

IN THE MATTER OF
SOUTHERN SPRING BED COMPANY 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 5796. Complaint, July 12, 1950—Decision, Mar. 22, 1951

Where the name Red Cross and the emblem of the Greek red cross had long been familiar to the American public and were associated in their minds with the Red Cross organization; and thereafter a corporation engaged in the manufacture of mattresses, bedsprings, bedding, and related products and in the interstate sale and distribution thereof—

- (a) Used and displayed as a trade name for its wares the words "Red Cross" and in connection therewith a red Creek cross, in advertisements in newspapers and periodicals of general circulation, on letterheads, invoices, tags, labels, containers, and in radio continuities and advertising matter disseminated since 1904, and thereby represented that its products were designed, endorsed, approved, or sponsored by the American Red Cross; that the Red Cross was financially interested in their sale; that they were manufactured in accordance with sanitary standards or specifications set up by the Red Cross organization; or that they had some other connection with the Red Cross;

The facts being said use was unauthorized; and said products were in no way associated with the American Red Cross; and

Where said corporation, engaged in the manufacture and interstate sale and distribution of a mattress and box spring which were substantially more rigid than normal mattresses and boxsprings; through statements in advertising—

- (b) Represented that its said "orthopedic" mattresses and box spring were specially built and scientifically designed to meet the exacting specifications of leading orthopedic surgeons and physicians and had their approval;
- (c) Represented that they might be effectively used indiscriminately as a cure or competent treatment for lumbago, sacroiliac, sciatica, neuritis, or sprained back; and
- (d) Represented through the use of said word "orthopedic" to describe or identify its said mattresses or springs that they were specially designed to and would correct certain deformities, diseases, and disorders of the body;

The facts being that while they were more rigid and provided a firmer and more level sleeping surface than conventional mattresses and springs, they were, nevertheless, stock mattresses and springs and could not be relied upon to correct any deformity, disease, or disorder of the body when used indiscriminately by the general public; their use did not constitute a cure or competent treatment for the aforesaid or any other ailment or condition, and their efficacy was limited to providing help in the alleviation of pain and in contributing to the comfort of the patient in cases in which a smooth, firm, and level sleeping surface is recommended or prescribed by a reputable physician;

With capacity and tendency to mislead and deceive a substantial portion of the public in the various respects hereinabove set out:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice of the public and constituted unfair and deceptive acts and practices in commerce.

As regards the use of the words "Red Cross" and the emblem of the red Greek cross, while respondent stated that it did not adopt the term and the depiction as a trade name and identification of its products for any unlawful purpose, that its use thereof had not been with the intent to appropriate any good will or identity of the American National Red Cross or to create confusion or deception, and that at no time within the memory of its present officers had use of such term and depiction led any of its dealers or members of the public to believe that it was in any way associated therewith; and that to their personal knowledge such dealers or the public had not been thereby led to believe that its products were manufactured, approved, or sponsored by or in any way connected therewith; it admitted that the Red Cross had not at any time authorized the use by it of the designation "Red Cross" or the emblem of a Greek red cross, that its products had never been manufactured in accordance with the specifications of the Red Cross, and that its use of said name and emblem, without the use of appropriate phraseology in conjunction therewith stating that its products were in no way so connected or associated, might create and cause among the members of the public confusion or deception; and the Commission accordingly so found.

In said proceeding in which the complaint also named as respondents certain persons who were alleged to have acted in conjunction and cooperation with each other in formulating, directing, and controlling the business, acts, practices, and policies of said corporation, no evidence was introduced to show that any of them actually ever participated in any of the practices concerned, and the Commission under the circumstances was of the opinion that insofar as it related to said respondents individually, the complaint should be dismissed.

Before *Mr. Clyde M. Hadley*, trial examiner.

Mr. Morton Nesmith for the Commission.

Smith, Kilpatrick, Cody, Rogers & McClatchey, of Atlanta, Ga., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, having reason to believe that Southern Spring Bed Co., a corporation; and Richard N. Schwab, Clarence S. Moeckel, Phillip L. Peebles, William P. Rucker, and Robert W. Schwab, Jr., individually and as officers and directors; Julian Price, J. B. Taylor, and Thomas H. Williams, individually and as officers; and Harrison Jones and Martin E. Kilpatrick, individually and as directors, respectively, of Southern Spring Bed Co., a cor-

poration, 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. Respondent, Southern Spring Bed Co. is a corporation organized and doing business under and by virtue of the laws of the State of Georgia, having its principal offices and place of business located at 290 Hunter Street SE., Atlanta, Ga. Respondent, Southern Spring Bed Co., for more than 5 years last past, has been engaged in the manufacture, offering for sale, and distribution among other things of mattresses, bedsprings, bedding, and related products. Said products are labeled, advertised, and sold under the descriptive name of Red Cross accompanied by the representation of a red Greek cross. Corporate respondent has caused said products, when sold by it, to be transported from its said place of business in the State of Georgia to the purchasers thereof at their respective points of location in various States of the United States other than the State of Georgia. Corporate respondent maintains, and at all times mentioned herein has maintained, a course of trade in said mattresses, bedsprings, bedding, and related products in commerce among and between the various States of the United States. Corporate respondent's volume of business in said commerce is substantial.

PAR. 2. Corporate respondent's respective officers and directors are now, and for more than 1 year last past have been, the following respondents; namely, Richard N. Schwab, president and chairman of the board of directors; Clarence S. Moeckel, Phillip L. Peebles, William P. Rucker, vice presidents and directors, and Robert W. Schwab, Jr., secretary-treasurer and director; Julian Price and J. B. Taylor, assistant vice presidents, Thomas H. Williams, assistant secretary-treasurer; and Harrison Jones and Martin E. Kilpatrick, directors. The business address of said corporate respondent; namely 290 Hunter Street SE., Atlanta, Ga., is also the business address of its aforesaid officers and directors.

The said above-named individual respondents in their official capacities as officers and directors of corporate respondent now act, and for more than 1 year last past have acted in conjunction and cooperation with each other in formulating, directing, and controlling the business, acts, practices, and policies of corporate respondent, including the advertising claims made directly and indirectly by cor-

porate respondent in connection with the sale of its aforementioned products in commerce.

PAR. 3. The American National Red Cross has a distinct legislative history and factual background, based upon the original International Geneva Convention of August 22, 1864, held at Geneva, Switzerland, which was the first and original Red Cross Convention. The stated purpose of that convention was "The Amelioration of the Condition of the Wounded in Time of War." The flag or emblem adopted by the Geneva Convention was that of a Greek type or design of red cross on a white background, the same being the colors of Switzerland reversed. The civilized States of the world were invited to adhere to the Geneva Convention and most of such countries, located in all parts of the world, did so adhere, adopting thereby the name and emblem of the red cross and undertaking to implement the work and principles enunciated in the convention.

The Government of the United States on July 26, 1882, formally ratified and adhered to the International Red Cross Geneva Treaty of August 22, 1864. In August 1884, the President of the United States directed that the Geneva Treaty be observed by the Army of the United States and that the Red Cross insignia be displayed on ambulances, hospitals, and arm bands of the Army Medical and Hospital Service.

The provisions of a second Geneva Red Cross Convention, that of October 20, 1868, making the original 1864 convention applicable to naval warfare, were observed by the Government of the United States in the Spanish-American War of 1898. United States vessels of war were required to hoist, in connection with their national flag, the white flag with the red cross.

