

Complaint

IN THE MATTER OF
BURTON BROS. & CO., INC.

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 1696. Complaint, Sept. 28, 1929—Decision, May 12, 1930

Where a corporation engaged in the sale to shirt manufacturers, of a trade-marked, expensively advertised, and widely and favorably known, specially woven cotton cloth; in pursuance of a decision to permit shirts made therefrom to bear its label only when sold at not less than minimum specified by it,

Adopted and employed a "notice" to the trade for transmission to haberdasher customers by manufacturer vendees using label (and making a large proportion of the shirts concerned), claiming or setting forth, (1) labels furnished, and trade-mark, its property, (2) guarantee of wear and satisfaction for said shirts, (3) limitation of label, mark, and accompanying guarantee to shirts advertised and sold at not less than minimum specified, (4) haberdasher's privilege to remove label and mark, and offer, advertise, and sell garment, at any price desired, under any name, mark or label not resembling its own, (5) irreparable damage to it through offer, advertisement, representation, or sale of shirt under name or label, at less than said minimum, and intent to protect itself, its trade, trade-mark and good will, therefrom, to the fullest extent of the law, and prevent such offering, advertisement, sale and damage, and (6) statement explanatory of policy, and haberdasher's acceptance of and agreement to conditions and facts of said notice through acceptance of invoice of which made a part; extending to retailers or haberdashers electing to sell shirts made of its aforesaid trade-marked, so-called Irish poplin, under its said label and mark, the benefit of said guarantee as well as of other selling aids, denied to those electing sale of such shirts without such label and mark;

Not intending through said notice to warn retailers against proceedings, never in fact brought, for price cutting, but with purpose and effect of fixing and controlling resale prices and preventing dealers' exercise of own discretion and with tendency and effect of suppressing competition, and depriving ultimate purchasers of advantages in price which would obtain from the natural and unobstructed flow of commerce in said garments under conditions of free competition:

Held, That such practices, under the circumstances set forth, constituted unfair methods of competition.

Mr. William T. Kelley for the Commission.

Green & Hurd, of New York City, for respondent.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent Burton Bros. & Co., Inc., a New York corporation, en-

Complaint

14 F. T. C.

gaged in the sale of its Burton's Irish Poplin to dealers and manufacturers of shirts and other apparel, with maintaining resale prices in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondent, as charged, engaged in conducting its business in the product in question, which it converts from cotton fabrics made by the mills in accordance with its specifications,¹ "for more than one year last past has enforced and still enforces a merchandising system adopted by it of fixing and maintaining uniform prices below which shirts made out of its fabric shall not be sold to the public by retail dealers handling them. Respondent enlists and secures the support and cooperation of its said shirt manufacturer vendees and said retail dealers who handle shirts made out of its said fabric and its officers, agents, and employees in maintaining and enforcing said retail dealer sale prices. In order to carry out said system, respondent during aforesaid times has employed and still employs the following means whereby it and those cooperating with respondent have undertaken to prevent and have prevented retail dealers handling shirts made out of respondent's fabric from selling same to the public at prices less than the retail dealer resale prices fixed and designated by respondent."

(a) Procuring adherence of shirt manufacturers to restrictions promulgated by it, by requiring such manufacturers in their sales to retailers, to attach to the shirts involved, and their containers, notices as to the prices at which such shirts are to be resold to the public;

(b) Communicating such restrictions to manufacturers in notices as aforesaid, letters, circulars, telegrams, and labels;

(c) Selling fabric herein concerned to shirt manufacturers only upon condition of their observing its said restrictions;

(d) Requiring all such manufacturers to cooperate with it under penalty of refusal of sale of its fabric to those not cooperating;

(e) Communicating the restrictions concerned as to prices, through manufacturers and otherwise, to retailers in the notices

¹Allegations of the complaint relating to respondent's business include the following:

"Respondent is engaged in purchasing from cotton mills a certain cotton fabric manufactured in accordance with its specifications and in converting said fabric into finished form and selling same to dealers for resale by the yard to the consuming public, and to manufacturers of men's shirts and other wearing apparel. Said fabric was originated by Burton Brothers some 35 years ago. It is of standard weave and is known to the trade and consuming public as Burton's Irish Poplin, under which name it is now and for many years last past has been sold."

