

Decision

IN THE MATTER OF
FRANK A. KERRAN ET AL. DOING BUSINESS AS DOUBLE
EAGLE REFINING CO.

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

Docket 6432. Complaint, Oct. 27, 1955—Decision, Feb. 14, 1958

Order requiring copartners engaged in Oklahoma City, Okla., in re-refining crankcase drainings of lubricating oil which they then sold to dealers for resale to the purchasing public in the same containers used for new oil without indicating its used nature, to cease advertising for sale or selling such reclaimed oil without disclosing to the purchaser that it was previously used and without a clear statement to that effect on the containers.

Mr. John W. Brookfield, Jr., for the Commission.

Mr. John B. Ogden and *Mr. Josh Lee*, Oklahoma City, Okla. for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges the respondents with violation of the Federal Trade Commission Act through the sale of lubricating oil made from previously used oil, without disclosing such prior use. After the filing of respondents' answer to the complaint, hearings were held at which evidence in support of the complaint was received. Upon the conclusion of such evidence respondents moved to dismiss the complaint on the ground that a prima facie case in support thereof had not been established. This motion was denied by the hearing examiner, whereupon respondents elected to offer no evidence (other than certain exhibits which had been received during the cross-examination of the Government's witnesses) and rested their case upon the record as then made. Proposed findings and conclusions have been submitted by counsel for both sides. Oral argument has not been requested, probably because the case was argued at length at the time the motion to dismiss was made.

2. The respondents, Frank A. Kerran and Cameron L. Kerran, are copartners trading as Double Eagle Refining Co., with their place of business located at 1900 NE. First Street, Oklahoma City, Okla. Respondents are engaged in the sale of lubricating oil for use in motor vehicles. They purchase "crankcase drainings," that is, oil which has been previously used in automobile motors, and then subject such oil to certain re-refining processes, after which it is sold to dealers for resale to the public. There is no question as to the interstate charac-

ter of their business, sales in substantial quantities being made regularly to purchasers located in a number of states other than Oklahoma. Also undisputed is the fact that respondents are in competition in interstate commerce with other sellers of lubricating oils.

3. Respondents' oil is packaged, displayed and sold to the public in metal containers of the same size and general appearance as those in which lubricating oils refined from virgin crude oil are sold. There is nothing on respondents' containers disclosing or indicating that the oil is other than an entirely new product made from virgin crude oil. After examining the containers, an experienced service station operator testified that unless informed to the contrary he would expect the oil therein to be new and unused oil refined from virgin crude oil, and, further, that from his experience with the public it was his opinion that the public would expect the same thing. That this is the correct view is obvious from an examination of the containers. Unquestionably, in the absence of clear disclosure by respondents as to the nature of their product, members of the public purchasing their oil would expect a new product, not oil made from previously used oil.

4. Respondents urge that their oil is not merely reclaimed or reprocessed oil, but is oil which has actually been re-refined. They insist that their refining plant is modern and complete, and that when the oil leaves their plant it meets all applicable standards and requirements. They further urge that it is an established scientific fact that oil does not wear out but may be used satisfactorily again and again so long as it is subjected to the proper re-refining process, and that their oil is of just as high quality as oil refined from virgin crude oil. While all of this may be true, the fact remains that the public is entitled to know what it is getting. It is entitled to be informed as to the nature of respondents' product so that it may make its own choice.

5. On certain of their containers respondents use the words "Paraffin Base," thus representing that the oil is paraffin base oil. The complaint challenges the correctness of this representation. The only testimony on this issue is that of respondent Cameron L. Kerran. Mr. Kerran is a college graduate, who specialized in academic courses having to do with petroleum. For some ten years he has been in charge of the operation of respondents' refining plant. He testified that the original oil (crankcase drainings) is usually received at the plant in tank truck loads of several thousand gallons each; that certain recognized scientific tests are used to determine whether the oil is at least 50 percent paraffin base; that under industry standards oil which is not less than 50 percent paraffin base may properly be labeled paraffin base; and that only oil meeting this requirement is so

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labeled by respondents. In view of this testimony it seems clear that this charge in the complaint has not been sustained.

