

Complaint

41 F. T. C.

IN THE MATTER OF
NORTHERN KENTUCKY INDEPENDENT FOOD
DEALERS ASSOCIATION, INC. ET AL.

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

Docket 5140. Complaint, Mar. 24, 1944—Decision, July 12, 1945

Where an association, the members of which included about 150 retail grocers across the Ohio River from Cincinnati who purchased bread from Ohio baking companies having regularly established delivery routes serving their trade area, with driver salesmen daily delivering the number of loaves specified or ordered by the purchaser or left to the judgment of the driver, who made regular collections except where the purchaser was billed by the baking company, and in all cases accounted to the employer for the bread taken, title to which was retained by the bakery company until sold by him;

Following the discontinuance by the bakeries, pursuant to order issued in December, 1942, by an executive agency of the Federal Government, of their practice of crediting the grocer with two day unsold or "stale" bread; member dissatisfaction with the bakers' refusal thereafter either to reduce the price of bread to retailers or to undertake to secure an amendment of the order so as to permit the bakers to resume their practice of picking up stale bread and crediting grocers; and adoption by said members, in an effort to secure the relief desired, of a planned course of action involving application of pressure to two important bakers in said territory, whose action it was believed would be followed by the others—

Concertedly withdrew their patronage from said two bakers in increasingly substantial numbers until advised by counsel that to engage in a boycott was illegal;

Effects of which acts and practices, and attempt and threat by them to exercise an oppressive and unlawful power to injure the business of others and to deprive the consuming public of the benefits of free competition in the sale and distribution of bread from Ohio to purchasers in Kentucky, had been and were to obstruct and hamper competition among baking companies in the sale and distribution of bread, and to obstruct and hamper competition among such members and other retail grocers in Kentucky in purchasing bread produced in Cincinnati, Ohio:

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

Before *Mr. Webster Ballinger*, trial examiner.

Mr. Karl E. Steinhauer for the Commission.

Moore, Benzinger & Quill, of Covington, Ky., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act

Complaint

and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that the association, corporations, partnerships and individuals named herein and hereinafter referred to as respondents, have violated the provisions of Section 5 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 such respect as follows:

PARAGRAPH 1. Respondent, Northern Kentucky Independent Food Dealers Association, hereinafter referred to as "respondent Association," is a non-profit corporation, organized on the 8th day of August, 1939, under the laws of the State of Kentucky, with its principal place of business located at 505 Scott Street, in the city of Covington, Ky. Its membership is composed of individuals, partnerships and corporations engaged in business as retail grocers in the State of Kentucky.

The aim and purpose of respondent Association is to bring about cooperation for the common good of the members of the Association.

The officers of respondent Association who, individually and as said officers, are named as respondents herein, are Paul Ogden, president; R. H. Goderwis, vice president; Larry T. Hiltz, secretary, and Barney J. Malloy, treasurer.

The membership of respondent Association consists of approximately 150 retail grocers, their number and identity varying from time to time, so that it is impracticable at any given time to name as respondents and bring before the Commission each and all of the members without manifest delay, confusion and inconvenience. Therefore, all members of the said respondent Association are also respondents herein, as a class, and the Commission names and includes as respondents in this proceeding, both separately and as representatives of the whole class, the above-mentioned officers and the following members of respondent Association, to wit: Virgil Clinkenbeard, George Stegner, T. C. Alpaugh, Richard Guenther, Daniel Roy and Charles Hindersman.

PAR. 2. The respondent members of respondent Association hereinafter referred to as "respondent members," have been since prior to the organization of respondent Association in 1939, and still are engaged in the business of operating retail grocery stores in the State of Kentucky. In the course of their said business, said respondent members purchase quantities of bread manufactured in the State of Ohio, which are shipped from said State to their respective places of business in the State of Kentucky for resale, and there has been and now is a regular course of interstate trade and

Complaint

41 F. T. C.

commerce in said bread between the various manufacturers thereof in the State of Ohio and respondent members and other retailers of bread in the State of Kentucky.

Said Ohio bread manufacturers are in competition with each other in the interstate sale and delivery of bread to respondent members and other retailers in the State of Kentucky. Said respondent members are in competition with each other and with other retailers in the purchase and sale of said bread in commerce as aforesaid.

PAR. 3. For several years last past, respondents, in the course of their said business, have maintained and still maintain an unlawful combination and conspiracy to pursue, and they have accordingly pursued and still pursue an agreed and planned common course of action to hinder and prevent two of the largest Ohio bread manufacturers from selling and delivering their bread in competition with their competitors to respondent members and other retailers in the State of Kentucky until such time as said bread manufacturers comply with respondents' demand that they either reduce the prices of their bread to respondents or exchange their fresh loaves of bread for respondents' stale, unsold loaves of bread on hand from time to time.

