

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS, JULY 1, 1967, TO
DECEMBER 31, 1967

IN THE MATTER OF

CORAN BROS. CORPORATION ET AL.

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

Docket 8697. Complaint, July 20, 1966—Decision, July 11, 1967

Order requiring a Boston, Mass., distributor of commercial solders to cease misrepresenting the nature, quality or composition of any of its solder products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Coran Bros. Corporation, a corporation, and John Coran and Charles Coran, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Coran Bros. Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State (Commonwealth) of Massachusetts, with its principal office and place of business located at 509 East 2nd Street in the city of Boston, State of Massachusetts.

Respondents John Coran and Charles Coran are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of commercial solders including wire solders designated "50/50 by volume" and "40/60 by volume." Said solders are sold to wholesalers and retailers for ultimate resale to the public.

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

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of their commercial wire solders, respondents have engaged in the practice of labeling and describing certain of said solders as "50/50 by volume" and "40/60 by volume."

PAR. 5. By and through the use of the aforesaid manner of labeling and describing said wire solders, the respondents represented:

(1) That their wire solder designated "50/50 by volume" is a 50/50 solder which is known in the trade as a solder containing 50% tin and 50% lead by weight.

(2) That their wire solder designated "40/60 by volume" is a 40/60 solder which is known in the trade as a solder containing 40% tin and 60% lead by weight.

PAR. 6. In truth and in fact:

(1) Their wire solder designated "50/50 by volume" is not a 50/50 solder as known in the trade as it contains less than 50% tin and more than 50% lead by weight.

(2) Their wire solder designated "40/60 by volume" is not a 40/60 solder as known in the trade as it contains less than 40% tin and more than 60% lead by weight.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

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

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had,

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and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

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

Mrs. Rose W. Sloan and Mr. Herbert L. Blume for the Commission.

Mr. Jack H. Backman and Mr. Jerrold C. Katz, Boston, Mass., attorneys for respondents.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

FEBRUARY 27, 1967

In the complaint, which was filed on July 20, 1966, the respondents are charged with the violation of Section 5 of the Federal Trade Commission Act in connection with the manner in which they described and labeled certain wire solders sold by them in commerce. The complaint reads in part:

PARAGRAPH FOUR: In the course and conduct of their business, and for the purpose of inducing the purchase of their commercial wire solders, respondents have engaged in the practice of labeling and describing certain of said solders as "50/50 by volume" and "40/60 by volume."

PARAGRAPH FIVE: By and through the use of the aforesaid manner of labeling and describing said wire solders, the respondents represented:

(1) That their wire solder designated "50/50 by volume" is a 50/50 solder which is known in the trade as a solder containing 50% tin and 50% lead by weight.

(2) That their wire solder designated "40/60 by volume" is a 40/60 solder which is known in the trade as a solder containing 40% tin and 60% lead by weight.

PARAGRAPH SIX: In truth and in fact:

(1) Their wire solder designated "50/50 by volume" is not a 50/50 solder as known in the trade as it contains less than 50% tin and more than 50% lead by weight.

(2) Their wire solder designated "40/60 by volume" is not a 40/60 solder as known in the trade as it contains less than 40% tin and more than 60% lead by weight.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PARAGRAPH SEVEN: In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as that sold by respondents:

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

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

In the answer filed by the respondents, they admit the allegations of Paragraph Four, but deny that the statements and representations are false, misleading and deceptive.

Hearings were held at Boston, Massachusetts, on November 28, 29, and 30, 1966, at which time complaint counsel put in their case and the respondents submitted their defense. Testimony was received from a total of 22 witnesses called by complaint counsel. The defense submitted the testimony of one witness, respondent John Coran, who had testified in connection with the case-in-chief. On January 13, 1967, the parties filed proposed findings, together with briefs in support thereof. Replies thereto were filed by complaint counsel on January 23, 1967, and by respondents on January 25, 1967. The proposed findings and conclusions not hereinafter specifically found or concluded are herewith rejected. The following abbreviations have been used herein: "C." for Commission's Complaint; "A." for Respondents' Answer; "Par." for paragraph; "Tr." for Transcript of Proceedings; and "CX" for Commission's Exhibit. Upon consideration of the entire record herein, the hearing examiner makes the following findings of fact and conclusions:

