

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS AND ORDERS, JULY 1, 1954, TO JUNE 30, 1955

IN THE MATTER OF CAMDEN FIBRE MILLS, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT AND OF THE WOOL PRODUCTS LABELING ACT

Docket 6106. Complaint, June 30, 1953—Decision, July 13, 1954

Where a manufacturer of cotton, woolen, and synthetic batts or battings sold to
manufacturers of shoulder pads and linings, and known as quilters—

- (a) Misbranded certain batts which contained substantial quantities of miscellaneous fibers other than wool, through labeling them as "100% Reprocessed Wool";
- (b) Misbranded batts as "Guaranteed 100% New", when such products were made from reprocessed stock; and
- (c) Failed to stamp, tag, or label as required by law certain cartons containing individual rolls of untagged or unmarked batting:

Held, That such acts and practices were in violation of the Wool Products Labeling Act and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. John Lewis*, hearing examiner.

Mr. George E. Steinmetz for the Commission.

Mr. Harry Shapiro and *Mr. Hirsh W. Stalberg*, of Philadelphia, Pa., for respondents.

DECISION OF THE COMMISSION

Pursuant to Rule XXII 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 July 13, 1954, the initial decision in the instant matter of Hearing Examiner John Lewis, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above-named respondents on June 30, 1953, charging them with having violated the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and the Federal Trade Commission Act, through the misbranding of certain wool products. Said respondents, after being duly served with the complaint, appeared by counsel and filed their answer in which they admitted the jurisdictional allegations of the complaint but denied having engaged in any illegal practices as charged.

Pursuant to notice, a hearing on the complaint was held on August 25, 1953, in Philadelphia, Pennsylvania, before Hearing Examiner James A. Purcell, theretofore duly designated by the Commission to hear this proceeding. Thereafter, on October 15, 1953, a further hearing on the complaint was held in New York, New York before the undersigned hearing examiner, who had theretofore been duly designated by the Commission to preside at said hearing in place of James A. Purcell, due to the latter's illness and unavailability to conduct said hearing. Counsel for respondents and counsel supporting the complaint interposed objection to the substitution of the undersigned as hearing examiner to the extent that such substitution was limited to his presiding at the single hearing, but stated that they had no objection to his substitution for the purpose of completing the taking of testimony and other evidence in this proceeding and the issuance of an initial decision based on all the evidence in the case, including that previously adduced before the original hearing examiner. Thereafter, pursuant to order of the Commission, the undersigned hearing examiner was substituted as hearing examiner in this proceeding in place and stead of Hearing Examiner James A. Purcell. Further hearings in this proceeding were held before the undersigned on January 7, 1954 at Washington, D. C., and on March 11, 1954 at Philadelphia, Pennsylvania.

At the various hearings held herein testimony and other evidence were offered in support of and in opposition to the allegations of the complaint, which testimony and other evidence were duly recorded and filed in the office of the Commission. All parties were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues. No request for oral argument was received from counsel. However, counsel availed themselves

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of the opportunity of filing proposed findings and conclusions, together with the reasons therefor, which have been carefully considered by the examiner.

Upon consideration of the entire record herein, and from his observation of the witnesses (with the exception of the two witnesses who testified at the first hearing),¹ the undersigned makes the following:

FINDINGS OF FACT

I. The business of respondents

In their answer respondents admit, and it is so found, that respondent Camden Fibre Mills, Inc. is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal place of business located at 166-176 West Columbia Avenue, Philadelphia 22, Pennsylvania. It is further admitted, and it is so found, that respondents Louis Silverstein, Raymond Silverstein and Frank N. Cooper are president and treasurer, secretary, and assistant secretary and treasurer, respectively, of the corporate respondent and that said individuals formulate, direct and control the acts, policies and practices of the corporate respondent, said individual respondents having and maintaining their business offices at the same address as the corporate respondent.

Respondents are manufacturers of certain cotton, woolen, and synthetic battings which they sell to manufacturers of shoulder pads and manufacturers of linings, known as quilters. Respondents have been engaged in the manufacture of battings from woolen material since approximately May 1951, having prior thereto confined their operations to battings made from other fibers. Respondents' total sales are in excess of \$1,500,000 per annum, with the sales of batting made from wool amounting to approximately \$200,000.

II. The interstate commerce

The largest market for respondents' wool battings is in the New York City area, with some sales being made in Pennsylvania and Maryland. The answer of respondents admits, and it is so found, that subsequent to the effective date of the Wool Products Labeling Act and more especially since the beginning of the year 1951, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment and

¹ No substantial issue of credibility is involved in the testimony of Frank N. Cooper and Robert S. Scott (who testified at the first hearing), in the resolution of which an opportunity for observation of the demeanor of these witnesses would be of any material assistance.

offered for sale in commerce, as "commerce" is defined in the Wool Products Labeling Act, wool products, as "wool products" are defined therein.

III. The alleged misbranding

A. *The charges*

The complaint alleges three different types of misbranding with respect to respondents' wool batting, as follows:

1. That certain of the batting was misbranded within the intent and meaning of Section 4 (a) (1) of the Wool Products Labeling Act and Rule 30 of the Rules and Regulations promulgated thereunder, in that it was falsely and deceptively identified as "100% Reprocessed Wool," whereas in fact it was not composed of 100% reprocessed wool but contained substantial quantities of miscellaneous fibers other than wool.

2. That certain of the batting was misbranded within the meaning of Section 4 (a) (1) of the Act and Rule 20 of the Rules and Regulations in that it was falsely and deceptively tagged as consisting of all or 100% new materials, whereas in fact it did not contain new wool but was composed of reprocessed wool, together with certain quantities of miscellaneous fibers other than wool.

