

Syllabus

IN THE MATTER OF
JOHN F. TROMMER, INC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 4689. Complaint, Jan. 29, 1942—Decision, Apr. 28, 1943*

Where a corporation engaged in the brewing of beer and in the competitive interstate sale and distribution thereof, including its "White Label" beer sold by it to retail at 10 cents in a "no deposit" bottle in the common 12-ounce size; having decreased the content an ounce as a means of retaining the "even price" of 10 cents as a strong selling point, following the effective date of the new Federal tax of 1 dollar per barrel on malt beverages, and adopted an 11-ounce bottle similar to the 12-ounce theretofore employed, though labeled inconspicuously with the true content—

Represented or implied in trade paper advertisements—irrespective of captions "TROMMER ABSORBS NEW DEFENSE TAX" and "TROMMER ABSORBS TAX ON SOME WHITE LABEL," responsibility for which it disclaimed—that there had been no increase in the price of said beer and that dealers and consumers would continue to obtain the same quantity they had been receiving before the new tax, through statement "There has been no increase in wholesale or retail prices of Trommer's White Label beer as a result of the Federal Tax bill * * * The * * * 'Family Pak,' a carton of 10 no-deposit bottles of White Label, continues to sell at \$1 with the price to the retailer also remaining unchanged" and statement in ensuing issue "The consumer price of * * * White Label beer in the no-deposit bottle has remained at 10 cents in grocery stores in spite of the Federal rearmament tax * * * The price of this package has not been increased to the retailer," and "The * * * 'Family Pak' * * * continues to sell at \$1, the price in the metropolitan area before the new * * * tax, and the price to the retailer on this package also remains unchanged";

With result, contributed to through use of bottles which to casual observer were indistinguishable from the former 12-ounce container, expected by many dealers and members of the public in the absence of information to the contrary—and notwithstanding label on the new bottle and inconspicuous changes in advertising cards, cartons, and cases and on order blanks and envelopes, which did not serve adequately to correct the erroneous impression created, as aforesaid, and in the case of said blanks and invoices reached only dealers—that a substantial number thereof and portion of the public were led to believe that it was in fact absorbing the said new tax, and with tendency and capacity to mislead said dealers and public with respect to the actual price of its beer and the quantity obtainable for the price paid, and to cause them to purchase substantial quantities as a result of the mistaken belief so engendered, whereby substantial trade was diverted unfairly to it from its competitors, among whom were those who did not engage in such acts or practices;

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

Complaint

36 F. T. C.

Before *Mr. John P. Bramhall*, trial examiner.

Mr. DeWitt T. Puckett for the Commission.

Dammann, Roche & Goldberg, of New York City, for respondent.

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 John F. Trommer, Inc., a corporation, 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, John F. Trommer, Inc., is a corporation, organized under the laws of the State of New York, and is now, and for several years last past has been, engaged in brewing and selling beer. Respondent brews and sells a brand of beer labeled and otherwise advertised as "Trommer's White Label" beer. Its principal office is at Bushwick Avenue and Conway Street, Brooklyn, N. Y., and it operates a brewery at 119 Hill Street, Orange, N. J.

PAR. 2. In the course and conduct of its business as aforesaid, respondent causes, and for several years last past has caused, its said product, when sold, to be transported from its said place of business in Brooklyn, N. Y., or from its brewery in Orange, N. J., to the purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times herein mentioned has maintained, a course of trade in said product in commerce between and among the various States of the United States and in the District of Columbia.

The respondent is now, and at all times mentioned herein has been, in substantial competition with other corporations, and with partnerships and individuals engaged in the sale and distribution of beer in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. For many years last past most beer, other than draft beer, has been offered for sale and sold at retail in 12-ounce bottles or cans for the price of 10 cents per bottle or can. Consequently, the purchasing public has come to expect a 12-ounce bottle or can of beer for the retail price of 10 cents in most cases.

PAR. 4. For several years prior to July 1, 1940, the effective date of the Federal "Defense Tax for Five Years" which increased the tax of fermented malt beverages, the respondent, in the course and con-

duct of its business as aforesaid, caused its "Trommer's White Label" beer to be packed in bottles having labels affixed thereto reading in part "Contents 12 Fl. Oz." Thus packed and labeled, said beer was sold to retail beer dealers located in different States who, in turn, sold the same to their customers for 10 cents per bottle, or in closed cartons containing 10 bottles for the price of 1 dollar.

