

Findings

IN THE MATTER OF
COLUMBIA CONTAINER CORPORATION ET AL.
ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 7105. Complaint, Apr. 3, 1958—Decision, July 20, 1960

Order requiring a Baltimore manufacturer to cease misrepresenting the quality of its corrugated fibreboard boxes through imprinting the certificate of the box maker—required by Rule 41, Uniform Freight Classification, established by American railroads as authorized by the Interstate Commerce Act—on boxes which did not conform to the standards set out in the rule in that the combined weight of the facings and the bursting strength of a substantial number of the boxes tested were less than the required minimum.

Before *Mr. William L. Pack*, hearing examiner.

Mr. Charles W. O'Connell for the Commission.

Shiple, Akerman & Pickett, of Washington, D.C., for respondents.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

The Federal Trade Commission issued its complaint against the above-named respondents on April 3, 1958, charging them with violation of the Federal Trade Commission Act by imprinting on the corrugated fibreboard boxes they manufacture and sell, false and misleading representations as to the bursting strength and weight of the fibreboard facings of said boxes. In response to a motion of Commission counsel, the complaint was amended by order of the hearing examiner issued June 18, 1958. In their answer, respondents denied the charges. Hearings were held before the hearing examiner and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. In an initial decision filed September 24, 1958, the hearing examiner found that the charges had not been sustained by the evidence and ordered that the complaint be dismissed.

Upon appeal by counsel supporting the complaint, the Commission issued its order on March 27, 1959, vacating the initial decision and remanding the case to the hearing examiner for the purpose of receiving certain additional evidence. Pursuant to such remand, the case was reopened and additional evidence, both in support of and in opposition to the complaint was received and considered and the case was argued orally before the hearing examiner. On February 24, 1960, an initial decision was filed wherein the hearing examiner again ordered dismissal of the complaint for failure of proof.

Counsel supporting the complaint filed an appeal from said initial decision and the Commission, after considering said appeal and the entire record, has determined that the appeal should be granted and that the initial decision should be vacated and set aside. The Commission further finds that the proceeding is in the public interest and now makes its findings as to the facts, conclusions drawn therefrom and order to cease and desist, which, together with the accompanying opinion, shall be in lieu of the findings, conclusion and order contained in the initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, Columbia Container Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 2240 Annapolis Avenue, Baltimore, Md. Respondent, James Glose, is an individual and president-treasurer of said corporate respondent. Mr. Glose formulates, directs and controls the acts, practices and policies of the corporate respondent. Respondent, Harvey Jones, is vice president of the respondent corporation.

2. In the course and conduct of their business, respondents are now and have been engaged in the manufacture of corrugated fibreboard boxes and in the sale and distribution of said boxes in commerce, as commerce is defined in the Federal Trade Commission Act.

3. Respondents are now and at all times mentioned herein have been in substantial competition in commerce with other corporations, firms and individuals in the sale of corrugated fibreboard boxes.

4. American railroads, through their Official Classification Committee, have established a Uniform Freight Classification containing ratings, rules and regulations governing the transportation of goods. Rule 41 of said classification prescribes certain minimum standards for fibreboard boxes used in interstate shipments. Included therein are requirements as to the bursting strength of such boxes and the minimum combined weight of the paper facings used in the manufacture of those boxes. These standards do not allow for tolerances.

Rule 41 requires that boxes made to conform to the standards set forth therein must bear a certificate of the box maker giving, among other things, the bursting strength in pounds per square inch of the fibreboard in the box, and stating that the box conforms to all construction requirements of Uniform Freight Classification.

Shippers who tender articles for interstate shipment in fibreboard boxes which do not comply with the requirements of the standards

in Rule 41 are required to increase their freight payments to the railroads by 20% on less than carload shipments and 10% on carload shipments.

5. In the course of their business, respondents have imprinted the certificate required by Rule 41 on certain of their corrugated fibre-board boxes, thereby representing that the boxes bearing such certificate conform to all of the standards set out therein.

6. A number of respondents' boxes were obtained by the Commission's investigating attorney from four of respondents' customers located in the Washington, D.C., area in July, 1957. Tests were conducted on thirteen of these boxes by Container Laboratories, Inc., New York, N.Y., in December, 1957. Two of these boxes appeared to have been used by the purchasers prior to the time they were turned over to the investigating attorney. The results of the tests conducted on these two boxes are not being considered. Of the eleven unused boxes, four did not meet the bursting strength test and nine failed to meet the requirements for the combined weight of the facings. One of the two boxes which met the weight requirement for the combined facings did not pass the bursting strength test. Thus, ten of the eleven unused boxes did not conform to all of the construction requirements of Rule 41.

Duplicates of the thirteen boxes, with one exception, were obtained by the investigating attorney at the same time as the originals were obtained. Tests were conducted on these boxes by Eastern Box Co., a competitor of respondents, in August, 1957. Seven of the nine unused boxes tested by Eastern Box Co., had facings whose combined weight failed to meet the standards set up by Rule 41. The test procedure employed by Eastern Box Co. in testing respondents' boxes for the combined weight of the facings is the same as that used by Eastern in testing its own boxes and any other boxes received in its plant for testing purposes.

7. At the time of testing by Container Laboratories, Inc., nine of the eleven unused boxes were approximately six months old. One of the two other boxes was approximately nine months old, while the remaining box was about one year old. The age of the duplicate of each of these boxes when tested by Eastern Box Co. was about four months less, respectively. From the time the boxes left respondents' plant until tests were performed by each of the two testing concerns, the boxes were stored under proper conditions.