3. That certain of the batting was misbranded in that it was not stamped, tagged or labeled as required under Section 4 (a) (2) of the Act and in the manner and form prescribed by the Rules and Regulations.

B. *The evidence*

The evidence of misbranding revolves around four samples of batting, alleged to have been manufactured by respondents, which were obtained by attorney-investigators of the Commission from the premises of four different customers of respondent. Three of the samples were obtained by one investigator and the fourth sample was obtained by another. The first sample, identified in this proceeding as Commission's Exhibit 11, was obtained from respondents' customer, State Quilting Company, on October 4, 1951. It was removed from a sealed carton bearing the name "Camden Fibre Mills Inc." and a label with the words, "100% Reprocessed Wool." Respondents' packing slip, which accompanied the merchandise on delivery to the customer, and their invoice covering the sale of the batting, both described the product as "100% Reprocessed Wool." The second sample, identified as Commission's Exhibit 12, was obtained by the same investigator on February 19, 1952 from the premises of Philip Gottlieb, a contractor performing quilting for respondents' cus-

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tomers, L. Rimsky Inc., a textile converter. The sealed carton from which this sample was obtained contained the name "Camden Fibre Mills Inc.," but no label or tag with respect to wool content. However, respondents' packing slip and invoice covering the delivery and sale of the batting which were obtained from the customer, L. Rimsky Inc., describe the batting as "Wool Batting Type WOOL * * * 100% Reprocessed." The third sample, identified as Commission's Exhibit 13, was obtained by the same investigator on January 14, 1952 from the premises of respondents' customer, Crown Quilting Company. The sample was obtained from a sealed carton bearing a tag with the identifying name "Camden Fibre Mills Inc." but no description of the wool content other than a designation of the product as "Wool." However, the packing slips and invoices covering the shipment and sale of the cartons of batting, from which the sample was taken, describe the merchandise as "Wool Batting Type WOOL * * * 100% Reprocessed Wool." The fourth sample, identified as Commission's Exhibit 15, was obtained by a second Commission investigator from the premises of respondents' customer, Kasbar Quilting Company, during February 1952. The sample was taken from a sealed carton bearing a tag with the name "Camden Fibre Mills Inc." The tag describes the product as "Wool" and it is further identified on the packing slip and invoice as "100% Reprocessed Wool."

Within a short time after each of the above samples was obtained, a portion thereof was transmitted to the National Bureau of Standards for testing as to fiber content. Each of the samples was given a chemical test, in accordance with standard Government specifications, to determine the presence of various fibers and the quantities thereof. In testing each piece of batting submitted, two samples from each piece were taken and separately tested. The results of these tests are as follows:

Fiber	Exhibit 11 Sample		Exhibit 12 Sample		Exhibit 13 Sample		Exhibit 15 Sample	
	No. 1	No. 2	No. 1	No. 2	No. 1	No. 2	No. 1	No. 2
	Percent	Percent	Percent	Percent	Percent	Percent	Percent	Percent
Acetate Rayon.....	1.9	1.9	2.0	1.9	1.6	1.4	1.3	1.5
Nylon.....			2.1	2.2			2.8	3.1
Vegetable Fiber (including cotton and viscose rayon).....	10.8	10.6	3.6	3.6	7.3	7.3	4.3	4.1
Wool.....	87.3	87.5	92.3	92.3	91.1	91.1	91.6	91.6

The first charge of misbranding is based on the fact that the above samples were labeled or identified, either on the cartons from which

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they were taken, or on the packing slips and invoices accompanying the delivery and sale of the merchandise, or on both, as "100% Reprocessed Wool," whereas the tests made by the Bureau of Standards disclose that they contained substantial quantities of other fibers. The second charge of misbranding is based upon the fact that all of the tags, invoices and packing slips of respondents', which were received in evidence in this proceeding, contain the following printed statement thereon: "Our Products Guaranteed 100% New." This representation is claimed to be false since respondents' wool batting is admittedly made from reprocessed, rather than new, wool. The third charge of misbranding rests primarily on the fact that the individual rolls of batting do not contain any tag, label or other means of identification showing the wool content of each piece of batting. Where a tag or label as to wool content is used it is affixed to the cartons in which the individual rolls of batting are packed for delivery, rather than on the rolls themselves.²

C. Contentions of respondents

The evidence offered by respondents in opposition to the complaint, and the contentions advanced by them, are directed primarily to the first charge of misbranding, viz., that respondents falsely or deceptively identified certain of their batting as 100% reprocessed wool. Respondents' contentions in this regard fall into three main categories, which may be summarized as follows:

1. Counsel for respondents attempted to establish at the hearings that there was a possibility the samples obtained by the Commission's attorney-investigators and tested by the Bureau of Standards, were not respondents' merchandise, but had been confused with merchandise from other manufacturers. It is not entirely clear whether respondents are still urging this contention, although the proposed findings submitted by them would appear to indicate that they now concede that the four samples were taken from their merchandise.³ In any event, however, the hearing examiner is satisfied from the record, and so finds, that the samples obtained by the Commission's agents and tested by the Bureau of Standards were all samples of merchandise manufactured by respondents and sold to the various customers referred to above under the designation or description, on the tag, label or accompanying invoice, of 100% reprocessed wool. The testimony of the Commission's investigators combined with

² The rolls of batting, which vary from 25 to 80 yards in length, are wrapped in tissue paper and are usually packed six to the carton.

³ See particularly paragraph 17 of respondents' proposed findings.

