IN THE MATTER OF

BEN COHEN TRADING AS BENTON FURS

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket 6501. Complaint, Feb. 9, 1956—Decision, Aug. 23, 1957

Order requiring a furrier in Los Angeles, Calif., to cease violating the Fur Products Labeling Act by failing to comply with labeling and invoicing requirements, by setting forth on invoices the name of an animal other than that producing the fur in certain products, and by advertising which falsely represented prices of certain products as less than wholesale.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, the Federal Trade Commission on February 9, 1956, issued and subsequently served its complaint in this proceeding upon the respondent named above charging him with the use of unfair methods of competition and unfair and deceptive acts and practices in violation of the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act. After the filing of answer by the respondent, a hearing was held before a hearing examiner of the Commission and testimony and other evidence was received into the record including evidentiary matters stipulated by agreement between counsel. On September 6, 1956, the hearing examiner filed his initial decision in which he held that certain of the complaint's charges were sustained by the greater weight of the evidence and that others should be dismissed for reasons of lack of jurisdiction or other proof.

The Commission having considered the cross-appeals filed from the initial decision of the hearing examiner and the entire record in this proceeding and having determined that the appeal of counsel supporting the complaint should be granted and the appeal of the respondent denied and that the initial decision should be vacated and set aside, the Commission further finds that this proceeding is in the interest of the public and now makes this its findings as to the facts, conclusions drawn therefrom and order, the same to be in lieu of said initial decision.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent Ben Cohen is an individual trading as Benton Furs. He engages in the sale at retail of fur garments,

his office and place of business being located at 714 South Hill Street, Los Angeles, California.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, the respondent has advertised and offered for sale his fur products in commerce and he also has sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur," and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of the aforementioned fur products have been misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

PAR. 4. Certain of the aforementioned fur products have been misbranded, in violation of the Fur Products Labeling Act, in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Required information was mingled with non-required information on labels, in violation of Rule 29(a) of the aforesaid Rules and Regulations;

(b) Required information was not completely set forth on one side of the labels, as required by Rule 29(a) of the aforesaid Rules and Regulations;

(c) Respondent failed to set forth an item number or mark on labels assigned to fur products, in violation of Rule 40(a) of the aforesaid Rules and Regulations;

(d) Required information was set forth in abbreviated form on labels, in violation of Rule 4 of the aforesaid Rules and Regulations.

PAR. 5. Certain of said fur products have been falsely and deceptively invoiced, in that they were not invoiced by the respondent as required under the provisions of Section 5(b)(1) of the Fur Products Labeling Act, and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in that the respondent, on invoices furnished to purchasers of said fur products, set forth the name of an animal other than the name of the animal which produced the fur, in violation of Section 5(b)(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder.

PAR. 7. Certain of the aforementioned fur products were falsely and deceptively invoiced, in violation of the Fur Products Labeling

Act, in that they were not invoiced by the respondent in accordance with the Rules and Regulations promulgated thereunder in that required information was set forth in abbreviated form, in violation of Rule 4 of the aforesaid Rules and Regulations.

PAR. 8. Certain of the respondent's aforementioned fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act and of Rule 44(a) of the Rules and Regulations as heretofore promulgated thereunder. In such connection, the respondent has caused the dissemination in commerce, as "commerce" is defined in the Fur Products Labeling Act, of newspaper advertisements concerning his fur products which advertisements were not in accordance with the provisions of Section 5(a) of the Fur Products Labeling Act and of the Rules and Regulations promulgated thereunder and which advertisements were intended to and did aid, promote and assist, directly and indirectly, in the sale and offering for sale of said fur products.

Illustrative thereof were advertisements of the respondent which appeared in various issues of the Los Angeles Examiner, a publication having wide circulation in the State of California and substantial circulation in areas of other States of the United States which are adjacent thereto. Certain of such advertisements have included the following statement:

* * *

OUR PRICES ARE LOWER
than the wholesale houses
COME UP AND SAVE MONEY!

Thereby, the respondent has represented that the prices at which his fur products are offered for sale are less than wholesale prices which representation was false and deceptive. The respondent himself buys at wholesale prices and sells at a profit, and his prices necessarily are in excess of wholesale prices.

PAR. 9. The respondent in the regular course of his business has been in substantial competition with other individuals, corporations, and firms likewise engaged in the sale and distribution of fur products.

CONCLUSIONS

The aforesaid acts and practices of the respondent, as herein found, have been in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and, as specified under the provisions of the aforesaid Act, additionally constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act.

Evidence also was submitted at the hearing relevant to the charges of alleged violation of Rule 44(f) of the Rules and Regulations prescribed by the Commission under the Fur Products Labeling Act incident to alleged use by the respondent of illustrations depicting more valuable fur products than those actually available at the respondent's advertised selling price. Those charges are not supported by the greater weight of the evidence, and provision for their dismissal accordingly is included in the order appearing hereafter.

ORDER

It is ordered, That respondent Ben Cohen, an individual doing business as Benton Furs or under any other name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product, or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce as "commerce," "fur," and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

(1) Failure to affix labels to fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(b) That the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(c) The name of the country of origin of any imported furs used in the fur products;

(d) The name or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce.

(e) That the fur product consists of used or second-hand fur or furs, when such is the fact;

(f) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact.

