

IN THE MATTER OF
BAAR & BEARDS, INC.

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

Docket 6831. Complaint, July 8, 1957—Decision, Apr. 9, 1959

Order dismissing, for failure to establish a *prima facie* case and lack of public interest, complaint charging New York City importers with violating the Wool Products Labeling Act by failing to label scarfs and stoles as required.

Mr. S. F. House for the Commission.

Mr. Harry J. Halperin, of Halperin, Natanson, Shivitz, Scholer and Steingut, of New York, N.Y., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

On motion of respondent to dismiss the complaint because the evidence fails to establish a *prima facie* case against the respondent and for want of public interest, the motion is sustained and therefore this initial decision is issued dismissing the complaint.

This proceeding is one brought pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939. The complaint was filed July 8, 1957, and after service thereof on respondent, answer was filed in due course. Hearings on the Commission's case-in-chief were subsequently held in New York, N.Y., November 12, 1957; in Washington, D.C., May 19, 1958; in St. Louis, Mo., September 2, 1958; and in Kansas City, Mo., September 3, 1958. Thereafter on September 8, 1958, counsel supporting the complaint rested the Commission's case-in-chief subject only to his renewal by motion of certain evidence which was previously offered on the record and rejected by the examiner. This motion, also filed on September 8, was opposed by respondent, and said motion was denied by an order dated September 30, 1958, which also granted a request of respondent to file its proposed motion to dismiss. Such motion to dismiss, together with a supporting brief, was filed October 21, 1958. On October 29, 1958, an answer brief was filed by counsel supporting the complaint. After due consideration of the whole record, the motion to dismiss has been sustained for reasons stated in this decision

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The sole contested issue in this case is whether respondent misbranded certain of its wool products, women's stoles and shrugs, by failing to stamp, tag, or label them as required by §4(a)(2) of the Wool Products Labeling Act of 1939 and the Commission's Rules and Regulations promulgated thereunder. Such alleged violations by respondent are set forth in paragraph 3 of the complaint as follows:

Certain of said wool products were misbranded in that they were not stamped, tagged or labeled as required under the provisions of Section 4(a)(2) of said Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder.

Among and as examples of said misbranded wool products are shrugs which were not stamped, tagged or labeled so as to show the required name or registered identification number as required by said Act and the Rules and Regulations promulgated thereunder, and scarfs and stoles which were not stamped, tagged or labeled so as to show any of the information as required.

Although paragraph 5 of the complaint is only conclusionary in character, since it is also denied, it, too, is set forth. It reads as follows:

The acts and practices as set forth in Paragraph Three constituted misbranding of wool products and were in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder and constituted unfair and deceptive acts and practices and unfair methods of competition within the intent and meaning of the Federal Trade Commission Act.

In paragraphs (3) and (5), respectively, of the answer, respondent denies each and every allegation in said paragraphs 3 and 5 of the complaint. Under Section 7(c) of the Administrative Procedure Act the burden of proof lies upon counsel supporting the complaint as the "proponent of a rule or order" to establish this controverted issue by "reliable, probative, and substantial evidence." The Commission's own Rules of Practice for Adjudicative Proceedings adopted and promulgated in conformity to said Act impose the burden of proof upon counsel supporting the complaint, §3.14(a); require an initial decision to "be based upon a consideration of the whole record and supported by reliable, probative and substantial evidence," §3.21(b); and provide for the admissibility of "(r)elewant, material and reliable evidence" and for the rejection of "(i)rrelevant, immaterial, [and] unreliable * * * evidence * * *," §3.14(b). Since the Administrative Procedure Act, §7(c), preserves to every party "the right * * * to conduct such cross-examination as may be required for a full and true disclosure of the facts," much of the evidence proffered in this proceeding was objectionable as hearsay, some

of it being hearsay compounded upon hearsay, or otherwise unfounded, improper, unreliable and insubstantial. Such evidence was therefore rejected by the hearing examiner. Some major items of rejected evidence as well as some which were withdrawn or were not pursued to a point where they became substantial, relevant or probative will now be referred to briefly before the evidence received is discussed since the record is probably more noteworthy for those things it does not contain than for what was received in evidence. The "reasons or basis" for matters rejected are also briefly stated herein although the record more fully discloses the examiner's precise reasons for each rejection, usually after considerable argument and discussion by counsel for the parties.

All allegations of the complaint except those in paragraphs 3 and 5 thereof are expressly admitted by the answer and they are therefore incorporated verbatim in the findings of fact hereinafter made.

While there are 339 pages of record herein and a total of 51 documentary exhibits were identified, the material portions of the record are much less extensive. Much of the transcript is concerned with extensive offers, objections, suggestions and arguments of counsel concerning many disputed matters and long, but necessary, remarks and rulings of the examiner under the conditions presented on procedural and evidentiary matters, many of which were elementary but which seemed new or confusing to counsel supporting the complaint. Several of the identified exhibits were never offered in evidence, and many of those which were received on the premise of primary relevancy, subject to later support and connection by other evidence, were never followed up and have therefore become immaterial. The first two hearings were quite brief and the last two were not long. In summary, only 19 of the 51 exhibits and about 200 pages of the record are evidence which will be considered in passing on the adequacy or inadequacy of the record to establish a *prima facie* case. The record is not orderly and is confusing, hence the major matters eliminated from consideration are now briefly referred to in order that the competent evidence in the record may be better understood.

Some testimonial evidence was presented at each of the four hearings above referred to. It consisted of the testimony of the respondent's secretary, three employees of the Commission,

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and four persons connected in some capacity with certain retail stores which were customers of respondent. It should now be stated that there is no attack by respondent upon the general credibility of any of the witnesses. Each of them endeavored to answer all questions put to him or her honestly and frankly and to the best of his or her ability and memory. Much of the testimony, however, is immaterial, and the relevancy, value and weight of much of the testimony is not conceded by respondent. Therefore as to each material matter the evidence has been very carefully considered and weighed by the hearing examiner, both separately and also in connection with all other evidence relating thereto. The substance of each witness' testimony is substantially set forth and discussed later herein.