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that of the customers from whom they obtained the samples of merchandise, invoices, packing slips and tags establishes *prima facie* that the merchandise they obtained was manufactured and sold by respondents. The evidence offered on behalf of respondents is insufficient to overcome the *prima facie* case thus established. In fact, aside from attempting to discredit the Commission's investigator Robert S. Scott, on cross-examination,⁴ there was no evidence offered by respondents which in any way suggests that the merchandise was not respondents'.

2. The second contention of respondents, and one which they seriously urged both at the hearing and in their proposed findings, is that there exists an understanding or custom in the trade that a wool product may be designated as 100% wool if it does not contain more than 5% non-wool fibers, and that consequently none of respondents' customers were deceived by the designation of the batting, which they bought from respondents, as 100% reprocessed wool. Respondents' contention that there is, in effect, a 5% tolerance in the labeling of wool products is based on a misconception of both the law and the facts. In the first place the only tolerances permitted under the Wool Products Labeling Act in the labeling of wool products are (a) where the deviation in fiber content from that stated on the label has resulted from "unavoidable variations in manufacture and despite the exercise of due care," and (b) an exemption in labeling a wool product, to the extent of 5% of the total fiber weight of such wool product, for "ornamentation." Neither of these so-called tolerances are applicable in the instant situation since there has been no showing by respondents that the variations in their product, described as 100% reprocessed wool, were due to any unavoidable variations in manufacture after the exercise of due care,⁵ or that the variations consisted of any ornamentation in the batting. In the face of the plain wording of the statute any trade practice or understanding to the contrary has no legal force or effect as a justification for the misdescription or misrepresentation of merchandise.⁶ Con-

⁴ Despite rather strenuous cross-examination of the witness Scott, the hearing examiner is satisfied from his testimony as a whole, which was largely corroborated by the testimony of respondents' customers, that the samples he obtained were from batting manufactured and sold by respondents.

⁵ Respondents did submit evidence that instructions had been given to employees that when changing from blended wool to 100% wool, the machinery used in processing the batting should be cleaned. This, however, does not establish that the deviations from the 100% wool designation resulted from unavoidable variations in manufacture since, according to one of respondents' own witnesses from the United States Testing Company, the wool content of the batting will always correspond to the fiber content of the wool stocks from which it is made.

⁶ See *F. T. C. v. Winsted Hosiery Co.*, 258 U. S. 483, 493.

cerning the contention of respondents that none of their customers were deceived by their labeling of the product as 100% reprocessed wool, it may be noted that this is immaterial since it is the tendency and capacity to deceive which constitutes the offense, and actual deception need not be shown.⁷

Even assuming, *arguendo*, that the existence of a trade understanding with respect to tolerances in wool labeling could have some legal effect, either as a defense to respondent's misbranding or as bearing on the question of public interest, the record in this case fails to establish any clear understanding or practice with respect to a 5% tolerance in the labeling of wool products. Thus while one witness stated that he understood a product could be called 100% wool if it contained in excess of 95% wool (R. 149), another witness indicated that the tolerance only applied to variances of 1 or 2% (R. 179). The main witness called by respondents for the purpose of establishing such trade understanding testified that while it was his understanding that any wool product containing up to 5% of foreign fiber could be labeled as 100% wool, it was customary in such instance to label the product as "commercially" 100% wool, otherwise the trade would understand that the 100% wool label meant what it stated. In line with the testimony of this witness, it may be noted that in none of the invoices or tags used by respondent does the word "commercial" or "commercially" appear, the merchandise being labeled unqualifiedly as "100% Reprocessed Wool."

Finally, even assuming that respondents had established the existence of a trade understanding with respect to a 5% tolerance in labeling batting and that such understanding had some legal efficacy, it would have no application in this case since all of the samples tested were found to contain in excess of 5% non-wool fibers. Unless the tests made by the National Bureau of Standards are unreliable, respondents' contention based on a so-called 5% tolerance is wholly irrelevant. Respondents refer in their proposed findings to two items as suggesting the possible unreliability of the tests conducted by the National Bureau of Standards. The first of these is the testimony of a representative of the United States Testing Company who stated that in testing batting it is sometimes necessary to test a number of samples in order to get a representative result since there may be variations of as much as 5 to 8% between two different samples from the same piece of batting. Respondents apparently regard this testimony

⁷ *F. T. C. v. Winsted Hosiery Co.*, *supra*; *F. T. C. v. Algoma Lumber Co.*, 291 U. S. 81; *Charles of the Ritz Dist. Corp. v. F. T. C.*, 143 F. 2d 676; *J. Bockenstette v. F. T. C.*, 134 F. 2d 369.

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as suggesting the unreliability of the tests conducted by the National Bureau of Standards where only two samples from each piece of batting were tested. However, the representatives of the Bureau of Standards testified that in obtaining each sample they took a number of fibers from different parts of each piece of batting tested in order to get a representative sample, and that only where the two samples tested reflect substantial variations in fiber content is it necessary to put the batting through a "carding" process in order to produce a more representative sample. The latter process was not used in this case since there was no significant variation between the two samples tested from each piece of batting. The test followed by the National Bureau of Standards is based on standard Government specifications which, according to respondents' own witness from the United States Testing Company, are substantially the same as the procedures which he follows in testing for fiber content. The examiner is satisfied as to the scientific accuracy of the methods used in, and the results achieved by, the tests conducted by the National Bureau of Standards. Respondents also rely on the testimony of the respondent Louis Silverstein that tests conducted on some of the wool stock which was later made up into batting disclosed that it was at least 95% wool. It may be noted that none of the reports of these tests were produced and no definitive testimony with respect to the results of the tests was given. In any event, whatever may have been the wool content of the samples referred to by Silverstein, there is no question but that the merchandise actually sold to the customers involved in this proceeding contained more than 5% non-wool fibers.