The complaint further sets forth that respondent's manufacturer vendees, with places of business principally in New York City, sell the shirts and other wearing apparel made out of the fabric in question direct to retailers throughout the different States, and to wholesalers for resale to retailers, and that respondent, and said manufacturers and retailers are in competition with other corporations, firms, and individuals similarly engaged.

hereinabove set forth to be affixed to shirts and their containers, by the manufacturers, and in circulars and labels;

(f) Warning and threatening retailers of conferences which will follow failure to observe the restrictions in question;

(g) Threatening all price-cutting retailers with suits for damages based upon alleged infringement of its trade-mark, Burton's Irish Poplin;

(h) Maintaining and publishing for the use of retailers, a list of names of those shirt manufacturers who have agreed to cooperate with it and observe its said restrictions;

(i) Investigating shirt manufacturers and retailers, to discover those who have failed to observe such restrictions; and

(j) Soliciting agreements from retailers that in the future they will maintain the retail dealer sale prices fixed by it.

As a result of its said acts and practices its said retail dealer resale prices have been generally maintained, as alleged, and the direct effect and result of its said alleged acts and practices, as charged, "has been and now is to suppress competition among retail dealers in the distribution and sale of respondent's products; to constrain said dealers to sell said products at aforesaid prices fixed by respondent and to prevent them from selling said products at such less prices as they may desire, and to deprive the ultimate purchasers of said products of the advantages in prices and otherwise which they would obtain from the natural and unobstructed flow of commerce in said commodities under conditions of free competition. Wherefore, said acts and practices of respondent are all to the prejudice of the public and constitute unfair methods of competition in commerce within the intent and meaning of section 5."

Upon the foregoing complaint, the Commission made the following

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an act of Congress approved September 26, 1914, the Federal Trade Commission issued and served its complaint upon the respondent Burton Bros. & Co., Inc., charging it with the use of unfair methods of competition in commerce. Respondent having entered its appearance and filed its answer herein, hearings were had and evidence was thereupon introduced upon behalf of the Commission, and the respondent before an examiner of the Federal Trade Commission theretofore duly appointed. Thereupon this proceeding came on for final hearing on the record, briefs of counsel for the Commission and counsel for the respondent, and the Commission being fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Burton Bros. & Co., Inc., is a corporation organized under the laws of the State of New York, with its principal place of business at New York City in said State. It is engaged in the business of buying cotton goods from mills, having same converted, and selling same to manufacturers, jobbers, and retailers. Respondent causes quantities of cotton goods dealt in by it to be transported, when sold, to the respective purchasers thereof, from New York City in the State of New York, through and into various other States of the United States and in the course and conduct of its said business, respondent, since its organization, has been and is now in active competition with various persons and partnerships and other corporations also engaged in the business of buying and selling cotton goods in commerce among the several States of the United States.

About thirty-five years ago, the president of respondent, then a member of the firm of Burton Bros. & Co., created a specially woven cotton cloth which was sold by the firm as Irish Poplin. Later, it was sold as Burton's Irish Poplin, and in 1923 the firm Burton Bros. & Co. registered the trade-mark Burton's Irish Poplin with an accompanying design of a shamrock, as applicable to this cloth. Burton Bros. & Co., the firm, and respondent, expended many thousands of dollars advertising the fabric, which as a result of its inherent quality and of the advertising and merchandising efforts of respondent and its predecessor in business has become widely and favorably known.

Respondent sells this cloth to jobbers and retailers for resale by the yard and to manufacturers of various types of wearing apparel. Manufacturers of men's shirts are the largest users of this cloth. Approximately twenty-five shirt manufacturers purchase this cloth from respondent, and make shirts out of the material and sell same, labeled Burton's Irish Poplin, to retail dealers located throughout the various States of the United States for resale to the consuming public.

In the latter part of 1927 the respondent decided that it would allow its label, Burton's Irish Poplin, to be used by retailers only upon condition that a shirt bearing the label be sold at a price specified by respondent, leaving the retailer free to sell the shirt at any price after first removing the label.

On December 31, 1927, respondent sent to each of the shirt manufacturers to whom respondent had been furnishing its labels, a printed letter explaining respondent's new policy regarding the use of its labels. This letter explained that respondent was hav-

ing its label changed in size so that it could, without extra cost or machine operation, be folded and sewn on the yoke or the bottom of a shirt in such a way that it could easily be cut off or detached by a retailer without injury to the shirt; that the cloth would be invoiced to the manufacturer as White Poplin or Colored Poplin, and the manufacturer would likewise invoice his shirts to his retailers as White Poplin shirts or Colored Poplin Shirts, attaching to the invoice a Notice of Trade prepared and furnished to the manufacturer by respondent. This notice to trade explained to the retailer that respondent allowed its label to be attached to the shirt only upon condition that title to the label be admitted as remaining in respondent, that the label was easily removable, and that while the retailer was at full liberty to remove the label and sell the shirt at any price he pleased, by accepting the invoice and shirt with label attached, he agreed not to sell the shirt with the label for less than \$2.75. This notice also stated that each shirt sold with respondent's label attached carried the guarantee that it would wear and give satisfaction or money would be refunded at any time by respondent.

Each of the shirt manufacturers to whom respondent sent its letter of December 31, 1927, had been previously supplied with respondent's old labels. To insure that these would be no longer used, respondent insisted that all of same then on hand be returned to respondent. Respondent also, having decided upon this new policy regarding use of its label, refused to supply any of these manufacturers with its label until assured that the manufacturer would use same only in accordance with the conditions specified in respondent's letter of December 31, 1927.

Many shirt manufacturers put their own trade mark, trade name or brand name on shirts made of respondent's cloth, in addition to respondent's label. After respondent, as the basis of its present policy, had changed the size of its label so as to make it readily detachable from shirts, the idea was conceived of having the manufacturer's label and respondent's label made on one strip, to be attached to the shirt only by that part bearing the manufacturer's label, thus making it easier for a retailer to cut off respondent's label without leaving any indication that there had been any additional label on the shirt. As a result, respondent now has arrangements with seven shirt manufacturers for the use of such combination labels. Shirt manufacturers pay for their proper part of these combination labels. The combination labels make the cutting off of respondent's label by a retailer a simple operation. Respondent's Exhibit 9² is a shirt bearing one of these combination labels and

² Not published.

shows the way such labels are attached. The above seven shirt manufacturers now using these combination labels distribute practically 95 per cent of Burton's Irish Poplin shirts.

Respondent sells its fabric, without its label, to any shirt manufacturer desiring same. Such shirt makers take only about 5 per cent of the total yardage of respondent's material which is used for shirts. Manufacturers sell Burton's Irish Poplin shirts to retail dealers at from \$21 to \$24 per dozen; \$22.50 per dozen is the prevailing price. The guaranty of respondent that shirts made out of its fabric would wash, wear, and give satisfaction or money would be refunded by respondent, applies only to shirts bearing respondent's name and label—Burton's Irish Poplin.

All of respondent's sales assistance to retailers is limited to retailers of shirts which bear its labels. Such sales assistance consists in the furnishing, free of cost, of large numbers of swatches bearing the retailer's name and address, and copies of respondent's label, and the payment of part of the expense of local advertising campaigns. Respondent's Exhibit 7² consists of some sixteen of such swatches. In no instance do these swatches bear a resale price below the minimum price fixed by respondent. In cases where the retailer desires a resale price higher than the minimum price fixed by respondent, there is printed on the swatches the resale price desired by the retailer. In soliciting retailers to handle these shirts, respondent furnishes to the retailer a list of shirt manufacturers from whom such shirts may be purchased, this list includes only those manufacturers to whom respondent furnishes its label.

On or about August 29, 1928, respondent sent to the shirt manufacturers using its label a new Notice to Trade, bearing date September 1, 1928, in which the minimum price at which shirts bearing respondent's label could be sold was raised to \$2.95.

