

IN THE MATTER OF
CONSOLIDATED PINNACLE COAL COMPANY AND
ELLIS MORRELL

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

Docket 3234. Complaint, Sept. 30, 1937—Decision, Apr. 10, 1940

Where a corporation had long been engaged in the operation of a mine at Pinnacle in Colorado, and in the sale of coal therefrom under name "Pinnacle" in said and adjacent States, including Iowa, Kansas, Nebraska, North Dakota, South Dakota, and Wyoming, and had expended large sum in advertising said coal and, for a number of years, was second largest coal mine operator in county in question and still one of the larger operators, and had built up a good reputation for coal mined by it as product of good grade and quality, and included in trade-mark registered by it word "Pinnacle," together with words that it was mined and shipped only by it, and made use of such trade-mark and words in its business for over 20 years and applied same to coal mined by it and to its freight cars, trucks, wagons, bins, etc., and coal under name "Pinnacle" had come to be generally recognized in the trade and among sellers and purchasers thereof in sales territory concerned as mined by it and exclusively from mine of that name and town; and thereafter corporate competitor, and relatively small operator, engaged in shipping to customers in Nebraska coal produced from mine some 42 miles distant from said Pinnacle mine or mine there located—

Made use of its corporate name, including word "Pinnacle," in connection with offer and sale of coal in question, and featured said corporate name in advertising material and made use of name "Pinnacle" in label under which it sold said coal, together with claims and representations thereon to effect that it was of highest quality, notwithstanding fact product in question was not that from said Pinnacle mine, to which it was generally inferior;

With capacity and tendency to mislead and deceive members of purchasing public into erroneous and mistaken belief that coal produced and sold by it under such label had been produced from mine at Pinnacle, operated by corporation aforesaid, and was of a grade and quality equal to that of the coal so named and produced by said corporation, and to induce members of purchasing public to buy its said coal by reason of such mistaken and erroneous belief, and with result of diverting trade unfairly to it from competitors, including those who offer and sell in commerce coal produced in mines other than that located at Pinnacle as above set forth, and operated by said corporation, and do not represent their coal as produced from such Pinnacle mine, and those who do not misrepresent in any particular the grade and quality of their product:

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

Before *Mr. Miles J. Furnas* and *Mr. William C. Reeves*, trial examiners.

Mr. Alden S. Bradley and *Mr. Joseph C. Fehr* for the Commission.

COMPLAINT

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 Consolidated Pinnacle Coal Co., a corporation and Ellis Morrell, an individual, hereinafter referred to as respondents, have been, and are now, 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 complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Consolidated Pinnacle Coal Co., is a corporation organized and existing under the laws of the State of Colorado, having its principal office and place of business in Denver, Colo. Respondent, Ellis Morrell, a resident of Denver, Colo., is president and manager of respondent corporation and at all times herein specified has directed and dictated the sales policies and business activities of said respondent corporation.

PAR. 2. Respondents have been for more than 2 years last past engaged in the business of selling and distributing coal. Respondents cause said coal when sold to be transported from said place of business in Denver, Colo., to the purchasers thereof located in various States of the United States other than Colorado.

Respondents are in competition with individuals, partnerships, and corporations engaged in the sale and distribution of coal in interstate commerce.

PAR. 3. Respondents, in the course and conduct of their business aforesaid, have used, and now use, the word "Pinnacle" as a part of the corporate name aforesaid and on stickers, advertisements, letterheads, and various other forms of advertising which forms of advertising were for the purpose of effecting sales of coal vended by them.

PAR. 4. The word "Pinnacle" used in connection with coal, has for more than 25 years signified and meant, and has been understood by the general purchasing public to signify and mean, coal produced from a certain mine known as the "Pinnacle mine" located in the

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county of Routt, State of Colorado, owned and operated by Victor American Fuel Co., a corporation of Denver, Colo.

