DECISIONS OF THE COURTS

CONSUMER SALES CORP. v. FEDERAL TRADE COMMISSION*

No. 175, Docket 22123—F. T. C. Docket 5680

(Court of Appeals, Second Circuit. July 15, 1952)

CEASE AND DESIST ORDERS—AIDING AND ABETTING UNFAIR OR UNLAWFUL ACT OR PRACTICE—SALESMEN'S MISREPRESENTATIONS

Finding that petitioners actively encouraged and participated in making alleged false representations of salesmen of their products by allegedly offering a reduced price if purchasers would collect and send in soap box tops of other manufacturers was supported by evidence justifying a cease and desist order.

EVIDENCE—ADEQUACY—DE MINIMUS CONCEPT—IF TESTIMONY OF FEW, OTHERWISE SUPPORTED

Finding of Federal Trade Commission that a substantial portion of public was induced to purchase petitioners' merchandise because of their salesmen's false representations justifying a cease and desist order was not unsupported because only 14 housewives testified before the Commission, although thousands of sales were made, where evidence indicated that the 14 witnesses were but a few of the many deceived.

CEASE AND DESIST ORDERS—DISCONTINUANCE OF PRACTICE PRECEDING—IF ABANDONMENT NOT PROVED

That practice of solicitation of soap box tops allegedly used in order to sell petitioners' merchandise based on false representations was discontinued prior to issuance of complaint by the Trade Commission would not preclude a cease and desist order on the ground that it was not in the public interest, where there was no proof of abandonment.

CEASE AND DESIST ORDERS—DISCONTINUANCE OF PRACTICE PRECEDING—IF ORDER NECESSARY TO PREVENT RESUMPTION

Even if illegal practices have been discontinued, such does not deprive Federal Trade Commission of power to enter such order as it determines necessary to prevent their revival, absent a showing of abuse of discretion.

CEASE AND DESIST ORDERS—PARTIES—WHEN CORPORATION RESPONDENT—IF INDIVIDUALS INCLUDED ALSO

Individual petitioners were properly included in cease and desist order of the Federal Trade Commission with respect to alleged illegal practices in sale of petitioners' products where they organized corporate petitioner and were its officers and guided it in matters of policy.

*Reported in 198 F. (2d) 404. For case before Commission see 47 F. T. C. 1429.

CEASE AND DESIST ORDERS—PARTIES—WHEN CORPORATION RESPONDENT—IF INDIVIDUALS INCLUDED ALSO—IF INDIVIDUAL, THERETOFORE OFFICER, DIRECTOR AND STOCKHOLDER, TERMINATED STATUS AS OFFICER, ETC., PRECEDING

That individual petitioner resigned as an officer and director of corporation and disposed of his stock before a cease and desist order was entered by the Trade Commission with respect to alleged illegal practices, did not make erroneous his inclusion in the order, where he was included because he himself had participated in the alleged deceptive practices.

CEASE AND DESIST ORDERS—SCOPE—WHETHER UNDULY BROAD—IF SIMILAR, AS WELL AS SPECIFIC, CHALLENGED CONDUCT AND METHODS INCLUDED IN

An order of the Federal Trade Commission ordering petitioners to cease and desist from certain deceptive practices in the sale of their products was not improper on the ground that it employed unduly broad and indefinite language, proscribing conduct other than that forming a basis of the complaint, where a large part of the language objected to properly sought to prevent the petitioners from continuing their illegal sale methods in a slightly different manner.

CEASE AND DESIST ORDERS—SCOPE—WHETHER UNDULY BROAD—MISREPRESENTATION—IF ORDER NOT LIMITED TO PARTICULAR SCHEME USED IN PAST

The Federal Trade Commission's power in entering a cease and desist order against deceptive practices in the sales of products is not limited to proscribing only the particular scheme used in the past, but it may also prohibit variations on the basic scheme.

CEASE AND DESIST ORDERS—SCOPE—WHETHER UNDULY BROAD—MISREPRESENTATION—PARTIES AND PRODUCTS

Where petitioners allegedly engaged in deceptive practices in selling their products, cease and desist order properly prevented them from using another legal entity to accomplish their purpose and properly prohibited them from selling different merchandise while using the same deceptive approach.

APPELLATE PROCEDURE AND PROCEEDINGS—CEASE AND DESIST ORDERS—MISREPRESENTATION—MODIFICATION

The power of the Court of Appeals to modify a cease and desist order of the Federal Trade Commission with respect to deceptive practices in the sale of products once an illegal trade practice has been found, is severely circumscribed.

CEASE AND DESIST ORDERS—SCOPE—WHETHER UNDULY BROAD—MISREPRESENTATION—PRICE AND VALUE—IF "SPECIAL PRICE" NOT MENTIONED IN COMPLAINT

Cease and desist order of the Federal Trade Commission ordering cessation of deceptive practices in sale of petitioners' products was not objectionable because the words "special price" were not mentioned in the complaint, which alleged that petitioners were offering their wares at what was allegedly said to be less than their real sale value when such was not the fact.

CEASE AND DESIST ORDERS—SCOPE—WHETHER UNDULY BROAD—MISREPRESENTATION—IF "UNLESS SUCH IS THE FACT" NOT INCLUDED

Cease and desist order of the Federal Trade Commission with respect to alleged deceptive practices in the sale of petitioners' products was not incomplete because of the absence of the words "unless such is a fact" under the evidence.

CEASE AND DESIST ORDERS—SCOPE—WHETHER UNDULY BROAD—MISREPRESENTATION—RELIEF AND MODIFICATION

Where Federal Trade Commission entered a cease and desist order against petitioners in connection with deceptive practices in sale of their products, petitioners could apply to the Commission for a modification of the order if and when they decided to do so.

CEASE AND DESIST ORDERS—SCOPE—WHETHER UNDULY BROAD—MISREPRESENTATION—RELIEF AND MODIFICATION—IF IN FUTURE, REPRESENTATIONS MIGHT BE TRUTHFULLY MADE

A cease and desist order of the Federal Trade Commission forbidding the making of representations in the sale of petitioners' products which are deceptive, need not be qualified by a provision permitting them if, in the future, they can truthfully be made.

(The syllabus, with substituted captions, is taken from 198 F. (2d) 404)

On petition to review order of Commission, petition dismissed and order enforced.

Mr. Murray M. Segal, of New York City, for petitioners.

Mr. W. T. Kelley, General Counsel, *Mr. James W. Cassedy*, Asst. General Counsel, and *Mr. James E. Corkey*, Sp. Atty., of Washington, D. C., for respondent.

Before SWAN, *Chief Judge*, and CHASE and FRANK, *Circuit Judges.*

SWAN, *Chief Judge:*

The proceedings culminating in the order of which the petitioners seek review were **[406]** commenced on July 13, 1949 by the issuance of a complaint by the Federal Trade Commission alleging the commission by Consumer Sales Corporation and Julius J. Blumenfeld and Myron J. Colin individually and as officers of said Corporation of unfair and deceptive acts and practices in commerce in violation of section 5 of the Federal Trade Commission Act, 15 U. S. C. A. § 45(a). Testimony and other evidence was taken before a trial examiner, and, on final hearing, the Commission made its findings of facts and concluded that the acts and practices so found were injurious to the public and violative of the Act. The material parts of the Commission's order, issued June 27, 1951, are set forth in the margin.[1]

[1] "It is ordered that the respondent, Consumer Sales Corporation, a corporation, and its officers, agents, representatives, and employees, and the individual respondents, Julius J. Blumenfeld and Myron J. Colin, and their respective agents, representatives, and employees, directly *or through any corporate or other device,* in connection with the offering for sale, sale or distribution of aluminum cookware, dinnerware, silverware, *or other merchandise,* in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

(1) That the respondents or any of them are connected with or represent in any manner any soap manufacturer *or any other company or organization* unless such is the fact.

The facts as reflected in the findings may be summarized as follows: Consumer Sales Corporation was engaged in the sale of aluminum cookware, dinnerware, silver plate and glassware through the medium of door-to-door salesmen. Certain of these salesmen have falsely represented to prospective customers that they were making a survey for prominent soap manufacturers who desired to obtain from housewives soap box tops, and if the prospective customer would collect and send to the corporate petitioner a certain number of box tops from said soap manufacturers' products, they were authorized to offer petitioners' merchandise at a special low price which was twenty to fifty dollars less than the regular price. In fact, the prices represented as constituting a special offer were the same as those at which the merchandise was customarily and regularly sold by the corporate petitioner. The Corporation furnished such salesmen order blanks entitled "Special Offer," and a certificate of authority to solicit and accept orders and collect deposits. Upon delivery of the merchandise to a purchaser the petitioners' truck-driver obtained the purchaser's signature to a note for the balance due and left with the purchaser an addressed envelope in which the soap box tops were to be mailed to the corporate petitioner. The individual petitioners were respectively president and secretary-treasurer of the Corporation and owned all its stock.[2] They directed its activities and formulated and controlled its policies.

The petitioners contend that they cannot be held responsible for misrepresentations by the salesmen, who were independent contractors; that the Commission's order is not in the public interest; that the individual petitioners, and particularly Blumenfeld, should not have been included in it; and that in any event it is too broad. These points will be considered seriatim.

The petitioners argue that they had no knowledge of the salesmen's false state-[407]ments and neither authorized nor participated in their making. The Commission, however, found that "by furnishing the salesmen with order forms falsely representing that they were making a special offer, by permitting the salesmen to request pur-

(2) That the respondents or any of them are making or conducting a survey.

(3) That the purchasers of the said merchandise are being given a reduced price for such merchandise *or any other valuable consideration* as a premium or reward for their collection of box tops, *cooperation in furnishing information or participation in any other similar project or activity.*

(4) That said merchandise is being sold at a special price when the price at which it is sold is the usual and customary price at which respondents sell such merchandise in the ordinary course of their business."

The order uses no italics. Italics have been added to indicate the terms of which the petitioners complain, as discussed in the final point of the opinion.

[2] Petitioner Blumenfeld resigned his office and disposed of his stock on March 21, 1950. This was eight months after the complaint was filed and about one month after hearings before the trial examiner were closed.

chasers to collect box tops and by furnishing self-addressed envelopes for the handling of the box tops, respondents actively encouraged and participated in making the said false representations." The petitioners' argument that having box tops sent to them was merely an innocuous scheme to preserve contact with a customer in order to be able to approach him again in the hope of making another sale is wholly unconvincing. Obviously the petitioners intended the salesmen to give some reason for asking the purchaser to collect soap box tops, and it would necessarily have to be a fictitious reason. The Commission found that "The evidence shows that the above-described sales approach was the usual and typical sales method, of salesmen selling respondents' products." It is also obvious that the petitioners knew that the "Special Offer" order blanks supplied to the salesmen would deceive customers since the prices stated thereon were the customary and regular prices for the merchandise offered. Since the finding that the petitioners "actively encouraged and participated in making" the false representations is amply supported by the evidence, it is unnecessary to consider whether or not the salesmen's relation to the petitioners was that of independent contractors.[3]

The contention is made that there is no evidence to support the Commission's finding that a substantial portion of the public was induced to purchase petitioners' merchandise on the strength of these false representations, and therefore the Commission's action was not in the public interest. The argument is based on the *de minimus* concept: only fourteen housewives testified before the Commission although thousands of sales were made. We are not persuaded by this reasoning, however. There is no indication that these were the only housewives to whom false representations were made. On the contrary, the evidence shows that all salesmen carried order blanks marked "Special Offer," and the brown envelopes were distributed to all buyers indicating that these fourteen witnesses were but a few of the many deceived.[4] Substantial amounts of merchandise having been sold by false and misleading representations, the interest of the public in the proceeding was well established.[5] It is also said that the practice of solicitation of soap box tops was discontinued prior to the issuance of the complaint, therefore the order was not in the public interest. Aside from one

[3] *Parke, Austin & Lipscomb, Inc.* v. *Federal Trade Com.*, 2 Cir., 142 F. (2d) 437, 440 [38 F. T. C. 881; 4 S. & D. 168].

[4] See *Steelco Stainless Steel, Inc.* v. *Federal Trade Commission*, 7 Cir., 187 F. (2d) 693, 696 [47 F. T. C. 1809].

[5] See, e. g., *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, 493 [4 F. T. C. 610; 1 S. & D. 198]; *Parke, Austin & Lipscomb, Inc.* v. *Federal Trade Commission*, 2 Cir., 142 F. (2d) 437, 441 [38 F. T. C. 881; 4 S. & D. 168]; *International Art Co.* v. *Federal Trade Commission*, 7 Cir., 109 F. 2d 393, 397 [30 F. T. C. 1635; 3 S. & D. 188], cert. den. 310 U. S. 632.

statement in the answer, however, there is no proof of abandonment and certain statements at the hearing point to an opposite conclusion. But even if the practice had been discontinued, that did not deprive the Commission of power to enter such order as it determined necessary to prevent their revival, absent a showing of abuse of discretion.[6] No abuse can be shown here. The soap box top approach was but a part of the whole scheme to delude purchasers into believing they were obtaining something for less than its real value, and there is no indication that petitioners have abandoned their misleading offer to sell goods at a special low price.

Little need be said in answer to the contention that the individual petitioners should not have been included in the order. They had organized the corporate petitioner approximately two years before this proceeding was commenced. They were its officers, they owned all its capi-[408]tal stock and they and their wives constituted its board of directors. It was admitted in the answer to the complaint, as well as in their testimony, that they directed and guided the corporation in matters of policy. Under these circumstances they cannot escape individual responsibility on the "flimsy pretext" that they were acting on behalf of the corporation and not as individuals.[7] The fact that Blumenfeld resigned as an officer and director and disposed of his stock before the order was entered does not make erroneous his inclusion in it. He was included not because he was still an officer or stockholder of the offending corporation but because he himself had participated in the use of unfair and deceptive acts or practices in commerce. Consumer Sales Corporation is not the only vehicle through which such acts may be accomplished in the future. We think the Commission was warranted in not dismissing the complaint against him.

Lastly petitioners argue that the order employs unduly broad and indefinite language which proscribes conduct other than that which forms the basis of the complaint. The order with the alleged objectionable portions in italics, is printed in the margin.[8] It will be noted that in large part the language objected to seeks to prevent petitioners from continuing their illegal sales methods in a slightly different manner. So much of the order as seeks to accomplish this end is proper. The Commission's power is not limited to proscribing

[6] *Hillman Periodicals, Inc.* v. *Federal Trade Commission*, 2 Cir., 174 F. (2d) 122 [45 F. T. C. 1103].

[7] *Steelco Stainless Steel, Inc.* v. *Federal Trade Commission*, 7 Cir., 187 F. (2d) 693, 697 [47 F. T. C. 1809], Cf. *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 119–120 [25 F. T. C. 1715; 2 S. & D. 429], *Sebrone Co.* v. *Federal Trade Commission*, 7 Cir., 135 F. (2d) 676, 678 [36 F. T. C. 1142, 3 S. & D. 570].

[8] See note 1, supra.

only the particular scheme used in the past. It may also prohibit variations on the basic theme.[9] Thus it was proper to prevent petitioners from using another legal entity to accomplish their illegal purpose, to prohibit them from selling different merchandise while using the same approach, and to enjoin representations that they were connected with large manufacturers who did not make soap or that the buyer was receiving a valuable consideration other than a reduced price for participating in a similar project or activity. Our power to modify an order such as this, once an illegal trade practice has been found, is severely circumscribed,[10] but even if it were not we could find nothing improper about the Commission's efforts to prevent this scheme from reappearing in a slightly altered garb. Petitioners also object to paragraph (4), asserting that the words "special price" were not mentioned in the complaint. There is no merit in the argument; the complaint adequately alleged petitioners were offering their wares at what was said to be less than their real value when such was not the fact. Nor do we think the words "unless such is the fact" should be added to paragraph (2). Petitioners are engaged in the business of selling, not conducting surveys, and there is no evidence that they have ever conducted a legitimate survey in the past or intend to in the future. If and when they decide to do so, either through their own organization or in conjunction with another company or organization as is permitted in paragraph (1), they may apply to the Commission for a modification of the order.[11] An order forbidding the making of representations which are deceptive need not be qualified by a provision **[409]** permitting them if in the future they can be truthfully made.[12]

The petition to review is dismissed and an order of enforcement may be entered.

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[9] *N. L. R. B.* v. *Express Publishing Co.,* 312 U. S. 426, 436–437; *Local 167* v *United States,* 291 U. S. 293, 299; *Hershey Chocolate Co.* v. *Federal Trade Commission,* 3 Cir., 121 F. (2d) 968, 971–972 [33 F. T. C. 1798; 3 S. & D. 392], *C. B. Miller Co.* v. *Federal Trade Commission,* 6 Cir, 142 F. (2d) 511, 520 [38 F. T. C. 868: 4 S. & D. 151].

[10] *Herzfeld* v. *Federal Trade Commission,* 2 Cir., 140 F. (2d) 207, 209 [38 F. T. C. 833; 4 S. & D. 109]; *Hillman Periodicals, Inc.* v. *Federal Trade Commission,* 2 Cir., 174 F. (2d) 122, 123 [45 F. T. C. 1103]; *Gold-Tone Studios, Inc.* v. *Federal Trade Commission,* 2 Cir., 183 F. (2d) 257, 259 [47 F. T. C. 1745]; *Independent Directory Corp.* v. *Federal Trade Commission,* 2 Cir., 188 F. (2d) 468, 470 [47 F. T. C. 1821].

[11] *P. Lorillard Co.* v. *Federal Trade Commission,* 4 Cir., 186 F. (2d) 52, 59 [47 F. T. C. 1755].

[12] *Macher* v. *Federal Trade Commission,* 2 Cir., 126 F. (2d) 420 [34 F. T. C. 1835; 3 S. & D. 467]; *Century Metalcraft Corp.* v. *Federal Trade Commission,* 7 Cir., 112 F. (2d) 443, 446–447 [30 F. T. C. 1676; 3 S. & D. 224]; *Lane* v. *Federal Trade Commission,* 9 Cir., 130 F. (2d) 48, 52 [35 F. T. C. 949; 3 S. & D. 501].

CONSOLIDATED MFG. CO. ET AL. v. FEDERAL TRADE COMMISSION [1]

CONTAINER MFG. CO. ET AL. v. FEDERAL TRADE COMMISSION

SUPERIOR PRODUCTS ET AL. v. FEDERAL TRADE COMMISSION

Nos. 6428-6430—F. T. C. Dockets 5557, 5560, 5561

(Court of Appeals, Fourth Circuit. Oct. 11, 1952)

METHODS, ACTS AND PRACTICES—AIDING AND ABETTING UNFAIR OR UNLAWFUL ACT OR PRACTICE—LOTTERY MERCHANDISING DEVICES

The Federal Trade Commission has power to eradicate merchandising by gambling in interstate commerce and to prohibit distribution in such commerce of devices intended to aid and encourage such merchandising.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—AIDING AND ABETTING UNFAIR OR UNLAWFUL ACT OR PRACTICE—LOTTERY MERCHANDISING DEVICES—SELLERS OF

Punch board sellers were subject to Federal Trade Commission's cease and desist order, notwithstanding fact that merchandise which was sold or distributed as result of operation of boards was not sold by them.

CEASE AND DESIST ORDERS—SCOPE—WHETHER TOO BROAD—AIDING AND ABETTING UNFAIR OR UNLAWFUL ACT OR PRACTICE—LOTTERY MERCHANDISING DEVICES

Federal Trade Commission's order, directing manufacturer to cease and desist from selling or distributing in commerce push cards, punchboards or other lottery devices which were to be used, or might be used, in sale or distribution of merchandise to public by means of game of chance, gift enterprise or lottery scheme, prohibited, when properly interpreted, only the distribution in interstate commerce of any push card, punchboard or other device which was designed to serve as an instrumentality for sale of articles of merchandise by lottery methods, and therefore such order was not too broad.

(The syllabus, with substituted captions, is taken from 199 F. (2d) 417)

On petition for review of Commission's orders, orders affirmed and enforced.

Mr. Alexander Blumenthal,, of New York City (*Glassgold & Blumenthal*, of New York City, on the brief), for petitioners.

Mr. Alan B. Hobbes, Sp. Atty., Federal Trade Commission, Washington, D. C. (*Mr. W. T. Kelley*, Gen. Counsel, and *Mr. Robert B.*

[1] Reported in 199 F. (2d) 417. For cases before Commission *see* 48 F. T. C. 692 (D. 5557); 48 F. T. C. 705 (D. 5560); 48 F. T. C. 718 (D. 5561).

Dawkins, Asst. Gen. Counsel, Federal Trade Commission, of Washington, D. C., on the brief), for respondent.

Before PARKER, *Chief Judge*, and SOPER and DOBIE, *Circuit Judges*.

PER CURIAM:

These are petitions to review and set aside orders of the Federal Trade Commission, which, on its part, asks that the or[418]ders be enforced. The orders complained of direct petitioners to cease and desist from selling or distributing in commerce as defined in the Federal Trade Commission Act "push cards, punchboards or other lottery devices which are to be used or may be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme". Petitioners contend that the Commission is without jurisdiction over them because they merely sell in commerce the punchboards and not the merchandise which is sold or distributed as a result of the operation of the boards, their argument being that the sale of the boards does not involve any "unfair methods of competition" or any "unfair or deceptive acts or practices" when considered apart from the merchandise sold or distributed in connection with their operation. This position was adequately answered in the opinion of Mr. Justice Minton, then a Circuit Judge, speaking for the Court of Appeals of the Seventh Circuit in *Modernistic Candies* v. *Federal Trade Commission* 7 Cir. 145 F. (2d) 454, 455, [39 F. T. C. 709; 4 S. & D. 288] wherein he said:

"It is clear that the Federal Trade Commission has the power to eradicate merchandising by gambling in interstate commerce. We think the Commission also has the power to prohibit the distribution in interstate commerce of devices intended to aid and encourage merchandising by gambling. The gamblers and those who deliberately and designedly aid and abet them are both engaged in practices contrary to public policy. Merchandising by gambling should not be divided into insulated acts, which appear innocent when examined separately. This unfair practice should be viewed as a whole. If the Federal Trade Commission is to police merchandising by gambling, it must police those who designedly and deliberately aid and abet this practice. We think the Commission has such power."

The decision of the Court of Appeals of the Seventh Circuit is squarely in point here. So also are the decisions in four other Circuits. See *Charles A Brewer & Sons, Inc.* v. *Federal Trade Commission* 6 Cir. 158 F. (2d) 74 [43 F. T. C. 1182; 4 S. & D. 588]; *Globe Cardboard Novelty Co.* v. *Federal Trade Commission* 3 Cir. 192 F. (2d) 444 [48 F. T. C. 1725]; *Bork Manufacturing Co.* v. *Federal Trade Commission* 9 Cir. 194 F. (2d) 611 [48 F. T. C. 1756]; *Lichtenstein* v. *Federal Trade*

Commission 9 Cir. 194 F. (2d) 607 [48 F. T. C. 1750]; *Hamilton Manufacturing Co.* v. *Federal Trade Commission* App. D. C. 194 F. (2d) 346 [48 F. T. C. 1743]. No judge anywhere has expressed a contrary opinion and nothing to the contrary can be worked out arguendo from *Trade Commission* v. *Bunte Bros.* 312 U. S. 349 [32 F. T. C. 1848; 3 S. & D. 337], which held merely that the Commission was without power over purely intrastate transactions.

We agree with the Court of Appeals of the Third Circuit that the order complained of is not too broad and that, properly interpreted, it prohibits "only the distribution in interstate commerce of any push card, punchboard or other device which is designed to serve as an instrumentality for the sale of articles of merchandise by lottery methods."

The orders of the Commission will be affirmed and an order will be entered by this court enforcing them in accordance with the provisions of 15 USC 45 (c).

Affirmed and enforced.

NATIONAL TOILET CO. v. FEDERAL TRADE COMMISSION [1]

No. 10411—F. T. C. Docket 5342

(Court of Appeals, Seventh Circuit. Oct. 20, 1952)

Order dismissing, pursuant to stipulation of counsel for the parties, petition to review and set aside the cease and desist order of Feb. 27, 1951, 47 F. T. C. 1023, prohibiting false representations in advertising to the effect that respondent's "Nadinola" cosmetic creams would clear up externally caused pimples and other types of skin blemishes and constituted an effective treatment therefor, and would improve skin texture.

Mr. James F. Hoge, of New York City, for petitioner.

Mr. James W. Cassedy, Asst. General Counsel, of Washington, D. C., for Federal Trade Commission.

Pursuant to stipulation of counsel for the parties, it is ordered by the Court that the petition filed May 7, 1951, to review and set aside the order to cease and desist be, and the same is hereby, dismissed without costs to either party.

[1] Not reported in Federal Reporter. Case before the Commission reported in 47 F. T. C. 1023.

FEDERAL TRADE COMMISSION v. NATIONAL HEALTH AIDS, INC. ET AL.[1]

Civ. A. No. 6077—F. T. C. Docket 5997

(United States District Court, D. Md., Civ. Div. Nov. 12, 1952)

FEDERAL TRADE COMMISSION ACT—WHEELER-LEA AMENDMENT—IN GENERAL

The Wheeler-Lea amendment to the Federal Trade Commission Act is in the nature of remedial legislation and should be liberally construed.

STATUTES AND STATUTORY CONSTRUCTION—IN GENERAL

A statute should be construed in light of the purpose it seeks to achieve and of the evil it seeks to remedy.

FEDERAL TRADE COMMISSION ACT—WHEELER-LEA AMENDMENT—INTENT—FALSE ADVERTISEMENTS

Evident intent of the Wheeler-Lea amendment to Federal Trade Commission Act is to enable Federal Trade Commission, in the public interest, to take more effective action against false advertisements.

FEDERAL TRADE COMMISSION ACT—FALSE ADVERTISING OF FOOD, DRUGS, ETC.—INJUNCTIVE PROCEEDINGS AND INJUNCTIONS—AS AUTHORIZED EITHER BEFORE OR DURING PENDENCY OF COMMISSION'S ADMINISTRATIVE PROCEDURE

Considering word "pending", in sense of "during", and in light of reference to dismissal of complaint, provision of Federal Trade Commission Act for the enjoining of false advertising pending issuance of complaint by Commission and until such complaint is dismissed, authorizes application for temporary injunction either before or during pendency of Commission's administrative procedure.

FEDERAL TRADE COMMISSION ACT—FALSE ADVERTISING OF FOOD, DRUGS, ETC.—INJUNCTIVE PROCEEDINGS AND INJUNCTIONS—VALIDITY—THAT PRODUCT, AS ASSERTED, A FOOD AND NOT A DRUG

[241] In proceeding by Federal Trade Commission for preliminary injunction against false advertising of a drug, objection by defendant that product was a food was technical rather than substantial in that Commission had jurisdiction over the advertising of both foods and drugs, and that complaint could readily be amended.

FEDERAL TRADE COMMISSION ACT—FALSE ADVERTISING OF FOOD, DRUGS, ETC.—INJUNCTIVE PROCEEDINGS AND INJUNCTIONS—"PROPER SHOWING"—APPLICABLE CRITERIA

Under Federal Trade Commission Act provision that, "upon proper showing", a temporary injunction against false advertising shall be granted without bond, a reasonable belief on part of Commission warrants its application for injunction, but action of Court should be based on the general considerations that properly apply in the issuance of preliminary injunctions.

[1] Reported in 108 F. Supp. 340.

ADVERTISEMENTS—FALSITY OF—TEST—NET IMPRESSION UPON GENERAL PUBLIC AS PROPER

Under Federal Trade Commission Act, test of falsity of advertisement is not whether it could be basis for civil action for deceit or for criminal proceeding for obtaining money by false pretences, but is what is likely to be net impression made upon general public by the advertisement, considered in its entirety, and as read or understood by those to whom it would appeal.

FEDERAL TRADE COMMISSION ACT—FALSE ADVERTISING OF FOOD, DRUGS, ETC.—INJUNCTIVE PROCEEDINGS AND INJUNCTIONS—"PROPER SHOWING"—APPLICABLE CRITERIA—POTENTIAL PECUNIARY INJURY TO PUBLIC FROM INDUCED PURCHASE OF PRODUCT

Showing of potential pecuniary injury to public from inducing purchase of product which, in advertisements was strongly represented as effective to make one well and keep one well, entitled Federal Trade Commission to temporary injunction restraining manufacturer of product from further dissemination of such advertisements.

(The syllabus, with substituted captions, is taken from 108 F. Supp. 340)

In proceeding for preliminary injunction to restrain dissemination of allegedly false advertisements, injunction granted.

Mr. Daniel J. Murphy and *Mr. Joseph Callaway*, of Washington, D. C., *Mr. Bernard J. Flynn*, U. S. Atty., of Baltimore, Md., for plaintiff.

Freer, Church and Green, Mr. Robert E. Freer and *Miss Nelle Ingels*, of Washington, D. C., and *Mr. Bernard H. Herzfeld*, of Baltimore, Md., for defendants.

CHESTNUT, *District Judge:*

In this case the Federal Trade Commission has filed a motion for a preliminary injunction against the defendants under the authority of s. 13 of the Federal Trade Commission Act, 15 USCA, s. 53, section (a) of which reads as follows:

"(a) Whenever the Commission has reason to believe—

(1) That any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 52 of this title, and (2) that the enjoining thereof, *pending the issuance of a complaint by the Commission under section 45 of this title, and until such complaint is dismissed by the Commission or set aside by the court on review*, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 45 of this title, would be to the interest of the public, the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court

of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. *Upon proper showing* a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business."

I have italicized the phrases of the statute which are particularly in question in this [342] case. Upon *proper showing* subsection (b) is not here in point.

Section 52 (referred to in section 53) reads as follows:

"52. Dissemination of false advertisements—Unlawfulness.

(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of foods, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of foods, drugs, devices, or cosmetics.

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 45 of this title. Sept. 26, 1914, c. 311, s. 12, as added Mar. 21, 1938, s. 49, s. 4, 52 Stat. 114."

The motion is based on the ground that the defendants are engaged in the sale and distribution in interstate commerce of a product designated as "N.H.A. Complex" and in connection therewith are causing the dissemination of false advertisements. The motion alleges that the advertisements are false in that they represent directly or by implication that N.H.A. Complex "will make one well and keep one well," and that it is a competent and effective treatment for various diseases including arthritis, rheumatism, neuralgia, sciatica, lumbago, gout, coronary thrombosis, brittle bones, bad teeth, malfunctioning glands, infected tonsils, infected appendix, gall stones, neuritis, underweight, constipation, indigestion, lack of energy, lack of vitality, lack of ambition and inability to sleep; and that all persons in this country normally consume a diet deficient in vitamins, minerals and proteins and that it is necessary for everyone to use a dietary supplement such as N.H.A. Complex to obtain the vitamins and proteins necessary to good health. It is further alleged that the Commission has reason to believe that the injunction would be in the interest of the public and that further dissemination of false advertisements will cause irreparable injury to the public.

The motion for the injunction was filed on September 18, 1952, contemporaneously with the filing of a formal complaint by the Federal Trade Commission in this court against the defendants which allege that under sections 5 and 12 of the Federal Trade Commission Act (52 Stat. 111, 15 USCA, ss. 45, 52) the Commission had issued its complaint against the defendants charging that they were engaged in the dissemination of false advertisements in violation of section 12 of the Act. In the complaint filed in this court it is alleged that the composition of N.H.A. Complex consists principally of certain enumerated vitamins and minerals with a certain amount of iodine, calcium and phosphorous. The detailed quantities, taken from the labels on the packages, are stated and the directions for dosage are "adults take ¼ oz. daily (which is approximately 2 level teaspoonsful or 4 half teaspoonful) followed by water, or take as directed by your physician." It is further alleged that the defendants have caused and are continuing to cause various false advertisements with respect to said drug preparation to be disseminated by radio and television broadcasts from broadcasting stations located in different States of the United States that have sufficient power to transmit said advertisements across State lines; and that such advertising is national in its scope. It is further alleged in the complaint that the advertisements are false in that they represent that N.H.A. Complex, used as directed "will make one well and keep one well" and will be effective in the treatment of various diseases and otherwise as heretofore mentioned with respect to the motion for a preliminary injunction. The complaint asks for the preliminary injunction. A copy of the complaint by the Commission in its own proceedings (Docket No. 5997) is attached as an exhibit to the complaint filed here for **[343]** a preliminary injunction. The administrative complaint was filed by the Commission May 29, 1952, and the complaint in this court was filed September 18, 1952.

On the separately filed motion for a preliminary injunction issued by this court, an order was signed for the defendants to show cause why said preliminary injunction should not issue as prayed within 3 days after service on them of a copy of the complaint and the motion for a preliminary injunction. On September 29, 1952, the defendant, National Health Aids of Baltimore, Inc. (formerly National Health Aids, Inc.) filed an answer to the motion and on the same day filed an answer to the complaint in this court. Some affidavits were also filed in support of the defendant's answer. The individual defendant, Charles Kasher, has not yet been served in the case and has filed no answer.

With the complaint in this court there has been filed a volume of exhibits and affidavits which, considered as a whole, tend strongly to support the averments of the complaint as to the nature and character and effect of the advertisements as false and misleading. The answer of the defendant, National Health Aids, Inc., denied that the advertisements are false and misleading and also denied that the preparation known as N.H.A. Complex is a drug. With the answer of the defendant there are also filed four affidavits of Baltimore lawyers which in their similar substance and effect state that the impressions made upon them respectively after reading the advertisements is contrary to the contention of the Federal Trade Commission. On the other hand, the more numerous and detailed and more explicit affidavits in support of the complaint are of medical men of repute and experience and of persons trained in the psychology and effect of advertisements on the public mind generally. With the complaint are filed four separate advertisements which are broadcast in practically national scope by radio and television. They are in the form of so-called lectures under the catchy titles of "Let's Live a Little"; "Stop Fooling Yourself"; "Animal, Vegetable, Mineral," and "Who Ya Laffin' At"; all by Dr. Charles D. Kasher who is the president of the corporation defendant, National Health Aids, Inc., and the defendant in this case who has not been served and has not answered. The radio and television broadcasts are of about thirty minutes duration. They are said to be novel in their kind and in general entertaining, in the way they are expressed. Apart from the affidavits filed with the Commission's complaint I think it quite important that the advertisements themselves be considered as a whole; and I have carefully read at least two of the four so-called lectures to get a comprehensive view of their import.

Counsel for the respective parties have been heard in oral argument and have filed briefs which I have carefully considered.

The first and possibly the most stressed contention of the defendant is that the wording of section 53 (15 USCA) does not authorize the issuance of a preliminary injunction in this case because the application therefor is made *after* and not *before* the filing by the Commission of its complaint against the defendant in the Commission procedure. The contention is that the language of section 53(a)(2) reading "pending the issuance of a complaint by the Commission under section 45 of this title, and until such complaint is dismissed by the Commission or set aside by the court on review * * *" by its correct interpretation permits the issuance of such an injunction only *before* the Commission files its own complaint in its own procedure. On first reading the section the contention seems at least plausible because of the ordinary meaning of the word "pending"; but while the word is often used in the sense of "until" it may also at times be used in the sense of "during." If the word "pending" is in its context given the meaning of "during" the whole phrase "pending the issuance of a complaint by the Commission under section 45 of this title and until such complaint is dismissed by the Commission or set aside by the court of review" is not inapt to express authority for the issuance of the injunction either before or after the Commission's own complaint has been filed. Moreover, and possibly more importantly, as the matter is expressed by counsel for the Commission, the conclusion of the phrase "and [344] until such complaint is dismissed" etc., means that the injunction is permitted both before and after the filing by the Commission's complaint in its own procedure, and during or pending the final termination of that Commission procedure. And there is to be found some support for this view in the legislative history of the section called to my attention by counsel for the Commission. Section 13(a) of the Federal Trade Commission Act was added to the Act (originally passed in 1914) by the so-called Wheeler-Lea Amendment of March 21, 1938, c. 49, s. 4, 52 Stat. 114. In report No. 1613, 75th Cong., 1st Sess., Mr. Lea, a member of the House Committee on Interstate and Foreign Commerce, submitted a report which was finally enacted. In this report the general purposes of the proposed legislation were described as being to broaden the powers of the Federal Trade Commission over unfair methods of competition and to provide the Commission with more effective control over false advertisements of foods. drugs, devices and cosmetics. In the body of the report on page 6 there appears the statement, as quoted by counsel for the Commission in their brief in this case, "in cases where the accused persists in the dissemination of a misleading advertisement after complaint, the Commission is given a prompt method of procedure to prevent the continuation of the offense by a temporary injunction issued by the court under section 13." And in their brief counsel further state that in the Congressional Record of January 12, 1936, p. 547, the managers of the bill said:

"In addition to that we have provided that the Commission may resort to the use of injunction pending final determination of its procedure in order to stop the dissemination of false advertisements where injuries to the public are involved if in the meantime the accused persists in continuing his false advertisements notwithstanding the Federal Trade Commission has taken up the case. When it comes to deciding the question whether or not the Commission should proceed, we give it the same discretion it has now to proceed in those cases where 'it would be in the public interest' to give this protection by a temporary injunction."

Counsel for the Commission also relevantly point out that the Wheeler-Lea amendment was in the nature of remedial legislation and accordingly should be liberally construed; and also that a statute should be construed in the light of the purpose it seeks to achieve and the evil it seeks to remedy. *Adler Hotel Co.* v. *Northern Hotel Co.*, 175 F. (2d) 619; *Binkley Mining Co.* v. *Wheeler*, 133 F. (2d) 863, 871.

Counsel for the defendant in contending for a contrary construction of the statute points to what he says was, until very recently indeed, the administrative practice of the Commission with respect to applications for such temporary injunctions. Thus, it is said that the present case is only the second one in which the Federal Trade Commission has ever applied for a temporary injunction *after* the filing of its complaint under the administrative procedure; and that heretofore there have been at least 37 cases in which the Commission has applied for temporary injunction *before* the issuance of the administrative complaint. Counsel have been able to refer me to only two federal appellate decisions dealing with section 53(a) (2). They are both in the 7th Circuit. The first is *Federal Trade Commission* v. *Thomsen-King & Co., Inc.*, 109 F. (2d) 516 [30 F. T. C. 1642: 3 S. & D. 658]. In that case one contention of the defendant was that the Commission could not apply for the injunction until *after* the administrative complaint had been filed. As to this, it was said by Circuit Judge Evans (pp. 518, 519):

"We are unable to accept defendants' view that the court's jurisdiction under section 53(a) (2) is dependent upon the pendency of proceedings before the Federal Trade Commission. Subsection (2) was written for a purpose which was to prevent the ineffectuality of proceedings before the Commission due to the offender's collecting the spoils incident to improper practices and liquidating or dissolving before the Commission can put a stop to its unfair practices.

[345] "As we construe the expression 'pending the issuance of a complaint' in subsection (2), it means that in the interim between 'the causing of the dissemination of an advertisement' in violation of section 52 of Title 15 U. S. C. A., and the action of the Commission, the latter may institute suit in the District Court to enjoin the dissemination of such advertisement. The effectiveness of the Commission's action might be defeated unless this authority to invoke the District Court's jurisdiction were given. It is a necessary part of the plan to prevent fraud and fraudulent commerce through fraudulent advertisements."

Of course this decision does not of itself establish the construction contended for by the Commission in this case. It does, however, indicate that the statute is remedial in nature and the evident purpose of its enactment was to enable the Commission to take more effective action against false advertisements in the public interest.

The second case is *Federal Trade Commission* v. *Rhodes Pharmacal Co., Inc.*, 191 F. (2d) 744 [48 F. T. C. 1685], where on the facts the District Judge refused to grant the injunction but the Court of Appeals reversed. On page 745, second paragraph, it is stated that the complaint for a temporary injunction had been filed *after* the issuance of an administrative complaint by the Commission; but it does not appear that there was any issue before the court on this point in that case. However, it seems not unreasonable to infer that the court would sui sponte have adverted to the question of construction of the statute if in applying it affirmatively there had been judicial doubt as to its application in the situation presented. In this connection it is noted that two of the Judges comprising the court in the second case had also sat in the former case where the question of construction was directly involved. In the second case Circuit Judge Major dissented on the insufficiency of proof to justify the issuance of the injunction. At the end of his dissenting opinion he noted that the hearing before the Commission had been concluded on its merits and awaited the decision by the Commission, and then he added:

"The complaint in the instant matter was not filed until almost two years after the proceeding was instituted before the Commission. I have serious doubt if the statute contemplates the issuance of an injunction under such circumstances, and, in any event, the long delay in making application for an injunction and the fact that a decision by the Commission on the merits could shortly be expected, were matters which the District Court might properly and evidently did take into consideration in the exercise of its discretion to deny the same."

