

Order

82 F.T.C.

date of every such acquisition or merger, the products involved and such additional information as may from time to time be required.

5. *It is further ordered*, That Avnet notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

Commissioner Dennison dissented for the reasons set forth in his dissenting statement.

IN THE MATTER OF

NATIONAL DYNAMICS CORPORATION, ET AL.

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

*Docket 8803. Complaint, Nov. 21, 1969—Decision, Feb. 16, 1973.*

Order requiring a New York City seller of battery additive, VX-6, and other articles of merchandise, among other things to cease misrepresenting earnings and profits from resale of its products; failing to maintain adequate records which substantiate its earnings claims; representing that any product has been approved by a laboratory or other organization or person; and misrepresenting the results of scientific tests.

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 National Dynamics Corporation, a corporation, and Elliott Meyer, individually and as an officer 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:

\*Reported as amended by the hearing examiner's order dated July 7, 1970.

PARAGRAPH 1. Respondent National Dynamics Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 220 East 23rd Street, in the city of New York, State of New York.

Respondent Elliott Meyer is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His 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 advertising, offering for sale and sale of the battery additive, VX-6, and other articles of merchandise 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 New York 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 aforesaid business, and for the purpose of including the purchase of said battery additive, respondents have made numerous statements and representations in circulars, periodicals and other materials with respect to the nature of their business, the earnings of their customers, the users of their product and the testing of it.

Typical and illustrative of the statements and representations in said advertising, but not all inclusive thereof, are the following:

You see, to help me round out my VX-6 sales organization, I need someone *right in your area right now.*

National advertising pre-sells VX-6 for you. Full-page magazine and newspaper ads read by millions of motorists.

We have a completely staffed and equipped engineering department to help you with any special sales and promotional matters that may come up. Don't hesitate to get our help in selling large users, or to make use of our engineering facilities to help you close any important orders. Our engineering department has been instrumental in getting some very big orders for a lot of our men.

## Complaint

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## Railroad Products Division.

\* \* \* \* \*

As a Franchise Distributor—We guarantee to protect you on business developed, on accounts opened and ON REPEAT SALES—There will be only *ONE FRANCHISE PER COUNTY* so, if you desire additional counties later on or now, advise us immediately so we may prepare you for the ultimate goal—Exclusive State Distributor for VX-6 Battery Additive!!

\* \* \* \* \*

Our men made MORE THAN \$4,000,000 PROFITS and haven't even scratched the surface yet!

These aren't Miracle Men—THEY'RE NOT EVEN HIGH-POWERED SALESMEN!

## Picture of an individual \$1,554.00 One Week

INDUSTRIAL—I sell VX-6 to plants for fork lifts and other trucks. Then they buy for all vehicles and fleets.—R.D. Kelly, Canada.

\* \* \* \* \*

I talk big figures, \$10,000, \$15,000, \$25,000 a year \* \* \* VX-6 is the Aladdin's Lamp of Specialty Selling.

\* \* \* \* \*

Certificate of approval issued to VX-6 by Independent Testing Laboratories.

\* \* \* \* \*

Tested Approved.

\* \* \* \* \*

## Laboratory Reports.

Don't forget—this wonder-working product (1) breaks up hardened, dense crystallized sulphate, converts it into ACTIVATED material for greater charging current, (2) insulates lead grids so they are not\* readily corroded by damaging acid, (3) reduces shedding from plates, (4) cuts down internal heat, (5) makes separators last longer, (6) gives an uninterrupted flow of steady current, (7) reduces oxidation, (8) puts a stop to warping and buckling of plates, (9) eliminates undercharging in normal battery use, (10) reduces evaporation of 'water loss' and thus does away with frequent checking while on the road.

PAR. 5. Through the use of the aforesaid statements and representations, and others of similar import and meaning, but not specifically set out herein, respondents represent, and have represented, directly or by implication, that:

(1) Respondents have a nationwide sales force, a separate division for handling railroad products and an engineering department; and that they are seeking persons to join their nationwide sales force.

