

the Commission.

It is further ordered, That respondents 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
ARNOLD CONSTABLE CORPORATION

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

Docket 7657. Complaint, Nov. 16, 1959—Decision, Jan. 12, 1961

Order requiring the operator of specialty stores in New York City and suburbs to cease making, in newspaper advertising, deceptive pricing and savings claims for its merchandise, such as use of the abbreviation "Reg." preceding a price figure for which they had never sold the ladies' luggage advertised, and representing a fictitious figure as "customary retail value" for cashmere coats copied from more expensive coats and specially made for the sale from fabrics which were "seconds".

Charles W. O'Connell, Esq., supporting the complaint.

Melvin D. Kraft, Esq., of Klein and Opton of New York, N.Y., for respondent.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

PRELIMINARY STATEMENTS

The Federal Trade Commission filed its complaint in this proceeding on November 16, 1959, in accordance with authority vested in it by the Federal Trade Commission Act, and therein charged the respondent, Arnold Constable Corporation, a Delaware corporation, doing business under the name of Arnold Constable, with promulgating false and misleading advertisements for ladies' luggage and ladies' cashmere coats, which respondent sold in "commerce" as that term is defined in and understood in relation to the Federal Trade Commission Act. A prehearing conference was held on December 18, 1959. Respondent's answer was filed on January 19, 1960. Hearings were conducted on February 8, 1960, in New York, New York, and on March 10, 1960, in New York, New York. The transcript contains 349 pages. Forty (40) exhibits were offered by counsel supporting the complaint, and exhibits through 18A were offered by respondent. At the conclusion of the hearing on March 10, 1960, respondent requested and was given leave to file a motion to dismiss the proceeding for failure of the evidence to prove the legally essential allegations of the complaint. The hearing examiner held that a ruling on this motion would, under Rule 3.8(e) of this Commission's Rules of Practice for Adjudicative Proceedings, necessitate an evaluation of all of the evidence in the record, and the examiner, therefore, ordered the parties to file proposed findings, conclusions, and order. By May 27, 1960, such findings were filed, and on June 15, 1960, an order was entered closing the hearing record.

The hearing examiner finds that counsel supporting the complaint has proven the legally essential allegations of the complaint by preponderant, reliable, probative, and substantial evidence in the record, and an order is herein entered granting to counsel supporting the complaint the relief which he has requested.

Findings requested by counsel which are not specifically adopted and incorporated herein are rejected and refused. The fact that the examiner has not incorporated in this initial decision, nor rejected, nor dismissed specifically, evidence which is in the record, should not be construed as indicating that such evidence has not been fully considered by the hearing examiner in preparing this initial decision. It indicates merely that the evidence which the examiner has specifically incorporated in his findings of fact is sufficiently relevant, preponderant, reliable, probative, and substantial for a proper adjudication of the issues presented by this record.

Respondent's motion of April 11, 1960, to dismiss the complaint after the close of the hearing is hereby overruled and denied.

The hearing examiner makes the following

FINDINGS OF FACT

Respondent, Arnold Constable Corporation, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at Fifth Avenue and Fortieth Street in New York, New York. It does business under the name of Arnold Constable. Respondent is now and has for some time last past been engaged in advertising, offering for sale, selling and distributing merchandise in interstate commerce, which merchandise consists, among other things, of ladies' luggage and cashmere coats. In the course and conduct of its business, the respondent now causes, and for some time last past has caused, its products, when sold, to be shipped from its place of business in the State of New York to purchasers thereof located in various other states of the United States. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in its said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

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

The Ladies' Luggage:

On July 20, August 13, and August 20, 1958, respondent ran newspaper advertisements in New York City daily newspapers, of which Commission's exhibit 1 (CX 1) is a sample, for the purpose of publicizing a special sale of ladies' light weight vinyl-covered nesting luggage at a price of \$11.00 per unit, "regardless of size". This luggage was specially manufactured for the sale by Reliable Luggage Company of West Pittsburg, Pennsylvania.

