IN THE MATTER OF

MILWAUKEE ALLIED MILLS, INC., ET AL.

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

Docket 7112. Complaint, Apr. 9, 1958—Decision, Mar. 23, 1959

Order requiring a manufacturer in Milwaukee, Wis., to cease violating the Wool Products Labeling Act by invoicing and labeling as 70 percent woolen and 30 percent non-woolen fibers, woolen waddings or interlining materials which contained substantially less than 70 percent wool, and by failing to label certain wool products as required.

Thomas A. Zebarth, Esq. for the Commission.

Wickham, Borgelt, Skogstad & Powell, by *John J. Ottusch*, Esq., of Milwaukee, Wisc., for respondents.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

On April 9, 1958, the Federal Trade Commission issued its complaint against Milwaukee Allied Mills, Inc., and Mark E. Atwood and William L. Armstrong, individually and as officers of said corporation (hereinafter collectively called respondents), charging them with misbranding and falsely and deceptively invoicing and representing certain wool products in violation of the provisions of the Wool Products Labeling Act of 1939 (hereinafter called the Wool Act), 15 U.S.C. 68, the Rules and Regulations promulgated thereunder, and the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served upon respondents.

The complaint alleges in substance that respondents misbranded certain of their wool products by not labeling them as required under the Wool Act and by falsely and deceptively labeling them with respect to the amount of the constituent fibers contained therein in violation of the Wool Act, and that respondents falsely and deceptively invoiced and represented the woolen content of their products in violation of the Act. Respondents appeared by counsel and filed an answer admitting the corporate, commerce, competition, and representation allegations of the complaint, as well as the misbranding by failure to label, stamp or tag their products as required under §4(a) (2) of the Wool Act, but denying that they falsely or deceptively labeled or tagged such prod-

ucts, or in any other way misrepresented such products, with respect to the amount of the constituent fibers contained therein.

Pursuant to notice, hearings were thereafter held in Milwaukee, Wisconsin, and Washington, D.C., before the undersigned hearing examiner duly designated by the Commission to hear this proceeding. All parties were represented by counsel, participated in the hearings, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons therefor. Both parties waived oral argument, and pursuant to leave granted, thereafter filed proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. All such findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded are herewith specifically rejected.[1]

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. The Business of Respondents

The complaint alleged, respondents admitted, and it is found that Milwaukee Allied Mills, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin. Mark E. Atwood and William L. Armstrong are president and secretary-treasurer, respectively, of said corporation. Said individual respondents cooperate in formulating, directing, and controlling the acts, policies, and practices of said corporation. Respondents have their office and principal place of business at 2322 Clybourn Street, Milwaukee, Wis.

II. Interstate Commerce and Competition

The complaint alleged, respondents admitted, and it is found that, subsequent to the effective date of the Wool Act, they have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, and offered for sale in commerce, as "commerce" is defined in the Act and the Wool Act, wool products, as "wool products" are defined in the Wool Act. Respondents in the course and conduct of their business were and are in substantial competition in com-

[1] 5 U.S.C. 1007(b).

merce with corporations, firms and individuals likewise engaged in the manufacture and sale of woolen waddings or interlining materials.

III. The Unlawful Practices

A. *Misbranding of Wool Products*

1. Stamps, Tags, and Labels Required by the Wool Act

Respondents are engaged in the manufacture and sale of woolen waddings or interlining materials. The complaint alleged, respondents admitted, and it is found that certain of these wool products were misbranded in that they were not stamped, tagged, or labeled as required under the provisions of §4(a)(2) of the Wool Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

2. False and Deceptive Stamping, Tagging or Labeling

The complaint also alleged that respondents misbranded certain of their wool products in violation of §4(a)(1) of the Wool Act by falsely and deceptively labeling or tagging them with respect to the amount of the constituent fibers contained therein. The complaint further alleged that respondents, in violation of §5 of the Act, by means of invoices and oral representations, falsely and deceptively misrepresented the woolen content of their products. These alleged violations of the two Acts are considered together inasmuch as they involve the same facts and evidence with respect to the woolen content of respondents' products.