8. The age of the boxes tested did not affect their bursting strength or the combined weight of the facings of said boxes. At the time tests were performed by Container Laboratories, Inc., and Eastern Box Co., the boxes were in substantially the same condition as when they left respondents' plant.

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9. Through the use of the certificate imprinted on their boxes and the statements contained therein, respondents have represented that their boxes conform to all of the construction requirements of Rule 41, Uniform Freight Classification. The evidence of record establishes that respondents' use of the certificate and the statements therein was false and misleading in that the bursting strength and the combined weight of the fibreboard facings, of a substantial number of said boxes, were less than the minimum required under said Rule 41.

10. The practice of the respondents, as hereinabove found, has had and now has the tendency and capacity to mislead and deceive purchasers of their boxes with respect to the construction of said boxes and thereby induce the purchase of substantial quantities thereof. As a result, substantial trade in commerce may be unfairly diverted to respondents from their competitors and substantial injury has been and is being done to competition in commerce.

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents. The aforesaid acts and practices of respondents, as herein found, were all to the prejudice and injury of the public and of respondents' competitors and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

The evidence of record fails to establish that the respondent Harvey Jones, as an individual, formulates, directs or controls the policies, acts and practices of the corporate respondent. In light thereof and in the absence of a showing of any circumstances in the record pointing to the necessity of directing an order against this respondent individually, the complaint will be dismissed as to respondent Harvey Jones in his individual capacity.

ORDER

It is ordered, That the respondents, Columbia Container Corporation, and its officers, and James Glose, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of corrugated fibreboard boxes in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Using on such boxes a certificate of box maker required by Rule 41, Uniform Freight Classification, when such boxes do not conform to all of the construction requirements of said Rule; or misrepresenting in any other manner the quality or weight of constituent parts, construction, bursting strength, or any other characteristics of their boxes.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to Harvey Jones in his individual capacity.

It is further ordered, That respondents, Columbia Container Corporation, a corporation, and James Glose, individually and as an officer of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

OPINION OF THE COMMISSION

By TAIT, *Commissioner*:

The complaint in this matter charges respondents with misrepresenting the combined weight of the fibreboard facings and the bursting strength of their corrugated fibreboard boxes in violation of Section 5 of the Federal Trade Commission Act. The case was remanded to the hearing examiner by Commission order issued March 27, 1959, and is now before us upon appeal of counsel supporting the complaint from the hearing examiner's initial decision after remand wherein he held that the allegations are not sustained by the evidence and ordered dismissal of the complaint.

Corrugated fibreboard consists of a corrugated paper center with paper facings glued to each side. A double wall corrugated fibreboard has an additional corrugating medium and an additional facing. The combined weight of the facings of a corrugated fibreboard box relates to the ability of the box to stand end shocks and to be piled without collapsing. Bursting strength pertains to the ability of the box to hold its contents without bursting.

This case involves alleged misrepresentation with respect to respondents' conformance to the standards set forth in Rule 41, Uniform Freight Classification, established by American railroads through their Official Classification Committee. Said rule prescribes a minimum combined weight of the facings used in corrugated fibreboard boxes, in pounds per 1,000 square feet, and a minimum bursting strength of the corrugated fibreboard in such boxes in pounds per square inch, based on boxes which come within specified sizes and gross weight limits. The railroads have estab-

lished these standards to avoid damage to shipments of goods because of inadequately constructed fibreboard boxes. Section 9(a) of Rule 41 requires that each box made to conform to this rule must bear a certificate of the box maker which gives certain specifications, including bursting strength, and contain a statement that the box conforms to all construction requirements of Uniform Freight Classification.

The rule provides that when goods are tendered for shipment in boxes which do not conform to the requirements and specifications of the rule, freight charges will be increased 20% on less than carload shipments and 10% on carload shipments.

The Interstate Commerce Act authorizes the establishment of the classification of which Rule 41 is a part. The classification is filed with the Interstate Commerce Commission which decides on the reasonableness of the terms thereof. Respondents contend that since Rule 41 is a tariff, enforcement is solely within the purview of the Interstate Commerce Commission and the Federal Trade Commission is without jurisdiction in this matter. The obvious answer to this argument is that this proceeding does not involve enforcement of Rule 41. The tariff provisions are imposed on shippers who transport goods in boxes in commerce. Respondents herein are not charged with violating Rule 41 but are charged with misrepresenting that the boxes which they manufacture comply with standards which are of importance to others for tariff purposes. Respondents' contention in this respect must be rejected.

The complaint alleges that respondents imprinted the certificate of the box maker required by Rule 41 on boxes which did not conform to the standards set out in the rule. In particular, it is alleged that the combined weight of the facings and the bursting strength of a substantial number of said boxes were less than the required minimum. When this matter was previously before the hearing examiner, the results of certain tests performed on boxes obtained from respondents' customers were entered in evidence by counsel supporting the complaint. The hearing examiner, in ordering dismissal at that time, based his decision in part upon his finding that there was no evidence in the record as to the time the boxes left respondents' plant and that there was no evidence indicating that the boxes were in substantially the same condition at the time of testing as when they were purchased from respondents. Upon review, we concluded that the public interest required that the issues be disposed of on the merits. The case was remanded to the hearing examiner for the purpose of receiving the evidence which had been found to be lacking.

