

Complaint

IN THE MATTER OF

WINER MANUFACTURING CO., INC., ET AL.

CONSENT ORDER, IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT AND THE WOOL PRODUCTS LABELING ACT*Docket 6317. Complaint, Mar. 23, 1955—Decision, June 28, 1955*

Consent order requiring a manufacturer in Hammond, Ind., to cease violating the Wool Products Labeling Act by labeling men's jackets consisting of 35% wool and 65% reused wool as "100% Wool", and failing to label others as required by the Act.

Before *Mr. James A. Purcell*, hearing examiner.

Mr. George E. Steinmetz for the Commission.

Abbell & Abbell, of Chicago, Ill., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Winer Manufacturing Co., Inc., a corporation, and Louis Winer, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Winer Manufacturing Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of Indiana. Louis Winer is president of said respondent corporation and this individual formulates, directs, and controls the acts, policies, and practices of said corporate respondent. The office and principal place of business of said respondents is located at 231 Condit Street, Hammond, Indiana.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939 and more especially since January 1954, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, and offered for sale in commerce, as "commerce" is defined in said Act, wool products, as "wool products" are defined therein.

PAR. 3. Certain of said wool products were misbranded within the intent and meaning of Section 4 (a) (1) of said Wool Products Labeling Act and the Rules and Regulations promulgated thereunder in that

they were falsely and deceptively labeled or tagged with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products were men's jackets labeled or tagged by respondents as consisting of "100% Wool," whereas in truth and in fact said products were composed of fabrics consisting of 35% wool and 65% reused wool, as the terms "Wool" and "Reused Wool" are defined in said Act.

PAR. 4. Certain of said wool products described as men's jackets were misbranded in that they were not stamped, tagged, or labeled as required under the provisions of Section 4 (a) (2) of said Wool Products Labeling Act and in the manner and form provided by the Rules and Regulations promulgated thereunder.

PAR. 5. The acts and practices of respondents as herein alleged were and are in violation of the Wool Products Labeling Act of 1939 and of the Rules and Regulations promulgated thereunder, and as such constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Sec. 3.21 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 June 28, 1955, the initial decision in the instant matter of hearing examiner James A. Purcell, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The Federal Trade Commission on March 23, 1955, issued its complaint in this proceeding charging respondents with the violation of the provisions of the Federal Trade Commission Act and of the Wool Products Labeling Act of 1939, as will more particularly appear by reference to said complaint.

On April 29, 1955, respondents entered into an agreement with counsel supporting the complaint and pursuant thereto submitted to the hearing examiner a stipulation for consent order disposing of all of the issues in this proceeding.

In said stipulation the respondent, Winer Manufacturing Co., Inc., is identified as a corporation organized under and existing by virtue of the laws of the State of Indiana, with its office and principal place of business located at 231 Condit Street, Hammond, Indiana. Respondent, Louis Winer, is identified as an individual and as President of the foregoing respondent corporation.

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Order

Respondents admit all of the jurisdictional allegations set forth in the complaint, and agree that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance therewith. All of the parties expressly waive the filing of answer, a hearing before the hearing examiner or the Commission, the making of findings of fact or conclusions of law by the hearing examiner or the Commission, the filing of exceptions and oral argument before the Commission and all other and further procedure before the hearing examiner and the Commission to which the said respondents might otherwise be entitled under the provisions of the aforesaid Acts and the Rules of Practice of the Commission.

Said stipulation provided further that it was executed for settlement purposes only and does not constitute an admission by said respondents that they have violated the law as alleged in the complaint. It was further agreed by the respondents that the Order contained in the stipulation shall have the same force and effect as if made after full hearing, presentation of evidence, and findings and conclusions thereon, and they specifically waive any and all right, power or privilege to challenge or contest the validity of the Order entered in accordance with said stipulation. They also agree that said stipulation, together with the complaint, shall constitute the entire record in this proceeding and that the complaint herein may be used in construing the terms of the hereinafter passed Order, which may be altered, modified, or set aside in the manner provided by the statute for the orders of the Commission.

In view of the facts above recited and that the Order embodied in said stipulation is identical with the Order *nisi* accompanying the complaint and that the acceptance thereof will effectively safeguard the public interest and pursuant to the express terms and provisions of said stipulation, the hearing examiner finds that this proceeding is in the public interest, accepts the aforesaid stipulation for consent order and issues the following order:

ORDER

It is ordered, That respondent Winer Manufacturing Co., Inc., a corporation, and its officers, and respondent Louis Winer, individually and as an officer of said corporation, and respondents' 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,

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of men's jackets or other "wool products," as such products are defined in and are subject to the said Wool Products Labeling Act of 1939, which products contain, purport to contain, or in any manner are represented as containing "wool," "reprocessed wool" or "reused wool," as such terms are defined in said Act, do forthwith cease and desist from misbranding said 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;

2. Failing to securely affix to or place on each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner:

(a) The percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding five percentum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage by weight of such fiber is five percentum or more, and (5) the aggregate of all other fibers;

(b) The maximum percentage of the total weight of such wool product of any non-fibrous loading, filling or adulterating matter;

(c) The name or the registered identification number of the manufacturer of such wool product or of one or more persons engaged in introducing such wool product into commerce, or in the offering for sale, sale, transportation, distribution or delivery for shipment thereof in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939.

Provided, That the foregoing provisions concerning misbranding shall not be construed to prohibit acts permitted by Paragraphs (a) and (b) of Section 3 of the Wool Products Labeling Act of 1939; and

Provided further, That nothing contained in this order shall be construed as limiting any applicable provisions of said Act or the Rules and Regulations promulgated thereunder.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of June 28, 1955].

Decision

IN THE MATTER OF
TRADE UNION COURIER PUBLISHING CORPORATION
ET AL.

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

Docket 5966. Complaint, Mar. 14, 1952—Decision, June 30, 1955

Order requiring a publishing firm in New York City to cease representing falsely that its bi-weekly newspaper had been endorsed by the American Federation of Labor, and publishing and demanding payment for advertisements not authorized by the prospects solicited.

Before *Mr. John Lewis*, hearing examiner.

Mr. Edward F. Downs and *Mr. Joseph Asper* for the Commission.
Waldman & Waldman, of New York City, for respondents.

DECISION OF HEARING EXAMINER ON REMAND OF PROCEEDING

STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above-named respondents on March 14, 1952, charging them with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act. Copies of said complaint and notice of hearing were duly served upon respondents. Said complaint charges in substance that respondents made certain misrepresentations concerning their labor affiliations in connection with the publication of a newspaper by them and also sought to insert unauthorized advertisements in said paper. Respondents appeared by counsel and filed a joint answer in which they denied having engaged in any of the illegal practices charged.

Pursuant to notice, hearings were thereafter held on various dates between May 5, 1952, and June 18, 1952, at New York, New York and Washington, D. C., before the undersigned hearing examiner, theretofore duly designated by the Commission to hear this proceeding. At said hearings 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. At the close of said hearings proposed findings of facts and conclusions of law were filed by counsel supporting the

complaint and counsel for respondents. No request for oral argument was made.

After reviewing the record herein, the undersigned on August 26, 1952, filed his initial decision and order dismissing the complaint on the ground that the record was lacking in substantial evidence to sustain the allegations of said complaint and because the public interest did not appear to require any corrective action in this proceeding. An appeal from said initial decision and order was thereafter filed with the Commission by counsel supporting the complaint with respect to the dismissal of two of the charges in the complaint. On February 18, 1953, counsel supporting the complaint filed a motion with the Commission for leave to withdraw said appeal and to remand this proceeding to the hearing examiner for the reception of further evidence. By order issued June 12, 1953, the Commission granted said motion, vacated the order of dismissal as to the two charges appealed from, and remanded this proceeding to the hearing examiner for the purpose of receiving further testimony and evidence on said charges.