By compelling Ohio's two largest bread manufacturers to comply with their said demand, respondents would, as a concomitant result, compel all other Ohio bread manufacturers selling bread to respondents and other grocers in Kentucky to likewise reduce the prices of their bread to respondents or exchange fresh loaves of bread for respondents' stale, unsold loaves of bread on hand from time to time.

Pursuant to such combination, conspiracy and agreed and planned common course of action, and in furtherance thereof, the respondent members have acted in concert and in cooperation with each other to refuse, and they have actually refused and still continue to refuse, and they have caused other retail grocers to refuse, and to continue to refuse to purchase bread from the said two largest Ohio bread manufacturers.

PAR. 4. The effects of respondents' acts and practices herein alleged are to obstruct and hamper competition between said two largest Ohio bread manufacturers and their competitors in the sale and delivery of Ohio bread to purchasers thereof in the State of Kentucky; to obstruct and hamper competition among respondent members and other retail grocers in the State of Kentucky in their purchases of Ohio bread. Respondents' said acts and practices constitute an attempt and threat to arrogate to themselves an oppressive and unlawful power to injure and destroy the business of others; to lodge

in respondents a dangerous and unlawful control of the prices at which Ohio bread is to be sold in the State of Kentucky; and to unlawfully take away from the consuming public the benefits resulting from free competition in the sale and delivery of bread from the State of Ohio to the purchasers thereof in the State of Kentucky.

PAR. 5. Each of the respondents herein named has directly or through the agency of respondent Association taken an active part in all the activities herein set out.

PAR. 6. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and constitute unfair methods of competition in commerce and unfair acts and practices in commerce within the intent and meaning of Section 5 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 March 24, 1944, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair methods of competition and unfair acts and practices in commerce in violation of the provisions of said act. After the filing of the respondents' answers, testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before an examiner 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 on the complaint, answers, testimony and other evidence, report of the trial examiner and exceptions thereto, and brief in support of the complaint (respondents not having filed brief and oral argument not having been requested); 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. (a) Respondent, Northern Kentucky Independent Food Dealers Association, Inc., (hereinafter frequently referred to as the association), is a nonprofit corporation, organized and existing under the laws of the State of Kentucky, with its office and principal place of business at 505 Scott Street, Covington, Ky. The membership of said association consists of approximately 150 in-

dividuals, partnerships, or corporations separately engaged in business as retail grocers. The members have their places of business in Kentucky in an area across the Ohio River from Cincinnati, Ohio, and in the immediate trading area of that city. The purposes of respondent association, as stated in its articles of incorporation, are, in substance, to bring about cooperation of its members for their common good.

(b) Respondent, Paul Ogden was, at the time the acts and practices hereinafter described were performed, a retail grocer with his place of business in Bellevue, Ky., and was president of respondent association. A physician's affidavit filed in this proceeding indicates that he has been a hospital patient for a number of months and makes it uncertain when, if ever, he may resume the conduct of a business.

(c) Respondent, R. H. Goderwis, is a retail grocer with his place of business in Covington, Ky., is a member of respondent association, and at the time the acts and practices hereinafter described were performed was vice president of said association.

(d) Respondent, Larry T. Hiltz, is a retail grocer with his place of business in Covington, Ky., is a member of respondent association, and at the time the acts and practices hereinafter described were performed was secretary of said association.

(e) Respondent, Barney J. Malloy, is a retail grocer with his place of business in Covington, Ky., is a member of respondent association, and at the time the acts and practices hereinafter described were performed was treasurer of said association.

(f) Respondents, Virgil Clinkenbeard, George Stegner, T. C. Alpaugh, Richard Guenther, Roy Daniel (the respondent named in the complaint as Daniel Roy), and Charles Hindersman, are retail grocers with their places of business located within the general area heretofore described and are members of respondent association. Because of the number of members and the constantly changing membership of respondent association, these members were made respondents as representatives of the membership generally.

