

IN THE MATTER OF
STANDARD SEWING EQUIPMENT CORPORATION AND
WILLIAM J. HACKETT AND HARRY KRON

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5
OF THE FEDERAL TRADE COMMISSION ACT

Docket 5888. Complaint, July 13, 1953¹—Decision, May 2, 1955

Order requiring an importer in New York City of sewing machine heads on which appeared the words "Made in Occupied Japan" or "Japan," and of completed sewing machines in the assembling of which those words on the heads were concealed by attachment of the motor, to cease offering their products for sale without clear and conspicuous disclosure of the country of origin of the heads, and to cease using the brand or trade name "Universal" without using in connection therewith in legible and clearly visible marking their corporate name.

Before *Mr. Frank Hier*, hearing examiner.

Mr. William L. Taggart and *Mr. Ames W. Williams* for the Commission.

Schnader, Harrison, Segal & Lewis, of Philadelphia, Pa., and *Holtz & Rose*, of Boston, Mass., for respondents.

Carretta & Counihan, of Washington, D. C., also represented Standard Sewing Equipment Corp. and William J. Hackett.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on June 27, 1951, issued and subsequently served its complaint in this proceeding upon respondents, Standard Sewing Equipment Corporation, a corporation, and William J. Hackett and Harry Kron, individually and as officers of said corporation, charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before the above-named hearing examiner, theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final consideration by said hear-

¹ As amended.

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ing examiner on the complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions presented by counsel; and said hearing examiner having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusions drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Standard Sewing Equipment Corporation is a corporation organized and existing under and by virtue of the laws of the State of New York with its office and principal place of business located at 114 W. 27th Street, New York, New York. Respondents William J. Hackett and Harry Kron, are President and Secretary-Treasurer, respectively, of corporate respondent and acting as such officers formulate, direct and control the policies, acts and practices of said corporation, their addresses being the same as that of the corporate respondent. There is no other officer, employer, agent or representative of corporate respondent, who has any control, authority or responsibilities over its acts and practices.

PAR. 2. Respondents are now and have been for several years last past, engaged in the sale of sewing machine heads imported from Japan by them, and of completed sewing machines of which such heads are a part, to retailers who, in turn, resell to the purchasing public. In the course and conduct of their business, respondents cause their said products, when sold, to be transported from their place of business in the State of New York to the purchasers thereof located in the various other States, and maintain and at all times mentioned herein have maintained a course of trade in said products in commerce among and between the various States of the United States. Their volume of trade in said commerce has been and is substantial.

PAR. 3. Respondents first began the importation of these sewing machine heads manufactured in Japan in the early months of 1949. Such machines had a gold decalcomania embossed or imprinted on the black enamel of the sewing machine head, reading "Japan" or "Made in Occupied Japan" just above the bed plate of the head on the rear of the vertical arm. These sewing machine heads are designed for electrical operation and when a motor is attached thereto at the only place provided for it, on the rear of the vertical arm, the aforesaid decalcomania marking, showing the origin of the machine head, is effectively concealed from even careful inspection, short of removing the motor, or of turning the machine into an awkward and unusual position, from the ordinary user's standpoint, which action would

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eventuate only from a desire to see that particular spot but entirely unlikely to ensue from ordinary or normal use of the machine. There is substantial evidence in the record, that purchaser-users never saw this concealed marking, or suspected the foreign origin of their purchases, at least until it was called to their attention by someone familiar with these machines and the marking. The finding is that such marking is for practical purposes, and to the ordinary user or purchaser, completely and effectively concealed.

PAR. 4. Sometime prior to June 1, 1949, the Bureau of Customs of the U. S. Treasury wrote corporate respondent that it was necessary in order for these above-described machine heads to pass through customs legally, that it require that the marking indicating the country of origin, appear on the face of the machine in a place where it was not likely to be defaced, covered, or obscured by combination with any other article, that the method of marking should be legible, indelible and permanent, and the approved forms of marking included die stamping, the use of a metal plate bearing the name of the country of origin, and stamping, or the use of the type of decalcomania which is not readily removed by ordinary washing with normal solvents. Thereafter respondents adopted, with the approval of the Customs authorities, a metal medallion, hexagonal or oval in shape about 1½ inches vertical and 1 inch horizontal, in gold or brass finish, bearing the legend "De Luxe" in raised quarter inch letters, and below that "De Luxe Family Sewing Machine Quality" in raised letters approximately ⅛" in length, and below that the word "Japan" in raised letters of approximately ¼" in length, and ordered their Japanese suppliers to attach them to all machines by rivets in the front of the vertical arm. Since the middle part of 1949 all sewing machine heads imported by respondents have been so marked.

PAR. 5. These brass or brass-colored medallions or plaques are in bright gold color, in small raised letters only of the same color, with no background coloring to emphasize the raised letters, so that the word "Japan" is indistinct, difficult to read at a distance of greater than a foot, unemphasized and distinguishable only by careful inspection. There is also sufficient evidence in the record that users and purchasers did not see, or seeing, did not comprehend such marking.

PAR. 6. When this marking is taken with the additional facts that the motor attached by respondents to these machines bear metal labels reading "Universal—Made in U. S. A.," "Delco—Made in Rochester, N. Y.," "Simplex—Made in U. S. A." or "Universal sewing machine motor—made in U. S. A.," which labels are plainly legible and conspicuous when the machine head is viewed from above; that the book

of instructions given when the machine is sold to consumers, nowhere mentions the place of manufacture of the machine, that the two examples of periodical advertising by the respondent themselves in the record, and that five of the seven examples of dealer advertising, in some instances partially subsidized by respondents nowhere mention importation or the origin of the machine and that the brand name "Universal" appearing on the front and across the top of the horizontal arm, conspicuous and legible at many feet distance, is part of the corporate name, or is the brand name of a number of American concerns, manufacturing and selling in the United States, some of them nationally known, it is plain that many consumer-purchasers would be, and are deceived into the belief, as the record shows, that respondents' Universal sewing machines are made in the United States. The finding accordingly, is that respondents' imported sewing machines and sewing machine heads, are not adequately marked to show their place of manufacture or origin.

PAR. 7. The facts that respondents at no time directly represented their imported sewing machines as being made in the United States, or would refuse to sell any dealer who did so, or that respondents' dealers are under no misapprehension as to the place of manufacture or origination or that respondents have never received any complaint as to customer confusion as to place of origin are immaterial. Respondents by placing in the hands of these dealers, their sewing machines as hereinabove described have provided those dealers with the means and instrumentality whereby the purchasing public may be, and is, misled and deceived as to the place of origin of said machines. This is emphasized by the substantial evidence in the record that these riveted medallions or plaques can be removed with comparative ease, without the marks of removal being discernible except upon the closest inspection. Even the rivet holes can be filled in with a black filler. There is also substantial evidence in the record that even when such holes are left gaping, that users took such holes to be for oiling the machine rather than to indicate the removal of something originally a part of the machine.

PAR. 8. Not all, but a substantial portion of the purchasing public has a decided preference for products of domestic manufacture over those of foreign make, particularly machinery of any kind, and when sewing machines are exhibited and offered for sale to the purchasing public and such articles are not marked at all, or are inadequately marked to show their foreign origin, or if marked and the markings are concealed, removed, or obliterated, such purchasing public understands and believes such articles to be wholly of domestic origin.

PAR. 9. The complaint alleges and the evidence shows that respondents' invoices and form letters which go to respondents' dealers (respondents do not deal with the consuming public) bear the legend "Manufacturers and wholesale distributors sewing machines and supplies" immediately beneath corporate respondents' name and that respondents do no manufacturing and neither own nor control any factory. The complaint further alleges that substantial numbers of retailers prefer to buy products from concerns who manufacture the products sold by them. Of this there is no substantial evidence in the record. Although two of respondents' dealers were witnesses in this proceeding, nothing on this point was asked them. These dealers know that respondents' sewing machines were made in Japan and for aught that appears may have likewise been aware that respondents bought them rather than manufactured them, or may have been wholly indifferent.

PAR. 10. Corporate respondent was organized in 1946, for the purpose of selling in the United States imported sewing machines, it being the first importer to do so, and for approximately two years it imported and sold in the United States the English made "Jones" under that name. Being unable to secure sufficient of these machines, corporate respondent turned to an Italian factory from which it imported sewing machines for a short time in 1948. These machines had a foreign brand name, which respondents decided would hamper rather than aid domestic merchandising and considered the adoption and use first of the name "Standard," but learned upon attempting to register it as a trade-mark "that there were some complications" and thereupon decided on "Universal" as a trade name. The latter name, however, had been registered as a trade-mark by the White Sewing Machine Company of Cleveland, Ohio, for use on sewing machines, but apparently it had not been so used for a number of years. Respondents' attorneys succeeded in having the registration cancelled for non-user by the U. S. Patent Office and on April 4, 1950, the latter issued a trade-mark registration to respondents for the name Universal to be used on sewing machines and it was thereafter put on a majority of the sewing machine heads which respondents imported from Japan by respondents' vendors in Japan, by gold decalomania across the front, and sometimes also on the top of the horizontal arm. Respondents since that time have prevented by some 25 legal actions the use of this brand name "Universal" on sewing machines marketed by others, and have undertaken to have their dealers listed in the classified section of telephone directories all listed under the brand name of Universal sewing machines, as well as regis-

tering each brand name in foreign countries where respondents have dealers.

PAR. 11. The brand name "Universal" appearing frequently but not always surrounded by a line tracing suggestive of a dog bone in shape, has also been registered by the U. S. Patent Office in favor of Landers, Frary & Clark of New Britain, Connecticut, for use on a wide variety of kitchen and household appliances, the original registrations dating back as far as 1906, 1914 and 1916 and the more recent registrations applicable to electrical household appliance being dated in 1933 and since. This firm advertises and sells nationally and extensively through dealers; electric toasters, coffee pots, food mixers, blenders, irons, grills, waffle irons, heating pads, small stoves, blankets, vacuum sweepers, floor polishers, and other household gadgets collectively known as light traffic appliances. These products are extensively advertised, widely sold through thousands of retail distributors and are well and favorably known to a very substantial portion of the purchasing public, particularly the feminine part thereof. The name "Universal" is stamped on many of these products unsurrounded by any dog-bone etching. Neither at the time of respondents' second registration as a trade-mark of the name "Universal" for use on their sewing machines, nor since, did Landers, Frary & Clark file or make any protest. Respondent Hackett testified that he had had some negotiations with the Universal Major Electrical Appliance Company of Lima, Ohio, manufacturers and distributors of the heavier household electrical appliances such as washers, dryers, water heaters, stoves, under the brand name of "Universal" by agreement with Landers, Frary & Clark, as to the former acting as distributor for respondents' Universal sewing machines. Neither it nor Landers, Frary & Clark have ever manufactured or sold sewing machines nor do they have their brand name registered for use on sewing machines. Landers, Frary & Clark also distributes vacuum bottles, food choppers, vacuum cleaners, food freezers and coffee makers under other brand names than "Universal."

PAR. 12. In addition to this, respondents have shown there are some 356 listings in the Manhattan telephone directory of corporations or organizations part of whose business name is the word "Universal" and some 85 similar listings in the Philadelphia telephone directory: that the U. S. Patent Office has issued trade-mark registrations to 64 business concerns throughout the country for the brand name "Universal" of which five are to Landers, Frary & Clark and of which three, other than respondents, are to concerns using such trade names on sewing machines and that there are eighteen state registrations of this trade name in twelve states, although none on sewing machines.

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Respondents and their dealers have also advertised "Universal" sewing machines locally to a considerable extent and such machines are listed in the catalogs of mail order houses and sold in department stores. Such advertising always bears corporate respondents' name or that of the dealer.

PAR. 13. The evidence as to consumer confusion over the name "Universal" is in some conflict. It was stipulated that respondents could produce approximately ten purchasers of respondents' machines who would, if called, testify that the name "Universal" thereon did not indicate to them any connection with Landers, Frary & Clark. On the other hand, more than twenty witnesses in two different locations, most of them housewives, testified in considerable detail that they were and had been for some time familiar with the Universal household electrical appliances sold by Landers, Frary & Clark and with the brand name "Universal" identified therewith, either from seeing advertisements thereof, from ownership, either by gift or purchase, or from seeing or using such appliances in the homes of relatives or friends, that they had a high regard for the utility and durability of such appliances, that when they were shown respondents' Universal sewing machines they received the impression that the latter were made by the same company—Landers, Frary & Clark, which made the "Universal" appliances, that some of them were not told differently by the sales person and in several instances, had that impression given them or strengthened by the salesman's conversation, that they bought respondents' sewing machines under that impression and for that reason. These witnesses were all cross-examined at length and the detail of their testimony as well as their number makes the evidence substantially preponderant that the brand name identity does confuse consumer-purchasers and does deceive them into buying respondents' sewing machines, believing them to be made by and sponsored by Landers, Frary & Clark. In addition thereto is the testimony of the Assistant District Attorney at Fort Worth, Texas, of the results of his investigation, pursuant to many complaints from purchasers, into the distribution in that area through one of respondents' dealers, of respondents' sewing machines, that many purchasers had bought them in the belief that they were made in the United States by Landers, Frary & Clark. On the record in this proceeding, it is immaterial that occasionally the word "Universal" on the products of Landers, Frary & Clark appears within a dog-bone frame on some of their advertising whereas respondents' "Universal" does not, or that respondents occasionally emboss theirs on a globe whereas Landers, Frary & Clark do not.

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PAR. 14. The record shows at least one dealer displaying and selling to the consumer public in the same store respondents' Universal sewing machines and Landers, Frary & Clark's Universal vacuum cleaners. It also shows that respondents' Universal sewing machines are offered for sale by a number of department stores.

PAR. 15. Respondents by placing in the hands of dealers, their sewing-machine heads and completed sewing machines of which the heads are a part, as described above, provide said dealers with a means and instrumentality whereby they may and do mislead and deceive the purchasing public as to the origin, manufacture and sponsorship of said machines.

PAR. 16. Respondents in the course and conduct of their business are in substantial competition in commerce with the makers and sellers of non-imported machines and also with sellers of imported machines.

PAR. 17. The failure of respondents adequately to disclose on their sewing-machine heads that they are manufactured in Japan, and the use by respondents of the brand or trade name "Universal" thereon, has the tendency and capacity to lead substantial numbers of the purchasing public into the erroneous and mistaken belief that respondents' machines are of domestic origin and are manufactured in the United States by the makers or distributors of Universal electrical household appliances, Landers, Frary & Clark, and to induce the purchase of substantial numbers of said sewing machines because of such erroneous and mistaken belief. As a result thereof, trade in commerce has been and may be unfairly diverted to respondents from their competitors and substantial injury has been and is being done to competition in commerce.

PAR. 18. The aforesaid acts and practices of respondent as hereinabove found are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

CONCLUSIONS

1. The foregoing findings of fact are not based in anywise on the testimony appearing in the record at pages 151-200; 227-339; 399-436; which testimony has been ignored and is rejected for lack of credibility and weight because the witness' demeanor under examination and because the testimony elicited under cross-examination of the witness clearly demonstrated to the Hearing Examiner that such testimony was not objective, but on the contrary was biased. The printed ex-

hibits introduced through this witness have, however, been given full weight and credit.

2. The fact that respondents' imported sewing machines are inspected and passed by United States Customs officials at the port of entry as being properly and adequately marked so far as Customs laws are concerned and that respondent has marked its products in accordance with Customs demands is immaterial and no defense to this proceeding (*L. H. & Son, Inc. v. F. T. C.*, 191 F. 2d 954).

3. The Commission has the authority to forbid sale without affirmative and clear disclosure on imported products of the country of origin. *L. Heller & Son, Inc. v. F. T. C.*, 191 F. 2d 954.

4. Whether or not the Singer Sewing Machine Company or any other concern or individual imports into this country articles of foreign manufacture which are not marked, or are inadequately marked as to place of origin is immaterial and no defense to this proceeding. Similar illegality by others is no defense to anyone. *Independent Directory Corporation v. F. T. C.*, 188 F. 2d 468; *Ford Motor Company v. F. T. C.*, 120 F. 2d 175.

5. The fact that Landers, Frary & Clark do not manufacture all of the products distributed by them in commerce under the brand name "Universal" or that they manufacture or sell other very similar products, marked and marketed under different brand names does not dilute or militate against the confusion and deception hereinabove found to exist with reference to the products advertised and branded "Universal" and respondents' sewing machines similarly branded.

6. The fact that respondents sell only to dealers, many or all of whom are aware of the origin of respondents' sewing-machine heads or sewing machines of which said heads are a part, so sold, or are informed thereof by respondents, is no defense to the charge of inadequate or concealed markings, since such machines are obviously intended for ultimate consumer purchase, and respondents, as the importers and distributors, have placed in the hands of others through sale, the means whereby the ultimate purchaser may be and is misled and deceived. *Chas. A. Brewers & Sons v. F. T. C.*, 158 F. 2d 74.

7. Registration of a brand or trade name or mark with the U. S. Patent Office for use on a class of products does not confer on the registrant the unqualified right to use such name where to do so is to confuse such products with products of even an entirely different class in the mind of the consumer because of the identity of the brand, the widespread currency and favorable acceptance of the latter products and their closeness in function and usage to the class of products for which such registration has been issued. Registration

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of a trade-mark is not controlling in a suit for unfair competition arising out of its use, *E. F. Prichard Co. v. Consumers Brewing Co.*, 136 Fed. 512, and the practice or rulings of the Patent Office cannot create a conclusive vested right in the registrant. *White House Milk Products Co. v. Dwinell-Wright Co.*, 111 Fed. 490, 493.

8. The use of a brand or trade name, on the acceptance and identification of which, much effort and money has been expended should not be taken away from the user unless the public interest clearly so requires. There is in this record, however, too much substantial evidence that the purchasers of sewing machines, or at least those who usually instigate their purchase—women—associate the name “Universal” with the products of another company, to doubt that public confusion exists and tends and will tend to induce purchases which otherwise would not be made. It matters not whether Landers, Frary & Clark are indifferent to such usage or confusion. Nor is the good faith of respondents in selecting its brand name, or its lack of intention to trade on the brand name of another, material. It is not private interest or motive which must be served, but solely that of the public.

9. Considerable thought and speculation in observance of the legal principle that a person will not be required to discontinue the use of a name where some remedy “short of excision” will give adequate protection (*Federal Trade Commission v. Royal Milling Company*, 288 U. S. 212; *Jacob Siegel Company v. Federal Trade Commission*, 327 U. S. 608) has been given to requiring the addition of a legend under the word “Universal” on the horizontal arm in letters sufficiently large to be as easily read as the word “Universal” such as “Not connected with Landers, Frary & Clark” or “Unrelated to any other electrical or household appliance” or “Importers and distributors of sewing machines only” or something else which would immediately dispel from the viewer’s mind the impression many of them get from the name “Universal.” However, the evidence is clear that any such decalomania marking can easily, quickly and effectively be obliterated by the superimposition thereon of a different decalomania undetectable by anyone other than an expert. The record shows the same with metal plaques, which can be removed in a matter of minutes, without trace, to the ordinary purchaser of the removal. From the demonstration of this in the hearing room, it would appear also that another and different plaque could be attached with rivets in the same holes without easily discernible marks of substitution. The record is barren of any suggestion by experienced persons as to how adequate protection against the confusion which the evidence dem-

onstrates, can be achieved short of complete excision of the name "Universal."

10. It is not necessary to show that public witnesses saw respondents' machines in the dealers' stores, or bought respondents' machines there or at all. It is sufficient, on the point of brand name confusion, if respondents' sewing machines are exhibited to the witness while testifying, or even if they merely testify to their confusion, or association of the brand name with the products of another seller without ever seeing respondents' product. Actual deception need not be shown and the law under which these proceedings have been brought seeks not only to protect the intelligent, the expert, the dealer, or the careful, but the ignorant, the credulous, the unthinking, the careless, the inattentive, in sum the ordinary, unsuspecting purchaser.

11. The record herein presents a far different picture than that of previous cases heard by this Hearing Examiner where brand names such as Mercury, Hudson or Hoover were alleged to deceive the purchaser into believing the sewing machine was made by the Ford Motor Car Company, the Hudson Motor Company or the Hoover Company. In the first place there is a wide disparity in use, function, price, and size between sewing machines and automobiles. Secondly, a large number of housewives, familiar with the Universal line of household electrical appliances, testified in great detail as to their reactions and impressions, detail which was missing in other records. Thirdly, this record reveals for the first time that a decalomania can be so effectively, cheaply and quickly covered by another and different decalomania that detection of the superimposition is impossible and further, that metal plaques or medallions riveted to the sewing machine head can be easily removed without visible marring of the enameled finish and the rivet holes filled so that only an expert can discern the alteration. It would seem that an adequate and effective marking would be to have the words "Made in Japan" cut into the top side of the bed of the machine head in letters of such size and depth that an enameling or covering with lacquer would not obliterate it and the user could not escape seeing and comprehending such marking. Whether this can be done, or if done, whether it too, can be concealed easily, the record does not reveal.

12. Since it is clear from the record that the individual respondents are the only officers, agents, representatives or employees of corporate respondent who have had or now have any authority or control over the acts and practices involved in this proceeding, the words "and its officers" following the words "a corporation" and the words "and said respondents' representatives, agents and employees" following the

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words "as officers of said corporation" in the order requested in the "Notice" appended to the complaint come within the prohibitions of *R. J. Reynolds Tobacco Co. v. F. T. C.*, 192 F. 2d 535, 540-4 and are accordingly omitted from the following Order.

ORDER

It is ordered, That the respondents, Standard Sewing Equipment Corporation, a corporation, and William J. Hackett and Harry Kron, individually and as officers of said corporation, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of sewing machine heads or sewing machines in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing foreign-made sewing machine heads or sewing machines of which foreign-made heads are a part, without clearly and conspicuously disclosing on the heads the country of origin thereof, in such manner that it cannot readily be hidden or obliterated.

2. Using the word "Universal," or any simulation thereof, as a brand or trade name to designate, describe or refer to their sewing machine heads or sewing machines of which the heads are a part, unless there appears in connection therewith, in legible and clearly visible marking, the name of the corporate respondent "Standard Sewing Equipment Corporation."

It is further ordered, That with respect to any issue raised by the complaint other than those to which this order relates, the complaint be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

By SECRET, Commissioner:

This is an appeal by respondents from an initial decision in which the hearing examiner found that respondents had violated the Federal Trade Commission Act in selling to dealers, who in turn sell to the consuming public, sewing machine heads and sewing machines (1) not adequately marked as to the country of origin (Japan), and (2) deceptively marked with the word "Universal."

In 1949, respondents began the importation from Japan of sewing machine heads, which are manufactured there under respondent's supervision. The head consists of a horizontal and vertical arm with sewing machinery, all attached to a base plate. After importation, the head is placed in a carrying case or cabinet, and usually a motor, foot pedal and light are attached. Such machines are then distributed

under the name Universal which word is attached in Japan by a decalcomania on the horizontal arm. In some cases, heads are imported without the name "Universal," for sale to manufacturers who distribute them under their own trade names. The number of heads imported with the word "Universal" has varied from 25% in 1949 to 60% in 1950 and 1951, and to 95% at the time of the hearing.

As a prerequisite to the requirement that a sewing machine or machine head manufactured in a foreign country must be marked to disclose the foreign origin of the article we must find, as the Commission long has, that a substantial number of the purchasing public has a general preference for sewing machines produced in the United States.