3. Respondents' final contention with respect to the false branding of their batting is based on an alleged guarantee which they received from their vendor, Western Wool & Fibre Company, from whom they claim they purchased substantially all of the stock which was later manufactured into batting, and sold to the customers above mentioned. This contention is based on Section 9 (a) of the Act which makes it a defense to a charge of misbranding if the person charged:

* * * establishes a guarantee received in good faith signed by and containing the name and address of the person residing in the United States by whom the wool product guaranteed was manufactured and/or from whom it was received * * *.

The evidence of a guarantee offered by respondents is twofold. First there is the testimony of respondent Louis Silverstein that a representative of the vendor, Western Wool & Fibre Company, told him that the merchandise would be marked 100% reprocessed wool and the actual content would not vary from this by more than 5%,

which was a permissible tolerance. This so-called guarantee does not meet the requirements of the Act since it is not in writing and, moreover, is not a guarantee that the merchandise would be 100% reprocessed wool, but rather that it would be at least 95% reprocessed wool. The second so-called guarantee relied upon by respondents is based upon the description of the raw material in the invoices from Western Wool & Fibre Company, covering the sale of the merchandise to respondents. In some of the invoices there is a stamped notation describing the merchandise as: "Reprocessed 100%." In a number of other invoices the following stamp appears:

"To the best of our knowledge and belief the commercial fiber content of this shipment as defined in the Wool Products Labeling Act of 1939 is as follows:

Reprocessed Wool 100%."

In the opinion of the examiner none of these notations on invoices of the Western Wool & Fibre Company constitutes a guarantee within the meaning of Section 9 of the Act since (a) they are not signed by the person purporting to guarantee the product and (b) they do not contain a statement that the wool product is not misbranded under the terms of the Act. While it may not be necessary to follow precisely the form of guarantee suggested in Rule 32 of the Rules and Regulations, the stamped notations on the invoices of Western Wool & Fibre Company do not comply with the requirements of Section 9 even under a liberal interpretation of that section. The first type of stamp, merely referring to the merchandise as "100% Reprocessed," clearly is not a guarantee. While the second type of stamp stating what the wool content is: "To the best of our knowledge and belief" is somewhat fuller, it too, in the opinion of the examiner, cannot be construed as a guarantee as to wool content, even overlooking the fact that it is unsigned. Moreover, even if the second type of invoice could conceivably be considered a guarantee, there is no showing by respondents that the samples of batting which were the subject matter of this proceeding were made from merchandise purchased under that type of invoice.⁸ In any event, even if both types of invoice could be considered as a guarantee, there is no showing that the guarantee was received "in good faith" as a representation that the merchandise was

⁸ According to the witness Silverstein, during 1951 his company purchased 444,968 pounds of wool stock from Western Wool & Fibre, 11,755 pounds from another company, and 15,851 pounds of part-wool stock from a third company. According to the testimony of Silverstein and his foreman, the batting from which the samples here involved were taken was all manufactured from the wool stock purchased from Western Wool & Fibre Company. However, this does not necessarily establish that the wool stock from which the samples were made was covered by the second type of invoice.

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actually 100% reprocessed wool since, according to the admission of respondent Silverstein, he was told by his vendor that the stock might contain up to 5% non-wool fiber.

C. Concluding findings

1. The record establishes, and it is so found by the hearing examiner, that respondents falsely and deceptively labeled or otherwise identified certain of their wool products, in the form of batting (samples of which were received in evidence in this proceeding as Commission's Exhibits 11, 12, 13 and 15), by describing them as 100% reprocessed wool, whereas in truth and in fact said products contain substantial quantities of miscellaneous fibers other than wool, as more particularly set forth in the results of the tests conducted by the National Bureau of Standards referred to above. Respondents' effort to justify their actions on the basis of the existence of an alleged understanding or practice in the trade permitting a 5% tolerance in the labeling of wool products does not constitute any legal justification for their misbranding of a wool product since the Act does not recognize any such tolerance or deviation and, moreover, is not deserving of recognition on the question of "public interest" since (a) respondents failed to establish any such trade understanding or practice and (b) all of the samples involved in this proceeding showed a deviation in excess of the alleged tolerance.

2. The second charge of misbranding is based on the fact that the invoices, packing slips and tags used by respondents in the sale and delivery of their batting contain thereon the printed statement: "Our Products Guaranteed 100% New." Respondents' explanation for the presence of this statement on these documents is that the corporate respondent had, prior to May of 1951, been manufacturing mainly cotton products and that this printed statement was intended as an explanation to the customers when they bought cotton that it was new cotton.

Since respondents' wool batting is made from reprocessed stock it clearly cannot be designated as "new," the latter designation denoting that it is composed wholly of new or virgin wool. While the invoices and packing slips also describe the product as "100% Reprocessed Wool," it is the opinion of the examiner, and it is so found, that the presence of the printed words: "Our Products Guaranteed 100% New," has the tendency and capacity to deceive and mislead. Respondents' explanation for the presence of these words does not constitute a legal defense. While the fact that the old invoices were only used temporarily during a change-over from cotton to wool products might be

taken into consideration as bearing on the question of public interest, the facts in this case do not establish that this was a temporary, passing situating, since respondents continued to use the same type of invoice, packing slip and tag from May 1951 to February 6, 1952 (the date of the last invoice received in evidence) and, so far as appears from the record, may still be using the same form. Accordingly, it is found that certain of respondents' wool products in the form of batting were misbranded within the intent and meaning of Section 4 (a) (1) of the Wool Products Labeling Act and of Rule 20 of the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively tagged, labeled or otherwise identified as 100% new materials whereas, in truth and in fact, the said products did not contain new wool, but were composed of reprocessed wool together with certain quantities of miscellaneous fiber other than wool.