PAR. 5. On or about July 1, 1940, the respondent reduced the amount of beer contained in each of its aforesaid bottles from 12 ounces to 11 ounces but no noticeable change was made in the size or shape of the bottles. Such bottles approximate in size, shape, and capacity 12-ounce beer bottles generally used in the beer trade. Although the amount of beer contained in respondent's 11-ounce bottles is stated on the labels attached thereto, such statement does not serve adequately to place purchasers on notice of the change in volume.

PAR. 6. In the course and conduct of its business operations, as aforesaid, the respondent caused to be disseminated false advertisements concerning its said beer by the United States mails and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act; and respondent also caused to be disseminated false advertisements concerning its said beer by various means for the purpose of inducing, directly or indirectly, the purchase of its said product in commerce, as "commerce" is defined in the Federal Trade Commission Act. Among and typical of the false, misleading, and deceptive statements and representations contained in said false advertisements caused to be disseminated, as hereinabove set forth, by the United States mails and by advertisements in trade papers and in other advertising literature, are the following:

TROMMER ABSORBS TAX ON SOME WHITE LABEL

The consumer price of Trommer's White Label beer in the no-deposit bottle has remained at 10 cents in grocery stores, in spite of the Federal rearmament tax, it has been announced by John F. Trommer, Inc. The price of this package has not been increased to the retailer. The Trommer "Family-Pak," a closed carton of 10 no-deposit bottles of White Label beer, also continues to sell at \$1. The price in the Metropolitan area before the new Federal tax, and the price to the retailer on this package also remains unchanged.

PAR. 7. Through the use of the aforesaid representations and others of similar import not specifically set out herein, the respondent has represented, directly or by implication, that the price charged for its "Trommer's White Label" beer and the amount of beer contained in each bottle remained the same subsequent to the imposition of the Federal tax referred to in said advertising matter. In truth and in fact the price per bottle and the amount of beer contained therein did

not remain the same subsequent to the effective date of the aforementioned Federal tax as the said tax was more than compensated for due to the substantial reduction in the amount of beer contained in each bottle sold by respondent subsequent to that date.

PAR. 8. Many of respondent's competitors do not engage in the acts, practices, and methods set out herein and still sell the 12-ounce bottle and can of beer, but have increased the price thereof to provide for the cost to them of the Defense Tax.

PAR. 9. The use by the respondent of the acts and practices herein set forth had and now has a capacity and tendency to mislead and deceive and has misled and deceived a substantial portion of the purchasing public into an erroneous and mistaken belief that the price of its said beer and the volume of beer contained in each bottle had not been changed, and into the purchase of substantial quantities of said product because of such erroneous and mistaken belief. Furthermore, the respondent's aforesaid practice has placed and is now placing in the hands of retail beer dealers a means which may be used to deceive the consuming public as to the price of its bottled beer and the quantity of beer contained in each bottle. In consequence trade has been diverted unfairly to the respondent from its competitors with the result that substantial injury has been done and is being done by respondent to competition in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 10. The aforesaid acts and practices of the respondent as herein alleged are all to the prejudice and injury of the public and of respondent's 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 January 29, 1942, issued and subsequently served its complaint in this proceeding upon the respondent, John F. Trommer, Inc., a corporation, charging it 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 that act. After the filing of respondent's answer, testimony and other evidence in support of the allegations of the complaint were introduced by the attorney for the Commission, and in opposition thereto by the attorneys for the respondent, before a trial examiner of the

Commission theretofore duly designated by it, and such testimony and other evidence were 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 thereto, testimony and other evidence, report of the trial examiner upon the evidence and the exceptions to such report, briefs in support of and in opposition to the complaint, and oral argument; 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, John F. Trommer, Inc., is a corporation, organized under the laws of the State of New York, with its principal office located at Bushwick Avenue and Conway Street, Brooklyn, N. Y. Respondent is now and for a number of years last past has been engaged in the brewing of beer, and in the sale and distribution of such beer to dealers. Respondent operates breweries both at its place of business in Brooklyn, N. Y., and at 119 Hill Street, Orange, N. J.