Counsel supporting the complaint at the first hearing offered certain letters of respondent, Commission's Exhibits 20 to 24, inclusive, which five letters were received in evidence without objection. R. 38-46. These letters were sent in response to letters from the Commission's Division of Wool, Fur and Flammable Fabrics. Such latter letters referred to certain alleged violations of the Wool Act by respondent reported by field investigators to the Division in Washington. They were identified as Commission's Exhibits 25 and 34 to 37, inclusive, it being contended that if admitted, by means of such hearsay latter charges, the said letters written by respondent's employees would be translated and transformed into admissions against respondent's interest. Objections to the offer of Exhibit 25, one of such letters, was sustained. R. 49-52. It was later conceded by counsel supporting the complaint that the hearing examiner in rejecting said exhibit "properly ruled * * * [it to be] * * * self-serving and hearsay." R. 59. He contended, however, that such letters should be received not as proof of the charges but because they, "taken together with the answers [of respondent], constitute an admission against interest." R. 60. He thereupon also offered his Exhibits 34 to 37 in evidence, R. 61-62, which were also rejected. R. 64. In accordance with a reservation made by him at the time the case in chief was rested, counsel supporting the complaint formally by motion reoffered all of such exhibits, and they were again rejected by an order filed October 30, 1958, all of them being self-serving and hearsay. The respondent's letters, Commission's Exhibits 20 to 24, are not admissions against interest and do not support the complaint but rather tend to justify a finding that respondent is cooperative and law abiding.

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Certain physical exhibits, Commission's Exhibits 1 and 4 for identification, respectively a tan shrug and a gray and white shrug, were never connected with respondent. No. 4 was never offered in evidence at all but No. 1 was offered and rejected, R. 10-23, and rejected again when reoffered. R. 131-136. A letter, Commission's Exhibit 39 for identification, which was addressed by the Commission to a Salt Lake City, Utah, store, relating to the said shrug, Exhibit 1, was rejected as hearsay. R. 126. Counsel supporting the complaint admitted that testimony of some representative of the Keith O'Brien store in Salt Lake City, Utah, would be a necessary foundation for the admission of Exhibit 1. R. 20.

There was an attempt to present testimony concerning what was said at a conference between the Commission's project attorney Canavan and Harry J. Halperin, the attorney for respondent some time prior to the filing of the complaint. R. 91-95. At that time Canavan had not authorized or requested any specific investigation of respondent but the matters involved in this proceeding "had been under investigation for sometime previous." In compliance with a request from respondent's said attorney, a conference was held in Canavan's office about October 4, 1956, said attorney and Canavan being the only persons present. Before further inquiry could be made, the examiner commented that he would not receive any such evidence because in his opinion to open the door to what took place between a conference between the two attorneys relating to a possible adjustment or settlement of the controversy was contrary to good law and practice; would tend to destroy the professional confidence which should exist on the part of lawyers dealing with the Commission on behalf of their clients; would be contrary to the Commission's own established practice of encouraging consultations which would lead to stipulated settlements; and would reduce the hearing to a controversy as to the relative credibility of opposing attorneys rather than one to be decided on the merits. After such ruling the attempt to draw out further answers from Canavan, an evidently embarrassed and reluctant witness, was abandoned.

The hearing examiner also rejected incompetent and immaterial opinion evidence as to the absence of any motive on the part of Commission's investigators to falsify any findings in their routine report as to alleged violations of the Wool Act. R. 87-88.

Counsel supporting the complaint also offered a memorandum of law in evidence "as an offer of proof of the facts stated therein." R. 122. It had theretofore been extensively discussed by both counsel and by the examiner with reference to the admissibility of Commission's Exhibit 38 for identification, a W-34A form submitted by the investigator Graham as to his alleged findings of nonlabeling deficiencies of respondent's garments sold to Klines, Inc., in St. Louis in August, 1954. R. 97-122. This memorandum of law was rejected as an offer of proof, either in its entirety or by counsel's piecemeal selection as an utterly incompetent and improper method of presenting an offer of proof. R. 122-124.

Commission's Exhibits 2, 3, 5 to 19, inclusive, and 28 to 30, inclusive, are photostatic copies of invoices of merchandise sold to a number of respondent's customers scattered throughout almost the entire country. After various off-record conferences as to some of the exhibits, each of said exhibits were received in evidence by agreement or without objection. R. 35, 57-58 and 132. Only 5 of these 20 invoices, however, have any substantial bearing upon the disputed issues in this case. Those which do have bearing are Commission's Exhibits Nos. 6 (to Pelletier Stores Company, Topeka, Kans.), 8 (to A. J. Bundschu Store, Independence, Mo.), 10 and 11 (to Klines, Inc., St. Louis, Mo.), and 29 (to the Tivoli-Vogue Store, Maryville, Mo.). Further references to these exhibits are hereinafter made. All of the rest of these invoice exhibits relate to transactions between respondent and some of its customers who operate retail stores in various cities in Ohio, Georgia, Texas, California, Utah, and several other Western or Southern States. Since no effort was made to present any further evidence as to those transactions evidencing any of the violations as charged generally in the complaint, such exhibits are all now immaterial. Counsel supporting the complaint definitely conceded that such supporting evidence would be necessary. R. 20, 35-36. But later on he stated he never had intended to obtain the testimony of the Commission's inspectors who purportedly reported finding non-labelled wool garments sold by respondent to the various stores in Ohio and the several other States above referred to. R. 317. The examiner had definitely refused on May 19 to commit himself in advance as to how much testimony or other evidence counsel supporting the complaint would need to submit in order to establish a *prima facie* case

or any kind of a case supporting a cease and desist order, that not being a proper function for the examiner. R. 118-120. And when such counsel finally rested, it was on his own volition after consultation with the Bureau of Litigation. See R. 335 and order filed October 1, 1958. The examiner then stated that if respondent had not established a *prima facie* case by investigator Graham it would be useless to proceed further to take similar evidence. R. 337. The exhibits of the Commission Nos. 2, 3, 5, 7, 9, 12 to 19, inclusive, 28 and 30 are therefore wholly immaterial and are disregarded. The examiner in the light of counsel's subsequent statement—in substance that he had never intended to connect them up—cannot understand why the record should have been encumbered with them in the first place.

Upon objections that they were hearsay, the examiner rejected the several offered reports of the Commission's attorney-investigator Harry E. Graham, although permitting him to use them as past recollection recorded to refresh his memory but confining his testimony to the facts of what he observed and did and eliminating his conclusions. These reports are Commission's exhibits for identification 38, 40, 41 and 44 to 49, inclusive. Since the evidence of Graham is that most vital and pivotal to the Commission's case, it will be more convenient and clarifying to discuss these offered exhibits and their rejection in connection with the extended analysis of his evidence later in this decision.

Near the close of the evidence, counsel supporting the complaint endeavored to identify 14 purportedly relevant reports from other investigators for the Commission. He had the witness Graham identify the signatures of the investigators on each of them, and, after suggesting that it would be a very onerous burden for the Commission to take the testimony of these 5 investigators who made such reports, stated, "I never intended, and don't intend, to call these witnesses, these investigators, on the stand and make them a witness. But just for the record I would like to identify these documents * * * as an indication that there were other violations." R. 317. The examiner thereupon ruled he would refuse to receive any such unfounded documents for any such unfair and improper purpose. No formal offer was therefore made of such 14 documents. R. 313-318.

