

IN THE MATTER OF
**PURITY ICE COMPANY, INCORPORATED, AND FELES
FERLISE, AS AN INDIVIDUAL AND AS PRESIDENT OF
SAID PURITY ICE COMPANY, INCORPORATED**

COMPLAINT EX REL. NATIONAL RECOVERY ADMINISTRATION, OPINION OF
COMMISSION, AND ORDER OF DISMISSAL IN REGARD TO THE ALLEGED VIO-
LATION OF SEC. 3 OF AN ACT OF CONGRESS APPROVED JUNE 16, 1933, AND
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 2203. Complaint, June 24, 1934—Decision, Apr. 4, 1935

Complaint, on relation of National Recovery Administration, charged respondent corporation and respondent individual, its president and moving spirit, with using unfair methods of competition, in or affecting commerce within the intent and meaning of Section 3 of the National Industrial Recovery Act and of Section 5 of the Federal Trade Commission Act, in constructing and equipping, in Lakeland, Fla., an ice plant, subsequent to date fixed by Article XI of the Code of Fair Competition for the Ice Industry, adopted and approved under said act, without applying to or securing from the Administrator for Industrial Recovery the certificate of public convenience and necessity there provided, sanctioning such construction, and finding the need of additional ice production, storage or tonnage at or in the city and territory involved, or seeking or offering to establish to the satisfaction of said administrator such requirement of public necessity and convenience, and without the establishment thereof or the giving of such a certificate or making of such a finding, and in beginning to manufacture and sell ice therefrom for transportation in interstate commerce, and for use for refrigerating food stuffs in process of transportation in commerce between and among the States, in competition with others similarly engaged;

With capacity and tendency to divert trade and custom to them from their competitors, to injury of latter and the public, endangering, through overproduction in said city and area, the permanence and orderly conduct of the industry therein, with the public loss and inconvenience incident to inability of its manufacturers to continue to produce, offer, sell and deliver ice to public in accordance with the requirements of said code, and to make it impossible for operators in said area to continue their enterprises without violating the same, and thus deny the public the benefit of its provisions relative to labor conditions and minimum wages and hours, embraced therein as a necessary part of the plan and purpose of said National Recovery Act; all in violation thereof and of said code adopted thereunder, and to the prejudice of the public and competitors.

Product of plant in question, construction of which without securing or seeking to secure such certificate was conceded, with capacity of about 15 tons a day, output of about 10, and fourteen employees, was sold entirely in said city in which located, and the surrounding territory, within said State, in competition with that from the plant of one of the largest ice concerns in the United States, with a daily capacity of 375 tons. Neither concern, however, shipped or caused to be shipped any ice outside the State, and

ice supplied by latter concern for refrigerating cars or trucks was delivered in said city or vicinity. By the provisions of Section 3 (b) of the aforesaid Act the provisions of Codes approved under it become standards of fair competition for the trade, industry, or subdivision thereof involved, and any violation of such standards in any transaction in or affecting interstate or foreign commerce is made an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act as amended.

Respondents contended, among other things, that they have not been engaged in any transactions either in, or affecting interstate commerce. In support of complaint it was contended that manufacturers in said competitive area were engaged in business affecting interstate commerce in that they supplied ice in said vicinity for refrigeration of cars and trucks transporting perishable commodities therefrom, and also supplied therein ice for refrigeration of food stuffs imported from outside the State, and, further, that in view of the relation between ice and transportation of perishables the mere construction of such plant affected interstate commerce.

Aside from a single sale and delivery, in said city, of ice to a truck engaged in transporting perishable vegetables in Florida to the District of Columbia, and sundry sales to local grocerymen for refrigerating meats shipped into Florida from other States, however, there was no evidence disclosing the slightest effect whatsoever upon interstate commerce of ice sold by respondents from plant concerned and the ice business, under decision in *New State Ice Co. v. Liebmann*, 285 U. S. 262, 279, is not distinctive from ordinary manufacture and production:

Held, That transactions as to which complaint has been made were not in interstate or foreign commerce and did not substantially or directly affect the same, and that facts show no burden, restraint or effect upon interstate commerce, and, Commission having no authority to proceed under the provisions of aforesaid Section 3 (b) of said Recovery Act, and to issue cease and desist order against respondents, complaint must be dismissed.

