

Decision

IN THE MATTER OF
THE FIRESTONE TIRE & RUBBER COMPANYORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 7020. Complaint, Dec. 31, 1957—Decision, June 9, 1959

Order requiring a tire manufacturer to cease advertising falsely that its second-line tires were used by manufacturers of motor vehicles as original equipment.

A charge that respondent's tire names were deceptive was dismissed due to its costly abandonment of the practice and compliance with the Tire Advertising Guides issued to the industry after date of the complaint.

Mr. Michael J. Vitale for the Commission.

Gravelle, Whitlock & Markey, by *Mr. Thomas S. Markey*, of Washington, D.C., and *Mr. Joseph Thomas* and *Mr. Stanley M. Clark*, of Akron, Ohio, for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

1. Respondent, The Firestone Tire & Rubber Company, charged with having violated §5 of the Federal Trade Commission Act, is a corporation organized, existing and doing business under the laws of the State of Ohio, with its office and principal place of business located at 1200 Firestone Parkway, Akron, Ohio.

2. It is now, and for many years last past has been, engaged in the manufacture of motor vehicle tires and tubes, which it sells through dealers located in the various States of the United States, and in the District of Columbia. It causes said tires and tubes to be shipped from its factories, located in several States, to its dealers located in various other States of the United States, and in the District of Columbia. It maintains, and at all times mentioned herein has maintained, a course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of trade in said commerce has been and is substantial.

3. At all times mentioned herein, respondent has been, and is now, in direct and substantial competition with other corporations, firms and individuals also engaged in the manufacture, sale and distribution of motor vehicle tires and tubes.

The "First Charge"

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4. The complaint charges that in advertising its "Super Champion" and "Deluxe Super Champion" tires, the respondent has falsely and deceptively represented that, at the time of the publication of the advertisements complained of, these tires had been or were currently being used as original equipment on eight million new cars as they left the factory, and were respondent's better-grade or first-line tires.

5. Two newspaper advertisements used nationally by respondent were presented in support of this charge. The first was published in January, 1957, and related to the "Super Champion" tire in the following language:

FIRESTONE'S GREATEST SALE
Save on the tire designed for
ORIGINAL EQUIPMENT
on 8,000,000 of America's Finest Cars
FIRESTONE
SUPER CHAMPION.

The second, published in April, 1957, was a similar advertisement but related to the "Deluxe Super Champion" tire. The relative language for that advertisement follows:

Don't Miss These Low Prices
During Our Great Sale
MAY TIRE SALE
The tire that was
ORIGINAL EQUIPMENT
on 8,000,000 new cars as they left the
factory. Same tread design *PLUS*
Modern Improvements.
FIRESTONE
DELUXE
SUPER CHAMPIONS

Both advertisements are of respondent's second-line tire. Their similarity is due to the fact that between January and April, 1957, the designation of respondent's second-line tire was changed from "Super Champion" to "DeLuxe Super Champion." No change was made in the character or quality of the tires.

6. In the tire industry, tires sold to and used by automobile manufacturers as original equipment on new cars are referred to as first-line or 100-level tires. These are better quality and sell for more than second-line tires, just as second-line tires are of better quality and sell for more than third-line tires. The variance in price between first-line and second-line tires amounts to approximately 25%.

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7. During the entire period covered by the complaint, respondent's first-line tire was designated the "DeLuxe Champion." However, late in 1954 respondent began manufacturing a new tire with more improved characteristics than the tire theretofore used and of higher quality as its first-line tire and adopted it as the "DeLuxe Champion" first-line tire. The tire, which prior to this time had been the first-line tire, became respondent's second-line tire, and was named "Super Champion" and later "DeLuxe Super Champion." In all respects as to physical characteristics, tread and quality, the second-line tires were the same, except for some minor improvements normal in the tire-manufacturing process, as the tires which earlier had been sold by respondent and used as first-line tires on more than eight million new automobiles. The only difference was in the change of name. This was the testimony of respondent's representatives called by counsel supporting the complaint, and was supported by an independent tire expert called by the respondent, who testified that these second-line tires were the same as those formerly sold by respondent as first-line tires.