(2) Setting forth on labels attached to fur products:

(a) Non-required information mingled with required information;

(b) Required information in abbreviated form.

(3) Failing to:

(a) Set forth on labels attached to fur products an item number or mark assigned to such products;

(b) Set forth on labels attached to fur products all required information on one side of such labels.

B. Falsely or deceptively invoicing fur products by:

(1) Failing to furnish invoice to purchasers of fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur products, as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(b) That the fur product contains or is composed of used fur, when such is the fact;

(c) That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is the fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies or waste fur, when such is the fact;

(e) The name and address of the person issuing such invoice;

(f) The name of the country of origin of any imported furs contained in the fur products.

(2) Using on invoices the name or names of any animal or animals other than the name or names provided for in paragraph B(1)(a) above, or furnishing invoices which misrepresent the country of origin of imported furs contained in the fur product, or which contain any form of misrepresentation or deception, directly or by implication, with respect to such fur products.

(3) Setting forth on invoices pertaining to fur products, required information in abbreviated form.

C. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement, notice, or in any other manner which is intended to aid, promote or assist, directly or indirectly in the sale or offering for sale of fur products, and which represents, directly or by implication, that the price of any fur product is less than or equivalent to the wholesale price, when such is not the fact.

It is further ordered, That the charges of this proceeding relating to alleged violations of Rule 44(f) be, and the same hereby are, dismissed.

It is further ordered, That respondent Ben Cohen shall, within sixty (60) days after service upon him of this order file with the

Commission a report in writing setting forth in detail the manner and form in which he has complied therewith.

Commissioners Gwynne and Tait dissenting.

OPINION OF THE COMMISSION

By KERN, Commissioner:

The respondent operates a store in Los Angeles for the retailing of fur garments and is charged in this proceeding with misbranding and false and deceptive invoicing and advertising of certain of his fur products and in violation of both the Federal Trade Commission Act and the Fur Products Labeling Act and of designated rules and regulations promulgated pursuant to the latter Act. Counsel for the respondent and counsel supporting the complaint have appealed from such rulings of the hearing examiner as were adverse to their respective contentions.

A brief analysis of pertinent provisions of the Fur Products Labeling Act and the pleadings is necessary since we must dispose of a procedural question presented by counsel supporting the complaint. The particular offenses relevant here are those contained in subsections (a) and (b) of Section 3 of the Fur Products Labeling Act. Subsection (a) renders unlawful the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product which is misbranded or falsely or deceptively advertised or invoiced; and subsection (b) proscribes the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, any misbranded or falsely advertised or invoiced fur product which is made in whole or in part of fur which has been shipped and received in commerce. Thus, the legal violations which are defined in subsection (a) are limited to and concern distributional and promotional activities "in commerce," which elsewhere in the Act is defined to include commerce between any state and any place outside thereof. On the other hand, the sanctions imposed under subsection (b) do not turn upon the interstate aspects of promotional activities. Instead, violation results when the deceptive acts occur in furtherance of the marketing of fur products made in whole or in part of fur which has been shipped and received in commerce.

Paragraph Two of the complaint alleges that the "respondent has sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which has been shipped and received in commerce." The five succeeding paragraphs of the complaint contain specific allegations as to the

manner in which certain of the respondent's fur products in that category allegedly were misbranded and falsely invoiced. It is not disputed that the respondent's labeling and invoicing were not in accordance with requirements specified in the Act and applicable rules and regulations of the Commission as charged in the complaint.

The allegations of two additional paragraphs of the complaint (Paragraphs Eight and Nine) were directed to advertising practices relating to "Certain of said fur products . . . in violation of the Fur Products Labeling Act. . . ." Thus the complaint might be construed to concern only those fur products made in whole or in part of fur previously shipped and received in commerce. Under Paragraphs Eight and Nine, the respondent was charged in substance with the dissemination in commerce of advertisements which were alleged to be in violation of law because they were not in accordance with the provisions of Section 5(a) of the Act (which section defines false advertising of fur products and furs) and because they misrepresented the products' price and their grade, quality and value in contravention of the provisions of subparagraphs (a) and (f) of Rule 44 of the Rules and Regulations promulgated by the Commission. Hence, alleged interstate aspects of the respondent's promotional activities also were brought within the scope of the proceeding under those charges.

Counsel supporting the complaint moved that Paragraph Two of the complaint be amended to include charges more expressly challenging the lawfulness of the respondent's labeling and invoicing practices as well as his advertising practices under Section 3(a) of the Act and irrespective of the garments' legal status under Section 3(b) as fur products allegedly made from furs which had been shipped and received in commerce. It was requested that such paragraph be revised to read as follows:

> Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has sold, advertised, offered for sale, transported and distributed fur products in commerce, and has sold, advertised, offered for sale, transported and distributed fur products which have been made, in whole or in part, of fur which has been shipped and received in commerce, as the term "commerce," the term "fur," and the term "fur products" are defined in the Act.

The hearing examiner denied the motion.