The United States was a party to and ratified a further International Red Cross Convention concluded at Geneva, Switzerland, on July 6, 1906, designed to improve and supplement the provisions agreed upon at Geneva on August 22, 1864. This convention, in article 18 thereof, provided:

Out of respect to Switzerland, the heraldic emblem of the Red Cross on a white ground, formed by the reversal of the federal colors, is continued as the emblem and distinctive sign of the sanitary service of armies.

A still further Red Cross Convention, held at Geneva, Switzerland, on July 27, 1929, was participated in and ratified by the Government of the United States. This convention continued as a distinctive sign of the Red Cross, the "heraldic emblem of the Red Cross on a white ground," out of respect to Switzerland.

Complaint

47 F. T. C.

PAR. 4. The introduction and development of the Red Cross movement in the United States was chiefly due to the vision and zeal of Miss Clara Barton, founder of the American Branch and former nurse during the War of 1861-65 Between the States of the United States. On October 7, 1881, Miss Barton and four associates incorporated the American Association of the Red Cross in the District of Columbia. It was recited in the articles of incorporation that the incorporators desired to form an association for benevolent and charitable purposes to cooperate with the International Committee of the Red Cross in Switzerland. The term of the association's corporate existence was stated to be for 20 years. One of the objects of the association, it was recited in its charter, was "to organize a system of national relief and apply the same in mitigating the sufferings caused by war, pestilence, famine and other calamities."

The initial incorporation of the Red Cross in the United States by Miss Barton and her associates in 1881 inaugurated the broad pattern and Nation-wide scope of Red Cross relief work that first functioned in an organized manner in the United States in the period between 1881 and 1905.

A second incorporation of the Red Cross organization occurred in the District of Columbia on April 29, 1893, when Miss Barton and a number of associates recorded the charter of the American National Red Cross to carry on the benevolent and humane work of the Red Cross in accordance with the articles of the international treaty of Geneva, Switzerland, entered into on the 22d day of August 1864, and adopted by the Government of the United States, on the first day of March 1882, and also in accordance with the broader scope given to the humane work of said treaty by the American Amendment, whereby the sufferings incident to great floods, famines, epidemics, conflagration, cyclones, and other disasters of national magnitude might be ameliorated by the administration of necessary relief. Among other purposes stated in the articles of incorporation were those of "the advancement of sanitary science and the training and preparation of nurses." This second organization picked up and carried on the work authorized and conducted by the first. The principal office of the American National Red Cross was located in the city of Washington, D. C.

On June 6, 1900, the American National Red Cross was incorporated for a third time, this time by an act of Congress, it being recited in said act that the importance of the organization's work demanded a

reincorporation by the Congress of the United States, a permanent organization being needed in every nation to carry out the purposes of the Geneva Convention of August 22, 1864. It was recited that this new corporation succeeded to the rights and property held, and to all duties theretofore performed, by the American National Red Cross incorporated under the laws of the District of Columbia, the same being dissolved. It was further recited in the articles of incorporation that the American National Association of the Red Cross and its reincorporating successor had used the distinctive flag and arm badge specified by article 7 of the Treaty of Geneva. This incorporated organization of June 6, 1900, among other things, was authorized and empowered "to continue and carry on a system of national and international relief in time of peace and apply the same in mitigating the sufferings caused by pestilence, famine, fires, floods, and other great national calamities." This new national charter of 1900 provided that the American National Red Cross, among other rights and privileges, was "to have the right to have and to use, in carrying out its designated purposes," an emblem and badge, a Greek red cross on a white ground, as the same has been described in the treaty of Geneva, August twenty-second, eighteen hundred and sixty-four and adopted by the several nations acceding thereto."

The American National Red Cross was reincorporated by act of Congress on January 5, 1905. This corporation was empowered to succeed to the rights and property which had been hitherto held, and to all of the duties which had theretofore been performed, by the American National Red Cross as a corporation duly incorporated by the act of June 6, 1900, the latter being thereby repealed and the organization thereby dissolved. Various of the provisions of this act were contained in substance in the prior act of 1900, including the purpose of continuing and carrying on "a system of national and international relief in time of peace and apply the same in mitigating the sufferings caused by pestilence, famine, fire, floods, and other great national calamities, and to devise and carry on measures for preventing the same." The new corporation, like its predecessors, was given the right "to have and to use in carrying out its purposes hereinafter designated, as an emblem and badge, a Greek red cross on a white ground." Section 4 of the act of January 5, 1905, contained the following provision:

"* * * Nor shall it be lawful for any person or corporation, other than the Red Cross of America, not now lawfully entitled to use the sign of the Red Cross, hereafter to use such sign or any insignia

colored in imitation thereof for the purpose of trade or as an advertisement to induce the sale of any article whatsoever. * * *

On June 23, 1910, the Congress passed an act amending and making more definite and specific the provisions of the said section 4 of the act of January 5, 1905, by adding the following proviso after the above inhibition against the use of the emblem for the purpose of trade or as an advertisement:

*"Provided, however, That no person, corporation, or association that actually used or whose assignor actually used the said emblem, sign, insignia, or words for any lawful purpose prior to January fifth, nineteen hundred and five, shall be deemed forbidden by this act to continue the use thereof for the same purpose and for the same class of goods. * * *"*

PAR. 5. Following the adoption of the so-called American amendment of 1881 to the Geneva Treaty of 1864, the scope of the American Red Cross work was greatly enlarged and expanded so as to include, in addition to the relief of suffering by war, the new relief comprehended by the so-called American amendment covering and including suffering by pestilence, famine, flood, fires, and other calamities deemed national in extent. Due to this expansion that included relief work on a national scale in various types of disasters, the work and aim of the American Red Cross became Nation-wide and known likewise in many foreign countries.

Following the incorporation of the Red Cross in 1881, the American organization participated in relief work growing out of and necessitated by a large number of national disasters and the Red Cross name and insignia became known all over America. The beneficial work of this great charitable organization met with wide public acclaim, resulting in the commercial adoption and appropriation of the Red Cross name and emblem for distinguishing proprietary marks, there being no law during the period between 1881 and 1905 making unlawful such commercial appropriation.

PAR. 6. The American National Red Cross, hereinafter variously referred to as the American Red Cross and Red Cross, is the best-known benevolent organization in the United States. It is an organization that is close to the people, supported by the people. Its emblem of a Greek red cross on the field of white is familiarly known in every city, town, village, hamlet, and crossroad in the United States. The American Red Cross is now, and has always represented, typified, and constituted the organized effort of the American people directed

toward the amelioration of the condition of the sick and wounded in time of war and the relief and succor of those suffering from national disasters, such as floods, fires, pestilence, famines, cyclones, earthquakes, and similar disasters. From its inception in the United States, the Red Cross has always been, and is now, supported and financed by the general public. Funds for the support of the organization are contributed annually in Nation-wide campaigns conducted for such purpose. The American Red Cross has experienced a tremendous growth. Its adult, individual, contributing membership now comprises some 17 million persons, not counting millions of additional junior members. There are more than 3,738 Red Cross chapters functioning in the United States, these with some 4,567 branches, the members of which, many of them highly trained, devote their time and energies to the relief work of the organization. There is a Red Cross chapter in practically every county in every State in the United States.

