

IN THE MATTER OF
RELIANCE PENCIL CORPORATION

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

Docket 1924. Complaint, Mar. 6, 1931—Decision, Apr. 11, 1932

Where a corporation engaged in purchase of pencils both in the "rough" and as finished products, from the manufacturer thereof, and in the business of smoothing, polishing, painting, and stamping the former and attaching brass ferrules and erasers thereto at its factory for the performance of such so-called finishing operations, and in the sale to jobbers and retailers of its said pencils, which were (1) result of nearly two years' laboratory experiments and practical tests directed to development of desired smoothness, color, strength, and size of the lead used, as well as to matter of numerous brand names, shapes, and colors of the various pencils sold, and were (2) made for it by the manufacturer with cedar and lead specially prepared for it in accordance with its secret formulæ and specifications and subject in case of both substances to its continuing scrutiny and regular inspection and tests to secure quality and uniformity, but (3) came to it in all cases ready to sharpen and write with, due to prior completion by the manufacturer of the difficult and expensive operations necessary to bring the pencil to such stage,

Prominently displayed phrase "Manufacturers of pencils * * *" immediately under its corporate name, upon letterheads, billheads, catalogues, circular letters, and other stationery and in advertisements in various trade magazines, and referred in catalogues to a "new modern plant" at a certain point, as the plant in which its pencils were made, and as "the home of Reliance Pencils," in which, "under continuous laboratory supervision, the entire process is carried on under one roof, under one control," and in a circular letter sent to customers made the statement that the "lead is blended by our exclusive process," facts being it was not a pencil manufacturer, and neither owned, controlled, operated, nor had any interest in any pencil factory, and plant in question was that of the manufacturer from which it purchased pencils dealt in by it as aforesaid, and which had an undisclosed financial interest in it, but in which it itself had no interest of any kind;

With tendency and capacity to mislead and deceive jobbers and retailers into buying pencils from it in the mistaken belief that aforesaid statements and representations were true, and thereby divert trade to it from competitors who as manufacturers in fact of pencils shared the trade advantage due to jobber's and retailer's preference to deal with the manufacturer by reason of latter's financial responsibility and assurance of securing uniform quality and refund or exchange of defective pencils:

Held, That such practices, under the conditions and circumstances set forth, were to the prejudice of the public and competitors and constituted unfair methods of competition.

Mr. G. Ed. Rowland for the Commission.

Brodek, Raphael & Eisner, of New York City, for respondent.

Complaint

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 New York corporation engaged in the sale and distribution of lead pencils to jobbers and retailers at points in the various States and the District of Columbia, and with principal office and place of business in New York City, with misrepresenting business status and advertising falsely or misleadingly in said respect, 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 as aforesaid and neither manufacturing the pencils dealt in by it, nor owning, operating or controlling any factory making the same, and with no exclusive process for blending the lead used, but purchasing its said lead pencils in the rough, from the manufacturers, and finishing the same at its factory, where it smooths, polishes, and paints them, stamps the name thereon and affixes thereto a brass tip and eraser, falsely represents itself through letterheads, billheads, stationery, catalogues, and advertisements in trade magazines as a pencil manufacturer, making, among others, the following representations and statements:

Placing, on letterheads, billheads, circular letters, etc., immediately under its name, the words "Manufacturers of pencils, penholders, erasers";

Placing, immediately under its name, substantially the same words in its advertisement in various trade journals;

Placing the word "manufacturers" under its name in a catalogue prepared and distributed by it and the language, in connection with a description of a pencil factory, "the home of Reliance Pencils. Here, under continuous laboratory supervision the entire process is carried on under one roof, under one control."

Respondent further, as alleged, stated in a letter sent to customers and prospective customers "This lead is blended by our exclusive process * * *."

"Said false, deceptive, and misleading statements and representations," as alleged, "have the tendency and capacity to and do cause jobbers and retailers, residing in various States of the United States to purchase the lead pencils sold by respondent in the mistaken belief that such statements and representations are true," and said alleged acts and practices "are all to the prejudice of the public and respondent's competitors," some of whom "own and operate a factory in which are manufactured the lead pencils which they sell, and who sell said lead pencils in interstate commerce without any

Findings

16 F. T. C.

false, deceptive, or misleading representations," and some of whom "buy the lead pencils which they sell from the manufacturers thereof, and who sell them in interstate commerce without representing that they are the manufacturers thereof."

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 (38 Stat. 717), the Federal Trade Commission issued and served a complaint upon the respondent above named, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act.