Respondent Coran Bros. Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with its office, manufacturing plant and principal place of business located on premises owned by it at 509 East 2nd Street, Boston, Massachusetts (C., Par. One; A., Par. 1; Tr. 21). After its organization in December 1947 or January 1948 to the year 1951, it was engaged in the scrap metal business (Tr. 47-8, 403). The corporation is now, and since 1951

has been, engaged in the manufacture, offering for sale, sale, and distribution of commercial solders that are mostly sold to wholesalers and retailers, located in approximately 30 States of the United States, for ultimate sale to the public (C., Par. Two; A., Par. 2; Tr. 36). Its gross sales in the years 1963, 1964, and 1965 were \$506,000, \$743,000, and \$829,000, respectively; for the first ten months of 1966, its gross sales were \$619,000 (Tr. 296-99). In the conduct of its business, the corporation now causes, and for some time last past has caused, its products, when sold, to be shipped from its place of business in Massachusetts to purchasers thereof located in various other States of the United States, and maintains, and at the times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act (C., Par. Three; A., Par. 3; Tr. 36-7).

The respondent John Coran is president and respondent Charles Coran is treasurer of the corporation (brothers) (Tr. 22, 67). Their address is the same as that of the corporate respondent (Tr. 21). They, together with Ruth Coran, the wife of John Coran, constitute the board of directors (Tr. 66). Since its inception, the corporation has been a family business (Tr. 45). John Coran owns 80% and Anne Coran, the wife of Charles Coran, 20%, of the stock of the corporation (Tr. 45). A third brother, Hyman B. Coran, did own 40% of the stock, but this was acquired by John Coran five or six years ago (Tr. 45). Although the respondents in their answer admit the allegation of the complaint that John Coran and Charles Coran "formulate, direct and control the acts and practices of the corporate respondent" (C., Par. One; A., Par. 1), the evidence establishes that Charles Coran functions only as a salesman for the corporation on a salary basis, and has no part in formulating any of the policies of the corporation (Tr. 66-9). John Coran, from the outset of the corporation, has set the policies of the corporation, and the acts and practices that are challenged in this proceeding are the results of a decision reached by him without consulting the other directors or the other stockholder (Tr. 29-30, 37, 40, 43, 45-6, 49-50, 66-7).

The record establishes that it has been industry practice for many years, and is current industry practice, when solders are labeled by numerical designations such as "50/50" and "40/60" that the first number before the slant mark (/) indicates the percentage of tin by weight and the second number after the slant mark (/) indicates the percentage of lead by weight. Further, the record also establishes that it has not been, nor is it

presently, industry practice to use the words "by weight" in connection with the aforesaid numerical designations, but that the use alone of such numerical designations indicates the percentage of tin and lead by weight.

Mr. Robert A. Putney, assistant manager of the metal division of the National Lead Company, having been employed by that company for 36 years (Tr. 136-37) testified:

Q. And as to product designation on the package or any other advertising description, to your knowledge, if you know, how has the product been sold as to product designation? With respect to tin-lead content?

A. Well, 50 per cent tin, 50 per cent lead wire solder would mean an alloy where per hundred pounds, you would use 50 pounds of lead and 50 pounds of tin.

Q. And would this apply to a 40/60 designation as well?

A. Forty pounds of tin and 60 pounds of lead, right.

Q. Based upon your knowledge of 36 years experience in the industry, has the product been sold on that weight basis?

A. Yes, it has (Tr. 140-41).

* * * * *

Q. Now, is it our understanding based on your marketing knowledge that prior to two years ago, approximately, all solders are or were described in the trade purely on a by weight basis as to tin-lead ratio?

A. If they were described as 50/50 or 40/60, the practice in the trade has been for those solders to contain 50 per cent tin, 50 per cent lead in the case of 50/50, and 40 per cent tin, 60 per cent lead in the case of 40/60.