The reasons for such a preference may vary and to explore them all might well be the source material for a lengthy book. National pride or a sense of loyalty to things American are, no doubt, great factors. Veterans who spent years fighting a foreign nation might well prefer American made goods over those of the nations against whom we were at war. Relatives, or even friends, of those imprisoned or killed, might well have the same preference. Many American workers, and even whole communities in which they work, have a preference based largely on the fact that certain imported goods have replaced in the American Market products they themselves would like to produce. Typical of such workers, to name only a few, are those in the glass, pottery, watch and fishery industries. There are many who feel that, in general, the quality of American made goods is superior. Further, a vast majority of people in the United States have a general preference for products made in the United States over those made in the many nations behind the iron curtain.

The Commission has decided many cases involving the marking of foreign made products and has repeatedly held that a preference exists for American made products. In *L. Heller & Son, Inc. v. Federal Trade Commission* (191 F. 2d 954, 7th Cir. [1951]) the court in its opinion said:

"A substantial portion of the purchasing public has a general preference for products produced in the United States by American labor and containing domestic materials, where other considerations such as style and quality are equal, and has a prejudice against imported products."

In the case before us the hearing examiner found as follows:

"Not all, but a substantial portion of the purchasing public has a decided preference for products of domestic manufacture over those of foreign make, particularly machinery of any kind, and when sewing

machines are exhibited and offered for sale to the purchasing public and such articles are not marked at all, or are inadequately marked to show their foreign origin, or if marked and the markings are concealed, removed, or obliterated, such purchasing public understands and believes such articles to be wholly of domestic origin."

The evidence in the present case is clear and substantial. The record contains testimony of 23 witnesses who had purchased Universal sewing machines. Four of these witnesses testified that medallions were on the machines they bought, but they did not see the word "Japan," even though they had been using the machines for months. They found the word "Japan" on the medallion only after a repairman or newspaper story caused them to look for it. In one case where a medallion was attached it had been chipped and is of no value as evidence against the respondents since nothing in the record indicates who did the chipping. In three cases the medallions had been removed. In fifteen cases the mark of origin was hidden under the motor, on the bottom of the machine or beneath a metal plate.

One witness said the word "Japan" was so tiny she had never seen it. Another said the word "Japan" was in very small letters and she had not seen it even though she had owned the machine for one year. This machine was Commission's Exhibit 65 and the size of the letters in the word "Japan" is exactly the size of those on the medallion approved by the Customs Service for the use of respondents. Another witness read the word at a distance of about one foot during the trial. She had been using the machine for months and had not seen the word "Japan."

Further light on this question may be gained by an examination of the Commission's Exhibit 7. This was a sewing machine, the head of which was imported by respondents. Around the top of the base of the machine, in gold, is a flowered strip 34 inches long, and $\frac{3}{8}$ of an inch wide. The same strip, four inches long is on the guard on the top of the machine. On top of the horizontal arm of the machine, in gold, are the words, "The Universal Sewing Machine," totalling four inches in length. On each side of the horizontal arm appears, in gold, the word, "Universal" four inches long and in letters $\frac{1}{2}$ inch high. Beneath this word on both sides of the horizontal arm, in gold, appear on a black background, the following: "Reg. U. S. Pat. Off." Also on this arm are three decorative designs, in gold, each approximately $\frac{1}{2}$ inch by one inch.

A substantial number of buyers, rosy-glowed, if the golden flowers on the machine head are what they seem, and bedazzled by all the golden words and golden decorations will fail to see the gold word

"Japan" in $\frac{1}{16}$ of an inch letters on the bottom fourth of a golden medallion well over one and $\frac{1}{2}$ inches high and over one inch wide. A little firefly shines clearly on a dark night. His best effort goes unnoticed in the brightness of the sun.

Only one of the 23 witnesses had the slightest idea that the machine she purchased was made in Japan.

Fourteen of the witnesses were asked if they would have bought the machines if they had known they were of foreign origin. All stated that they would not have made the purchases.

As found by the hearing examiner, the respondents, a short time after June 1, 1949, adopted, with the approval of the U. S. Customs officials, a marking of foreign origin described as follows:

"* * * a metal medallion, hexagonal or oval in shape about $1\frac{1}{2}$ inches vertical and 1 inch horizontal, in gold or brass finish, bearing the legend 'De Luxe' in raised quarter inch letters, and below that 'De Luxe Family Sewing Machine Quality' in raised letters approximately $\frac{1}{8}$ " in length, and below that the word 'Japan' in raised letters of approximately $\frac{1}{16}$ " in length, * * *."

The hearing examiner found as follows:

"These brass or brass-colored medallions or plaques are in bright gold color, in small raised letters only of the same color, with no background coloring to emphasize the raised letters, so that the word 'Japan' is indistinct, difficult to read at a distance of greater than a foot, unemphasized and distinguishable only by careful inspection. There is also sufficient evidence in the record that users and purchasers did not see, or seeing, did not comprehend such marking."

We can only conclude that the marking on the medallion was inadequate and that it was not properly attached. In fact, at the hearing an expert quickly removed one of the medallions and stated in the testimony that after removal there was no mark or blur on the machine that would be noticeable to a purchaser. One of the respondents testified that, "It is not easy to remove the medallion, but it can be done."

Eleven of the witnesses were asked if they had a general preference for American made goods and answered in the affirmative. Eight were asked if they had a preference for American made sewing machines and answered in the affirmative. None of the witnesses who had purchased sewing machines made a statement that they generally preferred foreign made goods or that they preferred foreign made sewing machines.

One of the respondents in his testimony said he did not remember receiving any complaints from consumers concerning the country of

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origin. This is not surprising inasmuch as the books of instructions handed to the purchasers did not contain the names or address of any of the respondents. Also the 20-year guarantee bond was signed by the dealer and the names or address of respondents does not appear on it. There was nothing in these printed documents to indicate the machine was of foreign origin and if a purchaser did not know, as many did not, that the machine was of foreign origin, they would not likely complain concerning something about which they had no knowledge.

The respondents have pointed out that the medallion they have been using was submitted to, and approved by, the Customs Service. We appreciate fully that this fact, and a fact it is, might well have led them to believe that the government required no further duty under another law.

When a citizen honestly seeks an answer to the question of what he must do to obey the law of the land, common decency, essential to all good government, demands that he not be tossed unnecessarily from one government agency to another.

We think this opinion, in future cases of a similar nature, will serve as a guiding lamp and clarify, for those who follow, the path they can and must take. It will make clear to any importer of sewing machines the markings that have met both the requirements of the Federal Trade Commission and the Customs Service.

In every one of the many sewing machine cases in which an order was issued by the Commission the machine head had been marked to the satisfaction of the Customs Service, it had been admitted in to the United States, and it had moved in commerce, a prerequisite to our jurisdiction. We should consider that the Customs Service has approved the marking, but it is no bar to our proceedings.

If the Customs Service approves a mark that meets the requirements of the Federal Trade Commission law, comity would dictate that we accept it if the issue is presented to us. We should not, through caprice or merely to show our authority, change a mark that will not deceive. On the other hand, we are bound to require a clearer marking if we believe the marking approved by the Customs Service has resulted, and may continue to result, in deception. A clearer marking will protect the ultimate consumer and will have no adverse effect upon the customs inspector in the performance of his duties because, in fact, a clearer marking would be easier for him to read.

The respondents in making a change in the medallion may suffer some inconvenience, but the cost of changing the medallion will not be great. In any event, Section 5 of the Federal Trade Commission Act and Section 304 of the Tariff Act were not enacted for the benefit of

respondents, but for the protection of the ultimate consumer. We do not think it can be maintained that Congress in the Tariff Act, or any amendment to it, intended to change or modify in any particular the authority it has granted the Federal Trade Commission.

The evidence of record in this case is that customers have been deceived as a result of inadequate marking and insufficient attachment of the medallion to the machine head.

One of the respondents' Texas dealers, Son-El Sewing Machine Company, was investigated by the county attorney's office. As the result of adverse publicity, the name of this company has been changed and it no longer handles respondents' machines. The salesmen of Son-El made misrepresentations for which respondents can not be held responsible. Chief of these misrepresentations, such as that Universal sewing machines were manufactured by the makers of Universal traffic appliances and the Singer Company, will be difficult for any dealer to make in the future, under paragraph 2 of our Order requiring the name "Standard Sewing Equipment Corporation" to be used in connection with the trade name "Universal."

Some medallions were removed and there is nothing in the record to indicate that respondents removed them. Respondents can be held responsible only to the extent that the medallions were not securely attached. This aid to misrepresentation of the country of origin will be made ineffective by Paragraph 1 of our Order requiring the medallion to be attached in such manner that it can not readily be hidden or obliterated.

One fact is clear. However great were the shortcomings of Son-El, the record reveals that of twenty-three purchasers in Pennsylvania and Texas the only four of them to get respondents' machines with the medallions intact got them from Son-El. The purchasers of these machines, a former saleslady of traffic appliances, two housewives, and a vocational nurse, testified that they had not seen the word "Japan" although they had the machines in their possession from one month to a full year. *In the whole record this is the best evidence of deception by inadequate marking.* To permit the undeniable deception of four persons out of twenty-three to continue is indefensible. This percentage of deception applied nationwide would effect millions of homes. Such deception can be prevented only by Paragraph 1 of our Order, requiring clear and conspicuous marking of the country of origin.

Upon consideration of all the material evidence in this record, we hold that a preference for sewing machines and sewing machine heads produced in the United States does exist and that the hearing examiner was right in finding that a substantial portion of the purchasing public

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has a decided preference for products of domestic manufacture over those of foreign make and that respondents' imported sewing machines and sewing machine heads are not adequately marked to show their place of manufacture or origin.

The Federal Trade Commission has no control over tariffs or what a consumer buys. Our only duty is to see that an article is adequately marked as to country of origin.

The appeal of the respondents in the matter of marking of foreign origin is denied.

We further direct that Paragraph 1 of the Order of the Initial Decision be modified to read as follows:

"Offering for sale, selling or distributing foreign made sewing machine heads or sewing machines of which foreign made heads are a part, without clearly and conspicuously disclosing on the heads the country of origin thereof, in such manner that it can not readily be hidden or obliterated."

The amended complaint charges respondents with deception in the use of the word "Universal" on machines and in advertising. The allegation is that "The word 'Universal' has been used for many years as a trade or brand name by one or more long-established corporations and firms transacting and doing business in the United States whose products, sold under such brand or trade name, are well and favorably known to the purchasing public."

This question has been before the Commission and the courts on many occasions and certain features have been considered as follows:

1. The fact of actual confusion among purchasers—

This is naturally an important element and in some cases relief has been denied where there was no such proof, and the likelihood of substantial confusion was remote. *G. B. Kent & Sons, Ltd. v. P. Lorillard Co.* (1953) 114 Fed. Supp. 621; *Arrow Distilleries, Inc. v. Globe Brewing Co.* (1941) 117 F. 2d 347.

In this case there is considerable evidence of actual confusion. A substantial number of witnesses in support of the complaint testified they were familiar with the line of products sold under the trade-mark "Universal," and thought they were buying from that line. Some were familiar with the name of the manufacturer, Landers, Frary & Clark, while others were not. On the other hand, it was stipulated that respondents could produce ten purchasers of their machines who would testify that the name "Universal" did not indicate any connection with Landers, Frary & Clark.

2. The character of the mark, whether strong or weak—

In *Arrow Distilleries, Inc. v. Globe Brewing Co.* (1941), 117 F. 2d 347, use of the word "Arrow" on beer and ale was permitted even

though another company used it on alcoholic cordials and liqueurs. There was in that case no evidence of actual confusion. The court gave, as examples of strong marks, arbitrary, fanciful, or distinctive words such as "Aunt Jemima," "Kodak" and "Rolls Royce"; but words in common use are given a much narrower scope, such as "Universal," "blue ribbon," "gold medal."

The U. S. Patent Office has issued trade-mark registrations in at least 64 instances and to many different companies of the word "Universal" to be applied to a variety of products. Sometimes, the word is registered with other words or in connection with particular designs. The telephone directories of Manhattan and Philadelphia show respectively 356 and 85 listings of business organizations which use the word "Universal" as part of their names.

3. The nature of the competing products—

It is not necessary that the competing products be identical. Other matters should be considered, such as similarity of appearance or use, whether they are ordinarily handled by the same manufacturer or distributor, whether sold in the same kind of stores, whether they have a common class of purchasers, whether purchased by the public generally, etc. In *Dwinell-Wright Co. v. National Fruit Products Co.*, 140 F. 2d 618, plaintiff had five registrations of "White House" on a line of fruit juices while defendant had three on tea, coffee and salted peanuts. The suit by plaintiff to prevent use of "White House" on a new product—a blend of canned orange and grapefruit juice—was successful. Lack of similarity between brushes and cigars was pointed out in *G. B. Kent & Sons, Ltd. v. P. Lorillard Co.*, 114 Fed. Suppl. 621, whereas in *Admiral Corp. v. Penco*, 203 F. 2d 517, a similarity was found to exist between electric ranges and refrigerators and electric sewing machines and vacuum cleaners.

The testimony in the case before us shows that one witness thought the sewing machine she purchased was all right because she had heard of Universal irons and toasters. Eleven of the witnesses thought the sewing machine was made in the United States because of the trade name "Universal." Five of the witnesses thought the machine was made by Landers, Frary and Clark, whose traffic appliances bear the trade name of "Universal." One witness had several Universal products and bought the sewing machine because she thought it was made by the same company. Another purchased the machine and thought it was made in the United States because he saw that the motor was made in the United States

The purchasers in some cases were confused and in practically every

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case they were deceived because of the use of the word "Universal" on the machine.

Upon consideration of all the evidence we find that respondents, by placing in the hands of distributors, their sewing machine heads and complete sewing machines, of which the heads are a part, and using the word "Universal" on the horizontal arm, have provided dealers with a means and instrumentality whereby they may, and do, mislead and deceive the purchasing public as to the origin, manufacturer and sponsorship of said machines.

On the other hand, respondents have registered the trade mark "Universal" for use on their sewing machines. They have spent a considerable sum of money in promoting and defending their trade mark. Respondents have prevented, by about twenty-five legal actions, the use of the word "Universal" on sewing machines distributed by others.

We believe that deception can be avoided without the complete excision of the word "Universal." Paragraph 2 of the Order in the Initial Decision should be modified to require respondents to cease and desist from using the word "Universal," or any simulation thereof, as a brand or trade name to designate, describe or refer to their sewing machine heads or sewing machines of which the heads are a part, unless there appears in connection therewith, in legible and clearly visible marking, the name of the corporate respondents "Standard Sewing Equipment Corporation."

Thus, the investment of the respondents in the trade name "Universal" will be protected and, at the same time, possible deception of the purchaser will be minimized.

The appeal on the use of the word "Universal" is denied except that the order is modified as directed in this opinion.

It is directed that Order issue accordingly.

Submitted with the appeal is a motion of respondents for an Order dropping Harry Kron as a respondent in this proceeding on the ground that Mr. Kron, on February 24, 1954, severed all connection with the corporate respondents, Standard Sewing Equipment Corporation, and now has no relationship with said corporation. The motion is supported by the affidavit of respondent William J. Hackett to the effect that Harry Kron did, on February 24, 1954, sell all of his stock in the corporation to William J. Hackett and severed all connection with the corporation.

During the hearing and prior thereto, Harry Kron was Secretary-Treasurer of the corporation and had control over its affairs equal to the respondent William J. Hackett. The affidavit does not set

out facts sufficient to justify the relief sought in the motion and the same is therefore denied.

The foregoing decision in this case has been based solely on the record and what follows is for the purpose of presenting precedents set in former cases. These precedents will be helpful to importers in determining what the Commission has held to be inadequate and adequate marking.

Administrative agencies are often criticized on two very important grounds—delay and inconsistency. The Federal Trade Commission has attempted to eliminate every cause of unnecessary delay.

By our new policy of writing opinions we have attempted to achieve consistency and build up a body of meaningful case law. Thus, it is essential that we review our previous action in similar cases.

One such case is that of the *Globe Machine Company*, Docket 5885.

On 27 June, 1951, the Commission issued a complaint against this company. The complaint said, in part:

“In some instances said heads, when received by respondents, are marked with a medallion placed on the front of the vertical arm upon which the words ‘Made in Occupied Japan’ or ‘Japan’ appear. These words are, however, so small and indistinct that they do not constitute adequate notice to the public that the heads are imported.”

An answer by respondent admitted this allegation, and the hearing examiner held that the above words were so small and indistinct that they did not constitute adequate notice to the public that the heads were imported.

On 4 April, 1952, the initial decision of the hearing examiner became the decision of the Commission and the respondents were given 60 days to show the manner and form of compliance with the order not to sell machines or machine heads unless the country of origin was clearly and conspicuously disclosed on the head. It is impossible to speculate with certainty what the Commission would have held concerning the original medallion had the case been tried and considered by them, nor is it necessary to do so. Important to the present case is what the Commission decided later. On 23 June, 1952, the *Globe Company* submitted a medallion it was using as an attempt to comply with the Commission’s order. On a gold background, in gold letters, were the words “Made in Occupied Japan.” All letters were $\frac{1}{8}$ of an inch in length. The Assistant General Counsel in charge of Compliance in a memorandum dated 13 July, 1953, pointed out, among other things:

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"In answer to our request, respondents, on June 23, 1952, submitted a specimen of the 'gold on gold' medallion which did not provide the clear and conspicuous disclosure required by the order."

The Assistant General Counsel had rejected this medallion as compliance, and also rejected compliance reports as to other parts of the Order.

When the respondents made no additional report he recommended that the Commission reject the original report of compliance submitted on 23 July, 1952. This report of compliance with a specimen of the medallion was submitted to the full Commission. The report was rejected. This was done by the Commission as an expert body with no testimony. It held that $\frac{1}{8}$ " gold letters on gold was not compliance with the order. The Commission properly used its expert judgment to determine what was not a clear and conspicuous disclosure of the country of origin.

It might be argued that the admission answer admitted sufficient evidence of deception to wholly justify the Commission in supporting the hearing examiner's initial decision that the lettering on the original gold medallion was too small.

Certainly it cannot be argued that the admission answer or consumer evidence, explicit or implied, would support the Commission in rejecting a compliance medallion, gold on gold, with letters twice the height of the original. The Commission, on its own authority, and as a body of experts, said that gold letters $\frac{1}{8}$ of an inch high, if placed on a gold medallion, would still, like the medallion condemned by the admission answer, be too small to prevent deception.

In fact, the Commission invariably has secured compliance with its orders, issued with or without trial, and to this date has never given a decision as to how high a gold letter must be on a gold background to constitute full compliance. On the other hand, the Commission has often held that gold letters far bigger than are used in the present case are deceptive if placed on gold. If the voice of the Commission was the voice of consumer deception in supporting the hearing examiner's findings and order in the Globe case, it was the voice of the Commission alone that said the letters on the medallion offered in compliance were lacking in stature. To accept the medallion in the case before us would be to accept a standard of notice far less than that rejected by the Commission. It could be nothing less than a retreat from the standards previously required in all cases for the protection of the public with respect to marking foreign made sewing machine heads.

In the Globe case the Commission decided the medallion submitted to show the form of compliance was inadequate. Never has that de-

cision been overruled. In fact, it has been followed as a standard of compliance in every subsequent case where an order has been issued with or without full trial before a hearing examiner.

For a more complete consideration of the matter of precedent, with respect to gold medallions similar to the one in the instant case, it will be helpful to review the action of the Commission in the nine sewing machine cases in which full trial was had, beginning with the first case in which an order was issued and ending with the last. Consideration will be limited to the adequacy of disclosure provided by medallions where gold letters were placed on a gold background.

1. In *Bieler and Rapinowitz et al.*, Docket 5891, the hearing examiner in his initial decision found that when medallions with the word "Japan" in raised letters $\frac{1}{4}$ to $\frac{3}{8}$ of an inch in length were used, casual inspection would apprise the purchaser of the country of origin.

On those machines where the word "Japan" was smaller the hearing examiner said:

"Others of these medallions on respondents' sewing machines are in bright color, in raised letters only, with no background coloring to emphasize the raised letters, and with other lettering, such as a brand or trade name of similar size and protrusion, so that the words 'Japan' or 'Made in Japan' are indistinct, difficult to read, unemphasized, and distinguishable only by careful inspection."

An order requiring clear and conspicuous marking was made the decision of the Commission on 28 August, 1952, and an order for compliance was issued. A medallion with the words "Made in Japan" in gold letters approximately $\frac{1}{8}$ inch in length, twice the length of the letters in the case before us, on a gold background was submitted and rejected as not providing the clear and conspicuous disclosure required. The same size gunmetal letters on gunmetal was later accepted as clear.

2. In *Royal Sewing Machine Corporation*, Docket 5892, the Commission found that the word "Japan" on gilt or bronze colored metal bands were because of size and location wholly inadequate. The record does not disclose the size of the letters.

After trial an order requiring clear and conspicuous marking was issued by the Commission on 5 May, 1953. A "gunmetal on gunmetal" medallion was accepted as compliance, letters $\frac{1}{8}$ of an inch in length being, in this color, considered clear and conspicuous.

3. In *Bega Sewing Machine, Inc.*, Docket 5893, the Commission found that the word "Japan" on a bronze colored metal medallion was so small and indistinct that it was not legible to those who bought them *or to the public*. The letters were approximately $\frac{1}{8}$ of an inch

in length, twice the length of the letters on the medallion in the case before us.

After trial, an order requiring clear and conspicuous marking was issued by the Commission on 18 September, 1953. A black on gold medallion was accepted as compliance with the black letters approximately $\frac{1}{8}$ of an inch in length being considered clear and conspicuous.

4. In *Astor Industries*, Docket 5889, the Commission found that the word "Japan" on gold color medallions "is indistinct, difficult to read, unemphasized and distinguishable only by careful inspection." The letters on the medallions were approximately $\frac{1}{8}$ of an inch in length, twice the length of the letters on the gold medallion in the case before us.

After trial, an order requiring clear and conspicuous marking was issued by the Commission on 17 February, 1954. Compliance has not been had due to reported reorganization of the company.

5. In *Pamco, Inc.*, Docket 6012, the Commission found that the word "Japan" placed on a medallion on the vertical arm of the machine "is, however, so small and indistinct that it does not constitute adequate notice to the public that the heads are imported." The record does not show the size of these letters.

After trial, with respect to the sewing machine heads in question, an order was issued on 17 February, 1954, requiring Max Chissik and Arthur Foyer, co-partners, doing business as Sewing Machine Factors, to clearly and conspicuously mark the country of origin. The complaint was dismissed as to all others. After the order was issued respondents claimed withdrawal from commerce.

6. In *Pickow Distributing Corp.*, Docket 5890, after trial the Commission found that the word "Japan" in letters approximately $\frac{1}{8}$ of an inch in length, twice the length of the letters on the medallion in the case before us, on a brass medallion was "indistinct, difficult to read, unemphasized, and distinguishable only by more careful inspection than a purchaser or user would ordinarily bestow." An order requiring clear and conspicuous marking was issued on 10 March, 1954. The compliance report stated the company was in process of liquidation.

7. In *Sewing Machine Sales Corporation, et al.*, Docket 6149, the word "Japan" was placed on a gold medallion in letters approximately $\frac{1}{16}$ of an inch in length. The hearing examiner found that this was not an adequate disclosure that the machine heads were made in Japan. The lettering is identical with that in the instant case. On the basis of the findings an order was issued on 3 August, 1954 requiring clear

and conspicuous marking and "gunmetal on gunmetal" was accepted as compliance.