Respondent's merchandise manager visited Reliable's plant in early 1958, and, after examining samples of Reliable's merchandise, and discussing its quality and price said, "Sam, this is a special occasion. I have got to have something different," referring to the ladies' luggage promotion which respondent was then planning. Respondent's representative requested Reliable to make up its regular 6600 "Travel Joy" line of luggage at a special price, but Reliable replied that it could not cut the price of its regular line in fairness to its other customers, who purchased and sold the 6600 line in New York City and throughout the country. Reliable finally agreed to

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"copy" the line, with some changes, and to "work close" and "cut corners" as much as it could.

As a result the luggage which Reliable made up for respondent's luggage sale was not the same luggage which Reliable had previously sold to respondent and which respondent had been selling under the name "Travel Joy". The linings, bindings, locks, and handles were different from the regular 6600 series which respondent had previously sold under the name "Travel Joy". Reliable's unit price to respondent for the specially constructed luggage was \$6.30. Respondent sold between 1,300 and 1,400 pieces of the luggage at \$11.00 per unit, and its witnesses testified that not a single customer had complained about the luggage.

Respondent advertised the specially constructed luggage for sale as follows (see CX 1):

in time for back-to-school	
NESTING LUGGAGE by Travel Joy	
(regardless of size!) \$11.00	
(in advertisement here appeared	
illustrations of the different	
types of luggage)	
21" Overnight case reg. \$16.50	24" Jr. Pullman reg. 18.50
Train cases reg. 17.50	26" Pullman reg. 22.50
29" Oversize Pullman reg. 29.50	

The words "reg. 16.50, reg. 18.50, reg. 17.50, reg. 22.50 and reg. 29.50" in CX 1 were calculated by respondent to convey the impression to the buying public, and did so convey the impression, that the identical luggage had previously been regularly sold by respondent at the prices indicated in CX 1. The identical luggage, constructed as it was, and manufactured as it was, had never before been sold by respondent. Respondent's direct or implied representation that the identical luggage had previously been sold at the prices indicated was false, misleading and deceptive. In the context of this proceeding respondent's representations in CX 1 are proscribed by, and are false, misleading and deceptive under the Federal Trade Commission Act proscriptions.

Ladies' Cashmere Coats:

Sometime prior to the fall of 1958, respondent decided to embark on a growth program for its Town and Country Shop for the approaching season. Accordingly, it began to shop the market for ladies' cashmere coats for sale at a low price. It selected for this sale ladies' cashmere coats manufactured by the firm of Bernard Drobes of New York, New York.

Bernard Drobes who testified concerning the coats and handled the transaction with respondent appeared to be a hard working, cons-

cientious and honorable businessman. In conducting his business he and his brother eliminate, or materially reduce, many over-head costs which their competitors have. This includes substantial reductions in the cost of styling, cutting, finishing and delivery, among others, and administrative expenses, as well. It also includes using "seconds" in fabrics. This permits Drobos to undersell his competitors. In making the cashmere coats for respondent, Drobos "copied" more expensive coats manufactured by his competitors. He styled the coats personally. By holding his out of pocket costs to approximately \$32.00, and cutting his profit to a minimum, Drobos sold the coats to respondent for \$39.75. In some instances he received as much as \$47.75.

Respondent advertised the coats as a \$119.00 value and sold approximately 1,000 of them for \$58.00.

These ladies' cashmere coats, even as the luggage, were specially made up by Drobos for respondent to enable respondent to resell the coats at an attractively low price.

Respondent ran a series of seven advertisements in October and November, 1958, in the New York City daily newspapers as follows (CX 2):

Pure cashmere coats \$58.00 value 119.00
Miliun lined
imported Chinese cashmeres
famous name cashmeres

The trade territory in this case was and is included in a fifteen mile radius from respondent's store at Fifth Avenue and Fortieth Street, New York, New York.