To the average person, the Red Cross flag and emblem mean a helping hand to those who need help. It means and indicates to them mercy, charity, and benevolence freely given without cost. The name and emblem variously suggest to members of the general public hospital work, trained nurses, food, clothing, and medicines, medical attention, including blood plasma for those rendered homeless and injured by disaster. The name of the Red Cross is associated always with medical treatment, preservation of health, and sanitation, through the use of the latest and most scientific methods and appliances available.

PAR. 7. Notwithstanding the wide public knowledge and appreciation of the benevolent work of the American Red Cross in connection with national disasters in the United States and in foreign countries between 1881 and 1905, as alleged in paragraphs 5 and 6 herein, respondents herein, without notice to or making inquiry of the American Red Cross, or requesting its permission in such respect, appropriated and used and have simulated and imitated the emblem of a Greek red cross and the words "Red Cross" in connection with the advertisement and sale of the various products produced and sold by said corporate respondent in commerce.

In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of certain of their products, the respondents in advertisements, in newspapers and periodicals of general circulation, by letterheads, invoices, tags, labels, and containers, and by radio continuities reaching into States other than that from which radio broadcasts emanated, for more than 5 years last past,

have used and displayed and now use and display the words "Red Cross" and a Greek cross in red in connection with the aforesaid advertisement and sale of their said products.

Respondents advertise and have advertised extensively in large daily papers of general interstate circulation, but a substantial portion of the advertising done by respondents to effect the sale of their products is conducted on a so-called dealer-cooperative basis in connection with which latter method matrices of advertisements and advertising copy are prepared by respondents' advertising representatives and supplied to retail dealer-customers located in various States other than the State of Georgia. Said dealer-cooperative advertisements are published over the name of the retail dealer and the cost of the advertising space used is shared by respondent Southern Spring Bed Co. on a 50-50 basis with the retail dealer. Some dealers who prepare their own advertising are supplied by respondents with suggested advertising copy. Radio continuities are also supplied to dealers in connection with respondents' dealer-cooperative advertising plan and the cost of the radio broadcast time is shared by corporate respondent and its dealers on a 50-50 basis.

PAR. 8. Through the use of the words "Red Cross" and the emblem of the Greek cross in red in connection with the advertisement and sale of their products in commerce, respondents have represented, directly, and by implication, that such articles are designed, endorsed, approved, or sponsored by the American Red Cross; that the Red Cross has prescribed some sanitary or other standard or specification for products produced by respondents; that the Red Cross is financially interested in the sale of said products or that there is some connection between the Red Cross organization and corporate respondent; and that respondents' products, by reason of the manner in which they are marked, branded, labeled, and advertised are in some manner connected or associated with the American Red Cross.

PAR. 9. The aforesaid representations are false, misleading, deceptive, and confusing. In truth and in fact, the Red Cross organization has never designed, endorsed, sponsored, or approved any product sold and distributed under the Red Cross name and emblem, by respondents or by any person, firm, or corporation, or otherwise. The Red Cross is not now and never has been interested directly or indirectly in the sale of any product, sold by corporate respondent under a Red Cross brand or otherwise, nor has the Red Cross ever prescribed any sanitary or other standard or specification for any article of commerce produced and distributed by corporate respondent, or otherwise. The Red Cross is not connected or associated with

1086

Complaint

corporate respondent in any way, financially or otherwise, and the Red Cross has never been requested to give and has never given corporate respondent permission to use the Red Cross name and emblem for Commercial purposes.

PAR. 10. The science of orthopedics relates to and comprehends the correction or prevention of deformities of the body. Orthopedic procedures in certain cases may embrace the proper use by a physician of a firm or more rigid type of bedspring or mattress to give support to the back.

In the further course and conduct of respondents' aforesaid business and for the purpose of inducing the purchase of certain of their bedsprings and mattresses, respondents have described and designated the same by the descriptive name of "Red Cross Orthopedic" and have likewise in such connection referred to and designated said bedsprings and mattresses as "A Red Cross Creation."

The use by respondents of the words "Red Cross" in conjunction with the term "orthopedic" constitutes within itself a false and misleading representation that respondents' said bedsprings and mattresses are of a particular type and construction that have been selected and approved by, or used by, the American Red Cross for the treatment and relief of certain conditions and have the endorsement and approval of the American Red Cross.

The use by respondents of the words or expression "A Red Cross Creation" as applied to their said bedsprings and mattresses, is further, a direct representation that such products, so designated, were designed by and built according to specifications prescribed by the American Red Cross.

PAR. 11. Respondents in connection with the sale of their said "Red Cross Orthopedic Box Springs and Mattresses" have made the following, among other representations:

Approved by Leading Orthopedic Surgeons.

* * * * *

Built to specifications of leading doctors.

* * * * *

For you, if you require the firm, level sleeping surface doctors advise.

* * * * *

Does your doctor prescribe a firm sleeping surface?

* * * * *

Do you sleep on a board? Do you rest better on a mattress that supports every inch of your body evenly?

* * * * *

Complaint

47 F. T. C.

The Red Cross Orthopedic Mattress gives you the firm support you need—plus comfort. Scientifically designed to meet the exacting specifications of leading orthopedic surgeons and physicians—made by bedding specialists with 66 years of know-how and experience, the Red Cross Orthopedic Mattress and Box Spring is an unbeatable combination for good health and good rest.

* * * * *

I have been among the many who suffer from back ailment. I experienced pain, and it was quite difficult to rest comfortably on inner-spring mattresses of competent make. A friend suggested that I procure an Orthopedic Red Cross Mattress and Box Spring. I have used this for a month and have rested well at night, and am confident that the spring and mattress have been contributing factors to my comfort and physical improvement.

* * * * *

Dear Doctor :

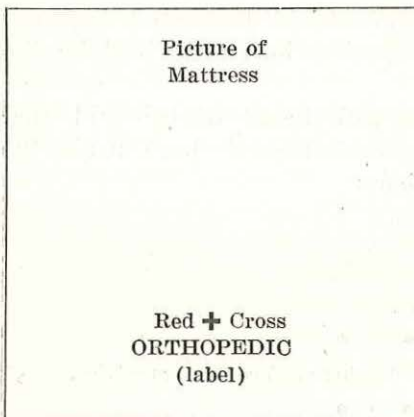
We know that you will be interested in the fact that we are now featuring the Red Cross Orthopedic Inner-spring Mattress and Box Spring, manufactured by the Southern Spring Bed Company of this city.

Several of the leading Orthopedic Surgeons and General Practitioners gave valued advice as to how a mattress and box spring to be used for Lumbago, Sacroiliac, sprained back, Sciatica, Neuritis, etc., should be made. Both of these items are specially built and are extra, extra firm. The finished products were examined by these doctors. They are what they want.

In recommending this outfit to your patients, please advise them to purchase both the mattress and springs as we are told desired results cannot be obtained otherwise.

* * * * *

Attention—DOCTORS !! Attention—PATIENTS !!



A
RED CROSS
CREATION!

IT GIVES A
FIRM SLEEPING
SURFACE AS
ORDERED BY
LEADING DOCTORS
FOR PATIENTS
WHO HAVE
LUMBAGO
SACROILIAC
SCIATICA
NEURITIS
SPRAINED BACK

Approved by leading orthopedic surgeons:

RED CROSS ORTHOPEDIC MATTRESS AND BOX SPRINGS, ANY SIZE.