While the question of construction is not free from all doubt, I take the view that section 53(a) does authorize the application for a temporary injunction either before or during the pendency of the administrative procedure. I think it was within the intention of Congress that the Commission should have that authority to proceed, and it is not difficult to contemplate possible cases where the public interest would require such procedure either before or after the issuance of the administrative complaint.

Another objection urged by defendant's counsel is that in the complaint N.H.A. Complex is described only as a drug; while it is contended that it is a food. I think there is little or no substance in this point. All the affidavits read together satisfy me that the composition can fairly be regarded both as a drug and as a food. Vitamins alone are I think very generally regarded in the nature of a food or a food supplement; but the composition of N.H.A. Complex is not limited to food and minerals but also includes some other substances commonly known as drugs, such as iodine. Apart from this the objection is technical rather than substantial in that the Commission has jurisdiction by the Act over false advertisements both of drugs and of foods. And if the composition should be regarded predominantly as a food, an amendment could readily be made to the complaint.

[346] A further contention of the defendant is worthy of more consideration. It relates to the sufficiency of the proof of what constitutes compliance with the phrase in section 53(a)(2) (second paragraph) reading: "Upon proper showing a temporary injunction or restraining order shall be granted without bond." The statute does not itself indicate what should constitute a proper showing. Counsel for the Commission contends that as the first phrase of the section reads—"Whenever the Commission has reason to *believe*" [italics supplied]. The proper showing that is required is merely the existence of a reasonable belief on the part of the Commission. On the other hand counsel for the defendant urges that this is entirely too narrow a view to take of the function and authority of courts of equity in dealing with the extraordinary remedy of injunction; and where such an extraordinary remedy may be used "without bond." There is language in the Rhodes case, supra, which seems to give at least some color to the contention of counsel for the Commission. But on reflection it is my opinion that in view of the nature of the subject matter it was hardly the intention of Congress to require a district court in the exercise of the extraordinary remedy of injunction to proceed affirmatively merely on the basis of the reasonable belief of the administrative agency. Very important rights may be affected by the issuance without bond of an injunction. In the instant case it appears without dispute that within about a year after the defendant had begun its interstate sales of N.H.A. Complex by the advertising mentioned, its gross volume of sales had reached $600,000 for the year 1951. Obviously much care should be exercised in the issuance of an injunction without bond which might destroy or very largely depreciate a business of this size and action should be withheld unless the facts fairly require affirmative relief in the public interest. While the injunction is described as a temporary injunction it is apparently agreed by counsel that when once granted it may continue in force for a long period of time, as it is said that it is by no means unusual for an administrative proceeding of this kind before the Commission to be pending for a year or more before final decision; and if the administrative complaint is not dismissed it is possible that further litigation over it may occupy an even longer period of time. A possible two years' delay in the pendency of this injunction if issued may be quite destructive of defendant's business. In this connection, however, of course I have in mind that if the injunction is issued here it would be subject to appeal which can doubtless with ordinary diligence of counsel be heard and decided by the Court of Appeals of this Circuit within a few months. The reasonable belief of the Commission is sufficient to warrant its application for the injunction, but the action of the Court should be based on the general considerations that properly apply in the issuance of preliminary injunctions.

These considerations have made it necessary to carefully examine the so-called showing made by the respective parties by their exhibits and affidavits. After doing so, I reach the conclusion that the temporary injunction should be issued; but I think the provisions of the decree should be carefully drawn and limited to the restraining of those false and misleading features of the advertisements which are clearly established.

In discussing my reasons for concluding that a proper showing has been made in this case for the issuance of a preliminary injunction, it is, of course, to be clearly understood that I am dealing only with the matter as now presented to the court and not in any way intending to prejudge what should be the final conclusion of the Commission after the full administrative hearing of both sides.

After reading and personally considering two of the advertisements I think the effect of them is correctly stated in the analysis and conclusions of the affiants, Ray C. Hackman and James Morgan Mosel. In substance their affidavits are that the advertisements fairly are intended to induce the general public belief that the ordinary food diet of the people of the United States is deficient in minerals and vitamins; that it is necessary to supplement the diet in practically all cases by a composition of vitamins and minerals; that N. H. A. Complex is the composition that is necessary to supplement **[347]** this food diet and will make one well and keep one well; and that thereby many serious diseases such as arthritis, rheumatism, appendicitis, peritonitis, insomnia, neuralgia, coronary thrombosis, defective teeth, infected tonsils, gall stones, bad bones, etc., can be prevented and cured by N. H. A. Complex as the only perfect dietary supplement. And the affidavits of several competent and experienced physicians, as for instance that of Dr. Leslie Newton Gay of Baltimore, who has specialized as an internist for 33 years, is that N. H. A. Complex when used as directed cannot be depended upon to make one well or keep one well; that it supplements only the minimum adult daily requirements of various vitamins and minerals which will not constitute a competent or effective treatment of diseases or symptoms caused by deficiency of these subjects except in the milder forms of such deficiencies where the continued use of N. H. A. Complex over a long period of time may be beneficial; that N. H. A. Complex however taken is of no value in the treatment of arthritis, rheumatism, sciatica, lumbago, gout, bursitis, coronary thrombosis, high blood pressure, diabetes, bad bones, bad teeth, malfunctioning glands, infected tonsils, infected appendix, gall stones, etc., and that it not true that all persons in the United States consume a diet that is deficient in vitamins and minerals as many persons consume a well balanced diet and obtain therefrom the daily requirements of vitamins and minerals. Such persons do not need to use a dietary supplement in order to assure their bodies of daily requirements of vitamins and minerals. Dr. Gay also points out that persons suffering from many of the mentioned diseases, conditions and symptoms, for which N. H. A. Complex used as directed is of no value, may suffer irreparable injury if proper diagnosis and treatment are delayed. He particularly mentions in that connection various forms of arthritis which may be cured completely without any permanent damage if proper diagnosis and treatment are received promptly and that especially in the case of coronary thrombosis delay in proper medical care may result in death, and that reliance upon N. H. A. Complex to the extent of neglecting the recognized therapeutic measures for controlling high blood pressure may cause cerebral hemorrhage, resulting in paralysis or death; and that reliance upon N. H. A. Complex and failure to follow prescribed diet and the use of insulin in cases of diabetes may result in coma or even death.

In the lecture entitled "Let's Live a Little" reference is made to the following physical ailments or diseases: headache, appendicitis, peritonitis, sleeplessness, arthritis, neuritis or neuralgia, sciatica, lumbago, gout, coronary thrombosis, rheumatism, bad teeth, bad eyes, tonsil infection, constipation, bad bones and lack of vitality. It is true that nowhere in the lectures do I find an express or direct statement that N. H. A. Complex will prevent or cure these specifically mentioned human ailments, but, as I pointed out, in the affidavits referred to reference to them is subtly interwoven into the lecture in such a way that the over-all impression can reasonably be stated to be that one hearing the lecture by radio or on television might well conclude that N. H. A. Complex is a perfect treatment to avoid or cure such ailments.

In this connection I have carefully considered the affidavits of the four Baltimore lawyers filed by the defendant and above referred to.

I do not think they adequately meet the case made by the plaintiff's affidavits. Naturally a lawyer in reading the printed lecture would note the failure of express or direct representation. It is doubtless true that a civil action for deceit or a criminal proceeding for obtaining money by false pretenses would not likely be sustained by a court. But the test of falsity in connection with this particular Act is different from that—it is the net impression which the advertisement is likely to make upon the general public. *Charles of the Ritz Distributors Corporation* v. *Fed. Trade Commission*, 2d. Cir., 143 F. (2d) 676 [39 F. T. C. 657; 4 S. & D. 226]. In determining the question of falsity, the advertisements must be considered in their entirety and as they would be read or understood by those to whom they appeal. *Aronberg* v. *Fed. Trade Commission*, 132 F. (2d) 165 [35 F. T. C. 979; 3 S. & D. 647].

It should also be remembered that the items here involved are spoken words by **[348]** radio and television and the listeners did not have the opportunity to carefully read the lectures as did the lawyers who expressed their opinion by affidavits for the defendant. The nature of these radio talks is of a kind that is more likely to be impressive to a listener in their general effect than where they are closely and quietly read.

In reaching the conclusion that the showing made by the Federal Trade Commission in this case justifies the issuance of a preliminary injunction I have considered another possible aspect of the matter. It may be thought that possibly the lectures are taken too seriously in view of the known tendency of advertisers of various products such as soaps, toilet articles or tobacco, to over-emphasize or exaggerate the good qualities of the particular product and as the American public has become more or less accustomed to this habit that therefore the advertisements or lectures in the instant case should be treated only as a novel entertaining form of the customary "puff" advertising.

It may also be said that N. H. A. Complex is not of itself a harmful drug when taken in quantities no greater than those prescribed on the package. But despite these considerations I think the proper view is that on the showing now made the preliminary injunction should issue because there is potential pecuniary injury to the public in inducing the purchase of a product which, though not intrinsically detrimental, and in some cases possibly is beneficial, is so strongly represented as effective to make one well and keep one well, or in effect to be good "for what ails you." As pointed out in some of the affidavits of the physicians there is the strong possibility of much graver damage to health in inducing people to rely upon a product as a remedy for or prevention of such serious diseases as are, by suggestion at least, woven into the radio lectures. The American public is entitled to be told honestly and fairly the truth so far as it is known to modern science with respect to either foods or drugs.

My conclusion is that the lectures in the instant case go beyond the boundaries of fair and permissible advertisements under the applicable law.

For these reasons I conclude that the showing made warrants the issuance of the preliminary injunction. Counsel are requested to submit the appropriate order or decree in due course.[2]

LESTER ROTHSCHILD, TRADING AS GEN-O-PAK COMPANY v. FEDERAL TRADE COMMISSION*

No. 10630—F. T. C. Docket 5853

(Court of Appeals, Seventh Circuit. Nov. 20, 1952)

INTERSTATE COMMERCE—WHAT DOES AND DOES NOT CONSTITUTE—COLLECTION SERVICE—IF ORGANIZED USE OF MAILS, ETC. INVOLVED

Where collection service operated by mailing postcard promised to send prepaid package of undisclosed contents, if subscriber's debtor would fill out return portion of card containing information useful to creditor, which package consisted of three pen points, and also operated under another trade name also not identifiable with collection business by distributing form letters to debtors subject to erroneous interpretation that information was sought as to employment situation, and operated under another trade name represented that uni[40]dentified sum of money would be sent upon receipt of requested information, such operations constituted "commerce" within Federal Trade Commission Act.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—MISREPRESENTATION—BUSINESS STATUS AND DECEPTIVE INDUCEMENTS TO PURCHASE OR DEAL—COLLECTION SCHEMES AND SWINDLES—IF STATEMENTS FACTUALLY TRUE

Where collection service operated by mailing postcard promising to send prepaid package of undisclosed contents if debtor would fill out return portion of card containing information useful to creditor, which package consisted of three pen points and also operated under another trade name also not identifiable with collection business by distributing form letters to debtors subject to erroneous interpretation that information was sought as to employment situation, and where such service under another trade name represented that an unidentified small sum of money would be sent upon receipt of requested information, such service was properly ordered to phrase such correspondence so as not to be misleading even though statements therein were factually true.

[2] See for order issued November 13, 1952, *post,* at p. 1785.

*Reported in 200 F. (2d) 39. For case before Commission, see 48 F. T. C. 1047.

METHODS, ACTS AND PRACTICES—IN GENERAL—LEGALITY—CRITERIA—PECUNIARY LOSS

It is not necessary that an unfair or deceptive act forbidden by Trade Commission Act should cause a pecuniary loss.

METHODS, ACTS AND PRACTICES—IN GENERAL—LEGALITY—CRITERIA—IF NO PRIVATE RIGHT VIOLATED

A purpose of Trade Commission Act is protection of public, and public interest may exist even though practice deemed to be unfair does not violate any private right.

(The syllabus, with substituted captions, is taken from 200 F. (2d) 39)

On petition to review order of Commission, petition denied and enforcement ordered.

Mr. Samuel E. Hirsch, of Chicago, Ill., for petitioner.

Mr. W. T. Kelley, Gen. Counsel, *Mr. Robert B. Dawkins*, Asst. Gen. Counsel, *Mr. Donovan Divet*, Atty., Federal Trade Commission, of Washington, D. C., for respondent.

Before MAJOR, *Chief Judge*, DUFFY and LINDLEY, *Circuit Judges*.

DUFFY, *Circuit Judge*. This is a petition to review a cease and desist order of the Federal Trade Commission. The amended complaint charged petitioner with unfair and deceptive acts and practices in commerce, in violation of the Federal Trade Commission Act.[1]

Petitioner's principal place of business is at Chicago, Illinois, and he operates under the trade names of Gen-O-Pak Company, American Deposit System, and Manpower Classification Bureau. Under each trade name petitioner sells services and literature intended to be used in locating delinquent debtors.

Operating as the Gen-O-Pak Company, petitioner sells two forms of double postcards carrying printed messages of which he is the author. Sales of these cards are made throughout the United States to firms and persons desiring to locate their delinquent debtors. One half of one of the double postcard forms reads as follows:

[1] Sec. 5 (a): "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

"The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 52 Stat. Sec. 111–112; 15 U. S. Code, Sec. 45 (a).

OFFICE OF THE GEN-O-PAK CO.
139 North Clark Bldg.,
Chicago 2, Illinois

Dear Friend:

We have on hand a package, which we will send to you if you will COMPLETELY fill out the return card, giving sufficient identification to warrant our sending this package to you. We will hold same at your risk subject to your forwarding directions for thirty days and the complete information requested. There are *no* charges whatsoever **[41]** and the package will be sent to you all charges *prepaid.*

Yours very truly,

The Gen-O-Pak Co.

The return card attached to the above card contains a questionnaire. Among other questions asked of the person addressed is the name of his bank, his employer, and the name of a friend.

Petitioner's customers receive bundles of such cards from petitioner and address them to their respective debtors at their last known address, and then return the cards to petitioner who mails them to the debtors as addressed. Petitioner sends to his customers any reply cards received giving information concerning their debtors, and also mails to each replying debtor a packet containing three pen points having a retail value of 6¢. Petitioner testified the packet of pens thus sent is the package referred to on the postcards addressed to the debtors. In 1950 petitioner sold 44,253 of such cards at a price of 15¢ a set. The charge of 15¢ includes the cost of the cards, the cost of the pens, and covered petitioner's service.

The second form of double postcards which petitioner uses while trading as Gen-O-Pak Company also is addressed by petitioner's customers. These cards are mailed to persons other than the debtor, and represent that Gen-O-Pak Company has on hand a package which it wishes to deliver to the debtor. The reply card asks for debtor's address and other information which would be valuable in making collections. When information is obtained by petitioner, it is sent on to his customers. The petitioner then sends a packet containing three pen points to the person answering the inquiry. The average charge for this type of double card is 11¢. In 1950 petitioner sold $8,510 worth of this type of card.

The Commission found that by use of such cards petitioner falsely represented, and placed in the hands of his customers a means of falsely representing, directly or by implication, to customers' debtors, and to others from whom information concerning debtors is sought, that such debtors are consignees of packages sent by others than petitioner and in the hands of petitioner in the usual course of his business; that the packages have been prepaid by the consignor and are held by petitioner only for forwarding purposes; that the packages are of substantial value, and that delivery cannot be made because of lack of identification or address. The Commission further found that such representations are false and misleading, that petitioner's business, so far as the recipients of the cards are concerned, has nothing to do with transportation of packages or their delivery to the proper consignees; that petitioner's whole scheme is that of obtaining information by subterfuge, and that the cards have no substantial connection with the sale and distribution of other products sold by petitioner.

Trading under the name, Manpower Classification Bureau, at the same address, petitioner sells and distributes in interstate commerce form letters which are sent to debtors whose names and last known addresses have been furnished by customers. The average price of the complete set of such letters and service is 11¢. The Commission found that by use of such form letters and the name, Manpower Classification Bureau, petitioner falsely represented, and placed in the hands of his customers a means of falsely representing that petitioner is engaged in operating a labor classification bureau for the purpose of obtaining information as to the manpower or employment situation, whereas petitioner's only purpose is to obtain information concerning delinquent debtors by subterfuge.

Petitioner also sells in interstate commerce a form letter designated, "The American Deposit System Type C Information Letter." The average price is 15¢. In 1950 petitioner sold 28,486 of these forms. The customers address the envelopes and petitioner mails them. The form letter states, "We will forward to you a small sum of money deposited with us, for you," if the debtor will give the information requested. The information asked is of a kind useful in collecting debts. When information is given, petitioner sends three pennies to person furnishing the information. The Commission found that the **[42]** petitioner was not in fact named as a depositary of a sum of money, and was not engaged in a fiduciary capacity or otherwise in receiving money to be delivered to debtors or others.

The Commission found generally that the statements and representations contained in the postcards and the form letters sold and distributed by petitioner, as well as by his use of the trade names, "Manpower Classification Bureau" and "American Deposit System," clearly have the tendency to mislead and deceive the recipients of such postcards and letters.

Petitioner is a member of a collectors' organization and as such subscribes to and advertises in a collectors' magazine, which is sent to collection agencies throughout the United States, and has the largest circulation of any magazine published in that field. Petitioner advertises under his various trade names. It is obvious from his advertising that all of petitioner's postcards and letters, under whatever trade name sold, are sold for no other purpose than to aid in making collections from delinquent debtors.

The Commission ordered petitioner to cease and desist the use of the postcards and letters hereinbefore described unless the words, "Collection Service," appear in conjunction with the trade name used. On this petition for review, petitioner claims the Commission was without jurisdiction to issue the order because he says he was not engaged in interstate commerce. He also contends that unfair competition [2] or deception on his part was not proved.

As to the question of interstate commerce, petitioner states, "Nothing passes between the States except a postcard or letter, and the mere forwarding of a request for information through the mail does not constitute commerce within the meaning of the Act." However, petitioner's services go beyond the mailing of a request for information. The entire transaction as hereinbefore described must be considered as a whole. It is clear that petitioner, on the dates specified in the complaint, was engaged in "commerce" as that term is defined in the Act.

Furthermore, the Commission is not deprived of jurisdiction because the deception involved was perpetrated by using the mails. *Progress Tailoring Co.* v. *Federal Trade Commission*, 7 Cir., 153 F. (2d) 103, 105 [42 F. T. C. 882; 4 S. & D. 455]; *Branch* v. *Federal Trade Commission*, 7 Cir., 141 F. (2d) 31, 34 [38 F. T. C. 857; 4 S. & D. 137].

Petitioner argues that the statements in his cards and letters are factually true and that it necessarily follows he did not engage in a deceptive act or practice. We do not agree. Words and sentences may be literally and technically true, and yet be framed in such a setting as to mislead or deceive. *Bockenstette, et al.* v. *Federal Trade Commission*, 10 Cir., 134 F. (2d) 369, 371 [36 F. T. C. 1106; 3 S. & D. 539]; *D. D. D. Corp.* v. *Federal Trade Commission*, 7 Cir., 125 F. (2d) 679, 682 [34 F. T. C. 1821; 3 S. & D. 455]. The petitioner intended the recipients of the cards and letters sold by him to draw inferences therefrom not based on fact. The information was requested not to

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[2] Petitioner's statement of the propositions of law relied on, and the introductory paragraph of his argument both use the term, "unfair competition," apparently inadvertently, since unfair competition is not charged and is not an issue herein.

enable petitioner to mail a package to debtor, but rather to entrap him. The Commission acted within its powers in requiring that if petitioner used the cards and letters in the operation of his business, same be worded and phrased so as not to be misleading and deceptive.

It is not necessary that an unfair or deceptive act forbidden by the Trade Commission Act should cause a pecuniary loss. One of the purposes of the Act has been the protection of the public, and public interest may exist even though the practice deemed to be unfair does not violate any private right. *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 27 [13 F. T. C. 581; 1 S. & D. 1166]; *Gimbel Bros., Inc.* v. *Federal Trade Commission*, 2d Cir., 116 F. (2d) 578, 579 [32 F. T. C. 1820; 3 S. & D. 314]; *Gulf Oil Corp.* v. *Federal Trade Commission*, 5 Cir., 150 F. (2d) 106, 108 [40 F. T. C. 933; 4 S. & D. 374]. The fact that acts and methods deemed deceptive are used to trap delinquent debtors does not prevent such acts and methods from being against the public interest. Some of the debtors may have had a justifiable reason for not promptly paying their obligations. And a considerable number of persons who **[43]** receive cards and letters from petitioner are not debtors.

A quite similar situation existed in *Silverman* v. *Federal Trade Commission*, 9 Cir., 145 F. (2d) 751 [39 F. T. C. 704; 4 S. & D. 283]. There the petitioner, operating as "General Forwarding System," sold double postcards to be used by creditors and collection agencies in obtaining information concerning debtors by subterfuge. There, as here, representations were made that the petitioner had a prepaid package for debtor which it could not deliver because of error of address or lack of identification. Another double card used represented that petitioner, operating as "Commercial Pen Company," wished to introduce its pens and would mail one free to debtor if he would supply the information requested. In that case the "pen" forwarded were pen points, as in the case at bar. The Commission entered a cease and desist order and the Court of Appeals affirmed, holding that the practice engaged in by petitioner was a "cheap swindle," which was not excused because it might in certain cases entrap swindling debtors. It was also held that it was not necessary to show that the swindled person suffered any pecuniary loss, the court citing *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 78 [18 F. T. C. 669; 2 S. & D. 247].

The evidence sustains the findings of the Commission and the Commission acted within its powers. Therefore the petition to review and set aside the Commission's order is denied, and the enforcement of the order of the Commission is ordered.

ROBERT O. BENNETT, DOING BUSINESS AS NATIONAL SERVICE BUREAU, ET AL. v. FEDERAL TRADE COMMISSION [1]

No. 11379—F. T. C. Docket 5745

(Court of Appeals, District of Columbia Circuit. Nov. 28, 1952)

METHODS, ACTS AND PRACTICES—MISREPRESENTATION—IF STATEMENTS LITERALLY TRUE OR NOT TECHNICALLY FALSE

Under Federal Trade Commission Act provision forbidding use of unfair and deceptive practices in commerce, deception may result from use of statements which are not technically false or which may be literally true, and words will be taken to mean what they are intended and understood to mean.

METHODS, ACTS AND PRACTICES—MISREPRESENTATION—DECEPTIVE INDUCEMENTS TO PURCHASE OR DEAL—COLLECTION SCHEMES AND SWINDLES

Use of a mail "skip tracer," which was a form letter sent to delinquent debtors promising to forward to the debtor a check for a small sum of money deposited for debtor with sender upon receipt of inclosed questionnaire containing requested information concerning debtor, his wife, his employer, his bank, references, etc., constituted use of unfair and deceptive practices in commerce within the Federal Trade Commission Act.

(The syllabus, with substituted captions, is taken from 200 F. (2d) 362)

In proceeding to set aside order of Commission, order affirmed

Mr. John J. Byrne, of Washington, D. C., for petitioners.

Mr. Alan B. Hobbes, Attorney, with whom *Mr. W. T. Kelley*, Gen. Counsel, and *Mr. Robert B. Dawkins*, Asst. Gen. Counsel, all of Federal Trade Commission, of Washington, D. C., on the brief, for respondent.

Before EDGERTON, PRETTYMAN, and WASHINGTON, *Circuit Judges.*

EDGERTON, *Circuit Judge:*

This is a petition to set aside a cease and desist order of the Federal Trade Commission. 52 Stat. 111–113, 15 U. S. C. § 45.

Petitioners' business consists largely though not entirely of locating delinquent debtors, and getting information from them, by what is called a mail "skip tracer". The debtors and also petitioners' customers are located throughout the United States.

Customers sign petitioners' form requesting petitioners to get information, to pay ten cents for it, and to deposit ten cents to the

[1] Reported in 200 F. (2d) 362. For case before the Commission, see 48 F. T. C. 736.

debtor's credit and charge the customer's account. Petitioners then mail the following form letter, together with a self-addressed return envelope and a questionnaire, to each person named by a customer: "If you will fill in the inclosed blank giving the requested information we will forward you a check for a small sum of money deposited with us for you for that purpose. Very truly yours, Robert Bennett". The letter is headed, and the questionnaire is addressed to, "The National Service Bureau Washington, D. C." Neither the letter nor the questionnaire says anything about a debt or a creditor. The questionnaire begins: "Below is the required information. Please send the check." The required information includes name, address, occupation, employer's name and address, husband's or wife's name and employer, home telephone, business telephone, bank, and names and addresses of two references. In response to a completed questionnaire petitioners mail their check for ten cents.

[363] Petitioners formerly used the words "Disbursement Officer" after the signature of Robert Bennett on their letter, and the words "Disbursement Office" in the corner of the return envelopes, but ceased to do so after the Commission issued its complaint against them.

The Commission found that petitioners' use of the combined words "National", "Service", and "Bureau", with a Washington address, represents that petitioners are connected with the United States government. The Commission found that petitioners, by saying they will on receipt of the requested information send "a check for a small sum of money deposited with us for you", represent "that a small but significant sum of money to which the recipient of the letter is entitled has been deposited * * * and that this money will be forwarded to the recipient of the letter upon his furnishing sufficient information by means of which he can be identified as the person entitled to the money * * *. In fact [petitioners] are not connected with the United States Government in any respect. No sum of money to which any recipient of these letters is entitled has been deposited * * * and no sum of money has been forwarded * * * other than [the] check for ten cents * * *. This practice is a transparent scheme to mislead and conceal the purpose for which the information is sought."

The Commission therefore found that petitioners were using unfair and deceptive practices in commerce within the meaning of the Federal Trade Commission Act and ordered them to cease (1) using the name "The National Service Bureau" or any other words which might imply that they are connected with the United States government or that their business is other than selling credit information; (2) representing that money has been deposited to the credit of persons questioned unless the money has in fact been deposited and the amount is expressly stated; and (3) using any forms, questions or other materials which do not clearly state that the information is to be used for credit purposes.

Words mean what they are intended and understood to mean. "Deception may result from the use of statements not technically false or which may be literally true." *United States* v. *95 Barrels of Vinegar*, 265 U. S. 438, 443. Petitioners themselves point out to prospective customers that "Washington, D. C., the nation's capital" is "the psychological city from which to send skip tracer mail". And the Commission might well find as it did in effect that, in the context of "deposited" and "a check", ten cents is not a "sum of money" or even "a small sum of money"; that "a small sum of money in this context is, at least, a substantial number of dollars. A check for ten cents may net the debtor less than nothing, since some banks charge ten cents for depositing a check and the debtor pays the postage on his questionnaire.

The fraudulent nature of petitioners' scheme is not only plain on its face but proved by its results. Letters in the record show directly that some debtors are deceived. Even more important, petitioners send out about 2100 letters a week and get about 700 replies, all from debtors who had failed to reply to letters from their creditors. It would be fantastic to suggest that one delinquent and previously unresponsive debtor out of three would reply if he thought he was furnishing information to his creditor for a net return, if any, of less than ten cents. There can be no reasonable doubt, and petitioners plainly do not doubt, that if they used the words "ten cents" they would get few replies. Their letter succeeds in conveying the false impression it must convey in order to achieve its purpose.

The Commission's order is valid and will be enforced.

Affirmed.

LIGGETT & MYERS TOBACCO CO. v. FEDERAL TRADE COMMISSION*

Civil Action File No. 80-4——F. T. C. Docket 6077

(United States District Court, S. D. New York, Dec. 1, 1952)

FEDERAL TRADE COMMISSION ACT—CONSTRUCTION—WORDS AND PHRASES—"DRUG"—FOOD, DRUG AND COSMETIC ACT—AS APPROPRIATELY RELEVANT

In determining what Congress intended by section of Federal Trade Commission Act which defines drugs as "articles (other than food) intended

*Reported in 108 F. Supp. 573.

to affect the structure of any function of the body of man", resort could appropriately be had to legislative history of section of Federal Food, Drug, and Cosmetic Act which employs identical definition of "drug".

FEDERAL TRADE COMMISSION ACT—CONSTRUCTION—WORDS AND PHRASES—"DRUG"—PRIOR INACTION UNDER POWER CONFERRED—AS NOT DETERMINATIVE PER SE—LEGISLATIVE INTENT

Fact that Federal Trade Commission had failed in past to treat certain type of cigarette advertising under its "drug" powers would not in itself be determinative of legislative interpretation of statutory definition of drugs, for purposes of application to cigarettes.

ADMINISTRATIVE BODIES AND AGENCIES—STATUTORY BOUNDARIES—AS MARKING AGENCY LIMITATIONS, CHANGING TIMES AND CONDITIONS NOTWITHSTANDING

As times and conditions change it is fitting that an administrative agency, before resorting to the legislature, should seek to invoke new means of coping with still unsolved problems, but in its zeal the agency must not exceed bounds of its statute.

FEDERAL TRADE COMMISSION ACT—CONSTRUCTION—WORDS AND PHRASES—"DRUG"—CIGARETTES—WHETHER EMBRACED IN TERM

Cigarettes are not a "drug" under provisions of Federal Trade Commission Act authorizing Commission to seek injunction against dissemination of false advertisements for the purpose of inducing the purchase of drugs.

(The syllabus, with substituted captions, is taken from 108 F. Supp. 573.)

On motion to dismiss action of Commission to enjoin dissemination of allegedly false advertising of cigarettes, motion granted.

Mr. Daniel J. Murphy, Chief, Division of Litigation, Bureau of Anti-Deceptive Practices and *Mr. Frederick McManus*, Trial Attorney, Federal Trade Commission of Washington, D. C., for plaintiff.

Simpson, Thacher & Bartlett, New York City, *Mr. Whitney North Seymour*, *Mr. Armand F. MacManus* and *Mr. Thomas Thacher*, of New York City, of counsel, for defendant.

IRVING R. KAUFMAN, D. J.

The Federal Trade Commission has sought to enjoin the dissemination of allegedly false advertising by the Liggett and Myers Tobacco Company pending the issuance of a complaint under Sections 5 and 12 of the Federal Trade Commission Act. The advertising in question is the defendant's representation

"directly or by implication, that Chesterfield Cigarettes can be smoked by any smoker without inducing any adverse effect upon the nose, throat and accessory organs of the smoker."

(Paragraph Six of Complaint). The Commission maintains [that] Section 12 and 13 (a) of the Federal Trade Commission Act [1] [574] confer jurisdiction upon this court. Liggett and Myers here moves to dismiss the complaint for lack of jurisdiction of subject matter on the ground that the product advertised is not a "drug" within the meaning of Section 12, 13 (a). The contention that cigarettes are within the purview of these sections is a novel one and consideration of the merits of the petition for injunction has, therefore, been reserved until this jurisdictional question is resolved.

Section 15 (c) states that for the purposes of Sections 12, 13 and 14 the term "drug" means:

(1) articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and

(2) articles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals; and

(3) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and

(4) articles intended for use as a component of any article specified in clause (1), (2), or (3); but does not include devices or their components, parts, or accessories.

Paragraph Five of the Complaint alleges that tobacco is a drug as "drug" is defined in the Federal Trade Commission Act because:

(a) It is recognized in the official Homeopathic Pharmacopoeia of the United States;

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[1] Sec. 12. (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5.

Sec. 13. (a) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5, would be to the interest of the public,

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

(b) Defendant in advertisements has represented and is representing directly and by implication that Chesterfield cigarettes are manufactured in such a manner as to prevent irritation to the nose, throat and accessory organs of smokers thereof.

By amendment to Paragraph Five of the Complaint the Commission seeks to add a third ground:

(c) Tobacco is an article intended to effect the functions of the body of man.

I shall consider these allegations in the order presented.

I. Effect of Listing in Homeopathic Pharmacopoeia

The difficulties which confronted the legislative draftsmen who sought to define "drug" are obvious. Realizing that no contemporary listing would suffice resort was **[575]** had to the three reference works. The issue then is whether smoking tobacco as exemplified by Chesterfield cigarettes falls within the category listed in the Homeopathic Pharmacopoeia. Tobacco does not appear in either the United States Pharmacopoeia or the National Formulary.

The defendant contends that since "cigarettes" as such are not listed in the Pharmacopoeia, this, by itself, is sufficient to render inapplicable this provision. I don't agree with this. Surely, if smoking tobacco is a drug the manner in which it is packaged, and what it is called after packaging, is, in this instance, of no greater significance than the difference between some other drug preparation in pill or powder form.

While it is true that the Homeopathic Pharmacopoeia of the United States (6th Ed. Rev. 1941) p. 546 lists tobacco, it does not stop with the mere mention of "tobacco." Several paragraphs follow the listing of tobacco with the following headings: "Description" – "Habitat" – "History" "Part Used" and "Preparations." It is only after an examination of each of those paragraphs that one can determine whether the listing was intended to cover all derivatives of the tobacco plant.

I am led to the inescapable conclusion that tobacco was listed in the Homeopathic Pharmacopoeia solely because it was the source of a preparation known as "tincture of tobacco." This preparation is described in the Pharmacopoeia as follows:

"Preparations.

a. Tincture ø. Drug strength $\frac{1}{10}$
Tabacum, in coarse powder, 100 Gm.
Distilled water, a sufficient
quantity in this proportion, 200 Cc.

Strong alcohol, a sufficient
quantity in this proportion, 824 Cc.
To make one thousand cubic centimeters
of tincture.

b. Dilutions: 2x and higher, with
dispensing alcohol.

c. Medications: 2x and higher."

No indication is given of the uses to which tincture of tobacco was put but, judging by its ingredients, it was a preparation far removed in form and purpose from the ordinary cigarette.

I conclude, therefore, that the listing of one derivative of the tobacco plant in the Homeopathic Pharmacopoeia does not warrant a holding that smoking tobacco—in cigarettes in general and Chesterfield cigarettes in particular—another derivation of that plant, is also included therein.

II. Allegation That Cigarettes Prevent Irritation.

The Commission's second allegation is that

"Defendant in advertisements has represented and is representing directly and by implication that Chesterfield cigarettes are manufactured in such a manner as to prevent irritation to the nose, throat and accessory organs of smokers thereof."

If this allegation were construed as a charge that the defendant affirmatively claimed a therapeutic purpose for Chesterfield cigarettes we would be confronted with a question of fact which would have to await trial. But this is not the case here. It is true that cigarettes have, in the past, been placed on the market and advertised as having therapeutic purposes. See *U. S.* v. *46 cartons, more or less, each containing 10 packages of an article of drug labeled in part: Fairfax Cigarettes* * * *. (Libel filed in U. S. D. C. N. J. June 13 1952.) However that is toeto caelo from a representation by the defendant of a "non-adverse" rather than beneficial effect. Thus, the Commission in its brief, p. 6, urges:

"The defendant is claiming for its Chesterfield cigarettes a quality allegedly not attributable to other cigarettes the quality of non-irritation of the nose, throat and accessory organs. And the inescapable conclusion is therefore that the defendants have so compounded their product as to eliminate, prevent or certainly mitigate the usual irritation that is caused by tobacco smoke, including cigarette smoke."

[576] Further, Paragraph Six of the complaint states, in part:

"In said advertisements defendants represented directly or by implication, that Chesterfield cigarettes can be smoked by any smoker without inducing any adverse effect upon the nose, throat and accessory organs of the smoker."

So construed, the issues raised by this allegation and those presented by the third charge which the Commission seeks to add by amendment, are substantially the same.

III. Allegation That Cigarettes are "Intended to Affect the Functions of the Body of Man"

Paragraph Six of the Complaint alleges that

"the smoke from Chesterfield cigarettes is an irritant to the mucous membrane of the nose, throat, Eustachian tubes, sinuses, larynx and trachea." [2]

The third statutory definition of a "drug" is by far the broadest. Anything which stimulates any of the senses may be said, in some perhaps insignificant degree, to affect the functions of the body of man. Consequently any article which, used in the manner anticipated by the manufacturer thereof, comes into contact with any of the senses may be said to be an article "intended to affect the functions of the body of man." (Overusage of many articles may have adverse effects but it is questionable whether the effects of overusage may be considered intended effects.)

Surely the legislators did not mean to be as all-inclusive as a literal interpretation of this clause would compel us to be.[3]

Our question is whether Congress intended to include articles which affect the functions of the body of man in the manner in which cigarettes affect those functions. But

"when we ask what Congress 'intended' usually there can be no answer, if what we mean is what any person or group of persons actually had in mind. Flinch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete occasion. He who supposes that he can be certain of the result, is the least fitted for the attempt."

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[2] The plaintiff submits, in opposition to the motion to dismiss, affidavits by medical authorities which seek to demonstrate that smoking has adverse effects upon the unhabituated smoker and the smoker who exceeds his limit of tolerance. While this motion should be decided on the pleadings, the plaintiff has asked that these affidavits be considered. For the purpose of this motion I shall assume the correctness of the statements in the affidavits.

[3] See footnote 5, infra.

L. Hand, J., in *U. S.* v. *Klinger*, C.A. 2, decided November 3, 1952, at p. 62. With this admonition in mind, we must nevertheless proceed to discover the legislative intent.

Resort may appropriately be had to the legislative history of Section 201(g) of the Food and Drug Act (21 U.S.C., Sections 301, 321 (g)) which employs the identical definition of "drug" as that found in Section 15(c) of the Federal Trade Commission Act. Senator Copeland, in explaining the inadequacies of the previous definition of "drug" stated:

"It also permits the escape of preparations which are intended to alter the structure of some function of the body, as, for example, preparations intended to reduce excessive weight."

78th Cong. Rec. 8960, 73rd Cong., 2d Sess. (1934).

The report from the Committee on Commerce on S–5, 74th Cong., 1st Sess. (1935) also cites "slenderizers" as an example of the type of article which the expanded definition was designed to encompass. These products have very decided effects upon the structure of the body and the very purpose for which the product is consumed is to bring about such effects.

The Commission asserts that the defendant alleges a "soothing" property and that cigarettes are advertised and bought with **[577]** this soothing property in mind. But many things soothe the troubled mind of modern man and I do not feel that this is the type of effect which the statute contemplates.[4]

There has been a long history of litigation between the Commission and cigarette advertisers. See e.g. *In the Matter of R. J. Reynolds Company*, 46 F.T.C. 706 (1950); *In the Matter of P. Lorillard Company*, 46 F.T.C. 735 (1950). I am conscious of the Commission's failure in the past to treat this type of cigarette advertising under its "drug" powers. This, however, should not in itself be determinative of the question of legislative interpretation. As times and conditions change it is fitting that an administrative agency, before resorting to the legislature, should seek to invoke new means of coping with still unsolved problems. But in its zeal the agency must not exceed the bounds of its statute. The legislative history, such as it it,[5] coupled with indications of contemporaneous administrative interpretation leads me to the conclusion that Congress, had the matter been considered, would not have intended cigarettes to be included as an article

[4] I pointed out upon the argument of the instant motion that a new suit of clothes has a palliative effect and the "soothing" effect of a new bonnet purchased by the fairer sex, should not be overlooked.

[5] See also Remarks of Senator Wheeler, 83d Cong. Rec. 3202–93, 75th Cong., 3d Sess. (1938).

"intended to affect the functions of the body of man" or in any other definition of "drug."

Since I hold that no "drug" is involved in the sale of defendant's product, the complaint must be dismissed. In view of this disposition, the plaintiff's motion for a temporary injunction will be considered withdrawn without prejudice. Settle order.

At New York, New York, in said district, on December 15th, 1952.

Defendant having moved this Court, by order to show cause dated November 12, 1952, to dismiss this action for lack of jurisdiction over the subject matter in that Section 13(a) of the Federal Trade Commission Act, as amended (15 U. S. C. A. § 53(a)), does not authorize the Court to grant a temporary injunction or otherwise entertain jurisdiction over this action, and said motion having regularly come on to be heard on November 20, 1952,

Now, on reading and filing the summons and complaint and the Marshal's return herein, the order to show cause dated November 12, 1952 and the thereunto annexed affidavits of Whitney North Seymour, Robert C. Batterman, William A. Blount and Thomas Thacher, all sworn to November 12, 1952, and the affidavits of Everett C. Albritton, Clarence R. Hartman and James P. Doyle, all sworn to November 18, 1952, submitted by the plaintiff in opposition to said motion, and plaintiff's amendment to Paragraph Five of the complaint, submitted November 20, 1952, and after hearing Messrs. Simpson, Thacher & Bartlett (Whitney North Seymour, Esq., of counsel) for the defendant, in support of said motion, and Frederick McManus, Esq., of counsel for the plaintiff in opposition thereto, and due deliberation having been had thereon, and it appearing to the Court that it lacks jurisdiction of the subject matter of this action, it is hereby

Ordered that the defendant's motion be and the same is hereby granted in all respects, and it is further

Ordered that the complaint herein be and it hereby is dismissed.

