

Complaint

IN THE MATTER OF

EVERETT J. GRANGER ET AL. TRADING AS GARDNER
& COMPANY

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

Docket 4278. Complaint, Aug. 28, 1940—Decision, May 3, 1951

Where two individuals engaged in the manufacture and interstate sale and distribution of pushcards and punchboards which, bearing explanatory legends or spaces therefor, were designed for use in the sale and distribution of merchandise at retail to the public by means of a game of chance, under a plan whereby the purchaser of a push or punch who, by chance, selected a concealed winning number, secured an article of merchandise without additional cost at much less than its normal retail price, others receiving nothing for their money other than the privilege of a push or punch—

Sold such devices to dealers in candy, cigarettes, clocks, razors, cosmetics, clothing and other merchandise, assortments of which, along with said devices, were made up by said dealers, and exposed and sold by retail purchasers thereof to the purchasing public in accordance with the aforesaid sales plan; and thereby supplied and placed in the hands of others the means of conducting lotteries, games of chance, or gift enterprises in the sale and distribution of merchandise to the consuming public, contrary to an established public policy of the United States Government and in violation of criminal laws;

With the result that members of the purchasing public were thus induced to trade with retailers who sold or distributed their merchandise through the use of such devices, and many retailers were thereby induced to trade with manufacturers, wholesalers and jobbers who thus sold and distributed their products; competitors of such retailers were faced with the alternative of using such devices or suffering the loss of substantial trade; and competitors of such suppliers, who did not use said devices, frequently had sales diverted to those who did:

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

Before *Mr. John W. Addison*, trial examiner.

Mr. J. W. Brookfield, Jr. for the Commission.

Mulliner, Prince & Mulliner, of Salt Lake City, Utah, for Bernice Feitler and Irwin Feitler.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal

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Trade Commission, having reason to believe that Everett J. Granger, Mame Partin, Frances Martin, Hattie G. Gardner, Thekla Maas, Bernice Feitler, and Erwin Feitler, individually and trading as Gardner & Co., 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. Respondents Everett J. Granger, Mame Partin, Frances Martin, Hattie G. Gardner, Thekla Maas, Bernice Feitler, and Erwin Feitler are individuals trading as Gardner & Co., with their principal office and place of business located at 2309 Archer Avenue, Chicago, Ill. Branch offices and places of business are located at Philadelphia, Pa., New Orleans, La., and San Francisco, Calif.

Respondents are now, and for more than 2 years last past have been, engaged in the manufacture of devices commonly known as pushcards and punchboards and in the sale and distribution of said devices to manufacturers of, and dealers in, various other articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia.

Respondents cause and have caused said devices when sold, to be transported from their aforesaid places of business to purchasers thereof at their respective points of location in various States of the United States other than the State of Illinois and in the District of Columbia. There is now, and for more than two years last past has been, a course of trade in such pushcard and punchboard devices by said respondents in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of their business as described in paragraph 1 hereof, respondents sell and distribute, and have sold and distributed to said manufacturers and dealers pushcards and punchboards so prepared and arranged as to involve games of chance, gift enterprises, or lottery schemes when used in making sales of merchandise to the consuming public. Respondents sell and distribute, and have sold and distributed, many kinds of said pushcards and punchboards, but all of said devices involve the same chance or lottery features when used in connection with the sale or distribution of other merchandise and vary only in detail.

Many of said pushcards and punchboards have printed on the faces thereof certain legends or instructions that explain the manner in which said devices are to be used or may be used in the sale or distribution of various specified articles of merchandise. The prices of the sales on said pushcards and punchboards vary in accordance with

the individual device. Each purchaser is entitled to one push or punch from the pushcard or punchboard, and when a push or punch is made a disc or printed slip is separated from the pushcard or punchboard and a number is disclosed. The numbers are effectively concealed from the purchasers and prospective purchasers until a selection has been made and the push or punch completed. Certain specified numbers entitle purchasers to designate articles of merchandise. Persons securing lucky or winning numbers receive articles of merchandise without additional cost at prices which are much less than the normal retail price of said articles of merchandise. Persons who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a push or punch from said card or board. The articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Others of said push-card and punch-board devices have no instructions or legends thereon but have blank spaces provided therefor. On those pushcards and punchboards the purchasers thereof place instructions or legends which have the same import or meaning as the instructions or legends placed by the respondents on said push card and punchboard devices first hereinabove described. The only use to be made of said pushcard and punchboard devices and the only manner in which they are used, by the ultimate purchasers thereof, is in combination with other merchandise so as to enable said ultimate purchasers to sell or distribute said other merchandise by means of lot or chance as hereinabove alleged.

