

Syllabus

IN THE MATTER OF

HIRAM E. BARBER DOING BUSINESS AS MOTOR EQUIPMENT SPECIALTY COMPANY

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

Docket 3617. Complaint, Sept. 30, 1938—Decision, Apr. 3, 1939

Where an individual engaged in manufacture, sale and distribution of two devices for use in connection with automobile work, namely, the "Mesco Fender Roller" and the "Universal Wheel Check," to purchasers in various other States, in substantial competition with others engaged in sale and distribution of other devices intended and sold for similar usage; in advertising in various periodicals and newspapers circulating throughout the various States for salesmen to engage in distribution of said devices, and in letters and circulars sent through the mails to prospective agents and salesmen purchasing for resale, and to those purchasing for use—

- (a) Made such statements, with respect to purported earnings or profits of salesmen of said devices, as "Up to \$250 weekly profits made with amazing new 'Mesco' fender tools," "Salesmen wanted—\$250 weekly profit made selling special tool set to garages," "Every garage needs one so you see \$250 per week isn't unreasonable. Really it is only a good week," and made, among others, such statements as "Hewett made \$84.50 in one day," etc., "Felton averaged better than \$150 weekly all summer long—Barber cleared \$1,100 in seven weeks—We will show you how to do as well," and "Dealers can just coin money";

Facts being successful demonstration is necessary in practically all cases to effect sales of said roller, and it is necessary to acquire considerable skill, which may be had only by actual practice and experience, in order to give such demonstration, those who do not acquire ability to operate roller so as to obtain successful and satisfactory results essential to success of a salesman cannot reasonably be expected to approach aforesaid earnings, many purchasers, without personal demonstration, have been unable to operate roller satisfactorily, notwithstanding written instructions, any earnings of \$250 a week were made by persons who had acquired sufficient skill to be able to demonstrate roller successfully, and even they had not earned at said rate consistently in ordinary course of business under normal conditions, stated earnings for specific periods of individuals named, who included owner and seller herein and all of whom were sufficiently skilled to give satisfactory demonstration, were not representative of their earnings over long periods, and none of salesmen obtained as result of said individual's advertising had earnings even approaching those of individuals mentioned;

- (b) Made such statements, with respect to efficacy of said roller and ease with which proficiency in use thereof might be acquired, and with respect to merchantability of said articles, as "Actually lifts dents out of fenders and makes them perfectly smooth without hammering, grinding or filing," "Does not mar paint or varnish," "Saves the long practice required with other tools," "Badly needed by every garage and shop," and "No competition";

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Facts being that, while said roller will, if capably operated, remove many dents, it will not remove all, additional work, in some cases, must be done either prior to or following use of roller, in order to obtain desired smoothness, operation cannot, in all cases, be carried on without marring paint or varnish, dependent upon number of factors including skill of operator, etc., proficiency in use cannot be acquired without certain amount of practice, and articles in question are in fact competitive, affecting salability of roller, and garage or shop owner's need thereof is reflected by present equipment and prospective purchaser's opinion as to relative merits of that and article in question; and

(c) Made such statements, with respect to terms and conditions of sale, as "If you can't sell them we will sell them for you or refund your money";

Facts being he did not refund to customers purchase price for such devices upon being advised of customer's inability to sell same, but required customers demanding such refund, and notwithstanding nondisclosure of such a requirement in his aforesaid advertising matter, to furnish lists of those to whom devices had been offered and reasons given for their refusal to purchase;

With effect of misleading and deceiving substantial portion of purchasing public into erroneous and mistaken belief that said statements and representations were true, and into purchasing substantial quantities of his devices because of such erroneous and mistaken belief, and with result that trade in commerce was thereby diverted unfairly to him from competitors engaged in sale and distribution of devices designed and intended for similar use;

Held, That such acts and practices were all to the prejudice and injury of the public and competitors and constituted unfair methods of competition in commerce.

Mr. Randolph W. Branch for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that Hiram E. Barber, an individual, trading and doing business under the name and style of Motor Equipment Specialty Co., hereinafter referred to as respondent, has violated the provisions of the 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 complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Hiram E. Barber, is an individual doing business under the name and style of Motor Equipment Specialty Co., with his office and principal place of business at Beaver City, in the State of Nebraska. The respondent is now, and for more than one year last past, has been, engaged in the manufacture and sale of various articles known generally as Automotive Specialties and particularly two devices known as the "Mesco Fender Roller" and the "Universal Wheel Check," the former for use in the removal of dents from auto-