The chief issue of fact with reference to the ladies' coats is whether respondent's representation in its advertisements that these were \$119.00 values was false, misleading and deceptive. The examiner finds that such type of representations in respondent's advertisement was and would continue to be false, misleading and deceptive, and proscribed by the Federal Trade Commission Act and decisions interpretive of the Act.

The only evidence contrary to this conclusion is that of respondent's own witnesses who testified that the coats compared favorably with more expensive coats being sold by respondent's competitors.

Even though this were true, which it is not, the testimony of Jack L. Plavnick, general manager of Ash's Inc., Bronx, New York, which is in the retail market area served by respondent was that Ash's purchased similar cashmere coats from Drobos in the fall of 1958, at a wholesale price of \$47.74 and sold them in that same season for around \$80.00. Philip Brous, downstairs buyer for Bloomingdale

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Brothers, New York, New York, testified that his store bought 13 coats from Drobos and Company at about the same time at a wholesale cost of \$64.75. Those coats had a mink collar, estimated to cost \$25.00, making the cost of the coat without the mink collar \$39.75. The coat with the mink collar was offered for sale by Bloomingdale for \$78.00. Mr. Brous stated that the coat would have retailed without the mink collar for about \$69.95, with the store's normal retail mark up of forty per cent of the retail price.

The normal retail mark up generally in the New York City trade area involved in this proceeding on ladies' coats, such as here involved was and is approximately forty per cent on the selling price.

Seymour Flessner, manager of the ladies' coat department for Saks' 34th Street, New York, New York, in respondent's general retail sales area, examined copies¹ of the Drobos coat at the hearing and testified that in his opinion RX 15 would retail for around \$70.00 and RX 16 would retail between \$60.00 and \$65.00 (tr. 329). Herbert Wolf, ladies' coat buyer for Stern Brothers, a New York City department store, in respondent's general retail sales area, examined RX 15 and RX 16 at the hearing and testified that in his opinion, the coat, RX 15 would sell at retail for not more than \$69.00-\$79.00, and RX 16 would sell for not more than \$69.00. (tr. 315).

The retail price of ladies' cashmere coats in the New York City trade area served by respondent, including coats purchased from Drobos was approximately the same at the time of the hearing as at the time of the respondent's sale under the challenged advertisement, CX 2.

In addition to the testimony of Messrs. Plavnick, Brous, Wolf and Flessner, the testimony of Bernard Drobos, who made the coats, was that the coats which he sold to respondent would retail in the New York trade area of respondent at the time of CX 2 for \$88.00. (tr. 90, 91, 92).

The dominant item of cost in the manufacture of these coats was the cost of the cashmere. One of the principal reasons why the Drobos firm was able to make up the coats to sell at such a low price was because Drobos used "seconds" in cashmere fabrics.

Respondent's representations that the coats had a retail market value of \$119.00 in that market area, at the time of the advertisement, was false, misleading and deceptive. The testimony of Eric Ullman who is an admitted expert in the field of textiles, was not particularly pertinent to the basic issue: the Drobos coat's retail value at the time of CX 2.

¹ These coats, RX 15 and RX 16, had been made up especially for the hearing by Drobos, at the request of respondent, in order to approximate or typify the coats actually sold by means of the challenged advertisement, CX 2.

The testimony of Herman Schulman, production manager of Country Tweeds, 250 West 39th Street, New York, New York, whose company makes a ladies' cashmere coat which sells at considerably more, although interesting, did not bear directly on the retail value of the Drobes coat. One of the Country Tweeds coats was in evidence and Mr. Schulman testified that the Country Tweeds garment involved much more labor costs; had a hand made bottom; that the hems were done by hand; the linings were put in by hand; and the coat had more yardage of material and "a larger sweep in the coat".

Respondent sold approximately 1,000 of the Drobes coats for \$58.00 and testified that it had received no complaints from any customers concerning said coats.