ESTHER ZITSERMAN TRADING AS J. M. HOWARD CO. v. FEDERAL TRADE COMMISSION [1]

No. 14533—F. T. C. Docket 5737

(Court of Appeals, Eighth Circuit. Dec. 18, 1952)

APPELLATE PROCEDURE AND PROCEEDINGS—FINDINGS AND CONCLUSIONS OF COMMISSION—IF EVIDENCE IN SUPPORT OF COMPLAINT NOT INCLUDED BY PETITIONER IN PRINTED RECORD

Where petitioner seeking review of a cease and desist order entered by the Federal Trade Commission failed to include in the printed record any

[1] Reported in 200 F. (2d) 519. For case before the Commission, see 48 F. T. C. 478.

of the evidence confessedly introduced in support of complaint filed against her, findings and conclusions would be presumed to be sustained by evidence, and could not be reviewed.

METHODS, ACTS AND PRACTICES—AIDING AND ABETTING UNFAIR OR UNLAWFUL ACT OR PRACTICE—LOTTERY MERCHANDISING DEVICES

Sales of goods by plan or method which involves use of game of chance, gift enterprise, or lottery is practice which is contrary to established policy of Federal Government and violative of Federal Trade Commission Act, and likewise it is contrary to public policy and public interest to place in hands of others the means of engaging in such acts and practices; and therefore selling in interstate commerce the means or instrumentalities by which merchandise can or may be sold by games of chance, gift enterprise or lottery is an unfair practice.

METHODS, ACTS AND PRACTICES—AIDING AND ABETTING UNFAIR OR UNLAWFUL ACT OR PRACTICE—LOTTERY MERCHANDISING DEVICES—IF SHIPPED IN INTERSTATE COMMERCE FOR ULTIMATE USE IN INTRASTATE RESALE ONLY

Interstate shipment of lottery devices for ultimate use in connection with sale and distribution of merchandise in intrastate commerce only was nevertheless an unfair practice subject to preventive control of Federal Trade Commission.

CEASE AND DESIST ORDERS—SCOPE—WHETHER TOO BROAD—AIDING AND ABETTING UNFAIR OR UNLAWFUL ACT OR PRACTICE—LOTTERY MERCHANDISING DEVICES

Federal Trade Commission's order, directing manufacturer to cease and desist [520] from selling or distributing in commerce push cards, punchboards, or other lottery devices which were to be used, or might be used, in sale or distribution of merchandise to public by means of game of chance, gift enterprise, or lottery scheme, prohibited, when properly interpreted, only the distribution in interstate commerce of any push card, punchboard or other device which was designed to serve as an instrumentality for sale of articles of merchandise by lottery methods, and therefore such order was not too broad.

(The syllabus, with substituted captions, is taken from 200 F. (2d) 519)

On petition for review of order of Commission, order affirmed and enforced.

Mr. F. W. James, of Evanston, Ill., for petitioner.

Mr. John W. Carter, Jr., Atty. for Federal Trade Commission, Washington, D. C. (*Mr. W. T. Kelley*, Gen. Counsel, and *Mr. Robert B. Dawkins*, Asst. Gen. Counsel, of Washington, D. C., on the brief), for respondent.

Before GARDNER, *Chief Judge*, and WOODROUGH and COLLET, *Circuit Judges*.

GARDNER, *Chief Judge*.

This is a petition to review a cease and desist order entered against petitioner by the Federal Trade Commission. The order was entered after hearing on complaint which alleged in substance that petitioner manufactured push cards and punchboards, selling and distributing them in interstate commerce to manufacturers of and dealers in various other articles of merchandise and that such push cards and punchboards are so prepared and arranged that when used in selling merchandise a game of chance, gift enterprise or lottery scheme is involved; that many persons, firms and corporations who distribute and sell merchandise in interstate commerce purchase petitioner's push cards and punchboards and pack and assemble assortments of merchandise with said push cards and punchboards; that retail dealers who purchase such assortments expose such assortments to the purchasing public and sell merchandise by means of petitioner's push cards and punchboards; that because of the element of chance involved members of the purchasing public are induced to buy from such retail dealers and as a result many retail dealers have been induced to deal with manufacturers, wholesale dealers and jobbers who distribute merchandise together with petitioner's devices; that the sale of merchandise to the public by the use of such push cards and punchboards involved a game of chance to procure merchandise at less than normal retail prices; that the sale of merchandise by this method and means teaches and encourages gambling among members of the public, all to the injury of the public; that the sale of merchandise by chance or lottery is a practice which is contrary to the established public policy of the Government of the United States and constitutes unfair acts and practices in commerce; that by the sale of petitioner's push cards and punchboards petitioner supplies to and places in the hands of others the means of conducting lotteries, games of chance or gift enterprises in the sale or distribution of merchandise; that petitioner thus provides others with the means of and instrumentalities for engaging in unfair acts and practices in commerce in the sale of merchandise. The complaint also charged that said acts and practices of petitioner are all to the prejudice and injury of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

By answer petitioner put in issue all the allegations of the complaint.

Although the printed record contains no evidence, nor even a recital that evidence was introduced in support of the allegations of the complaint, it is admitted by counsel for petitioner in his brief that "after issues were joined the Commission held hearings." Neither does the printed record contain any evidence introduced or offered by the petitioner. The hearing examiner filed his initial decision which included findings of fact and conclusions of law and an order to cease and desist. The findings which are set out in detail in the printed record sustained all the [521] substantial allegations of the complaint and concluded that the petitioner's acts and practices as found constituted unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. An order was entered which directed petitioner to cease and desist from "selling or distributing in commerce as 'commerce' is defined in the Federal Trade Commission Act, punchboards, push cards, or other lottery devices which are to be used, or which may be used, in the sale and distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme." Petitioner appealed to the Commission from the decision of the trial examiner and on hearing the decision of the trial examiner was affirmed and adopted as the decision of the Commission.

By her petition for review in this court petitioner asks that we review "the findings and order of the Federal Trade Commission in said cause and enter a decree in this honorable court setting aside the order of the Federal Trade Commission * * *." In support of her petition she urges: (1) that the hearing granted her did not comply with the due process clause of the Constitution nor with the Administrative Practice Act in that the trial examiner refused to grant the petitioner adequate hearings; (2) the Commission does not have jurisdiction to restrain the interstate shipment of push cards and punchboards; (3) the order issued is too broad; (4) the proceeding is not in the interest of the public as required by the Federal Trade Commission Act.

Although petitioner seeks a review of the findings of the Commission, she has not included in the printed record any of the evidence confessedly introduced in support of the allegations of the complaint. In this situation the findings and conclusions are presumed to be sustained by the evidence and may not be reviewed here.

The contention that petitioner was not granted a fair hearing is bottomed on certain alleged rulings of the trial examiner rejecting petitioner's proffered evidence. The evidence is not in the printed record and Rule 10 (b) of this court among other things provides that, "If the appellant or petitioner in his brief challenges rulings upon evidence, such evidence, the objections interposed thereto, and the rulings questioned shall be quoted in the printed record, and if the question of the sufficiency of the evidence to support a finding, ruling, order, verdict or judgment of the court or board is raised by the appellant or petitioner, he shall include in the printed record (in narrative form) all evidence received upon the trial or hearing pertinent to that question." See *Loughran* v. *Federal Trade Commission*, 8 Cir., 143 F. (2d) 431 [38 F. T. C. 919; 4 S. & D. 214]. It is, however, urged by the petitioner that the record sufficiently reflects the ruling of the court on the admission of evidence because there is printed in the record, under the heading "Ruling," the following: "The Commission on appeal from the Trial Examiner's initial decision in upholding the Examiner's ruling that petitioner could not have hearings for the purpose of introducing evidence on the intrastate use of punch boards, ruled 'The Commission is of the opinion that the distribution in commerce of devices which aid and encourage merchandising by gambling is contrary to the interest of the public.'" As there is nothing in this ruling which reflects the circumstances under which the ruling of the examiner was made nor what, if any evidence was offered, this record leaves much to conjecture and speculation. In the final analysis, however, we think the contention is substantially embodied in petitioner's argument to the effect that the Federal Trade Commission Act does not confer jurisdiction on the Commission to restrain transportation of the devices here in question in interstate commerce because the devices are used in connection with the sale of merchandise by chance or lottery in intrastate commerce. Unless petitioner's argument on this question is sound, then manifestly the ruling complained of which it is said denied her the right to make proof that the devices were ultimately to be used for the sale of merchandise only in intrastate commerce, could not be prejudicial.

[522] The controversy is concerned with the sale and distribution of lottery devices. Petitioner in her brief admits the sale and distribution in interstate commerce of lottery devices and their use in the sale and distribution of merchandise, and, indeed, as that is the finding of the Commission it can not, in the condition of the record, be here challenged. This narrows the issue to the question as to whether or not the Commission is without jurisdiction if these devices though transported in interstate commerce are ultimately used in connection with the sale and distribution of merchandise only in intrastate commerce. It is broadly urged that the Commission has no jurisdiction over interstate shipments of lottery devices. In the recent case of *Federal Trade Commission* v. *Raladam Company*, 316 U. S. 149 [34 F. T. C. 1843; 3 S. & D. 474], it is among other things said:

"One of the objects of the Act creating the Federal Trade Commission was to prevent potential injury by stopping unfair methods of competition in their incipiency. * * *"

It is now well settled by controlling decisions that the sale of goods by a plan or method which involves the use of a game of chance, gift enterprise, or lottery is a practice which is contrary to the established policy of the Government of the United States and violative of the Federal Trade Commission Act. It is equally well established that selling in interstate commerce the means or instrumentalities by which merchandise can or may be sold by games of chance, gift enterprise or lottery is an unfair method of competition. Placing in the hands of others the means of engaging in such acts or practices is contrary to the public policy and the public interest. The Commission found that the act prohibited by the order to cease and desist was the selling and distribution of lottery devices in interstate commerce and we think the act prohibited by the order is contrary to public policy of the United States Government. The questions have, we think, been conclusively determined against the contentions of the petitioner by a long list of decisions. *Chas. A. Brewer & Sons* v. *Federal Trade Commission*, 6 Cir., 158 F. (2d) 74 [43 F. T. C. 1182; 4 S. & D. 588]; *Modernistic Candies* v. *Federal Trade Commission*, 7 Cir., 145 F. (2d) 454 [39 F. T. C. 709; 4 S. & D. 288]; *Federal Trade Commission* v. *Martoccio Co.*, 8 Cir., 87 F. (2d) 561 [24 F. T. C. 1608; 2 S. & D. 381]; *Lichtenstein* v. *Federal Trade Commission*, 9 Cir., 194 F. (2d) 607 [48 F. T. C. 1750]. In *Lichtenstein* v. *Federal Trade Commission*, *supra*, the court among other things said:

"Upon a review of the history of Section 5 (a) in connection with the decisions of the court thereon, we are of the opinion that the petitioner's use of interstate commerce to ship these devices to be used in intrastate commerce in the gambling disposition of merchandise to the ultimate consumer is one of the 'unfair * * * practices in commerce' subject to the preventive control of the Commission."

Touching the question of public policy the court in *Modernistic Candies* v. *Federal Trade Commission*, *supra*, among other things said:

"There may be in every child the impulse that prompts him to take a chance, but it has been the public teaching and the public policy of the land that gambling is immoral and to be condemned. The Federal Government has made it a criminal offense to transport lottery tickets or to cause them to be transported in interstate commerce. 18 U. S. C. A. Sec. 387. Lotteries used in the marketing of merchandise have long been condemned by the Supreme Court and by this court. The cases are legion."

And again the court said:

"It is clear that the Federal Trade Commission has the power to eradicate merchandising by gambling in interstate commerce. We think the Commission also has the power to prohibit the distribution in interstate commerce of devices intended to aid and encourage merchandising by gambling. The gamblers and those who deliberately and designedly aid and abet them are both engaged in practices contrary to public policy. Merchandising by gambling should not be divided into [523] insulated acts, which appear innocent when examined separately. This unfair practice should be viewed as a whole. If the Federal Trade Commission is to police merchandising by gambling, it must police those who designedly and deliberately aid and abet this practice. We think the Commission has such power."

The case of *Chas. A. Brewer & Sons* v. *Federal Trade Commission*, *supra*, decided by the Court of Appeals for the Sixth Circuit, may be said to be on "all fours" with the instant case. The complaint in that case was substantially identical with that in the case at bar. The findings and the order were the same as are here involved and the same contentions of counsel for petitioner were made there as are urged here. These contentions are, we think, convincingly answered by the well considered opinion by Judge Martin which reviews all the pertinent authorities to the date of the opinion. After analyzing the Commission's findings the court said:

"* * * With deliberate intent, using channels of interstate commerce, they put into the hands of others, including manufacturers and wholesale and retail dealers, the means of using 'unfair methods of competition' and 'unfair or deceptive acts or practices.' Manufacturers and wholesale dealers who purchase their made-to-order punch boards and push cards frequently make up complete assortments of merchandise and boards or cards, which find their way into interstate commerce.

"For the reasons hereinafter appearing, we have reached the conclusion that, in thus aiding and abetting, inducing and procuring manufacturers and wholesale and retail dealers in merchandise to use unfair or deceptive acts or practices and unfair methods of competition, Charles A. Brewer and Son, though manufacturing no merchandise except the lottery devices which they ship in interstate commerce, fall within the restraining power of the Federal Trade Commission as vested by the Federal Trade Commission Act. 52 Stat. 111."

As before observed, every argument urged upon us here was considered by the court in the Brewer case and counsel for petitioner frankly admits that if correct the decision in that case is conclusive against him. He contends, however, that the cases above cited, including the Brewer case, are in conflict with the decision of the Supreme Court in *Federal Trade Commission* v. *Bunte Brothers*, 312 U. S. 349 [32 F. T. C. 1848; 3 S. & D. 337]. The Bunte case, however, is readily distinguishable in its facts from the instant case and this has been done for us by Judge Martin in his opinion in the Brewer case, where it is said:

"The case is plainly distinguishable from that at bar, in that, in the Bunte Brothers case, the sale of the petitioner's products was entirely within the State of Illinois. Here, the petitioners ship in interstate commerce throughout the United States their manufactured lottery devices."

The same view is expressed by the United States Court of Appeals for the Fourth Circuit in the recent case of *Consolidated Manufacturing Company, et al.* v. *Federal Trade Commission*, 199 F. (2d) 417 [49 F. T. C. 1658], where it is said inter alia:

"No judge anywhere has expressed a contrary opinion and nothing to the contrary can be worked out arguendo from *Trade Commission* v. *Bunte Bros.*, 312 U. S. 349 [32 F. T. C. 1848; 3 S. & D. 337], which held merely that the Commission was without power over purely intrastate transactions."

It is finally urged that the order of the Commission is too broad. This contention was also urged in the Brewer case and in the Consolidated Manufacturing Company case. Both of those courts expressed the view that the order complained of was not too broad. In the last cited case the court said:

"We agree with the Court of Appeals of the Third Circuit that the order complained of is not too broad and that, properly interpreted, it prohibits 'only the distribution in interstate commerce of any push card, punchboard or other device which is designed **[524]** to serve as an instrumentality for the sale of articles of merchandise by lottery methods.'"

We have given consideration to all other contentions of the petitioner and think they are wholly without merit.

The petition to review will be dismissed, and the cease and desist order of the Commission is affirmed and will be enforced.

FEDERAL TRADE COMMISSION v. MINNEAPOLIS-HONEYWELL REGULATOR CO.*

No. 11—F.T.C. Docket 4920

(United States Supreme Court. Dec. 22, 1952)

APPELLATE PROCEDURE AND PROCEEDINGS—PETITIONS FOR CERTIORARI—WHETHER TIMELY—IF REVERSAL OF PART III OF ORDER FOLLOWED BY LATER "FINAL DECREE" GRANTING REQUESTED ENFORCEMENT AS TO UNCONTESTED PARTS I AND II

In proceeding to review a cease and desist order of Federal Trade Commission, where the Court of Appeals, on July 5, 1951 reversed Part III of

*Reported in 344 U. S. 206, 73 S. Ct. 245; lower court's decision in 191 F. (2d) 786. For case before Commission, see 44 F. T. C. 351.

Commission's order and, following filing of Commission's memo on August 21, 1951 requesting that its cross-petition for enforcement be sustained as to Parts I and II, issued on September 18, 1951, a "final decree" repeating terms of its prior judgment and granting Commission's request, Commission's petition for writ of certiorari on December 14, 1951, was not timely.

APPELLATE PROCEDURE AND PROCEEDINGS—PETITIONS FOR CERTIORARI—WHETHER TIMELY—IF REVERSAL OF PART III OF ORDER FOLLOWED BY LATER "FINAL DECREE" GRANTING REQUESTED ENFORCEMENT AS TO UNCONTESTED PARTS I AND II—WHETHER "MEMORANDUM" REQUESTING, UNTIMELY PETITION FOR REHEARING

Where the Court of Appeals on July 5, 1951, had reversed Part III of the Federal Trade Commission's order, Commission's filing of memo on August 21, 1951, re- [246] questing that it cross-petition for enforcement of all three parts be sustained as to Parts I and II did not constitute an untimely petition for rehearing as to Part III of its order, and, therefore, the 90 day period for filing a writ of certiorari would not begin to run again from the September 18, 1951 final decree issued by the Court of Appeals granting Commission's request.

APPELLATE PROCEDURE AND PROCEEDINGS—PETITIONS FOR CERTIORARI—WHETHER TIMELY—HOW PERIOD TOLLED

The period within which an appeal must be taken or a petition for certiorari filed begins to run anew only when the lower court changes matters of substance or resolves a genuine ambiguity in a judgment previously rendered and not when a judgment previously entered has been reentered or revised in an immaterial way.

APPELLATE PROCEDURE AND PROCEEDINGS—PETITIONS FOR CERTIORARI—WHETHER TIMELY—HOW PERIOD TOLLED—WHETHER LEGAL RIGHTS AND OBLIGATIONS, SETTLED BY PRIOR ORDER, THEREAFTER DISTURBED OR REVISED

In determining whether reentry or revision of a judgment previously entered should toll time within which review must be sought, question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

APPELLATE PROCEDURE AND PROCEEDINGS—PETITIONS FOR CERTIORARI—WHETHER TIMELY—HOW PERIOD TOLLED—WHETHER LEGAL RIGHTS AND OBLIGATIONS, SETTLED BY PRIOR ORDER, THEREAFTER DISTURBED OR REVISED—IF PARTS I AND II OF ORDER, AFFIRMED AND ENFORCED BY COURT AFTER REVERSING PART III, NOT CHALLENGED BY RESPONDENT

In proceeding to review a cease and desist order of the Federal Trade Commission, where respondent did not challenge Parts I and II of the Commission's order, issue whether the Court of Appeals had power to affirm and enforce such parts of the Commission's order was not raised.

APPELLATE PROCEDURE AND PROCEEDINGS—PETITIONS FOR CERTIORARI—WHETHER TIMELY—IF JUDGMENT REVERSING PART III OF COMMISSION'S ORDER, FOLLOWED, AT COMMISSION'S REQUEST, WITH SUBSEQUENT JUDGMENT REPEATING TERMS OF PRIOR, AND AFFIRMING AND ENFORCING, AS REQUESTED, PARTS I AND II—PRIOR AS REVIEWABLE "FINAL"

In proceeding to review a cease and desist order of the Federal Trade Commission, judgment reversing Part III of Commission's order constituted a reviewable "final judgment" even though it was followed, at Commission's request, with a subsequent judgment repeating terms of the prior judgment and granting Commission's request that remaining Parts I and II be affirmed and enforced in accordance with Commission's cross-petition.

APPELLATE PROCEDURE AND PROCEEDINGS—PETITIONS FOR CERTIORARI—LIMITATIONS IN TIME—IN GENERAL

Litigation must at some sefinite point be brought to an end.

APPELLATE PROCEDURE AND PROCEEDINGS—PETITIONS FOR CERTIORARI—LIMITATIONS IN TIME—TOLLING OF—STATUTORY LIMITATION—APPLICATION

The statutes limiting the appellate jurisdiction of the Supreme Court are not to be applied in way which will permit tolling of time limitations because of some event which occurs in the lower court after judgment is rendered but which is of no import to matters to be dealt with on review.

(The syllabus, with substituted captions, is taken from 73 S. Ct. 245)

On writ of certiorari to Seventh Circuit, writ dismissed as untimely.
[207] *Acting Solicitor General Stern*, for petitioner.
Mr. Albert R. Connelly, of New York City, for respondent.

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

The initial question in this case is one of jurisdiction— whether the petition for certiorari was filed within the period allowed by law.[1] We hold that it was not.

The cause grows out of a proceeding initialed by petitioner, the Federal Trade [247] Commission, in 1943. At that time, the Commission issued a three-count complaint against respondent. Count I charged a violation of § 5 of the Federal Trade Commission Act;[2] Count II charged a violation of § 3 of the Clayton Act;[3] Count III dealt with an alleged violation of § 2a of the Clayton Act as amended by the Robinson-Patman Act.[4] A protracted administrative proceeding followed. The Commission finally determined against respondent on all three counts, [208] and it issued a cease and desist order, in three parts, covering each of the three violations.

Respondent petitioned the Court of Appeals for the Seventh Circuit to review and set aside this order. The Commission sought enforcement of all parts of its order in a cross-petition.

Respondent abandoned completely its attack on Parts I and II of the order. In briefs and in oral argument, respondent made it clear that the legality of Part III was the only contested issue before the Court of Appeals. Neither party briefed or argued any question arising out of Parts I and II.

[1] 28 U. S. C. § 2101 (c).
[2] 38 Stat. 719, 15 U. S. C. § 45.
[3] 38 Stat. 731, 15 U. S. C. § 14.
[4] 38 Stat. 730, as amended, 49 Stat. 1526, 15 U. S. C. § 13 (a).

On July 5, 1951, the Court of Appeals announced its decision. The opinion stated that since respondent did not "challenge Parts I and II of the order based on the first two counts of the complaint we shall make no further reference to them." The court then went on to hold that Part III of petitioner's order could not be sustained by substantial evidence and should be reversed. On the same day, the court entered its judgment, the pertinent portion reading as follows:

[209] "* * * it is ordered and adjudged by this Court that Part III of the decision of the Federal Trade Commission entered in this cause on January 14, 1948, be, and the same is hereby, Reversed, and Count III of the complaint upon which it is based be, and the same is hereby dismissed."

The Court of Appeals requires petitions for rehearing to be filed "within 15 days after the entry of judgment." The Commission filed no such petition. On August 21, 1951, long after the expiration of this 15-day period, and after a certified copy of said judgment, in lieu of mandate, was issued, the Commission filed a memorandum with the court which reads in part as follows:

"On July 5, 1951, the Court entered its opinion and judgment reversing Part III of the decision of the Federal Trade Commission dated January 14, 1948 and dismissing Count III of the complaint upon which it is based. No disposition has been made of the cross-petition filed by the Commission for affirmance and enforcement of the entire decision. The Commission takes the position that its cross-petition should be in part sustained, i. e., to the extent that the Court should make and enter herein a decree affirming Parts I and II of the Commission's order to cease and desist and commanding Minneapolis-Honeywell Regulator Company to obey the same and comply therewith. * * *

* * * * * * *

"11. In its briefs filed herein the petitioner abandoned its attack upon Parts I and II of the order and challenged only the validity of Part III of the order (see page 1 of petitioner's brief dated March 15, 1951). Thus, petitioner concedes the validity of Parts I and II of the order and does not contest the prayer of the Commission's cross-petition and brief with respect to the affirmance and enforcement of Parts I and II of the order."

Clearly, by this memorandum the Commission sought no alteration of the judg-[248]ment relative to Part III; in fact, it acknowledged the entry of judgment reversing Part III on July 5, 1951. It did not even claim it to be a petition for rehearing. It was submitted that Parts I and II of the order were uncontested, and "In conclusion

* * * submitted that the Court should make and enter * * * a decree affirming Parts I and II of the Commission's order to cease and desist."

On September 18, 1951, the Court of Appeals issued what it called its "Final Decree." Again the court **[210]** "ordered, adjudged and decreed" that Part III of the Commission's order "is hereby reversed and Count III of the complaint upon which it is based be and the same is hereby dismissed." The court then went on to affirm Parts I and II, and it entered a judgment providing for their enforcement, after reciting again that there was no contest over this phase of the order.

On December 14, 1951, the Commission filed its petition for certiorari. Obviously, the petition was out of time unless the ninety-day filing period began to run anew from the second judgment entered on September 18, 1951. In our order granting certiorari, 342 U. S. 940, we asked counsel to discuss the "timeliness of the application for the writ."

Petitioner refers us to cases which have held that when a court considers on its merits an untimely petition for a rehearing, or an untimely motion to amend matters of substance in a judgment, the time for appeal may begin to run anew from the date on which the court disposed of the untimely application.[5]

Petitioner apparently would equate its memorandum of August 21, 1951, with an untimely petition for a rehearing affecting Part III. But certainly its language and every inference therein is to the contrary. When petitioner filed its memorandum, the time for seeking a rehearing had long since expired.

Moreover, the memorandum was labeled neither as a petition for a rehearing nor as a motion to amend the previous judgment, and in no manner did it purport to seek such relief. On the contrary, the Commission indicated that it was quite content to let the Court of Appeals' decision of July 5 stand undisturbed. Since we cannot **[211]** treat the memorandum of August 21 as petitioner would have us treat it, we cannot hold that the time for filing a petition for certiorari was enlarged simply because this paper may have prompted the court below to take some further action which had no effect on the merits of the decision that we are now asked to review in the petition for certiorari.

Petitioner tells us that the application must be deemed to be in time because "when a court actually changes its judgment, the time to appeal or petition begins to run anew irrespective of whether a

[5] *Pfister* v. *Finance Corp.*, 317 U. S. 144, 149 (1942); *Bowman* v. *Loperena*, 311 U. S. 262, 266 (1940); *Wayne United Gas Co.* v. *Owens-Illinois Co.*, 300 U. S. 131, 137–138 (1937).

petition for rehearing has been filed." [6] We think petitioner's interpretation of our decisions is too liberal.

While it may be true that the Court of Appeals had the power to supersede the judgment of July 5 with a new one,[7] it is also true, as that court itself has recognized, that the time within which a losing party must seek review cannot be enlarged just because the lower court in its discretion thinks it should be enlagred.[8] Thus, the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought.[9] Only [249] when the lower court changes matters of substance,[10] or resolves a genuine ambiguity,[11] in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run [212] anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.[12]

The judgment of September 18, which petitioner now seeks to have us review, does not meet this test. It reiterated, without change, everything which had been decided on July 5. Since the one controversy between the parties related only to the matters which had been adjudicated on July 5, we cannot ascribe any significance, as far as timeliness is concerned, to the later judgment.[13]

Petitioner puts great emphasis on the fact that the judgment of September 18 was labeled a "Final Judgment" by the Court of Appeals, whereas the word "Final" was missing from the judgment entered on July 5. But we think the question of whether the time

[6] Brief for petitioner, p. 43.

[7] 28 U. S. C. § 452; see *Zimmern* v. *United States*, 298 U. S. 167 (1936).

[8] See *Fine* v. *Paramount Pictures*, 181 F. (2d) 300, 304 (1950).

[9] *Department of Banking* v. *Pink*, 317 U. S. 264 (1942); *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399 (1923); *Credit Co., Ltd.* v. *Arkansas Central R. Co.*, 128 U. S. 258 (1888).

[10] See *Zimmern* v. *United States*, 298 U. S. 167, 169 (1935); compare *Department of Banking* v. *Pink*, *supra*.

[11] Compare *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17 (1952).

[12] Compare *Rubber Co.* v. *Goodyear*, 6 Wall. 153 (1868) (appeal allowed from a second decree, restating most provisions of the first because the first decree, at the time of entry, was only regarded by the parties and the court as tentative); *Memphis* v. *Brown*, 94 U. S. 715 (1877) (appeal allowed from second judgment on the ground that the second made material changes in the first). See *United States* v. *Hark*, 320 U. S. 531, 533–534 (1944); *Hill* v. *Hawes*, 320 U. S. 520, 523 (1944).

[13] The suggestion is made that the September 18 judgment injected a new controversy into the litigation—the question of whether the Court of Appeals had the power to affirm and enforce the Commission's order after it had cross-petitioned for such relief. Cf. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470 (1952). But if the respondent had sought to contest that issue, it could have done so from the start, by raising objections to enforcement of all parts of the Commission's cross-petition. Instead, respondent refused to contest these parts of the Commission's order. Having done so, it removed the question involved in the *Ruberoid* case from this case.

for petitioning for certiorary was to be enlarged cannot turn on the adjective which the court below chose to use in the caption of its second judgment. Indeed, the judgment of July 5 [213] was for all purposes final. It put to rest the questions which the parties had litigated in the Court of Appeals. It was neither "tentative, informal nor incomplete." [14] Consequently, we cannot accept the Commission's view that a decision against it on the time question will constitute an invitation to other litigants to seek piecemeal review in his Court in the future.

Thus, while we do not mean to encourage applications for piecemeal review by today's decision, we do mean to encourage applicants to this Court to take heed of another principle—the principle that litigation must at some definite point be brought to an end.[15] It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period. Those statutes are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which [250] is of no import to the matters to be dealt with on review.

Accordingly, the writ of certiorari is dismissed.

Mr. Justice Black, dissenting.

The end result of what the Court does today is to leave standing a Court of Appeals decree which I think is so clearly wrong that it could well be reversed without argument. The decree set aside an order of the Federal Trade Commission directing Minneapolis-Honeywell to stop violating § 2 (a) of the Robinson-Patman Act by selling oil burner controls to some customers cheaper than to others. The Court of Appeals not only set aside the Commission's order as permitted under some circumstances. It went much further and ordered the Commis[214]sion to dismiss Count II of the complaint against Minneapolis-Honeywell. In doing so the Court of Appeals invaded an area which Congress has made the exclusive concern of the Federal Trade Commission. See *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 55 [44 F. T. C. 1499; 4 S. & D. 716]; *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 20; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145–146.

Moreover, the Court of Appeals held that there was no evidence at all to substantiate the Commission finding that a quantity discount pricing system of Minneapolis-Honeywell resulted in price discrim-

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[14] See *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507, 514 (1950).
[15] See *Matton Steamboat Co.* v. *Murphy*, 319 U. S. 412, 415 (1943).

ination that violated § 2 (a) of the Robinson-Patman Act. But there was evidence before the Commission that some customers of Minneapolis-Honeywell were given substantially bigger discounts on purchases than those given their competitors. And the Commission found that these variations were not justified by any differences in costs of manufacture, sale or delivery. We have emphasized that such a showing amply supports a Commission cease and desist order. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 47. The Court of Appeals here failed to follow our holding in the *Morton Salt* case. For this reason also it should be reversed.

I think the following facts show that the petition for certiorari here was filed in time. The Court of Appeals was petitioned by Minneapolis-Honeywell to review and set aside a Trade Commission order in its entirety. Later Minneapolis-Honeywell apparently conceded validity of part of the order and the court's first decree of July 5, 1951, failed to pass on all the provisions of the Commission's order.[1] The Commission had ninety days to ask **[215]** that we review that partial order if it was a "final" one. Within that ninety days, on August 21, 1951, the Commission asked the Court of Appeals to pass on the remainder of the order. In response a new and expanded decree of the Court of Appeals came down September 18, 1951, marked "Final Decree." December 14, 1951, within ninety days after rendition of this "Final Decree," the Commission filed here its petition for certiorari which the Court now dismisses.

[251] I think that no statute, precedent or reason relied on by the Court requires dismissal of this cause. Of course appealability of a judgment depends on its being "final" in the legalistic sense. But there is no more ambiguous word in all the legal lexicon.[2] The Court of Appeals thought its second not its first decree was "final." Counsel for the Commission evidently believed the second judgment was the "final" one. I am confident many lawyers would have thought

[1] See *e. g.*, "Though the merits of the cause may have been substantially decided, while any thing, though merely formal, remains to be done, this court cannot pass upon the subject. If from any intermediate stage in the proceedings an appeal might be taken to the supreme court, the appeal might be repeated to the great oppression of the parties." Chief Justice Marshall speaking for the Court in *Life & Fire Ins. Co. of New York* v. *Adams*, 9 Pet. 573, 602 (1835). "We think that the decree is not a final decree, and that this court has no jurisdiction of the appeal. The decree is not final, because it does not dispose of the entire controversy between the parties." *Keystone Iron Co.* v. *Martin*, 132 U. S. 91, 93. "It is the settled practice of this court, and the same in the King's Bench in England, that the writ will not lie until the whole of the matters in controversy in the suit below are disposed of. * * * The cause is not to be sent up in fragments." *Holcombe* v. *McKusick*, 20 How. 552, 554 (1857).

[2] "Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees. * * * The cases, it must be conceded, are not altogether harmonious." *McGourkey* v. *Toledo & Ohio R. Co.*, 146 U. S. 536, 544–545. Cf. *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507, 511.

the same under this Court's former cases. So I would have viewed the second judgment before today's holding. Former cases would have [216] pointed strongly to rejection of appeal from the incomplete first decree as an attempted "piecemeal" review.[3]

The majority advances logical and rational grounds for its conclusion that the first judgment rather than the second one was "final." That the second judgment was "final," legalistically speaking, is equally supportable by logic, reason and precedent, if not more so.[4] But in arguing over "finality" we should not ignore the fact that Congress has declared that this type proceeding should be reviewable both in the Court of Appeals and here. We frustrate that declaration when review is denied a [217] litigant because of his failure to guess right when confronted in August 1951 with a puzzle, the answer to which no one could know until today.

In prior cases cited in the Court opinion this Court has found ways to grant review to litigants bedeviled and confused by the judicially created fog or "finality."[5] In those prior cases the Court recognized the vagueness of the finality rule and refused to throw out of court litigants who had acted bona fide. It is unfortunate that the Court today fails to utilize this same kind of judicial ingenuity to afford this litigant the review Congress saw fit to provide in the public interest.

The proceedings against Minneapolis-Honeywell began before the Commission nine years ago. Sixteen hundred pages of [252] evidence were put on the record. It all goes to nought apparently because Commission counsel lacked sufficient clairvoyance to anticipate that this Court would hold that the July judgment rather than the one

[3] A multitude of cases would have supported such a belief on the part of Commission counsel. See, *e. g.*, Note 1 and the following: "But piecemeal appeals have never been encouraged." *Morgantown* v. *Royal Ins. Co.*, 337 U. S. 254, 258. "Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration." *Cobbledick* v. *United States*, 309 U. S. 323, 325. "The foundation of this policy is not in merely technical conceptions of 'finality' It is one against piecemeal litigation. "The case is not to be set up in fragments. * * *' *Luxton* v. *North River Bridge Co.*, 147 U. S. 337, 341." *Catlin* v. *United States*, 324 U. S. 229, 233–234.

[4] "Upon these facts we cannot doubt that the entry of the 28th of November was intended as an order settling the terms of the decree to be entered thereafter; and that the entry made on the 5th of December was regarded both by the court and the counsel as the final decree in the cause.

"We do not question that the first entry had all the essential elements of a final decree, and if it had been followed by no other action of the court, might very properly have been treated as such. But we must be governed by the obvious intent of the Circuit Court, apparent on the face of the proceedings. We must hold, therefore, the decree of the 5th of December to be the final decree." *Rubber Company* v. *Goodyear*, 6 Wall. 153, 155–156 (1867). See also *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 20–21; *Hill* v. *Hawes*, 320 U. S. 520; *United States* v. *Hark*, 320 U. S. 531; *Zimmern* v. *United States*, 298 U. S. 167; *Memphis* v. *Brown*, 94 U. S. 715.

[5] See cases cited in note 4.

in September was final. Rules of practice and procedure should be used to promote the ends of justice, not to defeat them.[6]

MR. JUSTICE DOUGLAS, dissenting.

While I do not believe the merits of the case are as clear as MR. JUSTICE BLACK indicates, I join in the parts of his opinion which deal with the question whether the petition for certiorari was timely under 28 U. S. C. § 2101 (c).

DAVID BERNSTEIN TRADING AS AFFILIATED CREDIT EXCHANGE AND BUSINESS RESEARCH v. FEDERAL TRADE COMMISSION*

No. 13104—F. T. C. Docket 5804

(Court of Appeals, Ninth Circuit. Dec. 29, 1952)

INTERSTATE COMMERCE—WHAT DOES AND DOES NOT CONSTITUTE—COLLECTION SCHEMES—IF ORGANIZED USE OF MAILS, ETC.

Collection agency operator who received debt assignments through interstate channels from creditors residing in states other than that in which his principal place of business was located and who received money from debtors in various states was engaging in a species of "commerce" within meaning of that term as used in the Constitution and Federal Trade Commission Act, and likewise the condemned practice, by which he secured information from debtors in various states by falsely representing his business status, was also "in commerce."

(The syllabus, with substituted captions, is taken from 200 F. (2d) 404)

In proceeding to review order of Commission, order affirmed.

Mr. Carl J. Mooslin, of Los Angeles, Cal., for petitioner.

Mr. W. T. Kelley, General Counsel, *Mr. James W. Cassedy* and *Mr. John W. Carter, Jr.*, Atty., Federal Trade Commission, of Washington D. C., for respondent.

Before: MATHEWS, HEALY, and BONE, *Circuit Judges.*

HEALY, *Circuit Judge:*

This is a proceeding to review and set aside a cease and desist order of the Federal Trade Commission based on findings of petitioner's

[6] *Hormel* v. *Helvering*, 312 U. S. 552, 557. See also *Maty* v. *Grasselli Chemical Co.*, 303 U. S. 197, 200–201. Cf. *Hazel-Atlas Co.* v. *Hartford-Empire Co.*, 322 U. S. 238.

*Reported in 200 F. (2d) 404. For case before the Commission see 48 F. T. C. 10.

having engaged in deceptive acts and practices in interstate commerce in violation of the Federal Trade Commission Act. Substantially, the charge was that in operating a collection agency the petitioner falsely represented his business status for the purpose of obtaining information of a personal nature from delinquent debtors which, but for the false representation, the debtors would not have supplied. Petitioner does not challenge the findings, but attacks only the conclusion of the Commission that his business is in commerce.[1] It is accordingly necessary to describe his business and the method of carrying it on, as indicated in the findings.

Petitioner operates a collection agency under the name of Affiliated Credit Exchange and he uses also for certain purposes the name Business Research. His principal office is at Los Angeles. One way in which he secures business is through solicitors who travel in various states—mostly far western states—and solicit accounts for collection. These solicitors are independent contractors who receive a stated sum for each account which through their efforts is assigned to petitioner for collection. The creditors reside in California and in other states. Petitioner furnishes the solicitors with assignment contract forms and forms for listing each account assigned. The accounts are against debtors residing in California or in states other than California, and each is listed on a blank form showing the name of the debtor, address, amount and nature of the debt, etc. This listing sheet is then attached to the contract of assignment, and the creditor thereupon executes the contract assigning the accounts so listed to the petitioner for collection on a commission basis. The contract having been delivered to the solicitor, the latter mails it to petitioner at Los Angeles.

Thus petitioner receives through interstate channels business from clients residing in states other than California. The **[405]** debtors concerned, in turn, may reside almost anywhere. Petitioner secures his business through the mails and carries it forward in the same manner. He receives money from debtors located in states other than California and transmits it, less his commission, to creditors who are also elsewhere than in California. Often he receives money from creditors representing his commission on debts paid direct to the creditor. These creditors, many of them, are located in states other than California.

In these ways the petitioner regularly uses the channels of interstate communication. His activities, while not trade in the ordinary

[1] As stated in his brief, petitioner's position is that "the pse of such double postcards, although misleading in nature, are not used in commerce and unless facts can be shown whereby petitioner's entire business could be adjudicated as being in interstate commerce, the Federal Trade Commission lacks jurisdiction to issue any binding order upon petitioner."

sense, are a species of commerce and constitute commerce within the meaning of that term as used in the Constitution and in the Federal Trade Commission Act. Cf. *International Text Book Company* v. *Pigg*, 217 U. S. 91; *Furst* v. *Brewster*, 282 U. S. 493; *N. L. R. B.* v. *Bank of America*, 9 Cir., 130 F. (2d) 624, 626; *Rothschild* v. *Federal Trade Commission*, 7 Cir., 200 F. (2d) 39, decided November 20, 1952. [49 F. T. C. 1673].