The requested amendment was closely related to other charges in the complaint and the general tenor of certain of the amendatory matters conformed to proof theretofore received in the record. It seems obvious that the parties regarded the issues of the case as broader than those presented under a very strict interpretation of the complaint. Both counsel appear to have regarded the issues

presented under the pleadings and proof to include the extent to which the distributional methods and promotional activities adopted by the respondent come within the scope of both subsections (a) and (b) of Section 3. Attesting to this is the fact that the first of various listed conclusions of law submitted by the respondent for the hearing examiner's adoption requested a finding that the respondent had not introduced or manufactured for introduction or sold or advertised for sale or transported or distributed in interstate commerce any fur product or fur "as contemplated by Section 3(a) of the Fur Products Labeling Act."

We think it would have been more appropriate had the hearing examiner granted in part the motion for amendment, pursuant to Section 3.9 of the Commission's Rules of Practice. We have decided to direct amendment of the complaint in conformity with such of the respondent's practices as the record indicates have been engaged in by him, namely, those relating to the advertising and offering for sale in commerce of the respondent's fur products.

The respondent's appeal challenges as erroneous the examiner's holding that certain of the respondent's fur products have been advertised and offered for sale in commerce within the meaning of the Act and that false advertisements which the respondent caused to be disseminated in such connection have constituted violations of Section 3(a) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder by the Commission. While the record does not disclose instances of actual sale and shipment by the respondent of his fur products to out-of-state customers and indicates instead consummation of sales at the respondent's place of business, the evidence establishes that the respondent's fur products were advertised on various occasions in a Los Angeles newspaper. Daily circulation (except Sunday) for that publication has represented approximately 332,000, of which 5,000 copies have gone outside the State of California; and Sunday circulation has approximated 686,000, of which some 40,000 have gone to subscribers or others outside the State. It is thus clear that the respondent has advertised his fur products in commerce. *Jacques De Gorter* v. *F.T.C.* (C.A. 9, Decided April 17, 1957.)

The respondent contends, however, that such advertising does not constitute advertising for sale in commerce of that merchandise within the meaning of the Act for the reason that evidence of interstate delivery or resale is absent. Section 3(a) forbids, among other things, "advertising or offering for sale in commerce" of fur products which are misbranded or falsely or deceptively advertised or invoiced. Its proscriptions are stated in the disjunctive. It, there-

fore, is impossible to reconcile with the language of the Act itself respondent's contention that Congress intended a sale in commerce as prerequisite to jurisdiction under Section 3(a). That "advertising . . . for sale in commerce," i.e., advertising in commerce for sale, is sufficient under the Act also is apparent from its legislative history. This subsection "makes unlawful the manufacture for introduction into commerce or the sale, advertising, or transportation in commerce of fur products which are misbranded or falsely or deceptively advertised or invoiced." (S. Rep. No. 78, 82nd Cong., 1st Sess. (1951, p. 3).

Since it is shown that the respondent has engaged in distributional and promotional activities in violation of Section 3(a) of the Act, our order which is being issued in lieu of that contained in the initial decision includes appropriate prohibitions with respect thereto.

Respondent's appeal also challenges the validity of the Commission's authority under the Act to promulgate Rule 44 of its Rules and Regulations prohibiting pricing misrepresentations with respect to fur products and furs. In the *De Gorter* case referred to above and decided subsequent to the filing by the respondent of its appeal in this proceeding, the Commission's authority to promulgate such rule was judicially approved, however. Considered by us also have been the exceptions additionally interposed under the respondent's appeal from the initial decision. Since they are related in vein to those discussed above, their denial is similarly warranted. The respondent's appeal is denied accordingly.

The appeal of counsel supporting the complaint except to the initial decision's ruling dismissing the charges under Section 3(b) of the Act. As previously noted, these charges allege that the respondent has sold, offered for sale, advertised and distributed fur products made in whole or in part of fur which has been shipped and received in interstate commerce and that such fur products were misbranded and falsely and deceptively advertised and invoiced. It was stipulated by the parties that the major portion of the respondent's fur garments have been obtained from sources outside the State of California. The appeal, however, does not except to the initial decision's finding that there is no showing of record that the respondent ever received fur skins in commerce.

It is conceded by the respondent that the prime issue presented under counsel's appeal concerns whether the offering for sale and sale of the respondent's misbranded and falsely invoiced fur products which were made in whole or part of skins shipped and received in commerce prior to acquisition by the respondent of such garments are within the purview of subsection (b). Included among the fur

products offered for sale by the respondent were garments made from peltries originating in Asia and Russia. It therefore is established for the purpose of this proceeding, and the Commission so finds, that included among the misbranded and falsely advertised and invoiced fur products offered for sale and sold by the respondent were garments made in whole or part of furs shipped and received in commerce prior to the respondent's receipt of those garments. Expressing the view that the Act's legislative history contains no clear indication of a contrary congressional intent, the hearing examiner, in effect, held that jurisdiction under Section 3(b) attaches only when the party charged with violation himself receives the fur skins in commerce and makes them into fur products. The respondent in opposing counsel's appeal concurs in this interpretation and contends that if the proscriptions of Section 3(b) with respect to intrastate sales were not limited to industry members processing skins shipped and by them received in commerce, then the subsection would represent an unconstitutional exercise of legislative authority by the Congress.

As to the latter contention, it is not within the province of this Commission to pass upon the constitutionality of legislation which it is charged with administering. *Engineers Public Service* v. *Securities & Exchange Commission*, 138 F. 2d 936, 952 (C.A. D.C., 1943). Beyond determining whether the statute is being properly interpreted and applied, we lack authority to declare further. *In the Matter of Blanton Company*, Docket No. 6197 (decided December 26, 1956). Had Congress elected however to declare unlawful local sales of misbranded fur products theretofore shipped and received in commerce, such a provision manifestly would be valid under the principles enunciated by the Supreme Court of the United States in its decision in *U.S.* v. *Sullivan*, 332 U.S. 689 (1947). In that case, the Court held it a valid exercise of legislative authority for Congress to forbid intrastate sales of misbranded drugs and that application thereof properly extended to situations in which local resale of the misbranded article occurred more than six months after its original shipment in commerce and wherein the local reseller also purchased in intrastate commerce the drug which he subsequently caused to be misbranded.

We deem the hearing examiner's interpretation of Section 3(b) to be erroneous. Subsection (b) explicitly provides that the manufacture, sale, advertising, offering for sale, transportation or distribution of any product made in whole or in part of fur which has been shipped and received in commerce, and which is misbranded

or falsely or deceptively advertised or invoiced, within the meaning of the Act or duly promulgated rules, shall be unlawful. Section 3(b) is unequivocal and is not ambiguous. The words being clear, they are decisive, and there is nothing to construe. *Van Camp & Sons* v. *American Can Company*, 278 U.S. 245, 253 (1929). The plain meaning of the statute will prevail as long as it does not lead to absurd results or clash with policy behind the legislation. *U.S.* v. *American Trucking Association, Inc.*, 310 U.S. 534, 543 (1940).

Our consideration of the legislative history furthermore convinces us that the interpretation advocated in counsel's appeal squares with the policy behind the legislation. The Fur Products Labeling Act was enacted by the 82nd Congress and Section 3(b) in its present form appeared in the original drafts of relevant bills there introduced, including S. 508 and H.R. 2321. After disagreeing votes by the two Houses and report by duly designated conferees, H.R. 2321 with certain amendments was enacted by the Congress and approved on August 8, 1951. Both the 80th and 81st Congress had considered and held hearings, however, on legislative proposals relating to the marketing of furs.

The first bill in which the legislative approach reflected in subsection (b) appears to have been adopted was introduced in the House on June 15, 1949 (H.R. 5187, 81st Cong.), and passed by it on July 14, 1949. Prior to that action by the House, this Commission in response to invitations to comment on other pending bills had suggested that consideration be given to broadening their scope in order to cover products manufactured for local sale when made in whole or in part from furs purchased and received in commerce. (Printed Report of Hearings on H.R. 4292, H.R. 97 and H.R. 3755 before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Congress, 1st Session, pages 29–31.) The amendatory language proposed in the Commission's letters was identical to that contained in Section 3(b) as enacted two years later.

The House Committee Report recommending enactment of H.R. 5187 sets out a letter from the Federal Trade Commission, dated June 27, 1949, which commented on this subsection as follows (H.R. Rept. No. 919, 81st Cong., 1st Sess., p. 5):

> Section 3(b) of the proposed bill brings within jurisdiction of the statute the furrier who manufactures his products from furs which he has received in interstate commerce and markets the finished products locally. Such amendment was suggested in our report on H.R. 3755 and is in our opinion desirable and necessary in placing local manufacturers on an equal competitive basis with out-of-state concerns.

Though the first sentence of this comment may appear to limit the application of the proposed subsection (as then understood by the Commission) to the case of the manufacturer of fur products who *himself* receives the component furs in interstate commerce, the succeeding sentence makes it clear that the Commission then understood that the subsection would place all local manufacturers of fur products on an equal footing with out-of-State manufacturers.* Obviously such an equalization cannot be achieved if local manufacturers of fur products who do not themselves receive their raw materials in interstate commerce are to enjoy an exemption from the statute.

The above-quoted comment makes reference to a prior Commission report on an earlier fur measure, H.R. 3755. That report, dated April 21, 1949, is also included in the House Committee Report (pp. 6–7) and is, in our estimation, of equal force in determining the intended scope of Section 3(b). Proposing the addition to H.R. 3755 of language identical with Section 3(b) of H.R. 2321, as finally enacted, the Commission wrote:

> During the course of hearings on the proposed legislation, however, it would be well to consider the possibility of broadening the scope of the bill to cover locally manufactured fur products made in whole or in part from furs purchased and received in commerce. Such action is fully within the power of Congress (*United States* v. *Sullivan*, 332 U.S. 698 [1948], and would place local manufacturers on an equal competitive basis with out-of-State concerns * * *.

The citation of *United States* v. *Sullivan* as precedent for extending federal jurisdiction to "locally manufactured fur products made in whole or in part from furs purchased and received in commerce" is definitive proof that the purpose of the subsection was to reach the fur products of the local manufacturer regardless of whether he himself had been party to the interstate transaction which brought the component furs into his State.