Q. That is by weight, not volume?

A. By weight (Tr. 141-42).

Mr. Alan R. Oatey, vice president of L. R. Oatey Company, Cleveland, Ohio, manufacturers of plumbing, automotive and hardware supplies, as well as solders, testified (Tr. 214):

THE WITNESS: Well, it has been historical in the industry to mark the spools by the 50/50 designation or 40/60. That is considered to be weight. That is accepted by the industry, by the manufacturers, and by the people who consume the product.

* * * * *

THE WITNESS: I do know, and these numbers stand for—the first 50, the first number always stands for tin, and in this case, 50 per cent would be tin. This is important, too, because in the industry, the first number given is always tin. This is how it has been right along.

Respondent John Coran testified (Tr. 410):

Q. Mr. Coran, in connection with your wire roll solder sold in spools, particularly one-pound spools, how do you label the 50/50 solder sold by your company when it is sold by weight?

A. 50 slant 50.

Q. Do the words "by weight" appear?

A. No.

Wire solders labeled and designated "50/50 by volume" and "40/60 by volume" were first placed on the market by the respondent corporation in the year 1963. It pioneered in this type of labeling (Tr. 41-2). Thereafter other manufacturers employed the "by volume" label. John Coran, when asked, "Have other competitors labeled their product by volume?", answered: "I have seen at least one, maybe two. I have heard of several others, but I have never seen their labels" (Tr. 414). The Commission issued a complaint, dated August 2, 1966, against *Thomas F. Lukens Metal Company, et al.*, of Philadelphia, Pennsylvania (Docket No. C-1089), wherein, on the same date, the Commission entered a consent order to cease and desist from the practices challenged as unfair and deceptive [70 F.T.C. 479]. A complaint, dated September 21, 1966, was issued against *Bow Solder Products Co., Inc., et al.*, of Newark, New Jersey (Docket No. 8712), wherein a consent cease and desist order was entered on January 19, 1967 [71 F.T.C. 48]. In each instance, the order recited that it was for settlement purposes only and did not constitute an admission by the respondents that they had violated the law. The charges in both complaints were similar to those in this proceeding. Respondents' counsel brought out on cross-examination of Mr. Putney of National Lead Company that four or five years ago one of the branches of his company had, for a period of about six months, labeled a solder with the number "50," which had only 40% tin by weight. In this connection, Mr. Putney testified (Tr. 155):

Now, when we received the letter from the Federal Trade Commission about four years ago and we reviewed all of the names assigned to the various grades of solder that we make, and when we found this out, we stopped it. Mr. Oatey of L. R. Oatey Company testified on cross-examination that his company did label solders with the numbers "50" and "40," but they contained only 40% and 30% tin by weight, respectively, and the practice was discontinued over four years ago as a result of a letter from the Federal Trade Commission. Mr. Oatey said:

This letter was sent to most all manufacturers pointing out that there was problems in the solder industry and there has been problems for many years and they were being the clearing house for trying to correct this situation. They were asking the manufacturers to discontinue labeling solders by numbers and any other designation that would cause confusion in the type of solder that it was. With this, we discontinued the use of the number 40 and the number 50 (Tr. 232).

When asked, "Are people apt to believe when you label that as a 50 as containing 50 per cent tin?", Mr. Oatey answered: "This is why we discontinued it. Exactly right" (Tr. 231).

A "50/50 by volume" solder has a tin content of 39% by weight (61% lead), and a "40/60 by volume" solder a tin content of approximately 29% by weight (71% lead). This is explained by the fact that tin has a specific gravity of 7.3 and lead 11.4 (Tr. 204). Specific gravity of solids (such as the metals, tin and lead) is defined as the ratio of the weight of any given volume of the substance to the weight of equal volume of water (*Webster's New Collegiate Dictionary*, 1961). Therefore, tin is 7.3 times, and lead 11.4 times, as heavy as water. Thus, it is apparent that the weight of tin in a "50/50 by volume" solder is considerably less than 50%, and the weight of tin in a "40/60 by volume" solder is considerably less than 40%.

