

Syllabus

IN THE MATTER OF

INTERNATIONAL PRESS SERVICE, INC. (FORMERLY
BERKELEY STUDIOS INTERNATIONAL PRESS SERVICE,
INC.), AND FRED FRIEWALDCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3618. Complaint, Oct. 1, 1938—Decision, Dec. 6, 1939*

Where a corporation engaged, as International Press Service, Inc., in sale in commerce among the various States of photographs of members of the public, posed, taken, developed, and finished by it and its agents and representatives, and an individual who was and had been president and treasurer thereof since its incorporation and had been participant in organization thereof and was one of its three stockholders and in direction and control of its sales activities and policies as below set forth, and who acted as photographer in its business and in the development, etc., of photographs taken by its agents and representatives of members of the public contacted by such agents and representatives; and as aforesaid engaged, in substantial competition with others similarly engaged in sale and distribution in commerce of photographs of members of the public, posed, taken, developed, and finished by such competitors;

In soliciting, through their "booker" or salesman, members of the public, usually selected from among those who had received publicity in newspapers or other publications and who, by reason of their business, professional, or other activities, were of news interest—

Represented to such persons, contacted usually by phone, that salesman or solicitor was a representative of Berkeley Studios, International Press Service, or of International Press Service, or of the Press Service or the International, and advised prospect thus approached that a photograph was desired for the press library of such corporation, and solicited appointment, without expense to one solicited, to permit making of photograph of such person for filing in such press library for release to any newspaper or other news publication which might call upon them for the furnishing of such a photograph, and advised inquiring prospect as to cost to him of one or more of the photographs thus taken on completion thereof, and invited person thus contacted, and to whom in due course they sent proofs, to "kindly approve one for press release and return it to our representative who will call * * *" and sought, at said time and irrespective of making of inquiries by prospects thus approached, to sell to said persons quantities of the finished photographs thus taken;

Notwithstanding fact corporation in question had no direct connection with any newspaper publication in the United States or in other countries, did not advertise its services to newspapers, had as its principal purpose the obtaining of the opportunity to photograph members of public and sell to said members such photographs, and purpose was not, primarily, to offer or cause to be published photographs solicited, as was case with the news

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services, such as International News Service or Associated Press, and they had no interest in and took no steps to cause publication of photographs taken by them;

With result that through use of words "press service" and word "International," they created false impression in minds of members of public, thus approached, that such members were being interviewed by a representative of a regular press or news photo service organization or by International News Photos or International News Service, and that they were being asked for permission to have their photographs taken for publication in regular course of the services rendered by said organizations in connection with some present or future news item, and caused belief on part of such members that purchase of a photograph or photographs, if made, was only incidental to seller's occupation, and that such purchase, if it could then be made, would perhaps be more favorable and convenient to purchaser, and secured thereby initial contact, and usually overcame normal sales resistance on part of prospective purchasers, met with by competitors, and placed with purchasers instead of seller, and members of public solicited, initiative, and such members were deceived into erroneous and mistaken belief aforesaid and into purchase of pictures from them as and from a regular press or news photo service organization and International News Photos, and trade was thereby diverted unfairly to them from their competitors who do not falsely represent identity, nature or character of their respective businesses:

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

Before *Mr. Edward E. Reardon*, trial examiner.

Mr. Jay L. Jackson and *Mr. John M. Russell* for the Commission.

Mr. Morton M. Lewis, of Boston, Mass., for respondents.

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 Berkeley Studios International Press Service, Inc., a corporation, and Fred Friedwald, an individual, hereinafter referred to as respondents, have violated the provisions of 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. The respondent, Berkeley Studios International Press Service, Inc., is a corporation organized, existing, and doing business under the laws of the State of Massachusetts and having its office and principal place of business at 36 Newbury Street in the city of Boston, State of Massachusetts. Respondent, Fred Friedwald is an individual having his office and principal place of business at 36

Newbury Street in the city of Boston, State of Massachusetts, and is president and treasurer of said corporation and directs and controls the sales activities and policies of said corporation with respect to the acts and practices herein set forth.

PAR. 2. The respondents are now, and have been, for more than two years last past engaged in the business of photographing persons, and in the sale and distribution of said photographs. Respondents sell said photographs to members of the purchasing public situated in various States of the United States and in the District of Columbia and cause the said photographs, when sold by them, to be transported from their aforesaid place of business in the State of Massachusetts to the purchasers thereof at their respective points of location in various States of the United States, other than the State of Massachusetts, and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in commerce in said photographs among and between the various States of the United States and in the District of Columbia.