8. In *Bond Sewing Stores*, Docket 6112, the initial decision of the hearing examiner automatically became the decision of the Commission on 23 November, 1954. The findings in this case are clear. The word "Japan" in gold letters approximately $\frac{1}{16}$ of an inch in length appeared on a gold medallion. The hearing examiner found that the word "Japan" was "not distinct and difficult to read at a distance greater than one foot or so, unemphasized and *distinguishable only by careful inspection.*" The word "Japan" in this case is the approximate size of the word "Japan" on the medallion at issue in the instant case. The examiner found "that respondents' imported sewing machines and sewing machine heads are not adequately marked to show the place of manufacture and origin, * * *" and required in his order clear and conspicuous disclosure on the heads as to the country of origin. On 24 January, 1955, the Commission by affirmative action ordered Bond Sewing Stores to comply with the order. The Commission decided in this case that the identical marking used in the case before us was inadequate.

9. In *Mercury Machine Importing Corporation, et al.*, Docket 6011, two gold on gold medallions were offered as Commission exhibits, one with the word "Japan" in letters approximately $\frac{1}{16}$ of an inch in length, the other with letters approximately $\frac{1}{8}$ of an inch in length. After trial a stipulation for a consent order was entered. An order of the hearing examiner requiring clear and conspicuous marking became the decision of the Commission on 4 January, 1955. A gold on gold medallion was tendered to show the form of compliance and was rejected on 28 January 1955. The word "Japan" on this medallion was approximately the size of that on the larger medallion submitted as an exhibit during the trial to show proof of inadequate marking, and twice the size of the letters on the medallion in the case before us.

Briefly, we will now consider six related cases which did not proceed to full trial. In each of these cases a medallion, stamped with the name of the country of origin, was attached on the front of the vertical arm of the machine. After admission answer or consent settlement, the hearing examiner found the marking inadequate as to country of origin and issued an order requiring clear and conspicuous marking.

The six cases are: *Home Machine Supply Inc.*, *Roman-Raichert Co., Inc.*, *Sewing Machine Exchange, et al.*, *State Sewing Machine Corp.*,

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et al., *Japan-America Trading Agency*, and *Mercury Vacuum Stores*. In each case the Commission ordered compliance with the order.

In the case of *Home Machine Supply, Inc.*, Docket 5884, compliance was accepted when "gold letters on gold" were changed to "gunmetal on gunmetal."

In the case of *Roman-Raichert Co., Inc.*, Docket 5886, compliance was accepted when "gold letters on gold" were changed to "black letters on gold."

In the case of *Sewing Machine Exchange, et al.*, Docket 5887, compliance was accepted after "gold letters on gold" were rejected and "silver letters on black" and "gold letters on black" were substituted.

In the case of *State Sewing Machine Corp., et al.*, Docket 5895, compliance was accepted when the "gold on gold" medallion was changed to "gunmetal on gunmetal."

In the case of *Japan-America Trading Agency*, Docket 6014, gold letters on a dark background were accepted in compliance with the order of the Commission.

In the case of *Mercury Vacuum Stores*, Docket 6064, a medallion with "gold letters on black" was accepted as compliance.

In none of these cases referred to above, or in any others considered by the Commission, has a medallion with "gold letters on gold" been accepted as compliance with an order to clearly and conspicuously disclose on the head of the machine its country of origin, not because it was "gold on gold" but solely because no such medallion submitted has been considered sufficiently clear and conspicuous. In the *Globe* case the Commission rejected a "gold on gold" medallion with the lettering twice the length of the lettering on the medallion used by the respondents. In the record of all the cases the only indication of a suitable size is a finding of the hearing examiner in *Bieler and Rapinowitz* that "the word Japan in raised gold letters $\frac{1}{4}$ to $\frac{3}{8}$ of an inch in length would by casual inspection, apprise the purchaser of the country of origin."

Gold letters $\frac{1}{8}$ of an inch in length on gold, invariably, have been the object of orders and rejected as meeting compliance. The play of light on a gold medallion renders such letters, as the Commission found in *Pickow Distributing Corp.*, "indistinct, difficult to read, unemphasized, and distinguishable only by more careful inspection than a purchaser or user would ordinarily bestow."

The play of light on gunmetal does not have the same result and raised letters $\frac{1}{8}$ inch in length on gunmetal have been accepted as compliance with many orders. Also, letters of one color, $\frac{1}{8}$ inch in length, have, because of contrast, been accepted as compliance when

placed on a background of a different color. What results in the required degree of clarity is for the Commission to decide, and it has spoken often. Its decisions, orders, and compliance requirements in former cases supported findings that the word "Japan" in gold letters $\frac{1}{16}$ of an inch in length on a gold background is not adequate notice to purchasers and the public of the country of origin.

If, in 16 cases, we hold that 12 inches make a foot, precedent requires that we give pause before, in subsequent cases, we hold that 6 inches make a foot.

We have found, in many cases, that the word "Japan," in letters of gold $\frac{1}{8}$ of an inch in length, on a gold background, is not clear. To ignore precedents can result only in unequal application of the law.

To permit the use of inadequate medallions would be to declare that *stare decisis*, as far as the sewing machine cases are concerned, is neither *stare* nor *decisis*. In respect to gold on gold medallions, *stare decisis* would be synonymous with *de minimis*.

Chairman HOWREY concurring in the result:

In the matter of marking of foreign origin I concur but with considerable reluctance. Respondents complied in all respects with the marking requirements of the Tariff Act as interpreted and enforced by the officials of the Customs Bureau. This is all that should be expected of a reasonable and prudent businessman. He should not be required to peddle his markings to various government agencies to ascertain separate and conflicting interpretations. It should be enough, ordinarily, to obtain the approval of the agency having original jurisdiction.

However, if the majority viewpoint in this instance were to be rejected, it would create a very difficult situation from a competitive standpoint. A large number of contrary decisions, many of them issued within the past two years, would have to be revised, reversed or ignored.²

The solution would appear to be for the General Counsel of the Federal Trade Commission to confer with the Customs Bureau and negotiate an inter-agency agreement on marking requirements for imported sewing machines. This agreement when approved by the Commission and the Department of the Treasury should then govern the Commission's Compliance Division in interpreting that portion of the various orders which requires that the markings "clearly and conspicuously" disclose the country of origin.

² See Docket Numbers. 5884, 5885, 5886, 5887, 5899, 5891, 5892, 5893, 5894, 5895, 5896, 5941, 6011, 6012, 6013, 6014, 6015, 6017, 6049, 6064, 6082, 6117 and 6149.

DISSENTING OPINION OF COMMISSIONER GWYNNE

I do not agree with the conclusion of the majority that the evidence is sufficient to prove that the machine heads in question were inadequately marked as to the country of origin (Japan).

In 1946, respondents began the importation of machine heads from England. When this source of supply became inadequate, they began in the early part of 1949 the importation from Japan of machine heads manufactured there under respondents' directions. These machine heads were marked on the rear of the vertical arm by a decalcomania which included the words "Japan" or "Made in Occupied Japan."

It developed that when a motor was attached, this marking was partly covered. Consequently, in the early summer of 1949, respondents received a letter from the Appraiser of Merchandise of the Bureau of Customs of New York City pointing out that: "It is necessary to require that the marking to indicate the country of origin appear on the face of the machine in a place where it is not likely to be defaced, covered or obscured by combination with any other article." The letter suggested that respondents instruct their shippers immediately relative to these marking requirements. Respondents stopped the importation of machine heads and, following discussions with the Assistant Director, a medallion to be attached to the front of the vertical arm was approved in a letter dated June 15, 1949 from the Customs officials, which letter contained the following:

"You are advised that the use of the plate submitted will be satisfactory provided the same is affixed to the upper part of the sewing machine in a place which will not be obscured by the usual attachments, such as a motor, etc., which may be added subsequent to importation and before delivery to the ultimate purchaser."

The evidence is undisputed that since about June 15, 1949 (which was about two years prior to the issuance of the complaint), all machine heads imported have been marked with this medallion which is described in the initial decision as follows:

"* * * a metal medallion, hexagonal or oval in shape about 1½ inches vertical and 1 inch horizontal, in gold or brass finish, bearing the legend 'De Luxe' in raised quarter inch letters, and below that 'De Luxe Family Sewing Machine Quality' in raised letters approximately ⅛" in length, and below that the word 'Japan' in raised letters of approximately ⅛" in length, * * *."

These brass or brass-colored medallions or plaques are in bright gold color, in small raised letters only of the same color, with no background coloring to emphasize the raised letters, so that the word 'Japan' is

indistinct, difficult to read at a distance of greater than a foot, unemphasized and distinguishable only by careful inspection. * * *”

Some of the machines bought by certain consumer witnesses who testified in support of the complaint were evidently imported prior to the adoption of the medallion above described. However, it is undisputed that such methods of marking had been voluntarily abandoned in favor of the metal medallion about two years prior to the issuance of the complaint. Consequently, the question of the adequacy of the former marking is not here involved. *Federal Trade Commission v. Civil Service Training, Inc.* (1953), 79 Fed. 2d 113.

The only questions involved are (1) is the metal medallion presently in use sufficient to acquaint prospective purchasers with the fact of foreign origin, and (2) is the medallion adequately attached to the machine head.

Hearings were held in Philadelphia on November 29, and 30, 1951 at which various consumer witnesses testified. The majority opinion points out that none of such witnesses bought respondents' machines with the medallion intact. No evidence was presented at these particular hearings having any substantial bearing on the two questions above mentioned.

Hearings were held in Dallas and Fort Worth, Texas beginning on December 8, 1952 and ending December 11, 1952. The consumer witnesses at those hearings bought their machines from Son-El Vacuum Stores, Inc., operating in Dallas and Fort Worth. This company was the subject of an investigation in 1951 by the Office of the District Attorney for Tarrant County, Texas. The assistant in charge thereof testified as to various false representations made by salesmen of Son-El and other deceptive practices in regard to machines sold, which included Universal as well as other machines. There was newspaper publicity in regard to the matter and many of the consumer witnesses learned in that manner of the deceptions practiced upon them and some contacted the District Attorney's Office in regard to them.

The majority opinion states:

“One fact is clear. However great were the shortcomings of Son-El, the record reveals that of twenty-three purchasers in Pennsylvania and Texas the only four of them to get respondents' machines with the medallions intact got them from Son-El. The purchasers of these machines, a former saleslady of traffic appliances, two housewives, and a vocational nurse, testified that they had not seen the word ‘Japan’ although they had the machines in their possession from one month to a full year. *In the whole record this is the best evidence of deception by inadequate marking.*”

I agree that this evidence would be very important if it related to the particular medallion in question. However, as I view the record, that is not the situation.

The former saleslady of traffic appliances, Mrs. L. G. Dawson, testified in substance:

When she bought the machine, she did not see any mark of foreign origin. When the story came out in the paper and after she had the machine in her home for a year, she found the word "Japan" on a "little sticker of a thing just stuck on there and says 'Universal Sewing Machine Company Japan.' You can just stick your thumb nail under it and, nick it off."

"It (the medallion exhibited to her) is similar; this is not the same medallion that is on mine."

After examining the medallion which is a part of Commission's Exhibit 65, she said: "This has Universal in large letters here, and mine has it going clockwise around the medallion * * * across the top there 'Universal Electric' and then 'Sewing Machine Company' down there in here. Down at the bottom, it is like this, similar to this 'Japan' in small letters at the bottom of the medallion."

It is my conclusion that the witness was not testifying about the medallion which was adopted by respondents in June, 1949 and which is the only one in question here.

The vocational nurse, Mrs. L. O. Graham, bought the machine introduced in evidence as Commission's Exhibit 65. This machine had a medallion on the front of the vertical arm with lettering which Mrs. Dawson at the hearing read as "The Universal Family Sewing Machine" and then "Japan" in very small letters. The medallion was on the machine when she bought it and she did not notice the word "Japan" until after she read the newspaper article. Here again, it is doubtful that the witness was speaking of the medallion involved in this case.

A total of ten housewives testified at the Texas hearings. Each testified in substance that when she bought the machine, she saw no marking of foreign origin. Later, some of them found a mark indicative of foreign origin on various parts of the machine. For example, Mrs. J. D. Owens found "Japan" inside the bobbin case; Mrs. Allen Jarrell and Mrs. B. L. Westmoreland found "Made in Japan" or "Made in Occupied Japan" behind the motor. These were obviously machines imported prior to June 15, 1949. None of the ten witnesses testified finding a medallion such as the one involved in this case.

It is true most of the machines had the word "Universal" on the horizontal arm. Respondent William J. Hackett gave the names of

five different companies with which litigation had been carried on because of their wrongful use of the name "Universal" on sewing machines. He further said there were in all 25 or 30 such cases. We therefore cannot conclude simply from the use of the name "Universal" that all the machines involved in this case were those of respondents.

The evidence of consumer deception based on the use of the medallion approved by the Customs officials is too uncertain to be of any substantial value.

Of course, the use of a well-known English name such as "Universal" may be considered on the general question of capability of deception. However, it is not disputed that this lettering was put on prior to the importation of the machines and was undoubtedly taken into consideration by the Customs officials when the medallion was approved. The same may be said of the gold ornamentation elaborated upon in the majority opinion. At least, there is no evidence that it was put on after the machines passed the customs inspection.

The initial decision mentions several items of evidence which arose subsequent to importation. Advertising by respondents and five out of seven dealer ads did not advise of foreign origin. The same is true of the instruction books that went with the machine. I do not believe that in this type of case, such omission can be said to be deceptive.

Attention is also called to the fact that motors attached to the machine bear metal labels reading "Universal—Made in USA," "Delco—Made in Rochester, New York," "Simplex—Made in USA," or "Universal Sewing Machine Motor—Made in USA." This is a circumstance to be considered, but the evidence of deception based on such marking is not clear.

Respondent William J. Hackett testified that their machines are sold to about 1,000 dealers and that he did not remember receiving any complaint concerning the country of origin either from a customer or a dealer. It may be true, as suggested in the majority opinion, that most customers did not know the name of the importer; but the dealers undoubtedly knew. Naturally, a dealer such as Son-El would not transmit a complaint. It is interesting to note that respondents quit selling Son-El in the latter part of 1950 which was several months prior to the investigation by the local District Attorney's Office and almost two years prior to the hearings by the Federal Trade Commission. It is also interesting to speculate what the evidence might have been had the consumer witnesses been chosen from customers of dealers who did not indulge in "bait advertising" and other reprehensible practices.

On the second question whether the medallion is adequately attached to the machine head, the evidence is also very meager. The medallion is attached to the vertical arm by two small rivets inserted from the front. Respondent Harry Kron and the manager of Son-El (the Texas retailer) testified that the medallion would be difficult to remove without marring or scratching the machine. On the other hand, the manager of the Fort Worth Singer Sewing Machine Company testified in substance that the medallion can be removed without seriously marring the machine; that the two copper pins holding it can be removed easily by knocking the heads off and driving them through; part of the metal pin which is flush with the vertical arm can be driven through with a punch of the same size into the inside of the arm. The witness did in fact at the hearing remove a medallion. There is very little other evidence on the subject of ease of removal unless it may be inferred from the fact that some medallions obviously were removed.

There is no evidence that the method of attachment was any different than that customarily used in such situations.

Among other things, respondents point out that they have fully complied with the marking requirements of the Tariff Act as interpreted and enforced by the Customs officials. On this point, the initial decision says:

"The fact that respondents' imported sewing machines are inspected and passed by United States Customs officials at the port of entry as being properly and adequately marked so far as Customs laws are concerned, and that respondent has marked its products in accordance with the Customs demands is immaterial and no defense to this proceeding." (*L. Heller & Son, Inc. v. F. T. C.*, 191 Fed. 2d 954).

I agree that it is not a defense. The conclusion of the Customs officials is not a judicial decision which can be plead as *res judicata*. That doctrine applies only to judicial proceedings and not to decisions made ministerially. See 53 C. J. S. p. 27; *Bridges v. U. S.* (1952) 199 Fed. 2d 811; *Pearson v. Williams, U. S. Commissioner of Immigration* (1906) 202 U. S. 281.

However, I do not agree that this evidence is immaterial. Not only is it material, but it should be given considerable weight. This is for two reasons, first, the intrinsic value of the evidence itself, and, second, the necessity for avoiding conflicting rulings by different agencies of the same government. Title 19, Sec. 1304 of the U. S. Code (1946) provides:

"Except as hereinafter provided, every article of foreign origin (or its container, as provided in subsection (b) hereof) imported into the United States shall be marked in a conspicuous place as legibly, in-

delibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. The Secretary of the Treasury may by regulations—

(1) Determine the character of words and phrases or abbreviations thereof which shall be acceptable as indicating the country of origin and prescribe any reasonable method of marking, whether by printing, stenciling, stamping, branding, labeling, or by any other reasonable method, and a conspicuous place on the article (or container) where the marking shall appear;”

The regulations of the Secretary of the Treasury provide:

“(b) The marking required by such section 304 shall include the English name of the country of origin, unless other marking to indicate the English name of the country of origin is specifically authorized by the Bureau. * * *

* * * * *

“(d) The method of marking shall be one suitable to produce marking on the particular article (or container) which, so far as the nature of the article (or container) will reasonably permit, will be legible to the usual ultimate purchaser of the article and so indelible and permanent as to assure that the marking will remain in a legible condition until the article is acquired by an ultimate purchaser. Stenciling upon such articles as bagging; branding or stenciling upon such material as wood; stamping with a rubber stamp upon such material as paper or cloth, but not upon metal; die-stamping, cast-in-the-mold lettering, etching, engraving, or marking by means of metal plates which bear the prescribed marking and which are securely attached to the article by screws or rivets on metal articles; * * * all the foregoing are ordinarily proper methods of marking. * * *

“(e) Articles (or containers) subject to marking to indicate the name of the country of origin shall be marked on an integral part in a reasonably conspicuous place where the marking can be easily read upon a casual examination of the article (or container) and is not likely to be defaced, destroyed, removed, altered, covered, obscured or obliterated by the treatment or use made of the article (or container) before it reaches the ultimate purchaser. * * *”

The Secretary of the Treasury may authorize the exception of any article from the requirements of the marking under certain circumstances.

In the enactment of Section 1304, Congress intended that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods, the country of which the goods are a product.

The purpose of this section is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will. *U. S. v. Friedlander & Co.*, (1940) 27 C. C. P. A. 297. In *U. S. v. Ury*, 106 Fed. 2d 28, the court said that Congress certainly intended to prevent removal or obliteration of a mark by a retailer while the imported article was on his shelf for sale, and yet the article in such a case has passed from foreign to local commerce. The purpose of the act was to apprise the public of foreign origin and thus to confer an advantage on domestic producers. In *Didia v. U. S.* (1939), 106 Fed. 2d 918, the court upheld an indictment for removing labels by the owner of a store while the goods were part of his stock. The goods had been shipped to the defendant by a wholesaler and obviously the defendant was not the importer.

A different situation is presented where goods are imported for purposes of manufacture and as a result of the manufacturing process the imported products lose their identity as such and become new articles having a new name, character and use. In *U. S. v. Gibson Thomsen Co., Inc.*, (1940) 27 C. C. P. A. 267, wood brush blocks and toothbrush handles were imported by a manufacturer of hairbrushes and toothbrushes. At the time of their importation, these articles were "legibly, indelibly, and permanently marked in a conspicuous place (so long as they remained in their imported condition) with the name of their country of origin (Japan), the word "Japan being die sunk on that part of the articles where, after importation, bristles were to be inserted in order to convert the toothbrush handles into toothbrushes and the wood brush block into hair brushes." Consequently, it was held that the importer-manufacturer, rather than the person who bought the completed hairbrush or toothbrush was the "ultimate purchaser" of the imported materials. In *U. S. v. Strauss Import Corp.*, 27 C. C. P. A. 274, a similar conclusion was reached in regard to imported slide fasteners to be used as closures on clothing, bags, etc., which, when so used, became an integral constituent and component part of the finished articles.

There are, of course, cases of goods manufactured in the United States substantially of imported products where the Commission may require a disclosure of that fact in order to prevent deception on the consumer, and this would be true even when the Customs officials require no marking or a marking only sufficient to advise the importer-manufacturer of the foreign origin. In *Heller & Sons, Inc. v. F. T. C.*, (1951) 191 Fed. 2d 954, respondents imported pearls either on strings or in bulk, marked with tags or labels either on the strings

or containers. Respondents removed the tags or labels, fabricated the pearls into necklaces, etc., and distributed them without disclosing that the major portion of the fabricated articles, the pearls, were of foreign origin. A cease and desist order was upheld.

In line with this thought, the Commissioner of Customs, in a circular letter dated August 30, 1945 to Collectors of Customs and Others Concerned, advised as follows:

"The Federal Trade Commission has informed the Bureau that although imported merchandise may be excepted from the requirements of marking to indicate the name of the country of origin under the provisions of section 304, Tariff Act of 1930, as amended, and the regulations thereunder, it is possible that in view of the provisions of section 5 of the Federal Trade Commission Act the marking of such merchandise to show the country of origin may be required by that Commission.

"Therefore, in future cases involving the application of section 304, *supra*, in each case where it is concluded that the imported merchandise is excepted from the requirements of marking the importer shall be informed that the Federal Trade Commission is also concerned with the marking of merchandise and it would be advisable for the importer to ascertain the views of that Commission relative to the application of the Federal Trade Commission Act to the merchandise in question."

In the present case, the Customs officials objected to the marking of the machines with a decalcomania on the back of the vertical arm, on the ground that the attachment of a motor would for practical purposes cover the marking. In this they were obviously thinking of the consumer as the "ultimate purchaser" under the Act. Certainly the former marking was adequate for the protection of the importer. In other words, the Customs officials were seeking to protect from deception the same class of person that the Federal Trade Commission is seeking to protect. The *Heller* case does not hold that the conclusion of the Customs officials is immaterial in the type of case that we now have before us. The court simply held that the Tariff Act giving specific authority over marking to the Customs officials did not by implication take away the jurisdiction of the Federal Trade Commission in cases under Section 5 of the Federal Trade Commission Act, simply because imported goods were involved. In the instant case, however, the question is not one of jurisdiction but of the weight to be given to the admitted fact that the marking in question had been approved by the Customs officials.

We can take judicial notice of the fact that the importation of many different types of goods is passed on by the Customs officials of the Port of New York. It is reasonable to believe that they have developed considerable skill and knowledge in regard to markings that will prevent deception. If the opinion of a consumer witness (whose experience may be limited to a single incident) is of value, the opinion of impartial experienced officers of the government acting in the performance of duties placed upon them by law would seem to be of at least equal value.

Secondly, to ignore the conclusions of the Customs officials will create confusion in the administration of the law. At best it is difficult for the citizen to find his way in the labyrinth of rules and regulations which beset him on all sides. It is not made easier when different agencies of the same government set up conflicting road signs. This thought was well expressed by the late Mr. Justice Jackson in his dissenting opinion in *The Ruberoid Company v. F. T. C.*, 343 U. S. 470 at page 482, in which he points out:

“* * * recent instances in which part of the government appears before us fighting another part—usually a wholly executive-controlled agency attacking one of the independent administrative agencies—the Departments of Agriculture (*Secretary of Agriculture v. United States*, 344 U. S. 298) and Justice (*United States v. Interstate Commerce Commission*, 337 U. S. 426) against the Interstate Commerce Commission, the Department of Justice against the Maritime Commission (*Far East Conference v. United States*, 342 U. S. 570), the Secretary of the Interior against the Federal Power Commission (*United States ex rel. Chapman v. Federal Power Commission*, 345 U. S. 153).”