(2) Respondents use national advertising to promote the sale

\*By hearing examiner's order dated July 7, 1970, the word "not" was inserted between the words "are" and "readily".

of the product to consumers and that consumer demand has been created for said product.

(3) Respondents have technical departments and trained professional personnel to assist distributors in the sale of their product to consumers.

(4) Respondents give exclusive franchises to distributors who receive protection in their areas of operation.

(5) Distributors of the product, VX-6, will regularly earn \$1,554.00 per week, \$25,000 per year and various other high amounts.

(6) Laboratories and certain users have approved and fully tested the product as to performance.

(7) Each of the use or performance representations made by respondents for the product has been substantiated by respondents through competent scientific tests or by authenticated, controlled and duly recorded user tests or both.

PAR. 6. In truth and in fact:

1. Respondents do not maintain a nationwide sales force, a special division for handling railroad products and an engineering department and they are not seeking persons to join a nationwide sales force. Respondents' primary sales effort is to induce so-called "distributors" to buy a quantity of their product for resale to the public. There is virtually no organized, directed sales force.

2. Respondents do not use national advertising to promote the sale of the product to consumers and there is little, if any, existing consumer demand. Respondents' advertising and promotional efforts are directed almost exclusively to the so-called "distributors."

3. Respondents do not have technical departments and trained professional personnel to assist distributors in the sale of the product to consumers. Respondents' operation is concerned solely with sales to distributors and prospective distributors.

4. Respondents do not give exclusive franchises and distributors who receive franchises are not given protection by respondents in their areas of operation. Respondents continue to make sales where franchise distributors are located.

5. Distributors of the battery additive, VX-6, do not realize the aforesaid earnings; but, on the contrary, few, if any, attain such earnings.

6. Laboratories and certain users have not approved and have

not fully tested the product. Some of the laboratories were either non-existent or had not authorized the use of a seal of approval. Testing of the product had not been accomplished or was incomplete and named users had not approved and tested said product.

7. Use or performance representations made by respondents for the product have not been substantiated by respondents through competent scientific tests or by authenticated, controlled and duly recorded user tests.

Therefore, the statements and representations referred to in Paragraphs Four and Five hereof were, and are, false, misleading and deceptive.

PAR. 7. Through use of published testimonials respondents represent, directly or by implication, that they are the statements of persons or organizations currently using respondents' product and that respondents have been given permission to publish such statements; whereas, in truth and in fact, in many instances, such testimonials are statements by persons or organizations who only used the product in the remote past and did not give permission for publication.

Therefore, the use of said testimonials was, and is, false, misleading and deceptive.

PAR. 8. 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 the respondents.

PAR. 9. 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 representations were and are true and into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of 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.

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## Initial Decision

*Mr. Michael C. McCarey and Mr. Jeffrey Tureck* supporting the complaint.

*Mr. Solomon H. Friend and Mr. Jerold W. Dorfman*, New York, N.Y. for respondents.

## INITIAL DECISION

BY DONALD R. MOORE, HEARING EXAMINER

MAY 24, 1971

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## PRELIMINARY STATEMENT

The complaint in this proceeding was issued on November 21, 1969, and was served on respondents on December 10, 1969. The complaint charges respondents with misrepresentation in the advertising and sale of a battery additive designated VX-6, in violation of Section 5 of the Federal Trade Commission Act. On January 19, 1970, respondents filed an answer in which they essentially denied the allegations of the complaint.

After a series of prehearing conferences and several postponements—occasioned largely by successive substitutions of counsel

supporting the complaint as a result of illness, resignation, and reassignment—25 hearings were held between September 21, 1970, and January 21, 1971. Several recesses were necessary because of a variety of scheduling difficulties, including the unavailability of certain witnesses, religious holidays, and conflicts in the calendar of the examiner and of counsel.

At the hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. Such testimony and evidence have been duly recorded and filed. The parties were represented by counsel and were afforded full opportunity to be heard, to examine and to cross-examine witnesses, and to introduce evidence bearing on the issues.

After the presentation of evidence, proposed findings of fact and conclusions of law and a proposed form of order were filed by counsel supporting the complaint and by counsel for respondents. Counsel supporting the complaint filed a brief in support of their proposed findings, while counsel for respondents incorporated their brief in their proposed conclusions of law. Reply briefs were filed by counsel for both parties. Those proposed findings not adopted either in the form proposed or in substance are rejected as lacking support in the record or as involving immaterial matters.

Having heard and observed the witnesses and having carefully reviewed the entire record in this proceeding, together with the proposed findings and briefs filed by the parties, the hearing examiner makes findings of fact, enters his resulting conclusions, and issues an appropriate order as follows.

As required by Section 3.51(b) (1) of the Commission's Rules of Practice, the findings of fact include references to the principal supporting items of evidence in the record. Such references are intended to serve as convenient guides to the testimony and to the exhibits supporting the findings of fact, but they do not necessarily represent complete summaries of the evidence considered in arriving at such findings. Where reference is made to proposed findings submitted by the parties, such references are intended to include their citations to the record unless otherwise indicated.

References to the record are made in parentheses, and certain abbreviations are used as follows:

CB—Brief of Counsel Supporting Complaint in Support of Proposed Findings of Fact, Conclusions of Law, and Order to Cease and Desist.

CPF—Proposed Findings of Fact, Conclusions of Law and Order filed by Counsel Supporting Complaint.

CRB—Complaint Counsel's Reply to Respondents' Proposed Findings of Fact, Conclusions of Law and Proposed Order.

CX—Commission Exhibit.

RPF—Respondents' Proposed Findings of Fact, Conclusions of Law and Proposed Order.

RRB—Respondents' Reply Brief in Opposition to Complaint Counsel's Findings of Fact, Conclusions of Law and Proposed Order.

RX—Respondents' Exhibit.

Tr.—Transcript.

References to the proposed findings and briefs of counsel are to page numbers, preceded by one of the abbreviations listed above. References to testimony sometimes cite the name of the witness and the transcript page number without the abbreviation "Tr."—for example, Meyer 284.

#### FINDINGS OF FACT

##### I. Respondents and Their Business<sup>1</sup>

Respondent National Dynamics Corporation ("National Dynamics" or "corporate respondent"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 220 East 23rd Street, in the city of New York, State of New York. National Dynamics was incorporated in May 1957 by respondent Elliott Meyer and others.

Respondent Elliott Meyer has been president of the corporate respondent since its inception. In that capacity, as well as in his capacity as an important stockholder—now, in effect, the sole stockholder—he has formulated, directed, and controlled the acts and practices of the corporate respondent. Mr. Meyer's address is the same as that of the corporate respondent.

<sup>1</sup> Except for respondents' contention that the complaint should be dismissed as to Elliott Meyer because of "no evidence" that he "acted in his individual capacity" (RPF 30), there is no dispute as to the facts recited in this section. Record references for the facts here found, as well as for additional background facts, include the following: Complaint, Paragraphs One, Two, and Three; respondents' answer, Par. 1; Tr. 9-10, 185-87, 316-18, 321-22; Meyer 280-84, 287-90, 310, 312-14, 343-47, 355-56, 389-90, 1282-89, 1445-50, 1465-70, 1474-81; Cooper 2174; CXs 116 I-J, 153 A-I, 154 A-E, 158 A, 214 A-F, 215 A-G, 216 A-D. For comparison of National Dynamics advertising and that of Auto Electrolite, see CXs 92 A-B, 287 A-B; CXs 17 A-B, 288 A-B, 289; CXs 20 A-D, 290 A-D.



Mr. Meyer's stock ownership in National Dynamics has ranged from zero to 100 percent. Mr. Meyer owned 100 percent of the stock during the first year of National Dynamics' existence. Subsequently his interest went down to 33 percent, but he acknowledged that he formulated, directed, and controlled the acts and practices of the corporation during this period. Thereafter, all of the stock was acquired by another corporation, but Mr. Meyer continued to serve as president and to direct the activities of the company. In 1964 the stock of the corporate respondent was acquired by a corporation in which Mr. Meyer owned 50 percent of the voting stock. Since 1965, Mr. Meyer has been in complete control of the corporate respondent as sole stockholder and chairman of the board of a holding company which owns all of the stock of the corporate respondent.

Thus, despite the corporate organization and the involvement of other corporations and other individuals, the record reflects domination and control by Mr. Meyer individually.

In addition, Mr. Meyer has been since 1968 the sole shareholder and president and chairman of the board of directors of another corporation, Auto Electrolite Corporation, which sells a battery additive, advertising for which is similar to the advertising for VX-6. National Dynamics and Auto Electrolite have offices at the same address, and personnel of National Dynamics carry on the business activities of Auto Electrolite as well. Auto Electrolite had gross sales of \$212,113 in 1969.

Respondents are now, and for more than 10 years have been, engaged in the advertising, offering for sale, sale, and distribution of the battery additive VX-6 and other articles of merchandise to the public. The business of respondents is substantial. During 1968 the total gross sales of National Dynamics amounted to \$825,000. Total gross sales in 1969 were \$1,000,000, of which sales of VX-6 accounted for \$900,000.

In the course and conduct of their business, respondents now cause, and for more than 10 years have caused, their products, when sold, to be shipped from their place of business in the State of New York to purchasers located in various other States of the United States; and they maintain, and for more than 10 years have maintained, a substantial course of trade in such products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondents are and have been in substantial competition in commerce with corporations, firms, and individuals engaged in the

sale of products of the same general kind and nature as that sold by the respondents. Although the evidence to support this allegation is somewhat sketchy (Meyer 374-74A; Halter 709-10; Miller 2097-99, 2102, 2107, 2129-30), there appears to be no real doubt that respondents sold VX-6 in competition with products of the same general kind and nature. Respondents did not deny the allegation (Answer, Par. 6), and their proposed findings and their reply brief do not address themselves to this matter.

In the course and conduct of their business and for the purpose of inducing the purchase of their battery additive VX-6, respondents have made numerous statements and representations in circulars, periodicals, and other materials with respect to the nature of their business, the earnings of their customers, the users of their product, and the testing of it. (The manner and form of respondents' publication and use of the challenged representations are set forth in CX 309 A-N (Par. 1-3, 5-13); in certain stipulations (Tr. 323-26, 334-38, 377-78); and in the testimony of Mr. Meyer (Tr. 374 K-374 L). Although respondents contend in their answer (Par. 2) that the representations quoted in Paragraph Four of the complaint were "reproduced out of context," the record fails to substantiate this contention.

## II. Credibility Questions

Misrepresentations allegedly contained in respondents' advertising will be considered in the sections that follow. First, however, it is desirable to consider questions of credibility involved in several of these sections so as to avoid the necessity for repetitive comments. The credibility problem arises because of conflicts between the testimony of respondent Elliott Meyer, the president of the corporate respondent, and that of Donald Meany, a former employee of respondents.

Except for the fact that the testimony of Mr. Meany represents either the only evidence or the principal evidence to support some of the allegations of the complaint,<sup>2</sup> the verbiage devoted to it—both in the transcript and in the submittals of counsel—is hardly justified by its subject matter.

Mr. Meany's testimony dealt with the handling of respondents' business correspondence; the question of specialized departments

<sup>2</sup> Mr. Meany's testimony was presented as newly discovered evidence (Tr. 2195-2232). Without his dubious testimony on several of the allegations, the examiner is left to wonder what proof complaint counsel may have had in support of the allegations before Mr. Meany volunteered as a witness.

or divisions and the technical assistance available to distributors; respondents' franchise arrangements; and the extent of Mr. Meyer's participation in the operation of National Dynamics. Mr. Meany's testimony was also apparently designed to impeach the testimony of Mr. Meyer that certain records of respondents had been destroyed or damaged as a result of a fire (Tr. 1276-81, 1302, 1332, 1422-23). In fact, this initially appeared to be the primary purpose of calling Mr. Meany as a witness. However, even if his testimony (Tr. 3580-3609, 3666-75) were accepted at face value, it does not constitute convincing evidence that damage to records was as limited as he suggested.

Because complaint counsel have made such an issue of the matter—and this is because Mr. Meany's testimony is crucial to certain aspects of their case—the credibility question must be resolved. The mere fact that complaint counsel felt impelled to make such a labored defense of Mr. Meany's credibility (CPF 14-20; CB 34-37) tends in itself to detract from the weight of his testimony. In any event, in the opinion of the examiner, Mr. Meany's testimony does not measure up to the standard of "reliable, probative, and substantial evidence" upon which a finding of fact must be based (Rule 3:51(b)). The reasons for this determination are manifold.

First, and perhaps most important, Mr. Meany was employed by respondents in a clerical capacity for only some ten months in 1970 (Tr. 3553), whereas the advertising representations that his testimony purported to challenge were circulated during a prior period of time. Both the timing of his employment and the capacity in which he was employed are factors that materially detract from his testimony on crucial issues of fact.

Second, when this circumstance is coupled with evidence, developed in the course of his cross-examination (Tr. 3615-92), that calls into question his morality and his emotional stability and that also suggests the possibility of bias and prejudice against respondents (Tr. 3637-38, 3625-29, 3609-12, 3644-49, 3684), his testimony becomes of dubious value—hardly sufficient to constitute a predicate for findings that respondents engaged in acts and practices violative of the law.

Mr. Meany's admission of homosexual acts (Tr. 3637-38) is merely one facet of a personal history of emotional instability that disqualifies him as a reliable witness on matters of crucial significance. By his own admission, he falsified the employment application that he filed with respondents and initially undertook

to continue the same deception on the witness stand (Tr. 3616-18). Although Mr. Meany ultimately answered with apparent candor further questions reflecting adversely on himself, the examiner is unable, on the basis of the entire testimony, including observation of his demeanor on the stand, to give full faith and credit to Mr. Meany's statements.

No useful purpose would be served by a lengthy discussion of the question whether, standing alone, Mr. Meany's admission of homosexual acts may provide a basis for questioning his credibility. Research indicates that in a jury case in a federal court, an objection to such a question would probably be sustained on the ground of relevance.<sup>3</sup> But here the question was asked and answered without objection (Tr. 3637). It may be stated parenthetically that complaint counsel's discussion of the law on this subject (CB 34-37) is somewhat of an oversimplification, ignoring the distinction frequently drawn between discrediting information elicited on cross-examination and the introduction of collateral evidence on the subject.<sup>4</sup> Be that as it may, the problem here is whether the admission should be disregarded in assessing the credibility of the witness.

Despite respectable authority to the contrary, the examiner believes that it is a factor that may be taken into account as bearing on the emotional stability of the witness and as seemingly illustrative of an "anything goes" philosophy on his part. When there is also evidence suggestive of bias and prejudice against respondents despite protestations to the contrary, the fabric of his testimony is not such as to inspire confidence in its reliability.

Under the circumstances presented by this record, the familiar rule authorizing an adverse inference from a party's failure to call a rebutting witness (CB 15-16) is not applicable to bolster Mr. Meany's testimony. Neither is the picture materially changed by a stipulation that another of respondents' employees would give testimony "substantially the same" as that of Mr. Meany (Tr. 3698-99).

The examiner finds unpersuasive the lengthy argument of complaint counsel attacking the credibility of Mr. Meyer (CPF 35-52).

<sup>3</sup> *United States v. Nuccio*, 373 F.2d 168, 171 (2d Cir. 1967), cert. denied, 387 U.S. 906; *United States v. Bowe*, 360 F.2d 1; 15 (2d Cir. 1966), cert. denied, 385 U.S. 961; *Salgado v. United States*, 278 F.2d 830, 831 (1st Cir. 1960); *United States v. Provoo*, 215 F.2d 531, 535-37 (2d Cir. 1954); see also *Tinker v. United States*, 417 F.2d 542, 544 (D.C. Cir. 1969), cert. denied, 396 U.S. 864.

<sup>4</sup> III *Wigmore on Evidence*, §§ 922-924, 977-87, (3d ed. 1940); 58 *Am. Jur.*, Witnesses §§ 758-760.

