

Decision

IN THE MATTER OF
ADVERTISING SPECIALTY NATIONAL ASSOCIATION
ET AL.

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 5952. Complaint, Feb. 7, 1952—Decision, Mar. 4, 1955

Order requiring a trade association of manufacturers and jobbers of advertising specialties, its jobber members and its manufacturing members who sold to jobbers, to cease acting in concert to secure resale price maintenance for the purpose of eliminating price competition among jobbers in each manufacturer's product; and dismissing the complaint as to all the direct-selling manufacturer members of respondent association who did not sell to jobbers.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Rufus E. Wilson and *Mr. George W. Williams* for the Commission.

Kittelle & Lamb, of Washington, D. C., for respondents generally.

Mendelsohn, Lane & Friedman, of Cleveland, Ohio, for Kromex Sales Co.

DECISION OF THE COMMISSION

The Commission, having fully considered the entire record herein including the transcript of the hearings (which shows that all members of Respondent Association were represented by counsel), the briefs of the parties and oral argument of counsel, hereby finds that this proceeding is in the interest of the public and makes this, and the accompanying opinion, its findings as to the facts and conclusion.

Respondent Advertising Specialty National Association, a non-profit corporation, is a trade association of the respondent manufacturers and jobbers of advertising specialties, organized and existing under the laws of the State of Illinois with its principal office located at 1346 Connecticut Avenue, N. W., Washington, D. C. The jobbing members and the member manufacturers supplying jobbers of said Association are numerous and changing.

The Named Jobber Respondents

The following listed respondent jobber members are representative of all of the jobber members of the respondent Association at the time of the issuance of the complaint, as named in the 1952 Membership Roster (Com. Ex. 45), and who are all respondents herein.

Rowan Printing Company, a North Carolina corporation, with its office and principal place of business at Salisbury, North Carolina.

The Geo. H. Jung Co., an Ohio corporation with its office and principal place of business at 312 East Court Street, Cincinnati, Ohio.

Harry K. Voelp, Inc., a Pennsylvania corporation, with its office and principal place of business at 134 Fourth Avenue, Pittsburgh, Pennsylvania.

Terra Haute Advertising Company, Inc., an Indiana corporation, with its office and principal place of business at 1317 Poplar Street, Terre Haute, Indiana.

Novelty Advertising Company, an Ohio corporation, with its office and principal place of business at 1148 Walnut Street, Coshocton, Ohio.

Respondents Margaret B. Rosen, W. Wells Woodward and Harry C. Lisle, who were jobber members of said Association in 1949, have not been members of the Association since prior to the issuance of the complaint herein. It is believed that the complaint, therefore, should be dismissed as to these three respondents. The term respondents as used hereinafter shall not include these individuals.

The Named Manufacturers Supplying Jobbers, Respondents

The following listed respondents are representative of all of the manufacturers supplying jobbers, who were members of the respondent Association at the time of the issuance of the complaint, as named in the 1952 Membership Roster (Com. Ex. 45), and who are all respondents herein.

The H. L. Moore Company, Inc., a Pennsylvania corporation, with its office and principal place of business located at Cochranon, Pennsylvania.

The George F. Cram Company, Inc., an Indiana corporation, with its office and principal place of business located at 730 East Washington Street, Indianapolis, Indiana.

Western Plastic & Specialty Co., Inc., an Ohio corporation, with its office and principal place of business located at 1130 Williamson Building, Cleveland, Ohio.

Kromex Industries, Inc. (Formerly Kromex Sales Company), and Ohio corporation, with its office and principal place of business located at 880 East 72nd Street, Cleveland, Ohio.

Paul C. Johnson and Esther G. Johnson, individually and as co-partners trading as J. E. Johnson Printing Company, with their office and principal place of business located at 8522 Lorraine Avenue, Cleveland, Ohio.

Bernet B. Lewis, individually, and trading as Advertising Specialty Company, having his office and principal place of business at 741 Washington Street, Indianapolis, Indiana.

Robert D. Phelps and John M. Phelps, individually and as copartners trading as Phelps Manufacturing Company, having their office and principal place of business at 916-922 North 15th Street, Terre Haute, Indiana.

Messenger Corporation, an Illinois corporation, with its office and principal place of business located at Auburn, Indiana.

Sanders Manufacturing Company, a Tennessee corporation, with its office and principal place of business at 122-126 Fourth Avenue, South, Nashville, Tennessee.

The Elliott Calendar Company, an Ohio corporation, with its office and principal place of business at 1148 Walnut Street, Coshocton, Ohio.

Perry L. Engel and Ray Thompkins, individually and as copartners trading as the Coshocton Novelty Company, having its office and principal place of business at Eleventh and Adams Street, Coshocton, Ohio.

The Guy S. Meek Calendar Co., an Ohio corporation, with its office and principal place of business at 1397 Walnut Street, Coshocton, Ohio.