The practices banned by the Commission are likewise in commerce. These are carried on for the purpose and in the manner now to be described. If a debtor has not responded or if there is indication that he has moved, petitioner attempts to locate him by use of what is commonly known as a double postcard. One card is addressed to the debtor and the return card is addressed to petitioner under the name of Business Research, Washington, D. C. These cards petitioner mails in bulk to his agent in Washington, D. C., and the latter mails the card to the individual debtors so that the communication will bear the Washington postmark. Naturally the cards go to addressees in various parts of the country.

The message addressed to the debtor states that "to enable us to complete our records it is necessary that you furnish the information requested on the attached card. Do this at once and mail to us." The reply part is designed to be detached, filled out, signed and mailed by the debtor. The matter on which information is to be given is stated in the latter card under various headings, including the name of the "subject" (in other words, the debtor), his address, his employer and the latter's address, debtor's monthly salary, whether he owns his home or car, whether married, and if so does the spouse work, number of dependents, etc. In other ways the return card simulates forms commonly used for statistical purposes. The Washington address serves as a sort of clincher for the general implication that the inquiring party is engaged purely in business research or possibly even in the compilation of official statistics. Under this pretext the petitioner gets information which helps him materially in his business of collecting bad debts.

The whole matter being clearly within the jurisdiction and competence of the Commission, its order is affirmed.

DEJAY STORES, INC. v. FEDERAL TRADE COMMISSION[1]

No. 77, Docket 22391—F. T. C. Docket 5793

(Court of Appeals, Second Circuit. Dec. 30, 1952)

CEASE AND DESIST ORDERS—METHODS, ACTS, AND PRACTICES—MISREPRESENTATION—DECEPTIVE INDUCEMENTS TO PURCHASE OR DEAL—COLLECTION SCHEMES

Creditor's use of letters in simulated handwriting, addressed to references furnished by delinquent debtor at time of his purchase, signed by someone other than creditor, representing that signer had an important letter for delivery to the delinquent debtor and requesting debtor's correct address, for the purpose of obtaining current address of delinquent debtor, constituted an unfair and deceptive practice, and was properly the subject of a cease and desist order of Federal Trade Commission.

CEASE AND DESIST ORDERS—SCOPE—WHETHER UNDULY BROAD—IF PRIOR PRACTICE ABANDONED FOR ONE LESS FLAGRANTLY DECEPTIVE—COLLECTION SCHEMES

Where creditor voluntarily abandoned former unfair and deceptive methods of tracing its debtors, but continued its campaign by using a method which, though less flagrantly deceptive than earlier practices, had same purpose and effect, the Federal Trade Commission could include in its cease and desist order the former as well as the latter practices, in order to prevent renewal of such earlier methods.

APPELLATE PROCEDURE AND PROCEEDINGS—CEASE AND DESIST ORDERS—COMMISSION DISCRETION—APPELLATE LIMITATIONS

A court should interfere with Federal Trade Commission's discretion in making an order to prevent resumption of an unfair and deceptive practice which has been discontinued only when it appears that the practice has been surely stopped.

METHODS, ACTS AND PRACTICES—MISREPRESENTATION—PUBLIC INTEREST—WHETHER INDIVIDUAL PECUNIARY LOSS, PREREQUISITE

In establishing the requisite public interest to justify Federal Trade Commission's action against unfair and deceptive practices, it is not necessary to show that person deceived has suffered any pecuniary loss.

METHODS, ACTS AND PRACTICES—MISREPRESENTATION—PUBLIC INTEREST—COLLECTION SCHEMES

Federal Trade Commission's conclusion that it is in the public interest to require that creditors should not use dishonest methods in collecting their debts is within commission's discretion.

(The syllabus, with substituted captions, is taken from 200 F. (2d) 865)

On petition to review and set aside order of Federal Trade Commission, petition denied and compliance ordered.

[1] Reported in 200 F. (2d) 865. For case before the Commission, see 48 F. T. C. 1177.

Gallop, Climenko & Gould, of New York City, for petitioner; *Mr. Milton S. Gould* and *Mr. Martin I. Shelton*, of New York City, of Counsel.

Mr. W. T. Kelley, Gen. Counsel, *Mr. Robert B. Dawkins*, Asst. Gen. Counsel, and *Mr. Donovan Divet*, Sp. Atty., of Washington, D. C., for Federal Trade Commission, respondent.

Before AUGUSTUS N. HAND, CHASE and FRANK, *Circuit Judges.*

PER CURIAM:

Affirming the decision of a Hearing Examiner, the Federal Trade Commission on April 10, 1952, ordered the petitioner to cease and desist from using various devices to obtain addresses of delinquent debtors because such devices had been found to be deceptive and misleading in violation of the Federal Trade Commission Act, 15 U. S. C. A. § 45 (a). The Hearing Examiner found that prior to 1943 the petitioner had sent delinquent debtors at their last known address a double post card reading: "Due to the shortage of transportation and manpower, we are unable to interview you personally. So please fill out detachable card and mail in. Respectfully yours, Personnel Management Bureau." The return card contained blanks which if filled in would provide petitioner with the debtor's address, and present employment status. It was also found that prior to 1946 a double post card addressed to debtors had been sent—reading as follows: "Dejay Service Co., 114 East 23rd St., New York, N. Y. NOTICE OF GOODS FOR DELIVERY. We are holding a package addressed to ---------------- which we have been unable to deliver because of incorrect address. Same will be forwarded upon receipt of the attached card properly filled in with the correct address of the above party. DEJAY SERVICE CO." The petitioner was found to be presently using a form letter in simulated handwriting, addressed to references furnished by the delinquent debtor at the time of his purchase: "I understand that you are a friend of ----------------. I have an important letter for ---------------- so please let me have the correct address. Thanks. J. King." The return envelope bore the address of "J. King, 10th Floor, 114 East 23rd St., New York 10, N. Y." The petitioner's practice was to write to debtors whose payments had been delinquent for two months or more requesting prompt payment. If this dun was returned by the post office because the addressee could not be located, the form signed "J. King" was sent to the debtor's references. "J. King" is John King, the petitioner's comptroller who supervises the collection of unpaid balances. It was found that the purpose of the form was to obtain the debtor's present address; the dunning letter, returned by the post office, was the only letter which the petitioner had for the debtor. The Hearing Examiner found that although the representation in this form letter was not literally false, "it and the circumstances surrounding its use are deceptive and misleading to the recipient," since a recipient of ordinary intelligence would not realize the real purpose of the letter.

The petitioner was ordered to cease using the names "Personnel Management Bureau" and "Dejay Service Co.," and from using any other material representing that its business is other than that of retailing merchandise. Also proscribed were representations that persons about whom information was sought were consignees of goods or packages in the hands of the petitioner, or that the information sought was to enable the petitioner to deliver the packages. The Commission further forbade the use of letters for the purpose of obtaining the current address of delinquent customers which represented that any person other than the petitioner has a letter for delivery to the delinquent debtor. The Federal Trade Commission affirmed the order of the Hearing Examiner.

The petitioner's first contention is that the "J. King letter" does not constitute an unfair or deceptive practice within the meaning of the Federal Trade Commission Act. It is clear that, while the letter is literally true, the information is sought on behalf of the store to assist it in collecting its debt, and not on behalf of an individual named J. King to enable him to forward an important personal letter to the delinquent. *Cf. Silverman* v. *Federal Trade Commission*, 9th Cir., 145 F. (2d) 751 [39 F. T. C. 704; 4 S. & D. 283]; *Rothschild* v. *Federal Trade Commission,* 7th Cir., 200 F. (2d) 39 [49 F. T. C. 1673]; *Bennett* v. *Federal Trade Commission*, D. C. Cir., 200 F. (2d) 362 [49 F. T. C. 1679]. The fact that there is no actual evidence that anyone is likely to be deceived does not impair the finding that the letter was misleading. The petitioner intended it to be deceptive, and as used it obviously was so.

The petitioner asserts that the cease and desist order should not have included the two forms which it had voluntarily abandoned in 1943 and 1946, because the finding that the cessation was not permanent, complete or in good faith was not supported by the evidence. Since it is clear that the petitioner continued its campaign to trace its debtors by using the "J. King" letter which, though less flagrantly deceptive than the earlier practices, had the same purpose and effect, the Commission was justified in such a finding and in acting to prevent a renewal of the earlier methods. A court should interfere with the Commission's discretion in making an order to prevent the resumption of a discontinued practice only when it appears that the practice has been "surely stopped." See *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 7th Cir., 142 F. (2d) 321, 330–1, cert. denied 323 U. S. 730 [38 F. T. C. 840; 4 S. & D. 117].

Finally, the petitioner asserts that the requisite public interest for the Commission to act was not shown to exist. But it is not necessary to establish that the person deceived has suffered any pecuniary loss. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 78 [18 F. T. C. 669; 2 S. & D. 247]. The Federal Trade Commission's conclusion that it is in the public interest to require that creditors should not use dishonest methods in collecting their debts is within its discretion. See *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 27–8 [13 F. T. C. 581; 1 S. & D. 1166]. Orders preventing similar practices have been upheld in three circuits. *Silverman* v. *Federal Trade Commission* (9th Cir.), *supra; Rothschild* v. *Federal Trade Commission* (7th Cir.), *supra; Bennett* v. *Federal Trade Commission* (D. C. Cir.), *supra.*

The petition to set aside the order of the Commission is denied, and pursuant to 15 U. S. C. A. § 45 (c) it is ordered that petitioner comply with the order of the Federal Trade Commission.

CARTER PRODUCTS, INC. v. FEDERAL TRADE COMMISSION [1]

No. 12940—F. T. C. Docket 4970

(Court of Appeals, Ninth Circuit. Jan. 19, 1953) [2]

EVIDENCE—COMPETENCE OF—MEDICAL TREATISES

[447] Generally, medical treatises are not in themselves competent evidence, since they constitute statements made out of court by persons not available for cross-examination.

EVIDENCE—COMPETENCE OF—MEDICAL TREATISES—AS BASIS OF OR INCIDENT TO CROSS-EXAMINATION—IF TESTIMONY OF MEDICAL EXPERT WITNESS, ON DIRECT, NOT BASED ON PROFFERED TREATISE

Refusal of Federal Trade Commission trial examiner, to allow to be read into record on cross-examination, a medical treatise on which medical expert witness had not predicated any of his testimony, although technical, was not erroneous.

EVIDENCE—EXPERT WITNESSES—CROSS-EXAMINATION OF TESTIFYING—UNDUE LIMITATION OF

In proceedings before trial examiner for Federal Trade Commission, where medical expert for Commission testified that his system of analysis proved erroneous experiments purporting to establish that pills performed function

[1] Reported in 201 F. (2d) 446. For case before Commission, see 47 F. T. C. 1137.
[2] Rehearing denied March 13, 1953.

producer claimed in advertising, trial examiner unduly limited cross-examination by precluding inquiry into instances in which witness had used the system in testing result of experiments reported in 166 articles published by him.

EVIDENCE—EXPERT WITNESSES—CROSS-EXAMINATION OF TESTIFYING—UNDUE LIMITATION OF—TESTS ON DOGS AND TRANSFERABILITY OF RESULTS TO PHYSICAL FUNCTIONS OF MEN

In proceeding before trial examiner for Federal Trade Commission, where medical expert for Commission testified broadly on transferability of results of tests on dogs to conclusions about physical functions of men, and specifically as to experiment tending to disprove claims advertised for pills, trial examiner erred in refusing pill producer opportunity to cross-examine as to other specific instances of transferability.

EVIDENCE—EXPERT WITNESSES—CROSS-EXAMINATION OF TESTIFYING—UNDUE LIMITATION OF—IF PROPOSED CROSS-EXAMINATION DIRECTED TO MATTERS PRESUMPTIVELY NECESSARILY WITHIN KNOWLEDGE OF WITNESS

In proceeding before trial examiner for Federal Trade Commission, where medical expert who had testified for Commission with regard to specific experiments was necessarily presupposed to have an extensive knowledge of human biliary system, the sustaining of objections to cross-examination about general workings of biliary system as distinguished from questions relating to the experiments, unless cross-examining counsel sponsored witness as his own, was error.

EVIDENCE—EXPERT WITNESSES—CROSS-EXAMINATION OF TESTIFYING—BROAD LATITUDE ESSENTIAL AND PROPER, AS NECESSARILY EXPLORATORY

Especially in the case of expert witnesses, cross-examination is of necessity exploratory and should be given broad latitude, since neither counsel nor judge can know in advance what chinks may be disclosed in the armor of the experts or what frailties revealed in his premises.

EVIDENCE—EXPERT WITNESSES—CROSS-EXAMINATION OF TESTIFYING—IF TESTIMONY BASED ON EXPERIMENTS ON PEOPLE AND CERTAIN EXPERT KNOWLEDGE OF WITNESS, AND CROSS-EXAMINATION LIMITED TO X-RAY PICTURES INCIDENT TO EXPERIMENTS

In proceeding before trial examiner for Federal Trade Commission, where medical expert for Commission, on direct examination, was allowed to testify generally as to experiments made on people taking certain pills and to draw extensively upon his knowledge of physiology and gastroenterology, trial examiner committed error in requiring that counsel for pill producer cross-examine witness only with regard to X-ray pictures taken in connection with experiments.

APPELLATE PROCEDURE AND PROCEEDINGS—FAIR HEARING—IF CROSS-EXAMINATION OF KEY WITNESSES UNDULY AND PREJUDICIALLY RESTRICTED—THAT AMPLE EVIDENCE POSSIBLY OTHERWISE AVAILABLE TO SUSTAIN FINDINGS AND ORDER

In proceeding by Federal Trade Commission where cumulative effect of unjustifiable restrictions placed by trial examiner on cross-examination of key witnesses for Commission was to deprive defendant drug manufacturer of fair hearing, court would not speculate as to what would have been outcome had fair and impartial hearing been accorded, even if there was ample evidence from other quarters to sustain findings and order of Commission.

(The syllabus, with substituted captions, is taken from 201 F. (2d) 446)

On petition to review order of Commission, order set aside.

Breed, Abbott & Morgan, of New York City, *Brobeck, Phleger & Harrison*, of San Francisco, Calif. (*Mr. William L. Hanaway* and *Mr. Stoddard B. Colby*, of New York City, *Mr. Herman Phleger* and *Mr. Alvin J. Rockwell*, of San Francisco, Calif., of counsel), for petitioner.

[448] *Mr. W. T. Kelley*, General Counsel, Federal Trade Commission, *Mr. Robert B. Dawkins*, Asst. Gen. Counsel, *Mr. Fletcher G. Cohn*, Sp. Atty., and *Mr. Jno. W. Carter, Jr.*, Attorney, Federal Trade Commission, of Washington, D. C., for respondent.

Before: HEALY, BONE, and ORR, *Circuit Judges.*

HEALY, *Circuit Judge:*

This case is before the court on petition to review and set aside an order of the Federal Trade Commission pertaining to a product labeled "Carter's Little Liver Pills, A laxative aiding bile flow."

In summary, the Commission found that the product does not stimulate the liver, aid the flow of bile, or have a therapeutic value in the treatment of any condition or disorder of the liver. The order does not prohibit the continued sale and distribution of the pills as a laxative, but does require the producer to cease and desist from all advertising claims relative to their therapeutic action on the liver or the flow of the bile, and it directs the excision of the word "Liver" from the trade name.

Questions pertaining to the sufficiency of the evidence or to the merits are not presented by the petition. What is claimed, principally, is that a fair hearing was denied petitioner in that the trial examiner unduly and prejudicially restricted its right of cross-examining certain of the Commission's expert witnesses upon whose testimony, in large measure, the findings and order were based.[1] The witnesses in question were Doctors Carlson, Bollman, Lockwood, and Case. We are of opinion that petitioner's claim is well grounded in respect of the three experts last named, but not in respect of the witness Carlson.

[1] Petitioner also urges that fatal error was committed in admitting evidence pertaining to certain experiments on dogs and human patients. In our opinion the objection to these experiments, several of which will be mentioned hereafter, goes to their weight only, not to their admissibility.

1. Dr. Carlson, a specialist in physiology, testified that Carter's pills, the ingredients of which are aloes and podophyllum, have no known therapeutic action over and beyond their laxative properties, and none upon the liver. He professed himself as being "pretty familiar" with the literature on the subject of the liver and the gastro-intestinal tract, and said that it is the consensus of informed medical opinion that aloes and podophyllum are capable of no action on the functioning of the liver. On cross-examination he was asked whether he knew a Dr. Alvarez of the Mayo Foundation and whether he was familiar with the latter's book entitled "Nervousness, Indigestion and Pain," and he replied that he knew Alvarez and had read his book. He said Alvarez "is pretty well informed, but that does not mean that I regard him as sound on all points. I have differed with him on many things, particularly on motility of the gastro-intestinal tract." He added that in formulating his views he had not relied on the works of Dr. Alvarez. Counsel for the petitioner then proposed to read to the witness an excerpt from the book and to question him concerning the same. The trial examiner sustained an objection and ruled that in order to permit the reading of excerpts from a treatise into the record on cross-examination it must first be shown that the witness had predicated his testimony in whole or in part upon the particular book or the particular author.

Later on, counsel questioned the witness concerning a medical dictionary that apparently had the blessing of the American Medical Association, or at any rate of Dr. Fishbein, and offered to read from it. As regards this book Carlson said it was authoritative as a dictionary but not as a scientific work. The examiner sustained an objection to the reading on the same ground as before.

These are the only specific offers of this nature we have been able to find in the record in connection with the cross-examination of Carlson. A study of his testimony on direct shows that the opinions he expressed were based on his own knowledge and experience and on treatises of medical men, particularly those in the field of internal medicine, whom he regarded as informed on the subject. We are not prepared to hold that the rulings of **[449]** the examiner in these instances amounted to an abuse of discretion. The general view is that medical treatises are not in themselves competent evidence, since they constitute statements made out of court by persons not available for cross-examination. A conflict of authority exists as to the use that may be made of them in the cross-examination of experts, many courts holding that they may not be used unless the witness on direct has based his opinions wholly or in part on a particular author, in which case the authority may of course be used for the purpose of contradicting or discrediting the witness.[2] Here, unlike the situation in *Reilly* v. *Pinkus*, 338 U. S. 269, no issue of fraudulent intent was involved.

Turning, however, to the cross-examination of the other experts mentioned, we think the rulings of the examiner tended to be insufferably technical where not wholly erroneous.

2. Dr. Bollman, called by the Commission, was a physiologist and biochemist of note. Among numerous other activities he served as an assistant director of the Mayo experimental research laboratory, organizing and carrying on a program which he said might be covered by the broad term "Experimental Pathology," embracing physiology, biochemistry and pathology. Most of his time had been spent in problems associated with the liver, and he had done considerable work on the gastro-intestinal tract. A bibliography listing 166 of his published articles was introduced in evidence by the Commission.

A witness for the petitioner, Dr. Morrison, had testified to experiments and tests designed to show that the relief of constipation by Carter's Little Liver Pills stimulated the flow of bile. Dr. Bollman undertook to discredit the findings of Morrison by means of an elaborate statistical document or chart which he had prepared and which he said was a method of his own for analyzing and criticizing Dr. Morrison's experiments and data, this document, marked Exhibit 202, being received in evidence over petitioner's objection. On cross-examination relative to this method Bollman said he had used the identical method in analyzing data in some of the scientific papers he had written. His attention was called to one of his articles and he was asked whether he had treated the data in that instance as he did Dr. Morrison's data, and he replied that he had not. For the announced purpose of testing the validity of the method he employed in his criticism of Morrison's data he was asked the following question: "Doctor, there are 166 of your publications listed in Commission's Exhibits 194–A to O and I will hand you that and ask you to point out if you can wherein you used the method represented by Commission's Exhibit 202 for analyzing Morrison's data in any one of your 166 articles?"

The question was objected to by counsel for the Commission, and in support of his interrogation petitioner's counsel stated: "I think since Dr. Bollman has reported on 166 different subject matters in his

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[2] For some of the cases pro or con see: *Reck* v. *Pacific-Atlantic S. S. Co.*, 2d Cir., 180 F. (2d) 866; *Mutual Benefit Health & Accident Ass'n* v. *Francis*, 8th Cir., 148 F. (2d) 590; *Laird* v. *Boston & M. R. Co.*, 80 N. H. 377, 117 Atl. 591. Contra: *Western Union Telegraph Co.* v. *Ammann*, 3d Cir., 296 Fed. 453; *Drucker* v. *Philadelphia D. P. Co.*, 35 Del. 437, 166 Atl. 796; *Commonwealth* v. *Phelps*, 210 Mass. 109, 96 N. E. 69.

Consult also Wigmore on Evidence, 3 Ed., Vol. VI, § 1700.

publications, many of which contain tables and sets of figures which are set forth to portray findings of facts that he made in his experiments, and since he had been called upon by the Commission to analyze the data of one of my former witnesses and has done it in a certain way which he states is the proper way to do it, and since the one and only paper of Dr. Bollman that I have in my possession now has been presented to him and he has testified that he did not use that method, that he used for analyzing Morrison's data in the article, although it contained sets of figures, I want to know where he has used it in any other, and whether he used it solely for analyzing his figures, and data in any of the other 165 articles that he has written."

[450] The trial examiner ruled as follows: "I am going to sustain the objection and put the burden upon you [petitioner's counsel] of proving that the doctor's method is inherently wrong, and I am going to further assume for the purpose of the ruling that this is a novel method that he has developed which to him in his scientific way makes him believe that it is sufficient, and so let the exhibit stand just as it is."

Insisting upon his right to inquire, petitioner's counsel indicated his willingness to take Bollman's "best recollection" of the number of times he had used his method in the past without requiring him to go through the whole list of articles. The examiner, however, declined to change his ruling. It seems to us that counsel was entitled to put the matter into proper perspective by inquiring whether and to what extent the witness' method conformed to standards employed by himself in other similar tests which he had performed. The ruling foreclosed inquiry along this line, and would appear even to have cut off effective cross-examination as to whether the method conformed to accepted technical and scientific standards.

Another instance of undue restriction of the cross-examination of Dr. Bollman will be noticed. This witness had performed a series of tests on dogs, the object of which was to prove that constipation has no effect upon the secretion or flow of bile. The dogs were anesthetized with ether. Their colons were surgically severed and the lower end of the intestine sewed up so as to bring about a complete intestinal obstruction or "obstipation," a condition which the doctor said does not exist in man. With no means of elimination, the dogs were regularly fed on a diet including glucose until in a matter of days they died or were destroyed. All had peritonitis at the time of death. The results of the experiments were ascertained by autopsies after varying degrees of post-mortem degeneration had taken place. The witness said that these examinations showed no impairment of the liver function. He testified broadly on direct that the results of his experiments are translatable to the human being, and deduced therefrom and on the basis of his own knowledge that constipation in man in no way impairs the functioning of the liver, and that "there is no relationship between constipation and the secretion of bile by the liver."

On cross-examination counsel sought among other things to inquire whether, functionally, man and dog react to the same stimuli in the same manner. A question to this effect was objected to and the examiner ruled: "The objection is sustained, unless counsel will state the particular stimuli referred to, whether it be food, drugs, or medicine." Counsel then undertook to question Bollman with respect to the stimuli of named drugs. The examiner sustained an objection to this line of questioning, saying that he thought the doctor had not "qualified * * * as a pharmacologist, hence I will not permit him to be questioned as to the possible effect of drugs upon the human body and upon that of dogs." Counsel called attention to the witness' testimony that the experiments he had performed on dogs are translatable to man and said, "I should think that it would be perfectly proper for me to develop in what types of situations reactions on dogs cannot be translated to man."

The examiner thereupon switched the ground of his adverse ruling from the absence of qualification in the witness to the nature of the experiments, stating that the experiments had not been performed with the use of drugs or medication, but had been essentially surgical in nature. He added "just let the ruling stand."

As already appears, the witness had been broadly qualified as an expert. His experiments on the dogs had been performed with the use of the drugs bromsulfaelin and ether, and possibly others. Many of the studies he had made and which were included in the 166 publications introduced by the Commission apparently dealt with the effect of various drugs on dogs and other animals, including humans. And he had testified on direct as to the effects of drugs on both man and animals, and had given it as his opinion that experiments with drugs on animals are transferable to man.

[451] We think that question as to the transferability generally of tests on dogs in connection with the working of the liver, and more specifically as to the extent to which these artificial and seemingly bizarre experiments might be regarded as simulating normal constipation in man, were proper subjects for scrutiny and justified a reasonably broad range of exploration on cross-examination. The examiner's rulings would thus seem to have foreclosed inquiry into matters bearing materially on the validity of the experiments.

3. Dr. Lockwood, testifying for the Commission, was a specialist in surgical research at the University of Pennsylvania Medical School and had written many scientific treatises. He treated diseases of the liver, hepatic system, gall bladder, and digestive system. In sum, the recitation of his qualifications was truly formidable, consuming approximately seven pages of the record.

He had at the instance of the Commission supervised and participated in tests made in the University medical hospital the purpose of which was to determine whether Carter's Little Liver Pills, administered to patients from whom total collection of bile had been obtained, would influence the production of bile in respect to volume and cholic acid content. His experiments were performed in the surgical ward of the hospital on twelve patients, all of whom were recuperating from major internal operations. Several of the patients had been suffering from jaundice shortly prior to the experiments, and the gall bladders of all but three had been removed before the collection of bile was begun. The tests entailed the insertion of a T-tube through the sphincter of Oddi into the common bile duct leading from the gall bladder and the liver to the duodenum. The T-tube was connected with a bottle system and a pump, permitting the collection in the bottles of the bile passing through the upper portion of the common duct. The quantity of bile collected varied somewhat from day to day throughout the whole course of the experiments, but the witness thought the variations were without significance. During the process of the collection, and a number of days after it began, doses of Carter's pills were given the patients. The witness gave it as his opinion on the basis of these experiments that the pills in no way influence the output of bile.

On cross-examination counsel for the petitioner undertook to inquire of the witness whether the condition of the experimentees was not abnormal and whether the tube and suction pump inserted in the biliary tract would not hamper the free flow of the bile. He asked whether in a normal individual, without the use of any such apparatus as was employed in the experiments, the common duct and gall bladder and the cystic ducts are not filled with bile most of the time. The witness answered, in effect, that they would be filled or partly so. The examination continued in the manner following:

"Q. At the lower end of the common duct is a sphincter?

A. Yes.

Q. Where the common duct enters the duodenum?

A. Yes.

Q. And as the system requires bile, that sphincter opens and closes into the duodenum from time to time, does it not?

A. That is right.

Q. And when the sphincter closes, there is a back pressure that is built up?

A. Yes.

Q. In the biliary system?

A. Yes.

Q. And does that back pressure have any influence at all on the flow of bile from the liver?"

The latter question was objected to as not being within the scope of the direct examination. The examiner ruled that "the Doctor here has not been qualified by the Commission's attorney as an expert on all of these various phases of the liver and the biliary tract. If you [referring to petitioner's counsel] care to undertake to qualify him, that would be a different matter, but it would seem to me that you are going beyond the scope of the direct examination." Another question along the same line was then asked and objected to, counsel for the Commission stating: "Now if Mr. Hanaway wants to qualify the **[452]** Doctor and use him as his witness on that, that is up to him." In sustaining the objection the examiner said: "I do not believe Dr. Lockwood has been qualified as an expert on the liver and biliary tract, for which reason I will uphold the objection, and give you an opportunity, if you care to, to qualify the witness on your own behalf, if you can, * * *" The following then occurred:

By Mr. HANAWAY [petitioner's counsel]:

"Q. Do you understand the operation of the biliary system, Dr. Lockwood?

Mr. COHN. [for the Commission]. Well, of course he is making him his witness, Your Honor.

Trial Examiner PURCELL. I think Mr Hanaway understands that.

The WITNESS: I have a sufficient working knowledge of the function of the biliary tract so that I wouldn't hesitate to treat patients for biliary tract disease.

By Mr. HANAWAY:

Q. Do you think you know enough about the operation by the biliary system under normal conditions to answer my questions concerning it?

A. I can answer any question you have asked me so far, yes.

Mr. HANAWAY. May I now proceed with the questioning, Mr. Examiner?

Trial Examiner PURCELL. With the understanding that from this point forward, you have made the witness your own."

At this juncture petitioner's counsel disclaimed any purpose of sponsoring the witness, and upon an attempted resumption of the cross-examination the following occurred:

By Mr. HANAWAY:

"Q. There is no mechanism in a normal human being that corresponds to this pump that you have described in Commission's Exhibit 148, is there, Doctor?

Mr. COHN. Objection, Your Honor.

Trial Examiner PURCELL. Objection sustained.

By Mr. HANAWAY:

Q. Then so far as the presence of the suction is concerned through the common duct and into the biliary system, that condition was abnormal, was it not?

Mr. COHN. I object, Your Honor.

Trial Examiner PURCELL. Objection sustained."

Little comment seems necessary. Dr. Lockwood himself professed his ability to answer the questions asked. As to his qualifications to do so, his experiments necessarily presupposed an extensive knowledge on his part of the biliary system. Throughout more than 150 pages of direct testimony he had been permitted to describe the intricate surgical experiments performed on the biliary systems of these twelve patients, all of whom were in the hospital for treatment of diseases of the gall bladder and biliary tract. Here, too, the abnormal condition of the experimentees plus the artificiality of the means by which the tests were carried on, suggested at least the possibility that the experiments had little if any value as support for the conclusions drawn from them.

More especially in the case of expert witnesses, cross-examination is of necessity exploratory and should be given broad latitude. Neither counsel nor the judge can know in advance what chinks may be disclosed in the armor of the expert or what frailties revealed in his premises. Cf. *Alford* v. *United States*, 282 U. S. 687. The condition imposed by the examiner that petitioner make this adversary witness his own was flagrant error. As Judge Sanborn remarked in *Heard* v. *United States*, 8 Cir., 255 Fed. 829, 832, "[i]t is no answer to a refusal to permit a full cross-examination that the party against whom the witness is called might have made him his own witness, and might then have proved by him or by some other witness, or by some writing, the facts which the cross-examiner was entitled to draw from the testimony of his adversary's witness. No one is bound to make his adversary's witness **[453]** his own to prove facts which he is lawfully entitled to establish by the cross-examination of that witness. The testimony given by a witness on his cross-examination is the evidence of the party in whose behalf he is called and the cross-examiner has the right to bind his adversary by the truth elicited from his own witness."

4. Dr. Case, a Commission witness, testified at length on direct concerning his qualifications. He specialized in radiology, had several degrees, and was a fellow or member of numerous learned bodies including the American and French Societies of Gastroenterology. He had written a four-volume Atlas and text on the digestive tube, and had contributed chapters to various medical books on a variety of subjects. Asked especially what studies and work he had had in gastroenterology, he replied: "All my life I have been especially interested in gastroenterology, and have done a great deal of gastroenterological surgery. I have always been interested in it. My X-ray work, if I have any special interest, has been in the digestive tube, especially gall bladder, stomach and bowel." He had, he said, performed over a thousand gall bladder operations and thought it would be fair to say that he had done about 15,000 tests of the gall bladder by a method of visualizing that organ.

On behalf of the Commission the Doctor undertook an assignment described in the trial examiners report as the making of "certain experiments with Carters Little Liver Pills to ascertain what effect said pills had upon the functioning of the liver in the production of bile, and of the gall bladder in the flow, storage, and concentration of bile."

For these experiments the witness had used a number of subjects to whom he administered a dye which would make the gall bladder and certain other parts of the biliary system visible when X-rayed. The subject was then required to eat a carbohydrate meal, all fats and proteins being eliminated. Following this an X-ray picture was taken of the gall bladder, and immediately the subject was given Carter's Liver Pills, and at the end of a few hours he was again X-rayed to see what effect, if any, the pills had had. Afterwards a fat meal was given the subject, and later a third picture taken to see what effect the fat had had on the biliary system. In summarizing the results of the experiments, the witness was questioned on direct and testified as follows:

Q. Well, based on any of the experiments, Doctor, what is your conclusion as to the results of Carter's Little Liver Pills, first, on the formation of bile by the liver?

A. They have no effect on the formation of bile by the liver.

Q. On the emptying of the gall bladder or causing the gall bladder to throw out bile?

A. It has no effect.

Q. And, third, upon the flow of bile?

A. It has no effect.

Q. Doctor, when I was talking about the 'flow of bile' I mean the flow of bile through the duct and through the sphincter of Oddi into the intestine. You understood that?

A. That is the only way it can flow. It can't flow any other way."

On cross, petitioner's counsel sought to inquire of the witness concerning the operation of the liver, gall bladder, and the ducts of the biliary system. Counsel for the Commission objected to the line of questioning as not being proper cross-examination. Petitioner's counsel remarked to the examiner that the questions were "right in line with the long discussion we had last night at the end of which you ruled I might explore into these things as a part of the biliary part of the functioning of the liver and gall bladder." The examiner sustained the Commission's objection saying: "Since my ruling of last night, I have taken occasion to read over Dr. Case's examination in chief in great detail, and I must frankly admit that because of his testimony as to his qualifications, I was misled into thinking that he had been introduced as a gastroenterologist, instead of which a very careful reading of his testimony, from the beginning to the end, discloses that practically every question that was put to him on direct examination **[454]** was based upon these pictures which he took as a Roentgenologist."

The examiner at this juncture turned to the witness and propounded a series of highly suggestive questions with the aim, so to speak, of cutting him down to size. At the conclusion he announced that he was going to change his ruling and limit cross-examination of the witness to the X-ray exhibits, "and anything that may properly be asked of him as to his qualifications in radiology, his interpretive readings of the various exhibits, and anything else that may appertain to the exhibits themselves."

Thereupon counsel for petitioner, after stating reasons thought to justify his attempted cross-examination, said:

"Now if your Honor wants to rule that this man is qualified only to describe what appears in those pictures, I am satisfied with that ruling.

Trial Examiner PURCELL. Very well, sir.

Mr. HANAWAY. And I will move to strike out everything else that he said today.

Trial Examiner PURCELL. You mean on cross-examination?

Mr. HANAWAY. On direct.

Trial Examiner PURCELL. On direct!

Mr. HANAWAY. Because he went way beyond that.

Trial Examiner PURCELL. Your motion to strike will be denied, and the ruling of the Examiner will stand. Confine your future examination to the pictures."

Now clearly it is not permissible for the Commission to qualify and use a witness for its own purposes as one having attainments in the field of gastroenterology, and then reduce him for purposes of cross-examination to the stature of a mere taker and explainer of X-ray pictures. We think that is what was done in this instance. As appears from the record excerpts quoted above, crucial questions put to Dr. Case were not confined to the X-ray exhibits but related generally to the *experiments* the witness had conducted. We agree with petitioner that more was involved in these experiments than a mere series of X-rays. The experiments were of the witness' own devising and were necessarily based on his familiarity with the physiology of the biliary system and the internal organs and on the vast number of cases he had previously examined. They dealt generally with the functioning of the gall bladder and bile and specifically with their functioning in respect of certain foods. In formulating the experiments as well as in interpreting them the witness was obviously required to draw extensively upon his knowledge of physiology and gastroenterology.[3]

It is argued that there was ample evidence from other quarters to sustain the findings and order of the Commission, hence the rulings, even if wrong, were not prejudicial. We are of opinion, however, that the cumulative effect of these unjustifiable restrictions on the cross-examination of key witnesses for the Commission was to deprive petitioner of a fair hearing. Such being the case the court is not disposed to speculate as to what would have been the outcome had a fair and impartial hearing been accorded. *Inland Steel Co.* v. *NLRB*, 7th Cir., 109 F. (2d) 9; *Empire Oil & Gas Corp.* v. *United States*, 9th, Cir., 136 F. (2d) 868, 871; *Willapoint Oysters* v. *Ewing*, 9th Cir., 174 F. (2d) 676, cert. den. 338 U. S. 860. Cf. *Reilly* v. *Pinkus*, 338 U. S. 269.

The order of the Commission is set aside.

[3] At a later stage of the proceedings petitioner subpenaed Dr. Case and offered to prove by him that he was president of the Battle Creek Food Company, producer and dispenser of a proprietary laxative in competition with petitioner, hence was an interested witness. The examiner rejected the offer on the ground that it came "too late," notwithstanding the case was still open for the taking of evidence.

BERNICE FEITLER ET AL. TRADING AS GARDNER & COMPANY v. FEDERAL TRADE COMMISSION*

No. 13011—F. T. C. Docket 4278

(Court of Appeals, Ninth Circuit. Jan. 28, 1953. Rehearing Denied Feb. 19, 1953)

METHODS, ACTS AND PRACTICES—LOTTERY MERCHANDISING—LOTTERY OR GAMBLING DEVICES—INTERSTATE SHIPMENT FOR USE IN INTERSTATE SALE

Under provision of Federal Trade Commission Act that unfair methods in competition in commerce and unfair or deceptive acts or practices in commerce are declared unlawful, the Federal Trade Commission has jurisdiction to restrain interstate shipment of gambling devices to be used in intrastate sales of merchandise.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—LOTTERY MERCHANDISING—LOTTERY OR GAMBLING DEVICES—INTERSTATE SHIPMENT FOR USE IN INTRASTATE SALE

Where petitioners, now seeking to review order requiring petitioners to cease and desist from distributing devices known as push cards and punch boards to manufacturers of and dealers in other articles of merchandise, manufactured, sold and distributed in interstate commerce, such devices to be used by such other manufacturers and dealers to effect a gambling sale of such merchandise to the consumer, the Federal Trade Commission had jurisdiction to enter order that petitioners cease and desist from supplying such devices.

METHODS, ACTS AND PRACTICES—GAMBLING DEVICES—INTERSTATE SHIPMENT OF—COMMISSION JURISDICTION

Under provision of Federal Trade Commission Act that unfair methods in competition in commerce and unfair or deceptive acts or practices in commerce are declared unlawful, the Commission's authority does not extend to the interstate shipment of gambling devices as such, but only to such shipments as amount to unfair trade practices.

EVIDENCE—EXCLUSION OF—LOTTERY MERCHANDISING AND LOTTERY OR GAMBLING DEVICES—THAT LATTER USED SOLELY FOR GAMBLING—WHETHER PREJUDICIAL

Federal Trade Commission's exclusion of evidence offered by petitioners, now seeking to review order requiring petitioners to cease and desist from distributing devices known as push cards and punch boards to manufacturers of and dealers in other articles of merchandise, to effect that persons use punch boards solely for gambling purposes and not to purchase merchandise and that trade is therefore not adversely affected by such devices was not prejudicial where Commission's jurisdiction did not depend upon effect of the operation of the devices but upon fact that the devices were used as a means of selling or distributing merchandise.

*Reported in 201 F. (2d) 790. For case before Commission, see 47 F. T. C. 1283.

METHODS, ACTS AND PRACTICES—LOTTERY MERCHANDISING AND LOTTERY OR GAMBLING DEVICES—IF USE OF LATTER BY ULTIMATE PURCHASER TO SELL OTHER MERCHANDISE SUSTAINED BY EVIDENCE

Evidence sustained finding of Federal Trade Commission that only use of push cards and punch boards manufactured and distributed by petitioners, now seeking to review order requiring petitioners to cease and desist from distributing such devices in interstate commerce, and the only manner in which they are used by the ultimate purchaser is in combination with other merchandise so as to enable the ultimate purchaser of the devices to sell or distribute other merchandise by means of chance.

APPELLATE PROCEDURE AND PROCEEDINGS—FINDINGS OF COMMISSION—IF ONE FINDING SUSTAINED BY ONLY EVIDENCE OF RECORD BEFORE COURT

Where only evidence in record before Court of Appeals concerned single finding of Federal Trade Commission, other findings of the Commission were not properly before the court for review.

CEASE AND DESIST ORDERS—SCOPE AND EXTENT—CRITERIA, IN GENERAL

Under provision of Federal Trade Commission Act that unfair methods in competition in commerce and unfair or deceptive acts or practices in commerce are declared unlawful, breadth of order of Federal Trade Commission, like the injunction of a court, must depend upon the circumstances of each case and the purpose of the order is to prevent violations of the Act.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—LOTTERY MERCHANDISING AND LOTTERY OR GAMBLING DEVICES—PUSH CARDS, ETC. WHICH ARE TO BE OR "MAY BE USED"

Evidence sustained Federal Trade Commission's order directing manufacturer to cease and desist from selling or distributing in commerce push cards, punch boards or other lottery devices which are to be used or "may be used" in sale or distribution of merchandise to public by means of game of chance, gift enterprise or lottery scheme, and under the evidence inclusion of phrase "may be used" did not render the order too broad.

(The syllabus, with substituted captions, is taken from 201 F. (2d) 790)

On petition to review order of Commission, order affirmed.