PAR. 3. Many persons, firms, and corporations who sell and distribute, and have sold and distributed, candy, cigarettes, clocks, razors, cosmetics, clothing, and other articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia, purchase and have purchased respondents' said pushcard and punchboard devices, and pack and assemble, and have packed and assembled, assortments comprised of various articles of merchandise together with said pushcard and punchboard devices. Retail dealers who have purchased said assortments, either directly or indirectly, or retail dealers who have purchased said devices direct from respondents and made up their own assortments, have exposed the same to the purchasing public and have sold or distributed said articles of merchandise by means of said pushcards and punchboards in accordance with the sales plan as described in paragraph 2 hereof. Because of the element of chance involved in connection with the sale and distribution of said merchandise by means of said pushcards and punchboards, many members of the purchasing public have been

induced to trade or deal with retail dealers selling or distributing said merchandise by means thereof. As a result thereof many retail dealers have been induced to deal with or trade with manufacturers, wholesale dealers, and jobbers who sell and distribute said merchandise together with said devices. Said persons, firms, or corporations have many competitors who sell or distribute like or similar articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia. Said competitors are faced with the alternative of descending to the use of said pushcard and punchboard devices or other similar devices which they are under a powerful moral compulsion not to use in connection with the sale or distribution of their merchandise, or to suffer the loss of substantial trade. Said competitors do not sell or distribute their merchandise by means of pushcard or punchboard devices or similar devices because of the element of chance or lottery features involved therein, and because such practices are contrary to the public policy of the Government of the United States and in violation of criminal laws, and such competitors refrain from supplying to, or placing in the hands of, others pushcard or punchboard devices, or any other similar devices which are to be used or which may be used in connection with the sale or distribution of the merchandise of such competitors to the general public by means of a lottery, game of chance or gift enterprise. As a result thereof substantial trade in commerce among and between the various States of the United States and in the District of Columbia has been unfairly diverted from said competitors who do not sell or use said devices to persons, firms, and corporations who purchase and use said devices of the respondents.

PAR. 4. The sale of merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure articles of merchandise at prices much less than the normal retail price thereof and teaches and encourages gambling among members of the public, all to the injury of the public. The use of said sales plan or method in the sale of merchandise and the sale of merchandise by and through the use thereof and by the aid of said sales plan or method is a practice of the sort which is contrary to an established public policy of the Government of the United States and in violation of criminal laws, and constitutes unfair methods of competition in commerce and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

The sale or distribution of said pushcard and punchboard devices by respondents as hereinabove alleged supplies to and places in the hands of others the means of conducting lotteries, games of chance or

gift enterprises in the sale or distribution of their merchandise. The respondents thus supply to, and place in the hands of, said persons, firms, and corporations the means of, and instrumentalities for, engaging in unfair methods of competition in commerce and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

PAR. 5. The aforesaid acts and practices of respondents as hereinabove alleged are all to the prejudice and injury of the public, and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on August 28, 1940, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging said respondents with the use of unfair acts and practices in commerce in violation of the provisions of that act. After the filing of the respondents' answers, testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a trial examiner of the Commission theretofore designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission upon the complaint, the respondent's answers thereto, the testimony and other evidence, the trial examiner's recommended decision and briefs and oral argument of counsel; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondents, Bernice Feitler and Irwin Feitler (erroneously named in the complaint as Erwin Feitler), are individuals who are now and since prior to 1940 have been trading and doing business as Gardner & Co., with their principal office and place of business located at 2309 Archer Avenue in the city of Chicago, State of Illinois. Respondents Everett J. Granger, Mame Partin, Francis Martin, Hattie G. Gardner, and Thekla Maas prior to February 1, 1940, were individuals trading as said Gardner & Company. On or about February 1, 1940, said respondents Everett J. Granger, Mame

Partin, Frances Martin, Hattie G. Gardner, and Thekla Maas sold their interests in the said business to respondents Bernice Feitler and Irwin Feitler, who have solely owned and conducted the business since that date.

