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

No. 10479—F. T. C. Docket 4634

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

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

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

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

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

W. H. BRADY & COMPANY, ET AL. v. FEDERAL TRADE COMMISSION [1]

No. 11226—F. T. C. Docket 5298

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

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

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

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

ORDER

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

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

[1] Not reported in Federal Reporter. For case before the Commission, see 48 F. T. C. 113.

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

PER CURIAM.

FEDERAL TRADE COMMISSION v. RUBEROID CO.[1] RUBEROID CO. v. FEDERAL TRADE COMMISSION

Nos. 448, 504—F. T. C. Docket 5017

(United States Supreme Court. May 26, 1952)

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

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

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

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

CEASE AND DESIST ORDERS—IN GENERAL—COMMISSION DISCRETION

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

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

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

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

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

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[1] Reported in 72 S. Ct. 800, 343 U. S. 470. For case before Commission, *see* 46 F. T. C. 879. For last decision of Court below, herein concerned, see 191 F. (2d) 294, and, in this volume, at p. 1699.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"By selling such products of like **[803]** grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products." [4]

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

[2] 46 F. T. C. 379, 386.
[3] 38 Stat. 730, as amended, 49 Stat. 1526, 15 U. S. C. § 13.
[4] 46 F. T. C. 379, 387.

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

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

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

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

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

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

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to afford an escape clause through which the seller might frustrate the whole purpose of the proceedings and the order by limiting future discrimination to something less than 5 percent.[8]

[804] The roofing material customers of Ruberoid may be classified as wholesalers, retailers, and roofing contractors or applicators.[9] The discriminations found by the Commission were in sales to retailers and applicators. The [475] Commission held that there was insufficient evidence in the record to establish discrimination among wholesalers, as such. Ruberoid contends that the order should have been similarly limited to sales to retailers and applicators. But there was ample evidence that Ruberoid's classification of its customers did not follow real functional differences. Thus some purchasers which Ruberoid designated as "wholesalers" and to which Ruberoid allowed extra discounts in fact competed with other purchasers as applicators. And the Commission found that some purchasers operated as both wholesalers and applicators. So finding, the Commission disregarded these ambiguous labels, which might be used to cloak discriminatory discounts to favored customers, and stated its order in terms of "purchasers who in fact compete." Thus stated, we think the order is understandable, reasonably related to the facts shown by the evidence, and within the broad discretion which the Commission possesses in determining remedies.

Finally, Ruberoid complains that the order enjoins lawful acts by failing to except from its prohibitions differentials which merely make allowances for differences in cost of manufacture, sale or delivery, or which are made in good faith to meet an equally low price of a competitor. Differences in price satisfying either of these tests are permitted by the terms of the act.[10] It is argued that the Commission

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[8] "True, the Commission did not merely prohibit future discounts, rebates, and allowances in the exact mathematical percentages previously utilized by respondent. Had the order done no more than that, respondent could have continued substantially the same unlawful practices despite the order by simply altering the discount percentages and the quantities of salt to which the percentages applied." *Federal Trade Comm'n* v. *Morton Salt Co.*, 334 U. S. 37, 52–53 [44 F. T. C. 1499; 4 S. & D. 716] (1948). The discussion following these words in the *Morton Salt* case, of certain aspects of the order in question there, manifestly affords no support to Ruberoid's contention here. *Id.*, at 53–54.

[9] Ruberoid suggests a fourth category of purchasers—manufacturers—and contends that the order is too broad in that it prohibits discrimination in sales to that group, e. g., in sales of shingles to competing manufacturers of prefabricated houses. We need not consider whether such an order would be too broad because we do not think the order here applies to such sales. By its terms, the order covers only sales to those competitively engaged "in the resale or distribution of such products [i. e., 'asbestos or asphalt roofing materials']," and not sales to those who use roofing materials in the fabrication of wholly new and different products.

[10] "[N]othing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. * * * 49 Stat. 1526, 15 U. S. C. § 13 (a). "[N]othing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor. * * *" 49 Stat. 1526, 15 U. S. C. § 13 (b), *Standard Oil Co.* v. *Federal Trade Comm'n*, 340 U. S.

has radically broadened its prohibitory [476] powers through failure to include these provisos in the order. We do not think so because we think the provisos are necessarily implicit in every order issued under the authority of the act, just as if the order set them out *in extenso*. Although previous Commission orders have included these provisos, they gained no force by that inclusion. Their absence cannot preclude the seller from differentiating in price in a new competitive situation involving different circumstances where it can justify the discrimination in accordance with the statutory provisos. Nor is the seller required to seek modification [805] of the order each time, for example, that a competitor's price reduction requires it either to lower its price in good faith to meet the lower competing price or to lose a fleeting sales opportunity. On the other hand, the implied inclusion of the provisos in the order does not shift from the seller the burden of proof of justification.[11] Neither does recognition of the implicit availability of these defenses allow the seller to relitigate issues already settled by prior proceedings before the Commission which resulted in an order that was affirmed in the courts. If questions of justification, claimed upon the basis of facts relating to costs or meeting competition, have once been finally decided against the seller, it cannot again interpose the same defense upon substantially similar facts when the Commission seeks to show that its order has been violated.[12] [477] The same result follows where the evidence supporting the defense, although not produced in the previous proceedings, was then available to the seller. In short, the seller, in contesting enforcement or contempt proceedings, may plead only those facts constituting statutory justification which it has not had a previous opportunity to present.

The sole question presented by the Commission's petition concerns the lower court's holding, with one dissent, that the Commission could not "obtain a decree directing enforcement of an order issued under the Clayton Act in the absence of showing that a violation of the order has occurred or is imminent." [13] The pertinent parts of the Act provide:

"If such person [subject to the order] fails or neglects to obey such

231 [47 F. T. C. 1766] (1951). Ruberoid does not complain of the omission from the order of the statutory provisos relating to the seller's right to select its own customers and to price changes in response to changing conditions affecting the market for, or the marketability of, the goods concerned. Hence we do not deal with those defenses here.

[11] Cf. *Federal Trade Comm'n* v. *Morton Salt Co.*, 334 U. S. 37, 44–45 [44 F. T. C. 1499; 4 S. & D. 716] (1948) (cost justification); *Federal Trade Comm'n* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746 [40 F. T. C. 906; 4 S. & D. 346] (1945) (meeting-competition justification).

[12] Where the Commission seeks both affirmance and enforcement of its order in one proceeding, contending that the seller has continued in its unlawful practices since the order was issued, the court, in deciding whether the order should be affirmed, will of course review the determination of the Commission in the ordinary manner. But questions thus settled will not be open in deciding whether the order has been violated and should therefore be enforced.

[13] 191 F. (2d) 294, 295.

order of the commission * * * while the same is in effect, the commission * * * may apply to the circuit court of appeals of the United States * * * for the enforcement of its order. * * * [T]he court * * * shall have power to make and enter * * * a decree affirming, modifying, or setting aside the order of the commission. * * *

"Any party required by such order of the commission * * * to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission * * * be set aside. * * * [T]he court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission * * * as in the case of an application [478] by the commission * * * for the enforcement of its order. * * *

"The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission * * * shall be exclusive." [14]

The Commission argues, first, that the provision authorizing it to apply for enforcement "if such person fails or neglects to obey such order" is merely "a Congressional directive to the Commission as to the circumstances under which it may go into court to seek enforcement," which does not amount to a prerequisite [806] to the court's granting of enforcement.[15] We cannot subscribe to this argument, which disregards the unequivocal language of the statute and its consistent interpretation over the 38 year period of its existence.[16] Congress, in 1938, amended similar language in the Federal Trade Commission Act, so that the reviewing court is now plainly required, upon affirmance, to enforce an order based upon violation of that act.[17] The Commission has [479] repeatedly sought similar amendment of the Clayton Act provisions involved in this case.[18] We will not now achieve the same

[14] 38 Stat. 735, as amended, 15 U. S. C. § 21.

[15] Brief for the Federal Trade Commission in No. 448, p. 16.

[16] E. g., *Federal Trade Comm'n* v. *Whitney & Co.*, 192 F. (2d) 746 [48 F. T. C. 1723] (C. A. 9th Cir. 1951); *Federal Trade Comm'n* v. *Standard Brands, Inc.*, 189 F. (2d) 510 [47 F. T. C. 1831] (C. A. 2d Cir. 1951); *Federal Trade Comm'n* v. *Herzog*, 150 F. (2d) 450 [41 F. T. C. 426; 4 S. & D. 399] (C. A. 2d Cir. 1945); *Federal Trade Comm'n* v. *Baltimore Paint & Color Works*, 41 F. (2d) 474 [14 F. T. C. 675; 2 S. & D. 75] (C. A. 4th Cir. 1930); *Federal Trade Comm'n* v. *Balme*, 23 F. (2d) 615 [11 F. T. C. 717; 1 S. & D. 666] (C. A. 2d Cir. 1928); *Federal Trade Comm'n* v. *Standard Education Society*, 14 F. (2d) 947 [10 F. T. C. 751; 1 S. & D. 567] (C. A. 7th Cir. 1926). The last three cases cited arose under the Federal Trade Commission Act, but since the Clayton Act provisions involved here are identical with the corresponding provisions of the Federal Trade Commission Act prior to 1938, 38 Stat. 720, the decisions make no distinction between them.

[17] "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." 52 Stat. 113, 15 U. S. C. § 45 (c). Unless the party subject to an order issued under the provisions of the Federal Trade Commission Act files a petition for review within 60 days, the order becomes final and its violation punishable. 52 Stat. 113–114, 15 U. S. C. § 45 (g) and (1).