PAR. 3. Respondents are engaged in substantial competition in commerce among and between the various States of the United States and in the District of Columbia, with other corporations and individuals, and with partnerships and firms taking, selling, and distributing photographs. Among such competitors in said commerce are many who do not in any manner misrepresent the identity, nature, and character of their business, and who do not make any other false statements in connection with the sale and distribution of their said photographs.

PAR. 4. International News Service is a company existing and doing business for many years last past in the State of New York as a news gathering organization, with its principal place of business located at 235 East Forty-fifth Street in the city of New York, State of New York, and having branch offices in the various States of the United States and in many foreign countries. An associate company, International News Photos, cooperates with the International News Service throughout the United States and in foreign countries by taking pictures of many of the persons who are the subjects of its news items which, with said pictures, it furnishes to the newspapers in the United States and foreign countries. The International News Service has a valuable good will and prestige because of the interest in and accuracy of its news and is well and favorably known to the reading public throughout the United States.

PAR. 5. In the course and conduct of their said business, and for the purpose of inducing the purchase of their photographs, respondents

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have caused false and misleading statements and representations with respect to the identity, nature, and character of their business to be disseminated in commerce, as defined in the Federal Trade Commission Act. Respondents or their agents call on members of the purchasing public, situated in various States of the United States and in the District of Columbia, who have prior thereto received publicity in newspapers or other publications, and represent to such persons: That they are from the International Press Service or Press Service and that they desire a recent photograph of the person for the press or for publication therein; that they are representatives of the International, which desires a recent photograph of such person to be used with an article for an early edition or for its press library; and otherwise, directly or by implication, represent that they are representatives of the aforesaid International News Service, its associate, International News Photos, or one of the recognized news or photographic news services, desiring to procure the photograph of such person for the purpose of publishing the same.

By means of the use of such statements and representations, disseminated as aforesaid, the respondents or their agents procure permission from such persons to take their photographs. Respondents or their agents cause photographs of such persons to be taken, and thereafter request such persons to select and approve one of the negatives, which respondents or their agents represent is to be released to the press. After such selection is made by the prospective purchaser, respondents, or their agents attempt to sell, and sell, to such persons quantities of the finished photographs at prices greatly in excess of those prices at which photographs of a similar kind and quality are customarily and ordinarily sold by competitors of the respondents.

PAR. 6. The aforesaid statements and representations used and disseminated by the respondents in the manner above described are deceptive, false, misleading, and untrue. In truth and in fact, respondent corporation is not a news or press photographic agency. Neither the respondents nor their agents or representatives have any connection, direct or indirect, with any newspaper or other publication. The respondents do not take the photographs of the aforesaid members of the purchasing public for the purpose of distributing such photographs to newspapers or for the press library of the corporate respondent. The respondents take such photographs for the purpose of selling the same to such members of the purchasing public at exorbitant prices. The said corporate respondent receives very few, if any, calls for any of its said photographs from newspapers or other publications, and it does not have or maintain a press library. The re-

spondents have no connection, direct or indirect, with the International News Service or International News Photos.

PAR. 7. The use by the respondents of the foregoing false, deceptive, and misleading statements and representations with respect to the identity, nature, and character of the business of the corporate respondent has had, and now has, the capacity and tendency to, and does, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such false statements and representations are true, and into the belief that the respondents or their agents represent the International News Service, International News Photos, or one of the recognized news or photographic news services, and causes a substantial portion of the purchasing public, because of said erroneous and mistaken belief, to purchase substantial quantities of respondents' photographs.

As a result, trade has been diverted unfairly to the respondents from their competitors in said commerce who truthfully advertise the identity, character, and nature of their business as described in paragraph 3. In consequence thereof, injury has been, and is now being, done by respondents to competition in commerce among and between the various States of the United States, and in the District of Columbia.

PAR. 8. The aforesaid acts and practices of the respondents as herein alleged are all to the prejudice of the public and of respondents' competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices 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 October 1, 1938, issued its complaint in this proceeding and caused it to be served on the respondents' International Press Service, Inc., a corporation (formerly Berkeley Studios International Press Service, Inc., a corporation), and Fred Friewald (referred to in said complaint as Fred Friedwald), an individual, charging the respondents with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of the provisions of said act.