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mobile fenders and the latter for use in determining the correctness of the alignment of automobile wheels. In the course and conduct of his business, respondent causes said devices, when sold, to be transported from his aforesaid place of business in the State of Nebraska to the prospective purchasers thereof located in the various States of the United States other than the State of Nebraska and respondent maintains, and has at all times herein referred to maintained, a course of trade in said devices in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of his business, as aforesaid, the respondent is now, and has been for more than one year last past, in substantial competition with other individuals, firms, partnerships, and corporations engaged in the sale and distribution of other devices designed, intended, and sold for similar usage in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of said business, and for the purpose of inducing the purchase of said devices by salesmen purchasing for resale and by others, the respondent has advertised for salesmen to engage in the distribution of his devices in newspapers, magazines and other periodicals having a large interstate circulation particularly among prospective agents and salesmen for devices of this character. Among, and typical of, the advertisements so used by the respondent are the following:

UP TO \$250 WEEKLY PROFITS MADE WITH AMAZING NEW "MESCO" FENDER TOOLS
Actually lifts Dents Out of Fenders and Makes Them Perfectly Smooth without Hammering, Grinding or Filing.

DOES NOT MAR PAINT OR VARNISH

Representatives Badly Needed by Every Garage and Shop—Ten Minutes Work Often Saves Buying New Fender—Saves the Long Practice Required with Other Tools—Often Makes More Profit Than All the Rest of the Shop Combined. Priced Where Every Shop Can Buy It.

Hewett made \$84.50 in one day selling "Mesco" Fender Tools—Felton averaged better than \$150 weekly all summer long—Barber cleared \$1100 in seven weeks—We will show you how to do as well.

Exclusive territory to producers—Main or side line. Get full particulars, while territory is available.

MOTOR EQUIPMENT SPEC. CO

Box 2050

Beaver City, Neb.

SALESMEN WANTED—

\$250 WEEKLY PROFIT MADE SELLING
SPECIAL TOOL SET TO GARAGES.

No Competition.

Write "Mesco"

Box 205-S

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SALESMEN—\$84.50 profit in one day by Hewett. \$1100 in seven weeks by Barber. Over \$200 per week all summer by Felton. All selling our Special Tool Set to garages. No competition. Exclusive Territory. Write Mesco, Box 205, Beaver City, Neb.

PAR. 4. For the purposes aforesaid, the respondent has caused letters and circulars relative to the purported profits or earnings of salesmen of said devices, to the terms and conditions upon which said devices might be purchased, and to the character, utility and merit of said devices, to be sent through the United States mails and otherwise to prospective agents and salesmen purchasing for resale and to others purchasing for use. Among, and typical of, the statements so made as to the purported earnings or profits of salesmen of said devices are the following:

Every garage needs one, so you see \$250 per week isn't unreasonable. Really it is only a good week.

Jewett, who had never sold a lick, went out for about two and a half months, took his family—came back with over \$1000 clear.

D. F. Felton—said "Even \$450 per month straight wouldn't tempt me in the least." He made as high as \$300 clear profit in a single week.

The profits our boys make don't look reasonable and I hesitate to mention them.

D. F. F. made \$90 clear in about six hours on his first trip.

Dealers can just coin money.

You have, as soon as these tools reach you, the makings of \$250 per week salary.

Among, and typical of, the statements so made by the respondent as to the purported terms and conditions upon which purchases of said devices might be made are the following:

If you can't sell them, we will sell them for you or refund your money.

Your sample outfit, the roller and check, cost you only \$12.50 if remittance accompanies order—Enclose one-third of amount of order if you wish it shipped C. O. D.

Among, and typical of, the statements so made by the respondent as to the character, utility and merit of said devices are the following:

It is new but we have not a single dissatisfied customer to our knowledge.

I have seen and used all kinds of fender rollers and I never saw a roller work as nice as that roller does.

We have had our roller for 3 weeks and sure like it fine.

This is the only wheel gauge I ever saw that tells us what we want to know. It is quick, accurate and not too expensive.

PAR. 5. Through use of the aforesaid statements appearing in his advertising literature, and through other statements of similar import and meaning, the respondent represents (1) that said fender roller device will make dented fenders smooth without hammering, grinding or filing or without marring the paint or varnish; (2) that

said devices can be successfully operated without long experience; (3) that large profits amounting to approximately \$250 per week could be earned by ordinary salesmen and distributors of said devices under normal and usual conditions; (4) that respondent would sell the devices for purchasers or refund the purchase price thereof in the event said salesmen and distributors could not sell such devices; (5) that there is in fact no substantial competition between respondent's devices and other devices designed and intended for similar usage; and (6) that said devices possess such utility and merit as to render them readily salable to all garages.