Courts usually give considerable weight to the conclusions of other courts, even where they are not bound to do so. In *Mast, Foos & Co. v. Stover Manufacturing Co.*, 177 U. S. 485, the court said:

“Comity is not a rule of law, but one of practice, convenience and expediency. It is something more than mere courtesy, which implies deference to the opinions of others, since it has substantial value in securing uniformity of decision and discourages repeated litigation of the same question.”

Title 19, Section 1304, lays down a general Congressional policy as to marking of imported articles which is binding on all of us. The law does not require that the marking itself shall be conspicuous, but only that it shall be in a conspicuous place. The importer is required to give notice of foreign origin; there is no requirement that he shall advertise it. Nor is there any mandate that the marking be visible

to all who pass by; some examination is required. The regulation of the Secretary of the Treasury is that marking shall be "in a reasonably conspicuous place where the marking can be easily read upon a casual examination of the article." I think this means the type of examination that would be made by the usual prospective purchaser.

The regulations also provide that marking by means of metal plate which contains the required information and which is securely attached to the article by screws or rivets is sufficient on metal articles. Reasonable skill and diligence should be exercised in putting on markings that will meet the requirements of the law. Nevertheless, in many cases a product can not be marked in such a manner as to insure that it will not be hidden or removed. That the Congress recognized this is shown by the criminal penalty provided in Title 19, Section 1304 (e) of a \$5,000 fine and one year imprisonment for removing or altering any such mark with intent to conceal information given thereby. It is my conclusion that the record does not justify an order against respondents in the matter of marking of foreign origin. That portion of the appeal should be granted.

The majority opinion refers to former cases where consideration has been given to this general subject. Some have to do with settlements and some with statements made in regard to compliance and others were contested cases.

Each case must be decided on its own facts as developed by the evidence. In none of these cases does it appear that the conclusions of the Customs officials as to the sufficiency of a particular marking was given any weight. In fact in *Astor Industries, Inc., et al.*, Docket 5889, and *Pickow Distributing Corporation et al.*, Docket 5890, it was held (citing *L. Heller and Sons v. FTC*) that such evidence was immaterial. I think this conclusion is not supported by the *Heller* case and should be overruled.

In prior statements on this subject, the Commission has discussed "gold on gold," "gunmetal on gunmetal," "clearly and conspicuously disclosing," "unemphasized," etc. In fact the Commission seems to have not only ignored the conclusions of the Customs officials but also the intent of Congress as expressed in its statutes. I agree with the statement in the Concurring Opinion of Chairman Howrey as to the desirability of cooperation with the Customs officials. It seems to me, however, that cooperation should begin in this case where the question is directly raised.

Commissioner MASON joins in this dissent.

SPECIAL OPINION CONCURRING WITH COMMISSIONER GWYNNE'S DISSENT

By MASON, Commissioner:

This is a case about color schemes and lettering on labels for imported sewing machines.

The Tariff Act says you can't bring manufactured products into the United States unless the goods are marked so the casual observer may see where they come from.

The Bureau of Customs of the Treasury Department administers this law—and a right good job it does.

Just why the Federal Trade Commission gets into the act is not apparent. But it is surprising how often an overdeveloped sense of responsibility makes one agency of Government duplicate, overrule or amend the work another has already done.

This is the opposite of the usual governmental practice known as "passing the buck." It is called "grabbing the buck."

The Commission grabbed the buck in the instant case because it felt neither the color scheme nor the size of the letters Treasury approved for defendant's labels really protected the public interest.

Here is what happened up to the time the Federal Trade Commission came into the picture.

While the defendant had always labeled his machines "Made in Japan" (the country of origin), the Bureau of Customs back in 1949 determined the markings were not as plain as they should be.

They told him so.

He changed his marking in accordance with their suggestion.

They wrote him a letter approving the change.

By 1955 the Federal Trade Commission decided it didn't like the Custom Collector's taste. According to the Federal Trade Commission, gold lettering on a gold medallion would no longer do. Gunmetal on gold, or even gunmetal on gunmetal would be quite all right, but even then, the letters should be just a bit bigger.

To give governmental recognition and full force and effect to this great ethnological shift, the Commission has now adjudicated that if defendant wants to use a gold medallion on a sewing machine, it ought to make the letters another color and increase the size of the word "Japan" a sixteenth of an inch.

So much has been said regarding the merits of an eighth of an inch over a sixteenth, and the virtue of gunmetal on gold over gold on gold, that I hesitate to add anything to this already exhausted branch of our knowledge. Suffice to say I am in complete agreement with the opinion of Commissioner Gwynne. I, too, opine that perhaps we had best leave this exotic field to the polished judgment of the ad-

ministrative official originally endowed with the burden of approving foreign marking, namely, the Treasury Department Bureau of Customs.

Not that we Commissioners aren't as cultured and refined as a customs collector—it's just that it takes us too long to be vague on matters he decides so clearly and quickly.

How did the Collector do this?

The 1949 change of marking effected by Customs involved the exchange of three letters.

One, signed by Customs, outlined what should be done.

One, signed by the importer, set forth his method of carrying out what Customs wanted.

And one, by Customs, acknowledged and approved the new marking, as follows:

"You are advised that the use of the plate submitted will be satisfactory provided the same is affixed to the upper part of the sewing machine in a place which will not be obscured by the usual attachments, such as a motor, etc., which may be added subsequent to importation and before delivery to the ultimate purchaser."

There may have been some collateral conversations at the time but, taken all in all, the proceedings were quick, inexpensive, and to the point.

Here was no beating around the bush with a lot of "cease and desist" language.

Customs told the importer just what it wanted. The importer did what he was told to do, and everybody was happy.

The time consumed—a few days.

The paper consumed—three letters.

The Customs Collector had agreeably accomplished his duty.

The businessman had agreeably complied with the law.

And the consumer?

Well, anybody with eyes good enough to thread the needle on the sewing machine could certainly read the Customs-approved gold medallion three inches above it. By so doing, customers could ascertain (if interested) the ancestry, origin and antecedents of the machines they bought.

All this indicates the Collector of Customs devised and used an efficient empirical routine for the protection of the public in marking foreign-made goods. Certainly his day-to-day administration of his duties entailed very little oppression and burden on those whose businesses are subject to his control.

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Opinion

As against the casual exchange of correspondence when Customs dealt with this problem, compare his administrative action with what took place when the Federal Trade Commission decided it, *too*, should protect the public interest.

Turn we now to the ineluctable and awesome scene as the Federal Trade Commission swung its batteries of lawyers, investigators, hearing examiners, reviewers, chiefs of bureaus and Commissioners into action.

Before drawing the complaint, the Commission engaged seven lawyers to make 79 investigations involving trips to :

<i>City</i>	<i>Number of Trips</i>
New York, N. Y.....	6
Brooklyn, N. Y.....	1
Philadelphia, Pa.....	2
Pittsburgh, Pa.....	2
West View, Pa.....	1
Washington, Pa.....	1
Etna, Pa.....	1
Cecil, Pa.....	1
New Brighton, Pa.....	1
McKeesport, Pa.....	1
Cleveland, Ohio.....	1
Providence, R. I.....	1
Baltimore, Md.....	2
Clinton, Md.....	1
Boston, Mass.....	2
Chelsea, Mass.....	1
Westfield, Mass.....	1
Springfield, Mass.....	1
Chattanooga, Tenn.....	1
Nashville, Tenn.....	1
Jersey City, N. J.....	2
Newark, N. J.....	1
Passaic, N. J.....	1
Hartford, Conn.....	1
Manchester, Conn.....	1
Atlanta, Ga.....	2
Falls Church, Va.....	1

When trial came on, the Commission had to send its prosecutor and its hearing examiner to Philadelphia, New York and Dallas, as well as employ court reporters to cover the extended hearings in those cities.

This represents an outlandish expenditure of Government funds, considering the results obtained. Nor do I believe it amiss to express some concern over the defendant's similar loss in defending himself for doing what Government had already advised him was "satisfactory."

It is cases like this that demonstrate the crying need for the Langer Bill.³

It appears that the defendant had spent \$100,000 in some 25 suits against private parties protecting his right to the labels on his sewing machines. In all of these suits he was successful. But now he had to employ his lawyers, stenographers, court reporters, et al., to again defend his property, but this time against his Government.

And here he did not do so well. For the Commission in its wisdom ordered the defendant to cease and desist from selling foreign-made sewing machines without

“Clearly and conspicuously disclosing on the heads the country of origin thereof, in such manner that it cannot readily be hidden or obliterated.”

Albeit the defendant and the Bureau of Customs had been rocking along for years in ignorance, both blissfully believing that defendant's labels already did just this. Certainly the above order did nothing to dissipate the fog.

If it weren't for the careful collation of staff comments on foreign marking by Commissioner Secrest in his novel but scholarly majority opinion, we would never know the Commission wanted a different color and a sixteenth of an inch bigger letters. The thing that tells what the Commission wants is not its quasi-judicial order, but the staff's interpretations as to what the order was really driving at.

In other words, we have coated our administrative busybodiness in the mummery of a judicial show to no avail, for no matter how we try to dress up our foreign-marking cases to look like they were quasi-judicial questions, in the end the Federal Trade Commission has to drop its role of court and let its staff act like an administrator.

All of this naturally leads to the question, how many administrators must an importer listen to—Customs, the Federal Trade Commission, and who next?

From a practical standpoint, the logistics of the problem indicate the advantages of direct Bureau of Customs administrative treatment in these cases over the costly and lengthy quasi-judicial process of the Federal Trade Commission.

There are other cogent reasons why we should retire gracefully (even though we at present have the authority to remain) from this type of litigation.

³ S. 1752 introduced in the 83d Congress, 1st Session: “No person shall be liable to the United States Government for * * * penalties because of conduct not in conformity with any statute or other law, if he establishes that his conduct was in conformity with * * * a rule * * * of an agency responsible for administering that law, and if such statement was promulgated to guide him * * *.”

Besides reworking the Bureau of Customs field, we have also wandered over into the Patent Office Trade-Mark Operation of the Department of Commerce.

In the instant case, defendant applied for and received a trade-mark registration for its use of the word "Universal." Issuance by the Patent Office of a trade-mark registration carries with it prima facie evidence of validity, ownership and right to use.

We have reversed the Department of Commerce copyright department which gave Standard the right to use the word "Universal" in manner and form as respondent has been using it for years, and all this after it has successfully defended in the courts of the land its right to such a symbol.

Here again there is no doubt but that we have the authority, but see what mischievous interpretations we foster when we command the defendant to cease and desist from

"Using the word 'Universal,' or any simulation thereof, as a brand or trade name to designate, describe or refer to their sewing machine heads or sewing machines of which the heads are a part, unless there appears in connection therewith, in legible and clearly visible marking, the name of the corporate respondent 'Standard Sewing Equipment Corporation.'"

This part of the order is based on the testimony of witnesses, some in Texas, some in Philadelphia, who testified when they saw the word "Universal," they thought the sewing machine was manufactured by Landers, Frary & Clark.

It so happens that Landers, Frary & Clark do not make sewing machines, but nevertheless it might be asked when we require Standard to add its name to the word "Universal" every time Standard uses it, are we in effect giving Landers, Frary & Clark an exclusive and perpetual monopoly to use the word "Universal" by itself?

Certainly on its face it looks like we were, but careful analysis will show this is not so.

Tomorrow Landers, Frary & Clark may haplessly find themselves the butt of a similar proceeding if other witnesses two thousand miles off in another direction are willing to testify that they believed the word "Universal" really indicates that the Fritter Fryer Company or the Zilch Zither Corporation made the machine in question.

When the trade-mark people adjudicate the fact of prior use for an article, they first give notice to the world by Official Gazette so that all who wish may make claims for or file interferences against the use of the word or phrase as a trade-mark.

We have neither the machinery nor the experience to do this.

Yet in the instant case we have overruled the Patent Commissioner's certificate and the administrative decision of the Collector of Customs, invalidating their decisions in both instances on the sole testimony of witnesses called for the prosecution, with no opportunity for any other person to challenge their statements except the defendant.

Opinions and impressions—they blossom everywhere and, with proper selection,⁴ witnesses will always come up with the “right answers”—a dozen for the prosecution—a dozen for the defense—depending on who calls them. Under most circumstances these witnesses clutter up a record and waste the taxpayers' money with no other results than the pitting of one set of propaganda against another.

Nine years ago, in *Federal Trade Commission v. Manhattan Brewing Company*, Docket 4572, I observed:

“Both the Government and defense attorneys lay great stress on their public witnesses. (A public witness is a person you pull off the street or get from the telephone book. They come to court and tell what impression they got from a sign, a label, or an advertisement. Theoretically, they are not generally supposed to know what it is all about until they are on the stand—to believe this would test the credulity of any man.) The witnesses were honest enough. They thought they were giving ‘impressions,’ but for the most part it was pre-delictions they were revealing. * * *

“Most public witnesses are disposed to stay out of trouble with Uncle Sam. When a Federal officer orders a citizen to appear in court, it's a great relief to discover Uncle Sam only wants you as a public witness instead of as a private defendant. This relief, coupled with pride in helping Uncle Sam, does funny things to people. It expands their virtue out of all proportion. They become parties to a game and they are out to have their side win, especially if their side is all-powerful Uncle Sam.

“As for the defendant's public witnesses, a lawyer never combs the country for witnesses against his own client. Through the years I have become convinced public witness testimony on ‘impressions’ is not worth a ‘continental’.”

In the light of our paltry appropriations, stamping out monopoly, restraints of trade and gross unfair acts in commerce is a grim business. For failure to maintain competitive freedom will slide our economy into either communal or a totalitarian decline.

We should not squander our appropriations on cases such as this,

⁴In the instant case the Government adjourned the trial in New York and went to Dallas, Texas, where a local sewing machine merchant had sold defendant's machines after the foreign-marketing label had been defaced.

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Order

but stick to what Chairman Howrey has often referred to as "hard core violations."

I join in Commissioner Gwynne's dissent.

FINAL ORDER

Respondents, Standard Sewing Equipment Corporation, a corporation, and William J. Hackett and Harry Kron, individually and as officers of said corporation, having filed on April 12, 1954, their appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on briefs and oral argument; and the Commission having rendered its decision granting in part and denying in part said appeal:

It is ordered, That the order contained in the aforesaid initial decision, be, and it hereby is, modified to read as follows:

It is ordered, That the respondents, Standard Sewing Equipment Corporation, a corporation, and William J. Hackett and Harry Kron, individually and as officers of said corporation, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of sewing machine heads or sewing machines in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing foreign-made sewing machine heads or sewing machines of which foreign-made heads are a part, without clearly and conspicuously disclosing on the heads the country of origin thereof, in such manner that it cannot readily be hidden or obliterated.

2. Using the word "Universal," or any simulation thereof, as a brand or trade name to designate, describe or refer to their sewing machine heads or sewing machines of which the heads are a part, unless there appears in connection therewith, in legible and clearly visible marking, the name of the corporate respondent "Standard Sewing Equipment Corporation."

It is further ordered, That with respect to any issue raised by the complaint other than those to which this order relates, the complaint be, and the same hereby is, dismissed.

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the above provisions.

It is further ordered, That the initial decision of the hearing examiner, as modified herein, be, and it hereby is, affirmed.

Chairman Howrey concurring in the result and Commissioners Mason and Gwynne dissenting.

IN THE MATTER OF

E. F. DREW & COMPANY, INC.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT AS AMENDED

Docket 6126. Complaint, Oct. 19, 1953—Decision, May 5, 1955

Order requiring a corporation with principal office in New York City and factory in New Jersey, to cease using in advertising terms or statements which represented or suggested that its "Farm Queen" oleomargarine was a dairy product.

Before *Mr. Everett F. Haycraft*, hearing examiner.

Mr. Joseph Callaway for the Commission.

Mr. Samuel J. Loewenstein, of New York City, for respondent.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

STATEMENT OF THE CASE

The Federal Trade Commission on October 19, 1953, issued a complaint charging the respondent with having violated the Federal Trade Commission Act by the use of unfair and deceptive acts and practices in commerce in the sale of oleomargarine. It was alleged in the complaint that respondent had disseminated advertisements concerning its product under the trade name "Farm Queen Oleomargarine" in such a way as to be misleading in material respects and constituting false advertisements, as such term is defined in Sections 12 and 15 of the Federal Trade Commission Act, in that they serve as representations or suggestions that respondent's product is a dairy product which is contrary to the fact. It is further alleged that the use of the words "Farm Queen" as a trade name for respondent's oleomargarine is also misleading in a material respect in that it serves as a representation or suggestion that respondent's product is a dairy product. It is further alleged that the use by respondent of the foregoing practices had the capacity and tendency to mislead and deceive a substantial portion of the purchasing and consuming public into the erroneous and mistaken belief that respondent's oleomargarine is a dairy product, and into the purchase thereof in the reliance upon such erroneous and mistaken belief. It is also alleged that respondent's said practice placed in the hands of dealers and other distributors a means and instrumentality to mislead the purchasing and consuming

public into such erroneous and mistaken belief and into the purchase of substantial quantities of said products because of such belief.

Respondent filed its answer in which it denied all the material allegations, and testimony was taken in support of, and in opposition to, the foregoing allegations of the complaint before the above-named Hearing Examiner. Thereafter, the proceeding regularly came on for final consideration upon the complaint and answer thereto, the testimony taken, the proposed findings submitted by respective counsel and oral argument, and said Hearing Examiner having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusions drawn therefrom and order:

FINDINGS AS TO THE FACTS

1. *The Respondent*: E. F. Drew & Company, Inc., is a corporation organized and existing under the laws of the State of Delaware with its principal place of business located at 15 East 26th Street, New York, New York.

2. *Interstate Business of Respondent*: Said respondent is now, and since approximately April 1950 has been, engaged in the manufacture of oleomargarine at its factory located at Boonton, New Jersey, and in the sale and distribution thereof under the trade name of "Farm Queen" to distributors, usually dairies, for resale and delivery to consumers. It causes its said product, when sold, to be transported from its factory located in the State of New Jersey to purchasers thereof located in various other states of the United States. It maintains, and at all times mentioned herein has maintained, a substantial trade in oleomargarine in commerce among and between the State of New Jersey and other states, particularly the State of New York. Respondent's annual business in the sale of its said product under the trade name "Farm Queen" is in excess of \$100,000, of which approximately 75 percent is shipped from its said plant in the State of New Jersey to its customers located in other states.

3. *Dissemination of Advertisements in Interstate Commerce*: Respondent, in the course and conduct of its aforesaid business, during the year 1952 and until October 19, 1953, disseminated, and caused the dissemination of, advertisements concerning its said product "Farm Queen Oleomargarine" by means of United States mail and other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including form letters, circulars and leaflets, for the purpose of inducing, directly or indirectly, the purchase of said product. Among such advertising matter was a bottle hanger—a sort

of handbill with a round hole in the top so that it would fit over the neck of a milk bottle. These were furnished by the respondent to its customers, dairies, whose route men, in turn, delivered milk to the ultimate consumers from door to door; and also to wholesale distributors of dairy products, who resold to dairies for door to door distribution. The bottle hanger was intended to be used, and was used, by the dairy route men by hanging it over the neck of a bottle of milk left at the door of the ultimate consumer. The other advertising matter, such as circulars and leaflets, was intended to be left by the dairy route men for each household customer.

Among and typical of the statements and representations contained in said advertisements furnished to dairies and other distributors for delivery to consumers were the following:

Farm Queen is always country-fresh * * * made from pure, highly refined, fresh vegetable oils.

Farm Queen gives you all the fresh, natural, golden-rich flavor of nature's finest vegetables * * * churned to delicate, sweet creamy goodness. Contains no artificial flavoring.

Starting now, our drivers will have it for you with the same day-to-day freshness which characterizes our other dairy products.

Since October 19, 1953, respondent has discontinued the use of the foregoing phrases, except it has continued to use the trade name "Farm Queen" in describing its said product.

4. *Specific Violations:* Such expressions as "churned to delicate sweet creamy goodness" and the statement "Starting now, our drivers will have it for you with the same day-to-day freshness which characterizes our other dairy products," when used by respondent in its advertising matter, as hereinbefore described, are representations or suggestions that respondent's oleomargarine is a dairy product.

CONCLUSIONS

The acts and practices of respondent, as hereinabove found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

This case is controlled by the provisions of Sections 12 and 15 (a) (2) which read as follows:

"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, 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 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. 15. (a) (2) In the case of oleomargarine or margarine an advertisement shall be deemed misleading in a material respect if in such advertisement representations are made or suggested by statement, word, grade designation, design, device, symbol, sound, or any combination thereof, that such oleomargarine or margarine is a dairy product, except that nothing contained herein shall prevent a truthful, accurate, and full statement in any such advertisement of all the ingredients contained in such oleomargarine or margarine."

The allegations in the complaint which go beyond the provisions of Section 12 and Section 15 (a) (2) of the Federal Trade Commission Act are not supported by the evidence in the record. From an examination of the advertisements themselves as well as the results of the surveys made among housewives in one city to obtain their opinions with respect to the advertisements, and representations contained therein, there appear to be only three statements which have the capacity and tendency to lead a purchaser to believe that respondent's product is a dairy product. There is no evidence in the record to support the allegation that any customer had purchased respondent's oleomargarine in reliance upon such erroneous and mistaken belief. It is not believed that it was necessary for the complaint to contain such allegations. Apparently Congress in the Oleomargarine Act, which amended Section 15 of the Federal Trade Commission Act, did not give the Commission the discretion of determining whether or not the representations of the respondent engender such erroneous and mistaken belief. All that is necessary for the Commission to allege and prove in order to show a violation of this section is that respondent represented that its oleomargarine "is a dairy product." It is not necessary for the Commission to allege and prove that it is *not* a dairy product. Congress recognized that oleomargarine is not a dairy product so did not place upon the Commission the requirement of such proof.

With respect to the trade name "Farm Queen," from its context on the label and in advertising matter, and also as a result of the surveys that were made, there is insufficient evidence in the record to support the allegation that the use of this phrase alone as a trade name is mis-

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leading as a representation that respondent's product is a dairy product. There are so many other activities associated with a farm other than dairying, that the use of the word "farm" in a trade name does not suggest a dairy. Furthermore, the principal ingredients of margarine are grown on a farm.

As to the contention of respondent that it has not disseminated false and misleading advertisements in interstate commerce, it is held that the facts disclosed by the record, and as herein found, give the Commission jurisdiction over the activities of the respondent. Certainly the respondent is engaged in the dissemination of advertisements when it prepares such advertisements and furnishes them to its customers for distribution to the public by those customers. Respondent once having prepared those advertisements containing the misleading statements and having furnished them to its customers had set in motion a form of dissemination which it contemplated and expected the dairy customer to complete by physically distributing the advertisements to the consuming public. Having performed the initial act, the respondent cannot say that the completion of that act by its customers was not a continuation of its own act, and where those customers were located in states other than the State of New Jersey, such dissemination took place in interstate commerce.

As to the contention of respondent that the word "churned" does not represent or suggest that respondent's oleomargarine is a dairy product, the understanding of the public of this word is so closely associated with the manufacture of butter, a typical and recognized dairy product, that for the respondent to use the word in describing oleomargarine is a representation or suggestion that oleomargarine also is a dairy product. Admittedly, the "churning" process in the manufacture of butter is not followed in the manufacture of oleomargarine. The agitation is necessary to make the butter—to separate the fat from the liquid—but this agitation is not necessary in the manufacture of oleomargarine, which is a mixture and all that is necessary to be done is to mix or blend the ingredients.