[18] E. g., F. T C. Ann. Rep. 7–8 (1951); F. T. C. Ann. Rep. 12 (1948); F. T. C. Ann. Rep. 13 (1947); F. T. C. Ann. Rep. 12 (1946).

result by reinterpretation in the face of Congress' failure to pass the bills thus brought before it.[19] Effective enforcement of the Clayton Act by the Commission may be handicapped by the present provisions, but that is a question of policy for Congress.

Alternatively, the Commission argues that, even though disobedience of the order is a condition to enforcement upon the application of the Commission, there is no such condition where the order comes before the court upon petition for review by the affected party. This argument begins with the difference in language between the statutory paragraphs providing for review at the instance of the respective parties, but consideration of the section as a whole convinces us that the most that can be said for the argument is that the section is ambiguous. We think the statutory prerequisite to enforcement applies when the Commission seeks enforcement by cross-petition after review has been set in motion by the party subject to the order as well as when the Commission makes the original application.[20] There is no reason why one who has complied with the order, but who seeks to have it reviewed and modified or set aside, should be placed in a worse position than one who does not exercise that right. We doubt that Congress intended its requirement for enforcement to depend entirely upon which party goes to court first.

Affirmed.

MR. JUSTICE BLACK concurs in the judgment and opinion of the Court, except that he thinks the Commission's order should expressly except from its prohibitions differentials which merely make allowances for differences in the cost of manufacture, sale, or delivery, or which are made in good faith to meet an equally low price of a competitor.

[807] MR. JUSTICE FRANKFURTER, not having heard the argument, owing to illness, took no part in the disposition of this case.

MR. JUSTICE DOUGLAS dissents from the denial of enforcement of the order.

MR. JUSTICE JACKSON, dissenting in No. 504.

The Federal Trade Commission, in July of 1943, instituted before itself a proceeding against petitioner on a charge of discriminating in price between customers in violation of subsection (a) of section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936, U. S. C. Title 15, sec. 13 (a).

Several violations were proved and admitted to have occurred in 1941. No serious opposition was offered to an order to cease and

[19] E. g., H. R. 10176, 75th Cong., 3d Sess.; H. R. 3402, 81st Cong., 1st Sess.

[20] Accord, e. g., *Federal Trade Comm'n* v. *Fairyfoot Products Co.*, 94 F. (2d) 844 [26 F. T. C. 1507; 2 S. & D. 444] (C. A. 7th Cir. 1938); *Butterick Co.* v. *Federal Trade Comm'n*, 4 F. (2d) 910 [8 F. T. C. 602; 1 S. & D. 378] (C. A. 2d Cir. 1925); *L. B. Silver Co.* v. *Federal Trade Comm'n*, 292 Fed. 752 [6 F. T. C. 608; 1 S. & D. 327] (C. A. 6th Cir. 1923).

desist from such discriminations, but petitioner did object to being ordered to cease types of violations it never had begun and asked that any order include a clause to the effect that it did not forbid the price differentials between customers which are expressly allowed by statute.

[481] However, the Commission refused to include such a provision as "unnecessary to assure respondent [petitioner here] its full legal rights." It also rejected the specific and limited order recommended by its Examiner and substituted a sweeping general order to "cease and desist from discriminating in price: By selling such products of like grade and quality to any purchasers who in fact compete with the favored purchaser in the resale or distribution of such products." It wrote no opinion and gave only the most cryptic reasons in its findings.[21]

On proceedings for review, petitioner attacked this order for its indeterminateness and its prohibition of differentials allowed by statute. The Court of Appeals, however, affirmed, saying:

"We sympathize with the petitioner's position and can realize the difficulties of conducting business under such general prohibitions. Nevertheless we are convinced that the cause of the trouble is the Act itself, which is vague and general in its wording and which cannot be translated with assurance into any detailed set of guiding yardsticks." [22]

This appraisal of the result of almost 10 years of litigation exposes a grave deficiency either in the Act itself or in the administrative process by which it has been applied. Admitting that the statute is "vague and general in its wording," it does not follow that a cease and desist order implementing it should be. I think such an outcome of administrative proceedings is not acceptable. We would rectify and advance the administrative process, [482] which has become an indispensable adjunct to modern government, by returning this case to the Commission to perform its most useful function in administering an admittedly complicated act.

If the Court of Appeals were correct, it would mean that the intercession of the administrative process between the Congress and the Court does nothing either to define petitioner's duty and liabilities or to impose sanctions. Congress might as well have declared, in these comprehensive terms, a duty not to discriminate and provided for prosecution of violations in the courts. That, of course, would impose on the courts the task of determining the meaning and application of the law to the facts. But that is just the task that this order

[21] A comprehensive study has pointed out the early failure of this Commission (and it applies as well to others) to clarify and develop the law and thereby avoid litigation by careful published opinions. Henderson, The Federal Trade Commission 334.

[22] *Ruberoid Co. v. Federal Trade Commission,* 189 F. (2d) 893, 894 [47 F. T. C. 1838].

imposes upon the courts in event of a contempt proceeding. The courts have derived no more detailed "guiding yardsticks" from the Commission than from Congress. On the contrary, the ultimate enforcement is further confused by the administrative proceeding, because it winds [808] up with an order which literally forbids what the Act expressly allows and thus adds to the difficulty of eventual sanctions should they become necessary.

If the unsound result here were an isolated example of malaise in the administrative scheme, its tolerance by the Court would be less troubling, though no less wrong. But I think its decision may encourage a deterioration of the administrative process of which this case is symptomatic and which invites invasion of the independent agency administrative field by executive agencies. Other symptoms, betokening the same basic confusion, are the numerous occasions when administrative findings are inadequate for purposes of review and recent instances in which part of the government appears before us fighting another part—usually a wholly executive-controlled agency attacking one of the independent administrative agencies—the Departments of Agriculture (*Secretary of* [483] *Agriculture* v. *United States*, 344 U. S. 298) and Justice (*United States* v. *Interstate Commerce Commission*, 337 U. S. 426) against the Interstate Commerce Commission, the Department of Justice against the Maritime Commission (*Far East Conference* v. *United States*, 342 U. S. 570), the Secretary of the Interior against the Federal Power Commission (*United States ex rel. Chapman* v. *Federal Power Commission*, 345 U. S. 153). Abstract propositions may not solve concrete cases, but, when basic confusion is responsible for a particular result, resort to the fundamental principles which determine the position of the administrative process in our system may help to illuminate the shortcomings of that result.

I. The Act, Like Many Regulatory Measures, Sketches a General Outline Which Contemplates Its Completion and Clarification by the Administrative Process Before Court Review or Enforcement.

This section of the act admittedly is complicated and vague in itself and even more so in its context. Indeed, the Court of Appeals seems to have thought it almost beyond understanding. By the act, nothing is commanded to be done or omitted unconditionally, and no conduct or omission is *per se* punishable. The commercial discriminations which it forbids are those only which meet three statutory conditions and survive the test of five statutory provisos. To determine which of its overlapping and conflicting policies shall govern a particular case involves inquiry into grades and qualities of goods, discrimina-

tions and their economic effects on interstate commerce, competition between customers, the economic effect of price differentials to lessen competition or tend to create a monopoly, allowance for differences in cost of [484] manufacturing, sale or delivery and good faith in meeting of the price, services or facilities of competitors.

This act exemplifies the complexity of the modern lawmaking task and a common technique for regulatory legislation. It is typical of instances where the Congress cannot itself make every choice between possible lines of policy. It must legislate in generalities and delegate the final detailed choices to some authority with considerable latitude to conform its orders to administrative as well as legislative policies.

The large importance that policy and expertise were expected to play in reducing this act to "guiding yardsticks" is evidenced by the fact that authority to enforce the section is not confided to a single body for all industries but is dispersed among four administrative agencies which deal with special types of commerce besides the Federal Trade Commission.[23]

[809] A seller may violate this section of the act without guilty knowledge or intent and may unwittingly subject himself to a cease and desist order. But neither violation of the act or the order will call for criminal sanctions; neither is even enforceable on behalf of the United States by injunction until after an administrative proceeding has resulted in a cease and desist order and it has been reviewed and affirmed, if review be sought, by the Court of Appeals. Only an enforcement order issued from the court carries public sanctions,[24] and its violation is punishable as a contempt. [485]

Thus Congress, in this act, has refrained from imposition of an unconditional duty directly enforceable by the government through civil or criminal proceedings in court, as it has in the Sherman Antitrust Act and the Wilson Tariff Act of 1894.[25] It has carefully kept such cases as this out of the courts and has shielded a violator from any penalty until the administrative tribunal hands down a definitive order. The difference is accented by another section of the Robinson-Patman Act which does make participation by any person in specified transactions which discriminate "to his knowledge" a criminal violation judicially punishable.[26]

It may help clarify the proper administrative function in such cases to think of the legislation as unfinished law which the administra-

[23] 15 U. S. C. § 21 vests enforcement in the Interstate Commerce Commission where applicable to certain regulated common carriers; in the Federal Communications Commission as to wire and radio communications; Civil Aeronautics Board as to air carriers; Federal Reserve Board as to banks, etc., and Federal Trade Commission as to all other types of commerce.

[24] 15 U. S. C. § 21.

[25] 15 U. S. C. §§ 1–4, 8, 9.

[26] 15 U. S. C. § 13 (a). [13a]

tive body must complete before it is ready for application.[27] In a very real sense the legislation [809] does not bring to a close the making of the law. The Congress is not able or willing to finish the task of prescribing a positive and precise legal right or duty by eliminating all further choice between policies, expediences or conflicting guides, and so leaves the rounding out of its command to another, smaller and specialized agency.

It is characteristic of such legislation that it does not undertake to declare an end result in particular cases but rather undertakes to control the processes in the administrator's mind by which he shall reach results. Because Congress cannot predetermine the weight and effect of the presence or absence of all of the competing considerations or conditions which should influence decisions regulating modern business decisions, it attempts no more than to indicate generally the outside limits of the ultimate result and to set out matters about which the administrator must think when he is determining what within those confines the compulsion in a particular case is to be.