The J. F. Meek Company, an Ohio corporation, with its office and principal place of business at 129½ South Fifth Street, Coshocton, Ohio.

The Beach Leather Co., Inc. (formerly known as The Beach Leather Company), an Ohio corporation, with its office and principal place of business at 1301 Walnut Street, Coshocton, Ohio.

Francis & Lusky Company, Inc., a Tennessee corporation, with its office and principal place of business at 1223-1225 Broadway, Nashville, Tennessee.

Kingston Pencil Corporation, a Tennessee corporation, with its office and principal place of business at 320 North Market Street, Chattanooga, Tennessee.

Daniel L. Townes, individually and trading as Shelbyville Pencil and Novelty Company, having his office and principal place of business at Shelbyville, Tennessee.

The Chaney Manufacturing Company, an Ohio corporation, with its office and principal place of business at 567 East Pleasant Street, Springfield, Ohio.

The Ohio Thermometer Company, an Ohio corporation, with its office and principal place of business at 33 Walnut Street, Springfield, Ohio.

Kurtz Bros., a Pennsylvania corporation, with its office and principal place of business at Fourth and Reed Streets, Clearfield, Pennsylvania.

Respondent Sidney S. Zentner, a member of the respondent Association in 1949, has not been a member since prior to the issuance of the complaint herein. It is believed that the complaint, therefore, should be dismissed as to him. The term respondent as used hereinafter shall not include this individual.

Respondents Scripto, Inc., Shaw-Barton, Inc., and Kemper-Thomas Company are shown by the record to be direct selling manufacturers only. For the reasons stated in the accompanying opinion of the Commission, it is believed that the complaint should be dismissed as to these respondents and to all other unnamed respondent manufacturing members of the Association shown in the 1952 Membership Roster (Com. Ex. 45) to have sold their products directly only and who are not shown to have sold at all through jobbers. The term respondents as used hereinafter shall not include any of these said direct selling manufacturers.

The Named Individual Respondents

Respondent Russel M. Searle is the Secretary of the respondent Association, has been active in all of its affairs, and has participated in the acts and practices hereinafter found to be illegal.

Respondent C. A. Peck, an individual, was President of Newton Manufacturing Company, Newton, Iowa, an unnamed jobber respondent herein, a Director and Chairman of the Executive Committee of the respondent Association during the time the acts and practices hereinafter found to be illegal occurred.

Respondent H. K. Atkins, an individual, was Treasurer of Winthrop-Atkins Co., Inc., 151 Pierce Street, Middleboro, Massachusetts, an unnamed respondent manufacturer supplying jobbers, a Director and member of the Executive Committee of the respondent Association during the time the acts and practices hereinafter found to be illegal occurred.

Respondent H. R. LeRoy, an individual, was President of LeRoy, Inc., an unnamed respondent manufacturer supplying jobbers, and a jobber and a Director of respondent Association during part of the time the acts and practices hereinafter found to be illegal occurred.

Respondent F. P. Spikins, an individual, was President of Bagley and St. Clair, an unnamed respondent manufacturer supplying jobbers, and a member of the Executive Committee during part of the time the acts and practices hereinafter found to be illegal occurred.

Respondents R. J. Bernard, H. E. Kranhold, George E. Wood, J. S. Shaw (erroneously named in the complaint as J. W. Shaw), and J. L. Turner were officials of direct selling manufacturer respondents which did not sell to jobbers. Respondents C. N. Montanye was an official of a company which withdrew from membership in respondent Association prior to the issuance of the complaint herein. It is believed, therefore, that the complaint should be dismissed as to these respondents. The term respondent as used hereinafter shall not include the individuals named in this paragraph.

Commerce and Competition

The respondent member manufacturers and member jobbers of said respondent Association, in the regular course and conduct of their respective businesses, as hereinbefore described, caused the aforementioned advertising specialty products, when sold, to be shipped or otherwise transported to the purchasers thereof located in the States of the United States and in the District of Columbia other than in the State of origin of said shipment. Said respondents have for many years last past carried on and are now carrying on a constant course of trade in commerce in said products between and among the various States of the United States and in the District of Columbia.

Respondent member manufacturers and member jobbers of said respondent Association are in competition with one another and other in manufacturing, selling and otherwise distributing the products herein described and referred to as "advertising specialties," including calendars, in commerce, within the intent and meaning of the Federal Trade Commission Act, except insofar as actual and potential competition has been hindered, frustrated, lessened, restricted, restrained or eliminated by the acts and practices found herein.

Acts and Practices

The respondent member manufacturers supplying jobbers and member jobbers and the individual respondents, acting through and with the assistance of the respondent Association and otherwise, in the manner described in the accompanying opinion of the Commission, have been parties to a planned common course of action and agreement to eliminate price competition with and among the jobbers in the sale of each manufacturer's products by:

1. Requiring respondent member manufacturers to sell advertising specialties to respondent member jobbers on a list price basis only.
2. Requiring respondent member jobbers to resell their products to

Order

51 F. T. C.

the ultimate consumer at prices fixed or established therefor by respondent member manufacturers.