Thereafter, pursuant to notice duly given, further hearings before the undersigned hearing examiner were held on various dates between October 1, 1953 and June 10, 1954, in Memphis, Tennessee; Milwaukee, Wisconsin; Minneapolis, Minnesota; and New York, New York. Testimony and other evidence were offered in support of and in opposition to the charges in the complaint which were remanded to the hearing examiner, said testimony and other evidence being duly recorded and filed in the office of the Commission. The parties were represented by counsel at all hearings, participated therein and were afforded full opportunity to examine and cross-examine witnesses and to introduce evidence bearing on the issues. At the opening of the hearings on the remand of this proceeding counsel for respondents moved to dismiss the complaint for the reason that the Commission had acted beyond its authority in remanding this proceeding. Counsel also renewed a motion made at the earlier hearings to dismiss the allegation of the complaint based on alleged unauthorized dealings, for the reason that said allegation is legally insufficient. Said motions were denied by the undersigned. At the close of the evidence on the remand of this proceeding, briefs were submitted by counsel in support of their respective positions. No request for oral argument was made.

Upon the entire record in the case and from his observation of the witnesses the undersigned makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENTS

Respondent Trade Union Courier Publishing Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 1150 Avenue of the Americas, New York, New York.¹ Respondents Maxwell C. Raddock, Charles Raddock and Bert Raddock are President, Secretary, and Treasurer, respectively, of the corporate respondent and in such capacities they formulate, direct and control its policies and practices. Their business address is the same as that of the corporate respondent.

Respondents have for several years last past been engaged in the publication of a tabloid size newspaper known as the Trade Union Courier. Said newspaper is published biweekly and is caused by respondents to be circulated from its point of publication to subscribers and purchasers located in various States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said publication in commerce among and between the various States of the United States, and the amount of said trade is substantial. Further, respondents in the course and conduct of their business engage in extensive transactions involving the transmission of letters, advertising proofs, checks and other business instruments, and the use of long distance telephone, all between and among various States of the United States.

II. The Alleged Illegal Practices

A. *Background and Issues*

The American Federation of Labor, or A. F. of L., as it is sometimes referred to, is a federation of local, national and international unions, with the membership in excess of three million. As indicated in the original decision of the examiner herein, respondents' newspaper seeks to espouse the cause of the American Federation of Labor and has been endorsed by a substantial number of that organization's affiliated unions. The newspaper is circulated among members of American Federation of Labor unions and is subscribed to by certain affiliated unions.

¹ The address of said respondent as alleged in the complaint and admitted in the answer was 3 West 17th Street, New York. However, during the pendency of this proceeding said respondent moved to the above address.

A large portion of respondents' income is derived from the sale of advertising space in their paper to industrial and other business firms. Respondents employ from 9 to 12 advertising salesmen or solicitors to solicit advertising orders. Outside of the New York City area, such solicitation is carried on mainly by long distance telephone calls.

As originally charged in the complaint, respondents were alleged to have falsely represented to prospective advertisers that they were officially endorsed by 2,000 A. F. of L. unions and were affiliated with certain labor press associations and news services. In their answer respondents admitted having made the representations attributed to them in this respect but claimed that such representatives were truthful. They established at the initial hearings herein that their publication was endorsed by a substantial number of A. F. of L. unions and that it was affiliated with certain labor press associations and news services. The charges of the complaint dealing with these issues were, accordingly, dismissed. No appeal therefrom was taken by counsel supporting the complaint.

The two remaining charges in the complaint involve the allegations (1) that respondents have falsely represented that they are endorsed by the American Federation of Labor, and (2) that they have engaged in the practice of placing advertisements of business firms in their paper without having received authorization and then seeking to exact payment therefor. In their answer respondents denied having engaged in either of such practices. These charges were likewise dismissed in the decision of the examiner originally issued herein. However, the proceeding was subsequently remanded to the examiner for further evidence on these issues after counsel supporting the complaint withdrew the appeal which had been filed to such dismissal. The sufficiency of the evidence in the record on these two issues is considered below, with particular reference to the evidence developed upon the remand of the proceeding.

B. Endorsement by the American Federation of Labor

At the most recent stage of the hearings, counsel supporting the complaint called a number of representatives of business firms in Memphis, Milwaukee and Minneapolis, who testified concerning long distance telephone conversations which they had with various advertising salesmen or solicitors of respondents during the period from 1950 to 1953. These witnesses testified that one of respondents' solicitors called them and sought to interest them in taking advertising space in respondents' publication. According to the witnesses, the solicitor usually referred to the fact that the paper was fighting for good

labor management relations or was fighting against communism in the labor movement, and asked the particular businessman being solicited to sponsor an advertisement espousing such sentiments. The prices quoted for the advertisements ranged from about \$600.00 to \$25.00, depending on the amount of space devoted to the advertisement of a particular firm.

During the course of the telephone conversations, according to these witnesses, respondents' solicitor referred to the fact that their newspaper had some connection with the American Federation of Labor. The basic question for decision on this issue is what the solicitors stated to be the nature of this connection, *viz.*, whether they limited themselves to stating the facts with respect to the paper's endorsement by certain unions of the A. F. of L. or whether they stated or sought to create the impression that the paper was endorsed by the American Federation of Labor itself. Below is set forth the versions given by some of the witnesses as to what the solicitor stated with regard to respondents' A. F. of L. connections:

1. That he wanted "an ad for the AFL paper" and that the paper was the "official organ of the AFL operating out of their national headquarters." (R. 500, 507)
2. That he "represented the American Federation of Labor" and that the paper was a "national publication of the AFL." (R. 517, 522)
3. That the paper "represented" or "was affiliated with the AFL." (R. 534, 548)
4. That the paper was "an official publication of the AFL." (R. 551, 552)
5. That the solicitor was "connected with the AFL unions or AFL." (R. 580)
6. That the solicitor was "representing the AFL against Communism" and was soliciting ads for the newspaper "through the sanction of the AFL." (R. 595, 602)
7. That the paper was "part of" or was "put out by the American Federation of Labor." (R. 645, 648)
8. That "they were bringing out an issue for the convention of the American Federation of Labor and that they were the official publication of the American Federation of Labor." (R. 700)
9. That the solicitor was "with the A. F. of L." and wanted an ad "in the A. F. L. paper." (R. 761, 762)
10. That the paper was the "national organ for the American Federation of Labor and that by our advertising in it we would be doing

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a national public relations job with the American Federation of Labor." (R. 791)

If the testimony of these witnesses and others who testified to similar effect is to be believed, there is no question but that a case of misrepresentation with respect to respondents' connection with the American Federation of Labor has been established. However, counsel for respondents contends that the testimony of these witnesses cannot be taken at face value because in some instances they admitted they were not sure as to exactly what the solicitor said to them, and some of the witnesses conceded that the solicitor might have used the expression "A. F. of L. unions" instead of "A. F. of L." in referring to respondent's connection with that organization. Counsel for respondents suggests that many of the witnesses called in support of the complaint were confused because of their lack of appreciation of the difference between a claim of endorsement by the parent body, the American Federation of Labor, and a legitimate claim that the paper was endorsed by a number of constituent locals affiliated with the American Federation of Labor. In arguing for the unreliability of the testimony offered in support of the complaint, counsel calls attention to the fact that the telephone solicitors who were called as witnesses for respondents "denied categorically" that they ever represented their employer or paper as being connected with or endorsed by the American Federation of Labor.

The examiner has carefully analyzed the testimony of the witnesses and the contentions of counsel for respondents and is convinced that the greater weight of the evidence supports a finding that respondents' solicitors did represent their paper as being endorsed by, or having an even closer connection with, the American Federation of Labor. A number of the instances cited by counsel for respondents where witnesses stated on cross-examination that the solicitor used the expression "A. F. of L. unions" involve merely affirmative responses by the witnesses to leading questions addressed to them by respondents' counsel and the record indicates the witnesses did not appreciate the distinction which counsel was trying to make between the A. F. of L. and unions of the A. F. of L. Moreover, when the testimony of these witnesses is analyzed as a whole it is clear that in most instances it was their understanding that the solicitor was referring to the American Federation of Labor. Although some of the witnesses were not certain of the precise words used by the solicitor, they were clear that the solicitor stressed the paper's connection with the American Federation of Labor and not merely with some unions of that organization.