Such legislation does not confer on any of the parties in interest the right to a particular result, nor even to what we might think ought to be the correct one, but it gives them the right to a process for determining these rights and duties. *Montana-Dakota Utilities Co.* v. *Northwestern* [810] *Public Service Co.*, 341 U. S. 246, 251; *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194, 195.

Such legislation represents inchoate law in the sense that it does not lay down rules which call for immediate compliance on pain of punishment by judicial process. The intervention of another authority must mature and perfect an effective rule of conduct before one is subject to coercion. The statute, in order to rule any individual case, requires an additional exercise of discretion and that [48[illegible]] last touch of selection which neither the primary legislator nor the reviewing court can supply. The only reason for the intervention of an administrative body is to exercise a grant of unexpended legislative

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[27] For emphasis and appreciation of this concept of American administrative law and of the function of the administrative tribunal as we have evolved it, I am indebted to an unpublished treatise by Dr. Robert F. Weissenstein, whose Viennese and European background, education, and practice gave him a perspective attained with difficulty by us who are so accustomed to our own process.

Lord Chancellor Herschell has employed a different but effective figure. "The truth is," said he, "the legislation is a skeleton piece of legislation left to be filled up in all its substantial and material particulars by the action of rules to be made by the Board of Trade. * * * it was the intention of the Legislature having expressed the general object, and having provided the necessary penalty, to leave the subordinate legislation, so to speak, to be carried out by the Board of Trade." *Institute of Patent Agents* v. *Lockwood*, 1894 A. C. 347, 356–357.

For an excellent study of English "Delegated Legislation Today" see Willis, Parliamentary Powers of English Government Departments, c. II, p. 47. For the extent to which this system has been used in England, see Lord Macmillan, Local Government Law and Administration in England and Wales, Vol. I, Preface.

power to weigh what the legislature wants weighed, to reduce conflicting abstract policies to a concrete net remainder of duty or right. Then, and then only, do we have a completed expression of the legislative will, in an administrative order which we may call a sort of secondary legislation, ready to be enforced by the courts.

II. The Constitutional Independence of the Administrative Tribunal Presupposes That it Will Perform the Function of Completing Unfinished Law.

The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart. They also have begun to have important consequences on personal right. Cf. *United States* v. *Spector*, 343 U. S. 169. They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.

Courts have differed in assigning a place to these seemingly necessary bodies in our constitutional system. Administrative agencies have been called quasi-legislative, quasi-excutive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying "quasi" is implicit with confession that all recognized classifications have broken [488] down, and "quasi" is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.

The perfect example is the Federal Trade Commission itself. By the doctrine that it exercises legislative discretions as to policy in completing and perfecting the legislative process, it has escaped executive domination on the one hand and been exempted in large measure from judicial review on the other. If all it has to do is to order the literal statute faithful executed, it would exercise a function confided exclusively to the President and would be subject to his control. Cf. *Myers* v. *United States*, 272 U. S. 52; U. S. Const., Art. II, §§ 1, 3. This Court saved it from executive domination only by recourse to the doctrine that "In administering the provisions of the statute in respect of 'unfair methods of competition'—that is to say in filling in and administering the details embodied by that general standard—the commission acts in part quasi-legislatively and in part quasi-judicially." *Humphrey's Executor* v. *United States*, 295 U. S. 602, 628.

When Congress enacts a statute that is complete in policy aspects and ready to be executed as law, Congress has recognized that enforcement is only an executive function and has yielded that duty to wholly

executive agencies, even though determination of fact questions was necessary.[28] Examples of the creation of such rights [489] and obligations are patent, revenue and customs [811] laws. Only where the law is not yet clear of policy elements and therefore not ready for mere executive enforcement is it withdrawn from the executive department and confined to independent tribunals. If the tribunal to which such discretion is delegated does nothing but promulgate as its own decision the generalities of its statutory charter, the rationale for placing it beyond executive control is gone.

[490] III. The Quasi-Legislative Function of Filling in Blank Spaces in Regulatory Legislation and Reconciling Conflicting Policy Standards Must Neither Be Passed On to the Courts Nor Assumed by Them.

That the work of a Commission in translating an abstract statute into a concrete cease and desist order in large measure escapes judicial review because of its legislative character is an axiom of administrative law, as the Court's decision herein shows. In delegating the function of filling out the legislative will in particular cases, Congress must not leave the statute too empty of meaning. Courts look to its standards to see whether the Commission's result is within the prescribed terms of reference, whether the secondary legislation properly derives from the primary legislation.

Then, too, we look to administrative findings, not to reconsider

[28] The legislative history of the Fair Labor Standards Act, 29 U. S. C. § 201 *et seq.*, exemplifies the choice which Congress must make between itself completing the legislation, and delegating the completion to an administrative agency. H. R. Rep. No. 2738, 75th Cong., 3d Sess., sets forth a summary of both the House Bill and the Senate Bill. The Senate Bill provided for the creation of a Labor Standards Board composed of five members, which was empowered to declare from time to time, for such occupations as are brought within the bill, minimum wages "which shall be as nearly adequate as economically feasible without curtailing opportunity for employment, to maintain a minimum standard of living necessary for health, efficiency, and general well being * * *" but not in excess of 40 cents per hour. *Id.*, at 15. Similar provisions empowered the Board to determine maximum hours, provided that in no case should the maximum be set at less than 40 hours. *Id.*, at 16. Likewise, the Board was empowered to require the elimination of substandard labor conditions. *Id.*, at 17.

The House Bill, on the other hand, itself laid down the minimum wage and maximum hour requirements, *id.*, 22–23, and gave to the Secretary of Labor discretion only to determine which industries were within the terms of the law, plus the power to investigate compliance with the law. *Id.*, at 23. The Act as ultimately adopted followed the House Bill; although there was created the office of Administrator of the Wage and Hour Division in the Department of Labor, the Administrator was given discretion only in minor matters relating to the applicability of the congressional standards. 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*

The Administration favored the plan of delegating legislative discretion to an independent administrative body to apply general standards to concrete cases. See testimony of Secretary of Labor Frances Perkins, Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st Sess. 178. However, the attempt of Congress itself to complete this complex law for enforcement by the Executive, through the courts, not only flooded the courts with litigations, but the courts' interpretation of the Act contrary to the policy which Congress thought it had indicated had disastrous consequences. 61 Stat. 84, 29 U. S. C. § 251 *et seq.*

their justification, but to learn whether the parties have had the process of determination to which the statute has entitled them and that the Commission has thought about—or at least has written about—all factors which Congress directed it to consider in translating unfinished legislation into a "detailed set of guiding yardsticks" that becomes law of the case for parties and courts.[29]

However, a determination by an independent agency, with "quasi-legislative" discretion in its armory, has a [491] much larger immunity from judicial review than does a determination by a purely executive agency. The court, in review of a case under the [812] tax law or the patent law, where the legislative function has been exhausted and policy considerations are settled in the Acts themselves, follows the same mental operation as the executive officer. On the facts, there results an obligation to pay tax, or there is a right to a patent. The court can deduce these legal rights or obligations from the statute in the same manner as the executive officer. Hence, review of such executive decisions proceeds with no more deference to the administrative judgment than to a decision of a lower court.

Very different, however, is the review of the "quasi-legislative" decision. There the right or liability of the parties is not determined by mere aplication of statute to the facts. The right or obligation results not merely from the abstract expression of the will of Congress in the statute, but from the Commission's completion and concretization of that will in its order. Cf. *Montana-Dakota Co.* v. *Northwestern Public Service Co.*, *supra*, 251; *Phelps Dodge Corp.* v. *Labor Board*, *supra*.

On review, the Court does not decide whether *the* correct determination has been reached. So far as the Court is concerned, a wide range of results may be equally correct. In review of such a decision, the Court does not at all follow the same mental processes as the Commission did in making it, for the judicial function excludes (in theory, at least) the policymaking or legislative element, which rightfully influences the Commission's judgment but over which judicial power does not extend. Since it is difficult for a court to determine from the record where quasi-legislative policymaking has stopped and quasi-judicial application of policy has begun, the entire process escapes very penetrating scrutiny. Cf. [492] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591.

Courts are no better equipped to handle policy questions and no more empowered to exercise legislative discretion on contempt pro-

[29] If the independent agencies could realize how much trustworthiness judges give to workmanlike findings and opinions and how their causes are prejudiced on review by slipshod, imprecise findings and failure to elucidate by opinion the process by which ultimate determinations have been reached, their work and their score on review would doubtless improve. See Henderson, The Federal Trade Commission, c. VI, p. 327.

ceedings than on review proceedings. It is plain that, if the scheme of regulating complicated enterprises through unfinished legislation is to be just and effective, we must insist that the legislative function be performed and exhausted by the administrative body before the case is passed on to the courts.

IV. This Proceeding Should Be Remanded For a More Definitive and Circumscribed Order.

Returning to this case, I cannot find that 10 years of litigation have served any useful purpose whatever. No doubt it is administratively convenient to blanket an industry under a comprehensive prohibition in bulk—an undiscriminating prohibition of discrimination. But this not only fails to give the precision and concreteness of legal duties to the abstract policies of the act, but it really promulgates an inaccurate partial paraphrase of its indeterminate generalities. Instead of completing the legislation by an order which will clarify the petitioner's duty, it confounds confusion by literally ordering it to cease what the statute permits it to do.

This Court and the court below defer solution of the problems inherent in such an order, on the theory that if petitioner offends again there may be an enforcement order, and if it then offends again there may be a contempt proceeding and that will be time enough for the court to decide what the order against the background of the act really means. While I think this less than justice, I am not greatly concerned about what the Court's decision does to this individual petitioner, for whom I foresee no danger more serious than endless litigation. [493] But I am concerned about what it does to administrative law.

