>
> (2) Was employed to meet any payment, allowance of discount furnished by a competitor.
>
> (c) An intermediary is prohibited from receiving, in connection with the same sales transaction, a brokerage fee or allowance or discount in lieu thereof from both the seller and the buyer, and is also prohibited from receiving a brokerage fee or allowance or discount in lieu thereof from either the seller or buyer if he, the intermediary, is subject to the direct or indirect control of the other party to the sales transaction.[40]

In addition, section 74.2 provides:

> (e) A discount or allowance by an industry member is in lieu of brokerage if it is attributable to a reduction or elimination of brokerage fees in connection with the sales transaction involved.
>
> (1) A discount or allowance granted by an industry member to some but not all customers would not under ordinary circumstances be considered in lieu of brokerage if—

39 30 Fed. Reg. 5331 (1965).
40 30 Fed. Reg. 5332 (1965).

(i) The industry member granting same makes no sales through brokers to any of his customers, or

(ii) The industry member makes all of his sales through brokers at the same brokerage rate.

(2) The actual basis for a discount or allowance at the time it was granted will indicate whether or not such was in lieu of brokerage.[41]

The Commission offers the following as examples of violations of section 2(c):

Example No. 1. A seller sells goods sometimes through brokers and sometimes on a direct basis, where no broker is involved. If on a direct sale the seller deducts an amount from the price which in fact constitutes an allowance or discount in lieu of brokerage, both the seller and the buyer have violated paragraph (a) of this section. It is of no consequence whether such payment or allowance is made directly by check, by deduction by the buyer from invoice price before remitting payment therefor, by deduction from the sales price by the seller, or otherwise.

In other transactions, however, the above-described buyer may function, not as a buyer, but as a bona fide broker for the same seller, negotiate for him a sale of goods to another party in accord with the seller's instructions and authorization and lawfully receive a brokerage fee for such service.

Example No. 2. In order to make a sale of a large quantity of products to a particular buyer who will not pay the seller's going price, the seller and his broker agree that the usual brokerage fee will be reduced and that the price to such buyer will be less than otherwise by an amount reflecting all or part of the brokerage reduction. The sale is made to such buyer at the reduced price. The seller, the broker and the buyer have violated paragraph (a) of this section.

Example No. 3. A broker is in fact the purchasing agent for a large buyer corporation and he is in all respects subject to such corporation's supervision and control. In connection with negotiation of purchases of goods and the handling thereof on behalf of the buyer corporation, the broker performs certain incidental services for the sellers involved and is paid brokerage fees by the sellers for such services. The payment of the brokerage fees by the sellers and the receipt and acceptance thereof by the broker are violations of paragraph (a) of this section. A broker may receive compensation for negotiating a valid and binding sales contract only from his principal for whom he has negotiated such contract.[42]

It should be noted that the FTC and members of the industry affected by these rules gave them careful attention during the three-year conference proceedings. They were finally promulgated after the unusual proceeding of a public hearing held by the full Commission. Three members of the Commission favored their promulgation and found them consistent in all respects with the law. One member dissented, and one member did not take part in the Commission's action.

Without question, the Trade Practice Rules for the Fresh Fruit and Vegetable Industry represent the Commission's most detailed interpretation of section 2(c). They leave no doubt that 2(c) expresses an absolute prohibition

41 30 Fed. Reg. 5333 (1965).
42 *Ibid.*

against a buyer — either directly or through one acting as his agent — receiving brokerage or other compensation in lieu thereof from a seller on the buyer's own purchases.