3. The third form of misbranding alleged in the complaint is based on the respondents' failure to stamp, tag or label its batting, as required under Section 4 (a) (2) of the Act and the Rules and Regulations promulgated thereunder. Whereas the other two forms of misbranding discussed above involve a false or deceptive tagging or labeling, the third form alleged in the complaint is based on a failure to attach labels containing the required information as to wool content and other information set forth in Section 4 (a) (2) of the Act. The main claim of violation of Section 4 (a) (2) is apparently based on the fact that respondents have failed to place any stamp, tag, label or other means of identification on the individual pieces of batting, as distinguished from the cardboard cartons in which the rolls of batting are packed.⁹

In the opinion of the hearing examiner respondents' failure to tag or label the individual rolls of batting, as distinguished from the cartons in which the batting is enclosed for shipment to the customer, does not constitute misbranding within the meaning of Section 4 (a) (2) and the Rules and Regulations promulgated under the Act. Under Rule 15 the tag or label containing the required information may be affixed to the container in which the wool product is packed, where the product is "sold and delivered in sealed containers which remain unbroken and intact until after delivery of the product to, and receipt thereof by, the purchaser-consumer." In this case the record shows that the purchaser-consumer is a manufacturer who uses the batting in the manufacture of some other product and not for resale purposes in the same form. It also appears that the cartons are sealed and remain

⁹ As previously indicated, the rolls are enclosed in tissue paper and are packed six to the carton.

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unbroken and intact until delivery of the product to the manufacturer. It is clear, therefore, that under this rule the labeling of the carton, as distinguished from the individual rolls of batting, constitutes sufficient compliance with the Act. However, the record does show that in the case of the sales to L. Rinsky, Crown Quilting Company and Kasbar Quilting Company the cartons themselves did not contain any label or tag describing the wool content of the product therein enclosed, the only description of the merchandise being on the invoices and packing slips which were not affixed to the carton or the merchandise. It is, accordingly, found that by failing to label either the batting or the cartons in which it was enclosed, in these instances, respondents misbranded said batting within the meaning of Section 4 (a) (2) of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder.

CONCLUSION OF LAW

The acts and practices of respondents, as hereinabove found, were and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder and, by virtue of Section 3 of said Act, constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. It is accordingly concluded that this proceeding is in the interest of the public and that an order to cease and desist should issue against respondents.

ORDER

It is ordered that the respondent, Camden Fibre Mills, Inc., a corporation, and its officers, and respondents, Louis Silverstein, Raymond Silverstein and Frank N. Cooper individually, and respondents' respective representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of wool batts or battings or other "wool products," as such products are defined in and subject to the Wool Products Labeling Act of 1939, which products contain, purport to contain, or in any way are represented as containing "wool," "reprocessed wool" or "reused wool," as those terms are defined in said Act, do forthwith cease and desist from misbranding such products by:

1. Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers included therein;

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plaint in this matter by issuing in lieu thereof the proposed amended and supplemental complaint filed with and made a part of the motion, and memorandum of respondent Luria Brothers and Company, Inc., opposing said motion.

Counsel supporting the complaint in their motion state that information obtained during a supplemental investigation in this matter discloses, in their opinion, that the complaint should be amended and supplemented in certain important respects. The two principal changes are (1) the addition as parties respondent of Bethlehem Steel Corporation and its two operating subsidiaries, Bethlehem Steel Company and Bethlehem Pacific Coast Steel Corporation, and (2) the addition of Hugo Neu Corporation as a party respondent, and the inclusion of a charge of conspiracy in restraint of trade involving Hugo Neu Corporation, unnamed Japanese steel mills, and Luria Brothers and Company, Inc.

The Commission having duly considered the motion, opposing memorandum of respondent Luria Brothers and Company, Inc., and the data and information in its confidential investigational files, and being of the opinion that the allegations of the proposed amended and supplemental complaint are within the general scope of the original complaint, and having reason to believe that the respondents named in the proposed amended and supplemental complaint have engaged in the acts and practices described therein, and it appearing that it would be to the interest of the public for it to issue its amended and supplemental complaint in the form proposed:

It is ordered that the motion of counsel supporting the complaint to amend and supplement the complaint in this matter be, and it hereby is, granted.

It is further ordered that the complaint in this matter be, and it hereby is, amended and supplemented to conform to the proposed amended and supplemental complaint submitted by counsel supporting the complaint, and that a copy of the amended and supplemental complaint be served on each of the parties to this proceeding.

It is further ordered that the amended and supplemental complaint specify the 14th day of September, A. D., 1954, at 10:00 o'clock as the time, and Philadelphia, Pennsylvania, as the place when and where a hearing will be had before Hearing Examiner John Lewis.

It is further ordered that this proceeding be, and it hereby is, remanded to the hearing examiner.

Commissioner Carretta dissenting.

DISSENTING OPINION OF COMMISSIONER ALBERT A. CARRETTA

This matter came on to be heard by the Commission upon motion of counsel supporting the complaint to amend and supplement the complaint herein by issuing, in lieu thereof, the proposed amended and supplemental complaint filed with and made a part of said motion, and upon answer of respondent Luria Brothers and Company, Inc., opposing said motion.

After due consideration, the majority of the Commission decided to grant the motion of counsel supporting the complaint and ordered a copy of the amended and supplemental complaint to be served upon each of the parties to this proceeding. With this action of my colleagues, I regret that I cannot agree.