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

Thereupon this proceeding came on for final hearing on the briefs and arguments of counsel, and the record, 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. Respondent, Reliance Pencil Corp., is a corporation, organized under the laws of the State of New York in April, 1929, having its office at 777 Broadway, in the city of New York, State of New York, and its factory in the city of Mt. Vernon, in the State of New York. The officers of respondent are Maurice E. Levine, president, and Louis Oskrov, secretary and treasurer. Respondent is now, and has been ever since its organization engaged in the business of smoothing, polishing, painting, and stamping lead pencils, and attaching brass ferrules and erasers thereto, and selling and distributing said finished lead pencils to jobbers and retail dealers located at points in the various States of the United States, and the District of Columbia. Respondent causes said pencils, when so sold, to be transported from its factory in the said city of Mt. Vernon, State of New York, through and into other States of the United States and the District of Columbia, to the purchasers thereof at their respective points of location.

In the course and conduct of its said business, as aforesaid, respondent is in direct and active competition with other individuals, partnerships, and corporations engaged in the manufacture, sale,

and distribution of lead pencils in interstate commerce among the various States of the United States and the District of Columbia.

PAR. 2. In the course and conduct of its business respondent has represented by its letterheads, billheads, circular letters, and other stationery, catalogues, and through advertisements in trade magazines having a general circulation throughout the various States of the United States, that it is a manufacturer of lead pencils. Upon its letterheads, billheads, catalogues, circular letters, and other stationery, and in its advertisements in various trade magazines, respondent prominently displays the phrase "Manufacturers of pencils, penholders, erasers" immediately under its corporate name. In its catalogues, which it distributes to its customers, respondent causes the word "manufacturers" to be printed immediately under its corporate name. Respondent advertises in such trade papers as Modern Stationery, Geyer's Stationery, Pacific Stationer, Southern Stationer, and Office Appliances.

In a catalogue formerly distributed by respondent to its customers, bearing date of September 1, 1929, appears a reference to a "new modern plant" at Lewisburg, Tenn., as the plant in which respondent's pencils are made, and said plant is further referred to in said catalogue, as follows:

This plant is the home of Reliance Pencils. Here, under continuous laboratory supervision, the entire process is carried on under one roof, under one control.

Respondent has discontinued using said catalogue, and has substituted one bearing the date of 1931, in which the above quoted statement does not appear. Respondent formerly sent out a circular letter to its customers containing the statement: "This lead is blended by our exclusive process." The use of this circular has been discontinued by respondent, and at the present time respondent does not send out circular letters of any kind.

PAR. 3. Respondent buys all of the pencils which it sells from Houston & Liggett, a company engaged in the manufacture of pencils, located at Lewisburg, Tenn. Respondent has no interest of any kind in the Houston & Liggett Co., and does not in any manner control said company, but Houston & Liggett has a financial interest in respondent's business, the nature and extent of which was not shown due to the objection of respondent's counsel. All of the processes of manufacture of the lead pencils which respondent sells are performed by Houston & Liggett at its factory at Lewisburg, Tenn.

The pencils as received by respondent from Houston & Liggett are in what is called in the trade the "rough." A pencil in the rough is a pencil which can be sharpened and used to the same extent as a fully finished pencil, but it is not salable to the public in the United States in that condition. Respondent maintains a factory at Mt. Vernon, N. Y., 50 by 54 feet in size, in which it employs from six to eleven workmen, who are engaged in smoothing, polishing, painting, and imprinting pencils received by respondent from Houston & Liggett, affixing brass tips and erasers thereto, and packing and shipping said pencils.

PAR. 4. Pencils are manufactured from pencil slats, which are thin pieces of wood, $7\frac{1}{2}$ inches long by $2\frac{1}{2}$ inches wide, two of which are required for the manufacture of seven lead pencils. The slats are grooved with seven grooves, the leads are then placed in the grooves of one of the slats and another slat, similarly grooved, is laid on the first slat containing the leads, and the two slats are securely glued together, forming what is called a "capped slat." The capped slat is then run through a shaping machine which separates it into rough pencils of the shape desired for the finished pencil. These are all manufacturing operations which are difficult and expensive, requiring a large investment in machinery, and the employment of skilled workmen. The pencils are then smoothed, polished, painted, imprinted with the name and grade of pencil, a brass tip and eraser affixed, and packed for shipment.

Some of the large manufacturers of lead pencils in the United States own timberlands from which the wood used in the production of their pencils is obtained, as well as sawmills which prepare the timber for use. Some of said manufacturers also compound and prepare the lead used in their pencils.