The Victor American Fuel Co. aforesaid has for more than 25 years past owned and operated and now owns and operates the "Pinnacle mine" above referred to and at all times produced a large and extensive tonnage of coal. Such coal, so produced and sold, is known and described throughout the mining trade and known to the general purchasing public as "Pinnacle" coal. Such coal has consistently maintained a high reputation on account of its quality, utility and fuel value, and is now widely and favorably known throughout the States wherein the same is sold. It has long had and now has a constant and favorable good will and the name "Pinnacle" as applied to or used in connection with coal has become and is a substantial asset of great value to the many individuals, partnerships, and corporations engaged in the mining, sale and transportation of such coal in interstate commerce.

The coal sold by the respondents in interstate commerce, as aforesaid, is not mined from the Pinnacle mine nor from any mine adjacent thereto, but is mined in a district separate and apart from that wherein the Pinnacle mine is located, separated from said Pinnacle mine by a range of mountains, and is not the same as, nor similar to, the coal known and described as "Pinnacle" coal, but is inferior thereto.

PAR. 5. The purchasing public has long recognized in "Pinnacle" coal certain attributes which make said coal desirable. Among these attributes are the following: (1) Low in ash content, (2) clean, (3) no clinkers, (4) no slacking, (5) high in heat units, which render "Pinnacle" coal a most economical fuel and give it a high fuel rating. The respondents represent that its said coal (1) is low in ash content, (2) has highest fuel rating, (3) is cleanest coal mined, (4) has no clinkers, (5) never slacks, (6) is most economical fuel, and (7) has highest heat units.

Said representations are false, deceptive, and misleading for in truth and in fact as these terms are understood by the purchasing public, respondents' said coal is not low in ash content, does not have the highest fuel rating, is not the cleanest coal mined, is not without clinkers, does slack, is not the most economical fuel, and not the highest in heat units.

PAR. 6. The practice of the respondents in using the word "Pinnacle" in the corporate name of the corporate respondent and in the advertising as aforesaid in selling coal mined in mines other than the Pinnacle mine has the capacity and tendency to and does mislead and deceive the members of the purchasing public into the false belief

that the coal so offered for sale and sold by them has actually been and is being mined from the Pinnacle mine, and that respondents' said coal is the coal that is commonly known and described as "Pinnacle" coal. Members of the purchasing public, as a result of such erroneous belief have been and are now being induced to purchase respondents' said coal.

PAR. 7. There are among the competitors of the respondents various individuals, partnerships, and corporations who sell and offer for sale in interstate commerce coal produced in mines other than the Pinnacle mine, who do not falsely represent that the coal so sold and offered for sale by them was mined from the Pinnacle mine and who do not falsely represent the quality and grade of such coal to be of the quality and grade of Pinnacle coal, and who do not in any manner misrepresent their coal or its source.

Such acts and practices of the respondent have the tendency and capacity to unfairly divert trade in said commerce to respondents from competitors who do not misrepresent the source of the coal vended by them nor the quality and grade thereof.

PAR. 8. The above and foregoing acts, practices, and representations of the respondents have been, and are all to the prejudice of the public and respondents' competitors as aforesaid, and have been and are, unfair methods of competition within the meaning and intent of section 5 of an act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

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, 1937, issued its complaint and caused same to be served upon the respondent Consolidated Pinnacle Coal Co., a corporation, charging respondents with the use of unfair methods of competition in commerce in violation of the provisions of said act. The individual respondent, Ellis Morrell, could not be located and the complaint was never served upon him. After the issuance of said complaint and the filing of respondent Consolidated Pinnacle Coal Co.'s answer thereto, testimony and other evidence in support of the allegations of the complaint and in opposition thereto were introduced before examiners of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter this proceeding regularly came on for final hearing before the Commission upon the complaint herein, the aforesaid answer, the testi-

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mony and other evidence and the brief of counsel for the Commission, and the Commission having duly considered the matter and being now fully advised in the premises finds that this proceeding is in the public interest, and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The corporate respondent, Consolidated Pinnacle Coal Co., is a Colorado corporation with its principal office and place of business in Denver, Colo. For a number of years said corporation has been engaged in the business of operating coal mines in Routt County, Colo., and in selling to retail dealers the coal produced from such mines. Prior to March 1, 1938, and prior to the date of the issuance of the complaint herein, the corporate respondent sold a portion of its output of coal to retail dealers located in States other than the State of Colorado. In connection with such sales the corporate respondent caused its coal, when sold, to be transported from the mines operated by it in Routt County, Colo., into other States of the United States wherein such purchasers were located. In the course and conduct of its said business the corporate respondent was in active competition in commerce among and between the various States of the United States with other corporations and with persons and partnerships also engaged in the sale and shipment of coal to purchasers buying for resale.

