

form in which they have complied with the order to cease and desist.

IN THE MATTER OF
BARNARD HOSIERY CO., INC., ET AL.

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

Docket 7544. Complaint, July 15, 1959—Decision, Sept. 22, 1960

Order requiring manufacturers to cease violating the Wool Products Labeling Act by labeling as "Wool 35%, Cotton 65%, 100% wool cushion sole", men's hosiery which contained no wool except for the soles and in which the percentage by weight of wool was substantially less than 35%; and by labeling other men's hosiery as "100% Wool Sole Cushioning—Top, body all cotton", when the wool content of the soles was substantially less than 100%.

Mr. Thomas A. Ziebarth and *Mr. Charles W. O'Connell* supporting the complaint.

Respondents, *Pro Se*.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

THE COMPLAINT

The complaint charges that respondents violated the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder by misbranding mens hosiery and it is also charged

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that the respondents violated Section 5 of the Federal Trade Commission Act through the use of false and misleading statements on sales invoices and shipping memoranda which misrepresented the fiber content of hosiery.

THE ANSWER

The corporate respondent and the individual respondent Nathan Natelson filed an answer which admitted the alleged corporate status of the corporate respondent and the control by the individual respondents. The individual respondent Robert Sharp did not file an answer and did not appear at the hearing but he did enter into a stipulation which is a part of the record in which he conceded that he cooperated in formulating, directing and controlling the acts and practices of the corporate respondent which was engaged in interstate commerce. The answer further admitted respondents were engaged in "commerce" as alleged and that they were in competition in commerce with others engaged in the manufacture and sale of hosiery containing wool. The other allegations were denied and the answer asserted as an affirmative defense that the markings on its hosiery were in full compliance with Rule 23 of the Rules and Regulations promulgated by the Commission under the authority of the Wool Products Labeling Act of 1939 and that such markings were not deceptive.

A hearing was held at which evidence was received in support of, and in opposition to, the allegations of the complaint. Thereafter, proposed findings as to the facts and a proposed order were submitted by counsel supporting the complaint and by the corporate respondent. These proposals have been considered and to a considerable extent those submitted by counsel supporting the complaint have been accepted and are embodied herein. To the extent that they are not embodied herein, the proposals submitted are hereby rejected.

After considering the entire record, the hearing examiner now finds the following facts.

FINDINGS OF FACTS

1. Respondent Barnard Hosiery Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Respondents Nathan Natelson and Robert Sharp are president-treasurer and secretary of the corporate respondent, respectively. Said individual respondents cooperate in formulating, directing and controlling the acts, policies and practices of the corporate respondent, including the acts and prac-

tices herein referred to. All respondents have their office and principal place of business at 29 West 34th Street, New York, N.Y.

2. Subsequent to the effective date of the Wool Products Labeling Act of 1939 and more especially since 1955, respondents have caused the manufacture for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce, as "commerce" is defined in said Act, wool products as "wool products" are defined therein.

3. Respondents in the course and conduct of their business as aforesaid were and are in competition in commerce with other corporations, firms and individuals likewise engaged in the manufacture and sale of hosiery containing wool.

4. The record shows that respondents are engaged in the business of marketing hosiery. The product which is the subject matter of the complaint is referred to as a "cushion sole sock". This product consists of a cotton sock to which wool has been added in certain places for its cushioning effect.

5. Wool has been added to the inside of the sole and high heel of the cotton sock by attaching the wool to the cotton portion by a process known as terry stitching and these are the only parts of the sock that contain any wool. The high heel is not to be confused with the heel. The heel is cushioned with cotton and an area above the heel is cushioned with wool and is referred to as the high heel. The toe like the heel is cushioned with cotton. The weights of wool and cotton in the parts of the sock that have the wool cushioning are approximately equal.

6. A test of one of the respondents' socks shows the wool content of the entire sock to be 19.3% and a test of another of respondents' socks shows that one to be 17.6% wool.

