

Complaint

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IN THE MATTER OF
FLYNN & EMRICH COMPANYCOMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 1584. Complaint, Mar. 20, 1929—Decision, Dec. 20, 1930*

Where a corporation engaged in the manufacture and sale of stokers, grates, and coal-feeding mechanisms including a mechanically operated stoker covered by letters patent, advised customers of a competitor over a period of years that it contemplated bringing suit for infringement of its patent against manufacturers and users of the infringing articles and that they were rendering themselves liable for damages and exposing themselves to possibilities of embarrassment and trouble through use of the competitive alleged infringing article, and suggested insertion in their contracts with said competitor of indemnifying clauses; not in good faith and with definite decision to bring any such suits, but in bad faith to prevent, hinder, and obstruct said competitor in the sale of its products:

Held, That such practice were to the prejudice of the public and competitors and constituted unfair methods of competition.

Mr. Henry C. Lank for the Commission.

Stewart & Pearre, of Baltimore, Md., 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, a Maryland corporation engaged in the manufacture and sale of stokers, grates, and coal-feeding mechanisms to the purchasing public throughout the United States, and with principal place of business in Baltimore, with threatening patent infringement and damage suits not in good faith, 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, during the years 1926 and 1927, threatened a competitor, the Perfection Grate & Stoker Co. of Springfield, Mass., with infringement suits, and said competitor's customers with damage suits for using the alleged infringing article, for the purpose of preventing and hindering said competitor from selling its products, forcing cancellation of sales already executed, and the removal of equipment sold by said competitor to customers.

As charged by the complaint, "such threats and statements were caused to be made by the respondent company in bad faith, for that, they were made with the purpose of hindering, embarrassing, obstructing or otherwise eliminating competition of the said Perfection Grate & Stoker Co. in the sale of said products in the channels of interstate trade and said respondent company did not cause such suits for infringement or damages to be brought, and/or did not propose to bring such suits at the time such threats or statements were caused to be made"; all to the prejudice of the public and respondent's competitors.

Upon the foregoing complaint, the Commission made the following

REPORT, FINDINGS AS TO FACTS, AND ORDER

Pursuant to the provisions of an act of Congress approved September 26, 1914 (38 Stat. 719), the Federal Trade Commission issued and served a complaint upon the respondent, Flynn & Emrich Co., charging it with the use of unfair methods of competition in interstate commerce in violation of the provisions of section 5 of said act.

The respondent having entered its appearance herein and filed its answer to said complaint, hearings were had and evidence was thereupon introduced on behalf of the Commission and respondent before an examiner of the Federal Trade Commission duly appointed.

Thereupon this proceeding came on for final hearing on the briefs of counsel for the Commission and respondent and oral argument of counsel for the Commission, and respondent and the Commission having duly considered the record and being fully advised in the premises, makes this its findings as to the facts and conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Flynn & Emrich Co., is a corporation organized under the laws of the State of Maryland with its principal office and place of business in the city of Baltimore, State of Maryland. It is engaged in the manufacture of stokers, grates, and coal-feeding mechanisms, and in the sale thereof to the purchasing public throughout the United States. It causes the said products when sold to be shipped or transported from its principal place of business in the State of Maryland to purchasers thereof in States of the United States other than the State of Maryland. In so carrying on said business respondent is and has been engaged in interstate commerce and in direct active competition with other corporations, firms, and partnerships likewise engaged in the manufacture of similar products and in the sale and distribution of the same in interstate commerce.

PAR. 2. Among the competitors of the respondent company is the Perfection Grate & Stoker Co., also known as the Perfection Grate & Supply Co., with its principal place of business in Springfield, Mass. The Perfection Grate & Stoker Co. was and is engaged in the manufacture and sale in interstate commerce of stokers, grates, and coal-feeding mechanisms, and in addition to hand stokers, it sold and distributed mechanically operated stokers which were known and described as automatic stokers or semiautomatic stokers.