With respect to the contentions of counsel for the respondent, that since the respondent has discontinued all of the expressions set forth in Paragraph Three of the complaint, with the exception of "Farm Queen," the complaint should be dismissed, it is held that so long as respondent contends that it has a right to use the expressions which, have been found herein to have been misleading and false advertisements in material respect, the Commission is amply justified in requiring the respondent to cease and desist making those representations.

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ORDER

It is ordered, That the respondent, E. F. Drew & Co., Inc., a corporation, and its officers, agents representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of oleomargarine or margarine do forthwith cease and desist from, directly or indirectly,

1. Disseminating or causing to be disseminated by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains:

The terms "churned to delicate, sweet creamy goodness," "country-fresh," or "* * * the same day-to-day freshness which characterizes our other dairy products," or any other statement, word, grade designation, design, device, symbol, sound, or any combination thereof which represents or suggests that said product is a dairy product: *Provided, however*, That nothing contained in this order shall prevent the use in advertisements of a truthful, accurate and full statement of all of the ingredients contained in said product, or of a truthful statement that said product contains butter or any other dairy product provided the percentage thereof contained is clearly and conspicuously set forth.

2. Disseminating or causing to be disseminated 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 product any advertisement which contains any of the representations prohibited in Paragraph One of this order.

OPINION OF THE COMMISSION

Chairman HOWREY delivered the opinion of the Commission:

This is the first contested case to be decided under the so-called Oleomargarine Amendment to section 15 of the Federal Trade Commission Act.¹ The amendment was part of the new Oleomargarine Act which became effective July 1, 1950.²

Under the amendment it is unlawful to disseminate any oleomargarine advertisement which is misleading in a material respect. The phrase "material respect" is defined in section 15 (a) (2) to include representations "made or suggested by statement, word, grade, designation, design, device, symbol, sound or any combination thereof, that such oleomargarine or margarine is a dairy product, * * *"

¹ 15 U. S. C. Sec. 55.

² Public Law No. 459, 81st Cong., 2d Sess., March 16, 1950; 64 Stat. 20.

Section 15 (f) defines "oleomargarine" or "margarine" to mean:

"(1) All substances, mixtures and compounds known as oleomargarine or margarine;

"(2) All substances, mixtures, and compounds which have a consistence similar to that of butter and which contain any edible oils or fats other than milk fat if made in imitation or semblance of butter."

The advertising matter under examination consisted of form letters, handbills, circulars and leaflets. They contained such statements as:

"Farm Queen margarine * * * is always country fresh * * *"

"Starting now our drivers will have it for you with the same day to day freshness which characterizes our other dairy products."

"* * * churned to delicate sweet creamy goodness."

These were charged in the complaint to be misleading in material respects in that they served to represent or suggest that respondent's product was a dairy product. The complaint also condemned, for the same reason, the use of "Farm Queen" as a trade name for respondent's oleomargarine.

One of the handbills, a so-called bottle hanger, had a round hole at the top so that it would fit over the neck of a milk bottle. These were furnished by respondent both to dairies and wholesale distributors of dairy products. The bottle hanger was used by the route man who hung it over the bottle of milk on the doorstep of the housewife. The leaflets, circulars and other advertising matter were also designed for door-to-door delivery by the dairy route man.

The hearing examiner held that such expressions as "churned to delicate, sweet, creamy goodness" and "Starting now our drivers will have it for you with the same day to day freshness which characterizes our other dairy products" had the capacity and tendency to lead a purchaser to believe that respondent's oleomargarine "is a dairy product." The hearing examiner said that while there was no evidence in the record that any customer had purchased respondent's oleomargarine in reliance upon such erroneous and mistaken belief, such proof was unnecessary under the Oleomargarine Act; that amended section 15 did not give the Commission discretion to determine whether or not respondent's representations engendered such belief; "All that is necessary for the Commission to allege and prove," he said, "in order to show a violation of this section is that respondent represented that its oleomargarine 'is a dairy product.'"

The initial decision did not include a prohibition against the use of the expression "country fresh" or against the use of the trade name "Farm Queen." The hearing examiner did not discuss "country

fresh" but with respect to the name "Farm Queen" he said there was insufficient evidence in the record to show that the use of this phrase constituted a representation that respondent's oleomargarine was a dairy product. "There are so many other activities associated with a farm," he said, "that the use of the word 'farm' in a trade name does not suggest a dairy." He added that the "principal ingredients of margarine are grown on a farm."

The oleomargarine-butter controversy, which culminated in the Oleomargarine act of 1950, had been waged in the halls and chambers of Congress for the better part of a century. The Act of August 2, 1886, for example, defined "butter" and "oleomargarine" and imposed upon the latter "discriminatory" excise taxes as well as labeling and packaging requirements.³

It was clear from the beginning that this exercise of the taxing power was not designed to raise revenue, but to achieve certain regulatory effects in the field of competition between oleomargarine and butter.⁴

In opening the Senate debate on the 1886 Act, Senator Miller said:

I resort to no subterfuges in this case, Mr. President. My objective in bringing forth this bill and supporting it is, not to secure a large increase to the revenue of our Government; but I have sought to invoke the taxing power of the Government in order that under it the Government might take absolute control of [oleomargarine] manufacture, might properly regulate it, and so regulate and control it that it should be carried on in a legitimate way and that the product should be sold to the consumer in all cases for what it is, and it is for that purpose that the friends of this measure have invoked the taxing power of the Government.⁵

The difference in tax treatment between yellow oleomargarine and white oleomargarine was first inserted in the law by the Act of May 9, 1902.⁶ This Act imposed a 10 cents per pound tax on oleomargarine which was artificially colored to look like butter.

By the Act of March 4, 1931, the 10 cent tax was made to apply to all oleomargarine which met an arbitrary statutory definition of "yellow" whether or not colored artificially.⁷

The 1950 bill as it passed the House and as it was reported to the Senate by the Committee on Finance continued to regulate oleomargarine in many respects under the Federal Food, Drug and Cosmetic Act, but provided for the repeal of all Federal taxation on oleomargarine. The Senate Committee in reporting the bill attempted to forestall some of the arguments of the Senators from dairy States by pointing out that

³ 24 Stat. 209.

⁴ Senate Report 309, Cong. Rec. Jan. 4, 1950, p. 44.

⁵ Cong. Rec. July 17, 1886, p. 7073.

⁶ 32 Stat. 193.

⁷ 46 Stat. 1549. See also Sen. Rep. 309, Cong. Rec. Jan. 4, 1950, pp. 44-45.

the Federal Trade Commission already had jurisdiction, under existing law, to prevent misrepresentation of oleomargarine as butter; also to prohibit advertising practices which were in any way deceptive or which confused oleomargarine with butter.⁸ These arguments failed to satisfy the opposition and, therefore, during the course of floor debate, Senator McCarthy of Wisconsin offered the amendment which became law as part of section 15 of the Federal Trade Commission Act.

Senator Fulbright who was in charge of the bill accepted the McCarthy amendment. For this reason the legislative history of the amendment consists largely of the comments of its sponsor, his colloquies with one or two other Senators, and the Conference Committee report.

Inasmuch as this is a case of first impression, it may be helpful to quote from these sources at some length:

Mr. McCARTHY. Simply stated, Mr. President, the amendment is for the purpose of making illegal the unfair and dishonest advertising of oleomargarine. I have before me some unusual examples of the attempts of the oleomargarine interests to try to pass their product off as butter. I believe that is unfair, not only to the dairy farmer, but also to the consumer. * * *

I have before me a newspaper from Memphis, the Memphis Press-Scimitar, dated February 24, 1949, advertising Durkee's oleomargarine, beside what looks like a pound of butter. There is pictured a dairy farm. This is advertised as "country fresh." Obviously the purpose of it is to create the impression that this is a dairy product.

I have before me, Mr. President, a newspaper from San Francisco, the San Francisco Call-Bulletin, advertising Wilson's oleomargarine as "churned fresh daily." As we know, "churning" means separating the butterfat from the milk. That is the common conception of it. There are of course other conceptions of churning, but in the public mind "churning" means taking the cream and removing the butter. They advertise this as "churned fresh daily," and they mention the word "milk" in it also.

I have before me also a newspaper from White Plains, N. Y., the Reporter Dispatch, dated December 1, 1949, in which again appears a very good drawing of dairy products. Underneath are the words "Dairy products, margarine, Numaid, 2 pounds 45 cents," under the heading of "Dairy products." * * * *

I have before me also, Mr. President, a New York newspaper dated Thursday, November 17, 1949. It is the Reporter Dispatch of White Plains. Again we find the same type of deliberately dishonest advertising. There appear drawings of cheese and butter, very excellent and very appetizing in appearance, and a huge banner saying "Remember, Dairy Products are Vital to Good Health." Underneath that it says "Nucoa, pound package 27 cents."

I have before me also, Mr. President, but unfortunately it cannot be reproduced in the Record, the Durkee package in which they pack the oleomargarine, very deliberately made to appear exactly as a butter package, even down to the grade

⁸ Sen. Rep. 309, Cong. Rec. Jan. 4, 1950, p. 45.

⁹ Cong. Rec. January 6, 1950, p. 128.

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AA, which only butter manufacturers should be entitled to use under the rules and regulations of the Department of Agriculture. * * *

Mr. WILEY. * * * The whole purpose of the amendment is clearly to indicate that it would be illegal for the oleo interests to advertise their products as dairy products. That is the sum and substance of the amendment, is it not?

Mr. McCARTHY. Yes, the purpose of the amendment is to prevent any form of advertisement which gives the impression, directly or by inference, that the consumer is buying butter.

Mr. WILEY. In other words, the amendment would place no limitation upon the legitimate advertising of oleomargarine or margarine?

Mr. McCARTHY. None whatsoever. I might say that there should not be. If the oleo interests can sell their product on its merits I do not think we should in any way try to resist them. But I do think we should make sure that they advertise it solely as what it is.¹⁰

* * * * *

Mr. AIKEN. * * * All of us know that it is widely misrepresented as a dairy product. I hold in my hand an advertisement clipped from a Vermont newspaper of last week. * * *

Here is the advertisement:

"Oleo, Golden Maid."

It is neither golden, nor do I suppose any maid had any part in its preparation. But there is the misleading inference that it is yellow oleomargarine. It is not.

After the words "Golden Maid," we see where the rub comes on the consumer: "One pound package, 19 cents."¹¹

* * * * *

Mr. McCARTHY. * * * I am very happy that we finally arrived at a clear-cut issue. The issue no longer is whether oleomargarine taxes are to be repealed. The dairy farmers, and the oleo interests are agreed that we should remove the taxes. The sole question now is how much protection will be accorded the producer and the consumer. * * * The principal source of fraud is the attempted imitation of butter even down to the minutest detail of packaging. * * *¹²

* * * * *

I have here another very interesting advertisement. It is another Durkee advertisement. It uses the words "country fresh." It displays a large picture of what at first glance appears to be a butter carton. There is a drawing of a barn, a silo and a pasture. * * *

Mr. FULBRIGHT. In view of the fact that I have accepted the Senator's amendment, I should like to inquire the Senator's purpose in discussing it further * * *

Mr. McCARTHY. * * * I had planned to discuss advertising containing the word "fresh" and the words "country fresh," but * * * I shall spend very little time on it. However, I have here a large advertisement, approximately 2 feet by 4 feet in size, which says "country fresh churned." It also uses the word "milk." It uses the phrases "fresh dairylike flavor" and "no artificial flavoring."

Mr. President, as I have already stated, oleomargarine does not come from the country, but from an oil mill consisting of tanks, pipes, valves, and knobs. That oil mill can be owned by a soap company, or a paint company, or an inter-

¹⁰ Cong. Rec. January 6, 1950, p. 129.

¹¹ Cong. Rec. January 10, 1950, p. 273.

¹² Cong. Rec. January 12, 1950, p. 359.

national cartel employing slaves on the coast of Africa—but none of these things has anything to do with the American countryside as represented by barns and silos. As I have additionally stated, oleomargarine is not fresh, but uses a preservative, as it is required to state by law. Nothing can be fresh and preserved at one and the same time. That ought to be obvious to anyone. Yet, this advertisement, sponsored by a supposedly reputable corporation, undertakes to tell the housewives of America that oleomargarine containing a preservative is not only fresh, but country fresh. In the face of this evidence, how are we to believed (sic) that the oleomargarine interests can be trusted with a color which is the traditional color of butter unless we very closely control their advertising?¹³

The Conference Committee accepted the amendment, as the Senate passed it, with this addition:

except that nothing contained herein shall prevent a truthful, accurate and full statement in any such advertisement of all the ingredients contained in such oleomargarine or margarine.¹⁴

Senator George, the senior Manager on Part of the Senate, said the addition was necessary because “* * * the Conference Committee was advised—indeed, there was no dispute upon the point—that certain dairy products—for instance, milk in some form—were used in the manufacture of oleomargarine.”¹⁵

In the light of the legislative history outlined above, we not only think the decision of the hearing examiner was fully justified, but we believe he should have gone further and prohibited the use of the term “country fresh.” It seems to us that “country fresh”—particularly as the term was used in the milk bottle hanger which said at the top in large print “Buy it Fresh from your Milkman!”—also constituted a representation that the product was a dairy product.

It is true, of course, that all of respondent’s advertising contained the word “oleomargarine” or “margarine” in large print, but the whole controversy leading up to amended section 15 of the Federal Trade Commission Act seems to be based on the assumption that the word “oleomargarine” is not by itself a sufficient negation; in other words, Congress seems to have conclusively presumed that many people think that the product, even when described by its correct name, is a dairy product and that the use of the name “oleomargarine” does not prevent it from being palmed off to the public as such. Whether or not, this legislative view was or is a valid one is not for us to decide.¹⁶

Congress was not merely striking at general misrepresentation or deception, already covered by existing law, but intended to deal spe-

¹³ Cong. Rec. January 12, 1950, pp. 359-360.

¹⁴ Cong. Rec. March 8, 1950, p. 3060.

¹⁵ Cong. Rec. March 8, 1950, pp. 3060-61.

¹⁶ It has been suggested that the term oleomargarine is as well known today as the term butter. We do not have to pass on this question inasmuch as Congress has decided otherwise.

cifically with the contention that the oleomargarine industry was attempting to profit from the good will of the dairy industry.

We are frank to say we have had some difficulty in coalescing the statutory language and the legislative intent. However, the real purpose of the amendment seems to be, and the statutory language lends itself to this interpretation, to stop the practice of suggesting that oleomargarine is a dairy product by associating it with dairy terms—thus the prohibition against any representation “made or suggested” by “statement, word, grade, designation, design, device, symbol, sound, or any combination thereof. * * *” It was intended, we believe, to reach a form of advertising which, through suggestion and association of ideas, leads or may lead the consumer to believe that the particular oleomargarine in question is a dairy product.

All of respondent’s representations, except the trade name, “Farm Queen,” seem to fall into this category. If the amendment is to have any meaning we must conclude that it went beyond existing law which prohibited advertisements having the tendency and capacity to deceive, and reached a situation like the present where the suggestion that oleomargarine is a dairy product resulted from associating it with dairy terms.¹⁷ This is not to say that all dairy terms, as such, are precluded. They are prohibited only when they suggest to the reader that the product is a dairy product.

Except as modified herein, we adopt the findings of the hearing examiner and the initial decision is affirmed.

FINAL ORDER

Counsel supporting the complaint and respondent E. F. Drew & Co., Inc. (erroneously named in the complaint as E. F. Drew & Company, Inc.), both having filed an appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on briefs and oral argument; and the Commission having rendered its decision denying respondent’s appeal and granting in part and denying in part the appeal of counsel supporting the complaint, and affirming the initial decision as modified:

¹⁷ Representative Andresen of Minnesota explained the purpose of the amendment as follows:

“This amendment would also prevent the use in oleomargarine ads of dairy scenes or dairy terms, such as pictures of cows or dairy farms or equipment, or such terms as dairy breed names, churned, and so forth. The amendment would also prevent the grouping of oleomargarine with dairy products in advertisements, particularly where such grouping occurs in a box or under a heading entitled ‘Dairy Products’ or suggesting that the products so grouped are dairy products.” Cong. Rec. Mar. 9, 1950, p. A1933.

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It is ordered, That the initial decision be, and it hereby is, modified by:

1. Inserting the term "country-fresh" directly after the term "churned to delicate, sweet creamy goodness" in paragraph number 4 of the findings of fact so as to include it as one of the terms found to constitute a representation or suggestion that respondent's oleomargarine is a dairy product.

2. Changing the word "two" to "three" in the third paragraph of the Conclusion so that the second sentence therein now reads: "From an examination of the advertisements themselves as well as the results of the surveys made among housewives in one city to obtain their opinions with respect to the advertisements, and representations contained therein, there appear to be only three statements which have the capacity and tendency to lead a purchaser to believe that respondent's product is a dairy product."

3. Changing the order to cease and desist so that it now reads as follows:

It is ordered, That the respondent, E. F. Drew & Co., Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of oleomargarine or margarine do forthwith cease and desist from, directly or indirectly:

1. Disseminating or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains:

The terms "churned to delicate, sweet creamy goodness," "country-fresh," or " * * * the same day-to-day freshness which characterizes our other dairy products," or any other statement, word, grade designation, design, device, symbol, sound, or any combination thereof which represents or suggests that said product is a dairy product;

Provided, however, That nothing contained in this order shall prevent the use in advertisements of a truthful, accurate and full statement of all of the ingredients contained in said product, or of a truthful statement that said product contains butter or any other dairy product provided the percentage thereof contained is clearly and conspicuously set forth.

2. Disseminating or causing to be disseminated 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 product any advertisement

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which contains any of the representations prohibited in Paragraph One of this order.

It is further ordered, That respondent E. F. Drew & Co., Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist as hereinabove set forth.

Commissioner Gwynne not participating for the reason that he did not hear oral argument.

IN THE MATTER OF
THE BLANTON COMPANY

Docket 6197. Complaint, Mar. 18, 1954—Order, May 5, 1955

Order reversing initial decision which dismissed the matter as not involving misrepresentation, for the reason that in a proceeding brought under sec. 15 (a) (2)—the Oleomargarine amendment—the prohibitions of sec. 5 are not controlling; and remanding the matter to the hearing examiner for further consideration.

Before *Mr. Everett F. Haycraft*, hearing examiner.

Mr. William L. Pencke and *Mr. Morton Nesmith* for the Commission.

Mr. M. R. Garstang, of Washington, D. C., for National Milk Producers Federation, amicus curiae.

OPINION OF THE COMMISSION

Chairman HOWREY delivered the opinion of the Commission:

This is an appeal from the initial decision of the hearing examiner granting respondent's motion to dismiss made at the close of the case in chief of counsel supporting the complaint.

The complaint charged that certain advertising representations of respondent were misleading in material respects, in violation of section 15 of the Federal Trade Commission Act, as amended, in that, they suggested that respondent's Creamo oleomargarine was a dairy product.

The complaint also challenged, for the same reason, the use of the word "Creamo" as a trade name for respondent's oleomargarine.

Reference is made to the Commission's opinion in the Matter of E. F. Drew & Company, Inc., Docket No. 6126, entered this day, for an analysis and interpretation of the new oleomargarine amendment to the Federal Trade Commission Act.

We agree with counsel in support of the complaint that we are not dealing here with the usual misrepresentation case, that is, with false and misleading advertising which may have the tendency or capacity to deceive in violation of section 5 of the F. T. C. Act,¹ but solely with the question whether or not the respondent has through the use of any "statement, word, grade, designation, design, device, symbol, sound or any combination thereof" suggested that the oleomargarine sold by it "is a dairy product."²

¹ 15 U. S. C. sec. 45.

² 15 U. S. C. sec. 55.

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It is clear that the 1950 amendment to section 15 constituted special legislation dealing with the long standing butter-oleomargarine controversy. It was intended, we believe, to reach a form of advertising which, through suggestion, the association of ideas and the use of dairy terms, leads or may lead the consumer to believe that the oleomargarine in question is a dairy product. This is not to say that all dairy terms, as such are precluded. They are prohibited only when they represent or suggest to the reader that the product is a dairy product.

Typical advertisements used by respondent are as follows:

BLANTON
CREAMO
BRAND

HERE'S PROOF
CREAM MAKES
A DIFFERENCE

(Picture of carton of
Creamo Oleomargarine)

CONTAINS 5% LIGHT CREAM
OLEOMARGARINE

Made from choice vegetable oils
blended with fat-free milk, cream,
and enriched with 15,000 units of
Vitamin A.

Millions of women prefer and continue
to buy Blanton Creamo Margarine
regularly, despite a flood of premi-
ums, coupons, and give-aways of-
fered by other brands. We think
this is proof that those women who
have tasted it, PREFER Blanton
Creamo Margarine with CREAM to
ordinary margarines with FREE
GIMMICKS.

Why don't YOU taste the difference
cream makes?"

Every single pound of BLANTON CREAMO MARGARINE puts Eagle Stamps in your Eagle Stamp book. It's the only margarine that's made fresh daily right here in St. Louis * * * the margarine that's better because it's blended with sweet fresh cream. All this and Eagle Stamps too. So remember, for freshness * * * for extra goodness * * * for extra savings—ask for Blanton Creamo Margarine.

The best tasting spread, regardless of price. That's what women write about Blanton Creamo Margarine. Better tasting because it's made better with sweet fresh milk PLUS PURE CREAM. If you haven't yet tasted Creamo, get your proof-pound today. Taste the difference costlier ingredients make.

The record contains a copy of the quantitative formula of Creamo. From this formula it appears that it contains:

1800 lbs. of hydrogenated margarine oil, being a blend of refined
cottonseed oil and soya bean oil
100 lbs. of peanut oil
325 lbs. of skim milk
124 lbs. of U. S. standard cream
75 lbs. of salt

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Based on this formula, which shows that the product contained substantial quantities of skim milk and U. S. standard cream, and the fact that respondent made no effort to conceal the fact that the product was oleomargarine, the hearing examiner concluded that the advertisements did not fall within the prohibitions of the statute.

The latter contention, as we said in No. 6126, is not controlling. If this proceeding had been brought under section 5 the question of concealment would be important; but inasmuch as we are dealing with section 15, or more particularly with section 15 (a) (2), the prominent use of the term "oleomargarine" and the lack of any concealment that the product was in fact oleomargarine are immaterial.

As to the formula, this might have been controlling if it had been published alongside such statements as "Better tasting because it's made better with sweet fresh milk Plus Pure Cream." However, such statements standing alone without qualification or limitation, or the use of the name "Creamo" by itself, might well lead some people to believe that the product is a dairy product. Under section 15 (a) (1), in determining whether any advertisement is misleading in a material respect, "there shall be taken into account * * * the extent to which the advertisement fails to reveal facts material in the light of such representations * * *"³

Many of respondent's advertisements and radio continuities included the statement "Contains 5% Light Cream." We believe that if all the advertisements under scrutiny which used the name "Creamo" or the terms "milk" and "cream," had clearly and conspicuously stated the percentages of cream and milk contained in the product, then they would have been sufficiently informative and would adequately have negated any suggestion that respondent's "oleomargarine * * * is a dairy product."

The initial decision of the hearing examiner is reversed and the matter is remanded to the hearing examiner for further consideration in accordance with this opinion and the opinion of the Commission in Docket No. 6126.

ORDER GRANTING APPEAL FROM INITIAL DECISION DISMISSING COMPLAINT,
AND REMANDING PROCEEDING TO HEARING EXAMINER

This matter having come before the Commission upon an appeal of counsel supporting the complaint from an initial decision of the hearing examiner dismissing the complaint for failure of proof at the close of the presentation of the case in support of the complaint; and

³ 15 U. S. C. sec. 55 (a).