3. Requiring those respondent member manufacturers who sell directly through their own salesmen, as well as to jobbers, to maintain the same list prices for their products on their direct sales as are furnished to respondent member jobbers.

Although, in most cases, the recommendations of the Jobbers Group that the Manufacturers supplying Jobbers establish and maintain resale list prices were carefully worded, it is clear that such action was insisted on by the Jobbers Group. Such collective action by a group of jobbers which constitutes a substantial part of this market had the practical effect of requiring this action by the manufacturers supplying jobbers.

Each of the manufacturers supplying jobbers and jobber members of respondent Association have been informed of the acts and practices engaged in by it in furtherance of said planned common course of action by attendance at meetings, or by being sent Association manuals, bulletins or other notices.

The aforesaid acts, practices, and methods of respondents are all to the prejudice of the public and have a substantial and dangerous tendency and capacity to hinder, lessen, restrict, and restrain competition in commerce in the sale of advertising specialties.

CONCLUSION

The aforesaid acts, practices and methods of respondents are all unfair acts and practices in commerce within the intent and meaning of section 5 of the Federal Trade Commission Act.

ORDER

1. *It is ordered*, therefore, That the jobber respondents Rowan Printing Company, Geo. H. Jung Co., Harry K. Voelp, Inc., Terre Haute Advertising Company, Inc., Novelty Advertising Company, and each of the jobber members of the respondent Advertising Specialty National Association, as named in the 1952 Membership Roster, and their respective officers, representatives, agents, and employees, in or in connection with the offering for sale, sale and distribution of advertising specialties in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in or carrying out any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said jobber respondents

or between or among any one or more of said jobber respondents and other jobbers not parties hereto, to do or perform any of the following acts or practices:

(a) Demanding that a manufacturer of said products establish or maintain resale list prices for any of its said products.

(b) Threatening to boycott a manufacturer of said products which does not establish or maintain resale list prices for any of its said products.

(c) Reporting price cutting of a manufacturer's list prices established as a result of demands or threats of a group of jobbers.

(d) Eliminating, lessening or suppressing price competition between or with jobbers of any manufacturer's said products.

2. *It is further ordered*, That the respondent manufacturers supplying jobbers, H. L. Moore Company, Inc., George F. Cram Company, Inc., Western Plastic & Specialty Co., Inc., Kromex Industries, Inc., Paul C. Johnson and Esther G. Johnson, individually and as copartners trading as J. E. Johnson Printing Company, Bernet B. Lewis, individually and trading as Advertising Specialty Company, Robert D. Phelps and John M. Phelps, individually and as copartners trading as Phelps Manufacturing Company, Messenger Corporation, Sanders Manufacturing Company, The Elliott Calendar Company, Perry L. Engel and Ray Thompkins, individually and as copartners trading as Coshocton Novelty Company, The Guy S. Meek Calendar Co., The J. F. Meek Company, Beach Leather Co., Inc., Francis & Lusky Company, Inc., Kingston Pencil Corporation, Daniel L. Townes, individually, and trading as Shelbyville Pencil and Novelty Company, The Chaney Manufacturing Company, Ohio Thermometer Company and Kurtz Bros., and each of the manufacturers selling to jobbers, who are named in the 1952 Membership Roster of the Advertising Specialty National Association, and their respective officers, representatives, agents, and employees, in or in connection with the offering for sale, sale or distribution of advertising specialties in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from individually or collectively:

Participating in, cooperating with, assisting in, or carrying out any planned common course of action, understanding, agreement, combination or conspiracy of jobbers, prohibited by paragraph 1 of this order.

Provided, however, That nothing herein shall be interpreted as prohibiting a manufacturer from establishing and maintaining resale prices on its products in any manner exempted from the prohibitions of the Federal Trade Commission Act by the McGuire Act.

3. *It is further ordered*, That the respondent Advertising Specialty

Opinion

51 F. T. C.

National Association and respondents Russell M. Searle, C. A. Peck, H. K. Atkins, H. R. LeRoy, and F. P. Spikins and the directors, officers and representatives of said respondent Association do forthwith cease and desist from, individually or collectively, participating in, cooperating with, or assisting in the carrying out of any planned common course of action, understanding, agreement, combination or conspiracy of jobbers prohibited by paragraphs 1 or 2 of this order.

4. *It is further ordered*, That the complaint be, and it hereby is, dismissed as to respondents Margaret B. Rosen, W. Wells Woodward, Harry C. Lisle, Sidney S. Zentner, Scripto, Inc., Shaw-Barton, Inc., The Kemper-Thomas Company, R. J. Bernard, H. E. Kranhold, George E. Wood, J. S. Shaw, J. L. Turner, C. N. Montanye and all of the direct selling manufacturer members of the respondent Association who do not sell to jobbers.