7. Respondents used two different transfers on the sock in question to designate the fiber content therein. These transfers read as follows:

- (1) Wool 35%; cotton 65%; 100% wool cushion sole (CX 1).
- (2) 100% Wool sole cushioning; top, body all cotton. (CX 3)

Respondents did not label their hosiery as required by Sections 4(a)(1) and 4(a)(2) of the Wool Products Labeling Act of 1939 in that the labels did not show the correct percentage of wool in their socks and did not show the actual percentage of wool in the sole section of the socks. In its proposed order the corporate respondent concedes that the transfer quoted first in finding 7 constitutes misbranding but contends that the transfer last quoted in finding 7 was not shown to be deceptive. Respondents contend that Rule 23 of the Rules promulgated under the Wool Act per-

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mits the use of the labeling last quoted in finding 7 because they contend that the sole is the inside of the sock and the foot is the outside. Literally, the term foot includes the toe, heel and sole and the term sole includes both the inner and outer layers if, in fact, there are inner and outer layers as is the case here. It may be that a cushion inner sole, as distinguished from a complete sole, could be considered a recognizably distinct section of a sock although the trade generally, as evidenced by the Trade Practice Rules for the Hosiery Industry, does not consider this to be true but it is not necessary to decide this because the respondents did not distinguish between inner sole and outer sole and it seems obvious that respondents' hose had both an inner sole of wool and an outer sole of cotton and thus the complete sole was misbranded. It could be considered that respondents' cushion sole is padding and that its fiber content should be set forth separately as required by Rule 24 but in any event this Rule has not been complied with and more particularly Rule 23 was not complied with as respondents contend.

The permissive portion of Rule 23 was not adhered to, but more importantly and as a part of the same issue, the mandatory portion of the Rule was violated because a failure to designate the part of the sole which was wool and the part which was cotton does not avoid deception as the rule requires. There is no evidence to show whether the cushion sole or inner sole is a recognizably distinct section except what may be observed from an examination of the product. It cannot be found that it is not a recognizably distinct section but if there is such section, Rule 23 requires that each such section be separately identified in the same label and the Rule would require that the fiber content of the inner sole, the outer sole, and each other recognizably distinct section be similarly identified with the fiber content shown. This, the respondents have not done. Thus, their contention that they have complied with the permissive section of the Rule must be rejected. It also appears that the use of larger print in the "100% wool" portion of the label and smaller print for the portion "top, body all cotton" aids in the deception.

CONCLUSION

Respondents have misbranded hosiery containing wool within the intent and meaning of Section 4(a)(1) and 4(a)(2) of the Wool Products Labeling Act of 1939 and of Rule 23 of the Rules and Regulations promulgated thereunder. It is also concluded that the evidence does not show a violation of Section 5 of the Federal Trade Commission Act which was alleged in Paragraph Ten of the Complaint because it does not appear that the shipping memoranda to

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the producing mill, which are in evidence, had the capacity to deceive.

ORDER

It is ordered, That respondents Barnard Hosiery Co., Inc., a corporation, and its officers and Nathan Natelson and Robert Sharp, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for the introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of hosiery composed in whole or in part of wool or other wool products, as such products are defined in and subject to the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers included therein;
2. Failing to affix labels to wool products showing each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.
3. Falsely or deceptively designating the character or amount of the fibers contained in any section of a wool product composed of two or more sections which are recognizably distinct in violation of Rule 23 of the Rules and Regulations promulgated pursuant to the Wool Products Labeling Act of 1939.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner*:

In the initial decision filed by the hearing examiner, the examiner found that the respondents had misbranded their hosiery products in violation of the Wool Products Labeling Act and that such violations included failure to comply with the requirements of Rule 23 of the Rules and Regulations promulgated under the Act. These findings and the order based thereon the respondents are here contesting.

The complaint's charges of misbranding and the evidence received related to two forms of imprinted labeling statements used by respondents for designating the fiber content of socks marketed by them, which statements or transfers read as follows:

- (1) Wool 35% ; cotton 65% ; 100% wool cushion sole.
- (2) 100% Wool sole cushioning ; top, body all cotton.

Respondents, in their appeal, do not challenge the finding of law violations attending use of the first aforementioned label. The appeal thus presents the sole question of whether the hearing examiner erred in finding that the second label fails to comply with the requirements of the rule previously referred to which provides for disclosure of the fiber composition of wool products on a sectional basis under circumstances and in the manner there prescribed.

