

IN THE MATTER OF
BROWN FENCE & WIRE 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 1929. Complaint, Mar. 19, 1931—Decision, June 28, 1932

Where a corporation engaged in the sale, on mail order, direct to the consuming public through advertisements in farm journals, and approximately a million catalogues distributed annually to customers and prospective customers in the farming communities, principally, and dealing in (1) wire fencing, fence posts, gates, fence stretchers, and other fencing accessories, manufactured chiefly in one of its three plants; (2) a considerable amount of wire fencing and fence anchors, made in and purchased from mills neither owned nor controlled by it, shipped upon order direct from place of production to consumer, and made, in case of said anchors, with tools and pursuant to designs developed by it for the manufacture thereof; (3) paints, varnishes, and enamels made for it according to its own special formulae in a factory in which it owned no interest; and (4) tires and tubes, baby chicks and poultry supplies, nursery stock, stoves and stove supplies, cream separators, roofing and shingles, nails, shrubs, storage tanks, water heaters, lamps, gas engines, hog troughs, and incubators; some of which merchandise was made for it by the manufacturers in their dull season under contracts pursuant to which it advanced funds for materials and bought the products at cost thereof, plus manufacturing expense, and thereby through its volume of business and considerations of overhead and seasonal losses sometimes obtained said products at cost and less and was thus able to resell same at a very low price, and all of which merchandise, excepting only that made by it as aforesaid, or for it under said contracts, it purchased from manufacturers in 35 distributing centers in various States under arrangement by which the merchandise was sent from the factory direct to the consumer upon receipt of its order at a price including two separate profits;

Represented in its catalogues that it sold direct from factory to consumer and that its prices for the articles there advertised were low because the customer did not have to pay anything for middlemen's profits and expenses, and were lower than competitors' prices because its customers paid only actual cost of manufacturing plus one small profit and described its prices as "direct from factory prices", and implied that all its goods were made by it, through such statements as "Forty years ago I started my straight line selling plan. Now I have over a million customers and the largest direct from factory fence business in the world! * * *", "My prices are so low because you don't pay a cent for middlemen's profits and expenses. No dealer, salesman, or jobber comes between us. You get the saving in cash and better quality", "My direct from factory plan of dealing is the most economical way of buying goods", "Every middleman who handles the goods on its way from the factory to you must add his profit and expense and include it in his selling price.

This adds cost but does not add value. When you buy from my factory direct you save these 'in between' costs—nothing is added to factory cost except one small manufacturer's profit. That's why you get so much greater value at less cost"; facts being it was a middleman and, excepting only aforesaid fencing and accessories and articles purchased at a loss as aforesaid, made a middleman's profit in the resale of the merchandise sold by it, in which there was an expense or profit accruing at the original source of the articles and a profit to it, both of which were passed on to the consumer;

With tendency to mislead and deceive the purchasing public into believing that by reason of its supposed manufacture of the various articles dealt in by it, the public was obtaining better goods at a lower price and thereby induce public to purchase such articles from it in preference to purchase from its competitors, some of whom do not so misrepresent:

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

Mr. PGad B. Morehouse for the Commission.

Mr. John Wattawa, of Washington, D.C., 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 Delaware corporation engaged in selling by mail various articles and supplies such as paint, roofing, cream separators, etc.,¹ to farmers or ranchers, chiefly, freight prepaid, from (1) its principal place of business in Cleveland, (2) factories of a manufacturing corporation of which it owned the stock, and (3) distributing points in various States, with misrepresenting business or trade status or advantages, and advertising falsely or misleadingly in said respect and as to composition of product, 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, in sale of its products in competition with others similarly engaged in sale and distribution of farm and home supplies as well as in competition with those engaged in wholesale manufacture, sale and distribution of such articles through jobbers and retailers, represents and has represented by catalogues and other advertising media, of which about one million copies are distributed throughout the United States annually, that it is a manufacturer of all the products so advertised and sold and that prospective purchasers by buying direct from the

¹ Other articles named in the complaint are stoves, furnaces, tires and tubes, shrubs, lamps, gas engines, hog troughs, incubators, baby chicks, fencing steel posts, barb wire and gates.

factory, will save a middleman's profit on all such products and obtain the same at factory cost plus one profit only; the facts being it manufactures nothing other than the fencing, steel posts, barb wire and gates made by its aforesaid subsidiary manufacturing corporation, but "buys and resells all of its other said merchandise from others, all in such manner that the purchaser of said products does not pay a factory price plus one profit only, as represented by respondent, and there is certain expense or charge accruing to the subsidiary corporation aforesaid or to the other original sources of the said products, in addition to a profit to respondent, which is passed on to the consumer."