History of Case

Under date of January 19, 1954, the Commission issued its original complaint in this matter charging the respondent brokers and the respondent mills with certain violations of Section 5 of the Federal Trade Commission Act, and charging respondent Luria Brothers and Company, Inc. with certain violations of Section 7 of the Clayton Act. It can fairly be presumed that prior to the issuance of said original complaint, the Commission had been furnished sufficient factual material relative to the allegations contained in Count I of the original complaint to cause at least a majority of the Commissioners to "have reason to believe" that the then proposed respondents had been or were using an unfair method of competition in commerce. As a matter of fact, Section 5 (b) of the Federal Trade Commission Act requires the Commission to reach such a conclusion before it may issue a complaint. As to Count II of the original complaint issued on January 19, 1954, which alleges certain violations of Section 7 of the Clayton Act, it can also fairly be presumed that prior to the issuance of said original complaint, the Commission had been furnished sufficient factual material to cause at least a majority of the Commissioners to "have reason to believe" that the then proposed respondent was violating or had violated the provisions of Section 7 of the Clayton Act. As a matter of fact, Section 11 of the Clayton Act requires the Commission to reach such a conclusion before it may issue a complaint.

On or before March 10, 1954, all of the original respondents had filed responsive pleadings.

On March 15, 1954, counsel supporting the complaint filed a motion with the Hearing Examiner seeking a cancellation of the initial hearing for the following reason:

"A short time before and subsequent to the issuance of the complaint in this matter information was received by counsel supporting the complaint concerning certain practices and activities in the iron and steel scrap industry. Supplemental investigation was promptly undertaken in several areas, but it has not yet been completed and evaluated. The information thus far received, however, indicates that the investigation now being made may have a vital bearing upon the course of this proceeding.

"Under the circumstances, therefore, it is requested that counsel supporting the complaint be allowed appropriate time to study and evaluate the information now being obtained so that it may be properly integrated into their plan and schedule of procedure. This should not require more than a few weeks and should result in more orderly proceedings and in the elimination of considerable waste and duplication of effort by all parties which may otherwise occur. Counsel supporting the complaint will take appropriate steps to resume the proceeding as promptly as circumstances permit."

On March 25, 1954, the Hearing Examiner granted said motion and ordered the initial hearing cancelled subject to being rescheduled upon five days notice.

Then, under date of May 25, 1954, before the Hearing Examiner had rescheduled the hearing in this matter, counsel supporting the complaint filed two motions: the first motion was addressed to the Hearing Examiner requesting him to certify this proceeding to the Commission, and the second was addressed to the Commission requesting it to amend and supplement the complaint herein. The motion addressed to the Hearing Examiner was properly filed pursuant to Rule X of the Commission's Rules of Practice, and no opposition to said motion having been filed by any of the respondents, the Hearing Examiner, on June 7, 1954, certified the proceeding to the Commission for the purpose of having it consider a simultaneously filed motion for the issuance of an amended and supplemental complaint.

On June 11, 1954, respondent Luria Brothers and Company, Inc. filed with the Commission its answer opposing the motion to amend and supplement the complaint.

* * * * *

Without considering at this time the minor changes sought to be made by the motion filed by counsel supporting the complaint, it can be briefly stated that the proposed amended and supplemental complaint would effect the following two substantial changes:

(1) It would add as parties respondent Bethlehem Steel Corporation, Bethlehem Steel Company, and Bethlehem Pacific Coast Steel Corporation.

(2) It would add Hugo Neu Corporation as a party respondent, and include a charge of conspiracy in restraint of trade involving said Hugo Neu Corporation, unnamed Japanese steel mills, and Luria Brothers and Company, Inc.

In its motion addressed to the Commission, counsel supporting the complaint stated:

"The information obtained during the supplemental investigation referred to in our motion of March 15 discloses, *in the opinion of counsel supporting the complaint*, that the complaint in this proceeding should be amended and supplemented in certain important respects." (Italics added.)

Counsel supporting the complaint also stated in their motion:

"*It is our opinion* that the Bethlehem Steel Corporation and its two operating subsidiaries should be included in the proceedings as respondent mills. *It is also our opinion* that Hugo Neu Corporation should be included as a new respondent and that a charge of conspiracy in restraint of trade involving Hugo Neu Corporation, unnamed Japanese steel mills, and Luria Bros. & Co., Inc. should be added to the complaint." (Italics added.)

I do not doubt for a moment that counsel supporting the complaint arrived at their "*opinions*" only after careful consideration of all of the information available to them in their investigational files. But after all, the Congress of the United States authorized the *Federal Trade Commission* to issue complaints when, among other things, *the Commission* "had reason to believe" that the person, partnership or corporation charged was violating or had violated any of the provisions of an Act administered by the Commission. This authority to issue complaints cannot, in my opinion, be delegated by the Commission to its staff members. Therefore, it must be the Commission, and not counsel supporting the complaint, which must reach the "opinion" that additional parties respondent should be named or that additional charges should be included in an already issued complaint.

The proposed amended and supplemental complaint attached to the motion of counsel supporting the complaint contained references to the new respondents, but, in my opinion, did not contain sufficient information within its four corners to cause me to have reason to believe that the four above-named new respondents had violated any law administered by the Federal Trade Commission. There un-

doubtedly was additional factual information available to counsel supporting the complaint, but it was not contained in any of the papers placed before the Commission. In this connection, it is interesting to note that in the Order adopted by the majority of my colleagues granting motion of counsel supporting the complaint, it is stated:

"The Commission having duly considered the motion, opposing memorandum of respondent Luria Brothers and Company, Inc., *and the data and information in its confidential investigational files, . . .*" (Italics added.)