Whether said Recovery Act, and Code involved, are unconstitutional for reasons asserted by respondents, or whether refusal of said certificate would, in instant case, permit monopoly in violation of Section 3 of said Act, not passed upon; and

Complaint dismissed "upon the ground that the transactions complained of are not in or affecting interstate commerce."

Mr. Richard P. Whiteley for the Commission.

Douglas, Obear, Morgan & Campbell of Washington, D. C., for respondents.

Cannon, Spieth, Taggart, Spring & Annat of Cleveland, Ohio, and *Mr. T. B. Cantrell*, of Washington, D. C., for Code Authority Ice Industry, Intervenor.

Mr. Gregory Hankin and *Mr. Peter Seitz* for National Recovery Administration, Intervenor.

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COMPLAINT

Whereas, the National Recovery Administration, a body created by order of the President, pursuant to Section 2, paragraphs (a) and (b) of the National Industrial Recovery Act, has applied to the Federal Trade Commission for the issuance of a complaint against the Purity Ice Company, Incorporated, a corporation, and Feles Ferlise, as an individual and as president of said Purity Ice Company, Incorporated, relating that said respondents through the violation of Article XI of the Code of Fair Competition for the Ice Industry, approved October 3, 1933, effective October 16, 1933, have been guilty of using unfair methods of competition in or affecting interstate commerce in violation of Section 5 of an Act approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes;" and

Whereas, by reason of the relation of said National Recovery Administration, the Federal Trade Commission has reason to believe that said respondents have been and are using unfair methods of competition in or affecting interstate commerce; and

Whereas, it appears to the Federal Trade Commission that a proceeding by it in respect thereof is in the public interest, and that it is in the public interest that the National Recovery Administration be allowed to intervene and appear in this proceeding;

Now, therefore, the Federal Trade Commission, pursuant to Section 5 of the Federal Trade Commission Act aforesaid, allows said National Recovery Administration to intervene and appear in this proceeding, and on said relation of National Recovery Administration issues this its complaint against said respondents stating its charges as follows:

PARAGRAPH 1. Respondent Purity Ice Company, Incorporated, is a corporation organized and existing under and by virtue of the laws of the State of Florida, having and maintaining its ice manufacturing plant, its office and principal place of business at South Florida Avenue and West Olive Street, in the city of Lakeland in the State of Florida.

PAR. 2. Respondent Feles Ferlise is president of respondent Purity Ice Company, Incorporated, and as such president dominates, directs and controls said Purity Ice Company, Incorporated, in all of its plans, policies, practices and acts to such extent that they are in fact the plans, policies, practices and acts of respondent Feles Ferlise in his individual capacity, and said corporation is used by respondent Feles Ferlise as an instrumentality for the accomplishment of his individual will, plans and purposes.

PAR. 3. Respondents, acting as above alleged, control and operate at the city of Lakeland in the State of Florida a certain factory or plant for the manufacture of ice and therein and thereby manufacture ice to be offered for sale and sold to the public. Respondents have been and are offering for sale and selling the ice so manufactured by them to the public in or affecting interstate commerce. Respondents sell said ice for transportation in interstate commerce, and the same is so transported, also to be used, and the same is used, for the purpose of refrigerating foodstuffs in the process of transportation in commerce between and among the State of Florida and the other States of the United States in this, to wit: Said ice and said foodstuffs so refrigerated thereby are transported from a point or points within the State of Florida into and through other States of the United States to points of destination located at various places within the several States of the United States. Respondents manufacture said ice to be offered for sale and sold, and do offer for sale and sell, said ice to persons, firms, associations and corporations engaged in such interstate commerce for the purpose of transportation in such commerce or for the purpose of refrigerating foodstuffs to be transported, and that are in fact transported, in such interstate commerce; and said ice is so transported in such interstate commerce.

PAR. 4. Other persons, firms, associations and corporations have been, and are, likewise engaged in the manufacture of ice at said city of Lakeland in the State of Florida, and at other points within the same competitive area, for the purpose of offering the same for sale and selling the same to the public and to persons, firms, associations or corporations likewise engaged in such interstate commerce to be by such purchasers transported in such interstate commerce, or used for the refrigeration of foodstuffs in the process of transportation in such interstate commerce, or to be transported therein, and that are actually transported therein.

In the course and conduct of their said business at all times respondents have been in competition, and still are in competition, with all such other persons, firms, associations or corporations so engaged in said business in or affecting such commerce between and among the State of Florida and the several States of the United States; and all acts or practices of respondents in relation to said manufacture of said ice, and said offering for sale, and said sale thereof, are methods of competition in or affecting interstate commerce under the provisions of the National Industrial Recovery Act approved June 16, 1933.

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PAR. 5. Under and pursuant to the provisions of Section 2 of said National Recovery Act, the President of the United States, on the 16th day of June 1933 by his certain Executive Order in writing appointed Hugh S. Johnson to be the administrator for Industrial Recovery under Title I of said Act.

Under and pursuant to the provisions of said National Industrial Recovery Act, the National Association of Ice Industries, as a representative of the Ice Industry, submitted to the President of the United States an application for the approval of a Code of Fair Competition for the Ice Industry.

Said application was duly referred to said Hugh S. Johnson, as such administrator, by and before whom such further action was taken and such further proceedings were had that said Johnson, as such administrator, submitted a certain Code of Fair Competition for the Ice Industry, to the President of the United States, together with his written report containing an analysis of said Code of Fair Competition, and his recommendations and findings with respect thereto, wherein said administrator found that said Code of Fair Competition complies in all respects with the pertinent provisions of Title I of the National Industrial Recovery Act, and that the requirements of clauses (1) and (2) of subsection (a) of Section 3 of said Act has been met. The concluding paragraphs of said report are in the following words, to wit:

My Dear Mr. President: I have the honor to submit and recommend for your approval the Code of Fair Competition for the Ice Industry. This Code represents the united efforts of the entire Ice Manufacturing Industry in the United States to comply with the spirit and word of the National Industrial Recovery Act.

An analysis of the provisions of the Code has been made by the Administrator. The wage and hour provisions provided for therein represent a marked improvement over those prevailing in the industry in 1929. I find that the Code complies with the requirements of clauses 1 and 2, subsection (a) of section 3 of the National Industrial Recovery Act.

Thereafter, and on the 3rd day of October 1933 the President of the United States made and issued his certain written Executive Order wherein and whereby he adopted and approved the report, recommendations, and findings of said administrator, and ordered that the said Code of Fair Competition be, and the same thereby was, approved, and by virtue of said National Industrial Recovery Act the provisions of said Code became, and still are, the standard of fair competition for the Ice Industry, and became, and still are, binding upon every member thereof. Respondents have been, and are, members of the Ice Industry within the intent and meaning of said Code, and have been, and are, bound by the provisions of said Code.

A printed copy of said Code, of said written report of said administrator, and of said Executive Order so made and issued by the President of the United States, is filed herewith, marked "Exhibit A"¹ and is by this reference thereto made a part of this complaint.