PAR. 12. Respondents, through the use of the above set forth advertising representations, and others, of similar import not specifically

set out herein, represent, and have represented, directly and by implication, that their said Red Cross Orthopedic box springs and mattresses are openly and publicly approved and endorsed by leading orthopedic surgeons and physicians; that their said box springs and mattresses are built to comply with and do provide the extra firm support and firm level sleeping surface that leading doctors advise and prescribe, and that physicians and surgeons may safely accept the recommendations of respondents in prescribing Red Cross Orthopedic box springs and mattresses for their patients; that respondents' said box springs and mattresses provide better support and greater relief than that obtained by persons who have been sleeping on bedboards to secure firm, rigid body support; that their said Red Cross Orthopedic box springs and mattresses constitute a cure for or an adequate reliable treatment for back ailments, lumbago, sacroiliac, sprained back, sciatica, neuritis, etc., and that desired results in the treatment of these ailments will be obtained through the use of respondents' said Red Cross Orthopedic box springs and mattresses; and that these products can be effectively used indiscriminately by members of the public without the diagnosis and supervision of a physician or surgeon in each of the above conditions or ailments.

PAR. 13. The said representations of respondents as set forth and described in paragraphs 10, 11, and 12 of this complaint, are misleading and untrue in the following, among other, particulars:

Respondents' said Red Cross Orthopedic box springs and mattresses have not been approved by or openly or publicly endorsed by leading physicians. Said box springs and mattresses do not provide the support that is obtained by persons who sleep on bedboards. Said box springs and mattresses do not provide a cure for or an adequate, reliable treatment for back ailments, lumbago, sacroiliac, sprained back, sciatica, neuritis, etc. Respondents' so-called "orthopedic" box springs and mattress affords no other value in the treatment of any condition than such support as it may give to the patient, and each individual requiring support from the bed he lies on must have determined for him by his physician whether respondents' bedspring and mattress may be effective as a support in his particular condition.

Respondents' said "orthopedic" bedsprings and mattresses, either separately or in combination, are stock bedsprings and mattresses and are improperly designated as "orthopedic" bedsprings and mattresses.

Respondents' and said "Red Cross Orthopedic" box springs or bedsprings and mattress was not originated or designed by the American Red Cross, and is not a creation of the American Red Cross. Respondents' said "orthopedic" bedsprings and mattress has not been ap-

proved or endorsed by the American Red Cross, or ever sold or used in pursuance of any suggestion from or concurrence by the American Red Cross. The American Red Cross is not directly or indirectly responsible for the representations made by respondents concerning their said "Red Cross Orthopedic" bedsprings and mattresses and said representations are not now made and have never been made with the consent, approval, or permission of the American Red Cross.

PAR. 14. Respondents' use of the Red Cross name and emblem in connection with the sale of their said products in commerce is not and does not constitute, and has not been established as an actual and lawful use thereof in the United States or the various States thereof, under the act of Congress of January 5, 1905, or amendment thereof, above referred to.

PAR. 15. In the course and conduct of their said business as set forth and described in this complaint respondents are now, and for sometime past have been, engaged in substantial competition with various other persons and with corporations, firms, and partnerships, likewise engaged in the manufacture, and in the offering for sale and distribution in commerce, of mattresses, bedsprings, bedding, and related products. Among the competitors of the respondents, described in the paragraphs 1 and 2 herein, are many who do not misrepresent their products.

PAR. 16. The use by respondents of the said false and misleading representations in connection with the sale of their aforesaid products has, and has had, a tendency and capacity to mislead and deceive and confuse a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true and into the purchase of substantial quantities of said products as the result of such belief so induced. As a result thereof substantial trade in said commerce has been unfairly diverted to respondents from respondents' competitors in said commerce who do not misrepresent their products, to the injury of said competitors, and to the injury of the public.

Corporate respondents further, by reason of the acts, practices, policies, and representations employed by it, by and with the advice, assistance, and cooperation of its said officers and directors named as respondents herein, in dealing with retailers, sales agents, sales representatives, or other distributors and outlets handling, advertising, and selling corporate respondent's said products under the name or designation Red Cross accompanied by the representation of a Greek red cross, has supplied to and placed in the hands of said retailers, sales agents, sales representatives, distributors, or outlets means and instrumentalities designed to enable and capable of en-

abling the latter to mislead and deceive members of the public in connection with the purchase of respondents' so-called Red Cross products.

PAR 17. The aforesaid acts and practices of said respondents as herein alleged are all to the prejudice of the public and the competitors of respondents 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.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on July 12, 1950, issued and subsequently served upon the respondents named in the caption hereof its complaint in this proceeding, charging said 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 that act. After the filing of the respondents' answers to said complaint, a hearing was convened by a trial examiner of the Commission theretofore duly designated by it to take testimony and receive evidence in support of and in opposition to the allegations of the complaint, and at said hearing a stipulation of all of the facts in the case was entered into by and between counsel for the respondents and counsel in support of the complaint. On the basis of the record thus presented (all intervening procedure having been waived), the trial examiner on December 29, 1950, filed his initial decision.

The Commission, having reason to believe that the initial decision was deficient in certain material respects, on February 8, 1951, issued and thereafter served upon the respondent, Southern Spring Bed Co., its order placing this case on the Commission's own docket for review and affording said respondent an opportunity to show cause why the initial decision should not be altered in the manner and to the extent shown by the tentative decision attached to said order. The respondent not having appeared in response to the leave to show cause, this proceeding regularly came on for final consideration by the Commission upon the record herein on review; and the Commission, having duly considered the matter and being now fully advised in the premises, makes the following findings as to the facts, conclusion drawn therefrom, and order, the same to be in lieu of the initial decision of the trial examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Southern Spring Bed Co., hereinafter sometimes referred to as respondent and as respondent corporation, is a corporation organized and doing business under the laws of the State of Georgia, having its principal offices and place of business located at 290 Hunter Street SE., Atlanta, Ga.

Said respondent was incorporated in the year 1883 and, since its inception, has been engaged in the manufacture, offering for sale, sale, and distribution, among other things, of mattresses, bedsprings, bedding, and related products, which, when sold by it, have been transported from its place of business in the State of Georgia to purchasers thereof in other States of the United States. The respondent maintains and at all times mentioned herein has maintained a course of trade in the aforesaid products in commerce among and between the various States of the United States, and its volume of business therein is substantial.

PAR. 2. In the course and conduct of its business, the respondent corporation, in advertisements in newspapers and periodicals of general circulation, on letterheads, invoices, tags, labels, containers, and in radio continuities for a number of years last past, and in certain advertising matter disseminated since 1904, has used and displayed, and now uses and displays, as a trade name for its wares the words "Red Cross" and in connection therewith an emblem consisting of a red Greek cross. All of respondent's advertising and all of its activities have been designed and carried on for the purpose of inducing and promoting the sale of its products.

PAR. 3. The American National Red Cross, familiarly known as the Red Cross, was incorporated by an act of Congress on January 5, 1905 (33 Stat., pt. I, pp. 599-602). Its prior history goes back to 1881, since which time it has used the words "Red Cross" as a part of its name and in connection with its various activities and the emblem of a Greek red cross on a white background. It has a membership of many millions, and maintains active chapters in practically every county in the United States. Its reputation as a great charitable institution is of world-wide, as well as national, scope. It has expended and continues to expend many millions of dollars annually on behalf of humanity. One of its great functions is the provision of medical and nursing care to the suffering and needy in times of disaster, flood, war, pestilence, and famine. Both the name "Red Cross" and the emblem of the Greek red cross have long been familiar to the American public.

and are associated in the minds of the public with the Red Cross organization.