Passing now to a consideration of the facts actually presented in the record, the hearing examiner has given full, careful and impartial consideration to all of the evidence received of record,

including all stipulations of fact and those facts pleaded in the complaint which are admitted by the answer. Therefore, upon consideration of all the material issues presented on the whole record and from his personal observation of the witnesses while testifying, the hearing examiner finds that the evidence in support of the Commission's case-in-chief has failed to establish even a *prima facie* case against respondent by reliable, probative and substantial evidence and has failed to establish any specific and substantial public interest in this proceeding. The specific findings of fact made by the examiner, together with the reasons or basis therefor are as follows:

The following allegations of paragraphs 1, 2 and 4 of the complaint, being admitted by the answer, are found to be factually true:

Respondent Baar & Beards, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 15 West 37th Street, New York, N.Y.

Subsequent to the effective date of the Wool Products Labeling Act of 1939 and more especially since January 1, 1954, respondents have introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce, as "commerce" is defined in said Act, wool products as "wool products" are defined therein.

Respondent in the course and conduct of its business was, and is, in competition in commerce with other corporations and with firms and individuals in the sale of wool products including stoles, scarfs, hoods and shrugs.

The evidence received of record in support of the complaint was substantially as follows:

Milton Beards, R. 5-49, secretary-treasurer of the corporate respondent Baar & Beards, Inc., testified on November 12, 1957, in New York City, in substance, that he and Sylvan M. Baar, its president, both owned substantial stock interests in respondent corporation and formulated its policies and managed and controlled its business, which was that of importing and manufacturing ladies' neckwear and accessories; that the business is wholesale, distributing and jobbing in character; and that its gross sales in 1956 were about ten million dollars, of which the substantial amount of about 15 to 20 percent was woollen products. This witness further described shrugs and stoles. A shrug,

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he stated, is a garment similar to a sweater, varying in size from short-fitted to half the length of a coat, there being many different styles, while a stole is a long knitted or woven scarf to wear over the shoulders. He also identified certain employees of the firm and described the manner in which the corporation's invoices described some of its products which are in controversy. He further produced certain invoices in response to the subpoena duces tecum served upon him. All of the invoices desired by counsel supporting the complaint were received in evidence, as hereinbefore stated, most of which are now immaterial.

In giving his testimony, Beards was assisted by off-record conferences with two of respondent's employees, Julius Meyerson and William Berlin, who were also present under subpoena, R. 11, 53. Berlin is manager of respondent's domestic goods department while Meyerson deals with its imports and also with some domestic scarfs. This procedure was satisfactory to counsel supporting the complaint, and all three were excused at the completion of Beard's testimony, R. 53. At this hearing the invoices of respondent were stipulated or received in evidence without objection (except Exhibit 3 which was received later). Other documentary evidence and certain physical evidence offered or merely identified were not received as already stated.

At the hearing in Washington, D.C., on May 19, 1958, testimony was taken of *Harvey H. Hannah*, R. 68-88, Chief of the Commission's Division of Wool, Fur & Flammable Fabrics, now designated Division of Textiles and Furs and hereinafter referred to as Division of Textiles and Furs, Bureau of Investigation, which is charged, among other things, with the administration of the Wool Products Labeling Act, and also that of *Charles F. Canavan*, R. 89-96 and 124-131, a project attorney in the same Bureau. *Hannah* testified to the routine field inspection practices of the Commission of stores throughout the United States where wool products "are being marketed and reaching ultimate purchaser-consumer * * * checking to see how the goods are labeled under the law at that time." These investigators operate under standing instructions from Hannah's office. Such an investigation "is purely a policing measure" at either the "retailer, manufacturer, or wholesaler level." Certain inspection report forms are filled in by the investigator at the time of the inspection. The W-34A form is used when the inspector observes a violation which "is considered more than a minor or technical violation." The general report form, he thinks it is W-33, is supplemented

by a W-34 form as well as the said W-34A form, which latter form is used "by inspectors who do general policing work" where more than a technical violation is believed to have occurred. This witness' testimony was curtailed by stipulation of counsel that Commission's Exhibit 38, a W-34A form, was executed by the field investigator or attorney-examiner in the regular or routine course of his duties. R. 81.

The witness *Canavan* testified it was part of his duties to authorize or request investigations of firms when it is believed they have violated the Wool Act; that during the pendency of the investigation of the proceeding at bar he received a request on or about July 20, 1956, from respondent's attorney for a conference and that the witness conferred with said attorney in the witness' office on or about October 4, 1956. Further inquiry into this transaction was obviated by its withdrawal as already stated. *Canavan* also testified that Commission's Exhibit 38 for identification was a form which was made out in the usual course of business by the investigators in the field. While he also testified to having received the shrug, Exhibit 1, through hearsay correspondence with some store, the letter referring to it was hearsay and not received in evidence. At this Washington hearing some documentary evidence was also received but much was rejected.

At a further hearing held in St. Louis, Mo., on September 2, 1958, the testimony was taken of *Richard I. Prager*, the manager of Kline's Franklin Simon Company, in downtown St. Louis, which prior to its acquisition by Franklin Simon and at the time relevant hereto was known as Kline's, Inc., R. 179-200, 214-216, and that of *Celeste Schwegel*, the company's office manager, R. 201-214, 216-217. One item of documentary evidence was also received but all other such evidence offered was rejected. *Prager* testified that such labels of Baar & Beards as he had seen were sewn to the garments received by Kline's from respondent and that it had never been the store's practice to remove such labels, but to the contrary the overall general policy had been to see that such labels were affixed to the garments, although "(i)nadvertently it is possible that labels have been removed or misplaced from the garments or lost or taken off." The store's personnel such as "buyers, assistant buyers, and heads of departments—were aware of such regulations. I wouldn't want to say that the average salesperson on the floor or receiving room personnel

where goods are ticketed [by Kline's] were aware of those regulations * * *. (O)n goods coming in so ticketed [labelled] it is not their prerogative to remove those tickets * * *." To the best of this witness' knowledge this practice was adhered to and the legal requirements as to retaining labels on woolen garments were disseminated by the management to the employees in all of its stores, including the downtown St. Louis store, as instructed by the main office in Chicago. In the St. Louis store on one occasion only there had been some correspondence in an effort to secure correct labels to attach to its merchandise from the manufacturer. A letter relating to the matter from the manufacturer, Kolmer Company, to Baar & Beards was produced from the file of Kline's and received in evidence as respondent's Exhibit 1.