PAR. 5. The best wood for use in the manufacture of lead pencils is southern red cedar, the largest supply of which is found in the States of Tennessee, Alabama, Georgia, and Mississippi. Southern red cedar for use in the manufacture of lead pencils is produced in several grades, the highest of which is known as No. 1, and is southern fence rail cedar, from 75 to 150 years old; this is followed by Nos. 2 and 3, which range in age from 45 years to 80 years. Grades below No. 3 are not suitable for the manufacture of lead pencils. Owing to the scarcity of southern red cedar all manufacturers of lead pencils are using western cedar to a large and increasing extent in the manufacture of their pencils.

The lead pencil which retails at 5 cents comprises approximately 99 per cent of all pencil sales in the United States. Each of the

leading pencil manufacturers has a 5-cent pencil, which is its leader. Respondent markets 36 or 37 different brands of lead pencils of various grades. Its 5-cent leader is called Templar, and is made of the best grade southern red cedar. Its Utopian, Exclusive, Spectator, and Sceptoe brands are made of lower grades of southern red cedar, and its drawing pencils are made of the best grade of southern red cedar. The quality of the wood entering into the manufacture of respondent's pencils is indicated in its catalogue; where the best grade of wood is used it is so stated, and where lower grades are used the fact is indicated by the statement that the pencil is made of southern red cedar. Where no wood is mentioned the pencil is made of western cedar.

With the exception of one manufacturer, who uses both southern red cedar and western cedar in its 5-cent pencil, all the principal competitors of respondent use western cedar in the 5-cent pencils which they manufacture and sell. Southern red cedar costs approximately 50 cents more per gross of pencils than does western cedar.

PAR. 6. Respondent obtains all of the pencils which it sells from Houston & Liggett, located at Lewisburg, Tenn. Forty to fifty per cent of the pencils sold by respondent are received by it from Houston & Liggett completely finished, and ready for the market, the finishing operations having been done by Houston & Liggett. The remainder of its pencils are received by it in the rough, and respondent does the finishing operations at its factory at Mt. Vernon, N. Y. Houston & Liggett, through a holding company, owns or operates the largest supply of southern red cedar in the United States, and manufactures pencil slats which it sells to pencil manufacturers throughout the United States.

PAR. 7. Subsequent to its organization respondent did not offer for sale any pencils for a period of about a year and nine months. During that period the president of respondent was engaged in laboratory experiments and practical tests in developing the kind and quality of pencils which it desired to offer for sale. These experiments and tests were directed to the development of the smoothness, color, strength, and size of the lead used in its pencils, as well as the brand names, shapes, and colors of the various pencils which it sells. There are five degrees of lead in respondent's Templar pencil, and it required three months' experimentation to get the required quality of lead, and there are six degrees of lead in its drawing pencils, which required nine months of experimentation to perfect.

Respondent procures the lead it uses in its pencils from M. A. Furst & Co., of Atlanta, Ga., which is the only manufacturer of leads for the pencil industry, except the large pencil manufacturers who compound and prepare their own leads. M. A. Furst & Co. prepare leads according to the specifications furnished it by each pencil manufacturer. There are no standard degrees of lead known as No. 1, No. 2, No. 3, etc. Respondent furnished the specifications for the lead it desired to use in its pencils to Houston & Liggett, who placed orders for the lead with M. A. Furst & Co., which company furnished Houston & Liggett with the lead prepared in accordance with the specifications. The quality of lead used in respondent's leading brands of pencils is superior to that used in its other brands. The formulæ of the leads used by respondent in its pencils are not known to respondent's competitors.

Respondent devoted considerable time and thought to the selection of names for its 36 or 37 brands of pencils in order that they would not conflict with names used by competitors, and would be short and easily remembered. Respondent's pencils retail at from 1 cent each to 10 cents each.

At all times the president of respondent watches and inspects the quality of the cedar used in its pencils, and at intervals of from 30 to 60 days he visits the factory of Houston & Liggett for this purpose. The lead used in its pencils is regularly inspected and tested by respondent at its factory in Mt. Vernon, N. Y., so as to insure at all times a uniform product.

PAR. 8. Respondent is in competition with many manufacturers of pencils in the United States. Among these competitors are some who manufacture everything which goes into the finished lead pencil which they sell, including the slats, leads, and erasers. Other smaller competitors buy the pencil slats and begin their manufacturing processes at that point, as described in paragraph 4 herein. Each pencil manufacturer has a 5-cent pencil which is its largest selling pencil. Respondent's prices to the trade for its pencils are the same as those of its competitors for similar grades.