5. *It is further ordered*, That the respondents 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 this order.

Commissioner Gwynne not participating as he did not hear oral argument and Commissioner Secrest not participating as oral argument was heard in this matter prior to his appointment to the Commission.

OPINION OF THE COMMISSION

Chairman HOWREY delivered the opinion of the Commission:

The complaint in this case charges that the Advertising Specialty National Association, a trade association of manufacturers and jobbers of advertising specialties, its members and certain individuals who have been active in its affairs, have been parties to an unlawful combination to eliminate competition in the sale of their products. The complaint specifically names twenty-three manufacturers, eight jobbers and eleven individuals as respondents and as representatives of the other members of the Association. Answers were filed by all of the named respondents denying the charges. Thereafter, fourteen days of hearings were held in Washington, D. C., during which considerable testimony and a large number of documents were presented in support of and in opposition to the allegations of the complaint.

Upon consideration of the case on the merits, the hearing examiner concluded that the record did not establish the existence of any illegal agreement or combination in restraint of trade. The proceeding is now before the Commission upon appeal from his initial decision dismissing the complaint.

Respondents are members of an unusual industry. They produce and sell hundreds of products, all having a common purpose—good will advertising. These products include calendars, pencils, letter openers, yardsticks, key cases and other articles of many kinds and descriptions. The essential features of advertising specialties are that they are given free by the buyer to the ultimate user and that they bear the advertising imprint of the giver. Prices are determined more by the advertising value of the product than upon the basis of its own utility. The product provides “billboard” space, so to speak, for the advertiser. The products of the different manufacturers, generally, are not comparable; they usually vary as to type, shape, appearance or value. Because of this variety in the products, there could not be much price uniformity between manufacturers’ products. Further the record shows there is a high degree of non-uniformity in price even between those products which are comparable. Competition between manufacturers is largely in ideas rather than in price.

The respondent Advertising Specialty National Association is composed of three classes of members: direct selling manufacturers, manufacturers who supply jobbers, and jobbers. In recent years the Jobbers Group and the Manufacturers Supplying Jobbers Group have each met separately and discussed the problems affecting their particular group. There have been no group meetings of the direct selling manufacturers. All classes of members attend the Association’s joint meetings. In 1951 eighteen direct selling houses with annual sales of \$72,195,744 were members of respondent Association. In the same year, 132 manufacturers who supply jobbers having total sales of \$29,943,988, and 144 jobbers with sales to consumers of \$17,066,528, were also members of respondent Association. The annual sales of advertising specialties for the entire industry were estimated at \$300,000,000.

The complaint alleges that these various classes of respondents have all combined and agreed to restrain competition and that they have used the Association as an instrumentality for the accomplishment of this purpose by taking joint action at Association meetings and by distributing and recommending to the members a jobber’s and a manufacturer’s Manual.

The complaint sets out a number of specific practices engaged in by respondents in formulating and carrying out their combination. In summary, those alleged practices consisted of requiring respondent manufacturers to establish and maintain consumer list prices on the products they sell to jobbers and requiring the jobbers to resell their products to the consumers at the resale prices so fixed by the manu-

facturers; requiring uniform practices as to discounts to jobbers, compensation to salesmen, anticipatory discount schedules to ultimate purchasers, free goods and charges for sketches and c. o. d. shipments; and preventing member manufacturers from selling to jobbers who are not members of the Association and restricting membership to those jobbers with whom respondents were willing to compete.

There is no charge of price fixing between the respondent manufacturers. The price competition with which this proceeding is concerned is between jobbers selling the products of the same manufacturer. As each of the manufacturers who supply jobbers sells its products to many different competing jobbers, there is competition between the jobbers in the sale of the identical product made by the same manufacturer. Price cutting by one jobber on such merchandise directly affects other jobbers competing in the sale of the same products.

The minutes of the Jobbers Group of the Association show that at practically every meeting there was a discussion of such price cutting. These jobbers, acting collectively at Association meetings, passed and submitted to the Manufacturers Supplying Jobbers Group resolutions urging these manufacturers to establish consumer list prices and to require that their list prices be maintained. The manual and minutes of their meetings show that respondent manufacturers who supply jobbers concurred in the objectives of these resolutions. Respondents contend that the resolutions of the jobbers and the action by the manufacturers' group did not constitute agreements to maintain list prices but were merely expressions by the individuals present that they recognized that maintenance of list prices was a sound business practice and one which insured compliance with the Robinson-Patman Act.

The hearing examiner found that no agreement existed between the manufacturers to establish consumer list resale prices for their jobbers nor to require the jobbers to resell at those prices. He recognized the existence of documentary evidence from which such an agreement could be inferred but refused to draw the inference principally because the prices established by each manufacturer were prices vertically fixed and did not result in price uniformity among the respondent manufacturers. He did not specifically discuss the evidence of agreement between respondent jobbers, nor the resolutions of the Jobbers Group and the Manufacturers Supplying Jobbers Group to establish and maintain resale prices for the purpose of eliminating price cutting on the jobber level.