The individual respondent, Ellis Morrell, has not been connected with the corporate respondent, Consolidated Pinnacle Coal Co. since March 1, 1938, and is now engaged in the trucking business in the State of New Mexico.

PAR. 2. In recent years one of the principal competitors of the respondent Consolidated Pinnacle Coal Co., in the mining of coal in Routt County, Colo., and the sale of such coal in the State of Colorado and States adjacent thereto, has been the Victor American Fuel Co., which company has operated a mine at Pinnacle, in Routt County, Colo. The output of this mine has been sold by said Victor American Fuel Co. in the State of Colorado and in States adjacent thereto, including the States of Iowa, Kansas, Nebraska, North Dakota, South Dakota, and Wyoming. In the years 1915 to 1937, both inclusive, said Victor American Fuel Co. produced from the mine operated by it at Pinnacle, Colo., 2,687,809 tons of coal, and in said years it spent more than \$200,000 in advertising the coal so produced by it, and the name "Pinnacle" as applied to such coal. For a number of years said Victor American Fuel Co. has been the second largest coal mine operator in Routt County, Colo., and is

still one of the larger operators. It has built up a good reputation for coal mined by it and such coal has been known to the trade as a coal of good grade and quality. It is generally recognized in the trade and among the sellers and purchasers of coal in the sales territory in which Pinnacle coal is sold and distributed that Pinnacle coal is mined exclusively from the Pinnacle mine situated in the town of Pinnacle, County of Routt, Colo. On February 22, 1922, the Victor American Fuel Co. caused to be registered in the United States Patent Office a trade-mark which has been used by it in its business since April 22, 1916, which trade-mark included the word "Pinnacle" in combination with the words "mined and shipped only by the Victor American Fuel Co." On May 24, 1922, it caused another trade-mark to be registered in said Patent Office, which latter trade-mark consisted of the single word "Pinnacle," which trade-mark has been continually used by it in its business since April 22, 1916, and has been applied and fixed to the coal mined by it and to the freight cars, trucks, wagons, and bins, and to other carriers, vehicles, and receptacles containing such coal. Also, these trade-marks were filed in the office of the Secretary of State of the State of Colorado, on October 20, 1925.

PAR. 3. The corporate respondent, Consolidated Pinnacle Coal Co., is a relatively small mine operator. The Commission finds that in November and December 1936, the corporate respondent made shipments of a number of cars of coal which it had produced from a mine then operated by it near the town of Hayden in Routt County, Colo., which shipments were delivered by the corporate respondent to its customers in the State of Nebraska. The mine from which such coal was produced is located 42 miles from the mine operated by the Victor American Fuel Co. near the town of Pinnacle in Routt County, Colo. The coal so produced by the corporate respondent was sold by it under a round label about 3 inches in diameter. In the center of such label was a star with seven points. The corporate name of said respondent containing the word "Pinnacle" was printed around the border. On each point of the star there was printed a claim or representation concerning the grade or quality of the coal, which claims and representations were to the effect that such coal was of the highest quality. The evidence shows, and the Commission finds, that the coal produced by the corporate respondent and sold under the representations hereinabove set out was of inferior grade to the coal produced by the Victor American Fuel Co. and sold under the name Pinnacle coal. The corporate respondent's coal mined from the mine located near the town of Hayden had a

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high moisture content and a high ash content. It disintegrated rapidly in handling and in transportation from the mine to the consumer and was generally inferior to the coal produced by the Victor American Fuel Co. from the mine operated by it at Pinnacle, Colo.