The novel point decided in the *Sullivan* case was that the Federal prohibition against misbranded foods and drugs applied to the seller of such articles even though they had passed from the hands of him who had brought them into the State. Distinguishing the facts from those of the earlier case of *McDermott* v. *Wisconsin*, 228 U.S. 115, but holding the rule of that case applicable, the Supreme Court said:

> [I]n the *McDermott* case the possessor of the labeled cans held for sale had himself received them by way of an interstate sale and shipment; here, while the petitioner had received the sulfathiazole by way of an intrastate sale and shipment, he bought it from a wholesaler who had received it as the direct

* In discussing the applicability of the subsection to "manufacturers" there was no intention to limit it to that class of merchant, for the subsection not only applies to the "manufacture for sale" but expressly to the "sale, advertising, offering for sale, transportation or distribution" of fur products as well.

consignee of an interstate shipment. These variants are not sufficient we think to detract from the applicability of the *McDermott* holding to the present decision. In both cases alike the question relates to the constitutional power of Congress under the commerce clause to regulate the branding of articles that have completed an interstate shipment and are being held for future sales in purely local or intrastate commerce. The reasons given for the *McDermott* holding therefore are equally applicable and persuasive here. And many cases decided since the *McDermott* decision lend support to the validity of § 301(k). See, *e.g.*, *United States* v. *Walsh*, 331 U.S. 432; *Wickard* v. *Filburn*, 317 U.S. 111; *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110; *United States* v. *Darby*, 312 U.S. 100; see *United States* v. *Olsen*, 161 F. 2d 669. [332 U.S. at 698]

There would have been no point in citing the *Sullivan* case rather than the *McDermott* case as authority for the proposed subsection if the Commission had not intended to manifest to Congress that the subsection was drawn in terms broad enough to encompass constitutionally the extreme case of the fur merchant or manufacturer who misbrands or falsely advertises fur products made of furs which have been received in interstate commerce by another.

Later events in the Act's history which occurred more contemporaneously with final enactment of the legislation indicate that an understanding prevailed in the enacting Congress that the area of jurisdiction conferred under the subsection extended to distributional situations other than those involved in the manufacture of fur products for local sale by the person purchasing the furs in commerce. For example, in its report of June 11, 1951, on H.R. 2321 (which with amendments subsequently was enacted by the 82nd Congress), the Committee on Interstate and Foreign Commerce of the House of Representatives described the bill as requiring mandatory invoicing of furs and labeling of fur products in interstate commerce and as applicable to furriers who manufactured fur products from furs received in interstate commerce. The report significantly added, however, that, when furs or fur products were advertised in commerce or were advertised after having been shipped and received in such commerce, the Act's affirmative requirements with respect to advertising were to be applicable. This clearly suggests an intention by Congress that the requirements prescribed in the Act were to extend not only to fur skins whose interstate journeys had terminated but also to fur products which were made of such fur skins.

Another subsequent aspect of the legislative history likewise indicating that a narrow construction of subsection (b) was not contemplated appears in connection with the proposal for certain amendments presented on the floor of the Senate on February 22, 1951. One of those amendments looked to authorizing an additional class

of resellers to substitute (under subsection (e)) their own labels for those originally placed thereon by the manufacturers, and the Senator sponsoring them presented a statement for the record which had been prepared by an organization of retailers. Included in the statement was the following in reference to subsection (b):

> * * * Section 3(B) confers jurisdiction on every fur product made in whole or in part of fur which has been shipped or received in commerce. This means that such a fur product remains subject to all of the provisions of the proposed law and to the jurisdiction of the Commission up to the time it reaches the ultimate consumer, irrespective of whether or not such garments pass in commerce when sold by the retailer.
>
> Because it will afford the retailer a very important right without weakening the underlying purpose of the bill, it is respectfully urged that the proposed amendment be incorporated into the fur-labeling bill. (97 Cong. Rec. 1462 (1951).)

That amendment to subsection (e) relating to label substitution was later adopted by the Senate and in further revised form remained in the bill as ultimately enacted. It thus appears that legislative action respecting a companion subsection ensued after the advisability of such revision was urged on grounds that the sweep of subsection (b) included "every" fur product made in whole or in part of fur which had been shipped and received in commerce and on assurances that, the amendment notwithstanding, retailers would continue to be bound by the disclosure requirements of the Act. These matters occurred almost contemporaneously with the statute's enactment and their import refutes conclusions that the scope of the subsection was to be restricted to local marketing activities of furriers processing garments from furs shipped and by them received in commerce.

The express language of the subsection and the Act's legislative history support the conclusion that subsection (b) confers jurisdiction over the local marketing of every fur product processed from furs which theretofore have moved in commerce. The order issued by the Commission *In the Matter of Jacques De Gorter, et al.*, Docket No. 6297 (decided May 11, 1956), was based on this interpretation. That order was affirmed on review. *Jacques De Gorter* v. *Federal Trade Commission, supra.*

The hearing examiner erred in failing to make appropriate findings relating to the respondent's violation of Section 3(b) of the Fur Products Labeling Act and we are granting this aspect of the appeal of counsel supporting the complaint. The errors urged in counsel's appeal incident to denial of the motion to amend the complaint in interests of broadening its charges under Section 3(a) to conform to the proof of record have been discussed previously. Those exceptions are being granted, including counsel's additional exceptions to

the scope of the initial decision's order to cease and desist. Our findings as to the facts, responsive to the allegations of the complaint as amended, and conclusions and order to cease and desist, are separately issuing herein.

Commissioners Gwynne and Tait dissented to the decision herein.

DISSENTING OPINION

By TAIT, Commissioner:

The majority errs in holding that the jurisdiction of the Commission is likewise established under Section 3(b).

The record does not support the majority finding "that included among the misbranded and falsely advertised and invoiced fur products offered for sale and sold by the respondent were garments made in whole or part of *furs shipped and received in commerce* prior to the respondent's receipt of those garments." (Emphasis supplied.) The evidence supports nothing more than a conclusion that some of the fur products sold by respondent *contained fur of animals having normal habitat in Asia and Russia.* Whether the pelts were, in fact, from animals raised in Asia and Russia, whether the pelts themselves were subsequently shipped from these geographical areas, or whether the pelts were first made into garments and the garments subsequently shipped therefrom is purely conjectural. To infer from the mere fact that these animals normally have a foreign habitat the further fact that the pelts were shipped and received in commerce is an unwarranted assumption.

There is no evidence in this record establishing that any furs, as such, were ever "shipped and received" in commerce by anyone. It should be kept in mind, of course, that the Fur Products Labeling Act consistently distinguishes between furs and fur products.

Secondly, even if the Commission's determination as to the source of the fur were supported by the record, which it is not, there is no finding and corresponding proof that respondent was engaged in "[t]he manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce * * *."

As more fully demonstrated below, applicability of Section 3(b) hinges on local manufacture of fur products made in whole or in part of fur (the skins) which has been received in commerce by the manufacturer who distributes such garments locally. Yet the majority view is satisfied that the requirements of Section 3(b) are met as long as anyone is found to have marketed or advertised fur prod-

ucts (the finished garment) made from out-of-state fur by another party.

The majority rests its conclusion principally on the legislative history of that subsection; however, the comfort which the Commission seeks to derive therefrom is quite illusory. My examination of the pertinent data does, in fact, lead to a wholly different conclusion.

Above all, it was the Commission which suggested the enactment of Section 3(b) to Congress. Consequently, the reasons for the Commission's recommendation will be given great weight by the reviewing court. *United States* v. *American Trucking Association, Inc., et al.*, 310 U.S. 534, 549 (1940).

The need for legislative action relating to the marketing and advertising of fur products was considered by the 80th and 81st Congresses, which held hearings on various proposals. During the 81st Congress, the following bills were introduced: H.R. 97, H.R. 3755, and ultimately H.R. 5187.

In response to an official request to comment on H.R. 97, the Commission by letter of February 15, 1949, suggested to the Committee on Interstate and Foreign Commerce of the House of Representatives the advisability of expanding the purview of the legislative proposal by:

* * * broadening the scope of the bill to cover locally manufactured fur products made in whole or in part from furs purchased and received in commerce. Such action is fully within the power of Congress. (*United States* v. *Sullivan*, 332 U.S. 689 [1948]) and would place local manufacturers on an equal competitive basis with out-of-state concerns and might easily be accomplished by amending section 3 of the proposed bill by inserting immediately following section 3(a) the following subsection:

"(b) The manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, and which is misbranded or falsely or deceptively advertised or invoiced, within the meaning of this Act or the Rules and Regulations prescribed under Section 8(b), is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce, under the Federal Trade Commission Act." Hearings Before Subcommittee of the Committee on Interstate and Foreign Commerce, 81st Cong., 1st Sess., May 1949, p. 29.

And when the Commission was asked to present its views on H.R. 3755, it repeated in its letter of April 21, 1949, word for word the above-quoted February statement (Id. at 31).

The attention of the majority centers on the *Sullivan* decision, which the Commission had cited to indicate the full range of Congressional power to legislate in that twilight area of commerce where the distinction between interstate and intrastate activities often be-

comes blurred. But this is a far cry from the majority's position that the mere citing of the *Sullivan* decision manifested an intent to include under Section 3(b) "all" local manufacturers irrespective of whether they or other parties received the out-of-state fur which was to become a component part of the finished product.

Moreover, in a strained effort to push the ambit of the subsection beyond reasonable bounds, the majority seeks to bring within the scope of the provision "the fur merchant [presumably meaning the retailer] or manufacturer who misbrands or falsely advertises fur products made of furs which have been received in interstate commerce by another."

Such a misconception should definitely and can easily be dispelled by presenting the events of 1949, as they relate to the subsection, in chronological sequence and considering them consequently in their proper perspective. Following the April letter of the Commission H.R. 5187 was introduced on June 15, 1949, and passed by the House on July 14, 1949. This bill incorporated *verbatim* subsection (b) as it had appeared in the proposed amendment to H.R. 91 and H.R. 3755; the wording of that subsection is identical with present Section 3(b). The Committee which favorably reported H.R. 5187 (Report No. 919, 81st Cong., 1st Sess.) appended a letter from the Commission dated June 27, 1949, stating in part:

> Section 3(b) of the proposed bill brings within jurisdiction of the statute *the furrier who manufactures his product from furs which he has received in interstate commerce and markets the finished products locally.* Such amendment was suggested in our report on H.R. 3755 and is in our opinion desirable and necessary in placing *local manufacturers on an equal competitive basis with out-of-State concerns.* (Emphasis supplied.)

The difference between the language of the statements in the February and April letters, on the one hand, and the language of the above-quoted excerpt from the June letter, on the other hand, is striking. The February and April pronouncements merely related to local manufacturers whereas the final June response specified the local manufacturers whom the Commission intended as the target of the recommendation, i.e., those who received the out-of-state fur and subsequently marketed locally the finished products made by them. And it was the fur-*receiving* local manufacturer whom the Commission sought to place "on an equal competitive basis with out-of-State concerns."