On cross-examination of this witness it developed that during 1954 he was manager of Kline's suburban store at Clayton, Mo., and was not personally familiar with affairs at the downtown store; that the store file had no further complaint correspondence such as respondent's Exhibit 1, and there was none involving respondent; that Kline's affix their own labels to woolen goods in addition to those placed thereon by the manufacturer and any lack of manufacturer's labels would come to management's attention. Advice as to the necessity of seeing that labels were attached to all woolen garments would not for a certainty be passed down to all employees. Kline's own tags were put on by salespeople in spare time or by its alteration department. Instruction to employees as to labelling requirements in any event could not be infallible "because there is too much goods coming into our store for every * * * [lack of label] * * * to be caught." He further testified that the file he had voluntarily produced containing respondent's Exhibit 1 was the only file he and Miss Schwegel after search had been able to find relating to non-labelling matters and to his knowledge none of the store's files had been destroyed.

Celeste Schwegel, the store's office manager, testified as to her duties in general, explaining how the store's notations on receiving memos were made directly and correctly from invoices received from the supplier, and the invoices themselves were then sent to the Chicago main office for payment. She supplied the information on certain receiving memos relating to November 24 and October 11, 1954, shipments from respondent, to Graham, the Commission's investigator, when he inspected Kline's on January 20, 1955. She testified that Kline's own price tickets

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were affixed to woolen garments by an employee in the receiving room whose duty it was to see that the manufacturer's labels were on each garment. She did not know where the woolen goods in question received from respondent were at the time of Graham's visit in January, 1955. Neither she nor Prager testified they had identified any goods to Graham as unlabelled garments from respondent.

Further evidence from these two witnesses developed that prior to the acquisition of Kline's, Inc., by Franklin Simon, each of its seven stores, which were all located in midwestern cities, was an autonomous unit, each purchasing through a wholly owned purchasing company; that in 1954 and 1955 the Kline's downtown St. Louis store occupied a 5-story building, also having a service basement and a mezzanine, with store space of 72,000 square feet and from 175 to 200 regular employees, probably peaking to 225, counting part-time employees; that during peak seasons 5 to 6 people worked in the receiving room, and from about 55 to 65 sales clerks normally, the number would go to about 90 in peak seasons; and that of this number from 40 to 45 would sell the types of woolen goods in question in this proceeding, all such being sold on the first floor.

While *Graham* testified to some extent at the St. Louis hearing, most of his evidence was presented in Kansas City and therefore will be discussed after that of the other witnesses who appeared at Kansas City.

The final hearing was held in Kansas City, Mo., on September 3, 1958. There the testimony was heard of *James W. Pimblott*, the merchandise manager for several departments, of the A. J. Bundschu Store of Independence, Mo., R. 219-243, that of *John O. Walker*, president of The Pellitier Stores Company of Topeka, Kans., R. 277-298, and that of *Harry E. Graham*, attorney-examiner of the Federal Trade Commission, whose testimony had been commenced at St. Louis the preceding day. Also at this hearing all documentary evidence offered was rejected.

The witness *Pimblott* testified (R. 219-243) that he had supervised the purchase of woolen scarfs and stoles for the Bundschu store for some five years and described the store's system of checking such merchandise upon its receipt from the distributor, its employees pinning the store's own cardboard ticket or tag to each garment as soon as such garments are removed from their container. They are then checked against the invoice. He

identified an original invoice of stoles and scarfs which was received from Baar & Beards on August 1, 1954, from his initials signed upon it by him but had no independent memory of the transaction. This was stipulated to be a duplicate of Commission's Exhibit 8. Only he and the girl in his department check such incoming merchandise as he said the store is not large enough for a receiving room. Baar & Beards is the only place where he buys woolen stoles, which he does on trips to New York. It has never been the practice of the Bundschu store to remove labels attached to woolen merchandise. He did not recall seeing Graham at the store in August, 1954, however, and he had no knowledge of any woolen scarf or stole from Baar & Beards being in the store in August, 1954, without having proper labels. No one ever showed him such an unlabeled article to identify it. The first time he ever heard of the present issue of nonlabeling of respondent's goods in the Bundschu store was a week before the hearing, about the time he received his subpoena and was interviewed by a Government representative. Only once during his five years of dealing with respondent as buyer for the Bundschu store had he had attention directed to lack of labels on woolen garments and he then invited this to the attention of the respondent's representative in the territory. He was unable to fix the time precisely, saying, "it's been some time ago," and thereafter labeling seemed to be better. He suggested that since the labels were sewn on, "just one might have been loose and been torn off." From this incident as testified to, it does not clearly appear just when such label may have come off, what garment he may have referred to, or whether the label was not on the garment when received, or only after it had been handled by clerks or customers. As to the August 1, 1954, shipment of scarfs and stoles from respondent to the Bundschu store which the witness received, when asked whether he was able to state definitely as to the presence or absence of labels, he could only speculatively answer, "* * * I knew that there must have been some labels on, and it is possible there were some not on."

The witness testified further that the Bundschu store is an old established business in Independence, now a city of some 45,000 or more inhabitants; that the store has about 65 clerks and other employees with a modern basement, a first floor, balcony, and complete ready-to-wear ladies' section on the second floor, with elevator service and also a city delivery service. The woolen scarfs and stoles are sold in two departments on two

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tables in two aisles, being handled and sold by four clerks in the course of ordinary trade. Respondent is the sole supplier of woolen scarfs and stoles to the Bundschu store. No other employee of the store who may have handled respondent's said shipment testified.

Walker, testified, R. 277-298, that he is the president and active manager of the Pellitier Stores Company in Topeka, Kans.; he recalled the visit of the investigator Graham to the store in January, 1956; that all incoming merchandise is routed through a central marking room, the head of which is an experienced employee who has been instructed never to remove any labels from woolen goods; that all sales people "are informed when they are hired not to remove anything and presumably are informed after that by their supervisors"; that it is not the store's practice or that of its employees to remove the labels; that from an invoice which is a duplicate of Commission's Exhibit 6, he testified certain stoles were received from respondent during the fourth week of December, 1955, and were passed through and marked in the marking room, after which the goods may have gone either onto the counters for sale or into the stockroom. He further testified that the woolen goods department buyer, one Beeson, prepared the store's price-marking tags for these stoles, after which it was the responsibility of the head of the marking department to place such store tags physically on the proper garments; that afterwards Beeson sees they are properly tagged before being placed in stock; that help in the stockroom are only instructed not to remove labels but they are not responsible for seeing that labels are on the garments; that no employees in the marking room who inspected incoming woolen garments were ever required to check wool garments to see that a label was attached to it; "because we never, to my knowledge, received a wool garment without a label on it." This witness does not personally manage that part of the store where such woolen garments are sold but only has it under him in a general supervisory way. When Graham came in January, 1956, the witness talked with him considerably about fur labeling but he cannot recall having talked with him about four or five woolen scarfs not being labeled. Pellitier's is an old established department store in the heart of the business district of Topeka, a city of 90,000, occupying four floors and a basement in a building 100 by 150 feet in size, with a 75,000 square footage, employing about 225

people; that probably two employees in the marking room would handle such goods when they were received on December 20, 1955; and probably some five clerks would work in the women's neckwear department where the goods received from respondent were on sale. Neither Beeson, the woolen goods buyer, nor any of the marking room employees testified.

The witness *Harry E. Graham* testified at St. Louis, R. 138-177, and at Kansas City, R. 244-276 and 299-334, that he was an "attorney-investigator" for the Federal Trade Commission, employed in the St. Louis branch for the Division of Textiles and Furs, making continuous inspections throughout the branch's territory (parts of 14 States), south into Arkansas and north to North Dakota, and west as far as Denver, Colo. His territory included Missouri and Kansas. His duties required him to make routine investigations to see that woolen goods were properly labeled and instructed retailers on their duties under the Wool Act. He covers all wool, fur and flammable fabrics manufacturing, wholesaling and retailing dealers. He has been performing his duties since 1948 and has covered several thousand retail stores in the course of his duties, covering his route about once in every three years. He uses forms in making his routine inspections and makes such inspections with no particular violator in mind.

His routine procedure, after introducing himself and showing his credentials to the store's management, is to examine the merchandise throughout the store and see that it is correctly labeled. If he finds an article not properly labeled, he fills out a Commission Form W-45-A. In this he incorporates general data on the store's ownership, location, management, etc. He also inserts "the number of items estimated to have been observed and the number estimated to have been deficiently labeled," R. 142, and makes such comments as he deems pertinent in space provided for that purpose. Unlabeled articles are considered "a major violation." Various violations are indicated by appropriate code numbers. If he finds what he believes to be a major violation, he notes the store's stock control information on the report, and from there he is able to go to the invoice of the goods. The invoice information is then copied on a Commission Form W-34-A. Wishing to preclude the possibility that the retailer may have removed the label or tag, he thoroughly examines several garments of this style to see that there are no tags and "(t)hen I question the personnel in that department to make certain that they are instructed to leave the tags on and, to the best of my

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knowledge, are leaving the tags on." If he finds tags on other like garments, he copies on his report form 45-A information from the store's stock control tag and then proceeds to the invoice in the due course of his investigation, which is after the inspection is completed in large stores, and then the invoice information is copied on the W-34-A form. He says he does not fill out this form "(u)ntil I am absolutely satisfied that this is a manufacturer's error." R. 145. It is his experience that both management and other store personnel are aware that labels showing wool content of goods must not be removed.

He investigated Kline's, Inc., a general ladies' specialty shop in St. Louis, on January 19 and 20, 1955; A. J. Bundschu Company in Independence, Mo., on August 4, 1954; and Pellitier's of Topeka, Kans., on January 23, 1956, R. 146, as well as the Tivoli Vogue store in Maryville, Mo., on August 25, 1954. In each of the four stores he prepared his reports on the said types of Commission forms W-45 and W-34-A as a part of his regular routine duties.

He further testified that at Kline's, not from memory but from examining his report, that he found "(a)n estimated number of 30 stoles and 15 scarf hoods," R. 156, which were unlabeled, that is lacking a tag showing the fibre content and identification of the manufacturer. He testified that through his routine procedure he obtained certain information such as that the supplier of the goods was the respondent, all of which he copied from the invoices and reported on the W-34-A forms, Commission's Exhibits 38 and 41. This information was taken by him from the invoices, Exhibits 10 and 11, R. 161-173. His report forms on this establishment identified as Commission's Exhibits 40, 38 and 41, respectively, were offered in evidence but rejected, as already referred to herein but subsequently more fully discussed.

He followed the same general procedure at the Bundschu store in independence, R. 177-246. The general report form W-45A made there was identified as Commission's Exhibit 44 and the form W-34-A as Exhibit 45. Both were also offered and rejected. The information on Exhibit 45 was traced back to respondent through the invoice, Commission's Exhibit 8, R. 246-252. The number of woolen goods found unlabeled was again estimated, R. 251, 252.

Again at Pellitier's in Topeka, Kans., on January 23, 1956, the same routine was followed. The general report form W-45A

made there was identified as Commission's Exhibit 46 and the form W-34A as Exhibit 47. Both of these were offered and rejected. The information on Exhibit 47 was traced back to respondent through the invoice, Commission's Exhibit 6, R. 256-259. Again there was an estimate of the number of unlabeled garments, R. 258.

On August 25, 1954, Graham made an investigation of Tivoli Vogue in Maryville, Mo., a town of about 7,000. This was a small one-room shop with only two clerks, the owner, a Mrs. Miller, and one other. The same general routine was followed but the witness recalled this shop because it was small. But it cannot be inferred and found that he actually counted the number of garments he reported unlabeled even there as they were "estimated," R. 269. The general report form W-45A made here was identified as Commission's Exhibit 48 and the form W-34A as Exhibit 49. Both were offered and rejected. The information on Exhibit 49 was traced back to respondent through the invoice Exhibit 29.

Graham was a very competent witness as to the few matters he could remember after his memory was refreshed from his reports. He refused to testify to matters beyond his knowledge, R. 164. He was very frank in saying that due to the very large territory he covered, going into thousands of different establishments and examining almost countless thousands of garments, he could not recall the matters in question except from reviewing his reports, from which he was permitted to refresh his memory. And even then he stated that his personal memory was not refreshed, R. 266-267. The reports themselves were each rejected when offered in evidence for many reasons subsequently set forth herein. He repeatedly referred in each of his reports to "estimated" numbers of garments concluded by him to be deficient from finding one or several lacking labels, R. 142, 156, 173, 251, 252, 258, 269, 275, and 303. He very freely disclosed why he did not examine each piece of merchandise to see whether it was labeled. He testified, for example:

In my practice and my routine of making these inspections, you put down the total number, estimated, of a particular garment. Then you check the merchandise and you estimate then if any are correctly or incorrectly labeled, how many of those are incorrectly labeled. . . . R. 274-275.

Well there is also a mental operation [in making estimates of unlabeled garments]. Here are 25 or 30 scarfs. All look alike; the same pattern. I

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look at three, maybe four, and I assume or make the mental hurdle there that the rest of them are all the same. . . .

I don't observe every individual unit in the store.

The examiner then interposed: "I take it, Mr. Graham, that if you had to inspect each and every garment in the course of your duties you never would get a good start on your job?"

Graham answered: "On top of that, there's a lot of items in the boxes, and I never go into the boxes unless I find something necessary for which I have to go into the boxes." R. 302.

Also questioned by Mr. Halperin * * *.

