

IN THE MATTER OF
UNION CIRCULATION COMPANY, INC. ET AL.

Docket 5978. Order and opinion, Oct. 10, 1955

Order denying respondents' motion requesting clarification of order prohibiting no-switching agreements among magazine subscription agencies.

Before *Mr. William L. Pack*, hearing examiner.

Mr. Lynn C. Paulson and *Mr. T. Harold Scott* for the Commission.

Mr. Benjamin Kirschstein and *Mr. Gilbert H. Weil*, of New York City, for Union Circulation Co., Inc., and along with—

Mr. Mortimer M. Lerner, of New York City, for National Circulation Co., Inc. and Periodical Sales Co., Inc.;

Mr. William N. Kenefick, of Michigan City, Ind., and *Mr. F. Kenneth Dempsey*, of South Bend, Ind., for Publishers Continental Sales Corp.;

Mr. A. Walter Socolow, of New York City, for Leo E. Light and Roy C. Hodge.

ORDER DENYING RESPONDENTS' MOTION FOR CLARIFICATION OF ORDER
TO CEASE AND DESIST

This matter having come on to be heard by the Commission upon respondents' motion filed on May 27, 1955, requesting clarification of the order to cease and desist issued herein on January 25, 1955¹ or, in the alternative, that the case be remanded to the hearing examiner for the purpose of redrafting the order, and answer of counsel supporting the complaint in opposition thereto; and

The Commission having determined, for the reasons appearing in the accompanying opinion of the Commission, that the motion and request for oral argument thereon should be denied:

It is ordered, That respondents' said motion and request for oral argument thereon be, and they hereby are, denied.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

Respondents' motion requests clarification of the cease and desist order entered herein on January 25, 1955 so as to render it clear that the order is not intended to refer to such "parties" as have been engaging in false, fraudulent, deceptive or otherwise unlawful acts,

¹ Order to cease and desist, dated Jan. 25, 1955, is reported in 51 F. T. C. 647.

practices or methods of competition in the course of selling magazine subscriptions. Grounds for the request are (1) that such clarification would conform and be consistent with the presently intended scope of the final order, and (2) unless so clarified or modified, the order is not supported by the law and findings of fact.

The case on appeal was very thoroughly presented by both sides in written briefs and by oral argument. In addition, counsel for respondents have supported this motion by written brief to which counsel for the complaint have filed a written reply. It is not believed therefore that further oral argument is necessary and request therefor is denied.

The complaint was under Section 5 of the Federal Trade Commission Act and charged respondents with unfair methods of competition, first, in a planned common course of action in the matter of "no-switching" agreements in the securing of magazine subscriptions and, second, in a common course of action in attempting to persuade and influence magazine publishers to withhold their business from subscription agencies not entering into such agreements.

The Commission found that the respondents had entered into contracts, one of the purposes of which was stated as follows:

"To prevent and eliminate the switching of, or inducing representatives of the respective agencies to violate their contracts or working arrangements with, or enticing away any representatives from their respective agencies."

The contracts contained the following provision:

"It is understood and agreed that no representative, contracting manager, crew operator, or solicitor, shall directly or indirectly negotiate with, endeavor to entice away, or authorize any representatives, contracting managers, crew operators or solicitors of the other agency. * * *

"It is further understood and agreed that the aforementioned terms and conditions do not obtain in any case (1) where the individual has not been engaged in the magazine business for at least one year, or (2) where the individual has not been engaged with either agency for at least one year, (3) except where the one year absence or inactivity has been occasioned by draft into military services or similar war contributions."

Although counsel supporting the complaint also argued that the no-switching agreements are boycotts affecting third parties and are therefore unreasonable and illegal per se, nevertheless both the hearing examiner and the Commission based their conclusions as to the legality of the contracts on their respective views as to the reason-

ableness of the contracts under all the circumstances. The conclusion of the Commission was that the contracts were an unreasonable restraint and it issued an order requiring respondents to cease and desist from:

"1. Entering into, carrying out, enforcing or giving effect to any agreement not to employ parties who have previously been actively engaged for themselves or for others in the business of soliciting magazine subscriptions."

The motion of respondents would rewrite the order substantially as follows:

"1. Entering into, carrying out, enforcing or giving effect to any agreement not to employ parties who have previously been actively engaged for themselves or for others in the business of soliciting magazine subscriptions, except with regard to such parties who in the course of such business have been using unfair methods of competition, or unfair or deceptive acts or practices."

This would involve a ruling by the Commission about a contract which the respondents never made and the effects of which were not explored at the trial. The wording of the contracts does not indicate an intention to apply the no-switching rule only "to such parties who in the course of such business have been using unfair methods of competition, or unfair or deceptive acts or practices." Nor do the statements of respondents and other evidence indicate that such was the intention. There is not sufficient evidence in the record by which the reasonableness of the suggested contract could be tested. Furthermore, the proposed order would leave unsettled the means by which the unfair methods of competition or unfair or deceptive acts or practices are to be determined (see *FTC v. Wallace*, 75 F. 2d 733).

The matters referred to in the second phase of respondents' motion were fully considered both in the initial decision of the hearing examiner and in the opinion of the Commission. After considering the entire record, the Commission found as an ultimate fact "that the no-switching agreements are, under all the circumstances, an unreasonable restraint and constitute unfair methods of competition within the meaning of Section 5 of the Federal Trade Commission Act.

Accordingly, respondents' motion is denied.

Complaint

IN THE MATTER OF

HARVEY J. STRAUSS DOING BUSINESS AS
H. J. STRAUSS FURS

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket 6371. Complaint, June 27, 1955—Decision, Oct. 12, 1955

Consent order requiring a furrier in Lowell, Mass., to cease misbranding and falsely advertising fur products in violation of the Fur Products Labeling Act and the Federal Trade Commission Act.

Before *Mr. John Lewis*, hearing examiner.

Mr. John J. McNally for the Commission.

Mr. Wallace H. Levy, of Lowell, Mass., for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Harvey J. Strauss, an individual, doing business as H. J. Strauss Furs, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Harvey J. Strauss is an individual doing business as H. J. Strauss Furs, with his office and principal place of business located at 44 Bridge Street, Lowell, Massachusetts.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has advertised and offered for sale fur products in commerce, and has sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4 (2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.