The principal solders used in the plumbing trade are solders designated and labeled "95/5," "50/50," and "40/60." Mr. Charles A. Buresh, a plumber, testified that "95/5" containing 95% tin and 5% antimony is used "for high temperature work, heating—copper heating pipes * * * say, running water, say 220, 220 degrees through heating pipes with a lot of expansion and contraction, frequent expansion and contraction" (Tr. 369-370); that the higher the temperature, the more tin you would want in the solder (Tr. 371); and that he uses "50/50" for "General purpose work, which is most work" (Tr. 366). Mr. Robert O. Weider, who is in the plumbing and heating business, testified: "Well, of course, the more tin content there is to the solder, the better the solder or the finer the solder is" (Tr. 317); and that "50/50" suits his general requirements (Tr. 318). Mr. Oatey of National Lead Company testified that "when you reduce the tin content, you are reducing the strength of the joint" (Tr. 242); that "most of them [plumbers] like to use 50/50 because it is recommended by the copper people as being the solder to use. This is the standard of the industry" (Tr. 242); that "Some 40/60 may work" (Tr. 243); that "No, 30/70, you are getting down so low in tin content, that the solder is chalky" (Tr. 243); and that "40/60 is not too bad a solder, but you can tell the difference between 40/60 and 50/50" (Tr. 243).

There were received in evidence nine one-pound spools of wire solder, five labeled "50/50 by volume," and four labeled "40/60 by volume," the products of the corporate respondent, which had been purchased by Attorney Richard J. Walsh of the Commission's Boston office during the month of August, 1966 from four wholesale supply houses located in the States of Connecticut and Rhode

Island (Tr. 97-115; CX 8, 9, 11, 12, 13, 15, 16, 17, 19, 20, 21, 22, 23). The said spools of solder were submitted to the Arnold Greene Testing Laboratories, Inc., of East Natick, Massachusetts, for analysis to determine the tin and lead content (Tr. 106). Copies of the laboratory reports setting forth the results of the tests are in the record. With reference to the five samples labeled "50/50 by volume," the reports show that the percentage of tin content by weight varied from 38.8% to 41.10%. The reports on the four samples labeled "40/60 by volume" show the percentage of tin by weight varied from 29.02% to 29.17%, and the lead content by weight varied from 70.32% to 70.62%. (The percentage of antimony content by weight on the nine samples varied from 0.18% to 0.41%; Tr. 115-136.) The findings show that, within tolerable allowances, the volume of tin and lead in each of the spools is consistent with the labels (Tr. 135-36).

Complaint counsel recognize that the products in question contain the volume of tin and lead represented and are truthfully labeled, but contend that the use of the "by volume" designation by respondents has a capacity and tendency to mislead members of the purchasing public. It is the position of the respondents, in their brief filed with their proposed findings, "that the members of the trade and the general public can distinguish between ounces and pounds, meters and feet, *weight* and *volume*, cubes and squares, grams and ounces, and other universally accepted standards of measurement, where it is relevant to the requirements of their work"; and that, so long as the "by volume" designation is a truthful statement, there can be no deception.

The labeling of a product with a designation which is literally true but nevertheless misleading or confusing is contrary to the elementary legal prohibition against deception.

In *United States v. 95 Barrels of Vinegar, et al.*, 265 U.S. 438 (1924), the Court said (at 443) :

Deception may result from the use of statements not technically false or which may be literally true. * * * It is not difficult to choose statements, designs and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act.

The principles of the above quoted case, which arose under the Food and Drugs Law of 1906, have been extended to matters arising under the Federal Trade Commission Act covering a multitude of products including, by way of illustration and not

limitation, automotive lubricating oil,¹ lumber,² flour,³ and many other products.

In *Bockenstette, et al. v. F.T.C.*, 134 F. 2d 369 (10th Cir. 1943), the Court said (at 371):

Words and sentences may be literally and technically true and yet be framed in such a setting as to mislead or deceive.