In the conduct of its business, the respondent at all times pertinent to the issues in this proceeding, was and is in substantial competition in commerce with corporations, firms, and individuals in the sale of merchandise which includes luggage and ladies' cashmere coats of the same general kind and character as those which respondent sold by means of the challenged advertisements, CX 1 and CX 2.

Respondent was and is engaged in interstate commerce as that term is understood and defined in the Federal Trade Commission Act and decisions interpretative of the Act. Substantial commerce in ladies' luggage and cashmere coats was affected by the respondent's deceptive advertisements: between 1,300 and 1,400 pieces of ladies' luggage, and approximately 1,000 ladies' cashmere coats were sold.

The use by the respondent of the false, misleading, and deceptive statements, typified in CX 1 and CX 2 has had, now has, and will have the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements were and are true, and, as a result thereof, to induce the purchase of substantial quantities of respondent's merchandise by reason thereof. As a consequence, substantial trade in commerce has been, and will be, unfairly diverted to respondent from its competitors unless said advertising practices are prohibited by order of this Commission.

The Federal Trade Commission Act prohibits the false and deceptive advertising which respondent employed to sell the luggage and ladies' cashmere coats in the instant proceeding.

Substantial injury has been and will continue to be done to respondent's competition, in commerce, unless respondent's said false and misleading advertising typified by CX 1 and CX 2 are proscribed and prohibited.

RESPONDENT'S ALLEGED ABANDONMENT OF THE CHALLENGED PRACTICES

The luggage advertisement ran on three dates in 1958, the last of which was August 20, 1958, and had not been repeated up to the time that this record was closed. The cashmere coat advertisement ran for a few dates in October and November, 1958, the last of which was November 28, 1958. The coat advertisement had not been repeated since. The cessation of the advertisements on November 28, 1958, was not related to the commencement of the instant proceeding.

However, respondent changed the coats' declared value from \$119.00 to \$99.00 after a Commission representative called upon him. Although respondent has not repeated the precise luggage and cashmere coat advertisements represented by CX 1 and CX 2, this record does not justify a finding that the particular advertising practice will not be resumed or used again by respondent.

There is no convincing proof in the record that the form of deception practiced by means of CX 1 and CX 2 will not hereafter be repeated. Testimony that some official of respondent made respondent's employees conscious of the Federal Trade Commission's *Guides Against Deceptive Pricing* falls far short of the proof required to support a dismissal under the rationale *Sheffield Merchandise Inc., et al.*, Docket No. 6627, or any other decisions in which dismissal has been sustained by this Commission, on grounds that the challenged practice has been abandoned and there is substantial proof that it will not be repeated or resumed. As a matter of fact, a dismissal of this proceeding on such ground might be interpreted by respondent as an indirect condonation of such practices.

DISCUSSION

To support a cease and desist order by the Federal Trade Commission in a proceeding such as this under the Federal Trade Commission Act there is no need to show injury to the purchasing public.²

"***Capacity to deceive and not actual deception is the criterion by which practices are tested under the Federal Trade Commission Act."³

The buying public does not weigh each word in an advertisement or representation. It is important to ascertain the impression that is likely to be created upon the prospective purchaser.⁴ It is in the public interest to prevent the sale of commodities by the use of false and misleading statements and representations.⁵ Advertisements are

² Jacob Siegel v. FTC, 150 F. 2d 751, 755.

³ Goodman v. FTC, 244 F. 2d 584, 604 CA 9th (1957).

⁴ Kalwajtys v. FTC, 237 F. 2d 654, 656 (Cert. den. 352 US 1025).