Mr. F. W. James, Evanston, Ill. (*Mr. George E. Lindelof, Jr.*, of Los Angeles, Cal., of counsel, for petitioner.)

Mr. W. T. Kelley, Gen. Counsel, *Mr. Robert B. Dawkins*, Asst. Gen. Counsel, and *Mr. Jno. W. Carter, Jr.*, Atty., Federal Trade Commission, of Washington, D. C., for respondent.

Before: HEALY, BONE and ORR, *Circuit Judges.*

BONE, *Circuit Judge.*

This is a petition to review a cease and desist order entered against petitioners by the Federal Trade Commission. The order was entered after a hearing on a complaint charging in substance that petitioners (respondents below) manufacture, sell and distribute in interstate commerce devices known as push cards and punch boards to manufacturers of and dealers in other articles of merchandise; that these push cards and punch boards are prepared so as to involve games of chance or lottery schemes when used in making sales of merchandise to the consuming public; that many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing merchandise by means of these lottery devices; that substantial trade has been thereby unfairly diverted from competitors selling similar merchandise who do not use these devices; and that the acts and practices of petitioners are all to the prejudice and injury of the public and constitute unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

The Commission made findings and conclusions sustaining all of the substantial allegations of the complaint and ordered petitioners to cease and desist from:

"Selling or distributing in commerce, as 'commerce' is defined in the Federal Trade Commission Act, push cards, punch boards, or other lottery devices, which are to be used or may be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme."

Petitioners' principal contentions are (1) that the Commission does not have jurisdiction to restrain the interstate shipment of push cards and punch boards; and (2) that the hearing granted petitioners did not comply with the due process clause of the Constitution nor with the Administrative Procedure Act. The two questions raised are related and we believe that the answer to the first will also dispose of the second.

It is no longer open to question that the Federal Trade Commission has jurisdiction to restrain interstate shipment of gambling devices to be used in intrastate sales of merchandise. Sec. 5 (a) of the Federal Trade Commission Act provides:

"SEC. 5. (a) * * * The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 15 U. S. C. A. § 45 (a).

Recently this court examined the legislative history of that provision in a case similar to this and concluded:

"Upon a review of the history of Section 5 (a) in connection with the decisions of the court thereon, we are of the opinion that the petitioner's use of interstate commerce to ship these devices to be used in intrastate commerce in the gambling disposition of merchandise to the ultimate consumer is one of the 'unfair * * * practices in commerce' subject to the preventive control of the Commission." *Lichtenstein* v. *Federal Trade Commission*, 9 Cir., 194 F. (2d) 607, 609 [48 F. T. C. 1750]; see also *Bork Mfg. Co.* v. *Federal Trade Commission*, 9 Cir., 194 F. (2d) 611 [48 F. T. C. 1756].

The question has been examined in several other circuits and all are in accord with the conclusion stated in the *Lichtenstein* case.[1] Nothing to the contrary can be found in *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U. S. 349 [32 F. T. C. 1848; 3 S. & D. 337], where it was merely held that the jurisdiction of the Commission does not extend to purely intrastate transactions. Cf. *Federal Trade Commission* v. *R. F. Keppel & Bro.*, 291 U. S. 304, 313 (18 F. T. C. 684; 2 S. & D. 259].

The contention of petitioners that they were denied a fair hearing is predicated upon certain rulings of the trial examiner striking evidence and refusing to hold hearings at various cities for the taking of testimony sought to be introduced by petitioners. The only portions of the printed record before us which bear on the question of the fairness of the hearing are the motion of petitioners before the Commission to set aside its cease and desist order and the order of the Commission denying the motion. The exact circumstances under which the challenged rulings of the trial examiner were made do not appear. However, the petitioners' contentions are clear enough, and even accepting their own view of these rulings, we are of the opinion that petitioners were not prejudiced thereby.

In the motion to set aside the cease and desist order there are set out a number of proposed stipulations of testimony, which apparently were not signed by counsel supporting the complaint. It is the contension of petitioners that the trial examiner erred in striking evidence tending to prove the matters set out in the proposed stipulations and in refusing requests for hearings at several cities to take testimony as to such matters.

The evidence sought to be introduced by petitioners consisted substantially of the following: (1) The persons who patronize punch boards do so only to satiate an appetite for gambling, and not to procure merchandise; (2) people who desire to buy merchandise do not resort to punch boards for this purpose; (3) punch boards are operated only in such establishments as taverns, pool halls and other places

[1] *Consolidated Manufacturing Co.* v. *Federal Trade Commission*, 4 Cir., 199 F. (2d) 417 [49 F. T. C. 1658] (Decided Oct. 11, 1952); *Zitserman* v. *Federal Trade Commission*, 8 Cir., 200 F. (2d) 519 [49 F. T. C. 1688] (Decided Dec. 18, 1952); *Hamilton Manufacturing Co.* v. *Federal Trade Commission*, *C.A.D.C.*, 194 F. (2d) 346 [48 F. T. C. 1743]; *Globe Cardboard Novelty Co.* v. *Federal Trade Commission*, 3 Cir., 192 F. (2d) 444 [48 F. T. C. 1725]; *Chas. A. Brewer & Sons* v. *Federal Trade Commission*, 6 Cir., 158 F. (2d) 74 [43 F. T. C. 1182; 4 S. & D. 588]; *Modernistic Candies, Inc.* v. *Federal Trade Commission*, 7 Cir., 145 F. (2d) 454 [39 F. T. C. 709; 4 S. & D. 288].

where people are encouraged to loiter, and not in strictly retail stores; (4) distribution of merchandise by punch board does not divert any sales from the ordinary channels of trade; (5) the merchandise distributed by means of punch boards consists largely of novelty items, candy and tobacco; (6) punch boards are not sales aids or sales stimulators.

Petitioners contend that this evidence, if admitted, would have destroyed the factual basis upon which the jurisdiction of the Commission in this case rests. The argument is that gambling by punch board is no more opposed to the public policy of the United States than are other forms of gambling. Since the Commission does not have authority to stop interstate shipment of other gambling devices, such as dice, roulette wheels, etc., it is urged that the Commission's power in this case must rest upon the fact that the use of punch boards in the distribution of merchandise has some effect upon trade or commerce which is different from, or greater than, the effects of other forms of gambling which involve only the exchange of money. Petitioners sought to prove that the operation of punch boards has no such effect, that such operation does not compete with other forms of merchandising, and that therefore the interstate shipment of these devices like the shipment of other gambling devices, is outside the orbit of the Commission.

We agree that the Commission's authority does not extend to the interstate shipment of gambling devices as such, but only to such shipments as amount to unfair trade practices. *Lichtenstein* v. *Federal Trade Commission*, *supra*. But the jurisdiction of the Commission in this case does not depend upon any particular effect of the operation of punch boards and push cards upon merchandising competition, but upon the single fact that these devices, unlike most other gambling devices, are used as a *means of selling or distributing merchandise* which is opposed to the public policy of the United States. This was made abundantly plain in the *Lichtenstein* case, *supra*. It is the fact that the interstate shipment of these devices facilities *a kind of merchandising* which induces and encourages the public to gamble which makes such shipment an "unfair trade practice." Proof that the use of punch boards in the gambling disposition of merchandise has no effect upon trade in the same kinds of merchandise by other means could not have affected the question of the Commission's jurisdiction.

Petitioners, as we understand their argument, do not contend that the proof rejected by the trial examiner was offered for any purpose other than to show that the Commission did not have jurisdiction over the practice here in question. Indeed, we cannot see how such proof could have aided petitioners' case on the merits. The offered evidence, if admitted, would have been strongly probative of the gambling use of push cards and punch boards in the distribution of merchandise—the very circumstance which brands the shipment of these devices in interstate commerce an *unfair* act or practice. Petitioners were not prejudiced by the challenged rulings of the trial examiner.

The only finding of the Commission which is directly challenged is the finding that "the only use to be made of [petitioners' push cards and punch boards] and the only manner in which they are used by the ultimate purchaser thereof is in combination with other merchandise so as to enable said ultimate purchaser to sell or distribute the other merchandise by means of lot or chance." There was some evidence at the hearing that petitioners' devices may be used as a kind of question and answer game. The slips of paper punched from the punch boards have, in addition to a number, a question printed upon them. The numbers on these tabs are keyed to an answer book. One who buys a punch may be obliged to answer the question before receiving a prize. There was also evidence that a gummed paper reproduction of a checkerboard may be pasted on the punch boards. If this feature is used, the tabs punched from the board are keyed to checker problems posed on the checkerboard which must be solved by the patron. Petitioners cited several state court decisions holding that punch boards when used with this question and answer feature were not gambling devices.

However, there is no evidence in the record that any punch board furnished by petitioners was ever actually used as a question and answer game. The witness Groves testified as to the manner of operation of a punch board with this feature but admitted that she had never seen one in actual use. James, a witness for petitioners, testified that he was engaged in introducing and testing the legality of the question and answer game throughout the United States on behalf of four or five punch board manufacturers. He testified that all of the merchandise punch boards distributed by petitioners had questions printed on the tabs which are punched from the boards. However, he did not know anything about the number of answer books which petitioners distributed with their boards. He testified that none of the boards had legends upon them instructing the operators how to operate the question and answer game. Neither did he know the extent of the use of the checkerboard idea in connection with petitioners' boards. He testified that prior to 1938 he made very little progress in developing a market for the games because they were covered by an outstanding patent, and it was stipulated by the parties that "the acts and practices of [petitioners] * * * and their methods of doing business in connection with the sale and distribution of * * * merchandise have remained the same from 1929 to the date of the issuance of the complaint herein."

The witness for respondent testified that the push cards and punch boards of petitioners were used as games of chance. The finding of the Commission is clearly sustained by the evidence.

Petitioners also contend that the Commission erred in not adopting their proposed findings of fact. This is nothing more than an oblique attack on the Commission's findings. Since the only evidence in the record before us pertains to the finding above discussed, the other findings of the Commission are not properly before this Court for review.

Petitioners raise several questions as to the power of the Commission to make the order here in question, but these questions were fully answered in the *Lichtenstein* case, *supra.*

Finally, petitioners contend that the order is too broad. In the *Bork* and *Lichtenstein* cases, *supra*, orders similar to the one now before us were modified by ordering the words "or may be used" stricken therefrom. However, the breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations of the Act, the threat of which is indicated by past conduct of the petitioners. *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 436–437. There was evidence that all of the merchandise punch boards of petitioners have the question feature on their tabs, though apparently this feature is not used in the actual operation of the boards. If the use of the boards as question and answer games would not be gambling, the deletion of the words "or may be used" from the order would considerably embarrass its enforcement, since it would always be open to petitioners to assert that the boards could be operated so as not to involve games of chance, even though the question feature is a mere subterfuge. We believe the evidence here warrants affirmance of the order as issued.[2]

The orders of the Commission are affirmed. An order will be entered by this Court enforcing them in accordance with the provisions of 15 U. S. C. A. § 45.

[2] In the two very recent cases of *Consolidated Manufacturing Co.* v. *Federal Trade Commission* and *Zitserman* v. *Federal Trade Commission, supra,* note 1, orders virtually identical to the one now before us were affirmed without modification.

FEDERAL TRADE COMMISSION v. MOTION PICTURE ADVERTISING SERVICE CO., INC.[1]

No. 75—F. T. C. Docket 5498

(Supreme Court of United States. Feb. 2, 1953)

"UNFAIR METHODS OF COMPETITION"—SCOPE AND EXTENT OF PHRASE—AS NOT LIMITED TO COMMON LAW OR SHERMAN ACT CATEGORIES

[362] The "unfair methods of competition" which are condemned by Federal Trade Commission Act are not confined to those illegal at common law or condemned by Sherman Act.

FEDERAL TRADE COMMISSION ACT—OBJECTIVES—AS PROHIBITIVE OF POTENTIAL AND ACTUAL VIOLATIONS OF SHERMAN AND CLAYTON ACTS AND AS SUPPLEMENTAL TO UNDERLYING PURPOSE OF

The Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act, and to stop in their incipiency acts and practices which, when full blown, would violate those Acts, as well as to condemn, as "unfair methods of competition", existing violations of such Acts.

METHODS, ACTS AND PRACTICES—DEALING ON EXCLUSIVE AND TYING BASIS—EXCLUSIVE SCREENING AGREEMENTS FOR ADVERTISING FILM—AS AN UNREASONABLE RESTRAINT OF COMPETITION, TENDING TO MONOPOLY, AND "UNFAIR METHOD OF COMPETITION"

Evidence sustained Federal Trade Commission's finding that advertising film distributor's exclusive screening agreements with theatre operators unreasonably restrained competition and tended to monopoly and thus constituted an "unfair method of competition" within the Federal Trade Commission Act.

APPELLATE PROCEDURE AND PROCEEDINGS—METHODS, ACTS, AND PRACTICES—WHETHER AND WHEN UNFAIR—IMPACT OF PARTICULAR PRACTICE ON TRADE—AS MATTER FOR COMMISSION AND NOT COURTS

It is for Commission, not courts, to determine, in proceedings under Federal Trade Commission Act, precise impact of particular practice on trade, since point where method of competition becomes "unfair" within Act often turns on exigencies of particular situation, trade practices, or practical requirements of business in question.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—DEALING ON EXCLUSIVE AND TYING BASIS—EXCLUSIVE SCREENING AGREEMENTS FOR ADVERTISING FILM—IF PROHIBITION LIMITED TO THOSE IN EXCESS OF ONE YEAR

Where, in proceedings on unfair competition complaint against advertising film distributor, Trade Commission found that term of one year for exclusive screening agreements between distributors and theatre owners had become standard practice, and that theatres would complete screening advertisements as required by advertising contracts even though such contracts extended beyond expiration date of exclusive screening agreement, Commission did not exceed limits of its allowable judgment in merely pro-

[1] Reported in 344 U. S. 392, 73 S. Ct. 361. For cases before Commission, see 47 F. T. C. 378. Lower court case at 194 F. (2d) 633.

hibiting distributor from entering into any contract granting exclusive privilege for more than one year, rather than banning exclusive contracts in their entirety.

METHODS, ACTS AND PRACTICES—LEGALITY, IN GENERAL—IF SHERMAN ACT INVOLVED

When Sherman Act is involved, crucial fact is impact of particular practice on competition, not label that it carries.

METHODS, ACTS AND PRACTICES—DEALING ON EXCLUSIVE AND TYING BASIS—EXCLUSIVE SCREENING AGREEMENTS FOR ADVERTISING FILM—WHETHER PLEA OF RES JUDICATA AVAILABLE—IF PRIOR PROCEEDING BASED ON CONCERT OF ACTION AND INSTANT PROCEEDING AGAINST INDIVIDUAL ACTS OF ONE RESPONDENT

Plea of res judicata was not available to film distributor charged with unfair competition in connection with exclusive screening agreements made with theatre owners, notwithstanding a prior proceeding in which same distributor and its competitors had been charged with conspiracy involving use of such exclusive agreements, where the subsequent proceedings against the distributor charged no conspiracy and was directed against individual acts of such distributor.

(The syllabus, with substituted captions, is taken from 73 S. Ct. 361)

On writ of certiorari to the Court of Appeals for the Fifth Circuit, judgment reversed.

MR. JUSTICE FRANKFURTER and MR. JUSTICE BURTON dissented.

[393] *Mr. James L. Morrisson*, of Chicago, Ill., for petitioner.
Mr. Louis L. Rosen, of New Orleans, La., for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent is a producer and distributor of advertising motion pictures which depict and describe commodities offered for **[363]** sale by commercial establishments. Respondent contracts with theatre owners for the display of these advertising films and ships the films from its place of business in Louisiana to theatres in twenty-seven states and the District of Columbia. These contracts run for terms up to five years, the standard one being for one year. A substantial number of them contains a provision that the theatre owner will display only advertising films furnished by respondent, with the exception of films for charities or for governmental organizations, or announcements of coming attractions. Respondent and three other companies in the same business (against which proceedings were also brought) together had exclusive arrangements for advertising films with approximately three-fourths of the total number of theatres in the United States which display advertising films for compensation. Respondent had exclusive contracts with almost 40 percent of the theatres in the area where it operates.

The Federal Trade Commission, the petitioner, filed a complaint charging respondent with the use of "unfair methods of competition" in violation of § 5 of the Federal Trade Commission Act, 38 Stat. 717, 719, 52 Stat. **[394]** 111, 15 U. S. C. § 45. The Commission found that respondent was in substantial competition with other companies engaged in the business of distributing advertising films, that its exclusive contracts have limited the outlets for films of competitors and has forced some competitors out of business because of their inability to obtain outlets for their advertising films. It held by a divided vote that the exclusive contracts are unduly restrictive of competition when they extend for periods in excess of one year. It accordingly entered a cease and desist order which prohibits respondent from entering into any such contract that grants an exclusive privilege for more than a year or from continuing in effect any exclusive provision of an existing contract longer than a year after the date of service in the Commission's order.[1] 47 F. T. C. 378. The Court of Appeals reversed, holding that the exclusive contracts are not unfair methods of competition and that their prohibition would not be in the public interest. 194 F. (2d) 633.

The "unfair methods of competition," which are condemned by § 5 (a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act. *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304. [18 F. T. C. 684; 2 S. & D. 259]. Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business. *Id.*, pp. 310–312. It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act (see *Federal Trade Commission* v. *Beech-Nut Co.*, 257 U. S. 441, 453) [4 F. T. C. 583; 1 S. & D. 170]—to stop in their incipiency acts and practices which, when full blown, **[395]** would violate those Acts (see *Fashion Guild* v. *Federal Trade Commission*, 312 U. S. 457, 463, 466) [32 F. T. C. 1856; 3 S. & D. 345], as well as to condemn as "unfair methods of competition" existing violations of them. See *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 691 [44 F. T. C. 1460; 4 S. & D. 676].

The Commission found in the present case that respondent's exclusive contracts unreasonably restrain competition and tend to monopoly. Those findings are supported by substantial evidence. This is not a situation where by the nature of the market there is room for newcomers, irrespective of the existing restrictive practices. The

[1] Comparable findings and like orders were entered in each of the three companion cases. *Matter of Reid H. Ray Film Industries*, 47 F. T. C. 326; *Matter of Alexander Film Co.*, 47 F. T. C. 345; *Matter of United Film Ad Service, Inc.*, 47 F. T. C. 362.

number of outlets for the films is quite limited. And due to the exclusive **[364]** contracts, respondent and the three other major companies have foreclosed to competitors 75 percent of all available outlets for this business throughout the United States. It is, we think, plain from the Commission's findings that a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is therefore an "unfair method of competition" within the meaning of § 5 (a) of the Federal Trade Commission Act.

An attack is made on that part of the order which restricts the exclusive contracts to one-year terms. It is argued that one-year contracts will not be practicable. It is said that the expenses of securing these screening contracts do not warrant one-year agreements, that investment of capital in the business would not be justified without assurance of a market for more than one year, that theatres frequently demand guarantees for more than a year or otherwise refuse to exhibit advertising films. These and other business requirements are the basis of the argument that exclusive contracts of a duration in excess of a year are necessary for the conduct of the business of the distributors. The Commission considered this argument and concluded that, although the exclusive contracts were beneficial to the distributor and preferred **[396]** by the theatre owners, their use should be restricted in the public interest. The Commission found that the term of one year had become a standard practice and that the continuance of exclusive contracts so limited would not be an undue restraint upon competition, in view of the compelling business reasons for some exclusive arrangement.[2] The precise impact of a particular practice on the trade is for the Commission, not the courts, to determine. The point where a method of competition becomes "unfair" within the meaning of the Act will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question. Certainly we cannot say that exclusive contracts in this field should have been banned in their entirety or not at all, that the Commission exceeded the limits of its allowable judgment (see *Siegel Co.* v.

[2] The Commission said: "Under the general practice the representative of the respondent first contacts the theater to determine if space is available for screen advertising and make such arrangements as conditions warrant with respect to such space. In this way respondent's representative is able to show prospective advertisers where space is available. In contacting the theater it is necessary for the respondent to estimate the amount of space it will be able to sell to advertisers. Since film advertising space in theaters is limited to four, five, or six advertisements, it is not unreasonable for respondent to contract for all space available in such theaters, particularly in territories canvassed by its salesmen at regular and frequent intervals.

"It is therefore the conclusion of the Commission in the circumstances here that an exclusive screening agreement for a period of one year is not an undue restraint upon competition." 47 F. T. C. 389.

Federal Trade Commission, 327 U. S. 608, 612 [42 F. T. C. 902; 4 S. & D. 476]; *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 726–727 [44 F. T. C. 1460; 4 S. & D. 676]) in limiting their term to one year.[3]

[397] The Court of Appeals held that the contracts between respondent and the theatres were contracts of agency and therefore governed by *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. **[365]** 568 [5 F. T. C. 599; 1 S. & D. 271]. This was on the theory that respondent furnishes the films by bailment to the exhibitors in exchange for a contract for personal services which the exhibitors undertake to perform. But the *Curtis* case would be relevant here only if § 3 of the Clayton Act[4] were involved. The vice of the exclusive contract in this particular field is in its tendency to restrain competition and to develop a monopoly in violation of the Sherman Act. And when the Sherman Act is involved the crucial fact is the impact of the particular practice on competition, not the label that it carries. See *United States* v. *Masonite Corp.*, 316 U. S. 265, 280.

Finally, respondent urges that the sole issue raised in the Commission's complaint had been adjudicated in a former proceeding instituted by the Commission which resulted in a cease and desist order. 36 F. T. C. 957. **[398]** But that was a proceeding to put an end to a conspiracy between respondent and other distributors involving the use of these exclusive agreements. The present proceeding charges no conspiracy; it is directed against individual acts of respondent. The plea of *res judicata* is therefore not available since the issues litigated and determined in the present case are not the same as those in the earlier one. Cf. *Tait* v. *Western Maryland R. Co.*, 289 U. S. 620, 623.

Reversed.

[3] A suggestion is made that respondent needs a period longer than one year in view of the fact that the contracts with advertisers are often not co-terminous with the exclusive screening agreements, due in large part to the delays in obtaining advertising contracts after the exclusive screening agreements have been executed. The Commission rejected this contention stating that by custom and by the terms of the exclusive contracts the theatre completes the screening of advertisements as required by the advertising contracts, even though those contracts extend beyond the expiration date of the exclusive screening agreement. We have concluded that the order which the Commission entered in this case is consistent with that construction. It does not prevent the completion of any particular advertising contract after the expiration of the exclusive screening agreement. The order merely prevents respondent from requiring the theatre owner to show only its films after that date. It does not prevent the theatre owner from making an otherwise exclusive agreement with another distributor at that time. No theatre owner is a party to this proceeding. The cease and desist order binds only respondent.

[4] This section makes unlawful a lease, sale, or contract for sale which substantially lessens competition or tends to create a monopoly. 15 U. S. C. § 14.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BURTON joins, dissenting.

Neither the findings of the Commission nor the opinion of the Court dispel my doubts that the Commission has not adequately shown that it has been guided by relevant criteria in dealing with its findings under § 5 of the Federal Trade Commission Act. The Commission has not explained its conclusion with the "simplicity and clearness" necessary to tell us "what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510, 511.

My primary concern is that the Commission has not related its analysis of this industry to the standards of illegality in § 5 with sufficient clarity to enable this Court to review the order. Although we are told that respondent and three other companies have exclusive exhibition contracts with three-quarters of the theaters in the country that accept advertising, there are no findings indicating how many of these contracts extend beyond the one-year period which the Commission finds not unduly restrictive. We do have an indication from the record that more than half of respondent's exclusive contracts run for only one year; if that is so, that part of respondent's hold on the market found unreasonable by the **[399]** Commission boils down to exclusion of other competitors from something like 1,250 theaters, or about 6%, of the some 20,000 theaters in the country. The hold is on about 10% of the theaters that accept advertising.

Apart from uncritical citations in the brief here,[1] the Commission merely states a dogmatic conclusion that the use of these contracts constitutes an "unreasonable restraint and restriction of competition." *In re Motion Picture Advertising Service Co.*, 47 F. T. C. 378, 389. The Court's opinion is merely an echo of this conclusion and **[366]** states without discussion that such exclusion from a market without more "falls within the prohibitions of the Sherman Act" because, taken with exclusive contracts of other competitors, 75% of the market is shut off. But there is no reliance here on conspiracy or concerted action to foreclose the market, a charge that would of course

[1] The decisions of this Court relied on do not dispose of this case. In *International Salt Co.* v. *United States*, 332 U. S. 392, we dealt with the largest producer of salt for industrial purposes, who by means of typing agreements rather than exclusive contracts, attempted an undue extension of his patent monopoly. Apart from these differences, it deserves to be noted that salt sales in one year amounted to $500,000 by the patentee. To the extent that that decision is predicated on a Sherman Law violation, it seems inapplicable here. In *United States* v. *Yellow Cab Co.*, 332 U. S. 218, apart from other differences, conspiracy was charged to shut off a substantial share of the market permanently by means of vertical integration. *United States* v. *Pullman Co.*, 50 F. Supp. 123, in which many other factors were present and the share of the market considerable, was affirmed by an equally divided Court. 330 U. S. 806.

warrant action under the Sherman Law. Indeed, we must assume that respondent and the other three companies are complying with an earlier order of the Commission directed at concerted action. See *In re Screen Broadcast Corp.*, 36 F. T. C. 957. While the existence of the other exclusive contracts is, of course, **[400]** not irrelevant in a market analysis, see *Standard Oil Co.* v. *United States*, 337 U. S. 293, 309, this Court has never decided that they may, in the absence of conspiracy, be aggregated to support a charge of Sherman Law violation. Cf. *id.*, at 314. If other factors pertinent to a Sherman Law violation were present here, the Commission could not leave such factors unmentioned and simply ask us to review a broad unexplained finding that there is such a violation.[2] In any event, the Commission has not found any Sherman Law violation.

But we are told, as is of course true, that § 5 of the Federal Trade Commission Act comprehends more than violations of the Sherman Law. The Federal Trade Commission Act was designed, doubtless, to enable the **[401]** Commission to nip in the bud practices which, when full blown, would violate the Sherman or Clayton Acts. But this record does not explain to us how these practices, if full blown, would violate one of those Acts. The Commission has been content to rest on its conclusion that respondent's exclusive contracts unreasonably restrain competition and tend to monopoly. If judicial review is to have a **[367]** basis for functioning, the Commission must do more than to pronounce a conclusion by way of fiat and without explication. This is not a tribunal for investigating an industry. Analysis of practices in the light of definable standards of illegality is for the Commission. It is for us to determine whether the Commission has correctly applied the proper standards and thus exhibited that familiarity with competitive problems which the Congress anticipated the Commission would achieve from its experience. Cf.

[2] The strongest finding of the Commission, par. 11, Findings as to the Facts, 47 F. T. C., at 387, states that these contracts have been "of material assistance in permitting the respondent to hold for its own use the screens of the theaters with which such contracts were made and has deprived competitors of the respondent from showing their advertising films in such theaters thereby limiting the outlets for their films in a more or less limited field and in some instances resulted in such competitors being forced to go out of the screen advertising business because of inability to obtain outlets for their screen advertising." Most contracts have the practical effect of excluding those who are not parties and failure to obtain business is of course a cause of business failure. If all contracts are not to be bad on such reasoning, it seems that much be more, particularly in view of indications here not adverted to by the Commission in its formal findings that what little business failure there has been among competitors may to some extent have resulted from the inferior quality of competitors' films. See Trial Examiner's Report Upon the Evidence, R. 44. In any event, such a finding does not establish a Sherman Law violation. In Sherman Law proceedings, we would have issues sharply defined in Sherman Law terms and findings from relevant evidence specifically directed to those terms made by the District Judge. Findings adverse to a claim of violation of the Sherman Law would have the weight given by Rule 52 (a) of the Federal Rules of Civil Procedure. Cf. *United States* v. *Oregon Med. Soc.*, 343 U. S. 326, 332.

Federal Trade Commission v. *Cement Institute*, 333 U. S. 683, 727 [44 F. T. C. 1460; 4 S. & D. 676].

No case is called to our attention which, because of factual similarity, would serve as a shorthand elucidation of the Commission's conclusion. The *Standard Oil* case, *supra*, relied on in the Commission's brief, does not serve this purpose. Although the *Standard Oil* case was brought under § 3 of the Clayton Act, I shall assume that it could have been brought under § 5 of the Federal Trade Commission Act, so that respondent cannot argue the inapplicability of the decision merely because the language of § 3 may be inapplicable. But taking that case simply as an expression of "policy" underlying § 5, it is not sufficient to support the holding in this case. In the *Standard Oil* case, we dealt with the largest seller of gasoline in its market; Standard had entered into exclusive supply contracts with 16% of the retail outlets in the area purchasing over $57,000,000 worth of gasoline. It may be that considerations undisclosed could be advanced to indicate that the percentage of the market **[402]** shut off here, calculated by a juggling of imponderables that we certainly would not confidently weigh without expert guidance, ought not to be considered significantly different from that in the *Standard Oil* case, or perhaps more important in the light of that decision, see 337 U. S., at 314, that the aggregate volume of business is of as great significance to the public as it was there. Even so, there are apparent differences whose effects we would need to have explained.

The obvious bargaining power of the seller *vis-a-vis* the retailer does not, so far as we are advised, have a parallel here. Nor are we apprised by proof or analysis to disregard the fact that here the advertising, unlike sales of gasoline by the retailer in the *Standard Oil* case, is not the central business of the theaters and apparently accounts for only a small part of the theaters' revenues.[3] In any event, in the *Standard Oil* case we recognized the discrepancy in bargaining power and pointed out that the retailers might still insist on exclusive contracts if they wanted. See 337 U. S., at 314. And although we are not told in this case whether the pressure for exclusive contracts comes mainly from the distributor or the theater, there are indications that theaters often insist on exclusive provisions. See Findings as to the Facts No. 12, *In re Motion Picture Advertising Service Co.*, *supra*, at 388.

[3] It may well be that this factor will turn out to be of little significance. In an entirely different context, we recognized that such a factor need not be decisive in an atttempt to assess the competitive effects, as among purchasers, of discriminatory pricing. See *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 49–50 [44 F. T. C. 1499; 4 S. & D. 716]. Since here, however, the factor probably bears more on the relative bargaining power of theaters and distributors than on competitive effects among the theaters, different considerations may operate.

Further, the findings of the Commission indicate that there are some factual differences in the "exclusive" provisions **[403]** here, for in this industry, as may not have been feasible in gasoline retailing, distributors of films often do have access to the theaters having nominally exclusive contracts with competing distributors. At times the exclusive provision may do little more than give the distributor a priority over other distributors in the use of screen space. Indeed, the degree of exclusion of com**[368]**petitors in some instances is represented simply by the inadequacy of a 15% commission paid the "excluded" competitor when he is permitted to show his films in theaters nominally exclusive. The Commission found the 15% unprofitable in local advertising, but it did not find how much of the affected competitors' total business, which may also have included manufacturer-dealer or cooperative advertising and national advertising, was in effect excluded because of the unprofitability of the commission in local advertising. In short, we are not told that the exclusive feature here should be considered the economic equivalent of that in the *Standard Oil* case.

Although the facts of this case do not meet the *Standard Oil* decision, even if that case is taken merely as an expression of antitrust policy engrafted on § 5, it is urged that the Commission should be allowed ample discretion in developing the law of unfair methods of competition to meet the exigencies of a particular situation without undue hampering by the Court. But if judicial review is to have any meaning, extension of principle to meet new situations must be based on some minimum demonstration to the courts that the Commission has relied on relevant criteria to conclude that the new application is in the public interest. In this case, apart from equivocal statements in the Trial Examiner's report on the evidence as to the interests affected by exclusion from this market, we have no specific indication of the need for enforcement in this area, cf. *Federal Trade Commission* **[404]** v. *Keppel & Bro.*, 291 U. S. 304, 314 [18 F. T. C. 684; 2 S. & D. 259], even if the Commission had afforded reasons why the law of unfair methods of competition should strike down exclusive contracts such as those here involved. At the least, we should remand this case to the Commission for adequate explanation of the reasons why the public interest requires its intervention and this order.[4] Cf. *Federal Trade Commission* v. *Klesner*, 280 U. S. 19 [13 F. T. C. 581; 1 S. & D. 1166].

[4] Since I take this view of the case, I need not attempt to determine whether the issues in this case have already been adjudicated in favor of the respondent. Without consideration of the record in the former proceedings, I cannot say whether the issues, raised as they apparently were in the pleadings before the Commission, were decided so as to preclude a second trial of those issues. Circumstances now undisclosed may justify the Commission's exercise of its flexible powers.

It is of great importance to bear in mind that the determination of the scope of the prohibition of "unfair methods of competition" has not been left to the administrative agency as part of its fact-finding authority but is a matter of law to be defined by the courts. See *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427 [2 F. T. C. 564; 1 S. & D. 69]. The significance of such judicial review may be indicated by the dissimilar treatment of comparable standards entrusted to the enforcement of the Interstate Commerce Commission. In dealing with the provisions of the Interstate Commerce Act requiring reasonableness in rates and practices from carriers subject to the control of the Commerce Commission, we read the Act as making the application of standards of reasonableness a determination of fact by that Commission and not an issue of law for the courts. Unlike the Federal Trade Commission Act, the Interstate Commerce Act dealt with governmental regulation not only of a limited sector of the economy but of economic enterprises that had long been singled out for public control. The range within which the broadly stated concepts of reasonable-**[405]**ness moved was confined as well as defined by experience, and application of the concepts was necessarily limited to easily comparable economic activity. On the other hand, the Federal Trade Commission Act gave an administrative agency authority over economic controls of a different sort that began with the Sherman Law—restrictions upon the whole domain of economic enterprise engaged in inter-**[369]**state commerce. The content of the prohibition of "unfair methods of competition," to be applied to widely diverse business practices, was not entrusted to the Commission for *ad hoc* determination within the interstices of individualized records but was left for ascertainment by this Court.

The vagueness of the Sherman Law was saved by imparting to it the gloss of history. See *Nash* v. *United States*, 229 U. S. 373. Difficulties with this inherent uncertainty in the Sherman Law led to the particularizations expressed in the Clayton Act. 38 Stat. 730. The creation of the Federal Trade Commission, 38 Stat. 717, made available a continuous administrative process by which fruition of Sherman Law violations could be aborted. But it is another thing to suggest that anything in business activity that may, if unchecked, offend the particularizations of the Clayton Act may now be reached by the Federal Trade Commission Act. The curb on the Commission's power, as expressed by the series of cases beginning with the *Gratz* case, *supra*, so as to leave to the courts rather than the Commission the final authority in determinng what is an unfair method of competition, would be relaxed, and unbridled intervention into business practices encouraged.

I am not unaware that the policies directed at maintaining effective competition, as expressed in the Sherman Law, the Clayton Act, as amended by the Robinson-Patman Act, and the Federal Trade Commission Act, are difficult to formulate and not altogether harmonious. [406] Therefore, the interpretation of the Acts by the agency which is constantly engaged in construing them should carry considerable weight with courts even in the solution of the legal puzzles these statutes raise. But he is no friend of administrative law who thinks that the Commission should be left at large. In any event, whatever problems would be raised by withholding judicial review from determinations of the Commission are for Congress to face, at least in the first instance. (See my views expressed in *Stark* v. *Wickard*, 321 U. S. 288, 311.) Until Congress chooses to do so, we cannot shirk our duty by leaving determinations of law to the discretion of the Federal Trade Commission. Not only must we abstain from approving a mere say-so of the Commission and thus fail to discharge the task implied by judicial review. It is also incumbent upon us to seek to rationalize the four statutes directed toward a common end and make of them, to the extent that what Congress has written permits, a harmonious body of law. This opinion is an attempt, at least by way of adumbration, to carry out this aim.

I would have the Court of Appeals remand this case to the Commission.

BOOK-OF-THE-MONTH CLUB, INC. ET AL. v. FEDERAL TRADE COMMISSION*

No. 139, Docket 22429—F. T. C. Docket 5572

(Court of Appeals, Second Circuit. Feb. 10, 1953)

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—FALSE AND MISLEADING ADVERTISING—"FREE PRODUCT"—IF IN FACT DECEPTIVELY CONDITIONED ON SOME UNDERTAKING

[487] Advertisement, which stated in large print at top "free" to new members a copy of some designated book and which at bottom and in much smaller print contained a coupon which when signed and sent to advertiser constituted contract to purchase at least four books a year, made misleading use of term "free", and justified cease and desist order, in view of fact that if member failed to buy four books within a year the advertiser demanded and expected to collect retail price of the "free" book.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—FALSE AND MISLEADING ADVERTISING—"FREE PRODUCT"—IF IN FACT DECEPTIVELY CONDITIONED ON

*Reported in 202 F. (2d) 486. For case before Commission, see 48 F. T. C. 1297.

SOME UNDERTAKING—WHETHER ORDER VITIATED BY PRIOR ADMINISTRATIVE INTERPRETATION

Administrative interpretation with reference to use of word "free" and words of similar import under certain conditions to describe merchandise, promulgated by Federal Trade Commission after institution of proceedings, did not vitiate commission's order, directing advertiser to cease and desist from using word "free" in advertising book which was not a gift or gratuity, on theory that interpretation constituted rule invalidly adopted and prejudiced case against advertiser, in view of fact that interpretation was not essential to commission's order.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—FALSE AND MISLEADING ADVERTISING—"FREE PRODUCT"—IF IN FACT DECEPTIVELY CONDITIONED ON SOME UNDERTAKING—WHETHER COMMISSION ESTOPPED BY EARLIER INVESTIGATION, AND ANNOUNCED DISCONTINUANCE OF PROCEEDING, WITHOUT PREJUDICE

Federal Trade Commission's letters to advertiser stating that commission had investigated complaint that advertisement was misleading and had found that further proceedings were not warranted but reserving right to reinstate matter did not estop commission from issuing cease and desist order.

(The syllabus, with substituted captions, is taken from 202 F. (2d) 486)

On petition to review order of Commission, petition denied; compliance ordered.

Mr. George M. Wolfson and *Mr. Cuthbert B. Caton* (Wolfson, Caton & Moguel, of counsel), for petitioners.

Mr. W. T. Kelley, *Mr. Robert B. Dawkins* and *Mr. Alan B. Hobbes*, for respondent.

On May 23, 1940, the Commission by letter, bearing File No. 28-2-2309, advised petitioner that it had "given consideration to the facts developed in a preliminary investigation of an application for complaint involving alleged false and misleading advertising" by petitioner; that from the investigation the Commission had found that further proceedings by it were not warranted; and that the "files covering this application have, therefore, been closed without prejudice to the right of the Commission to reinstate the matter if conditions should warrant."

On July 8, 1947, the Commission by letter, bearing File No. 1-20162, advised petitioner as follows: "The Commission has given consideration to the facts developed by a preliminary investigation made pursuant to an application for complaint alleging violation of the Federal Trade Commission Act through the alleged misleading and deceptive use of the terms 'free' and 'without cost' in the advertising and sale of books by the Book-of-the-Month Club, Inc., proposed respondent in the above numbered matter. Inasmuch as it appears from the facts disclosed by this preliminary investigation that the proposed respondent herein sets forth clearly and conspicuously the terms and conditions of the offer under which the 'free' books may be secured; and that the offer is made under circumstances and conditions that do not appear in any other respect to constitute an act, practice or method of competition calling for corrective action in the public interest, the Commission does not contemplate at this time further proceedings in the matter. You are advised, however, that the Commission may at any time take such further action as the public interest may require."

On January 14, 1948, the Commission adopted and published in the Federal Register what it there called "administrative interpretations with reference to the use of the word 'free' and the words of similar import under certain conditions to describe merchandise." These "interpretations" read as follows:

"The use of the word 'free' or words of similar import, in advertising to designate or describe merchandise sold or distributed in interstate commerce, that is not in truth and in fact a [488] gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring directly or indirectly to the benefit of the advertiser, seller or distributor, is considered by the Commission to be a violation of the Federal Trade Commission Act."

On January 30, 1948, the Commission in a letter to petitioner, bearing File No. 1-20162, after referring to those "interpretations" as a "statement of policy" and quoting those "interpretations," went on to say: "Because of the use in advertising of such words and phrases as 'free,' and 'book-dividend' under circumstances requiring the prior purchase of certain books in order to receive the merchandise referred to as 'free,' etc., the Commission reconsidered and rescinded its action of June 6, 1947, closing this matter, reopened the case, and directed that an opportunity be extended to execute a stipulation to cease and desist; with the further direction that if a satisfactory stipulation not be tendered, formal complaint issue, in conformity with the statement of policy as above set out."