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It is significant that while some of the conversations related took place several years prior to the witness' testimony, at a time when the witness' recollection might be less than clear, others testified about conversations which took place in recent months prior to the hearing. The record reflects a close parallel in the statements reported to have been made by respondents' solicitors in both the earlier and the more recent periods.

Corroboration of the oral testimony of the witnesses called in support of the complaint appears, in several instances, in written records made by them at a time when the conversations were clear in their mind. Thus one of the witnesses referred to by counsel for respondents, who gave an affirmative answer on cross-examination in response to the question whether the solicitor said respondents' paper was the paper of "A. F. of L. Unions nationally," indicated in a letter written to the paper within a week after the conversation what his actual understanding was of the representation made by the solicitor. In advising the paper that it was cancelling an order for an advertisement, the following was given as the reason:

"We have received information that your paper is not affiliated with the American Federation of Labor as represented by your [salesman]." (CX67)

In reply to this letter, respondents' advertising manager advised the writer, in part, as follows:

"The Trade Union Courier, leading independent labor newspaper in the country, was founded in January, 1936, and has been published regularly since that year, presenting the vital labor news affecting the nation and covering the A. F. L. union it represents from an anti-Communist standpoint and from the standpoint, too, of better labor-management relations." (CX63)

It is significant that in his reply the advertising manager did not make a clear-cut denial of any claim of representation of the American Federation of Labor but added to the confusion by an ambiguous reference to the paper's presentation of labor news "affecting the nation and covering the A. F. L. union it represents."

Another witness within a month after a telephone conversation with one of respondent's solicitors in which he agreed to take an advertisement, addressed a letter to respondents requesting return of his check for the following reason:

"Upon checking further, we find that you have misrepresented. When soliciting us by phone, you gave us a lengthy description of how the American Federation of Labor was making a 'drive' to better

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relations between employer and employee, and that all the A. F. of L. locals were participating in this." (CX 98)

Still another witness, who had some prior dealings with respondents, asked his secretary to get on the phone as soon as he recognized the nature of the call and she recorded respondents' solicitor as having made the following statement:

"I am with the Trade Union Courier of the American Federation of Labor."² (CX 100)

Although as previously mentioned, the witnesses called by respondents generally denied the statements attributed to them, the examiner can give little weight to their denials.³ While they were quite certain an answer to leading questions directed to them on their direct examination that they had made none of the statements attributed to them, their testimony on cross-examination as to whom they spoke with and when the conversations took place, indicated that they had very little actual recollection of the conversations about which they professed to have such vivid recollections on direct examination. Considering the fact that they usually make about 2,000 telephone solicitations a year, it is not surprising that they could not recall conversations which in some instances went back three or four years.

The same witnesses sought to bolster their evidently faulty recollections by reference to what they said was their usual practice in talking to prospective advertisers over the telephone. A large portion of this testimony impressed the examiner as unconvincing and lacking in inherent probability. Despite the fact that the paper is endorsed by a number of unions affiliated with the American Federation of Labor and this would be a natural talking point in seeking to sell advertising, several of the witnesses at first insisted that they made no reference to the American Federation of Labor in any way, shape or form in their conversations. When the absurdity of this situation became apparent to them, several of the witnesses conceded that they referred to the American Federation of Labor, but that this was only done in response to some query by the recipient of the call as to what connection they had with the labor movement. In such instances, ac-

² Counsel for respondents contend this transcription is not accurate because the secretary did not get on the telephone until after the solicitor had introduced himself and that the above statement was something which the witness had inserted and was not an actual part of the conversation. However, the examiner is satisfied that the above was an actual part of the conversation and was not edited in any way by the witness.

³ In several instances the conversations with one of the respondents' salesmen were attributed to an employee who is no longer with respondents and who respondents claim could not be located to testify. In these instances the testimony of the conversations stands uncontradicted in the record, except for some general testimony of respondents' advertising manager which has little probative value.

according to these witnesses, they would mention the endorsement of the paper by American Federation of Labor unions.

However, a careful examination of their testimony convinces the examiner that they did more than they had a right to do legitimately, and that they deliberately set about to create an impression of some connection between the paper and the national A. F. of L. Thus, one of the solicitors testified:

"* * * when I told Mr. Cooney we were a labor paper, he asked me what sort of a labor paper we are, and I told him we are a *pro-A. F. of L.* paper, and during the conversation there he asked me what affiliation you might have had *with the A. F. of L.*, and I told him we were officially endorsed by *the A. F. of L. Unions* * * *." (R. 852) [Emphasis supplied]

Another solicitor testified that if a person asked him: "Are you people endorsed by CIO or A. F. of L.," he would reply "[W]e are endorsed by A. F. of L. Unions." (R. 922)

Still another witness testified that, "when people asked me what labor publication we are, I tell them we espouse and expound the principles of A. F. of L." (R. 978)

Although the examiner has already found above that a member of the witnesses called in support of the complaint testified truthfully and accurately that the solicitor told them the paper was connected with or endorsed by the American Federation of Labor, it is immaterial in the opinion of the examiner whether the solicitor, under the circumstances here present, used the expression "A. F. of L. Unions" rather than A. F. of L. In the context in which these conversations took place, the use of the expression "A. F. of L. Unions" was calculated to give the listener the impression that a relationship to the national body of the organization or to the organization as a whole was involved. That the use of this expression has such a tendency to deceive was unwittingly admitted by respondents' advertising manager who indicated that even his own salesmen had been misled by the paper's claim of A. F. of L. association. Thus, the witness testified:

"* * * they themselves [the salesmen] sometimes [were] confused—they asked me do you represent the *American Federation of Labor*, and I said *yes*, we represent the American Federation of Labor Unions."⁴ [Emphasis supplied.]

⁴ It may be noted that while the same witness at one point in his testimony stated that he never gave the salesmen instructions on what not to tell prospective advertisers "because they know what not to say" (R. 1003, 1004), at another point he claimed that he specifically instructed them not to tell people the paper was endorsed by the American Federation of Labor (R. 1010). No credence is given by the examiner to the latter statement.

It may be noted that in reaching this conclusion the examiner does not do so as the basis of the argument made by counsel supporting the complaint, both at the earlier stage of this proceeding and again now, that a truthful statement by respondents as to their endorsement by certain unions of the A. F. of L. is per se a representation as to endorsement by the American Federation of Labor. The examiner's conclusion is, rather, based on the subtle, and sometimes not so subtle, insinuations which pervaded the sales talk of the solicitors and which tended to create the impression of an association with the A. F. of L. as a national organization. Under these circumstances whether the solicitors used the expression "A. F. of L." or "A. F. of L. Unions" is of little import. In fact, in a long distance telephone call the difference between the use of the singular or plural is sometimes blurred out and, under the circumstances here present, it is probable that this was done purposely.

Counsel for respondents suggests in his brief that any instances where a salesman might have overstated respondents' relationship to the American Federation of Labor must be regarded as isolated and as not being a part of the deliberate policy of the paper. The examiner cannot agree with counsel's contention in this regard. It is the opinion of the examiner that the record as it now stands shows a widespread and deliberate policy of misrepresentation which cannot be regarded as the isolated action of individual salesmen. In his earlier decision, the examiner indicated his awareness of the existence of suspicious circumstances in the case but, because of the confusion in the great bulk of the testimony, he could not make any affirmative finding of misrepresentation and gave respondents the benefit of the doubt by attributing two proven statements concerning respondents' connection with the A. F. of L. to the isolated, unintentional action of individual salesmen. However, the examiner is now satisfied that neither these instances, nor the other instances which have been established at the present hearings, were at all isolated. There is no question that the salesmen were acting within the scope of their apparent authority and respondents cannot escape responsibility for their conduct.⁵

In an effort to show respondents' good faith and to demonstrate that their official policy was to dispel any possible misunderstanding of their connection with the American Federation of Labor, counsel for respondents rely upon a change in the format of respondents' publication which, it is claimed, was voluntarily done after the time of the examiner's earlier dismissal of the complaint herein. As indi-

⁵ *Standard Distributors, Inc. v. F. T. C.*, 211 F. 2d 7, 13 (C. A. 2, 1954).