8. Therefore, the advertising statements of respondent that the tire was "designed for original equipment" and "was original equipment" on 8,000,000 new cars were in fact true statements. However, the advertisements were misleading and deceptive, and have the capacity and tendency to mislead and deceive the tire-purchasing public. At first glance and to a technically uninformed reader the impression might readily be conveyed that the tire had been designed as original equipment for use on cars coming off factory lines at the time of the publication of the advertising. The advertising is deceptive and misleading in that the full facts are not disclosed. The advertisements would have been completely and factually correct and not deceptive or misleading if respondent had indicated therein by some appropriate phrase that the tires being advertised were tires which, in fact, had been designed for and used as original equipment on new cars prior to 1955.

9. The actual or potentially misleading and deceptive advertising representations shown by the foregoing facts, and similar representations by other tire manufacturers must have motivated the statement in paragraph 3 of the "Tire Advertising Guides," issued by the Commission in May, 1958, that:

A tire which was formerly but is not currently used as "Original Equipment," should not be described as "Original Equipment" without clear and conspicuous disclosure in close conjunction with the term, of the latest actual year such tire was used as "Original Equipment."

10. Although the respondent has indicated its sincere purpose to conform to and abide by the "Tire Advertising Guides," the unusual circumstances do not appear to be existent in respect to the above-mentioned advertising practices which, under the Commission's policy, would justify a dismissal of the complaint without prejudice as to the charges pertaining thereto.

The "Second Charge"

11. Respondent maintains that there is no second charge in the complaint. The first hearing was conducted on that theory, but prior to the second hearing the hearing examiner, at a conference, informed the parties that he believed the complaint could be interpreted as including a charge, at least inferentially, that the names used on respondent's tires, "DeLuxe Champion," "DeLuxe Super Champion," and "Super Champion," were in themselves confusing, misleading and deceptive.

12. The manner in which the names were used is not in dispute. "DeLuxe Champion" has, during the entire period involved in this proceeding, been the name used for respondent's first-line, original-equipment tire; "Super Champion," from early 1955 through 1956, has been the name for the second-line tire, but since early 1957 has been used as the name for respondent's third-line tire; since early 1957 "DeLuxe Super Champion" has been the name used for respondent's second-line tire.

13. This use of names is confusing. Considering names only, the second advertisement quoted in paragraph 5 above might easily lead the reader to believe that the "DeLuxe Super Champion," then and now respondent's second-line tire, is or was an improvement of respondent's current "DeLuxe Champion" first-line, original-equipment tire, which is not the fact. And as between "DeLuxe Champion" and "Super Champion," the current designation of respondent's third-line tire, opinions could well differ as to which signifies the higher quality tire; etymologically, "super" might indicate higher quality than "DeLuxe." Certainly there could be honest differences of opinion as to tire quality if the names alone were the only criterion.

14. To prevent confusion which might arise from the use of designations of this type, the Commission's Tire Advertising Guides specifically provide:

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2. DECEPTIVE DESIGNATIONS

In the advertising or labeling of products industry members should not use designations for grades of products they offer to the public:

(1) which have the capacity to deceive purchasers into believing that such products are equal or superior to a better grade or grades of that member's products when such conclusion would be contrary to fact. (For example, if the "first line" tire of a manufacturer is designated as "Standard," "High Standard," or "Deluxe High Standard," the tires of that manufacturer which are of lesser quality should not be designated or described as "Super Standard," "Supreme High Standard," "Super Deluxe High Standard," or "Premium"), * * *.

15. The complaint in this proceeding was issued December 31, 1957; the first hearing was held March 13, 1958; the case-in-chief in support of the complaint was rested April 8, 1958; after a motion to dismiss had been filed and ruled on, the next hearing was held on September 16, 1958. In the meantime the guides, which had been discussed by the Commission and the tire industry for a year or more, were issued on May 20, 1958, and published in the Federal Register on May 29, 1958. The final hearing was held December 11, 1958. After the issuance of the guides and prior to the final hearing, respondent held several conferences with the Bureau of Consultation of the Federal Trade Commission, and an agreement had been reached with the Bureau as to new names which would be considered by the Bureau to be in compliance with the guides, and which could appropriately be used in place of respondent's previous tire names.

16. Following this agreement and in conformance therewith, respondent took immediate action to change its tire molds, and, by letters dated October 13, 1958, and November 25, 1958, notified its field organization and its dealers as to the name changes of its third-line and second-line tires, respectively, which had then been accomplished. Change of molds to show the new names involved considerable expense; one of respondent's witnesses said that already more than \$200,000 has been spent in making the changeover. It also appears that in the changeover Firestone will be put to much other expense and suffer considerable losses. The good faith of respondent in making the changes and attempting to comply with the guides as they relate to tire designations is evident and cannot be impugned.

