GALTER v. FEDERAL TRADE COMMISSION[1]

No. 9489—F. T. C. Docket 4458

(Court of Appeals, Seventh Circuit. Feb. 5, 1951)

CEASE AND DESIST ORDERS—IF PRACTICE ABANDONED—WHETHER ABUSE OF DISCRETION—PERIOD OF ABANDONMENT—PROPER MEASURE OF

In determining whether the Federal Trade Commission has abused its discretion in ordering a petitioner to desist from an unfair practice which it has already halted, court is concerned largely not with period of time which has elapsed between cessation and entry of order, but with time from date of cessation to date of issuance of complaint.

CEASE AND DESIST ORDERS—IF PRACTICE ABANDONED—WHETHER ABUSE OF DISCRETION—PERIOD OF ABANDONMENT—IF PRACTICE DISCONTINUED MORE THAN YEAR AFTER COMPLAINT

In action by petitioner to set aside cease and desist order issued by the Federal Trade Commission to prevent petitioner from using three proper names, on ground that petitioner had long since discontinued use of names, stipulation which showed that use of two names was discontinued more than a year after issuance of complaint, did not, in absence of other evidence, prove that discontinuance was voluntary, and discontinuance of unfair practice was of itself no bar to issuance of cease and desist order.

CEASE AND DESIST ORDERS—IF PRACTICE ABANDONED—WHETHER BAR TO ISSUANCE, *per se*

The mere discontinuance of an unfair practice is of itself no bar to issuance of a cease and desist order based thereon by the Federal Trade Commission.

CEASE AND DESIST ORDERS—IF PRACTICE ABANDONED—WHERE RIGHT TO CONTINUE, NEVERTHELESS, STILL CONTENDED FOR, AND INTENTION AND PROMISE TO REFRAIN, LACKING

In action by petitioners to set aside Federal Trade Commission order which prevented petitioners from using three proper names, on ground that petitioners had long since discontinued use of names, where petitioners still contended that they could use names and expressed no intention to refrain from that use, and made no promise to do so, Commission was fully justified in believing that claimed cessation of lawful action was not voluntary, but was brought about by Commission's proceedings, and District Court [sic] would not interfere with Commission's exercise of discretion but would uphold the entry of order.

STIPULATIONS—WHERE DECISION UPON FACTS STATED AND TESTIMONY AND EVIDENCE TAKEN, AGREED TO—WHETHER FURTHER HEARINGS THEREBY PRECLUDED

Stipulation between parties before Federal Trade Commission that Commission might render its decision upon facts stated therein, and upon testimony and evidence already taken in proceedings, did not constitute an agreement that no more hearings were to be held, but indicated that there

[1] Reported in 186 F. (2d) 810. For case before Commission, see 44 F. T. C. 80.

would be more hearings, and that if Commission approved stipulation, evidence taken at those hearings would not be considered in disposing of the proceedings.

STIPULATIONS—WHERE DECISION UPON FACTS STATED, AND TESTIMONY AND EVIDENCE TAKEN, AGREED TO—IF EVIDENCE AT ADDITIONAL HEARINGS NOT TO BE CONSIDERED—WHETHER PETITIONER DENIED DUE PROCESS, WHERE SUCH HEARINGS NECESSARILY HELD, ABSENT EVIDENCE OF VIOLATION OF AGREEMENT BY COMMISSION

Where parties before Federal Trade Commission stipulated that Commission might render its decision upon facts stated in stipulation and upon testimony and evidence taken in proceedings, and that if Commission approved stipulation, evidence taken at additional hearings would not be considered in disposing of proceedings, and additional hearings were necessarily held by Commission and there was nothing in record to indicate that Commission violated provisions of stipulation, even if petitioners had no notice of additional hearing, petitioners were not denied due process of law.

STIPULATIONS—CEASE AND DESIST ORDERS—WHETHER DISCREPANCIES—IF ERROR HARMLESS

[811] In action by petitioners to set aside cease and desist order issued by Federal Trade Commission to prevent petitioners from using three proper names, where evidence did not disclose any right in petitioners to use the names in such a manner as to mislead public into believing that petitioner's products were products of companies which had exclusive right to use names even if stipulation that names were exclusive property of those companies was erroneous, error was harmless.

STIPULATIONS—CEASE AND DESIST ORDERS—WHETHER DISCREPANCIES—TRADE NAME USE—IF MISLEADING—THAT OTHERS THAN RESPONDENT, AND ALLEGED OWNERS OF EXCLUSIVE RIGHT TO, MAY HAVE ALSO USED SAME

In action by petitioners to set aside cease and desist order issued by Federal Trade Commission in proceeding to protect public against fraud and deception, and to prevent petitioners from using three proper names, evidence that other corporations than those allegedly entitled to exclusive use of the names used the names, did not indicate that stipulation entered into between parties was erroneous in stating that Commission had available witnesses who would testify that they had been or would be misled, induced, as a consequence of use of names to buy petitioner's products.

STIPULATIONS—CEASE AND DESIST ORDERS—WHETHER DISCREPANCIES—TRADE NAME USE—IF MISLEADING

Evidence supported order of Federal Trade Commission directing petitioners to cease and desist from using three proper names, to protect public against fraud and deception, even though statement in stipulation that names in question belonged exclusively to three corporations were wholly disregarded.

CORPORATE DISSOLUTION—WHETHER LIMITED CORPORATE EXISTENCE THEREAFTER—IN GENERAL

Under Illinois law, upon dissolution of a domestic corporation, however it may be effected, corporation will nevertheless be regarded as still existing for purpose of settling up its affairs and having its property applied for payment of its just debts.

CORPORATE DISSOLUTION—WHETHER LIMITED CORPORATE EXISTENCE THEREAFTER—AMENABILITY TO SUIT—INJUNCTIVE PROCEEDINGS AGAINST PROSPECTIVE ACTS

Under Illinois law, liability of a corporation for act performed by it prior to its dissolution is preserved for 2 years, but corporation is not subject to an injunction against act to be performed in the future, especially where act sought to be enjoined is in no way related to winding up of affairs of the corporation.

CEASE AND DESIST ORDERS—PARTIES—IF CORPORATIONS, SINCE DISSOLVED, INCLUDED

In action by petitioners to set aside cease and desist order issued by Federal Trade Commission in proceeding to prevent petitioners from using three proper names, where several of corporations which petitioners represented, had been dissolved under Illinois law, names of those corporations would be stricken from the Commission's order.

(The syllabus with substituted captions, is taken from 186 F. (2d) 810)

On petition to review and set aside order of Commission, order modified, and as so modified, approved, confirmed and ordered enforced.

Mr. Henry H. Koven, and *Mr. Howard R. Koven*, Chicago, Ill., for petitioners.

Mr. W. T. Kelley, General Counsel, *Mr. Donovan Divet*, Special Attorney, Federal Trade Commission, *Mr. James W. Cassedy*, Associate General Counsel, Washington, D. C., for respondent.

Before KERNER, DUFFY and LINDLEY, *Circuit Judges.*

LINDLEY, *Circuit Judge:*

Petitioners seek to review and set aside a cease and desist order entered against them pursuant to a complaint charging them with unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of the Federal Trade Commission Act, 15 U. S. C. A. 45. The Commission issued the complaint on February 4, 1941, after which this proceeding was consolidated for trial with another in which the respondents were jobbers who purchased for resale certain electric razors and cameras manufactured by [812] petitioners. Joint hearings were held from time to time until February 27, 1942, when petitioners and the attorneys for the Commission entered into a stipulation, whereby it was agreed that, subject to the approval of the Commission, the facts stated therein might be made a part of the record and "that upon such facts and upon the testimony and evidence already taken, the Commission might dispose of the proceeding. Between the date of signing the stipulation and its approval by the Commission, further hearings were held in the consolidated proceeding, at none of which petitioners were represented. The Commission, however, in making its findings, says that it did not rely upon the evidence adduced at these further hearings but considered only the stipulated facts, and such evidence as had been received prior to

the date of the stipulation. The Commission, on August 14, 1947, entered its cease and desist order, whereupon petitioners filed their petitions to set aside the order or, in the alternative, to reopen the proceeding for the taking of further testimony, both of which were denied.

Although petitioners broadly assert "that the order to cease and desist should be set aside in whole or in part," they have not attacked those paragraphs directing them to cease and desist from (1) falsely representing as the customary prices of their products prices in excess of those at which the products are ordinarily sold, (2) falsely representing that the prices at which their products are offered are special or reduced prices or are applicable for a limited time only, or (3) falsely representing that their products are guaranteed against defective workmanship and materials, but have confined their attack to those portions ordering them to cease and desist from (1) using the names "Elgin," "Remington," and "Underwood" on their products, and (2) representing as "candid-type" any cameras not equipped with special lenses and shutters or incapable of taking action pictures under unfavorable light conditions. Since the Commission has joined in the request that the court modify the order by striking those paragraphs relating to the representation of petitioners' cameras as "candid-type" cameras, the issue before this court is as to the validity of that portion of the order which directs that petitioners cease and desist from using the names "Elgin," "Remington," and "Underwood."

In support of their contention that the prohibition against their use of the three names should be set aside, petitioners, asserting that their use of the names has been long since discontinued, cite *Federal Trade Commission* v. *Civil Service Training Bureau*, 79 F. (2d) 113, 116 (CA–6) [21 F. T. C. 1197; 2 S. & D. 306, 309] in which the court held that "The commission is not authorized to issue a cease and desist order as to practices long discontinued, and as to which there is no reason to apprehend renewal. *L. B. Silver Co.* v. *Federal Trade Commission* (CCA) 292 Fed. 752 [6 F. T. C. 608; 1 S. & D. 327] cf. *United States* v. *U. S. Steel Corp.*, 251 U. S. 417, 445, 40 S. Ct. 293, 64 L. Ed. 343, 8 A. L. R. 1121." This court, in *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. (2d) 321 [38 F. T. C. 840; 4 S. & D. 117], in considering the effect of the cessation of an unfair practice, indicated that it also was of the opinion that the Commission should not ordinarily enter an order in cases where the unfair practice condemned in the order had been discontinued, but went on to say, at page 330: "On the other hand, *parties who refused to discontinue until proceedings are begun against them* and proof of their wrongdoing obtained, *occupy no position where they can demand a dismissal.* The *order to desist* deals with the future, and we think it is somewhat *a matter of sound discretion to be exercised wisely by the Commission* * * *. We are not

satisfied that the Commission abused that discretion in the instant case." [Emphasis supplied.] This language, when considered in conjunction with the decisions of this court which have flatly held that discontinuance of an unfair practice will not of itself necessarily bar issuance of a cease and desist order based thereon, *Fairyfoot Products* v. *Federal Trade Commission*, 80 F. (2d) 684, 686 [21 F. T. C. 1224; 2 S. & D. 330], or justify a court in refusing to enforce such order, *Corn Products Refining Co.* v. *Federal Trade Commission*, 144 F. (2d) 211, 220 [39 F. T. C. 664; 4 S. & D. 234], means, we think, that, in determining whether the Commission has abused its discretion in ordering a petitioner to **[813]** desist from an unfair practice which he has already halted, the court is concerned largely not with the period of time which has elapsed between the cessation and the entry of the order but with the time from the date of cessation to the date of issuance of the complaint.

It was stipulated, in the instant proceeding, that petitioners had used the name "Elgin" on their products for three months during the fall of 1939 and that they had manufactured electric razors marked "Underwood" and cameras marked "Remington," the latter having been made for the DeLuxe Products Co. and the word "Remington" placed thereon at that company's request.[1] The stipulation is silent as to the exact dates of use of the marks "Underwood" and "Remington," but petitioners, in their petition to set aside the Commission's order, averred that they had not been used "since entering into the stipulation as to the facts in February 1942 * * *." If these allegations are accepted as true, the result is that the use of two of the three names is not shown to have been discontinued until more than a year after issuance of the complaint, which does not, in the absence of other evidence, even tend to prove that the discontinuance was voluntary and most certainly does not, in view of the well-settled rule that the mere discontinuance of an unfair practice is of itself no bar to issuance of a cease and desist order based thereon, *Fairyfoot Products Co.* v. *Federal Trade Commission*, 80 F. (2d) 684, 686, (CA–7) [21 F. T. C. 1224; 2 S. & D. 330]; *Corn Products Refining Co.* v. *Federal Trade Commission*, 144 F. (2d) 211, 220 (CA–7) [39 F. T. C. 664; 4 S. & D. 234], warrant a holding that the Commission abused its discretion in entering the order or in declining to set it aside. *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. (2d) 321, 330 (CA–7) [38 F. T. C. 840; 4 S. & D. 117]. The improper use of the

[1] Petitioners' argument that this fact somehow absolves them of any responsibility for the use of the name "Remington" is patently without merit, for it is clearly established that one who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of the Act. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483 [4 F. T. C. 610; 1 S. & D. 198]; *Marietta Mfg. Co.* v. *Federal Trade Commission*, 50 F. (2d) 641, 642 (CA–7) [15 F. T. C. 613; 2 S. & D. 129]; *Perloff* v. *Federal Trade Commission*, 150 F. (2d) 757, 759–760 (CA–3) [40 F. T. C. 878; 4 S. & D. 316].

names in the past was a stipulated fact. And though petitioners have asserted abandonment of the practice, they still contend in this court that they have a right to continue it. They express no intention to refrain from it; they make no promise to do so. Under these circumstances, the Commission was fully justified in believing that the claimed cessation of wrongful action was not voluntary but brought about by the Commission's proceeding and that, in view of petitioners' continued insistence that they might use each of the three names and the absence of any assertion or proof of intent not to renew their use and of any promise so to do, it was in the public interest to enjoin such use. With such exercise of discretion we may not interfere.

In petitioning the Commission to set aside its order or reopen the proceeding, petitioners urged that they should be released from the stipulation on which the order was based for the reason that "in violation of the terms of the stipulation * * * hearings were held in this cause subsequent to the date of the filing of said stipulation * * * at which hearings evidence adverse to the interests of these respondents was introduced * * *." Before this court, however, petitioners have taken a somewhat different position. Although they contend that holding hearings in the consolidated cause subsequent to the signing of the stipulation without notice to them constituted a denial of due process, they inconsistently complain that the Commission did not consider the evidence adduced at those hearings which, they say, indicated that a substantial number of the facts stipulated were not true, and urge that, for this reason, the stipulation and, of course, the cease and desist order based thereon, should be set aside by this court. The Commission, although denying that hearings were held in violation of the stipulation or without notice to petitioners, contends that, in any event, petitioners were not prejudiced thereby since none of the [814] evidence received at those hearings was considered in disposing of the proceeding against petitioners; it contends further that the evidence received at those hearings does not show that the facts stipulated are not true.

