

## MISCELLANEOUS PROCEEDINGS

IN THE MATTER OF

### THE AMERICAN CRAYON COMPANY

REPORT OF THE FEDERAL TRADE COMMISSION UPON ITS INVESTIGATION OF  
ALLEGED VIOLATION OF ITS ORDER TO CEASE AND DESIST

*Docket 4142. Report and Conclusion, April 29, 1953*

Report of the Commission based on the evidence adduced before its hearing examiner during the investigation of said matter, directed by it, including in such consideration of the evidence all of the offers of proof and evidence stricken from the record by said examiner, and his report, the proposed report submitted by both counsel, and the record in the matter; and its conclusion that respondent's practice, as described in Paragraphs 1 through 9 of the Commission's report, constituted a violation of Paragraphs 4 and 5 and of the last unnumbered prohibition of the Commission's order to cease and desist, as set forth in said report below and as originally reported in 32 F. T. C. 306 at page 314.

Said practice consisted in the granting by respondent, in connection with the interstate sale of crayons, chalk, paint sets, and educational supplies, of a 10% discount to its "educational promotional distributors" as compensation for services and facilities furnished by said purchasers in connection with the handling for sale, sale, and offering for sale of respondent's said products, while not making any discount available on proportionally equal terms to other of its customers which were in competition in the resale of said products with said favored customers, and it was the Commission's conclusion that such acts and practices, which it concluded violated its said order, had been engaged in by respondent for several years and were still continuing without any indication of being terminated during the course of the investigation in question and constituted serious and substantial violations of the order involved.

The Commission further concluded that certain acts and practices of respondent as set out in Paragraph 10 of its report did not constitute any substantial violation of its order to cease and desist in the matter.

*Mr. Webster Ballinger*, hearing examiner.

*Mr. James S. Kelaher* and *Mr. James I. Rooney* for the Commission.  
*Flynn, Py & Druse*, of Sandusky, Ohio, and *Marshall, Melhorn,*  
*Block & Belt*, of Toledo, Ohio, for respondent.

## THE PROCEEDINGS

On September 21, 1951, the Federal Trade Commission directed that an investigation be conducted to determine whether The American Crayon Company, its officers, directors, representatives, agents and employees have violated an order of the Commission issued on December 31, 1940, directing them, in connection with the offering for sale, sale and distribution of crayons, chalk, paint sets, educational supplies and allied products, to cease and desist from engaging in certain discriminatory pricing practices. A hearing examiner of the Commission was duly designated to preside at hearings to be conducted for that purpose. Said hearing examiner was empowered, for the conduct of the hearings, with all of the functions of a hearing examiner as provided by the Commission's Rules of Practice in the same manner as though the hearings were to be conducted pursuant to formal complaint, and it was directed that he, in lieu of rendering an initial decision at the conclusion of the taking of testimony and reception of evidence, certify the record to the Commission, together with his report on the evidence.

Pursuant to and in accordance with said order, hearings were held at which evidence was adduced and received before said hearing examiner and such evidence was duly recorded and filed in the office of the Commission. The reception of evidence was terminated on May 22, 1952, and thereafter counsel supporting contentions that the order to cease and desist has been violated and counsel for the respondent each submitted to the hearing examiner a proposed report upon the investigation, and the hearing examiner subsequently submitted his report upon the investigation.

The Commission, having duly considered the evidence adduced during the investigation herein, including all of the offers of proof and evidence stricken from the record by the hearing examiner, the report of the hearing examiner, the proposed reports submitted by both counsel, and the record herein, and being now fully advised in the premises, makes this its report upon the investigation of the alleged violation of the order to cease and desist.

## THE ORDER

The order to cease and desist issued herein on December 31, 1940, is as follows:

It is ordered that respondent, The American Crayon Company, a corporation, its officers, directors, representatives, agents and employees, in connection with the offering for sale, sale and distribution of

crayons, chalk, paint sets, educational supplies and allied products in interstate commerce for use or resale, do forthwith cease and desist:

(1) from selling such commodities of like grade and quality to competing purchasers at uniform prices and granting varying discounts therefrom in the manner and under the circumstances found in Paragraph 4 of the aforesaid findings as to the facts and conclusions;

(2) from continuing or resuming the discriminations in price referred to and described in Paragraph 4 of the Commission's findings as to the facts herein;

(3) from otherwise discriminating in price between purchasers of crayons, chalk, paint sets, educational supplies and allied products of like grade and quality, in a manner and degree substantially similar to the manner and degree of the discriminations referred to in Paragraph 4 of the Commission's findings as to the facts herein, and in any other manner resulting in price discriminations substantially equal in amount to such discriminations, except as permitted by Section 2 of the Clayton Act as amended;

(4) from granting or allowing compensation to any customer of the respondent of an amount equal to ten per cent of the respondent's net billing prices of the products sold by such customer, for services or facilities furnished by or through such customer in connection with the handling, sale or offering for sale of respondent's products, unless such payments are made available on proportionally equal terms to all buyers from the respondent who are competitors of such customers;

(5) from granting or allowing compensation of an amount equal to five per cent of the respondent's net billing prices of products sold by such customer, for services or facilities furnished by or through such customer in connection with the handling, sale or offering for sale of respondent's products, unless such payments are made available on proportionally equal terms to all buyers from the respondent who are competitors of such customer.