The omission, in the above-quoted extract from the June letter, of any reference to the *Sullivan* case is also significant. If the citation of the *Sullivan* case in a previous letter is definitive proof of a sig-

nificant purpose, as claimed by the majority, why was this reference omitted? Clearly it would not have been omitted if it were of such importance as is now claimed.

In the June letter the emphasis conspicuously was on the words "received in interstate commerce" which the majority now simply reads out of the statute. As distinguished from Section 3(b), the focal point of the *Sullivan* provision (§ 301(k) of the Food, Drug, and Cosmetic Act of 1938) was an article "*held for sale after shipment* in interstate commerce." Section 3(b), however, concerns a commodity, not alone shipped but both shipped and received in interstate commerce. Thus, the language used in Section 3(b) had the effect of contracting the reach of the *Sullivan* decision which was based on the statutory term "shipment" without reference to the receipt of goods in commerce.

The Commission's proposal as embodied in Section 3(b) was submitted in order to close a loophole through which manufacturers who did not market, in commerce, fur products made of out-of-state fur received by them but who disposed of such products locally could slip away from the jurisdiction of the Commission.

The argument of the majority that its point has been proved by the Commission's citing of the *Sullivan* rather than the *McDermott* case (*McDermott* v. *Wisconsin*, 228 U.S. 115 (1913)) in the first two letters is misleading, for Mr. Justice Black merely discussed the *McDermott* decision in the context of the constitutionality of the Food, Drug and Cosmetic Act. The incidental fact that respondent in the *McDermott* case had received the article in commerce was not the decisive issue since only shipment, not receipt, in commerce was the test under the 1938 Act as well as under the 1906 Act, which was attacked in the *McDermott* case. Nevertheless, the majority concludes that since the Commission did not mention the *McDermott* case but did cite the *Sullivan* decision, there was evidence of the intent "to encompass constitutionally the fur merchant or manufacturer who misbrands or falsely advertises fur products made of furs which have been received in interstate commerce by another." One can only express astonishment at such a strained deduction.

If the majority is correct, any manufacturer who would acquire out-of-state pelts through a chain of preceding purchasers years after the furs had entered the state would come within the purview of the provision. The majority contends that this effect—and I cannot possibly accept such reasoning—flows from the fact that "the subsection not only applies to the 'manufacture for sale' but expressly to the 'sale, advertising, offering for sale, transportation or distribu-

tion' of fur products as well." Does the majority seriously believe that a manufacturer does not intend to sell, does not intend to advertise, does not intend to offer for sale, does not intend to transport or distribute his product?

Be that as it may, it is simple logic that any goods shipped in commerce must likewise be received in commerce unless they are lost or destroyed in transit. It is therefore inconceivable that the words "and received" [in commerce] were added purely as linguistic embellishments of a redundant nature. It follows that neither Congress nor the Commission could have aimed indiscriminately at all consignees without considering whether or not they received the fur in commerce. Thus, the objective of Section 3(b) must have been, and continues to be, to cover exclusively those consignees who not only receive fur in commerce but also use such fur to manufacture products for marketing purposes, receipt alone being insufficient to come within the purview of that subsection.

In a further effort to bolster its contention that the scope of Section 3(b) goes beyond the statutory language and intent, the majority draws for support on a statement made in Report No. 546 of June 11, 1951, 82d Cong., 1st Sess., p. 2, which accompanied H.R. 2321, i.e., the bill finally enacted by the 82d Congress. There it is said:

> It [the bill] further requires that when fur or fur products are advertised *in such commerce, or after having been shipped or received in such commerce*, these vital facts be truthfully stated in the advertising. (Emphasis supplied.)

I fail to see any reasonable relation between the above statement and the instant question of whether only a local manufacturer who made a finished garment from out-of-state fur received by him in commerce is subject to Section 3(b).

Next, the majority seeks to strengthen its view with a statement by a private organization of retailers submitted through Senator Lodge, for the record, to explain a proposed amendment to subsection (e), not subsection (b), of Section 3 dealing with label substitution and relating to S. 508, the companion bill to H.R. 2321. In the course of their presentation, the retailers incidentally mentioned that Section 3(b) conferred jurisdiction over every fur product made of fur shipped and received in commerce and that such product remained subject to all the mandatory requirements of the law regardless of whether or not such garments passed in commerce when sold by a retailer.

The majority has chosen to quote, in addition to the foregoing paraphrased version, the paragraph immediately following the re-

tailers' reference to Section 3(b) thus giving the impression that the latter paragraph would likewise relate to Section 3(b). Read in its proper context, that paragraph unequivocally relates not to subsection (b) but to the amendment to subsection (e) proposed by the retailers.

It is plain that the view expressed by the retailers, a private organization, was nothing more than their interpretation, to which we cannot attach any weight. In any event, the amendment which was adopted pursuant to the request of this trade group was confined to subsection (e).