17. The very fact that the guides were promulgated and are specific as to tire designations is indicative that the practice in which respondent was involved has been of wide extent in the tire industry. There are undisputed statements in the record that

the Bureau of Consultation is negotiating with other major tire companies regarding changes to be made by them in tire designations, and that much progress has been and is being made.

18. Under these circumstances the expediency of the issuance in this proceeding of a cease-and-desist order with respect to tire designations is doubtful. The guides state that they "do not constitute a finding in and will not affect the disposition of any formal or informal matter now pending with the Commission." But it is stated that the guides

are administrative interpretations by the Commission of the requirements of the laws it enforces applicable to the subject matter of the guides. They have been adopted for the purposes of assisting all affected parties to be in prompt, simultaneous and voluntary compliance with those requirements. Additionally, they are designed to afford continuing guidance to all affected parties.

19. The issuance of a cease and desist order as to tire designations would delay respondent's changeover program that is now nearing completion. It would result in the transfer of future negotiations as to tire names from the Commission's Bureau of Consultation to the Commission's Compliance Division so far as respondent herein is concerned, but would leave with the Bureau of Consultation the completion of negotiations with all other tire companies. There would follow a degree of confusion which might affect the agreement already reached between the Commission's staff members and respondent, and bring into question again the acceptability of the names now agreed upon. Moreover, the continuing guidance of the industry with respect to tire names would thus become a divided guidance—one company, the respondent herein, would be working with the Compliance Division of the Office of the General Counsel, all others would be working with the Commission's Bureau of Consultation. This duplication or paralleling of procedure would appear to be highly unsatisfactory and impractical.

20. Nothing can be gained by the issuance of a cease and desist order forbidding respondent to use the tire designations which were heretofore used but which it already has permanently abandoned. Such an order would, in any event, affect only one member of the tire-manufacturing industry. The public interest will be more completely and better served if the industry as a whole can be brought together under a uniformly satisfactory system of tire designation. This can be accomplished in only two ways—one, through cooperative compliance with rules

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such as are suggested by the guides; the other, through litigation, which would involve, not one, but a series of suits against all members of the industry who may have offended in this respect. There are compelling facts and inferences of record to the effect that several tire manufacturers, other than respondent, have engaged in the use of tire designations which, in themselves, are or may be confusing to the public.

21. Respondent has permanently discontinued the use of the tire designations mentioned in the complaint in this proceeding. It has, with the approval of the Bureau of Consultation of the Federal Trade Commission, agreed upon new tire designations, and has already incurred much expense and will incur still further expense and losses in putting such new designations into effect. The facts and circumstances, so far as respondent is concerned and as they relate to industry practices in general, are of such extensive and unusual nature as to warrant, under the precedents established by the Commission, the dismissal of this phase of the proceeding without prejudice to the right of the Commission to take such further action against respondent as future facts may warrant.

CONCLUSIONS

1. In its advertising relating to original equipment, the respondent has made representations which were misleading and deceptive and had the capacity and tendency to mislead and deceive the purchasing public.

2. The aforesaid acts and practices of respondent, as herein found, were all to the prejudice and injury of the public and of respondent's competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

3. This proceeding is in the public interest, but the public interest does not require the issuance of a cease and desist order as to respondent's practices with respect to tire designations, and as to any charges pertaining thereto the complaint should be dismissed without prejudice. Accordingly,

It is ordered, That respondent, The Firestone Tire & Rubber Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution

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of its motor vehicle tires and tubes, or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, directly or by implication, that any tire not currently used as original equipment has been used or designed for use as original equipment, without clear and conspicuous disclosure, in close conjunction therewith, of the latest year such tire was actually sold and used as original equipment, the term "original equipment" tires being defined as "the same brand and quality tires used generally as original equipment on new current models of vehicles of domestic manufacture."

It is further ordered, That the complaint, in all other respects, be, and the same hereby is, dismissed without prejudice to the right of the Commission to take such further action against respondent herein as future facts may warrant.

OPINION OF THE COMMISSION

By TAIT, Commissioner:

The complaint in this matter charged respondent, The Firestone Tire & Rubber Company, with violation of Section 5 of the Federal Trade Commission Act. Counsel supporting the complaint has appealed from the hearing examiner's dismissal of one of the allegations of the complaint and from certain findings and conclusions and the order in the initial decision.