*It is further ordered,* That the respondent, The American Crayon Company, a corporation, its officers, directors, representatives, agents and employees, in connection with the sale and distribution of crayons, chalk, paint sets, educational supplies and allied products, do forthwith cease and desist from granting or allowing to any customer of the respondent any compensation for services or facilities furnished by or through such customer in connection with the handling, sale or offering for sale of respondent's products, unless such payments are made available on proportionally equal terms to all buyers from the respondent who are competitors of such customer.

## REPORT ON THE FACTS

ACTS AND PRACTICES RELATING TO PARAGRAPHS 4 AND 5 AND TO THE LAST  
UNNUMBERED PROHIBITION OF THE ORDER TO CEASE AND DESIST

PARAGRAPH 1. American Crayon Company, respondent herein, is engaged in the manufacture and nationwide distribution of crayons, chalk, water colors and allied products (R. 4). Its principal office and place of business is located in Sandusky, Ohio (Com. Ex. 2).

PAR. 2. Gordon E. James, Director of respondent's General Sales Division, testified that his company sells its products both to wholesalers and retailers, that among its wholesale customers are approximately 3,500 accounts classified as "Jobbers" and 94 accounts classified as Educational Promotional Distributors, that both of these classes of wholesale accounts are furnished the same price lists by respondent, and that the same prices, regular trade discounts and cash discounts are made equally available by respondent to all such accounts (Com. Ex. 2; R. 6-17).

PAR. 3. Grant A. Waddle, Director of respondent's Sales Promotion and Merchandising, testified that in addition to its regular trade and cash discounts respondent allows a ten percent "Sales Service Discount" on certain of its school supply items which are to be resold to educational institutions, to those of its accounts which it classifies as "Educational Promotional Distributors" (Com. Exs. 6 and 7; R. 32-37, 40). He stated that this sales service discount was paid to such accounts for performing in the school field the services as set out in its form letter granting such a classification (Com. Ex. 7; R. 32-33, 44-46). Said form letter reads as follows:

We are pleased to advise you that inasmuch as you comply with all of the requirements necessary in order to be considered as an Educational Promotional Distributor, you are entitled to our Sales Service Discount of 10% from our regularly published prices and on those items specifically considered as representative items of our line for the field of sales promotion that your good firm covers.

The items covered in this arrangement are attached.

This Sales Service Discount is being allowed because of your willingness, desire and ability to perform the following services for us:

1. Carrying complete stock of all demand items, including a representative stock of our merchandise.
2. Employing salesmen who are engaged in the regular solicitations of business from large educational institutions.
3. Issuing and distributing a catalog including therein items of our manufacture.

4. Actively demonstrating with samples and displays to the ultimate consumer groups and to educational meetings and conventions the merits of our merchandise.

5. Regularly quoting to and servicing educational institutions for their requirements and complying with our requests that you quote on such business; also reporting on competitive conditions in your territory.

6. Maintaining a stock of samples and sales literature sufficient to properly service all inquiries in your territory from your particular class of accounts.

as expressed in your letters and upon the recommendation of our representative.

This arrangement shall remain in effect only so long as you substantially perform the special services listed above, and may also be terminated by either party giving the other sixty days written notice of the desire to terminate. (Com. Ex. 7.)

A list of the 94 customers of respondent who have entered into this arrangement and who receive the described ten percent Sales Service Discount is set out in the record as Commission's Exhibit 8.

PAR. 4. Mr. Waddle testified that notice of the existence of this ten percent sales service discount was contained in respondent's price list for only two years after the issuance of the Commission's order to cease and desist herein, namely 1941 and 1942 (Com. Ex. 1; R. 47-48). He admitted that since that time notice in writing of the existence of this discount has been given by respondent only by means of a form letter sent only to those customers requesting information and to those customers recommended for classification as Educational Promotional Distributors by respondent's fieldmen (Com. Ex. 6; R. 35-36, 47-48). He further admitted that such written notice has not been sent to all of respondent's school supply accounts, since 1942 (R. 36, 47-48). He further testified that respondent's salesmen were instructed to give information to any account making an inquiry or which the salesman felt was qualified to receive the discount (R. 67-68, 237-238). He testified that the existence of this discount was generally known to the trade and that in his best judgment it was known to all school supply houses (R. 59-60, 232).