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The Commission having fully considered the entire record herein including briefs in support of and in opposition to said appeal and being of the belief, for the reasons stated in its accompanying opinion, that a prima facie case has been made out and that the complaint was erroneously dismissed:

It is ordered, That the appeal of counsel supporting the complaint from the initial decision is hereby granted.

It is further ordered, That the initial decision dismissing the complaint is hereby set aside and this matter is remanded to the hearing examiner for further appropriate proceedings in due course.

IN THE MATTER OF
REDDI-SPRED CORPORATION

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT AS AMENDED

Docket 6228. Complaint, June 30, 1954—Decision, May 5, 1955

Order requiring a seller in Philadelphia, Pa., to cease using in advertising representations and suggestions that it "Reddi-spred" oleomargarine was a dairy product.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. William L. Pencke for the Commission.

Duane, Morris & Heckscher, of Philadelphia, Pa., for respondent.

Mr. M. R. Garstang, of Washington, D. C., for National Milk Producers Federation, *amicus curiae*.

DECISION OF THE COMMISSION

STATEMENT OF THE CASE

The Federal Trade Commission on June 30, 1954, issued a complaint alleging that respondent, Reddi-Spred Corporation, has violated the Federal Trade Commission Act by the use of unfair and deceptive acts and practices in commerce in the sale of oleomargarine. Respondent filed an answer denying that its advertisements were in violation of law.

Pursuant to notice, hearings were held in Philadelphia, Pennsylvania, on September 3 and 22, 1954, before Abner E. Lipscomb, a hearing examiner designated by the Commission to hear this proceeding. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded respondent and counsel supporting the complaint. All testimony and other evidence was recorded and filed in the office of the Commission.

After receiving proposed findings of fact, the hearing examiner filed his initial decision dismissing the case for failure of proof on October 29, 1954. Thereafter, counsel supporting the complaint appealed to the Commission from this initial decision. Briefs were filed in support of and in opposition to the appeal, including a brief of the National Milk Producers Federation as *amicus curiae*, and respondent's brief in reply thereto.

Upon consideration of the entire record herein, the Commission, having determined that the hearing examiner erroneously dismissed

this complaint, reversed and set aside his initial decision and in lieu thereof makes the following:

FINDINGS OF FACT

Respondent, Reddi-Spred Corporation, is an Illinois corporation having its principal place of business at 311 Walnut Street, Philadelphia, Pennsylvania.

Respondent sells oleomargarine under the trade or brand name of Reddi-Spred to purchasers located in various States of the United States other than Pennsylvania, and during the last two years has regularly caused its product, when sold, to be transported from its place of business in Pennsylvania to its said purchasers in interstate commerce. Respondent's sales of Reddi-Spred, during the year from August, 1953, to September, 1954, totaled approximately \$70,000, of which approximately 40 percent was outside of the State of Pennsylvania.

In the course of its said business, respondent has disseminated and caused the dissemination of advertisements of Reddi-Spred by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including advertisements inserted in newspapers and television programs, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of Reddi-Spred; and respondent has also disseminated and caused the dissemination of advertisements concerning Reddi-Spred by the same means for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of Reddi-Spred in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondent's advertisements, above referred to, all feature the name "Reddi-Spred" in large dark letters. All contain a large picture of a package of Reddi-Spred with that name showing on it in large dark letters and with either Oleomargarine or Margarine also on it in large, but less distinct, letters. All of the advertisements also feature the word "BUTTER" in large dark letters. Since September, 1953, all of the advertisements show that "VEGETABLE FATS" are ingredients in Reddi-Spred in letters of equal size and prominence as the word "BUTTER."

An example of one advertisement which respondent has disseminated, and intends to disseminate in the future, reads as follows:

Sorry * * *

We must call it "Margarine" (that's the law)

But this product is so wonderfully different
that it really should have a name all its own.

(Picture of a girl's face)

1. Disseminating or causing to be disseminated by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any statement, word, grade designation, design, device, symbol, sound or any combination thereof which represents or suggests that said product is a dairy product;

Provided, however, That nothing contained in this order shall prevent the use in advertisements of a truthful, accurate and full statement of all of the ingredients contained in said product, or of a truthful statement that said product contains butter or any other dairy product provided the percentage thereof contained is clearly and conspicuously set forth.

2. Disseminating or causing to be disseminated 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 product any advertisement which contains any of the representations prohibited in paragraph one of this order.

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

OPINION OF THE COMMISSION

Per CURIAM:

An examination of respondent's Reddi-spread oleomargarine advertisements reveals that the word "butter" was prominently displayed throughout and in fact emphasized as the most choice and flavorful ingredient of the product.

Based on the Commission's opinions in the matters of *E. F. Drew & Company*,¹ Docket No. 6126, and *The Blanton Company*,² Docket No. 6197, entered this day, the initial decision is reversed and it is directed that an order issue accordingly.

Nothing contained in the order shall prevent the use of representations that respondent's oleomargarine contains butter or other dairy product, provided the statements are true and provided the percentage thereof contained in the product is clearly and conspicuously set forth.

¹ See p. 1056.

² In an interlocutory ruling, p. 1070, the Commission reversed a decision of the hearing examiner following the submission of the case-in-chief by the counsel supporting the complaint, granting respondent's motion to dismiss the complaint. In said opinion, the Commission noted that if all the questioned advertising had contained as full a disclosure as to the actual ingredients as some of the advertising did, such might have been sufficient to negative any suggestion that respondent's oleomargarine was a dairy product.

IN THE MATTER OF

RONALD LEVINE, ALSO KNOWN AS RONALD LORING,
ET AL., DOING BUSINESS AS STANLEY GIRL COAT CO.
AND PRINCESS NELL GIRL COAT

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

Docket 6269. Complaint, Dec. 22, 1954—Decision, May 7, 1955

Consent order requiring manufacturers in New York City to cease violating the Wool Products Labeling Act by labeling as "100% Reprocessed Wool," interlinings of girls' coats which consisted of reused wool together with substantial quantities of miscellaneous non-woolen fibers and non-fibrous materials, and by failing to disclose on the labels the name of the manufacturer.

Before *Mr. Loren H. Laughlin*, hearing examiner.

Mr. George E. Steinmetz for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Ronald Levine, also known as Ronald Loring, and Stanley Levine, also known as Stanley Loring, each individually and as copartners, trading and doing business as Stanley Girl Coat Co. and Princess Nell Girl Coat, hereinafter referred to as respondents, have violated the provisions of said Acts; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Ronald Levine, also known as Ronald Loring, and Stanley Levine, also known as Stanley Loring, are individuals and copartners trading and doing business as Stanley Girl Coat Co. and Princess Nell Girl Coat. The offices and principal place of business of each of said respondents are located at 209 West 26th Street, New York 1, New York.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since January, 1953, said respondents have manufactured for introduction, introduced, sold, transported, distributed, delivered for shipment and offered for sale, in

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commerce, as "commerce" is defined in said Act, wool products, as "wool products" are defined therein.

PAR. 3. Certain of said wool products were misbranded within the intent and meaning of Section 4 (a) (1) of said Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively labeled or tagged with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products were girls' coats containing interlinings, the fiber content of which interlinings were labeled or tagged by respondents as consisting of "100% Reprocessed Wool," whereas in truth and in fact the said interlinings did not consist of 100% Reprocessed Wool as the term "Reprocessed Wool" is defined in said act, but consisted of reprocessed or reused wool fibers, together with substantial quantities of miscellaneous non-woolen fibers and non-fibrous materials.

PAR. 4. Certain of said wool products described as girl's coats were further misbranded within the intent and meaning of Section 4(a) (2) of said Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were not stamped, tagged or labeled as to disclose the name or the registered identification number of the manufacturer thereof, or of one or more persons subject to Section 3 of said Act with respect to said wool products.

PAR. 5. The acts and practices of the respondents as herein alleged, were and are in violation of the Wool Products Labeling Act of 1939, and of the Rules and Regulations promulgated thereunder, and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated May 7, 1955, the initial decision in the instant matter of hearing examiner Loren H. Laughlin, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (hereinafter referred to as the Commission) on December 22, 1954, issued its complaint under the Federal Trade Commission Act and the Wool Products Labeling Act of 1939 against Ronald Levine, also known as Ronald Loring, and Stanley

Levine, also known as Stanley Loring, each individually and as copartners trading and doing business as Stanley Girl Coat Co., and Princess Nell Girl Coat, charging them and each of them in several particulars with having violated the provisions of said Acts and of the Rules and Regulations of the Commission promulgated under said Wool Products Labeling Act. Said complaint was thereafter duly served upon each of said respondents, but said defendants have failed to answer the complaint.

On March 10, 1955, however, the respondents stipulated in writing with counsel supporting the complaint, therein waiving the filing of an answer and agreeing that a consent order against the respondents be entered herein in terms identical with those contained in the notice issued and served on respondents as a part of the complaint herein. Such written stipulation was approved in writing by the Director and Assistant Director of the Commission's Bureau of Litigation.

By said stipulation, among other things, respondents have admitted all the jurisdictional allegations of the complaint and agree that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations; that the parties expressly waive a hearing before the Hearing Examiner or the Commission and all further and other procedure to which the respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission; and that the order to cease and desist issued in accordance with said stipulation shall have the same force and effect as if made after a full hearing, the parties having waived specifically therein any and all right, power or privilege to challenge or contest the validity of said order. It was also stipulated and agreed therein that the complaint herein may be used in construing the terms of the order provided for in said stipulation, and, further, that the signing of said stipulation is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

The aforesaid stipulation for consent order as so approved was submitted on March 10, 1955, to the above-named hearing examiner for his consideration in accordance with Rule V of the Commission's Rules of Practice. And upon due consideration of the complaint and the stipulation for consent order, which is hereby accepted and ordered filed as part of the record herein, it having been stipulated they shall be the entire record herein on which such order may be entered, the hearing examiner finds that the Commission has jurisdiction of the subject matter of this proceeding and of each and both of the parties respondent herein, both individually and as copartners under the

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trade names above stated; that the complaint states a legal cause for complaint under the Federal Trade Commission Act, and the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated by the Commission under the latter Act against the respondents, both as an entirety and in each of the particular violations alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said stipulation is appropriate for the disposition of this proceeding, the same to become final when it becomes the order of the Commission; and that said order therefore should be, and hereby is, entered as follows:

ORDER

IT IS ORDERED, That the respondents Ronald Levine, also known as Ronald Loring, and Stanley Levine, also known as Stanley Loring, individually and trading and doing business under the several firm names of Stanley Girl Coat Company and Princess Nell Girl Coat, or under any other name or names, and their respective representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of girls' coats or other "wool products," as such products are defined in and subject to the Wool Products Labeling Act of 1939, which products contain, purport to contain, or in any way are represented as containing "wool," "reprocessed wool," or "reused wool," as those terms are defined in said Act, do forthwith cease and desist from misbranding such products by:

1. Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers included therein;

2. Failing to securely affix to or place on each such product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner:

- (a) The percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding five percentum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage by weight of such fiber is five percentum or more, and (5) the aggregate of all other fibers;

- (b) The maximum percentage of the total weight of such wool product, of any non-fibrous loading, filling, or adulterating matter;

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(c) The name or the registered identification number of the manufacturer of such wool product, or of one or more persons engaged in introducing such wool product into commerce, or in the offering for sale, sale, transportation, distribution or delivery for shipment thereof in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939.

3. Failing to separately set forth on the required stamp, tag, label, or other means of identification, the character and amount of the constituent fibers of the interlinings of any such wool product.

Provided, That the foregoing provisions concerning misbranding shall not be construed to prohibit acts permitted by paragraphs (a) and (b) of Section 3 of the Wool Products Labeling Act of 1939; and

Provided, further, That nothing contained in this order shall be construed as limiting any applicable provisions of said Act of the Rules and Regulations promulgated thereunder.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of May 7, 1955].

Decision

IN THE MATTER OF
ARTISTIC CARD PUBLISHING CORP. ET AL.ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 5984. Complaint, May 12, 1954¹—Decision, May 12, 1955*

Order requiring five corporate manufacturers of greeting cards sold by the box directly to the purchasing public by mail or by house-to-house solicitation, to cease concertedly fixing prices, quantity brackets, and common formulas for calculating prices for their products.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Floyd O. Collins for the Commission.

Rabbino & Rabbino, of New York City, for Artistic Card Publishing Corp., White Plains Greeting Card Corp., Colonial Greetings, Inc., United Craftsmen, Inc. and Artistic Card Co., Inc.

Sherburne, Powers & Needham, of Boston, Mass., for Chilton Greetings Co. and Phillips Card Co.

Davies, Richberg, Tydings, Beebe & Landa, of Washington, D. C., for Doehla Greeting Cards, Inc. and Phillips Card Co.

Mr. John I. Robinson, of Springfield, Mass., for Card Mart, Inc.

Mr. LeRoy Stein, of Elmira, N. Y., for Elmira Greeting Card Co., Inc.

Grandeferd & Goodman, of New York City, for Hedenkamp & Co.

Mr. Richard J. Hatchfield, of Brockton, Mass., for Clyde L. Evans and Lawrence E. Evans.

Cooley & Cooley, of Springfield, Mass., for Charles E. Schwer and John L. Schwer.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

On May 8, 1952, the Federal Trade Commission issued its complaint herein, charging the National Association of Greeting Card Publishers, its Secretary and Managing Director, four members of its Executive Committee, nine manufacturing members and fourteen distributor members with agreeing to fix prices, quantity brackets, discounts, terms and conditions of sale, and with separating orders and thereby avoiding consolidation of quantities to avoid lower prices for the larger quantities in a single order, in violation of Section 5 of the Federal Trade Commission Act.

¹ Amended.

After the filing of answers by respondents, five hearings were held at which testimony and other evidence were introduced in support of the allegations of the complaint by counsel therefor before the above-named Hearing Examiner, theretofore duly designated by the Commission.

At the conclusion of these hearings on March 24, 1953, at which time the attorney in support of the complaint closed his case in chief, and within the time allowed by the Hearing Examiner, respondents moved to dismiss the complaint supported by briefs to which counsel in support of the complaint filed answering brief. Thereafter, the hearing examiner on June 10, 1953, ordered the complaint dismissed for lack of sufficient evidence to constitute a prima facie case against the following respondents: The National Association of Greeting Card Publishers; Stephen Q. Shannon, individually and as Secretary and Managing Director of respondent Association; Thomas Doran, A. I. Fidelman, Julian Friede and Charles J. Hedenkamp, individually and as Members of Executive Committee of such Association; Allied Greeting Card Corporation; Messenger Corporation; National Printing Company, Inc.; Standard Greetings, Inc.; McKenzie Engraving Company; Southern Greeting Card Company; Friendship Studio, Inc.; General Card Company; and Wallace Brown, Inc., in the form of initial decision pursuant to the rules of the Commission. No appeal was filed to such order and on July 30, 1953, the Commission affirmed such dismissal. The motions to dismiss the complaint as to the remaining respondents were denied by appropriate order of the Hearing Examiner on June 10, 1953, from which an appeal was filed on behalf of one respondent, Elmira Greeting Card Co., Inc., but this appeal was denied by the Commission on July 30, 1953. Thereafter, three hearings were held at which the remaining respondents introduced testimony and other evidence in opposition to the allegations of the complaint and the evidence introduced in support thereof, and the case was closed on the record for the taking of further testimony December 15, 1953. January 25, 1954, was fixed as the time for the filing of any proposed findings and conclusions by counsel. Several days prior thereto counsel in support of the complaint notified the Hearing Examiner that he desired to ask the Commission to issue an amended complaint, and thereupon the order fixing time for filing proposed findings and conclusions was set aside.

Thereafter, on May 12, 1954, the Commission issued its amended complaint, identical with the original complaint except that it omitted the respondents previously dismissed on motion as parties, and added

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a new distributor respondent, Artistic Card Company, Inc., alleging that its stockholders and directors were the same as those of Artistic Card Publishing Corp., a manufacturer respondent. Thereafter, counsel for all remaining respondents, and counsel for the new respondent stipulated to stand on their answers filed to the original complaint, as being their answers to the amended complaint, and further stipulated that the record made under the original complaint should be considered as the record under the amended complaint and as the basis of disposition of this proceeding. Proposed findings of facts and conclusions were thereafter filed by all counsel except on behalf of Card Mart, Inc. and Elmira Greeting Card Co., Inc., and the case closed August 6, 1954. Upon consideration of the entire record herein and from his observation of the witnesses, the Hearing Examiner finds that this proceeding is in the interest of the public and finds the facts as follows:

1. (a) Respondent Artistic Card Publishing Corp. is a corporation organized and doing business under the laws of the State of New York with its home office located at 1575 Lake Street, Elmira, New York.

(b) Chilton Greetings Company is a corporation organized and doing business under the laws of the State of Massachusetts, having its office and principal place of business at 147 Essex Street, Boston, Massachusetts.

(c) Respondent Doehla Greeting Cards, Inc., is a corporation organized and doing business under the laws of the State of Delaware, having its principal office and place of business at Nashua, New Hampshire.

(d) Respondent White Plains Greeting Card Corp. is a corporation organized and doing business under the laws of the State of New York, having its office and principal place of business at 1220 Bank Street, White Plains, New York. Said respondent operates its business in two divisions, namely; Thomas Doran Co. and Cheerful Card Co. The first named division operates the wholesale distribution part of said respondent and the latter handles the retail distribution part of said business. The foregoing respondents are engaged in manufacturing and distributing greeting cards, as hereinafter more fully described, to distributors and also, with the exception of Artistic Card Publishing Corp., directly to the public through direct selling agents and are known in the industry as direct sellers. The above-named respondents will hereinafter be referred to as manufacturing respondents.

2. (a) Respondent Card Mart, Inc., is a corporation organized and doing business under the laws of the State of New York, having its principal office and place of business at 642 South Summer Street, Holyoke, Massachusetts.

(b) Respondent Colonial Greetings, Inc., is a corporation organized and doing business under the laws of the State of Massachusetts, having its principal office and place of business at 600 Boston Post Road, Greenwich, Connecticut.

(c) Respondent Elmira Greeting Card Co., Inc., is a corporation organized and doing business under the laws of the State of New York, having its principal office and place of business at 501 East Clinton Street, Elmira, New York.

(d) Respondent Phillips Card Company is a corporation organized and doing business under the laws of the State of Massachusetts, having its principal office and place of business at 50 Hunt Street, Newton, Massachusetts.

(e) Respondent United Craftsmen, Inc., is a corporation organized and doing business under the laws of the State of Ohio, having its principal office and place of business at 1400 State Street, Cincinnati, Ohio.

(f) Respondent Hedenkamp & Co., Inc., named as Hedenkamp & Company in the amended complaint, is a corporation organized and doing business under the laws of the State of New York, having its principal office and place of business at 361 Broadway, New York, New York.

(g) Respondents Clyde L. Evans and Lawrence E. Evans are individuals and copartners trading and doing business under the partnership name of New England Art Publishers with their principal office and place of business at North Abington, Massachusetts.

(h) Respondents Charles E. Schwer and John L. Schwer are individuals and copartners trading and doing business under the partnership name of Charles E. Schwer Co. with their home office and principal place of business at 165 Elm Street, Westfield, Massachusetts.

(i) Respondent Artistic Card Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York with its home office and principal place of business located at 1575 Lake Street, Elmira, New York. The stockholders and directors of this respondent are the same as the stockholders and directors of respondent Artistic Card Publishing Corp.

The above-named respondents are distributors of greeting cards, buying in excess of 80 percent thereof from the direct sellers described in Paragraph One hereof for resale through direct selling agents to the consuming public and will be hereinafter referred to as distributor respondents.

3. The commodities involved in this proceeding are boxed greeting cards which are used by the purchasing public throughout the United

States on such occasions as Christmas, Easter, Fathers Day, Mothers Day, birthdays, funerals, weddings, anniversaries, etc. They are packaged and sold as an assortment in a single box containing from 14 to 20 cards each, which cards vary in design, quality, novelty, etc., and which boxes are classified in the industry as Christmas boxes and Everyday boxes. Practically all of these boxes are retailed to the consumer at \$1.00 each. A very minor part of the production is able to command \$1.25 a box. The economic and commercial experience of the industry has been that such boxes cannot be sold to the public in any profitable volume at more than \$1.00.²

4. The manufacturing respondents, in the course and conduct of their business, manufacture greeting cards as above described and consistently purchase greeting cards from each other to make up these box assortments and sell and ship such box assortments, or cause the same to be sold and shipped, to direct selling agents and to distributors such as and including those named in Paragraph 2 hereof from their respective places of business to such purchasers located in the various States of the United States other than the State of origin of said shipments, and have carried on and engaged in, and do now carry on and engage in, commerce as that term is defined in the Federal Trade Commission Act.

5. Distributor respondents have been, in the regular course and conduct of their businesses, purchasing greeting cards in boxes from manufacturers thereof, including those named in Paragraph 1 hereof, to the extent of 80 percent of their requirements or more, and causing such merchandise, when purchased, to be shipped from the various places of manufacture to their respective places of business and in turn selling and shipping such merchandise, or causing the same to be sold or shipped, to direct selling agents, many of whom are located in various States of the United States other than the State of origin of said shipments or the State in which said distributor respondents are located and have carried on and engaged in, and do now carry on and engage in, commerce as the term is defined in the Federal Trade Commission Act.

6. In the course and conduct of their selling, offering for sale, and shipping in commerce of said greeting cards, packaged as described, said manufacturing respondents except for the agreement and understanding hereinafter found, would have been in the past, and would now be, in competition with each other. Said distributor respondents are in competition with each other.

² Whether or not the business of respondents herein amounts to 20 percent or 80 percent of the box card business done in the United States is immaterial, if there was an agreement on price.

7. It is the custom, and has been for a number of years, of manufacturing respondents, many months in advance of the season for which the cards are intended, to issue price lists in the form of order blanks, one for the Everyday assortment and one for the Christmas assortment. Prices are scaled to quantities and in 1948 these quantities uniformly among manufacturing respondents provided for 65¢ each on purchases from 1 to 9; 60¢ each of purchases from 10 to 24; 55¢ each on purchases from 25 to 49; and 50¢ each on purchases of 50 or more. Each of the manufacturing respondents' price lists for the year 1948 are the same as to these prices and quantities.

8. In September of 1948 an informal group discussion among respondents was held following the convention of the National Association at which prices were discussed. Although there were 20 or more representatives at the meeting, only 7 were identified. Four of these present testified and testimony of one was stipulated. Apparently, the cause of this discussion was a 12-25 percent increase in postal rates which would become effective during the year of 1949 and since respondents sell entirely by mail this represented a substantial increase in operational cost, and ways and means of how to absorb this cost increase by passing it on by price increase was the principle subject discussed.

9. Herman Chilton of respondent Chilton Greetings Company testified that he had a change in quantity discounts (price increase for 1949) pretty well set in his mind and had adopted a plan to increase prices prior to this meeting, and in fact had price scales already made out but that after hearing the discussion he made one change in those price scales. Another direct seller present at this meeting testified that the price list he subsequently came out with had the same quantity brackets as were discussed at the meeting. Harry Doehla of respondent Doehla Greeting Cards, Inc., whose testimony was stipulated, and which company is the largest producer of greeting cards among respondents, said that he announced at the meeting that he was going to increase the quantity requirements necessary for agents to secure discounts; that he anticipated that his distributors would adopt a similar policy, and further, that at that time he had reason to believe that some of his principal competitors were going to adopt an identical quantity discount scale for sales to agents, although he would not know this for certain until they issued their order blanks several months later. Thomas Doran of respondent White Plains Greeting Card Corp. testified that at this meeting he heard specific quantity brackets mentioned; that he liked the idea of the meeting and would put in the prices but not until December when he knew

what his competitors were doing. All of them denied that any agreement was reached.