PAR. 6. Article XI of said Code provides as follows:

If at any time an individual, firm, corporation, or partnership, or other form of enterprise, desires to establish additional ice production, storage, or tonnage in any given territory said party must first establish to the satisfaction of the Administrator that public necessity and convenience require such additional ice-making capacity storage or production. The ice manufactured from any plant that was not in actual operation on September 8, 1933, shall not be sold to any purchaser for a period of twelve months from the date subsequent to September 8, 1933, upon which the operation of such plant may be initiated or resumed, at prices lower than the lowest corresponding prices in good faith published, as required by this Code, in a schedule or schedules governing prices to such purchasers; providing and excepting that this provision will not apply to the sale of ice manufactured by the following:

(a) Plants installed upon authority, of a certificate of necessity and convenience duly issued by the Administrator; or

(b) Plants temporarily shut down for repairs for a period not in excess of twelve months prior to September 8, 1933; or

(c) Plants that were owned or whose output was controlled by companies or operations that were on September 8, 1933, in good faith engaged in the business of selling ice to the general trade in the market in which the ice from such plants is proposed to be sold, such plants being on September 8, 1933, out of operation because of the intent in good faith to further the economic conduct of the business of such company or operation.

At no time prior to the 30th day of January 1934 did respondents or any of them own, control or operate an ice manufacturing plant, or manufacture or offer for sale or sell ice, at the city of Lakeland in the State of Florida, or at any point within the same competitive area. At said date respondents' said ice-manufacturing plant had not been constructed, nor was any such plant in operation or in existence at said city of Lakeland or at any place within the same competitive area.

At no time did respondents or any of them apply to said Hugh S. Johnson, as such administrator, for a certificate or finding of public necessity and convenience for the construction of their said ice-manufacturing plant or for the establishment of additional ice production, storage, or tonnage at or in said city of Lakeland or in any given territory in which said city is located. At no time did respondents or any of them seek or offer to establish to the satisfaction of said administrator that public necessity and convenience require such additional ice-making capacity, storage or production. At no time was it established to the satisfaction of said administra-

¹ Not published.

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tor that public necessity and convenience required such additional ice-making capacity, storage or production. At no time did said administrator give a certificate, or make a finding, that public necessity and convenience require such additional ice-making capacity, storage or production.

Notwithstanding said provisions of Article XI of said Code, and the failure of respondents to establish, or seek or offer to establish, to the satisfaction of said Administrator that public necessity and convenience require such additional ice-making capacity, storage or production, respondents, acting as hereinabove alleged, caused their said ice-manufacturing plant to be constructed and equipped for the purpose of manufacturing ice therein and thereby, and began and have continued to manufacture ice at said plant as above alleged and to offer the same for sale and to sell the same in all things as hereinabove alleged.

PAR. 7. The use of said acts and practices above alleged has the tendency and capacity to divert trade and custom to respondents from their competitors, to the injury of such competitors. The use of said acts and practices is to the injury of the public in this, to wit: It causes such overproduction of ice at said city of Lakeland and in and throughout the competitive area in which said city is located as to endanger the permanence and orderly operation of said industry in said city and competitive area, with the public loss and inconvenience that are incident to the inability of manufacturers of ice in said area to comply with the requirements of said Code of Fair Competition for the Ice Industry, and to continue to produce and offer to sell and to sell and deliver ice to the public under the requirements of said Code of Fair Competition. The use of said acts and practices, has the tendency and capacity to injure the public by making it impossible for operators of ice-manufacturing plants in said area to continue in their said enterprise without violating said Code of Fair Competition denying to the public the benefit of the provisions of said Code relative to labor conditions, minimum wages and hours of labor, which are a necessary part of the plan and purpose of said National Industrial Recovery Act.

PAR. 8. The above alleged acts and practices of respondents are all in violation of the provisions of said National Industrial Recovery Act and of said Code of Fair Competition for the Ice Industry established thereunder, and are all to the prejudice of the public and of respondents' competitors. Said acts and practices constitute unfair methods of competition in or affecting commerce within the intent and meaning of Section 3 of said National Industrial Recovery Act and of Section 5 of an Act of Congress, entitled "An

Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

OPINION

The complaint in this case charges the Purity Ice Company, a corporation, and Feles Ferlise, individually and as president of the said company, with the violation of certain provisions of the Code of Fair Competition for the Ice Industry. Complaint was issued upon the relation of the National Recovery Administration, and counsel for that administration and for the Ice Code Authority were permitted to intervene and to prosecute the complaint.