The boxes upon which tests were conducted were obtained in July, 1957, in the course of the investigation of this matter. Thirteen boxes were obtained from four of respondents' customers located in the Washington, D.C., area (Commission Exhibits 2-12, 14 and 15). With one exception, for each box obtained a duplicate box was also obtained from the same customer (Commission Exhibits 17-28).

The original group of thirteen boxes was tested in December, 1957, by Container Laboratories, Inc., New York City, stipulated by counsel as being a reputable and qualified testing laboratory. It appears from the evidence of record that two of these thirteen boxes had been used by the purchasers thereof prior to being obtained by the Commission's investigator. The hearing examiner was of the opinion that no used boxes should have been employed for testing purposes. Counsel supporting the complaint contends that on the basis of certain opinion testimony and the fact that in the test report (Commission Exhibit 16), no reference is made to the use of the boxes as adversely affecting the test results, the hearing examiner should have considered the results of the tests performed on the used boxes. However, viewing the entire record, we do not find it necessary to rule on this question in reaching our decision.

The report of the tests as to the unused boxes discloses that four of these eleven boxes did not meet the bursting strength test and nine failed to meet the requirements for the combined weight of the facings. One of the two boxes which was satisfactory as to the combined weight of the facings failed to pass the bursting strength test. Thus, the tests showed that ten out of eleven of the unused boxes did not meet the requirements of Rule 41 in one respect or another.

The duplicate set of boxes was tested by Eastern Box Co., Baltimore, Maryland, a competitor of respondents, in August, 1957. Of the twelve boxes tested, three showed evidence of use. Seven of the nine unused boxes had facing sheets whose combined weight failed to meet the standards set up in Rule 41. Although Eastern also conducted bursting strength tests, the results thereof were not placed in evidence. It was conceded by counsel supporting the complaint that the bursting strength tests were not conducted in the manner prescribed in Rule 41.

The hearing examiner did not consider the results of the tests conducted by respondents' competitor in making his decision. Counsel supporting the complaint contends that Eastern's test results do have probative value. The evidence with respect to the method employed by Eastern in testing respondents' boxes discloses a vari-

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ance from the method employed by Container Laboratories, Inc. Samples, after a baking out period, were allowed to condition under controlled temperature and humidity for 24 hours before testing by Container Laboratories, Inc., whereas Eastern allowed only 1 hour for conditioning. However, respondents' contention that this shows bias is refuted by the testimony of the competitor's technical director that the method employed in testing respondents' boxes was the same as that employed by Eastern in testing its own boxes and any other boxes sent into its plant for that purpose. While we think that the same conclusion would be reached in this case without considering Eastern's tests, we think the hearing examiner was in error in holding that they are completely devoid of evidentiary value. The mere fact that the tests were performed by a competitor is not sufficient grounds for refusing to consider them.

Subsequent to the remand, evidence was introduced as to the age of respondents' boxes at the time they were tested and the conditions under which they were stored from the time of purchase until testing. This evidence included the testimony of the four customers of respondents from whom the boxes were obtained. All four testified as to their procedure in ordering boxes from respondents, the time period between placing orders and delivery by respondents, the length of time a supply of boxes generally lasted, and they specifically related most of the boxes to invoices which were received into the record. In addition, the respondent James Glose testified that in most cases, boxes were made up as orders were received. On the basis of this evidence, the hearing examiner found that with two exceptions, the thirteen boxes tested by Container Laboratories in December, 1957, were about six months old when tested. One of the remaining boxes was found to have been about nine months old and the other about one year old at the time of testing. Although noting an exception as to the two used boxes, the hearing examiner found that when tested in December, 1957, the thirteen boxes were in substantially the same condition as when they left respondents' plant. We agree that the evidence relied on by the hearing examiner fully supports these findings. Moreover, there is additional evidence which apparently was not considered by the hearing examiner. Two experts who have conducted numerous tests on fibreboard boxes to determine compliance with Rule 41 were called as witnesses by counsel supporting the complaint. Both testified, in substance, that age alone would not affect the weight of the facings or the bursting strength of fibreboard boxes for a period of at least three years.

In addition to the above evidence, counsel supporting the complaint introduced results of tests conducted on the same boxes by

Container Laboratories, Inc., in June, 1959. Counsel had these additional tests made for the purpose of ascertaining whether there had been any significant change in the condition of the boxes between the original test and the retest, a period of about eighteen months. If the retest showed no significant change, it would, in counsel's view, create an inference that no change occurred in the condition of the boxes in the six month period from the date the boxes left respondents' plant until they were first tested.

The hearing examiner, upon consideration of the results of the retests, found that there was no substantial change in the condition of the thirteen boxes between tests. He also found that there was no significant difference between the results of the first and second tests insofar as the weight of the facings was concerned. No comparison was made as to bursting strength as the second series of tests were incomplete in that respect due to the fact sufficient material was not available for adequate testing.

Respondents strenuously objected to the action of counsel supporting the complaint in having the exhibits retested without requesting approval by the hearing examiner or the Commission and without notice to respondents. On the basis of this action by counsel supporting the complaint, respondents moved to have these exhibits stricken from the record. This motion was denied by the hearing examiner. While we believe the better course would have been for counsel supporting the complaint to have notified respondents of his proposed action, we do not find it necessary to pass on the hearing examiner's ruling as we do not rely on the results of the retests in reaching our decision.