The complaint alleged and respondents admitted that they labeled and tagged their waddings as containing 70 percent woolen and 30 percent nonwoolen fibers. The complaint also alleged and respondents admitted that they invoiced and orally represented said products as containing 70 percent woolen and 30 percent nonwoolen fibers. Thus the basic issue is whether or not such tags and representations were true.

In the manufacture of their product, respondents purchase from two sources of supply clippings or scraps of cloth in 1,000-pound bales, which are supposed to contain approximately 70 percent wool and 30 percent nonwool. Respondents run this material through a machine known as a rag picker, which reduces it to the original cloth fibers but does not effectively mix or stir the fibers so as to produce an homogenous product containing uniform percentages of wool and nonwool fibers. This shredded material is then placed into another machine called a garnet

which wads it. Facing material is then added. The final product is sold to and used by others as a wadding or interlining material for jackets and similar types of products. The garnet like the rag picker does not mix the fibers so as to produce an homogenous result with uniform percentages of woolen and nonwoolen fiber.

As previously found, respondents, admitted that they labeled such wadding as containing 70 percent wool and 30 percent nonwool, and also invoiced and orally represented such wadding as having such woolen and nonwoolen content. Two samples of respondents' wadding were secured at random from two different customers of respondents. Two tests of each sample were made by a chemist employed by the Commission to ascertain the woolen content thereof. Respondents conceded the expert qualifications of the chemist, who testified that the tests conducted were standard and recognized tests for ascertaining the wool and other fiber content of such materials. The two tests of one sample revealed a woolen content of 34.5 and 34.8 percent, respectively. The two tests of the other sample revealed a woolen content of 32.4 and 31.8 percent, respectively. It is apparent from these tests that the woolen content in each case did not amount even to one-half as much as represented by respondents.

Respondents argue that the tests were inadequate both because of the limited number of samples and the manner in which they were made. Having conceded the expert qualifications of the chemist, and in the light of her testimony with respect to the nature, type and sufficiency of her tests, this contention is without merit. Respondents also rely upon the proviso contained in §4(a)(2)(A) of the Wool Act as a defense to their misbranding and misrepresenting the woolen content of their products. The proviso reads as follows:

> . . . *Provided*, That deviation of the fiber contents of the wool product from percentages stated on the stamp, tag, label, or other means of identification, shall not be misbranding under this section if the person charged with misbranding proves such deviation resulted from unavoidable variations in manufacture and despite the exercise of due care to make accurate the statements on such stamp, tag, label, or other means of identification.

Respondents contend both that they exercised due care and that the deviation resulted from unavoidable variations in manufacture. The record establishes the contrary. As previously found, respondents secured their raw materials from two sources of supply. Respondents requested these suppliers to label such clippings as to woolen content and said suppliers refused to do so.

In addition thereto, one of the suppliers furnished respondents with letters stating that the cuttings contained 70 percent wool and 30 percent nonwool fibers, approximately 5 percent more or less, and also specifically stating that this was not to be construed as a warranty of any kind. Section 9(a) of the Wool Act sets forth the type of guaranty in writing available to respondents as a defense for misbranding. It is apparent that respondents have received no such guaranty from either supplier. In fact, the refusal of such suppliers either to label or warrant the woolen content of their clippings should have warned respondents, in the exercise of due care, that such supplies might well not contain the amount of wool respondents were representing their product to contain.