The following allegations were made in the complaint:

PARAGRAPH FIVE: . . . respondent represented, directly and by implication that its motor vehicle tires designated as "Super Champion" and "DeLuxe Super Champion" are now, or have been used by the manufacturers of motor vehicles as original equipment, and that said tires are respondent's better grade or first line tires.

PARAGRAPH SIX: The foregoing statements and representations were and are false, misleading and deceptive. In truth and in fact. [sic] The motor vehicle tires designated as "Super Champion" and "DeLuxe Super Champion" are not now, and never have been, used as original equipment by the manufacturers of motor vehicles. Respondent's tire used by manufacturers of motor vehicles as original equipment is, and has been for several years, a tire designated by respondent as the "DeLuxe Champion," and is referred to by respondent as a first line tire or 100 level tire.

The tires designated as "Super Champion" and "DeLuxe Super Champion" are in fact respondent's second line tires. The use of the names "Super Champion" and "DeLuxe Super Champion" is confusing and misleads purchasers thereof into believing that said tires are superior in grade to the tire designated as the "DeLuxe Champion," which is contrary to the fact.

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The hearing examiner found with respect to the first allegation that respondent's advertisements, published in January and April 1957, conveyed the impression that the tires designated as "Super Champion" and later as "DeLuxe Super Champion" had been designed as original equipment for use on cars coming off factory lines at the time of the publication of the advertisements. He also found that these tires were not being used as original equipment at the time the aforementioned advertisements were published, but that they were essentially the same as first line or original equipment tires sold by respondent prior to 1955. The examiner concluded that the advertising was deceptive and misleading only in that it failed to disclose when the tires had been used as original equipment and his order was directed solely to the elimination of the deception resulting from the failure to make this disclosure.

The record reveals that respondent's original equipment or first line tire during the years 1952, 1953 and part of 1954 was the "DeLuxe Champion Super Balloon." In November, 1954, a tire designated "DeLuxe Champion" became respondent's first line tire and the "DeLuxe Champion Super Balloon" was redesignated "Super Champion" and became respondent's second line tire. This tire was sold as "Super Champion" until February, 1957, when its name was changed to "DeLuxe Super Champion." The designation "Super Champion" was given to a third line tire at that time.

Although there is some evidence to the effect that certain changes were made in the tires designated "Super Champion" and later as "DeLuxe Super Champion," the record is not entirely clear as to what these changes were. The evidence also shows that minor changes, or so-called "evolutionary improvements," may be made in any tire sold by respondent without any change being made in the grade designation of the tire. For example, there is evidence to the effect that during the years 1955 and 1956 nine such changes were made in respondent's first line tire, the "DeLuxe Champion." The record does not show that the changes made in the "Super Champion" and the "DeLuxe Super Champion" were anything other than technological improvements ordinarily made within any line or grade of tires. Insofar as we can determine, there was no greater difference between the second line tire sold in 1957 and the original equipment tire sold in 1954 than there was between the original equip-

ment tire sold in 1955 and the same tire sold in 1956. There is no record basis for overruling the hearing examiner and finding that the second line tire designated as "Super Champion" and as "De-Luxe Super Champion" was different in any material respect from a former original equipment tire. We are of the opinion, therefore, that the evidence fails to sustain the allegation that the tire in question had not previously been used as original equipment. The order contained in the initial decision is adequate to prevent the practice found to be unlawful.

The other question presented for the determination of the Commission on this appeal is whether the hearing examiner erred in dismissing without prejudice that part of the complaint charging respondent with the use of deceptive tire designations. The examiner concluded that this charge should be dismissed on the ground that the practice had been permanently abandoned under unusual circumstances and that the public interest, therefore, did not require the issuance of a cease and desist order.

Counsel supporting the complaint points out that respondent did not abandon the practice in question prior to the issuance of the complaint on December 31, 1957. He also contends that the conditions which led to the violation still exist and that there is no real assurance that the practice will not be resumed.

As we stated in the matter of *Ward Baking Company*, Docket No. 6833 (decided June 23, 1958), dismissal is rarely warranted in cases where a party waits until the Commission has acted and only then discontinues his illegal practice. We also pointed out in that case and in the matter of *Argus Cameras, Inc.*, Docket No. 6199 (decided October 20, 1954), that the Commission, in the exercise of its proper discretion, may dismiss a complaint even though the discontinuance takes place after proceedings have been initiated, where there is a clear showing of unusual circumstances which in the interest of justice do not require entry of an order.

We are of the opinion that the circumstances of the discontinuance of the practice in this matter do not indicate a likelihood of resumption.

For some time prior to the issuance of the complaint herein, the use of questionable brand names had been widespread in the tire industry. This practice had not previously been challenged by the Commission in a formal proceeding. On November 22, 1957, the Commission announced that Tire Advertising Guides would be adopted to enable all members of the tire industry to

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discontinue voluntarily and simultaneously the deceptive practices then known to be prevalent in the industry. The letter transmitting proposed guides to the industry specifically mentioned use of deceptive tire designations as one of the practices which the guides would seek to eliminate.

Within a few weeks after receiving the proposed guides, officials of respondent met with members of the staff of the Commission's Bureau of Consultation in an effort to work out a suitable change in tire designations under the voluntary procedure which had been made available to the industry. Although there appears to have been no question as to respondent's willingness to correct the practice, its reasons for not doing so at the time are apparent. One of the major problems with which it was confronted was that the correction of the practice was a difficult, expensive and time consuming undertaking, requiring a change in the names embedded in the sidewalls of its tires. Moreover, at that time there had been no change in the competitive situation in the industry insofar as this practice was concerned and no final rule or guide pertaining to the practice had yet been adopted by the Commission.

Shortly after respondent had begun negotiations with the Bureau of Consultation, complaint was issued against it. At first the hearing examiner was of the opinion that the use of deceptive tire designations was not an issue in the proceeding, and he ruled accordingly. Though he later reversed his position, it was not until about September 15, 1958, that respondent was fully aware that it must defend against a charge of having employed deceptive tire designations. On September 16, 1958, shortly after the guides had become operative, the hearing examiner suspended hearings until December 1, 1958, to afford respondent an opportunity to continue its negotiations concerning compliance with the Tire Advertising Guides. As a result of these negotiations, which had begun in December 1957, respondent revised its tire designations in a manner acceptable to the Bureau of Consultation.

The hearing examiner has found that respondent acted in good faith in attempting to comply with the guides as they relate to tire designations. We have no reason to disturb this finding or to doubt respondent's willingness to cooperate when the matter was first brought to the attention of the industry, though these two circumstances alone can hardly constitute an assured discontin-

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uance. However, respondent has taken costly steps to bring itself into line with the new standards. Moreover, the competitive conditions that influenced respondent to adopt the practice in the first place have been changed by the industrywide adoption of the guides, and it is to be expected that the continuing guidance to be afforded by this program will prevent a recurrence. These considerations, together with the nature of the correction itself, lead us to believe that there is no "cognizable danger of recurrent violation" and that everything that could be accomplished by a cease and desist order has already been done.

The appeal of counsel supporting the complaint is denied and the initial decision will be adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of counsel in support of the complaint from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and adopting the initial decision:

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

Findings

IN THE MATTER OF
THE HIGBEE COMPANYORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS*Docket 7084. Complaint, Mar. 12, 1958—Decision, June 9, 1959*

Order requiring a furrier in Cleveland, Ohio, to cease violating the Fur Products Labeling Act by failing to comply with labeling and invoicing requirements, and by advertising which failed to disclose the names of animals producing the fur in some products or that other products were made of artificially colored or cheap or waste fur, and which contained the name of an animal other than that producing certain furs.

Mr. Alvin D. Edelson supporting the complaint.

Mr. Robert W. Poore, of *Jones, Day, Cockley & Reavis*, of Cleveland, Ohio, for respondent.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER
PRELIMINARY STATEMENT

The complaint in this proceeding charges the Higbee Company, a corporation, hereinafter called respondent, with violating the Federal Trade Commission Act, the Fur Products Labeling Act, and the rules and regulations promulgated thereunder, by misbranding, falsely invoicing, and falsely advertising its fur products in the operation of its retail department store in Cleveland, Ohio. After service of the complaint respondent filed an answer denying each of the violations alleged. Hearings have been held at which evidence in support of and in opposition to the complaint was received. Proposed findings of fact, conclusions, and order have been filed by respective counsel. All proposed findings and conclusions not found and concluded herein are rejected.

FINDINGS OF FACT

1. Respondent, the Higbee Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 100 Public Square, Cleveland, Ohio.
2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has been and is now engaged in the sale, advertising and offering for sale of fur products at retail in the Cleveland area, which said fur products were made