In ordering dismissal on the grounds of failure of proof, the hearing examiner minimized the differences between the requirements of Rule 41 for the weight of the facings and the results of the tests performed on six of respondents' boxes. The combined weight of the facings of five of those six boxes is required to be 84.0 pounds (per thousand square feet) and the sixth box is required to have combined facings weighing 126.0 pounds. On the basis of the Container Laboratories' tests conducted in December, 1957, the boxes listed by the hearing examiner fell short of the required weight by 4.5 pounds, 5.4 pounds, 4.8 pounds, 5.4 pounds, 3.3 pounds and 6.6 pounds. We agree with counsel supporting the complaint that these variances cannot be minimized. In the first place, Rule 41 sets up absolute standards and does not provide for tolerances. Purchasers of the boxes are entitled to rely on the manufacturer's certificate that these standards have been adhered to. Moreover, the significance of these amounts becomes apparent when considered in light of the evidence of record that the basic stand-

ard weights of paper facings purchased from paper mills and used in combination in manufacturing corrugated fibreboard containers are 26 pounds, 33 pounds, 38 pounds, 42 pounds, 47 pounds, 69 pounds and 90 pounds. The weight shortage in four of the five boxes required to have combined facings weighing 84 pounds is more than the difference between the use of a 38 pound facing and a 42 pound facing in combination. Of the remaining boxes not listed by the hearing examiner, two met the requirements for the weight of the facings while the other four showed shortages in amounts of 20.9 pounds, 8.5 pounds, 7.9 pounds and 9.0 pounds.

The hearing examiner found that facing paper used in the manufacture of boxes may vary in weight as much as 4 or 5 percent within a given roll, and different rolls, although marked as being of the same weight, also vary materially. There is testimony that this 4 or 5 percent variation relates to the total spread between the minimum and the maximum weight of the roll. For example, the paper in a roll marked 42 pounds, allowing a 5-percent variance (2.1 pounds), would vary in weight between 40.95 pounds and 43.05 pounds. However, respondents' production manager testified that the variance will be two pounds either way in a 42-pound roll. Giving full weight to his testimony, no box required to have facings weighing 84 pounds would have facings weighing less than 80 pounds. Seven of the eight unused boxes tested which were required to weigh 84 pounds failed to meet this 80-pound minimum, even assuming that all of them had facings with the maximum variance in weight at the lowest level. Moreover, there is testimony that some paper producers manufacture their paper overweight so as to allow for variations.

The undisputed evidence in this record discloses that ten out of eleven boxes selected at random from respondents' customers failed to meet the requirements of Rule 41 in tests performed by an independent testing laboratory stipulated by counsel as being fully qualified to perform such tests. In addition, there is evidence that seven out of nine other boxes tested by a competitor were below the standards set forth in the rule. The evidence establishes that these boxes were in substantially the same condition when tested as when they left respondents' plant with a certificate imprinted thereon which represented that they conformed to all construction requirements of Rule 41. In our view, this evidence affords a reasonable basis for a conclusion that a substantial number of boxes sold by respondents were misrepresented. In light of this evidence, certain other testimony of record with respect to respondents' manufacturing procedures and customer satisfaction, and the absence of evidence that respondents' boxes have been found to be defective in

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actual use, all of which was given weight by the hearing examiner, is deemed immaterial.

We observe from our review of the record that the respondent Harvey Jones is charged in the complaint in his individual capacity as well as in his capacity as an officer of the corporation. The answer, while admitting that Jones is an officer of the corporation, denies that he has ever participated to any extent whatsoever in the formulation, direction or control of the policies, acts or practices of the corporate respondent. The president and sole stockholder of respondent corporation, James Glose, admitted in his testimony that he is individually responsible but denied that Jones has anything to do with the policies of the corporation. Jones did not testify and there is a complete absence in this record of any evidence or showing of circumstances to support a conclusion that individual liability should attach as to him. Under the circumstances, the complaint will be dismissed as to Harvey Jones in his individual capacity.

In view of the foregoing, the appeal of counsel supporting the complaint is granted. The initial decision is set aside, and we are entering our own findings as to the facts, conclusions and order to cease and desist in conformity with this opinion.

IN THE MATTER OF

NATIONAL BUSINESS ASSOCIATES, INC., ET AL.

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

Docket 7626. Complaint, Oct. 23, 1959—Decision, July 20, 1960

Consent order requiring a Chicago company to cease using deception in the sale of real estate advertising, including such claims as that it had prospective buyers interested in a particular property, that the asking price was too low and should be raised and that it would make the sale at the increased price in a short time, that it financed the purchase of the listed property, and that the listing fee would be returned if the property was not sold promptly.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that National Business Associates, Inc., a corporation, and Lawrence J. Gordon and Judith Gordon, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in re-

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spect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent National Business Associates, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois. Its office and principal place of business is 7014 South Crandon Avenue, Chicago 49, Ill.

Respondents Lawrence J. Gordon and Judith Gordon are individuals and officers of corporate respondent National Business Associates, Inc., and formulate, direct, and control the practices of said corporate respondent. Their office and principal place of business is that of the corporate respondent, 7014 South Crandon Avenue, Chicago 49, Ill.