Respondent further, as charged, "represents and has represented in its catalogues and advertising matter as aforesaid that its fence wire so advertised, offered, and sold in interstate commerce, is a steel wire containing from .15 to .30 percent of copper, by means of which the durability of said wire is doubled, whereas in truth and in fact the copper content of said wire is and has been in many cases grossly exaggerated in, to wit, that analyses have shown the copper content to be from .01 to .07 percent."¹

Said representations, as alleged, "are calculated, have a tendency, and operate to mislead and deceive purchasers and prospective purchasers of respondent's merchandise into the belief that when purchasing such merchandise they are saving a middleman's profit and obtaining a 'direct from factory to consumer' price, and to mislead and deceive the purchasers and prospective purchasers of fence wire into the belief that the durability thereof is that of a wire containing 15 to 30 percent copper, all of which tends to and does divert trade from competitors of respondent to the respondent," and said alleged acts and things and false and misleading representations, as charged, are to the prejudice of the public and competitors and constitute unfair methods of competition.

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 a complaint upon the respondent, Brown Fence & Wire Co., a corporation, charging it with the use of unfair methods of competition in commerce, in violation of the provisions of said act.

Respondent having entered its appearance and filed its answer to the complaint herein, hearings were had and evidence was introduced

¹ Charge corrected to conform to stipulation. See paragraph 3 of Findings, on p. 384.

upon behalf of the Commission and respondent before a trial examiner of the Commission duly appointed thereto, and said trial examiner having filed his findings of facts herein and counsel for both the Commission and the respondent having filed exceptions thereto,

Thereupon this proceeding came on for final hearing on the record herein, briefs, and oral arguments of both counsel for the Commission and respondent, and the Commission having duly considered the matter and 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, Brown Fence & Wire Co., was incorporated in 1901 under the laws of the State of Ohio. In 1923 it was reincorporated under the laws of the State of Delaware and acquired the stock of and has ever since wholly managed and controlled the Peerless Wire & Fence Co., a corporation owning and operating factories at Adrian, Mich., and Memphis, Tenn. Respondent's principal place of business and a plant operated under its own name are at Cleveland, Ohio. It is now and since long prior to 1923 has been engaged in the business of selling on mail orders direct to the consuming public such merchandise as wire fencing, fence posts, gates, fence stretchers and other fencing accessories, most of which it manufactures in one of its three plants aforesaid. The rest of the articles in the same manner advertised and sold by it, such as fence anchors, tires and tubes, baby chicks and poultry supplies, nursery stock, stoves and stove supplies, cream separators, paints, varnishes and enamels, asphalt roofing and shingles, nails, shrubs, storage tanks, water heaters—and since 1931, lamps, gas engines, hog troughs and incubators—are bought by respondent from the most conveniently located factory, hatchery or nursery and shipped directly from such place of production to the customer, under respondent's name and guarantee and with freight prepaid on orders exceeding \$5 in amount. The fence anchors and a considerable amount of wire fencing are purchased by respondent in a finished state from mills not owned or controlled by it, and shipped upon order direct from the place of production to the consumer.

Respondent developed the tools and designs used by the other mills for making the fence anchors. The paints, varnishes, and enamels so sold by respondent are manufactured for it on contracts in a factory in which respondent owns no interest, according to specially owned formulae of respondent. It advances funds for the materials and buys such paint products at the cost of the raw material plus

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manufacturing costs at a fixed price per gallon. This arrangement with the paint company and also with some of the other contracting manufacturers is confined to their dull seasons. Through considerations of overhead and seasonal losses respondent with its volume of business in some cases obtains the products for which it has so arranged at cost and sometimes less than cost, and is thus able to resell at a very low price. Orders received by respondent for merchandise sold by it (other than such of the wire fencing and allied products as are manufactured by it and other than such products as it has been able to buy at or below the manufacturing cost) are filled pursuant to arrangement which respondent has with manufacturers located in thirty-five distributing centers in various States of the United States, and such merchandise is sent from the factories of such manufacturers direct to the consumers upon the order of respondent, with two separate profits included in the sale price.

Respondent causes all of the merchandise so sold by it to be transported from the point of origin through and into various other States of the United States to the respective purchasers thereof, and in the course and conduct of its business has been, and is now in active competition with other individuals, partnerships, and corporations engaged in a similar sale and distribution in interstate commerce of home and farm supplies of a like kind and nature, as well as with individuals, partnerships, and corporations engaged in the wholesale manufacture, sale, and distribution in interstate commerce, through jobbers and retailers, of such articles.

PAR. 2. In the course and conduct of its business as aforesaid respondent causes advertisements to be published in farm journals having general circulation in various States of the United States, and issues each year approximately one million catalogues which it causes to be distributed to customers and prospective customers principally in farming communities in all of the States of the United States. In these catalogues respondent uses as an inducement to prospective customers to buy from it in preference to its competitors, the representations that it sells direct from the factory to the consumer; that the prices for the articles advertised in such catalogues are low because the customer does not have to pay anything for middlemen's profits and expenses, and that such prices are lower than others (by "others" intending and meaning respondent's competitors), for the reason that customers of respondent pay only the actual cost of manufacture plus one small profit, and the prices asked by respondent for the merchandise offered for sale in such catalogues are described as "direct from factory prices." Among such statements are the following:

Forty years ago I started my straight line selling plan. Now I have over a million customers and the largest direct from factory fence business in the world! Why? Simply because my higher quality and lower price save a lot of money for my customers. *Every page of this book* proves that it pays to buy your fencing and *other farm and home needs* direct from Jim Brown's factory.

BETTER QUALITY AT LOWER PRICE

My prices are so low because you don't pay a cent for middlemen's profits and expenses. No dealer, salesman, or jobber comes between us. You get the saving in cash and better quality. Go through this catalogue carefully. Compare my low, freight paid prices with others. * * * See how much I save you on farm and poultry fencing, gates, steel posts, barb wire, smooth wire, poultry netting, paint, roofing, furnaces, heaters, oil stoves, tires, tubes, cream separators, baby chicks, brooders, and the many other things shown in this, my 40th Anniversary Money Saving Bargain Book. (*Italics supplied.*) (From inside front cover of respondent's 1929 catalogue—Commission's Exhibit No. 1.)

Introductory statements of like tenor and effect preface the indices and pages of respondent's 1930 and 1931 catalogues. By plain implication, catalogue arrangement, illustrations, and direct statements, representation is made by respondent that the goods sold (without limitation to such of the fencing and accessories as are manufactured by respondent) are from respondent's own factories, viz:

My direct from factory plan of dealing is the most economical way of buying goods. It increases the purchasing power of your dollars fully 33½ percent. In other words, whenever you buy goods in a retail store from 25 to 50 percent of the price you pay represents the profits and expenses of the store keeper, the jobber and the wholesaler. Every middleman who handles the goods on its way from the factory to you must add his profit and expense and include it in his selling price. This adds cost but does not add value.

When you buy from my factory direct you save these "in between" costs—nothing is added to factory cost except one small manufacturer's profit. That's why you get so much greater value at less cost when you buy from Jim Brown. (From page 4 of respondent's 1930 catalogue—Commission's Exhibit No. 2.)

Reference is here made to pages 2 and 3 of respondent's 1931 catalogue, Commission's Exhibit No. 3, wherein the same representations are made.

Whereas, in truth and in fact, with reference to all articles sold by it other than such of the fencing and accessories as are manufactured by it and such articles as it has purchased from a manufacturer at a loss to that manufacturer, respondent is a middleman and makes a profit in the resale of merchandise purchased by it from various manufacturers, and on this account the foregoing representations contained in its catalogue to the effect that the purchases from respondent are direct from factory to consumer and that the prices at which respondent sells its merchandise are "direct-from-factory

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prices", have a tendency to mislead and deceive the purchasing public into the belief that by reason of the fact that respondent manufactures such articles the public is obtaining better goods at a lower price, and thereby induce the public to purchase such articles from respondent in preference to respondent's competitors, some of whom do not so represent. The Commission finds with reference to the aforesaid articles there is an expense or profit accruing at the original source of the said articles and a profit to respondent, both of which are passed on to the consumer.