See also *Koch, et al. v. F.T.C.*, 206 F. 2d 311 (6th Cir. 1953).

In *Korber Hats, Inc. v. F.T.C.*, 311 F. 2d 358 (1st Cir. 1962), the Court said (at 360-61):

[1] Section 5 of the Act makes unlawful unfair methods of competition and unfair or deceptive acts or practices in commerce. Congress thus gave the Commission a broad mandate to prevent public deception in the give and take of the market place. It is clear that what is an "unfair" method of competition can only be assayed in the environmental and marketing context of the particular practice put in issue. In *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 532, 533, 55 S.Ct. 837, 844, 79 L.Ed. 1570 (1935), the Court said: "What are 'unfair methods of competition' are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest."

[2] The power of the Commission to issue cease and desist orders against mislabelling or false advertising was recognized at an early date. *Federal Trade Comm. v. Winsted Co.*, 258 U.S. 483, 42 S.Ct. 384, 66 L.Ed. 729 (1922). Courts have consistently upheld the Commission's efforts to compel manufacturers and retailers to adhere to a high level of honesty in connection with their labelling and advertising habits, see *Kalwajtys v. Federal Trade Commission*, 237 F. 2d 654, 656, 65 A.L.R.2d 220 (7th Cir., 1956), *cert. denied*, 352 U.S. 1025, 77 S. Ct. 591, 1 L.Ed.2d 597 (1957), and to "insist upon the most literal truthfulness" in marketing their goods. *Moretrench Corporation v. Federal Trade Commission*, 127 F. 2d 792, 795 (2nd Cir., 1942). In this area not only the cynical but the naive are to be protected and if the Commission, in its discretion, "thinks it best to insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein,' it is not for the courts to revise their judgment." *General Motors Corp. v. Federal Trade Commission*, 114 F. 2d 33, 36 (2nd Cir., 1940).

[3] While advertising and labelling are frequently considered together, there is good reason to insist upon a higher degree of veracity in the latter. It may well be argued that consumers accept labelling statements literally while perhaps viewing with a more jaundiced eye the vaunted claims of the advertising media.

The question here is whether there is substantial evidence to support a finding that a consumer in buying the corporate re-

¹ *Royal Oil Corporation, et al. v. F.T.C.*, 262 F. 2d 741 (4th Cir. 1959); *Double Eagle Refining Co., et al., v. F.T.C.*, 265 F. 2d 246 (10th Cir. 1959), *cert. denied*, 361 U.S. 818; *Mohawk Refining Corporation, et al. v. F.T.C.*, 263 F. 2d 818 (3d Cir. 1959).

² *F.T.C. v. Algoma Lumber Co., et al.*, 291 U.S. 67 (1934).

³ *F.T.C. v. Royal Milling Co. et al.*, 288 U.S. 212 (1933).

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respondent's solders labeled "50/50 by volume" or "40/60 by volume" might be misled.

The record contains the testimony of the following five Commission witnesses who were engaged in the wholesale plumbing supply business:

Mr. Irving Rose, who has been in the plumbing supply business for forty years and is president of the Mattapan Supply Company with locations in Boston, Medford, and Mattapan, Massachusetts, with annual sales volumes somewhat in excess of one million dollars (Tr. 72-3), said that he bought solder from Coran only two or three times (Tr. 79). He testified further:

A. Well, we buy 95/5 solder. We buy that by the number. This we know. This is a guaranteed item to us, 95/5. We buy 50/50 or 40/60 as by volume. There is a certain marking on 50/50 that we buy by volume. They will tell us that it will be 43 per cent tin, 42 per cent, it will vary from time to time. We buy 50/50 solder, and if we tell them that we want exact 50/50 solder, they will tell us whether they can give it to us or not.

Q. Have you been familiar with solder which is labeled 50/50 by volume?

A. I would only be guessing if I say it (Tr. 76).

* * * * *

Q. Now, do you recall when you first came across a solder labeled 50-50 by volume?

A. As far as I know, this has been marked this way for the many, many years that I have been in business, the 50/50. There is a certain hyphen one way. I used to be able to tell the difference by the marking.