PAR. 2. Respondents are now, and for more than one year last past have been, engaged in the business of soliciting the listing for sale and advertising of real estate and other property. In connection with this business, respondents are and have been engaged in the operation, in commerce, of a business which offers for sale advertising in newspapers and other advertising media and other services and facilities in connection with the offering for sale, selling, buying and exchanging of business and other properties. In connection therewith, the respondents have been and now are transmitting and receiving, through the United States mail, advertising matter, pamphlets, circulars, letters, contracts, checks, money orders and other written instruments which are sent and received between respondents' place of business in the State of Illinois and persons, firms, and corporations located in various States of the United States, and thereby have engaged in extensive commercial intercourse in commerce, as "commerce" is defined in the Federal Trade Commission Act.

The volume of the aforesaid business conducted by respondents has been and is substantial.

PAR. 3. In the course and conduct of their business, respondents, through the use of newspaper advertising, post cards, circulars and other written instruments circulated in various States, and through oral statements made by their solicitors or representatives, all for the purpose of obtaining listings of property for sale and collecting substantial sums of money as fees for the listing and sale of property, have represented, directly and by implication, to persons who had property for sale: (1) that they have available prospective buyers who are interested in the purchase of their specific properties; (2) that their property would be sold within a short period of time as a result of respondents' efforts; (3) that the property is underpriced and the asking price should be raised, and that they could and would sell the property at the increased price; (4) that respondents were and are able to finance or assist in financing the purchase of

the listed properties; (5) that the listing fee is an advance on the selling commission and will be refunded to the property owner if the property is not sold within a short period of time.

PAR. 4. The aforesaid representations were and are false, misleading, and deceptive. In truth and in fact: (1) Respondents have never had prospective buyers interested in and available to purchase the specific property listed; (2) property is seldom, if ever, sold as a result of respondents' efforts; (3) the purpose of increasing the owner's asking price for the property is not that it was underpriced but, on the contrary, to increase the fee collectible in advance and to increase the property owner's interest in respondents' services; (4) Respondents do not and have not financed the purchase of listed property; (5) the listing fee is not an advance on the selling commission but is a fee charged for listing the property and in most cases is not refunded.

PAR. 5. The use by respondents of the aforesaid acts and practices, in connection with the conduct of their aforesaid business has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the public and to induce many owners of property, because of said false, deceptive, and misleading representations, to enter into contracts respecting the listing and advertising of their properties and to pay over substantial sums of money to respondents in connection therewith.

PAR. 6. The acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. William A. Somers for the Commission.

Respondents, *pro se*.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

In the complaint dated October 23, 1959, the respondents are charged with violating the provisions of the Federal Trade Commission Act.

On May 4, 1960, respondents National Business Associates, Inc., a corporation, and Lawrence J. Gordon, individually and as an officer of said corporation, entered into an agreement with counsel in support of the complaint for a consent order.

Under the foregoing agreement, the respondents admit the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and have the same force and effect

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as if entered after a full hearing and the document includes a waiver by the respondents of all rights to challenge or contest the validity of the order issuing in accordance therewith. The agreement further recites that it is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged in the complaint.

The hearing examiner finds that the content of the agreement meets all of the requirements of section 3.25(b) of the Rules of the Commission.

The agreement provides that the complaint insofar as concerns the individual respondent Judith Gordon should be dismissed for the reasons set forth in an affidavit attached thereto that said respondent was never active in the business of the corporate respondent and that she at no time contributed any monies, time and/or work on behalf of the business of the corporate respondent, nor did she serve for or on behalf of the business complained of in the complaint. Said Judith Gordon was only an officer in name for the corporate respondent to enable affiant to qualify under the incorporating laws of the State of Illinois.

The hearing examiner being of the opinion that the agreement and the proposed order provide an appropriate basis for disposition of this proceeding as to all of the parties, the agreement is hereby accepted and it is ordered that the agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission. The following jurisdictional findings are made and the following order issued.

1. Respondent National Business Associates, Inc., is a corporation, and respondent Lawrence J. Gordon is an individual and officer of the corporate respondent with their office and principal place of business located at 7014 South Crandon Avenue, Chicago 49, Ill.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents National Business Associates, Inc., a corporation, and its officers, and Lawrence J. Gordon, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, or sale of advertising in any advertising media, or of other services and facilities in connection with the offering for sale, selling, buying, or exchanging of business or any kind of property, in commerce, as "commerce"

is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

1. Respondents have available prospective buyers who are interested in the purchase of specific property.

2. Property listed with respondents will be sold as a result of their efforts.

3. Property sought to be listed is underpriced or that the asking price should be increased, or that respondents can or will sell the property at the increased price.

4. Respondents finance or assist in financing the purchase of listed property.

5. The listing fee is an advance on the selling commission or will be refunded to the property owner.

It is further ordered, That the complaint be, and it is hereby, dismissed as to respondent Judith Gordon.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 20th day of July 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondent National Business Associates, Inc., a corporation, and Lawrence J. Gordon, individually and as an officer of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

QUEEN ANNE COUNTY CLAM ASSOCIATION ET AL.

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

Docket 7578. Complaint, Sept. 2, 1959—Decision, July 21, 1960

Consent order requiring two Maryland clam digger associations and their responsible officers, to cease conspiring to suppress competition in the purchase or sale of soft shell clams harvested in the Chesapeake Bay region, in pursuance of which they engaged in such illegal practices as establishing and maintaining uniform prices and terms, boycotting dealers who purchased or sought to purchase at less than their fixed prices, and using threats of reprisals, intimidation, and physical violence and other means to enforce adherence to their prices.