Even assuming the clippings were originally 70 percent wool, respondents concede that the method of manufacturing used by them might frequently result in substantial batches of wadding containing far less than 70 percent wool, because the machines used do not mix the fibers into an homogenous mass and therefore wadding resulting from a 1,000-pound bale containing 30 percent nonwool might well contain large portions having little or no wool content, and certainly substantially less than 70 percent. Indeed, respondents base their contention that such variations were unavoidable upon this fact. However, they testified that there are machines available which would bring about an adequate mixture resulting in an homogenous product containing the same percentages of wool and nonwool as the raw material. They stated that they did not use this machine because it would have increased their costs of production. Patently this cannot be characterized as an unavoidable variation in manufacture. Further, it demonstrates that respondents not only did not exercise due care in labeling and representing the woolen content of their products, but in fact knew that substantial percentages of their wadding must have contained less than 70 percent wool.

In support of their "due care" defense, respondents also testified that they previously had conducted periodic chemical tests of their own to determine the woolen content of their product. Again for economic reasons, these tests had been discontinued by respondents for almost a year prior to the hearings herein. In addition, their tests when conducted were done so improperly in that they failed to exclude the acetate content of the wadding, thereby substantially increasing the resulting percentage of "wool." Even wih this erroneously enhanced percentage, on oc-

casion their tests resulted in a finding of substantially less than 70 percent wool. Because of the knowledge derived from their own chemical tests as well as the knowledge that their method of manufacture resulted in substantial quantities of wadding containing much less than 70 percent wool, respondents' "due care" defense is without merit.

For the reasons set forth above with respect to due care and unavoidable variations, respondents' reliance upon the *Beacon* decision [2] is misplaced. In that case the Commission found the respondent had met the terms of the proviso to §4(a) (2) (A), hereinabove quoted. The Commission held that:

> . . . It is and for many years has been the respondent's policy to do everything possible and to take every precaution to see that its blankets contain the percentages of wool and other fibers claimed for them, and it appears that, insofar as this result can be obtained, the respondent has been successful in these efforts. It is true that, due to unavoidable variations in the mechanical manufacturing process, and despite the exercise of due care, swatches of some of the respondent's blankets have been found to contain slightly less than the percentages of wool fibers called for by the labels affixed to such blankets, but these variations apparently represent rare and isolated mistakes against which the respondent cannot reasonably be expected to guarantee. . . .

A mere reading of the foregoing quotation demonstrates its inapplicability to the facts herein.

A preponderance of the reliable, probative, and substantial evidence in the entire record convinces the undersigned and accordingly it is found that respondents misbranded certain of their wool products with respect to the amount of the constituent fibers contained therein, in violation of §4(a) (1) of the Wool Act and the Rules and Regulations promulgated thereunder, and falsely and deceptively invoiced and represented their products with respect to woolen content, in violation of §5 of the Act.

B. *The Effect of the Unlawful Practices*

The use by respondents of the false, deceptive and misleading statements and representations in invoices, shipping memoranda, orally or in any other manner, hereinabove found, has had and now has the tendency and capacity to cause manufacturers purchasing respondents' products and relying upon such false statements and representations to misbrand products made from said products of respondents.

---

[2] *Beacon Manufacturing Co.*, 46 F.T.C. 1073 (1949).

CONCLUSIONS OF LAW

1. Respondents are engaged in commerce, and engaged in the above-found acts and practices in the course and conduct of their business in commerce, as "commerce" is defined in the Act and in the Wool Act.

2. The misbranding acts and practices of respondents hereinabove found are in violation of the Wool Act and the Rules and Regulations promulgated thereunder, and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the meaning of the Act.

3. The acts and practices of respondents constituting misrepresentations hereinabove found are all to the prejudice and injury of the public and of respondents' competitors, and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Act.

4. This proceeding is in the public interest and an order to cease and desist the above-found unlawful acts and practices should issue against respondents.

