

MISCELLANEOUS PROCEEDINGS

IN THE MATTER OF

THE AMERICAN CRAYON COMPANY

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

Docket 4142. Report and Conclusion, April 29, 1953

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

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

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

Mr. Webster Ballinger, hearing examiner.

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

THE PROCEEDINGS

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

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

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

THE ORDER

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

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

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

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

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

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

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

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

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

REPORT ON THE FACTS

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

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

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

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

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

The items covered in this arrangement are attached.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

as large as that covered by Gateway Paper & Supply Company (R. 162-163, 309).

PAR. 9. Based upon the above-cited evidence, the Commission is of the opinion that the record shows that the Gateway Paper & Supply Co. has shown its willingness, desire and ability to perform the services required by respondent of its competitors, Favor Ruhl Company, Inc., and Fond du Lac School Supply Company, for receiving the ten percent sales service discount as specifically set out in the terms of their agreement, and that by refusing to grant the same discount to the Gateway Paper & Supply Co. under these circumstances, respondent has failed to make that discount available to it upon proportionally equal terms. The fact that Gateway Paper and Supply Co. is not presently furnishing the services to respondent without compensation is not controlling. Nor is the fact that certain purchasers furnish services in excess of those required. Respondent has clearly set out in writing the services required of Favor Ruhl & Company, Inc., and Fond du Lac School Supply Company for said sales service discount. The Gateway Paper & Supply Co. has shown its willingness, desire and ability to perform those services.

Furthermore, based upon the admission of respondent's Director of Sales Promotion and Merchandising, Mr. Waddle, that respondent has not supplied information as to its sales service discount to all of its school supply account purchasers (R. 36), and his further admission that usually arrangements for such discount can only be made for firms whose major business is direct sales to educational institutions (Resp. Ex. 2F), the Commission concludes that respondent as a regular practice does not make its sales service discount available on any basis to certain of its purchasers which to some extent resell its products directly to educational institutions.

ACTS AND PRACTICES RELATING TO PARAGRAPHS 1, 2 AND 3 OF THE ORDER
TO CEASE AND DESIST

PAR. 10. Favor Ruhl & Company, Inc., and Fond du Lac School Supply Company received the ten percent sales service discount on products purchased from respondent which they in fact resold in the regular trade channels (R. 85-87, 127). The evidence indicates, however, that allowing this discount on products so resold was contrary to respondent's policy that it be allowed only on products actually resold to educational institutions (R. 40-42, 46-47, 51-53, Resp. Ex. 2F). Also, it is indicated that the amount of products so resold was not substantial (R. 85-87, 129). Respondent, upon being informed during this investigation of this practice, has taken action to prevent its reoccurrence (R. 251-254).

CONCLUSION

Respondent's practice, as described in Paragraphs 1 through 9 hereinabove, of granting in connection with the interstate sale of crayons, chalk, paint sets and educational supplies a ten percent discount to its "Educational Promotional Distributors" as compensation for services and facilities furnished by said purchasers in connection with the handling for sale, sale and offering for sale of respondent's said products while not making any discount available on proportionally equal terms to other of its customers which are in competition in the resale of said products with said favored customers, constitutes a violation of Paragraphs 4 and 5 and of the last unnumbered prohibition of the order to cease and desist herein.

These acts and practices, concluded to violate said order, have been engaged in by respondent for several years and were still continuing without any indication of being terminated during the course of this investigation. They constitute serious and substantial violations of said order of the Commission.

The Commission further concludes that the acts and practices of respondent as set out hereinabove in Paragraph 10 do not constitute any substantial violation of its order to cease and desist herein.

Mr. Howrey not participating.

TRADE PRACTICE CONFERENCE SUMMARY

During the period covered by this volume, July 1, 1952, through June 30, 1953, five sets of rules, including two revisions, were approved, as was a new "Push Money" rule.¹

NEW AND REVISED RULES

These rules, together with their citations to Title 16—Commercial Practices—in the 1953 Supplement of the Code of Federal Regulations, in which they are set out in full as originally promulgated through the Federal Register, are as follows as identified by the industry involved, to wit:

Hearing Aid Industry, which had suffered from "bait" advertising, false and misleading guarantees, deceptive claims as to visibility of the product when worn, failure to disclose the use of used parts, and deceptive claims as to acceptance or approval by medical authorities, and in the case of which the twenty-three Group I rules and four Group II rules promulgated for the industry constituted a revision and extension of and supplemented those promulgated by the Commission on Dec. 30, 1944 (*16 CFR, 1953 Supp., Sec. 214.0 to Sec. 214.104*);

Cedar Chest Manufacturing Industry, which had suffered from false and misleading guarantees, deceptive substitution of products, commercial bribery, and price discrimination, and in the case of which

¹The nature of the trade practice conference, criteria considered by the Commission in authorizing a conference, rule administration, and various other activities in connection with the Commission's trade practice conference work during the period concerned are set forth in the Commission's 1953 Annual Report in Chapter Six, and copies of the individual sets of trade practice rules as heretofore promulgated by the Commission for different industries may be had on request.