The express statement in the stipulation that the Commission might render its decision upon the facts stated therein "and upon the *testimony and evidence already taken* in this proceeding" [Emphasis supplied] would hardly seem to constitute an agreement that no more hearings were to be held but would rather indicate that it was contemplated that there would be more hearings but that, if the Commission approved the stipulation, the evidence taken at those hearings would not be considered in disposing of the instant proceeding. Certainly, it is obvious that additional hearings were necessarily held in the proceeding with which the instant proceeding had been consolidated, for the respondents in that proceeding were not parties to the stipulation. Such hearings had, in fact, been scheduled and peti-

tioners notified thereof prior to signing the stipulation. But, even assuming that petitioners had no notice of the hearings and that evidence adverse to their interests was received at those hearings, still there is no denial of due process shown, for there is, in the record, nothing to indicate that the Commission violated that provision of the stipulation by which it agreed that it would consider only the facts stipulated and the evidence already taken, in disposing of the case, and to argue that the Commission's adherence to its agreement with petitioners constituted a denial of due process to them is to take an obviously untenable position.[2]

There remains petitioners' contention that the evidence received in the companion proceeding subsequent to the signing of the stipulation indicated that a substantial number of the facts stipulated were untrue and required that the stipulation be set aside. The evidence on which they rely revealed that the names "Elgin," "Remington," and "Underwood" were used by companies other than the Elgin Watch Co. and the Remington and Underwood Typewriter Cos. This evidence, they say, indicates that the stipulation is incorrect in stating that the names in question are the exclusive property of the aforementioned companies.[3] Assuming arguendo that the evidence did show that the stipulation was erroneous in this respect, we cannot see that petitioners can be benefited thereby, for this is not an action for trade-mark violation but a proceeding to protect the public against fraud and deception, and the evidence taken in the companion proceeding did not disclose any right in petitioners to use the names "Elgin," "Remington," and "Underwood" in such a manner as to mislead the public into believing that petitioners' products were the products of the Elgin, Remington, or Underwood corporations. Nor does it indicate that the stipulation was erroneous in stating that the Commission had witnesses available who would testify that they had been or would be so misled, and induced, as a consequence thereof, to buy petitioners' products.[4] Thus, the Commission's order would have substantial support in the evidence even though the statements that the names in question belonged exclusively to Elgin, Remington, and Underwood were wholly disregarded.

[815] Petitioners, in their alternative petition to set aside the order or reopen the proceeding, for the first time directed the Commission's

[2] That the Commission did not consider any evidence taken at the subsequently held hearings in the consolidated cause is admitted by petitioners themselves and is, in fact, the premise upon which they base their contention that the Commission erred in failing to set aside the stipulation as patently untrue.

[3] Petitioners also state that this evidence accounts for the dismissal of the complaint against the respondents in the companion proceeding, but the dismissal order entered by the Commission in that proceeding clearly indicates that dismissal was predicated on the fact that the respondents had not manufactured or selected the trade names for the products referred to in the complaint or done any of the advertising referred to therein, but were merely jobbers who had purchased the products from the petitioners herein.

[4] The stipulation provided that the Commission might consider these statements and give to them the same credence as if the witnesses were called.

attention to the dissolution, late in 1943, of the corporate petitioners American Supercraft Corp. and Match King, Inc., also sometimes known by its trade name, Monrach Manufacturing Co., their dissolution having been accomplished through voluntary proceedings brought by the stockholders, officers and directors of the respective corporations. This disclosure was made in connection with petitioners' argument that their abandonment of the unfair practices against which the order had been issued made that order unnecessary and improper. Although we have rejected the contention that the order should have been set aside because of such abandonment, the fact that the corporations have been dissolved raises a question as to the propriety of the entry of the order against them.

The Commission argues that section 157.94, chapter 32, Illinois Revised Statutes, providing that "The dissolution of a corporation * * * shall not take away or impair any remedy available * * * against such corporation * * * for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within 2 years after the date of such dissolution," authorizes issuance of a cease and desist order against the dissolved corporations, but the cases interpreting that section and its predecessors are strikingly devoid of even the slightest suggestion that the provision that a dissolved corporation shall, for a limited time after dissolution, be held legally responsible for any *liability incurred prior to dissolution* can be extended so far.

In *Life Association of America* v. *Fassett*, 102 Ill. 315, the Illinois court considered at length the purpose and effect of a statutory provision extending the existence of a dissolved corporation for 2 years from the date of its dissolution. The court there observed, at page 323: "Upon the dissolution or civil death of a corporation, all its real estate, by the strict rule of the common law, reverts to the original owners or their heirs, and all its personal estate vests in the Crown, in England, and the State here, and all debts due to or from it are by operation of law extinguished. * * * With a view of mitigating the rigor of the common law with respect to the effects of a defunct corporation, the legislature of this and most, if not all, of the other States of the Union have, by appropriate legislative enactments, provided for a just and equitable distribution of their assets in cases of insolvency, or sudden dissolution from any cause, and our own act on the subject contains a provision which in express terms extends their corporate existence 2 years from the date of their dissolution, for such purpose." The court concluded, at page 324: "From these and other provisions of the statute it clearly appears that it is a part of the settled policy of the State, at least so far as domestic corporations are concerned, that upon their dissolution, however that may be effected, they shall nevertheless be regarded as still existing for the purpose of

settling up their affairs and having their property applied for the payment of their just debts * * *." The influence of this decision on subsequent Illinois cases is noted in the court's opinion in *Evans* v. *Illinois Surety Co.*, 298 Ill. 101, in which, after quoting at length from the *Fassett* case, the court stated, at page 108: "The doctrine of this opinion has never been modified or changed, and in some respects it has been specifically approved in several decisions. *St. Louis and Sandoval Coal Co.* v. *Sandoval Coal Co.*, 111 Ill. 32; *Singer* v. *Hutchinson*, 183 id. 606; *Eau Claire Canning Co.* v. *Western Brokerage Co.*, 213 id. 561; *Commercial Trust Co.* v. *Mallers*, *supra*; *Edwards* v. *Shillinger*, 245 Ill. 231."

Although the earlier Illinois statutes were perhaps more explicit in providing for the continued existence of a dissolved corporation for the purpose only of [816] winding up its affairs, it would seem quite evident, in the light of the Illinois cases construing such statutes and the public policy expressed therein, that the current provision does no more than preserve for a 2-year period, the corporation's liability for acts performed by it prior to its dissolution but does not make it subject to an injunction against acts to be performed in the future, especially where, as here, the acts sought to be enjoined are in no way related to the winding up of the corporate affairs and are, therefore (in view of the Supreme Court's statement, in *Chicago Title and Trust Co.* v. *Wilcox Bldg. Corp.*, 302 U. S. 120, 129, that "The only power left to the corporation * * * (after dissolution) * * * was to finish pending cases begun within 2 years after its dissolution. With that exception, its corporate powers were ended for all time and for all purposes"), beyond the dissolved corporation's power to perform. Such was the construction accorded the statute by the District Court in *Laning* v. *National Ribbon & Carbon Paper Mfg. Co.*, 40 F. Supp. 1005, the court stating, at page 1006, "It seems to me quite evident that the legislature intended that the decree dissolving the corporation should terminate its existence absolutely except for the purpose of enabling a creditor to maintain an action against it," and such has been the construction generally accorded statutes extending the existence of a corporation after dissolution, Fletcher Cyc. Corp., Perm. Ed. (1942 revised volume), section 8170. Thus it seems clear that the Commission, when the dissolution of the corporate petitioners was brought to its attention, should have amended its order by striking therefrom the names of the aforementioned corporate petitioners.

The order of the Commission is modified by striking therefrom paragraphs 1 (g) and 5 (f), as requested by the Commission, and by striking therefrom also the names of American Supercraft Corp. and Match King, Inc. In all other respects, and as so modified, the order is approved, confirmed, and order enforced.

FEDERAL TRADE COMMISSION v. RHODES PHARMACAL CO., INC., ET AL.[1]

No. 51 C 176—F. T. C. Docket 5691

(District Court for the Northern District of Illinois, Eastern Division. February 21, 1951)

Memorandum opinion and decision by Judge La Buy denying Commission's motion for preliminary injunction, made under section 13 of the Federal Trade Commission Act, restraining defendants from alleged false advertising of a medicinal product called Imdrin, on the ground that the court should not determine the questions of fact involved upon the verified pleadings and ex parte affidavits, and upon the additional consideration that an early determination of the case on the merits by the Commission may be anticipated.

On motion for preliminary injunction, injunction denied and suit dismissed.

Mr. Frank E. Gettleman and *Mr. Arthur Gettleman* of Chicago, Ill., and *Mr. James B. Goding* of Washington, D. C., for respondents.

Mr. James W. Cassedy, Assistant General Counsel, and *Mr. Joseph Callaway*, both of Washington, D. C., for Federal Trade Commission.

MEMORANDUM

Plaintiff, Federal Trade Commission, has filed its complaint herein and prays for the issuance of a preliminary injunction restraining defendants from alleged false advertising of a product called Imdrin. Said complaint for injunction is made pursuant to section 53 (15 U. S. C. A.) reading as follows:

(a) Whenever the Commission has reason to believe—

(1) That any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 52 of this title, and

(2) That the enjoining thereof pending the issuance of a complaint by the Commission under section 45 of this title, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 45 of this title, would be to the interest of the public,

the Commission may by any of its attorneys designated by it for such purpose bring suit in a district court of the United States * * * to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. * * *

The allegations of the complaint, supported by affidavits, if undenied would justify the issuance of the injunction prayed for, but the de-

[1] Not reported in Federal Reporter. Decision reversed by the Court of Apeals, July 5, 1951, 191 F. (2d) 744.

fendants have filed their verified answer denying all the material allegations of the complaint and submitted counter-affidavits in support of their answer. In *Woodside* v. *Tonopah & G. R. Co.* (C. C. Nev., 1911), 184 Fed. 359, 360, the court was confronted with the same condition of the pleadings and in resolving the problem said as follows:

> The defendants have answered as they are required to do under the statute, and have fully met and denied all of the equities of the complaints. The answers are specific and under oath. In equity practice this is usually deemed sufficient to dissolve a restraining order and prevent the issuance of an injunction pendente lite; that is to say, where the equities of the bill are denied fully and explicitly by a sufficient answer under oath, the court usually denies an injunction pendente lite, for the reason that such an answer is deemed to overcome the equities of the bill.

It appears, therefore, where the equities of the complaint are fully and explicitly met by denial under oath, a preliminary injunction will not be granted. See also *Behre* v. *Anchor Insurance Co. of N. Y.* (C. C. A. 2, 1924), 297 Fed. 986; *Decorative Stone Co.* v. *Building Trade Council* (C. A. 2, 1926), 13 F. (2d) 123; *Horsman* v. *Kaufman* (C. C. A. 2, 1922), 286 Fed. 372.

In the present case both the plaintiffs and defendants have submitted affidavits in support of their verified pleadings. Such a procedure is permissible and there being no opportunity to see the witnesses, the contents of all affidavits are entitled to equal weight. This principle was adhered to by the Court of Appeals in the Third Circuit in *Warner Bros. Pictures* v. *Gittone* (C. C. A. 3, 1940), 110 F. (2d) 292, wherein it said:

> Furthermore we think that a preliminary injunction should not have been granted upon evidence largely in the form of affidavits as was done in the case before us. The evidence was conflicting and the trial judge, in order to enable him to resolve these conflicts, should have been afforded the opportunity of testing the credibility of the witnesses by having the benefit of their cross-examination and, if possible, their presence in court. In the absence of such opportunity the affidavits of each side were entitled to equal weight. * * *

See also *General Talking Pictures Corp.* v. *Stanley Co.* (D. C. Del., 1930), 42 F. (2d) 904; *United States* v. *Zukauckas* (D. C. Pa., 1923), 293 Fed. 756; *United States* v. *Wierton Steel Co.* (D. C. Del., 1934), 7 F. Supp. 255; Cyc. Fed. Pro., Vol. 13, page 176; 43 C. J. S. page 907.

The court has read the verified pleadings and the affidavits and is of the opinion that the verified complaint and answer present debatable questions which are not resolved by the supporting affidavits. In such a situation, where the pleadings present controverted questions, and where the affidavits are in conflict and equally balanced as to proofs,

a court should not issue a preliminary injunction, unless special circumstances warrant issuance to preclude irreparable injury to the plaintiff and without substantial damage to the defendant pending a final hearing on the merits. *Lare* v. *Harper & Bros.* (C. C. A. 3, 1898), 86 Fed. 481, 483; *United States* v. *Zukauckas*, supra.

The instant case is controlled by the above announced rule, that is, that a preliminary injunction should never be granted unless it appears clearly that petitioner has sustained its burden. To resolve technical controversial facts solely on pleadings and conflicting affidavits does not satisfy the ends of justice, and where the plaintiffs contentions in fact and in law are seriously disputed, an injunction will not issue. *Lare* v. *Harper & Bros.*, supra; *United States* v. *Zukauckas*, supra; *General Talking Pictures Corp. v. Stanley*, supra; *Popular Mechanics* v. *Fawcett Publications* (D. C. Del., 1923), 1 F. Supp. 292; *Decorative Stone* v. *Building Trade Council*, supra.

The court arrives as the question of whether there exist special circumstances in the instant case to warrant issuance of the injunction in order to prevent irreparable injury. The Commission filed its complaint in this court on January 30, 1951, in connection with Commission proceedings which had commenced on August 17, 1949. Attorney for the defendants has filed an affidavit alleging that following the filing of defendant's answer on September 8, 1949, numerous conversations were had with the attorney for the Commission wherein defendant requested an early trial, but that despite these requests there was no hearing until September 27, 1950. The affiant further avers that defendants were ready to proceed to trial at all times and so notified the Commission and the delay was due solely to the Commission. In support of these allegations are attached copies of correspondence had with the Commission. Hearings were finally commenced on September 27, 1950. The Commission has concluded its case and the court is advised that in a matter of 6 weeks, the case will be concluded. It appears, therefore, that if diligently prosecuted, there will be an early determination of the merits.

The court is of the opinion that there are serious debatable questions presented and the court should not determine these questions of fact upon the verified pleadings and ex parte affidavits. Since the plaintiff has failed to maintain its burden, the court will decline to issue an injunction. Therefore, the motion for preliminary injunction is denied and the suit is dismissed. This memorandum shall constitute the findings of fact and conclusions of law of the court.

An order in accord with the above has this day been entered.

STEELCO STAINLESS STEEL, INC. ET AL. v. FEDERAL TRADE COMMISSION [1]

No. 10178—F. T. C. Docket 5530

(Court of Appeals, Seventh Circuit, Mar. 6, 1951)

APPELLATE PROCEDURE AND PROCEEDINGS—FINDINGS OF COMMISSION—PRESUMPTION

The findings by the Federal Trade Commission are presumed to be supported by substantial evidence, and a court is not required to search the record for undesig-[694]nated errors claimed in an omnibus attack upon the findings.

METHODS, ACTS AND PRACTICES—DISPARAGEMENT OF COMPETITORS AND THEIR PRODUCTS—PRODUCTS—WHETHER TRADE UNDULY DIVERTED FROM COMPETITORS TO DISPARAGER

In action to review and set aside a cease and desist order issued by the Federal Trade Commission, evidence sustained finding of Commission that as a result of manufacturer's disparagement of competitors' products, trade had been unduly diverted to manufacturer from competitors.