The complaint alleges that respondents violated the Code in question by failing to apply for or to secure from the Administrator for Industrial Recovery a certificate of public convenience and necessity as required by the provisions of Article XI.²

That article provides that any individual, firm, corporation, or partnership, or other form of enterprise, desiring to establish additional ice production, storage, or tonnage in any given territory must first establish to the satisfaction of the administrator that the public necessity and convenience require such additional ice-making capacity, storage, or production.

Under the provisions of Section 3 (b)³ of the National Industrial Recovery Act, after the President has approved a Code, the pro-

² If at any time an individual, firm, corporation, or partnership, or other form of enterprise, desires to establish additional ice production, storage, or tonnage in any given territory, said party must first establish to the satisfaction of the Administrator that public necessity and convenience require such additional ice-making capacity, storage or production. The ice manufactured from any plant that was not in actual operation on September 8, 1933, shall not be sold to any purchaser for a period of twelve months from the date subsequent to September 8, 1933, upon which the operation of such plant may be initiated or resumed, at prices lower than the lowest corresponding prices in good faith published, as required by this Code, in a schedule or schedules governing prices to such purchasers; providing and excepting that this provision will not apply to the sale of ice manufactured by the following:

"(a) Plants installed upon authority, of a certificate of necessity and convenience duly issued by the Administrator; or

"(b) Plants temporarily shut down for repairs for a period not in excess of twelve months prior to September 8, 1933; or

"(c) Plants that were owned or whose output was controlled by companies or operations that were on September 8, 1933, in good faith engaged in the business of selling ice to the general trade in the market in which the ice from such plants is proposed to be sold, such plants being on September 8, 1933, out of operation because of the intent in good faith to further the economic conduct of the business of such company or operation."

³ "After the President shall have approved any such code, the provisions of such Code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended; but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended."

visions of such Code become the standards of fair competition for the trade or industry or subdivision thereof involved. Any violation of such standards in any transaction, in or affecting interstate or foreign commerce, is made an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended.

Respondents admit that they established a plant or factory for the manufacture of ice at Lakeland, Fla., subsequent to the approval of the Code of Fair Competition for the Ice Industry without securing or attempting to secure a certificate of public convenience and necessity as required under Article XI of said Code. They deny, however, that they have at any time been engaged in any transaction in or affecting interstate or foreign commerce. Other defenses are raised by respondents which will be stated hereinafter.

The record shows that the Code for the Ice Industry was approved by the President on October 3, 1933, and became effective October 16, 1933; that early in 1934 the respondents established a plant for the manufacture of ice at Lakeland, Fla., with a capacity of about 15 tons per day and an actual sale of approximately 10 tons daily, and proceeded to sell the ice manufactured in that plant in the city of Lakeland and the territory immediately surrounding said city. The respondent company employed 14 persons. At the time that this plant was established, there was in operation in that area one other ice plant, with a daily productive capacity of about 375 tons. This latter plant was operated by the Federal Ice Refrigerating Company, a subsidiary of the City Ice and Fuel Company. The latter company is the largest ice manufacturing concern in the United States, owns and operates approximately 18 plants in the State of Florida, and has some 26 subsidiaries or branches throughout the United States and Canada. The Federal Ice Refrigerating Company did not ship or cause to be transported any ice outside the State of Florida and the ice which it supplied for refrigeration of cars and trucks was sold and delivered to such cars and trucks in the city of Lakeland or vicinity.

The record fails to disclose a single instance where the respondents sold or shipped ice outside the State of Florida. All of their manufacturing operations were carried on in the city of Lakeland, and all of their sales were restricted to that city or its immediate vicinity. Consequently, the respondents were not engaged in interstate commerce.

Under the National Industrial Recovery Act, the jurisdiction of the Commission over unfair methods of competition is extended to

transactions "in or affecting interstate or foreign commerce." Do respondents' transactions as disclosed by the record affect interstate commerce?