10. Within one to five months subsequent to this meeting, price lists issued by respondents show increases from an identical level to a new and increased identical level, and it is assumed that respondents made substantial sales thereafter at these uniform prices.³

11. Without more, this clearly indicates an understanding and agreement among both manufacturing respondents and distributor respondents on prices to be charged to direct selling agents. It has been many times held by the courts that identical prices charged by competitors with evidence of meetings thereof at which prices were discussed, raises a strong and reasonable inference of price agreement. Respondents, however, claim that the inference which arises from this uniform, parallel and common action on their part is destroyed and a contrary inference is established by two factors: First, the flat and uniform increase in postal rates, representing, of course, an operational cost; and second, that distributor respondents who purchase from the manufacturing respondents were already under an economic compulsion to follow the prices of respondent manufacturers so that agreement to do so would be futile.

12. It appears from the record that manufacturing respondents who design, pictorialize, lithograph or print greeting cards can only afford to do so with a limited number of new cards because it costs in excess of \$20,000.00 to produce one line of cards; consequently, to obtain assortments for box merchandise and to obtain volume, which is economically necessary for sheer existence, each manufacturer buys from other manufacturers. Likewise, it appears from the record that all manufacturing respondents with one possible exception sell to all distributor respondents and that the distributor respondents purchase, likewise, from each other. It is not economically feasible for distributors to buy quantities of various cards and make up their own box assortments. It further appears from the record that both distributor respondents and manufacturing respondents, with one exception, sell almost entirely through direct selling agents whose recruitment is an annual, expensive and competitive process. These direct selling agents, solicited by full-page advertisements in such magazines as Good Housekeeping, McCalls and Woman's Home Companion, select their lines of merchandise in accordance with what

³ While it is true that the Artistic Card Publishing Corp. did not issue price lists and did not sell to direct selling agents, the Artistic Card Company, Inc. did do so, and since these two respondents have the same management and ownership, the effect is the same. It is immaterial in this proceeding whether a management group takes an action with its right hand or its left.

they think they can sell best to the consumer and shop around among manufacturing respondents and distributor respondents for samples of the lines of each, frequently selling one line one season and another line another season. They sell to the user by mail, personal solicitation and through social groups.

13. The uncontradicted evidence in the record shows that although no formal announcements are customarily made by manufacturing respondents to that effect, nevertheless, it is well understood in the industry that a manufacturer will not sell to a distributor who in reselling undercuts pricewise that manufacturer's prices to the latter's own direct selling agents, and that the manufacturers advise distributors as to the prices such manufacturers will charge their direct selling agents. Obviously, a manufacturer could not obtain direct selling agents if the latter could purchase the same box assortment from the distributor for less than he would have to pay the producer of such box assortment. Distributors, consequently, must maintain the same resale prices to direct selling agents as their suppliers do or they will be unable to obtain a sufficient volume of boxed greeting cards to remain in business. The record reveals that from 80 percent to 95 percent of purchases of these respondent distributors are made from the four manufacturing respondents remaining in this proceeding, and that the other 5 percent to 20 percent of their purchases made from other manufacturers, would not sustain them in business.

14. This economic picture, which is uncontradicted in the record, raises an equally, if not more reasonable, inference that there was no understanding or agreement, on the part of distributor respondents upon prices, or stated otherwise, the quantity brackets at which these greeting card boxes would be sold. It is a well-known fact of ordinary life that businessmen generally do not engage in futile acts, especially where there is a definite risk of expense and public embarrassment. The inference of agreement arising from the testimony hereinabove set forth is destroyed by the lack of necessity for such agreement, or stated otherwise; by the established fact that the purpose of such an agreement had already been accomplished by the economic facts of life pertinent to this industry.

15. The claim of respondents that the increase in postal rates, uniform in amount and applicable to all respondents, was an economic justification for the increase in price is not sustained. The price increase was identical from an identical or uniform level, and such an assertion could not be maintained in the absence of a showing that all respondents had absolutely uniform operational costs in all elements so that an increase in any element thereof would produce ex-

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actly the same increase in total operational cost in that all respondents shipped the same quantities by weight, the same distances. Evidence of operational costs was offered by only one respondent manufacturer and this, in the form in which it was presented, being by conjecture or forecast based on past averaging, fell far short of producing or justifying the price increase made in 1949.

16. The inference of agreement among the four manufacturing respondents, therefore, had not been refuted or explained on the economic or any other basis and it is therefore found that in September 1948, or shortly thereafter, manufacturing respondents Artistic Card Publishing Corp., Chilton Greetings Company, Doehla Greeting Cards, Inc., and White Plains Greeting Card Corp. did enter into an agreement or understanding between and among themselves to fix the prices, terms and conditions, including uniform identical quantity brackets for pricing purposes of the boxed greeting cards which they sold, and since Artistic Card Company, Inc., has the same stockholders as Artistic Card Publishing Corp., it is found by reason of such common ownership and control to have been a party to such agreement.

17. There is no evidence to support the charge in the complaint that any respondents have by agreement or understanding "separated and thereby avoided consolidation of orders with the effect of avoiding lower prices applicable to the larger quantities which would have been involved in consolidated orders" or that they have "separated quantities and thereby avoided consolidations of quantities in different price classes in a single order with the effect of avoiding the lower prices which would have been applicable by reason of the greater quantities."

ORDER

It is ordered, That respondents, Artistic Card Publishing Corp., a corporation, Chilton Greetings Company, a corporation, Doehla Greeting Cards, Inc., a corporation, White Plains Greeting Card Corp., a corporation, doing business in its own corporate name or in the name of its division, Thomas Doran Co., or any other name, Artistic Card Company, Inc.,⁴ a corporation, and the officers, agents, employees and representatives of each of them, directly or indirectly, jointly or severally or through any coporate or other device, in or in connection with the offering for sale, sale, or distribution of greeting cards in interstate commerce, as "commerce" is defined in the

⁴ Since Artistic Card Publishing Corp. and Artistic Card Company, Inc. have common ownership, direction and control, any order against one alone could be easily ignored by the other, therefore both are included. The one is the alter ego of the other.

Appeal from Initial Decision

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Federal Trade Commission Act, do forthwith cease and desist from engaging in, entering into, participating in or carrying out any planned common course of action, understanding, agreement, combination or conspiracy between any two or more of said respondents, or between any one or more of said respondents and another, or others not parties hereto, to do or perform any of the following acts or things: fixing or establishing prices at which said greeting cards are to be sold or offered for sale, fixing or establishing quantity brackets, fixing or establishing any common method or formula for calculating prices or using any such method or formula so established or fixed and from holding meetings at which prices, terms, conditions of sale, or trade practices or policies designed to eliminate competition in price or otherwise are discussed or acted upon.

It is further ordered, That all motions to dismiss this proceeding as to them, filed by the above-named respondents, be, and the same are, hereby denied.

It is further ordered, That this proceeding be, and the same hereby is, dismissed as to respondents Card Mart, Inc., Colonial Greetings, Inc., Elmira Greeting Card Co., Inc., Phillips Card Company, United Craftsmen, Inc., Hedenkamp & Co., Inc., all corporations, and as to respondents Clyde L. Evans and Lawrence E. Evans, copartners doing business under the partnership name of New England Art Publishers, and as to respondents Charles E. Schwer and John L. Schwer, copartners doing business under the partnership name of Charles E. Schwer Co., and motions to that end, filed by these respondents, are accordingly granted.

ON APPEAL FROM INITIAL DECISION

Per CURIAM:

STATEMENT OF THE CASE

On May 8, 1952, complaint issued herein charging The National Association of Greeting Card Publishers, its Secretary and Managing Director, four (4) members of its Executive Committee, nine (9) manufacturing members and fourteen (14) distributor members with violation of Section 5 of the Federal Trade Commission Act through (a) agreeing to fix prices, (b) agreeing to fix quantity brackets, (c) agreeing to fix discounts, (d) agreeing on terms and conditions of sale, and (e) separating orders and thereby avoiding consolidation of quantities to avoid lower prices for larger quantities in a single order. On March 24, 1953, counsel in support of the complaint closed his case in chief and respondents moved to dismiss. Briefs in support of and in opposition to these motions were filed.

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Appeal from Initial Decision

On June 10, 1953, the hearing examiner in an initial decision dismissed the complaint for failure to establish a prima facie case against the National Association, its Secretary and General Manager, the four (4) members of its Executive Committee, five (5) manufacturing members and four (4) distributor members. No appeal therefrom was taken except by one distributor member, Elmira Greeting Card Co. The latter's appeal was denied by the Commission on July 30, 1953, and on the same date the Commission affirmed the dismissal of the complaint as ordered by the hearing examiner's initial decision of June 10, 1953.

After further hearings and the introduction of evidence, the case was closed on the record for the taking of further testimony December 15, 1953. Prior to expiration of the time for the filing of proposed findings and conclusions by counsel, the attorney in support of the complaint moved the Commission to issue an amended complaint identical with the original complaint except that it omitted respondents previously dismissed as parties, and added a new distributor respondent Artistic Card Company, Inc., alleging that its stockholders and directors were the same as those of Artistic Card Publishing Corp., a manufacturer respondent. The Commission granted that motion and thereafter on May 12, 1954, the amended complaint issued.

By agreement between counsel it was stipulated that respondents named in the amended complaint would elect to, and did, stand upon answers filed to the original complaint and it was further stipulated that the record made under the original complaint should be considered the record under the amended complaint and as the basis for disposition by the hearing examiner of the proceeding. In due course motions to dismiss were filed and the case was closed August 6, 1954, the hearing examiner having previously stated on the record that said motions to dismiss would be disposed of in his initial decision on the whole record.

On August 11, 1954, the hearing examiner filed his aforesaid initial decision dismissing the complaint as to the remaining distributor corporations and partnership (in effect granting their motions to dismiss, previously filed) and holding that the manufacturing corporations and affiliates had engaged in the unfair methods of competition and unfair acts and practices alleged (in effect denying the latter's motions to dismiss, previously filed).

Counsel in support of the complaint appealed from that part of the hearing examiner's initial decision dismissing the complaint as to the distributor respondents. Counsel for manufacturing respond-

The Facts

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ents Artistic Card Publishing Corp. (Artistic Card Company, Inc.), Chilton Greetings Company, Doehla Greeting Cards, Inc., and White Plains Greeting Card Corp. also appealed in toto from the initial decision, filing numerous exceptions and allegations of error on the part of the hearing examiner through his failure to adopt certain findings. These manufacturing respondents "In the event that Respondents' Appeal from the Initial Decision in toto should not be sustained, * * * appeal from the form and substance of the Order there-to appended and urge that such Order should be modified in the respects hereinafter urged." Briefs were filed, oral argument was heard by the Commission on February 1, 1955, and the case was taken under advisement.

STATEMENT OF FACTS

This proceeding involves the manufacture, and distribution in commerce, as that term is defined in the Federal Trade Commission Act, of boxed greeting cards, packaged as single box assortments of from 14 to 20 cards each, for sale to consumers by "direct selling agents" (door to door salesmen, church, school and civic organizations, etc.) at the customary and traditional price of \$1.00 per box. Not involved here is that segment of the industry which manufactures and/or sells greeting cards through retail stores. The cards are used by the purchasing public on Christmas, New Year's, Easter, Father's Day, Mother's Day, birthdays, funerals, weddings, anniversaries, etc. The manufacturing respondents create, design, print and sell boxed assortments to each other and to the distributor respondents. Manufacturing respondents *and* distributor respondents sell in competition with each other to the "direct selling agents." It is the pricing practices at this level of distribution that are involved here.

The greeting card industry has two selling seasons, one for the Everyday assortment and one for the Christmas assortment. It has been the custom over a period of years for manufacturing respondents to issue many months in advance of each season price lists in the form of order blanks. Prices are quoted by manufacturing respondents to quantity schedules; and in 1948 all manufacturing respondents involved here uniformly quoted the price for each box to "direct selling agents" as:

- 65¢ each for 1 to 9 boxes
- 60¢ each for 10 to 24 boxes
- 55¢ each for 25 to 49 boxes
- 50¢ each for 50 boxes or more.

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In the summer of 1948, pursuant to statutory authority, the Post Office Department announced parcel post rate increases to become effective January 1, 1949, which would result in rate increases for manufacturing respondents of from 12% to 25% in different categories and proportionally direct increases in their operational costs. Thereafter, in September of 1948, informal group discussions among respondents were held following the convention of the National Association at which prices and ways and means of how to meet this increased operational cost were the subject. In these groups specific changes in quantity brackets were discussed.

The hearing examiner found the facts to be substantially as briefly recited above and further found as an ultimate fact that, within one to five months subsequent to the September meeting, price list order blanks issued by respondents (both manufacturers and distributors) showed increases from an identical level to a new and increased identical level. In this connection, the hearing examiner reviewed the evidence bearing upon the activities and discussions at the September gathering and for details in that connection reference is made to his initial decision.

The new, and uniform, price list promulgated subsequent to the September 1948 discussions was as follows:

- 65¢ each for 1 to 19 boxes
- 60¢ each for 20 to 49 boxes
- 55¢ each for 50 to 99 boxes
- 50¢ each for 100 boxes and over.

APPEAL OF COUNSEL SUPPORTING COMPLAINT

Counsel in support of the complaint has appealed from that part of the initial decision wherein the hearing examiner in effect dismissed the complaint as to distributor respondents by granting motions to that end filed by those respondents. Specifically, in this appeal, exception is taken to Paragraph 14 of the initial decision and, incidentally, to the form of order to cease and desist, insofar as it fails to include the distributor respondents.

Paragraph 14 of the initial decision, to which counsel supporting the complaint excepts, in substance is a finding that the facts disclosed in the record raise a reasonable inference that there was, on the part of distributor respondents, no understanding or agreement upon prices or quantity brackets at which greeting card boxes would be sold.

There is in the record evidence that manufacturing respondents sell to each other and to all distributor respondents who, in turn, also

purchase from each other. Both distributor respondents and manufacturing respondents, in competition with each other, sell through "direct selling agents." While the record discloses no formal announcement to that effect, it is well understood in the industry that a manufacturer will not sell to a distributor who resells to direct selling agents at prices less than the manufacturer sells to direct selling agents. If the distributors did sell for prices under those of the manufacturers, the former, it is obvious, would have no source of supply. It follows that, of necessity, distributors must maintain the same resale prices to direct selling agents as the manufacturers do.

The inference of agreement on the part of distributors, if any such inference be considered as reasonably arising from testimony regarding the September 1948 events, is, in our opinion, dissipated by the complete lack of any necessity for such agreement. The distributor respondents had no alternative but to maintain the resale prices to direct selling agents that they did, in order to remain in business. The hearing examiner has weighed the evidence on this score, including the demeanor of witnesses testifying before him, and found no agreement by distributor respondents. On the whole record we agree with him that the economic picture, in the circumstances peculiar to this industry, supports the conclusion. The exceptions taken in this connection must fall and the appeal of counsel supporting the complaint should be denied.

RESPONDENTS' APPEAL IN TOTO

(a) *Assignments of Error*

Respondents assign as error the hearing examiner's refusal to adopt seven specific proposed findings and the conclusions of law submitted by respondents. Respondents also except, in whole or in part, to certain designated paragraphs of the initial decision.

At the outset respondents contend that the examiner erred in refusing to adopt findings concerning the weight and effect to be given to the testimony of a disinterested witness (Sugden) that no agreement was entered into by respondents at their discussions in September, 1948. The law is well settled that no formal agreement is necessary to constitute an unlawful conspiracy. In circumstances where, as here, identical prices were charged by competitors after the holding of meetings at which prices were discussed, the hearing examiner was fully justified in concluding that a conspiratorial price agreement did in fact exist. The testimony of the witness relied upon as a basis for the contrary finding proposed by respondent was wholly insufficient

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to overcome this inference, and the hearing examiner's refusal to adopt such finding cannot be said to have been erroneous. Respondents' assignment of error in this respect, accordingly, is overruled (Respondents' Appeal Brief, Point III). Our ruling here is equally applicable to respondents' assignment of error on the hearing examiner's part in refusing to adopt findings that there is no evidence of any agreement, understanding or planned common course of action as to prices, terms or conditions of sale, including uniform quantity discount brackets to dealers. This assignment of error (Respondents' Appeal Brief, Point IX) also is overruled.

Respondents further contend it was error for the hearing examiner to refuse to adopt proposed findings to the effect that (a) price uniformity existed prior to the alleged conspiratorial meeting in September, 1948; (b) that usually and normally the dealer prices of each publisher legitimately were available to other publishers prior to the printing of price lists each new season; and (c) that Doehla Greeting Cards, Inc. was the largest publisher in the direct selling field, the first to announce dealer prices each season, and that other publishers awaited such announcement before establishing their own dealer prices. If, in fact, the uniformity in respondents' price lists subsequent to September 1948, was the result of an agreement and understanding as to prices, it makes no difference what the pre-existing circumstances were as to price uniformity, availability of competitors' prices, Doehla's predominant size in the industry, etc. Proposed findings on the enumerated points, therefore, were immaterial in the face of the hearing examiner's finding that unlawful combination did obtain. We conclude, and find, that the hearing examiner correctly refused to adopt these proposed findings (Respondents' Appeal Brief, Points IV, V and VI).

Respondents except to the hearing examiner's characterization of the increase in quantities required to be purchased in order to qualify for discounts as an "increase in price." If this characterization of the uniform changes in quantity discount schedules by manufacturing respondents is subject to the interpretation placed upon it by respondents—that in all instances after 1948 all purchasers of all quantities were required to pay increased prices—it is probably inaccurate. If that is what it means, then to that extent respondents' exception probably is well taken. If however, as the Commission understands it, the characterization of the change as an "increase in price" means that purchasers of given quantities before 1948 had to pay increased prices after 1948 on the same quantities (except in the case of purchasers in quantities of from 1 to 9 boxes and from 20 to 24 boxes), then the

characterization is both accurate and appropriate. The Commission so interprets the term "increase in price."

In this same connection respondents also assign as error the hearing examiner's failure to adopt Doehla's proposed Finding 39 (a) to the effect that the increase in the minimum number of boxes of greeting cards required to be purchased in order for dealers to qualify for the maximum discount did not result in any dealer paying any more than he had under the previous schedule, provided such dealer ordered somewhat larger quantities than he had previously, except that the smallest dealers, who buy 9 boxes or less per order and dealers who purchased from 20 to 24 boxes per order, encountered no increase whatever. While this proposed finding may be considered as stating the facts, these facts do not upset nor disturb the conclusion that there had been a conspiratorial tampering with the quantity purchase schedule. It is thus apparent that the hearing examiner's rejection of this proposed finding was in nowise prejudicial.

In view of the foregoing, respondents' exception is denied and its assignment of error in this connection is overruled (Respondents' Appeal Brief, Point VII).

Respondents contend also that the hearing examiner erred in refusing to adopt a finding to the effect that Doehla's parcel post cost for 1949 increased 12% on the per dollar of sales basis and 13.5% per box sold basis over 1948 costs. In the initial decision it is clear that the hearing examiner fully considered the evidence adduced with relation to this proposed finding, weighed it and expressly found that "Evidence of operational costs * * *, in the form in which it was presented, being by conjecture or forecast based on past averaging, fell far short of producing or justifying the price increase made in 1949." On the record as made the hearing examiner was justified in rejecting this proposed finding as "unreliable." In our opinion, the pertinent evidence based as it is on conjecture and forecast projected on past averaging was inconclusive, speculative and, therefore, unreliable. We so find (Respondents' Appeal Brief, Point VIII).

(b) *Respondents' Exceptions*

We turn now seriatim to respondent's exceptions which are directed to the whole, or part, of specific paragraphs of the hearing examiner's initial decision.

Respondents except to the hearing examiner's statement in Paragraph 4 of the initial decision to the effect that manufacturers purchase greeting cards from each other to make up box assortments. A correct statement would be that manufacturers purchase *boxed assort-*

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ments of cards from each other to fill out their various lines for resale. Technically, this objection is well taken and the exception is granted without, however, changing the result herein (Respondents' Appeal Brief, Point XI).

Respondents except to the following part of Paragraph 5 of the initial decision:

"Distributor respondents have been * * * purchasing greeting cards in boxes from manufacturers thereof, including those named in Paragraph 1 hereof, to the extent of 80 percent of their requirements or more * * *."

The contention is that, as written, this gives rise to a misconception. Obviously, as stated by respondents, what was meant was that these distributors purchase

"* * * greeting cards in boxes from manufacturers thereof named in Paragraph 1 hereof, to the extent of 80 percent of their requirements or more * * *."

The hearing examiner recognized this in the last sentence of Paragraph 13 of his initial decision where he found:

"The record reveals that from 80 to 95 percent of purchases of these respondent distributors are made from the four manufacturing respondents * * *."

We grant this exception, noting, however, that such action does not affect our ultimate disposition of the appeals herein (Respondents' Appeal Brief, Point XII).

Respondents except to Paragraph 6 of the initial decision to the extent it states respondent-publishers are not in competition with each other. We think the record discloses that, except for the agreement and understanding found by the hearing examiner to exist, the manufacturing respondents would be in competition with each other price-wise. The ultimate fact found, however, is that through agreement and understanding price lists issued by respondents showed increases from an identical level in 1948 to a new and increased identical level in 1949. Respondents may be considered to have remained on a competitive basis insofar as service and quality, among other things, are involved, but not as to price. Respondents' exception in this respect is denied (Respondents' Appeal Brief Point XIII).

Respondents except to the second sentence of Paragraph 9 of the initial decision reading as follows:

"Another direct seller present at this meeting testified that the price list he subsequently came out with had the same quantity brackets as were discussed at the meeting."

It is respondents' contention here that the hearing examiner intended to refer to a "Publisher-Respondent" rather than to a "direct seller"; that what the examiner has done is to take the testimony of a distributor and make it appear as testimony of a publisher as a basis for his ultimate conclusion of conspiracy.

The term "direct seller" is used in the industry to describe a "publisher-respondent." The initial decision ⁵ so finds with regard to respondent White Plains Greeting Card Corp. and the hearing examiner had reference to the testimony of Thomas Doran of Thomas Doran Co., a division of manufacturing respondent White Plains, who testified that he was a manufacturer of greeting cards as well as a distributor ⁶ and that the price list he subsequently came out with had the same quantity brackets as were discussed at the meeting.⁷ Respondents' exception on this point is, therefore, without merit and is denied (Respondents' Appeal Brief, Point XIV).

Respondents except to the first sentence in Paragraph 11 of the initial decision which concludes that record evidence of the fact that prices were discussed in the September, 1948, groups, plus the established fact that prices subsequently actually were increased uniformly from one identical level to a new identical level, "Without more" clearly establishes that an understanding existed to agree on prices to be charged direct selling agents.

Respondents except to use of the phrase "Without more" by the hearing examiner and contend he had no right to conclude there was nothing more, by way of evidence, relevant to the inference of conspiratorial price agreement. Respondents, in this regard, rely principally on the testimony of Sugden, a disinterested witness, and upon the related contentions made in connection with their Point III attacking the hearing examiner's refusal to adopt findings as to the weight and effect of Sugden's testimony that no agreement was entered into at the September, 1948, meeting.

We have already determined above that in the circumstances disclosed by the record the hearing examiner correctly concluded that an unlawful conspiratorial price agreement existed and that the rejection of the respondents' proposed finding to the contrary was not erroneous. Respondents' exception to the phrase "Without more" and its concomitant inference that there was collusive price agreement must, therefore, be denied (Respondents' Appeal Brief, Point XV).

Respondents except to Paragraph 16 of the initial decision which in substance is a finding that since the inference of agreement among the

⁵ Initial Decision, Paragraph 1 (d).

⁶ Transcript 138.

⁷ Transcript 142.

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four manufacturing respondents had not been refuted nor explained, the latter, therefore, "did enter into an agreement or understanding between and among themselves to fix the prices, terms and conditions, including uniform identical quantity brackets for pricing purposes of the boxed greeting cards which they sold." Our rulings above on respondents' assignments of error (Respondents' Appeal Brief, Points III, IV, V, VI and IX) adequately dispose of this exception to Paragraph 16 of the hearing examiner's initial decision and it is denied (Respondents' Appeal Brief, Point XVI).

Respondents have appealed generally from the initial decision and generally from the hearing examiner's action on their proposed findings. They, the respondents, have termed this their "Appeal from the Initial Decision in toto." Our rulings so far dictate respondents' appeal "*in toto*" should be denied.

RESPONDENTS' APPEAL IN THE ALTERNATE FROM FORM OF ORDER

Having disposed of respondents' appeal in toto from the initial decision we now turn to respondents' appeal from the form and substance of the hearing examiner's order to cease and desist. This portion of respondents' appeal is in two parts.

First, it is contended by respondents that the hearing examiner acted improperly and unjustifiably in including within the ambit of the order to cease and desist "the officers, agents, employees and representatives of each of them [corporate manufacturing respondents]." Respondents cite in support of this contention the decision of the United States Court of Appeals for the Seventh Circuit in the *Reynolds Tobacco Co.* case⁸ that the Commission's inclusion of "officers, agents and employees" in an order to cease and desist was unjustified.

Subsequent to that decision, we held in the matter of *Hato Company, Inc.*⁹ that the decision of the United States Supreme Court in the *Regal Knitwear Co.* case¹⁰ "fully disposes of the issue in this matter, until such time as the Supreme Court shall speak further on the question." The Supreme Court has not ruled further and no compelling argument has been presented here that persuades us to reverse the *Hato Company, Inc.* decision. The hearing examiner was correct in ruling that the order herein should run against the "officers, agents, employees and representatives" of the corporate manufacturing respondents. Respondents' appeal from this ruling, accordingly, should be denied.

⁸ *Reynolds Tobacco Co. v. F. T. C.*, 192 F. 2d 535 (1951).

⁹ *In the Matter of Hato Company, Inc., et al.*, Docket No. 5807 (Decided October 6, 1952).

¹⁰ *Regal Knitwear Co. v. N. L. R. B.*, 325 U. S. 9 (1945).

Secondly, we turn to the respondents' appeal from the hearing examiner's failure to include saving clauses in the order to cease and desist so as properly to limit its scope. Respondents did not request the hearing examiner for the inclusion of these exclusionary provisos. The proposition was, however, incorporated in their appeal brief and, although not pressed in oral argument before us, will be disposed of here for the record.

Respondents seek inclusion in the order of three provisions which, in effect, would assure that the inhibitions of the order shall not be construed to prohibit:

- (1) Agreements on prices, terms, or conditions of sale independently offered and accepted by a buyer and a seller when such agreements are bona fide and are not made for the purpose nor have the effect of restraining competition;
- (2) The maintenance of a bona fide relationship between principal and agent;
- (3) Agreements, discussion or other action between a corporate respondent and its officers, or between a corporate respondent and its subsidiaries or affiliates relating solely to the business of such corporate respondent and its subsidiaries and affiliates, "when not for the purpose or with the effect of restricting competition."

Respondents argue that such provisos are necessary because the part of the order immediately preceding the enumeration of inhibited activities forbids:

"* * * any planned common course of action, understanding, agreement, combination, or conspiracy between any two or more of said respondents and another, or others not parties hereto * * *,"

and state that the purpose of such provisos is to protect the rights of individual respondents to carry on their normal business relationships.

We believe the provisos sought to be included in the alternative in the order to cease and desist herein are unnecessary. This question of the inclusion of such provisos in Commission orders was dealt with by the Seventh Circuit Court of Appeals in the case *The Milk and Ice Cream Can Institute et al. v. F. T. C.*¹¹ where it was sought to amend a Commission order by inserting a proviso permitting respondents to do independently that which they were enjoined from doing conspiratorially or by agreement. On the precise problem presented here the Court there said:

¹¹ 152 F. 2d 475 (C. C. A. 7, 1946).

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Conclusion

"It is argued, among other things, that the order prohibits lawful action, disassociated from a conspiracy to fix prices, that it is indefinite in its terms and that it is susceptible of the construction that it prohibits independent action by petitioners. We are convinced from a study of the order that there is little, if any, merit in the criticism made concerning it. The order provides that respondents (petitioners here) 'do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, mutual agreement, understanding, combination, or conspiracy between and among any two or more of said respondents or between any one or more of said respondents and others not parties hereto, to do or perform any of the following acts or practices' * * * It will be noted that each of the prohibited acts is directed solely at price fixing in connection with an agreement or conspiracy. It is not a valid criticism to say that they are enjoined from the activities mentioned when used independently or even by an agreement unrelated to the price structure. The Commission in its brief concedes what we think is obvious: *'It is wholly unnecessary that the order be amended so as to expressly reserve to petitioners their rights of independent action. They have those rights regardless of the order and those rights would not be changed or protected in the least by adding such a proviso. The time when such questions should properly be determined is not in connection with the present consideration of the order but whenever the order is alleged to have been violated by a given set of facts. If those facts embody a condition of independent action it will be a perfect defense. The Commission knows as well as petitioners that no violation of the order in its present form can be established by any showing of independent action * * *.'*" (Italics provided.)

For the reasons stated by the Court above, respondents' appeal in this regard here should be denied.

CONCLUSION

We have fully considered the entire record herein, including the transcript of hearings, exhibits, briefs of both parties and oral argument of counsel before the Commission.

For the reasons hereinabove stated, we conclude that the hearing examiner's initial decision is correct, that the appeal therefrom of counsel in support of the complaint and the appeal of respondents, Artistic Card Publishing Corp., Artistic Card Company, Inc., Chilton Greetings Company, Doehla Greeting Cards, Inc. and White Plains Greeting Card Corp., from the initial decision, together with the exceptions and assignments of error thereto filed by both sides, includ-

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ing the said respondents' assignment that the hearing examiner erred in refusing to adopt their proposed conclusions of law, are without merit (except as hereinabove noted in some minor respects) and that such appeals should be, and they hereby are, denied. Accordingly, the initial decision of the hearing examiner will be affirmed and appropriate order will be entered.

Commissioner Howrey did not participate in the foregoing for the reason that he did not hear oral argument herein.

FINAL ORDER

This matter having come before the Commission on appeals from the hearing examiner's initial decision filed by counsel in support of the complaint and on behalf of respondents Artistic Card Publishing Corp., Chilton Greetings Company, Doehla Greeting Cards, Inc., White Plains Greeting Card Corp., and Artistic Card Company, Inc.; and the matter having been heard on briefs and oral arguments; and the Commission having rendered its decision denying the appeals and affirming the initial decision:

It is ordered, That the aforesaid respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order contained in said initial decision.

Commissioner Howrey not participating for the reason that he did not hear the oral argument.

Opinion

IN THE MATTER OF
CROWN ZELLERBACH CORPORATION

ORDER AND OPINION

Docket 6180. Complaint, Feb. 15, 1954—Order, May 16, 1955

Interlocutory order in Sec. 7, Clayton Act, proceeding denying the appeal of counsel supporting the complaint from the hearing examiner's order sustaining respondent's objections to the receipt into evidence of Commission's Exhibit 62 for identification, and remanding the case for further proceedings;

Holding also

- I. That said Exhibit 62, the tabulation or survey of sales of coarse paper before and after the challenged acquisition of a competitor, was not objectionable as hearsay; and
- II. That the Commission's order of Jan. 18, 1955, was unnecessarily restrictive, and in lieu thereof

Ordering that the work papers used in compiling aforesaid survey be made available to respondent at the discretion of the hearing examiner, with the provision that no information that could be identified with the reporting companies should be admitted into the public record.

Before *Mr. Earl J. Kolb*, hearing examiner.

Mr. L. E. Creel, Jr., *Mr. J. Wallace Adair*, *Mr. Dwight L. Carhart* and *Mr. William R. MaHanna* for the Commission.

Mr. Philip S. Ehrlich and *Mr. Philip S. Ehrlich, Jr.*, of San Francisco, Calif., and *Sullivan & Cromwell*, of New York City, for the respondent.

OPINION OF THE COMMISSION

By GWYNNE, Commissioner:

This is an interlocutory appeal by counsel supporting the complaint. The questions involved have to do with a tabulation identified as Commission's Exhibit 62.

The complaint charges respondent (which is engaged in the business of producing and selling pulp, paper and paper products) with violation of Section 7 of the Clayton Act in connection with the acquisition of St. Helens Pulp & Paper Co. Subsequent to the issuance of the complaint, the Federal Trade Commission, by resolution, authorized the Bureau of Economics to collect data, ascertain market characteristics, and prepare statistical compilations for use in this proceeding.

At the hearing Dr. Irston R. Barnes, an economist of the Federal Trade Commission in charge of developing the economic work relating to Section 7 matters, testified that he had charge of the carrying out of the above resolution and he related in detail various steps taken under his supervision. He testified in substance that St. Helens had

reported 98% of its sales in the Western and Pacific States were converters and jobbers. Questionnaires were prepared classifying the various papers formerly manufactured and sold by St. Helens into certain specified types. The questionnaires to converters classified the products into eight types of coarse paper; those to jobbers covered six types of coarse paper and three types of coarse paper products. Both jobbers and converters were instructed to show the dollar volume of such purchases from each named supplier of such products for specified periods of time, both before and after the acquisition. If the company's records did not supply prices on the product basis specified in the report, estimates based on company records were to be used. The list of jobbers and converters was made of from St. Helens' sales book, from respondent's sales analysis, from Lockwood's Directory of the Paper & Allied Trades for 1953 and from other sources. Some wholesale grocers were also included. Answers to the questionnaires were required to be certified by an officer of the corporation. Reports received were tabulated both as to dollar volume and percentage of aggregate sales by each supplier shown in the reports.

At the conclusion of the direct testimony of Dr. Barnes, the tabulation (Commission's Exhibit 62) was offered in evidence. Respondent objected on the ground that the basic material on which the survey was based had not been made available for cross-examination. The Hearing Examiner ruled that unless the material were made available, it would be necessary to sustain the objection. At that point an adjournment was taken and counsel supporting the complaint took up with the Commission the matter of authorizing the respondent to make some examination of the reports.

On January 18, 1955, the Commission directed the Bureau of Economics to transmit the records to the Bureau of Litigation with authority to make the data available to counsel for respondent under the following conditions:

"(1) It shall be made available to such counsel in the Washington Office of the Commission solely for inspection and for use during the examination of the witness or witnesses who received and edited the replies and compiled the Survey. No information secured on FTC forms EE-1 or EE-2 that can be identified with reporting companies shall be admitted into the public record for any purpose.

"(2) The Survey documents shall not be removed from the Washington Office of the Commission. An employee of the Commission familiar with the records shall have custody of same at all times during the inspection or other use thereof. He shall have full responsibility for the preservation of such records and shall cooperate with and assist those using them "

Respondents insisted that the disclosure permitted under the Commission's order was inadequate, which view was sustained by the Hearing Examiner and he entered an order "that the objections of the respondent to Commission's Exhibit 62 for identification be sustained."

The questions involved are (1) Is the tabulation (Commission's Exhibit 62) admissible in evidence as an exception to the hearsay rule? (2) Are the limitations placed by the Commission on respondent's examination of the questionnaires such as to deny it a fair trial?

In the general discussion on hearsay in Wigmore on Evidence, 3rd edition, Volume V, Section 1420 and following, the distinguished author says: "The purpose and reason of the hearsay rule is the key to the exceptions to it." He points out that cross-examination "is, beyond any doubt, the greatest legal engine ever invented for the discovery of truth * * *". The theory of the rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare, untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test * * * may in a given case be superfluous; that is, not needed or impossible of employment. * * * If a statement has been made under such circumstances that even a skeptical caution would look upon it as trustworthy (in the ordinary sense), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured."

Wigmore concludes that a consideration of two principles has been responsible for most of the hearsay exceptions. These principles are, first, the circumstantial probability of trustworthiness and, second, the necessity for the evidence.

These principles have been considered and applied in a great variety of cases, many of which are cited in the briefs. For example, tabulations or surveys made by a competent witness have been admitted in evidence where the tabulations were made from evidence already properly in the case. *U. S. v. Grayson*, 1948, 166 F. 2d 863; *Harper v. U. S.*, 1944, 143 F. 2d 795; *U. S. v. Feinberg*, 1944, 140 F. 2d 592. In some cases tabulations or audits have been admitted, even though the records or data on which the exhibits were based were not formally in evidence but were available for examination. *Northern Pacific Railway Company v. Keyes*, 1898, 91 Fed. 47 and *Butler v. U. S.*, 1951, 53 F. 2d 800.

Another type of case has to do with surveys based on consumer opinion. As example is *U. S. v. 88 Cases, More or Less, Containing Bireley's Orange Beverage*, 1951, 187 F. 2d 967, which was a libel proceeding under the Food, Drug and Cosmetic Act. There, the court

admitted surveys covering answers given by 3,539 individuals to questions prepared by the government. These questions concerned conclusions drawn by the individuals (based on certain advertising) as to the contents of the product in question. Other cases commenting on the admissibility and value of this type of evidence are *Bristol-Myers Company v. F. T. C.*, 1950, 185 F. 2d 58; *Gulf Oil Corporation v. F. T. C.*, 1945, 150 F. 2d 106; *Rhodes Pharmacal Company v. F. T. C.*, 1953, 208 F. 2d 382. In the latter case the court said "Obviously, the value of a survey depends upon the manner in which it is conducted, whether the techniques used were slanted or fair." In none of the cases does it appear that the individuals whose opinions were collected were available for cross-examination.

Some of the language in *Elgin National Watch Company v. Elgin Clock Company*, 1928, 26 F. 2d 376, seems to indicate a view contrary to that expressed in the above cases. There, a petition was filed for an injunction restraining defendant from using "Elgin" in connection with its products. Plaintiff, relying on equity rule 48, asked permission to file an affidavit of Arthur Lynn, based on answers to questionnaires mailed to many retail jewelers. Questionnaires asked not only for the opinions of the individual jewelers as to the impressions made by the word "Elgin" but also asked what the opinions of the jewelers' customers were. The court's conclusion seems to have been based largely on its opinion of the purpose and meaning of equity rule 48.

In addition to the public opinion or consumer surveys, the courts have also admitted in evidence tabulations of factual data, which data was gathered by numerous persons not available for cross-examination. In *U. S. v. Aluminum Company of America*, 1940, 85 F. Supp. 820, one of the issues concerned bauxite deposits in Arkansas. Exhibit 1684 was a tabulation made by a witness of facts shown by the records of the drillings of 605 test holes. The court ruled against the government's claim that the individual and numerous drillers should be called to testify as to what each had learned in his separate drilling operations. The court overruled the objections that the offered exhibit was hearsay. The drillings had not been done for the purposes of the law suit. It also appeared that it had been the general custom to accept such test hole reports as correct without calling the makers to verify them. *Powhatan Mining Company, et al v. Ickes*, 1941, 118 F. 2d 105, involved an application to the Bituminous Coal Division of the Department of Interior for changes in minimum coal prices. The Director of the Division admitted in evidence 25 pages of tabulations based upon invoices filed with the Division under Section 4, II(a) of the Bituminous Coal Act, purporting to show the

prices of coal of similar quality sold to one of the largest consumers in the district. Section 4, II(a) provided "All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it * * * copies of all invoices * * *. All such records shall be held by the statistical bureau as the confidential records of the code member filing such information." The court held that the tabulations were admissible under the liberal rules applicable to administrative hearings and that the exhibit was not hearsay.

American Employers Insurance Company v. Roundup Coal Mining Company, 1934, 73 F. 2d 592, was an action to recover on a fidelity bond because of fraud and embezzlement of an employee, Bunker. One claim was that Bunker embezzled money received from the company's customers and failed to credit such payment on the books. Exhibit 65 was made up by an auditor from replies to letters to various customers, in which replies was set out what purported to be the true status of the individual accounts. The exhibit was held to be "not only hearsay, but also made up of a series of self-serving declarations." Thus, it appears that the showing of the circumstantial probability of trustworthiness was unsatisfactory nor was there adequate showing of the necessity for the evidence. In fact, it appears that the evidence, even if admitted, would have had no direct bearing on the real question at issue.

Concerning the second principle, that is, the necessity for the evidence, Wigmore points out that necessity, in one form or another, is found in all the hearsay exceptions. Wigmore on Evidence, Volume V. Section 1630. In applying this principle, Wigmore recommends a reasonable and practical approach as is shown by the following statement from *U. S. v. Aluminum Company of America*, 35 Fed. Supp. 820 at 823:

"In effect, Wigmore, says that, as the word necessity is here used, it is not to be interpreted as uniformly demanding a showing of total inaccessibility of firsthand evidence as a condition precedent to the acceptance of a particular piece of hearsay, but that necessity exists where otherwise great practical inconvenience would be experienced in making the desired proof (Wigmore, 3rd Ed., Vol. V. sec. 1421; Vol. VI, sec. 1702). As will be seen by scrutinizing the cases cited above as being in accord with or supporting the Merriam case, it is inconceivable that what the courts whose decisions control in this court have said can properly be construed as requiring that physical inability be shown in order to establish the type of necessity which constitutes one of the conditions precedent for using hearsay. If it were otherwise, the result would be that the exception created to the

hearsay rule would thereby be mostly, if not completely, destroyed.”

This matter of necessity for the evidence has been emphasized particularly in antitrust cases, where the inquiry often takes a wide range. In commenting on this fact, the court in *U. S. v. Minnesota Mining and Manufacturing Company*, 1950, 92 Fed. Supp. 947, said at page 948:

“Relevant political and economic facts can be presented to the court in an informal way. It is not necessary to comply with those minimal standards of evidentiary competence suitable for the proof of other types of facts, even in the comparatively loose procedure commonly followed in an anti-trust case where the government seeks an injunction. Cf. *U. S. v. U. S. Machinery Corporation*, D. C. 89 Fed. Supp. 349. It is sufficient that the economic and political facts come from published sources recognized as authoritative, persuasive or reliable by the profession of economists and political scientists, and if the publications are presented at a time and in a manner which give the adverse party adequate opportunity to examine, to challenge, to rebut and to argue upon them.”

See also *Cub Fork Coal Company v. Glass Company*, 1927, 19 F. 2d 273.

In applying these two tests of admissibility in the instant case, consideration must be given to the statute under which the data was collected and tabulated. Section 6 of the Federal Trade Commission Act provides:

“That the commission shall also have power—

“(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

“(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission

may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission."

"(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use."

Section 10 of the Act provides:

"Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, * * * shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than \$1,000 nor more than \$5,000 or to imprisonment for a term of not more than three years, or to both such fine and imprisonment."

As against the required trustworthiness and necessity, respondent urges, among other things: that the surveys were conducted by mail; that they were made after complaint was issued and for purposes of this litigation; that Dr. Barnes, while a trained economist, is not an expert in the paper business; that the classification of products was not correct; that the method of selecting customers (particularly those of respondent and St. Helens Pulp & Paper Co.) was unfair and would result in biased answers; that the persons supplying the evidence are not available for cross-examination.

These are all matters which may be inquired into and evaluated at the proper time. They have to do with the weight of the evidence rather than its admissibility. Dr. Barnes' testimony, already in the record, sets out the steps taken to insure the accuracy of the data sought under Section 6 of the Federal Trade Commission Act. One of the developments of our complex economic life is the increase in the use of information of this character, both by government and business. The personal property tax system of many States relies on data collected by officials and certified by the individual taxpayer to be correct. Tabulations of this data so collected are later used by boards in equalizing taxes between governmental subdivisions. The use of information collected by the Census Bureau is another example. Surveys made by independent organizations on a variety of subjects are used and relied upon in the field of business. Such a survey was considered admissible

and as having probative value in the matter of Pillsbury Mills, Inc., Docket No. 6000.

It is our conclusion that Commission's Exhibit 62 is not subject to the objection that it is hearsay.

II

The second question (and the one immediately before us) has to do with the limitation placed by the Commission on the use of the date upon which Exhibit 62 was based.

Many of the cases already cited have also considered this question. In *Powhatan Mining Company, et al. v. Ickes*, the Director did not allow an inspection of the invoices on which the tabulations were based, because he considered them confidential. The court pointed out that the information secured under Section 4, II (a) was not confidential in this type of proceeding, and that the disclosure should have been made, in the interest of a fair hearing. *Northern Pacific Railway Company v. Keys*, 91 Fed. 47, was a suit involving the fixing of railway rates by a State board of railway commissioners. A large number of tables were prepared in the accounting departments of several railroads affected showing the amount of business done for a certain period. The work was done by 40 or 50 clerks under the direction of the heads of the departments who were called as witnesses. The court held that it was not necessary to call the clerks to testify as to the correctness of the tables as each clerk made but a part of them, but it was sufficient if the records from which the computations were made were placed at the disposal of the opposing party for examination. *Augustine v. Bowles*, 1945, 149, F. 2d 93, was an action by the Administrator of the OPA for treble damages for violation of the Emergency Price Control Act. Exhibit 11 was a compilation showing overcharges made by Augustine in the sale of meats to wholesale grocers. An OPA investigator, Ortland, obtained the original invoices of sales from Augustine, had another investigator prepare the tabulation listing customers sales, prices, etc. Ortland, alone, was called and testified he only "spot checked" a certain number of invoices. All the invoices, however, were made available at the trial for examination by Augustine and the tabulation was held admissible.

The general purport of these decisions is that cross-examination is a valuable right and should not be restricted beyond the actual necessities of a particular case. We believe that the order of the Commission of January 18, 1955, was unnecessarily restrictive. It is ordered that the said order be withdrawn and the following is adopted in lieu thereof:

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Order

For the purposes of this litigation the basic information collected by the Bureau of Economics pursuant to Commission resolution of May 6, 1954, and the work papers used in compiling the Survey of Western Converters and Jobbers of Certain Coarse Paper and Paper Products shall be made available to respondent and its counsel, at such reasonable times and places as may be determined by the hearing examiner. No information secured on FTC forms EE-1 or EE-2 that can be identified with reporting companies shall be admitted into the public record for any purpose.

The case is remanded to the Hearing Examiner for further proceedings in accordance with this opinion.

ORDER RULING ON INTERLOCUTORY APPEAL

Counsel supporting the complaint having filed an interlocutory appeal from the hearing examiner's order of February 14, 1955, sustaining the respondent's objections to the receipt into evidence of Commission's Exhibit 62 for identification; and

The Commission having heard the appeal on briefs and oral arguments, and having rendered its decision recognizing that the restrictions upon the use of the basic information and work papers used in compiling the exhibit, imposed by the Commission's order of January 18, 1955, were unduly restrictive, and directing that said basic information and work papers be made available to the respondent and its counsel under the terms and conditions set forth in said decision, and having remanded the case to the hearing examiner for further proceedings in accordance with the decision:

It is ordered, That the appeal of counsel supporting the complaint be and it hereby is, otherwise denied.