PAR. 2. In the course and conduct of their respective businesses as retail grocers, the members of respondent association and other grocers located in the same area purchase bread from a number of baking companies having their plants in the State of Ohio. These baking companies have regularly established delivery routes serving the trade area in which the members of the respondent association are located. Driver-salesmen employed by the baking companies call daily upon the grocers and other purchasers located on their particular routes and deliver from a supply of bread on their trucks the

number of loaves specified by the purchaser or, pursuant to a previous understanding, make delivery of a quantity which is left to the judgment of the driver-salesman, or deliver a quantity of bread not to exceed a previously specified number of loaves. In occasional instances, purchasers may, for particular reasons, order of the baking company or of the driver-salesman an unusual quantity of bread for delivery on a specified date in the future. The baking company retains title to the bread until it is sold by the driver-salesman. This employee collects from the purchasers daily or weekly for the bread thus delivered, or in some instances the purchaser is billed by the baking company at the end of specified periods. In all cases the driver-salesman accounts to his employer for the bread taken from the bakery, and the amount taken each day is customarily based upon an estimate by the driver-salesman as to his probable deliveries. The members of respondent association thus purchase bread in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. (a) For many years it had been customary for baking companies, in delivering bread to retail grocers, to pick up any bread remaining unsold for two days and credit the grocer with the amount he paid for it. Such bread was referred to as "stale" bread. The usual loaves sold in the area in question were 20- and 22-ounce loaves, which were sold to the grocer at 9¢ and 10¢ a loaf, respectively, and which were resold by the grocer at 11¢ and 12¢ respectively, the normal and customary gross margin of profit to the grocer being 2¢ per loaf. In December 1942, an order was issued by an executive agency of the Federal Government affecting the distribution of bread. Among other things, it prohibited the baker from accepting the return of "stale" bread, and thus shifted any loss resulting from "stale" bread from the baker to the retailer. The members of the association felt that the gross margin of profit of 2¢ per loaf did not enable them to bear the loss resulting from "stales" and still recover a reasonable profit from their handling of bread. The members of respondent association were also of the opinion that the baking companies should give them some relief, either through a reduction in price to the grocer which would afford a larger gross margin of profit or through securing an amendment of the order mentioned so as to permit the baking companies to pick up "stale" bread and credit the grocer therefor, as had been done in the past.

(b) The president of respondent association appointed a bread committee consisting of Ben Kees, Sylvester Wagner, Larry T. Hiltz, George Scharold, George Johannigmann, and Richard Guen-

ther, all members of the board of directors of respondent association except Larry T. Hiltz, who was its secretary. At the direction of the president of the association or of this bread committee, the assistant secretary of the association invited representatives of each of the baking companies concerned to meet with these members of the association, and such meeting was had on March 3, 1943, at the offices of the association in Covington, Ky. The meeting was attended by Paul Ogden, president of the association, Larry T. Hiltz, its secretary, Ben Kees, Sylvester Wagner, George Scharold, George Johannigmann, and Richard Guenther, and by representatives of all the baking companies concerned. The representatives of respondent association placed before the baking company representatives their views that either a reduction should be made in the price of bread to them in order to increase their gross margin of profit, or that a modification of the order should be secured to permit bakers to pick up "stale" bread or credit the grocers with the cost thereof. The representatives of the bakers were asked to reply within a week as to what action they would take in response to the request made. Under date of March 8, 1943, the president of Rainbo Baking Company wrote the respondent association advising it of his regret at being unable to comply with their request, and each of the other bakers telephoned the association giving similar answers.

PAR. 4. When the baking companies refused to comply with the request made of them, the president and other representatives of respondent association decided that pressure should be applied in an effort to secure the relief which they thought necessary. They further decided that since the Rainbo Baking Company and the Taystee Bread Company were important bakers in the Cincinnati territory, any action which these bakers took would be followed by all other baking companies operating in that territory. The plan decided upon was to cease purchasing bread from Rainbo and Taystee, and this decision was obviously communicated to members of the association and to some nonmember retail grocers and their cooperation solicited. There is testimony that this was done by informal meetings and by individual solicitations. On March 11, 1943, thirty-three grocers discontinued purchases from Taystee Bread Company, and on March 12, forty-one discontinued purchases from Rainbo Baking Company. At various dates thereafter additional grocers discontinued purchases from these companies until as of April 1, 1943, fifty-seven had quit buying from Taystee and sixty-three from Rainbo. Forty-six grocers ceased buying from both of these baking companies, and twenty-eight stopped buying from one or the other of the baking companies. Prior to the cam-

paign initiated by respondents, Taystee had about four hundred customers in the northern Kentucky area served by its routes out of Cincinnati, and Rainbo had about four hundred and fifty customers served by its routes in the same area. At the regular directors' meeting in April 1943, counsel for the association was asked by the board for advice concerning the "stale" bread controversy and they were advised that it was illegal to engage in a boycott. There is no evidence of any activities in promoting the boycott after this time. Some of the grocers who quit buying bread from Taystee or Rainbo, or both, had resumed their purchases from one or both of these companies before the receipt of the advice mentioned, and others have not resumed the purchase of bread from these baking companies. The loss of sales to Taystee Bread Company and Rainbo Baking Company resulting from this boycott was reflected in an increase of approximately the same amount in the sales of the Continental and Schulze baking companies on their routes serving the area in question.