[813] To leave definition of the duties created by an order to a contempt proceeding is for the courts to end where they should begin. Injunctions are issued to be obeyed, even when justification to issue them may be debatable. *United States* v. *United Mine Workers*, 330 U. S. 258, 289 *et seq.*, 307. But in this case issues that seem far from frivolous as to what is forbidden are reserved for determination when punishment for disobedience is sought. The Court holds that some modifications are "implicit" in this order. Why should they not be made explicit? Why approve an order whose literal terms we know go beyond the authorization, on the theory that its excesses may be retracted if ever it needs enforcement? Why invite judicial indulgence toward violation by failure to be specific, positive and concrete?

It does not impress me as lawyerly practice to leave to a contempt proceeding the clarification of the riciprocal effects of this Act and order, and determination of the effect of statutory provisos which are then to be read into the order. The courts cannot and should not as-

sume that function. It is, by our own doctrine, a legislative or "quasi-legislative" function, and the courts cannot take over the discretionary functions of the Commission which should enter into its determinations. Plainly this order is not in shape to enforce and does not become so by the Court's affirmance.

This proceeding should be remanded to the Commission with directions to make its order specific and concrete, to specify the types of discount which are forbidden and reserve to petitioner the rights which the statute allows it, unless they are deemed lost, forfeited or impaired by the violations, in which case any limitation should be set forth. The Commission should, in short, in the light of its own policy and the record, translate [494] this Act into a "set of guiding yardsticks," admittedly now lacking. If that cannot be done, there should be no judicial approval for an order to cease and desist from we don't know what.

If that were done, I should be inclined to accept the Government's argument that, along with affirmance, enforcement may be ordered. I see no real sense, when the case is already before the Court and is approved, in requiring one more violation before its obedience will be made mandatory on pain of contempt. But, as this order stands, I am not surprised that enforcement should be left to some later generation of judges.

C. HOWARD HUNT PEN CO. *v.* FEDERAL TRADE COMMISSION [1]

No. 10479—F. T. C. Docket 4918

(Court of Appeals, Third Circuit. May 27, 1952)

APPELLATE PROCEDURE AND PROCEEDINGS—FINDINGS OF COMMISSION—WHETHER SUPPORTED BY SUBSTANTIAL EVIDENCE

[274] On petition to review an order of the Federal Trade Commission, the only question for review by the appellate court is whether on the record as a whole there is substantial evidence in support of the finding of the Commission.

METHODS, ACTS AND PRACTICES—MISREPRESENTATION—COMPOSITION OR MANUFACTURE OF PRODUCT

Evidence justified finding of the Federal Trade Commission that petitioner continued to represent that its pen points were 14 karat gold plated when in fact they were covered with such a minute quantity of gold alloy as not to constitute 14 karat gold plate as that term is understood by the purchasing public.

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[1] Reported in 197 F. (2d) 273. For case before Commission, see 47 F. T. C. 1171.

APPELLATE PROCEDURE AND PROCEEDINGS—FINDINGS OF COMMISSION—IF SUPPORTED BY SUBSTANTIAL EVIDENCE—COURT LIMITATION

On petition to review an order of the Federal Trade Commission, the function of the appellate court is not to retry the case and it has no right to substitute a different view from that of the Commission so long as it determines that its findings have substantial support in the whole record.

CEASE AND DESIST ORDERS—SCOPE AND EXTENT—WHETHER TOO BROAD—IF PRIOR STIPULATION

An order of the Federal Trade Commission prohibiting a resumption of petitioner's former practice of falsely representing that its pen points were made of 14 karat gold was not too broadly worded nor improper because the petitioner had stipulated with the Commission prior to the issuance of the complaint agreeing to desist from representing that its pen points were of solid gold.

EVIDENCE—SECONDARY MEANING—ESTABLISHMENT OF—AS DEFENSE TO ALLEGED DECEPTIVE PRIMARY DESIGNATION

On petition to review an order of the Federal Trade Commission ordering petitioner to desist from representing that its fountain pen points were "iridium tipped" a high degree of proof was essential in establishing before the Commission defense of secondary meaning that pen points so tipped were of unusual hardness, and petitioner could not prevail if its evidence was of a quality short of establishing two meanings with equal titles to legitimacy by force of common acceptation.

EVIDENCE—SECONDARY MEANING—ESTABLISHMENT OF—AS DEFENSE TO ALLEGED DECEPTIVE PRIMARY DESIGNATION—"IRIDIUM TIPPED" PEN POINTS

On review of an order of the Federal Trade Commission ordering the petitioner to desist from representing that its fountain pen points were "iridium tipped" petitioner failed to establish the defense of secondary meaning that the quoted words by common acceptation had acquired a secondary meaning that pen points so tipped were of unusual hardness and wearing quality.

CEASE AND DESIST ORDERS—MISREPRESENTATION—COMPOSITION OR MANUFACTURE OF PRODUCT—"IRIDIUM TIPPED" PEN POINTS

On petition to review an order of the Federal Trade Commission ordering petitioner to desist from falsely stating that its fountain pen points were "iridium tipped" where the word "iridium" had attained a primary meaning of an unusually hard element of the platinum family, the use of such word, absent a secondary meaning, was inherently false and misleading to the public and it was immaterial that the tipping material used on the petitioner's pen points might be as serviceable or almost as serviceable as iridium.

METHODS, ACTS AND PRACTICES—MISREPRESENTATION—TRADE OR PRODUCT NAMES—PUBLIC CHOICE AND CONSUMER PREJUDICE

The consumer is prejudiced by the inherently false and misleading use of the designation of a manufacturer's product if upon giving an order for one thing he is supplied with something else and in such matters the public is

entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance.

AIDING AND ABETTING UNFAIR OR UNLAWFUL ACT OR PRACTICE—IN GENERAL

One placing in hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of the act.

CEASE AND DESIST ORDERS—MISREPRESENTATION—SOURCE OR ORIGIN OF PRODUCT—MAKER—"WALTHAM" FOUNTAIN PENS

[275] On order of the Federal Trade Commission ordering petitioner to desist from using the word "Waltham" in connection with its fountain pens was not improper as against petitioner's claim that it had discontinued the practice and had no intention of resuming it where at the same time petitioner insisted it had the right to do so.

(The syllabus, with substituted captions, is taken from 197 F. (2d) 273.)

On petition to review order of Commission, order affirmed.

Mr. Harvey Lechner, *Philadelphia, Pa.* (*Synnestvedt & Lechner*, Philadelphia, Pa., *Mr. Alfred C. Aurich*, Philadelphia, Pa., on the brief), for petitioner.

Mr. J. B. Truly, Washington, D. C. (*Mr. W. T. Kelley*, General Counsel, *Mr. James W. Cassedy*, Assistant General Counsel, Washington, D. C., on the brief), for Federal Trade Commission.

Before BIGGS, *Chief Judge*, and MCLAUGHLIN and HASTIE, *Circuit Judges.*

MCLAUGHLIN, *Circuit Judge:*

Petitioner, a pen point manufacturer, seeks to set aside an order of the Federal Trade Commission of March 29, 1951, which ordered it forthwith to cease and desist from:

"(1) Representing, through the use on fountain pen points of the term '14 Kt. Gold Plated' or '14 K. Gold Plate,' or any other term or mark, that such points are coated or covered with an alloy of substantial thickness and not less than 14/24ths by weight of gold, when such is not the fact; or misrepresenting in any manner the quantity or quality of the gold coating or covering on any fountain pen points.

"(2) Representing in any manner, directly or by implication, that fountain pen points are made of an alloy of gold when such points are in fact made of other materials and are merely coated or covered with an alloy of gold.

"(3) Using the word 'Iridium' or the words 'Iridium Tipped,' or any simulation thereof, either alone or in conjunction with other words, to designate, describe or refer to any fountain pen points which are not in fact tipped with the element iridium.

"(4) Using the word 'Waltham' as an imprint on or in connection with the sale of any fountain pen points; or otherwise representing that any of the respondent's fountain pen points are the products of the Waltham Watch Manufacturing Co. of Waltham, Massachusetts."

For many years the petitioner, a New Jersey corporation, has been making inexpensive fountain pen points at its Camden, N. J., plant and is one of the largest of such manufacturers. Its products are made of stainless steel which are then electroplated with a coating of gold alloy. Concededly these have been and are sold and shipped by it to manufacturers and assemblers of fountain pens all over the United States and in export trade.

SECTION 1

Petitioner has no objection to the form of section 1 of the above order but asserts there is no basis for the section because, according to it, for some four years prior to the filing of the complaint in February, 1943, it has only done that which is plainly permissible under the section. The Commission rejected petitioner's assertion and found that petitioner "has continued to represent that its pen points are 14 karat gold plated when in fact they are coated with such a thin covering of such a minute quantity of gold alloy as to not constitute 14 karat gold plate as that term is understood by the purchasing public". The foundation of this statement and of section 1 of the order is that the representation "14 Kt. Gold Plated" or "14 K. Gold Plate" means that as said in section 1, "* * * such points are coated or covered with an alloy of substantial thickness and not less than 14/24ths by weight of gold,". That is a single complete representation. For a pen point to be properly designated as "14 K. [276] Gold Plate" it must be covered with not less than 14 karat gold alloy of substantial thickness. If either the requisite fineness or thickness is missing it is not entitled to such description. Nor would it be, of course, though not vital in the present circumstances if both fineness and thickness were absent. The only question for our review of section 1 is whether on the record as a whole there is substantial evidence in support of the finding of that section.

The findings of the Commission are set out below which deal generally with the necessity of a substantial thickness of gold plating of a fineness of not less than 14 karat on fountain pen points so marked.[2]

[2] Fourteen karat is a standard of fineness representing that an object so marked consists of an alloy which contains 14/24ths pure gold by weight. Gold plating of 14 karat fineness is the lowest karat fineness of gold which will successfully resist the corrosive effects of ink. A substantial thickness of gold plating of a fineness not less than 14 karat is necessary to protect fountain pen points from such corrosion. One of the purposes of gold plating fountain pen points is to protect them from such corrosion. Fountain pen points which are covered with a substantial thickness of gold plating of a fineness of not less than 14 karat have great appeal to the consuming public because of the appearance, intrinsic value and known resistance to corrosion of the gold.

As to certain of petitioner's pen points it was found that they had stamped on them representations as to their composition and quality. Among and typical of the representations were and are the following: "14 Kt. Gold Plated" and "14 K. Gold Playte". The Commission then found:

"The use by respondent of the inscriptions '14 Kt. Gold Plated' and '14 K. Gold Plate' and others of similar import and meaning not set out herein, has the tendency and capacity to deceive and mislead the purchasing public into the belief that said fountain pen points so marked are plated with a substantial amount of 14 karat gold alloy of substantial thickness. In truth and in fact, respondent's fountain pen points so marked are not plated with a substantial amount of gold alloy and the plating on the said points is not of a substantial thickness. Its said points so marked are coated with a gold alloy of a thickness of less than seven millionths (.000007) of an inch. Certain of said points manufactured by respondent prior to 1938 were tested by the National Bureau of Standards and were found to be coated with a gold alloy of a thickness of from approximately 3.6 millionths (.0000036) to less than two millionths (.000002) of an inch, which gold alloy had a value of approximately five cents per gross of pen points. The coating of gold alloy on the pen points so tested consisted of such a minute quantity that its actual karat fineness could not be determined. There is no evidence that respondent's methods of gold plating their pen points have varied from the time of manufacture of the pen points so tested."

It is true that the pen points of petitioner marked "14 Kt. Gold Plated" or "14 K. Gold Plate" which were examined by the Bureau of Standards were from the period prior to 1939. Apparently they were manufactured in 1937. The testimony of the president of petitioner shows that it had continued with at least one of its objectionable imprints to sometime in September 1938. That type of imprint not only specified the fineness of the gold alloy used in covering the pen point but by its legend that the point was "Gold Plate" or "Gold Plated" it affirmatively indicated that the gold alloy covering because of the amount of the gold alloy present on the pen point was entitled to be labeled "Gold Plate" or "Gold Plated". Petitioner's claim that at least since April 1939 (when its consultant, Davidoff, hereinafter mentioned, began his association with the firm) it has "* * * consistently stamped the term '14 Kt. Gold Plated' or '14 K. Gold Plate' only on pen points which are covered with an alloy of 'substantial thickness and not less than 14/24th by weight of gold' * * *" implies a willingness to concede that prior to April 1939 [277] its pen points so marked were not plated with a substantial thickness of not less than 14 karat gold alloy. As to those pen points tested by the Bureau of

Standards there is substantial evidence in the record that they had thin coatings of gold running from 1.4 to 3.6 millionths of an inch. They did not have even sufficient gold coating from which their karat fineness could be determined by the usual tests.

It is not seriously disputed that the representations "14 Kt. Gold Plated" or "14 K. Gold Plate" mean to the purchasing public that pen points so marked are covered with a substantial thickness of gold alloy of not less than 14 karat fineness. One Government expert testified to a trade practice standard that the gold must be from a minimum of seven millionths of an inch thick before they can call it gold electroplate. The question of what would constitute a substantial thickness of gold alloy in gold plating is not before this court for the reason that the petitioner contends that the testimony of its witness, Davidoff, a consulting chemical engineer, shows that since April 1939 the thickness of its pen point coating has been from substantially six to seven millionths of an inch. Thus instead of affirmatively attacking a standard of substantial thickness, petitioner asserts that it has met that standard consistently since 1939.

Davidoff, testifying on April 11, 1949, said that he had been engaged as a consultant for chemical and metallurgical processes for approximately 12 years. He said that he had been employed as a consultant by petitioner for approximately 10 years; that he had spent quite a bit of time in the plant; spent many days there training the plating foreman and had standardized methods of plating. He stated that he still goes up to the plant quite often and does a considerable volume of laboratory work on petitioner's problems relating to the plating field and corrosion. He said that the six to seven millionths of an inch gold plating on the pen points amounted to a tenth of a cent of gold per nib and 15 cents worth on each gross of nibs. He said that this standard had been in effect prior to his association with the Hunt company and that "* * * we have maintained it since that time." There is no credible proof in the case on behalf of petitioner or otherwise that petitioner had changed from its objectionable method of using a thin gold coat during the period from September 1938 to April 1939 when Davidoff came in as consultant. The Commission could hardly be expected to accept Davidoff's statement as to what went on prior to his association with the company. Regarding the actual presence of from six to seven millionths of an inch of gold on petitioner's pen points, Davidoff does not establish this by any accurate scientific test such as those used by the Bureau of Standards when it had examined petitioner's pen points and had found them insubstantially coated. He readily disposes of the whole problem by saying that it is a question of mathematics. "We have the area and the weight of gold, and the density of gold, and there is just a simple relationship

which relates to all of those factors." Davidoff was petitioner's sole witness as to it increasing the quantity of gold in its plating operation. His mathematical calculation was based on the assumption that 15 cents worth of gold on each gross of nibs would be spread equally over all of the nibs. In fact the record shows that where pen points are electroplated in the manner used by petitioner, with about 10,000 pen points plated simultaneously, the thickness of gold varies from place to place on a given pen point and also varies from pen point to pen point. What makes Davidoff's mathematical calculation additionally suspect is the testimony of petitioner's president that the actual value of gold on a standard size gross of nibs is around 12 cents. Even if that amount of gold could be spread equally over a gross of nibs, it could never result in a substantial thickness of seven millionths of an inch.

The president of petitioner was shown two separate Commission exhibits consisting of six pen points each. The first group was stamped "Duripoint 14 Kt. Gold Plate" and the second six were stamped "Warranted Durium Tipped 14 Kt. Gold Plate." The pens in both these exhibits were in[278]substantially gold coated. The witness stated that as to the first group, "* * * this particular imprint according to our records was discontinued in September 1938." He said regarding the second exhibit, "The marking reading 'Warranted Durium Tipped' etc., was discontinued in 1938." It is the fact that nowhere did the witness testify that the manufacturer of such points with their objectionably thin gold coating was itself so discontinued.

From all of the foregoing, we think there was substantial evidence on the record as a whole to justify the Commission's finding that petitioner has continued to represent that its pen points are 14 karat gold plated when in fact they are covered with such a minute quantity of gold alloy as not to constitute 14 karat gold plate as that term is understood by the purchasing public. *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474. Our job is not to retry this case. We have no right to substitute a different view from that of the Commission so long as we have determined that its findings have substantial support in the whole record. See the Federal Trade Commission Act, 15 U. S. C. section 45 (c), which, in providing for judicial review of a cease and desist order of the Commission, directs that "The findings of the Commission as to the facts, if supported by evidence, shall be conclusive."

As we have seen there is strong evidence that the gold alloy in the examined pen points was not of the thickness which would warrant the use of the term "Gold Plate". This of itself justifies section 1 of the order. While there may be some inference that the asserted fine-

ness of the alloy was also lacking, that point is not essential to the upholding of section 1 and need not be discussed further. The action of the Commission as set out in section 1 of the order is appropriate under the existent circumstances. We do not reach the question whether the Commission would have abused its discretion in entering this section of the order had the petitioner in fact, as alleged, discontinued the unlawful practice 4 years before the filing of the complaint.

SECTION 2

The factual basis for this section of the order is transparently clear from the Commission's findings of facts. There it said:

"PARAGRAPH FIVE: In the course and conduct of the aforesaid business for several years prior to 1939, respondent stamped on certain of its pen points the inscription '14 K' or '14 Kt' in large type and underneath stamped the inscription 'Gold Plate' or 'Gold Plated' in type so small as to be inconspicuous and almost illegible. On certain of these pen points the inscriptions 'Gold Plate' or 'Gold Plated' were stamped so far down the shank of the pen point as to be hidden from view when the point was properly fixed in the barrel of the fountain pen. *The use by respondent of such inscriptions in this manner has had the tendency and capacity to deceive and mislead the purchasing public into the belief that said fountain pen points so marked were made of an alloy of gold. In truth and in fact such pen points were made of other materials coated with an alloy of gold.*

"On July 31, 1939, respondent entered into an agreement with the Commission to cease and desist from continuing to mark its fountain pen points in any manner having the capacity or tendency to cause the belief that the pen points are of 14 karat solid gold when such is not the fact. Since that agreement, on all pen points manufactured by respondent marked with the inscription '14 K Gold Plate' or '14 Kt Gold Plated,' the said numerals and letters thereon have been of the same size, and the words 'Gold Plate' or 'Gold Plated' have been placed sufficiently far from the base of the pen point so as to always be clearly visible when the point so marked was assembled in the completed fountain pen.

* * * * * * *

"PARAGRAPH SEVEN: * * *

"By placing in the hands of manufacturers and assemblers of fountain pens its fountain pen points stamped [279] and inscribed as aforesaid, respondent has furnished said manufacturers and assemblers with the means of deceiving the public into the belief that certain of the said fountain pen points were made of genuine 14 karat gold, * * *." (Emphasis supplied.)

The petitioner contended before the Commission that, inasmuch as

it entered into a stipulation with the Commission prior to the issuance of the complaint in this matter wherein it agreed to cease and desist from representing that its pen points are of solid gold, and inasmuch as it has complied with that agreement, no order to cease and desist should be entered by the Commission as to such representation. In answer to that, the Commission explained the legal basis for section 2: "The Commission has found that respondent has continued to represent that its pen points are 14 karat gold plated when in fact they are coated with such a thin covering of such a minute quantity of gold alloy as to not constitute 14 karat gold plate as that term is understood by the purchasing public. In the view of the Commission the respondent's false representation that its pen points are plated with 14 karat gold and its prior false representation that the pen points are made of 14 karat gold are so similar as to create a doubt as to whether the respondent may not in the future resume the practice of falsely representing that its pen points are made of 14 karat gold. The Commission therefore finds that an order requiring respondent to cease and desist from falsely representing that its pen points are made of an alloy of gold is in the interest of the public."

In this court petitioner has adopted a construction of section 2 of the order which totally ignores its factual and legal basis as above detailed by the Commission. We think the Commission was entirely reasonable in its finding that an order framed in the language of section 2 is in the interest of the public. Petitioner's arguments studiously avoid any quarrel with the order to the extent that it prohibits the resumption of petitioner's former practice of falsely representing that its pen points are made of 14 karat gold.

Petitioner's major premise, from which flows all of its objections to this section of the order, is that section 2 deals with unmarked pen points, petitioner having decided that section 1 deals with pen points which are marked. Typical of the arguments which are raised against this section, which are entirely without substance, is the one that the section would be violated if petitioner made and marketed an unmarked pen point made of stainless steel or other base metal which is coated or covered with gold "because such an unmarked article would superficially look like gold and therefore petitioner might be regarded as implying, from the very color of the finished product, that it was made of gold alloy." That there is no merit to this contention is fully demonstrated by the Commission's express finding that "The evidence of record is not sufficient to sustain the allegations of the complaint * * * that the public * * * is likely to be misled or deceived, by the golden color of respondent's pen points, into falsely believing that such points are either made of gold alloy or are gold plated." Again petitioner says that the word "merely" is most in-

definite and that it may have reference to a "* * * coating of gold so thin that a pen point is not corrosion resistant." It is plain that section 2 is not concerned at all with the thickness of the coating of gold alloy on petitioner's pen points. Section 1 of the order governs that subject. Section 2 prohibits the resumption of petitioner's former practice of falsely representing that its pen points are made of 14 karat gold, and that alone. The section is not too broadly worded for its purpose and we do not think it fairly susceptible of petitioner's attempted construction of it.

SECTION 3

The complaint alleged that petitioner's use of the word "Iridium tipped" stamped on certain of its pen points constitutes a representation that said pen points are tipped with a comparatively rare and expensive element known as iridium and that none of petitioner's pen points are actually [280] so tipped. The answer admitted that petitioner had used and was continuing to use the words "Iridium tipped" on its pen points, although in fact its points were not tipped with iridium. Its sole defense, affirmatively stated, was that the words "Iridium" or "Iridium tipped" when used in connection with pen points "* * * have acquired, by common acceptation for many decades, a secondary meaning, to wit, that the pen points are tipped with metal of unusual hardness and wearing quality."

A high degree of proof was essential in establishing the defense of secondary meaning before the Commission. The very wording of petitioner's answer recognizes that, in the words of Mr. Justice Cardozo, it had to show that "* * * by common acceptation the description, once misused, has acquired a secondary meaning as firmly anchored as the first one." *Federal Trade Commission* v. *Algoma Co.*, 291 U. S. 67, 80 [18 F. T. C. 669; 2 S. & D. 247]. It could not prevail if its evidence was of a quality "* * * short of establishing two meanings with equal titles to legitimacy by force of common acceptation." Ibid. We think that petitioner failed to establish the fact of secondary meaning under those governing principles. Certainly the Commission was justified (*Universal Camera Corp.* v. *National Labor Relations Board*, supra, p. 490) in finding, as it did, that "* * * this contention is not supported by the record and that respondent's use of these terms to designate and describe its products is erroneous and misleading."

From the very defense of secondary meaning, the Commission was free to recognize that the word "iridium" has a primary meaning, i. e. an unusually hard element of the platinum family.[3] Petitioner's argu-

[3] Iridium is defined in Funk & Wagnalls' New Standard Dictionary (1944) as follows: "A silver-white, hard, brittle metallic element belonging to the platinum group, with the members of which it is found alloyed in nature."

ment before the Commission had no starting point without that concession. Indeed the word speaks for itself. *Perloff* v. *Federal Trade Commission*, 3 Cir., 150 F. (2d) 757, 758 [40 F. T. C. 878; 4 S. & D. 316]. Thus the use of the word "iridium" or its equivalent on petitioner's pen points, absent the secondary meaning contended for it by petitioner, was and is inherently false and misleading to the public and for that reason has the tendency and capacity to mislead the purchasing public into the belief that petitioner's pen points are tipped with iridium, when that is not the fact. It is of no moment, in this proceeding in the public interest, that what the purchaser gets in the tipping material used on petitioner's pen points may be as serviceable as or almost as serviceable as iridium. "The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. * * * In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance." *Federal Trade Commission* v. *Algoma Co.*, supra, page 78. There is prejudice also to other manufacturers of pen points who, as this record shows, purchase the same tipping material as does petitioner but who do not mark their points with the word "iridium."

At most petitioner's testimony with respect to secondary meaning is that in the pen trade, since 1920 or 1921, manufacturers and distributors of pen points have come to understand that points marked "iridium" are not in fact tipped with that element but are tipped with a synthetic alloy containing no iridium.[4] Petitioner uses that alloy in two forms, Alloy #425 which sells for about $85 an ounce and Alloy #514, about $80 an ounce. At the time of the Commission hearing, the testimony was that iridium sold for $165 an ounce.

[281] The president of petitioner admitted that the material used for tipping its pen points is invoiced to it by the seller, American Platinum Works, as "pen tipping material" and not as "iridium". "They invoice it as their number so-and-so, and I have knowledge as to the analysis of the particular alloy invoiced." The manager of the American Platinum Works testified that his company did not call the tipping material "iridium". They refer to it merely as "tipping material". The only time their product was ever called "iridium" was once "* * * by mistake by a typist. She billed it once as 'iridium'." He clearly disposed of any thought that it was a proper practice to call his tipping material "iridium" when, testifying about a competing product, he said: "I know that one of our competitors, he put a small percentage of iridium in it, say, about two per cent—I am not sure myself—just that he could call it 'iridium.' *Now, we didn't*

[4] It is interesting to note that one of petitioner's witnesses, Julius M. Kahn, treasurer and assistant general manager of David Kahn, Inc., understood that a very small percentage of iridium was actually present in the synthetic alloy. His firm is reportedly the largest producer of fountain pens in the world.

want to camouflage anything, we didn't put any in." (Emphasis supplied.)

Petitioner principally relies on the testimony of witnesses who were largely interested in perpetuating the practice of labeling this tipping material "iridium". In addition to its president, executives of at least three of the chief manufacturers of inexpensive pen points testified on its behalf. All of the latter followed the identical practice of marking their pen points "Iridium tipped" though they used the same tipping materials as does the petitioner. It may be that their testimony was sufficient to establish that in the pen trade, among manufacturers and distributors of pen points, the word "iridium" has in fact come to have a secondary meaning. But their knowledge is not to be imputed to the public [5] and we cannot say that as to the public petitioner has proved to the requisite degree of certainty the secondary meaning for which it contended.

SECTION 4

Petitioner's sole objection to this section is that its former practice of manufacturing pen points inscribed with the word "Waltham", was discontinued in 1941, 2 years before the Commission's complaint was filed in this proceeding. Petitioner alleged in its answer to the complaint that it has no intention of resuming that practice but there is no specific testimony to that effect. We see no reason why even if there had been the Commission would have been bound simply by the promise of the petitioner. Particularly is this true where petitioner's claim before the Commission and before this court has been that it was not guilty of any deception in so marking its pen points because it was acting on instructions from its customer. Such a claim is patently without merit and was so for many years before 1941. One who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of the Act. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 1922, 258 U. S. 483, 494 [4 F. T. C. 610; 1 S. & D. 198]. The Federal Trade Commission Act, 15 U. S. C. Section 45 (b), gives the Commission the right to file a complaint whenever any person, etc. "* * * *has been* or is using any unfair method of competition, * * *." (Emphasis supplied.) Petitioner may not be heard to complain of an order restraining it from an unfair method of competition when at the same time petitioner insists it has the right to practice it. *Galter* v. *Federal Trade Commission*, 7 Cir., 186 F. (2d) 810, 813 [47 F. T. C. 1797].

A decree will be entered affirming the order of the Federal Trade Commission and commanding obedience to its terms.

[5] *Masland Duraleather Co.* v. *Federal Trade Commission*, 3 Cir., 34 F. (2d) 733, 737 [13 F. T. C. 567; 1 S. & D. 1155]; *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 2 Cir., 26 F. (2d) 340, 342 [12 F. T. C. 721; 1 S. & D. 682], cert. denied 278 U. S. 623.

HASTIE, *Circuit Judge*, dissenting in part.

In this case judicial approval is being accorded a 1951 order of the Federal Trade Commission—after hearings begun in 1943 and completed in 1949 on a 1943 complaint—which in the main directs the Hunt Pen Co. to cease and desist from manufacturing practices not shown to have been indulged since the 1930's. Apposite, there- [282] fore, is the recent remonstrance of a member of the Commission that the agency had "tackled * * * [a] problem at the tomb, instead of the womb". See *Grocery Distributors Association*, 1948, 44 F. T. C. 1200, 1217. Similar concern about untimeliness negativing public interest underlies my unwillingness to lend judicial sanction to three of the four provisions of the Commission's present order which to me seem merely obituary denunciations rather than curative interventions. But since this conception of what is funereal and futile must also embrace the dissenting postscript in which it is expressed, my views will be stated in very brief summary.

The first paragraph of the Commission's order directs the manufacturer to cease and desist from representing that its pen points are covered with gold of fourteen carat fineness and substantial thickness. The record contains sworn testimony for the manufacturer that ever since 1939 its pens have been so coated and that its representations of that fact have been accurate and proper. The entire case to the contrary offered by the Government, which bore the burden of proof, was that analysis of some pen points manufactured by the respondent before 1939 and stamped "14KT, gold plate" revealed only an inconsequential and scarcely measurable gold wash or coating. There is no evidence that the Government had examined or tested a single pen point manufactured by the respondent after 1938. In these circumstances, I think there was not substantial evidence on the whole record that the offending practice had been continued beyond 1938. It seems to be conceded that the pre-1939 practices, unless continued thereafter, afford insufficient justification for this paragraph of the Commission's order.

The second paragraph of the order prohibits representations that pen points are 14 carat gold, as distinguished from gold plated base metal. The Government concedes that objectional practice in this regard was discontinued pursuant to stipulation of the manufacturer more than three years before the present complaint was filed. The sole justification for its proscription now is the similarity of this long since discontinued practice to the allegedly more recent practice involved in paragraph one of the order. But it has already been shown that there is no evidence that the misrepresentation charged in paragraph one was continued after 1938.

I agree with the court that the third paragraph of the order should be sustained and enforced.

The fourth paragraph prohibits the use of the word "Waltham" on pen points. It is not disputed that the imprint "Waltham" was placed on certain pen points formerly manufactured by Hunt Pen Co. for and pursuant to the specifications of a particular customer who was marketing fountain pens under that name which he had registered as a trademark. It is to be remembered that Hunt does not manufacture complete pens but rather manufactures pen points for sale to those who assemble and distribute fountain pens under whatever name. There is no indication that the Waltham imprint ever was used except at a particular customer's specification or that it has been used at all since 1941. Indeed, the customer in question long since stipulated with the Commission that it would no longer market under the imprint "Waltham" and there is no suggestion that it or anyone else is likely to do so improperly. There is no indication that Hunt intended or suspected anything deceptive when it complied with the customer's request to mark his pens with the name he had registered. The Commission suggests only one basis for possible apprehension Hunt might at some time wrongfully imprint "Waltham" on pen points. The Commission points out that, although the company says that it does not and will not use this imprint, it at the same time claims that it acted innocently ten years ago when it filled a customer's order for pen points with that imprint. On this basis alone the Commission reasons that if the supplier does not confess turpitude and willful wrong, although it believes, as the evidence indicates, that it was at worst the innocent instrumentality of another's wrong, there is danger that it may do willful wrong in the future. But, *non sequitur*.

[283] I would give the Commission great leeway in deciding when there is danger that a deceptive act may be repeated. But there should be something in the record to show this danger when it is the sole basis of public interest in discontinued practices. When the proscribed practice has been discontinued years before complaint and the Commission's apprehension of renewal seems clearly without foundation, I think a court should not accept the judgment of the Commission or enforce its order. Cf., *Winston Co.* v. *F. T. C.*, 3 Cir. 1925, 3 F. (2d) 961 [8 F. T. C. 625; 1 S. & D. 401] *cert. den.* 269 U. S. 555; *F. T. C.* v. *Civil Service Training Bureau*, 6 Cir. 1935, 79 F. (2d) 113 [21 F. T. C. 1197; 2 S. & D. 306]. But cf., *Educators Ass'n v. F. T. C.*, 2 Cir. 1940, 108 F. (2d) 470, 473 [30 F. T. C. 1614; 3 S. & D. 171] *rehearing den.*, 110 F. (2d) 72 [30 F. T. C. 1658; 3 S. & D. 208] *modified*, 118 F. (2d) 562 [32 F. T. C. 1870; 3 S. & D. 356] *F. T. C.* v. *McLean & Son*, 7 Cir. 1936, 84 F. (2d) 910, 912–13, [22 F. T. C. 1149; 2 S. & D. 347] *cert. den.* 299 U. S. 590. We have such a case here.

RESTRAINING AND INJUNCTIVE ORDERS OF THE COURTS

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

No. 51C 176—F. T. C. Docket 5691

(United States District Court, N. D. Illinois, Sept. 25, 1951)

Order of the District Court of Sept. 25, 1951 granting temporary injunction to restrain defendants from disseminating any advertisement which represents that their drug preparation "Imdrin" is an adequate and effective treatment for arthritis, rheumatism, etc., as below set forth.[1]

Mr. Daniel J. Murphy and *Mr. Joseph Callaway*, both of Washington, D. C., for the Commission.

Mr. Frank E. Gettleman, *Mr. Arthur Gettleman* and *Mr. Edward Broadkey*, Chicago, Ill., for Rhodes Pharmacal Co.

Order for Preliminary Injunction

This cause comes on to be heard upon the verified complaint of the plaintiff, Federal Trade Commission, upon motion of the plaintiff for the issuance of a preliminary injunction against the defendants, Rhodes Pharmacal Co., Inc., a corporation and J. Sanford Rose and Jerome H. Rose, individually and as officers of said corporation, upon the verified answer of all said defendants, upon the affidavits filed in support of the complaint and in support of said answer; and

It appearing to the court that the defendant, Rhodes Pharmacal Co., Inc., is a corporation organized under the laws of the State of Ohio, with its principal place of business located in the Eastern Division of the Northern District of Illinois; that the defendant, J. Sanford Rose, is an individual residing within the Eastern Division of the Northern District of Illinois and is president of the corporate defendant, Rhodes Pharmacal Co., Inc.; that the defendants Jerome H.

[1] The lower court's denial of such an injunction on Feb. 21, 1951, was reversed and remanded by CA–7 on July 5, 1951 (191 F. (2d) 744). See 47 F. T. C. 1806.

Motion for supersedeas and stay of order, as above entered, filed on September 27, was denied October 10. Pursuant to stipulation of counsel for the parties, appeal of defendants-appellants was dismissed without costs by order and decree of October 23, 1951.

For imposition of fine, or plea of nolo contendere, in criminal information suit, on Dec. 11, 1951, see *infra*, at p. 1807.

Rose is an individual residing in New York, N. Y. and is vice president and treasurer of the corporate defendant Rhodes Pharmacal Co., Inc.; that the said Jerome H. Rose has entered his appearance to the complaint of the plaintiff herein by filing a joint answer with the corporate defendant and the other individual defendant J. Sanford Rose; and

It appearing to the court that it has jurisdiction over the parties and the subject matter hereof; and

It appearing to the court that the defendants are engaged in the sale and distribution of a drug product as defined in the Federal Trade Commission Act advertised as "Imdrin" in commerce between and among the various States of the United States and in the District; and

It appearing to the court that said defendants prior to the filing of the complaint herein have disseminated and caused to be disseminated certain advertisements concerning said drug product Imdrin by United States mails and by various means in commerce as "commerce" is defined in the Federal Trade Commission Act for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase in commerce as "commerce" is defined in the Federal Trade Commission Act of said drug product, which advertisements are alleged by the plaintiff to be false in that they represent directly and by implication that said drug product Imdrin is an adequate, effective and reliable treatment for all kinds of arthritis or rheumatism, neuritis, sciatica, gout, neuralgia, fibrositis, or bursitis; that said drug product Imdrin will arrest the progress of, correct the underlying causes of and cure all kinds of arthritis or rheumatism, neuritis sciatica, gout, neuralgia, fibrositis, or bursitis; that said drug product Imdrin is an adequate, effective and reliable treatment for the symptoms and manifestations of all kinds of arthritis or rheumatism, neuritis, sciatica, gout, neuralgia, fibrositis, or bursitis and will afford complete and immediate relief from the aches, pains, and discomforts thereof; that by taking Imdrin those afflicted with the ailments mentioned above will be enabled to resume their normal living and usual occupations and that Imdrin is a remarkable, amazing, sensational, new discovery of scientific research; and

It appearing to the court from the showing made by the plaintiff and the showing made by the defendants that there exists between the parties hereto a controversy, the determination of which will require a full presentation of all the facts with reference thereto, which full presentation is contemplated by the Federal Trade Commission Act to be made to said Commission and not to the court upon application for preliminary injunction; and

It appearing to the court from a full consideration of the pleadings, affidavits filed both for the plaintiff and for the defendants, and argument of counsel presented that there is reasonable cause to

believe that the defendants herein are and were, prior to the filing of the complaint herein, engaged in the dissemination of false advertisements for the said preparation Imdrin in violation of the Federal Trade Commission Act and that plaintiff is entitled to the issuance of a preliminary injunction as prayed for in said complaint.

Therefore, it is ordered, adjudged, and decreed, That the defendant Rhodes Pharmacal Co., Inc., a corporation, its officers, employees, servants, representatives, and assigns and J. Sanford Rose and Jerome H. Rose, individually and as officers of said corporation, and all other persons having notice of this order, be and they hereby are, and each of them hereby is (until the complaint issued by the Federal Trade Commission is dismissed by the Commission, or set aside by the Circuit Court of Appeals or the Supreme Court of the United States on review or the order of the Commission to cease and desist made thereon becomes final within the meaning of sec. 5 of the Federal Trade Commission Act) enjoined and restrained from:

Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing or which is likely to induce directly or indirectly the purchase of said drug preparation advertised and sold as Imdrin, which advertisement represents directly or by implication that said preparation—

(1) Is an adequate, effective, or reliable treatment for any kind of arthritis or rheumatism, neuritis, sciatica, gout, neuralgia, fibrositis, or bursitis;

(2) Will arrest the progress of, correct the underlying causes of, or cure any kind of arthritis or rheumatism, neuritis, sciatica, gout, neuralgia, fibrositis, or bursitis;

(3) Is an adequate, effective, or reliable remedy for the symptoms or manifestations of any kind of arthritis or rheumatism, neuritis, sciatica, gout, neuralgia, fibrositis, or bursitis, or that its effect on the pains and discomforts of these conditions will be greater than such temporary and partial relief as may be afforded in the individual case;

(4) Will enable those persons afflicted with arthritis or rheumatism, neuritis, sciatica, gout, neuralgia, fibrositis, or bursitis to resume their normal living or usual occupation;

(5) Is a remarkable, amazing, or sensational new discovery of scientific research.

