

IN THE MATTER OF
WOONSOCKET SPINNING COMPANY ET AL.

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

Docket 6474. Complaint, Dec. 5, 1955—Decision, Sept. 5, 1956

Consent order requiring a manufacturer in Woonsocket, R.I., to cease violating the Wool Products Labeling Act by failing to label certain cones of yarn to show the percentages of fiber content, and by making false statements on invoices and shipping memoranda concerning the fiber content.

Mr. Frederick McManus for the Commission.

Hartman & Craven, by *Mr. Milton Rosenberg*, of New York City, for Woonsocket Spinning Co.

Weil, Gotshal & Manges, by *Mr. Jesse D. Wolff*, *Mr. Edward C. Wallace* and *Mr. Ira M. Millstein*, of New York City, and *Mr. Edward L. Merrigan*, of Washington, D.C., for Theodore Birnbaum.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

This proceeding was initiated December 5, 1955. The complaint charges that respondent Woonsocket Spinning Company, and respondent Theodore Birnbaum individually and as an officer of said corporation, violated the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939, and the provisions of the Federal Trade Commission Act, in that certain of the yarns manufactured and sold by said respondents were not properly "stamped, tagged, or labeled", and in that respondents had made certain misstatements on their invoices and shipping memoranda concerning the content of the wool products manufactured and sold.

The corporate respondent, Woonsocket Spinning Company, on March 13, 1956, entered into an Agreement Containing Consent Order To Cease And Desist with counsel supporting the complaint, which was approved by the Assistant Director and Director of the Commission's Bureau of Litigation and transmitted to the Hearing Examiner.

The agreement identifies respondent Woonsocket Spinning Company as a corporation existing and doing business under and by virtue of the laws of the State of Rhode Island, with its offices and principal place of business located at 115 Ricard Street, Woonsocket, Rhode Island.

The agreement provides, among other things, that said respondent admits all the jurisdictional facts alleged in the complaint and that

the record herein may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based, insofar as they relate to the corporate respondent, shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified, or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by said respondent that it has violated the law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Said respondent waived any further procedural steps before the Hearing Examiner and the Commission, the making of findings of fact or conclusions of law, and all of its rights to challenge the validity of the order to cease and desist entered in accordance with the agreement.

As to respondent Woonsocket Spinning Company, a corporation, the order agreed upon fully covers all the issues raised in the complaint, and adequately prohibits the acts and practices charged therein as being in violation of the Federal Trade Commission Act and of the Wool Products Labeling Act of 1939. The Hearing Examiner, therefore, accepts the Agreement Containing Consent Order To Cease And Desist tendered by the corporate respondent.

Respondent Theodore Birnbaum moved to dismiss the complaint as to him and, "in the alternative", answered said complaint. At the initial hearing said respondent amended his answer, deleting therefrom all allegations and denials except those pertaining to the allegation of the complaint that he formulated, directed and controlled the acts, policies and practices of the corporate respondent. This allegation respondent Birnbaum specifically denied. He stated affirmatively in his answer "that he did not, during the periods complained of, nor does he now dominate and manage * * *, nor have dominant control of the respondent corporation, * * *; and that he was not * * * nor is he now in top control, and that it is not necessary to join him in any cease and desist order entered herein in order to make such * * * order fully effective in preventing the acts complained of * * *".

Two hearings were held, at which three witnesses were called to support the allegation of the complaint thus put in issue by

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respondent Birnbaum, and five purchase-order exhibits were admitted as evidence. Thereafter counsel supporting the complaint and counsel for respondent Birnbaum submitted proposed findings and conclusions. Upon the basis of this record, relating only to the issue raised by respondent Birnbaum, the following findings of fact and conclusions are made.

1. The stock of the corporate respondent, during the period in question in this proceeding, was owned by three persons: Walter Bareiss, Gregory Shlomm and Norman Glauber (Glauber's interest was purchased by the other two during 1955 or early in 1956). During 1954 Alex Craven was president of the corporation. He was succeeded by Gregory Shlomm, who, the record discloses, was the active representative of the stockholders and in top control of the corporation.

2. Respondent Theodore Birnbaum, a graduate of the Wharton School of Business Administration and a former employee of the Columbia Picture Company in sales and distribution, was employed in 1950 by Walter Bareiss, who was engaged then in the wool and yarn business. This was Theodore Birnbaum's first experience in the wool and yarn business, in which he was not an expert.

3. When Bareiss and his associates took over and reorganized Woonsocket Spinning Company in January, 1954, Theodore Birnbaum continued in their employ, without contract, and was made vice-president of the company, although he owned no corporate stock therein. This was a part-time employment—two days per week on an average—and he continued to serve the stockholders in their other joint enterprises, receiving, roughly, 20 to 35% of his pay from Woonsocket Spinning Company, which retained as plant superintendent Montcalm Ricard Tessier, son of the founder of the business, who had been connected with the company for at least 25 years, and was an expert in the field. Theodore Birnbaum was his immediate superior. Tessier resigned at the end of January, 1955; his successor was interviewed and employed by Shlomm. Birnbaum resigned his position with respondent corporation on March 20, 1956.