Moreover, the very same subsection (e), which was the object of the amendment proposed by the retailers, clearly identifies them (certainly for present purposes) as the "person(s) selling, advertising, offering for sale or processing a *fur product** which has been shipped and received in commerce," *not* as persons selling, advertising, offering for sale or processing a fur product *made from fur* which has been shipped and received in commerce. The distinction between the two classes of persons is so obvious and the dissimilarity between the language of subsection (e) and the language of subsection (b) so startling as to lead to the inescapable conclusion that the latter subsection cannot and does not cover retailers. Retailers are covered by other subsections of Section 3.

Not even in the mainstay of the majority's argument, namely the February and April letters, was there the slightest intimation that Congress and the Commission intended to include retailers in the purview of Section 3(b). Throughout the legislative history of that subsection reference was made only to manufacturers.

Finally, in basing the Commission's jurisdiction on Section 3(b) as well as on Section 3(a), the majority relies on the recent decision of the Circuit Court of Appeals for the Ninth Circuit in *Jacques De Gorter and Suze C. De Gorter as individuals and as co-partners, trading as Pelta Furs* v. *Federal Trade Commission*, No. 15, 184 decided April 17, 1957, D. 6297 (hereinafter called the *Pelta* case).

The reason for the majority's leaning on the *Pelta* decision is the Court's unqualified affirmance of the Commission's order, which, without supporting findings to that effect, included as jurisdictional grounds Section 3(b). Yet, the reasons for assuming jurisdiction over *Pelta*, as stated in the Commission's findings, were:

* * * the activities of the respondents in procuring fur products from sources outside the State of California, and thereafter advertising and offering for sale, in newspapers of interstate circulation, and then selling and shipping and de-

* Emphasis supplied.

livering such fur products in commerce clearly bring their business activities within the concept of "commerce" under the Fur Products Labeling Act. (p. 2 of the Findings As to the Facts)

And, though omitting the acts of selling and shipping and delivering fur products *in commerce*, the Commission's opinion confirmed the existence of these jurisdictional grounds as follows:

* * * Since the record clearly discloses that respondents procured fur products outside of California and thereafter advertised them in newspapers with interstate circulation, their business activities clearly come "within the concept of commerce under the Fur Products Labeling Act." We are of the opinion that the Hearing Examiner's conclusion that respondents' business activities come within the ambit of both acts is correct and is substantiated on the record.

Our conclusion that respondents are *engaged in interstate commerce*, both as defined by the Fur Products Labeling Act and by the Federal Trade Commission Act, as indicated above, and our rulings hereinafter on respondents' second plea on appeal and on the appeal of counsel in support of the complaint render it unnecessary specifically to discuss in this opinion respondents' exceptions on appeal as such. (Emphasis supplied; p. 2 of Commission's opinion)

(Respondents' first plea was that they "were not engaged in interstate commerce." Their second plea and the plea of counsel supporting the complaint related to Rule 44 matters).

The determination of the Commission is prominently characterized by the fact that its findings and its opinion, as far as they relate to the issue of jurisdiction, concerned interstate business activities. Thus for the purpose of establishing the Commission's jurisdiction, the practices which the *Pelta* respondents were charged with and found to have engaged in were violations of Section 3(a) and not Section 3(b), and the Court's findings and conclusions did not go beyond that.

The attention of the Court was focused solely on Section 3(a) when it described the object of the Act as making unlawful:

* * * the introduction, or manufacture for introduction, into commerce or the sale, advertising or offering for sale in commerce, or the transportation or the distribution in commerce, of any fur product which is misbranded or deceptively advertised or invoiced. (p. 9 of the Court's decision)

The Court, just like the Commission, did not refer anywhere in the opinion to the provisions of Section 3(b).

Nothing could more effectively reveal the Court's thinking on the question of jurisdiction than the very language of its decision:

The sales to persons residing outside California, the advertising in newspapers of interstate circulation, and the out-of-state origin of approximately one-fourth of the *products* sold, taken together, establish the fact that the petitioners were engaged *in interstate commerce* as that term is defined in the special Act under consideration and in the Federal Trade Commission Act. (Emphasis supplied; p. 16 of the Court's decision)

This determination follows in every respect the Commission's findings quoted above. Neither that determination nor those findings* contain the slightest reference to fur products made from fur shipped and received in commerce.

The legislative history of Section 3(b) which was not called to the attention of the Commission and the Court in the *Pelta* case and, indeed, was not presented to the Commission in the instant case, makes it eminently clear that shipping alone does not satisfy the statutory requirements for the Commission's jurisdiction. The fur must also be received in commerce by the manufacturer—the paramount condition precedent which must exist in order to invoke the application of Section 3(b).

The practice of receiving fur in commerce by local manufacturers who marketed the finished product improperly within their community was the evil at which the Commission sought to strike and was the sole reason for causing the enactment of Section 3(b).

The foregoing review and evaluation of the majority's position leave no alternative but to conclude (1) that Section 3(b) jurisdiction can be established only on a finding (absent in the instant case) that respondent has locally manufactured and distributed fur products made from fur which was received by him in commerce and (2) that violations of Section 3(b) constitute a basis for the Commission's jurisdiction wholly independent of, and entirely apart from the grounds enumerated in Section 3(a). Infractions occur under Section 3(a) in the event of interstate promotion and distribution of fur products by retailers, manufacturers and others; and under Section 3(b) in cases of intrastate advertising and marketing by only local manufacturers who make their products from fur which they receive in interstate commerce.

Chairman Gwynne concurs in this dissent.

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* As well as opinion.