The respondents filed a joint answer to the complaint on October 8, 1938. Thereafter, testimony and other evidence in support of the complaint was introduced by Jay L. Jackson, attorney for the Commission, and in opposition to the allegations of the complaint by Morton M. Lewis, attorney for the respondents, before Edward E. Reardon, an examiner of the Commission theretofore duly desig-

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nated by it. The testimony and other evidence introduced was duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final hearing before the Commission on the complaint, the answer of the respondents, the testimony and other evidence, brief in support of the complaint, and brief of respondents in opposition thereto, and upon oral arguments of John M. Russell, counsel for the Commission, and Morton M. Lewis, counsel for the respondents, and the Commission having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent International Press Service, Inc. is a corporation organized, existing, and doing business under the laws of the State of Massachusetts since its incorporation in 1934. Its name was changed to Berkeley Studios International Press Service, Inc. in about 1935. Thereafter on or about December 28, 1937, its name was changed back to International Press Service, Inc. Its office and principal place of business is at 36 Newberry Street, Boston, Mass.

The respondent Fred Friewald is and has been president and treasurer of the respondent International Press Service, Inc. since its incorporation. He participated in the organization of the corporate respondent and he holds a stock interest therein and is one of its only three stockholders. He directs and controls the sales activities and policies of said corporation with respect to the acts and practices herein set forth. His office and principal place of business is located at 36 Newberry Street in the city of Boston, Mass. The complaint herein incorrectly referred to respondent Fred Friewald as Fred Friedwald. Said complaint was duly served on respondent Fred Friewald. Respondent Fred Friewald and the Fred Friedwald referred to in the complaint herein are, for all purposes in this proceeding, one and the same person.

PAR. 2. The respondent International Press Service, Inc., during various times since in or about the year 1934, has been engaged in the business of the sale in commerce among and between the various States of the United States of photographs of members of the public that were posed, taken, developed and finished by the corporate respondent, its agents, and representatives, as hereinafter set forth.

In the course and conduct of their aforesaid business, respondents, during the times mentioned herein, caused said photographs, when

sold by them, to be transported from their aforesaid place of business in the State of Massachusetts to the purchasers thereof at their respective points of location in various States of the United States other than the State of Massachusetts.

PAR. 3. The respondents in the business of the sale and distribution, as aforesaid, of photographs of individuals, posed, taken, developed, and finished by respondents, are and have been, during the times above mentioned, in substantial competition with other individuals, firms, and corporations who are and have been engaged in the business of the sale and distribution in commerce among and between various States of the United States of photographs of members of the public which were posed, taken, developed, and finished by such competitors.

Among such competitors are many who do not in any manner misrepresent the identity, nature, and character of their business, and who do not make any other false statements in connection with the sale and distribution of their said photographs.

PAR. 4. There is in the United States, among other news services, a well-known news service designated the International News Service, which is and has been for a number of years past, engaged in supplying news items to newspapers and other publications in the various States of the United States. It is a recognized news agency, such as the Associated Press.

International News Service does not take photographs or pictures but in connection with its news service, it is, and has been, its regular practice to secure from the International News Photos copies of pictures or photographs, on its own account and at the request of newspapers and publications.

PAR. 5. The International News Photos is a subsidiary corporation of King Features Syndicate. Its business is the distribution of news photos, and the sale of photographs to newspapers both by free sale and under contracts in which it agrees to supply photographs to a paper for a certain period of time and for a certain price. It has representatives throughout the United States and elsewhere in the world.

The International News Photos does not take posed pictures. The pictures it takes are action pictures.

PAR. 6. The metropolitan newspapers, such as the Boston Herald, the Boston Globe, and the Boston Traveler, of Boston, Mass., each, keeps a library of files of pictures, containing photographs of individuals to the number of several hundred thousands, which each obtains and has obtained from a variety of sources, including its own staff photographers, the Associated Press, International News Photos, and occasionally from local photographers, and including such pictures as the

newspaper's own reporters may take in the course of getting the day's news.

PAR. 7. The corporate respondent, International Press Service, Inc., has a library of files in which it has about 12,000 photographs, 97 per cent of which are photographs of residents of Boston, Mass.

The corporate respondent has no direct connection with any newspaper publication in the United States and no direct connection with any newspaper or other publication in other countries. It does not advertise, and it has not advertised, its services to newspapers, but the corporate respondent has, however, on occasions serviced newspapers, including The Boston Herald and The Boston Traveler, with photographs from respondent's library or photographs, and photographs of individuals taken by the corporate respondent have been published in the Boston Daily Globe.

The corporate respondent has also, on occasion, supplied glossy prints, or proofs of photographs, from its library files to the subjects of the photographs for publication in newspapers.