Obviously Mr. Meyer was not a disinterested witness, and there may be some basis for discounting some of his testimony on the basis of his natural bias. The examples of inconsistency and faulty memory relied on by complaint counsel are not impressive. In view of the period covered and the mass of detailed information involved, the fact that Mr. Meyer was unable to furnish specific details concerning many matters is hardly surprising. The examiner finds no substantial basis for rejecting his testimony.

### III. Representations As to The Nature and Scope of Respondents' Business

#### A. "Nationwide Sales Force"

The first representation challenged by the complaint (Paragraph Five (1)) is that respondents have represented that they have a "nationwide sales force" and that they are seeking persons to join this nationwide sales force. This representation was made in sales letters containing such statements as these:

\* \* \* I urgently need a man in your area to help me round out my National VX-6 Sales Organization. (CX 14 A)

\* \* \* [T]o help me round out my Nationwide VX-6 sales organization, I need someone *right in your area right now*. (CX 17 A)

In alleging these representations to be false and misleading, the complaint (Paragraph Six (1)) alleges—and complaint counsel purpose a corresponding finding (CPF 33)—that:

Respondents do not maintain a nationwide sales force, \* \* \* and they are not seeking persons to join a nationwide sales force. Respondents' primary sales effort is to induce so-called "distributors" to buy a quantity of their product for resale to the public. There is virtually no organized, directed sales force.

Complaint counsel concede that respondents solicit and secure distributors from all parts of the country—numbering 12,000 in 1969—but they contend that "this group of salesmen is not organized, nor in any way directed, nor a sales force." This contention they profess to base on evidence that they characterize as "for the most part circumstantial" (CPF 33-34), but their proposed findings are based more on unsupported opinion than on documented facts. Their so-called circumstantial evidence is as follows:

(1) A statement, without any record citation, that "In essence, respondents sell to anyone who will buy their product, and once

a customer does buy, respondents are not particularly interested in anything else but selling him more."

(2) Their *ipse dixit* that it is "obvious" that with only 12 or 15 executives and employees, respondents could not "organize and direct" these 12,000 distributors "even if they wanted to do so"—and "respondents did not want to do so."

3. The testimony of a former employee that he was instructed to "skim" incoming mail.

(4) The fact that whereas the sales manager "described his duties \* \* \* as 'overseeing the general sales and work[ing] with our distributors'," he "did not describe his job as organizing or directing a sales organization of some 12,000 sellers of VX-6."

(5) The facts that respondents are direct mail sellers; that they purchase mailing lists to acquire names of prospective salesmen; that they correspond by form letter; that they do not sell on consignment; and that they do not extend credit.

(6) Their unsubstantiated conclusion that respondents "have neither the time, facilities, personnel, nor desire to organize or direct a 12,000-man sales force." (CPF 33-34).

Merely to state such a basis for a proposed finding of misrepresentation is to expose its insufficiency.

The examiner finds no misrepresentation here. Respondents have 12,000 distributors throughout the United States (CPF 33-34). Respondents furnished to these distributors advertising literature, sales aids, demonstration kits, booklets, advertising mats, TV scripts, and radio scripts. Respondents processed and answered inquiries from distributors and offered sales assistance by mail, by telephone, and by personal visit. The testimony of one employee concerning the "skimming" of mail from distributors—even if fully credited (see *supra*, pp. 6-8 [pp. 497-500 herein])—does not prove that respondents' distributor network is not a "nationwide sale force."

This case is to be distinguished from a line of Commission cases involving sellers who falsely represent that they are seeking "employees" when they are actually seeking to sell merchandise. Such is not the thrust of the complaint's allegations regarding respondents' sale force. In any event, the fact that respondents' distributors are independent contractors rather than employees does not prove that respondents do not have a nationwide sales force.