4. Respondent Birnbaum's exact status at Woonsocket Spinning Company is not clear. He stated that he was "an intermediary or coordinator between the physical mill, the personnel at the mill, and the other officers and stockholders of the company", and that he was primarily responsible to the stockholders, who had the last word and ultimate control of the respondent corporation. Normal problems were handled at the plant, but if any serious doubt arose as to acceptance of an order for yarn, or purchase of fiber, or a

policy matter, the stockholders were consulted. Shlomm was at the plant frequently.

Tessier testified that Shlomm was president and in control of the corporation; that Shlomm could and did, on several occasions, overrule Birnbaum; otherwise, Birnbaum was in charge. Tessier was a witness not without interest in the matter. There was a coldness between him and Theodore Birnbaum, and it was evident from his attitude, appearance and testimony that he was not volunteering information in Birnbaum's behalf. On the other hand, to specific questions his answers were truthful. The five purchase orders produced for the record for fur fibers of the sort involved in making the yarn alleged in the complaint to have been improperly labelled, bearing dates from October 4, 1954, to January 25, 1955, were all signed by Tessier.

5. Besides that of Birnbaum and Tessier, the only other testimony in the proceeding was by a Federal Trade Commission investigator, who stated that when he went to Woonsocket Spinning Company's place of business to investigate, he requested to see the official in charge of the mill, and was shown in to Mr. Birnbaum, who furnished the specific information requested by him, and cooperated with him "very completely". What the mislabelling or misrepresentation consisted of, or by whom it was actually performed, is not disclosed by the record.

The Issue as to Respondent Birnbaum

Upon these facts the Hearing Examiner is asked to make a finding that Theodore Birnbaum formulated, directed and controlled the acts, policies and practices of Woonsocket Spinning Company.

The Law as to Individual Responsibility

The Administrative Procedure Act provides that findings must be "supported by and in accordance with the reliable, probative, and substantial evidence". Substantial evidence has been defined in *Carlay v. F.T.C.*, 42 F.T.C. 897, 153 F. 2d 493, as being

* * * more than a mere scintilla. It means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. It must be of such character as to afford a substantial basis of fact from which the fact in issue can be reasonably inferred. It excludes vague, uncertain or irrelevant matter. It implies a quality and character of proof which induces conviction and makes a lasting impression on reason. *Consolidated Edison Company v. National Labor Relations Board*, 305 U.S. 197; *National Labor Relations Board v. Columbian Enameling and Stamping Company*, 306 U.S. 292, 299; *National Labor Relations Board v. Thompson Products, Inc.*, 97 F. 2d 13, 15 (C.C.A. 6). The rule of substantial evidence is one of fundamental

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importance and marks the dividing line between law and arbitrary power; and the requirement that a finding must be supported by substantial evidence does not go so far as to justify orders without a basis in evidence having rational, probative force. *Consolidated Edison Company v. National Labor Relations Board*, *supra*, *National Labor Relations Board v. Thompson Products*, *supra*.

The degree of control that must be exercised before an officer of a corporation can be held individually responsible for corporate acts and practices has also been defined.

The most recent pronouncement of the Commission as to individual responsibility is found in its decision of June 29, 1956, in the matter of *Maryland Baking Company, et al.*, Docket 6327, in which the Commission denied an appeal from a Hearing Examiner's initial decision dismissing the complaint as to an individual respondent, despite a finding that the individually-named respondent was "Chairman of the Board, a large stockholder in and treasurer of respondent corporation * * * (and) primarily responsible for the acts and practices * * * alleged to be unlawful".

As stated in the initial decision in that proceeding,

The outstanding case * * * for the inclusion of officers of respondents individually in Commission's orders to cease and desist is that of *FT.C. v. Standard Education Society, et al.*, 1937, 302 U.S., 112. In that case, however, the court held that there were circumstances, as disclosed by Commission's finding, when further efforts of these individual respondents to evade orders of the Commission might be anticipated, and under those circumstances it was proper for the Commission to include them in its cease and desist order. The court commented on the fact that the three individually named respondents acted with the same freedom as though no corporation existed and that the Commission was justified in reaching the conclusion that it was necessary to include the individuals in each part of its order, if the order was to be effective in preventing the unfair competitive practices which the Commission had found to exist. * * * .

The *Standard Education Society* case reversed a decision of the Second Circuit, which thereafter, in 1954, had another case before it, *Standard Distributors, Inc., et al. v. F.T.C.*, 211 F.2d 7, requiring application of the rule laid down by the Supreme Court. Judge Hand, writing for a majority of the court, interpreted the Supreme Court's decision as meaning "that such an order may include those officers of a corporation who are in *top* control of the activities that the Commission finds to have violated the Act".

The courts have said that the president of a corporation who is also Chairman of the Board, owns all but one share of the stock and alone is responsible for promulgating the advertising and supervising the field agents, may be held individually, *Tractor Training Service v. F.T.C.*, 1955, 227 F.2d 420; that officers of a

corporation who admitted that they had been engaged in the sale of the preparations involved could be held, *Sebrone Co., et al., v. F.T.C.*, 1943, 135 F.2d 676, 36 F.T.C. 1142; that officers and directors of a corporation who formulated, directed and controlled its policies, practices and acts, but not one who was "not actively engaged in the conduct of said business", could be held, *Consumers Home Equipment Co. v. F.T.C.*, 1947, 164 F.2d 972; 44 F.T.C. 1453; that where "the management, direction and activities of the corporation" were those of an individual who was president and majority stockholder of a corporation whose other officers and stockholders were members of his immediate family, such individual could be held, *Steelco Stainless Steel, Inc., et al., v. F.T.C.*, 1951, 187 F.2d 693, 46 F.T.C. 643, 47 F.T.C. 1814; that two individuals who had founded the corporation only two years before the complaint was filed, were its officers, directed and guided its policies, participated in its unfair and deceptive acts and practices, owned all its capital stock and, with their wives, constituted the Board of Directors, could be held, *Consumer Sales Corp. v. F.T.C.*, 1952, 198 F.2d 404, 49 F.T.C. 1651; and that where three individuals had dominant control of one corporation and contained similar control over another corporation under circumstances from which the Commission concluded that it was necessary to enjoin the individuals in order to prevent the unfair practices complained of, the order was proper against the individuals, *Gelb, et al. v. F.T.C.*, 1944, 144 F.2d 580, 39 F.T.C. 694.

CONCLUSIONS

The facts herein do not fall within any of the categories set forth in any of these decisions as justifying the issuance of an order against an officer, individually, for acts and practices of a respondent corporation. Theodore Birnbaum was merely a hired employee of the respondent corporation, whose policies and practices were formulated, directed and controlled by its stockholders. There is no showing that respondent Theodore Birnbaum, individually, was directly or otherwise responsible for the mislabelling alleged to be in violation of law. He has severed his connection with the company. Under these circumstances, the order hereinafter issued appears adequate to prevent the acts and practices herein complained of, without the inclusion therein of respondent Birnbaum individually.

From the facts of record and the justifiable inferences based thereon, it must be concluded that the charges of the complaint as to respondent Theodore Birnbaum, individually, have not been

sustained, and that therefore the complaint herein, insofar as it relates to respondent Birnbaum as an individual, should be dismissed.

This proceeding is in the public interest, and the order consented to by respondent corporation is adequate as to it. Accordingly,

It is ordered, That the respondent, Woonsocket Spinning Company, a corporation, the officers of said corporation, and said respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of cones of yarn or other wool products, as such products are defined in and subject to the Wool Products Labeling Act of 1939, which products contain or purport to contain, or in any way are represented as containing "wool", "reprocessed wool" or "reused wool", as those terms are defined in said Act, do forthwith cease and desist from misbranding such products by:

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

2. Failing to securely affix 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 products, 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 products of any nonfibrous 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 products 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.

It is further ordered, That the respondent, Woonsocket Spinning Company, a corporation, the officers of said corporation, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of yarns or other merchandise, in commerce, do forthwith cease and desist from, directly or indirectly:

Misrepresenting in sales invoices, shipping memoranda, or in any other manner the fiber content of said products.

It is further ordered, That the complaint herein, insofar as it relates to Theodore Birnbaum individually, be, and the same hereby is, dismissed.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT
OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 5th day of September, 1956, become the decision of the Commission; and, accordingly:

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

Commissioner Gwynne not participating.

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IN THE MATTER OF
THE ELWELL-PARKER ELECTRIC COMPANY

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

Docket 6329. Complaint, Apr. 15, 1955—Decision, Sept. 6, 1956

Order dismissing, for lack of proof of the effect on competition required by the statute, complaint charging a manufacturer of industrial trucks, with principal place of business in Cleveland, Ohio, with discriminating in price by means of cumulative and non-cumulative quantity discount plans, in violation of Sec. 2(a) of the Clayton Act.

Mr. William H. Smith for the Commission.

Stage & Butler, of Cleveland, Ohio, for respondent.

INITIAL DECISION DISMISSING COMPLAINT BY FRANK HIER,
HEARING EXAMINER

Counsel in support of the complaint in this proceeding, having moved, before any evidence taken, to dismiss the complaint without prejudice, on the ground that he is unable to prove the effect on competition prescribed by the statute under which the complaint is brought, and nothing to the contrary appearing, and counsel for respondent obviously having no objection, said motion is granted, and, accordingly,

It is ordered, That the complaint herein be, and the same hereby is, dismissed without prejudice.

DECISION OF THE COMMISSION

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 6th day of September, 1956, become the decision of the Commission.

Commissioners Gwynne and Mason not participating.