The record fails to establish that respondents Everett J. Granger, Mame Partin, Frances Martin, Hattie G. Gardner, and Thekla Maas, since February 1, 1940, participated in any manner in the acts and practices hereinafter described, and the Commission is of the opinion that the complaint should be dismissed as to these five named respondents. The term "respondents" as used hereinafter will therefore not include these five named respondents unless the contrary is indicated.

PAR. 2. Trading under the name of Gardner & Co. the respondents are now, and since prior to 1940 have been, engaged in the manufacture of devices commonly known as pushcards and punchboards, and in the sale and distribution of said devices to manufacturers of, and dealers in, various other articles of merchandise in commerce between and among the various States of the United States. Respondents cause and have caused said devices, when sold, to be transported from their place of business in the State of Illinois to purchasers thereof at their respective points of location in various States of the United States other than the State of Illinois. There is now, and since prior to 1940 has been, a course of trade in such pushcard and punchboard devices by said respondents in commerce between and among the various States of the United States.

PAR. 3. Among the various types of punchboards and pushcards manufactured and sold by the respondents, as aforesaid, are many which are designed for use by retail dealers in the sale and distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme. Many of these said pushcards and punchboards have printed on the faces thereof certain legends or instructions that explain the manner in which said devices are to be used or may be used in the sale or distribution of various specified articles of merchandise. Such legends or instructions are printed by respondents according to specifications received from the customers. The prices of the sales on said pushcards and punchboards vary with the individual device. Each purchaser is entitled to one punch from the pushcard or punchboard, and when a push or punch is made a disc or printed slip is separated from the pushcard or punchboard and a number is disclosed. The numbers are effectively concealed from the purchasers and prospective purchasers until a selection has been made and the push or punch completed. Certain specified numbers en-

titled purchasers to designated articles of merchandise. Persons securing lucky or winning numbers receive articles of merchandise without additional cost at prices which are much less than the normal retail price of said articles of merchandise. Persons who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a push or punch from said card or board. The articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Others of these said pushcard and punchboard devices have no instructions thereon but have blank spaces provided therefor. On those pushcards and punchboards the purchasers thereof place instructions or legends which have the same import or meaning as the instructions or legends placed by the respondents on said pushcard and punchboard devices hereinabove described.

Except for pushcard and punchboard devices used for gambling, where persons securing the lucky or winning numbers are paid money prizes, the only use to be made of said pushcard and punchboard devices and the only manner in which they are used by the ultimate purchaser thereof is in combination with other merchandise so as to enable said ultimate purchaser to sell or distribute the other merchandise by means of lot or chance.

PAR. 4. Many persons, firms, and corporations who sell and distribute various articles of merchandise in commerce, such as candy, cigarettes, clocks, razors, cosmetics, clothing, and other articles of merchandise, have purchased the respondents' pushcards and punchboards, and such purchasers have made up assortments consisting of various articles of merchandise and a card or board and have sold and distributed their merchandise so packed and assembled to retail dealers and others for resale to the public.

PAR. 5. Retail dealers who have purchased assortments of merchandise herein referred to have exposed and sold said merchandise to the purchasing public by the use of the pushcards and punchboards in accordance with the aforesaid sales plan. Thus, the respondents supply to and place in the hands of others the means of conducting lotteries, gift enterprises, or games of chance in the sale and distribution of merchandise to the consuming public.

PAR. 6. Because of the element of chance involved in the purchase of merchandise by means of pushcards and punchboards, members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing their merchandise through the use of such devices. As a result, many retail dealers have been induced to

deal or trade with manufacturers, wholesale dealers, and jobbers who sell and distribute their products together with said pushcard and punchboard devices.

Such retail dealers have competitors who sell or distribute like or similar articles of merchandise. Said competitors are faced with the alternative of also using pushcards and punchboards and other similar devices in connection with the sale and distribution of their merchandise or suffering the loss of substantial trade.

Manufacturers, wholesale dealers, and jobbers who use pushcards, punchboards and similar devices in connection with the sale of their merchandise to retailers also have competitors who do not use such devices. Such manufacturers, wholesalers, and jobbers who do not use lottery devices in promoting the sale of their merchandise often have their sales and potential sales diverted to those who do use these devices.