It is further ordered, That this order of injunction be issued without bond.

This injunction shall be effective 15 days after date.

PENALTY PROCEEDINGS

United States v. *Rhodes Pharmacal Co.*, United States District Court, Eastern District, Pennsylvania. In a criminal information suit brought under the provisions of section 14 of the Federal Trade Commission Act, defendant following its plea of nolo contendere, was fined $500 on December 11, 1951, for disseminating a false advertisement of its medicinal preparation "Imdrin" in the March 12, 1951, issue of "Drug Topics", with misleading references to a district court decision at Chicago on February 21, 1951,[1] which, in denying Commission's motion for preliminary injunction to restrain false advertising of said preparation, pending the Commission's disposition of its complaint in the matter in Docket 5691, did not pass on the truth or falsity of the challenged advertising.

NOTE: On July 5, 1951, the Court of Appeals for the Seventh Circuit reversed the decision of the District Court (see 191 F. (2d) 744, or *ante*, at p. 1685) and remanded the case to the District Court; said District Court, on September 25, 1951, granted the injunction, to be effective within 15 days, restraining the alleged false advertising until final disposition of the Commission's complaint; the Court of Appeals on October 10, 1951, denied defendant's motion for supersedaes stay of order; the Commission on December 3, 1952, issued its findings and cease and desist order; and the company, on November 25, 1952, filed its petition for review in the Court of Appeals for the Seventh Circuit, where the matter rests as of this writing.

The advertisement in question, a full page one, stated, among other things, under the caption "IMDRIN'S MOMENTOUS COURT VICTORY BENEFITS EVERY DRUGGIST IN AMERICA!", that the denial of the injunction and dismissal of the suit "cleared IMDRIN of 'false and misleading advertising'" (among four other alleged specified results as respects the truth of the challenged advertising), and stated, among other things, under the subcaption "HERE IS WHAT IMDRIN'S COURT VICTORY MEANS TO YOU, MR. DRUGGIST", that "IF IMDRIN had failed in its battle, the precedent would have been established for the Federal Trade Commission to obtain an injunction preventing a drug company or druggist from doing any kind of advertising pending the outcome of its case with the F. T. C."

[1] 47 F. T. C. 1806, not reported in Federal Reporter.

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U. S. v. *Thomas Management Corp., et al.;* United States District Court for the Northern District of Illinois; judgment entered for $11,600 on Feb. 28, 1952.

Respondent corporation and individuals, their representatives, etc., had been ordered as of June 5, 1942, in connection with the offer, sale and distribution of various cosmetic and medicinal preparations for external and internal use in the treatment of conditions of the hair and scalp, to cease and desist from directly or indirectly:

1. Disseminating or causing to be disseminated, by means of the United States mails, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or through inference:

(*a*) That respondents' preparations constitute a cure or remedy for dandruff, or have therapeutic value in the treatment of dandruff, in excess of the removal of dandruff scales; or are an effective treatment for any form of itching scalp in excess of affording temporary relief from the symptom of itching when such itching is not caused by systemic or constitutional conditions.

(*b*) That dandruff is caused by the flask bacilli of Unna and that said preparations will destroy such germs.

(*c*) That said preparations have therapeutic properties which are effective in inducing the growth of hair or in causing new hair to grow.

(*d*) That the use of said preparations will prevent the abnormal loss of hair or induce a normal growth of hair on thin and bald spots.

(*e*) That said preparations will prevent baldness, or are a cure or remedy for baldness, or have any effective therapeutic value in the treatment of baldness.

(*f*) That respondent's preparations "Trichovita" and "Trichotone" supply elements essential to the growth of hair, or have any therapeutic value in stimulating the growth of hair.

(*g*) That said preparations "Trichovita" and "Trichotone" will rejuvenate the formative cells from which hair grows.

2. Disseminating or causing to be disseminated, by any means, any advertisement for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations prohibited in paragraph 1 hereof.

It is further ordered, That the respondents shall, within 60 days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order. (Docket 4422, 34 F. T. C. 1305 at 1323.)

TRADE PRACTICE CONFERENCE SUMMARY [1]

During the period of this volume, July 1, 1951, to June 30, 1952, rules were promulgated for 6 industries, and revised for 5, in keeping with the Commission's efforts to relate trade practice rules to new industry conditions and problems, as follows:

Cosmetic and Toilet Preparations Industry, in which significant provisions of the rules promulgated clarified the requirements of sections 2 (d) and 2 (e) of the Clayton Act with respect to the furnishing of promotional allowances or services by sellers to their customers, along with an explanatory analysis of such sections of the Act and, by way of guidance, a method of complying therewith.

Rayon and Acetate Textile Industry, in which the 1937 rules were revised and extended primarily to do away with the misunderstanding arising through failure to distinguish in nomenclature between regenerated cellulose textile fibers and cellulose acetate textile fibers, and the resulting confusion, and in which, besides covering requirements for the identification of products composed in whole or in part of "rayon" or "acetate", the rules deal with the use of construction and weave terms; the use of the words "silk", "pure dye", "wool", "linen", "flax", "cotton", etc.; use of trade-marks in connection with industry products; requirements for the disclosure of adulterants; and labeling information as to the treatment and care of products; and include an educational program with a view to enabling consumers, widely represented in the proceeding, to enjoy the full benefit and qualities of these products.

Pearl, Cultured Pearl and Imitation Pearl Industry, in which the rules replace and supersede with respect to the products mentioned the provisions in the 1938 Wholesale Jewelry Industry rules, and solved—with the active cooperation of all segments of the industry—an unusually large number of technical problems peculiar to the industry, including definition of the designations "Pearl" and "Cultured Pearl"; misuse of the terms "Pearl", "Cultured Pearl", "Cultivated Pearl", "Seed Pearl", "Oriental Pearl", and the word "oriental";

[1] As pointed out by the Commission in its 1952 Annual Report, the trade practice conferences provide the means (1) for industry members to cooperate with the Commission in establishing for their respective industries trade practice rules interpretative of laws administered by the Commission and (2) for elimination and prevention of unfair trade practices on an industrywide basis; secure voluntary observance of the law by means of industrywide conferences without recourse to formal trial procedure, with resulting substantial economy both to Government and industry; furnish industry with authoritative guidance and a substantial degree of certainty as to what it may do under the laws administered by the Commission; and afford consumers the protection to which they are lawfully entitled.

misuse of the terms "reproduction", "synthetic", "replica", and of the words "real", "genuine", "natural", "wild", and "gem"; and deal with misrepresentations as to the origin of products, and disclosure of foreign origin of imitation pearls; misleading illustrations, fictitious prices, misuse of terms like "Close outs" and use of push money and consignment distribution.

Grocery Industry, with over 600,000 members, including manufacturers, brokers, wholesalers, retailers, and other marketers, in which the rules cover all segments of the industry and constitute a revision and extension of the 1932 rules, and—of particular interest to consumers—include prohibition of deceptive pricing practices, misrepresentation of available supply of products, and use of deceptive and misleading selling methods and schemes; and—of paramount importance to the trade—rules dealing with the provisions of the Robinson-Patman Amendment to the Clayton Act prohibiting unlawful discrimination in price, payment or receipt of unlawful brokerage commissions, and the furnishing of illegal promotional allowances or services.

Floor Machinery Industry, a relatively new and growing industry which had not previously operated under Commission trade practice rules, composed of concerns engaged in the manufacture, sale, or distribution of household, commercial, or industrial power-driven machines for wet or dry cleaning, polishing, resurfacing, or maintenance of floors or floor coverings, or parts, accessories, or attachments for such machines, but not including dry-suction "vacuum cleaners", in which the 28 Group I and 6 Group II rules illustrate the wide range of industry practices treated under the trade practice conference procedure.

Set-up Paper Box Industry, members of which manufacture and sell noncollapsible boxes fabricated from noncorrugated paperboard, in which rules relating to important industry problems cover the practices of substituting lower quality products for those called for in the original order, selling below cost, and price discrimination.

Upholstery and Drapery Fabrics Industry, in which the rules constitute a revision and extension of those promulgated by the Commission in 1932, and are designed to prevent such unfair practices as misrepresentation of industry products, including misbranding and deception as to origin, prohibited discrimination in terms of sale, imitation of trade-marks, and deceptive concealment of the fiber or material content of any product, as well as deceptive nondisclosure of the fact that any product contains used fiber or material.

Gladiolus Bulb Industry, in which the major problems covered in the rules relate to deception as to the true size of bulbs offered for sale, and the related problems of misrepresenting the flowering ability of

immature bulbs; and also include use of deceptive guarantees and deceptive pricing, and outline trade standards of quality.

Narrow Fabrics Industry, producer of nonelastic woven fabrics for many thousands of end uses in such industries as the shoe, clothing, textile, electrical, rubber, and ordnance industries, and in which subjects covered by the rules, among others, are selling below cost, disclosure as to foreign origin of imported narrow fabrics, unlawful coercion or combinations in restraint of trade, and prohibited discrimination in price.

Sun Glass Industry, in which the 1941 rules were revised and extended, and include, among others, provisions inhibiting misuse of the terms "ground", "polished", and "ground and polished", and of the word "Crookes", and use of deceptive representations as to products conforming to a standard or specification.

Public Refrigerated Storage Industry, involving the business of providing refrigerated storage space, and issuance of warehouse receipts for stored products and the supplying of services and facilities incidental to such storage, and in which some of the more important rules include those entitled "Deceptive Issuance of Warehouse Receipts", "Delivering Goods When Negotiable Warehouse Receipt Is Outstanding and Uncancelled", "Commercial Bribery", "Inducing Breach of Contract", and "Prohibited Forms of Trade Restraints".

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