PAR. 4. The respondent's unrestricted use in advertising and elsewhere of the words "Red Cross" and the emblem of the Greek red cross to designate and refer to its products constitutes a representation that the respondent's products are designed, endorsed, approved, or sponsored by the American Red Cross; that the Red Cross is financially interested in the sale of the products; that said products are manufactured in accordance with sanitary standards or specifications set up by the Red Cross organization; or that there is some other connection between the respondent's products and the American Red Cross.

PAR. 5. The respondent, Southern Spring Bed Co., states that it did not adopt the term "Red Cross" and the depiction of a Greek cross as a trade name and identification of its products for any unlawful purpose, and that its use of said trade name and emblem since their adoption has not been with the intent or for the purpose of appropriating any good will or identity of the American National Red Cross or the creating of confusion or deception of the trade or public. Said respondent admitted, however, and accordingly the Commission finds, that the American National Red Cross has not at any time authorized the use by respondent of the designation "Red Cross" or the emblem of a Greek red cross, and that respondent's products have never been manufactured in accordance with specifications of the American National Red Cross. The respondent's representations to the contrary, made by the use, as aforesaid, of the words "Red Cross" and the emblem of the Greek red cross, have been and are, therefore, false.

PAR. 6. The respondent further states that at no time within the memory of any of its present officers has its use of the term "Red Cross" and the depiction of a Greek red cross led any of its dealers or members of the public to believe that respondent is in any way associated with the American National Red Cross; nor to their personal knowledge are such dealers or the public led to believe by the use of said trade name and emblem that the respondent's products are manufactured, approved, or sponsored by or in any way connected with the American National Red Cross. Nevertheless, the respondent admits, and the Commission finds, that the respondent's use of said name and emblem, without the use of appropriate phraseology in conjunction therewith, disclosing that the respondent's products are in no way connected or associated with the American National Red Cross, may create and cause among the members of the public such confusion or deception.

PAR. 7. During the past several years the respondent, Southern Spring Bed Co., has designed and manufactured a mattress and box

Findings

47 F. T. C.

spring, both of them substantially more rigid than normal mattresses and box springs, which were intended by it to be sold to those members of the public who prefer or need such mattresses and/or box springs. In connection with the interstate sale of said mattresses and box springs, respondent has used in advertising disseminated in interstate commerce the following statements:

The Red Cross Orthopedic Mattress gives you the firm support you need—plus comfort. Scientifically designed to meet the exacting specifications of leading orthopedic surgeons and physicians—made by bedding specialists with 66 years of know-how and experience, the Red Cross Orthopedic Mattress and Box Spring is an unbeatable combination for good health and good rest.

Approved by Leading Orthopedic Surgeons.

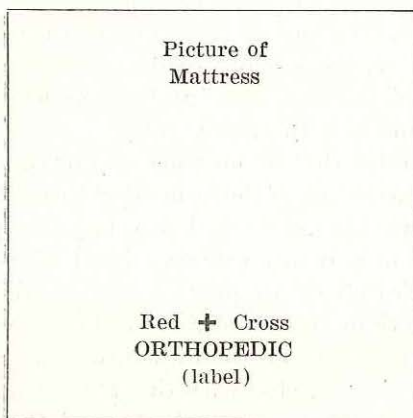
Built to specifications of leading doctors.

Dear Doctor:

We know that you will be interested in the fact that we are now featuring the Red Cross Orthopedic Inner-spring Mattress and Box Spring, manufactured by the Southern Spring Bed Company of this city.

Several of the leading Orthopedic Surgeons and General Practitioners gave valued advice as to how a mattress and box spring to be used for Lumbago, Sacroiliac, sprained back, Sciatica, Neuritis, etc., should be made. Both of these items are specially built and are extra, extra firm. The finished products were examined by these doctors. They are what they want.

Attention—DOCTORS!! Attention—PATIENTS!!



IT GIVES A
FIRM SLEEPING
SURFACE AS
ORDERED BY
LEADING DOCTORS
FOR PATIENTS
WHO HAVE
LUMBAGO
SACROILIAC
SCIATICA
NEURITIS
SPRAINED BACK

Approved by leading orthopedic surgeons: RED CROSS ORTHOPEDIC MATTRESS AND BOX SPRINGS, ANY SIZE.

PAR. 8. Through the use in advertising of the above statements the respondent has represented that its "orthopedic" mattresses and box springs are specially built and scientifically designed to meet the exacting specifications of leading orthopedic surgeons and physi-

cians and have their approval, and, further, that said mattresses and springs may be effectively used indiscriminately as a cure or competent treatment for lumbago, sacroiliac, sciatica, neuritis, or sprained back. Moreover, the word "orthopedic" alone, when used to describe or identify the respondent's mattresses or springs, serves as a representation that such mattresses or springs are specially designed to, and will, correct certain deformities, diseases, and disorders of the human body.

The respondent, Southern Spring Bed Co., admits, and on the basis of such admission the Commission finds, that while the respondent's mattresses and springs are designed and constructed in a manner different from conventional mattresses and springs in that they are more rigid, providing a firmer and more level sleeping surface, they, nevertheless, are stock mattresses and springs and cannot be relied upon to correct any deformity, disease, or disorder of the human body when used indiscriminately by the general public. The use of said springs or mattresses is not a cure or competent treatment for lumbago, sacroiliac, sciatica, neuritis, sprained back, or any other ailment or deformity of the body, and the efficacy of the mattresses and springs, from a remedial standpoint, is limited to providing help in the alleviation of pain and in contributing to the comfort of the patient in those orthopedic cases in which a smooth, firm, and level sleeping surface is recommended or prescribed by a reputable physician. Thus, the respondent's representations, as set forth in paragraph 7, have been and are false and deceptive.

PAR. 9. The use by the respondent, as aforesaid, of the words "Red Cross" and the emblem of the red Greek cross has had the capacity and tendency to mislead and deceive a substantial portion of the public in the respects enumerated in paragraph 4; and the use by said respondent of the representations set forth in paragraphs 7 and 8 has had the capacity and tendency to mislead and deceive a substantial portion of the public in the respects mentioned in said paragraph 8.

CONCLUSION

The acts and practices of the respondent, Southern Spring Bed Co., as herein found, have all been to the prejudice of the public and have constituted unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

The complaint in this proceeding also named as respondents herein the following persons, alleging that said persons have acted in conjunction and cooperation with each other in formulating, directing,

Order

47 F. T. C.

and controlling the business, acts, practices, and policies, of the respondent, Southern Spring Bed Co., including the advertising claims made in connection with the sale of the aforementioned products: Richard N. Schwab, Clarence S. Moeckel, Phillip L. Peebles, William P. Rocker, Robert W. Schwab, Jr., Julian Price, J. B. Taylor, Thomas H. Williams, Harrison Jones, and Martin E. Kilpatrick. No evidence was introduced to show that any one of these respondents ever actually participated in any of the practices described, however, and in the circumstances the Commission is of the opinion that insofar as it relates to these respondents individually the complaint should be dismissed.