Said chapter (Industry Cooperation, pp. 37-42) describes, in connection with voluntary adherence to law, the trade practice conference, and also the stipulation procedure as carried out through separate stipulation agreements entered into with various separate businesses, e. g., this volume, at p. 1587.

Referring to the trade practice conference in some of its more general aspects, the Annual Report there states:

"Trade practice rules are helpful standards for complying with the laws that bear on them. They provide orderly abandonment of unfair or deceptive practices in an entire industry without giving unfair competitive advantage to any individual member or group. The Commission maintains continuing and cooperative liaison with industry to help it achieve voluntary compliance and prevention of the inception of bad practices. When trade practice rules are published, industry members are informed of the legal requirements applicable to their particular trade or business. Unwitting violations are thus substantially reduced."

the nineteen Group I rules and two Group II rules constituted a revision of those promulgated for that industry on May 12, 1933, and included numerous changes clarifying applicable requirements of laws administered by the Commission (*16 CFR, 1953 Supp., Sec. 217.0 to Sec. 217.102*);

Portrait Photographic Industry, in the case of which the nineteen Group I rules prohibit deception of consumers by such terms as "Oil Painting," "Gold Tone," "Platinum," "Etching," and "Silk" in describing portraits offered for sale, and condemn also deceptive pricing practices and sale of products through the use of lottery or game of chance (*16 CFR, 1953 Supp., Sec. 215.0 to Sec. 215.19*);

Industrial Bag and Cover Industry, in the case of which the sixteen Group I rules deal, among other things, with such practices as misrepresentation and misbranding of products, misrepresentation as to character of business, misrepresenting products as conforming to standards, substitution of products, false and misleading price quotations, defamation of competitors or false disparagement of their products, and commercial bribery (*16 CFR, 1953 Supp., Sec. 213.0 to Sec. 213.103*); and

Millinery Industry, in the case of which the eight Group I rules deal, among other things, with such practices as "deception as to origin of wool felt and fur felt hats and hat bodies (with labeling requirements specified)," "deceptive concealment of fact that hat bodies, hats, or components thereof are not new," "use of fictitious price," and "false invoicing" (*16 CFR, 1953 Supp., Sec. 216.0 to Sec. 216.103*).

NEW STANDARD "PUSH MONEY" RULE FOR INCLUSION IN TRADE PRACTICE RULES

As set forth in a Commission release dated June 23, 1953—

The Federal Trade Commission approved and adopted a standard "push money" rule which will be included in future trade practice rules where the need of any rule of this character is felt. This standard rule was adopted for purposes of clarification and consistency and should provide a clear guide to business concerns using this sales device. The former push money rules which have been incorporated in trade practice rules in the past will be superseded by the new standard rule in the event revisions of such rules are undertaken. As a practical matter, the provisions of the standard rule will be used in connection with the administration of all such rules. The principal difference between the new rule and the old rules is that the element of putative deception of the customer has been eliminated. However, the standard rule makes clear that push money payments can only

be made with the knowledge and consent of the sales person's employer, usually the retail store. The form of the standard rule is as follows:

"Rule—Push Money.

It is an unfair trade practice for any industry member to pay or contract to pay anything of value to a sales person employed by a customer of the industry member, as compensation for, or as an inducement to obtain, special or greater effort or service on the part of the sales person in promoting the resale of products supplied by the industry member to the customer—

(1) When the agreement or understanding under which the payment or payments are made or are to be made is without the knowledge and consent of the sales person's employer; or

(2) When the terms and conditions of the agreement or understanding are such that any benefit to the sales person or customer is dependent on lottery or chance; or

(3) When any provision of the agreement or understanding requires or contemplates practices or a course of conduct unduly and intentionally hampering sales of products of competitors of an industry member; or

(4) When, because of the terms and conditions of the understanding or agreement, including its duration, or the attendant circumstances, the effect may be to substantially lessen competition or tend to create a monopoly; or

(5) When similar payments are not accorded to salespersons of competing customers on proportionally equal terms in compliance with Sec. 2 (d) and (e) of the Clayton Act.

(NOTE.—Payments made by an industry member to a salesperson of a customer under any agreement or understanding that all or any part of such payments is to be transferred by the salesperson to the customer, or is to result in a corresponding decrease in the salesperson's salary, are not to be considered within the purview of this Rule —, but are to be considered as subject to the requirements and provisions of Sec. 2 (a) of the Clayton Act.

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