PAR. 7. The sale of merchandise to the purchasing public through the use of or by means of pushboards or punchboards in the manner above described involves a game of chance or the sale of a chance to procure articles of merchandise at prices much less than the normal retail price thereof. The use of said sales plan or method in the sale of merchandise, and the sale of merchandise by and through the use thereof and by the aid of said sales plan or method, is a practice which is contrary to an established public policy of the Government of the United States and is in violation of criminal laws.

CONCLUSION

The acts and practices of the respondents as herein found are all to the prejudice and injury of the public and constitute 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 respondents' answers thereto, testimony and other evidence in support of and in opposition to the allegations of the complaint introduced before a trial examiner of the Commission theretofore duly designated by it, the trial examiner's recommended decision, and briefs and oral argument of counsel, and the Commission having made its findings as to the facts and its conclusion that the respondents (except the respondents Everett J. Granger, Mame Partin, Frances Martin, Hattie G. Gardner and

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Order

Thekla Maas) have violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondents, Bernice Feitler and Irwin Feitler, individuals trading under the name of Gardner & Co., or trading under any other name, their agents, representatives, and employees, directly or through any corporate or other device, do forthwith cease and desist from:

Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, pushcards, punchcards, or other lottery devices, which are to be used or may be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

It is further ordered, That the respondents, Bernice Feitler and Irwin Feitler, 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 this order.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to the respondents, Everett J. Granger, Mame Partin, Frances Martin, Hattie G. Gardner, and Thekla Maas.

Commissioner Mason concurring in the findings as to the facts and conclusion, but not concurring in the form of order to cease and desist, for the reasons stated in his opinion concurring in part and dissenting in part in Docket 5203, Worthmore Sales Company.¹

¹ See 46 F. T. C. 606. March 10, 1950.

IN THE MATTER OF
MONOLITH PORTLAND CEMENT COMPANY ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SUBSEC. (a) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT APPROVED JUNE 19, 1936

Docket 5671. Complaint, July 1, 1949—Decision, May 4, 1951

Where a corporation, its subsidiary and their officers, engaged in the sale and distribution of Portland cement produced at said subsidiary's plant at Laramie, Wyo., to purchasers located principally in Colorado, New Mexico, and Nebraska, who purchased said product either for resale or for use in the manufacture and sale of ready-mixed concrete, concrete building blocks and other concrete products, and who in competition with other customers of respondents of other cement producers—

Discriminated in price during a certain period, through charging purchasers transporting cement from its Laramie plant by motor truck 20 cents per barrel more than they offered or sold cement of like grade and quality to purchasers who transported it by rail freight;

With the result that the customer so favored was thereby enabled to obtain greater profits from the resale of such cement and either to undersell its competitor who was not thus favored or to furnish to its customers superior facilities and services; any appreciable differential in the price of its said product accordingly had the capacity of diverting trade from the nonfavored to the favored customers; and effect of such practice, therefore, might have been substantially to lessen competition in the lines of commerce in which such purchasers were engaged and in injure, destroy or prevent competition with the purchasers who received the lower prices:

Held, That their said acts and practices in selling cement transported by motor truck at a price higher than they sold cement of like grade and quality transported by rail freight, as above set forth, constituted violations of subsec. (a) of section 2 of the Clayton Act as amended.

In said proceeding in which respondents stated in their amended answer that in the pricing policy in question, admittedly followed from January 1, 1947, to January, 1949, they did not at any time believe they were unlawfully discriminating in price in favor of or against any particular type of transportation, and believed that the price differentials were justified by reason of difference in cost, but stated that to avoid the trouble and expense incident to the contention of the proceeding, and particularly in view of the fact that the practice complained of had been abandoned, thus eliminating the criticized differentials in price, they expressly waived their right to offer any evidence to justify the higher price of motor truck loaded cement upon the grounds of corresponding higher costs;

The Commission made no finding relative to cost justification in view of respondents' express waiver of the right to offer or adduce testimony or evidence related thereto.

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

Mr. James I. Rooney and *Mr. James S. Kelaher* for the Commission.

Loomis & Lazear, of Cheyenne, Wyo., for respondents.

COMPLAINT

The Federal Trade Commission having reason to believe that the party respondents named in the caption hereof, and hereinafter more particularly designated and described, since June 19, 1936, have violated and are now violating the provisions of subsection (a) 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 against the said respondents, stating its charges as follows:

PARAGRAPH 1. Respondent Monolith Portland Cement Co. is a Nevada corporation with offices and principal place of business located at 215 West Seventh Street, Los Angeles, Calif.