6. The failure of respondents to disclose that their oil is made from previously used oil has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the belief that such oil is new and unused oil, made from virgin crude oil, and to cause such members of the public to purchase respondents' oil as a result of the erroneous and mistaken belief so engendered. This failure of respondents to reveal the nature of their product also serves to place in the hands of retail dealers a means and instrumentality whereby such dealers may mislead the public with respect to respondents' product. The present proceeding is therefore in the public interest. Respondents' practice is to the prejudice of the public and of respondents' competitors, and constitutes an unfair method of competition and an unfair and deceptive act and practice in commerce in violation of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondents, Frank A. Kerran and Cameron L. Kerran, individually and as copartners trading as Double Eagle Refining Co., or trading under any other name, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of lubricating oil in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

- (1) Representing, contrary to the fact, that their lubricating oil is refined or processed from other than previously used oil;
- (2) Advertising, offering for sale or selling, any lubricating oil which is composed in whole or in part of oil which has been reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in advertising and in sales promotion material, and by a clear and conspicuous statement to that effect on the container.

OPINION OF THE COMMISSION

By Anderson, Commissioner:

Respondents in this proceeding have appealed from the hearing examiner's initial decision holding that they have violated the Federal Trade Commission Act by distributing in commerce lubricating oil without disclosing that it is made from previously used oil. The complaint herein also challenged the correctness of respondents' rep-

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resentation that certain of its products consist of a "paraffin base." The hearing examiner found that, under industry standards, oil which is not less than 50 percent paraffin base properly may be labeled "paraffin base" and that only oil meeting this requirement is so labeled by respondents. The initial decision, therefore, held that the allegations of the complaint in this latter respect were not sustained. No appeal was taken from that ruling. Consequently, the issue before the Commission upon the appeal of respondents is whether respondents' failure to disclose their oil as previously used constitutes a violation of the Federal Trade Commission Act.

The complaint in this connection charges in effect that respondents' oil consists of used oil, obtained from drainings of motor crankcases and from other sources, which is reclaimed or reprocessed by the respondents. It is alleged that the reprocessed oil is sold in containers similar in size and appearance to those used for new oil and that it has the appearance of new and unused oil. The complaint further sets out that these containers bear no markings of any nature disclosing that the product is reclaimed or reprocessed used oil. According to the complaint, in the absence of disclosure on the containers that the oil therein is used, reclaimed or reprocessed, the general understanding and belief on the part of dealers and the purchasing public is that oil sold in containers such as are used by respondents is, in fact, new oil and not used, reclaimed or reprocessed oil.

The hearing examiner in his initial decision found that respondents purchase "crankcase drainings" which is subjected to certain re-refining processes and then sold to dealers for resale to the public. He further found that respondents' oil, as alleged, is packaged, displayed and sold to the public in metal cans of the same size and general appearance as those in which lubricating oils refined from virgin crude oil are sold, and also that there is nothing on respondents' containers disclosing or indicating that the oil is other than an entirely new product made from virgin crude oil. He concluded that, in the absence of clear disclosure as to the nature of the product, members of the public purchasing respondents' oil would expect a new product, not oil made from previously used oil. This conclusion is drawn in part from the testimony of an experienced service station operator with 25 years in the oil business who stated that from his examination of respondents' containers, he was unable to determine whether they contain new or previously used oil; that in his experience the public had a preference for lubricating oil made from "* * * virgin crude, or original crude oil, or original motor oil that is what I would term a quality motor oil that's first run." This witness also testified that

his personal preference also is for a "first run oil" and that unless he sees the word "re-refined" on containers, he expects to find virgin oil therein and that, based on his experience, the public expects the same.

Respondents in their appeal brief have set out "ten important facts" as being established by evidence of record and offers of proof. The evidentiary facts referred to by respondents, and the offers of proof adverted to, with two exceptions, all are relevant only to the subject of the quality of respondents' re-refined oil as compared with lubricants made from virgin crude. We are not concerned in this proceeding with whether or not respondents are offering to the public a "high quality" product "just as good as" competitive products. Such matters are immaterial to the issue before us. That issue relates to whether respondents' failure to disclose that their oil is made from previously used oil has the tendency and capacity to mislead and deceive the purchasing public into the belief that such oil is new and unused oil, made from virgin crude oil. It involves the question of whether the public is led to purchase respondents' oil as a result of the erroneous and mistaken belief so engendered. A subsidiary issue is whether, as further alleged in the complaint, such failure to reveal the nature of the product also serves to place in the hands of unscrupulous or uninformed dealers a means and instrumentality whereby such dealers may mislead the public with respect to respondents' product.

One of two expectations in the "important facts" listed by respondent is the statement that "Double Eagle oil is a paraffin base oil." The hearing examiner ruled, as we have seen, that the predominant base of respondents' oil is paraffin and, no appeal having been taken from that ruling, the matter no longer is in issue. The second exception we noted above is respondents' statement that "The Double Eagle Refining Co. has not misbranded or untruthfully labeled any of its products." This statement has implicit in it the entire issues in the case and will be fully discussed hereinafter. It is the only one of the "ten important facts" material to the appeal before us.

In contending that the initial decision should be set aside as erroneous, the appeal argues that failure to disclose on labels the "previous state of the oil" before the refining process has no effect whatever on the finished product. This point as developed by respondents' counsel in the appeal brief and on oral argument, of course, goes again to the matter of the quality of the oil and, in the opinion of the Commission, is not germane to the question before it.

The Commission is of the opinion that the record supports the hearing examiner's finding that in the absence of clear disclosure members of the public purchasing respondents' oil would expect a new

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product, not oil made from previously used oil. We agree that the public is entitled to know what it is getting and that it should be informed of the nature of respondents' product so that it may make its own choice between lubricants made from virgin crude and lubricants made from used oil. As the Supreme Court said in the *Algoma Lumber Co.* case,¹ in holding that whether the substituted product is as good or better than the original product is immaterial:

The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212, 216; *Carlsbad v. W. T. Thackeray & Co.*, 57 Fed. 18. In such matters the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance.

Or, as the same court said earlier in the *Royal Milling Co.* case:²

The result of respondents' acts is that such purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might not buy *if correctly informed as to its origin*. We are of the opinion that the purchasing public is entitled to be protected against that species of deception, and that its interest in such protection is specific and substantial. [Emphasis supplied.]

Respondents recognize the rationale of these decisions and do not dispute their doctrine. They argue, however, that in requiring a product to be labeled truthfully as being made from used oil, because of the ignorance of the purchasing public, it "will be misled into believing that it is a low grade product, when actually it is a high grade product" and that it would be unfair to require the use of a label which would "cause the public to under-value a product" and which, "because of the erroneous impression it would give to the public, would *decrease* the sales * * *." Respondents in advancing this contention tacitly admit, in effect, that many members of the public are prejudiced against oil made from previously used oil and that they have a preference for oil made from virgin crude. If consumers have that preference, it cannot be satisfied by imposing upon them a similar article, or one equally as good, but having a different origin. *Federal Trade Commission v. Algoma Lumber Co.*, *supra*; *Federal Trade Commission v. Royal Milling Co.*, *supra*; and see, *Benton Announcements, Inc. v. Federal Trade Commission*, 130 F. 2d 254 (C.A. 2, 1942); *Ohio Leather Co. v. Federal Trade Commission*, 45 F. 2d 39 (C.A. 6, 1930).

In summary, the general appearance of respondents' containers, respondents' failure to reveal thereon the fact that the contents were made from used oil, and the general public preference for new oil, all tend to create and foster in the minds of dealers and the purchasing public the mistaken belief that respondents' oil is new oil and misleads

¹ *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934).

² *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212, 217 (1933).

them to purchase such products, thereby unfairly diverting trade from competitors, causing injury to competition and the public. It is clear that in the absence of adequate disclosure to the contrary, the public assumes and has the understanding and belief that oil which is offered to it in regular channels of trade is oil refined from crude instead of oil derived from used oil. Respondents' practices hereinabove discussed constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Respondents next argue that no public good would be served by requiring disclosure of prior use of respondents' oil, that there is no precedent for such disclosure, and that the disclosure, if required, would be misleading and thereby unlawful. In view of what has been said herein, the Commission is of the opinion that these contentions are without merit.

Further, respondents assert that to require such disclosure would destroy the re-refining industry and result in the wasting of millions of barrels of lubricating oil every year and thereby would be adverse to the public interest. We think this argument also is without merit. As the Supreme Court said of a similar contention in the *Algoma Lumber Co.* case, *supra*:

Finally, the argument is made that the restraining orders are not necessary to protect the public interest (see *Federal Trade Commission v. Royal Milling Co.*, *supra*), but to the contrary that the public interest will be promoted by increasing the demand for *pinus ponderosa*, though it be sold with a misleading label, and thus abating the destruction of the pine forests of the east.

The conservation of our forests is a good of large importance, but the end will have to be attained by methods other than a license to do business unfairly. [Emphasis supplied.]

We also have considered the form of the order which is contained in the initial decision. Its requirement that a disclosure that the respondents' oil has been processed, when such be the fact, in whole or part from previously used oil be set forth on the products' containers is appropriate and has sound support in the record. The provision additionally requiring that the facts in that respect also be disclosed in any advertising and promotional material utilized by the respondents in the future conduct of their business is similarly warranted and looks to protecting purchasers in marketing situations precluding their detailed examination of the respondents' containers at point of sale. The gravamen of the complaint challenges unfair and deceptive practices whereby oil made from previously used oil has been marketed by the respondents under circumstances causing it to be purchased as oil made from crude. To prevent continuance of the practices found above to be deceptive resulting from slight variations by the

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respondents in past sales methods, we think that the public interest requires inclusion of an additional provision in the order proscribing affirmative claims that their oil is processed from crude.

In the light of the above and in the interest of clarity, the order contained in the initial decision is being modified. The respondents' appeal is denied and the initial decision, modified as noted above, is adopted as the decision of the Commission.

Commissioner Tait did not participate in the decision herein.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having determined, for the reasons appearing in the accompanying opinion, that respondents' appeal should be denied and that the order contained in the initial decision should be modified:

It is ordered, That the appeal of respondents from the initial decision be, and it hereby is, denied.

It is further ordered, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That the respondents, Frank A. Kerran and Cameron L. Kerran, individually and as copartners trading as Double Eagle Refining Co., or trading under any other name, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of lubricating oil in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, contrary to the fact, that their lubricating oil is refined or processed from other than previously used oil;

(2) Advertising, offering for sale or selling, any lubricating oil which is composed in whole or in part of oil which has been reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in advertising and in sales promotion material, and by a clear and conspicuous statement to that effect on the container.

It is further ordered, That respondents Frank A. Kerran and Cameron L. Kerran 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 said initial decision, as modified.

It is further ordered, That the initial decision of the hearing examiner, as modified hereby, be, and the same hereby is, adopted as the decision of the Commission.

Commissioner Tait not participating.

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IN THE MATTER OF
ASHEVILLE TOBACCO BOARD OF TRADE, INC., ET AL.
ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT

Docket 6490. Complaint, Jan. 11, 1956—Decision, Feb. 14, 1958

Order requiring the Tobacco Board of Trade in Asheville, N.C., and its member-dealers in leaf tobacco, including owners of the 12 auction warehouses operating on the Asheville burley tobacco market and independent tobacco buyers in the area, to cease restricting the establishment of competitive warehousing on the Asheville market by unreasonable limitations on the selling time allotted to new entrants, specifically failing to give reasonable credit for the full size and capacity of new entrants, and limiting the possible gain or loss in selling time allotted to any warehouse for any one selling season to any specific percentage of the selling time allotted for the preceding selling season.

Mr. Rufus E. Wilson and Mr. R. D. Young, Jr., for the Commission.
Williams and Williams, by *Mr. Robert R. Williams and Mr. Silas G. Bernard*, of Asheville, N.C., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE COMPLAINT

On January 11, 1956, the Federal Trade Commission issued its complaint in the above-entitled proceeding, charging the Asheville Tobacco Board of Trade and the individual members thereof with conspiring together to follow, and following, since 1954, a common course of action designed for, and which resulted in, hindering, restricting and preventing, unreasonably, the establishment and operation of market facilities, market opportunities and competition in the purchase and sale of leaf tobacco in the Asheville tobacco market, in violation of § 5 of the Federal Trade Commission Act.

THE ANSWERS

On March 20, 1956, answers were filed by counsel on behalf of all the Respondents except Henry B. Duncan, A. R. Johnson, Jr., Sherrod N. Landon, J. W. Moore, E. G. Anderson, and J. E. Godwin.

Respondent Henry B. Duncan, who is designated in the record as H. B. Duncan, was never served with the complaint, and did not submit an answer thereto nor appear in this proceeding. Accordingly, the complaint herein, as to him, should be dismissed.

Respondent A. R. Johnson, Jr., upon whom, likewise, service of the complaint was unobtainable, is reported to have died in October