PAR. 4. The use by the corporate respondent, Consolidated Pinnacle Coal Co., of the word "Pinnacle" in its corporate name and the use of the labels and other advertising material which featured its corporate name containing the word "Pinnacle" had the capacity and tendency to mislead and deceive members of the purchasing public into the erroneous and mistaken belief that the coal produced and sold by the corporate respondent under such label had been produced from the mine located at Pinnacle, Colo., operated by the Victor American Fuel Co. and that such coal was of a grade and quality equal to that of the Pinnacle coal produced by the Victor American Fuel Co. and had the capacity and tendency to induce such members of the purchasing public to purchase corporate respondent's coal on account of such mistaken and erroneous beliefs.

PAR. 5. There are among the competitors of the respondent Consolidated Pinnacle Coal Co., various persons and partnerships and other corporations who offer for sale and sell coal in commerce between and among several of the States of the United States, which coal is produced in mines other than the mine located at Pinnacle, Colo., and operated by the Victor American Fuel Co., and which competitors do not represent that the coal so offered for sale and sold by them was produced from said mine located at Pinnacle, Colo.; also, there are among the competitors of respondent those who do not misrepresent in any particular the grade and quality of the coal sold by them. As a result trade has been unfairly diverted to the corporate respondent from such competitors.

CONCLUSION

The aforesaid acts and practices of the corporate respondent Consolidated Pinnacle Coal Co., as herein found, are 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 provisions 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 respondent Consolidated Pinnacle Coal Co. (respondent Ellis Morrell

not having been served), testimony and other evidence taken before examiners of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, brief filed herein by counsel for the Commission (respondent not having filed brief); and the Commission having made its findings as to the facts and its conclusion that said respondent, Consolidated Pinnacle Coal Co., has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent Consolidated Pinnacle Coal Co., its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of coal, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "Pinnacle" in any corporate or trade name, or at all, when the coal sold by respondent has not been mined from the Pinnacle Mine situated at Pinnacle in the County of Routt, State of Colorado.

2. Designating or describing coal which has not been mined from the Pinnacle Mine situated at Pinnacle in the County of Routt, State of Colorado, as being Pinnacle coal; or otherwise representing that such coal is Pinnacle coal.

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

It is further ordered, That the case growing out of the complaint herein be, and the same hereby is, closed as to Ellis Morrell, subject to the Commission's right to reopen the case in the event future developments so warrant.

IN THE MATTER OF
FORSON LABORATORIES, INC.

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

Docket 3361. Complaint, Mar. 18, 1938—Decision, Apr. 10, 1940

Where a corporation engaged in sale and distribution of its "Nu-Myst" medicament and vaporizer therefor, to drug jobbers and dealers; in advertisements thereof through means of radio broadcasts over stations of extrastate audience and through advertisements in newspapers, periodicals, and trade journals of general circulation throughout the United States, and circulars distributed to customers, and through use of the mail, advertising folders, letters, and literature—

Represented that its said preparation was a cure or remedy for whooping cough, colds, hay fever, rose fever, and asthma, and a competent and effective treatment for such ailments and conditions which would relieve the same, and was more than a relief from local irritation which might be caused by ailments in question, and that said product would destroy bacteria and prevent growth thereof;

Facts being that it was not a cure or remedy or competent or effective treatment for said various ailments and conditions and would not give relief therefor beyond point above noted nor destroy or prevent growth of bacteria, specifically was not a cure for colds generally, causes of which so-called allergies are many-fold, and, lacking anything to control bronchial tube spasms, would not control asthma nor, lacking germicidal quality, relieve whooping cough, and its various representations aforesaid were misleading and untrue;

With tendency and capacity to mislead and deceive substantial portion of purchasing public into erroneous and mistaken belief that all of its said representations were true, and with result, as a consequence of such belief, that a number of consuming public purchased substantial volume of its product in preference to that of those engaged in substantial competition with it in sale and distribution of similar products in commerce among the various States and in the District of Columbia and in sale and distribution of products intended and used for purposes for which it recommended its said product:

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

Before *Mr. Arthur F. Thomas* and *Mr. Randolph Preston*, trial examiners.

Mr. William L. Taggart for the Commission.

Mr. Philip Steinman and *Mr. Lawrence H. Sanders*, of New York City, for respondent.