APPELLATE PROCEDURE AND PROCEEDINGS—EVIDENCE—TESTIMONY—CREDIBILITY AND WEIGHT

The credibility and weight to be attached to witnesses' testimony before the Federal Trade Commission has been lodged with the Commission as the trier of the facts.

METHODS, ACTS, AND PRACTICES—DISPARAGEMENT OF COMPETITORS AND THEIR PRODUCTS—PRODUCTS—SALESMEN OF DISPARAGER—STATUS

In action to review and set aside a cease and desist order issued by the Federal Trade Commission, evidence sustained finding of Commission that salesmen in making disparaging remarks about competitors' products were acting in the capacity of employees and agents of manufacturer and manufacturer was bound by and responsible for their activities.

CORPORATIONS—ACTS OF—IN GENERAL

A corporation can act and speak only through its authorized officers and agents.

CEASE AND DESIST ORDERS—PARTIES—CORPORATE ACTS—IF INDIVIDUAL JOINED, MAIN STOCKHOLDER IN FAMILY CORPORATION

Where individual petitioner had management, direction and complete control over activities of corporation and was the main stockholder with only his son-in-law and daughter as other stockholders, Federal Trade Commission was justified in issuing cease and desist order against individual petitioner as well as against corporation.

---

[1] Reported in 187 F. (2d) 693. For case before Commission, see 46 F. T. C. 643.

APPELLATE PROCEDURE AND PROCEEDINGS—EVIDENCE—OPINION—IF IN CONFLICT WITH OTHER TESTIMONY

Opinion evidence need not be rejected merely because it is in conflict with other testimony of the same character, since the weight to be attached to such testimony is for the trier of fact.

(The syllabus, with substituted captions, is taken from 187 F. (2d) 693)

On petition to review order of Commission, petition dismissed.

Mr. John A. Nash, *Mr. Arthur H. Schwab* and *Mr. Earl M. Friesenecker*, all of Chicago, Ill., for petitioners.

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

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

MAJOR, *Chief Judge*.

This is a petition by Steelco Stainless Steel, Inc., and Clyde C. Carr, individually and as an officer of the corporation, to review and set aside a cease and desist order issued by the Federal Trade Commission (respondent) on March 15, 1950. The complaint issued March 9, 1948, charging petitioners with unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act, 15 U. S. C. A. Sec. 45. Petitioners were engaged in the sale and distribution of stainless steel cooking utensils in interstate commerce in competition with others selling various types of cooking utensils. The complaint as well as the findings are voluminous and supply material for an opinion almost without end, if we were looking for an excuse to indulge in such time-consuming activity, but in the view which we take, no useful purpose could be served in so doing. And particularly is this so in light of the disclosure that petitioners by their answer to the complaint and by stipulation entered into at the trial have conceded a major portion of the allegations of the complaint. It follows that findings made in accordance therewith and those portions of the order predicated upon such findings are not open to attack.

More than that, while petitioners in their brief and argument in this court make the general charge that the findings are not supported by substantial evidence, they fail to point out the particular findings under attack, many of which, as already noted, [695] rest upon conceded facts. It has been held that findings are presumed to be supported by substantial evidence, *Federal Trade Commission* v. *A. McLean & Son*, 84 F. (2d) 910, 911 [22 F. T. C. 1149, 2 S. & D. 347],

certiorari denied 299 U. S. 590, and that a court is not required to search the record for undesignated errors claimed in an omnibus attack upon the findings, *North Whittier Heights Citrus Assn.* v. *National Labor Relations Board*, 109 F. (2d) 76, 83, certiorari denied 310 U. S. 632.

Notwithstanding what we have said, it is discernible from petitioners' brief that their attack upon the substantiality of the findings may be categorized as follows: (1) that petitioners' salesmen made disparaging statements relative to competitive products, which petitioners in their brief state is the most important and material issue; (2) that petitioner Clyde C. Carr was improperly included in the order in his individual capacity; (3) that the order is based upon conflicting opinion testimony, and (4) that the findings and order are based upon unjustified inferences and unwarranted interpretation of the meaning of representations made and immaterial representations which it is asserted were no more than so-called "puffing" statements.

With the issues thus narrowed, we return to a brief statement of the factual situation pertinent thereto. The complaint alleged that petitioners caused their products, stainless steel cooking utensils, to be sold and offered for sale through sales agents who conducted, under petitioners' direction, demonstrations in the use of the products, exhibiting charts and distributing pamphlets and various other printed matter accompanied by sales talks taken from sales manuals supplied by petitioners, and that by this method, manner and means petitioners disseminated false, misleading and deceptive statements and representations as to the characteristics and nature of the products and the effectiveness and result upon health to be obtained from the use thereof in the cooking and preparation of food; and, as to the vital need of various named organs and tissues of the human body for certain designated materials and vitamins, and the effect thereof on the structure and function of such organs and tissues. The complaint goes into much detail describing the false and misleading representations thus made and sets forth various pamphlets and circulars issued by the petitioners. Because of their length we shall not attempt to set forth these exhibits in detail. It is sufficient to note that they list many and perhaps all of the minerals essential to the functions and structure of the various organs and tissues of the human body, together with the effect which they are designed to have thereon. Typical of the representations thus made is that sulphur purifies and tones the human system and intensifies feeling and emotions; that phosphorus nourishes the brain cells, builds power of thought and stimulates the growth of the hair; that calcium gives vitality, endurance, heals wounds, and counteracts acid; that magnesium relaxes the nerves, refreshes the human system, prevents and relieves constipation; that potassium is a liver activator, makes tissues elastic, muscles supple,

creates grace, beauty, and a good disposition. Contained in one of said exhibits is a representation that vitamin A affords resistance to disease and is effective in preventing and relieving anemia, pellagra and gallstones; that vitamin B prevents and relieves nervous disease and paralysis; that vitamin C imparts strength and endurance and prevents and relieves muscular disease and loss of weight, and so on. In another exhibit is a picturization of the human body in connection with which there appear statements associating various tissues and organs with certain specified minerals and vitamins. That such representations were false is not disputed, but it is claimed they were not deceptive.

The complaint alleged that for the purpose of inducing the purchase of their products petitioners made false and disparaging statements and representations of cooking utensils sold by their competitors, such representations and statements being to the effect that consumption of food prepared or kept in aluminum utensils, if eaten, would cause cancer, stomach trouble, anemia, blood poisoning, and various other ailments, afflictions, and diseases detrimental to the [696] health of the user, that the preparation of food in such utensils would cause formation of poisons, and that by reason of such false and disparaging statements the public was induced to purchase large quantities of petitioners' products and, as a result, trade had been unlawfully diverted to petitioners from their competitors.

On the issue of the disparagement of competitive products, the Commission found, "* * * over a substantial number of years, over a representative area, and in a substantial number of instances a number of respondents' salesmen, in the course of their demonstration and selling talks, represented to prospective purchasers that cooking food in aluminum ware would cause, in the consumer of the food, cancer, ulcers, bad health, decayed teeth, indigestion, and poisoning, bacterial and metallic; that minerals and vitamins essential to health were lost by cooking therein; that their use was bad for children and pregnant women; that aluminum ware retained an odor and destroyed the color of food," and that "The effect of these representations was to frighten some of those to whom they were made into discarding their currently used cooking utensils and buying respondents' products and persuading others to do likewise." It was found that these representations were false and deceptive in that cooking in aluminum utensils did not have the effect, produce the results, or cause the diseases ascribed to them. And the Commission found, "As a result of the disparagement of competitors' products, trade has been unfairly diverted to the respondents from their competitors, whereby substantial injury has been, and is being, done by respondents to their competitors in commerce among the States of the United States and the District of Columbia."

Petitioners attack this finding relative to disparagement mainly upon two grounds: (1) that the testimony is so lacking in probative value as not to constitute substantial evidence, and (2) in any event, petitioners' salesmen were acting in the capacity of independent contractors rather than agents and that petitioners are not responsible for their statements. The Commission offered some 24 housewives as witnesses on this disparagement issue, and in varying degree their testimony amply supports the finding. It is true, as argued by petitioners and as pointed out by the Trial Examiner, that little, if any, weight should be attached to the testimony of some of such witnesses for various reasons. However, determination of the credibility and weight to be attached to their testimony has been lodged with the Commission as the trier of the facts. More than that, their testimony is quite convincing that petitioners' salesmen made the representations found by the Commission. We are not impressed with the contention that the testimony of such witnesses is not substantial merely because it relates to a comparatively few of petitioners' salesmen. Especially is this so when such testimony is evaluated in connection with the false, misleading, and deceptive pamphlets and literature which admittedly were prepared and placed in the hands of the salesmen by petitioners. It may be true that there is nothing in such pamphlets or literature directly suggestive of disparagement of competitive products, but it certainly was suggestive in that petitioners' salesmen were authorized to sell petitioners' products on other than a truthful and honest basis. It is hardly conceivable that such pamphlets and literature could have been supplied for any other purpose, and it is a weak argument on the part of petitioners that its salesmen went further in their unfair and deceptive tactics than was suggested by petitioners themselves. And it is of little benefit to petitioners that they instructed their salesmen to sell their products on the merits without disparagement of competitive products.

The Commission found, "In the sale of their products, respondents enter into contracts, called franchises, with salesmen, designated as dealers, and furnish the latter with sales manuals, instruction books, advertising matter, pamphlets, leaflets, charts, circulars, order books, chattel mortgages for deferred-payment sales, and sample outfits of respondents' products. Such agents have authority to receive the sales price of respondents' products, to receive deposits on deferred payment sales, to evaluate and allow trade-in allowances on used [697] cooking utensils and to conduct demonstrations of cooking with respondents' utensils in the homes of prospects, giving lectures and sales talks in the course thereof. Such salesmen, in most instances, devote their full time to respondents and do not sell other merchandise. These salesmen do not purchase respondents' products for resale to the consumer but sell them on behalf of respondents. Such salesmen

are agents or employees of respondents and are not independent contractors or independent dealers. Respondents are fully responsible for such salesmen's acts and statements made in connection with the sale or offering for sale of their products and germane thereto."

No direct attack is made upon this finding, but nonetheless cases are cited in support of the theory that the salesmen were independent contractors or, at any rate, sustain a relationship with petitioners by which the latter are not responsible for their activities. The authorities cited are of no aid to petitioners' contention. We think it is hardly open to question but that the salesmen were acting in the capacity of employees and agents of petitioners and that petitioners are bound by and responsible for their activities.

The Commission found, "Respondent Clyde C. Carr is president of, and the majority stockholder in, the corporate respondent, and has been such since he organized the corporation. The only other officers and stockholders are his son-in-law and daughter, who, together with him constitute the board of directors. By virtue of stock ownership, officership, and active direction, the policies, activities, and practices of the corporate respondent are his."

Notwithstanding this undisputed finding, it is argued that petitioner Carr in his individual capacity should not be included in the order under attack. The record unmistakably discloses that the management, direction, and activities of the corporation were those of Carr. A corporation can act or speak only through its authorized officers and agents. In the instant case it was Carr alone, and it is not discernible either how or why his activities as a person should be separated or distinguished from those of the corporation. In our view, he as an individual occupies precisely the same position as does the corporation. To think contrary means that an individual as the sole manager of and responsible for the activities of a corporation can escape liability on the flimsy pretext that he was merely acting on behalf of the corporation and not as an individual. We think he is a proper party to the cease and desist order and approve the Commission's action in this respect. Cf. *Federal Trade Commission* v. *Standard Education Society et al.*, 302 U. S. 112, 120 [25 F. T. C. 1715; 2 S. & D. 429]; *Sebrone Co. et al.* v. *Federal Trade Commission*, 135 F. (2d) 676, 678 [36 F. T. C. 1142; 3 S. & D. 570].

Petitioners contend that conflicting opinion testimony is insufficient to support adverse findings against them. We know of no rule which requires the rejection of proper opinion testimony merely because it is in conflict with other testimony of the same character. The weight to be attached to such testimony, the same as any other kind of testimony, is for the trier of the facts and we know of no reason against its utilization as the basis for a finding. More than that, petitioners fail to specify which of the findings they would have us reject because

based upon such testimony. Likewise without merit is the argument that the Commission indulged in unjustified inferences and unwarranted interpretations which it has ascribed to petitioners' activities, particularly the statements contained in the pamphlets and literature which were applied to their salesmen. In fact, we think that the inferences thus drawn were not only reasonable but inescapable. Neither are we impressed with the suggestion that representations relied upon can be excused on the basis that they are only "puffing," as that expression is sometimes used. It seems plain that the representations were made in order to induce the purchase of petitioners' products, and those contained in printed matter as well as the false statements by the salesmen were made with that end in view. Statements made for the purpose of deceiving prospective purchasers and particularly those designed to consummate the sale of products by [698] fright cannot properly be characterized as mere "puffing."

An examination of the record is convincing that other questions raised by petitioners are without merit and need not be discussed. No reason is discernible why the order complained of should not be enforced.

The petition to review is dismissed, and a decree will be entered affirming the Commission's order to cease and desist and commanding obeyance and compliance by petitioners.

FOLDS ET AL. v. FEDERAL TRADE COMMISSION [1]

No. 10233—F. T. C. Docket 5332

(Court of Appeals, Seventh Circuit. Mar. 23, 1951)

APPELLATE PROCEDURE AND PROCEEDINGS—FINDINGS OF COMMISSION—REVIEW—APPELLATE DUTY—AS LIMITED TO RECORD AS A WHOLE, INCLUDING EXAMINER'S REPORT

It is the Federal Trade Commission which has ultimate responsibility of finding facts and it is findings of Commission that Court of Appeals is authorized to review, but its duty is to ascertain whether on record as a whole there is substantial evidence to support findings of Commission and record includes examiner's report.

METHODS, ACTS, AND PRACTICES—ADVERTISING FALSELY OR MISLEADINGLY—QUALITIES OR PROPERTIES OF PRODUCT

On petition for review of an order to cease and desist entered by Federal Trade Commission, evidence did not sustain Commission's finding that petitioners made representations that liquid sold by them was an effective treatment for pimples.

---

[1] Reported in 187 F. (2d) 658. For case before Commission, see 47 F. T. C. 898.

APPELLATE PROCEDURE AND PROCEEDINGS—ORDERS OF COMMISSION—APPELLATE POWER—MODIFICATION

Under statute giving Court of Appeals power not only to affirm or reverse but also to modify orders of Federal Trade Commission, court has power to modify the remedy.

APPELLATE PROCEDURE AND PROCEEDINGS—ORDERS OF COMMISSION—EVIDENCE—MODIFICATION TO CONFORM TO

Where petitioners did not represent that their product was an effective treatment for pimples but did improperly advertise that product would cause pimples to disappear overnight, cease and desist order of Federal Trade Commission would be modified so as to prohibit such representation.