In support of the allegations of the complaint it is contended that the ice manufacturers in the Lakeland competitive area are engaged in business affecting interstate commerce in that they supply ice at Lakeland or vicinity for the refrigeration of cars and trucks which transport perishable commodities from Lakeland and vicinity to other States, and also in that they supply in Lakeland ice for the refrigeration of foodstuffs imported into Lakeland and vicinity from outside the State of Florida. It is further contended that in view of the relation between ice and transportation of perishables the mere construction of an ice plant affects interstate commerce. It is to be noted that aside from a single sale and delivery in Lakeland of ice to a truck engaged in transporting perishable vegetables from Florida to the District of Columbia, and sundry sales of ice to grocymen in Lakeland for the purpose of refrigerating meats which had been shipped into Florida from other States, there is no evidence to show that any of the ice sold by the respondents had the slightest effect whatsoever upon interstate commerce. Did the sale and delivery of ice to the truck in Lakeland and the sale and delivery of ice to the grocers in Lakeland affect interstate commerce so as to confer authority upon the Commission to proceed under Section 3 (b) of the National Industrial Recovery Act?

The question whether intrastate transactions so affect interstate commerce as to come within the purview of Federal regulatory authority under the Commerce Clause has come before the Supreme Court most frequently in litigation arising under the antitrust laws, although other Federal legislation has called for judicial determination of this question. Following *Hopkins v. United States* (171 U. S. 578, 592) which declared "there must be some direct and immediate effect upon interstate commerce", the holding in *Swift & Co. v. United States* (196 U. S. 375, 397), that the effect of the restraint upon interstate commerce was "not accidental, secondary, remote or merely probable"; and the declaration in *Hammer v. Dagenhart* (247 U. S. 251, 272), that "the mere fact that they were intended for interstate commerce transportation does not make their production subject to Federal control under the Commerce Clause", there developed a line of cases squarely controlling the instant proceeding.

In *United Mine Workers v. Coronado* (259 U. S. 344), a civil suit under the Sherman Act, the court in determining whether the conspiracy involved was in restraint of interstate commerce, declared that while coal mining is not interstate commerce, and the power of

Congress does not extend to its regulation as such, nevertheless if the practices in connection with coal mining are likely to obstruct, restrain or burden interstate commerce it is within the power of Congress to subject them to restraint, but that the practices themselves not being of an interstate character, "the intent to injure, obstruct or restrain interstate commerce must appear as an obvious consequence" of the acts.

In *United Leather Workers v. Herkert* (265 U. S. 457), also a civil action under the Sherman Law, the court held that prevention by means of a strike, of manufacture of goods destined for interstate commerce was not an interference with such commerce, stating at page 471:

* * * the mere reduction in the supply of an article to be shipped in interstate commerce, by illegal or tortious prevention of its manufacture, is ordinarily an indirect and remote obstruction to that commerce.

Industrial Association v. United States (268 U. S. 64), presented a case under the Sherman Act of a combination of builders and dealers restricting the purchase of building materials used in San Francisco to products made by open shops. This necessarily raised the question of the effect on interstate commerce in products sold and shipped to San Francisco in such commerce. Referring to the alleged restraint upon the purchase of interstate products, the court stated (at page 80):

The effect upon, and interference with, interstate trade, if any, were clearly incidental, indirect and remote, precisely such an interference as this court dealt with in *United Mine Workers v. Coronado*, 259 U. S. 344, and *United Leather Workers v. Herkert*, 265 U. S. 457.

and further, the court stated (at page 82):

The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation, for building is as essentially local as mining, manufacturing or growing crops, and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act.

Levering v. Morrin (289 U. S. 103), involved a conspiracy to suppress local building operations solely for the purpose of compelling employment of union labor. The court held that it could not be adjudged a conspiracy to restrain interstate commerce, merely because, incidentally, by checking the local use of building materials it would curtail the sale and shipment of those materials in interstate commerce. The court stated (at page 107):

Prevention of the local use was in no sense a means adopted to effect such a restraint. It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy.

In the light of these decisions the facts of the instant case disclose a very apparent weakness and remoteness in any effect they may have upon interstate commerce. Of the ice business, the Supreme Court has stated (*New State Ice Co. v. Liebmann*, 285 U. S. 262, 279):

We are not able to see anything peculiar in the business here in question which distinguishes it from ordinary manufacture and production.

The further contention of the relator to the effect that supplying ice for refrigeration of foodstuffs imported into the State of Florida constitutes interstate commerce, is disposed of by the following principle of law laid down in the case of *Industrial Ass'n v. United States*, *supra*, in which the court (at page 78) held:

It is true, however, that plaster in large measure produced in other states and shipped into California was on the list; but the evidence is that the permit requirement was confined to such plaster as previously had been brought into the State and commingled with the common mass of local property, and in respect of which, therefore, the interstate movement and the interstate commercial status had ended.

Since the transactions of respondents, as to which complaint has been made, were not in interstate or foreign commerce and did not substantially or directly affect said commerce, the Commission has no authority to issue a cease and desist order against them, and the complaint must be dismissed.

This is not to say that power does not exist under the National Industrial Recovery Act and under the Federal Trade Commission Act to take all necessary measures, including control of transactions wholly intrastate in character, whenever indispensable to protect or foster interstate commerce. This principle is not applicable here. The facts show no burden, restraint or effect upon interstate commerce.

Respondents further contend that the National Industrial Recovery Act is unconstitutional; that the refusal of a certificate of public convenience and necessity would, in the instant case, permit a monopoly in violation of Section 3 (a) of the National Industrial Recovery Act; and that Article XI of the Code of Fair Competition for the ice industry violates both the Fifth and Tenth Amendments to the Constitution. These contentions need not be considered since the Commission has decided that it lacks authority in the matter for the reason that the transactions complained of are not "in or affecting" interstate commerce.

The complaint must, therefore, be dismissed.

Order

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ORDER OF DISMISSAL

This matter coming on to be heard by the Commission upon the complaint of the Commission, the answer of the respondent, the testimony taken in support of the allegations of complaint and in opposition thereto, and the briefs and oral arguments of counsel for the Commission, and the relator and for the respondent, and the Commission being now fully advised in the premises:

It is ordered, That the complaint herein be, and the same is, dismissed upon the ground that the transactions complained of are not in or affecting interstate commerce.

Complaint

IN THE MATTER OF

EDWARD M. KAHN CORPORATION

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

Docket 2295. Complaint, Mar. 6, 1935¹—Order, Apr. 18, 1935

Consent order requiring respondent, its agents, etc., in connection with the sale, advertisement and offer of cloth or fabric in interstate commerce, to cease and desist from using or causing others to use words or terms "Taffeta", "Silk" and "Pure Dye", either singly or together, in newspapers, periodicals, sample books, or other publications, or by means of the radio, or by means of labels attached thereto, to describe or to designate cloth or fabric in the form of narrow ribbon or in any other form, unless fiber of the composition thereof is derived entirely from silk, product of the cocoon of the silkworm.

Mr. Edward E. Reardon for the Commission.

COMPLAINT¹

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, having reason to believe that the Edward M. Kahn Corporation, hereinafter referred to as respondent, has been and now is using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its amended complaint stating its charges in that respect, as follows:

PARAGRAPH 1. Edward M. Kahn Corporation, is a corporation formed by consolidation of existing corporations on or about March 1, 1933, under the laws of the State of New York, and having its usual and principal place of business in New York City, N. Y., at all times since said date.

PAR. 2. The respondent is, and, during all the time since its incorporation, has been engaged in the manufacture of Narrow Ribbons, some of which are and have been composed entirely of silk and some of which are and have been composed partly of silk and partly of other fiber, such as rayon, with a factory located at Glendale, N. Y. And the respondent during said time has been engaged in the business of the sale of the Narrow Ribbons manufactured by it,

¹ Amended.