PAR. 9. There is an advantage in the trade in being known as a manufacturer of lead pencils because jobbers and retail dealers prefer to buy from a manufacturer because they are assured of getting pencils of a uniform quality at all times, and also because of the financial responsibility of the manufacturer, which assures the jobbers or retail dealers of being able to return any pencils which prove defective for exchange or refund. The pencils sold by respondent are of a uniform quality from year to year.

PAR. 10. Respondent is not a manufacturer of pencils, and does not own, control, operate, or have any interest in any factory where lead pencils are made. The operations which respondent performs, described in paragraph 3 herein, are known as finishing operations in the pencil industry, and while they are necessary in order to make the lead pencils merchantable in the United States, they are not essential operations to the manufacture of the pencil. A pencil in the rough is as efficient for writing purposes as is one that has been finished. Many thousands of gross of lead pencils without finish are sold by United States pencil manufacturers to foreign countries for use therein.

PAR. 11. The statements and representations made by respondent that it is a manufacturer of lead pencils, and describing the factory of Houston & Liggett as the "home of Reliance Pencils," as set forth in paragraph 2 herein, are false, deceptive, and misleading and have the tendency and capacity to mislead and deceive jobbers and retailers into buying pencils from respondent in the mistaken belief that such statements and representations are true, and thereby divert trade to respondent from competitors who are in fact manufacturers of lead pencils.

CONCLUSION

The practices of respondent, Reliance Pencil Corp., under the conditions and circumstances set forth in the foregoing findings as to the facts, are to the prejudice of the public and respondent's competitors, and are unfair methods of competition in interstate commerce, and constitute a violation of section 5 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."

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, the testimony 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 respondent, Reliance Pencil Corp., its officers, agents, representatives and employees, in connection with the sale and distribution of lead pencils in commerce between and among

Order

16 F. T. C.

the several States of the United States, and the District of Columbia, cease and desist from:

(1) Representing in any manner, either directly or indirectly, on its letterheads, billheads, envelopes, catalogues, circular letters, and any other stationery, that it is a manufacturer of lead pencils, unless and until said respondent actually owns, controls, or operates a factory in which it performs the operations necessary to the manufacture of a lead pencil.

(2) Inserting, or causing to be inserted in newspapers, magazines, or other periodicals, advertisements in which it represents itself to be a manufacturer of lead pencils, unless and until said respondent actually owns, controls, or operates, a factory in which it performs the operations necessary to the manufacture of a lead pencil.

(3) Representing in any manner, either directly or inferentially, that a factory belonging to a corporation in which respondent has no financial or proprietary interest, is a factory owned, controlled, or operated by respondent.

It is further ordered, That 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 this order has been complied with and conformed to.

Commissioner Ferguson dissents.

Complaint

IN THE MATTER OF

J. MERRELL REDDING INDIVIDUALLY AND TRADING
AS THE NIX-NOX COMPANY

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

Docket 1983. Complaint, Feb. 6, 1932¹—Decision, Apr. 25, 1932

Where an individual engaged in sale of its so-called "Nix-Nox Fluid" for automotive use, falsely represented and advertised that said product mixed with gasoline in proportion of one part to a thousand would increase power, permit operation on a leaner mixture, and increase mileage considerably; with result of misleading and deceiving dealer purchasers and consuming public to whom such representations were repeated by said dealer purchasers, into believing same to be true, inducing purchase of product in question in reliance on such belief, and diverting trade from and otherwise injuring competitors of said individual, and with capacity and tendency so to mislead, deceive and divert:

Held, That such practices, under the conditions and circumstances set forth, were to the prejudice and injury of the public and competitors and to the detriment and restraint of fair and legitimate competition in industry concerned, and constituted unfair methods of competition.

Mr. Henry C. Lank for the Commission.

SYNOPSIS OF COMPLAINT ¹

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent individual, engaged under his own name and also as aforesaid, in sale of a fluid for mixing with gasoline for automotive use, and with principal place of business in Dallas, Tex., with misrepresenting results of product and advertising falsely or misleadingly in said respect, in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce; in that respondent falsely represented that his said product, mixed with gasoline in certain proportions for automotive use will increase power and permit operation on a leaner mixture, and increase mileage considerably if the carburetor is cut down, and printed and distributed advertisements containing such false representations and statements; with effect of misleading and deceiving dealer purchasers into believing said representations to be true, inducing their purchases in reliance upon such erroneous belief, and diverting trade from and otherwise injuring competitors, and of also misleading

¹ Amended.