The complaint charges that all of the respondents, jobbers and manufacturers, entered into a planned common course of action to re-

quire the jobbers to sell their products at the resale prices established by the manufacturers. As discussed hereafter, joint action was taken by the Jobbers Group and the Manufacturers Supplying Jobbers Group at Association meetings as to resale price maintenance. The facts as to what occurred at the meetings are clearly set out in the minutes. There is little dispute as to such facts. The principal issue is whether or not respondents' group action constituted an agreement in restraint of trade.

The record shows that in 1939 officials of the Association mistakenly concluded that sound and practical operations under the Robinson-Patman Act required a manufacturer of advertising specialties to establish and maintain the prices at which its products were to be sold to the ultimate consumer by its jobbers. A resolution to this effect was unanimously adopted at the General Membership Meeting of the Association on October 4, 1939.

Periodically, the Jobbers Group of the Association recorded its desire to maintain manufacturers' published prices and passed resolutions requesting the Manufacturers Supplying Jobbers Group to establish resale list prices, to demand adherence to them by jobbers, and to require their own salesmen, when selling direct to the consumers, to sell at the list prices.

A typical reaction by the manufacturers group was to accept the spirit of the request, to state they would take appropriate steps, and to reaffirm their Robinson-Patman Act resolution. Price cutting from established resale prices was discussed at a joint meeting of the Association with it being emphasized that both jobbers and manufacturers should see to it that they were maintained. The manufacturers group of the Association in its Manufacturers' Manual recommended to manufacturer members that they maintain their resale prices and eliminate price cutting. The jobbers Manual of Practices put out by the Association also recommended to jobbers that they maintain list prices and report jobbers who cut prices. The foreword of the manual contains a statement that it sets forth the majority opinion of the jobber members of the Association.

Increased price cutting through entry of new manufacturers into the field would periodically cause the Jobbers Group to take action. Policing of price cutting was frequently discussed at jobbers meetings with the consensus of the meetings being that instances of price cutting should be reported to the manufacturer involved so that he could take corrective steps. In such cases the manufacturer usually contacted the accused jobber and endeavored to eliminate his price cutting. Campaigns were conducted with approval of both the jobbers

Opinion

51 F. T. C.

and manufacturers to discourage manufacturers from selling to jobbers at net prices without establishing and maintaining consumer list prices. In this same connection the Secretary of the Association, at the request of the Jobbers Group, developed a form letter which was sent to any manufacturer selling an advertising specialty at a net price to a jobber without establishing a consumer list price. This letter contained the following statements:

"The purpose of this letter is to tell you of the jobber's disfavor of net prices and to show you the traditional, desired and safe method of presentation of prices to the advertising specialty industry. This action was requested at the recent meeting of the Jobbers Group of the Association.

"The established jobber knows that any advertising specialty sold on a net price basis very soon becomes a 'price football'—it will be sold at all kinds of prices—and that the salesmen's commission as well as the jobber's margin suffer thereby. The result is that products presented at a net price to jobbers are avoided by established jobbers. Selling effort is put on products that are presented in the usual manner and which, as a result, have greater stability.

"The worthwhile and responsible jobber will not handle a line unless the manufacturer sets and maintains the price. He cannot afford to put his selling efforts behind a product which is unstable pricewise.

"There is another reason, too, why 'net prices' are not acceptable. It is a legal reason and is based on federal law—the Robinson-Patman Act—popularly known as the anti-price-discrimination law. In view of established selling methods in the advertising specialty industry, this law requires that the manufacturers' established price be maintained. Hence, the effect of the law is that the manufacturer is responsible for the price at which his goods are sold. It is the manufacturer's responsibility to establish his prices to the ultimate buyer—the advertiser—and to insist that such prices are maintained."

The minutes of a meeting of the Jobbers Group and those of a meeting of the Manufacturers Supplying Jobbers Group show that one of these campaigns to induce manufacturers to establish and maintain consumer list prices had produced "most salutary results."

The record indicates that virtually all of the manufacturers in this field do establish and maintain consumer list prices. There is some price cutting by some jobbers, but only in a small percentage of their sales.

These facts establish that the jobbers have acted in concert through the Association and with their suppliers—to secure resale price maintenance for the purpose of eliminating price competition among them-

selves in each manufacturer's products, and that their actions have had a substantial tendency to eliminate price competition among themselves at the consumer level.