cated in the examiner's prior decision, respondents previously stated at the top of the editorial page of the paper that it was: "Devoted to the interests of all Unions in the Eastern States Affiliated with the American Federation of Labor." This statement has been changed to read as follows:

"The Trade Union Courier was founded in 1936 in the interest of all trade unions affiliated with the American Federation of Labor * * * The Trade Union Courier is officially endorsed by more than 2000 A. F. L. unions in the United States and Canada and supports the aims and aspirations of all anti-communist unions. This newspaper does not speak officially for the A. F. of L. national body in Washington and is *not* the official voice or organ of the Executive Council of the A. F. of L." (RX 34)

Counsel apparently regards this statement as clarifying respondents' relationship to the American Federation of Labor. In the opinion of the examiner, the revised statement hardly serves this purpose. Whereas the former statement refers to a limited community of interest with "Unions in the Eastern States," the new statement refers to a broad association with "all trade unions affiliated with the American Federation of Labor." While the statement also says that the paper "does not speak *officially* for the A. F. of L. national body *in Washington* and is not the *official* organ of the *Executive Council* of the A. F. of L." [Emphasis supplied], there is a suggestion in the language used of some unofficial relationship between the paper and the A. F. of L. as an organization. Nowhere is there a clear-cut statement that the paper is not endorsed by the American Federation of Labor.

It may also be noted that this alleged voluntary effort to clarify matters did not occur until shortly after the Commission had remanded this proceeding to the hearing examiner to take further evidence. Considering the time lag of one year between the issuance of the examiner's decision and the change in format, and the fact that the change occurred within two months after the Commission's order of remand, it may be doubted that respondents' action was purely voluntary.

In any event, there is evidence in the record that the type of practices charged in the complaint were continued by salesmen even after the alleged change of format. It is clear, therefore, that this issue is not moot and that there is a definite need for corrective action. On the record as a whole, the examiner concludes and finds that respondents have engaged in misrepresenting the facts as to their relationship with the American Federation of Labor and have sought to create, and have created, the impression among prospective advertisers that their

newspaper is endorsed by, affiliated with, or bears a close connection with the American Federation of Labor.

Counsel for respondents make the argument in their brief that it is of no real significance to a prospective advertiser whether the connections of a labor publication are with the A. F. of L. or with A. F. of L. unions. Counsel suggest that since respondents' paper is endorsed by a substantial number of unions and is circulated among union members, a prospective advertiser would have little concern with whether the paper had an official connection "with central headquarters in Washington." The examiner cannot agree with argument. While it may be that respondents have some following in the labor movement, it is one thing to represent that it is endorsed by a segment of a labor organization and another to claim endorsement by the entire body. The claim of endorsement by the American Federation of Labor is not merely a claim of recognition by some labor officials in Washington but by the entire body of unions comprising the federation and acting as an organized group. There can be no question but that the fact of an endorsement by, or relationship with, the A. F. of L. is a material fact which, it may reasonably be inferred, would influence the judgment of a prospective advertiser and as to which he is entitled to be correctly advised.

Counsel for respondents also make the argument that the distinction between the American Federation of Labor and unions of that organization has been largely obliterated in common parlance and that it has become a familiar practice to represent or identify organizations or publications as being "A. F. of L.," although not technically a part of the parent organization. The only evidence cited to support this assertion is the fact that some witnesses referred loosely to local labor organizations and publications as being "A. F. of L." However, the record discloses that the witnesses appreciated the distinction between a local organization affiliated with the American Federation of Labor and the national organization itself. In any event there has been no showing that the expression "American Federation of Labor" or "A. F. of L." has acquired any such secondary meaning as to justify a claim of A. F. of L. endorsement when only endorsement by certain unions of the A. F. of L. is involved.⁶ The Federal Trade Commission Act is intended to protect the uninformed and the innocent and not merely the sophisticated. The fact that any significant portion of the public may be misled is sufficient to establish a violation of the Act.⁷

⁶ *F. T. C. v. Winsted Hosiery Co.*, 258 U. S. 483, 493; *Hunt Pen Co. v. F. T. C.*, 197 F. 2d 273, 280, (C. A. 3, 1952).

⁷ *Positive Products Co. v. F. T. C.*, 132 F. 2d 165 (C. A. 7, 1942); *Prima Products, Inc. v. F. T. C.*, 209 F. 2d 405, 409 (C. A. 2, 1954).

C. Unauthorized Dealings

Counsel supporting the complaint offered evidence that in a number of instances respondents sent bills to business firms and sought to collect for advertisements, despite the fact that a representative of the firm had refused to agree to take an advertisement when solicited by long distance telephone call.

In some instances there was an outright refusal but respondents nevertheless sought to insert an advertisement and to collect therefor. In other instances the firm's representative told the solicitor that he could not agree to an advertisement without the approval of a partner or of the company's board of directors, or requested that the solicitor send a written proposal because the company did not authorize advertisements by telephone. In the latter instances respondents nevertheless sent bills and sought to collect for an advertisement without awaiting the necessary approval action by the company. The record discloses that it was particularly in the latter type of situation, where there was any indication that the firm might possibly accept an advertisement, that the solicitor would "jump the gun" and have a bill sent to the firm.

Counsel for respondents urge that the evidence offered in support of the complaint not be accepted because of its unreliability and as being contrary to the evidence offered by respondents' witnesses. In two instances the claim of unreliability is based upon the fact that counsel supporting the complaint relied wholly upon letters written to respondents by the firms in question stating that the advertisement had not been authorized, such letters not being supported by any witness who talked to the solicitor.⁸ Counsel contend that these letters are hearsay evidence and that no finding can be based thereon. However, it may be noted that no objection to these letters was made at the hearings based on the hearsay character thereof. Although the letters are undoubtedly hearsay they are a reliable type of hearsay, having been written contemporaneously with the events at issue, and the record fails to disclose that respondents ever replied to these letters to question the correctness of the statements therein made. Moreover, the circumstances under which respondents sought to foist an advertisement on these firms, as recorded in the letters, comports with other reliable evidence in the record.

In any event, even disregarding these two transactions, there is ample evidence in the record to support the charges in the complaint.

⁸ These instances involve transactions with R. L. Bernardo & Sons and American Snuff Company, both of Memphis. ((CX 57, 77 and 79)).

In at least two instances the testimony of witnesses concerning unauthorized dealings stands uncontradicted in the record and is corroborated by letters written contemporaneously with the event.⁹ In one of these transactions the witness testified that he had advised the solicitor that he could not take an advertisement without the concurrence of his partner. Nevertheless he received a bill for \$150.00, upon receipt of which he wrote to respondents as follows:

"I did not give your Mr. Picard authority to run an advertisement in your publication, nor do I appreciate your apparent effort to try to force me to order an advertisement." (CX 70)

In another transaction involving the same solicitor, a witness testified that he told the latter to write a letter outlining his proposition but received instead a bill for \$100.00, whereupon he sent a telegram to respondents and then wrote as follows:

"Confirming our telegram we did not authorize your Mr. Bob Picard to insert an ad in your magazine.

"We did ask him to write us an air mail letter explaining in detail exactly what he was wanting.

"We do not authorize any donations by telephone * * * and do not appreciate the high pressure methods involved in this instance." (CX 82)

While respondents' solicitors in several other instances claimed that they had received approval for an advertisement before having a bill sent to the firm, the examiner was not impressed with the testimony of these witnesses. It was evident that they had little recollection of their alleged conversations and were relying primarily on the fact that after the conversation with a representative of the firm in question they had filled out a form of sales memorandum, from which they concluded that the transaction must have been authorized. However, the examiner cannot accept this testimony in the light of the testimony given by apparently truthful witnesses who testified in support of the complaint and in the light of the generally unconvincing and unimpressive performance given by the solicitors, both with respect to the testimony on this issue and that discussed above.

