

IN THE MATTER OF
UNITED STATES PENCIL COMPANY, INC. 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 5929. Complaint, Oct. 9, 1951—Decision, Jan. 3, 1953

As respects lead strength in pencils, this may vary as much as 10 or 15 percent in different sections of the same pencil, and there is a like variation between pencils of the same grade or hardness produced by different manufacturers.

Where a corporation and its two officers, engaged in the interstate sale and distribution of lead pencils and, in connection therewith, in the distribution of premiums or "free" goods; through circulars mailed to individuals and firms whose names and addresses were procured primarily from telephone and other directories—

- (a) Represented that they offered ball point pens, memo pads, pencils sharpeners, and other articles free; the facts being that in order to get any article of "free" merchandise, it was necessary that the customer purchase one gross or more of pencils from them;
- (b) Represented that their pencils were superior to all other leading brands, that the lead therein was more than twice as strong as that in ordinary pencils, and that such strength had been shown by tests made on a United States Bureau of Standards machine;

The facts being that their pencils had never been tested on a Bureau of Standards testing machine; while they had had some private tests made, conclusions reached were not supported by reliably accurate data, so that the report of the concern showing that their pencils ranked first among the five groups tested could not be accepted as supporting their claim, especially that their pencils "rate 1st among a test of all leading brands"; and while a cursory test was made in their place of business by a representative of a company from which they purchased, on a machine similar to that described in a governmental bulletin and such as were constructed and used by various pencil companies, the evidence would not support a finding that leads in their pencils were significantly stronger than those in ordinary pencils; With tendency and capacity to mislead a substantial portion of the purchasing public into the erroneous belief that such representations were true and with effect of thereby inducing its purchase of substantial quantities of their merchandise; and

- (c) Directly and indirectly represented "National Credit Service Company" to be a bona fide collection agency in no way connected with themselves, and through use of said trade name employed various methods of intimidation and harassment to induce consignees of their merchandise, including both authorized and unauthorized shipments, to make payments allegedly due them;

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The facts being that the National Credit Service Company was merely a trade name which said officers had adopted and registered as such in the New York County Clerk's office, and which they made use of only in connection with unpaid accounts due to the corporation or to other companies owned or controlled by said individuals;

With tendency and capacity to mislead and deceive persons to whom they had consigned merchandise as to the nature of the National Credit Service Company and its relation to them and of thereby causing such persons to pay to them sums of money which they were not obligated to pay:

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.

As respects the charge in the complaint that respondents had shipped merchandise to consignees without having received bona fide order therefor and in other cases had shipped larger quantities than had been ordered: it appeared, under all the circumstances, that such shipments were the result of honest mistakes or due to the affixing to orders of nonauthentic signatures by pranksters.

In said general connection, it further appeared that while respondents in their efforts to collect offered a discount upon pencils claimed by the recipient to have been mislent, asked for the return thereof at their expense, and used the National Credit Service Company as a collection agency, in no case was suit ever filed; and that after exhausting such remedies the account was closed out and the loss accepted as an incident of the business.

Before *Mr. J. Earl Cox*, hearing examiner.

Mr. Jesse D. Kash and *Mr. L. J. Farnsworth* for the Commission.
Ruth Gottdiener, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that United States Pencil Co., Inc., a corporation, David Teitelbaum and Samuel Fingerhut, individually and as officers of said corporation, 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, United States Pencil Co., Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 100 Fifth Avenue, New York, New York.

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Respondents David Teitelbaum and Samuel Fingerhut are President and Secretary-Treasurer, respectively, of the corporate respondent and in such capacity they formulate and execute its policies and practices. Their business address is the same as that of corporate respondent.

PAR. 2. Respondents have for several years last past been engaged in the sale and distribution of lead pencils, pencil sharpeners, ball point pens, fountain pens, desk pads, cutlery, and other merchandise. Respondents cause and have caused their said products, when sold, to be transported from their aforesaid place of business in the State of New York to purchasers thereof located in the various States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said products in commerce among and between various States of the United States and in the District of Columbia. Their volume of trade in said commerce has been and is substantial.

PAR. 3. Respondents, in the course and conduct of their said business and for the purpose of inducing the sale of their said merchandise, have made many statements and representations with regard to the quality and price thereof. The statements and representations so made by respondents have appeared in advertisements, circulars, and other advertising media of general circulation in various States of the United States. Typical of said representations of respondents, but not all inclusive, are the following:

FREE

with each and every gross of pencils
Jumbo Ballpoint pen memo pad. * * *

FREE

with each and every gross of pencils
this orbic ballpoint pen * * *
Free gift included for quick action
Postage free order blank.
A great many thousands have sold for
\$10.00 each * * *

Nationally advertised sharpener \$3.00
FREE with an order of one gross or more. * * *

FREE with any order of one gross or more
FAMOUS "EVER-SHARP" Ball Pen
* * *

Best

by Test
N. Y. Testing Laboratory
has shown that "USCO" bonded pencils
rate 1st among a test of all
leading brands. * * *

New . . . Electro Bonded 100 percent Stronger Leads.
New USCO Electro Bonded Pencils tested on
a United States Bureau of Standards
Testing Machine shows that these leads
are definitely more than twice as strong
as ordinary pencils.

PAR. 4. Through the use of aforesaid statements and others of the same import, but not specifically set out herein, respondents have represented that they offer ball point pen and memo pad sets, ball point pens, pencil sharpeners, and other merchandise free; that respondents' pencils are superior to those of all other leading manufacturers and that the same is proven by a test made by the New York Testing Laboratory; that the lead in corporate respondent's pencils is more than twice as strong as that in ordinary pencils and that their pencils are not ordinary pencils, but are superior to ordinary pencils.

PAR. 5. In truth and in fact, respondents do not give ball point pen and memo sets, ball point pens, pencil sharpeners, and other articles "free." In order to obtain said merchandise, it is necessary to purchase other merchandise and the price of the so-called free merchandise is included in the price of the merchandise purchased. The tests performed by the New York Testing Laboratories did not show corporate respondent's pencils to be superior to the brands tested and characterized by respondents as leading brands and said pencils are not in fact superior to those tested. The lead in said pencils is not significantly stronger than that in pencils which are generally considered to be ordinary. By all accepted standards respondents' pencils are ordinary, not extraordinary or superior.

PAR. 6. The use by respondents of the foregoing false, misleading and deceptive statements and representations had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations were true and has caused and now causes a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase substantial quantities of respondents' merchandise.

PAR. 7. Further, in the course and conduct of their said business respondents make and have made a practice of shipping merchandise to consignees thereof without having received orders therefrom for said merchandise and attempting to collect the price thereof. Respondents have also engaged in the practice of shipping to customers larger amounts of merchandise than had been ordered and attempting to collect the price thereof.

PAR. 8. In the course and conduct of their business and for the purpose of enforcing payments allegedly due them for shipments, both authorized and unauthorized, of their goods, respondents have adopted

and used the name "National Credit Service Company," and by the use of such name, and by letter, and fictitious addresses and notices, have represented it to be a bona fide collection agency in no way connected with respondents. Under this guise respondents employ various methods of intimidation and harassment to induce consignees of respondents' merchandise to make payment therefor, whether said consignees had ordered the merchandise or not.

PAR. 9. The said representations were false. In truth or in fact, "National Credit Service Company" was not a bona fide collection agency nor was it independent of and distinct from respondents; it was a trade name used by respondents as a front for making and enforcing collections as herein set forth.

PAR. 10. The use of the name "National Credit Service Company" and the practices aforesaid, by respondents, had the tendency and capacity to mislead and deceive persons to whom respondents' merchandise has been consigned, with respect to the nature of "National Credit Service Company" and its relation to respondents, and by reason thereof to pay to respondents sums of money which they were not obligated to pay because of the unauthorized shipment of merchandise and because merchandise was purchased as the result of respondents' deceptive practices as herein alleged.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and constitute unfair acts and deceptive practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rules XXII and XXIII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated January 3, 1953, the initial decision in the instant matter of hearing examiner J. Earl Cox, as set out as follows, became on that date the decision of the Commission, "Commissioner Mason and Commissioner Carretta not concurring in those portions of the findings as to the facts, conclusion and order to cease and desist which relate to the use of the word 'free'".¹

¹ Said "Decision," etc. dated January 22, 1953, reads as follows, omitting the formal Order of Compliance, set forth infra at page 744, and the nonconcurrence of Commissioners Mason and Carretta as to the use of the word "free", as above set out:

The initial decision of the hearing examiner having been filed in this proceeding on November 21, 1952, and counsel for respondents having seasonably filed a notice of respondents' intention to appeal therefrom; and

No appeal brief having been filed within the time provided by the Commission's Rules

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on October 9, 1951, issued and subsequently served its complaint in this proceeding upon the respondents United States Pencil Co., Inc., a corporation, and David Teitelbaum and Samuel Fingerhut, individually and as officers of said corporation, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before the above-named hearing examiner, theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final consideration by said hearing examiner on the complaint, answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel, oral argument not having been requested, and said hearing examiner having duly considered the record herein finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, United States Pencil Co., Inc., is a corporation, organized in 1918, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 100 Fifth Avenue, New York, New York, in a building at the corner of Fifth Avenue and 15th Street with entrances also at 1-3 West 15th Street.

Respondents David Teitelbaum and Samuel Fingerhut are president and secretary-treasurer, respectively, of the corporate respondent and in such capacity, they formulate and execute its policies and practices. Their business address is the same as that of the corporate respondent.

PAR. 2. Respondents have for several years last past been engaged in the business of selling and distributing lead pencils and in connection therewith have distributed as premiums or "free" goods pencil sharpeners, ball point pens, desk pads and other merchandise. In connection with their aforesaid business, respondents cause and have

of Practice and, therefore, no matter having been presented for determination by the Commission on appeal:

Therefore, pursuant to Rules XXII and XXIII of the Commission's Rules of Practice, the initial decision of the hearing examiner, a copy of which is hereto attached, did on January 8, 1953, become the decision of the Commission.

caused their said products to be transported from their aforesaid place of business in the State of New York to customers and purchasers thereof located in the various States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said products in commerce among and between various States of the United States and in the District of Columbia.

The respondents contact prospective customers through the use of advertising circulars mailed directly to individuals and firms whose names and addresses are procured primarily from telephone and other directories. Annually they send out approximately 60 million circulars at a mailing cost of over \$500,000.00, receive some 600,000 orders and do more than \$1,000,000.00 business, mostly in small orders of from 1 to 10 gross of pencils. They have about 150 employees. Their volume of trade in commerce has been and is substantial.

PAR. 3. Respondents, in the course and conduct of their said business and for the purpose of inducing the sale of their pencils, have, in the aforementioned circulars, made representations with regard to the quality and price of their pencils and with respect to the "free" merchandise offered to customers. Typical of said representations, but not all inclusive, are the following.

FREE with each and every gross of pencils
JUMBO BALLPOINT PEN MEMO PAD * * *

Nationally Advertised
SHARPENER . . . FREE
With an order of one gross or more.

FREE! With Any Order of
One Gross or More
Famous
"EVER-SHARP"
Ball Pen

BEST BY TEST
N. Y. Testing Laboratory has
shown that "USCO" bonded
pencils rate 1st among a
test of all leading brands.

* * *

NEW . . . ELECTRO BONDED 100% STRONGER LEADS.

New USCO ELECTRO BONDED PENCILS, tested on a U. S. Bureau of Standards Testing Machine, shows that these leads are definitely more than twice as strong as ordinary pencils.

PAR. 4. Through the use of the aforesaid statements and others of the same or similar import but not specifically set out herein, respondents have represented that they offer ball point pens, memo pads, pencil sharpeners and other merchandise free; that respondents' pencils are superior to all other leading brands; that the lead in

respondents' pencil is more than twice as strong as that in ordinary pencils; and that such strength is shown by tests made on a United States Bureau of Standards testing machine.

PAR. 5. In truth and in fact respondents do not give ball point pens, memo pads, pencil sharpeners or other articles of merchandise free. These mentioned articles and other merchandise are offered to respondents' customers only in connection with the sale of pencils, and in order to get any article of "free" merchandise, it is necessary that the individual customer purchase one gross, or more, of pencils from the respondents.

Respondents' pencils are not superior to all other leading brands and the lead in respondents' pencil is not twice as strong nor significantly stronger than the lead in other pencils, whether of leading or ordinary brands. The respondents' pencils have not been and are not now tested on a United States Bureau of Standards testing machine.

In 1948 respondents had some tests made by the New York Testing Laboratories, Inc. but the indicia of a careful, scientifically valid experiment were not evident either in the objective selection of pencils to be tested or in the manner in which the tests were carried out, nor were the conclusions reached adequately supported by reliably accurate data. Hence, the report of the New York Testing Laboratories, Inc., showing that respondents' pencils ranked first among the five groups of pencils tested, cannot be accepted as supporting the claim made in respondents' advertising, especially that their pencils "rate 1st among a test of all leading brands."

The record does not show that a test of comparative strength of the leads of respondents' and other brands of lead pencils was ever made on a U. S. Bureau of Standards Testing Machine or that there is such a testing machine. The record does show that a cursory test was made in respondents' place of business by the representative of a company from which respondents were purchasing pencils on a machine similar to one described in a governmental bulletin, SS-P-201, and that similar machines are constructed and used by various pencil companies. The reliable, probative and substantial evidence does not support a finding that leads in respondents' pencils "are definitely more than twice as strong as ordinary pencils" or that they are significantly stronger. The record shows that lead strength may vary as much as 10 percent or 15 percent in different sections of the same pencil and that between pencils of the same grade of hardness produced by different manufacturers there will be a like variation in lead strength.

PAR. 6. The use by respondents of the foregoing statements and representations herein found to be false, misleading and deceptive had and has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations are true and has caused and now causes a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase substantial quantities of respondents' merchandise.

PAR. 7. In the course and conduct of their said business respondents have shipped merchandise to consignees thereof without having received bona fide orders therefor and, in other cases, larger quantities of merchandise than have intentionally or actually been ordered, and have collected or attempted to collect the price thereof. However, the record does not show that such shipments have been wilfully or intentionally made by respondents. On the contrary, the record seems clearly to establish that such shipments were made only as the result of mistakes or because of the mischievous pranks of practical jokers.

The order blank which constitutes a part of the circular which respondents customarily use carries, in columnar style, the words: 10 gross, 5 gross, 3 gross, 2 gross, 1 gross, and before each is a box in which the purchaser is to place an "X" or checkmark designating the quantity of pencils desired, and at the bottom there is a place for signature and address. Upon receipt of an order blank bearing a name and address, respondents ship the quantity of pencils indicated thereon and the consignee is requested to remit by return mail.

The customer has no duplicate of his order, nor is the original filed by respondents who retain for their records only one copy of the invoice which is enclosed with the shipment. Thus there is no way, once an order is sent out, to verify either the quantity ordered or the signature. For a short period after the issuance of the complaint in this proceeding, respondents did retain for reference and checking a quantity of original orders selected not at random but because a careful examination gave indication that there might be some question with respect thereto. It was found that in some cases the signatures were not authentic, presumably having been placed on the orders by pranksters, in other cases the "X" or checkmark was placed in such a manner as not clearly to indicate the quantity of pencils desired, in other cases it was found that the customer did not intend to order the quantity of pencils clearly indicated on the order. Such factors coupled with careless but honest mistakes that can be attributed to respondents' own employees would account for mis-shipments and over shipments much in excess of those, than can, from the evidence in this proceeding, be found to have been made by the respondents.

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In their efforts at collection, respondents have offered a discount of 10 percent upon the pencils claimed by the recipient to have been mis-sent, have asked for return of the pencils at respondents' expense, and have used National Credit Service Company as a collection agency, but in no case has suit ever been filed. After exhausting these remedies the account has been closed out and the loss accepted as an incident of the business.

PAR. 8. In the course and conduct of their business and for the purpose of enforcing payments allegedly due them for shipments, both authorized and unauthorized, respondents have adopted and used the above-mentioned National Credit Service Company, 1-3 West 15th Street, New York 11, New York, and through the use of such name and address, and in correspondence have directly and indirectly represented it to be a bona fide collection agency in no way connected with respondents and through its use have employed various methods of intimidation and harassment to induce consignees of respondents' merchandise to make payment therefor.

PAR. 9. The said representations were and are false and misleading. The National Credit Service Company is a trade name registered in the New York County Clerk's Office, adopted by the individual respondents, David Teitelbaum and Samuel Fingerhut, as partners, and used by them only in connection with unpaid accounts due the corporate respondent or other companies owned and controlled by the two partners. It is not independent of and distinct from respondents and is not a bona fide collection agency.

PAR. 10. The use by respondents of the name "National Credit Service Company" together with the practices aforesaid, had and has the tendency and capacity to mislead and deceive persons to whom respondents' merchandise has been consigned as to the nature of "National Credit Service Company" and its relation to respondents, and by reason thereof has caused and causes them to pay to respondents sums of money which they were not obligated to pay.

CONCLUSION

The aforesaid acts and practices of respondents found herein to be false and misleading are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents, United States Pencil Co., Inc., a corporation, and its officers, and David Teitelbaum and Samuel Fin-

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gerhut, individually and as officers of United States Pencil Co., Inc., their representatives, agents and employees, directly or through any corporate or other device, in connection with the sale, offering for sale or distribution of pencils or other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "free", or any other word or words of similar import or meaning, to designate, describe or refer to articles of merchandise which are not in truth and in fact a gift or gratuity or are not given to the recipient thereof without requiring the purchase of other merchandise, or requiring the performance of some service inuring, directly or indirectly, to the benefit of the respondents;

2. Representing directly or by implication that respondents' pencils are superior to all other leading brands of lead pencils;

3. Representing directly or by implication that the leads in respondents' pencils are twice as strong or significantly stronger than the lead in ordinary or leading brands of pencils;

4. Representing directly or by implication that tests have been made of the strength of leads in respondents or other pencils by the use of a United States Bureau of Standards testing machine;

5. Representing directly or by implication that "National Credit Service Company," or any other trade or fictitious name under which business is done by respondents, is a bona fide collection agency not connected with respondents.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondent, United States Pencil Co., Inc., a corporation, and the respondents, David Teitelbaum and Samuel Fingerhut, shall, within sixty (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 the order contained in said decision [as required by said decision and order of January 3, 1953].

Syllabus

IN THE MATTER OF

DAVID TEITELBAUM ET AL. DOING BUSINESS AS
UNITED STATES STATIONERY COMPANY

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

Docket 5930. Complaint, Oct. 11, 1951—Decision, Jan. 3, 1953

Where four partners engaged in the interstate sale and distribution of storage and filing cabinets and other merchandise—

- (a) Represented in advertising circulars of interstate circulation that steel storage cabinets depicted were regularly sold by them for \$69 and that the price had been reduced to \$29.95;

Notwithstanding the fact that the cabinets were regularly sold for \$29.95; while they did at one time sell a different size "all-steel" cabinet for \$69, there was no showing that said price was ever applicable to the smaller cabinet advertised;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that said representations were true, and with effect of causing it to purchase substantial quantities of such merchandise; and

- (b) Adopted and used the name "National Credit Service Company, 1-3 West 15th Street, New York 11, New York" for the purpose of enforcing payments allegedly due them for shipments of goods, both authorized and unauthorized, and through the use of such name and address, and by correspondence, directly and indirectly represented it to be a bona fide collection agency in no way connected with them, and through use thereof employed various methods of intimidation and harassment to induce consignees of their merchandise to make payment therefor;

The facts being that the "National Credit Service Company" was merely a trade-name registered in the New York County Clerk's office and adopted and used by two of said partners only in connection with unpaid accounts due to said United States Stationery Company and to other companies in which they were interested;

With tendency and capacity to mislead and deceive persons to whom respondents' merchandise had been consigned, and with effect of causing such persons to pay respondents sums of money which they were not obligated to pay:

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.

Respondents' representation that "complete steel filing system" cabinets were sold by them for \$39.95 as a regular item and that the \$33.95 price constituted a reduction or a special offer, was borne out by reliable, probative and substantial evidence, and was therefore accepted as true.