(1) In three of these cases, there is no quorum of the Commission at the present time for rendering adjudicative decisions on the merits and issuing any orders to cease and desist based upon findings of violation of law. Adjudication of these cases would require reargument of the appeals. The specific practices challenged in these cases occurred almost a decade ago, in the mid-1950's, and competitive conditions in this dynamic and rapidly changing industry appear to have altered significantly since then.

(2) The Commission has this date announced the initiation of a broad inquiry into the problems of competition in the marketing of gasoline. Orders to cease and desist entered against a few oil companies—orders which would probably not become final, if at all, until completion of lengthy review proceedings in the Federal Courts of Appeals and the Supreme Court—could not provide complete or effective solution to the competitive problems of the gasoline industry. It would appear to be more desirable, from the standpoint of effective administration of the law, that the Commission concentrate its necessarily limited resources on a comprehensive industry-wide approach to the problems of competition in the marketing of gasoline.

Commissioner Dixon not participating and with Commissioner MacIntyre dissenting for the reasons stated by him in the accompanying dissenting opinion.

In the Matter of

CROWN PUBLISHERS, INC., ET AL.

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

Docket 8593. Complaint, Sept. 5, 1963—Decision, Dec. 28, 1964

Order requiring a New York City corporation, engaged in publishing, selling, and distributing books and other publications to retailers for resale to the public, to cease preticketing deceptively high prices on their reprinted books, including the reprint edition of "High Iron," by such practices as placing on the jacket thereof a price higher than the prevailing retail price with a printed wavy line through it suggesting a hand drawn ink line, thereby conveying the impression that said books were reduced by retailer.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Crown Publishers, Inc., a corporation, also doing business as Bonanza Books, and Nathan

Wartels, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Crown Publishers, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 419 Park Avenue South, in the city of New York, State of New York.

Respondent Nathan Wartels is the president of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices herein set forth. His office and principal place of business is located at the above stated address.

PAR. 2. Respondents are now, and for some time last past have been engaged in the business of publishing, offering for sale, selling and distributing books and other publications to retailers for resale to the general public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, said books, when sold, to be shipped from their aforesaid place of business in the State of New York to retailers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said books in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, respondents are now, and for some time last past have been, engaged in the publishing, offering for sale, selling and distributing of a book titled "High Iron" by Lucius Beebe. Respondents sell this book to retail book stores for $1.79 and recommend that it be sold to the public for $2.98. On the inside flap of the jacket, the price $6.00 appears with a line drawn through it. Respondents thereby are now, and for some time last past have been representing, directly or by implication, that the usual and customary retail selling price of said book in the recent regular course of business in all respondents' trade areas has been $6.00, and that members of the general public who purchase said book at retail at a price lower than $6.00 save the difference between said lower price and $6.00.

PAR. 5. In truth and in fact, the usual and customary retail selling price of said book in the recent regular course of business in all respondents' trade areas has not been $6.00. Such price is in excess of the generally prevailing price or prices at which said book has been sold at retail in the recent regular course of business, in some, if not all, of the trade areas where the representations are made; and accordingly, in such trade areas, members of the general public who purchase said book at retail at a price which is lower than $6.00 do not save the difference between such low price and $6.00.

Said statements and representations were, therefore, false, misleading and deceptive.

PAR. 6. By the aforesaid practices, respondents now place, and for some time last past have placed, in the hands of retailers, the means and instrumentalities by and through which they may mislead the public as to the price at which said book has been usually and customarily sold at retail in the recent regular course of business, and as to the savings afforded in the purchase of said book.

PAR. 7. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition in commerce, with corporations, firms and individuals engaged in the sale of books and other publications of the same general kind and nature as those sold by respondents.

PAR. 8. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations, and practices, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' books by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of the respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce, in violation of Section 5(a)(1) of the Federal Trade Commission Act.

Mr. George J. Luberda, for the Commission.

Denning & Wohlstetter, by *Mr. Ernest H. Land* of Washington, D.C., for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

JUNE 15, 1964

The complaint in this proceeding alleges that, in the course of selling their reprint of the 1938 Edition of the book HIGH IRON, by Lucius

Beebe, in interstate commerce, respondents affixed thereto a dust cover or dust jacket on the left inside flap of which there is imprinted a $6.00 price with a line drawn through it, thus ~~$6.00~~.

Respondents thereby [represent] * * * that the usual and customary retail selling price of said book in the recent regular course of business in all respondents' trade areas has been $6.00, and that members of the general public who purchase said book at retail at a price lower than $6.00 save the difference between said lower price and $6.00.

The complaint further alleges that $6.00 is not the usual and customary retail price of said book in any trade area, and that respondents' action in affixing such dust covers upon HIGH IRON places in the hands of retail book sellers a means by which said retail book sellers may mislead the public as to the price at which respondents' reprint edition of HIGH IRON has been usually and customarily sold at retail in the recent, regular course of business in the trade areas involved. This is asserted to be a violation of Section 5 of the Federal Trade Commission Act.

Answer to the complaint was filed in the usual manner; prehearing conferences were convened; prehearing orders issued as a result thereof; stipulations of fact resulting from the prehearing procedures have been filed; hearings have been held; oral and documentary evidence has been received; proposed findings, conclusions and briefs have been filed, and the matter is now before the hearing examiner for decision.

The legally operative facts are not disputed for the most part. It is the legal conclusions to be drawn therefrom which are in dispute.

Complaint counsel has not, in this proceeding, sought to try all of the pricing practices of respondents, but has limited himself to the actionable deception, if any, in respondents' practice of affixing to its reprint edition of the book HIGH IRON the dust jacket hereinabove described (CX 2–CX 5).

Complaint counsel has categorized this as a "preticketing" case. If this were a preticketing case, it would fall within the rationale of *Regina Corporation* v. *F.T.C.*, 322 F. 2d 765 (C.A. 3, 1963). However, in his arguments and in the papers which he has filed, complaint counsel relies upon the rationale of the Federal Trade Commission and the Court of Appeals in *Giant Food, Inc.* v. *F.T.C.*, 322 F. 2d 977. The instant case is neither a classic preticketing case within the rationale of *Regina* nor a classic deceptive pricing case within the rationale of *Giant Food*. The case presents to some extent a problem of deceptive packaging. If the left inside flap of the dust jacket of respondents' reprint of HIGH IRON were altered with the addition of a few explanatory words, the deception of which complaint counsel complains would not exist.

Effective January 8, 1964, the Federal Trade Commission adopted *Guides Against Deceptive Pricing*, which were accompanied by a special statement by Commissioner Everette MacIntyre.[1] Such *Guides Against Deceptive Pricing*, *inter alia*, state:

GUIDE I—FORMER PRICE COMPARISONS

One of the most commonly used forms of bargain advertising is to offer a reduction from the advertiser's own former price for an article. If the former price is the actual, *bona fide* price at which the article was offered to the public on a regular basis for a reasonably substantial period of time, it provides a legitimate basis for the advertising of a price comparison. Where the former price is genuine, the bargain being advertised is a true one. If, on the other hand, the former price being advertised is not *bona fide* but fictitious—for example, where an artificial, inflated price was established for the purpose of enabling the subsequent offer of a large reduction—the "bargain" being advertised is a false one; the purchaser is not receiving the unusual value he expects. In such a case, the "reduced" price is, in reality, probably just the seller's regular price.

A former price is not necessarily fictitious merely because no sales at the advertised price were made. The advertiser should be especially careful, however, in such a case, that the price is one at which the product was openly and actively offered for sale, for a reasonably substantial period of time, in the *recent, regular course of his business*, honestly and in good faith—and, of course, not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based. And the advertiser should scrupulously avoid any implication that a former price is a selling, not an asking price (for example, by use of such language as, "Formerly sold at $ ______"), unless substantial sales at that price were actually made. (Italic supplied.)

* * * * * * *

If the former price is set forth in the advertisement, whether accompanied or not by descriptive terminology such as "Regularly," "Usually," "Formerly," etc., the advertiser should make certain that the former price is not a fictitious one. If the former price, or the amount or percentage of reduction, is not stated in the advertisement, as when the ad merely states, "Sale," the advertiser must take care that the amount of reduction is not so insignificant as to be meaningless. It should be sufficiently large that the consumer, if he knew what it was, would believe that a genuine bargain or saving was being offered. An advertiser who claims that an item has been "Reduced to $9.99," when the former price was $10.00, is misleading the consumer, who will understand the claim to mean that a much greater, and not merely nominal, reduction was being offered.

At the time that these new Guides became effective, Commissioner Everette MacIntyre's separate statement (Appendix A) included the following:

[1] Commissioner MacIntyre's statement is attached as Appendix A.

The nub of the problem as I see it is that these Guides are not, as they purport, restatements of the law; the changes introduced here are too sweeping for that. It is fair to say that the Guides in many respects are sharply at variance with the body of law on this subject painfully built up by the Commission and courts over a number of decades. The result may well be the opposite of that intended—uncertainty for consumers, the businessman and the Commission's staff alike. Under the circumstances, there is a serious question that we can sustain the necessary vigour of enforcement even with the best of intentions.

On February 17, 1964, in *Clinton Watch Company*, Docket No. 7434 [64 F.T.C. 1443], in acting upon respondents' petition to reopen proceedings, *inter alia*, the Commission stated:

* * * However, the Commission has directed that all outstanding cease and desist orders involving deceptive pricing shall be interpreted, and thus *pro tanto* modified, so as to impose on respondents subject to such orders no greater or different obligations than are stated in the Commission's newly-revised Guides Against Deceptive Pricing issued on January 8, 1964.

Simultaneously, Commissioner MacIntyre issued the following statement:

I am compelled to issue a separate statement setting forth my views on the Commission's action in modifying the cease and desist order issued against the Clinton Watch Company in this proceeding. The significant provision amending the order reads as follows:

"* * * the Commission has directed that all outstanding cease and desist orders involving deceptive pricing shall be interpreted, and thus *pro tanto* modified, so as to impose on respondents subject to such orders no greater or different obligations than are stated in the Commission's newly-revised Guides Against Deceptive Pricing, issued on January 8, 1964. * * *"

I do not concur with this action for the following reasons. Respect for the businessmen who come before it, as well as for the appellate courts, requires that Commission orders be drafted with sufficient precision so that they can be understood. The wholesale "pro tanto" incorporation of the provisions in the new Guides, adopted in this instance, affords the Clinton Watch Company no guidance for the regulation of its future conduct with respect to its pricing practices. The Guides, of course, cover a multitude of deceptive pricing practices which may or may not be applicable to the Clinton Watch Company and it is doubtful that the "*pro tanto*" qualification will enlighten either the Commission's staff or respondent as to precisely those terms of the Guides applicable to the Clinton Watch Company. This difficulty is, of course, compounded by the fact that the Guides themselves still require considerable adjudicative definition before either the courts, the Commission, or the business community will be fully advised of their legal significance. In violation of the Supreme Court's injunction in *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37 (1948), the Commission here is shifting to the courts the burden of determining the factual question of what constitutes unfair conduct. I am surprised that this Commission, which recently has made so many pronouncements of the necessity for clear and definitive orders, is in this area embarking on a course which can