PAR. 2. In the course and conduct of its business, respondent causes and has caused its beer, when sold, to be transported from its places of business in New York and New Jersey to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains and has maintained a course of trade in its beer in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. Respondent, is now, and at all times mentioned herein, has been in substantial competition with other corporations, and with partnerships and individuals, engaged in the sale and distribution of beer in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 4. Among the various brands of beer sold by respondent is a brand designated by it as "White Label" beer. This beer was placed on the market many years ago, and has been one of respondent's most successful products. Until 1938, White Label beer was sold in various types of bottles and at different prices, but in 1938 respondent adopted the policy of selling this particular beer in a "no deposit" bottle to retail at the price of 10 cents per bottle. In the brewing industry, the term "no-deposit bottle" means that the bottle is nonreturnable and that no deposit is required from the consumer when the beer is purchased from the retail dealer.

Up until July 1, 1940, White Label beer was sold in bottles containing 12 fluid ounces. On that date, however, the new Federal tax of 1 dollar per barrel on malt beverages became effective, and respondent was confronted with the question whether the price of White Label should be increased or a reduction made in the contents of the bottle. After making inquiry among some of its dealers, respondent decided to adopt the latter alternative inasmuch as it was felt that the "even price" of 10 cents for the beer was a strong selling point with the public. Upon reaching this decision, respondent arranged with the concern which manufactured its bottles to supply a bottle having a capacity of 11 fluid ounces rather than 12 fluid ounces. While the actual measurements of the two bottles differed slightly, the bottles were substantially the same in general appearance and the reduction in the capacity was not discernible except upon close inspection or comparison. When the 11-ounce bottle was placed on the market, respondent discontinued entirely the use of the 12-ounce no-deposit bottle.

(Respondent has at all times continued to sell some of its White Label in a 12-ounce bottle, but this is an entirely different type of bottle, being a "tall" or "pouring" bottle and being intended for sale to taverns, restaurants, and other places where beer is sold for consumption on the premises. There has been no standard or customary retail price for this type of bottle, the price in each case depending largely upon the nature of the particular establishment serving the beer and the decision of the establishment as to the price to be charged. This type of bottle is not involved in the present proceeding.)

PAR. 5. Shortly after reaching its decision to reduce the contents of its no-deposit bottle to 11 ounces, respondent on July 13, 1940, addressed the following memorandum to its sales force:

IMPORTANT * * * ALL SALESMEN

When the new Federal tax appeared imminent, we studied carefully the possible effect on White Label in no-deposit bottles. The cost of this package—imported hops, bottles, cartons—had been rising for a long time—and we were beginning to doubt our ability to continue it as a 10¢ package. To increase the cost would destroy the even-price advantage this bottle has enjoyed—and the \$1.00 flat price of "Family-Pak".

Therefore we decided to make the White Label no-deposit bottle an 11-ounce container, avoiding any increase in cost to consumer or retailer—we absorb the new Federal tax.

White Label at 11 ounces is still the biggest buy in the American beer market. It still is a premium Malt Beer, brewed solely of fancy malt and costly imported hops.

It should sell at a faster pace at 10¢ than it has ever sold in the past (now that canned beer sells at 11¢).

Please re-sell the story of White Label to every dealer and urge him to get the bigger profits of faster turnover at 10¢ straight (Resp. Ex. No. 10).

On July 16, 1940, there appeared in a trade paper known as the "Grocer-Graphic," which had a circulation of about sixteen thousand among retail grocers and delicatessen operators in the New York City trade area (which includes New York City and portions of New Jersey and Connecticut), the following news item:

TROMMER ABSORBS NEW DEFENSE TAX

There has been no increase in wholesale or retail prices of Trommer's White Label beer as a result of the Federal defense tax bill, it has been announced by John F. Trommer, Inc. The Trommer "Family Pak," a carton of 10 no-deposit bottles of White Label continues to sell at \$1 with the price to the retailer also remaining unchanged (Resp. Ex. No. 17).

This item, while not actually written by respondent, was based upon information supplied by respondent to the publisher. Respondent denies particularly that it authorized the use of the caption, "Trommer Absorbs New Defense Tax."

In the next issue of this same paper, published on July 30, 1940, the following appeared, also as a news item:

TROMMER ABSORBS TAX ON SOME WHITE LABEL

The consumer price of Trommer's White Label beer in the no-deposit bottle has remained at 10 cents in grocery stores in spite of the Federal rearmament tax, it has been announced by John F. Trommer, Inc. The price of this package has not been increased to the retailer. The Trommer "Family-Pak," a closed carton of 10 no-deposit bottles of White Label beer, also continues to sell at \$1, the price in the metropolitan area before the new Federal tax, and the price to the retailer on this package also remains unchanged (Com. Ex. No. 5).