Respondent Monolith Portland Midwest Co., is a Nevada corporation with offices and principal place of business at 215 West Seventh Street, Los Angeles, Calif., and is a wholly owned subsidiary and under the immediate direction and control of respondent Monolith Portland Cement Co.

Respondents Coy Burnett, W. D. Burnett, and E. R. Durfee are individuals, and are president, vice president, and secretary-treasurer, respectively, of both corporate respondents. These individual respondents formulate, control, and direct the policies, practices, and methods of the corporate respondents. Respondent Stanley W. Russell is an individual and vice president of the corporate respondent Monolith Portland Midwest Co.

PAR. 2. Respondents are now and have been since June 19, 1936, engaged in the business of selling and distributing Portland cement, hereinafter referred to as "cement," produced at their manufacturing plant located at Laramie, Wyo., and operated by respondent Monolith Portland Midwest Co.

Respondents cause said cement, when sold, to be transported from the place of manufacture at Laramie, Wyo., to the purchasers thereof located in States other than the State of Wyoming, and there is and has been at all times herein mentioned a continuous current of trade and commerce in said product across State lines, between respondents' manufacturing plant and the purchasers of such product. Said product is sold and distributed for use, consumption and resale with the various States of the United States.

PAR. 3. Respondents' customers purchase cement either for resale or for use in the manufacture and sale of ready-mixed concrete, concrete building blocks and other concrete products.

In the course and conduct of their business, respondents' customers are competitively engaged with each other and with the customers of other cement producers within the various trading areas in which the respondents' said customers offer for sale and sell the said product, at retail or in processed form as described herein.

PAR. 4. Respondents in the course and conduct of their business, as hereinbefore set forth, have been since January 1, 1947, and now are, discriminating in price between different purchasers of their cement of like grade and quality by selling said product to some of their customers at higher prices than they sell and have sold such product of like grade and quality to others of their customers. Such discriminations arise from respondents' pricing policy, in effect since January 1, 1947, whereby the respondents sell or offer for sale, cement, at their plant located at Laramie, Wyo., to purchasers who have the said cement transported therefrom by rail freight at 20 cents per barrel lower than they sell or offer for sale said cement to purchasers who transport said cement therefrom by motortruck or other means of motor transportation.

PAR. 5. The effect of such discriminations in price as set forth in paragraph 4 may be substantially to lessen competition in the lines of commerce in which those purchasers of respondents' product who receive the benefits of such discriminations are engaged and to injure, destroy, or prevent competition with the customers of respondents who receive the benefits of such discriminations.

PAR. 6. The foregoing alleged acts and practices of said respondents as set forth herein constitute violations of subsection (a) 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.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

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, 1936 (the Robinson-Patman Act) (15 U. S. C., sec. 13), the Federal Trade Commission on July 1, 1949, issued and subsequently served upon the respondents named in the caption hereof its complaint in this proceeding, charging said respondents with having violated the provisions of subsection (a) of section 2 of said Clayton Act, as amended. After the filing of the respondents' answer to the complaint and the designation of a trial examiner by the Commission, the respondents,

upon leave granted by the trial examiner, withdrew their original answer and in lieu thereof filed an amended answer in which, solely for the purposes of this proceeding, they admitted all of the material allegations of fact set forth in the complaint and waived all hearings and further procedure, including the filing of a recommended decision by the trial examiner. In said answer the respondents expressly consented for the Commission to proceed upon the complaint and admission answer to make its report, stating its findings as to the facts, including inferences which it may draw therefrom, and its conclusion based thereon, and enter its order requiring the respondents to cease and desist from the discriminations charged in the complaint.

Subsequently, this proceeding regularly came on for hearing before the Commission upon the complaint, the respondents' amended answer thereto, and certain memoranda of counsel in support of the complaint and of counsel for the respondents, filed as, for, and in lieu of briefs, attached to which memoranda were drafts of proposed findings as to the facts, conclusion, and order to cease and desist which were recommended by counsel in support of the complaint and by counsel for the respondents for issuance by the Commission in disposition of the proceeding.

