

THE WORLD SYNDICATE PUBLISHING CO., ET AL. v.  
FEDERAL TRADE COMMISSION

No. 10479—F. T. C. Docket 4634

(Court of Appeals, Second Circuit. Apr. 7, 1952)

Dismissal, for failure to prosecute, of petition to review order of November 22, 1949, 46 F. T. C. 223, requiring respondent manufacturers and publishers of dictionaries to cease and desist from representing any of their dictionaries as those of Noah Webster, as edited and revised by a staff of eminent authorities in philology and lexicography, and as new and different from dictionaries previously published by respondents.

*Wittenberg, Carrington & Farnsworth*, New York City, attorneys for petitioners.

*Mr. James W. Cassedy*, Assistant General Counsel, Washington, D. C., for Federal Trade Commission.

Petition to review dismissed in open court on April 7, 1952, for want of prosecution and for failure to comply with the court's rules.

W. H. BRADY & COMPANY, ET AL. v. FEDERAL TRADE  
COMMISSION<sup>1</sup>

No. 11226—F. T. C. Docket 5298

(Court of Appeals, District of Columbia. Apr. 12, 1952)

Order dismissing, upon stipulation of parties, petition to review order of Aug. 8, 1951, 48 F. T. C. 113, prohibiting interstate sale and distribution of push cards, punchboards, or other lottery devices.

*Mr. Thurman Hill*, of Washington, D. C., and *Mr. John C. Kelley*, of Chicago, Ill., for petitioners.

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

## ORDER

This case came on for consideration on the petition for review of an order of the Federal Trade Commission and on petitioners' motion for leave to adduce additional evidence before the Federal Trade Commission and respondent having filed a stipulation for the dismissal of the petition for review and for the dismissal of the motion for leave to adduce additional evidence, it is

*Ordered* by the Court that the petition for review of an order of the

<sup>1</sup>Not reported in Federal Reporter. For case before the Commission, see 48 F. T. C. 113.

Federal Trade Commission and the motion to adduce additional evidence before the Federal Trade Commission filed herein be, and they are hereby, dismissed.

PER CURIAM.

---

FEDERAL TRADE COMMISSION v. RUBEROID CO.<sup>1</sup>  
RUBEROID CO. v. FEDERAL TRADE COMMISSION

Nos. 448, 504—F. T. C. Docket 5017

(United States Supreme Court. May 26, 1952)

CEASE AND DESIST ORDERS—SCOPE AND EXTENT—AS PREVENTIVE AND PROSPECTIVE

Orders of Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future.

CEASE AND DESIST ORDERS—SCOPE AND EXTENT—WHETHER LIMITED TO PRECISE FORM OF ILLEGAL PRACTICE

The Federal Trade Commission is not limited to prohibiting illegal practice in the precise form in which it is found to have existed in the past, but may close all roads to the prohibited goal.

CEASE AND DESIST ORDERS—IN GENERAL—COMMISSION DISCRETION

The Federal Trade Commission has wide discretion in choice of a remedy deemed adequate to cope with unlawful practices disclosed.

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

Congress expected Federal Trade Commission to exercise special competence in formulating remedies to deal with problems in the general sphere of competitive practices, and courts will not interfere except where the remedy selected has no reasonable relation to unlawful practices found to exist.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE—DIFFERENTIALS—IF VERY SMALL, COMPETITIVELY SIGNIFICANT

Where Federal Trade Commission found that very small differences in price were material factors in competition among manufacturer's customers, and manufacturer offered no evidence to the contrary, Commission was not required to limit its prohibition against price discrimination to specific differential of five percent or more shown to have been adopted in past violations, but properly prohibited all price differentials between competing purchasers.

---

<sup>1</sup> Reported in 72 S. Ct. 800, 343 U. S. 470. For case before Commission, see 46 F. T. C. 379. For last decision of Court below, herein concerned, see 191 F. (2d) 294, and, in this volume, at p. 1699.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE—CUSTOMER CATEGORIES AND FUNCTIONAL DIFFERENCES

Where there was ample evidence that roofing material manufacturer's classification of its customers did not follow real [801] functional differences, as between wholesalers, retailers, and contractors or applicators, and Federal Trade Commission found that some purchasers operated as both wholesalers and applicators, cease and desist order properly prohibited discrimination between any purchasers who in fact compete, without limitation to categories of customers among which previous discrimination had been found.

CEASE AND DESIST ORDERS—SCOPE AND EXTENT—DISCRIMINATING IN PRICE—PURCHASERS COMPETING IN RESALE AND DISTRIBUTION OF ROOFING MATERIALS—WHETHER PROHIBITION APPLICABLE TO SALES TO COMPETING MANUFACTURERS OF PREFABRICATED HOUSES

A cease and desist order prohibiting price discrimination among purchasers competitively engaged "in the resale or distribution" of roofing materials would not apply to sales to competing manufacturers of prefabricated houses, and was not too broad.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE—STATUTORY EXCEPTING PROVISOS—IF NOT INCLUDED IN ORDER

Statutory provisos permitting price differentials which merely allow for differences in cost of manufacture, sale or delivery, or are made to meet equally low price of competitor, are necessarily implicit in every order issued under authority of the statute and hence need not be included in Federal Trade Commission's cease and desist order.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE—STATUTORY EXCEPTING PROVISOS—IF NOT INCLUDED IN ORDER—AS NOT PRECLUDING PRICE DIFFERENTIATING BY SELLER IN NEW COMPETITIVE SITUATION

The absence, from Federal Trade Commission's cease and desist orders prohibiting price discrimination, of statutory exceptions of differentials allowing for differences in cost of manufacture, sale or delivery, or made to meet equally low price of competitor, cannot preclude seller from differentiating in price in a new competitive situation involving different circumstances pursuant to statutory provisos.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE—IF PRICE REDUCTION THEREAFTER BY COMPETITOR

Seller is not required to seek modification of Federal Trade Commission's cease and desist order prohibiting price discrimination each time that a competitor's price reduction requires it either to lower price in good faith or lose a sales opportunity.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE—STATUTORY EXCEPTING PROVISOS—IF NOT INCLUDED IN ORDER—WHETHER BURDEN OF JUSTIFICATION SHIFTED THEREBY, OR ISSUES THERETOFORE SETTLED SUBJECT TO RE-LITIGATION

The implied inclusion of statutory provisos permitting price reduction in Federal Trade Commission's cease and desist order prohibiting price discrimination does not shift from seller the burden of proof of justification,

or allow seller to relitigate issues already settled by prior proceedings before the Commission which resulted in an order that was affirmed in the courts.

APPELLATE PROCEDURE AND PROCEEDINGS—CEASE AND DESIST ORDERS—VIOLATION—DISCRIMINATING IN PRICE—DEFENSE JUSTIFICATION—COSTS AND COMPETITION—IF THERETOFORE DECIDED AGAINST SELLER OR AVAILABLE SUPPORTING EVIDENCE NOT INTRODUCED

If questions of justification for price discrimination, claimed upon basis of facts relating to costs or meeting competition, have once been finally decided against seller or evidence supporting such defense was available to seller although not produced, seller cannot again interpose the same defense upon substantially similar facts when Federal Trade Commission seeks to show that its order has been violated.

APPELLATE PROCEDURE AND PROCEEDINGS—CEASE AND DESIST ORDERS—AFFIRMANCE AND ENFORCEMENT—CLAYTON ACT—DISCRIMINATING IN PRICE—VALIDITY OF ORDER—WHETHER ISSUE OF, AFTER ESTABLISHMENT, OPEN ON VIOLATION

Where Federal Trade Commission seeks both affirmance and enforcement of its order prohibiting price discrimination in one proceeding, contending that seller has continued unlawful practices since the order was issued, court will review Commission's determination in the ordinary manner, but questions thus settled will not be open in deciding whether the order has [802] been violated, and should therefore be enforced.

APPELLATE PROCEDURE AND PROCEEDINGS—CEASE AND DESIST ORDERS—ENFORCEMENT AND CONTEMPT PROCEEDINGS—DISCRIMINATING IN PRICE—DEFENSE JUSTIFICATION—AS LIMITED TO STATUTORY, WHERE OPPORTUNITY TO PRESENT NOT THERETOFORE AVAILABLE

In contesting enforcement or contempt proceedings under cease and desist order prohibiting price discrimination, seller may plead only those facts constituting statutory justification which it has not had a previous opportunity to present.

APPELLATE PROCEDURE AND PROCEEDINGS—CEASE AND DESIST ORDERS—ENFORCEMENT—CLAYTON ACT—VIOLATION SHOWING AS PREREQUISITE

The Federal Trade Commission cannot obtain a decree directing enforcement of an order issued under the Clayton Act in absence of showing that violation of the order has occurred or is imminent.

STATUTES AND STATUTORY CONSTRUCTION—FEDERAL TRADE COMMISSION AND CLAYTON ACTS—AFFIRMANCE AND ENFORCEMENT OF ORDERS—THAT FORMER, BUT NOT LATTER, ACT, AMENDED TO REQUIRE ENFORCEMENT, BASED UPON VIOLATION, UPON AFFIRMANCE

Where Congress amended Federal Trade Commission Act so as to require enforcement of order based upon violation thereof, upon affirmance of such order, but failed to pass bills seeking similar amendment of the Clayton Act, court would not reinterpret the Clayton Act so as to achieve the same result as the amendment sought.

STATUTES AND STATUTORY CONSTRUCTION—CLAYTON ACT—ENFORCEMENT—IF HANDICAPPED BY PROVISIONS OF ACT

That effective enforcement of Clayton Act may be handicapped by present provisions of such Act is a question of policy for Congress, and not a question for court in interpreting the Act.

## APPELLATE PROCEDURE AND PROCEEDINGS—CEASE AND DESIST ORDERS—ENFORCEMENT—PETITIONS AND CROSS-PETITIONS—CLAYTON ACT—VIOLATION SHOWING AS PREREQUISITE

Violation of cease and desist order prohibiting price discrimination, as a statutory prerequisite to enforcement of such order, applies when Federal Trade Commission seeks enforcement by cross-petition after review has been set in motion by the party subject to the order, as well as when the Commission makes the original application.

(The syllabus, with substituted captions, is taken from  
72 S. Ct. 800)

On writs of certiorari to the Court of Appeals for Second Circuit, judgment affirmed, Mr. Justice Black, otherwise concurring, thinking that the order should expressly except permitted cost and competitive differentials; and Mr. Justice Douglas and Mr. Justice Jackson dissenting.

*Mr. James W. Cassidy*, of Washington, D. C., for Federal Trade Commission.

**[471]** *Mr. Cyrus Austin*, of New York City, for Ruberoid Co.

**[472]** MR. JUSTICE CLARK delivered the opinion of the Court.

In this case we granted cross-petitions for certiorari to review the decree of the Court of Appeals affirming, but refusing to enforce, a cease and desist order issued by the Federal Trade Commission to the Ruberoid Co.

Ruberoid is one of the Nation's largest manufacturers of asphalt and asbestos roofing materials and allied products. The Commission found that Ruberoid, in a number of specific instances, had discriminated among customers in the prices charged them for roofing materials. Further finding that the effect of those discriminations "may be substantially to lessen competition in the line of commerce in which [those customers] are engaged, and to injure, destroy, or prevent competition between [those customers],"<sup>2</sup> the Commission held that the discriminations were violations of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act.<sup>3</sup> 46 F. T. C. 379. Ruberoid was ordered to:

"[C]ease and desist from discriminating in price:

"By selling such products of like **[803]** 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."<sup>4</sup>

Upon Ruberoid's petition for review, the Court of Appeals affirmed

<sup>2</sup> 46 F. T. C. 379, 386.

<sup>3</sup> 38 Stat. 730, as amended, 49 Stat. 1526, 15 U. S. C. § 13.

<sup>4</sup> 46 F. T. C. 379, 387.

and granted enforcement of the order. 189 F. (2d) 893. However, on rehearing, the Court of Appeals amended its mandate to strike that part which directed enforcement. 191 F. (2d) 294. We granted certiorari to review questions, important in the administration of the Clayton Act, as to the scope and enforcement of Federal Trade Commission orders. 342 U. S. 917.

[473] We first consider the contentions of Ruberoid, which are mainly attacks upon the breadth of the order. Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.<sup>5</sup> Moreover, “[t]he Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices” disclosed. *Jacob Siegel Co. v. Federal Trade Comm’n*, 327 U. S. 608, 611 [42 F. T. C. 902; 4 S. & D. 476] (1946). Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices.<sup>6</sup> Therefore we have said that “the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.” *Id.*, at 613.

In the light of these principles, we examine the specific objections of Ruberoid to the order in this case. First, it is argued that the order went too far in prohibiting *all* price differentials between competing purchasers, although only differentials of 5 percent or more were found. But the Commission found that very small differences in price [474] were material factors in competition among Ruberoid’s customers, and Ruberoid offered no evidence to the contrary. In this state of the record the Commission was not required to limit its prohibition to the specific differential shown to have been adopted in past violations of the statute.<sup>7</sup> In the absence of any indication that a lesser discrimination might not affect competition there was no need

<sup>5</sup> *Federal Trade Comm’n v. Morton Salt Co.*, 334 U. S. 37, 51–52 [44 F. T. C. 1499; 4 S. & D. 716] (1948); cf. *International Salt Co. v. United States*, 332 U. S. 392, 398–400 (1947).

<sup>6</sup> *Federal Trade Comm’n v. Cement Institute*, 333 U. S. 683, 726–727 [45 F. T. C. 1063; 4 S. & D. 676] (1948); 38 Stat. 722, 15 U. S. C. § 47.

<sup>7</sup> *Federal Trade Comm’n v. Morton Salt Co.*, 334 U. S. 37, 51–52 [44 F. T. C. 1499; 4 S. & D. 716] (1948); cf. *Labor Board v. Eapress Publishing Co.*, 312 U. S. 426, 436–437 (1941).