A proceeding subsequently began which, after a hearing, ended in findings and an order of the Commission directing petitioners to cease and desist from "Using the word 'free,' or any other word or words of similar import or meaning, in advertising to designate or describe any book, or any other merchandise, which is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring directly or indirectly, to the benefit of the [Club]."

The advertising matter which was before the Commission at the hearing was the same in substance as that which was the subject of the letters of May 23, 1940, and July 8, 1947.

FRANK, *Circuit Judge:*

We feel obliged by *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112 [25 F. T. C. 1715; 2 S. & D. 429], to deny the relief sought by petitioners and to hold that the Commission's order must stand. In that case, this court was reversed. We had said that, to the discharge of its duty, the Commission should not "bring a pedantic scrupulosity: too solicitous a censorship is worse than any evils it may correct, and a community which sells for profit must not be ridden on so short a rein that it can only move at a walk. We cannot take seriously the suggestion that a man who is buying a set of books and a ten years' 'extension service,' will be fatuous enough to be misled by the mere statement that the first are given away, and that he is paying only for the second. Nor can we conceive how he could be damaged were he to suppose that that was true. Such trivial niceties are to impalpable for practical affairs, they are will-o'-the-wisps, which divert attention from substantial evils." [1] But the Supreme Court held we were mistaken, saying (302 U. S. at 116–117): "The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. * * * It was clearly the practice of respondents through their agents * * * to mislead customers into the belief that they were given an encyclopedia, and that they paid only for the loose-leaf supplement."

1. We regret that we perceive no legally significant difference between the pivotal facts of that case and those of the instant case. The crucial factor here is **[489]** that the Book-of-the-Month Club typically publishes an advertisement which states in large print at the top, "Free * * * to new members of the Book-of-the-Month Club" a copy of some designated book. This advertisement contains, at the bottom and in much smaller print, a coupon which, when signed and sent to and Club, constitutes a contract between it and its new "member"; this coupon states that he is to "receive free" the designated book, and that he agrees "to purchase at least four books-of-the-month a year from the Club." The evidence shows that the so-called "free book" is not, in fact, a gift: If the member fails to buy four books-of-the-month

[1] *Federal Trade Commission* v. *Standard Education Society*, 86 F. (2d) 692, 695–696 (C. A. 2) [24 F. T. C. 1591; 2 S. & D. 366].

within a year after joining the Club, the Club demands and expects to collect from him the retail price of the "free" book, although sometimes the Club will relinquish this demand provided the "free" book is returned to it. Although there was some evidence in addition to the foregoing which may have further supported the Commission's findings, we think it was not necessary in the light of the cited Supreme Court decision.

2. Petitioners contend that the "administrative interpretations" issued by the Commission on January 30, 1948, constituted a "rule" which the Commission invalidly adopted; that the Commission relied on that "rule" in deciding against petitioners; and that, at any rate, by uttering that "rule," it unfairly and unlawfully prejudged the case against petitioners. But the so-called rule—in effect a rough restatement of the Supreme Court's decision in the *Standard Education* case—was not at all essential to the Commission's order; for, once the Commission began the proceeding, it could not help deciding as it did, thanks to that Supreme Court decision.

3. The letters of May 23, 1940, and July 8, 1947, could not estop the Commission. But we think it proper to note that, in the circumstances, petitioners' practices, although they have been validly prohibited for the future, involved no moral impropriety.

Petition to set aside the order of the Commission is denied, and pursuant to 15 U. S. C. A. § 45(c) it is ordered that petitioner comply with the order of the Federal Trade Commission.

PRECISION ELECTROTYPE COMPANY v. FEDERAL TRADE COMMISSION[1]

No. 13665—F. T. C. Docket 5356

(Court of Appeals, Ninth Circuit. Feb. 20, 1953)

Order granting petitioner's motion for leave to withdraw as against petitioner petition to review Commission's order of October 23, 1952 which required respondent trade associations, various corporations, including petitioner, etc., in connection with the offer, etc., of electrotypes, stereotypes, or matrices in commerce, to cease and desist from entering into or carrying out any planned common course of action, etc., to fix and maintain prices, discounts, terms, and conditions of sale, etc.

Mr. Moses Laskey of *Brobeck, Phleger & Harrison*, of San Francisco, Calif., for petitioner.

Mr. Robert B. Dawkins, Asst. Gen. Counsel, of Washington, D. C., for Federal Trade Commission.

[1] Not reported in Federal Reporter. For case before the Commission, see 49 F. T. C. 366.

Following stipulation to the effect that if petitioner would withdraw petition to review prior to the time for filing the transcript of record, the Commission would, as against petitioner, vacate the order of which review was sought and dismiss the proceedings in which the order had been entered, and petitioner's motion for leave to withdraw petition for review, the court on February 20, as appropriate under the circumstances and the court's rules, entered the following:

Order

Upon the foregoing motion and stipulation, it is hereby ordered that leave to withdraw the Petition for Review herein is granted, and said Petition is hereby deemed withdrawn.

RADIO-TELEVISION TRAINING SCHOOL v. FEDERAL TRADE COMMISSION

No. 11,325—F. T. C. Docket 5536

(Court of Appeals, District of Columbia. Feb. 25, 1953)

Order dismissing, pursuant to agreement, petition to review order of Dec. 5, 1951, 48 F. T. C. 501, which required respondents, in connection with the offer, etc., of a course of instruction for home study in the fields of radio and television, to cease and desist from representing, directly or by implication, (a) that said course was capable of training radio or television technicians or repairmen; and (b) that any practical training was provided to purchasers of said course; and from making certain other specified misrepresentations in said connection; but which, as modified subsequent to said petition and prior to said dismissal required respondents to desist from advertising or representing directly or by implication, (a) that one completing said course in radio and television was assured of proper preparation and ample training for a successful future career as a technician in said fields of science; and (b) that said course embraced all practical training necessary for success in said fields of science; and from making certain other representations specified in the original order.

Posner, Berge, Fox & Arent, of Washington, D. C., for petitioner.

Mr. Robert B. Dawkins, Assistant General Counsel, of Washington, D. C., for Federal Trade Commission.

Agreement of Dismissal

It is hereby agreed between the parties hereto that the above-entitled cause be dismissed under Rule 21, and the clerk is hereby directed to enter the case dismissed, and that he transmit a certified copy of this agreement to the Office of the Secretary, Federal Trade Commission.

(S) Henry J. Fox,
HENRY J. FOX,
Attorney for Petitioner.

(S) ROBERT B. DAWKINS,
Attorney for Respondent.

NOTE.—The modified findings and order, dated Feb. 11, 1953, 49 F. T. C. 1022, found additionally that prior to July 1947 respondent's course did not include any practical training in the techniques of radio or television repair or construction, but consisted entirely of instruction in the theory of radio and television; that such techniques could not be acquired except by actual experience in working with radio or television sets in a shop or laboratory; that periodically since said date respondent corporation had added one at a time to its course of instruction, kits of practical materials and parts for use by its students in accordance with instructions to provide them with some measure of practical training; and that respondent's entire course had been extensively revised and improved since the issuance of the complaint in the matter; but that, even as then constituted, its successful completion would not qualify a student as an expert radio or television technician, nor provide him with all of the preparation and practical training necessary for a successful career as a technician in said fields of science, or equip him with the necessary qualifications to obtain and hold high-salaried positions in the radio and television industry, etc.

GAY GAMES, INC. ET AL. *v.* FEDERAL TRADE COMMISSION*

No. 4539—F. T. C. Docket 5554

(Court of Appeals, Tenth Circuit. Apr. 14, 1953. Rehearing Denied May 11, 1953)

METHODS, ACTS AND PRACTICES—LOTTERY MERCHANDISE—IN GENERAL

Practice of selling goods by means which involve a game of chance, gift enterprise, prize or lottery is contrary to established public policy of the United States.

METHODS, ACTS AND PRACTICES—AIDING AND ABETTING UNFAIR OR UNLAWFUL ACT OR PRACTICE—LOTTERY DEVICES FOR LOTTERY MERCHANDISING

Persons who sell and distribute, in interstate commerce, devices designed for purpose of selling merchandise by games of chance or lottery, and thereby

*Reported in 204 F. (2d) 197. For case before Commission, see 48 F. T. C. 1449.

aid, abet and induce manufacturers and wholesale and retail dealers in merchandise to use unfair or deceptive acts or unfair methods of competition, are engaged in practices violative of Federal Trade Commission Act.

METHODS, ACTS AND PRACTICES—AIDING AND ABETTING UNFAIR OR UNLAWFUL ACT OR PRACTICE—LOTTERY DEVICES FOR LOTTERY MERCHANDISING—IF USED BY MANUFACTURER AND DISTRIBUTOR PURCHASERS AND BY DIRECT OR INDIRECT RETAILER VENDEES IN SALE OF MERCHANDISE ASSORTMENTS

Where corporation and its president sold push cards and punch boards to manufacturers and wholesalers who distributed merchandise packed and assembled with such devices and corporation and president also sold such devices, directly and indirectly, to retail dealers who used devices for sale of merchandise by game of chance or lottery, corporation and president had aided and induced "unfair and deceptive acts and practices" and "unfair methods of competition," in violation of Federal Trade Commission Act.

CEASE AND DESIST ORDERS—SCOPE AND EXTENT—WHETHER TOO BROAD—AIDING AND ABETTING UNFAIR OR UNLAWFUL ACT OR PRACTICE—LOTTERY DEVICES FOR LOTTERY MERCHANDISING—LOTTERY DEVICES "WHICH ARE TO BE USED, OR WHICH, DUE TO THEIR DESIGN, ARE SUITABLE FOR USE", ETC.

Federal Trade Commission order directing certain corporation and its president to cease and desist from selling or distributing in commerce push cards, punch boards, or other lottery devices which are to be used or which, due to their design, are suitable for use in sale or distribution of merchandise to public by means of game of chance, gift enterprise or lottery scheme, was not too broad.

(The syllabus, with substituted captions, is taken from 204 F. (2d) 197)

On petition to review order of Commission, order affirmed and enforced.

Mr. F. W. James, of Evanston, Ill., for petitioners.

Mr. John W. Carter, Jr., Atty., Federal Trade Commission of Washington, D. C. (*Mr. W. T. Kelley*, General Counsel, and *Mr. Robert B. Dawkins*, Asst. General Counsel, Federal Trade Commission of Washington, D. C., on the brief), for respondent.

[198] Before PHILLIPS, *Chief Judge*, and BRATTON and HUXMAN, *Circuit Judges*.

PHILLIPS, *Chief Judge*.

This matter is here upon petition to review and set aside a cease and desist order issued by the Federal Trade Commission.

The Commission issued its complaint in which it charged that Noel's Gay Games, Inc., a corporation,[1] and Guy E. Noel, individually

[1] Hereinafter referred to as Games, Inc.

and as an officer of Games, Inc., were engaging in unfair or deceptive acts or practices in commerce in violation of 15 USCA § 45 (a).

In the complaint the following facts were specifically alleged:

Games, Inc. is an Ohio corporation with its office and principal place of business at Muncie, Indiana; Noel is president and treasurer of Games, Inc.; Games, Inc. is owned, dominated, controlled, and directed by Noel; and Games, Inc. and Noel have cooperated and acted together in the carrying out of such alleged unlawful acts and practices.

At the time of the filing of the complaint Games, Inc. and Noel were engaged, and for more than three years immediately prior thereto had been engaged in the manufacture of devices commonly known as push cards and punch boards and in the sale and distribution of such devices to manufacturers of various articles of merchandise, who sell such merchandise in commerce between and among the various states of the United States and in the District of Columbia, and to dealers in various articles of merchandise in the various states of the United States and the District of Columbia. They cause such devices so sold to be transported from the State of Indiana to the purchasers thereof in states of the United States, other than Indiana, and the District of Columbia, constituting a course of trade in such devices.

Such devices so sold and distributed to such manufacturers of and dealers in merchandise, involved games of chance, gift enterprises, or lottery schemes when used in making sales of merchandise to the consuming public. Games, Inc. and Noel cause to be printed on the faces of some of such devices instructions that explain the manner in which such devices are to be used or may be used in the sale or distribution of various specified articles of merchandise.

The price of the sales on such devices varies in accordance with the individual device. For the indicated price a purchaser is entitled to one punch or push from the device. When a push or punch is made, a disc or printed slip is separated from the device and a number is disclosed. The numbers are effectively concealed from prospective purchasers and from purchasers until a selection has been made and the push or punch completed. Certain specified numbers entitle purchasers to designated articles of merchandise. Persons securing winning numbers receive articles of merchandise without additional cost, so that the prices they pay are much less than the normal retail prices of such articles. Persons who do not secure winning numbers receive nothing for their money, other than the privilege of making a push or punch from the device. Articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Other such devices have no instructions thereon, but have blank spaces provided therefor wherein the purchasers thereof place instructions, which have the same import as the above-mentioned instructions.

The only use to be made of such devices and the only manner in which they are used by the ultimate purchasers thereof is in combination with other merchandise, thus enabling the ultimate purchaser to sell or distribute merchandise by means of lot or chance.

Many persons, firms, and corporations, who sell and distribute articles of merchandise in commerce between and among the various states of the United States and in the District of Columbia, purchase such devices and pack and assemble them with assortments of various articles of merchandise. Retail dealers, who have purchased **[199]** such assortments, either directly or indirectly, expose the same to the purchasing public and sell or distribute articles of merchandise by means of such devices. Because of the element of chance involved in connection with the sale and distribution of such merchandise by means of such devices, many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing such merchandise by means thereof and many retail dealers have been induced to deal with or trade with manufacturers, wholesale dealers, and jobbers who sell and distribute such merchandise, together with such devices.

Games, Inc. and Noel filed an answer in which they denied the allegations of the complaint. A hearing was held before an examiner designated by the Commission. Thereafter, Games, Inc. and Noel withdrew their original answer and filed a substituted answer in which they admitted all the material allegations of the complaint, and consented that the matter be determined by the Commission on the complaint and answer.

Thereafter, the Commission found the facts as alleged in the complaint and admitted by the answer and concluded that the practices of Games, Inc. and Noel "are all to the prejudice and injury of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act" and entered its order directing Games, Inc. and Noel to cease and desist from

"Selling or distributing in commerce, as 'commerce' is defined in the Federal Trade Commission Act, push cards, punchboards, or other lottery devices which are to be used or which, due to their design, are suitable for use in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme."

Two propositions of law which control the disposition of this case are now well established by the adjudicated cases. They are: (1) The practice of selling goods by means which involve a game of chance, gift enterprise, prize or lottery is contrary to the established public policy of the United State; [2] and (2) persons who sell and distribute, in interstate commerce, devices designed for the purpose of selling merchandise by games of chance or lottery, and thereby aid, abet and induce manufacturers and wholesale and retail dealers in merchandise to use either unfair or deceptive acts or practices or unfair methods of competition, are engaged in practices contrary to the public policy of the United States and violative of the Federal Trade Commission Act.[3]

The devices here involved were designed for the specific purpose of selling merchandise by game of chance or lottery. The acts and practices of Games, Inc. and Noel aid, abet and induce manufacturers and wholesalers to distribute merchandise packed and assembled with such devices and aid, abet and induce retail dealers to engage in the sale of merchandise by game of chance or lottery and thus aid, abet and induce unfair and deceptive acts and practices and unfair methods of competition, adversely affecting interstate commerce and commerce in the District of Columbia.

We conclude that the acts and practices of Games, Inc. and Noel are violative of the Federal Trade Commission Act **[200]** and within the power of the Commission to prohibit.

Games, Inc. and Noel assert that the order is broader than the complaint and urged modification thereof. A like contention with respect to similar orders has been considered by a number of the courts. See: *Consolidated Mfg. Co.* v. *Federal Trade Commission*, 4 Cir., 199 F. (2d) 417, 418 [49 F. T. C. 1658]; *Globe Cardboard Novelty Co.* v. *Federal Trade Commission*, 3 Cir., 192 F. (2d) 444, 447 [48 F. T. C. 1725] and cases there cited.

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[2] *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 313 [18 F. T. C. 684; 2 S. & D. 259]; *Zitserman* v. *Federal Trade Commission*, 8 Cir., 200 F. (2d) 519, 522 [49 F. T. C. 1688]; *Globe Cardboard Novelty Co.* v. *Federal Trade Commission*, 3 Cir., 192 F. (2d) 444, 446 [48 F. T. C. 1725]; *Modernistic Candies* v. *Federal Trade Commission*, 7 Cir., 145 F. (2d) 454, 455 [39 F. T. C. 709; 4 S. & D. 288]. See also: *Maltz* v. *Sax*, 7 Cir., 134 F. (2d) 2, 4.

[3] *Chas. A. Brewer & Sons* v. *Federal Trade Commission*, 7 Cir., 158 F. (2d) 74, 77–79 [43 F. T. C. 1182; 4 S. & D. 588]; *Zitserman* v. *Federal Trade Commission*, 8 Cir., 200 F. (2d) 519, 522, 523 [49 F. T. C. 1688]; *Consolidated Mfg. Co.* v. *Federal Trade Commission*, 4 Cir., 199 F. (2d) 417, 418 [49 F. T. C. 1658]; *Globe Cardboard Novelty Co.* v. *Federal Trade Commission*, 3 Cir., 192 F. (2d) 444, 446, 447 [48 F. T. C. 1725]; *Modernistic Candies* v. *Federal Trade Commission*, 7 Cir., 145 F. (2d) 454, 455 [39 F. T. C. 709; 4 S. & D. 288]; *Lichtenstein* v. *Federal Trade Commission*, 9 Cir., 194 F. (2d) 607, 609, 610 [48 F. T. C. 1750]; *Feitler* v. *Federal Trade Commission*, 9 Cir., 201 F. (2d) 790 [49 F. T. C. 1723] (decided January 28, 1953).

We construe the order to prohibit only the distribution, in interstate commerce, of any punch card, punch board or other device which is designed to serve as an instrumentality for the sale of articles of merchandise by lottery methods. So construed, the order is freed from objection.

The order of the Commission is affirmed and judgment will be entered by this court enforcing it in accordance with the provisions of 15 USCA § 45 (c).

INDEPENDENT GROCERS ALLIANCE DISTRIBUTING CO. v. FEDERAL TRADE COMMISSION [1]

No. 10606—F. T. C. Docket 5433

(Court of Appeals, Seventh Circuit. April 29, 1953)

FINDINGS OF COMMISSION—WHETHER SUPPORTED BY EVIDENCE AND CONCLUSIVE—STIPULATION AND INFERENCES FROM—WHETHER BROKERAGE COMMISSION PAID TO RECIPIENT ACTING IN FACT IN ITS OWN BEHALF OR THAT OF OTHER DIRECT OR INDIRECT DEFENDANT BUYERS

Stipulation of parties and inferences properly drawn therefrom supported Federal Trade Commission's findings, which were to effect that defendant corporation, which purported to act as broker for grocery producers, was in fact acting in its own behalf or in behalf of other defendants to which it sold the products handled, and that the other defendants directly or indirectly received benefit of brokerage commissions charged, in violation of Robinson-Patman Act; hence, findings would have to be regarded as conclusive.

PROCEEDINGS BEFORE COMMISSION—EVIDENCE—WEIGHT AND INFERENCES—AS FOR COMMISSION

In a proceeding instituted before the Federal Trade Commission, the weight to be given to established facts, as well as the inferences reasonably to be drawn therefrom, is for the Commission.

METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE, ETC.—CLAYTON ACT, SEC. 2 (c)—BROKERAGE COMMISSIONS—IF RECIPIENTS INTERMEDIARIES ACTING IN BEHALF OF OR UNDER CONTROL OF BUYER

Intermediaries acting in behalf or under the control of buyers may not receive brokerage commission upon the purchases of such buyers.

PROCEEDINGS BEFORE COMMISSION—INTRODUCTION OF EVIDENCE—IF LEAVE TO INTRODUCE REBUTTAL, SOUGHT LONG AFTER STIPULATION AND SUBMITTAL OF CASE, DENIED

Defendant, which stipulated in 1947 proceeding before Federal Trade Commission that Commission could proceed to decision on bases of stipulation of facts, briefs and arguments, and without adduction of other evidence, and which did not act until May, 1951 to petition to introduce fur-

[1] Reported in 203 F. (2d) 941. For case before Commission, see 48 F. T. C. 894.

ther evidence on ground that prejudicial remarks by Commission's attorney necessitated rebuttal evidence, failed to establish the materiality of the additional evidence or that there were reasonable grounds for failure to adduce it at Commission hearing.

(The syllabus, with substituted captions, is taken from 203 F. (2d) 941)

On petition to review order of Commission, petition denied; order affirmed.

Mr. Lyman W. Sherwood, *Mr. Lewis G. Groebe*, *Ungaro & Sherwood*, Chicago, Ill., for petitioners.

Mr. W. T. Kelley, Gen. Counsel, *Mr. James E. Corkey*, Atty., Federal Trade Commission, *Mr. Robert B. Dawkins*, Asst. Gen. Counsel, Washington, D. C., for respondent.

Before MAJOR, *Chief Judge*, and FINNEGAN, and SWAIM, *Circuit Judges.*

FINNEGAN, *Circuit Judge:*

This is a petition to review and set aside a cease and desist order issued by the Federal Trade Commission as the outcome of a complaint charging petitioner and others with having violated Section 2 (c) of the Clayton Act, as amended by the Robinson-Patman Act.

The complaint, issued on April 18, 1946, alleged that the petitioner, Independent Grocers Alliance Distributing Company, while acting as an intermediary, had been and was accepting brokerage and commission from numerous sellers on transactions in which the Alliance was in fact acting on its own behalf and in behalf of the purchasers in such transactions in violation of Section 2 (c) of the Clayton Act, as amended. The section provides as follows:

"Section 2 (c). That it shall be unlawful for any person engaged in commerce, in the course of such commerce, **[942]** 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." 49 Stat. 1527; 15 U. S. C. A. sec. 13 (c).

The complaint identified the purchasers as wholesale grocery concerns affiliated with I. G. A. by virtue of contracts or so-called franchise agreements. The complaint charged that in addition to I. G. A. and its directors, the provisions of sec. 2 (c) were violated by The Grocers Company and its directors, who were charged with receiving and accepting for the benefit of the wholesale grocers affiliated with I. G. A., part of the brokerage fees collected by the Alliance on the purchases of such wholesalers. Stokely Brothers & Company, Inc., Jersey Cereal Company, Dean Milk Company, and Cupples Company were also charged with violations by reason of the payment of brokerage to the Alliance on purchases and sales in which the Alliance was acting for and in behalf of its affiliated wholesalers. These sellers are alleged to be typical of a large group of manufacturers, producers, and processors engaged in selling a substantial portion of their commodities to buyers who purchased through I. G. A. as an intermediary for such buyers. Franklin MacVeigh & Company, E. R. Godfrey & Sons Company, Winston & Newell Company, and Wetterau Grocer Company, Inc., are charged individually and as members of a class consisting of wholesale grocery concerns, each of which was alleged to be affiliated with and under contract with I. G. A., and each of which was a stockholder of the Grocers Company, with having received brokerage or an allowance in lieu thereof on purchases they made through I. G. A.

The Jersey Cereal Company, Dean Milk Company, and Cupples Company did not file answers to the complaint. Stokely-Van Camp, Inc. (designated in the complaint as Stokely Brothers & Company, Inc.) answered denying the charges but took no further part in the proceedings. The Grocers Company, and its directors, and E. R. Godfrey & Sons Company, Wetterau Grocer Company, Inc., and Winston & Newell filed answers admitting the material allegations of the complaint with a few minor corrections that raised no controversial issues. Winston & Newell also entered into a stipulation as to certain facts not encompassed in its answer and later successfully argued to the Commission that it should not be included in any order that might be issued. Franklin MacVeigh & Company joined in the stipulation of facts signed by petitioners herein, but took no further part in the proceedings.

The answer filed by Independent Grocers Alliance Distributing Company and its six directors denied the material allegations of the complaint. In particular it was denied that I. G. A., when acting as an intermediary in purchase and sales transactions, was acting in its own behalf and for and in behalf of the purchasers in such transactions. On the contrary, it was asserted that I. G. A. had acted for and in behalf of the sellers in all purchase and sales transactions in which it has been engaged.

The issues raised by the answer of the Alliance and its directors were disposed of by a stipulation of facts which incorporated numerous exhibits. The stipulation was signed by counsel representing the complaint, by counsel for the I. G. A., and its directors, and also by counsel for Franklin MacVeigh & Company.

The stipulation provided that with respect to the parties the Commission might without:

"* * * the adduction of other evidence, and without intervening procedure, hear this matter on the complaint, respondents' answers, this stipulation, briefs and oral arguments by counsel for the respondents and for the Commission, and proceed to make and enter its findings of fact, inferences, **[943]** and conclusions based thereon and enter its order disposing of this proceeding."

At a subsequent hearing before the examiner three of the six directors of I. G. A., *i. e.*, James D. Godfrey, Ned N. Fleming, and Robert H. Perlitz after changing attorneys, and after leave obtained, withdrew the answer previously filed in so far as it applied to them, and filed a substitute answer admitting the material allegations of the complaint with some few unimportant factual corrections. These parties took no further part in the proceedings.

Proposed findings of fact and conclusions were filed with the hearing examiner by counsel supporting the complaint and by counsel for petitioners herein, and the examiner heard oral argument on the various contentions advanced. Thereafter he filed his recommended decision and the matter was briefed and oral argument was had before the Commission on November 23, 1948. Before the Commission reached a decision, two vacancies occurred in its membership and when these were filled, the Commission, on its own motion, set the matter down for reargument, which took place on November 2, 1950.

On April 16, 1951, some five months after the second oral argument to the Commission, the petitioners herein filed a petition with the Commission for leave to adduce additional evidence. This petition was made on the ground that certain remarks of Commission counsel during the reargument before the Commission were prejudicial to petitioners, and, that consequently, they were entitled to submit evidence in contradiction. On May 17, 1951, the Commission denied the petition for the reason that the record was clearly sufficient to enable it to dispose of all issues involved and the evidence proposed to be introduced would be irrelevant and immaterial to any of the issues. On March 7, 1952, the Commission entered its findings as to the facts, concluded that petitioners and certain other parties had violated sec. 2 (c) of the Robinson-Patman Act as alleged, and entered its order to cease and desist.

On April 3, 1952, petitioners filed in this Court a petition to review and set aside the Commission's order. Thereafter, on November 3, 1952, they filed a petition for leave to adduce additional evidence. This petition the Court denied without prejudice to the right of petitioners to renew the request upon the hearing on the merits.

Petitioners contend that the cease and desist order of the Commission should be set aside because they claim the I. G. A. acted for the sellers in the transactions in connection with which the Alliance received brokerage or commissions from the sellers; and that I. G. A. in such transactions did not pass on to the buyers brokerage or commissions it received from the sellers. They likewise urge in the alternative that this court direct that the cause be remanded to the Commission to hear evidence on the question whether, since the effective date of the Act charged to have been violated, the Alliance rendered brokerage services to the sellers under agreements with such sellers.

The respondent Commission on the other hand urges the affirmance of the order issued against I. G. A. and its directors.

The question presented by the first and second contentions of the petitioners is whether or not the Alliance, as an intermediary in the purchase transactions of its affiliated wholesalers, acts for and on behalf of such wholesalers or acts for and on behalf of the sellers in such transactions. The Commission considering the facts shown with respect to the franchise agreements between Alliance and its wholesalers, considering also the license agreements of Alliance to the sellers authorizing such sellers to use labels, brands and trade marks belonging to Alliance, and considering the ownership and management of I. G. A., and the disbursements made by the Alliance of the brokerage it received in such transactions, found that I. G. A. acted for and on behalf of its affiliated wholesalers in such transactions.

We might, as the Commission did, examine in detail each of the above specified phases of the question involved. The finding of facts made by the Commission embraces more than 35 printed pages of the record, and any examination we might make would be equally as lengthy. Manifestly **[944]** such an examination is not practicable in this opinion. In its last finding the Commission, in summarizing its examination, said:

"Paragraphs 18: (a) In the transactions of purchase and sale hereinbefore described, respondent Independent Grocers Alliance Distributing Company has, by reason of the facts already set forth, including more particularly those referred to in this sub-paragraph, acted for and in its own behalf and for and in behalf of the buyer-respondent and other buyers."

"(1) The capital stock of respondent Independent Grocers Alliance Distributing Company is and has been owned and controlled by two holding corporations—Market Specialty Company and the Grocers Company—the controlling stock of both of which is owned by individuals, partnerships, or corporations which also own or control, directly or indirectly, through stock ownership, or otherwise, wholesale grocery firms which are and have been buyers through said respondent, and which directly or indirectly receive and have received the benefit of brokerages or commissions paid by sellers to respondent Independent Grocers Alliance Distributing Company on said buyers' purchases; and, further, each of respondent Independent Grocers Alliance Distributing Company's officers and directors, with the exception of William W. Thompson, is an official or director of a wholesale grocery firm which is or has been a buyer of merchandise through Independent Grocers Alliance Distributing Company and which directly or indirectly receives and has received the benefit of brokerages or commissions paid to Independent Grocers Alliance Distributing Company by sellers upon said buyers' purchases.

"(2) Through the operation of franchise agreements executed between respondent Independent Grocers Alliance Distributing Company and its affiliated wholesale grocers, said respondent collects and receives from said wholesale grocers certain monthly fees as compensation for purchasing services and for other services rendered to said wholesale grocers in connection with their purchase and sale of merchandise; and, further, in connection with merchandise packed for sale under I. G. A. labels, allots, restricts, and designates the territory and channels through which said merchandise may be sold.

"(3) Through the operation of contracts executed between respondent Independent Grocers Alliance Distributing Company and selected seller-respondents and other selected sellers, packers, manufacturers, and producers, respondent Independent Grocers Alliance Distributing Company specifies and controls the quality of merchandise which said sellers may pack and sell under the I. G. A. brands; controls, restricts, and designates the number and type of buyers to whom said merchandise may be sold, and determines through negotiation with said sellers the prices at which said merchandise may be sold to said buyers.

"(4) Respondent Independent Grocers Alliance Distributing Company passes on and has passed on said brokerages, commissions, or other compensation received by it from sellers to the buyer-respondents and other buyers in the form of services, including advertising allowances restricted to the promotion of I. G. A.-branded merchandise and known as 'territorial advertising' and in the form of stock dividend payments, 50% of which said respondent paid to its stockholder-respondent the Grocers Company, for the benefit of the buyer-respondents (except Winston & Newell Co.) and other buyers who own the majority of the stock of respondent the Grocers Company."

In view of the ultimate finding the Commission necessarily concluded that I. G. A. in accepting brokerage fees or commissions on the purchases of its affiliated wholesalers was violating the provisions of sec. 2 (c) of the Robinson-Patman Act. Accordingly **[945]**, the Commission entered its order requiring petitioners to cease and desist from:

"Receiving or accepting, directly or indirectly, from any seller, or from respondent Independent Grocers Alliance Distributing Company, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon any purchase for the account of respondent Independent Grocers Alliance Distributing Company or for the account of any stockholder of respondent Independent Grocers Alliance Distributing Company or respondent The Grocers Company, or for the account of any wholesale grocery concern affiliated or under contract with respondent Independent Grocers Alliance Distributing Company, or in connection with any purchase wherein said respondents act in fact for or in behalf or subject to the direct or indirect control of any party to the transaction other than the seller."

We have given considerable time to an examination of the stipulation of facts and of the exhibits attached thereto and are satisfied that the findings of the Commission are supported by the stipulation and inferences properly drawn therefrom. As a consequence we must regard the findings of the Commission as conclusive. *Federal Trade Com.* v. *Standard Education Society*, 302 U. S. 112 [25 F. T. C. 1715; 2 S. & D. 429] *Federal Trade Com.* v. *Algoma Lumber Co.*, 291 U. S. 67 [18 F. T. C. 669; 2 S. & D. 247]; *Modern Marketing Service* v. *Federal Trade Com.*, 149 F. (2d) 970–973 [40 F. T. C. 938; 4 S. & D. 379]. Furthermore, the weight to be given to established facts, as well as the inferences reasonably to be drawn therefrom, are for the Commission. *Federal Trade Com.* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52–63 [11 F. T. C. 636; 1 S. & D. 583].

There is abundant authority to the effect that intermediaries acting in behalf or under the control of buyers may not receive brokerage payments upon the purchases of such buyers. *Biddle Co.* v. *Federal Trade Com.*, 96 F. (2d) 687 [26 F. T. C. 1511; 2 S. & D. 447]; *Oliver Bros., Inc.* v. *Federal Trade Com.*, 102 F. (2d) 763 [28 F. T. C. 1926;

3 S. & D. 86]; *Modern Marketing Service* v. *Federal Trade Com.*, 149 F. (2d) 970 [40 F. T. C. 938; 4 S. & D. 379] and *Federal Trade Com.* v. *Herzog*, 150 F. (2d) 450 [41 F. T. C. 426; 4 S. & D. 399].

It remains to consider petitioner's contention that they should have been permitted to adduce additional evidence and that the cause should be remanded to the Commission with directions that they be allowed to do so.

The right to present a petition for leave to adduce additional evidence is governed by sec. 11 of the Clayton Act (38 Stat. 734, 15 U. S. C. A. 21). The pertinent part of sec. 11 is as follows:

"If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, authority, or board, the court may order such additional evidence to be taken before the commission, authority, or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. * * *"

In the matter at bar the cause was submitted to the Commission upon a stipulation (already quoted) which provided that without the adduction of other evidence the Commission might proceed to consider the stipulation, briefs and arguments and dispose of the matter. The complaint herein was filed on behalf of the Federal Trade Commission on April 18, 1946. The stipulation appears to have been entered into in 1947. The petition for leave to adduce additional evidence was filed in 1951.

The petitioners made no offer of proof of any kind before the Commission and leave to adduce additional evidence was denied by the Commission on May 17, 1951.

Petitioners in their briefs in this court claim that counsel appearing in support of the complaint would not agree to incorporate the additional proof in the stipulation. They now assert that to make an **[946]** offer of proof would have been a useless act, and extremely expensive, and they further claim that they believed the decision of the Commission would be in their favor on other grounds, and that such evidence was not necessary.

We are not impressed by petitioner's present contentions. The Supreme Court said in *Southport Petroleum Co.* v. *Labor Board*, 315 U. S. 100:

"To insure that (the petition) would be used only for proper purposes and not abused by resort to it as a mere instrument of delay, Congress provided that before the Court might grant relief thereunder it must be satisfied of the materiality of the additional evidence, and that there were reasonable grounds for failure to adduce it at the hearing before the Board * * *"

The petition to set aside and vacate the Commission's order and the motion for the entry of an order remanding the cause to the Commission are, and each of them is therefore denied, and the order of the Federal Trade Commission against I. G. A. and its directors is affirmed.

FEDERAL TRADE COMMISSION v. LIGGETT & MYERS TOBACCO COMPANY[1]

No. 241, Docket 22609—F. T. C. Docket 6077

(Court of Appeals, Second Circuit. May 4, 1953)

On appeal from order of District Court for the Southern District of New York, denying preliminary injunction for lack of jurisdiction over the subject matter, order affirmed.

Mr. W. T. Kelley, General Counsel, *Mr. Robert B. Dawkins*, Asst. General Counsel, *Mr. Frederick McManus* and *Mr. Alan B. Hobbes*, Sp. Attorneys, of Washington, D. C., for Federal Trade Commission, appellant.

Simpson, Thacher & Bartlett, of New York City, *Mr. Whitney North Seymour*, *Mr. Armand F. McManus*, *Mr. James L. Parris* and *Mr. William J. Manning*, of New York City, of counsel, for appellee.

Before SWAN, *Chief Judge*, and AUGUSTUS N. HAND and CHASE, *Circuit Judges*.

PER CURIAM.

Order affirmed on opinion below, D. C., 108 F. Supp. 573.

NOTE.—For case below denying requested preliminary injunction pending conclusion of proceeding before Commission against respondent, on ground that cigarettes are not a "drug" under provisions of Federal Trade Commission Act authorizing Commission to seek injunction against dissemination of false advertisements for the purpose of inducing the purchase of drugs, see ante, at p. 1681.

[1] Reported in 203 F. (2d) 956.

BEE JAY PRODUCTS, INC. ET AL. *v.* FEDERAL TRADE COMMISSION [1]

No. 4581—F. T. C. Docket 5736

(Court of Appeals, Tenth Circuit. May 14, 1953)

On petition to review an order of the Commission, order affirmed and enforced.

Mr. F. W. James, of Evanston, Ill., for petitioners.

Mr. John W. Carter, Jr., Atty., Federal Trade Commission, of Washington, D. C. (*Mr. W. T. Kelley*, General Counsel, and *Mr. Robert B. Dawkins*, Asst. General Counsel, Federal Trade Commission, of Washington, D. C., on the brief), for respondent.

Before BRATTON, HUXMAN and PICKETT, *Circuit Judges.*

PER CURIAM.

On the authority of Gay Games, Inc. v. Federal Trade Commission, 10 Cir., 204 F. (2d) 197, the order of the Commission is affirmed and judgment will be entered enforcing such order in accordance with the provisions of 15 U. S. C. A. § 45 (c).

UNITED FILM SERVICE, INC. v. FEDERAL TRADE COMMISSION [2]

No. 14282—F. T. C. Docket 5497

(Court of Appeals, Eighth Circuit. May 29, 1953)

On petition to review and set aside order of Commission, order affirmed and enforced.

Morrison, Hecker, Buck, Cozad & Rogers, of Kansas City, Mo., for petitioner.

Mr. W. T. Kelley, General Counsel, *Mr. Robert B. Dawkins*, Asst. General Counsel, and *Mr. James W. Cassedy*, Asst. General Counsel, Federal Trade Commission, of Washington, D. C., for respondent.

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[1] Reported in 204 F. (2d) 272. For case before Commission, involving sale of lottery devices for use in lottery merchandising, *see* ante, at page 238.

[2] Reported in 204 F. (2d) 694. For case before Commission, in which respondent was required to cease and desist from entering into contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films in theatres owned, controlled or operated by them under the terms of such contracts, extended for a period in excess of one year, etc., *See* 47 F. T. C. 362.

PER CURIAM.

Petition to review and set aside order of Federal Trade Commission dismissed and order of Federal Trade Commission affirmed and enforced, on stipulation of parties, etc.

MAURICE J. LENETT, ET AL. v. FEDERAL TRADE COMMISSION[1]

No. 11789—F. T. C. Docket 5964

(Court of Appeals, District of Columbia Circuit. June 2, 1953)

Dismissal, on stipulation of parties, of petition for review of Commission's order of Jan. 15, 1953, 49 F. T. C. 914 requiring respondent individuals, their representatives, etc., in connection with the offer, etc., of automobile springs in commerce to cease and desist from offering, etc., any automobile spring composed in whole or in part of previously used parts unless disclosure of such fact is permanently stamped or fixed on each such spring in a clear and conspicuous manner and in such location as to be clearly legible to a purchaser and unless there is plainly printed on a container thereof similar notice to that effect.

Mr. James W. Cassedy, of Washington, D. C., for petitioner.

Mr. Robert B. Dawkins, Asst. General Counsel, of Washington, D. C., for Federal Trade Commission.

STIPULATION FOR DISMISSAL OF PETITION TO REVIEW

Whereas the above-named petitioners did on March 18, 1953, file in this Court their petition to review and set aside an order to cease and desist entered against them by the respondent Federal Trade Commission on January 15, 1953; and whereas respondent did on April 27, 1953, file in this Court the transcript of the record herein as required by law; and whereas the above-named petitioners do not wish to prosecute the aforesaid petition to review:

Now, therefore, it is hereby stipulated and agreed by and between the above-named petitioners and the above-named respondent by and through their respective attorneys that the aforesaid petition to review said order to cease and desist be dismissed without cost to any of the parties.

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[1] Not reported in Federal Reporter. For case before the Commission, *see* 49 F. T. C. 914.

U. S. PRINTING & NOVELTY CO., INC. ET AL. v. FEDERAL TRADE COMMISSION*

No. 11602—F. T. C. Docket 5647

(Court of Appeals, District of Columbia Circuit. June 4, 1953)

METHODS, ACTS AND PRACTICES—AIDING AND ABETTING UNFAIR OR UNLAWFUL ACT OR PRACTICE—LOTTERY DEVICES

Federal Trade Commission has authority over sale of lottery devices.