HEARING EXAMINER JOHNSON: The question was by volume.

THE WITNESS: By volume, yes.

HEARING EXAMINER JOHNSON: It had been marked that way?

THE WITNESS: I can't recall. I said I would be guessing if I said so (Tr. 77).

* * * * *

HEARING EXAMINER JOHNSON: If you read 50/50 by volume on the spool, would that make any difference to you?

THE WITNESS: I would believe it is 50/50 by volume.

HEARING EXAMINER JOHNSON: Yes, and you would not believe it is 50/50 by weight, would you?

THE WITNESS: I would not know what 50/50 by weight meant (Tr. 80).

Mr. Alfred Paul Ardente, of Providence, Rhode Island, has been selling plumbing supplies since 1946, doing business as The Ardente Supply Company, Inc. Prior thereto, starting in 1930, he was a plumber. The company buys and sells the corporate respondent's products. During the course of his examination, he was shown four spools of Coran solder (CX 20, 21, 22 and 23), which he had sold to Attorney Walsh of the Commission. When questioned with respect to the "By volume" label appearing on the exhibits, he stated (Tr. 262): "To us it really don't mean anything.

When I buy solder, I tell him I want 40/60 or 50/50 or 95/5, that's it." He added that he did not know if there is a difference between weight and volume. On cross-examination, he testified:

Q. Mr. Ardente, if you saw a solder labeled "50/50 by weight" and another solder labeled "50/50 by volume," would you know the difference?

A. No, I would not know the difference.

Q. You would not know the difference?

A. No.

Q. In other words, you just have no conception of the difference between weight and volume?

A. No (Tr. 265).

* * * * *

Q. In other words, you have no conception, actually, of the difference between weight and volume in general?

A. No, I take it for granted it is the same product. When I order 50/50, it should be 50 tin, 50 lead, and that's it (Tr. 266).

Mrs. Eleanor Rhian, of Providence, Rhode Island, testified that she has been running the Rhian Supply Company, which has been in business for 31 years, since her husband's death three years ago, and during the three years she has bought and sold Coran products (Tr. 266-68). She was shown the spools of solder labeled "50/50 by volume" (CX 16) and "40/60 by volume" (CX 17) which she sold to Attorney Walsh, and, upon being asked, "When you order the type of solder that we are referring to in these two exhibits, how do you specify the type of solder?", she replied: "Well, I order 40/60, 50/50, or 90/10, depending on what I need to fill orders" (Tr. 268). When asked what "by volume" means to her, she said: "It does not mean anything. I just read the number. That is it" (Tr. 269).

Mr. Abraham Feinstein, chairman of the board of the Republic Pipe and Supply Company of Roxbury, Massachusetts, has been in the plumbing supply business for over 35 years, but never sold any of the Coran solder (Tr. 273-74, 279). He testified (Tr. 275):

Well, we call the company up and order so many spools of 50/50, so many spools of 95/5, and so many spools of 40/60.

* * * * *

Well, that is how the plumbers ask for it and it is 50 per cent tin, 50 per cent lead.

He said there is no language or description on the solder package, other than the number, that had any significance to him in his business (Tr. 275). On cross-examination, he testified that he did not know if the spools of solder he had ordered were by volume or by weight (Tr. 276), and he never had occasion to do business

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with any solder marked "50/50 by volume" or "40/60 by volume" (Tr. 277).

Mr. Richard Rollins, manager for the past two years of the Atlantic Pipe and Supply Company of Boston, Massachusetts, with six years of experience in purchasing plumbing supplies, testified that he ordered spools of solder designated "50/50" and "95/5" (Tr. 335-36); that solder marked "50/50" contained 50% lead and 50% tin (Tr. 336); and that he "always figured it would be by volume" (Tr. 337).

The record also contains the testimony of the following nine consumer witnesses (six being engaged in the plumbing and heating trade) called at the instance of complaint counsel:

Mr. Robert L. Sawyer, a plumber since 1949, took over Edward Sawyer Company, Incorporated, of Mattapan, Massachusetts, a business his father started in 1918. When asked how he customarily bought tin-lead wire solder, he said: "Well, we order it 50/50 or 95/5. We, you know, place the order, we want so many spools of 50/50 and so many spools of 95/5" (Tr. 89-90). He testified that when at supply houses he had heard other people ordering solder: "They usually go to a counter and say I want a spool of 50/50, or a pound of 50/50—you know, a spool or a pound. That is it. Or give me a roll or a spool or a pound of 95/5" (Tr. 91). He said that he would know the difference between "by volume" and "by weight" (Tr. 93); and on being asked how much tin there would be in a solder marked "50/50 by volume," he answered (Tr. 94):

Well, if you make it down by weight, you would get a cubic foot of lead weighs approximately 400—some odd pounds and a cubic foot of tin weighs approximately 300—some odd pounds. I have not mathematically figured it out for a while. I think it comes to 40-60.

He testified further (Tr. 95):

Q. During the course of your experience in purchasing solder, have you ever had occasion to receive solder marked 50/50 by volume when you ordered 50/50 solder?

A. Well, it has been so long that we have bought these other brands of solder that I imagine we must have.

HEARING EXAMINER JOHNSON: Do you know?

THE WITNESS: To be honest with you, whether we have received it by volume?

HEARING EXAMINER JOHNSON: Yes.

THE WITNESS: The only way I can say is the way it was flowing, it was not 50/50 by weight, because we could not make a good tin joint.

HEARING EXAMINER JOHNSON: You could not say that you received some 50/50 by volume when you ordered 50/50 by weight, could you, definitely?

THE WITNESS: Well, definitely, I would say the way the solder was flowing, the joints were being made up, we could assume that it was not a 50/50 joint.

Mr. William A. Strickland, of the William L. Collins Company of South Boston, Massachusetts, has been in the plumbing and heating business for 26 years. He testified that in connection with his work he uses "50/50" and "95/5" solder 75% of the time; and, when asked if that was by weight or by volume, he said: "By volume. By volume, I assume, yes. I don't know. I assume by volume" (Tr. 255); and that when he orders solder for copper pipe, he specifies (Tr. 255):

Just 50/50 solder. It is noted in the trade as fine solder, 50/50 solder. It is usually on your spool and says 50/50. It does not say by volume or by weight. Specifically. We usually buy Dutton's solder and I know that is 50/50.

He stated that solder marked "50/50" or "50/50 by volume" is the same thing as far as he is concerned—he does not know the difference (Tr. 255-56). On cross-examination the following exchange took place:

Q. However, assuming that you saw a solder labeled 50/50 by weight and you saw another solder, 50/50 by volume, you would understand the difference, would you not?

A. No, I would not. I would assume it was the same.

Q. You would assume it was the same?

A. I could tell the minute I used it.

Q. You could tell when you used it?

A. It would not be fine enough, if it was 50/50 by weight, it would not be fine enough.

Q. It would not be fine enough?

A. 50/50 by weight is too light. That is why they use the 50/50. It usually says "fine" on it, for that purpose, I assume.

Q. You know the difference between volume and weight, of course?

A. Positively (Tr. 256).

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Q. By any chance, have you ever used Coran Brothers solder?

A. No, I never have. I have never heard of it.

Q. You have never heard of it?

A. No, we use Dutton and Dutch Boy, Puritan.

HEARING EXAMINER JOHNSON: Do they label their's by volume?

THE WITNESS: No, they just say 50/50 fine (Tr. 258).

Mr. Harry B. Sandofsky, of the Sandy Plumbing Company, Dorchester, Massachusetts, has been in the plumbing business over 40 years, and has had as many as 97 plumbers in his employ (Tr. 283-84). He testified that in soldering copper piping he uses "50-50, mostly" (Tr. 284-85); that in ordering that solder, "I would say send me a case of 50/50 solder" (Tr. 285); that he had