ORDER

It is ordered, That the respondent, Southern Spring Bed Co., 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, or distribution of the respondent's bed-springs and mattresses, or other products, in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using (subject to the permissible limits prescribed by the act of January 5, 1905, as amended by section 4 of the act of June 23, 1910) the words "Red Cross," or any abbreviation or simulation thereof, or the mark of a Greek red cross or any other mark, emblem, sign, or insignia simulating a Greek red cross, on the respondent's products; or using said words or said mark in selling or advertising the same;

(a) Unless respondent uses upon the label, whether on the article, wrapper, or carton, and with equal clearness and conspicuousness, in immediate conjunction with said words or said mark, the legend, This product has no connection whatsoever with the American National Red Cross: *Provided*, That if said words or said mark appear on more than one side of the respondent's article, wrapper, or carton, the respondent shall use said legend, as aforesaid, on each such side; and

(b) Unless the respondent, in each of its written advertisements containing said words or said mark uses the said legend with equal clearness and conspicuousness: *Provided*, That if an advertisement covers more than one page, the respondent shall use said legend as aforesaid on each and every page on which said words or said mark shall appear; and

(c) Unless the respondent, in each of its radio advertisements containing said words or said mark, makes the statement contained in said legend with equal clearness and conspicuousness.

1086

Order

2. Using the word "orthopedic," or any term or expression of like import, as a designation for or as descriptive of its stock bedsprings, or mattresses;

3. Representing, directly or by implication, that the respondent's bedsprings or mattresses are specially built and scientifically designed to meet the specifications of orthopedic surgeons or physicians, or that such springs or mattresses have the approval of any surgeon or physician for use, unless prescribed; or

4. Representing, directly or by implication, that the respondent's bedsprings or mattresses, when used indiscriminately, may be relied or depended upon to correct any deformity or disease of the human body, or that the use of any such spring or mattress will provide any beneficial effect in orthopedic cases except to the extent that it will help to alleviate the pain and contribute to the comfort of the patient.

It is further ordered, That the respondent, Southern Spring Bed Company, 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 it.

IN THE MATTER OF
HESMER, INC., ET AL

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SUBSEC. (c) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1949, AS AMENDED BY AN ACT APPROVED JUNE 19, 1936

Docket 5815. Complaint, Oct. 6, 1950—Decision, Mar. 22, 1951

Where a corporation engaged in the manufacture of certain food products and in the purchase of others, and in the wagon-jobbing under its own trade names or marks and otherwise of its condiments, oleomargarine, peanut butter, and other food products to retail grocers in the tri-State area of Indiana, Illinois, and Kentucky—

- (a) Received and accepted brokerage fees or commissions upon purchase orders which the individual who was its president, majority stockholder and intermediary, placed with the separate food brokerage business which he conducted under his own name; and

Where said individual, following the assumption by him of active control and management of said corporation, the organization by him of said separate brokerage business, his appointment—which he sought and secured—as broker for vendors of such food products, and the making of agreements between him and vendors to the effect that they would grant or pay to him their usual brokerage fees on all purchases made by said corporation as well as on all other transactions he handled with other vendees—

- (b) Received on its purchase orders—which as president and majority stockholder he caused to be prepared by said corporation, transmitted to himself doing business as aforesaid brokerage concern, and rewrote and forwarded the usual or customary brokerage fees or commissions paid by said vendees:

Held, That such acts and practices of said corporation and individual in receiving or accepting commissions, brokerage, etc., from vendors of food products, under the circumstances set forth, were in violation of subsection (c) of sec. 2 of the Clayton Act as amended.

Before *Mr. Frank Hier*, trial examiner.

Mr. Cecil G. Miles and *Mr. Edward S. Ragsdale* for the Commission.

Hatfield, Fine, Hatfield & Sparrenberger, of Evansville, Ind., for respondents.

COMPLAINT

The Federal Trade Commission, having reason to believe that the corporation and individual named in the caption hereof as the parties respondent herein, and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (c) of section 2 of the Clayton Act (U. S. C. title 15, sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Hesmer, Inc., hereinafter sometimes referred to as Hesmer, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Indiana. Its office and principal place of business is located at 4300 Stringtown Road, Evansville, Ind.

Hesmer is now, and since several years prior to 1946 has been, engaged in the wholesale grocery business. It purchases some food products, such as canned fruits and vegetables, and manufactures others, such as potato chips, jelly, and condiments. Some of the food products purchased by Hesmer bear the trade names or marks of the vendors. Other food products which it purchases and all food products which it manufactures bear its own trade names or marks.

Said food products, so purchased or manufactured by Hesmer, are sold by it to retail grocers located principally within a 100-mile radius of Evansville, Ind.—the so-called tri-State area of Indiana, Illinois, and Kentucky. Said sales amount to approximately \$1,250,000 annually.

Prior to about 1946, about two-thirds of the capital stock of Hesmer was owned or controlled by one Clyde Hesmer who was president of and actively managed and controlled Hesmer during that period. Clyde Hesmer died about 1946.

PAR. 2. Respondent, Edward A. Mitchell, hereinafter sometimes referred to as Mitchell, is an individual residing at 1409 South Kentucky Avenue, Evansville, Ind.

Mitchell is now, and since several years prior to 1946 has been, a stockholder in Hesmer. During the period prior to 1946 when Clyde Hesmer was president of Hesmer and owned or controlled about two-thirds of its capital stock, Mitchell owned or controlled about one-third thereof. From about 1946, after the death of Clyde Hesmer, to the present time, Mitchell has owned or controlled about two-thirds of Hesmer's capital stock; and one R. C. Bon Seigneur and one Isadore J. Fine together have owned or controlled about one-third of said stock.

Also from about 1946, after the death of Clyde Hesmer, to the present time, Mitchell has been president of Hesmer; and R. C. Bon Seigneur and Isadore J. Fine, respectively, have been its general manager and counsel. During the period from about 1946 to about January 1949 although he was president of Hesmer, Mitchell did not undertake its active management and control as such, he being then engaged in performing other duties which required substantially all of his time and his almost continuous absence from Evansville, Ind.

Complaint

47 F. T. C.

Mitchell is now, and since about January 1949 has been, actively and principally engaged in the management and control of Hesmer as its salaried president and responsible for all of its policies, practices, and acts, including those in connection with its purchases. In addition to his salary, and as compensation for his services in connection with Hesmer's purchases, Mitchell receives the payments and grants herein after more particularly alleged.

PAR. 3. From about January 1949 to the present time, the same period during which, as above alleged, Mitchell was the salaried president of Hesmer, he was also doing business as the Ed. Mitchell Co., with office and place of business located at 201 East Illinois Street.

As the Ed. Mitchell Co., Mitchell engages in what he designates as the food-brokerage business. Said business consists almost exclusively of receiving from Hesmer, and forwarding to certain vendors, Hesmer's orders for its requirements of food products sold by said vendors, and of receiving, in connection with said purchases, brokerage fees and commissions paid or granted by said vendors, as hereinafter more particularly alleged.

A minor part of said business, not the subject of this complaint, consists in effecting purchase and sales transactions between said vendors and vendees other than Hesmer.

PAR. 4. In the course and conduct of their business, respondents are now, and since about January 1949 have been engaged in commerce, as commerce is defined in the Clayton Act, as amended by the Robinson-Patman Act. Continuously during said period, respondents purchased food products or caused food products to be purchased from vendors with places of business located in several States of the United States and caused said food products so purchased to be transported from said vendors' places of business to destinations in other States.