Respondents' hosiery is referred to as a cushion sole sock. It is essentially a cotton sock with tufted or looped stitching affording a cushioning effect and applied by a process known as "terry stitching." The cushioning for the toe and heel is composed of cotton; that for the area in between them, that is, the sole, is wool; and that for the high heel, namely, the reinforcing area joining the heel and extending up toward the body or leg, also is wool. The cushioning is limited to these particular portions of the sock and is plainly visible on their inner surfaces and, where the wool yarn is knitted with the cotton yarn, they form the fabric. The weights of the cotton and wool in the parts where wool is used are approximately equal.

Rule 23¹ permits and authorizes sellers of wool products which are composed of two or more recognizably distinct sections of differing fiber compositions to show the fiber composition of each section separately, provided that such designations include the respective percentages applicable to each section specifically designated and provided that the disclosure made is adequate to fully inform purchasers; and under the rule, sectional disclosure of fiber composition in the manner above prescribed is mandatory when necessary to avoid deception of purchasers or purchaser-consumers. The exhibits received in evidence include a copy of certain specifications relating to wool "cushion-sole" men's socks which have been approved by the procurement divisions of the armed services. These specifications prescribe, in effect, a seamless sock with top and leg composed of designated yarns and having terry or tuft stitches "throughout the high heel, heel, sole, toe, toe and ring toe."

Respondents contend that the hearing examiner erred in failing to find that the term "sole" as a designation for cushion sole hose

¹ Rule 23—*Sectional Disclosure of Content.*

(a) *Permissive.* Where the wool product is composed of two or more sections which are recognizably distinct and such several sections are of different fiber composition, the required fiber content to be stated upon the stamp, tag, label, or other mark of identification may be separated in the same label or mark in such manner as to show the fiber composition of each section, provided the section to which the respective percentages and fiber designations apply is specifically designated and such disclosure by sections is adequate fully to inform purchasers of the required information.

(b) *Mandatory.* The disclosure by sections as above provided shall be made in all instances where such form of marking is necessary to avoid deception of purchasers and purchaser-consumers. [16 C.F.R. § 300.23]

connotes the inner portion where two fabrics are combined to form its foot portion and that the inner cushioning material in the foot area thus constitutes a distinct section for purposes of fiber disclosure. Were the area constituting the inner cushioning in the foot section deemed an appropriate distinct section for purposes of fiber disclosure, as contended, the respondents' labels identifying the sole cushioning of their hosiery as "100% wool" and referring to the top and body as all cotton still would not supply the information prescribed by the rule and would be deceptive. This is evident because the heel and toe are likewise components of the foot portion and not of the top and body of hosiery, and the label is silent as to the fact that these components in the respondents' products are in fact all cotton. Furthermore, not all the yarn used by the respondents for the cushioning effect is wool yarn. As previously noted, the cushioning for the toe and heel of their socks is composed of cotton.

In 1941, the Commission promulgated Trade Practice Rules for the Hosiery Industry. Rule 9(n)² thereof recognizes as appropriate sections of hosiery for purposes of making sectional disclosures of fiber content, (1) the "body" or "leg"; (2) the "top" or "welt"; and, (3) the "foot" or "heel, toe and sole." Although the record suggests that production of socks having this type of cushioning material began later, in 1943, the record also includes evidence as to current practices and customs in the hosiery trade respecting the nomenclature of sections and disclosure of their fiber contents. An affidavit executed by an official of a trade association, whose membership manufactures approximately 75% of the hosiery produced in this country, states that members (and non-members with few exceptions) recognize and use the sections designated in the above trade practice rules. Furthermore, according to that affidavit, the member producers and most nonmembers who make hosiery wish cushion soles composed of cotton and wool yarn also set forth the fiber contents of such soles separately together with the respective percentages of each fiber. It is clear therefore that there is no general understanding among the members of the industry that the inner segment of a cushion sole is an appropriate distinct section for purposes of fiber disclosure. It is evident, on the other hand, that a cushion sole consisting of an inner and outer segment is the portion which is duly recognized as an appropriate distinct section for purposes of fiber disclosure.