The text of this item, exclusive of the caption, was prepared and supplied to the paper by respondent. Here, as in the case of the earlier item, respondent disclaims any responsibility for the caption. Respondent's purpose in supplying this item for publication was to correct what it considered an erroneous implication of the earlier item. The earlier item did not, in respondent's opinion, distinguish sufficiently between the no-deposit 10-cent bottle of White Label and the tall or pouring bottle, the price of which had been increased by respondent to cover the new tax.

It appears from the record that these two news items attracted widespread attention in the trade and caused considerable confusion, due to the failure of the items to make any reference to the fact that the contents of the no-deposit bottle had been reduced from 12 to 11 ounces. Respondent's competitors (most of whom were continuing to use a 12-ounce bottle and had increased the price to cover the tax) experienced difficulty in meeting the competitive situation thus created.

A third issue of the trade paper, which was published on August 13, 1940, carried a news item which disclosed the actual circumstances surrounding the continuance of the 10-cent price. This item read as follows:

NOW 11 OUNCES IN TROMMER BREWERY

NO-DEPOSIT PACK

Contents of the no-deposit bottles of Trommer's White Label beer have been reduced to 11 ounces since the imposition of a Federal defense tax on July 1. For this reason the John F. Trommer Co. has not increased wholesale prices on this container unit nor have the retail prices on these been increased. A story, released by the Company and published in this newspaper on July 30, did not state that this change in contents had taken place (Resp. Ex. No. 18).

Respondent, on August 8, 1940, also issued the following letter to some four thousand retail dealers in the New York trade area:

Several inquiries have reached us regarding the contents of our White Label no-deposit bottle, and we are glad to clarify this matter.

White Label is brewed of costly imported Malt. The price of this material has been rising constantly. We had been concerned over this, because the public knows White Label has been a 10¢ seller for years and we were afraid we would have to increase its price. Then came the new Federal tax of \$1.00.

We are confronted with the prospect of destroying the "even-money" quick-sale and quick-turnover features of not only individual bottles, but also the even-money feature of the 10-bottle Family-Pak. After considerable study we determined that *your* interest and the consumers' interest would best be served by reducing the contents merely one ounce to eleven ounces; by our absorbing the Federal tax, and thereby continuing the consumer price of White Label at 10¢ in single bottles and \$1.00 in the Family-Pak.

We are sure every retailer who knows that quick turnover at a fair profit is more profitable than large profits and only occasional sales, will welcome his opportunity to be able to continue to give his customers White Label at the same old price of 10¢ per bottle (Resp. Ex. No. 15).

The label on the new type of bottle contained, in small type, the legend "Contents 11 fl. oz." Certain advertising cards used by respondent included a picture of the new bottle and label, and respondent also made certain changes in the wording on its cartons and cases indicating that the bottles were "11 oz. bottles." Similar changes were also made on respondent's order blanks and invoices.

(In May 1942, the War Production Board issued an order prohibiting the use of beer containers of less than 12 fluid ounce capacity, and respondent thereupon discontinued the use of the 11-ounce bottle and reverted to the use of a 12-ounce deposit bottle, increasing its price to cover the increased content of the bottle.)

PAR. 6. It is insisted by respondent that the record, considered as a whole, demonstrates that respondent had no intention of misleading its dealers or the public with respect to the reduction in the content of

its bottles, and it is particularly urged that respondent should not be held responsible for the captions appearing on the first two news items in the trade paper to the effect that the new tax was being "absorbed" by respondent. The Commission is of the opinion, however, that, aside from the captions, the items were misleading in that they represented or implied that there had been no increase in the price of respondent's beer, and that both dealer and consumer would continue to obtain for the regular price the same quantity of beer as they had been receiving before the imposition of the new tax. Assuming that respondent did not authorize the specific statement in the caption of the news items that respondent had "absorbed" the tax, the items, independent of the caption, could not but have the effect of leading a substantial number of dealers, and through such dealers a substantial portion of the public, to believe that respondent was in fact assuming the entire burden imposed by the new tax—that is, was "absorbing" it.