(The syllabus with substituted captions, is taken from 187 F. (2d) 658)

On petition to review order of Commission, order modified and affirmed and enforcement, as modified, ordered.

Mr. Frank E. Gettleman and *Mr. Edward Brodkey*, of Chicago, Ill., for petitioners.

Mr. W. T. Kelley, General Counsel, *Mr. James W. Cassedy*, Assistant General Counsel, *Mr. Donovan Divet*, Special Attorney, Federal Trade Commission, all of Washington, D. C., for respondent.

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

[659] DUFFY, *Circuit Judge*.

Petitioners ask us to review an order of the Federal Trade Commission dated June 6, 1950, requiring petitioners to cease and desist from disseminating any advertisement which represents directly or by implication that a medicinal product called Kleerex will cause pimples to disappear or constitutes an effective treatment for pimples.

A typical advertisement of petitioners' product follows:

"Yes, it's true, there is a safe harmless medicated liquid called Kleerex that dries up pimples overnight. Those who followed simple directions and applied Kleerex upon retiring were amazingly surprised when they found their pimples had disappeared. These users enthusiastically praise Kleerex and claim they are no longer embarrassed and are now happy with their clear complexions.

"Many (users) report that they had a red sore pimply face one night and surprised their friends next day with a clear complexion."

In the complaint the Commission charged that by the use of said statements and others of like import, petitioners have described the therapeutic properties of Kleerex and represented that it was an *effective treatment* for pimples and that these statements were grossly exaggerated, false, and misleading. The gravamen of the complaint was that petitioners represent that Kleerex is an effective treatment for pimples.

The evidence disclosed that pimples are a low inflammatory lesion of the skin, caused by a specific germ, and that they range in size from scarcely visible bumps to the proportion of boils, and usually are surrounded by an area of redness. There also was testimony that the primary treatment of pimples is a thorough washing of the face or affected parts with soap and water, although ultraviolet rays and vaccines are occasionally used.

Dr. Scott was the only witness who testified upon behalf of the Commission. He received his medical degree in 1940, served a year's interneship, then 10 months as an assistant in a Marine Hospital in Baltimore, and 9 months as medical officer on a Coast Guard cutter. From February 1943 to October 1944 he was assistant on the medical service at the Marine Hospital in Chicago. For a period of about 2 years before he testified herein he held the position of clinical director and chief of the medical service at that hospital. Dr. Scott had not seen the bottle of Kleerex used as an exhibit until about 15 minutes before the hearing commenced. He had never used Kleerex or conducted any tests or experiments with it. He did testify, however, that for some time prior to the hearing he knew the formula of Kleerex.

The active ingredients of Kleerex are prepared calamine, spirits of camphor, resorcin, and distilled extract of witch hazel. Milton Folds, a registered pharmacist and one of the copartners of the Kleerex Co., and Professor Ocen, who teaches pharmacy at the University of Illinois, and Dr. Scott all testified as to the properties of the ingredients of Kleerex. It is without dispute that calamine is composed largely of zinc oxide, which when placed on the skin has a drying action, combined with an antiseptic and antipruritic (relief from itching) action, and is pink in color; that spirits of camphor has an astringent action on the skin and is also antipruritic; that resorcin, in the concentration of 1 to 2 percent used in the Kleerex formula, is antiseptic, antipruritic, and analgesic (pain relieving); and that witch hazel is mildly antiseptic.

It was stipulated that if five named persons of varying ages and representing both sexes were called as witnesses, each would testify that he or she had been afflicted with pimples, and had used Kleerex in accordance with the printed directions accompanying it, that after using Kleerex he or she received relief from itching and accompanying pain, that the colored covering of Kleerex concealed their blemishes, and that their pimples disappeared, but not overnight.

The directions for the use of Kleerex were: "Just before retiring, wash your face with a good soap and warm water [660] * * * Dip the brush in the Kleerex and apply to the affected parts. After the first coat is thoroughly dry, apply the second coat. Do this just before retiring. Leave Kleerex on overnight. It is greaseless and stainless. * * * Follow this procedure every night, and we know

that you are going to be pleasantly surprised with the results you will obtain. * * *"

Dr. Scott's testimony was given in Chicago on September 25, 1946. The trial examiner closed the record on November 4, 1946, and filed his recommended decision and basis therefor on April 4, 1947. He found that Kleerex will, if used as directed over a period of time, dry up and remove pimples, but would not do so overnight, that the Commission's charge that petitioners' implied representation that Kleerex is an effective treatment for pimples is misleading, deceptive, and false, was not sustained by the record. He recommended that a cease and desist order be entered against the advertising that Kleerex would remove pimples overnight, but otherwise recommended that the complaint be dismissed.

On May 8, 1947, counsel for the Commission moved to set aside the recommended decision of the trial examiner and to take additional evidence. On October 30, 1947, the Commission ordered the proceedings opened and a hearing was held at Fredericksburg, Va., on May 25, 1948. The only witness at this hearing was Dr. Scott, and he expressed his opinion that Kleerex is not an effective treatment for pimples. The trial examiner sustained an objection to his answer as being the expression of an opinion going to the ultimate issue of the case. On March 28, 1949, the Commission reversed this ruling of the trial examiner. Nevertheless, on May 23, 1949, the trial examiner, after reviewing the evidence adduced on both hearings, reaffirmed his previous findings and recommended decision. He emphasized that the additional evidence had not changed the factual situation which demonstrated that Kleerex would, if used as directed, and for a sufficient length of time, cause pimples to dry up, the blemishes being temporarily concealed by the pink residue of the solution. On June 6, 1950, the Commission, refusing to follow the recommended decision, entered the cease and desist order hereinbefore described.

The Commission found that the ingredients of Kleerex were mildly astringent, antiseptic, antipruritic, and analgesic in nature; that in the proportions present in Kleerex they have a tendency to dry up surface lesions, to decrease the number of organisms on the surface of the skin, and to relieve pain and itching; that Kleerex may be applied in such manner as to leave a pink-colored residue sufficient to mask small pimples from view, but that it is not effective in concealing severe inflammation. Based upon Dr. Scott's testimony, the Commission concluded that Kleerex was not an effective treatment for pimples. The Commission did not charge, nor make a finding, that the use of Kleerex was injurious to the skin or to the person using it.

In their brief counsel for the Commission state the findings of the trial examiner are of no interest to this court, implying, we assume,

that we are not to give them any consideration. We do not agree with that statement, although we recognize that it is the Commission which has the ultimate responsibility of finding the facts and that it is the findings of the Commission that we are authorized to review.

Our duty is to ascertain whether on the record as a whole there is substantial evidence to support the findings of the Commission.[1] In a very recent case involving the findings of the Labor Board (*Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, decided Feb. 26, 1951), the Supreme Court said: "* * * Surely an examiner's report is as much a part of the record as the complaint or the testimony. * * *"

Also:

"It is therefore difficult to escape the conclusion that the plain language of the statutes directs a reviewing court to determine the substantiality of evidence on the record including the examiner's report. The conclusion is confirmed by the indications in the legislative history that en[661]hancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform."

And further: "* * * Nothing suggests that reviewing courts should not give to the examiner's report such probative force as it intrinsically commands. * * *"

The court also said:

"We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. * * *"[2]

The real basis for the Commission's complaint was that petitioners represented that Kleerex was an effective treatment for pimples. No such representation was ever made, but the Commission purported to find in the advertisements an implied representation to that effect, and 2 years after Dr. Scott had first testified, and a year and a half

[1] Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, et seq.

[2] Although in the *Universal Camera* case, *supra*, the court was considering Labor Board findings and order, the same rule is applicable to findings of the Federal Trade Commission. The court there said: "It would be mischievous word-playing to find that the scope of review under the Taft-Hartley Act is any different from that under the Administrative Procedure Act. * * * And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act."

after the record had been closed, the Commission brought Dr. Scott from Chicago to Fredericksburg, Va., to give opinion evidence that Kleerex was not an effective treatment for pimples. We do not think that the Commission's finding that petitioners made such a representation is supported by substantial evidence. The action of the Commission is subject to the same criticism which this court heretofore made in *International Parts Corp.* v. *F. T. C.*, 133 F. (2d) 883 [36 F. T. C. 1102; 3 S. & D. 535], where the manufacturer of an automobile muffler advertised that the metallic finish prevented rust and corrosion. The Commission there made a finding that the use of the word "prevent" implied "permanency." This court there vacated the Commission's cease-and-desist order.

It should be kept in mind that the conclusion of the Commission was reached in spite of its express findings that the ingredients of Kleerex in the proportions present in that product have a tendency to dry up surface lesions, to decrease the number of organisms on the surface of the skin and to relieve pain and itching. There was no claim whatsoever in this case that Kleerex would injure the skin of any person using it. The only legitimate criticism of petitioners' advertisements is that they were too broad in scope. They should not have advertised that Kleerex would cause pimples to disappear overnight, or to imply that users would have a clear complexion the next day after using same. The trial examiner made a very sensible and sound recommendation based upon the entire record. It is difficult to understand why the Commission did not follow his recommendation, instead of making a mountain out of a pimple as they have attempted to do in this case.

The statute gives this court power not only to affirm or reverse but also to modify the orders of the Commission. 15 U. S. C. A. 45 (c) and (d). This power to modify extends to the remedy. *F. T. C.* v. *Royal Milling Co. et al.*, 288 U. S. 212 [17 F. T. C. 664; 2 S. & D. 217]; *Carter Products, Inc., et al.* v. *F. T. C.*, 186 F. (2d) 821, [47 F. T. C. 1788] (Decided Feb. 2, 1951.)

The cease and desist order will be modified by the elimination of the last clause in Order (1) thereof, to wit, "That said products will cause pimples to disappear or constitutes an effective treatment for [662] pimples," and by the insertion in lieu thereof of the following clause, "That application of Kleerex will cause pimples to disappear overnight or that the user thereof will have a clear complexion the day following its use at night."

As modified herein, the cease and desist order is affirmed, and the enforcement thereof, as modified, is ordered.

INDEPENDENT DIRECTORY CORP. ET AL. v. FEDERAL TRADE COMMISSION[1]

No. 158, Docket 21769—F. T. C. Docket 5486.

(Court of Appeals, Second Circuit. Apr. 16, 1951)

APPELLATE PROCEDURE AND PROCEEDINGS—FINDINGS OF COMMISSION—IF SUBSTANTIAL SUPPORTING EVIDENCE—APPELLATE LIMITATION

Where findings of the Federal Trade Commission that publishers were guilty of deceptive commercial practice had the support of substantial evidence, the findings were binding on appeal to the Court of Appeals.

COMMISSION—POWER OF—ILLEGAL TRADE PRACTICES—REMEDY—DETERMINATION OF

Where an illegal trade practice has been proved and found, the Federal Trade Commission is empowered to determine the appropriate remedy.

APPELLATE PROCEDURE AND PROCEEDINGS—ILLEGAL TRADE PRACTICES—REMEDY—COMMISSION DETERMINATION—APPELLATE LIMITATION

The means chosen by the Federal Trade Commission for abatement of an illegal trade practice will not be disturbed unless the discretion of the Commission has been clearly abused.

CEASE AND DESIST ORDERS—METHODS, ACTS, AND PRACTICES—SECURING ORDERS FALSELY OR MISLEADINGLY—DECEPTIVE ASSOCIATION WITH, OF CUSTOMER'S PRIOR RELATED TRANSACTIONS WITH OTHERS

Where publishers' practice of soliciting advertising by mail by sending to a prospective customer one of publishers' order blanks to which was pasted one of the prospective customers' advertisements, clipped from some directory or other publication with which publishers had no connection, was shown to have conveyed to some prospective customers the idea that it was merely submission of proof of advertisement already ordered or to be renewed, so that they signed order without knowing that it was an order, Federal Trade Commission properly entered a cease and desist order.

PROCEEDINGS BEFORE COMMISSION—SUBPOENAS—REQUESTS FOR—DENIAL OF—WHETHER ABUSE OF DISCRETION

In hearing before Federal Trade Commission against publishers charged with an illegal trade practice in connection with its solicitation of advertising by mail, court did not abuse its discretion in denying subpoenas duces tecum to require third parties to produce all contracts for listings and advertisements in their telephone directories and all records of dealings with 17 witnesses, who had testified that they were misled by publishers' solicitation of advertising, and subpoenas ad testificandum requiring the attendance of the 17 witnesses to establish the unreliability of their testimony previously given.

---

[1] Reported in 188 F. (2d) 468. For case before the Commission, see 47 F. T. C. 13.

PROCEEDINGS BEFORE COMMISSION—SUBPOENAS—REQUESTS FOR—DENIAL OF—NATURE OF COMMISSION'S POWER

The Federal Trade Commission is not bound to issue subpoenas duces tecum on request as a ministerial act and then to entertain a motion to quash or modify, and it has a quasi judicial discretion to deny the application.

PROCEEDINGS BEFORE COMMISSION—EVIDENCE—EXCLUSION OF—SECURING ORDERS FALSELY OR MISLEADINGLY—DECEPTIVE ASSOCIATION WITH, OF CUSTOMER'S PRIOR RELATED TRANSACTIONS WITH OTHERS—THAT PUBLISHER-RESPONDENT HAD SATISFIED CUSTOMERS

In proceeding before the Federal Trade Commission against publishers [469] charged with illegal trade practice in their solicitation of advertising by mail, commission properly excluded evidence that publishers had many satisfied customers, who renewed their advertisements, since fact that publishers had satisfied customers was entirely irrelevant.

PROCEEDINGS BEFORE COMMISSION—EVIDENCE—EXCLUSION OF—SECURING ORDERS FALSELY OR MISLEADINGLY—DECEPTIVE ASSOCIATION WITH, OF CUSTOMER'S PRIOR RELATED TRANSACTIONS WITH OTHERS—USE OF SAME METHOD BY OTHERS

In proceeding before the Federal Trade Commission against publishers charged with illegal trade practice in their solicitation of advertising by mail, evidence that other publishers used same method of solicitation was properly excluded, since evidence as to what others did was irrelevant.

(The syllabus with substituted captions, is taken from 188 F. (2d) 468)

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

Hays, St. John, Abramson & Schulman, of New York City; *Mr. John Schulman, Mr. Osmond K. Fraenkel, Mr. Jacob Steinfeld*, and *Mr. Irwin Karp*, all of New York City, of counsel.

Davis, Polk, Wardwell, Sunderland & Kiendl, of New York City, for American Tel. & Tel. Co., New York Tel. Co., New England Tel. & Tel. Co. and Southern Bell Tel. & Tel Co.

Hughes, Hubbard & Ewing, of New York City, for Reuben H. Donnelley Corp.

Mr. W. T. Kelley, general counsel, *Mr. James W. Cassedy*, assistant general counsel, *Mr. Alan B. Hobbes*, attorney, all of Washington, D. C., for Federal Trade Commission.

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

CHASE, *Circuit Judge:*

The petitioners, who are two corporations which publish directories and two individuals who are officers in such corporations, are seeking to have set aside a cease and desist order of the Federal Trade Commission.