PAR. 8. The sale of photographs taken by the corporate respondent has been mostly to the subjects of the photographs. About 30 percent of the persons photographed by the corporate respondent, and whose consent to be photographed has been obtained upon the solicitation of respondent's representatives, as hereinafter described, purchase from the corporate respondent from one to a dozen photographs. The corporate respondent did a gross business of \$9,000, approximately, in the sale of photographs in 1938.

PAR. 9. The price charged by respondents for photographs bought by a subject whose photograph has been taken by their photographer varies as to quality, size, etc. The top price is, and has been, \$5 a print, or \$60 per dozen, but respondents sell more of their photographs for which their price is \$30 per dozen or \$2.50 a print, than they sell of the higher priced photographs.

The prices of the finished photographs taken by the respondents are approximately the same as the prices at which photographs of a similar kind and quality are customarily sold by competitors of the respondents.

PAR. 10. Respondent Friewald, the president and treasurer of the corporate respondent, acts in the business of the corporate respondent as a photographer and in the developing, finishing, and dark room work in the completion of the photographs taken by the corporate respondent's agents and representatives of members of the public contacted by them. The corporate respondent also employs a "booker," a salesman whose duties are to make appointments with members of the public to have their photographs taken.

PAR. 11. The corporate respondent's "booker," or salesman, is one Herbert Pusick, who is one of the three stockholders of the corporate respondent. As a booker, he has charge of the sales and solicitations of appointments with members of the public for the taking of their photographs by the corporate respondent.

In the course of the respondents' business, their employee Pusick, or other employee acting as a solicitor, usually contacts members of the public by telephone to request the privilege of taking a photograph of the member of the public so approached. In contacting members of the public, the respondents select such persons from among those who have received publicity in newspapers or other publications, and those who by reason of their business, professional or other activities are of news interest. Having contacted a member of the public on the telephone, the respondents' employee, in the usual course of his procedure, states that he is a representative of Berkeley Studios, International Press Service, or that he is a representative of the International Press Service, and sometimes states that he is a representative of the Press Service, or the International, and inquires whether the person he has telephoned has a recent photograph, stating that such a photograph is desired for the press library of the corporate respondent. The member of the public telephoned is solicited to make an appointment for the taking of his photograph by the photographer of the respondents, which, it is stated, is to be without expense to the person solicited and to be for the purpose of being filed in the corporate respondent's press library to be released to any newspaper or other news publication who may call upon the respondents to furnish such a photograph.

After an appointment has been made for the taking of the photograph, the person solicited is told that within 2 or 3 days several proofs of the photograph will be submitted to him for the purpose of having his approval of one of the proofs. Usually at this stage of the transaction, or at its beginning, the person solicited asks the respondents' representative if he may purchase one or more of the photographs if he is pleased with them when the proofs have been submitted to him. Thereupon, the respondents' agent states the prices at which the completed photographs may be obtained in quantities of one or more, and some sales result from this procedure. Respondents have a card they enclose with the proofs which states "enclosed are proofs of the negatives for which you recently posed. Will you kindly approve one for press release and return it to our representative who will call within the next few days." Respondents' representative, when he calls, endeavors to sell prospects quantities of the finished photographs, even when prospect has not inquired concerning same. Respondent Fred Friewald testified that

the respondents when they call upon prospects "have about the same approach as one to another."

PAR. 12. Members of the public generally, especially those members of the public who are subject to being solicited by the respondents' agents, are familiar with the fact that there are newspaper services whose sole activities consist of supplying items of news to newspapers and other news publications, and many of the public know of such associations as the Associated Press and the International News Service as such news gathering organizations, and that in the course of their supplying news items to the news publishers, it is their custom to deliver photographs of persons and places along with the news items furnished to news publications.

Members of the public know or have the impression that the obtaining and publishing of photographs by such news service organizations are incidental matters in connection with their news gathering activities.

On the other hand, the obtaining of the opportunity to photograph members of the public, and to sell such photographs to them, is the principal purpose and result of the aforesaid acts and practices of respondents. The respondents have no interest in and take no steps to cause the publication of photographs taken by them, while on the other hand, whenever a photograph is solicited by the news services, such as the International News Service or the Associated Press, the purpose is primarily to offer or cause the photographs in question to be published.

In soliciting members of the public to make appointments for the taking of their photographs, the respondents, by the use of the words "press service" and by the use of the word "International," which words are a part of the corporate name of the corporate respondent, create the false impression in the minds of the members of the public so approached that they are being interviewed by the representative of a regular press or news photos service organization, or by the International News Photos or International News Service, and that they are being asked for permission to take their photographs for publication in the regular course of the services rendered by such organizations in connection with some present or future news item.