The Commission is of the further opinion that this result was contributed to through the use of bottles which were to the casual observer indistinguishable from the former bottles which contained 12 ounces rather than 11 ounces. It appears from the testimony of respondent and the manufacturer of the bottles that it was desirable, both from the viewpoint of the cost of the bottle and in order to obviate the necessity of alterations in respondent's bottling machinery, that the same general type of bottle be retained. Assuming this to be true, it nevertheless appears that the retention of the same type of bottle furthered, to some extent at least, the erroneous impression created by the news items. Of significance also in this connection is the fact that the 12-ounce bottle was in rather general use in the industry, and in the absence of information to the contrary many dealers and members of the public expected a bottle of that capacity.

The Commission is also of the opinion that the disclosure on the label and on the cartons, cases, and advertising cards of the actual contents of the new bottle did not serve adequately to correct the impression created by the news items, as the statements making the disclosure were in inconspicuous type or lettering and in many cases would not be observed by the ordinary purchaser, particularly in view of the similarity of the old and new bottles. With respect to the disclosure in the order blanks and invoices, here also the statements as to the capacity of the bottle were inconspicuous, and moreover, these statements reached only the dealers and not the public.

PAR. 7. The Commission therefore finds that the representations made or caused to be made by respondent through the trade paper were erroneous and misleading, and that the use of these representations had the tendency and capacity to mislead a substantial number of

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dealers and members of the public with respect to the actual price of respondent's beer and the quantity of such beer obtainable for the price paid, and the tendency and capacity to cause such dealers and members of the public to purchase substantial quantities of respondent's product as a result of the erroneous and mistaken belief so engendered. In consequence thereof, substantial trade was diverted unfairly to the respondent from its competitors, among whom were those who did not engage in such acts or practices.

CONCLUSION

The acts and practices of the respondent as herein found are all to the prejudice of the public and of respondent's 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 respondent, testimony and other evidence in support of and in opposition to the allegations of the complaint taken before a trial examiner of the Commission theretofore duly designated by it, report of the trial examiner upon the evidence and the exceptions to such report, briefs in support of and in opposition to the complaint, and oral argument; and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Federal Trade Commission Act:

It is ordered, that the respondent, John F. Trommer, Inc., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of respondent's beer in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, directly or by implication, that respondent is paying or absorbing any tax on its beer, when such purported payment or absorption is in fact compensated for, in whole or in part, by a reduction in the capacity of the containers in which such beer is sold, or by a reduction in the quantity of beer placed in such containers.

It is further ordered, That the respondent 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.

Complaint

IN THE MATTER OF
PARKER-McCRORY MANUFACTURING COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914*Docket 4707. Complaint, Feb. 10, 1942—Decision, Apr. 29, 1943¹*

Where a corporation engaged in the manufacture and competitive interstate sale of its electric-fence controllers, designated as "Parmak Electric Fencers"; by advertisements in newspapers and trade journals, and by means of folders, pamphlets, circular letters, and other advertising media distributed generally to prospective purchasers, directly or by implication—

- (a) Represented that the use of a single wire with its electric-fence controller would positively hold all livestock, and that its electric-fence controller would hold livestock as effectively as a steel or concrete enclosure; and was a positive, sure, and certain method to confine livestock, would prevent its escape under all conditions, and would hold the worst of fence breakers; and
- (b) Represented that use of said product cut fencing costs to less than \$10 per mille and effected a saving of 90 percent in fencing costs;

Facts being that said "Parmak Electric Fencer" equipped with a single wire would not confine any animal of a size which would permit it readily to pass under or over the wire without coming in contact therewith, or any animal whose natural covering or coat would insulate it from electric shock at the point of contact; nor confine fence breakers unless said fence breakers had received prior and proper training; or otherwise accomplish economies and results as above claimed therefor;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the mistaken belief that such misleading representations were true and into the purchase of said product because of such erroneous belief, whereby trade was diverted unfairly to it from its competitors, many of whom did not misrepresent their products; to the substantial injury of competition:

Held, That said acts and practices, as above set forth, were all to the prejudice and injury of the public and competitors, and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Before *Mr. Lewis C. Russell*, trial examiner.

Mr. Jesse D. Kash for the Commission.

Mr. Alfred D. Hillman, of Kansas City, Mo., for respondent.

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 Parker-McCrory Manufacturing Co., a corporation, hereinafter referred to as re-

¹ Findings as to the facts and order to cease and desist issued by the Commission on Jan. 13, 1943 (not published), were vacated and set aside by the Commission on Mar. 20, 1943.