CEASE AND DESIST ORDERS—SCOPE AND EXTENT—WHETHER TOO BROAD—SALE OF LOTTERY DEVICES FOR LOTTERY MERCHANDISING—WORDS "WHICH ARE TO BE USED, OR WHICH, DUE TO THEIR DESIGN, ARE SUITABLE FOR USE", ETC. MODIFIED TO READ "WHICH ARE DESIGNED OR INTENDED TO BE USED"

On petition for review of order of Federal Trade Commission forbidding manufacturing printer to sell in interstate commerce push cards, punch boards, or other lottery devices "which are to be used, or which, due to their design, are suitable for use" in sale or distribution of merchandise to public by means of game of chance, gift enterprise or lottery scheme, order would be amended so as to insert, in replacement of quoted words, words "which are designed or intended to be used".

(The syllabus, with substituted captions, is taken from 204 F. (2d) 737)

On petition to review order of Commission, order modified and affirmed.

Mr. Horace J. Donnelly, Jr., of Washington, D. C., with whom *Mr. Arthur V. Sullivan, Jr.*, of Washington, D. C., was on the brief, for petitioners.

Mr. Alan B. Hobbes, Special Attorney, Federal Trade Commission, of Washington, D. C., with whom *Mr. Robert B. Dawkins*, Assistant General Counsel, Federal Trade Commission, of Washington, D. C., was on the brief, for respondent.

Before PROCTOR, FAHY and WASHINGTON, *Circuit Judges.*

PER CURIAM: Petitioner seeks review of an order of the Federal Trade Commission.[1] The facts are essentially similar to those in *Hamilton Manufacturing Co. v. Federal Trade Commission*, 90 U. S. App. D. C. 169, 194 F. (2d) 346 (1952) [48 F. T. C. 1743]. The order of the Commission forbids petitioner, a manufacturing printer,

*Reported in 204 F. (2d) 737. For case before Commission see 49 F. T. C. 190.

[1] The order was issued under authority of Section 5 of the Federal Trade Act, 38 Stat. 719 (1914), as amended, 15 U. S. C. A. § 45.

to sell in interstate commerce "push cards, punchboards, or other lottery devices *which are to be used, or which, due to their design, are suitable for use* in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme." [Emphasis supplied.]

Petitioner urges that the recent decision of the United States Supreme Court in *United States* v. *Halseth*, 342 U. S. 277 (1952), establishes that the Federal Trade Commission has no authority over the sale of lottery devices. For the reasons given by the Ninth Circuit in *Lichtenstein* v. *Federal Trade Commission*, 194 F. (2d) 607, 611 (1952) [48 F. T. C. 1750], this contention must be rejected. Petitioner also attacks the form of the Commission's order, alleging it to be inconsistent with our decision in *Hamilton Manufacturing Co.* v. *Federal Trade Commission*, *supra.* As to this, we agree with petitioner. The order of the Federal Trade Commission will be amended so as to insert, in replacement of the words italicized above, the words "which are designed or intended to be used." As thus modified, the order will be affirmed.

So ordered.

AUTOMATIC CANTEEN CO. OF AMERICA v. FEDERAL TRADE COMMISSION*

No. 89—F. T. C. Docket 4933

(United States Supreme Court. June 8, 1953)

METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE, ETC.—CLAYTON ACT, SEC. 2 (f)—KNOWINGLY INDUCING OR RECEIVING A "DISCRIMINATION IN PRICE PROHIBITED BY THIS SECTION"—SCOPE OF PROHIBITION—AS NOT INCLUDING PRICE DIFFERENTIALS NOT ELSEWHERE FORBIDDEN, AND AS PERMITTING LOWER PRICE PROPERLY BASED ON SELLER'S COST DIFFERENCES

In Robinson-Patman Act provision prohibiting buyers from knowingly inducing or receiving a "discrimination in price prohibited by the section," quoted words have reference to the substantive prohibitions against discrimination by sellers defined elsewhere in the Act, and hence, the discriminatory price that buyers are forbidden to induce cannot include price differentials that are not forbidden to sellers, and a buyer is not precluded from inducing a lower price based on cost differences that would provide a seller with a defense.

METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE, ETC.—CLAYTON ACT, SEC. 2 (f)—KNOWINGLY INDUCING OR RECEIVING A "DISCRIMINATION IN PRICE PROHIBITED BY THIS SECTION"—BUYER'S GUILT OR RESPONSIBILITY—KNOWL-

*Reported in 346 U. S. 61, 73 S. Ct. 1017. For case before Commission *see* 46 F. T. C. 861, and for decision of C.A.–7, 194 F. (2d) 433.

EDGE OF BUYER—IF LIMITED TO FACT THAT PRICES ARE LOWER THAN THOSE OFFERED OTHER BUYERS

Under Robinson-Patman Act provision prohibiting buyers from knowingly inducing or receiving a discrimination in price, no substantive violation occurs if buyer only knows that the prices are lower than those offered other buyers.

METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE, ETC.—CLAYTON ACT, SEC. 2 (F)—KNOWINGLY INDUCING OR RECEIVING A "DISCRIMINATION IN PRICE PROHIBITED BY THIS SECTION"—BUYER'S GUILT OR RESPONSIBILITY—IF UNLAWFUL PRICES RESULT FROM SPECIAL PRICE OBTAINED BY BUYER

Under Robinson-Patman Act provision making it unlawful for buyers "knowingly to induce or receive" a discrimination in price, quoted words cannot be read as charging buyers, who through their own activities obtain a special price, with responsibility for whatever unlawful prices result, an interpretation that would comprehend any buyer who engaged in bargaining over price.

METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE, ETC.—CLAYTON ACT, SEC. 2 (F)—KNOWINGLY INDUCING OR RECEIVING A "DISCRIMINATION IN PRICE PROHIBITED BY THIS SECTION"—BUYER'S GUILT OR RESPONSIBILITY—KNOWLEDGE OF BUYER—IF PRICES INDUCED OR RECEIVED KNOWN TO BE PROHIBITED DISCRIMINATIONS

Robinson-Patman Act provision prohibiting buyers from knowingly inducing or receiving a discrimination in price does not put buyer at his peril whenever he engages in price bargaining, but makes it unlawful only to induce or receive prices known to be prohibited discriminations.

ROBINSON-PATMAN ANTIDISCRIMINATION ACT—ADMINISTRATIVE CONSTRUCTION—AS INVOLVED IN BROADER ANTITRUST POLICIES LAID DOWN BY CONGRESS—IF ALTERNATIVE CONSTRUCTION FAIRLY OPEN—DUTY OF SUPREME COURT

Although due consideration is to be accorded to administrative construction of price discrimination act, where alternative interpretation is fairly open, it is duty of Supreme Court, except where Congress has provided to the contrary, to reconcile such interpretation with the broader antitrust policies that have been laid down by Congress.

METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE, ETC.—CLAYTON ACT, SEC. 2 (F)—KNOWINGLY INDUCING OR RECEIVING A "DISCRIMINATION IN PRICE PROHIBITED BY THIS SECTION"—BUYER'S GUILT OR RESPONSIBILITY—KNOWLEDGE OF BUYER—IF INDUCED LOWER PRICES WITHIN ONE OF SELLER'S DEFENSES, SUCH AS COST JUSTIFICATION: OR NOT KNOWN BY HIM NOT TO BE

[1018]Under Robinson-Patman Act provisions prohibiting buyers from knowingly inducing or receiving a discrimination in price, a buyer is not liable if the lower prices he induces are either within one of the seller's defenses, such as the cost justification, or not known by him not to be within one of those defenses.

METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE, ETC.—CLAYTON ACT, SEC. 2 (f)—KNOWINGLY INDUCING OR RECEIVING A "DISCRIMINATION IN PRICE PROHIBITED BY THIS SECTION"—BURDEN OF PROOF—EVIDENCE AS TO COSTS OR OTHER PERTINENT RECORD DATA BEARING ON JUSTIFICATION OF DIFFERENTIAL

OR LACK OF—AS REMAINING WITH COMMISSION AFTER ESTABLISHMENT OF BUYER'S KNOWLEDGE OF PRICE DIFFERENTIAL

In a proceeding under Robinson-Patman Act provision prohibiting buyers from knowingly inducing or receiving a discrimination in price, the burden of coming forward with evidence as to costs or other record data, by which the differential might or might not be justified, does not shift to the buyer, once the Federal Trade Commission has established buyer's knowledge of a price differential, but remains with Commission which, with its broad power of investigation and subpoena, is on a better footing to obtain such information than is the buyer.

METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE, ETC.—CLAYTON ACT, SEC. 2 (f)—KNOWINGLY INDUCING OR RECEIVING A "DISCRIMINATION IN PRICE PROHIBITED BY THIS SECTION"—BUYER'S GUILT OR RESPONSIBILITY—KNOWLEDGE OF BUYER—IF BUYER BUYS, KNOWINGLY, IN SAME QUANTITIES AS HIS COMPETITOR, AND IS SERVED BY SELLER IN SAME MANNER, ETC.

Under Robinson-Patman Act provision which prohibits buyers from knowingly inducing or receiving a discrimination in price, a buyer who knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer, can fairly be charged with notice that a substantial price differential cannot be justified.

METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE, ETC.—CLAYTON ACT, SEC. 2 (f)—KNOWINGLY INDUCING OR RECEIVING A "DISCRIMINATION IN PRICE PROHIBITED BY THIS SECTION"—BUYER'S GUILT OR RESPONSIBILITY—KNOWLEDGE OF BUYER—ESTABLISHMENT OF PRIMA FACIE CASE BY COMMISSION—IF BUYER KNEW THAT METHODS BY WHICH HE WAS SERVED, AND QUANTITIES IN WHICH HE PURCHASED WERE SAME AS IN CASE OF HIS COMPETITOR, OR, KNOWING DIFFERENCES, SHOULD HAVE KNOWN THEY COULD NOT GIVE RISE TO SUFFICIENT SAVINGS IN COST OF MANUFACTURE, ETC. TO JUSTIFY PRICE DIFFERENTIAL

In a proceeding under Robinson-Patman Act provision prohibiting buyers from knowingly inducing or receiving a discrimination in price, Federal Trade Commission, to establish prima facie case, need only show that buyer knew that methods by which he was served and quantities in which he purchased were same as in case of his competitor, and if methods or quantities differ, Commission must only show that such differences could not give rise to sufficient savings in cost of manufacture, sale or delivery, to justify the price differential, and that buyer, knowing these were only differences, should have known that they could not give rise to sufficient cost savings.

METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE, ETC.—CLAYTON ACT, SEC. 2 (f)—KNOWINGLY INDUCING OR RECEIVING A "DISCRIMINATION IN PRICE PROHIBITED BY THIS SECTION"—BUYER'S GUILT OR RESPONSIBILITY—KNOWLEDGE OF BUYER—ESTABLISHMENT OF PRIMA FACIE CASE BY COMMISSION—IF COST DIFFERENCES SHOWN AS VERY SMALL COMPARED WITH PRICE DIFFERENTIAL, AND SUCH AS COULD NOT REASONABLY HAVE BEEN THOUGHT AS JUSTIFYING

In a proceeding under Robinson-Patman Act provision prohibiting buyers from knowingly inducing or receiving a discrimination in price, a showing by the Federal Trade Commission that the cost differences are very small compared with the price differential, and could not reasonably have been thought to justify the price difference, should be sufficient to establish prima facie case.

APPELLATE PROCEDURE AND PROCEEDINGS—FINDINGS OF COMMISSION—APPLICABLE CRITERIA AS APPROPRIATELY ADAPTED TO SUPREME COURT REVIEW OF CORRECTNESS OF STANDARDS AND FAIRNESS OF MODE BY WHICH COMMISSION'S CONCLUSION REACHED

Although Federal Trade Commission should not be required to particularize its findings in such an exacting manner as to make Supreme Court in effect a court of review on the facts, the Commission should not shelter behind uncritical generalities or such looseness of expression as to make it essentially impossible for Supreme Court, which is charged with the duty of reviewing correctness of standards which Commission applies and essential fairness of mode by which it reaches its conclusions, to determine what really lay behind the conclusions which court is to review.

(The syllabus, with substituted captions, is taken from 73 S. Ct. 1017)

On petition for review of desist order, judgment of Court of Appeals, Seventh Circuit, reversed and case remanded with instructions, JUSTICE DOUGLAS, BLACK and REED, dissenting.

[62] *Mr. Edward F. Howrey*, of Washington, D. C., for petitioner.
Mr. Robert B. Dawkins, of Washington, D. C., for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The Robinson-Patman Act, directed primarily against sellers who discriminate in favor of large buyers, includes a provision under which proceedings may be had against buyers who knowingly induce or receive discriminatory prices. That provision, § 2 (f) of the Act, is here for construction for the first time as a result of a complaint issued by the Federal Trade Commission against petitioner, a large buyer of candy and other confectionary products for resale through 230,000-odd automatic vending machines operated in 33 States and the District of Columbia. Petitioner, incorporated in 1931, has enjoyed rapid growth and has attained, so we are told, a dominant position in the sale of confectionary products through vending machines.

The Commission introduced evidence that petitioner received, and in some instances solicited, prices it knew were as much as 33% lower than prices quoted other purchasers, but the Commission has not attempted to show that the price differentials exceeded any cost savings that sellers may have enjoyed in sales to petitioner. Petitioner moved to dismiss the complaint on the ground that the Commission had not made a prima facie case. This motion was denied; the Commission stated that a prima facie case of violation had been established by proof that the buyer received lower prices on like goods than other buyers, "well knowing that it was being favored over competing purchasers," under circumstances where the **[63]** requisite effect on competition had been shown. The question whether the price differentials made more than due allowance for cost differentials did not need to be decided "at this stage of the proceeding." On petitioner's failure to introduce evidence, the Commission made findings that petitioner knew the prices it induced were below list prices and that it induced them without inquiry of the seller, or assurance from the seller, as to cost differentials which might justify the price differentials. The Commission thereupon entered a cease and desist order. 46 F. T. C. 861. On review, the Court of Appeals affirmed,[1] holding that the Commission's prima facie case under § 2 (f) does not require showing absence of a cost justification. 194 F. (2d) 433.

Section 2 (f) of the Robinson-Patman Act, roughly the counterpart, as to buyers, of sections of the Act dealing with discrimination by sellers, is a vital prohibition in the enforcement scheme of the Act. In situations where buyers may have difficulty in proving their sellers' costs, § 2 (f) could, if the Commission's view in this case prevails, become a major reliance for simplified enforcement of the Act not only by the Commission but by plaintiffs suing for treble damages. Such enforcement, however, might readily extend beyond the prohibitions of the Act and, in doing so, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation. We therefore thought it necessary to grant certiorari. 344 U. S. 809.

[64] Enforcement of the Clayton Act's original declaration against price discrimination was so frustrated by inadequacies in the statutory language that Congress in 1936 enacted the sweeping amendments to that Act contained in what is known as the Robinson-Patman Act. 49 Stat. 1526, 15 U. S. C. § 13. Chief **[1020]** among the inadequacies had been express exemption of price discrimination in the sales of different quantities of like goods, an exemption that was interpreted as leaving quantity-discount sellers free to grant discounts to quantity buyers that exceeded any cost savings in selling to such buyers. *Goodyear Tire & Rubber Co.* v. *F. T. C.*, 101 F. (2d) 620 [28 F. T. C. 1899; 3 S. & D. 63]. In an effort to tighten the restriction against price discrimination inimical to the public interest, Congress enacted

[1] The Court also granted enforcement of the order on a cross petition by the Commission. The Commission concedes the impropriety of this action under our decision in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470 [47 F. T. C. 1838], rendered after the decision of the Court of Appeals in the case now before us. In view of this concession, we assume that the Court of Appeals, on the remand of this case, will, without further direction, reconsider its order for enforcement.

two provisions bearing on the issues in this case.[2] It made price discrimination in the sale of like goods unlawful without regard to quantity, although quantity discounts, like other price differentials, could still be jus-[65]tified if they made "no more than due allowance" for cost differences in sales to different buyers. Congress in addition sought to reach the large buyer, capable of exerting pressure on smaller sellers, by making it unlawful "knowingly to induce or receive a discrimination in price which is prohibited by this section."

Since precision of expression is not an outstanding characteristic of the Robinson-Patman Act, exact formulation of the issue before us is necessary to avoid inadvertent pronouncement on statutory language in one context when the same language may require separate consideration in other settings. Familiar but loose language affords too ready a temptation for comprehensive but loose construction. We therefore think it imperative in this case to confine ourselves as much as possible to what is in dispute here.

We are here asked to settle a controversy involving simply the burden of coming forward with evidence under § 2 (f) of the Act. The record, so abundant in its instances of individual transactions that the Commission itself felt bound to animadvert on undue proliferation of the evidence by Government lawyers,[3] may be taken as

[2] The two prohibitions are as follows:

"SEC. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *."

[The other provisos of § 2 (a), not relevant here, concern the grant of authority to the Commission to establish quantity limits, recognition of the seller's right to select his customers under certain conditions, and exemption of price changes made in response to changing market conditions.]

* * * * * * *

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

[3] The Commission recognized the need, common in antitrust litigation, for care on the part of the prosecuting officers not to overburden the record. "The record in this case does not disclose the reason for such a plethora of cumulative evidence as was adduced by Government counsel in the instant matter. Neither harassment of litigants nor the waste of Government funds in needless reiteration through cumulative evidence should be countenanced, nor does it seem that it was necessary to name 14 sellers as typical of a group from which respondents had induced or received discriminations in price, and certainly the records of not more than 5 of such sellers would have supplied ample evidence of such discriminations or price differentials." *In re Automatic Canteen Co. of America,*

[66] presenting varying degrees of bargaining pressure exerted by a buyer on a seller to obtain prices below those quoted other pur-**[1021]** chasers. In some instances, so the Commission found, petitioner's method was to "inform prospective suppliers of the prices and terms of sale which would be acceptable to [petitioner] without consideration or inquiry as to whether such supplier could justify such a price on a cost basis or whether it was being offered to other customers of the supplier." 46 F. T. C., at 888. A typical instance of the maximum pressure found by the Commission was a series of negotiations in which representatives of petitioner sought to explain to a prospective supplier the kind of savings he might enjoy in sales to petitioner and might make the basis of a price differential. In such instances, petitioner sometimes gave the supplier estimates of what it considered "representative" percentage savings on various costs such as freight, sales costs, packaging, and returns and allowances.[4]

The Commission made no finding negativing the existence of cost savings or stating that whatever cost sav**[67]**ings there were did not at least equal price differentials petitioner may have received. It did not make any findings as to petitioner's knowledge of actual cost savings of particular sellers and found only, as to knowledge, that petitioner knew what the list prices to other buyers were. Petitioner, for its part, filed offers of proof that many sellers would testify that they had never told petitioner that the price differential exceeded cost savings. An offer of proof was in turn made by the Commission as to the testimony of these sellers on cross-examination; such proof would have brought out that petitioner never inquired of its suppliers whether the price differential was in excess of cost savings, never asked for a written statement or affidavit that the price differentials did not exceed such savings, and never inquired whether the seller had made up "any exact cost figures" showing cost savings in serving petitioner.

Petitioner claims that the Commission has not, on this record, made a prima facie case of "knowing inducement of prices that made more than due allowance for cost differences," while the Commission con-

46 F. T. C. 861, 892. Failure to limit the evidence in some such way to typical transactions would create an especially heavy burden in a proceeding against a buyer under § 2 (f) such as that here, where discriminatory sales were alleged to have been made by about 80 of the buyer's 115 suppliers.

[4] Although the Commission recited such instances, it did not relate them to what the buyer should have known as to costs. It did not find from such instances that the circumstances should have provoked inquiry in the mind of a prudent business man. In short, we do not have a case in which the Commission in its informed judgment was led to conclude that in the circumstances knowing acceptance or inducement of a preference justified an inference of knowledge as to costs.

tends that it has established a prima facie case, justifying entry of a cease and desist order where the buyer fails to introduce evidence. Before proceeding to an examination of the statutory provisions, it is desirable to consider the kind of evidence about which this dispute centers. Petitioner is saying in effect that under the Commission's view, the burden of introducing evidence as to the seller's cost savings and the buyer's knowledge thereof is put on the buyer; this burden, petitioner insists, is so difficult to meet that it would be unreasonable to construe the language Congress has used as imposing it. If so construed, the statute, petitioner contends, would create a presumption so lacking rational connection with the fact established as to violate due process.

[68] We have been invited to consider in this connection some of the intricacies inherent in the attempt to show costs in a Robinson-Patman Act proceeding. The elusiveness of cost data, which apparently cannot be obtained from ordinary business records, is reflected in proceedings against sellers.[5] Such proceedings make us aware of how **[1022]** difficult these problems are, but this record happily does not require us to examine cost problems in detail. It is sufficient to note that, whenever costs have been in issue, the Commission has not been content with accounting estimates; a study seems to be required, involving perhaps stop-watch studies of time spent by some personnel such as salesmen and truck drivers, numerical counts of invoices or bills and in some instances of the number of items or entries on such records, or other such quantitive measurement of the operation of a business.[6] **[69]** What kind of proof would be required of a buyer we do not know. The Commission argues that knowledge generally available to the buyer from published data or experience in the trade could be used by petitioner to make a reasonable showing of his sellers' costs. There was no suggestion in the Commission's

[5] For a collection of relevant authorities and secondary material available on cost showings under the Act, see Note, 65 Harv. L. Rev. 1011. See also Fuchs, The Requirement of Exactness in the Justification of Price and Service Differentials under the Robinson-Patman Act, 30 Tex. L. Rev. 1; Haslett, Price Discriminations and their Justifications under the Robinson-Patman Act of 1936, 46 Mich. L. Rev. 450, 472; Sawyer, Accounting and Statistical Proof in Price Discrimination Cases, 36 Iowa L. Rev. 244. For discussion of specific cost cases under the Act, see Aronson, Defenses under the Robinson-Patman Act, in Business and the Robinson-Patman Law (Werne ed.), 212, 227; Taggart, The Cost Principle in Minimum Price Regulation, 110, 8 Mich. Bus. Studies 151, 260 (1938); Warmack, Cost Accounting Problems under the Robinson-Patman Act, CCH Robinson-Patman Act Symposium (1947) 105; Comment, 35 Ill. L. Rev. 60.

[6] Federal Trade Commission rulings in some cost cases "demonstrate that expert testimony and other evidence extrinsic to an actual cost analysis will be given little weight by the Commission. The FTC apparently believes that such materials lack the objectivity and relevance of the approved method of analysis." Note, 65 Harv. L. Rev. 1011, 1013–1014. See also Warmack, *supra,* note 6. Compare *In re Minneapolis-Honeywell Regulator Co.,* 44 F. T. C. 351, 394, a case in which "an extensive cost study" resulting from "sincere and extensive efforts" was in part accepted.

opinion, however, that it would take a different attitude toward cost showings by a buyer than it has taken with respect to sellers, and "general knowledge of the trade," to use the Commission's phrase, unsupported by factual analysis has as yet been far from acceptable, and indeed has been strongly reproved by Commission accountants, as the basis for cost showings in other proceedings before the Commission.[7]

No doubt the burden placed on petitioner to show his sellers' costs, under present Commission standards, is heavy. Added to the considerable burden that a seller himself may have in demonstrating costs is the fact that the data not only are not in the buyer's hands but are ordinarily obtainable even by the seller only after detailed investigation of the business. A subpoena of the seller's records is not likely to be adequate. It is not a question of obtaining information in the seller's hands.[8] It is a matter of studying the seller's business afresh. Insistence on proof of costs by the buyer might thus have other implications; it would almost inevitably require a degree of cooperation between buyer and seller, as against other buyers, that may offend other antitrust policies, and it might also expose the seller's cost secrets to the prejudice of arm's-length bargaining in the future. Finally, not one but, as here, approximately 80 different sellers' costs may be in issue.

[70] It is against this background that the present dispute arises. The legislative setting indicates congressional recognition of the need to charge buyers with a responsibility for price discrimination comparable, so far as possible, to that placed on sellers. Thus, at the least, we can be confident in reading the words in § 2 (f), "a discrimination in price which is prohibited by this section," as a reference to the substantive prohibitions against discrimination by sellers defined elsewhere in the Act.[9] It is there-**[1023]**fore apparent that the discriminatory price that buyers are forbidden by § 2 (f) to induce cannot include price differentials that are not forbidden to sellers in other sections of the Act, and, what is pertinent in this case, a buyer is not precluded from inducing a lower price based on cost differences that would provide the seller with a defense. This reading is, indeed, not seriously disputed by the parties. For we are not dealing simply with a "discrimination in price;"[10] the dis-**[71]**crimination in price" in § 2

[7] See, *e. g.*, Warmack, *supra*, note 6, at 107, 110.

[8] Cf. Longman, Distribution Cost Analysis, 250, and articles cited *supra*, note 6.

[9] See, *e. g.*, 80 Cong. Rec. 6428, 9419; H. R. Rep. No. 2951, 74th Cong., 2d Sess. 8.

[10] Were that the case, it might strictly be argued that the seller's "defenses" are not relevant in a § 2 (f) proceeding and that what is prohibited is the knowing inducement or receipt of a price lower than that accorded competing buyers. Such an interpretation has ambiguous legislative support. Congressman Utterback, in submitting the conference

(f) must be one "which is prohibited by this section." Even if any price differential were to be comprehended within the term "discrimination in price," § 2 (f), which speaks of prohibited discriminations, cannot be read as declaring out of bounds price differentials within one or more of the "defenses" available to sellers, such as that the price differentials reflect cost differences, fluctuating market conditions, or bona fide attempts to meet competition, as those defenses are set out in the provisos of §§ 2 (a) and 2 (b).

This is not to say, however, that the converse follows, for § 2 (f) does not reach all cases of buyer receipt of a prohibited discrimination in prices. It limits itself to cases of knowing receipt of such prices. The Commission seems to argue, in part, that the substantive violation occurs if the buyer knows only that the prices are lower than those offered other buyers. Such a reading not only distorts the language but would leave the word "knowingly" almost entirely without significance in § 2 (f). A buyer with no knowledge whatsoever of facts indicating the possibility that price differences were not based on cost differences would be liable if in fact they were not. We have seen above that § 2 (f) does not refer to all price differentials. But we do not think that price differentials, even as a matter of uncritical impression, come so often within the prohibited range of price discriminations that the language can in any way be read one way for some purposes and another in relation to the word "knowingly."

The Commission's attempts in this case to limit the word "knowingly" to a more reasonable area of prohibition are not, we think, justified by the language Congress has used. The Commission argues that Congress was attempting to reach buyers who through their own activities obtain a special price and that "knowingly to induce or receive" can be read as charging such buyers [72] with responsibility for whatever unlawful prices result. But that argument would comprehend any buyer who engages in bargaining over price. If the Commission means buyers who exert undue pressure, the argument might find greater support in the legislative background but less in the language Congress has employed. Such a reading not only ignores

report to the House, stated, "* * * a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other." 80 Cong. Rec. 9416. Plainly enough, under this statement, a discrimination in price may mean either a price differential in sales to two competitors, or a price differential in sales to two competitors which, because of an absence of cost or other justification, puts the unfavored competitor at a disadvantage. Compare Haslett, *supra,* note 6, at 453–466, with McAllister, Price Control by Law in the United States, 4 Law & Contemp. Prob. 273, 291. In any event, controversy over the meaning of the isolated phrase "discrimination in price" is beside the point here.

the word "receive" but opens up even more entangling difficulties with interpretation of what is undue pressure.[11]

The Commission also urges, from legis-**[1024]**lative explanation of similar language in § 2 (a), that the word "receive" can in some way be limited to a continued and systematic receipt of lower prices that could fairly charge the recipient with knowledge of illegality.[12] While we need not decide whether systematic receipt of prices in itself **[73]** could ever be sufficient to give the buyer the requisite knowledge,[13] we think, as the argument itself recognizes, that the inquiry must be into the buyer's knowledge of the illegality.

Not only are the arguments of the Commission unsatisfying, but we think a fairer reading of the language and of what limited legislative elucidation we have points toward a reading of § 2 (f) making it unlawful only to induce or receive prices known to be prohibited discriminations.[14] For § 2 (f) was explained in Congress as a provision under which a seller, by informing the buyer that a proposed discount was unlawful under the Act, could discourage undue pressure from the buyer.[15] Of course, such devices for private enforcement of the Act through fear of prosecution could equally well have been achieved by providing that the buyer would be liable if, through the seller or otherwise, he learned that the price he sought or received

[11] Time and again there was recognition in Congress of a freedom to adopt and pass on to buyers the benefits of more economical processes, see, *e. g.*, H. R. Rep. No. 2287, 74th Cong., 2d Sess. 10, 17; 80 Cong. Rec. 9415, 9417; buyer pressure to obtain the benefits of such savings could certainly not be undue pressure. Cf. Edwards, Maintaining Competition, 161. The Commission's findings do not suggest such a discrepancy in bargaining position between this buyer and his suppliers as to warrant characterizing the buyer as "bludgeoning." The Commission did find that those on whom the greatest "pressure" was exerted were such not inconsiderable candy manufacturers as the Curtiss Candy Co. and W. F. Schrafft & Sons Corp.

[12] See H. R. Rep. No. 2951, 74th Cong., 2d Sess. 5–6, explaining the language in § 2 (a) quoted *supra*, note 2, "or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination," as follows: The purpose of the addition of the word "knowingly" "is to exempt from the meaning of the surrounding clause those who incidentally receive discriminatory prices in the routine course of business without special solicitation, negotiation, or other arrangement for them on the part of the buyer or seller, and who are therefore not justly chargeable with knowledge that they are receiving the benefit of such discrimination." The context in which this explanation was given, as well as the precise language, so differs from § 2 (f) that this interpretation does not present a contradiction between it and our reading of § 2 (f).

[13] See pp. 80–81 [1778–1779] *post*.

[14] We of course do not, in so reading § 2 (f), purport to pass on the question whether a "discrimination in price" includes the prohibitions in such other sections of the Act as §§ 2 (d) and 2 (e).

[15] Congressman Utterback, in presenting the conference report to the House, spoke quite clearly in terms indicating that the provisions of § 2 (f) contemplated only the buyer who knew that the price was not justified by costs. Section 2 (f) "makes it easier [for the manufacturer] to resist the demand for sacrificial price cuts coming from mass-buyer customers, since it enables him to charge them with knowledge of the illegality of the discount, and equal liability for it, by informing them that it is in excess of any differential which his difference in cost would justify as compared with his other customers." 80 Cong. Rec. 9419.

was lower than that accorded competitors, but we are unable, in the light of congressional policy as expressed in other antitrust legislation, to read this ambiguous language as putting the buyer at his peril whenever he engages in price bargaining. Such a reading must be rejected in view of **[74]** the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated.[16] Although due consideration is to be accorded to administrative construction where alternative interpretation is fairly open, it is our duty to reconcile such interpretation, except where **[1025]** Congress has told us not to, with the broader antitrust policies that have been laid down by Congress. Even if the Commission has, by virtue of the Robinson-Patman Act, been given some authority to develop policies in conflict with those of the Sherman Act in order to meet the special problems created by price discrimination, we cannot say that the Commission here has adequately made manifest reasons for engendering such a conflict so as to enable us to accept its conclusion. Cf. *Eastern-Central Motor Carriers Assn.* v. *United States*, 321 U. S. 194, 211–212.

We therefore conclude that a buyer is not liable under § 2 (f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses. This conclusion is of course only a necessary preliminary in this case. As we have noted earlier, the precise issue in the case before us is the burden of introducing evidence—a separate issue, though of course related to the substantive prohibition. This issue, involving as it does some of the same considerations, requires us further to consider a balance of convenience in the light of whatever evidentiary rules Congress has laid down for proceedings under the Act. Assuming, as we have found, that there is no substantive violation if the buyer did not know that the prices it induced or received were not cost-justified, we must in this case determine whether proof that **[75]** the buyer knew that the price was lower is sufficient to shift the burden of introducing evidence to the buyer.

The Commission, in support of its position that it need only show the buyer's knowledge that the prices were lower, employs familiar interpretative tools without adequate regard to their immediate serviceability. It labels a seller's defense, such as the cost-justification, as an "exception to the general prohibition" and from this argues that under conventional rules of evidence the Commission need come forward with evidence of violation only of the "general prohibition." This interpretation has foundation in the many commonsensical read-

[16] Cf. Adelman, Effective Competition and the Antitrust Laws, 61 Harv. L. Rev. 1289, 1331: Edwards, Maintaining Competition, 161.

ings of comparable prohibitions so as to put the burden of showing a justification on the one who claims its benefits. We have said as much even in connection with that part of § 2 (b) of the Robinson-Patman Act which attempts to lay down the rules of evidence under the Act.[17] That section provides, "Upon proof being made * * * that there has been discrimination in price * * * the burden of rebutting **[76]** the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section." The Commission points out that it was under this section that we held in the *Morton Salt* case that the burden of showing a cost-justification is on the seller in a § 2 (a) proceeding, and argues that the same burden is on the buyer. It argues that the "prima-facie case thus made" clearly refers back to "proof **[1026]** [of] discrimination in price" and thus, from our decision in *Morton Salt*, that the prima facie case of a prohibited discrimination to which § 2 (b) refers consists only of proof of a difference in prices in the sale of like goods having the requisite effect on competition. Saying that § 2 (f) differs from § 2 (a) "only in containing the express requirement that the buyer shall have 'knowingly' induced or received such price discriminations," the Commission asks us to hold that a prima facie case under § 2 (f), is made out with a showing of the prima facie case of § 2 (a) violation "plus the additional element of having induced or received such discrimination with knowledge of the facts which made it violative of Section 2 (a)."

We need not concern ourselves with the Commission's interpretation of the words "prima-facie case thus made" in § 2 (b) and the resulting conclusion that if § 2 (a) and § 2 (f) are to be read as counterparts, the elements necessary for a prima facie case under § 2 (a) are sufficient for a prima facie showing of the "discrimination in price which is prohibited by this section" in § 2 (f). However that may be, the Commission recognizes that there is an "additional element" resulting from the word "knowingly" in § 2 (f), and, of course, it is that ele-

[17] *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, 44–45 [44 F. T. C. 1499; 4 S. & D. 716]. Cf. S. Rep. No. 1502, 74th Cong., 2d Sess. 3. Section 2 (b) in its entirety reads as follows: "(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." Throughout this opinion, a reference to § 2 (b) is to the procedural language preceding the proviso; the language of the proviso, which we construed in *Standard Oil Co. v. Trade Comm'n*, 340 U. S. 231 [47 F. T. C. 1766], is referred to only when we speak of the "proviso of § 2 (b)."

ment about which the controversy here centers and to which we must address ourselves. We may, however, note in passing that consistency between § 2 (a) and § 2 (f) both as to what constitutes the prohibited "discrimination in price" and as to the elements of a prima facie showing of the [77] prohibited "discrimination in price" would not be disturbed by a holding against the Commission in this case, for we are concerned here with the prima facie showing of knowledge, admittedly an independent and separate requirement of § 2 (f) above and beyond that of § 2 (a).

The Commission argues that a prima facie case of knowledge is made out when it is shown that the buyer knew the facts making the price differential violative of § 2 (a). At another point it urges that it must now show only "that the buyer affirmatively contributed to obtaining the discriminatory prices by special solicitation, negotiation or other action taken by him." However the argument is phrased, the Commission is, on this record, insisting that once knowledge of a price differential is shown,[18] the burden of introducing evidence shifts to the buyer. The Commission's main reliance in this argument is § 2 (b), which, as we have stated above, we interpreted in the *Morton Salt* case as putting the burden of coming forward with evidence of a cost justification on the seller, on the one, that is, who claimed the benefits of the justification.

To this it is answered that although § 2 (b) does speak not of the seller but of the "person charged with a violation of this section," other language in § 2 (b) and its proviso seems directed mainly to sellers,[19] that the legislative chronology of the various provisions ultimately resulting in the Robinson-Patman Act indicates that § 2 (b) was drafted with sellers in mind, and that the few cases so far decided have dealt only with sellers.

[78] A confident answer cannot be given; some answer must be given. We think we must read the infelicitous language of § 2 (b) as enacting what we take to be its purpose, that of making it clear that ordinary rules of evidence were to apply in Robinson-Patman Act proceedings.[20] If [1027] § 2 (b) is to apply to § 2 (f), although we do not decide that it does because we reach the same result without it, we think it must so be read. Considerations of fairness and con-

[18] In this connection, see *supra*, note 4, and *post*, note 24.

[19] For example, the language of the proviso of § 2 (b) concerning price differentials made to meet competition refers only to "a seller"; further, the authority given the Commission under § 2 (b) when justification is not shown is "to issue an order terminating the discrimination," an order that could not usefully be directed to buyers. But cf. 80 Cong. Rec. 9418.

[20] Congressman Patman, describing the § 2 (b) rule as to the burden of proof, said: "It means exactly the rule of law today. It is a restatement of existing law. So far as I am concerned you can strike it out. It makes no difference. It is the law of this land exactly as it is written there." 80 Cong. Rec. 8231.

venience operative in other proceedings must, we think, have been controlling in the drafting of § 2 (b), for it would require far clearer language than we have here to reach a contrary result. Cf. *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 617–618. If that is so, however, decisions striking the balance of convenience for Commission proceedings against sellers are beside the point.[21] And we think the fact that the buyer does not have the required information, and for good reason should not be required to obtain it, has controlling importance in striking the balance in this case. This result most nearly accommodates the case to the reasons that have been given by judges and [79] legislators for the rule of § 2 (b), that is, that the burden of justifying a price differential ought to be on the one who "has at his peculiar command the cost and other record data by which to justify such discriminations." [22] Where, as here, such considerations are inapplicable, we think we must disregard whatever contrary indications may be drawn from a merely literal reading of the language Congress has used. It would not give fair effect to § 2 (b) to say that the burden of coming forward with evidence as to costs [23] and the buyer's knowledge thereof shifts to the buyer as soon as it is shown that the buyer knew the prices differed. Certainly the Commission with its broad power of investigation and subpoena, prior to the filing of a complaint, is on a better footing to obtain this information than the buyer. Indeed, though it is of course not for us to enter the domain of the Commission's discretion in such matters, the Commission may in many instances find it not inconvenient to join the offending seller in the proceedings.

If the requirement of knowledge in § 2 (f) has any significant function, it is to indicate that the buyer whom Congress in the main sought to reach was the one who, knowing full well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices. Enforcement of the provisions of

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[21] It does not aid understanding to suggest that § 2 (f) has the same significance, as to a knowing buyer, as other sections of the Act have as to a knowing seller. A buyer knowing he is receiving a lower price cannot be said to be in the same position as a seller granting a lower price. The language of the statute bars such a construction. Even if the buyer has the "same" burden as the seller, the fact that a seller has the burden to show his costs does not automatically, by virtue of § 2 (f), become a buyer's burden to show the seller's cost. Nor has *Federal Trade Commission* v. *Staley Mfg. Co.*, 324 U. S. 746, 759–760 [40 F. T. C. 906; 4 S. & D. 346], any helpful relation to the problem of this case, if for no other reason than that that case did not call for a detailed consideration of the procedural portions of § 2 (b).

[22] 80 Cong. Rec. 3599. *Samuel H. Moss, Inc.* v. *Federal Trade Commission*, 148 F. (2d) 378, 379 [40 F. T. C. 885; 4 S. & D. 324]; 80 Cong. Rec. 8241.

[23] Our view that § 2 (b) permits consideration of conventional rules of fairness and convenience of course requires application of those rules to the particular evidence in question. Evidence, for example, that the seller's price was made to meet a competing seller's offer to a buyer charged under § (2) (f) might be available to a buyer more readily even than to a seller.

§ 2 (f) against such a buyer should not be too difficult. Proof of a cost justification being what it is, too often no one can ascertain whether a price is cost-justified. But trade ex**[80]**perience in a particular situation can afford a sufficient degree of knowledge to provide a basis for prosecution. By way of example, a buyer who knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer can fairly be charged with notice that a substantial price differential cannot be justified. The Commission need only to show, to establish its prima facie case, that the buyer knew that the methods by which he was served and quantities in **[1028]** which he purchased were the same as in the case of his competitor. If the methods or quantities differ, the Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings. The showing of knowledge, of course, will depend to some extent on the size of the discrepancy between cost differential and price differential, so that the two questions are not isolated. A showing that the cost differences are very small compared with the price differential and could not reasonably have been thought to justify the price difference should be sufficient.

