

Decision

IN THE MATTER OF
MOHAWK REFINING CORP. ET AL.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT

Docket 6588. Complaint, July 17, 1956—Decision, Feb. 14, 1958

Order requiring a concern in Newark, N.J., engaged in reclaiming used motor oil obtained from drainings of motor crankcases which they sold, some of it blended with new oil, to dealers for resale to the purchasing public, to cease advertising for sale or selling such oil without disclosing to the purchaser that it was previously used and without a clear statement to that effect on containers.

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

Mr. Seymour Friedman and *Mr. Joseph H. Freehill*, of Washington, D.C., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

Respondents are charged with having engaged in unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of the Federal Trade Commission Act, by the sale of lubricating oil which has been reprocessed by them in whole or in part from used motor oil procured from gasoline stations and other sources, without showing on the containers in which said oil is sold, or otherwise disclosing, the fact that such oil is reclaimed and reprocessed. By answer respondents deny that they have in any way violated the Federal Trade Commission Act, and aver that the Federal Trade Commission is without jurisdiction in the matter, that the proceeding is not in the public interest, and that the complaint fails to state a cause of action.

Hearings have been held, evidence in support of and in opposition to the allegations of the complaint has been received, duly recorded and filed with the Commission, proposed findings of fact and conclusions have been submitted by counsel and oral argument thereon heard by the hearing examiner. Based upon consideration of the entire record, the following findings of fact are made and conclusions reached:

1. Respondent Mohawk Refining Corp. is a corporation organized and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 472 Frelinghuysen Avenue, in the city of Newark, N.J. Respondents John E. C. Stroud, C. Kenneth Johnes, and William L. Ashby are

individuals and officers of said corporation. These individual respondents dominate and direct the affairs and practices of said corporate respondent.

2. Respondents are now, and for more than 2 years last past have been, engaged in the business of producing motor lubricating oil by collecting, reprocessing and re-refining used motor oil obtained from automobile crankcase drainings and other sources. Respondents' refining operation consists of a series of processes, including filtration, dehydration, heat, acid, and clay treatments. The finished motor oil is sold straight, or with additives. Sometimes, in order to meet varying viscosity requirements, it is blended with motor oils refined from "crude" oil. Respondents' product is sold to blenders and other industrial users, to jobbers and to retailers for resale to the public. It is sold either in bulk or in quart and 2-gallon cans under various brand names, including "Mohawk Oil," "Mohawk Chieftain Oil," "Tomahawk High Speed Motor Oil," "Solar Power Oil" and other names specified by customers. The trade names are used interchangeably for re-refined used oil, refined crude oil, or a blend of the two.

3. During each of the years 1954 and 1955, respondents sold approximately 2 million gallons of oil, for which they realized about \$500,000. Of this total, between 75 and 90 percent represented oil produced by respondents, and from one-quarter to one-third of all sales were in interstate commerce, involving transportation from respondents' place of business in New Jersey to purchasers located in various other States, mostly States near New Jersey. Although respondents' business is small compared to total oil sales in the United States, it is still substantial.

4. Respondents trade also as "Metropolitan Lubricating Terminal," a registered trade name of Mohawk Refining Corp., which also has an affiliate "Oil Collection Corporation" through which collections are made of the used oils which become the raw material in respondents' reprocessing and re-refining operations. Respondents are in competition with other individuals, firms, and corporations engaged in the production and sale of lubricating oil made from used oil, and with others who sell lubricating oil made from crude oil.

5. Most of respondents' bulk sales are on customer specification or to meet customer requirements. The containers used for the oil sold for the retail trade indicate the S.A.E. viscosity rating of the oil con-

tent in accord with standards established by the Society of Automotive Engineers, but these containers bear no statement as to the nature or origin of the raw material from which the oil is derived. In the absence of such statements, the record indicates, many retail dealers and many members of the purchasing public believe that the oil sold in such containers is in fact refined from crude oil for which they, the purchasing public have a preference as opposed to oil which has been reprocessed and re-refined from oil that has been previously used. There is substantial evidence that the public buys motor oil largely on the basis of price, in the belief that the higher-priced oils will give them better service. For this reason most of the oil sold for use in automobiles is of the higher- or medium-priced oils.

6. The quality of the lubricating oil sold by the respondents is not in question in this proceeding. There is no charge or implication that respondents' oil is lacking in lubricating qualities, in efficiency, or in adaptability to the uses for which it is sold; nor is it claimed that it is inferior to lubricating oil which has been refined from crude oil. Therefore no finding is required in this respect. For this reason, respondents' offer of evidence that no difference in characteristics or qualities of lubricating oils arises out of the fact that some may have been refined from crude oil while others were re-refined from used oil, and that the origin or source of the raw material is not decisive as to the quality of the lubricating oil which is derived therefrom, was rejected.

