

Syllabus

IN THE MATTER OF

NORTHERN FRUIT AND PRODUCE CO., NATHAN RUBEN,
TED E. WOLFE, LEE W. WOLFE, GROWERS' PRODUCE
EXCHANGE, JACK RUBEN, AND L. G. WILLIAMSCOMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2115. Complaint, Oct. 5, 1933¹—Decision, Mar. 8, 1934*

Where two corporations dealing in seed potatoes and three individuals, incorporators, employees or officers of one or both of said corporations as the case might be,

- (a) Labeled the bags thereof with tags which set forth that the contents were fully described in Federal Inspection Certificate No. (giving it) now on file at U.S. Department of Agriculture, Washington, D.C., and thereby, with intent to deceive, falsely represented that said potatoes had been competently and disinterestedly inspected, while growing in the field, by or under the auspices of a Federal agency, by which it had been certified that they were free from "dwarf", "running out", "mosaic", and other deleterious diseases, determinable by such inspection;

The facts being that the particular inspection referred to was not that immediately above described, or an inspection made under supervision of an accredited Federal or State institution or organization, as had come to be understood by the word "certified", through the practice of inspecting and certifying, under official auspices, seed potatoes in seed potato growing states, and the efforts of state and local organizations and educational institutions and state and national agencies in widely disseminating and stressing the value of planting such potatoes certified as "free" from said diseases, but was one, made in response to their request, for condition only, or for condition, size, quality, and grade, as the case might be,

With result that prospective purchasers bought said potatoes as and for those inspected and certified as above set forth, and paid higher prices therefor than they otherwise would have done; and

- (b) Falsely represented to prospective purchasers that they were selling and shipping them seed potatoes designated by Federal Inspection Certification as "U.S. No. 1 grade" and that the potatoes in said shipments were true to variety;

With result that their said representations were passed on to, through and by the various buyers, commission merchants, middlemen, wholesalers, jobbers and chain stores, as aforesaid, to the ultimate purchasers who, believing and relying thereon, purchased and planted seed potatoes productive of inferior crops, they were enabled to sell their said so-called certified seed potatoes at a greater profit than was obtainable by competitors, who do not make such misrepresentations, and were unfairly enabled to undersell competitors, who had had their potatoes field-inspected, at greater cost, by competent, disinterested persons under supervision of accredited national or state associations or institutions, and who, after paying reasonable

¹ Amended and supplemental.

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and usual expense thereof, were unable to compete with them at a profit, and with capacity and tendency so to result and to divert trade from competitors to them:

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

Mr. PGad B. Morehouse for the Commission.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondents, Northern Fruit & Produce Co., and Growers' Produce Exchange, Illinois corporations engaged in the purchase and sale of seed potatoes in car-load lots in various states, and with offices and principal places of business in Chicago, and respondent Ted E. Wolfe, former employee of the former corporation, respondents Nathan Ruben and Lee W. Wolfe, president and secretary, respectively, thereof, and in case of said Wolfe, active manager of both, and respondents Jack Ruben and L. G. Williams, incorporators and officers² of the latter, with misbranding or mislabeling and misrepresenting product as to inspection, quality, and variety, in violation of the provisions of Section 5 of said Act, prohibiting the use of unfair methods of competition in interstate commerce; in that respondents set forth on tags attached to bags of their said product, inspection thereof by the Department of Agriculture through referring to its "Federal Inspection Certificate No." etc., and falsely represented its potatoes as U.S. No. 1 grade and true to variety, notwithstanding fact that particular inspection in question was not that competent, disinterested inspection of the growing plant for injurious diseases, associated by trade and planters through educational work of state and other public organizations and institutions with word "certified"; with intent and effect of misleading and deceiving purchasers and prospective purchasers, bringing about planting of seed productive of inferior crops, and securing the premium paid for seed potatoes in fact thus inspected and certified as free from such diseases, and of prejudicing competitors who had incurred the expense of the more costly field inspection, and were thereby unable to compete at a profit; all to their prejudice and that of the public.³

² Together with said Ted W. Wolfe.

³ The allegations of the complaint are set forth substantially verbatim in the findings, respondents either failing to appear or admitting such allegations, and consenting to entry of order to cease and desist against them.

The practices of respondents, Northern Fruit & Produce Co. and Ted E. Wolfe in tagging seed potatoes misleadingly were the subject of an order to cease and desist on Dec. 6, 1932. See 17 F.T.C. 140. Following such order, said respondents, as alleged, have operated through the other respondents herein.

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, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", the Federal Trade Commission issued and served its amended and supplemental complaint upon the respondents charging them with the use of unfair methods of competition in violation of the provisions of the said act.