This notice, which is still in effect, reads as follows:

NOTICE TO TRADE—SEPTEMBER 1, 1928

The label and trade-mark on these shirts are the property of Burton Bros. & Co., Inc., manufacturers of Burton's Irish Poplin, who on each shirt bearing this label and trade-mark will give this guarantee, namely, that this shirt will wear and give satisfaction or money will be refunded at any time by Burton Bros. & Co., Inc.

The use of this label and trade-mark and the guarantee which goes with it is permitted by Burton Bros. & Co., Inc., only when the shirt bearing this label and trade-mark is offered, advertised, and sold for not less than \$2.95, and such permission is subject always to the following conditions:

This label and trade-mark may easily be cut off or detached without injury to the shirt. The haberdasher, after first removing these labels and trade-marks, may offer, advertise, and sell these shirts as White Poplin shirts,

² Not published.

or under any other name, trade-mark, or label that does not resemble any of Burton Bros. & Co., Inc.'s, for 3 cents a shirt, or any other price the haberdasher desires.

Offering, advertising, representing, or selling of these shirts under Burton Bros. & Co., Inc.'s name, trade-mark, or label at less than \$2.95 per shirt irreparably damages Burton Bros. & Co., Inc., its trade, trade-mark, and good will, and is not permitted.

Burton Bros. & Co., Inc., proposes to protect itself, its trade, trade-mark, and good will and to prevent such offering, advertising, selling, and damage to the fullest extent of the law.

This policy has been adopted for our mutual protection and for the general benefit of the trade. These shirts have, accordingly, been invoiced and sold to the trade as White or Colored Poplin shirts, and such invoices and sales have in each case been subject to the conditions contained in this Notice to Trade, and by accepting such invoices, sale, and shirts the haberdasher has in each case admitted and conceded the facts and conclusions set forth therein and accepted and agreed to comply with all the conditions contained therein.

BURTON BROTHERS & CO. INC.

440 Fourth Avenue, New York City.

PAR. 2. Respondent in connection with the sale of its material, Burton's Irish Poplin, to its shirt manufacturer customers stands responsible for the quality and condition of said material and guarantees to ultimate buyers that such shirts will wash, wear, and give satisfaction.

PAR. 3. Shirt manufacturers, in connection with the sale of shirts made out of Burton's Irish Poplin material and carrying respondent's name, label, and trade-mark, as heretofore described in these findings, have sold such shirts to retail dealers under the restriction as to resale price appearing on respondent's Notice to Trade above set forth. Such shirts have been and now are generally sold at the minimum resale price fixed by respondent. Retail dealers in selling such shirts to the consuming public have not, except in a very few cases, sold such shirts for less than the minimum price fixed by respondent. Less than one-half dozen retail dealers located in the United States have sold such shirts at a price below the minimum price fixed by respondent.

PAR. 4. The respondent has never brought any suit or action against any dealer or any person on account of such dealer or person having offered for sale or sold shirts bearing or carrying its name, label, or trade-mark at prices less than the minimum resale price fixed by it.

PAR. 5. The notice set forth in paragraph 1 hereof is not given by the respondent with any purpose to warn retail dealers against any action or proceeding which respondent intends to bring on account of sales below its fixed price, but such notice is given for the purpose and with the effect of fixing and controlling resale prices and of preventing the exercise by such dealers of their own discretion in the sale of said shirts.

Order

14 F. T. C.

PAR. 6. The respondent on one occasion requested a manufacturer-customer to refuse to sell Burton's Irish Poplin shirts to two retail dealers located in New York City who were not observing in the sale of shirts to the public respondent's fixed resale price. The respondent requested this manufacturer to call on one of said retail dealer who was not observing its said resale price for the purpose of having said dealer sell said shirts at its fixed price. Another shirt manufacturer-customer of respondent called on this retail dealer and requested him to fall in line and sell Burton's Irish Poplin shirts at the price fixed by respondent. Another manufacturer-customer of respondent offered to sell this dealer Burton's Irish Poplin shirts if he would resell same at respondent's fixed price. Retail dealers who sold for less than respondent's fixed price have always been able to obtain Burton's Irish Poplin shirts from some of the manufacturers of such shirts.