PAR. 3. Paragraph 3 of the complaint as amended by a stipulation reported on page 2 of the transcript charged the respondent with misrepresenting the copper content of its fence wire. Commencing with its 1930 catalogue respondent stressed its fence wire as "copper bearing", thereby intending and meaning and being by the public generally understood to represent such wire as having a copper content of not less than .15 percent. The evidence shows that fifty-three samples in all were analyzed by the Bureau of Standards. Thirty-nine of these samples were copper bearing steel wire ranging from .16 percent to .38 percent of copper content. The evidence further shows that since 1930 respondent had a valid and subsisting contract with a Pittsburgh steel company from which it purchases all the wire out of which it fabricates its fencing, and such contract contains the proviso that such wire shall have a copper content of not less than .15 percent. As to such wire fencing as is purchased by respondent from others for resale, the evidence shows that respondent has insisted upon the proper copper content; that analysis of the wire rods furnished such company was made and showed a general run of .15 percent or more. Commission's Exhibit No. 8 was a piece of wire obtained through the agency of a competitor upon respondent's order placed with the Northwestern Barb Wire Co., and was only one of fourteen different samples purchased by that competitor in the same manner and for the same purpose. Analysis of this sample showed a copper content of less than .15 percent, and respondent offered the explanation that there might have been a mistake made by the Northwestern Barb Wire Co. After giving careful consideration to all the evidence relating to this matter the Commission finds that the charges of paragraph 3 of the complaint are not supported by the weight of evidence.

CONCLUSION

The practices of the said respondent under the conditions and circumstances described in the first two paragraphs of the foregoing

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findings 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 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 respondent thereto, the testimony taken and briefs filed herein, and the oral arguments of counsel, 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 the respondent, Brown Fence & Wire Co., a corporation, its agents, representatives, servants, and employees, in connection with the sale or offering for sale in interstate commerce of all articles by it not manufactured, fabricated, produced, or grown in any mill, plant, factory, nursery, hatchery, or establishment actually owned, managed, operated, or controlled by respondent, cease and desist as follows:

1. From representing, directly or by implication, that such articles are by it so manufactured, fabricated, produced, or grown.

2. From directly or by implication giving as a reason for its alleged ability to sell said articles not by it so manufactured, fabricated, produced, or grown, the fact that said articles are furnished direct to the consumer from respondent's own factories, mills, nurseries, hatcheries, or other establishments without any expense or charge for a middleman, or with but one profit plus the manufacturer's cost, when such is not the case.

It is further ordered, That the complaint be, and the same is hereby dismissed as to paragraph 3 thereof, on the ground that the charges contained in said paragraph have not been proven.

It is further ordered, That the respondent, Brown Fence & Wire Co., a corporation, shall within 60 days after 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 this order to cease and desist.

IN THE MATTER OF
ELBY EXTRACT COMPANY

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914

Docket 1940. Complaint, Apr. 16, 1931—Decision, June 28, 1932

Where a corporation engaged in the manufacture and sale of flavoring extracts and sirups,

- (a) Employed words "Bouquet 3me" and "London Dry Essences", in describing its said products in circular letters and in labeling the same, and stated that such products were "absolutely our own products manufactured and imported exclusively by us under our own special formula";
- (b) Labeled its product with the words "Eugene et Joseph Freres" and a depiction of a building typical of European edifices, with aforesaid words upon the front thereof, and, below, the legend "Huiles essentielles, chimiques, fine synthetiques, extraits superieur, Grasse, France—New York, U.S.A." (subsequently changed to the English equivalent thereof), and reproduced upon the wooden containers of its bottled product a pictorial representation of aforesaid label bearing the words "Eugene et Joseph Freres", and the aforesaid French legend (thereafter changed as aforesaid); and
- (c) Featured the words "Eugene et Joseph Freres", with the words "Bouquet 3me" in advertising its product in a trade periodical and depicted in said advertising the bottle in which said product was sold by it and the wooden containers enclosing the bottles for sale, together with said names "Eugene et Joseph Freres", said building typical of European edifices, with said names on the front thereof, and below, the French legend above referred to for which it later substituted the English version as above set forth;

Facts being products in question were not made abroad nor imported, but were composed to the extent of 70 or 75 percent of domestic solvents, and to the extent of 25 or 30 percent of essential oils purchased by it from or through importers and manufacturers' agents in the United States, only a small part of the building depicted was ever occupied by it, and the words "Eugene et Joseph Freres" at no time appeared across the front thereof, but only over one of the doors or windows of the part used by it; With capacity and tendency to mislead and deceive purchasers and prospective purchasers into believing said products to have been imported, and to divert trade to it from competitors selling imported extracts made in France and other foreign countries, and those selling extracts made in the United States out of imported essential oils, in combination with domestic solvents, and truthfully advertising and describing the same, to the injury of said competitors' business: