

IN THE MATTER OF
E. T. MOYE TRADING AS MOYE PHOTOGRAPHERS

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT

Docket 6101. Complaint, May 21, 1953—Decision, Apr. 23, 1954

Where an individual with studio and principal place of business in Washington, D. C., engaged in the interstate sale and distribution of photographs through sales agents who called upon prospective customers and solicited orders through one or more of several sales agreements, sometimes designated by him as certificates or advertising offers, and through oral representations—

- (a) Represented through such agents that a "portrait," as described in said sales agreement, would be made for \$2.95, the representative to be paid \$1.75 or \$1.95 as the case might be, balance to be paid photographer at time of appointment, that about six proofs would be shown, and, as stated by said agents, that the pictures would be taken within a few days at a definite time fixed; the facts being that at different times his representatives failed to take the pictures as agreed or to deliver proofs when taken or finished pictures as promised or within a reasonable time; sometimes made no delivery of proofs or pictures until long after time promised and then only as a result of persistent demands; in other cases made no such delivery; frequently, where either no pictures were taken or proofs or pictures delivered and customers were required to go to his studio for the pictures, refused to refund the initial payment; sometimes declined to deliver proofs unless the customer made a deposit on additional pictures to be purchased; in some instances when pictures were not delivered and deposits not returned, customers were compelled to resort to the Small Claims Court in order to protect their rights and obtain a refund; and he sometimes failed to furnish promised proofs; and
- (b) Represented, in soliciting over the phone, that the customer, upon answering correctly a simple question, would receive free one 8 x 10 silvertone portrait; following which answer the salesman, calling to make an appointment and give the customer a certificate entitling him to sittings at the studio, always collected \$1.00 "service" charge, and, when the pictures were taken, required the payment of an additional sum of \$3.00 in order to obtain the pictures, failing which, no portraits or pictures were delivered or refund made of said additional payment, thus exacted:

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. Everett F. Haycraft*, hearing examiner.

Mr. Ames W. Williams for the Commission.

Mr. E. T. Moye, of Silver Spring, Md., and *Mr. David I. Abse*, of Washington, D. C., for respondent.

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 May 21, 1953, issued and subsequently served its complaint in this proceeding upon respondent E. T. Moye, an individual trading as Moye Photographers, charging him with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that Act. At hearings held thereafter, testimony and other evidence were introduced in support of and in opposition to the allegations of the complaint before a hearing examiner of the Commission. On November 12, 1953, the hearing examiner filed his initial decision.

The Commission subsequently placed this case on its own docket for review and, having reason to believe that the initial decision of the hearing examiner did not constitute an appropriate disposition of the proceeding, it issued, on March 4, 1954, and thereafter served its order affording the respondent and counsel supporting the complaint an opportunity to show cause why the initial decision should not be altered in the manner and to the extent shown in the tentative decision attached to that order. No appearance was entered however in response to such leave to show cause.

This case regularly came on thereafter for final consideration by the Commission upon the record herein on review, and the Commission, having duly considered such record, now finds that this proceeding is in the public interest and concludes additionally that the aforementioned tentative decision is an appropriate decision and now should be adopted as the decision of the Commission.

It is therefore ordered, That the tentative decision of the Commission as attached to the order of March 4, 1954, be, and it hereby is, adopted as the decision of the Commission in disposition of this proceeding.

It is further ordered, That the respondent shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist contained in said tentative decision, a copy of which is attached hereto.

Commissioner MEAD concurs except for the form of the order regarding use of the word "free". (See Mead dissent in the matter of Walter J. Black, Inc., et al., Docket 5571.)

TENTATIVE DECISION OF THE COMMISSION

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent E. T. Moye is an individual trading as Moye Photographers with his studio and principal place of business located at 711 14th Street NW., Washington, D. C. Respondent

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is now and for more than a year last past has been engaged in the business of making and selling photographs.

PAR. 2. Respondent during the period stated herein has engaged in the sale and distribution of photographs in commerce between and among the various States of the United States and in the District of Columbia. Respondent's volume of business in such commerce has been and now is substantial, particularly in those States adjacent and near to the District of Columbia.

PAR. 3. In the course and conduct of his said business, respondent has employed and now employs sales agents or representatives who call upon prospective customers in their homes or at their place of employment for the purpose of securing orders for photographs.

PAR. 4. In soliciting orders for photographs said sales agents or representatives make use of one or more of several sales agreements sometimes designated by respondent as certificates or advertising offers which contain provisions of sale substantially as follows:

A Beautiful 15 x 19 Salon Size Portrait

FOR ONLY \$2.95
UNMOUNTED

*\$1.00 EXTRA CHARGE FOR MORE
THAN 1 PERSON

*SITTINGS MADE IN YOUR HOME
OR OUR STUDIO

PAYABLE AT TIME OF SITTING

*APPROXIMATELY 6 PROOFS
SHOWN

*ADDITIONAL PORTRAITS AT
SPECIAL PRICES

Pay Representative \$1.95 and Balance to Photographer at Time of Appointment

In some instances this sales agreement, certificate or advertising offer contains the following language:

A Beautiful 16 x 20 Salon Size Portrait

FOR ONLY \$2.95
UNMOUNTED

*\$1.00 EXTRA CHARGE FOR MORE
THAN 1 PERSON

*SITTINGS MADE IN YOUR HOME
OR OUR STUDIO

PAYABLE AT TIME OF SITTING

*APPROXIMATELY 6 PROOFS
SHOWN

*ADDITIONAL PORTRAITS AT
SPECIAL PRICES

PAY REPRESENTATIVE \$1.95
AND BALANCE TO PHOTOGRAPHER AT TIME OF APPOINTMENT

In other instances the following language was used in the sales agreements or certificate signed by customers:

A Beautiful 16 x 20 Salon Size Portrait

Unmounted

FOR ONLY \$2.95

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Pay Representative \$1.75

\$1.20 at Time of Sitting
Plus 50¢ Handling ChargesGROUP CHARGES \$1 FOR EACH
ADDITIONAL PERSON;ADDITIONAL PORTRAITS CAN
BE OBTAINED AT SPECIAL
PRICES6 PROOFS SHOWN
TO SELECT FROM

Name -----

Location -----

Town -----

PAR. 5. Agents or representatives of said respondent in the course and conduct of their solicitation of business for the respondent call from house to house upon housewives and induce such customers to sign the sales agreements, certificates or advertising offers hereinbefore described and to pay said representative \$1.95 or \$1.75 as the case may be. In the course of these solicitations, the sales representatives state and represent, among other things, that respondent's offers are special offers, that the pictures will be taken within a few days at a definite time fixed, and that the balance of \$1.00 in some instances and \$1.20 in others is to be paid at the time the pictures are taken.

On numerous occasions the respondent's representatives have failed to take the pictures as provided in said agreements and in other instances have failed to deliver the proofs of pictures when taken, and in still other instances respondent has failed to deliver finished pictures within the time promised or within a reasonable time thereafter. In a number of cases delivery of the proofs or the pictures was not made until many months after the time promised and then only as a result of persistent demands by the customers and in still other instances such delivery has never been made. In numerous instances respondent has also refused to make refunds of the initial payment made at the time of the solicitation where either the pictures were not taken, the proofs were not delivered or the pictures were not delivered, the customers being required to go to respondent's studio for the pictures.

In some instances the sales representatives of the respondent declined to deliver proofs to the customers unless the customers made a deposit on additional pictures to be purchased from the respondent. When deposits were made on the order for finished pictures as required by respondent's said representatives, in some instances the pictures were not delivered and the deposits were not returned to the customers, and said customers were compelled to resort to the Small Claims Court in order to protect their rights and to obtain a refund of money deposited.

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In some instances when pictures were taken, respondent did not furnish the customers with six proofs as represented in the agreement.

PAR. 6. It is also the practice of sales agents and representatives of the respondent in soliciting orders for photographs to call prospective customers on the telephone and advise such prospective customers that upon answering correctly a simple question they will receive free of charge one 8 x 10 silvertone portrait and if the question is answered correctly, an appointment is made to call upon said prospective customers for the purpose of arranging for sittings at respondent's studio. Thereafter, said salesmen or representatives call upon the prospective customers at their homes to make an appointment for sittings at respondent's studio and to give to the prospective customers certificates entitling them to sittings at the studio and although it was understood that no further charges would be made, and the pictures were free, the representatives always collected \$1.00 "service" charge from each of the customers and at the time the pictures are taken, the customers are required to pay an additional sum of \$3.00 each in order to obtain the pictures. If the customers refuse to pay the additional \$3.00, respondent refuses to deliver the portraits or pictures or to refund the payments originally made.

PAR. 7. The use by the respondent of the aforesaid acts and practices in connection with the offering for sale and sale of photographs in commerce has had and now has the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the representations hereinabove set forth are true, and into the purchase of said portraits or photographs in reliance upon such erroneous belief.

CONCLUSION

The aforesaid acts and practices of respondent, as hereinabove set out, are all to the prejudice 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 respondent E. T. Moye, individually, and trading as Moye Photographers, or under any other name, and his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of photographs in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing over the telephone or otherwise, directly or by implication, that a photograph will be presented for correctly answering a question or inquiry unless such photograph is actually given as represented.

B. Using the word "free" or any other word or words of similar import or meaning, in advertising or in other offers to the public, to designate or describe any photograph, or other article of merchandise:

(1) when all of the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise are not clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood; or

(2) when, with respect to any article of merchandise required to be purchased in order to obtain the "free" article, the offerer either (a) increases the ordinary and usual price; or (b) reduces the quality; or (c) reduces the quantity or size of such article of merchandise.

C. Representing through the use of coupons, certificates or otherwise that photographs of a designated kind and character will be made for a stipulated price or at a time or times specified, unless this is in fact done and without the imposition of conditions not clearly stated or revealed when such representation is made.

D. Representing that finished photographs will be delivered to purchasers or will be delivered at a specified time or place when such delivery is not made, in fact.

IN THE MATTER OF
NATIONAL BISCUIT COMPANY

OPINION AND MODIFIED ORDER IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 2 (A) OF THE CLAYTON ACT AS AMENDED

Docket 5013. Opinion, etc., Apr. 26, 1954

Opinion and orders modifying, in response to motion by Commission's Bureau of Antimonopoly, grounded on asserted greater clarity and enforceability, section 3 of an order issued on Feb. 23, 1944, 38 F. T. C. 213, 222, which—after theretofore requiring respondent, among other things, in connection with the offer, etc., of bakery packaged food products in interstate commerce for use or resale, to cease and desist from selling such commodities of like grade and quality to competing purchasers at uniform prices, but subject to certain varying additional discounts pursuant to which, as set forth in the findings in detail, customer purchasers with branches or outlets were privileged, under respondent's so-called "Headquarters Discount" schedule, to aggregate their monthly purchases, irrespective of the quantity or volume delivered to the particular branch or outlet so as to receive the monthly volume and other discounts thereby provided—

Further required respondent, in the aforesaid connection, to cease and desist:

"3. From otherwise discriminating in price between purchasers of bakery packaged food products of like grade and quality, in any manner or degree substantially similar to the manner and degree of the discriminations referred to in paragraph four of the aforesaid findings as to the facts; or in any other manner resulting in price discriminations substantially equal in amount to the aforesaid discriminations, except as permitted by Section 2 of the Clayton Act as amended";

So as to require respondent, in lieu thereof, to cease and desist:

"3. From otherwise discriminating in price between purchasers of bakery packaged food products of like grade and quality where said purchasers in fact compete in the sale and distribution of such products."

Mr. Austin H. Forkner for the Commission.

Covington & Burling, of Washington, D. C., and *Mr. Everett Wheeler Barto*, of New York City, for respondent.

OPINION OF THE COMMISSION

By MASON, Commissioner:

This case is before us on a motion by counsel in the Commission's Bureau of Antimonopoly to reopen the proceeding solely for the purpose of modifying the Commission's order to cease and desist, respondent's answer opposing the motion, reply of counsel supporting the motion, and oral argument of counsel.

The Commission, on February 23, 1944, found that the respondent has violated Section 2 (a) of the Clayton Act as amended and entered

its order directing the respondent to cease and desist from discriminating in price in the manner and under the circumstances described in the findings and also to cease and desist:

"3. From otherwise discriminating in price between purchasers of bakery packaged food products of like grade and quality, in any manner or degree substantially similar to the manner and degree of the discriminations referred to in paragraph four of the aforesaid findings as to the facts; or in any other manner resulting in price discriminations substantially equal in amount to the aforesaid discriminations, except as permitted by Section 2 of the Clayton Act as amended."

Counsel supporting the motion suggests that the order to cease and desist would be clearer and more enforceable if the above-quoted provision is modified to read:

"From otherwise discriminating in price between purchasers of bakery packaged food products of like grade and quality where said purchasers in fact compete in the sale and distribution of such products."

Respondent opposes the motion on the grounds, among others, that under controlling authority and settled Commission policy it would be improper for us to reopen this proceeding and modify the order to cease and desist in the respects set out in the motion; that substantive rights of the respondent would be affected if the order is modified as requested; and that the facts disclosed by the record in this case would not support an order prohibiting all price discriminations between competing customers because there is no showing that any or all price differentials adversely affect competition.

The basic question raised by the motion is whether the order heretofore entered is ambiguous, unclear, or otherwise inadequate or inappropriate to prohibit the respondent from continuing or resuming the unlawful practices it was found to have engaged in. If the order, for one reason or another, is inadequate or inappropriate for that purpose, we have not only the statutory authority but also the duty to modify the order in the respects necessary. Obviously, any modified order to cease and desist which we might enter must be supported and justified by the facts disclosed by the evidence in the record. No substantive rights of the respondent will be affected by any modified order which is fully supported and justified by the evidence in the record.

The stipulated facts in this case show that respondent has discriminated in price between different purchasers by selling its bakery food products to competing customers at different prices and that the effect of the described discriminations in price, some of which were

no more than one-half of one percent of the selling price, "has been or may be substantially to lessen competition in the line of commerce in which the purchasers receiving and those denied the benefits of such discriminatory prices are engaged, and to injure, destroy, or prevent competition between purchasers receiving the benefit of said discriminatory prices and those to whom they are denied. The effect also has been or may be to tend to create a monopoly in those purchasers receiving the benefit of said discriminatory prices in said line of commerce in the various localities or trade areas in the United States where said favored customers and their disfavored customers are engaged in business."

The stipulated facts, we believe, fully support an order prohibiting the respondent from discriminating in price between competing customers.

We turn now to the question of whether an order prohibiting discriminations in price should exclude from its prohibitions those discriminations expressly permitted by Section 2 of the Clayton Act. We think not. As the Supreme Court pointed out in the *Ruberoid* case (*FTC v. Ruberoid Co.*, 343 U. S. 470) the statutory provisos are necessarily implicit in every order issued under the authority of the Act. However, recognition of the implicit availability of a seller's defenses under the Act does not allow a seller to relitigate in enforcement or contempt proceedings issues already settled. In the original proceedings in this case, respondent had an opportunity to avail itself of any one or all of the defenses set out in Section 2 of the Clayton Act, as amended. This the respondent did not see fit to do. All questions as to respondent's defenses to the discriminations shown have thus been settled. The order, however, does not make it clear that in a violation proceeding it is not necessary to again determine whether discriminations made under the same circumstances as those existing at the time the order was entered are permitted by Section 2 of the Clayton Act, as amended. To the contrary, the inclusion of the phrase "except as permitted by Section 2 of the Clayton Act as amended" may actually be misleading as suggesting the possible retrial in enforcement or contempt proceedings of issues already settled.

This is not to say that a seller who has violated Section 2 (a) of the Clayton Act, as amended, and against whom we have issued an order to cease and desist, is forever precluded from asserting one or more of the defenses which were available to him during the original proceeding and which either were not advanced or failed for lack of proof. To the contrary, in the event of a definite change of circumstances in which a seller may avail himself of any or all of the statutory defenses.

To illustrate, let us assume that a shoe manufacturer with two anti-

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quoted, manually operated machines in his shop was charged with having discriminated in price because he granted a discount of ten percent off list price on a thousand pairs of shoes and only five percent off on one dozen pairs. His defense that the price difference was cost justified was not established. The Commission, after making appropriate findings, entered a cease and desist order telling the shoe manufacturer to quit discriminating in price between competing purchasers. The order contained none of the statutory provisos. The day after the order was entered the shoemaker discarded his two antiquated and manually operated machines and installed ten new, automatic machines. The cost of tooling up these new machines for one dozen pairs of shoes was just as much as the cost for tooling up for a thousand dozen. The shoemaker's accountants, after making a thorough cost study, advised him that because of this and other cost savings he could now cost justify a discount of twenty percent on a thousand dozen or more pairs of shoes. In such a case, assuming the advice is sound, the respondent shoemaker would have a good defense to a charge that he had violated the order to cease and desist. He could either show these facts affirmatively in a motion to the Commission to modify the order or he could wait until the Commission petitioned a United States Court of Appeals for enforcement of the order and then present the changed facts to the trier of the facts in that proceeding.

We believe the order to cease and desist in this case should be modified in the respects and in the particulars set out in the motion.

Commissioners Howrey and Gwynne did not participate for the reason that oral argument on the motion to modify the order was heard prior to their appointment to the Commission.

ORDER GRANTING MOTION, AND REOPENING PROCEEDING AND MODIFYING
ORDER TO CEASE AND DESIST

This matter having come on to be heard by the Commission upon the motion by counsel in the Commission's Bureau of Antimonopoly to reopen this proceeding solely for the purpose of modifying the Commission's order to cease and desist entered herein on February 23, 1944, in the particulars set out in said motion, respondent's answer opposing the motion, reply of counsel supporting the motion, and oral argument of counsel; and

The parties heretofore having had notice of the proposed modification and having been heard with respect thereto, and the Commission being of the opinion, for the reasons set forth in the accompanying opinion of the Commission, that the said motion should be granted and that this proceeding should be reopened and the order to cease and desist modified in the respects and in the particulars set out in said motion:

It is ordered, That the said motion to reopen this proceeding solely for the purpose of modifying the order to cease and desist be, and it hereby is, granted.

It is further ordered, That this proceeding be, and it hereby is, reopened solely for the purpose of modifying the order to cease and desist in the respects and in the particulars set out in said motion.

It is further ordered, That the order to cease and desist heretofore entered in this matter be, and it hereby is, modified by changing paragraph 3 thereof to read as follows:

"3. From otherwise discriminating in price between purchasers of bakery packaged food products of like grade and quality where said purchasers in fact compete in the sale and distribution of such products."

It is further ordered, That a modified order to cease and desist incorporating the modification provided for in this order be issued and served upon the respondent.

Commissioners Howrey and Gwynne not participating for the reason that oral argument on the motion was held prior to their appointment to the Commission.

MODIFIED ORDER TO CEASE AND DESIST

This proceeding was heard by the Federal Trade Commission upon the complaint of the Commission and the stipulation as to the facts entered into between the respondent herein and the then Chief Counsel for the Commission, which provided, among other things, that without the presentation of argument or other intervening procedure the Commission might issue and serve upon the respondent herein findings as to the facts and conclusion based thereon and an order disposing of the proceeding; and the Commission, having made its findings as to the facts and its conclusion that said respondent had violated the provisions of subsection (a) of Section 2 of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes," the Clayton Act, as amended by the Robinson-Patman Act, issued its order to cease and desist on February 23, 1944.

Thereafter, counsel in the Commission's Bureau of Antimonopoly filed a motion requesting modification of the said order to cease and desist, and the Commission, having duly considered said motion, respondent's answer thereto, reply of counsel supporting the motion, and oral argument of counsel, and having issued its order granting said motion and reopening the proceeding and modifying said order to cease and desist in the respects set out therein, now issues this, its modified order to cease and desist:

It is ordered, That the respondent, National Biscuit Company, a corporation, and its officers, directors, representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of bakery packaged food products in interstate commerce for use or resale, do forthwith cease and desist:

1. From selling such commodities of like grade and quality to competing purchasers at uniform prices and thereafter granting varying discounts therefrom in the manner and under the circumstances found in paragraph four of the aforesaid findings as to the facts.

2. From continuing or resuming the discriminations in price referred to and described in paragraph four of the aforesaid findings as to the facts.

3. From otherwise discriminating in price between purchasers of bakery packaged food products of like grade and quality where said purchasers in fact compete in the sale and distribution of such products.

It is further ordered, That the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this modified order.

Commissioners Howrey and Gwynne not participating for the reason that oral argument on the motion to modify the order was heard prior to their appointment to the Commission.

Consent Settlement

50 F. T. C.

IN THE MATTER OF
THE DAHLBERG COMPANY ET AL.

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6143. Complaint, Nov. 18, 1953—Decision, Apr. 27, 1954

Where a corporation and its three officers, engaged in the interstate sale and distribution of their "Dahlberg Tru-Sonic Canal Earphone", which was sold as an accessory or attachment for hearing aids and was designed to be inserted in the ear canal; in advertising in newspapers and circulars and other media—

- (a) Falsely represented that said device would fit the ear canals of all persons and that when inserted in the ear canal, it was hidden and out of sight;
- (b) Falsely represented that it had been accepted by the American Medical Association; and
- (c) Falsely represented that it was so constructed that it would fit all hearing aids:

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. James A. Purcell*, hearing examiner.

Mr. Charles S. Cox for the Commission.

Mackall, Crounse, Moore, Helmey & Palmer, of Minneapolis, Minn., for respondents.

CONSENT SETTLEMENT ¹

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on November 18, 1953, issued and subsequently served its complaint on the respondents named in the caption hereof, charging them with unfair and deceptive acts and practices, in violation of the provisions of said Act.

Respondents desiring that this proceeding be disposed of by the Consent Settlement procedure in Rule V of the Commission's Rules of Practice, solely for the purposes of this proceeding, and review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the Consent Settlement here-

¹ The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on April 27, 1954, and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.