⁵ Parke Austin & Lipscomb v. FTC, 142 F. 2d 437.

not to be judged by their effect upon the scientific or legal mind, which will dissect and analyze each phrase but rather by their effect upon the average member of the public who more likely will be influenced by the impression gleaned from a first glance at the most legible words.⁶

The "impression gleaned from a quick glance at the most legible words" in respondent's advertisement of the ladies' luggage (CX 1) is that the *identical* luggage had previously been *regularly* sold by respondent at the prices quoted in the advertisement. This is so contrary to fact as not to require any laboring of the point. For the luggage, constructed identically as that made up for the sale had never, regularly or otherwise, been offered for sale by respondent. Respondent asked for, and the luggage manufacturer gave him, a substitute piece of luggage in which the manufacturer "cut corners" and "worked close". The luggage had been purposely made up to sell at the special \$11.00 price.

No inference should be drawn (for none is intended) that the luggage was not worth the price at which it was sold, but this does not mitigate the fact that respondent's advertisement (CX 1) falsely and deceptively represented that the identical luggage had *regularly* sold at higher prices. This representation in CX 1 was simply not true. The meaning of the word "regular" in reference to price is well settled under Commission decision as being the sellers usual and customary price for identical merchandise in the same trade area.⁷

Respondent's advertisements for the luggage (CX 1) represented directly or by implication that the higher prices set out in said advertisements were respondent's "regular" retail prices for the identical luggage advertised. The "regular" price for an article is the price at which the seller customarily sells it in the trade area involved. Respondent had not previously sold the identical luggage at any price and it was, and is false, misleading and deceptive for respondent and any other vendor to contrast a current price with a price at which similar merchandise, even though manufactured by the same manufacturer, has previously been sold unless the prior sale was of identical products.

Respondent's advertising in CX 2 was false, misleading and deceptive in that it was calculated to convey, and did convey the impression to a person reading it, that the ladies' cashmere coats therein advertised for sale had a "value" of \$119.00. The use of the word

⁶ Ward Laboratories, Inc., et al. v. FTC, 276 F. 2d 952 (CA 2—April 14, 1960).

⁷ See the Commission's opinion of January 7, 1960, in *Bond Stores, Inc.*, Docket No. 6789, which, incidentally refers to another proceeding involving the same respondent, *Arnold Constable* in Docket No. 7109.

"value" in such context, measured against pertinent decisions,⁸ is that the Drobes coats ordinarily sold in respondent's retail market area for \$119.00. The precise coats had been, even as the luggage, made up specially for the sale, and had never before been sold in the trade area.

The manufacturer of the coats, who should be best qualified to set a value for them, fixed their retail value at \$88.00. Four other well qualified expert witnesses also testified that their retail value was considerably under \$119.00. Respondent itself reduced the value stated on the price tags from \$119.00 to \$99.00 when it learned that the Commission was questioning justification for the "value" figure.

The Federal Trade Commission's *Guides Against Deceptive Pricing* adopted October 2, 1958, inter alia, proscribe the use of the word "regularly" or any abbreviation thereof unless the saving or reduction is from the advertisers usual and customary retail price for the *same specific* article offered for sale as distinguished from similar or comparable merchandise. Inasmuch as the same specific luggage offered for sale by respondent's advertisements (CX 1) had never previously been offered for sale by respondent, the representation that the \$11.00 advertised price was a reduction from former prices of \$16.50, \$17.50, \$18.50, \$22.50, and \$29.50 for the same and identical luggage was and is patently false, misleading and deceptive, and proscribed by Section 5 of the Federal Trade Commission Act. The testimony of the luggage manufacturer and respondent's buyer is unambiguous and clear to the effect that the manufacturer refused to furnish the regular 6600 series, Travel Joy, which respondent had previously sold, for this particular sale.

Respondent's advertisement of that luggage as its "reg." or regular luggage was false, misleading and deceptive and violative of the Commission's *Guides Against Deceptive Pricing*, with which respondent is certainly now familiar.

Similarly, the *Guides* make it unmistakably clear that the word "value" is deceptive unless it is a true and accurate representation of an article's usual and customary retail price in the trade area involved. The retail value of the ladies' coats, which respondent advertised in CX 2 at \$119.00 was considerably less than that figure according to the testimony of four qualified disinterested coat buyers, plus the testimony of the man who manufactured the coats.