However, following the promulgation of the Trade Practice Rules for the Fresh Fruit and Vegetable Industry, the Commission dissipated some of the clarity of its earlier construction of the "services rendered" provision as expressed in these rules. This came about in the *Garrett-Holmes* case.[43] The respondent was charged with receiving brokerage or discounts in lieu thereof from some of its suppliers in connection with its purchases of food products for its own account for resale. In adopting the hearing examiner's findings of fact that the respondent received brokerage or discounts in lieu thereof, the Commission issued a final order to cease and desist. However, with one member dissenting, the Commission stated in its final order:

> Here, as in *F.T.C. v. Henry Broch & Co.*, 363 U.S. 166, 173 (1960), "There is no evidence that the buyer rendered any services to the seller[s] * * * nor that anything in its method of dealing justified its getting a discriminatory price" as "brokerage" or discounts in lieu thereof. On the basis of the findings of fact, the examiner was correct in concluding that the payments received by respondent violated Section 2(c) of the Clayton Act, as amended.[44]

In view of its clear holding in its Trade Practice Rules for the Fresh Fruit and Vegetable Industry that the "services rendered" provision does not provide a basis allowing a buyer to receive brokerage on its purchases, the appendage added to the Commission's final order in this case raises more questions than it answers. Notwithstanding this, the Commission has never directly ruled that a buyer may receive brokerage or compensation in lieu thereof on the basis that it rendered services to the seller.

The Commission's opinion in the *Hruby* case[45] is not an exception to this settled administrative practice. In this case, two members of the Commission, with one member dissenting and two not participating, found that the discounts, allegedly brokerage, received by the buyer-respondent were in fact not brokerage or in lieu of brokerage but functional discounts. The majority opinion stated: "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)."[46] In effect, therefore, the Commission held that the practice complained of in this case was not cognizable under section 2(c).

Flotill Prods., Inc.[47] involved so-called field brokers which the Commission found did not purchase for their own account. Because of this, the Commission held that the seller could lawfully pay brokerage commissions to the field brokers. It also held that Flotill paid an unlawful allowance in lieu of brokerage to a buyer even though this allowance was fictitiously labeled as a promotional allowance.

43 Garrett-Holmes Co., 3 TRADE REG. REP. ¶ 17209 (F.T.C. Feb. 26, 1965).
44 *Id.* at 22280.
45 Hruby Distrib. Co., 61 F.T.C. 1437 (1962).
46 *Id.* at 1449.
47 Flotill Prods. Co., 3 TRADE REG. REP. ¶ 16970 (F.T.C. June 26, 1964).

IV. Summary

Appellate adjudications and FTC administrative interpretations demonstrate that the "services rendered" provision in section 2(c) provides no basis for carving out an exception which would permit a buyer to receive brokerage or a discount in lieu thereof from a seller on the buyer's purchases. The absolute ban in section 2(c) against such diversion of brokerage, either directly or in the form of a price reduction, has been accepted. Where it is shown that a buyer received brokerage from a seller, directly or indirectly, there is no controlling precedent for holding that the "services rendered" provision provides an exception to the 2(c) prohibition.

The most frequently expressed underlying reason for this rule is that construing the provision as a general exception permitting buyers to receive brokerage on their purchases would open the door to price discriminations which the Robinson-Patman Act, and 2(c) in particular, was designed to prevent. The congressional intent to eliminate preferential treatment of favored buyers through the medium of brokerage appears to be the primary reason why both the courts and the Commission have rejected the argument that "services rendered" provides an exception allowing buyers to receive brokerage on their purchases. This construction has prevailed for nearly thirty years since the brokerage section first became law. The apparent desire is to carry out expressed legislative policy and to conform to what has judicially and administratively been determined as the basic overall congressional purpose and design in enacting section 2(c).

The prospects for change in this policy are uncertain. Much will depend on the selectivity exercised by the FTC in initiating actions under the brokerage section. Filing cases under this section which would be disposed of more appropriately under section 2(a) may lead to interpretative changes which could make the application of section 2(c) less clear and less certain. Where a price discrimination does not involve brokerage, section 2(c) is inapplicable. The overall statutory scheme imposes the dual obligation of first deciding whether the preferential treatment has been effected by means of receipt of brokerage or an allowance or discount in lieu thereof and then, if so, applying the absolute ban as provided in the brokerage section.