The Commission duly caused said complaint to be served upon the respondents, and each of them, stating its charges in that respect and containing notice of a hearing upon a day and at a place therein fixed, to wit, the 10th day of November, 1933, at 2 o'clock in the afternoon, at the office of the Federal Trade Commission in the City of Washington, D.C. Respondents Northern Fruit & Produce Co., a corporation, Nathan Ruben, and Lee W. Wolfe, having failed to appear at the place and time so fixed or to answer or to show cause why an order should not be entered by the Commission as to them; and respondents Ted E. Wolfe, Jack Ruben, L. G. Williams and Growers' Produce Exchange, a corporation, having answered the said amended and supplemental complaint under date of December 9, 1933, admitting all the allegations thereof to be true, waiving hearing on the charges therein set forth, refraining from contesting the proceeding, and consenting that the Commission might make, enter and serve upon them, and each of them, an order to cease and desist from the violations of law therein alleged, thereupon this cause came on for final disposition pursuant to Rule III of the Rules and Regulations duly adopted for the purpose of carrying out the provisions of the aforesaid act, due notice of which was served upon each of the respondents with the aforesaid amended and supplemental complaint, and the Commission having duly considered that respondents Northern Fruit & Produce Co., a corporation, Nathan Ruben, and Lee W. Wolfe, are in default and being fully advised in the premises, makes this its report stating its findings as to the facts and conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The Respondent Northern Fruit & Produce Co., is a corporation organized under the laws of the State of Illinois, formerly having its office and place of business in the city of Chicago,

State of Illinois, but no longer doing business, its affairs now being in the hands of a receiver, Mr. Arthur C. Wick, of 100 West Monroe Street, Chicago, Ill. The respondent Ted E. Wolfe was an employee of the aforesaid company as an inspector of seed potatoes and is now, together with respondents Jack Ruben and L. G. Williams, one of the incorporators and officers of the respondent Growers' Produce Exchange, a corporation organized, existing and doing business under the laws of the State of Illinois, with its office and principal place of business at 3108 West Fifty-first Street, Chicago, Ill. Lee W. Wolfe is secretary of the respondent, Northern Fruit & Produce Co. and has been its active manager. Respondent Nathan Ruben is president of the Northern Fruit & Produce Co.

PAR. 2. For approximately three years last past the respondent Northern Fruit & Produce Co. has been engaged in the business of buying and selling seed potatoes and also operating as a commission merchant dealing in seed potatoes, purchasing in carload lots from the sellers located in various states other than the State of Illinois, and shipped by these sellers from such other states to the company at Chicago, Ill. In the course and conduct of its business, while the said carloads of seed potatoes were in Chicago awaiting resale and transshipment prior to December, 1932, the said company employed the respondent Ted E. Wolfe to certify and tag the bags in which said seed potatoes were contained. Respondent Ted E. Wolfe falsely, for hire, designated himself as "Mid-West Agricultural Institute" and upon the instructions of the company thereupon certified and tagged the seed potatoes with tags describing them as "certified" by the "Mid-West Agricultural Institute", and the seed potatoes thus certified and tagged, the Northern Fruit & Produce Co., acting sometimes as broker and sometimes as middleman, resold and transshipped into and through various other states of the United States, to various buyers, other commission merchants, middlemen, wholesalers, jobbers, and chain stores at a price which included a premium charged and received by reason of such false certification and tagging. Heretofore a complaint was issued by the Commission against the respondents Northern Fruit & Produce Co. and Ted E. Wolfe and on December 6, 1932, an order was issued against these two respondents, requiring them to cease and desist from the aforesaid practices. Thereafter these two respondents have conducted their seed potato business through the agency of the other respondents herein, namely, Growers' Produce Exchange, Lee W. Wolfe, Jack Ruben and L. G. Williams, individuals, in the manner and using further unfair methods of competition as hereinafter set out.

PAR. 3. Respondents and each of them cause seed potatoes when sold, to be shipped from and to the city of Chicago in the State of

Illinois into and through the various other states from the sellers and from themselves to the purchasers thereof. In the course and conduct of their business, as aforesaid, respondents and each of them have been and are in competition with other individuals, partnerships and corporations engaged in the sale and distribution in interstate commerce, of seed potatoes.