7. Respondents assert that there is much variation in the potentialities of crude oils obtained from various fields, that the paraffin-base Pennsylvania crude oil is of much higher quality than the asphaltic, naphthenic, or mixed-base oils that come from the coastal and midcontinent areas. They assert that the lubricating oil which they produce will not be affected by the characteristics of the used oil which they utilize as basic raw material any more than the lubricating oil of other refiners will be affected by the various sources of crude oil supply; from this they conclude that the public interest does not require that they disclose the origin or source of their oil unless it is required that the sources of all other oils also be disclosed. This argument is rejected. This proceeding is specific and must be decided by the hearing examiner upon its own merits. Respondents' argument relates to an issue of general policy which is strictly within the discretion of the Commission.

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CONCLUSIONS ¹

1. The Commission clearly has jurisdiction in this matter.
2. By respondents' failure to disclose the fact that their oil is reprocessed and re-refined from used oil, many purchasers have been deceived and misled into buying such oil, thinking it to be oil refined from crude oil, when such is not the fact. "[T]he public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance" (*F.T.C. v. Algoma Lumber Co.*, et al., 291 U.S. 67, 78). The failure of respondents to inform their customers who resell to the public as to the facts concerning the source or origin of their oil places in the hands of these customers a means and instrumentality whereby they too may mislead the public with respect to the nature of respondents' oil.
3. The aforesaid acts and practices of respondents, and their failure to disclose that their oil is composed in whole or in part of oil which has been processed and re-refined from used oil have had and now have the tendency and capacity to mislead and deceive a substantial number of dealers and members of the purchasing public into the erroneous and mistaken belief that said oil is refined from crude oil, and to induce the purchasing public to purchase substantial quantities of the respondents' products because of such erroneous and mistaken belief.
4. As a result thereof, 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.
5. This proceeding is in the public interest, and the aforesaid acts and practices are in violation of the Federal Trade Commission Act. Therefore,

It is ordered, That respondents, Mohawk Refining Corp., a corporation, and John E. C. Stroud, C. Kenneth Johnes, and William L. Ashby, individually and as officers of Mohawk Refining Corp., 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;

¹ For related cases supporting the conclusions, see the Commission's decisions in the matters of: *Westville Refinery, Inc.*, docket 4370, 36 FTC 402; *Penn-Lub Oil Products Co.*, docket 4524, 34 FTC 1049; *Dabrol Products Corp.*, et al., docket 5656, 47 FTC 791; *Pennsylvania Oil Terminal, Inc.*, et al., docket 5868, 48 FTC 356; and *High Penn Oil Co., Inc.*, docket 6492, not yet published.

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(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:

The initial decision filed by the hearing examiner ruled that the respondents have violated the Federal Trade Commission Act by failing to disclose that the motor lubricants which they sell are oils processed from previously used oil and the respondents' appeal challenges that holding and decision as erroneous.

The respondents purchase drainings left by motorists at filling stations and garages when changing their oil and subject these and other waste oils to refining or re-refining processes at their place of business in Newark, N.J. That oil, alone or blended with new oil, is packed in containers and resold in commerce by the respondents to jobbers and dealers. No text appears on the containers in which the products are distributed stating or suggesting in any manner that the oil has been processed in whole or in part from previously used oil. The containers are of the same size and general appearance as those in which oil refined from crude customarily is sold to the public; and the appearance of respondents' oil is identical with that of virgin oil.

The foregoing matters are not in dispute. The complaint issued by the Commission includes a charge that, in the absence of disclosure by the respondents that their oil is reclaimed oil, dealers and the consuming public have the understanding and belief that the oil is new oil and purchase it as such with the result that the public is deceived and trade unfairly diverted to respondents from their competitors. The hearing examiner found, in effect, that the charges of the complaint were sustained by the evidence. The respondents vigorously except to the initial decision's findings, among others, that the public has a preference for oil refined from crude over that processed or re-refined from previously used oil and that many dealers and members of the public purchase respondents' oil under beliefs that it consists of oil refined from crude.

The appeal argues in such connections that the public buys oil solely on the basis of price, brand name, and dealer reliability, and that preference as to source of the raw materials in oil plays no role

in consumer choice. The matters relied upon by the respondents in support of these contentions are greatly outweighed, however, by other testimony received into the record from trade and consumer witnesses. Rather than representing mere theoretical expressions of consumer preferences as argued by the respondents, we think that those witnesses' testimony supports informed determinations that a marked preference exists among consumers and dealers for motor oil refined from crude over oils processed from waste oil. Furthermore, there is sound record basis for additional conclusions that, in the absence of 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.

The respondents further contend that their re-refined oil and the oils refined from crude are one and the same and that substitution in no sense results when respondents' products are purchased by persons unaware of their origin. This, the appeal contends, precludes findings that the respondents' failure to disclose processing facts represents a withholding of material facts from purchasers or that such practice constitutes unfair and deceptive acts and practices or unfair methods within the purview of the act. Their chemical identity and equivalence in lubricating qualities notwithstanding, the record clearly shows that members of the public do not regard these two categories of oil as equally acceptable for use in their cars. Inasmuch as the respondents' oil is made by processing waste oils, their lubricants originate as, and essentially constitute, reclaimed products as distinguished from those long accepted by consumers and dealers which are made by refining crude oil.

Not only does the appeal's argument on this aspect ignore the right of consumers to purchase according to their preferences and prejudices but it disregards the fact that trade is diverted unfairly from both marketers of reclaimed oil so labeled and vendors of oil refined from crude when the respondents' oil is purchased under mistaken beliefs that it is virgin oil. The consumer is prejudiced if on giving an order for one thing he is supplied with something else. *F.T.C. v. Royal Milling Co.*, 288 U.S. 212, 216, 217 (1933); *F.T.C. v. Algoma Lumber Co.*, 291 U.S. 67, 77, 78 (1934).

It is clear, therefore, that the respondents' failure to disclose that their product is made in whole or in part from previously used oil entails silence as to a fact highly material and consequential to users and dealers in motor oil. We think that the hearing examiner correctly found that such practice has had the tendency and capacity

to deceive and caused purchases of respondents' oil under mistaken beliefs that it was oil made from crude rather than a product derived from previously used oil.

The appeal also contends that no power is conferred under the act to require revealing statements in cases of nondisclosure unless the challenged practice also is accompanied by false statements or affirmative misrepresentation pertaining to the articles offered. This legal concept is erroneous. The Commission has plenary power to require affirmative disclosure of material facts in situations where seller silence results in deception of purchasers. *Haskelite Manufacturing Co. v. F.T.C.*, 127 F. 2d 765 (C.A. 7, 1942); *L. Heller & Son, Inc. v. F.T.C.*, 191 F. 2d 954 (C.A. 7, 1951).

The complaint alleges that the public purchases the respondents' oil under mistaken beliefs that it is "new oil." The hearing examiner found that the erroneous beliefs engendered among purchasers were that the products were oil "refined from crude oil." The appeal states that the term "new oil" is not used by the trade to identify oil derived from crude and that no dictionary defines "new oil" as such. Respondents argue that the hearing examiner's finding represents a substantial variation from the charge and that the complaint should be dismissed for failure of proof to sustain its essential allegations. That "new oil" in the complaint refers to other than reclaimed oils and can refer only to the remaining category of oil and hence means oil derived from crude, is beyond doubt. Therefore, the deception which the hearing examiner correctly found to be proved fully conformed to the pleading and the appeal's arguments to the contrary are erroneous.

The respondents also except to rulings of the hearing examiner excluding certain testimony and documentary evidence from the record. The rejected matters included evidence relied on to show that the oil industry does not disclose the source of its oils, that source is not regarded in the trade as relevant to the oils' quality or value, and that virgin and re-refined oil cannot be differentiated from a laboratory or specifications' standpoint. We think that the excluded evidence in essence related to the quality of the respondents' motor oil. Quality and identity of performance are not material, however, to the issues of this proceeding which are: whether the public distinguishes or has marked preference between virgin oil and oil processed from used oil and whether rights of the public to receive the product which it chooses are prejudiced. This aspect of the appeal is also being denied.

We also have considered the form of the order which is contained in the initial decision. Its requirement that a disclosure that the re-

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spondents' 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. Another provision of the hearing examiner's order further forbids the respondents to use affirmative statements similarly calculated to engender beliefs that they refine their oil from crude oil. The gravamen of the complaint challenges unfair and deceptive acts and 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. This additional provision of the order is likewise appropriate inasmuch as it is designed to prevent recurrence of the past practices which are the targets of the complaint should they be resumed under an expansion or variation in their original theme.

While approving it in substance, we are modifying the form of the initial decision's order, however, to conform it to those adopted in our decisions in the matters of *Salzer Refining Co., Inc., et al.*, Docket No. 6339, and *Frank A. Kerran, et al.*, Docket No. 6432, which also are issuing this day.

The respondents' appeal is denied and the the initial decision, modified as noted above, is adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon the respondents' appeal from the initial decision of the hearing examiner; and the Commission having determined, for reasons stated in the accompanying opinion, that said appeal should be denied and that the order contained in the initial decision should be modified:

It is ordered, That the appeal of the respondents 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 respondents, Mohawk Refining Corp., a corporation, and John E. C. Stroud, C. Kenneth Johnes, and William L. Ashby, individually and as officers of Mohawk Refining Corp., 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:

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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 the respondents 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.

IN THE MATTER OF
LINCOLN OIL CO. ET AL.

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

Docket 6669. Complaint, Oct. 30, 1956—Decision, Feb. 14, 1958

Consent order requiring sellers in Boston, Mass., to dealers for resale to the purchasing public of oil consisting in whole or in substantial part of reclaimed oil obtained from drainings of motor crankcases, to cease advertising and selling such oil without disclosing to the purchaser that it was previously used, and without a clear statement to that effect on the containers.

Mr. William R. MaHanna for the Commission.

Mintz, Levin & Cohn, by *Mr. William H. Wolf*, of Boston, Mass.,
for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondents with violation of the Federal Trade Commission Act in connection with the sale of their reclaimed or reprocessed lubricating oil. An agreement has now been entered into by respondents and counsel supporting the complaint which provides, among other things, that 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, 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 respondents that they have violated the law as alleged in the complaint.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an adequate basis for an appropriate disposition of the proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued: