

ARNOLD CONSTABLE CORPORATION

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

Docket 7106. Complaint, Apr. 3, 1958—Decision, June 24, 1960

Order requiring a New York City department store to cease violating the Fur Products Labeling Act by failing to set forth on invoices the country of origin of imported furs and failing in other respects to comply with invoicing provisions.

Charges of misbranding and false advertising were dismissed.

1558

Findings

Before *Mr. Robert L. Piper*, hearing examiner.

Mr. Charles W. O'Connell and *Mr. Henry D. Stringer* for the Commission.

Schreiber, Klein & Opton, of New York City, for respondent.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, the Federal Trade Commission on April 3, 1958, issued and subsequently served upon the respondent, Arnold Constable Corporation, a corporation, its complaint, charging said respondent with misbranding and the false and deceptive invoicing and advertising of fur products in commerce in violation of the aforementioned Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act.

On October 16, 1958, the charges contained in paragraphs 7, 8, and 9 of the complaint as to false and deceptive advertising were dismissed by order of the Commission. Thereafter, at the conclusion of the case-in-chief, the hearing examiner granted respondent's motion to dismiss paragraphs 3 and 4 of the complaint dealing with misbranding. The Commission, on interlocutory appeal, vacated the examiner's order and remanded the matter for the taking of additional evidence on respondent's method of operation. Further hearings were held and on June 3, 1959, the hearing examiner filed an initial decision holding that the charges as to misbranding and false invoicing were sustained. Respondent was thereby ordered to cease and desist the practices found to be unlawful.

The Commission having considered the respondent's appeal from the aforementioned initial decision of the hearing examiner and the entire record in this proceeding and having rendered its decision granting the appeal and vacating and setting aside the initial decision, now makes this its findings as to the facts, conclusions drawn therefrom, and order, the same to be in lieu of those contained in said initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, Arnold Constable Corporation, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its office and principal place of business at Fifth Avenue and 40th Street, New York, New York. It does business under the name of Arnold Constable.

2. The respondent, since August 9, 1952, the effective date of the Fur Products Labeling Act, has engaged in the introduction into

Findings

56 F.T.C.

commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products, and has sold, advertised, offered for sale, transported, and distributed fur products which have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur," and "fur products" are defined in the Fur Products Labeling Act.

3. Certain of the aforementioned fur products were falsely and deceptively invoiced in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations thereunder. The record establishes that there has been a failure to set forth on invoices the country of origin of imported furs and that required information has been abbreviated in violation of Rule 4. Examples of such invoicing defects are as follows:

(a) Commission Exhibit 68, demonstrating the failure to disclose the Canadian origin of the fur as shown by a supplier document, identified as Commission Exhibit 133 and testimony on the subject.

(b) Commission Exhibits 64 and 65, demonstrating the failure to disclose the origin of the furs as South West Africa as shown by the supplier documents, identified as Commission Exhibits 128 and 129, respectively.

(c) Commission Exhibits 62, 63, 66, 67 and 68, variously demonstrate abbreviations of required information in violation of Rule 4 in the use of "nat" for natural, "S W Africa" for South West Africa and "Can" for Canada.

4. In reference to the fur products found to be falsely and deceptively invoiced in violation of Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations thereunder, the record discloses evidence such as copies of manufacturers' documents showing that fur from which the garments therein mentioned were made originated in countries outside of the United States, namely, Canada and South West Africa; respondent's sales tickets or invoices showing that the garments described thereon were shipped or sent to persons located outside of the State of New York; and testimony that the term "Nat Can Wild Mink Coat" on a manufacturer's invoice indicates that the fur in the garment so described is Canadian fur.

5. There is no reliable, probative evidence to support the charge in the complaint of misbranding in violation of Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder.

1558

Opinion

CONCLUSIONS

The aforesaid acts and practices of the respondent relating to false and deceptive invoicing have been in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and, as specified under the provisions of the aforementioned Act, constitute unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That Arnold Constable Corporation, a corporation, doing business as Arnold Constable, or trading under any other name or names, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale, transportation or distribution in commerce, of any fur product, or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which has been made in whole or in part of fur which has been shipped or received in commerce, as "commerce," "fur," and "fur products" are defined in the Fur Products Labeling Act, do forthwith cease and desist from falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchases of fur products showing all of the information required to be disclosed by each of the subsections of Section 5(b) (1) of the Fur Products Labeling Act.
2. Setting forth on the invoices required information in abbreviated form.

It is further ordered, That the respondent 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.

Commissioner Tait not participating.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner*:

The respondent, Arnold Constable Corporation, was charged by the complaint with misbranding and with false and deceptive invoicing and advertising of fur products in violation of the Fur Products Labeling Act and the Rules and Regulations thereunder and the Federal Trade Commission Act. The charges as to false

and deceptive advertising were dismissed October 16, 1958, by order of the Commission.

The hearing examiner filed his initial decision on June 3, 1959, holding that the charges as to misbranding and false invoicing were sustained and ordering respondent to cease and desist the practices found to be unlawful. Respondent has appealed from this initial decision so far as it relates to misbranding practices asserting as grounds that there is no proof of the offering for sale by the respondent of a misbranded garment; that respondent had relied in good faith on continuing guaranties filed by its suppliers; that there is no competent and reliable evidence as to the text of the challenged labels; and that the examiner had improperly permitted an alleged relitigation of the issues.

The Issue as to Continuing Guaranties

The hearing examiner, relying in part on our disposition of a similar issue in *The Fair*, Docket No. 6822 (March 4, 1959), denied respondent's defense that the labels alleged to be defective were furnished by its suppliers who had filed continuing guaranties as provided in Section 10(a) of the Fur Products Labeling Act.¹ In *The Fair*, *supra*, we held that under Rule 34(a) of the Fur Rules and Regulations, the respondent therein was legally obligated to examine the suppliers' labels on fur products which it purchased, advertised and sold and to correct any erroneous labels.² We ruled that the defects in the labels clearly could have been discovered with the use of ordinary diligence and that the respondent therein obviously should have been aware of them. We rejected the contention that it had relied "in good faith" on the suppliers' guaranties.

The Court of Appeals for the Seventh Circuit in *The Fair v. Federal Trade Commission*, 272 F. 2d 609 (1959), overruled the Commission on this point, holding that Rule 34(a) merely permits

¹ Section 10(a) reads as follows:

"No person shall be guilty under section 3 if he establishes a guaranty received in good faith signed by and containing the name and address of the person residing in the United States by whom the fur product or fur guaranteed was manufactured or from whom it was received, that said fur product is not misbranded or that said fur product or fur is not falsely advertised or invoiced under the provisions of this Act. Such guaranty shall be either (1) a separate guaranty specifically designating the fur product or fur guaranteed, in which case it may be on the invoice or other paper relating to such fur product or fur; or (2) a continuing guaranty filed with the Commission applicable to any fur product or fur handled by a guarantor, in such form as the Commission by rules and regulations may prescribe."

² Rule 34(a) reads:

"If a person subject to Section 3 of the Act with respect to a fur product finds or has reasonable cause to believe the label affixed thereto is incorrect or does not contain all the information required by the Act and the Rules and Regulations, he shall correct such label or replace same with a substitute containing the required information."

the retailer to correct errors and does not impose the obligation to examine for and to correct errors under the burden of forfeiture of its rights under Section 10(a) for failure to discover all which may exist.

The hearing examiner, in considering respondent's contentions under Section 10(a) during the hearings, made it clear that he would take official notice of continuing guaranties filed with the Commission by respondent's suppliers, providing they were in existence. While he made no such ruling, he did refer in his initial decision to a concession by counsel in support of the complaint that most of respondent's suppliers had filed continuing guaranties in conformity with Section 10, although two had not done so. Counsel in support of the complaint, in his answering brief, asserts that the record shows that respondent offered misbranded fur products for sale in two instances where no guaranty at all had been established. These were identified as fur garments from Lou Linder (Commission Exhibit 72) and M. Gelto and Sons (Commission Exhibit 97). There is a fair inference from all the circumstances that continuing guaranties existed in the period involved in all except the two above-mentioned instances. Respondent, however, must do more than to merely establish the existence of such guaranties. It must also show that they were received in good faith.

In this proceeding, there is evidence that respondent sought to deal only with suppliers who would file a guaranty in accordance with the provisions of Section 10(a). Respondent has also shown that it had assurances from its various suppliers that they had filed continuing guaranties with the Federal Trade Commission. In the circumstances, we are satisfied that respondent has established as to all except two defective labels that guaranties were received in good faith in conformity with Section 10(a) of the Fur Act.

The Question of Commerce

The two alleged misbranding violations which cannot be disposed of on the basis of continuing guaranties involve, as indicated above, Commission Exhibits 72 and 97. Also, in these instances, there is no showing that separate guaranties were received from the suppliers. Nevertheless, the charge of misbranding has not been sustained. As to the fur products involved, there is no evidence, nor did the hearing examiner find, that such were introduced, or manufactured for introduction, into commerce, or sold, advertised or offered for sale in commerce or transported or distributed in commerce. Furthermore, there is no evidence or finding that the misbranding involved the manufacture for sale, sale, advertising, offer-

ing for sale, transportation or distribution of a fur product which was made in whole or in part of fur which had been shipped and received in commerce. Accordingly, the allegations as to misbranding in the two instances mentioned above must likewise be dismissed. It is not enough that respondent in its answer admitted the general allegations as to commerce contained in Paragraph Two of the complaint. This alone will not justify findings that the particular acts of alleged misbranding were a part of such commerce.

Charges as to False Invoicing

Respondent has not appealed from the holding in the initial decision regarding the false and deceptive invoicing charge. We observe, however, that there is no finding in the initial decision that the particular instances of alleged false invoicing involve commerce as defined in the Fur Act, although the record discloses that this is so. There is evidence of the sale and distribution of falsely invoiced fur products in commerce. For instance, several exhibits indicate out-of-state sales transactions in which the fur products were sent to customers located in New Jersey. There is also evidence that some of the falsely invoiced fur products were made from fur which had been shipped and received in commerce, such as testimony and suppliers' invoices showing the foreign origin of the furs from which certain of the fur products were made. The initial decision will be modified accordingly.

Our disposition of the part of the case as to misbranding, from which the appeal was taken, renders it unnecessary to consider the other arguments of the respondent.

Respondent's appeal is granted, and it is ordered that the charges as to misbranding be dismissed. The initial decision is vacated and set aside, and our findings, conclusions and order to cease and desist are issuing in lieu thereof.

Commissioner Tait did not participate in the decision of this matter.

IN THE MATTER OF

INTERNATIONAL PARTS CORPORATION ET AL.

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