Counsel for respondents urges that any instances of unauthorized dealings which may have been established by the record should be regarded as the unauthorized, isolated action of individual salesmen. However, the examiner does not find this to be the case. This type of

⁹ These involve transactions with the solicitor previously mentioned who is no longer employed by respondents.

practice was too widespread to be regarded as the isolated action of individual solicitors.¹⁰

In the light of the evidence now in the record, the examiner is of the opinion that several instances of unauthorized dealings referred to in his prior decision which were then regarded as isolated transactions, not reflecting respondents' regular policy of doing business, can no longer be considered to be such. It is accordingly concluded and found, on the record as a whole, that respondents have engaged in the practice of billing firms for advertisements which were not authorized and of seeking to insert advertisements without authorization and then seeking to exact payment therefor.¹¹

Counsel for respondents take the position that even if there were some instances of unauthorized dealings, there is no showing that respondents engaged in any fraudulent or deceitful conduct or attempted to collect payment by threats of lawsuit or other forcible methods. Counsel point out that where the customer advised respondents that the ad was unauthorized no further attempts were made to enforce payment. Counsel accordingly contends that the conduct established by the record fails to establish any violation of the Federal Trade Commission Act, citing particularly the cases which the examiner cited in his earlier decision.

Insofar as the facts are concerned, the record does show that respondents made persistent efforts to enforce payment for advertisements, including the sending of several letters and notices to the putative advertiser one of which was entitled "Final Notice" and advised the advertiser that his remittance:

"* * * must reach this office by [a given date] * * *. You will save us time and expense by immediate payment."

However, it is true that except for one instance there is no evidence that respondents continued to seek payment after being advised that the advertisement was not authorized.¹² Nevertheless, it is the opinion of the examiner that irrespective of whether strenuous efforts or threats were made to enforce payment, the engagement in a regular practice of billing customers for advertisements which were not authorized and seeking to collect therefor is itself a form of unfair

¹⁰ In at least one instance even after respondents were advised that no authorization for the ad had been given they continued to bill the firm. (CX 78, 79.)

¹¹ The above finding is not based on the transaction with Home Savings Bank of Milwaukee, upon which counsel supporting the complaint relies. The record shows that this firm did agree to take an advertisement, albeit based on the representation that the paper was an official publication of the American Federation of Labor.

¹² See footnote "10" for a reference to this incident.

or deceptive practice proscribed by the Federal Trade Commission Act. To the extent that the examiner may have appeared to take a different position in his earlier decision, it may be regarded as hereby modified. The examiner has carefully studied the Commission cases cited in his earlier decision and is now convinced that the deliberate practice of billing for unauthorized ads falls within the purview of the Act. While it is true that similar conduct in a number of the cases cited occurred in a context of fraud and of threats to enforce payment, nevertheless, the Commission's order in each case specifically enjoined the practice of billing customers for or delivering merchandise not ordered, as well as the other practices found.¹³

III. THE EFFECT OF THE PRACTICES FOUND

The record establishes, and it is so found, that respondents, in the conduct of their business, are in substantial competition in commerce with other firms and individuals likewise engaged in the publication of newspapers and other periodicals, some of which sell advertising to be inserted therein, and particularly with the publishers of newspapers and other periodicals published or endorsed by the American Federation of Labor or by unions and organizations affiliated with the American Federation of Labor.

The acts and practices of respondents above found, with respect to representing that their paper is endorsed by, affiliated with, or closely connected to, the American Federation of Labor have had and now have the tendency and capacity to mislead prospective purchasers of advertising space into the erroneous and mistaken belief that the said representations were and are true and into the purchase of advertising space because of such erroneous and mistaken belief. As a result, it may reasonably be inferred that substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been and is being done to competition in commerce. The unfair practice engaged in by respondents of publishing unauthorized advertisements in their publication has subjected firms and individuals to harassment and unlawful demands for payment of non-existent debts.

¹³ See, in addition to the cases cited in the examiner's earlier decision, *Dorfman v. F. T. C.*, 144 F. 2d 737 (C. A. 8, 1944), affirming one of the cases cited by the examiner sub. nom. *Stetson Felt Mills*, 36 F. T. C. 651. In that case paragraph 6 of the order enjoined respondents from:

"Preparing orders for quantities of rugs or other merchandise in excess of the quantities requested by purchasers * * *."

This paragraph was specifically approved by the court of appeals as follows:

"In short, the Order says to petitioners and their salesmen, cease deceiving your customers and stop padding their orders. The Order, in our opinion, places no unfair burden upon the petitioners. It should be strictly obeyed."

CONCLUSION OF LAW

It is concluded that the acts and practices of respondents, as hereinabove found, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of section 5 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 enjoining respondents from engaging in such conduct.

ORDER

It is ordered, That respondents Trade Union Courier Publishing Corporation, a corporation, its officers, and Maxwell C. Raddock, Charles Raddock and Bert Raddock, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale and sale of advertising space in the newspaper now designated as the "Trade Union Courier," whether published under that name, or any other name, and in connection with the offering for sale, sale and distribution of said newspaper, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that said newspaper is endorsed by, affiliated with, sponsored by, or otherwise connected with the American Federation of Labor.

2. Placing, printing or publishing any advertisement on behalf of any person or firm in said paper without a prior order or agreement to purchase said advertisement.

3. Sending bills, letters or notices to any person or firm with regard to an advertisement which has been or is to be, printed, inserted or published on behalf of said person or firm, or in any other manner seeking to exact payment for any such advertisement, without a bona fide order or agreement to purchase said advertisement.

ON APPEAL FROM INITIAL DECISION

Per CURIAM:

Statement of the Case

Complaint herein issued on March 14, 1952, charging respondents with violation of Section 5 of the Federal Trade Commission Act by the use of unfair and deceptive acts and practices and unfair methods of competition through statements made in the Trade Union Courier,

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and through oral statements made by respondents' duly authorized representatives, to the effect that the Trade Union Courier is endorsed by the American Federation of Labor; that said publication officially is endorsed by 2,000 A. F. L. unions, that it is affiliated with the American Labor Press Association and that it is serviced by the International Labor News Service and by the American Labor News Service [correctly identified in the record as American Federation of Labor News Service (T. 13)]. The complaint also charges respondents with having engaged in the further practice of placing advertisements of various business concerns in the Trade Union Courier without having received authorization therefor and of then seeking to exact payment for said advertisements from said concerns.

Thereafter, in the usual course, answer was filed and hearings were held before a hearing examiner duly designated by the Commission. On August 26, 1952, the hearing examiner filed his initial decision and order dismissing the complaint for lack of record evidence to sustain the allegations of the complaint and because the public interest did not require corrective action against the respondents. Appeal to the Commission was taken by counsel supporting the complaint with respect to the dismissal of two of the charges of the complaint. i. e.—

(1) that respondents falsely represented that their publication was endorsed by the American Federation of Labor, and

(2) that respondents placed advertisements of various business concerns in their publication without having received authorization therefor and of them seeking to exact payment for such advertisements from said concerns.

No appeal was taken from the dismissal of the other charges in the complaint.

By order of June 12, 1953, this Commission granted a motion filed by counsel supporting the complaint for permission to withdraw his partial appeal from the initial decision. The said order of June 12, 1953, also vacated the order of the hearing examiner dismissing the complaint as to the two charges appealed from, reopened the case for the introduction of testimony and evidence pro and con on the aforesaid two charges and remanded the proceeding to the hearing examiner for the reception of further testimony and evidence.

In due course further hearings before the hearing examiner were held and testimony and evidence adduced in support of and in opposition to the two charges of the complaint which were remanded to the hearing examiner. At the opening of the hearings on remand and at the close of evidence offered in support of the complaint, as well as

at the end of the entire case, respondents filed motions to dismiss which were denied by the hearing examiner. Briefs were submitted to the hearing examiner by counsel in support of their respective positions. And, upon the entire record and from his observation of the witnesses, the hearing examiner on December 29, 1954, filed his initial decision on remand consisting of his statement of the case, findings of fact, conclusion of law and order to cease and desist from:

1. Representing, directly or by implication, that said newspaper [Trade Union Courier] is endorsed by, affiliated with, sponsored by, or otherwise connected with the American Federation of Labor.

2. Placing, printing or publishing any advertisement on behalf of any person or firm in said paper without a prior order or agreement to purchase said advertisement.