What other circumstances can be shown to indicate knowledge on the buyer's part that the prices cannot be justified we need not now attempt to illustrate; [24] but **[81]** surely it will not be an undue administrative burden to explain why other proof may be sufficient to justify shifting the burden of introducing evidence that the buyer is or is not an unsuspecting recipient of prohibited discriminations. We think, in any event, it is for the Commission to spell out the need for imposition of such a harsh burden of introducing evidence as it appears to have sought in this case. Certainly we should have a more solid basis than an unexplained conclusion before we sanction a rule of evidence that contradicts antitrust policy and the ordinary requirements of fairness. While this Court ought scrupulously to abstain

[24] We need not in this case consider the weight that can be attached to affirmative statements by the seller to the buyer that a price was or was not cost-justified, since there were no such statements in this case. See supra, p. 67 [1769]. We need not now consider whether in an appropriate case the Commission may find it necessary to subject such statements to careful scrutiny. Thus, for instance, the Commission may consider that a seller stating that a price would be unlawful might in some situations be puffing rather than stating anything which a buyer can rely on or should be charged with. On the other hand, the Commission may in some circumstances wish to refuse to accept a buyer's claim that he relied on an affidavit or other assurance from the seller that price differentials were cost-justified; the furnishing of such an assurance might, together with other circumstances, indicate a sufficient absence of arm's-length bargaining to raise serious doubts as to the weight the assurance should be given in support of a buyer's claim.

from requiring of the Commission particularization in its findings so exacting as to make this Court in effect a court of review on the facts, it is no less important, since we are charged with the duty of reviewing the correctness of the standards which the Commission applies and the essential fairness of the mode by which it reaches its conclusions, that the Commission do not shelter behind uncritical generalities or such looseness of expression as to make it essentially impossible for us to determine what really lay behind the conclusions which we are to review. Cf. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510–511.

Because of our view of the balance of convenience in these circumstances, we do not reach petitioner's claim that the Commission is in effect saying that knowledge of a difference in prices creates a presumption of knowledge that the price was unlawful, a presumption it claims would fall for lack of rational connection under *Tot* v. *United States*, 310 U. S. 463. Cf. Note, E[dmund] **[82]** M. M[organ], 56 Harv. L. Rev. 1324. It has seemed to us unnecessary in this case to speak of presumptions, and we need only call attention to the fact that in this case, as in the *Tot* case, we have dealt only with the burden of introducing evidence and not with the burden of persuasion, as to which different considerations may apply.

The judgment of the Court of Appeals, accordingly, is reversed as to the charges in Count II of the complaint (Count I is not before us), and the case is remanded to that **[1029]** court with instructions to remand it to the Federal Trade Commission for such further action as is open under this opinion. It is so ordered.

Reversed and remanded with instructions.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE REED concur, dissenting.

This decision is a graphic illustration of the way in which a statute can read with enervating effect.

Section 2 (b) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13 (b) provides that where proof is made that there has been "discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be *upon the person charged with a violation of this section*, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination * * * ." [Italics added.]

Section 2 (f) makes it unlawful "*for any person*" engaged in commerce "knowingly to induce or receive a discrimination in price which is prohibited by this section." [Italics added.]

The words "the person charged" as used in § 2 (b) and the words "any person" used in § 2 (f) plainly include buyers as well as sellers.

[83] The nature of the discrimination condemned is made clear in § 2 (a). It outlaws discrimination "in price between different purchasers of commodities of like grade and quality" where the effect is substantially to prevent or lessen competition or tend to create a monopoly as respects any person "who either grants or knowingly receives the benefit of such discrimination." But it permits price differentials "which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities" in which the commodities are sold or delivered.

In the present case, the Court determines that even though "a buyer knew that the price was lower," such knowledge is insufficient to "shift the burden of introducing evidence to the buyer." But § 2 (b) requires the person shown to practice a discrimination to establish a justification. Section 2 (f) was intended to make clear that the same bans and burdens are on a *knowing* buyer obtaining discriminatory prices as we held in *Federal Trade Commission* v. *Staley Mfg. Co.*, 324 U. S. 746, 759–760 [40 F. T. C. 906; 4 S. & D. 346], approved in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231 [47 F. T. C. 1766], are on a *knowing* seller who grants them.

The record shows persistent and continuous efforts of this large buyer in wheedling and coercing suppliers into granting it discriminatory prices. The Commission summarized petitioner's activities in far more sedate terms than their bizarre nature justified:

"Respondent used various methods to induce its suppliers to grant discriminatory prices. One of these was to inform prospective suppliers of the prices and terms of sale which would be acceptable to the respondent without consideration or inquiry as to whether such supplier could justify such a price on a cost basis or whether it was being offered to other [84] customers of the supplier. At other times the respondent refused to buy unless the price to it was reduced below prices at which the particular supplier sold the same merchandise to others. In other instances respondent sought to explain to the prospective supplier that certain alleged savings would accrue to the supplier in selling to respondent or that certain elements of the supplier's cost could be eliminated, which would in respondent's opinion, justify a lower price. In carrying out this form of inducement, respondent would advise a supplier or prospective supplier of the price which it considered 'standard price.' In letters written to the Curtiss Candy Company on November 15, 1939, and to W. F. Schrafft & Sons Corporation on February 15, 1937, respondent summarized alleged savings to these companies as follows:

" *Alleged Savings*	*Curtiss Co. Percent*	*Schrafft Corp. Percent*
(1) Freight savings of	6	5 to 7
(2) Sales cost savings of	7	7
(3) 24-count cartons savings of	5	5
(4) Return and allowances savings of	1	1 to 2
(5) Free deals and samples savings of	8	2 to X
(6) Shipping containers savings of	--	1 to 2
Total deduction	27	21 to 25

"Respondent advised these companies that such alleged savings could be made because of the method by which respondent made purchases and because certain services could be eliminated in selling of it."

There is no doubt that the large buyers wield clubs that give them powerful advantages over the small merchants. Often large merchants gain advantages over other sellers of the same merchandise by obtaining price concessions by pressure on their suppliers. The evil was **[85]** acknowledged in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 43 [44 F. T. C. 1499; 4 S. & D. 716]. The Congress plainly endeavored to curb the buyer in the kind of activities disclosed by this record. As the House Report reveals, the line sought to be drawn was between those who incidentally receive discriminatory prices and those who actively solicit and negotiate them. H. R. Rep. No. 2951, 74th Cong., 2d Sess., pp. 5–6.

The Court disregards this history. The Court's construction not only requires the Commission to show that the price discriminations were not justified; it also makes the Commission prove what lay in the buyer's mind. I would let the acts of the buyer speak for themselves. Where, as here, the buyer undertakes to bludgeon sellers into prices that give him a competitive advantage, there is no unfairness in making him show that the privileges he demanded had cost justifications. This buyer over and again held itself out as a cost expert.* I would hold it to its professions. Since it was the coercive influence, there is no unfairness in making it go forward with evidence to rebut the Commission's prima facie case.

*A reading of the record leaves no doubt that petitioner knew in numerous instances that it was squeezing a price from the seller which was less than the seller's costs.

UNITED STATES NAVY WEEKLY, INC. ET AL. v. FEDERAL TRADE COMMISSION[1]

No. 11495—F. T. C. Docket 5572

(Court of Appeals, District of Columbia Circuit. June 18, 1953)

CEASE AND DESIST ORDERS—SCOPE AND EXTENT—MISLEADING TRADE OR PRODUCT NAMES—RELIEF—CRITERIA IN DETERMINING

Where Federal Trade Commission finds that use of a trade name is misleading, Commission should go no further than is reasonably necessary to correct the evil and protect the public, but commission has a wide latitude for judgment in selecting a remedy and determining whether qualifying words will eliminate deception.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—MISREPRESENTATION—TRADE OR PRODUCT NAMES—"U. S. NAVY MAGAZINE" FOR UNOFFICIAL PUBLICATION

Use of trade name "United States Navy Magazine" for an unofficial publication, privately owned, was deceptive and misleading, and elimination of deception could not be effected by a qualification or explanation to effect that the publication had no official connection with United States Navy, but only prohibition against use of such name.

CEASE AND DESIST ORDERS—SCOPE AND EXTENT—BUSINESS STATUS—GOVERNMENT CONNECTION—WHERE REPRESENTATION THAT UNOFFICIAL PUBLICATION OWNED, EDITED OR PUBLISHED BY "NAVAL" PERSONNEL—IF, AS CONTENDED, PUBLICATION OWNED, ETC., BY "NAVY" PERSONNEL

Where Federal Trade Commission ordered publishers of unofficial, privately owned publication to cease and desist from representing that the publication was owned, edited or published by "naval" personnel, but publishers asserted that their representation was that the magazine was owned, edited and published by "navy" personnel, which they claimed to be, Federal Trade Commission was not required to concern itself with technical distinction between the two terms, since the public would not be aware of such distinction and would be deceived by either term.

(The syllabus, with substituted captions, is taken from 207 F. (2d) 17)

On petition for review of order of Federal Trade Commission, order affirmed.

Mr. Byron N. Scott for petitioners.

Mr. Donovan Divet, Special Attorney, Federal Trade Commission, with whom *Messrs. W. T. Kelley*, General Counsel, Federal Trade Commission, and *Robert B. Dawkins*, Assistant General Counsel, Federal Trade Commission, were on the brief, for respondent.

Before WILBUR K. MILLER, PRETTYMAN and FAHY, *Circuit Judges.*

[1] Reported in 207 F. (2d) 17. For case before the Commission see 48 F. T. C. 1347.

WILBUR K. MILLER, *Circuit Judge:*

The corporate petitioner, United States Navy Weekly, Inc., publishes the bimonthly "United States Navy Magazine." The individual petitioners, [18] George L. Carlin and Ray E. Fenstemaker, are respectively president and secretary-treasurer of the corporation. They seek review of a cease and desist order entered against them by the respondent Federal Trade Commission.

After hearing, in a proceeding duly initiated, the Commission concluded that the use of an apparently official name for an unofficial publication, privately owned and operated, is misleading and unlawful, and that no qualification or explanation of the name would eliminate its misleading and deceptive tendency. The Commission further concluded, inter alia, that various slogans employed by the petitioners mislead and deceive the public into the erroneous belief that the magazine is an official organ of the United States Navy Department and contains complete coverage of Navy news. It further found that the corporation had been falsely represented as having national and regional offices. The Commission therefore ordered the corporation and the two individuals to cease and desist from: (a) using the name "United States Navy Magazine"; (b) representing that the publication is officially connected with or sponsored by the United States Navy; (c) representing that the publication is owned, edited or published by naval personnel; (d) representing that the publication contains a complete coverage of Navy news from the ships, stations, bases or yards of the United States Navy or from Washington, D. C.; and (e) representing that the publication has a national office or an editorial office at any location contrary to fact.

The petitioners ask that we strike from the order the prohibition against using the name "United States Navy Magazine," the prohibition against representing that the publication is owned, edited or published by naval personnel, and the prohibition against representing that it has a national office.

It is argued that the Commission exceeded its authority in requiring the abandonment of the trade name "United States Navy Magazine," since all that is reasonably necessary to correct the evil found to exist is to order that the qualifying words "Not owned by the Government" be prominently used in immediate connection with the name of the magazine.

Although the Commission should go no further, in a case like this, than is reasonably necessary to correct the evil and protect the public, it has a wide "latitude for judgment" in selecting a remedy and in determining whether qualifying words will eliminate deception. *Siegel* v. *Federal Trade Commission*, 327 U. S. 608 (1946) [42 F. T. C

902; 4 S. & D. 476]. The Commission's conclusion that qualification or explanation to the effect that the publication has no official connection with the United States Navy would not eliminate the tendency of the name to mislead and deceive, is in accord with our decision in *Federal Trade Commission* v. *Army and Navy Trading Co.*, 66 App. D. C. 394, 88 F. (2d) 776 (1937) [24 F. T. C. 1601; 2 S. & D. 374]. There the appellees suggested, just as the petitioners do here, that the trade name "Army and Navy Trading Company" be qualified by some such phrase as "Not connected with the Army and Navy." We held that no qualifying words would wholly eliminate the deception.

With reference to the portion of the order requiring them to cease and desist from representing "That said publication is owned, edited or published by naval personnel," petitioners assert they have not so represented. They have stated, they say, "that the magazine is 'Owned, edited and published by "Navy" personnel,' not Naval personnel." In other words, they distinguish between the terms "Navy personnel" and "Naval personnel." Carlin is a permanently retired chief warrant officer and Fenstemaker, once a member of the Naval Reserve, is a Civil Service clerk employed by the Navy as a civilian. The other stockholders are in an inactive status as far as the Navy is concerned. The argument that Carlin and his associates are Navy personnel, although they are not Naval personnel, is a quibble which cannot prevail. The Federal Trade Commis**[19]**sion need not concern itself with a technical distinction between the two terms, since the public would not be aware of such a distinction and would be deceived by either term.

As the record supports all portions of the order under attack, the petition for modification will be denied.

Affirmed.

RESTRAINING AND INJUNCTIVE ORDERS OF THE COURTS[1]

FEDERAL TRADE COMMISSION v. NATIONAL HEALTH AIDS, INC. ET AL.

Civ. A. No. 6077—F. T. C. Docket 5997

(United States District Court, D. Md., Civ. Div., Nov. 13, 1952)

Order granting temporary injunction, following the opinion and decision of the Court in said matter, to restrain defendant corporation, its officers, etc., from disseminating in commerce, etc., any advertisement which represents

[1] During the period covered by this volume, namely, July 1, 1952, to June 30, 1953, injunctions were denied as follows:

Liggett & Myers Tobacco Co. v. *Federal Trade Commission,* in which the Commission sought unsuccessfully to enjoin the dissemination of allegedly false advertising by Liggett & Myers, pending the issuance of a complaint, under Secs. 5 and 12 of the Federal Trade Commission Act, namely, defendant's advertising that its Chesterfield cigarettes can be smoked without inducing any adverse effect upon the nose, throat, and accessory organs. In denying the injunction, the D. C., S. D. of N. Y., on Dec. 1, 1952, rejected the Commission's contention that cigarettes were a "drug" under the provisions authorizing the Commission to seek injunction against dissemination of false advertisements to induce the purchase of drugs. 108 F. Supp. 573, *ante,* at p. 1681. For decision of Court of Appeals, Second Circuit, on May 4, 1953, affirming said denial of preliminary injunction for lack of jurisdiction over the subject matter, see 203 F. (2d) 956, *ante,* at p. 1759. Said matter, in which complaint subsequently issued in Docket 6077, is pending, awaiting decision, at this writing.

Dr. A. Posner Shoes, Inc. v. *Federal Trade Commission,* in which plaintiff first sought unsuccessfully in the S. D. of N. Y. to enjoin the Commission from continuing its administrative proceeding in Docket 6003 (in which the Commission charged respondent with making false claims respecting so-called orthopedic shoes). In said proceeding the Commission by interlocutory ruling had sustained the hearing examiner in denying respondent Posner's motion to dismiss the complaint against it on the ground of *res judicata,* namely, dismissal by the Commission on Oct. 28, 1937, of an earlier complaint in Docket 2380, 25 F. T. C. 1510. Judgment of the District Court, District of Columbia, to which the matter had been removed on the ground of venue, denying plaintiff's motion for temporary injunction on April 30, 1953, for lack of jurisdiction, was affirmed by the Court of Appeals for the District of Columbia on June 19, 1953. Cease and desist order in said matter issued June 16, 1954, 50 F. T. C. —.

Philip Morris & Co., Ltd., Inc. v. *Federal Trade Commission,* in which the Court of Appeals for the District of Columbia on May 11, 1953, denied the Commission's motion for issuance of an injunction restraining and enjoining petitioner from making certain prohibited representations concerning Philip Morris cigarettes, until the Commission's cease and desist order, then under review in said Court, became final or was set aside. Said order, issued December 29, 1952, Docket 4794, 49 F. T. C. 703, required respondent to cease representing, among other things, that its cigarettes would not irritate the upper respiratory tract, and from making other related misrepresentations. Subsequently, in response to Commission motion, said Court, on Aug. 28, 1953, set aside such order and remanded the case to the Commission "for reconsideration and such proceedings and disposition as the public interest, the facts, and the law may warrant".

that defendant's "NHA Complex", used as directed, will make one well and keep one well, that it is a competent or effective treatment for or will cure arthritis, rheumatism, and numerous other ailments and conditions, etc., and from making certain other representations in said connection, as in said order specified, until the complaint issued by the Commission has been dismissed by it or duly set aside by a Court of Appeals or the Supreme Court, or has become final.[2]

Mr. Daniel J. Murphy and *Mr. Joseph Callaway*, of Washington, D. C., *Mr. Bernard J. Flynn*, U. S. Atty., of Baltimore, Md., for plaintiff.

Freer, Church and Green, Mr. Robert E. Freer and *Miss Nelle Ingels*, of Washington, D. C., and *Mr. Bernard H. Herzfeld*, of Baltimore, Md., for defendants.

ORDER FOR PRELIMINARY INJUNCTION

This case comes on to be heard upon the verified complaint of plaintiff, Federal Trade Commission and supporting affidavits, upon motion of plaintiff for the issuance of a preliminary injunction against National Health Aids, Inc., a corporation, and Charles D. Kasher, individually and as president of said corporation; upon the verified answers of National Health Aids of Baltimore, Inc., and the supporting affidavits, to the complaint and motion of plaintiff above mentioned, upon briefs filed by both sides; and

It appearing to the Court that National Health Aids of Baltimore, Inc., a corporation organized under the laws of Maryland was formerly National Health Aids, Inc., a corporation, and is the corporate defendant in this action; and

It further appearing to the Court that the defendant, National Health Aids, of Baltimore, Inc., a corporation, was duly served with copy of complaint and motion of plaintiff for a preliminary injunction herein within the District of Maryland, has filed answer herein and that the Court has jurisdiction over the said defendant and the subject matter hereof; and

It appearing to the Court that the defendant, Charles D. Kasher, has not been served with copy of said complaint or said motion and that the Court does not have jurisdiction over this individual defendant; and

It appearing to the Court that the answering defendant is engaged in the sale and distribution of a preparation, which is either a drug or a food, as "drug" and "food" are defined in the Federal Trade

[2] For preceding opinion and decision, reported in 108 F. Supp. 340, see *ante*, at p. 1661. For cease and desist order which followed complaint in question in Docket 5997, issued Dec. 3, 1952, see *ante*, at p. 601.

Commission Act, advertised as NHA Complex, in commerce between and among the various states of the United States; and

It appearing to the Court that the composition of the recommended daily dosage and directions for use on the label of said preparation are as follows:

Composition: "EACH ¼OZ. CONTAINS:

Minimum Assay	*Minimum Adult Daily Requirement*	*Percentage of Daily Requirement*
Vitamin A (Vitamin A Palmitate) 4000 U. S. P. Units	4000 U. S. P. Units	100
Vitamin B–1 (Thiamine Hydrochloride) 1 Miligram	1 Milligram	100
Vitamin B–2 (Riboflavin) 2 Milligrams	2 Milligrams	100
Vitamin C (Ascorbic Acid) 30 Milligrams	30 Milligrams	100
Vitamin D (Irradiated Ergosterol) 400 U. S. P. Units	400 U. S. P. Units	100
Niacinamide 10 Milligrams	10 Milligrams	100

Plus the following Vitamins for which the need in human nutrition has not been established: D Panthenol 215 Mcgs., Vitamin E (Wheat Germ Oil Fortified with Alpha Tocopherol Acetate) 0.5 Mgs., Vitamin B–12 (Oral Gradé) 1 Mcg., Inositol 7.5 Mgs., Choline 15 Mgs., plus trace amounts of other Vitamins.

Minimum Assay	*Minimum Adult Daily Requirement*	*Percentage of Daily Requirement*
Essential Amino Acids 100 Milligrams	-------------	---
Iron (Ferrous Sulfate) 10 Milligrams	10 Milligrams	100
Iodine (Potassium Iodide) 0.1 Milligram	0.1 Milligram	100

In addition, 100 Mgs. of Calcium and 100 Mgs. of Phosphorus (from DiCalcium Phosphate). Plus trace amounts of the following Minerals for which the need in human nutrition has not been established: Potassium (from Potassium Iodine) 0.033 Mgs., Copper (from Copper Sulfate) 0.35 Mgs., Sodium (from Sodium Chloride) 5.5 Mgs., Zinc (from Zinc Sulfate) 0.35 Mgs., Cobalt (from Cobalt Sulfate) 0.35 Mgs., Manganese (from Manganese Sulfate) 0.35 Mgs., Magnesium (from Magnesium Carbonate) 0.35 Mgs., Sulfur 1 Mg., Fluorine (from Sodium Fluoride) 0.5 Mgs., Boron (from Sodium Metaborate) 0.2 Mgs., Molybdenum (from Sodium Molybdate) 0.2 Mgs."

Directions:

"Adults take ¼ oz. daily (which is approximately 2 level teaspoonfuls or 4 half teaspoonfuls daily) followed by water. Or take as directed by your physician"; and

It appearing to the Court that said answering defendant prior to the filing of the complaint herein has disseminated and caused to be disseminated certain advertisements concerning said product, NHA Complex by various means in commerce as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing and which are likely to induce directly or indirectly the purchase of said preparation NHA Complex; and said answering defendant has also disseminated and caused the dissemination of advertisements concerning said preparation by various means for the purpose of inducing and which are likely to induce directly or indirectly the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisements are alleged by the plaintiff to be false in that they represent directly or through implication that the preparation NHA Complex, used as directed, will make one well and keep one well: that, used as directed, said preparation is a competent and effective treatment for and will cure arthritis, rheumatism, neuralgia, sciatica, lumbago, gout, coronary thrombosis, brittle bones, bad teeth, malfunctioning glands, infected tonsils, infected appendix, gall stones, overweight, underweight, neuritis, constipation, indigestion, lack of energy, lack of vitality, lack of ambition, and inability to sleep; that all persons in this country consume a diet deficient in vitamins, minerals, and proteins, and that it is necessary for every one to use a dietary supplement, such as NHA Complex to obtain the vitamins, minerals, and proteins necessary for good health; and

It appearing to the Court that there exists between the parties hereto, a controversy, the determination of which will require a full presentation of all the facts with reference thereto, which full presentation is contemplated by the Federal Trade Commission Act shall be made to said Commission and not to the Court upon application for preliminary injunction: and

It appearing to the Court from a full consideration of all the pleadings and supporting affidavits that there is reasonable cause to believe that the answering defendant herein is and was, prior to the filing of the complaint herein engaged in the dissemination of false advertisements for said preparation, NHA Complex, in violation of the Federal Trade Commission Act and that plaintiff is entitled to a preliminary injunction as prayed for in said complaint.

Therefore, it is ordered, adjudged and decreed, That the defendant, National Health Aids of Baltimore, Inc., a corporation, its officers, agents, employees, servants, and assigns, and all other persons having notice of this order be, and they hereby are, and each of them hereby is (until the complaint issued by the Federal Trade Commission is dismissed by the Commission, or set aside by a Circuit Court of Appeals or the Supreme Court of the United States on review or the order of the Commission to cease and desist made thereon becomes final within the meaning of Section 5 of the Federal Trade Commission Act), enjoined and restrained from:

Disseminating, or causing to be disseminated, any advertisement by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said preparation advertised and sold as NHA Complex, or any product of substantially similar composition or possessing substantially similar properties, whether sold under the same name or any other name, which advertisement represents directly or by implication:

1. That said preparation used as directed will make one well and keep one well;

2. That said preparation is a competent or effective treatment for or will cure arthritis, rheumatism, neuralgia, sciatica, lumbago, gout, coronary thrombosis, bad bones, bad teeth, malfunctioning glands, infected tonsils, infected appendix, gall stones, overweight;

3. That said preparation, used as directed is of any value in the treatment of diseases, disorders, and symptoms such as neuritis, underweight, constipation, indigestion, lack of energy, lack of vitality, lack of ambition, or inability to sleep, except when such diseases, disorders and symptoms are due soley to mild vitamin and mineral deficiencies, and then only when said preparation is taken continuously over a long period of time or that the diseases, disorders, and symptoms mentioned in this paragraph result only from vitamin or mineral deficiencies;

4. That all persons in this country consume a diet deficient in vitamins, minerals, and proteins or that it is necessary for every one to use a dietary supplement such as NHA Complex to obtain the vitamins, minerals, and proteins necessary for good health.

Disseminating, or causing to be disseminated, any advertisement by any means for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said preparation, advertised and sold as NHA Complex, or of any product of substantially similar composition or possessing substantially similar properties, whether sold under the same or any other name, which advertisement contains any of the representations prohibited above.

It is further ordered that this order of injunction be issued without bond and that it shall be effective 10 days after date.

Dated this 13th day of November 1952.

260133—55——116

FEDERAL TRADE COMMISSION v. KEN WHITMORE, INC. AND SIDNEY SISSELMAN

Civ. A. No. 53-22-F—F. T. C. Docket 6091

(United States District Court, D. of Massachusetts, Jan. 12, 1953)

Findings of fact in connection with the manufacture and introduction, sale, etc., in commerce of certain ladies' coats. which, as found, were wool products, as defined in the Wool Products Labeling Act, contained no hair or fiber of the Cashmere goat. and were misbranded in connection with the aforesaid and other matters in violation of said Act; conclusion of law that defendants violated Sec. 3 of said Act and that the Commission was entitled to a preliminary injunction under the provisions of Sec. 7 (b) thereof; and order for such injunction (following prior temporary restraining order) enjoining respondents, until issuance and disposition of the Commission's complaint in the matter, from introducing, etc., any product containing or purporting to contain wool, etc., which is misbranded as in said order set forth.[1]

Mr. William M. King and *Mr. Henry D. Stringer*, both of Washington, D. C., for the Commission.

Mr. Sidney Sisselman, of Pittsfield, Mass., for defendants.

Findings of Fact and Conclusions of Law

This action having been tried before the court I make and file the following findings of fact and conclusions of law constituting:

FINDINGS OF FACT

I. Ken Whitmore, Inc., is a corporation duly incorporated under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business at 16 Oak Street, Pittsfield, Massachusetts, within the jurisdiction of this Court.

Sidney Sisselman is an individual residing and transacting business in the District of Massachusetts, and is president of said corporate defendant with his office and principal place of business at 16 Oak Street, Pittsfield, Massachusetts.

The said corporate defendant and Sidney Sisselman, as president of said corporation, formulate, control, and direct the policies, acts and practices of said corporation and act together in cooperation with each other in performing the acts and practices hereinafter set out.

II. The defendants are now, and for several years past have been, engaged in the manufacture of articles of wearing apparel for women, including ladies' coats. These ladies' coats are wool products as that

[1] Such complaint issued by the Commission in Docket 6091, April 1, 1953, and was followed on July 7, 1953, 50 F. T. C. —, by the decision of the Commission adopting the initial decision, with its cease and desist order, of the hearing examiner.

term is defined in Section 2 (e) of the Wool Products Labeling Act of 1939, and such wool products are and have been introduced, manufactured for introduction, sold, delivered for shipment and offered for sale in commerce, as commerce is defined in the said Act, by the defendants.

III. Some of the ladies' coats referred to in Paragraph II, supra, are and have been misbranded within the intent and meaning of the Wool Products Labeling Act of 1939, and the Rules and Regulations thereunder, in that said coats are and have been falsely and deceptively stamped, tagged, labeled, and otherwise identified, in this, that said coats carry labels with the following legend thereon:

"A Blend of Wool and
IMPORTED
(Design)
CASHMERE
All Wool"

By using the labels aforesaid the defendants represent that their coats are made of fabrics which are a blend of wool and imported Cashmere fiber. Such representation and label is false in that said coats are not made of fabrics which contain any hair or fiber of the Cashmere goat, but in truth and in fact are made of fabrics which contain only the wool or fleece of the sheep or lamb.

IV. The coats referred to in Paragraph II are and have been further misbranded, in that in addition to the labels referred to in Paragraph III, supra, they carry additional labels showing the following legends:

"A coat to wear everywhere—
all seasons
this 100% pure wool fabric
has been woven to the rigid
specifications
of Ken Whitmore
tailorman
100% Wool WPL 466"

"This garment
made of
100% Virgin Wool
Wool Interlining
Mfg. No. 466"

on reverse

"Ken Whitmore, Inc.
Pittsfield, Mass."

The use on the same coats of labels which state that the coats are made of 100% Wool and another label that states the coats are a blend of wool and imported cashmere has the capacity and tendency to mislead and deceive and does mislead and deceive the purchasing public, and causes such coats to be misbranded within the intent and meaning of the Wool Products Labeling Act of 1939 and Rule 30 (16 CFR § 300.30) of the Rules and Regulations thereunder.

V. The coats referred to in Paragraph II, supra, are and have been further misbranded, within the intent and meaning of the Wool Products Labeling Act of 1939 and Rule 25 (16 CFR § 300.25) of the Rules and Regulations thereunder, in this, that the label referred to in Paragraph III states that the coats contain cashmere fiber, when such is not the fact.

VI. The coats referred to in Paragraph II, supra, are and have been further misbranded within the intent and meaning of the Wool Products Labeling Act of 1939 and Rule 19 (16 CFR § 300.19) of the Rules and Regulations thereunder, in this, that the label referred to in Paragraph III does not give the percentage of the alleged cashmere fiber present therein, if any.

VII. The defendants have knowledge that the coats manufactured by them and referred to above are misbranded, as hereinbefore alleged, and they are knowingly and wilfully continuing to introduce, sell, deliver for shipment, and offer for sale, in commerce, said misbranded coats.

VIII. The further introduction, selling, delivering for shipment, and offering for sale, in commerce, of these misbranded coats, may and will cause irreparable injury to the public, in that purchasers will be induced to buy these misbranded coats by reason of the false and fraudulent labels appearing thereon, there being a decided preference in the public to buy coats containing cashmere fiber.

CONCLUSIONS OF LAW

I. The defendants have violated Section 3 of the Wool Products Labeling Act of 1939 by introducing, manufacturing for introduction, selling, distributing, delivering for shipment, and offering for sale, in commerce, misbranded wool products.

II. The Federal Trade Commission, plaintiff herein, is entitled to a preliminary injunction under and by virtue of Section 7 (b) of the Wool Products Labeling Act of 1939.

Let an order be entered accordingly.

ORDER FOR PRELIMINARY INJUNCTION

This cause coming on to be heard on the motion of plaintiff for a preliminary injunction; and due notice having been given to defendants; and the defendant Sidney Sisselman individually and as president of Ken Whitmore, Inc., appeared in person and agreed that a preliminary injunction might issue; and the court having considered the verified complaint filed herein together with the affidavits submitted in support thereof; and being fully advised in the premises, is of the opinion that the plaintiff has made a proper showing for a preliminary injunction under the provisions of Section 7 (b) of the Wool Products Labeling Act of 1939; and finds:

That the defendants have been violating Section 3 of the Wool Products Labeling Act of 1939 in this, that said defendants have introduced, manufactured for introduction, sold, distributed, delivered for shipment, and offered for sale, in commerce, wool products, which are misbranded within the intent and meaning of such Act and the Rules and Regulations thereunder.

It is therefore ordered, adjudged and decreed, That, until complaint is issued by the Federal Trade Commission under the Federal Trade Commission Act, and such complaint is dismissed by the Commission or set aside by a court on review, and until order to cease and desist thereon by the Commission has become final within the meaning of the Federal Trade Commission Act, the defendants, Ken Whitmore, Inc., a corporation and Sidney Sisselman, individually and as president of such corporation, and each of them, their officers, agents, servants and employees, be and they hereby are restrained and enjoined from:

Introducing, manufacturing for introduction, selling, distributing, delivering for shipment, and offering for sale, in commerce, any product containing, purporting to contain, or represented as containing, wool, reprocessed wool, or reused wool, which is misbranded in the following respects:

1. By attaching labels to wool products stating that such products contain the hair or fiber of the cashmere goat, when such is not the fact;

2. By attaching labels to wool products showing that such products are made of 100% wool and other labels showing that such products are made of a blend of wool and cashmere fiber;

3. By attaching labels to wool products which show the name of a fiber not present in such products;

4. By attaching labels to wool products that show they contain cashmere fibers without stating the percentage thereof.

Done this 12th day of January, 1953.

FRANCIS J. W. FORD,
District Judge.

Note: On Jan. 7 preceding Judge Ford issued "Temporary Restraining Order" as follows:

TEMPORARY RESTRAINING ORDER

This cause came on to be heard ex parte on motion of counsel for the plaintiff who represented that a temporary restraining order should be issued forthwith without notice to prevent irreparable loss and injury to the public in view of the fact that plaintiff alleges that the defendants are introducing, selling, delivering for shipment and offering for sale, in commerce, ladies coats which are wool products and which are alleged to be misbranded under Section 3 of the Wool Products Labeling Act of 1939, and it appearing to the court that plaintiff is entitled to the relief prayed for under Section 7 (b) of the Wool Products Labeling Act of 1939.

Now, therefore, it is ordered that the said Ken Whitmore, Inc., a corporation, and Sidney Sisselman, individually and as President of such corporation, their officers, agents, servants and employee be and hereby are enjoined and restrained from:

Introducing, manufacturing for introduction, selling, distributing, delivering for shipment, and offering for sale, in commerce, any product containing, purporting to contain or represented as containing, wool, reprocessed wool, or reused wool which is misbranded in the following respects:

1. By attaching labels to wool products stating that such products contain the hair or fiber of the cashmere goat, when such is not the fact;

2. By attaching labels to wool products showing that such products are made of 100% wool and other labels showing that such products are made of a blend of wool and cashmere fiber;

3. By attaching labels to wool products which show the name of a fiber not present in such products;

4. By attaching labels to wool products that show they contain cashmere fiber without stating the percentage thereof.

This restraining order to expire on January 12, 1953 unless otherwise extended by the court.

[Sgd] FRANCIS J. W. FORD,
District Judge.

Jan. 7, 1953
2:15 P. M.

PENALTY PROCEEDINGS

United States v. *Domestic Diathermy Co.;* United States District Court for the Southern District of New York; judgment entered for $20,038.20 on Sept. 22, 1952.

Respondents Max E. Heyman and Maude S. Jaret, individuals, their agents, representatives, and employees, had been ordered as of June 19, 1943, in connection with the offering for sale, sale, or distribution of respondents' device designated as "Domestic Short-Wave Diathermy," or any other device of substantially similar character, whether sold under the same name or under any other name, to cease and desist from directly or indirectly:

1. Disseminating or causing to be disseminated any advertisement, by means of United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or by implication:

(a) That said device is safe or harmless.

(b) That said device, when used by unskilled laymen in the treatment of self-diagnosed conditions, constitutes a competent or effective treatment of or remedy for rheumatism, arthritis, sciatica, neuralgia, lumbago, sinus trouble, neuritis, laryngitis, tonsilitis, bursitis, muscular ailments, common colds, asthma, traumatic injuries, or ailments common to women.

(c) That said device constitutes a competent or effective treatment for the alleviation of pain resulting from diseases and ailments of the human body unless specifically limited to conditions which do not involve acute inflammatory processes, glandular structures, or the special senses.

(d) That the use of said device will renew youthful vigor, establish body efficiency and resistance to disease, or restore body or spirit.

(e) That the treatment provided by said device is similar to that known as "friendly fever" or that the results of its use are comparable to those obtained through the use of "friendly fever."

2. Disseminating or causing to be disseminated any advertisement by means of the United States mails, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement fails to reveal clearly and conspicuously that said device is not safe for use for any condition unless and until a competent medical authority has determined, as a result of diagnosis, that the use of diathermy is indicated, and has prescribed the frequency and

rate of application of the treatments, and the user has been adequately instructed by a trained technician in the use of such device.

3. Disseminating or causing to be disseminated any advertisement, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondents' device, which advertisement contains any representation prohibited in paragraph 1 hereof or which fails to contain the warning set forth in paragraph 2 hereof.

It is further ordered, That the respondents shall, within 10 days after service upon them of this order, file with the Commission an interim report in writing stating whether they intend to comply with this order, and, if so, the manner and form in which they intend to comply and that within 60 days after the service upon them of this order the respondents shall file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order. (Docket 4942, 36 F. T. C. 920 at 931.)

United States v. *Gerald A. Rice et al.*; United States District Court for the Western District of Washington; judgment entered for $25,500 on Oct. 7, 1952.

Respondent individual, his agents, representatives, and employees, had been ordered as of Aug. 27, 1948, in connection with the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of courses of study and instruction intended for preparing students thereof for examinations for Civil Service positions in the United States Government, or any similar courses of study, to cease and desist from:

1. Representing, directly or by implication, through the use of the terms "Public Service Institute," "Civil Extension Service," "Office of Civil Preparation," or any other term of similar import or meaning, as a trade name or as a part thereof, that the respondent has any connection with the United States Government or any branch or agency thereof.

2. Representing, directly or by implication, through the use of the terms "Director," "Assistant Director," "Chief Special Agent," or any other term of similar import or meaning, to designate or describe the respondent or any of his representatives or salesmen, that the respondent or any of his employees have any connection with the United States Government or any branch or agency thereof.

3. Representing, through the use of emblems or other picturizations resembling or simulating official United States Government seals or insignia that the respondent or his business is connected with the United States Government or any branch thereof.

4. Representing in any manner, either directly or by implication, that the respondent or his business has any connection with the Government of the United States or any branch or agency thereof, including the United States Civil Service Commission.

5. Representing, directly or by implication, that the respondent is authorized by the United States Civil Service Commission to qualify applicants for Government positions, or that positions in the United States Civil Service may or can be obtained through the respondent or by completing any of the respondent's courses of study.

6. Misrepresenting in any manner the positions and opportunities for employment in United States Civil Service positions of students completing the respondent's courses of study.

It is further ordered, That the respondent shall, within 60 days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order. (Docket 5321, 45 F. T. C. 192 at 204.)

United States v. *Midwest Studios, Inc.;* United States District Court for the District of Oregon; judgment entered for $14,000 on Dec. 23, 1952.

Respondent corporation, its officers, representatives, agents, and employees, had been ordered as of May 11, 1939, in connection with the offering for sale and sale and distribution of colored or tinted photographs or colored enlargements thereof having a photographic base, and of frames therefor, in commerce as "commerce" is defined in the Federal Trade Commission Act, to cease and desist from:

1. Representing, directly or in any manner, that colored or tinted pictures, photographs, or photographic enlargements are hand-painted or are paintings.

2. Using the terms "free hand-painted portrait," "oil painting," or the word "painting," either alone or in conjunction with any other terms or words or in any way to designate, describe, or refer to colored or tinted pictures, photographs or photographic enlargements or other pictures produced from a photographic base or impression.

3. Misrepresenting that any specified sum is the actual cost of "handling" a picture, "wrapping," or "parcel post," or the "painter's time," or otherwise misrepresenting the actual cost of either materials or delivery.

4. Representing that a picture similar to sample displayed will be delivered unless the picture so delivered is of the same kind, quality, design, and workmanship.

5. Representing that respondents are conducting any special or advertising campaign in any particular place or locality for the purpose of obtaining special exhibitors, or otherwise, unless such campaign

or such special offer is in fact then being conducted or made in such locality for such purpose.

6. Representing that said pictures are being, or will be, sold only to a limited number of customers, or otherwise misrepresenting any material fact concerning the terms and conditions of sale, or the extent to which the sale of such pictures is limited.

7. Misrepresenting through the use of a "draw", or drawing contest, or through the use of "lucky" blanks, slips, coupons, or certificates, or through the use of any other device, plan or scheme, or through any introductory or advertising offer, or otherwise, that any customer thereby would obtain a financial advantage or would be entitled to receive any picture free or would receive a substantial discount or reduction in the price of any picture or pictures.

8. Concealing from or failing to disclose to customers upon initial contact that the finished picture when delivered will be so shaped and designed that it can only be used in a specially designed, odd style of frame which can be obtained from Midwest Studios only.

9. Representing to customers in any manner that suitable frames for pictures may be purchased elsewhere unless such odd design of frame can in fact be readily purchased in the customary marts of trade.

10. Representing as the customary or regular prices or values of frames prices and values which are in excess of the prices at which frames are regularly and customarily sold in the normal and usual course of business.

11. Obtaining promissory notes which recite that there is an outstanding "balance due on portrait," or otherwise misrepresenting that any sum or balance is due on a picture, when in fact the purchaser has previously paid the full prescribed contract price for said picture.

12. Retaining the original photograph loaned to respondents for use in making its picture, or retaining the pictures made by it therefrom, after full payment has been made therefor, unless all of the terms and conditions upon which said original photograph or said picture made by respondent is to be retained in connection with the purchase and payment for a frame, or for any other purpose, are fully and adequately revealed to the purchaser at the time the original photograph is obtained from such purchaser.

It is further ordered, That the respondents shall, within 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. (Docket 3011, 28 F. T. C. 1583 at 1604.)