

IN THE MATTER OF
NEUVILLE, INC., ET AL.

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

Docket 6405. Complaint, Aug. 24, 1955—Decision, Nov. 2, 1956

Order requiring New York City sellers of men's hosiery to cease pre-ticketing their merchandise with exaggerated fictitious prices; and representing falsely that their hosiery had received a meritorious award by use of such names as "Academy Award."

Edward F. Downs, Esq., counsel supporting the complaint.

Emanuel D. Finkelman, Esq., of New York, N.Y., for respondents.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

STATEMENT OF THE CASE

On August 24, 1955, the Federal Trade Commission issued its complaint against Neuville, Inc. and Abner B. Neuville (hereinafter collectively called respondents), charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served upon respondents.

The complaint alleges in substance that respondents, by attaching price labels to their hosiery products, falsely represented that such prices were the regular and usual retail prices of said hosiery; by the use of the name "Academy Award" for their hosiery products, falsely represented that said products had received a meritorious award based upon comparative tests; and by both of such actions, placed in the hands of retailers a means and instrumentality for deceiving and misleading the purchasing public. Respondents appeared by counsel and filed a joint answer admitting the corporate, commerce and competition allegations of the complaint, the attaching of price labels to their products, the use of the name "Academy Award," and the fact that their products had received no meritorious award, but denying all alleged violations of the Act.

Pursuant to notice, hearings were thereafter held before the undersigned hearing examiner, duly designated by the Commission to hear this proceeding, on January 10 and March 14, 1956 in New York City. All parties were represented by counsel, participated in

the hearings, and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, orders, and reasons therefor. At the conclusion of the case-in-chief, counsel for respondents made several separate motions to dismiss the complaint for want of proof which were denied.

During the initial hearing, counsel supporting the complaint objected to the introduction of any evidence concerning the "value" of respondents' products, upon the ground that value was not relevant to the issues. After reserving ruling on this objection and consideration thereof, prior to the second hearing an order was issued sustaining the objection on the ground that, since the only issue was whether or not respondents' prices attached to their products were the usual and regular *prices* of such products, the value of such products was irrelevant. At the conclusion of the hearings, all parties waived oral argument and, pursuant to leave granted, thereafter filed proposed findings of fact, conclusions of law, and reasons in support thereof, together with proposed orders. All such findings of fact and conclusions of law proposed by the parties respectively, not hereinafter specifically found or concluded, are herewith specifically rejected.¹

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

The complaint alleged, respondents admitted, and it is found that Neuville, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 366 Fifth Avenue, New York, New York. Respondent Abner B. Neuville is president of said corporation and, as such, formulates, directs and controls the policies and activities of said corporate respondent. The address of respondent Abner B. Neuville is the same as that of the corporate respondent.

II. Interstate Commerce and Competition

The complaint alleged, respondents admitted, and it is found that they are now and have been for several years last past engaged in the sale and distribution of men's hosiery for resale to the public.

¹ 5 U.S.C., § 1007(b).

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In the course and conduct of their business, respondents now cause and for the past several years have caused said product, when sold, to be transported from their place of business in the State of New York, or from the usual place of manufacture thereof, namely, the State of North Carolina, to the purchasers thereof located in various other states of the United States and in the District of Columbia. Respondents maintain and at all times mentioned herein have maintained a substantial course of trade in said hosiery, in commerce, among and between the various states of the United States and the District of Columbia. In the course and conduct of their business, respondents are in substantial competition in commerce with other corporations, firms and individuals likewise engaged in the sale and distribution of hosiery.

III. The Unlawful Practices

A. *The Issues Framed*

The two principal issues in this case are whether respondents falsely represented the usual and regular retail prices of their products by attaching to them price tickets in specific amounts, and whether respondents falsely represented that their products had received a comparative-test meritorious award by the use of the name "Academy Award" on their products. Subsidiary issues flowing therefrom are whether, by such actions, respondents placed in the hands of retailers a means and instrumentality for deceiving purchasers, and whether such representations tended to mislead retailers and the public into the purchase of such products, thereby causing injury to the public, diverting trade to respondents from competitors, and injuring competition.

B. *The False Representations*

1. The Fictitious Pricing

The facts establish that respondents' representations concerning the usual and regular retail prices of their hosiery were false. The record reveals that respondents sold their hosiery under the trade names of "NuTex" and "Academy Award," and preticketed a substantial portion of such hosiery with price labels of 55¢, 65¢, 75¢, 85¢, \$1.00 and \$1.50. It further establishes that such prices were not the usual and regular retail prices but were in many instances substantially in excess thereof. Counsel supporting the complaint called respondent Neuville and three representatives of retail establishments selling Neuville hosiery. Respondents, in addition to recalling Mr. Neuville, called two representatives of retail establishments selling Neuville hosiery.

According to Mr. Neuville, who has been in the business for 32 years, the maintained retail markup in the trade varies from about 35% to 40%. The testimony of the retail representatives called by counsel supporting the complaint was substantially the same. Mr. Neuville admitted that a substantial portion of the Neuville hosiery was preticketed with price labels, and that while some of the retailers sold it fairly regularly at such prices, others usually sold it for less. He also testified that some of the customers requested the price labels and others did not. Mr. Charles Logan, buyer for Saks' 34th Street store in New York City, testified that the preticketed Neuville hosiery which he received carried the price label of \$1.00, and that he normally sold it at 79¢ because Saks carried a so-called "brand" line at \$1.00 and it would not be good business practice to sell Neuville hosiery at that price, because he would then be in competition with himself. He said that the only time he sold Neuville hosiery at the \$1.00 price was when he received a particular style not carried in the brand line.

Both of the other retail representatives called by counsel supporting the complaint testified that they usually sold the preticketed Neuville hosiery for substantially less than the ticketed price. In addition, one of the retail representatives called by respondents admitted that his store sold some of the hosiery purchased from Neuville at less than the ticketed prices. This testimony is further substantiated by the fact that, whether the markup was computed on the basis of the wholesale price or the retail price, it would not in either event bring the retail price near that on the price ticket. The record establishes that Neuville, Inc. sold its hosiery ticketed 55¢ for from 23¢ to 31¢, the 65¢ hosiery from 23¢ to 35¢, the 75¢ hosiery from 23¢ to 44¢, the 85¢ hosiery from 23¢ to 50¢, and the \$1.00 hosiery from 33¢ to 60¢.

It must now be considered well settled that such "fictitious pricing" constitutes an unfair and deceptive practice and an unfair method of competition. As the Commission recently said: "fictitious pricing is a practice which the Commission and the courts have repeatedly held to be unfair and in violation of the Federal Trade Commission Act."²

2. The Representation Through the Use of the Name "Academy Award"

Respondents admitted that they used the trade name "Academy Award" for their products, and that such products had not received any meritorious award based upon comparative tests. Re-

² *The Orloff Company, Inc.*, Docket No. 6184 (1956), and cases cited therein.

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spondents' only defense to this allegation appears to be one of innocent intent and lack of proof that such designation actually deceived retailers and the purchasing public. Obviously the name "Academy Award" is a false representation, implying as it does the receipt of some award for a superior product. It is too well settled to warrant extended discussion that the Commission properly may infer that such false representations have a tendency and capacity to mislead retailers and the purchasing public, and in addition place in the hands of retailers a means and instrumentality for misleading and deceiving the public.

C. Respondents' Contentions and Defense

In addition to respondents' formal denial of all alleged violations of the Act, respondents also argue that: (1) they have no control over or knowledge of the retail prices charged by their dealers; (2) a substantial portion of their hosiery is not preticketed, the record shows that a large part of the purchasing public is not influenced or misled by price tickets, and therefore there is no proof of public interest; (3) there is no proof in the record that trade was diverted from their competitors or that competition was substantially injured; and (4) their hosiery has a value comparable to other hosiery labeled and sold at the same prices as respondents' labels and hence purchasers are not misled or injured nor is competition injured.

(1) Contrary to respondents' contention, the record establishes that respondents knew that many of their retailers usually and regularly sold their hosiery at prices substantially less than the labels. Mr. Neuville admitted this fact. The fact that respondents have no control over the prices charged by their retailers is completely irrelevant. The violation consists not in the fact that retailers charged certain prices but in the fact that respondents falsely represented such prices. Lack of control over the actions of others cannot justify false representations concerning them. In addition, one who places in the hands of others a means of deception is responsible therefor and himself guilty of deception.³

(2) The fact that a substantial portion of respondents' hosiery is not preticketed is of no benefit to respondents as a defense. It results merely in the conclusion that they are violating the Act some of the time instead of all of the time. Respondents' contention that there is no showing of public interest because of the evidence in the record that many people are not influenced or misled by such fictitious pricing is also without merit. In this connection,

³ *F.T.C. v. Winsted Hosiery Company*, 258 U.S. 483 (1922).

respondents appear to place great reliance upon the testimony of Mr. Logan that in his opinion the public would not be misled because most people no longer pay much attention to such price labels. However, Mr. Logan also testified that a small percentage of purchasers preferred products selling at prices substantially less than the price label because they thought they were bargains. Another retail representative called by counsel supporting the complaint testified that in his opinion there was generally an advantage to the retailer in having the product labeled at a price higher than that at which it was selling. In addition, a retail representative called by respondents testified that some of the purchasing public preferred products selling at prices less than labeled to other products of comparable value not having such labels. It is, of course, well established that the Act is meant to protect the innocent and naive as well as the experienced and sophisticated buyer. The proof in the record establishes the public interest as well as the injury to the public and the competition.

(3) Respondents also argue that there is no proof in the record concerning any diversion of trade from their competitors or substantial injury to competition in commerce. It is well settled that where persons engage in unfair and deceptive representations of their products in commerce, the Commission properly may infer that such representations mislead the public into the purchase of such products, thereby unfairly diverting trade from competitors and causing substantial injury to competition.⁴

(4) Respondents' contention concerning the "value" of their hosiery, namely, that such hosiery has a value comparable to other hosiery actually selling at the same prices, as above noted has previously been decided adversely to respondents in ruling on the objection of counsel supporting the complaint to such evidence. As pointed out then, assuming *arguendo* that respondents' products have a value equal or comparable to similar products regularly sold at the labeled prices, such fact would not justify respondents in representing that the labeled prices were the usual and regular *prices* of their products when in truth and in fact they were not. If in fact their hosiery is of such value, there is no reason why respondents may not so advise the public by truthful representations to that effect. However, such a fact could not and does not justify a false representation as to the usual and regular prices. The public is entitled to know the truth, and not be misled into buying what it believes is being sold at a "bargain" price substan-

⁴ *F.T.C. v. Raladam Co.*, 316 U.S. 149 (1942).

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tially less than the regular price. Most of the experienced retail representatives testified that, in their opinion, the fact that respondents' hosiery carried a price label in excess of the price at which it was being offered for sale frequently aided in the sale of such hosiery to the public. The fact that the purchasing public prefers products labeled with prices in excess of that at which they are sold, over product of equal value selling at the same price but not so labeled, in itself evidences that the public is misled into believing that the labeled price is the usual and regular price of the product and consequently the purchase is a bargain.

D. Concluding Findings

A preponderance of the reliable, probative and substantial evidence in the entire record establishes, and it is found, that the hosiery distributed and sold by respondents was not regularly and usually sold at the prices attached by respondents, but on the contrary was usually and regularly sold at prices substantially less than the labeled prices. By attaching such price labels in the course and conduct of their business in commerce, respondents represented that such prices were the usual and regular retail prices, when in truth and in fact such representations were false, misleading and deceptive. It is further found that respondents, in the course and conduct of their business, sold and distributed in commerce hosiery under the name and designation of "Academy Award," and by the use of such name falsely represented that such hosiery had received a meritorious award on the basis of comparative tests with other hosiery. It is further concluded and found that respondents, by the practices above found, have placed in the hands of retailers and dealers a means and instrumentality whereby they may deceive and mislead the purchasing public. It is further concluded and found that there is no proof that any dealers or retailers were misled by respondents' representation concerning the usual and regular retail prices, nor does the evidence adduced warrant a finding that such representations have the tendency or capacity to mislead such dealers and retailers, as distinguished from the purchasing public.

E. The Effect of the Unlawful Practices

The acts and practices of respondents, as hereinabove found, have had and now have the tendency and capacity to mislead and deceive members of the purchasing public with respect to the usual and regular retail prices of their hosiery, and to mislead and deceive dealers, retailers and members of the purchasing public with respect to the designation "Academy Award," thereby inducing the pur-

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chase of substantial quantities of their products. As a result, substantial trade in commerce has been and is being unfairly diverted to respondents from their competitors and substantial injury has been and is being done to competition in commerce.

CONCLUSIONS OF LAW

1. Respondents are engaged in commerce, and engaged in the above-found acts and practices in the course and conduct of their business in commerce, as "commerce" is defined in the Act.

2. Respondents are in substantial competition in commerce with other corporations, firms and individuals engaged in the sale and distribution of hosiery.

3. The acts and practices of respondents hereinabove found are all to the prejudice and injury of the public and of their competitors, and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Act.

4. As a result of the above-found acts and practices of respondents, substantial injury has been done to competition in commerce.

5. The above-found acts and practices of respondents with respect to the price labeling of their products do not, as alleged in the complaint, have the capacity and tendency to mislead dealers and retailers.

6. This proceeding is in the public interest, and an order to cease and desist the above-found unlawful practices should issue against respondents.

ORDER

It is ordered, That respondents Neuville, Inc., a corporation, and Abner B. Neuville, as president of Neuville, Inc., and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of hosiery in commerce, as "commerce" is defined in the Act, do forthwith cease and desist from:

1. Representing in any manner that certain amounts are the regular and usual retail prices of hosiery when such amounts are in excess of the prices at which such hosiery is usually and regularly sold at retail;

2. Putting into operation any plan whereby retailers or others may misrepresent the regular and usual retail prices of merchandise; and

3. Representing through the use of the name or phrase "Academy Award" or any other name or phrase of similar import that they or their hosiery have received a meritorious or other award.

It is further ordered, That the allegation of the complaint, that the price-labeling acts and practices of respondents have the capacity or tendency to mislead dealers and retailers, be and hereby is dismissed.

ON REVIEW OF INITIAL DECISION

By MASON, Commissioner:

By its order of September 14, 1956, the Commission extended the effective date of the initial decision in this proceeding until further notice. Upon its review of the record the Commission has concluded that the initial decision requires modification in two respects:

First, the hearing examiner in his initial decision related his dismissal of the allegation of the complaint as to the capacity and tendency of respondents' "preticketing" practices to deceive dealers and retailers to his decision in the matter of *Ma-Ro Hosiery Company, Inc., et al.*, Docket No. 6436. Upon appeal, the Commission modified the *Ma-Ro* initial decision so as to eliminate therefrom the implication that under no circumstances could dealers and retailers be deceived by the practice of "preticketing." It is our view that the initial decision in the instant case should be similarly modified.

Second, the complaint in this matter names Abner B. Neuville as a respondent and alleges that he "is president of said corporation [Neuville, Inc.] and, *as such*, formulates, directs and controls the policies and activities of said corporate respondent" (an allegation which the respondents in their answer admitted). Thus, while the charging paragraphs of the complaint refer to the "respondents," the apparent basis for such reference, insofar as Mr. Neuville is concerned, is his participation, as president of the corporate respondent, in the formulation, direction and control of the activities of Neuville, Inc. Aside from his activities as an official of the company, Abner B. Neuville is not charged with anything.

In response to the allegation of the complaint, the finding of fact in Section I of the initial decision, as it had to be, is that "Respondent Abner B. Neuville is president of said corporation and, *as such*, formulates, directs and controls the policies and activities of said corporate respondent." The order to cease and desist, however, is directed against Abner B. Neuville, both individually and as president of Neuville, Inc.

In the absence of anything in the record to support a conclusion that Mr. Neuville, in his individual capacity, might induce evasion of the terms of the order by the corporate respondent, or any other

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circumstance pointing to the necessity of directing the order against him in his individual as distinguished from his official capacity, the order to cease and desist in its present form cannot be approved. Accordingly, we are modifying it to delete all reference to Abner B. Neuville, individually.

As modified, the initial decision should be adopted as the decision of the Commission. An appropriate order will be entered.

FINAL ORDER

This matter having come on to be considered by the Commission, subsequent to entry of its order of September 14, 1956, extending until further notice the effective date of the initial decision herein; and

The Commission having rendered its decision indicating the respects in which the initial decision should be modified:

It is ordered, That said initial decision be, and it hereby is, modified by striking therefrom the last sentence of Section III, Paragraph D, entitled "Concluding Findings," and by substituting therefor the sentence:

"It is further concluded and found that there is no proof that any dealers or retailers were misled by respondents' representation concerning the usual and regular retail prices, nor does the evidence adduced warrant a finding that such representations have the tendency or capacity to mislead such dealers and retailers, as distinguished from the purchasing public."

It is further ordered, That the order to cease and desist contained in the initial decision be modified by deleting from the preamble thereof the words "individually and" immediately following the name of respondent Abner B. Neuville.

It is further ordered, That as modified the initial decision herein be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents, Neuville, Inc., a corporation, and Abner B. Neuville, as president of said corporation, 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 contained in the initial decision as modified.

IN THE MATTER OF
SUTSON, INCORPORATED, ET AL.

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

Docket 6578. Complaint, June 27, 1956—Decision, Nov. 2, 1956

Consent order requiring New York City operators of a record-of-the-month club under the trade name of "Music Treasures of the World," to cease representing falsely that those who became "associate members" by purchasing a record for 10¢ might cancel their membership at any time, and to cease shipping records and attempting to collect payment after the required notification of cancellation had been given.

Mr. Michael J. Vitale for the Commission.

Bergerman & Hourwich by *Mr. Milton Bergerman*, of New York City, for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondents with certain violations of the Federal Trade Commission Act in connection with the sale of phonograph records. An agreement has now been entered into by counsel supporting the complaint and all of the respondents except Lester Leventhal which provides, among other things, that said respondents admit all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if entered after a full hearing, said respondents specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified, or set aside in the manner provided for other orders of the Commission; and that the agreement is for settlement purposes only and does not constitute an admission by said respondents that they have violated the law as alleged in the complaint.

With respect to respondent Lester Leventhal, the agreement recites that this respondent has not participated in formulating, directing or controlling any of the policies, acts or practices referred to in the complaint, this recital being supported by an affidavit executed