PAR. 5. In the course and conduct of said business in commerce, Hesmer is now, and continuously since about January 1949 has been purchasing food products from vendors who paid or granted to it, in connection with said purchases, commissions, brokerage, or other compensation, or discounts or allowances in lieu thereof, which said payments or grants it received or accepted.

Said payments or grants were so made to and so received or accepted by Hesmer through Mitchell, who, in the course and conduct of said business in commerce, doing business as the Ed. Mitchell Co. and acting in fact as an intermediary for Hesmer or in its behalf, or as its agent or representative, is now, and continuously since about January 1949

has been purchasing food products for the account of Hesmer from vendors who paid or granted to him, doing business and acting as aforesaid, in connection with said purchases, commissions, brokerage, or other compensation, which said payments or grants he, doing business and acting as aforesaid, received and accepted.

PAR. 6. To effectuate the making of said payments or grants and their receipt and acceptance, as alleged in paragraph 5, respondents engaged in, among others, the acts and practices hereinafter alleged.

During or about January 1949 the time when Mitchell, owning two-thirds of the capital stock of Hesmer, assumed its active management and control as salaried president, Mitchell established, and commenced doing business as, the Ed. Mitchell Co. At or about that time, and from time to time thereafter, Mitchell, doing business as the Ed. Mitchell Co., sought and received appointment as a broker for several vendors of the kinds of food products purchased and sold by Hesmer, including food products to bear the trade names or brands of Hesmer. With some of said vendors Mitchell had had a personal connection for many years. It was understood or agreed by and between said vendors and Mitchell that said vendors would grant or pay to Mitchell, doing business as the Ed. Mitchell Co., their usual or customary brokerage fees or commissions on all purchases made by Hesmer as well as on all other transactions handled by Mitchell with other vendees. There was the same understanding or agreement by and between Mitchell and R. C. Bon Seigneur and Isadore J. Fine, together the owners of one-third of the capital stock of Hesmer, and, respectively, its general manager and counsel.

Upon securing said appointments as broker, Mitchell, as president of and majority stockholder in Hesmer, prepared and transmitted to himself, doing business as the Ed. Mitchell Co., or caused to be prepared and so transmitted by or under the supervision of R. C. Bon Seigneur, general manager of and minority stockholder in Hesmer, Hesmer's purchase orders for its requirements of food products sold by vendors who had made said appointments. This was the case, in some instances, even though the prices of said food products, not taking into account the brokerage fees and commissions to be paid to Mitchell, would give Hesmer less profit than would be given to it by purchasing competing food products from others.

Doing business as the Ed. Mitchell Co., Mitchell rewrote said purchase orders, or caused them to be rewritten, onto the forms of said company, which forms Mitchell forwarded, or caused to be forwarded, to said vendors.

Pursuant to said orders, said vendors sold said food products to Hesmer, and, in connection therewith, paid or granted to Mitchell, doing business as the Ed. Mitchell Co. their usual or customary brokerage fees or commissions. Said fees and commissions were accepted or received, and, after payment of expenses, have so far, upon advice of counsel Isadore J. Fine, been retained by Mitchell, doing business as the Ed. Mitchell Co.

PAR. 7. The acts and practices of respondents in receiving or accepting commissions, brokerage, or other compensations, or allowances or discounts in lieu thereof, as hereinabove alleged, are in violation of subsection (c) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of an act of Congress entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by an act of Congress approved June 19, 1926 (the Robinson-Patman Act (15 U. S. C. sec. 13)), the Federal Trade Commission on October 6, 1950, issued and subsequently served its complaint in this proceeding upon the respondents named in caption hereof, charging said respondents with having violated subsection (c) of section 2 of said Clayton Act, as amended. After the filing of the respondents' answer a hearing was convened by a trial examiner of the Commission theretofore duly designated by it to take testimony and receive evidence in support of and in opposition to the allegations of the complaint, and at said hearing solely for the purposes of this proceeding a stipulation of all of the facts in the case was entered into by and between counsel for the respondents and the Director of the Commission's Bureau of Antimonopoly. On the basis of the record thus presented (all intervening procedure having been waived), the trial examiner on December 11, 1950, filed his initial decision.

The Commission, having reason to believe that the initial decision was deficient in certain material respects, on January 19, 1951, issued and thereafter served upon the parties its order placing this case on the Commission's own docket for review and affording the respondents an opportunity to show cause why said initial decision should not be altered in the manner and to the extent shown by the tentative decision attached to said order. The respondents not having appeared in response to the leave to show cause, this proceeding regularly came on for final consideration by the Commission upon the record herein

on review; and the Commission, having duly considered the matter and being now fully advised in the premises, makes the following findings as to the facts, conclusion drawn therefrom, and order, the same to be in lieu of the initial decision of the trial examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Hesmer, Inc., hereinafter sometimes referred to as Hesmer, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Indiana. Its office and principal place of business is located at 4300 Stringtown Road, Evansville, Ind. Hesmer is now, and since several years prior to 1946 has been, engaged in the manufacturing and wagon-jobbing of food products. It purchases some food products, such as cheese, pickles, peanut butter, oleo-margarine, catsup and other condiments, and food specialties, and manufactures others, such as potato chips, jelly, carmel crisp, corn curls, salad dressing, mustard, horseradish, and other condiments. Some of the food products purchased by Hesmer bear the trade names or marks of the vendor. Other food products which it purchases and all food products which it manufactures bear its own trade names or marks. Said food products, so purchased or manufactured by Hesmer, are sold by it to retail grocers located principally within a 100-mile radius of Evansville, Ind.—the so-called tri-State area of Indiana, Illinois, and Kentucky. Said sales amount to approximately \$1,250,000 annually.

Prior to 1946, about two-thirds of the capital stock of Hesmer was owned or controlled by one Clyde Hesmer who was president of and actively managed and controlled Hesmer during that period. Clyde Hesmer died about 1946.

PAR. 2. Respondent, Edward A. Mitchell, hereinafter sometimes referred to as Mitchell, is an individual residing at 1409 South Kentucky Avenue, Evansville, Ind., and is now, and since several years prior to 1946 has been, a stockholder in Hesmer. During the period prior to 1946 when Clyde Hesmer was president of Hesmer and owned or controlled about two-thirds of its capital stock, Mitchell owned or controlled about one-third thereof. From about 1946, after the death of Clyde Hesmer, to the present time, Mitchell has owned or controlled about two-thirds of Hesmer's capital stock; and one R. C. Bon Seigneur and one Isadore J. Fine together have owned or controlled about one-third of said stock.

From about 1946, after the death of Clyde Hesmer, to the present time, Mitchell has been president of Hesmer; and R. C. Bon Seigneur

Findings

47 F. T. C.

and Isadore J. Fine, respectively, have been its general manager and counsel. During the period from about 1946 to about January 1949, although he was president of Hesmer, Mitchell did not undertake its active management and control as such, he being then engaged in performing other duties which required substantially all of his time and his almost continuous absence from Evansville, Ind.

Mitchell is now and since about January 1949 has been active in the management of Hesmer, Inc., as its salaried president, and has exercised substantial authority and control over the business, including its purchase and sales policy. In addition to his salary as president, and as compensation for his services in connection with Hesmer's purchases, Mitchell receives the payments and grants, hereinafter more particularly set out.