Then as a matter of fact, Mr. Graham, isn't it true that many conclusions, many conclusions that you came to as a result of your investigations as the result of mental operations of your mind and calculations, are entered upon your reports?

The witness answered, "Estimations, yes." R. 275.

In tracing shipments back to invoices, the witness was also very free to voluntarily discuss his instructions and routine which appears not to be precise but also based on conjecture like the "estimates" above referred to. He testified in such regard that when he went back to the invoice from the store's stock control information to check the source of goods:

. . . I do not need all invoices. In the performance of my duties one invoice to tie the scarfs or stoles into one source is what I am instructed to get. There may on occasion, then, be several styles without labels, in which case I may only get one invoice, which may only cover part of one style. There might have been several shipments or many shipments of various styles at various times. I am only trying to tie in these garments with this supplier. And once I have done it once I feel I have done it. R. 275.

Furthermore, the evidence fails to demonstrate just whom Graham interviewed among the employees to obtain his information. He testified that since he had to be certain that the error of no label on a garment or garments was the manufacturer's error he questioned "the personnel in that department to make certain that they * * * to the best of my knowledge, are leaving the tags on." Since that is the beginning of his checking, if there were any dishonest report made to him, then to proceed to tag the manufacturer with the error by further formal procedures without presenting such persons as witnesses for cross-examination would seem to be idle operations. The examiner may not presume that the store's unnamed personnel's hearsay statements to Graham are gospel truth upon which the respondent may be found guilty of any violation of law. Also Graham cannot

possibly test and compare all unlabeled woolen garments with those of like character, style, and quality which do bear a manufacturer's label. He must of necessity rely in such respects on hearsay information from store personnel. An excellent simple illustration of this occurred at the Tivoli Vogue shop where he had to rely on the owner, Mrs. Miller, in that "very small store," R. 299, 325, to get him the invoice on the item or items alleged to have a deficient label. Counsel then asked, "You accepted the word that those three scarfs * * * [unlabeled] * * * came from Baar & Beards. Isn't that true?" Graham answered, "I did." R. 273. But in other cases of hearsay reports to Graham in other stores the names of such witnesses are not even given. Nor were any such persons called as witnesses. The store operators and managers who did testify herein had given no such information to Graham. Graham finally testified that he could not recall that in any of the four stores he inspected that he saw Baar & Beards' labels on any merchandise whatever but he knew that he had inspected hundreds of stores where respondent's labels were on all of respondent's goods and no violation report was therefore made. R. 332.

These circumstances, among others, show that there are many material links missing in the chain of evidence to which Graham testified which are fatal to the Commission's case. It is implicit in our system of justice that findings of fact cannot be based on surmise, conjecture, or hearsay. This is not said in criticism of Graham, a faithful and competent public servant who followed his instructions in these routine investigations. But the Commission's case in a contested proceeding cannot be premised on such loose routine procedures but must be based upon material, relevant, substantial and reliable evidence. One such witness does not and cannot make a solid record in this type of contested proceeding, and there is no short cut to victory without step by step proof of the charges made.

In order to have established the alleged facts here that the respondent shipped any of its wool products in question in commerce without proper stamps, labels and tags, it was necessary to prove two basic things, first, that the items in question emanated from respondent, and, second, that when they were inspected by the witness Graham they were in the same condition as when they were shipped from respondent's place of business. This principle is elementary in the law of evidence. These facts, of course, must be established by the testimony of those persons

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who handled or saw handled such merchandise from the time it was shipped by respondent, or received by the several retail stores in question, right up to the time of Graham's inspection. From the record it is clear that in the substantially large stores of Kline's, Inc., in St. Louis, and Pellitier's in Topeka, Kans., many employees handled the merchandise from the time of its receipt, checking it against invoices, repackaging it and transferring it to stock or to counter or shelf for sale, or both. While in the case of the smaller stores in Independence and Maryville, Mo., only a few store employees may have handled the merchandise, the fact remains of record that Graham had to rely upon others' hearsay statements in making his inspection report the same as he did in the cases of the larger stores. The department manager, Pimblott, testified Graham did not talk to him when he inspected the Bundschu store, and his lady assistant did not testify in the case, and neither did Mrs. Miller of the Maryville store or her clerk testify. Furthermore, the merchandise being for retail sale in all of these stores, much of it, at least, was open to inspection and handling by customers. And Graham seldom looked in boxes containing such merchandise. Precisely how many customers may have handled these displayed garments before Graham saw them is purely speculative. In the case of each of the four stores in question there is utterly no evidence as to what amount of handling there was by clerks, and what took place between the times of first presentment to customers and the times of Graham's respective inspections. That the goods were in the same condition throughout that entire period is not established. The burden of proof of such facts was not on the respondent. It challenges credulity in any event that merchandise for sale such as women's neckwear, the products in question here, would not have been handled by clerks and put on, fitted, and otherwise physically manipulated by any and all female customers in search of such a garment. It must be remembered that the invoices to Kline's were dated October 8 and November 17, 1954, and the inspection by Graham was on January 19 and 20, 1955, after the busy Thanksgiving and Christmas selling seasons of 1954. Likewise, at Pellitier's the goods were received during the fourth week of December in 1955, and Graham inspected the store a month later on January 23, 1956. The goods of respondent were received by Tivoli Vogue August 13, 1954, and the inspection by Graham was August 28, about two weeks

later. Only in the Bundschu store where the goods came in on August 1, 1954, and Graham inspected on August 4 did the timing of the two events occur fairly closely together. But any women's wearing apparel that is popular and in great demand, as the evidence clearly shows respondent's stoles and scarfs were, does not soon escape the customer's eye and touch.

Upon careful review of Graham's evidence the examiner finds it to have been fairly given but lacking in the quality, value and weight required to establish the facts it was offered for. Graham properly tried to hold himself within the bounds of his own knowledge, and taken at its very least, his actual knowledge is very limited and so impregnated and shot through with hearsay, conclusion, estimate and conjecture, that it establishes no facts connecting the respondent with any violations charged against it.

The reports which Graham made to his superiors, of course, are infected with exactly the same inherent defects that his testimony is, since it was based upon such reports. Commission's Exhibit 38 for identification was the first of these reports offered in evidence, R. 78, and it was only after objection thereto was sustained and the examiner ruled he would sustain objections to any other such reports that counsel supporting the complaint finally decided to present other evidence, including that of Graham, the investigator. But after Graham had testified, such counsel then offered all of the reports Graham had identified and testified from to fortify and bolster Graham's evidence. Objections to the reports were sustained. The witness Hannah had repeatedly voluntarily described the work of the Division of Textiles and Furs and that of its attorney-examiners conducting field investigations as "policing work" or "policing measures" R. 69, 70, 72, and 74-76. This was, of course, a correct characterization of the duties of the Division and its field investigators. Hannah testified that the report forms in question have been in use for over ten years and each investigator is given instructions on filling out the required form tied in with the applicable invoice and other applicable information whenever he observes a violation of the Act or the rules and regulations thereunder. An offer in evidence of said Exhibit 38 for identification was formally made, R. 97, and ruling was reserved on respondent's objection on the ground of hearsay. On June 27, 1958, said objection was sustained by a formal order. The order did not detail reasons inasmuch as counsel supporting the complaint had advised he would take the testimony later on of the attorney-examiner,

Graham at St. Louis. Subsequent developments and the persistent reoffer of this exhibit and the offer and reoffer of many similar exhibits, Commission's Exhibits 41, 45, 47 and 49 and other report forms, Exhibits 40, 44, 46 and 48, make necessary a statement of the basic reasons for the rejection of all such offers.

These reports are all, both in fact and by the official classification of Mr. Hannah, "policing" reports. They are reports which are required and made administratively and ex parte as matters which relate "solely to the internal management of * * * [the] agency," as Section 3 of the Administrative Procedure Act refers to such matters. By that provision such matters are not required to be stated and published in the Federal Register for the information of the public. Even if as claimed they were made available to respondent prior to filing the complaint, that fact is immaterial. The documents are based on hearsay. The witness Graham made it clear as already stated, not only that he relied on hearsay in making such reports but also that the reports contained "estimates" of the numbers of reported violations rather than by actual count and that they contained much subjective thinking on his part. He furthermore was unable to refresh his recollection therefrom. While partially conceding that the hearsay objection was valid, counsel supporting the complaint attempted to establish the admissibility of such reports under the "Regular Business Entries" or so-called "shop-book rule," codified in Federal law as 28 U.S.C.A. §1732, an exception to the hearsay rule. Since the routine surveys of the Commission's field investigators were repeatedly and properly characterized by the Chief of the Textiles and Furs Division as "policing work" or "policing measures," their reports are therefore necessarily "police reports." Investigators' reports have been held by the courts repeatedly and consistently as not being entries made in the regular course of business and within that exception to the hearsay rule. See, for example, *Hartzog v. U. S.* 217 F. 2d 706, 710; *United States v. Ware*, 247 U.S. 698, 700; and *Johnson v. Lutz*, 253 N.Y. 124, 127-128. In addition to such authorities, Section 7(c) of the Administrative Procedure Act gives "Every party * * * the right * * * to conduct such cross-examination as may be required for a full and true disclosure of the facts." Section 3.16(b) of the Commission's own Rules of Practice likewise grants the right of cross-examination.

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Therefore the hearing examiner properly sustained objections to said Commission's Exhibit 28 for identification and to all of the other exhibits which were "police" reports made by Graham to his superiors.

There is therefore no substantial, probative and reliable evidence whatsoever upon which a finding can be based that any of the wool products in question ever left the respondent's place of business in New York without the proper stamps, tags or labels thereon as required by law. To find that the Commission's case-in-chief has even reached a *prima facie* status, there being no witnesses' testimony linking each questioned garment step by step in being handled back from Graham to respondent, only inferences can supply these missing links. And just as Graham had to rely on hearsay information as to the origin of the unlabeled goods because the cold invoices could not *per se* identify specific garments, likewise it is true that the identification of each garment he found deficient as to label must rest upon evidence, not upon many successive inferences, namely, that before each of the "estimated" items was inspected by Graham none of the clerks or customers handling it had theretofore in any manner loosed or removed a label or tag therefrom; that the receiving clerk or clerks in removing the item from the package it came in had not mishandled it; that the item was not received in good order from the common carrier; and that the carrier had received it without label from the respondent.

That this is piling inference upon inference to arrive at a finding of fact admits of no doubt. The law is well settled in many judicial decisions that findings of fact cannot be made by courts or juries upon such a speculative and conjectural basis. Such a flagrant super-imposition of inference upon inference in the instant proceeding would do violence to the basic premise of rational decision, which under positive statutory mandate must be founded upon "reliable, probative, and substantial evidence." The controlling decision on the rejection of the "inference on inference" method of proof is *U.S. v. Ross* (1875), 92 U.S. 281, 283-284. This well settled principle is as fully applicable to administrative law as to jurisprudence in general. The use of "inference on inference" has "no more place in the conduct of hearings by an administrative officer than in a court of law." *Automobile Sales Co. v. Bowles*, Adm'r. (D.C., N.D., Ohio, 1944), 58 F. Supp. 469, 473. The Administrative Procedure Act was designed, among other things, to eliminate "the drawing of ex-

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pert inferences not based upon evidence." *Pittsburgh S.S. Co. v. N.L.R.B.* (C.A. 6, 1950), 180 F. 2d 731, 733, affirmed *N.L.R.B. v. Pittsburgh S.S. Co.* (1951), 340 U.S. 498. Even prior to that Act Judge Minton, later Mr. Justice Minton of the Supreme Court, had judicially stigmatized such a method of administrative decision, and most pertinently to the situation here, in *Interlake Iron Corp. v. N.L.R.B.* (C.C.A. 7, 1942), 131 F. 2d 129, 133, wherein he held:

But an inference cannot be piled upon an inference, and then another inference upon that as such inferences are unreasonable and cannot be considered as substantial evidence. Such a method could be extended indefinitely until there would be no more substance to it than the soup Lincoln talked about that was "made by boiling the shadow of a pigeon that had starved to death."

But counsel supporting the complaint now urges that the motion to dismiss the complaint made at the close of the Commission's case-in-chief should be denied on the basis of the Commission's orders in *Vulcanized Rubber & Plastics Co.* (Interlocutory Order, November 29, 1955), Docket No. 6222, and *Timken Roller Bearing Company* (Interlocutory Order, May 27, 1958), Docket No. 6504, because, in substance, the hearing examiner at that stage of the proceeding "views the evidence and inferences reasonably to be drawn therefrom in the light most favorable to the complaint" and such a motion in that posture of the case "should be granted only when it is apparent that there is in the record no substantial evidence in support of the complaint * * *." Neither those decisions nor that of the U.S. District Court for the Southern District of New York in *U.S. v. Consolidated Laundries Co.* (March 17, 1958, 26 L.W. 2461) are in point with the evidentiary situation now presented in the instant proceeding. There was a vast amount of substantial evidence to sustain an order in *Vulcanized Rubber* when respondent's motion was interposed and the examiner's initial decision sustaining the complaint finally entered after the respondent's evidence was in was affirmed by the Commission, and respondent's petition for review was later dismissed by the U.S. Court of Appeals for the District of Columbia. In the *Timken* case the Commission found much substantial evidence and the case is now before the examiner upon remand for further hearings. In the *Consolidated Laundries* case, defendant waived the presentation of evidence and a judgment of conviction was entered. Furthermore, there is no question of credibility involved here. All witnesses in

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this case have been considered to be honest and fully credible and there is no conflict of evidence on any material matter, yet the record evidence utterly fails to establish even a single, isolated case of respondent's having violated the Wool Act.

Even giving full evaluation to the "estimated" amounts of allegedly unlabeled woolen goods received by the said four concerns in Missouri and Kansas from respondent, the sum total of their value is small. In the two Kline's shipments the "estimated" 30 unlabeled stoles were invoiced at a wholesale price of not more than \$3.98, while the "estimated" 15 unlabeled scarf hoods were either at \$1.98 or \$1.25 each. The total value of these allegedly unlabeled articles could not have exceeded \$150. In the Bundschu shipment there were "estimated" to be only five unlabeled scarfs. In the Pellitier shipment there were also "estimated" to be five unlabeled stoles at \$5.95, or a total of about \$30. There were "estimated" to be six unlabeled stoles at Tivoli Vogue. The total wholesale cost of all the garments in these four stores "estimated" to be unlabeled would not exceed about \$250.

Since the annual business of respondent is some 10 million dollars with about 15 to 20 percent thereof being woolen goods, or from one and a half to two million dollars worth each year, and the alleged violations occurred during a period of about a year and a half between August 1, 1954 and January 23, 1956, the amount of allegedly defectively labeled merchandise, in dollars worth, can only amount at the most to an almost infinitesimal fraction of one percent of respondent's annual business. Only a few garments out of a multitude delivered by respondent during this period are claimed to have been unlabeled. Counsel supporting the complaint concedes: "The fact is the existence of merely a few unlabeled articles is of no concern even to the Federal Trade Commission because of the possibility of accidental removal." (Answer to motion to dismiss complaint, p. 10.) It is true that this statement is advanced in support of a specious contention that lack of labels on woolen garments, must be accredited to the respondent because retail "stores cannot be expected to devote their efforts to guarding against a deficiency in scarfs * * *." But the quoted statement of the Commission's disinterest is also fully applicable to the respondent. At best the *de minimis* rule calls for a dismissal of this proceeding.

Respondent's motion to dismiss incorporates as its second basis

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that the continuation of this proceeding would not be in the public interest. The necessity for public interest is inherent in every Federal Trade Commission proceeding. From the foregoing analysis of the evidence, it is clearly evident that the proceeding is not maintainable upon its factual merits. But even if all the properly rejected evidence in this case had been received as reliable and probative and this case were to have been decided upon the facts in such a record, together with the reasonable and fair inferences arising therefrom, such a record would not justify a decision and order against respondent in the public interest. Counsel supporting the complaint relies entirely upon the respondent's four transactions on which evidence was adduced, respectively, with the Bundschu Store and with Tivoli-Vogue, both in August 1954, with Kline's, Inc., in November 1954, and with the Pellitier Stores Company in January, 1956. With reference to transactions between respondent and other customers scattered throughout the country as to which invoices were received in evidence, Commission's Exhibits 2, 3, 7, 9 and 12 to 19, inclusive, such counsel, although seeking to identify investigators' reports purportedly relating to such transactions, expressly stated as to such investigators, "I never intended, and don't intend, to call these witnesses, these investigators, on the stand and make them a witness." R. 317. The Commission's case therefore has been presented to the fullest extent possible and it is not to the public interest to further maintain this proceeding on such trivial matters as are submitted here.

From the foregoing evidence the examiner draws the following:

CONCLUSION OF LAW

The allegations of the complaint set forth in paragraphs 3 and 5 thereof charging respondent with acts and practices of misbranding of wool products violative of the Wool Products Labeling Act of 1939 and the Commission's Rules and Regulations promulgated thereunder have not been established by reliable, probative and substantial evidence as required by Section 7(c) of the Administrative Procedure Act or by relevant, material and reliable evidence as required by §3.14(b) of the Commission's Rules of Practice for Adjudicative Proceedings nor established that this proceeding is to the public interest. Therefore the following order is entered:

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ORDER

It is ordered, That the motion of respondent to dismiss the complaint on the basis (a) that the Commission's case-in-chief has failed to establish a *prima facie* case and (b) is not to the public interest is hereby sustained and the complaint should be, and the same hereby is, dismissed.

DECISION OF THE COMMISSION

The hearing examiner, on January 19, 1959, having filed his initial decision, wherein he made his findings of fact and conclusions of law and dismissed the complaint in this proceeding; and the Commission, on March 6, 1959, having extended until further order the date on which the initial decision otherwise would have become the decision of the Commission; and

The Commission, while not agreeing with some of the statements and conclusions in the initial decision, having determined that the complaint was properly dismissed:

It is ordered, That insofar as said initial decision dismisses the complaint in this proceeding it is adopted as the decision of the Commission.

Decision

IN THE MATTER OF
ONEIDA LTD.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2(d) OF THE CLAYTON ACT

Docket 7236. Complaint, Aug. 21, 1958—Order, Apr. 9, 1959

Order dismissing, following discontinuance in good faith of illegal practice before Commission investigation, complaint charging a large silverware manufacturer with granting discriminatory advertising allowances to favored customers.

Mr. William H. Smith and Mr. James R. Fruchterman for the Commission.

Shearman & Sterling & Wright, by Mr. Robert L. Clare, Jr., of New York, N.Y., for respondent.

INITIAL DECISION DISMISSING COMPLAINT
BY FRANK HIER, HEARING EXAMINER

On August 21, 1958, complaint in this proceeding was issued by the Commission charging violation of Section 2(d) of the Robinson-Patman amendment to the Clayton Act, alleging that respondent granted a special advertising allowance to one of its customers, Associated Barr Stores, Inc., of Philadelphia, Pa., a chain of retail jewelry outlets, for a special television promotion program and had paid substantial sums of money thereon during 1954, 1955, and 1956, and that this allowance was not granted on proportional or any other terms to any of respondent's other customers in that area.

Time was extended for answer, and on October 20, 1958, respondent moved to dismiss the complaint on the basis of voluntary discontinuance in good faith prior to any investigation or litigation activities. This motion was supported by an affidavit of the president in which it was admitted that the payments were made as alleged; that the allowance was discontinued by letter to Barr dated November 28, 1956, copy of which was attached; that no investigator called on respondent prior to September 9, 1957; that the special TV promotion program was a financial and commercial failure; that, in fact, the payments thereunder exceeded the sales; that the respondent had discontinued in June 1957 all advertising allowances of any kind or character; that the administration of any advertising program