3. Sending bills, letters or notices to any person or firm with regard to an advertisement which has been or is to be printed, inserted or published on behalf of said person or firm, or in any other manner seeking to exact payment for any such advertisement, without a bona fide order or agreement to purchase said advertisement.

Timely appeal from the hearing examiner's initial decision on remand was taken by respondents and briefs were filed with the Commission by both sides. The case is now before the Commission for final disposition on the merits on the full record, including a document filed by respondents April 28, 1955, withdrawing their request for oral argument on appeal before the Commission, and requesting that particular reference be made to a brief filed by respondents on November 12, 1952, as well as renewing a contention by respondents respecting certain rulings by the hearing examiner (T. 776-779, 802-803) with regard to statements given by witnesses to Federal Trade Commission investigators.

Statement of Facts

Respondent corporation publishes a biweekly tabloid size newspaper—Trade Union Courier. The named individual respondents are officers of the corporation and each is actively engaged in formulation, direction, management or control of the paper's policies and practices. Respondents employ from 9 to 12 advertising salesmen or solicitors who solicit advertising orders by personal contact and otherwise. Mainly, such solicitation is by long distance telephone. A large portion of respondents' income is derived from this sale to industrial and other business firms of advertising space, in the form of "institutional" advertising promoting "good labor-management relations" and "fighting against Communism in the labor movement."

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The publication is endorsed by a substantial number of American Federation of Labor trade unions and is affiliated with several labor press associations and news services. As previously indicated, all charges of the complaint, with two exceptions, were resolved in respondents' favor by the hearing examiner. The Commission's action of June 12, 1953, in remanding the case to the hearing examiner for further hearings on the two remaining issues, in effect sustained the hearing examiner's original initial decision dismissing the complaint on all points except those two issues which are now before us on appeal for final decision. At the time of issuance of the order of remand we did not specifically so hold. We do so now.

Respondents' Appeal

Respondents vigorously contend at the outset that the hearing examiner erred in denying respondents' motions to dismiss paragraph 6 of the complaint and to dismiss the two remaining charges in the complaint filed at the end of the Commission's case and at the end of the entire case.

Paragraph 6 of the complaint reads in full as follows:

"In the course and conduct of their business, respondents have engaged in the further practice of placing advertisements of various concerns in their paper without having received authorization therefor and then seeking to exact payment for said advertisements from said concerns."

Respondents urge that the allegations of this paragraph are insufficient as a matter of law to constitute a violation of the Federal Trade Commission Act and that, therefore, the Commission is without jurisdiction "to entertain that item of the complaint." The hearing examiner denied the motion, holding that "the deliberate practice of billing for unauthorized ads falls within the purview of the Act." It is too well settled to require citation of authorities that the Commission, in the first instance, subject to the judicial review provided, has the determination of what practices come within the scope of the Act. It is our view, and we so find, that the hearing examiner correctly denied respondents' motions in this regard. The question of whether or not the evidence sustains the charge that respondents in fact engaged in the practice in question will be discussed hereinafter in connection with our disposition on the merits of the two issues before us.

Respondents also contend that the hearing examiner erred in denying motions to dismiss the two charges of the complaint which were the subject of the Commission's order remanding the proceeding to the

hearing examiner—i. e., endorsement of the Trade Union Courier by the A. F. of L. and unauthorized insertion of advertisements. They advance as principal grounds in support of those motions contentions, among others, that the findings, conclusion and order in respect to each of these issues are not within the scope of the complaint, that the testimony and evidence are insufficient to support the charges made, and that an order to cease and desist entered against respondents would not be in the public interest.

We turn first to the argument of respondents with regard to the alleged variance of the hearing examiner's findings, conclusion and order from the charges of the complaint. Essentially it is respondents' position that "Had they been faced with the type of charge which would support an order such as is proposed by the examiner, they would have known what they had to meet and could have presented their defense accordingly. The fact is that they were not; no such notice was given them." The complaint alleged that respondents, in the Trade Union Courier and through statements by its advertising solicitors, represented, directly or by implication, that the paper is endorsed by the American Federation of Labor and that respondents inserted advertisements in the said paper without prior authorization therefor and then sought to exact payment for those advertisements. Respondents answered, including seven pages of affirmative defenses therein, much testimony was taken and elaborate findings of fact were made by the hearing examiner, the ultimate conclusion of which is that respondents, in fact, had engaged in the practices described. The record is clear that respondents at all times in the proceeding were fully aware of the scope and intent of the charges against them and the disposition of the two issues by the hearing examiner corresponds generally to the actual situation sought to be corrected. There was not here any abandonment of the very substance of the original charges of the complaint and the substitution of other charges which respondents could not have anticipated and had no opportunity to meet.

Having been fully justified in his findings that respondents have engaged in the unfair and deceptive practices alleged in the complaint, the examiner equally was justified in entering an order which would be effective in preventing the use of such practices in the future. As was held by the Supreme Court in the case of *Federal Trade Commission v. Ruberoid Co.*¹:

"Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out

¹ *Federal Trade Commission v. Ruberoid Co.*, 343 U. S. 470, 473 (1952).

this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be bypassed with impunity. Moreover, "[t]he Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices' disclosed. *Jacob Siegel Co. v. Federal Trade Comm'n*, 327 U. S. 608, 611 (1946)." We are of the opinion, and find, that the hearing examiner's order conforms to the theory of, and is reasonably related to, the charges contained in the complaint. The sufficiency of the evidence with respect thereto is hereinafter considered and weighed.

As indicated above, respondents in addition urge that an order to cease and desist entered against them would not be in the public interest claiming that there has been no showing whatever of any specific, substantial public interest in this case or of the type of practice and injury covered by the Act. We have here a situation where, in the entire context surrounding all actions of the respondents and their authorized representatives, the hearing examiner found that over a substantial period of time, over a representative area, and in a substantial number of transactions, through statements by salesmen, through correspondence, invoices, letterheads, etc. respondents engaged in the practices involved for the purpose of inducing sales of advertising space as charged in the complaint. Admittedly, respondents' solicitors contact several thousands of prospective customers a year, a considerable segment of the public, who through alleged misrepresentations are induced to purchase advertising space which, also admittedly, accounts for a large part of the corporate respondent's income. Evidence of record establishes also that the Trade Union Courier is competitive for the advertising dollar with several hundreds of other labor publications, of which there are several thousands, and that it reaches labor leaders throughout the country, of whom there are 300,000 to 500,000 at the present time. It is clear, therefore, that there is sufficient public interest present here to warrant this proceeding and to support the order which we determine below should issue.

Respondents also filed a number of specific exceptions to the findings, conclusion, and to certain rulings of the hearing examiner. The first four of respondents' exceptions are disposed of by our rulings above. The balance of the specific exceptions are disposed of in the

next succeeding paragraphs or are overruled in effect by our final disposition of this matter on the merits.

In their appeal respondents except specifically to the denial by the hearing examiner of motions to dismiss on the ground that the hearing examiner's 1952 initial decision dismissing the complaint was *res adjudicata*. The Commission's order of June 12, 1953, remanding the case adverted to hereinabove, disposes of this point. There, in ruling upon respondents' objections in opposition to remand, the Commission held that:

"The power to reopen a proceeding for the reception of additional evidence is inherent in trial tribunals and its exercise is a matter within their discretion. That the Commission delegates certain of its trial functions to hearing examiners does not divest it of its status as a trial tribunal, nor convert it into an appellate body. Whatever cogency respondents' objections might have were they made in a court proceeding between private litigants, they are not persuasive here in a proceeding which is predicated upon the public interest which demands that the Commission be fully informed concerning the practices in question."

This exception of respondents is denied.

Respondents further except to rulings of the hearing examiner admitting over objection testimony concerning "impressions" of certain witnesses as to what was said to them orally by respondents' solicitors. It is well established that there is no better method to resolve whether or not a statement or representation is misleading than to determine its meaning to those to whom such statements or representation has been made. The record discloses here that in most instances witnesses testified to their best recollection of the substance of their conversations with respondents' solicitors. Some did relate their impressions gained therefrom as to respondents' relationship with the A. F. of L. Wigmore² perhaps best states the rule controlling in the latter circumstances which we believe is dispositive of respondents' contention in this respect:

"The general rule, universally accepted is therefore that the substance or effect of the actual words spoken will suffice, the witness stating this substance as best he can from the impression left upon his memory. He may give his 'understanding' or 'impression' as to the net meaning of the words heard."

This exception of respondents is denied.

² Wigmore, On Evidence, Third Edition, Section 2097; See also *U. S. v. Krulwitch*, 167 F. 2d 943.

Respondents also except to the denial by the hearing examiner of motions to strike the testimony of one witness as not being connected with or binding upon respondents and to strike the testimony of another witness as not being within the issues of the case. In the first instance the witness testified he received a long distance call from New York for an ad in 1953, which he declined to authorize and that he was subsequently billed therefor as shown by a registered letter in evidence. Respondents' witness Koota, a solicitor, testified he called the witness but could not recall whether or not an ad was authorized. In the second instance the witness testified as to the substance of what was said to him over the phone; and an invoice for an ad, as well as a letter from respondents' advertising manager acknowledging the advertising order, connects up the witness' testimony with the issues in this proceeding. The Commission has concluded that the hearing examiner's rulings on these two motions were correct. Even if respondents' contentions here were well grounded, it would not affect final disposition of respondents' appeals herein since the greater weight of other testimony and evidence supports the initial decision on remand as herein appears. These exceptions of respondents are denied.

The hearing examiner denied a request and a motion by respondents' counsel that statements of interviews with witnesses by Federal Trade Commission investigators be produced at the hearings before the hearing examiner. These rulings were based upon the ground that reports of such investigations are made in the course of the discharge of official duties and are confidential except where used for the purpose of refreshing a witness' recollection, in which event their confidential nature is waived. Respondents excepted.

In a memorandum filed with the Commission April 28, 1955, respondents cite that in the case of *Gordon v. United States*³ the Supreme Court definitively held that where a witness testifies to having given a statement to a Government investigator, the trial tribunal must examine that statement for inconsistencies with his statement on the stand, and in the event of such inconsistency must furnish the statement to the defendant. Reference also was made to *U. S. v. Krulewitch*.⁴ Counsel for respondents contend that this rule applies irrespective of whether the witness used the statement on the stand. The case of *Gordon v. United States*, *supra*, is distinguishable from the situation here. The former was a criminal proceeding where the prosecution's case stood or fell on the testimony of a witness who admittedly had made prior statements contradictory to those made on

³ *Gordon v. United States*, 344 U. S. 414 (1953).

⁴ *U. S. v. Krulewitch*, 145 F. 2d 76 (2d Cir. 1944).

the witness stand. Here there is no criminal proceeding where the considerations involved in production of prior contradictory statements dictate strict application of the pertinent rules of evidence. In the *Gordon* case there was proof that the prior statements sought to be produced were in fact contradictory. That is not so here. Further, in its opinion, the Supreme Court recognized *inter alia* that the assertion of privilege as to confidential character could have defeated a move to require production of the contradictory statements if the statements there involved had been of that nature. The case of *U. S. v. Krulewitch*, *supra*, similarly is distinguishable. It, in pertinent part, merely restates the rule in the *Gordon* case.

Nor is there any question of waiver here. The witnesses involved did not use confidential reports of Commission investigators to refresh their recollections so as to constitute such waiver and the confidential character of the statements was asserted. This exception of respondents is denied.

This leads us now to consideration of the sufficiency of the evidence of record herein and to final disposition of the two issues remaining in this case.

Unauthorized Advertisements

The gravamen of the charge here is that respondents without prior authority inserted advertisements in the Trade Union Courier on behalf of various industrial and other concerns and thereafter sought to exact payment therefor. This charge is attacked by respondents on jurisdictional grounds which are disposed of above. In addition, employment of the practice categorically is denied by them.

The hearing examiner in his initial decision on remand reviews in considerable detail the testimony and evidence relevant to this point. He had an opportunity to observe at close hand the bearing and demeanor of the witnesses and he states in his initial decision that he was not impressed with the testimony of respondents' salesmen witnesses that particular advertisements had been authorized. The hearing examiner concluded that he could not accept this testimony in the light of the testimony of apparently truthful witnesses in support of the complaint and in the light of the generally "unconvincing and unimpressive performance given by the solicitors." While not bound by the findings and conclusions of the hearing examiner in this respect, our own examination of the whole cold record has convinced us that the testimony of the solicitors was based at best upon a vague recollection of their conversations with prospective customers and that, as found by the hearing examiner, they relied primarily upon

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the fact that after a given solicitation they had filled out a sales memorandum from which they concluded that the transaction must have been authorized. And the record contains numerous instances of the unauthorized insertion of advertisements. The testimony of witnesses in support of the complaint establishes that no less than sixteen firms and individuals were billed in amounts from \$25.00 to \$350.00 for advertisements which they had not authorized, or which they had expressly refused to take. Documents in evidence further establish that payment for such advertisements was sought to be exacted through several follow-up letters and "Final Notices" requesting payment. Persistent efforts were made to enforce payment and the examiner concluded that the extent to which this practice was engaged in amounted to an unfair and deceptive practice proscribed by the Federal Trade Commission Act. Our examination of the "whole record" leads us to determine that the findings in this respect clearly are supported by the greater weight of the evidence. Respondents' appeal from the hearing examiner's initial decision on the issue of insertion of unauthorized advertisements and the efforts of respondents towards exaction of payment therefor as constituting a violation of the Federal Trade Commission Act is, therefore, denied

Endorsement by American Federation of Labor

The hearing examiner in his initial decision found that, on the record as a whole, respondents misrepresented the facts as to their relationship with the American Federation of Labor and that they sought to create, and did create, the impression among prospective advertisers that the Trade Union Courier is endorsed by, affiliated with, or bears a close connection with, the American Federation of Labor. This finding by the hearing examiner is based upon his evaluation of the versions given by some of the businessmen witnesses as to what respondents' advertising solicitors said to them when they were approached to take advertisements in the Trade Union Courier as follows:

1. That he wanted 'an ad for the AFL paper' and that the paper was the 'official organ of the AFL operating out of their national headquarters.'
2. That he 'represented the American Federation of Labor' and that the paper was a 'national publication of the AFL.'
3. That the paper 'represented' or 'was affiliated with the AFL.'
4. That the paper was 'an official publication of the AFL.'
5. That the solicitor was 'connected with the AFL unions or AFL.'

6. That the solicitor was 'representing the AFL against Communism' and was soliciting ads for the newspaper 'through the sanction of the AFL.'

7. That the paper '[was represented as] part of' or was 'put out by the American Federation of Labor.'

8. That 'they were bringing out an issue for the convention of the American Federation of Labor and that they were the official publication of the American Federation of Labor.'

9. That the solicitor was 'with the A. F. of L.' and wanted an ad 'in the A. F. L. paper.'

10. That the paper was the 'national organ for the American Federation of Labor and that by our advertising in it we would be doing a national public relations job with the American Federation of Labor.'"

This testimony was attacked by respondents on the ground that it was unreliable because some of the witnesses on cross-examination admitted they were not sure as to exactly what the solicitor said to them and because some conceded that the solicitors might have used the term "A. F. of L. Unions" instead of "A. F. of L." The hearing examiner in this connection notes that in such instances the responses of the witnesses were affirmatively given to leading questions by respondents' counsel and that he, the hearing examiner, was satisfied that the witnesses did not appreciate the distinction between the two terms. He concluded that the evidence established that respondents' solicitors consistently stressed the paper's connection with the American Federation of Labor and not merely the fact of record of the paper's endorsement, affiliation, or connection with only some of the constituent unions of the Federation. Uncontroverted on the record and not subject to dispute is the fact that the American Federation of Labor, as such, endorses no newspaper that solicits, accepts or publishes advertising.

Further, the hearing examiner found this oral testimony to have been corroborated by written records made by some of these witnesses at a time when the conversations were clearly in their minds. For example, the hearing examiner in his initial decision points out that one witness, who testified that one of respondents' solicitors stated to him that respondents' paper was the paper of "the A. F. of L. unions nationally," in advising the paper, by a letter in evidence, that an order for an advertisement was being cancelled, gave the following reason:

"We have received information that your paper is not affiliated with the American Federation of Labor as represented by your [salesmen]."

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In a reply to this letter, respondents' advertising manager made no clear cut denial as to any claim of representation of the Federation but stated ambiguously only that:

"THE TRADE UNION COURIER, leading independent labor newspaper in the country, was founded in January, 1936, and has been published regularly since that year, presenting the vital labor news affecting the nation and covering *the A.F.L. union it represents* from an anti-Communist standpoint and from the standpoint, too, of better labor-management relations." (*Italics supplied.*)

Another of these witnesses, the initial decision points out, within a month after a long distance telephone conversation with one of respondents' solicitors, wrote to respondents requesting return of his check in payment for an advertisement as follows:

"Upon checking further, we find that you have misrepresented. When soliciting us by phone, you gave us a lengthy description of how the American Federation of Labor was making a 'drive' to better relations between employer and employee, and that all the A. F. of L. locals were participating in this."

And, another witness had his secretary get on the phone as soon as one of respondents' solicitors identified himself. She recorded the latter as stating:

"I am with the Trade Union Courier of the American Federation of Labor."

Respondents' solicitors on the stand denied the statements attributed to them and, in this connection, the hearing examiner's initial decision concludes as follows:

* * * A large portion of this testimony impressed the examiner as unconvincing and lacking in inherent probability. Despite the fact that the paper is endorsed by a number of unions affiliated with the American Federation of Labor and this would be a natural talking point in seeking to sell advertising, several of the witnesses [respondents' advertising solicitors] at first insisted that they made no reference to the American Federation of Labor in any way, shape or form in their conversations. When the absurdity of this situation became apparent to them, several of the witnesses conceded that they referred to the American Federation of Labor, but that this was only done in response to some query by the recipient of the call as to what connection they had with the labor movement. In such instances, according to these witnesses, they would mention the endorsement of the paper by American Federation of Labor unions.

"However, a careful examination of their testimony convinces the examiner that they did more than they had a right to do legitimately,

and that they deliberately set about to create an impression of some connection between the paper and the national A. F. of L. Thus, one of the solicitors testified:

"* * * when I told Mr. Cooney we were a labor paper, he asked me what sort of a labor paper we are, and I told him we are a *pro-A. F. of L.* paper, and during the conversation there he asked me what affiliation you might have had *with the A. F. of L.*, and I told him we were *officially endorsed by the A. F. of L. Unions* * * *."

"Another solicitor testified that if a person asked him: 'Are you people endorsed by CIO or A. F. of L.?' he would reply '[W]e are endorsed by *A. F. Unions*.'" (Emphasis supplied.)

In the light of the record the hearing examiner finally concluded that the sales pitch of respondents' solicitors was pervaded with subtle, and sometimes not so subtle, insinuations which tended to create the impression of an association with the A. F. of L. as a national organization and that the solicitors did not limit themselves to stating the actual fact of record with respect to the paper's endorsement by only some unions of the A. F. of L. The fact that the paper is endorsed by some A. F. of L. unions is undisputed, the hearing examiner so found, and the Commission does not question such finding. The Commission agrees with the hearing examiner, however, that while respondents may have some following in the labor movement, that does not justify their solicitors in seeking to create the impression that the paper is endorsed by the American Federation of Labor itself. The Commission is satisfied, on the whole record, that the hearing examiner was correct in finding that respondents' authorized solicitors customarily followed the pattern indicated in their sales talk and that a significant portion of the public was in fact misled thereby. Respondents' appeal from the hearing examiner's initial decision in respect to the misrepresentation of the Trade Union Courier's relationship with the American Federation of Labor is denied.

Scope of Order

In addition to contending that the order to cease and desist, contained in the initial decision on remand, is not within the scope of the complaint—which contention already has been denied above—respondents press the point that the said order is so broad and vague as to render respondents liable to the penalties of contempt for perfectly legitimate conduct. They claim they are given no guidance as to what instructions they must give their solicitors, nor are the solicitors themselves told what they can do and what they cannot do in simple, intel-

ligible terms. In essence their contention is that the proscriptions of the order are too general in scope and that the only order which can properly be entered here is one inhibiting the use of representations that the Trade Union Courier is "endorsed" by the American Federation of Labor.

There is no merit to this contention. The Commission's orders, being wholly prospective in operation and intended to prevent the occurrence in the future of illegal activity, must of necessity be somewhat general in their scope. To be effective, such orders must proscribe not only specific acts alleged or proved to have been engaged in in the past, but, to the extent that the pleadings and the proof will permit, the general, and other specific, related course of conduct as well.

We have found above that the terms of the order to cease and desist are reasonably related to, and within the scope of, the allegations of the complaint. Record proof further substantiates that finding since the testimony and evidence herein clearly establish a course of conduct on the part of respondents' authorized solicitors which was intended to, and did in fact mislead prospective purchasers of advertising space to authorize advertisements and to pay therefor in the mistaken belief that the Trade Union Courier was officially endorsed by, affiliated with, sponsored by, or otherwise connected with the American Federation of Labor as an organizational entity itself. Respondents' exception on this point is denied.

Conclusion

We have fully considered the whole record herein, including the transcript of hearings, exhibits, and briefs (including respondents' brief filed with the Commission November 12, 1952) of both parties.

For the reasons hereinabove stated, we conclude that the hearing examiner's initial decision on remand and his rulings on respondents' various motions are correct. Accordingly, respondents' appeal from the initial decision, including their exceptions thereto, is hereby denied and the initial decision of the hearing examiner is affirmed. Appropriate order will be entered.

FINAL ORDER

This matter having come before the Commission upon respondents' appeal from the hearing examiner's initial decision and the matter having been heard on the whole record, including briefs [request for oral argument having been withdrawn by respondents]; and the Com-

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Final Order

mission having rendered its decision denying respondents' appeal and affirming the initial decision:

It is ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order contained in said initial decision.

IN THE MATTER OF
LOUIS BUCHWALTER ET AL. TRADING AS NATIONAL
FEATHER & DOWN COMPANY

ORDER, OPINION, ECT., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT

Docket 6132. Complaint, Oct. 28, 1953—Decision, June 30, 1955

Order requiring manufacturers in Brooklyn, N. Y., to cease misrepresenting the down and feather content of their pillows on labels affixed thereto or otherwise.

Mr. Ames W. Williams for the Commission.

Davidson, Cohen & Zelkin, of New York City, for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges that the respondents have violated the provisions of the Federal Trade Commission Act by misrepresenting the contents of feather pillows which they manufacture and distribute in commerce, and, further, that they have falsely represented that their pillows have been laboratory-tested by the National Bureau of Standards, an agency of the United States Government.

After the filing of an answer, hearings were held, in which testimony and other evidence was presented, duly recorded and filed in the office of the Commission. By stipulation all the evidence in the companion feather cases was made a part of the record in this case, except so far as such evidence relates exclusively to the identification, contents and analyses of the feather samples in each of those cases.¹ Proposed findings of fact, conclusions and order have been submitted by counsel. On the basis of the entire record, the following findings of fact are made:

1. Respondents Louis Buchwalter and Emanuel Cohen are copartners trading as National Feather & Down Company, with their office and principal place of business at 160-166 Seventh Street, Brooklyn 15, New York.

2. Respondents are now, and for more than one year last past have been engaged in the manufacture of feather pillows, which they sell to dealers for resale to the public.

Respondents have caused and now cause their pillows, when sold

¹ The companion feather cases are: Docket 6132, National Feather & Down Company; Docket 6133, The L. Buchman Co., Inc., et al.; Docket 6134, Burton-Dixie Corp., et al.; Docket 6135, N. Sumergrade & Sons, et al.; Docket 6137, Northern Feather Works, Inc., et al.; Docket 6161, The Salisbury Co., et al.; Docket 6188, Globe Feather & Down Co., et al.; and Docket 6208, Sanitary Feather & Down Co., Inc., et al.