PAR. 4. For more than two years last past through the efforts of state and local organizations, educational institutions, and widely disseminated information by state and national agencies, potato planters have come to recognize the value of planting seed potatoes certified to be free from various diseases deleteriously affecting crop production, such as "dwarfing", "running out", or "mosaic", some of which diseases are destructive, soil-innoculating, and can only be detected by inspection of the growing seed potato plant. Seed potatoes are grown almost exclusively in those states in the northern half of the United States and transshipped, with Chicago, Ill., as a central distributing point, to states in the southern portion of the United States and virtually all of the seed potato raising states have made provisions for field inspection conducted by trained men during the growing season, generally under the auspices of the State Agricultural College or other organization or institution. After inspection there is customarily a certificate issued which the grower may attach to his bags of seed potatoes prior to shipment. From the foregoing educational propaganda, customs and practices in the seed potato trade, wholesalers, jobbers, retailers and many of the consuming public have come to associate, where seed potatoes are concerned, the word "certified" with a product which, while still growing, has been competently and disinterestedly inspected for freedom from destructive plant diseases, under the supervision of an accredited federal or state institution or organization. By reason of such trade practices and association of ideas, purchasers have been and are willing to and do pay higher prices for seed potatoes which have been certified in such manner.

PAR. 5. The aforesaid respondents in the course and conduct of their business as aforesaid, since the Commission's order to cease and desist as aforesaid have made a practice of requesting inspection, by the Bureau of Agricultural Economics of the United States Department of Agriculture, of the carloads of potatoes by respondents shipped and sold in interstate commerce as aforesaid, and the said bureau, in accordance with its usual practice, has been furnishing to respondents in response to such requests, inspections and reports of two kinds, viz: (a) Report without reference to size, quality or grade, known as "for condition only", (b) With ref-

erence to size, quality and grade, as well as with reference to condition of the car and the load. When an inspection of whichever kind respondents may have requested has been made, an inspection certificate is made out, given a number, and filed with the United States Department of Agriculture in Washington and a copy thereof is supplied by the said bureau to these respondents. Respondents, well knowing the meaning which the word "Certified" has come to have by reason of the aforementioned circumstances, and intending to continue to deceive purchasers and prospective purchasers as to the manner, place and source of inspection and certification of the seed potatoes sold and offered for sale since December, 1932, have been and still are attaching to the bags of seed potatoes shipped in interstate commerce, tags in words and figures following, to wit:

OSKY WOW WOW

Brand

Seed and Table

POTATOES

Chief of them all

Northern Fruit & Produce Co., Chicago

[Reverse]

The ----- in this sack were grown in MINNESOTA and came from car 19548 and are fully described in Federal Inspection Certificate No. 173449 now on file at U.S. Department of Agriculture, Washington, D.C.

PAR. 6. Under and by reason of the general and common understanding on the part of wholesalers, jobbers, retailers and potato planters, by means of the aforesaid misleading reference to the "Federal Inspection Certificates" and "U.S. Department of Agriculture", respondents, and each of them, in the course and conduct of their business, are falsely representing to purchasers and prospective purchasers that such seed potatoes have been competently and disinterestedly inspected while growing in the field, by or under the auspices of a Federal Agency, by which it has been certified that such seed potatoes are free from "dwarf", "running out", "mosaic" and any other potato disease determinable by inspection of the seed potato plant while growing and that they are "certified" potatoes

within the meaning of the general and common understanding of the phrase "certified seed potatoes" as above set out, when in truth and in fact such is not the case, and prospective purchasers, believing and relying upon the truth of such representations, purchase respondents' seed potatoes at a price higher than they would pay for seed potatoes not inspected and certified in the manner in which they believe respondent company's seed potatoes have been inspected and certified.

PAR. 7. In the course and conduct of their business, as aforesaid, respondents, and each of them, have represented to prospective purchasers that they were selling and shipping to such purchasers seed potatoes designated by Federal Inspection Certification as "U.S. No. 1 Grade", and that the potatoes in said shipments were true to variety, when in truth and in fact such potatoes were neither of such grade nor true to variety.

PAR. 8. The representations of respondents as aforesaid have been and are passed on by respondents to, through and by the various buyers, commission merchants, middlemen, wholesalers, jobbers, and chain stores, as aforesaid, to the ultimate purchasers who, believing and relying thereon, purchase and plant seed potatoes of a quality and condition productive of inferior crops. The aforesaid methods used by respondents, their agents, officers, servants and employees have a tendency to, and do unfairly result in (a) respondent companies' being able to sell its so-called "certified" seed potatoes at a greater profit than can be obtained by competitors who do not so misrepresent to their prospective purchasers and, (b) respondent companies being able to undersell those of its competitors who, in the course and conduct of their business, have had their seed potatoes field-inspected by competent disinterested persons under supervision of accredited national or state associations or institutions and who, after paying the reasonable and usual expenses of such inspection and certification (greater than the expenses of respondent company's so-called inspection and certification), are unable to compete with respondent company at a profit.

PAR. 9. The foregoing methods of competition and each of them are to the prejudice of competitors of the respondent company, to the prejudice of the public, and have a tendency to divert trade from respondents' competitors to respondents and constitute unfair methods of competition in interstate commerce within the intent and meaning 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."