The order required the petitioners to stop a practice they had been using in soliciting advertising by mail. This practice was to send to a prospective customer one of the petitioners' order blanks to which

was pasted one of the prospect's advertisements clipped from some directory or other publication with which the petitioners had no connection. The printed matter on the order blank included statements that the submitted advertisement was from another publication, that the solicitor was an independent directory publication, and that it had nothing to do with any telephone company. The Commission found, following the recommendation of its trial examiner, that these written statements did not prevent the recipients of such solicitations from being deceived into thinking that they were merely approving the proof of, or renewing, an advertisement they had ordered in another publication and consequently signing the petitioners' order blank without being aware that they were signing an order for any additional advertising.

The petitioners attack the order for the following reasons: They say that the evidence did not support the findings that the method of solicitation by mail used by the petitioners was deceptive, since no one who read their order blank would be misled; that even if anyone was deceived the order eliminating the method entirely was too drastic in that some other sufficient means of warning careless signers could have been devised; that they were erroneously denied subpoenas for certain evidence; and that certain offered evidence was erroneously excluded.

The Commission found on adequately supporting evidence the following pertinent facts. The corporate petitioners publish directories which list the names, addresses, and telephone numbers of business concerns. Such concerns are classified in respect to the products manufactured or sold or the services performed, and their advertisements are published with their listing. The directory of the Independent Directory Corp. of Illinois is circulated throughout the Midwest and that of the Independent Directory Corp. of New York throughout the Middle Atlantic and Southeastern States. Each edition of a directory is guaranteed to have a minimum distribution of 50,000 copies, most of which are placed free of charge although a few are sold. The individual petitioners control both corporations and the principal income of the corporations comes [470] from the sale of listings and advertising. These sales are solicited both by salesmen and by mail, the latter accounting for perhaps thirty percent of the total receipts. The petitioners do a substantial business with their old customers but continually solicit new ones by the so-called "clip and paste" method outlined above. Often they use clippings of advertisements from the familiar "Red Books" published by The Reuben H. Donnelley Corp. in the New York and Chicago areas, and from the also familiar "yellow pages" in local telephone directories of other communities. They attach such a clipping to an order blank of their own which has a blank space provided for that purpose and

send it to the advertiser. The latter is apt to jump to the conclusion from the appearance of the order blank so made up that it is the submission of a proof of an advertisement already ordered, or to be renewed, and to sign the blank in the belief that such proof is being approved. A fair number of such signers so testified as to the actual deceptive effect of the practice upon them. It was also the custom of the petitioners not to send bills for the advertisements for some weeks after the blanks were signed and usually not until the directory had gone to press. When signers who were billed protested that they had not signed an order or had not knowingly signed one, sometimes the orders were cancelled but the more common practice was to send each protestant a photostatic copy of the order and to insist upon payment. Then sometimes compromises were made with those who still refused to pay and sometimes collection suits were brought.

The Commission's findings of the deceptive commercial practice, having the support of substantial evidence, are binding here. *Excelsior Laboratory, Inc.* v. *Federal Trade Commission*, 2 Cir., 171 F. (2d) 484 [45 F. T. C. 1087, 4 S. & D. 792]. It was reasonably to be expected that a busy business man might glance at any previously published advertisement of his business and take it for granted that the publisher of it had submitted a proof for a renewal, or that he might believe it was a previously ordered advertisement whether he specifically remembered it as such. Such a misconception is more probable in the case of the careless business man who is also entitled to protection from deception. *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112 [25 F. T. C. 1715, 2 S. & D. 429]. *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission*, 2 Cir., 143 F. (2d) 676, 679–80 [39 F. T. C. 657, 4 S. & D. 226].

It may be that some more eye-arresting manner might be devised to make sure that the information now actually on the order blank showing its true nature would be brought home to the solicited person. We may assume that there is, and still be bound to give effect to the order made. It is well established that where an illegal trade practice has been proved and found the Commission is empowered to determine the appropriate remedy. *Hillman Periodicals, Inc.*, v. *Federal Trade Commission*, 2 Cir. 174 F. (2d) 122 [45 F. T. C. 1103]. The means chosen for its abatement will not be disturbed unless the Commission's discretion has been clearly abused, and such an abuse has not been made to appear.

It follows, therefore, that the order should be enforced, provided there was no reversible error by denial of the right of the petitioners to be heard, *i. e.*, if the order was made after hearing them as due process of law requires.

The subpoenas *duces tecum* which were requested and denied required the New York Telephone Co. and the Reuben H. Donnelley

Corp. to produce all contracts for listings and advertisements in any of their telephone directories for the years 1940–48, inclusive, and all copy, proof, correspondence, and records of telephone conversations with regard to 17 of the witnesses who testified and their business concerns. The subpoenas *ad testificandum* would have required the attendance of these 17 witnesses to testify for the petitioners "to establish the unreliability of their testimony" previously given. What this boiled down to was an attempt to show that the general make-up and appearance of the order blanks sent to these witnesses by the petitioners was so different from that of forms used by the two [471] companies above named that the testimony of such witnesses that they thought they signed something one of those companies had sent could not be believed.

The lack of error in the denial of a request for such subpoenas needs little demonstration. In the first place it was but an amplification of the fact that an attentive, careful person could have found enough on the order blank as presented to show just what it was. But, even so, the test as to the likelihood of deception in these cases is not what would be apparent from comparison. *Pillsbury* v. *Pillsbury-Washburn Flour Mills Co.*, 7 Cir., 64 Fed. 841; *A. Y. McDonald & Morrison Mfg. Co.* v. *H. Meuller Mfg. Co.*, 8 Cir., 183 Fed. 972. This is a situation, as the evidence demonstrates, where the order blanks are often given only a casual glance, and what was said in another, but kindred, situation in *Coca-Cola Co.* v. *Chero-Cola Co.*, App. D. C., 273 Fed. 755, applies: "He acts quickly. He is governed by a general glance. The law does not require more of him." However, regardless of any doubtful relevancy, the subpoenas were properly denied. They were so sweeping as to be well considered unreasonable. And the Federal Trade Commission is not bound to issue subpoenas *duces tecum* upon request as a ministerial act and then to entertain a motion to quash or to modify. It has a quasi-judicial discretion to deny the application. *Hale* v. *Henkel*, 201 U. S. 43, 76–77; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 306 [7 F. T. C. 599; 1 S. & D. 341]; *E. B. Muller & Co.* v. *Federal Trade Commission*, 6 Cir., 142 F. (2d) 511 [38 F. T. C. 868; 4 S. & D. 151]. Without the papers subpoenaed there was no reason, so far as we can ascertain, for the reappearance of the 17 witnesses who had previously testified.

The evidence excluded was proof that the petitioners had many satisfied customers who renewed their listings and advertisements and that other publishers solicited advertisements by sending to prospective advertisers clippings of advertisements such persons had in other publications. The fact that petitioners had satisfied customers was entirely irrelevant. They cannot be excused for the deceptive practices here shown and found, and be insulated from action by the Com-

mission in respect to them, by showing that others, even in large numbers, were satisfied with the treatment petitioners accorded them. And the evidence as to what others did was equally irrelevant. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483 [4 F. T. C. 610; 1 S. & D. 198]; *Federal Trade Commission* v. *Standard Education Society*, 2 Cir., 86 F. (2d) 692, rev. on other grounds, 302 U. S. 112 [25 F. T. C. 1715; 2 S. & D. 429].

Petition for review dismissed; order affirmed and enforced.

CONCRETE MATERIALS CORP. v. FEDERAL TRADE COMMISSION [1]

No. 10090—F. T. C. Docket 5474

(Court of Appeals, Seventh Circuit. May 25, 1951)

PROCEEDINGS BEFORE COMMISSION—DUE PROCESS—EVIDENCE—MISREPRESENTATION—QUALITIES OR PROPERTIES OF PRODUCT—WHETHER TESTIMONY OF GOVERNMENT TECHNICIANS PROPERLY CONSIDERED, IF RESPONDENT NOT REPRESENTED BY COUNSEL

In hearing to determine whether company should cease and desist making certain representations as to effectiveness of its products as waterproofing agents, Federal Trade Commission properly considered [360] testimony of technicians of Bureau of Standards, though company was not represented by an attorney to cross-examine the technicians.

PROCEEDINGS BEFORE COMMISSION—METHODS, ACTS, AND PRACTICES—QUALITIES OR PROPERTIES OF PRODUCT—COMMISSION'S BURDEN

In hearing to determine whether company should cease and desist making certain representations as to effectiveness of its products as waterproofing agents, it was incumbent on Federal Trade Commission to prove its charges by competent, relevant, and substantial evidence.

ADMINISTRATIVE AGENCIES—EVIDENCE—RULES OF—APPLICABILITY

Administrative agencies, such as the Federal Trade Commission, are not restricted by rigid rules of evidence.

PROCEEDINGS BEFORE COMMISSION—EVIDENCE—WEIGHT

The weight to be given evidence introduced before the Federal Trade Commission is for the determination of the commission.

CEASE AND DESIST ORDERS—METHODS, ACTS, AND PRACTICES—ADVERTISING FALSELY OR MISLEADINGLY—QUALITIES OR PROPERTIES OF PRODUCT—WATERPROOFING

Evidence authorized order of Federal Trade Commission requiring company to cease and desist making certain representations as to the effectiveness of its products as waterproofing agents.

---

[1] Reported in 189 F. (2d) 359. For case before Commission, see 46 F. T. C. 152.

(The syllabus with substituted captions is taken from 189 F. (2d) 359)

On petition to review order of the Commission, enforcement ordered.

Mr. George F. Callaghan, *Mr. John J. Toohey*, of Chicago, Ill., for petitioner.

Mr. W. T. Kelley, General Counsel, *Mr. James W. Cassedy*, Assoc. Gen. Counsel, and *Mr. Donovan Divet*, Sp. Atty., Federal Trade Commission, all of Washington, D. C., for respondent.

BEFORE DUFFY, FINNEGAN and LINDLEY, *Circuit Judges.*

DUFFY, *Circuit Judge.*

Petitioner asks us to review and set aside an order of the Federal Trade Commission issued November 9, 1949, requiring that petitioner cease and desist making certain representations as to the effectiveness of its products as waterproofing agents. Petitioner manufactured and distributed in interstate commerce products known as Comco 2, Iron Waterproofing; Comco 4, Waterproofing Paste; and Comco 6, Transparent Waterproofing. For the purpose of inducing the purchase of its products petitioner circulated advertising folders, pamphlets and circular letters through the mail. Typical of the statements contained therein are the following:

> You can now permanently stop all leaks and seepage in concrete, brick, stone and tile; also waterproof below water-level basements and pits under pressure. Comco No. 2, our own waterproofing will do the job. This is a special chemical mixture of iron and other chemicals that, when mixed with water only, and brushed into the cracks of walls and floors needing repair will permanently waterproof and stop leaks under all conditions no matter how severe.
>
> For after-construction waterproofing problems in foundations. Permanently waterproofs concrete, brick, stone and tile walls and floors from either inside or outside. For all classes of construction where a positive waterproof condition is necessary. Successful under all conditions no matter how severe.

And:

> Comco 6, Comco Transparent Waterproofing. A transparent water repellant liquid that effectively seals and waterproofs concrete, brick, stone, stucco, plaster or masonry surfaces. Makes surface permanently nonabsorbent.

And:

> Comco 4, Comco waterproofing paste for new construction work. Produces a close-meshed concrete that increases strength and permanently waterproofs. Makes concrete flow easily around reinforcing.

After due notice the first hearing was had in Chicago, Ill. The two principal officers of petitioner appeared without counsel, and one of them testified. The Commission's attorney there notified petitioner's officers that a subsequent hearing would be held in Washington, D. C., for [361] the purpose of receiving the testimony of three technicians of the National Bureau of Standards as to certain tests which had been made on samples of petitioner's products. Prior

to the hearing in Washington the Commission's trial attorney on two occasions suggested to petitioner's officers that an attorney be engaged to represent petitioner. Although timely notified of the time and place, no one appeared for petitioner at the Washington hearing. During the course of that hearing a letter was received from petitioner requesting a postponement, but the hearing proceeded. However, a subsequent hearing was scheduled for Chicago. Petitioner appeared at the second Chicago hearing with counsel, who moved to strike certain testimony received at the Washington hearing, but did not request an opportunity to cross-examine the witnesses who testified at the Washington hearing. Petitioner then submitted the testimony of its secretary-treasurer, and also that of a chemist of a testing laboratory. The latter testified as to the qualitative and quantitative analyses of petitioner's products, but did not testify as to the lasting qualities of the products when applied as directed.

The trial examiner submitted a Recommended Decision. Thereafter the Commission filed findings of fact and conclusions of law, which were in accord with the recommendations of the trial examiner, and entered the cease and desist order.

Petitioner claims that the Commission's order is not supported by substantial evidence. Its principal contention here is that the tests conducted by the Bureau of Standards were made out of the presence of and without notice to the petitioner, and that the testimony of the Bureau of Standards technicians was largely hearsay testimony. Petitioner argues that such testimony should not have been received by the trial examiner or considered by the Commission. Petitioner also contends that because the order as entered is broad in its sweep, it offers no guide for compliance.

The finding as to Comco 2, Iron Waterproofing is supported by substantial evidence. Cyrus Fishburn, a well qualified expert who has been with the Bureau of Standards since 1928, testified as to the results of experiments he conducted with Comco 2. Although he applied three applications to a specimen brick wall, each in accordance with directions, nevertheless water seeped through at several points. The permeability tests given by him simulated an exposure of the wall to wind-driven rain. Fishburn testified, "The Comco 2 cannot be considered to be a satisfactory waterproofing for permeable brick masonry walls when applied as directed to the inside, unexposed face."

The finding as to Comco 6, Transparent Waterproofing is not supported by evidence quite so unequivocal, as Comco 6 was not tested. But, relying upon a previous report prepared by him, based upon tests in 1943 of another product "containing essentially the same ingredients as Comco 6," Fishburn testified, "The material will not waterproof highly permeable masonry surfaces," but admitted that it would tend to seal the pores in those surfaces. He questioned the permanency of

the effectiveness of the pore-sealing, stating, "It may last 5 or 6 years and be effective for that time as a pore sealer." He laid considerable emphasis on the fact that it would not seal openings larger than the pore space.

The Commission found that through the advertising statements heretofore stated as to Comco 6, petitioner represented that its product "effectively seals and waterproofs concrete, brick, stone, stucco, plaster and masonry surfaces, and makes said surfaces upon which it is applied permanently nonabsorbent to water," and that such representations were false.

Although Fishburn did not test Comco 6, he possessed the education and practical experience which qualified him to judge the waterproofing qualities of Comco 6 by tests which he had previously made of products of essentially the same ingredients compounded in the same proportion. Furthermore, the Commission itself has had wide experience in the masonry waterproofing [362] industry.[1] We conclude that substantial evidence supports the Commission's findings as to Comco 6.

The testimony as to Comco 4, Waterproofing Paste was given by Leonard Bean and Thomas Kelly, employees of the Bureau of Standards. Bean, a chemist, personally had not made a test of Comco 4 but testified from the notes of a subordinate who was no longer with the Bureau and who made such a test under his direction. He limited his testimony to the chemical analysis of the product, stating that it was a fatty acid type water repellent agent. He disclaimed qualifications to testify as to its waterproofing qualities. Kelly, a well qualified materials engineer, testified that he was familiar with the report of the Bureau of Standards prepared by his predecessor, Hornibrook, who was no longer with the Bureau. Kelly referred to Comco 4 as a "type of waterproofing which we have tested at the Bureau of Standards." He testified further that from his general scientific knowledge, Comco 4 does not make concrete waterproof in the sense of a permanent condition, and that under pressure it does not have any appreciable waterproofing effect. The Hornibrook report (exhibit 16) contained several comments which were favorable to petitioner, as follows:

> These materials are generally capable of effecting small reductions in absorption by capillarity, and because of the increased workability imparted to the concrete, may indirectly contribute to the uniformity of the concrete in place (that is, result in a greater freedom from honeycomb and similar defects), and accordingly improve the impermeability. Such improvements in impermeability and absorption as effected by the use of this material may be expected to be of reasonable permanence.

[1] After many conferences and months of investigation, the Commission promulgated on August 31, 1946, trade practice rules for the masonry waterproofing industry. Fed. Reg., 16 Code of Federal Regulations (1949 Ed.), p. 481. Rule 2 covers "Deceptive Use of Representations 'Waterproof,' 'Waterproofing,' Etc."

Petitioner advertised Comco 4 for new construction work and claimed it "produces a close-meshed concrete that increases strength and permanently waterproofs. Makes concrete flow easily around reinforcing." It is apparent that the only words subject to criticism are, "permanently waterproofs." Petitioner objects because the Commission's order prohibits it from advertising Comco 4 as suitable for waterproofing without disclosing that its use will not render surfaces below grade impermeable to water under pressure. Petitioner states that it never advertised Comco 4 would render surfaces below grade impermeable to water under pressure. However, it did represent for new construction that Comco 4 would permanently waterproof, and we think the Commission was justified in insisting petitioner make clear that it would not be satisfactory for that purpose for surfaces below grade subject to water under pressure.

Petitioner's contention that the Commission should not have considered any of the testimony of the technicians of the Bureau of Standards cannot be sustained. True, it is incumbent on the Commission to prove its charges by competent, relevant and substantial evidence. *Carlay Co et al.* v. *Federal Trade Comm.*, 7 Cir., 153 F. (2d) 493 [42 F. T. C. 897; 4 S. & D. 470]. But administrative agencies, such as the Federal Trade Commission, have never been restricted by the rigid rules of evidence. *Federal Trade Comm.* v. *Cement Institute et al.*, 333 U. S. 683, 705 [44 F. T. C. 1460; 4 S. & D. 676.]. Moreover, the petitioner's objections go largely to the weight of the evidence, and it is well established that the weight to be given is a matter for the determination of the Commission. *Corn Products Refining Co. et al.* v. *Federal Trade Comm.*, 324 U. S. 726 [40 F. T. C. 892; 4 S. & D. 331]. Perhaps it would have been better for petitioner to have been represented by an attorney at the Washington hearing so that the witnesses from the Bureau of Standards might have been cross-examined, but it was no fault of the Commission that this was not the case.

As to the scope of the cease and desist order, our consideration must be whether the Commission has made "an **[363]** allowable judgment in its choice of the remedy." *Jacob Siegel Co.* v. *Federal Trade Comm.*, 327 U. S. 608, 612 [42 F. T. C. 902; 4 S. & D. 476]. We think the Commission was clearly supported by substantial and adequate findings to conclude that the practices of petitioner were to the prejudice of the public and constituted unfair and deceptive acts in commerce, and that the form of the Commission's order meets the test of an allowable judgment in the choice of the remedy.

Enforcement of the cease and desist order of the Commission is ordered.

FEDERAL TRADE COMMISSION v. STANDARD BRANDS, INC.[1]

No. 73, Docket 21742—F. T. C. Docket 2986

(Court of Appeals, Second Circuit. Mar. 30, 1951. On Rehearing June 4, 1951)

APPELLATE PROCEDURE AND PROCEEDINGS—ENFORCEMENT OF ORDERS—CLAYTON ACT—VIOLATIONS—COMMISSION HEARINGS ON—FINDINGS—STATUS BEFORE COURT, IF AFFIRMANCE ORDER NOT FIRST OBTAINED

Where Federal Trade Commission, without first obtaining a court affirmance of order directing seller to cease and desist from discriminating in price between different buyers of bakers' yeast, held a hearing to determine whether seller had violated order, and at such hearing seller had full opportunity to offer evidence and in all respects to be fully heard, Court of Appeals on affirming the order, could, in exercise of its discretion, treat the Commission's findings as if it were the master of the Court of Appeals, and could pass on question whether seller had violated the order.

APPELLATE PROCEDURE AND PROCEEDINGS—ENFORCEMENT OF ORDERS—CLAYTON ACT—VIOLATIONS—COMPLIANCE REPORT—DISCRIMINATION IN PRICE—WHERE DIFFERENT SCALE ADOPTED BY SELLER-RESPONDENT, SUBSEQUENT TO COMMISSION ACCEPTANCE OF SUCH REPORT—BURDEN OF JUSTIFICATION IN PROCEEDING FOR DECREE

Where seller in compliance with order of Federal Trade Commission filed report of scale of prices with stated prices of stated quantities, and Commission accepted report as compliance, but thereafter seller adopted a new scale which included new brackets of quantities and prices involving new relations between customers, seller had burden in proceeding by commission for decree affirming and enforcing order, of proving that new differentials were based on due allowances for differences in cost of manufacture, sale or delivery resulting from different methods or quantities in which product was sold to buyers.

APPELLATE PROCEDURE AND PROCEEDINGS—ENFORCEMENT OF ORDERS—CLAYTON ACT—VIOLATION—COMPLIANCE REPORT—DISCRIMINATING IN PRICE—WHERE DIFFERENT SCALE ADOPTED BY SELLER-RESPONDENT SUBSEQUENT TO COMMISSION ACCEPTANCE OF REPORT—IF DIFFERENT COMPETITION FROM THAT THERETOFORE INVOLVED, AFFECTED

Where seller in compliance with order of Federal Trade Commission filed report of scale of prices with stated prices of stated quantities and Commission accepted report as compliance, but thereafter seller adopted a new scale which included new brackets of quantities and prices involving new relations between customers, fact that new scale substantially lessened competition between seller and some of its competitors, did not prove a violation of Commission's order, which was based on complaint charging that sales unlawfully affected competition among seller's customers.

---

[1] Reported in 189 F. (2d) 510. For case before Commission, see 29 F. T. C. 121, 30 F. T. C. 1117, and 46 F. T. C. 1485.

APPELLATE PROCEDURE AND PROCEEDINGS—ENFORCEMENT OF ORDERS—CLAYTON ACT—VIOLATION—DISCRIMINATING IN PRICE—IF PROHIBITED DISCRIMINATION BETWEEN BUYERS, DISCONTINUED, AFTER 7 MONTHS' VIOLATION

Finding of Federal Trade Commission, on basis of ample evidence, that for 7 months seller violated clause of order directing seller to cease and desist from discriminating in price between different buyers, justified enforcement of that clause by Court of Appeals, though violation had ceased and thereafter no violation occurred.

METHODS, ACTS, AND PRACTICES—DISCRIMINATING IN PRICE—JUSTIFICATIONS—COMPETITIVE PRICES—IF COMPETITOR'S PRICE UNDERCUT BY OTHERWISE DISCRIMINATORY PRICE OF SELLER-RESPONDENT

Fact that competitor of seller was selling bakers' yeast to a customer at a given quantity at a stated price, which was less than seller's price for same quantity, did not authorize seller under the Clayton Act to sell that customer a smaller quantity at a price below its competitor's price for that smaller quantity and also below its own scale price for that smaller quantity, though the price was not below its competitor's or its own scale price for the large quantity sold to that customer by the competitor.

METHODS, ACTS, AND PRACTICES—DISCRIMINATING IN PRICE—JUSTIFICATIONS—BURDEN OF ESTABLISHING

Where Federal Trade Commission proves discrimination by seller without more, Commission makes out a prima facie case, and seller then has burden of rebut[511]ting the prima facie case by showing justification.

CEASE AND DESIST ORDERS—METHODS, ACTS, AND PRACTICES—DISCRIMINATING IN PRICE—SALE AT "OFF-SCALE" PRICES

Clause of order of Federal Trade Commission that seller cease and desist from discriminating in price between different buyers of bakers' yeast by selling yeast to certain buyers at "off-scale" prices, was sufficient and was not required to be modified to include additional language.

(The syllabus with substituted captions, is taken from 189 F. (2d) 510.)

On application by Commission for decree affirming and enforcing desist order against respondents: Order modified and, as modified, affirmed, and in part enforced.

Mr. W. Crosby Roper, Jr., *Mr. Charles F. Barber*, Washington, D. C., (*Mr. Newell W. Ellison*, of counsel), *Mr. Henry Weigl* of New York, *Covington, Burling, O'Brian & Shorb*, of counsel, for respondents.

Mr. W. T. Kelley, General Counsel, *Mr. John W. Carter, Jr.*, (*Mr. James W. Cassedy*, of counsel) all of Washington, D. C., for Federal Trade Commission.

Before L. HAND, SWAN, and FRANK, *Circuit Judges*.

The facts are stated in the reports and orders of the Federal Trade Commission, reported in 29 F. T. C. Decisions 121, 30 F. T. C. Decisions 117, and 46 F. T. C. Decisions 1485.

The Commission's order of June 15, 1939, as amended by the order of May 1, 1940, ordered Standard Brands to "cease and desist from discriminating in price between different purchasers of bakers' yeast of like grade and quality, either directly or indirectly:

"(1) By selling said bakers' yeast at different prices based upon the total quantity or volume purchased or required monthly by the respective purchasers, as set forth in schedule A of paragraph 10 of said findings of fact;

"(2) By selling said bakers' yeast at different prices based upon the total quantity or volume purchased (whether from the respondents or from any other source) over a period of time by the respective purchasers, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce in which respondents or any of their customers are engaged, or to injure, destroy, or prevent competition with respondents or any of their customers, except where said differentials in price, based upon the quantities or volume purchased from the respondents during such period of time by said respective purchasers, make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such bakers' yeast is to such purchasers sold or delivered during the period of time for which such differentials are allowed;

"(3) By means of price differences resulting from selling said bakers' yeast to a single purchaser at prices based upon the total quantity or volume purchased (whether from the respondents or from any other source) during a period of time by such purchaser, irrespective of the quantities or volume delivered by the respondents to the separate plants, factories, bakeries, or warehouses of such purchaser, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce in which respondents or any of their customers are engaged, or to injure, destroy, or prevent competition with respondents or any of their customers, except where said differentials in price make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which said bakers' yeast is to such purchasers sold or delivered;

"(4) By selling said bakers' yeast to certain of such purchasers at so-called off-scale prices as described in paragraph 12 of said findings of fact, even though the differentials in price of any given price scale make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which said bakers' yeast is to such purchasers sold or delivered during the period of time for which such differentials in price are allowed."

FRANK, *Circuit Judge:*

1. *Affirmance of the order.*—Respondent makes no substantial argument against affirmance except as to clause [512] (4). That clause does not contain the minimum qualifying language required by the statute; i. e., "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce in which any of [respondent's] customers are engaged, or to injure, destroy, or prevent competition with any of its customers." The omission seems to have been inadvertent. The Commission's findings, sufficiently supported by the evidence, sustain that clause of the order if read to include that qualification. The Commission's complaint is broad enough to cover that clause so qualified. Standard Brands, in the long interval between the entry of the order and the present proceedings in this court, did not seek to have the order judicially reviewed. In the circumstances, we direct that clause 4 be modified to include the omitted language; and, in that revised form, we affirm that clause, and accordingly, the entire order.

2. *Enforcement of the order.*—The Commission, without first obtaining a court affirmance of the order, held a hearing to determine whether respondent had violated the order. At this hearing, respondent had full opportunity, of which it availed itself, to offer evidence and in all respects to be fully heard. On the basis of this hearing, the Commission made findings to the effect that respondent had violated clauses 2, 3, and 4 of the order; and the Commission, on the basis of the hearing record and its findings, asks this court, if it affirms the order, to enforce those clauses.

Standard Brands argues that this procedure for enforcement is fatally defective because an affirmance of the Commission's order must precede any effort to determine whether it has been violated. We think the cases cited by respondent [1] do not so hold. True, it has been customary for a court, upon affirming such an order, to appoint a master to make an inquiry as to violation, and, usually, to name the Commission as master. But there is no reason why, now that we have affirmed the order, we may not, in the exercise of our discretion, treat the Commission's findings as if the Commission had been appointed our master, since in the Commission hearings, respondent was accorded all its procedural privileges. (If, in future cases, a respondent, believing the Commission's order invalid, wishes to avoid what it may consider the needless expense of such a hearing if the order is invalid,

[1] *F. T. C.* v. *Herzog*, 150 F. (2d) 450 (C. A. 2); [41 F. T. C. 426, 43 F. T. C. 1175; 4 S. & D. 399, 582]. *F. T. C.* v. *Balme*, 23 F. (2d) 615 (C. A. 2; [11 F. T. C. 717; 1 S. & D. 666]. *F. T. C.* v. *Paramount, Famous Laskey Corp.*, 57 F. (2d) 152 (C. A. 2); [16 F. T. C. 660; 2 S. & D. 161]. *F. T. C.* v. *Baltimore Paint & Color Works*, 41 F. (2d) 474 (C. A. 4); [14 F. T. C. 475; 2 S. & D. 75]. *F. T. C.* v. *Standard Education Society*, 14 F. (2d) 947 (C. A. 7); [10 F. T. C. 751; 1 S. & D. 567]. *F. T. C.* v. *Morrissey*, 47 F. (2d) 101 (C. A. 7); [14 F. T. C. 710; 2 S. & D. 113].

such a respondent can promptly test the order's validity by a petition to review the order.) We turn, then, to the question whether Standard Brands has violated the order.

(a) Violation of the second clause of the order.—Standard Brands on May 1, 1940, in compliance with the order, filed report showing a scale of prices with stated prices of stated quantities. The Commission promptly accepted this report as compliance. Subsequently, in 1945, Standard Brands adopted a new scale.

We think that the new scale included new brackets of quantities and prices which involved new relations between customers; that Standard Brands therefore had the burden of proving that the new differentials were (responsive to changed conditions or otherwise) based on "due allowances for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities" in which Standard Brands bakers' yeast was sold to purchasers; that no such proof was made; and that the evidence sustains the Commission's findings of substantial lessening of competition between Standard Brands and some of its competitors.

However, we think that all this did not prove a violation of the Commission's order. That order was issued after a proceeding in which the Commission's complaint charged that Standard Brands' sales unlawfully affected competition among Standard Brands' customers. The com[513]plaint did not charge, nor did the Commission (in connection with its order) find, that Standard Brands' activities had had any unlawful effects upon its own competitors.

Had the evidence in the initial proceedings shown injury to such competitors, perhaps—in line with current doctrines concerning variance in civil and criminal cases—the Commission might properly have amended its complaint to conform to the proof, giving respondent an adjournment (if one was requested and there was surprise) to offer further evidence. This liberal doctrine has of recent years been applied to proceedings of several administrative agencies;[2] but the older cases seem not to have applied it to proceedings of the Federal Trade Commission.[3] Whether it should be applied to this Commission's proceedings, we need not here consider, although in another context, we have recently held that doctrines applicable to other agencies should apply to this Commission.[4] For the Commission did not amend the complaint, nor, in the initial proceedings, did it make any findings concerning injury to Standard Brands' competitors. The

---

[2] See, *e. g., Kuhn* v. *CAB,* 183 F. (2d) 839 (App. D. C.); *N. L. R. B.* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 349; *N. L. R. B.* v. *Greater New York Br. Corp.,* 147 F. (2d) 337; *N. L. R. B.* v. *Grieder Mach. T. D. Co.,* 142 F. (2d) 163, 166 (C. A. 6).

[3] *Federal Trade Commission* v. *Gratz,* 253 U. S. 421, 427 [2 F. T. C. 564; 1 S. & D. 69]; *Gimbel Bros.* v. *Federal Trade Commission,* 116 F. (2d) 578, 579 (C. A. 2). [32 F. T. C. 1820; 3 S. & D. 314.]

[4] *Herzfeld* v. *Federal Trade Commission,* 140 F. (2d) 207, 209 (C. A. 2); [38 F. T. C. 833; 4 S. & D. 109].

order, therefore, must be read in the light of the complaint and the findings accompanying the order. Consequently, the findings made, in connection with the violation hearings, of reduction of competition with Standard Brands' competitors do not show a violation of clause (2) of the order.

Perhaps this conclusion may seem somewhat formalistic. For the Commission may at once begin a new proceeding pursuant to a complaint charging violations of the Act as to Standard Brands' competitors and, in such a proceeding, the Commission may properly consider the evidence heretofore taken in the violation hearing. Nevertheless, this seeming formalism is desirable in fairness to respondent since, in such a new proceeding, it may be able to offer evidence proving that its actions were not unlawful vis-à-vis its own competitors.

(b) Violation of the third clause of the order.—The Commission found, on the basis of ample evidence, that for some seven months in 1945 Standard Brands violated this clause. This violation ceased, and thereafter no such violation occurred. Nevertheless, the finding justifies enforcement.[5]

(c) Violation of the fourth clause of the order as modified.—Standard Brands argues that section 2 of the Clayton Act [6] permits sales at prices below its scale where those sales were made "in good faith to meet an equally low price of a competitor." What Standard Brands did may be described in general terms as follows: A competitor of Standard Brands was selling to a customer a given quantity at a stated price which was less than Standard Brands' price for that same quantity. In order to obtain some of this customer's business, Standard Brands would sell that customer a smaller quantity at a price below its competitor's price for that smaller quantity and also below its own scale price for that smaller quantity (but not below its competitor's or its own scale price for the larger quantity sold to that customer by the competitor).[7] [515] We think that the argument ad-

[5] *F. T. C.* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260; *Edison Co.* v. *Labor Board*, 305 U. S. 197, 230; *Gelb* v. *F. T. C.*, 144 F. (2d) 580, 581 (C. A. 2) [39 F. T. C. 694; 4 S. & D. 271]; *N. L. R. B.* v. *Sewell Mfg. Co.*, 172 F. (2d) 459, 461 (C. A. 5); *Pueblo Gas & Fuel Co.* v. *N. L. R. B.*, 118 F. (2d) 304, 307 (C. A. 10).

[6] 15 U. S. C. § 13.

[7] The Commission's findings in this respect read as follows:

"Paragraph Seven: (a) The record contains details of the accounts of 242 [514] customers of respondent which were introduced as evidence tending to show violations of paragraph 4 of the order to cease and desist. It appears that in 15 of these sales were made in accordance with the scale prices, while in 226 sales were made at prices which were below those established by respondent's scale of prices in existence between January 2, 1945, and March 1946 for the volume of monthly purchases by respective customers involved. Sales made below scale prices fall in two categories: (1) those where the customer purchased a portion of his monthly requirements from respondent and a portion from competitors and the prices granted him by respondent was based upon the customer's total purchases in accordance with the respondent's established scale of prices just as though the customer's entire monthly purchases had been made from respondent, and (2) those in which the customer purchased his total monthly requirements from respondent but was granted a price below that required by respondent's established price for his particular monthly volume

vanced to justify this practice answers itself. An "equally low price of a competitor" means an equally low price for a given quantity.[8]

Clause 4 is modified. We affirm the order as thus modified. Enforcement of clause 2 is denied. We grant enforcement of clause 3 and of clause 4 as modified. [On rehearing]

Respondent's petition is denied. The Commission's petition is partly granted for the following reason: In *Moss, Inc.* v. *Federal Trade Commission*, 148 F. (2d) 378, 379 (C. A. 2) [40 F. T. C. 885, 42 F. T. C. 921; 4 S. & D. 324, 495], we held that, under 15 U. S. C. § 13 (b), when the Commission proves discrimination without more, it makes out a

---

of purchases. The majority of sales made by respondent at prices below its established scale of prices falls in the first category.

"(b) Most of the 226 accounts to which sales were made at prices below those established by respondent's scale of prices involved transactions with small and medium-sized bakers in which sales were made by respondent's sales representatives in accordance with its instructions. It was this class of customer which was given the greatest advantage by respondent's price scales of January 2, 1945, and which had previously been purchasing bakers' yeast from respondent at prices in excess of those paid competitors. Respondent's sales representatives were in effect instructed to exercise their best efforts to sell at scale prices when possible and to deviate therefrom only where, and to the extent, they found it necessary to do so in order to protect respondent's business or get new business and to permit such price deviation only to the extent of meeting the low price of a competitor. The evidence of record discloses that these instructions were substantially carried out.

"However, said instructions were initially deficient in two respects and therefore ineffective in preventing sales at prices which deviated from respondent's scale prices only to the extent of meeting equally low prices of competitors. Respondent failed to advise said representatives as to what low price of a competitor was to be met or to define said low price and permitted them to consider the entire monthly requirements of a customer to be used as a basis for determining the price to be quoted and used in meeting the undefined low price of a competitor regardless of the monthly quantity actually purchased from respondent. The record discloses numerous instances in which respondent quoted and sold bakers' yeast not only at prices below its established scale prices but below the prices of competitors, particularly when the monthly volume purchased by the customer is taken into consideration and used as a basis for determining price. In such instances the low price of a competitor was for a monthly quantity of yeast far in excess of that sold said customer by the respondent. In other instances, where respondent was already supplying the total monthly requirements of a customer it reduced prices below its scale for such requirements. In these instances its representatives were advised by the buyer of unconfirmed price quotations of competitors, and in others neither respondent nor its representatives had any knowledge of the competitive price quotations or even the name of the alleged potential competitor.

"(c) For more than nine years prior to January 2, 1945, respondent consistently sold bakers' yeast at prices higher than those of most of its competitors and yet retained more than 57 percent of the total volume of said yeast sold throughout the United States. A competitive situation or condition was thus established under which most competitors of respondent could normally expect to sell and did sell bakers' yeast at prices slightly below those of respondent. Also, buyers normally expected to purchase, and did purchase, said product from respondent at prices slightly in excess of those paid most of its competitors. Under these conditions it was unnecessary for respondent to meet or match exactly a lower price of a competitor in order to retain business or to get new business. By adoption of its price scales of January 2, 1945, respondent overturned the conditions of nine years' standing and initiated discriminatory prices in many instances lower than the prices of its competitors and thereby forced them to lower their prices to an extent which threatened their ability to survive. By thereafter selling below the prices thus established, in some instances, respondent in fact put into effect still larger price differentials resulting in still broader discriminations than those found to exist under said price scale. In view of the foregoing the Commission is of the opinon that the respondent did not in good faith meet the equally low prices of competitors after January 1945 but abandoned its former policy of making higher prices than its competitors for one of underselling them on a discriminatory basis."

[8] We see nothing contrary to this conclusion in *Standard Oil Co.* v. *F. T. C.*, 340 U. S. 231.

prima facie case, and that the respondent then has the burden of rebutting this *prima facie* case by showing justification. This ruling, together with its approval in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 45 [44 F. T. C. 1499, 4 S. & D. 627], leads us to believe that we erred in our original opinion in the instant case in requiring clause (4) of the order to be modified. Accordingly, we affirm the order without such modification, and grant enforcement thereof except Clause 2.

RUBEROID CO. v. FEDERAL TRADE COMMISSION [1]

No. 149, Docket 21667—F. T. C. Docket 5017
(Court of Appeals, Second Circuit. June 4, 1951)

CLAYTON ACT AS AMENDED BY ROBINSON-PATMAN ACT—PRICE DISCRIMINATION—JUSTIFICATIONS—BURDEN OF PROOF

Under Robinson-Patman Price Discrimination Act, burden is on seller seeking benefits of one of exceptions of act to prove, that seller comes within exception.

APPELLATE PROCEDURE AND PROCEEDINGS—ENFORCEMENT OF ORDERS—CLAYTON ACT—VIOLATIONS—CONTEMPT PROCEEDINGS—PRICE DISCRIMINATION—JUSTIFICATIONS—IF NOT AVAILED OF BEFORE COMMISSION

Where seller who was charged with price discrimination in violation of statute had not introduced any evidence at hearing before Federal Trade Commission which might show that discount allowed was within statutory exceptions and order directing seller to cease and desist from such practices was entered, seller would not thereafter be entitled to litigate issue as to exception in contempt proceedings for violation of order but new hearing on order would be justified only in event of definite change of circumstances.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE—BUYER DIFFERENTIATION—IF NO RIGID FUNCTIONAL—WHOLESALERS, RETAILERS, AND APPLICATORS

Where there was no rigid differentiation between functions of various buyers of asphalt roofing from seller who was charged with price discrimination but some buyers were in fact both wholesalers and applicators, even though there was no finding that there was price discrimination by seller as to wholesalers, order of Federal Trade Commission which was general and embraced not only applicators and retailers but wholesalers as well in directing seller to desist from price discrimination was proper.

CEASE AND DESIST ORDERS—METHODS, ACTS, AND PRACTICES—DISCRIMINATING IN PRICE—IF PRICE DISCRIMINATION BETWEEN COMPETING PURCHASERS, ETC., PROHIBITED—WHETHER MODIFICATION TO PROVIDE SLIGHT DIFFERENTIAL, AS TO RETAILERS, INDICATED

[894] Order of Federal Trade Commission pursuant to Robinson-Patman Price Discrimination Act which prohibited any price discrimination between

[1] Reported in 189 F. (2d) 893. For cases before Commission, see 46 F. T. C. 379.

competing purchasers in products of like grade and quality, was proper and would not, on revew, be modified as to retailers in such manner as to provide slight price differential even assuming that such differential would have been found by Commission to be immaterial.

(The syllabus with substituted captions, is taken from 189 F. (2d) 893)

On petition to review order of the Commission, order affirmed and enforcement granted.[2]

Mr. Cyrus Austin, of New York City (*Austin & Malkan*, of New York City, on the brief), for the petitioner.

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

Before L. HAND, AUGUSTUS N. HAND, and CLARK, *Circuit Judges*.

CLARK, *Circuit Judge:*

On a proceeding to review an order of the Federal Trade Commission, petitioner Ruberoid Co. prays that the order be set aside, or in the alternative modified in some four respects. The order was issued upon a complaint charging petitioner with violation of section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. A., section 13 (a). It directed petitioner to cease and desist from price discrimination in the sale of asbestos or asphalt roofing materials "by selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products."

The order was issued after hearings, wherein counsel for the Commission produced evidence showing that petitioner had granted discounts or price differentials of from 5 to 7½ percent of list price to certain of its customers. Petitioner classified its customers into three groups: wholesalers, retailers, and applicators, the last being roofing contractors who applied petitioner's products on their contract jobs for which they were paid as a whole. The Commission found active competition for the resale of petitioner's products, as well as the price discrimination noted, among the roofing contractors or applicators and the retailers. As to wholesalers, there was sharp disagreement among counsel as to whether the record established any discrimination there. The Commission noted this, and went on to hold the evidence insufficient to establish such discrimination, but pointed out "that the particular designations given purchasers are not always controlling

[2] On rehearing, the court, in its decision of August 14, 1951, held that so much of its mandate as directed the enforcement of the order was premature and should be stricken.

as indicating the functions actually performed by such purchasers. For example, one purchaser, although engaged primarily as a roofing contractor or applicator, sold quantities of the products to other applicators. And another purchaser, although classified by respondent as a wholesaler, also functioned as an applicator." In a conclusion challenged here, it then said that the particular designations applied to the various purchasers were unimportant, the controlling factor being the establishing of price discriminations among purchasers who were in fact competing with one another in the resale of petitioner's products. So, it continued: The corrective action "should be sufficiently comprehensive to stop the discriminations, irrespective of the designations applied to the purchasers."

At the hearings petitioner presented no evidence contesting the price discrimination found by the Commission and does not seriously contest the issuance of some form of order against it. It does, however, vigorously attack the order for its generality and for the particular prohibitions discussed below. We sympathize with the petitioner's position and can realize the difficulties of conducting business under such general prohibitions. Nevertheless we are convinced that the cause of the trouble is the act itself, which is vague and [895] general in its wording and which cannot be translated with assurance into any detailed set of guiding yardsticks. Compare *Standard Oil Co.* v. *F. T. C.*, 340 U. S. 231, 249, 253 [47 F. T. C. 1766]. In formulating its orders, the Commission has tried from time to time to develop a plan; but one of its latest attempts, that in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37 [44 F. T. C. 1499; 4 S. & D. 716], resulted in such failure that it is now attempting a new course, which "merely represents another milestone" in its efforts to establish a fair and just interpretation of this difficult act. We are not justified in ordering the Commission to undertake an illusory certainty which will not stand up in the process of review.

Petitioner's requested modifications are that the order be reframed to prohibit only differentials between purchasers of roofing materials competing in the resale thereof as applicators or retailers; to exempt differentials of less than 2½ percent between retailers; to contain a proviso excepting a discount for differences in petitioner's costs of manufacture, sale, or delivery, i. e., a quantity or other discount permitted under the act itself; and to contain a proviso excluding from its prohibition differentials made in good faith to meet competition, again as permitted in the act itself. The first two provisions, petitioner claims, are required by the evidence. The last two, involving exceptions in the act itself, it claims to be necessary lest it either be held in contempt for lawful acts or bear the burden of showing legality.

Parenthetically, we should point out that under the *Morton Salt* case, explicitly following our own decision in *Samuel H. Moss, Inc.*,

v. *F. T. C.*, 2 Cir., 148 F. (2d) 378 [40 F. T. C. 885; 4 S. & D. 324], certiorari denied 326 U. S. 734, the burden of proving that a seller comes within one of the Act's exceptions is placed upon the one who claims it. Furthermore, under both the wording of the particular order and the law itself, no contempt can be found for legally permissible acts. If there were any doubt about this, both the Commission's brief and our opinion herein point out as much. Further, it is surely not necessary to repeat the wording of the statute in the order itself. The Commission does point out, however, with some force that petitioner has been found guilty of definite price discriminations and has not seen fit to introduce evidence which might show these discounts within the statutory exceptions. Petitioner should not have the opportunity of making that contest hereafter on a proceeding in contempt. Only in the event of a definite change of circumstances will a new hearing on the facts be justified. The insertion of the provisos is therefore not only unnecessary to the extent that they are legally applicable, but potentially misleading as suggesting the possible retrial in contempt proceedings of issues already settled.

The other two requested modifications are apparently the main reasons for plaintiff's appeal to us. Since discrimination among wholesalers was not found, the argument is that the prohibition should run against only differentials among applicators or retailers. Since no differentials under 5 percent were found, the argument is that there is no evidence to support a finding of material discrimination in lesser differentials—specifically, those up to 2½ percent among retailers. The first point rests upon the provision of the act which prohibits discrimination "in price between different purchasers of commodities of like grade and quality" and previous decisions of the Commission drawing distinctions in price discrimination based upon functional differences among classes of competing purchasers. Thus the order in the *Morton Salt* case, which appears at page 51 of 334 U. S., separately prohibits price discrimination among wholesalers and price discrimination among retailers. That fact, however, was not of importance in the decision and nothing therein states any arbitrary requirement to that effect. Here, too, the Commission's answer appears adequate, as is demonstrated by its findings and conclusions with respect to the applicators. Indeed to many of us an "applicator" who purchases petitioner's products to use them in a contracting job for some building owner would seem pretty much like a [896] wholesaler; moreover, as the Commission pointed out, there was no rigid differentiation of function: one applicator, for instance, sold quantities of the products to other applicators, while one wholesaler acted as an applicator. The Commission appears quite justified, therefore, in concluding that there was no real functional difference

necessarily disclosed by petitioner's classification of its customers and that the order should hit the evil directly, rather than invite evasion by incorporating an ambiguous label. Austin, Price Discrimination and Related Problems under the Robinson-Patman Act 51, 52 (1950).

As to the request for the modification permitting a 2½-percent differential, there seem two definite answers: First, there is nothing in the law suggesting such a limited differential; even assuming *arguendo* that the Commission perhaps might permit it on a finding of immateriality under all the circumstances, we cannot force such a finding upon it. Second, there was evidence tending to show that differentials of small amounts were important in the trade. As to the first, petitioner's argument seems to run along the line that one who is found guilty of exceeding a 30-mile-per-hour automobile speed limit for traveling 50 miles per hour should then receive permission to travel at 40 miles per hour—or at least 35. Proof of the violation here made should lose nothing, it would seem, because it is thorough proof of a thorough violation. Prohibition should cover in any event the violation in full.

Petitioner claims some support from the *Morton Salt* case, but we think that decision is quite definitely against the contention made. In that case the Commission expressly prohibited selling "to some wholesalers [or retailers as covered by a separate paragraph] thereof at prices different from the prices charged other wholesalers who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than 5 cents per case which do not tend to lessen, injure, or destroy competition among such wholesalers [retailers]." The court specifically says, 334 U. S. at page 53: "Paragraphs (a) and (b) up to the language of the provisos are approved," a statement it repeats later, 334 U. S. at page 55. It goes on to point out that the clause permitting differentials of less than 5 cents "would appear to benefit respondent, and no challenge to it, standing alone, is here raised." Then it considers the respondent's objection to the final clause and holds that clause invalid for a vagueness which throws the whole question into the courts. It strikes this latter part out, but, while saying that it would sustain the order with the exception of the proviso, nevertheless concludes that the deleted part is so important that the Commission "should have an opportunity to reconsider the entire provisos in light of our rejection of the qualifying clauses, and to refashion these provisos as may be deemed necessary."

Thus it is quite clear that an order may legally prohibit all differentials, and hence the form of prohibition before us is justified by the *Morton Salt* case. It is to be noted that the court does not in that case expressly approve of the small differential of 5 cents per case there suggested by the Commission, although it is a possible inference, in

view of the purpose for which the matter was returned to the Commission, that a finding in favor of such a differential would not be illegal if based on appropriate evidence. It is clear, however, that the case does not force the Commission always to indicate some modest maximum in stating its prohibition.

Moreover, here the evidence produced by the Commission through the testimony of a sales manager for the petitioner showed that differentials of small amount and specifically of 2½ percent were quite important in the realm of competition among petitioner's customer. The manager testified that in certain instances the 5-percent discount allowed was insufficient for the customers' uses and petitioner found it therefore necessary or desirable to add an additional 2½ percent. *Cf.* Austin, *op. cit. supra* at 48, 49. In the light of this evidence and in view of the very wide discretion given the Commission in fitting the [897] remedy to the evil before it, *Jacob Siegel Co.* v. *F. T. C.*, 327 U. S. 608, 611, 612 [42 F. T. C. 902; 4 S. & D. 476]; *Charles of the Ritz Distributors Corp.* v. *F. T. C.*, 2 Cir., 143 F. (2d) 676, 680 [39 F. T. C. 657; 4 S. & D. 226], we are not justified in ordering the insertion of a maximum permissible discrimination, even a moderate one, in this order. It must, therefore, stand for appropriate enforcement.

Order affirmed; enforcement granted.

REID H. RAY FILM INDUSTRIES, INC. v. FEDERAL TRADE COMMISSION [1]

No. 14281—F. T. C. Docket 5495

(Court of Appeals, Eighth Circuit. June 26, 1951)

Order dismissing, upon stipulation of parties, appeal of petitioner in above entitled case to review order of Commission of October 17, 1950, 47 F. T. C. 326 at 338, requiring respondent corporation, its officers, etc., in connection with the sale, leasing, and distribution of commercial or advertising films in commerce to cease and desist from—

Entering into contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films in theaters owned, controlled or operated by such exhibitors when the term of such contracts extends for a period in excess of 1 year, or continuing in operation or effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends for a period of more than a year from the date of the service of the order.

On petition to review Commission's order to cease and desist, appeal dismissed.

Oppenheimer, Hodgson, Brown, Baer & Wolf, St. Paul, Minn., for petitioner.

[1] Reported in 190 F. (2d) 207. For case before Commission, see 47 F. T. C. 326.

Mr. W. T. Kelley, Gen. Counsel, *Mr. James W. Cassedy*, Asst. Gen. Counsel, and *Mr. John W. Carter*, Acting Asst. Gen. Counsel in charge of appeals, Federal Trade Commission, all of Washington, D. C., for respondent.

PER CURIAM:

Petition for review of order of Federal Trade Commission dismissed with prejudice, but without costs to either party in this court, on stipulation of parties.

PENALTY PROCEEDINGS

United States v. *International Salt Co.*, United States District Court, N. D., Illinois. Judgment of $40,000 was entered on June 13, 1951, against International because of its failure to file a special supplemental report concerning its compliance with a Commission order (34 F. T. C. 38 at 56, and, as modified, 37 F. T. C. 339, at 340), which prohibited a price-fixing conspiracy among certain salt producers. The court also directed International to file the special report.

The Commission's modified order required respondent corporations, etc., to cease and desist from entering into, continuing, or carrying out, or directing, instigating, or cooperating in, any planned common course of action, mutual agreement, combination, or conspiracy, to fix or maintain the prices of salt or curtail, restrict, or regulate the production or sale thereof, and from doing any of the following acts or things pursuant to any such planned or agreed common course of action:

1. Establishing or maintaining uniform prices for salt, or uniform terms and conditions in the sale thereof, or in any manner agreeing upon, fixing, or maintaining any prices, including terms and conditions of sale, at which salt is to be sold.

2. Adhering, or promising to adhere, to filed or published prices or terms and conditions of sale for salt pending the filing of changes therein with the Salt Producers' Association, or with any other agency, or with each other.

3. Continuing the delivered price zones heretofore used for making quotations and sales of salt, or establishing or maintaining any delivered price zones which are similar to those heretofore used in that their use would result as heretofore in making the delivered prices of the respective corporations identical despite their different costs of delivery.

4. Exchanging, directly or through the Salt Producers' Association, or any other agency or clearing house, price lists, invoices, and other records of sale showing the quantity, current prices, and terms and conditions of sale allowed by said corporations to dealers and distributors: *Provided, however*, That nothing herein shall prevent said association from collecting and disseminating to the respective manufacturers figures showing the total volume of sales of salt without disclosing the sales volume of individual producers, for the purpose,

or with the effect, of restraining competition in the offering for sale, or sale, of salt.

5. Exchanging, directly or through the medium of the Salt Producers' Association, or any other agency, the names of distributors or dealers who receive special discounts, for the purpose, or with the effect, of restraining competition in the offering for sale, or sale, of salt.

6. Curtailing, restricting, or regulating the quantity of salt to be produced and sold by said corporations by any method or means during any given period of time, for the purpose, or with the effect, of restraining competition in the offering for sale, or sale, of salt (Docket 4320, 37 F. T. C. 339 at 340).

NOTE.—The entry of the foregoing judgment, preceded by the entry of a similar judgment by the same court at Chicago on January 25, 1951, in *U. S.* v. *Morton Salt Co.*, completed the litigation through which the two companies sought unsuccessfully to challenge the validity of the Commission's supplemental order *re* compliance, and is reported in 80 F. Supp. 419, 45 F. T. C. 1075, 174 F. (2d) 703, 45 F. T. C. 1125, and 338 U. S. 632, 46 F. T. C. 1436.

TRADE PRACTICE CONFERENCE SUMMARY

During the period of this volume, July 1, 1950, to June 30, 1951, trade practice rules were promulgated for seven industries, and revised for two, under the Commission's trade practice conference procedure, which provides members of an industry with the opportunity to cooperate in establishing rules for the prevention of unfair practices on an industry-wide basis and represents a practical application of the principle of self-regulation. Said procedure, to the extent that it brings about widespread voluntary observance of the law, avoids the necessity for formal litigation, and thereby saves industry and the Government time and money, and benefits average citizens as taxpayers, businessmen, and consumers.

Such industries, and rules applicable thereto, as thus promulgated, include:[1]

Retail installment sale and financing of motor vehicles, in which the rules adopted, among other things, prohibit the practice of concealed "packing" by requiring that the purchaser be furnished with an itemization of the finance charge, insurance costs, and other charges before consummation of the sale; and prohibit use of deceptive rate charts; execution of contracts containing blank spaces; misrepresentation of insurance coverage or rates, or finance charges; and the forcing of purchasers to obtain insurance from a particular company.

Canvas cover industry, involving the manufacture, finishing, etc., or marketing of canvas products such as tarpaulins, truck covers, tents, awnings, etc., in which the rules deal with misrepresentation of the resistance of canvas covers to fire, water passage, weather, or mildew; inadequate disclosure as to size and fabric; harmful and excessive stretching; misuse of such terms as "custom-made" and "shrunk"; the loading or adulterating of products; and the failure to disclose presence of used material.

Bedding manufacturing and wholesale distributing industry, involving sleeping equipment such as mattresses, bedsprings, etc., in which the rules deal with deceptive concealment or nondisclosure of the nature of mattress filler material; and deceptive use of such terms as "Rx," "posturize," "waterproof," "orthopedic," "latex," and "foam rubber."

Cocoa and chocolate industry, in which the rules deal with deceptive use of the word "free"; coercing the purchase of one product as prerequisite to the purchase of others; the marketing of products through

[1] Copies of the full trade practice conference rules, as promulgated for the different industries, and other information with respect to the Commision's trade practice conference work, which is described in the Commission's annual report for the year ended June 30, 1951, may be had on application to the Commission.

lottery methods, and unlawful discrimination in price or promotional services or facilities.

Slide fastener industry, involving the manufacture, assembling, and distribution of zippers, in which the rules deal with unfair nondisclosure of the foreign origin of slide fasteners or other component parts; misrepresentation of the length of zippers; and competition-stifling exclusive-dealing arrangements with dealers; and, in the group II category—which embraces permissive practices and voluntary restrictions considered conducive to the maintenance of free and fair competition—such matters as arbitration of disputes, dissemination of credit information, filing of trade-marks, and the furnishing of excessive free sample to prospective customers.

Seam binding industry, involving the manufacture, distribution, and marketing of the narrow fabric used to prevent raveling or fraying of seams and hems of wearing apparel, in which the rules deal with misrepresentation of fiber or material content, yardage, and types of edges of seam binding; false invoicing; and unlawful discrimination in price or promotional services or facilities.

Parking meter industry, involving such meters and related parts and accessories, in which the rules deal with various forms of misrepresentation and deception in the advertising or sale of industry products; commercial bribery; inducing breach of contract; deceptive guarantees; fictitious price quotations; and false invoicing.

Milk bottle cap and closure industry, in which rules promulgated for the paper bottle cap industry in November 1931, were revised and extended to cover all milk bottle caps and closure regardless of composition, and in which the rules deal with misrepresentation of industry products and character of business of members; deceptive use of trade-marks; unlawful coercion or combination in restraint of trade; commercial bribery; unlawful selling below cost; and unlawful discrimination in price or promotional services or facilities; and, in the group II category, with arbitration of disputes, repudiation of contracts, and accurate records.

Feather and down products industry, in which rules promulgated in July 1932, for said industry, concerned with the manufacture, etc., of pillows, comforters, sleeping bags, and similar products wholly or partially filled with feathers or down, were revised and extended; contain a new definition of the industry covered; define significant trade terms such as "down," "down fiber," "water fowl feathers," and "natural feathers"; establish trade tolerances as to content and size; describe acceptable labeling practices; and deal with use of second-hand materials, and cleanliness of feather and down stocks; fictitious price lists; false invoicing; commercial bribery; defamation of competitors; and unlawful discrimination in price or promotional services or facilities.

TABLE OF COMMODITIES[1]

DECISIONS AND ORDERS

[1] Commodities involved in dismissing or vacating orders are indicated by italicizing the page reference. For table of commodities in stipulations embraced in instant volume, see p. 1855.

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

STIPULATIONS

STIPULATIONS

STIPULATIONS

STIPULATIONS

STIPULATIONS

STIPULATIONS

STIPULATIONS

INDEX[1]

DECISIONS AND ORDERS

[1] Covering practices in cease and desist orders. For index by commodities involved rather than practices, *see* Table of Commodities. Reference to matters involved in vacating or dismissing orders are indicated by italics.

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

DECISIONS AND ORDERS

STIPULATIONS

STIPULATIONS

STIPULATIONS

STIPULATIONS

○