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Pursuant to the provisions of the Federal Trade Commission Act (38 Stat. 717; 15 U.S.C.A., Section 41 et seq.) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties named in the caption hereof, and hereinafter more particularly described and designated as respondents, have violated and are violating the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges in that respect as follows:

PARAGRAPH 1. The Queen Anne County Clam Association is a corporation organized and existing under and by virtue of the laws of the State of Maryland. Said corporation's principal office and place of business is located in Grasonville, Md.

The control, direction, and management of said corporate respondent are vested in its officers and members. Said officers are elected annually to serve a term of one year. The officers of this corporate respondent include a president, a vice president, and a secretary-treasurer. During 1958 and 1959 the officers of said corporation were Charles Ford, Grasonville, Md., President; Elwood Thompson, Grasonville, Md., Vice President; and Oscar Schultz, Grasonville, Md., Secretary and Treasurer.

The aforementioned officials of the Queen Anne County Clam Association, their predecessors, and successors have directed or controlled the policies, acts, and practices of said Association, including one or more of the policies, acts, and practices which are complained against herein.

Said officials in their individual capacities as members of the Queen Anne County Clam Association, have performed, authorized, or adopted one or more of the policies, acts, and practices which are complained against herein.

PAR. 2. Respondents Hiram Ruth, William Hoxter, John Thomas, Willard Jones, Benjamin Austin, Sr., and George Darrell, all of whom reside at Grasonville, Md., are members of respondent Queen Anne County Clam Association.

The activities of these individual members and of the aforementioned officers in authorizing, performing, or adopting one or more of the policies, acts, and practices as hereinafter alleged are representative of the activities of all the members of the Queen Anne County Clam Association during 1958 and 1959.

The membership of said Queen Anne County Clam Association is composed of a number of persons and partnerships engaged in the business of harvesting and selling soft shell clams. The number of

members fluctuates but usually exceeds fifty, with the membership comprised mostly of parties harvesting and selling clams in Queen Anne County, Md. Because of the large and fluctuating membership of said Queen Anne County Clam Association, it is impracticable to specifically name each member as a party respondent herein. Furthermore, the membership of said association, as a class, is adequately represented and can be defended in this proceeding by the aforementioned members; therefore, said members are not only named individually as respondents, but also as representatives of the entire membership of respondent association as a class, so that the members not named specifically are made parties respondent as though they had been named individually herein.

PAR. 3. Respondent Anne Arundel County Clam Association is an unincorporated association with its principal office and place of business located in Shady Side, Md. Respondents Gordon Hallock, John M. Nieman, Woodrow Blythe, and Charles Cantler, all of whose addresses are Shady Side, Md., are, and have been, President, Vice President, Secretary, and Treasurer, respectively, of said Arundel County Clam Association. The aforementioned officials of respondent Anne Arundel County Clam Association, together with the members thereof, have directed or controlled the policies, acts, and practices of said association.

The aforementioned officials, in their individual capacities as members of said association, have performed, authorized or adopted one or more of the policies, acts, and practices complained against herein. In this respect, the activities of said officials in their individual capacities are representative of the activities of all the members of the Anne Arundel County Clam Association.

The membership of the Anne Arundel County Clam Association is composed of a number of persons and partnerships engaged in the business of harvesting and selling soft shell clams. The number fluctuates, but usually it exceeds twenty-five. Because of the large and fluctuating membership of said Anne Arundel County Clam Association, it is impracticable to specifically name each member as a party respondent herein. Furthermore, the membership of said Anne Arundel County Clam Association, as a class, is adequately represented and can be defended in this proceeding by the aforementioned officials of the Association. Therefore, the respondent officials of respondent Anne Arundel County Clam Association are named respondents in their respective official positions, individually, as members of the Anne Arundel County Clam Association, and also as representatives of the entire membership of respondent association, as a class, so that the members not named specifically

are parties respondent as though they had been named individually herein.

PAR. 4. Respondent Shadyside Seafood Cooperative, is an unincorporated association with its principal offices located in Shady Side, Md. Its members are engaged in the business of harvesting and selling soft shell clams. Respondent John M. Nieman, who also resides at Shady Side, Md., is president of said respondent Shadyside Seafood Cooperative, and as such, together with the members of said Cooperative, has directed or controlled the policies, acts, and practices of said cooperative and also has, expressly or impliedly, authorized, performed, or adopted, one or more of the policies, acts, or practices herein alleged to have been performed by or through said cooperative. Said policies, acts, and practices were performed by or through the medium of said respondent cooperative, or by or through respondent John M. Nieman, with the approval and on behalf of its individual members, and were intended to, and did, bind said members in the same manner and with the same effect as though they had engaged in same.

The number of members of said cooperative fluctuates, with the exact membership at any particular time not being known, so that it is impracticable to specifically name each member of said cooperative as a party respondent herein. Furthermore, the membership of said cooperative, as a class, is adequately represented and can be defended in this proceeding by the said respondent John M. Nieman, who, acting for, or in the name of, the respondent cooperative, markets and determines the prices and terms at which the respondent members of said respondent cooperative sell the clams they gather. Therefore, said respondent John M. Nieman is not only named as respondent individually, as a member and as president of said respondent cooperative, but also as representative of the entire membership of respondent cooperative, as a class, so that the members of said respondent cooperative are made parties respondent as though they had been named individually herein.

PAR. 5. All of the individual respondents named herein are engaged in, or connected with, the business of harvesting and selling soft shell clams in the Chesapeake Bay and its tributaries for resale commercially.

This business developed in the Chesapeake Bay region in 1952, coincidentally with the development of hydraulic clam dredges and the shortage of soft shell clams in New England.

The Maryland Soft Shell Clam Industry has grown from a relatively small volume business in 1952 to its present volume of \$1,500,000 to \$2,000,000 annually. The number of clam boats operating

in Maryland waters has increased from seven in 1952 to over a hundred in 1959.

PAR. 6. All the respondents named herein are engaged in doing business in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that the individual respondents are clam diggers harvesting clams in commercially navigable waters, selling and shipping, or causing such clams to be shipped, to dealers located not only in the State of Maryland, but in other States of the United States and in the District of Columbia, and to agents of buyers of such clams located in states other than the State of Maryland. Said dealers buy and sell the clams in one continuous flow of commerce to buyers located in States of the United States other than the State of Maryland.

Respondents, Queen Anne County Clam Association, Anne Arundel County Clam Association, and Shadyside Seafood Cooperative, as well as the representative respondent officials of each, also are engaged in such commerce, in that they, on behalf of their representative respondent members, ship, or cause to be shipped, such clams to dealers or other buyers located not only in the State of Maryland, but in other States of the United States and in the District of Columbia, and in that they performed, in commerce, one or more of the acts or practices hereinafter set forth.

PAR. 7. In the course and conduct of the aforesaid business of gathering and selling soft shell clams in commerce, as hereinbefore described, the respondents, Queen Anne County Association, together with its respondent officers and members; respondent members of respondent Anne Arundel County Clam Association, together with said respondent association and its officers; and respondent members of respondent Shadyside Seafood Cooperative, together with said respondent cooperative and its president, respondent John M. Nieman, have, since approximately 1958, entered into, maintained, and effectuated an understanding, agreement, combination, and conspiracy to pursue, and they have pursued, a planned common course of action between and among two or more of them, or between one or more of them and others not named parties respondent herein, to suppress and hinder competition between and among themselves and also between themselves and such other parties in the purchase or sale in such commerce of said clams.

PAR. 8. Pursuant to, and in furtherance of, said understanding, agreement, combination, conspiracy, and planned common course of action, said respondents since 1958 have adopted, accepted, or performed, among others, the following policies and practices, and the acts committed to effectuate them:

1. Attempting to establish, fix, and maintain, and they have established, fixed and maintained, uniform and noncompetitive prices for the purchase or sale of soft shell clams harvested by members of respondents, Queen Anne County Clam Association, Anne Arundel County Clam Association, and Shadyside Seafood Cooperative;

2. Establishing, fixing, and maintaining, and they have established, fixed, and maintained, uniform and noncompetitive terms for the purchase or sale of soft shell clams harvested by said respondent members;

3. Boycotting dealers and purchasers of soft shell clams who seek, or have sought, to purchase, or have purchased, such clams at prices lower than those established, fixed, or maintained by respondents;

4. Enforcing adherence to said prices and the terms of purchase or sale by various means and methods, including threats of reprisals, intimidation, and physical violence against individual sellers or purchasers who do not comply with, or who refuse to comply with, such prices or terms.

PAR. 9. The capacity and tendency of the aforesaid understanding, agreement, combination, conspiracy, and planned common course of action, and the practices, policies, and acts done pursuant thereto, as hereinbefore set forth, have been, and are, to unlawfully restrict, restrain, hinder, and destroy competition in the harvesting, offering for sale, and marketing of soft shell clams in commerce, as "commerce" is defined in the Federal Trade Commission Act, within the intent and meaning of Section 5 of said Act.

PAR. 10. The policies, acts, and practices of the respondents, as hereinbefore set forth, are to the prejudice and injury of the public interest and constitute unfair acts and practices and unfair methods of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. James H. Kelley supporting the complaint.

Mr. Vachel A. Downes, Jr., of Centreville, Md., *Mr. Samuel Scrivener, Jr.*, and *Mr. David S. Scrivener*, of Washington, D.C., for respondents.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on September 2, 1959 charging them with entering into and maintaining an agreement among themselves and between themselves and others to fix and maintain uniform prices, terms and conditions of sale of soft shell clams and enforcing adherence to such prices and terms of sale. It was further charged that respondents agreed to and did boycott dealers who purchased

or sought to purchase such clams at prices lower than the prices fixed by respondents.

On May 3, 1960, there was submitted to the undersigned hearing examiner two separate agreements between the above-named respondents, their counsel, and counsel supporting the complaint providing for the entry of a consent order.

Under the terms of the agreements, the respondents admit the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and have the same force and effect as if entered after a full hearing and the documents include a waiver by the respondents of all rights to challenge or contest the validity of the order issuing in accordance therewith. The agreements further recite that they are for settlement purposes only and do not constitute an admission by the respondents that they have violated the law as alleged in the complaint.

The hearing examiner finds that the content of the agreements meet all of the requirements of Section 3.25(b) of the Rules of the Commission.

The hearing examiner having considered the agreements and proposed order, and being of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding, the agreements are hereby accepted, and it is ordered that said agreements shall not become a part of the official record unless and until they become a part of the decision of the Commission. The following jurisdictional findings are made and the following order issued.

1. Respondent Queen Anne County Clam Association is a corporation existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at Grasonville, Md.

At the time of issuance of the complaint, respondents Charles Ford, Elwood Thompson and Oscar Schulz (misspelled Schultz in the complaint) were respectively president, vice president, secretary and treasurer of the respondent Queen Anne County Clam Association with their address the same as said association's address. Charles Ford and Elwood Thompson are no longer officers of the association. Respondent Oscar Schulz is now president of the said respondent association.

2. Respondent Anne Arundel County Clam Association is an unincorporated association organized and existing as an entity under the laws of the State of Maryland governing unincorporated associations, with its principal office and place of business located at Shady Side, Md.

Order

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Respondents Gordon Hallock, John M. Nieman, Woodrow Blythe and Charles Cantler are respectively president, vice president, secretary and treasurer of the respondent Anne Arundel County Clam Association with their address the same as that of Anne Arundel County Clam Association.

By order of November 16, 1959, the complaint herein was dismissed as to respondent Benjamin Austin, Sr., for the reason that it appeared that he was inadvertently joined as a respondent in this proceeding.

3. Counsel supporting the complaint and Counsel for Seafood Co-Operative, Inc., (erroneously named in the complaint as Shadyside Seafood Cooperative) its officers, directors and members, and John M. Nieman, individually, and as president, member and representative of the entire membership of that co-operative have moved that the complaint be dismissed as to these respondents. This motion is hereby granted and the following order dismisses the complaint as to these respondents in the capacities named in the motion.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

ORDER

It is ordered, That the respondents Queen Anne County Clam Association and its officers, their respective successors and assigns, agents, representatives, employees and members, directly or through any corporate or other device, and Oscar Schulz, acting in any official capacity for said Association, and that the respondents Anne Arundel County Clam Association and its officers, their respective successors and assigns, agents, representatives, employees and members, directly or through any corporate or other device, and Gordon Hallock, John M. Nieman, Woodrow Blythe and Charles Cantler, acting in any official capacity for said association, in connection with the purchase or sale or the offering to purchase or to sell in commerce, as "commerce" is defined in the Federal Trade Commission Act, of soft shell clams or any other type or form of seafood, do forthwith cease and desist from entering into, continuing, co-operating in or carrying out any planned common course of action, understanding, agreement, combination or conspiracy between any of said respondents or between any one of said respondents and others not parties hereto, to do or perform any of the following acts or practices:

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Decision

1. Establishing, fixing or maintaining, or attempting to establish, fix or maintain, prices or terms for the purchase or sale of any of said seafood products.

2. Engaging in boycotts of dealers or other purchasers in connection with the sale of any of said seafood products.

3. Enforcing adherence, by any means or methods, to prices for the purchase or sale of any such seafood products.

It is further ordered, That the complaint be dismissed as to Charles Ford, Elwood Thompson, Oscar Schulz, Hiram Ruth, William Hoxter, John Thomas, Willard Jones and George Dorrell, in their individual capacities and also as representatives of the entire membership of the Queen Anne County Clam Association, and also be dismissed as to Charles Ford and Elwood Thompson as officers of said association.

It is further ordered, That the complaint be dismissed as to Gordon Hallock, John M. Nieman, Woodrow Blythe and Charles Cantler, in their individual capacities and also as representatives of the entire membership of the Anne Arundel County Clam Association.

It is further ordered, That, upon joint motion of Counsel Supporting the Complaint and Counsel for Respondent Seafood Co-Operative, Inc., the complaint be dismissed as to Seafood Co-Operative, Inc. (erroneously named in the complaint as Shadyside Seafood Cooperative), its officers, directors and members; and as to John M. Nieman, individually and as President, member and representative of the entire membership of Seafood Co-Operative, Inc.

Provided, However, that nothing herein shall prevent any association of bona fide clam fishermen acting pursuant to and in accordance with the provisions of the Fisherman's Cooperative Marketing Act (15 USCA, Paragraphs 521-522) from performing any of the acts and practices permitted by said Act.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 21st day of July 1960, become the decision of the Commission; and, accordingly:

It is ordered, That the respondents ordered to cease and desist in the initial decision herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF
KASTNER-SHERMAN CORP. ET AL.

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

Docket 7429. Complaint, Feb. 27, 1959—Decision, July 22, 1960

Order requiring wholesalers in Waltham, Mass., to cease representing carbon steel drills falsely as high-speed drills and misrepresenting the regular retail price of a ten-piece drill set by printing on the container "\$3.95 Value".

Mr. John J. Mathias for the Commission.

Goulston & Storrs, by *Mr. Phillip J. Newon*, of Boston, Mass., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The respondents are charged with having violated the Federal Trade Commission Act through misrepresenting the value and quality of a 10-piece set of drills which they imported and offered for sale to distributors and jobbers for ultimate resale to the public.

The essential facts, which were stipulated, and the conclusions drawn therefrom are as follows:

1. Respondent Kastner-Sherman Corp. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Massachusetts, with its principal office and place of business located at 740 South Street in the City of Waltham, State of Massachusetts.

2. Respondents Warren F. Kastner and Jerome Sherman are officers of the corporate respondent. They formulate, direct, and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

3. Respondents are now, and for some time last past have been, engaged in the importing of carbon steel drills and other merchandise, and in the advertising, offering for sale, sale and distribution of said merchandise to distributors and jobbers, and to wholesalers and retailers for resale to the public.

4. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said product, when sold, to be shipped from their place of business in the State of Massachusetts to purchasers thereof located in various other States of the United States and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said