The proposed form of findings as to the facts, conclusion, and order to cease and desist having been altered by the Commission to the extent and for the reasons shown by the tentative order issued November 28, 1950, the respondents were afforded opportunity to show cause why the tentative findings, conclusion, and order to cease and desist attached thereto should not be entered herein as the Commission's decision. Thereafter, on January 22, 1951, the respondents filed certain objections to the entry of said documents; and the Commission, having duly considered the objections and the entire record herein and being now fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. (a) The respondent, Monolith Portland Cement Co., is a corporation organized and existing under the laws of the State of Nevada, with offices and its principal place of business located at 215 West Seventh Street, in the city of Los Angeles, State of California.

(b) The respondent, Monolith Portland Midwest Co., is a corporation organized and existing under the laws of the State of Nevada, with its offices and principal place of business also located at 215 West

Seventh Street, in the city of Los Angeles, State of California. This respondent is a wholly owned subsidiary of and is under the immediate direction and control of the respondent, Monolith Portland Cement Co.

(c) The respondents, Coy Burnett and E. R. Durfee, are individuals and are, respectively, president, vice president, and secretary-treasurer of both of the corporate respondents, Monolith Portland Cement Co. and Monolith Portland Midwest Co. The respondent, Stanley W. Russell, is an individual and is vice president of the respondent, Monolith Portland Midwest Co. The respondents, Coy Burnett, W. D. Burnett and Stanley W. Russell, as officers of the aforesaid respondent corporations, are primarily responsible for and are the persons primarily concerned with formulating the practices and policies of Monolith Portland Midwest Co. with respect to sales of cement at the manufacturing plant of said company located at Laramie, Wyo.

PAR. 2. The respondents named in paragraph 1, acting through the respondent, Monolith Portland Midwest Co., were, at the time of the issuance of the complaint, and since June 19, 1936, they have been, engaged in the business of selling and distributing portland cement produced at the cement-manufacturing plant of said company located at Laramie, Wyo. Said cement, when sold, is transported either by the respondents or by its purchasers from the place of manufacture at Laramie, Wyo., to the respective locations of the purchasers thereof both in the State of Wyoming and in States other than Wyoming, principally Colorado, New Mexico, and Nebraska. There is now, and at all times mentioned in the complaint there has been, a continuous current of trade and commerce in said product by the respondents across State lines between the respondents' manufacturing plant and purchasers of such product. The respondents' cement is sold and distributed for use, consumption and resale in various States of the United States, but principally in the States of Wyoming, Colorado, New Mexico, and Nebraska.

PAR. 3. The respondents' customers purchase cement either for resale or for use in the manufacture and sale of ready-mixed concrete, concrete building blocks and other concrete products, or for other purposes. Such customers are generally competitively engaged with one or more of the other customers of the respondents and with the customers of other cement producers within the various trading areas in which such customers offer for sale and sell cement purchased by them from the respondents either at retail or in processed form.

PAR. 4. In the course and conduct of their business, as aforesaid,

the respondents, from January 1, 1947, until January 1949, offered for sale and sold cement at their plant located at Laramie, Wyo., to purchasers transporting said cement from said point of sale by motor truck at a price 20 cents per barrel higher than they offered for sale or sold cement of like grade and quality to purchasers transporting the same from said point of sale by rail freight. In so doing the respondents discriminated in favor of purchasers transporting such cement by rail freight and against purchasers transporting their cement by motor truck.

PAR. 5. In all instances in which the respondents' cement is sold to one of their customers at a price exceeding by any appreciable amount the price at which their cement of like grade and quality is sold to other competing customers the customer so favored in price is thereby enabled to obtain greater profits from the resale of such cement and to either undersell its competitor who is not so favored or to furnish to its consumer purchasers superior facilities and services. For this reason, any appreciable differential in the price of the respondents' cement as between competing customers has the capacity of diverting trade from the nonfavored customers to the customers favored with the lower price. The Commission therefore finds that the effect of the respondents' practice of selling their cement to purchasers transporting the same from the place of manufacture by motor truck at a price higher than they sold cement of like grade and quality to competing customers transporting it by rail freight may have been substantially to lessen competition in the lines of commerce in which such purchasers were engaged and to injure, destroy, or prevent competition with the purchasers of such cement who received the lower price.

PAR. 6. In their amended answer to the complaint the respondents stated that during the month of January 1949 the pricing policy above described was abandoned and that thereafter the respondents established, and have since maintained, the practice of charging no differential in price for cement loaded onto motor trucks at their plant at Laramie, Wyo., as distinguished from cement loaded onto rail cars at said plant, provided only that the amount of cement loaded, whether loaded onto one or more motor trucks at the same time of loading, is equal to the amount of a minimum rail car loading. In seeking to defend their pricing policy admitted to have been followed from January 1, 1947, until January 1949, the respondents also stated that they did not at any time believe they were unlawfully discriminating in price in favor of or against any particular type of transportation, and that while said pricing policy was in effect they believed the resulting price differentials were justified by reason of differences

in costs. The respondents stated further, however, that for the purpose of avoiding the trouble and expense incident to a continuation of this proceeding, and particularly in view of the fact that the practice complained of has been abandoned, thus eliminating all differentials in price with respect to cement transported by motor truck, they expressly waived their right to offer any evidence tending to justify the higher price of motor truck loaded cement upon the grounds of correspondingly higher costs. The respondents having expressly waived the right to offer or adduce testimony or evidence relating to cost justification, the Commission, of course, makes no finding with respect thereto.

CONCLUSION

The acts and practices of the respondents in selling cement to purchasers transporting the same from the place of manufacture by motor truck at a price higher than they sold cement of like grade and quality to purchasers transporting it from such place of manufacture by rail freight, as herein found, constituted violations of subsection (a) of section 2 of the 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 the act of Congress approved June 19, 1936 (the Robinson-Patman Act).

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the respondents' amended answer thereto, and certain memoranda of counsel in support of the complaint and of counsel for the respondents proposing disposition of the case, and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of subsection (a) of section 2 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, 1936 (the Robinson-Patman Act) :

It is ordered, That the corporate respondents, Monolith Portland Cement Co. and Monolith Portland Midwest Co., and their officers, and the respondents, Coy Burnett, W. D. Burnett, and E. R. Durfee, individually and as president, vice president, and secretary-treasurer, respectively, of said corporate respondents, and the respondent, Stanley W. Russell, individually and as vice president of the respondent,

Monolith Portland Midwest Co., and said respective respondents' agents, representatives, and employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale, or distribution of portland cement in commerce, as "commerce" is described in the aforesaid Clayton Act, do forthwith cease and desist from directly or indirectly discriminating in price between different purchasers of their cement of like grade and quality who are competitively engaged with each other in the resale of such cement, either at retail or in processed form, by offering to sell or selling such product to purchasers who have said cement transported from the place of sale by motor truck at any higher price than said product is offered for sale or sold to purchasers who have it transported from the place of sale by rail freight: *Provided, however,* That the foregoing shall not be construed to prevent the respondents from defending any alleged violation of this order by showing that any differences in price make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which said product is to such purchasers sold or delivered.

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

IN THE MATTER OF

MORRIS ROSEN AND ROSELINE FABRICS, INC.

COMPLAINT, FINDINGS, AND ORDERS IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF AN ACT OF CONGRESS APPROVED OCT. 14, 1940

Docket 5833. Complaint, Dec. 19, 1950—Decision, May 5, 1951

Where an individual and the corporate instrumentality through which he conducted his business—

Misbranded certain wool products in violation of the Wool Products Labeling Act and rules and regulations promulgated thereunder, in that they offered, sold and distributed in commerce, 38,000 yards of piece goods, purchased in greige form, without affixing thereto the stamps, tags, labels, etc., required by said act and rules, etc.:

Held, That such acts and practices, under the circumstances set forth, were in violation of the Wool Products Labeling Act and said rules and regulations, and constituted unfair and deceptive acts and practices.

Before *Mr. Webster Ballinger*, trial examiner.

Mr. R. L. Banks, Jr. and *Mr. Jesse D. Kash* for the Commission.

Mr. William Weisman, of New York City, for respondents.

COMPLAINT

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 Morris Rosen, an individual, and Roseline Fabrics, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said acts and rules and regulations promulgated under the Wool Products Labeling Act of 1939, 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 Morris Rosen, is an individual, and Roseline Fabrics, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York with its office and principal place of business located at 1410 Broadway, New York, N. Y. Respondent, Morris Rosen, is president of Roseline Fabrics, Inc., and in control of its operations, and said respondent corporation is in fact an instrumentality through which the said Morris Rosen conducts his business.