As a matter of fact, both the allegations of the complaint and the contentions of complaint counsel are self-contradictory. The same

paragraph of the complaint that alleges that respondents "are not seeking persons to join a nationwide sales force" also alleges that respondents' "primary sales effort is to induce so-called 'distributors' to buy a quantity of their product for resale to the public." Similarly, complaint counsel contend, on the one hand, that respondents are interested only in selling more VX-6 to their distributors and, on the other hand, that respondents do not want to organize and direct these distributors so as to obtain reorders.

Whatever may have been the theory of the complaint regarding respondents' alleged misrepresentation of a "nationwide sales force," the evidence fails to show any misrepresentation, and the charge should be dismissed.

*B. Specialized Divisions and Technical Assistance*

Other challenged representations are to the effect that respondents have a separate division for handling railroad products, an engineering department, and technical departments with trained professional personnel to assist distributors in the sale of their product to consumers. (Complaint, Paragraph Five (1), (3)) These representations were contained in respondents' advertising as follows:

We have a completely staffed and equipped engineering department to help you with any special sales and promotional matters that may come up. Don't hesitate to get our help in selling large users, or to make use of our engineering facilities to help you close any important orders. Our engineering department has been instrumental in getting some very big orders for a lot of our men. (CX 111 D; see CX 48 D)

Naturally, if there is ever a need for technical information in reference to batteries or VX-6—our trained staff of technicians are always at your service. (CX 62 C)

I, and the rest of my staff of technicians, have been instructed to give you all the cooperation and assistance possible. (CX 87 B)

You'll have full access to our Engineering and Industrial Departments, at no extra cost to you in engaging and closing of any important orders that will prove beneficial and profitable to all of us. (CX 95 B)

RAILROAD PRODUCTS DIVISION. (CX 9A)

The evidence to support the allegations that these representations were false, misleading, and deceptive (Complaint, Paragraph Six (1), (3)), is hardly substantial. Although the evidence tending to substantiate the challenged representations is not altogether satisfactory either, the burden is on counsel supporting the complaint to prove that respondents have not maintained a railroad

products division, an engineering department, or any technical departments with trained professional personnel to assist distributors in selling VX-6. This burden they have failed to carry.

There is credible evidence that respondents have had a railroad products division and an engineering or technical service department staffed by Orrin White, I. J. Luman, Edward J. Halter, Frank Murphy, and Ed Griffin and that, in addition, respondents have utilized private laboratories on a consultant or contract basis, particularly Industrial Testing Laboratories, which is in the same building as respondents' office. The record establishes that extensive sales were made to railroads; that there was a special industrial package of VX-6 utilized by railroads; that there was advertising specially directed to railroads; that National Dynamics was a member of the Association of Railroad Suppliers; that Messrs. White, Griffin, Murphy, and Halter visited railroads throughout the country for the purpose of assisting distributors in making sales to railroads, as well as in making direct sales to railroads; and that they otherwise provided technical assistance to distributors in person and by correspondence (Meyer 357-61, 368-74, 1290-1307, 1318-23, 1506-10; Halter 685-86, 693-96, 712-49, 753-57, 797-98; Murphy 4835-39, 4860-61; Rogers 1845-1932; Tr. 647-55; RXs 1-6, 10-16; CXs 242 A-G, 248-249 J, 265 A-B, 280 A-D).

In addition to questioning the credibility of Mr. Meyer and noting the evidentiary indication that most of the named individuals are now no longer connected with National Dynamics (CPF 35-54), complaint counsel rely primarily on the testimony of Donald Meany, a former employee of National Dynamics. Mr. Meany testified that he did "not know of any railroad products division of National Dynamics;" that there was neither an engineering department nor a technical department, although there was a technical manual; and that there was no one who worked in an engineering or technical capacity (Tr. 3557-58).

Mr. Meany was employed by National Dynamics from January 1970 until mid-November 1970 (Tr. 3553), and thus his knowledge concerning respondents and their business is limited to that period, whereas the challenged representations were disseminated prior to that time. In view of this time factor, and in view of the limitations of the positions that Mr. Meany held—primarily that of bookkeeper and correspondence clerk (Tr. 3553-56)—his testimony hardly measures up to substantial evidence of false advertising on the part of respondents. In addition, as noted *supra* (pp.