This result has been reached with full recognition of the fact that all parties said they believed that the Robinson-Patman Act required manufacturers of advertising specialties to establish resale prices and to maintain them. Products were shipped directly from the manufacturers to the ultimate customer on the jobber's order and, although the sale was to the jobber who resells the products, this method of delivery allegedly caused the belief in the industry that the manufacturer would be liable for any price discrimination by its jobbers. Respondents claim to have been acting throughout on this belief. This does not justify, however, the jobber's concerted action to eliminate price cutting. A mistaken belief that an action is proper does not legalize it. Participation by jobbers in an agreement such as this to suppress price competition between themselves is an unreasonable restraint of trade even though the parties to the combination may have believed their actions were legal.

An additional argument is made that respondents' acts in connection with resale price maintenance were permitted by the Federal Fair Trade Acts. The McGuire Amendment to the Federal Trade Commission Act exempts certain resale price maintenance agreements. However, it provides that nothing therein shall make lawful agreements between competitors, such as the jobbers herein, who are selling on the same competitive level. Similar provisions in the Miller-Tydings Amendment to the Sherman Act have been interpreted as not permitting a combination of producers, wholesalers and retailers to fix and maintain resale prices wherein the retailers and wholesalers agreed to persuade and compel the producers to establish and maintain agreed upon resale prices by entering into formal fair trade contracts. *U. S. v. Frankfort Distilleries, Inc.*, 324 U. S. 293, 296 (1945). The facts in this case can be distinguished but the *Frankfort* decision clearly establishes that a combination including competing retailers to eliminate price competition on the retail level by causing the producers to establish and maintain resale prices is not legalized by resale price maintenance statutes. Here the jobbers, acting jointly through the Association, persuaded producers to agree collectively to take action to establish and maintain resale prices so as to eliminate price cutting between the jobbers. Such concert of action to suppress price competition between jobbers does not come within the exemption of the McGuire Act.

The manufacturers who supply jobbers by accepting as a group the

Opinion

51 F. T. C.

jobbers' joint request that they establish and maintain consumer list prices and in stating that they would take appropriate steps, thereby agree to establish and maintain resale prices. The manufacturers acted to help the jobbers perfect their joint efforts to eliminate price cutting with full knowledge of their purpose. At one joint meeting of the Association, for instance, the manufacturers and jobbers participated in a lengthy discussion as to ways and means of policing price cutting. Because the problem affected the various manufacturers differently, it was concluded that each manufacturer should decide how to police his own prices. Where a jobber reported an instance of price cutting to a manufacturer, the latter usually contacted the jobber doing the cutting and endeavored to have it eliminated.

Upon this record we feel compelled to disagree with the hearing examiner and to hold that respondent jobbers and the respondent manufacturers supplying them participated in an illegal combination, as alleged in the complaint. This is not true as to respondent direct selling manufacturers who did not participate in this joint action.

As to those allegations concerning alleged agreements to prevent sales to jobbers who were not members of the Association, the hearing examiner correctly held they were not established by the evidence. Agreements were reached as to what classes of business organizations were eligible for membership in the Association as jobbers, but there is a failure of proof as to agreement to boycott non-member jobbers. In fact the record shows the contrary, namely, that respondent manufacturers sold freely to non-member jobbers.¹

The record further fails to show any illegal agreement as to the remainder of the practices alleged in the complaint, for the reasons adequately set out by the hearing examiner in his initial decision.

The appeal from the initial decision is granted as to the issue of concert of action between respondent jobbers and the respondent manufacturers who supplied them to suppress price cutting through resale price maintenance. In all other respects the appeal is denied.

SPECIAL CONCURRING OPINION

By MASON, Commissioner.

I concur in the decision of the Commission. No respondents were tried in absentia. Members of the Association not named in the

¹ The \$17,066,526 in sales by respondent jobbers at consumer prices presumably does not even equal one-half of the \$29,943,988 in sales by respondent manufacturers supplying jobbers, as the manufacturers' sales are in terms of invoice prices to the jobber and reflect the discount granted (Tr. 1427). Thus, it appears that over one-half of these manufacturers' sales were made to non-member jobbers.

caption of the complaint were represented by counsel of record and took part in the proceedings.

NOTE. The initial decision, after setting forth the nature of the complaint and the numerous practices which respondents were alleged to have engaged in pursuant to their said unlawful concert of action, is as follows:

The industry is an uncommon one. Although it sells merchandise, the merchandise is incidental to the purpose for which it is bought, namely, advertising. The merchandise must be geared to the message which the customer desires to convey to the ultimate donee. The products are varied: calendars, pencils, thermometers, leather products, yardsticks, paint paddles, cigarette lighters, knives, letter openers, combs, key cases, notebooks, desk sets, refrigerator dishes, windshield scrapers, most of which are imprinted, of course, with the name of the donor for the obvious purpose of advertising his business. They are not homogeneous, nor even for the most part, of like grade and quality. Manufacturers sell either direct to such donors or through jobbers who, in turn, sell to donors. From the evidence it is apparent that the advertising service is more important than the sale of merchandise and that the sale is part of an advertising plan. A single manufacturer customarily sells through several hundred jobbers and on the other hand, a single jobber frequently represents several hundred manufacturers in order to have as wide a selection of articles with donee appeal and advertising message at his command as possible. Samples are supplied to jobbers by manufacturers as are catalogs and price sheets. Suggested selling prices for each product usually appear thereon as well as letter symbols which indicate to the jobber the percentage of discount from the suggested selling price which is to be the jobber's compensation. The jobber typically does not carry any stock of such merchandise or physically handle advertising specialties. When he secures an order it is written up in his office and transmitted to the manufacturer of that product and, if accepted, the product is then manufactured with the advertiser's name imprinted thereon and shipped directly by the manufacturer to the customer in the jobber's name. Invoicing is to the jobber at the suggested selling price less the jobber's discount, responsibility of collection of sale price and the assumption of credit risk being upon the jobber. The jobber's salesman is compensated by a portion of the difference between the suggested selling price and the invoice price to the jobber agreed upon between him and his employer jobber. Direct selling houses eliminate jobbers and compensate their salesmen on a commission basis.

The complaint rates largely on inferences claimed to arise from the

language appearing in the minutes, bulletins, constitution, by-laws, creed, Manufacturers' and Jobbers' Manuals of ASNA. An inference of agreement could reasonably be drawn from several excerpts from these two Manuals, such as that "it was agreed that a particular recommendation be followed" or that a particular "recommendation was adopted" but, on the whole, after reading all the voluminous documentary evidence, it appears to the Examiner that this evidence is inconclusive on the point of agreement. Repeatedly, the words recommended usage or practice are used. Repeatedly, it appears that the jobber group made recommendations to the manufacturer group as to the practices of the latter which were either not adopted or approved, or were passed over. Repeatedly, it also appears that the Association regarded it as illegal to agree or to coerce or to adopt or to enforce any recommendation or consensus of opinion as to what was stated to be sound business practice. Much is made by counsel in support of the complaint about the so-called creed of the Association which contains the statement: "I believe in the maintenance of established policies and selling prices, and believing all this, I hereby pledge my efforts to the maintenance and execution of these principles.", and the constitution and by-laws which contain the quite natural statements that the members are bound thereby. These statements, however, in the Examiner's opinion, are general, platitudinous, bland and indefinite. The foreword to the Manufacturers' Manual, of which also much is made, states that the information contained therein represents the studied and careful consideration of the individual members, that it has been prepared for the guidance of those similarly engaged, and includes only conclusions that have been discussed and approved. In view of the testimony of how these statements were arrived at, the time of their formulation and their purpose, the Examiner finds no conclusive or persuasive evidence of agreement therefrom. There is no question of credibility presented.

Stress is laid on an alleged agreement among manufacturers to maintain list prices and there is evidence from which this could be inferred. Such inference is, however, negated by the fact that the great majority who did insist on such list price maintenance had done so long prior to any discussion thereof in any ASNA meetings, by the fact that no price uniformity resulted, and by the fact that the insistence was vertical rather than horizontal and not universal.

Much is also made of the alleged conspiracy among manufacturers to require jobbers to maintain suggested resale prices. The ASNA documentary evidence at most shows discussion and recommendations to do so, the testimony by interested witnesses is in the negative. The

facts which lead the Examiner to the conclusion that there existed no such conspiracy or agreement are: (1) there is no competition between many manufacturers' products because such products are not identical or even similar, even in a given category, such as notebooks, because of the wide range of sizes, backing, paper, binding, etc.; (2) there is no price uniformity shown among products which indirectly may compete; (3) neither all manufacturers nor all jobbers did so; (4) there is sound business reason for a manufacturer individually insisting on his customers doing so; (5) price cutting exists in the industry; (6) no price uniformity exists among competing manufacturers where suggested resale prices were in fact maintained by their jobbers. The evidence as a whole indicates that what maintenance existed was an individual matter with each manufacturer down his distributional line rather than a horizontal agreement among manufacturers, as is charged.

As to the remainder of the restraints charged, the Examiner does not believe that these respondents or the other members of the Association purportedly joined by representation, in fact agreed on the business practices charged in the complaint for the following reasons:

(1) Competition in this industry is as to product and idea rather than as to price which is relatively unimportant.

(2) There are but relatively few instances of any inquiry among the membership as to whether or not a recommended business practice was being followed or as to what practices were being followed.

(3) There is no substantial evidence of policing by the Association or by any committee thereof.

(4) There is no evidence of any enforcement, coercion or penalization for failure to follow the recommended business practices or the following contrary or different practices.

(5) Lack of a uniform basis in making charges and lack of resulting uniformity, such as in making charges for samples, sketches, etc.

(6) A practice discussed and recommended in one year is found to be rediscussed and re-recommended in subsequent years, which is certainly not indicative of the claimed agreement on that practice in the first instance. If the agreement had been made and followed there would be no point in rediscussing and re-recommending the same practice. The discussion, if any, would have been confined to suggested amendment or change.