PAR. 5. The effects of the aforesaid acts and practices of respondent association its officers, directors, and members have been, and are, to obstruct and hamper competition among baking companies in the sale and distribution of bread, to obstruct and hamper competition among respondent members and other retail grocers in the State of Kentucky in purchasing bread produced in Cincinnati, Ohio, and constitute an attempt and threat by respondents to exercise an oppressive and unlawful power to injure the business of others and to deprive the consuming public of the benefits of free competition in the sale and distribution of bread from the State of Ohio to purchasers thereof in the State of Kentucky.

CONCLUSION

The acts and practices of respondents, as herein found, are all to the prejudice and injury of the public and constitute unfair methods of competition in commerce and unfair 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 answers of respondents, testimony and other evidence in support of and in opposition to the allegations of the complaint taken before an examiner of the Commission theretofore duly designated by it, report of the trial examiner and exceptions thereto, and brief in support of the

Order

41 F. T. C.

complaint (respondents not having filed brief and oral argument not having been requested), 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 respondent, Northern Kentucky Independent Food Dealers Association, Inc., a nonprofit corporation, its officers, directors, and members, their respective representatives, agents, and employees, and respondents R. H. Goderwis, Larry T. Hiltz, and Barney J. Malloy, individually and as officers of the aforesaid corporate respondent, their respective agents, representatives, and employees, in or in connection with the purchase of bread and other grocery products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between and among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, for the purpose or with the effect of coercing, or seeking to coerce, any seller into the adoption of any price, sale, or distribution policy desired by respondents, or otherwise hindering or restraining competition in the sale and distribution of said products:

1. By ceasing dealing with or reducing their purchases from any seller or sellers of bread or other grocery products.

2. By inducing, persuading, or coercing others into ceasing dealing with or into reducing their purchases from any seller or sellers of bread or other grocery products.

3. By hindering, obstructing, or preventing any seller of bread or other grocery products from making sales of his products.

It is further ordered, That, for the reasons appearing in the findings as to the facts, this proceeding be, and the same hereby is, closed as to respondent Paul Ogden without prejudice to the right of the Commission to institute further proceedings should facts warrant such action.

It is further ordered, That respondents shall within 60 days after the service upon 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.

Complaint

IN THE MATTER OF
PEGGY SHOPS, INC., TRADING AND DOING BUSINESS
AS KARLTON VOGUE SHOP

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND THE WOOL
PRODUCTS LABELING ACT OF 1939, APPROVED OCT. 15, 1940

Docket 5035. Complaint, Aug. 25, 1943—Decision, July 19, 1945

Where a corporation engaged in selling to the general public from its store, women's clothing, purchased from manufacturers in its own and other States, including many articles which were wool products within the intent and meaning of the Wool Products Labeling Act of 1939, and, when delivered to its store, had affixed thereto the stamp, tag, label or other means of identification purporting to show the percentage of the total fiber weight of wool, reprocessed wool, reused wool and non-wool fiber, maximum percentage of adulterating matter, and proper identification of the manufacturer, seller, etc., as provided by the aforesaid act and rules promulgated thereunder; before offer for sale or sale by it of said products to the general public, and with intent to violate the provisions of said act and rules—

Removed, mutilated, participated in or caused the removal or mutilation of said stamps, tags, labels or other means of identification and did not replace them with substitute stamps, etc., containing the information required as aforesaid;

With the result that said wool products, when offered for sale and sold by it, did not have affixed thereto the information required by said Act and rules and regulations:

Held, That such acts, practices, and methods of said corporation, as herein found, violated the provisions of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, were all to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Before *Mr. Arthur F. Thomas*, trial examiner.

Mr. DeWitt T. Puckett and *Mr. G. M. Martin* for the Commission.
Loewenstein & Winokur, of Philadelphia, Pa., for respondent.

COMPLAINT¹

Pursuant to the provisions of the Federal Trade Commission Act, and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said acts, the Federal Trade Commission, having reason to believe that Peggy Shops, Inc., a corporation, trading and doing business as Karlton Vogue Shop,

¹ Complaint published as amended by the following order of Nov. 4, 1943:

This matter coming on to be heard by the Federal Trade Commission upon the motion of counsel for the Commission to amend the complaint in this case by substituting