PAR. 6. The aforesaid representations so made and disseminated by the respondent in the course of his aforesaid business are misleading, deceptive, and false. In truth and in fact, the use of said fender roller device does not in all cases make dented fenders smooth without hammering, grinding or filing and will not generally perform a smooth operation on fenders without marring the paint or varnish. Respondent's devices cannot be successfully used except by those who have devoted a substantial amount of time to practice therewith. Large profits amounting to approximately \$250 per week have not been and cannot be earned by ordinary salesmen and distributors under normal and customary business conditions. In the few instances, if any, in which profits approximating said sum were earned, there were special and unusual circumstances in connection therewith which were not revealed to prospective purchasers purchasing for resale. Ordinary salesmen and distributors under normal and usual conditions of business cannot earn profits in any amount closely approximating the sums represented. Respondent does not customarily refund the purchase price of said devices or sell said devices for purchasers in instances wherein the purchasers have been unable to sell such devices themselves. There is in fact substantial competition between respondent's devices and other devices intended for similar uses. Respondent's said devices do not generally possess the degree of utility and merit represented and can be successfully operated only after long practice and experience with said devices.

PAR. 7. The use by the respondent of the aforesaid false and misleading statements and representations in connection with the offering for sale and sale of said devices in commerce as aforesaid has had, and now has, the capacity and tendency to, and does, mislead and deceive prospective purchasers of such devices into the false and erroneous beliefs that said representations are true and into the purchase of respondent's said devices in and on account of said mistaken and erroneous beliefs so induced by respondent's representations. As a result thereof, trade has been unfairly diverted to re-

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spondent from competitors engaged in selling similar devices or other devices designed and intended for similar usage who do not misrepresent the amount of profits that can be earned through selling said devices or otherwise misrepresent the nature, utility and merit of their respective devices. In consequence thereof, injury has been done by respondent to competition in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 8. The acts and practices hereinabove alleged on the part of the respondent are all to the prejudice of the public and to the competitors of respondent and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on September 30, 1938, issued, and on October 3, 1938, served, its complaint in this proceeding upon said respondent, Hiram E. Barber, trading and doing business as Motor Equipment Specialty Co., charging him with the use of unfair methods of competition in commerce in violation of the provisions of said act. On October 7, 1938, the respondent filed his answer in this proceeding. Thereafter a stipulation was entered into whereby it was stipulated and agreed that a statement of facts, signed and executed by the respondent and W. T. Kelley, chief counsel for the Federal Trade Commission, subject to the approval of the Commission, may be taken as the facts in this proceeding and in lieu of testimony in support of the charges stated in the complaint or in opposition thereto, and that the said Commission may proceed upon said statement of facts to make its report, stating its findings as to the facts and its conclusion based thereon and enter its order disposing of the proceeding without the presentation of argument or the filing of briefs. Thereafter, this proceeding regularly came on for final hearing before the Commission on said complaint, answer, and stipulation, said stipulation having been approved, accepted and filed, and the Commission having considered the same and being now fully advised in the premises finds that this proceeding is in the interest of the public and makes its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Hiram E. Barber, is an individual doing business under the name and style of Motor Equipment Spe-

cialty Co. His office and principal place of business is at Beaver City, Nebr. The respondent is, and has been for more than one year last past, engaged in the manufacture, sale and distribution of two devices known as the "Mesco Fender Roller" and the "Universal Wheel Check." The former is used in the removal of dents from automobile fenders and the latter in determining the correctness of the alignment of automobile wheels. Respondent causes said devices, when sold, to be transported from the State of Nebraska to the purchasers thereof at their respective points of location in various States of the United States other than in the State of Nebraska. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in commerce in said devices among and between various States of the United States.

During this period the respondent has been in substantial competition with other individuals and with firms, partnerships, and corporations engaged in the sale and distribution of other devices intended and sold for similar usage in commerce between and among the various States of the United States.

PAR. 2. In connection with the sale of its devices, the respondent has advertised in various periodicals and newspapers having a circulation through the various States of the United States for salesmen to engage in the distribution of these devices, and has also caused letters and circulars to be sent through the United States mails between and among various States of the United States to prospective agents and salesmen purchasing for resale and to others purchasing for use.

In the manner and by the means aforesaid the respondent has made statements and representations relating to (1) purported earnings or profits of salesmen of the devices; (2) the efficacy of the fender roller; (3) the ease with which proficiency in the use of the fender roller may be acquired; (4) the merchantability of the articles, and (5) the terms and conditions of sale by respondent. The statements and representations by respondent, disseminated as aforesaid, are hereinafter set forth.

PAR. 3. With respect to the purported earnings or profits of salesmen, the following representations were made by respondent:

Up to \$250 weekly profits made with amazing new "Mesco" fender tools.

Hewett made \$84.50 in one day selling "Mesco" fender tools—Felton averaged better than \$150 weekly all summer long—Barber cleared \$1100 in seven weeks—We will show you how to do as well.

Salesmen wanted—\$250 weekly profit made selling special tool set to garages.

Salesmen—\$84.50 profit in one day by Hewett. \$1100 in seven weeks by Barber. Over \$200 per week all summer by Felton.

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Every garage needs one so you see \$250 per week isn't unreasonable. Really it is only a good week.

Jewett, who never sold a lick, went out for about 2½ months, took his family—came back with over \$1000 clear.

D. F. Felton said—"Even \$450 per month straight wouldn't tempt me in the least." He made as high as \$300 clear profit in a single week.

The profits our boys made don't look reasonable and I hesitate to mention them.

D. F. F. made \$90 clear in about 6 hours on his first trip.

Dealers can just coin money.

A successful demonstration is necessary in practically all cases to effect sales of respondent's fender roller and it is necessary to acquire considerable skill in order to give a successful demonstration, which skill can be acquired only by actual practice and experience. Ability to operate the roller so as to obtain successful and satisfactory results is essential to success as a salesman and those who do not acquire such ability cannot reasonably be expected to approach the aforesaid represented earnings. Without personal demonstration, many purchasers have been unable to operate the roller satisfactorily although respondent furnishes to such purchaser-salesmen written instructions for the operation of the device. Any earnings of \$250 per week which may have been made by those selling the device have been made by persons who have acquired sufficient skill in the operation of the roller to be able to demonstrate it successfully, but even such persons have not earned at that rate consistently in the ordinary course of business under normal conditions or circumstances.

The earnings of the various individuals mentioned above were made prior to 1935. Those attributed to one individual were made in 1929 while selling for \$12.50 a single article that cost him \$3, whereas the dealers now sell four articles which cost them \$10.75 and have a recommended resale price of \$36. Two of the individuals mentioned above are not now engaged in the sale of the device. "Barber," who is stated to have earned \$1,100 in 7 weeks, is the respondent and is extremely proficient in the use of the fender roller of which he is the designer and manufacturer.

The stated earnings for specific periods of the individuals named are not representative of consistent earnings by these persons over long periods. All of them were sufficiently skilled in the operation of the fender roller to give a satisfactory demonstration.

None of the respondent's salesmen obtained as a result of his advertising have had earnings even approaching those of the individuals mentioned in respondent's advertisements and circulars.

PAR. 4. With respect to the efficacy of the fender roller, the following representations were made:

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Actually lifts dents out of fenders and makes them perfectly smooth without hammering, grinding or filing.

Does not mar paint or varnish.

The fender roller will, if capably operated, remove many dents. It will not, however, since dents may be so located as to be inaccessible to the device, remove all dents from all types of fenders. In some cases work must be done either prior to or after the use of the roller in order to obtain the desired smoothness. The operation cannot in all cases be carried on without marring the paint or varnish. Whether or not such marring occurs depends upon a number of factors which include the skill of the operator, the severity of the dent, the condition of the paint or varnish, and the extent to which it was damaged.

PAR. 5. With respect to the ease with which proficiency in the use of the fender roller may be acquired the following representation was made:

Saves the long practice required with other tools.

Proficiency in the use of the roller cannot be acquired without a certain amount of practice.

PAR. 6. With respect to the merchantability of the devices the following representations were made:

Badly needed by every garage and shop.

No competition.

Every garage needs one.

The articles are competitive. The existence of this competition affects the saleability of the fender roller, and whether or not it is needed by a garage or shop will depend upon its present equipment and the opinion of the purchaser as to the relative merits of this equipment and the respondent's article.

PAR. 7. With respect to the conditions upon which purchases of the devices might be made the following representation was made:

If you can't sell them we will sell them for you or refund your money.

Respondent does not refund to his customers the purchase price for such devices upon being advised of the customer's inability to sell the same. When demands for such refunds are made, respondent requires the customers, demanding such refund, to furnish lists of those to whom the devices have been offered for sale by such customers and the reasons given for their refusal to purchase. Respondent does not disclose such requirement to prospective purchasers of his devices in the advertising matter disseminated as aforesaid.

PAR. 8. The use by respondent of the aforesaid false and misleading statements and representations has had, and now has, the capacity and tendency to, and does, mislead and deceive, and has misled and de-

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ceived, a substantial portion of the purchasing public into the erroneous and mistaken belief that the said statements and representations are true, and into purchasing substantial quantities of respondent's devices because of said erroneous and mistaken belief. As a result thereof trade in commerce among and between various States of the United States has been diverted unfairly to the respondent from his competitors engaged in the business of selling and distributing devices designed and intended for similar usage.

CONCLUSION

The aforesaid acts and practices of the respondent, as herein found, are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, and a stipulation as to the facts entered into between the respondent herein and W. T. Kelley, chief counsel for the Commission, which provide, among other things, that without further evidence or other intervening procedure, the Commission may issue and serve upon the respondent herein findings as to the facts and conclusion based thereon and an order disposing of the proceeding, and the Commission having made its findings as to the facts and conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, Hiram E. Barber, individually and trading as Motor Equipment Specialty Co., or under any other name or names, his representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of certain devices now designated as the "Mesco Fender Roller" and "Universal Wheel Check," or any other devices of substantially similar construction or design, in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing any specified sum of money as possible earnings or profits of agents, salesmen, representatives, or distributors for any given period of time which is not a true representation of the average net earnings or profits consistently made by respondent's active, full time agents, salesmen, representatives, or distributors in the ordinary course of business under normal conditions and circumstances.

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2. Representing any specified sum of money as earnings or profits of any specified agent, salesman, representative or distributor for any given period of time which has not in fact been consistently earned net by such agent, salesman or distributor in the ordinary course of business and under normal business conditions.

3. Representing that the use of such fender roller will remove all dents from all fenders, or will in all cases remove dents from fenders without the necessity of hammering, grinding, filing, or performing other work on the fender, or will in all cases remove dents from fenders without causing damage to the finish of the fender.

4. Representing that such fender roller can be operated adequately or successfully without practice in the operation thereof.

5. Representing that there is no competition in connection with the sale of such devices with other devices designed and intended for similar usage or that such devices are needed by every garage or shop.

6. Representing that respondent will refund the purchase price for such devices to his customers who are unable to resell the same unless and until such is the fact and unless all the terms and conditions of such offer of refund are clearly and unequivocally stated in equal conspicuousness and in immediate connection therewith.

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

IN THE MATTER OF
ARONSON-CAPLIN COMPANY, INC.

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

Docket 3649. Complaint, Nov. 9, 1938—Decision, Apr. 3, 1939

Where a corporation engaged in manufacture, sale, and distribution of women's lingerie, including slips and nightgowns, to retailers in various States and in the District of Columbia, in substantial competition with others engaged in sale and distribution of such products and garments made of silk, rayon, and other fabrics, and including many who do not in any manner misrepresent the nature, character or quality of their merchandise or materials of which made, and do not make any other false statements in connection with sale and distribution thereof—

Represented, through use of such terms as "satin," "taffeta," and "pure dye," and such phrases as, "Taffeta De Luxe 100 percent pure dye, finest tested acetate yarns," on statements purportedly describing material of which its said merchandise was made in catalogs or price lists distributed among prospective purchasers, and on labels attached to articles in question, that said merchandise was made of silk, product of cocoon of silkworm;

Notwithstanding fact said products were not made of silk as aforesaid, as long associated in mind of purchasing public with said terms, which, by substantial part of purchasing public and retailers, were understood and believed to be used only to describe merchandise made of silk, and word "acetate," used either separately or in conjunction with words "satin," "taffeta," or "pure dye," and other words and phrases of similar import or meaning, not sufficiently well known and understood by purchasing public to indicate to or inform them that merchandise thus described was made in whole or in part of material other than silk, and of rayon, was, on contrary, in and as incorporated in such designations, understood by substantial portion of such public to describe silken fabrics and merchandise or products of silk, long held in great public esteem and confidence for their preeminent qualities and preferred by substantial number of members of such public in purchase of lingerie, including slips and nightgowns;

With result of placing, through such labeling on its said articles, distributed as aforesaid, in hands of retailers instrumentality which might be used by them to divert trade unfairly from its competitors who truthfully mark and brand their merchandise, and with effect of misleading and deceiving substantial portion of purchasing public into erroneous and mistaken belief that such false statements, representations and advertisements were true, and that its said products were made of silk, product of cocoon of silkworm, and of causing substantial portion of said public, because of such erroneous and mistaken belief, to purchase substantial quantities of its said goods, and of thereby diverting unfairly trade to it from its competitors in commerce who truthfully advertise, brand and mark their products; to the injury of competition in commerce:

Held, That such acts and practices were all to the prejudice and injury of the public and competitors and constituted unfair methods of competition.

Mr. James L. Fort for the Commission.

Mr. Milton N. Mound, of New York City, for respondent.