PAR. 5. Mr. Thoren, owner of the Gateway Paper & Supply Co., Beloit, Wisconsin, testified that his company has been engaged in the school supply business since August 1, 1944, that it purchases art supplies (i. e., crayons, water colors and allied items) from respondent; that two of its salesmen, who call only on school accounts, sell respondent's and Binney & Smith art supplies in addition to paper and general supplies; that it competes with several of the companies

listed by respondent as its Educational Promotional Distributors and who receive the above-described ten percent sales service discount; and that among such favored competitors were Favor Ruhl & Company, Chicago, Illinois, and Fond du Lac School Supply Company, Fond du Lac, Wisconsin (R. 107-8, 118-119). He further testified that his company had never been offered and had never received said sales service discount (R. 108-9). He testified that he requested said discount of respondent's representative, Mr. Merrill Ward, in 1950; that he offered to do what was required in order to receive said discount; that Mr. Ward thought he was entitled to it as well as some of the accounts that enjoyed it; and that Mr. Ward suggested he write to Mr. Grant Waddle, respondent's official who had the authority to grant such discounts (R. 109-110).

In a series of letters written between November 22, 1950, and March 27, 1951, Mr. Thoren informed Mr. Waddle that he had gone over respondent's requirements for receiving the ten percent sales service discount with Mr. Ward and that both felt his company was entitled to the said discount (Resp. Ex. 2A, B, E and G). Mr. Waddle's replies, in addition to explaining the requirements for receiving said discount, stated that usually such arrangements can only be made for firms whose major business is direct sales to educational institutions and that Mr. Ward would explain in more detail (Resp. Ex. 2C and F). Mr. Thoren was given no further explanation of why his request was not granted (R. 109).

PAR. 6. Mr. Thoren further testified that his company, Gateway Paper & Supply Co., has been in the school supply business since August 1, 1944 (R. 107); that he personally has been in that business for over twenty years (R. 113); that two of his salesmen spend their full time calling on school accounts (R. 118); and that said salesmen contact approximately 1,500 schools located in Wisconsin, Michigan, Iowa, Illinois, Missouri and Indiana (R. 113). He testified that his company publishes and distributes to public and parochial schools in its trade area its catalog of school papers, equipment and supplies (R. 111). This catalog lists with illustrations and descriptive material certain of respondent's items for which there is the largest demand (Com. Ex. 10). Mr. Thoren further testified that his company vigorously tried for the business of educational institutions for which formal bids are required during the years 1947 through 1949. Having discovered that its bids on respondent's products were not competitive, it has not submitted bids on such products since that time (R. 112).

PAR. 7. The record contains a copy of respondent's letter of November 18, 1942, to Favor Ruhl & Company, Inc., and of respondent's

letter of December 16, 1948, to Fond du Lac School Supply Company, in the form quoted in Paragraph 3 hereof, granting them the ten percent sales service discount and setting out the requirements therefor (Com. Exs. 9 and 11). Frank J. Peters, General Manager of Favor Ruhl & Company, and Henry F. Wetter, President of Fond du Lac School Supply Company, both testified that their companies have received said discounts in accordance with the terms of this arrangement since the date of receipt of said letters (R. 84-85, 126-127). Mr. Peters testified that the Chicago branch of his company sells school supplies throughout the entire United States and that it has ten salesmen soliciting such business (R. 82, 100). Mr. Wetter testified that his company sells school supplies throughout the entire State of Wisconsin and that it has four salesmen engaged in soliciting such business (R. 125, 130).

PAR. 8. In rebuttal respondent's Director of Sales Promotion, Mr. Waddle, testified that upon receipt of the letters from Mr. Thoren requesting the ten percent sales service discount for the Gateway Paper & Supply Co., he made an investigation to determine if that company was qualified for the said discount (R. 259-260). He further testified that the investigation disclosed that said company was not effectively promoting the sale of respondent's products to educational institutions as it had too few salesmen for the area covered (R. 266-7); that it did not list a representative line of respondent's products in its catalog (R. 268); that it did not actively display respondent's items at educational meetings and conventions (R. 272); that it did not report to respondent on competitive conditions (R. 273), but that it did carry a representative stock of respondent's merchandise (R. 265-266). He, therefore, concluded that said company was not performing the services required for receiving the sales service discount and further concluded that a company attempting to cover 1,500 schools with two salesmen in the manner attempted by said company could not effectively promote and sell respondent's products (R. 273-274).

In further rebuttal respondent called the president of Allied, Inc., and the manager of the equipment and supply division of Blackwell Wielandy Company, both of which companies were classified by respondent as Educational Promotional Distributors.

Both testified that their companies specialized in selling to schools, described their sales promotional efforts for respondent's products, and stated that they employed fifteen and eight salesmen, respectively, in this field, and that they covered a limited sales area (R. 134-174, 286-302). They further testified that in their opinion it would be impossible for two salesmen to effectively service the schools in an area