PAR. 3. From about January 1949 to the present time, the same period during which, as above set out, Mitchell was the salaried president of Hesmer, Inc., he was also doing business as the Ed. Mitchell Co., with office and place of business located at 201 East Illinois Street, Evansville, Ind.

As the Ed. Mitchell Co., Mitchell engages in what is designated as the food brokerage business, and at the present time approximately 15 percent of the business done by the Ed. Mitchell Co. consists of receiving purchase orders from Hesmer, Inc., for its requirements of food products and forwarding said orders to certain vendors, and in receiving and accepting brokerage fees from the vendors on said purchases of Hesmer, Inc., hereinafter more particularly set out. A year ago the percentage of the business of the Ed. Mitchell Co. done through sales to Hesmer, Inc., was much greater than 15 percent. The remainder of the business of the said Ed. Mitchell Co. consists of effecting purchase and sales transactions between said vendors and vendees other than Hesmer, Inc., and is not the subject of the complaint herein.

PAR. 4. In the course and conduct of their business, respondents are now, and since about January 1949 have been, engaged in commerce, as commerce is defined in the Clayton Act, as amended by the Robinson-Patman Act. Continuously during the said period, respondents purchased food products or caused food products to be purchased from vendors with places of business located in several States of the United States and caused said food products so purchased to be transported from said vendors' places of business to destinations in other State.

PAR. 5. In the course and conduct of said business in commerce, Hesmer, Inc., is now and continuously since about January 1949 has been purchasing food products from vendors through the Ed. Mitchell

Co., which vendors paid or granted to the Ed. Mitchell Co. in connection with said purchases, commissions, brokerage, or other compensation or discounts or allowances in lieu thereof, which said payments or grants were received or accepted by Edward A. Mitchell, doing business as the Ed. Mitchell Co. The acceptance of said brokerage fees or commissions by Edward A. Mitchell, doing business as the Ed. Mitchell Co., and also president and majority stockholder of Hesmer, Inc., was in effect and in fact a receipt by Hesmer, Inc., of said brokerage fees or commissions through its intermediary or agent acting for or in its behalf continually since January 1949 to the present time.

PAR. 6. To effectuate the making of said payments or grants and their receipt and acceptance, as found in paragraph 5 hereof, respondents engaged in, among others, the acts and practices hereinafter set-out.

On or about January 1949, at the time when Mitchell, owning two-thirds of the capital stock of Hesmer, Inc., became active in the management and control of Hesmer, Inc., as its salaried president, Mitchell established and commenced doing business as the Ed. Mitchell Co. At or about that time and from time to time thereafter, Mitchell, doing business as the Ed. Mitchell Co., sought and received appointment as a broker for several vendors of the kinds of food products purchased and sold by Hesmer, Inc., including food products to bear the trade names or brands of Hesmer, Inc. It was understood or agreed by and between said vendors and Mitchell that said vendors would grant or pay to Mitchell, doing business as the Ed. Mitchell Co., their usual or customary brokerage fees or commissions on all purchases made by Hesmer as well as on all other transactions handled by Mitchell with other vendees.

Upon securing said appointment as broker, Mitchell, as president and majority stockholder in Hesmer, Inc., prepared, or caused to be prepared, and transmitted to himself, doing business as the Ed. Mitchell Co., Hesmer's purchase orders for a substantial amount of its requirements of food products sold by vendors who made said appointments. Doing business as the Ed. Mitchell Co., Mitchell rewrote said purchase orders, or caused them to be rewritten, onto the forms of said company, which forms Mitchell forwarded, or caused to be forwarded, to said vendors.

Pursuant to said orders, said vendors sold said food products to Hesmer, Inc., and, in connection therewith, paid or granted to Mitchell, doing business as the Ed. Mitchell Co., their usual or customary brokerage fees or commissions. Said fees and commissions were

Order

47 F. T. C.

accepted or received, and, after payment of expenses, have been retained by Mitchell, doing business as the Ed. Mitchell Co.

CONCLUSION

The acts and practices of respondents in receiving or accepting commissions, brokerage, or other compensation or allowances or discounts in lieu thereof, from vendors of food products in the manner and under the circumstances hereinabove found, are in violation of subsection (c) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That the respondents, Hesmer, Inc., and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the purchase of food products or other commodities in commerce, as commerce is defined in the aforesaid Clayton Act, to forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon purchases made for said respondent's own account.

It is further ordered, That the respondent, Edward A. Mitchell, individually and trading as the Ed. Mitchell Co., or trading under any other name or trade designation, and said respondent's agents, representatives, and employees, directly or through any corporate or other device, in connection with the purchase of food products or other commodities in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof, upon purchases made by or for the respondent, Hesmer, Inc., or purchases made by or for any other purchaser for or on whose behalf the respondent, Edward A. Mitchell is acting in fact as agent, representative, or other intermediary.

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

Syllabus

IN THE MATTER OF
SAMSON CORDAGE WORKS ET AL.

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

Docket 5839. Complaint, Jan. 8, 1951—Decision, Mar. 26, 1951

Where seven corporations and the former president of four concerns which were merged into one of the seven; and who was also a former officer of the Solid Braided Cord Manufacturers Association, engaged in the interstate sale and shipment of their cordage products, including cotton sash cords, awning cords, clothes lines, and other similar cotton cordage; and a second individual who was a former secretary-treasurer of the Cotton-Textile Institute, Inc., and a former officer of said Manufacturers Association and other trade associations, and was for many years a co-conspirator with the others in carrying out the unlawful acts in commerce below set-out;

Engaged in organizing and developing a combination, agreement and planned common course of action to suppress and eliminate competition among themselves and others in said products; and pursuant thereto—

- (a) Agreed to and did fix and maintain prices, fix, modify, or eliminate certain trade discounts, and adopt and use uniform terms of conditions of sale;
- (b) Agreed to and did reduce the number of hours or shifts for work in their manufacturing plants, with the intent and effect of curtailing production;
- (c) Agreed to and did eliminate certain grades and weights of cordage products;
- (d) Agreed to and did formulate, adopt, and place in operation the practice of making uniform allowances from shipping charges;
- (e) Exchanged among themselves, directly or indirectly, information relating to current and future prices, terms, or conditions of sale, and freight charges and allowances or deductions made therefrom;
- (f) Agreed to and did adopt, maintain, and use uniform standards or specifications for sizes, weights, and descriptions for said products, for pricing purposes, and agreed to and did fix, establish, and maintain substantially uniform price differentials between products of uniformly varying sizes, weights, and descriptions;
- (g) Agreed to and did abandon the practice of guaranteeing prices against decline; and
- (h) Agreed to and did place in operation, from time to time, a plan of resale price maintenance whereby the customers were required to sell products concerned at prices and upon terms and conditions of sale which they fixed or which were agreed upon by or stipulated between them and the customers;

Effects of which practices and activities included the stifling of price competition among them; establishment of substantially uniform price differentials between products of uniformly varying sizes, weights and descriptions; and of substantially identical prices, trade discounts, terms or conditions of sale and freight allowances; and unlawful resale price maintenance and restraint of trade among their customers:

Held, That said combination, etc., and said acts, practices, pricing methods, devices, and policies were unfair and to the prejudice of the public; deprived it