

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

product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

5. In the course and conduct of their business prior to July 1, 1959, and for the purpose of inducing the sale of their merchandise, respondents have made certain statements with respect to the quality and value of their steel drills, in advertising material, catalogues and invoices, of which the following are typical:

RAPID WALTHAM,
RAPID SPEED WALTHAM,
HIGH SPEED WALTHAM.

Respondents further cause to be printed on the case in which their 10-piece set of drills is packed the statement "\$3.95 Value" and picture said case and printing thereon in their catalogue.

6. Through the use of the aforesaid statements, respondents represented:

a. That said drills were composed of high-speed steel and were high-speed drills;

b. That the amount designated as "value" was the price at which the 10-piece set of drills referred to was usually and customarily sold at retail.

7. Said statements and representations were false, misleading and deceptive. In truth and in fact:

a. Said drills were composed of carbon steel, which is not a high-speed steel, and were not high-speed drills;

b. The amount designated as "value" was substantially in excess of the price at which the 10-piece set of drills was usually and customarily sold at retail.

8. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of drills of the same general kind and nature as those sold by respondents.

9. Respondents' representations as to the composition and value of the Waltham 10-piece set of drills were false, misleading and deceptive; and by making such representations, respondents placed in the hands of wholesalers, jobbers, and retailers means and instrumentalities by and through which they may mislead the public as to the quality and value of said drills.

10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of substantial quantities of respondents' product by reason of said

erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

11. The aforesaid acts and practices of respondents, as herein found, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now 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. This proceeding is in the public interest, and the Commission has jurisdiction over the acts and practices of the respondents as herein found.

12. The Waltham imported drills were manufactured and labeled to the order of respondents, who are therefore completely responsible for their quality and their labeling. Although in their memorandum of law and in oral argument respondents' counsel stated that since the violation of the Act has been called to their attention, the respondents "forthwith ceased and desisted from the practice" of labeling the merchandise in question, a cease-and-desist order seems to be appropriate. Therefore,

It is ordered, That respondents, Kastner-Sherman Corp., a corporation, and its officers, and Warren F. Kastner and Jerome Sherman, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of drills or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing in any manner, directly or by implication:

(a) That drills made of carbon steel are composed of high-speed steel or are high-speed drills;

(b) That the retail value of merchandise manufactured to their order or labelled by them is any amount which is in excess of the price at which such merchandise is usually and customarily sold at retail;

2. Placing in the hands of others a means and instrumentality by and through which they may deceive and mislead the purchasing public, in respects set out in paragraph 1 above.

OPINION OF THE COMMISSION

By KERN, *Commissioner*:

This matter is before the Commission upon appeal by counsel supporting the complaint from the hearing examiner's initial decision.

The only issue presented for our consideration is the scope of the order issued by the hearing examiner.

The complaint charges respondents with misrepresenting the quality and value of steel drill sets. The facts are not in dispute, respective counsel having entered into a stipulation in which all of the factual allegations of the complaint are admitted to be true. Respondents are wholesalers and for the purposes of this case, the merchandise which they sell may be classified into three categories: imported goods which are labeled to their order; domestic goods purchased in bulk and packaged and labeled by them; and domestic goods which are packaged and labeled by others prior to sale to the respondents. In this latter category, respondents have no control over the retail price representations which the seller places on the product or its package.

Counsel supporting the complaint and respondents both submitted proposed orders to the hearing examiner. The only difference between these orders is in the wording of the inhibition directed at prohibiting the fictitious pricing practice. The hearing examiner adopted the order proposed by respondents which requires them to cease representing:

That the retail value of merchandise manufactured to their order or labeled by them is any amount which is in excess of the price at which such merchandise is usually and customarily sold at retail.

Counsel supporting the complaint contends that the order should cover all merchandise sold by the respondents and should not be limited to merchandise "manufactured to their order or labeled by them," which phrase does not appear in the order he requested. In support of this argument, counsel supporting the complaint cites those cases which hold that a Commission order to be of value must proscribe the unfair methods and practices complained of as well as the specific acts by which they are manifested. This is a well established principle. The question is whether its proper application to the facts in this case justifies the order urged by counsel supporting the complaint.

The complaint alleges that respondents cause to be printed on the case in which their drills are packed, an amount designated as "value" which is substantially in excess of the price at which the drills are usually and customarily sold at retail and picture said case and printing thereon in their catalog. There can be no doubt that the order should be broad enough to prevent respondents from selling other goods by the same method as such drills are sold. However, an essential element of the deceptive sales method alleged in this complaint is that respondents caused the fictitious retail price to be printed on their products. This constitutes the unfair sales

method stipulated to by respondents and which may be prohibited by the Commission. In our opinion, the limited scope of the complaint and proof in this particular case will not sustain an order broader than that contained in the initial decision.

In view of the foregoing, the appeal of counsel supporting the complaint is denied and the initial decision is adopted as the decision of the Commission.

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

FINAL ORDER

This matter having been heard by the Commission upon appeal by counsel supporting 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 respondents, Kastner-Sherman Corp., a corporation, and Warren F. Kastner and Jerome Sherman, individually and as officers 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 contained in