By such solicitation the members of the public so approached are caused to believe that a purchase of a photograph or photographs, if made, is only incidental to the seller's occupation, and that a purchase of a photograph or photographs, if it can be then made, will be perhaps more favorable and convenient to the purchaser.

By such means, and by such false impression created, the respondents, through their agents and representatives, secure the initial con-

tact and overcome the normal sales resistance on the part of prospective purchasers, which is met with by competitors in the taking and selling of photographs to members of the public and the initiative, a most influential element in the purchase and sale transaction of the photographs is usually thus, by the false impression created, placed with the purchasers, the members of the public solicited by the respondents, instead of remaining with the seller, the corporate respondent.

PAR. 13. The use by the respondents of the aforesaid false and misleading statements and representations has the capacity and tendency to, and does, and did, mislead and deceive members of the purchasing public into the erroneous and mistaken belief that the corporate respondent is and was a regular press or news photos service organization or is and was the International News Photos and into the purchase of pictures from respondents because of such erroneous and mistaken belief. In consequence thereof trade has been diverted unfairly to the respondents from their said competitors who do not falsely represent the identity, nature or character of their respective businesses.

CONCLUSION

The aforesaid acts and practices of the respondents, and each of them, are all to the injury and prejudice of the public and of respondents' competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices 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 respondents, testimony and other evidence taken before Edward E. Reardon, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed herein and oral arguments by John M. Russell, counsel for the Commission, and by Morton M. Lewis, counsel for the respondents, and the Commission having made its findings as to the facts and its conclusion that said respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent International Press Service, Inc., a corporation, its officers, representatives, agents, and employees, and respondent Fred Friewald, his representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of photographs in com-

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merce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing through the use of the term "International Press Service," or any part thereof, or any other term of similar import or meaning, in any corporate or trade name, or in any other manner or through any other means or device, that respondents, or either of them, form a part of, or have any connection with, the International News Service or International News Photos; or that respondents, or either of them, operate a press photographic service, or have any connection therewith, unless and until respondents, or such respondent, are, or is, regularly engaged in the business of selling a substantial percentage of the photographs taken by respondents, or such respondent, to the press for publication.

It is further ordered, That the respondents shall within 60 days after service on them of this order file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

Syllabus

IN THE MATTER OF
W. R. YOUNG, DOING BUSINESS AS NATIONAL
EMPLOYEES TRAINING SERVICE

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

Docket 3331. Complaint, Feb. 10, 1938—Decision, Dec. 7, 1939

Where an individual engaged, as National Employees Training Service, in sale and distribution of correspondence course lessons for persons expecting to take civil service examinations to qualify for appointment to positions in the United States classified civil service, and, as thus engaged, in selling his said courses and lessons to purchasers in other States, in active competition with others also engaged in sale of courses of instruction of same general nature in commerce among the several States—

- (a) Represented, directly or through agents, that he and his said agents were employed by the United States Government and represented the United States Civil Service Commission, and set forth on postal cards, containing various statements with respect to available Government positions and also words "Government positions \$105 to \$175 per month," and inviting inquiry on the attached prepaid reply card, but without advising recipient that he was in business of selling courses of instruction, trade name, National Employees Training Service, facts being neither he nor any of his agents were in the employ of the United States Government and in no way represented the United States Civil Service Commission;
- (b) Represented that his business had been in existence for many years and was an old established one, and that prospective students solicited would have to enroll immediately in order to get within the quota of Government positions allotted to said individual, and which was practically filled, facts being his business had not been in existence for many years, but only for a period of a few years, no such quota had been allotted for the benefit of any of the persons who might purchase courses of instruction which he sold, and he did not confine his soliciting to students of high scholastic standing, but solicited all persons who were willing to subscribe to the course;
- (c) Represented that jobs with the United States Government would be secured for the students taking the course of instruction offered by him, or that the money paid for such courses would be refunded, facts being he could guarantee no positions to any person completing his course, and, with few exceptions, did not refund price of tuition after being unable to secure a position for any student who had completed same; and
- (d) Represented that he was able to get advance information concerning examinations to be conducted by the Civil Service Commission, and that students who had completed his courses had preference over other applicants for positions in the classified civil service, facts being he could in no way influence or control such appointments, persons who completed his courses had no preference over others and he could be of no assistance to prospective appointees to such positions except by instructing them so that they might be better prepared to take the necessary examination to have their names placed upon