The Wool Products Labeling Act contemplates that products containing the woolen fibers there designated bear labels or other

² 6 Fed. Reg. 2428 (May 15, 1941); 16 C.F.R. § 152.9 (1960).

means of identification showing the respective percentages of total weight of those and the other fiber constituents. Under Section 6(a) of the Act, the Commission is empowered, among other things, to make rules requiring the segregation of such prescribed information as relates to different portions of a wool product in the interest of preventing deception or confusion. Rule 23 was promulgated by the Commission pursuant to that authority. The statute makes it mandatory, and the rules and regulations contemplate, that products subject to the Act and containing a uniform blend of fibers throughout be identified as to their fiber content in the manner prescribed by Section 4(a)(2)(A) of the Act. The rule is directed to wool products composed of two or more recognizably distinct sections of differing composition; and subparagraph (a) imposes a duty on sellers electing to avail themselves of its permissive provisions to specifically designate each component section and disclose the respective fiber compositions of each. The record in this proceeding supports informed determinations that respondents have failed to comply with Rule 23(a) because their labeling statements or transfers have failed to designate the recognizably distinct sections of their hosiery and to show the respective percentages of wool and cotton contained in the fabric composing each such section. Such products accordingly were misbranded within the meaning of the Act.

Rule 23 additionally makes sectional disclosure mandatory in any situation where that form of marking is necessary to prevent deception. Tests of two representative samples of respondents' socks reveal that the wool present in one constituted 19.3% of its entire weight and in the other 17.6%. As previously noted, however, only the high heel and the sole area of the foot between the heel and toe of respondents' hosiery have contained wool fiber. That a statement designating the percentage which the wool fiber in those particular areas bears to the entire sock would represent and imply, contrary to the facts, that the wool fiber was uniformly present in that percentage throughout the entire sock is obvious, and requires no further comment. It follows that respondents' cushion sole hosiery are subject to the mandatory requirements of Rule 23(b).

Where Rule 23 is governing, it is not necessary that the label additionally show the percentages in which the constituent fibers of the distinct sections are present in the overall product. At the option of the seller, however, a statement in that regard may be set forth on the label as non-required information in conformity with Rule 10(b).

To the extent that the findings and conclusions in the initial decision depart from those expressed above, the initial decision shall be deemed modified. We further note that the order to cease and desist contained in the initial decision does not expressly require that future labels reveal the statutorily prescribed fiber information on a sectional basis. The order is being appropriately modified to remedy this deficiency and also for the purpose of clarifying the fact that overall disclosure of fiber content is not required in labeling situations where Rule 23 governs. The respondents' appeal is denied and the initial decision, modified as noted above, is being 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 the appeal filed by the respondents from the initial decision of the hearing examiner; and

The Commission having denied the appeal for reasons stated in the accompanying opinion and having further determined that the order to cease and desist contained in the initial decision should be modified:

It is ordered, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That respondents, Barnard Hosiery Co., Inc., a corporation, and its officers, and Nathan Natelson and Robert Sharp, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for the introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of hosiery composed in whole or in part of wool or other wool products, as such products are defined in and subject to the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers included therein.

2. Failing to affix labels to wool products showing each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939; provided, however, that the

overall content of the wool products need not be given if such products are labeled in accordance with Rule 23 of the Rules and Regulations promulgated under said Act.

3. Misbranding wool products by failing to set forth on stamps, tags, labels or other means of identification attached to such products the information required under Section 4(a)(2)(A) of the Wool Products Labeling Act with respect to each specifically designated section of a wool product composed of two or more sections where such sections are of a different fiber composition and are recognizably distinct.

4. Falsely or deceptively designating the character or amount of the fibers contained in any section of a wool product composed of two or more sections which are recognizably distinct in violation of Rule 23 of the Rules and Regulations promulgated pursuant to the Wool Products Labeling Act of 1938.

It is further ordered, That the charges contained in paragraph ten of the complaint be, and the same hereby are, dismissed.

It is further ordered, That the initial decision as modified herein be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondents named in the preamble of the order to cease and desist 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.

Commissioner Tait not participating.

IN THE MATTER OF
HOVING CORPORATION