PAR. 3. The respondent company manufactured and sold a mechanically operated stoker which was known and described as Huber

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semimechanical stoker. This stoker was being sold by the respondent during the years 1926 and 1927 and during the same period of time by its competitor, the Perfection Grate & Stoker Co. During the same period of time several other competitors were manufacturing and distributing stokers similar in design and operation to the semimechanical stoker of respondent and the semiautomatic stoker of the Perfection Grate & Stoker Co. The respondent's stoker was covered by letters patent, the first being patented July 10, 1917, reissued June 14, 1921, and certain new features patented July 1, 1924.

PAR. 4. In the State of New York and in the New England States, the respondent company employed salesmen on a commission basis to solicit and sell the Huber semimechanical stoker and other products, and these salesmen in soliciting sales in the above territory came into competition with the mechanically operated stoker of the Perfection Grate & Stoker Co.

The respondent in December, 1925, or January, 1926, consulted their patent attorneys in Baltimore, Md., and these patent attorneys informed the respondent that they considered the respondent had a thoroughly substantial case and that respondent's patents would be upheld by the courts. Thereafter from time to time as their representatives were in competition with those competitors using their alleged patent features in the manufacture of stokers, they furnished their representatives copies of their patent papers giving such representatives permission to show these patent papers to prospective customers, to point out to such prospective customers that there were certain features embodied in their stoker that were patented, and if any other manufacturer embodied the same features in his stoker, that he was infringing these patents, and respondent also gave permission to its representatives to point out that a user of an infringed article could be made a party to a suit just the same as the manufacturer.

PAR. 5. Thereafter a salesman of the respondent called upon a company in Connecticut which was then installing a Perfection Grate & Stoker Co.'s stoker, and after examining the stoker, stated to the purchaser "that the Perfection people had made infringements, or at least had copied their patent, and that they were anticipating suing the Perfection people and also any other company that had installations made by the Perfection people".

In the spring or summer of 1926 a salesman of the respondent called on the president of a corporation in New Haven, Conn., which had installed a Perfection semiautomatic stoker, and after inspecting the stoker stated "our people contemplate bringing a suit for

infringement. Of course you or anybody else using it would be liable. They may never bring a suit but I just want to tell you that if they bring a suit that all users of that (meaning the Perfection Stoker) would be liable for damages”.

In May, 1926, a salesman of the respondent called upon the chief engineer of an organization in Waterbury, Conn., who had installed or started to install a Perfection semiautomatic stoker. The salesman inspected this stoker and stated that the coking table was the respondent's patent and that respondent was going to sue the Perfection Grate & Stoker Co. and that the purchaser would be required to take this stoker out.

In the spring of 1927 a salesman of the respondent called upon a firm in New London, Conn., who had purchased a Perfection stoker and stated “We are the only people that can install the alternating bar” (referring to the type of mechanical operation of a product of the Perfection Grate & Stoker Co.). “We hold the full rights to the patents. It is a positive fact that we control the patent on the alternating bar movement. I am afraid you will get into trouble if you put it in.”

On or about March, 1927, a salesman of the respondent called on the production manager and chief engineer of a corporation in New York City who was purchasing a stoker from the Perfection Grate & Stoker Co., and stated that “the Perfection Grate & Supply Co. were infringing the patents of Flynn & Emrich and that it was the intention of Flynn & Emrich Co. to prosecute the Perfection Grate & Supply Co. for these infringements”, and suggested that the purchaser have the Perfection Grate & Supply Co. insert a clause in its contract so as to protect and save the purchaser harmless from any or all claims or suits relating to inventions and patents.

PAR. 6. In January, 1927, the respondent consulted a firm of patent attorneys in New York, and on March 24, 1927, this firm of patent attorneys advised the respondent that in their opinion the respondent had a good cause of action for infringement against the Perfection Grate & Supply Co., that such action could be proceeded with with the evidence then in hand. At this time respondent inquired as to the cost of such an action and was advised that they might look forward to an expense of perhaps \$25,000.

During the period between December, 1925, and March, 1927, while the salesmen of the respondent were making the statements above recited, the respondent had not determined to bring any suit. In May or June, 1927, the respondent determined not to bring suit immediately. At the time this Commission issued the complaint in this case, March 20, 1929, the respondent had brought no suit.