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CONCLUSION

The acts and practices of the said respondents, and each of them, under the conditions and circumstances described in the foregoing findings are to the prejudice of the public and of respondents' competitors; are unfair methods of competition in 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 amended and supplemental complaint of the Commission, and the answers of respondents Ted E. Wolfe, L. G. Williams, Jack Ruben and Growers' Produce Exchange, a corporation, admitting all the allegations thereof to be true, waiving hearing on the charges therein set forth, refraining from contesting the proceeding and consenting that the Commission might make, enter and serve upon all of them and each of them an order to cease and desist from the violations of law therein alleged, and respondents Northern Fruit & Produce Co., a corporation, Nathan Ruben and Lee W. Wolfe having failed to appear at the time and place fixed by the Commission for them to show cause why an order should not be entered against them and having failed to file answer to the complaint of the Commission, duly served upon them and upon each of them, and now being in default; and the Commission having made its findings as to the facts and the conclusion that each of the said respondents 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 respondents, and each of them, and their agents, representatives, servants, and employees, in connection with the sale and shipment in interstate commerce of seed potatoes, cease and desist as follows:

(1) From directly or indirectly representing to the purchaser or prospective purchaser by means of tags attached to said seed potatoes, or in any other manner, that the said seed potatoes have been inspected or certified with reference to size, quality or grade when such is not the fact.

(2) From representing, directly or indirectly, that such seed potatoes have been inspected for "dwarfing", "running out",

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"mosaic", or any other potato disease determinable only by inspection of the seed potato plant while growing, when such seed potatoes do not come from plants so inspected.

(3) From representing, directly or indirectly, by reference to Federal inspection certificate numbers on tags attached to the bags in which said seed potatoes are shipped, or in any other manner, that the said seed potatoes have been inspected and reported upon by any department or bureau of the United States Government with reference to size, quality and grade when the Federal inspection referred to is an inspection by the Bureau of Agricultural Economics of the United States Department of Agriculture of said seed potatoes, of that kind and nature known as an inspection and report "for condition only."

(4) From representing, directly or indirectly, that the said seed potatoes have been inspected or certified to in any other manner whatsoever than is actually the case, and

(5) From representing, directly or indirectly, that such seed potatoes are of a grade known and designated as "U.S. No. 1" or that the potatoes in any one shipment thereof are true to variety when such is not the fact.

It is further ordered, That the respondents, and each of them, shall, within 60 days from the date of the service upon them of a copy of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they, and each of them, have complied with the order herein set forth.

IN THE MATTER OF
TUTTLE'S TITE-ON CEMENT 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 2133. Complaint, Dec. 5, 1933—Decision, Mar. 19, 1934

Where a product correctly termed vitreous enamel, and consisting of a glass manufactured with the same ingredients, and in much the same manner, as glass, but with the surface appearance of porcelain, though not true porcelain, long since developed by ceramic manufacturers, had come in recent years to be so widely and continuously advertised by refrigerator and other manufacturers using vitreous enamel surfaces on their products, as porcelain enamel finish, that vitreous enamel surfaces had widely come to be accepted and understood by such manufacturers and the consuming public as "porcelain enamel"; and thereafter a corporation engaged in the manufacture of a thin, cementlike material intended and sold for use as a paint or lacquer in finishing or surfacing refrigerators, tables, chairs, and various other articles, so as to simulate in appearance that kind of surface or finish which had come to be known to the general public as "porcelain enamel", as aforesaid, and in the sale thereof to manufacturers, wholesalers, and retailers,

Designated said material on labels and in advertising as "C. S. Porcelain", and in circular letters addressed and mailed to prospective purchasers featured said designation, and the word "porcelain", through such statements as "We have been successful in developing an air hardening Porcelain", etc., "This Porcelain is not poisonous", etc., "This Porcelain bakes at a low temperature", etc.;

Notwithstanding fact that said preparation, which contained not to exceed one percent of silica and alumina, main constituents of clay (chief ingredient of true porcelain), was neither that product known to manufacturers and consumers as porcelain or porcelain enamel, or generally accepted by them as such and did not produce a surface having the equivalent desirable characteristics of a porcelain enamel surface, as respects resistance to heat, abrasion, washing solutions, and fruit acids;

With the result that members of the consuming public purchased articles such as refrigerators, table tops, and others finished and surfaced with said "C. S. Porcelain" as and for articles finished with porcelain enamel, and it passed on to its immediate customers the means of receiving the ultimate consumer, and with tendency to mislead and deceive not only purchasers and prospective purchasers of its said product, but purchasers and prospective purchasers of articles surfaced and finished therewith by others in the belief that said product and articles had the same or equivalent characteristics as genuine porcelain or porcelain enamel, and thereby to divert trade from and otherwise injure competitors:

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

Mr. PGad B. Morehouse for the Commission.