ORDER

It is ordered, That respondents Milwaukee Allied Mills, Inc., a corporation, and its officers, and Mark E. Atwood and William L. Armstrong, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for the introduction into commerce, or offering for sale, sale, transportation, or distribution in commerce, as "commerce" is defined in the Act and the Wool Act, of woolen waddings or interlining materials or other "wool products" as such products are defined in, and subject to, the Wool Act, do forthwith cease and desist from misbranding said products by:

1. Falsely or deceptively stamping, tagging, labeling, or otherwise identifying such products as to the character or amount of the constituent fibers contained therein;

2. Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner:

a. The percentages of the total fiber weight of such wool product exclusive of ornamentation not exceeding 5 percentum of said

total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where the percentage by weight of such fiber is 5 percentum or more, and (5) the aggregate of all other fibers;

b. The maximum percentage of the total weight of such wool product of any nonfibrous loading, filling, or adulterating matter; and

c. The name or registered identification number of the manufacturer of such wool product or of one or more persons engaged in introducing such wool product into commerce or in the offering for sale, sale, transportation, distribution, or delivery for shipment thereof, in commerce, as "commerce" is defined in the Wool Act.

It is further ordered, That Milwaukee Allied Mills, Inc., a corporation, and its officers, and Mark E. Atwood and William L. Armstrong, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of woolen waddings or interlining materials, or any other products or material in commerce, as "commerce" is defined in the Act, do forthwith cease and desist from:

Directly or indirectly misrepresenting the constituent fibers of which their products are composed or the percentages or amounts thereof in sales invoices, shipping memoranda, or in any other manner.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

This matter is before the Commission on appeal of respondents from the initial decision and order of the hearing examiner. The respondents filed an appeal brief and counsel in support of the complaint filed a reply brief. Oral argument was not requested.

The complaint charged the respondents with misbranding and falsely and deceptively invoicing and representing certain wool products in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder and the Federal Trade Commission Act.

The complaint alleged that respondents misbranded certain of their wool products by not labeling them as required by the Wool Act and by falsely and deceptively labeling them with

respect to the constituent fibers contained therein in violation of the Wool Act, and that respondents falsely and deceptively invoiced and represented the woolen content of their products in violation of the Act. Respondents admitted the corporate existence, competition and misrepresentation allegations of the complaint, as well as misbranding by failure to comply with Section 4(a)(2) of the Wool Act, but denied they falsely or deceptively labeled or tagged such products, or in any other way misrepresented such products with respect to the amount of the constituent fibers contained therein.

The respondents raise the following two issues in their appeal brief:

(1) Are the results of the two tests for fiber content performed on small quantities of the respondents' wadding sufficient to support a finding that the wadding did not contain the amounts of wool represented?

(2) Were the deviations in fiber content of the respondents' wadding the result of unavoidable variations in manufacture despite the exercise of due care within the meaning of Sec. 4(2)(A) of the Wool Products Labeling Act of 1939?

I.

The respondents claim there is not substantial evidence to support the order, for only one witness testified that the product did not contain 70% wool. They contend this testimony fails to establish a violation for the following reasons:

a. The amount of material tested is too small;

b. The testing procedure is incorrect;

c. The respondents have affirmatively proven that their wadding did in fact contain 70% wool as represented by them.

The record shows that two different pieces of material were tested. The samples were obtained from two different customers of respondents located in two different cities by two different investigators from different shipments made on different dates. From each of these, the Commission witness stated she cut a piece of material from a corner of each of the samples obtained. Each piece tested was approximately 21 square inches and weighed about 1.25 to 1.35 grams. The respondents contend this must be contrasted with their annual production in excess of 1,000,000 pounds. We agree with Commissioner Davis in his opinion in Docket No. 5506 (Smithline Coats and Smithline Coat Co.) 45 F.T.C. Dec. 79, in which he said:

The enforcement of this Act must necessarily be made on the basis of a sampling of the products of a large number of sellers. If violations are indi-

cated, it would obviously be most impractical and unnecessary to test several thousand or even several hundred of the products of a seller in order to establish a violation of the Act. The Act places the responsibility on the manufacturer and distributor of products subject thereto to label them correctly and in accordance with the terms of said Act. . . .

The respondents claim the testing procedure was incorrect, not because of the type of test performed and not because of the professional competence of the person making the test, but only because the test consisted of a small corner from each exhibit. The respondents' contention is premised on the basis that they are under no duty to produce a homogenous mixture so that the woolen content of the batting will be evenly distributed throughout. We must reject this contention. This is the very situation that the legislation was designed to correct.

Respondents contend they have proved that the wadding contained 70% wool. In support thereof, they point to oral and written representations received from suppliers and to the fact that they made periodic tests using the "standard boil-out method." Contrasted to this is evidence produced by the two tests on each sample which shows a woolen content of 34.5 and 34.8, respectively, on one sample, and 32.4 and 31.8 on the other.

The respondents receive their supplies from two suppliers. While respondents requested their suppliers to properly label their shipments in 1953, one supplier in 1957 stated that to the best of his knowledge the clippings contained 70% wool and 30% man-made fibers, but specifically denied that this was a warranty. The second supplier in 1957 stated that to the best of its knowledge the cuttings contained 70% wool fibers and 30% man-made fibers and there was approximately 5% variation. By such action on the part of their suppliers, respondents were put on notice that the supplies likely did not contain the specified fibers as represented. Yet, they continued to rely absolutely on such representations.

And, in 1957, the respondents, for reasons of economy, stopped making tests. Even when respondents conducted tests, they were such that the acetate content was not excluded, thereby substantially increasing the resulting percentage of "wool." And even then, respondents admitted that their tests sometimes resulted in finding less than 70% wool. Thus, we believe the record amply supports the finding that the percentages of wool were substantially less than claimed.

II.

Respondents, in attempting to prove that the deviation in fiber content was unavoidable and despite the exercise of due care, establish three factors which they state must be considered:

(a) The type of raw materials available;
(b) The processing method and procedures available for the processing of this raw material; and
(c) The type of product manufactured.

The respondents base this defense on Section 4(a)(2)(A) of the Wool Products Labeling Act of 1939 which states as follows:

* * * deviation of the fiber contents of the wool product from percentages stated on the stamp, tag, label, or other means of identification, shall not be misbranding under this section if the person charged with misbranding proves such deviation resulted from unavoidable variations in manufacture and despite the exercise of due care to make accurate the statements on such stamp, tag, label, or other means of identification.

They contend that with the introduction of synthetic fibers, separation of baled clippings become impossible as a practical matter and that a reasonable interpretation should be reliance upon "careful hand sorting by experienced waste material dealers such as those from whom the respondents purchase their clippings." We cannot accept this contention. This would eliminate a class of manufacturer from the provisions of the Act and would deny to the public the type of protection which the law was meant to cover.

The evidence clearly shows that while respondents knew it was possible to achieve a homogenous mixture by special machinery, hand mixing or other means, they failed to do so claiming that the cost would be prohibitive. This is not a valid excuse for violating the law.

The respondents next contend that due care must be determined according to the economic realities of the wool wadding industry and to impose upon respondents additional cost of manufacturing would be to destroy the industry. Thus, the criterion of due care in the wadding industry must be given wide variation.

Woven throughout these three arguments is the thought that the expense and difficulty of correctly stating the content of the material would place an intolerable burden on the respondents. We must reject this contention. The law does not require a particular fiber content or a specific manufacturing process. The law does require that the fiber content be correctly stated on the labels. The law was designed for the protection of the consumer.

Whatever the content, the respondents can conform to the provisions of the Act merely by correctly stating the fiber content on their labels so that no misrepresentations occur.

Respondents' appeal is hereby denied. The findings and order of the hearing examiner are adopted as the findings and order of the Commission. It is directed that an order issued in accordance with this opinion.

FINAL ORDER

The respondents herein having filed an appeal from the hearing examiner's initial decision, and the Commission having considered the matter on the briefs of counsel (oral argument not having been requested), and having rendered its decision denying the appeal and adopting as its own the findings and the order in the initial decision:

It is ordered, That the respondents, Milwaukee Allied Mills, Inc., a corporation, Mark E. Atwood and William L. Armstrong, shall, within sixty (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 the order contained in the aforesaid initial decision.

IN THE MATTER OF

INDEPENDENT SALMON CANNERIES, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(c) OF THE CLAYTON ACT

Docket 7201. Complaint, July 22, 1958—Decision, Mar. 24, 1959

Order requiring Seattle packers of salmon and other sea food products acting also as primary brokers for other packers, to cease violating the brokerage section of the Clayton Act by such practices as granting certain buyers or their agents reductions in price which were offset in whole or in part by a reduction of the field broker's commission, and granting price concessions which reflected brokerage on direct sales.

Mr. Cecil G. Miles for the Commission.

Mr. Josef Diamond, of *Lycette, Diamond & Sylvester*, of Seattle, Wash., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding involves alleged violations of §2(c) of the Clayton Act, as amended (U.S.C., Title 15, §13), it being charged in the complaint, in substance, that respondents have paid, granted or allowed something of value as commission, brokerage, or other compensation, or allowance or discount in lieu thereof, in connection with the sale of their seafood products or those of their packer-principals, to buyers purchasing for their own account for resale, or to agents or intermediaries, acting for or in behalf of, or subject to the direct or indirect control of, said buyers.

The complaint was issued on July 22, 1958, and from the record it appears that respondents were duly served with a copy of said complaint; that they never filed an answer or other pleading and have long been in default of answer or any other appearance, except as to a letter dated October 29, 1958, by counsel above named, asking for an earlier setting or a postponement of the initial hearing herein; that due service was made upon such counsel pursuant to the Commission's Rules of Practice for Adjudicative Proceedings of the order setting this proceeding for November 25, 1958, in Seattle, Washington, for the purpose of hearing the evidence to be presented by counsel supporting the complaint to find whether or not the facts as against said respondents are as alleged in the complaint, to make proper findings on the evidence presented, and to determine the form of order to be issued against said respondents under said

complaint and evidence in the initial decision to be rendered herein as to said respondents.

On November 25, 1958, at the time and place designated therefor, the hearing examiner appeared to conduct such a hearing, counsel supporting the complaint appeared, and counsel for respondents also appeared with a request that the hearing be set over to November 28, 1958, at 10:00 a.m., at the same place, in order for him to obtain instructions from his client, which request was granted. But on that date, just before the hearing, counsel for respondents advised by telephone that he had no further instructions from his clients and to proceed with the hearing. Accordingly the hearing examiner conducted this hearing as scheduled, at which counsel for respondents did not appear; respondents being long in default of answer, and, on motion of counsel supporting the complaint, their default was taken and entered of record by the hearing examiner. Hearing then proceeded upon the presentation made by the attorney for the Commission who requested that findings be made against said respondents in accordance with the allegations of the complaint and that order be issued against said respondents. The proceeding was then taken under advisement.

Upon due consideration of the whole record herein and the hearing examiner being fully advised in the premises, it is found as follows:

1. Respondent Independent Salmon Canneries, Inc., hereinafter sometimes referred to as corporate respondent, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its principal office and place of business located at Pier 66, Seattle Wash. Respondent has been for the past several years and is now engaged in packing, selling, and distributing canned and cured fish, including canned salmon, all of which are hereinafter referred to as seafood products, and is a substantial distributor of said products. Respondent also acts as primary broker for a number of packer-principals, in connection with the sale and distribution of their seafood products.

2. Respondent Bernard D. Oxenberg is an individual and is vice president of the corporate respondent named herein. Individual respondent Oxenberg and the Oxenberg family own a substantial majority of the outstanding capital stock of the corporate respondent. As vice president and substantial owner, as described above, respondent Oxenberg exercises authority