PAR. 7. The direct tendency and result of the foregoing acts and methods of respondent have been and now are to fix and control the resale price of shirts and suppress competition, and to constrain retail dealers to sell said shirts at the prices fixed by respondent, and to prevent them from selling said shirts at such less prices as they may desire, and to deprive the ultimate purchasers of said shirts of those advantages in prices which would obtain from the natural and unobstructed flow of commerce in said shirts under conditions of free competition.

CONCLUSION

The practices of the said respondent under the conditions and circumstances described in the foregoing findings are unfair methods of competition in commerce and constitute a violation of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, answer of the respondent, testimony and evidence, briefs and oral argument, and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes",

It is now ordered, That respondent Burton Bros. & Co., Inc., its officers, agents, and employees, in connection with the sale or offering

for sale, in interstate commerce, of shirts made out of the fabric or material—Burton's Irish Poplin—do cease and desist from:

(1) Requesting shirt manufacturers to attach to invoices of shirts, or to boxes, or other containers of shirts respondent's Notice to Trade set out and referred to in the findings as to the facts in this proceeding;

(2) Publishing or making use of said notice or any notice or statement which asserts to retail dealers, directly or in effect, (a) that such shirts are sold them subject to resale price restrictions or on condition that they be not sold for less than prices fixed by respondent, or (b) that any retail dealer who sells such shirts at a price less than the resale price thereof fixed by respondent, then and there becomes legally liable to respondent;

(3) Making, publishing, or otherwise using any threat express or implied to bring a suit or action in any court against any retail dealer who sells such shirts, at prices less than the resale price thereof fixed by respondent;

(4) Utilizing any other equivalent methods or means of accomplishing the maintenance or control of retail dealer resale prices of shirts.

It is further ordered, That the respondent shall within 60 days after the service upon it of a copy of this order file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinbefore set forth.

IN THE MATTER OF
EVERITT & GRAF, INC.

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 1611. Complaint, Apr. 25, 1929—Decision, May 19, 1930

Where trade names and brands featuring the word "California", and, particularly, the words "California Sports Hat", had come to be associated with a type of hat long since made by California hat manufacturers, sold throughout the several States under said name, exhibited and displayed along with such words, prominently featured, in the larger cities, possessed a good will and reputation for style, quality, and workmanship and especially for the distinctive manipulation and combination of colors therein embodied, and in demand through its qualities and characteristics and extensive advertising by the makers, with total sales amounting to about \$10,000,000 annually and an annual advertising expenditure in excess of \$100,000, and the phrase "California Sports Hat", usually accompanied in advertisements with illustrations of California scenery and products, motoring, boating, and other sports popular in said State, and such phrases as "From Sunny California", "Colors Born of Sunshine", etc., had come to be known and understood by the trade and purchasing public as describing sport hats made in California; and thereafter a Milwaukee manufacturer,

- (a) Designated a sport hat made and styled by it in its Milwaukee factory and sold at a lower price, "California sport hat" and so branded the lining and, after a time and in inconspicuous type, with the words "Made in Milwaukee" and also the individual containers thereof and larger cartons containing same, sealed with gummed paper strips containing the words "Styled and produced by Everitt & Graf, Inc., Milwaukee, Wis.", and depicted on said containers and cartons outdoor scenes of motoring, boating, and golfing, with background of water, mountains, and palm trees, without further accompanying explanatory statement; and
- (b) Employed the words "California sport hat" in advertising its said product, in newspapers and other publications of general circulation and featured prominently said product, in newspapers and other publications of general circulation and featured prominently said words in circulars and bulletins sent to customers and prospective customers, together with such phrases as "Style, fit, make, and finish—America's greatest hat sensation—Happy days and sunny skies", and pictorial representations of styles and types of hats and aforesaid hat boxes or containers prominently featuring the aforesaid phrases, along with California sport scenes;

With the capacity and tendency to mislead and deceive customers and many of the consuming public into believing its said hats to have been made in California and into purchasing the same in such belief and with effect of placing in the hands of retail dealer customers, who prominently featured the phrase "California sport hat", in advertising such Milwaukee