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PAR. 7. The statement made by the salesmen of the respondent as recited in paragraph 5 above, were made in accordance with the permission or instructions as given to such salesmen by the respondent and referred to in paragraph 4 above.

PAR. 8. The permission or instructions as referred to in paragraph 4 above were not given in good faith and the respondent at the time of giving the permission or issuing such instructions had not determined to bring any suit for infringement or suit for damages, and such permission or instructions were given for the purpose of preventing and hindering and obstructing a competitor from making sales of its products.

PAR. 9. The statements made by the salesmen of the respondent to purchasers of semimechanical stokers were, in view of the permission and instructions of the respondent, directly chargeable to the act or acts of the respondent, and the respondent caused such statements to be made in bad faith and without definite determination to bring any such suit for infringement or suit for damages, and were caused to be made for the purpose of preventing and hindering and obstructing a competitor from making sales of its products.

CONCLUSION

The aforesaid acts and practices of the respondent, Flynn & Emrich Co., are all to the prejudice of the public and respondent's competitors, and constitute unfair methods of competition in commerce within the intent and meaning of section 5 of an act of Congress entitled "An act to create a Federal Trade Commission, to define its power and duties, and for other purposes", approved September 26, 1914.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, and the testimony and evidence taken and briefs filed herein, and oral argument of counsel, and the Commission having made its findings as to the facts and 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 the respondent, Flynn & Emrich Co., its officers, agents, representatives, and employees, in connection with the sale of its stokers in interstate commerce, cease and desist from directly or indirectly threatening any person, firm, or corporation with patent infringement, damage or other suit or suits in bad faith for the purpose of diverting the trade of any competitor or competitors to it and without intention to sue.

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

Syllabus

IN THE MATTER OF
PERFECT VOICE INSTITUTE AND T. G. COOKE

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

Docket 1503. Complaint, Mar. 13, 1928—Decision, Dec. 23, 1930

Where a corporation engaged in the sale of a method of voice development, and an individual, its president, manager, and controller thereof, in advertising and describing its so-called course of "Physical Voice Culture" in newspapers, magazines, and other publications of general circulation, and in pamphlets, letters, circulars and other forms of printed, written or mimeographed matter,

- (a) Represented the method as new and based on the alleged fundamental relation of the hyo-glossus muscle to the effective development of the speaking and singing voice, by isolation and development of such muscle, through devices and instruction provided, and the grooving of the tongue as therein set forth, and that the system in question had been proved by every law of physics, anatomy, mechanics, and mathematics, and had proven infallible in the case of thousands of students all over the world, the facts being that the muscle referred to could not be isolated and separately developed, served no possible function in voice tone production, and said claims and representations were false and misleading;
- (b) Falsely represented that every student could have a beautiful speaking or singing voice through development of said hyo-glossus muscle by physical exercise and performance of a few simple, silent exercises, requiring only a few minutes a day, in the privacy of his own home, that such exercises would result, in a few months, in a powerful, beautiful, and vibrant voice, and in progress from day to day, and that the development and control of such muscle, or lack thereof, was the primary cause of a strong and perfect, or weak and imperfect voice;
- (c) Represented and stated that a post mortem on the throat of Caruso showed wonderful development of said muscle and proved the amazing truth of the "Feuchtinger" discovery of the true functions of such muscle, instinctive control of which after many years led to Caruso's becoming the century's greatest singer, and that the main difference between normal vocal organs of the student and those of Caruso and other world famed singers lay in the control, strength, and development of the muscle in question, the facts being that no such post mortem was ever performed, there was no evidence that Caruso ever made any effort to control said muscle or attributed his voice thereto, or to any other muscle, and implications of the aforesaid representations were wholly unwarranted, incredible and deceptive;
- (d) Offered its said course to prospective pupils enrolling within a limited time at the temporarily reduced and special price of \$89.50 instead of the regular and full price of \$120, the fact being that the former figure constituted its regular, permanent, and full price for the entire treatise, books, course of instruction, and articles and accessories making up its aforesaid course; and