It is clear from the foregoing quotation that in disposing of the pending motion, my colleagues considered more than that which was actually contained in the motion filed by counsel supporting the complaint, and in the answer filed by respondent Luria Brothers and Company, Inc. This represents the area of difference between me and my colleagues. The question which the subject motion has raised is:

"After issues have been joined in a proceeding brought by the Federal Trade Commission, may the Commissioners, for any purpose whatsoever, refer to data and information in the Commission's confidential investigational files which are not part of the record either before the Hearing Examiner or before the Commission?"

My answer to this question is in the negative.

This involves the very important question of separation of functions of administrative agencies. It is not a new problem. Much has been written about it, and there are many and varied opinions. As to my own attitude, I feel that *especially* because my duties as a Commissioner involve both administrative acts and quasi-judicial acts, I want to be very careful that I do not wear both cloaks at the same time, or interchangeably to suit my convenience.

The desire to work out a more effective and more feasible method of preventing unwanted things from happening accounts for the formation of many Federal administrative agencies. The chief device for implementing the legislative process is the investigating power. But in addition to investigating suspected offenders of the law, an administrative agency such as the Federal Trade Commission also charges the suspected offender; prosecutes him; judges him; and fixes the remedy authorized by law. Thus an administrative agency is a composite detective agency, grand jury, prosecuting attorney, judge and public hangman. With all of these powers concentrated in the same individual or individuals, I am especially fearful lest one function be carried over into another to the detri-

ment of the person charged. In my opinion, it is the commingling of these functions by administrative officers and administrative agencies which has brought to the term "bureaucracy" an invidious connotation. It seems to me that we are committed to big government, and today the bulk of government is administration. Consequently, problems of administrative procedure and control, the domain of administrative law, bulk large in the immediate future. The survival of Democracy may well depend upon an orderly development of administrative law and tribunals to give effective direction to the administrative process.

The legal professions both in England and in the United States have been slow to recognize administrative law as a separate body of law. It will be remembered that in 1933, the American Bar Association created a Special Committee on Administrative Law to inquire into the practicability and desirability of divorcing quasi-judicial functions and quasi-legislative and executive functions in some or all of those administrative tribunals in which a combination of functions then existed.

Roscoe Pound has made the following indictment of the administrative process:

"Perhaps the worst feature of administrative procedure, as it has developed since 1900, results from combining or not differentiating the receiving of complaints, investigation of them, bringing and conducting a prosecution upon them, advocacy before the agency itself by its own subordinates in the course of the prosecution and adjudication. Thus the adjudication becomes one by or with the advice and assistance of those who investigated, prosecuted, and were advocates for the prosecution. Such things are in clear derogation of the fundamental maxims of justice that no one is to be judge in his own case."¹

From a recent Supreme Court decision familiar to practitioners in the field of anti-trust law, we obtain these words of caution:

"It must not be forgotten that the administrative process and its agencies are relative newcomers in the field of law and that it has taken and will continue to take experience and trial and error to fit this process into our system of judicature." *United States v. Morton Salt Company*, 338 U. S. 632, 642 (1950).

Mr. Chief Justice Hughes in 1938 stated in *Morgan v. United States*, 304 U. S. 1, 22:

"The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset,

¹ "Proposed Legislation as to Federal Administrative Procedure", 20 Indiana Law Journal (October, 1944), 45. See also address by Roscoe Pound before Phi Beta Symposium, February 20, 1939, 5 Vital Speeches (March 1939), 342; and speech before American Bar Association in Association's Report for 1941.

if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play." (Italics added.)

I should like to quote from the Final Report of the Attorney General's Committee on Administrative procedure dated January 24, 1941. The Attorney General at that time was Hon. Robert H. Jackson. Beginning at Page 203, there are printed additional views and recommendations of Messrs. McFarland, Stason, and Vanderbilt, members of the Attorney General's Committee. The first section thereof has to do with the separation of functions of administrative agencies. On page 209, the following language appears:

Shall deciding officers go beyond the formal record in contested proceedings and, after formal proceedings are commenced, consult with the agency's own prosecuting attorneys, investigators, experts, and specialists? Emphatically, we think (and the Committee fully agrees) that at this stage of procedure deciding officers should, except for proper use of official notice and clerical help, confine their consideration strictly to matters of record produced during formal proceedings.

It is this point which I am making in the subject proceeding—inasmuch as issues were joined after the issuance of the original complaint, the Commission was estopped to consider anything outside of the formal record before it in disposing of the subject motion. If the Commission can justify its recourse to data and information in its confidential investigational files in this case, why would it not also be able to justify recourse to such information after a proceeding has been terminated before the Hearing Examiner and is on appeal to the Commission from the decision of the Hearing Examiner? I believe it is wrong in both instances, and that once issues have been joined in any formal proceeding brought by the Commission, the Commission from then on may act only in its quasi-judicial authority and never "swap cloaks" for purposes of expediency.

In the subject case, there is no doubt in my mind that counsel supporting the complaint have additional information to that disclosed in the subject motion and in the proposed amended and supplemental complaint. In my opinion, said counsel and all counsel in future cases should submit to the Commission at least enough factual information to cause the individual Commissioners to have reason to believe that the law has been or is being violated. On the basis of the formal documents before me in this case, I can reach no such conclusion and inasmuch as I have not resorted to any data and information in the confidential investigational files of the Commission, I must vote to

deny the motion of counsel supporting the complaint seeking the issuance of an amended and supplemental complaint.

SPECIAL CONCURRING OPINION OF COMMISSIONER LOWELL B. MASON

I concur with the majority view in the above case.