(7) The record abundantly shows that there was no substantial adherence to the practices claimed to have been agreed upon. The evidence is substantial and overwhelming that manufacturers, both direct and through jobbers, and the jobbers themselves, followed whatever

practice their particular activity dictated was best for their own business, whether it agreed with or conflicted with the practices recommended in the Manufacturers' or Jobbers' Manual. The record abundantly indicates that each of the substantial number of members who testified as witnesses did as he saw fit with reference to following any of the eighteen business practices hereinabove set out as being charged in the complaint. If the recommended practices had the binding effect, or the moral obligation to follow, claimed for them, this would not occur. Each of these witnesses gave what appeared to the Examiner to be sound as well as plausible business reasons for his own course of conduct and this testimony is uncontroverted.

(8) Some of the practices alleged to restrain trade are *de minimis* competitively (charging for samples, giving of free goods, service charges on C. O. D. shipments) others are not unreasonable (assuming them to be by agreement and uniform) such as charging for sketches, C. O. D. deposits.

It is true of course, that an agreement to restrain trade even though not effectuated is just as unlawful as though it had been effectuated. (*Keasby & Mattison Co. v. F. T. C.*, 159 F. 2d 942; *Socony-Vacuum Oil v. U. S.*, 310 U. S. 150; *Fashion Originators Guild v. U. S.*, 312 U. S. 457.) However, the record does not here present a picture of an agreement entered into which was subsequently thwarted either by Government prosecution or default of a substantial number of members, or other obstruction. If there existed the claimed agreement the Association and its membership had ample time to carry it out without obstruction or untoward event preventing it. Furthermore, where the fact of the agreement is in itself in question, the subsequent conduct of the parties claimed to have entered into it is still cogent evidence as to whether there was in fact any agreement. The courts and the Commission have repeatedly relied upon postmeeting uniformity of action by those present, and those represented by those present, to sustain a finding of agreement. Neither suggestion nor remonstrance by concert is of itself conclusive evidence of an agreement.

The theory of counsel supporting the complaint as evidenced by his submitted proposed findings of fact, argument and reasons therefor would forbid, as imposing an illegal moral obligation of compliance, any discussion of business practices, any recommendations or suggestions regarding them in any meeting and limit a trade association meeting and activity to listening to non-member speeches, dances, cocktail parties, and individual sales efforts.

The picture presented by this record to the Examiner is of an industry in which rigid business practices such as those charged in the

complaint would be improbable, if not practically impossible, because of the peculiarities of its merchandising, the disparate groups composing the Association, and their diverse commercial interests, the wide range of both products and ideas and the individual situations of those even in the same group, the combinations of product with idea and purpose so multifarious and diverse, and the multiplicity of manufacturers selling through the same jobber. The record presents a picture of growth and increasing competition. Most of the latter is on idea and product rather than on price with ingenuity and imagination unlimited.

The charge of boycott by members of non-members is wholly unsustained. Four of the five member manufacturers who appeared as witnesses sold to more non-members than to members and two non-member jobbers who appeared as witnesses had never been refused any manufacturer's line because they were non-members. There is no affirmative evidence of any boycott in the record. The ASNA minutes show that the selection of jobbing accounts has always been recognized as the individual manufacturer's prerogative and no pressure has been exerted on manufacturers to discourage or prevent them from selling to non-member jobbers.

Accordingly, *it is ordered*, That the complaint be, and the same hereby is, dismissed as to all of the respondents in this proceeding.

IN THE MATTER OF
NORTHERN BROKERAGE CO., NORTHERN PRODUCE
EXCHANGE CO., AND GEORGE M. KRISCHEL

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (C) OF
THE CLAYTON ACT AS AMENDED

Docket 6274. Complaint, Dec. 22, 1954—Decision, Mar. 10, 1955

Order requiring a corporate food broker, its president, and a second corporate wholesaler in which said president and his wife owned a 50% interest, to cease violating sec. 2(c) of the Clayton Act as amended, by receiving commissions, etc., from sellers on sales made by said broker to the affiliated wholesaler.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

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

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 March 10, 1955, the initial decision in the instant matter of hearing examiner Abner E. Lipscomb, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On December 22, 1954, the Federal Trade Commission issued its complaint in this proceeding, charging Respondents with violating, and having violated, the provisions of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936. On January 27, 1955, Respondents filed their answer thereto, admitting all the material allegations of fact set forth in said complaint. Under the provisions of Rule VIII (a) of the Commission's Rules of Practice, the submission of such an answer constitutes a waiver of Respondents' rights to a hearing as to the facts alleged in the complaint, and of all other intervening procedure. The Rule cited also provides that when such an answer is filed, the Hearing Examiner shall make findings as to the facts and conclusions based upon such complaint and answer, and issue an order disposing of the proceeding. Accordingly, the Hearing Examiner, having duly considered the record herein, finds that this proceeding is in the interest