When a complaint is amended to include new parties and new charges either before or after issue is joined (but prior to trial), the Commission is functioning administratively, not judicially. Accordingly, we must give respondents those protections afforded them as to notice and opportunity to plead which are set out in Section 5 of the Federal Trade Commission Act. The order here does that. To do more would invest this part of the proceedings with an adjudicatory character which, in my opinion, it does not have.

I am mindful of the dangers inherent in any Government agency where the prosecuting function is closely aligned to the judicial process. Our ancestors looked upon a wedding of these functions with a bilious eye. Nevertheless we are, as the able dissent graphically pictures us, "a composite detective agency, grand jury, prosecuting attorney, judge and public hangman" (the latter perhaps only in a poetic sense).

Keeping in mind the historic tyrannies such misalliances have engendered in the past, I agree with the dissenting viewpoint that strict boundary lines between diverse functions must be scrupulously respected.

Perhaps this is our saving grace for, to use a homely metaphor, the combinations of functions within the Commission does not result in an entirely new single element such as you get when you mix sour milk with baking soda, sugar and flour to produce a cake. In a cake all the ingredients lose their original characteristics and become one.

As litigants will testify, there is nothing like cake about the Federal Trade Commission. It is more like a combination of clams, oysters, fish, lobsters and whatever else goes into a bouillabaisse. No matter how you cook a bouillabaisse, your end product tastes like and still is clams, oysters, fish, lobsters and whatever else goes into that kind of a soup.

So with the Commission, he who tastes its different functions must find each distinctive and apart, and no amount of cooking should blend them into one. As prosecutors, we are still prosecutors. As judges, we are still judges. The difficulty comes when we or litigants get confused as to which function we are performing at any given time.

For the Commission never gets away from any of its regalia. Look deep down into a Commissioner and you will still be able to recognize his policeman's uniform, his judge's robe and sometimes even his sheriff's star. But which costume goes on top is not set by the calendar or the timing sequence of a litigation. Each is donned not at our convenience, but by the mandates of the statute.

For instance, we cannot say that once a complaint is issued we die as administrators and are born as judges, with no chance of ever resurrecting the former character. For example, after weeks of trial during which the Commission sits in its judicial function, the attorney in charge of the complaint and respondent's counsel often come before us with a proffered settlement. At this point we drop our role as judges, and acting in our administrative capacity, consider their proposal. Thus our choice of function is determined not by the sequence of trial, but by the type of work the exigencies of litigation put in front of us.

In the instant case the order discloses that the Commission has considered the "data and information in its confidential investigational files." This serves notice on the world that we are acting as administrators, for no honest judge would peek into undisclosed records when formulating a judicial decision. So then as administrators we came to the conclusion that "having reason to believe that the respondents named in the proposed amended and supplemental complaint have engaged in the acts and practices described therein, and it appearing that it would be to the interest of the public for it to issue its amended and supplemental complaint in the form proposed:" we issued the instant order authorizing service of the new complaint on old and new parties.

Borrowing an idiom from the dissent I would say, "Here we are wearing our administrator's hat, not our judicial robes."

Perhaps if I were writing the order myself I would include that we did it neither on the motion nor the opposing motion of the parties litigant, for such consideration gives the appearance at least of basing our decision on the weighing of adversary contentions. Be that as it may; this order was arrived at not through the judicial but through the administrative process.

The danger pointed out in the dissenting opinion that the various functions may become confused unless separated by sequences may be very real, but it is one which our congressional creators must have long considered and taken as one of the calculated risks which cannot be avoided in administrative law.

Complaint

IN THE MATTER OF

SUNSHINE BISCUITS, INC., STATLER MANUFACTURERS
CORP., STATLER DISTRIBUTORS, INC., AND LAW-
RENCE S. REISS

PARTIAL CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 2 (A) OF THE CLAYTON ACT AS AMENDED, AND OF THE FEDERAL
TRADE COMMISSION ACT¹

Docket 6191. Complaint, Mar. 11, 1954—Decision, July 20, 1954

Partial consent settlement order requiring Sunshine Biscuits, Inc., the second largest producer of bakery packaged food products in the United States, with gross sales for 1952 of about \$120,000,000, to cease selling or contracting to sell its products on the condition that purchasers not use or deal in the merchandise of any of its competitors, and entering into or carrying out agreements with any seller of automatic vending machines that the latter's vendees, operators, etc., would dispense through said machines exclusively Sunshine bakery products; and requiring Statler Manufacturers Corp., a seller of some 7,000 automatic vending machines located throughout the country, with gross annual sales of about \$500,000, to cease selling, or making or enforcing any contract for the sale of, vending machines on the condition that purchasers dispense through the machines exclusively Sunshine bakery products, among other things.

Before *Mr. John Lewis*, hearing examiner.

Mr. William H. Smith and *Mr. Brockman Horne* for the Commission.

Mr. A. W. DeBirny, of Long Island City, N. Y., and *Mr. Robert E. Freer*, of Washington, D. C., for Sunshine Biscuits, Inc.

Mr. Avel B. Silverman, of New York City, for Statler Manufacturers Corp., Statler Distributors, Inc. and Lawrence S. Reiss.

COMPLAINT

The Federal Trade Commission, having reason to believe that Sunshine Biscuits, Inc., hereinafter more particularly designated and described, has violated and is 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, and pursuant also to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Commission, having reason to believe that said Sunshine Biscuits,

¹ Count I of the complaint, charging price discrimination in violation of Sec. 2 (a) of the Clayton Act as amended by Sunshine in the sale of its products, was settled a year later by a consent order to cease and desist, effective July 30, 1955, 52 F. T. C. —.