THE "ABANDONMENT" DEFENSE

In order to justify the dismissal of a proceeding on the grounds that the proscribed practice has been discontinued, or abandoned,

⁸ See the *Bond Stores* opinion, supra (Note 7) Docket No. 6789 for a limited discussion of the use of the word "value".

there must be in the record sufficient evidence from which the examiner may find that there is no reasonable likelihood that the practice will be resumed.⁹ One of the most recent Commission decisions discussing this defense is in *Sheffield Merchandise, Inc., et al.*, Docket No. 6627 (March 4, 1960). As recently as May 23, 1960, the Commission affirmed a dismissal in a false and misleading advertising case: *Charles Pfizer Co., Inc.*, Docket No. 7487. In *Pfizer* the examiner found, inter alia, "It is believed that the practice charged has been completely abandoned and because of the circumstances of its abandonment that it is improbable that it will ever be resumed by the present management of respondent, or any successor." The record in this proceeding will not support such finding.

The application of the pertinent statutes, decisions, and precedents to this record, compels the following:

CONCLUSIONS

The complaint filed herein states a good cause of action against respondent under the Federal Trade Commission Act and this proceeding is in the public interest.

The Federal Trade Commission has jurisdiction over and of the parties to this proceeding and the subject matter thereof.

Respondent is engaged in "commerce" as "commerce" is defined in the Federal Trade Commission Act.

Counsel supporting the complaint has proven the legally material allegations of the complaint by a preponderance of relevant, probative, substantial and material evidence in the record; and

The acts and practices of the respondent so proven, were and are to the prejudice and injury of the public, and of respondent's competitors, and did, 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;

Now, therefore,

It is ordered, That respondent Arnold Constable Corporation, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of luggage, wearing apparel, or any other merchandise in commerce, as "commerce" is

⁹ See *Wildroot Company, Inc.*, Docket No. 5929 (1953); *Argus Camera, Inc.*, Docket No. 6199 (1954); *Bell and Howell Co.*, Docket No. 6729 (1957); *Bohn Aluminum, et al.*, Docket No. 5720 (1955); *Stokely-Van Co. v. FTC*, 246 F. 2d 458 (1957); *New Standard Publishing Co. v. FTC*, 194 F. 2d 181; *Sheffield Merchandising Inc.*, Docket No. 6627 (1960). See July 7, 1958, opinion of Commission.

defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication:

1. That any amount is respondent's usual and customary retail price of merchandise when it is in excess of the price at which said merchandise is usually and regularly sold by respondent in the recent regular course of its business.

2. That any amount is the retail value or price of an article of merchandise when it is in excess of the price at which said merchandise is usually and customarily sold at retail by respondent in the trade area, or areas, where the representation is made.

3. That any savings are afforded in the purchase of merchandise from respondent's usual and regular prices unless the prices at which it is offered constitute reductions from the prices at which said merchandise is usually and customarily sold by respondent in the normal course of its business.

4. That any savings are afforded in the purchase of merchandise from the price at which said merchandise is usually and customarily sold at retail in the trade area or areas where the representations are made unless the price at which it is offered constitutes a reduction from the price at which said merchandise is usually and customarily sold at retail by respondent in such trade area or areas.

B. Misrepresenting in any manner the amount of savings available to purchasers of respondent's merchandise, or the amount by which the price of said merchandise is reduced from the price at which it is usually and customarily sold by respondent in the recent regular course of its business, or from the price at which said merchandise is usually and customarily sold in the trade area, or areas, where the representation is made.

OPINION OF THE COMMISSION

By *SECRET, Commissioner*:

The hearing examiner found that the complaint's charges that the respondent had engaged in deceptive pricing practices were sustained by the evidence. The respondent has appealed from the initial decision filed by the hearing examiner which contains his findings in those respects and order to cease and desist from such practices.

The respondent operates a specialty store in New York City and branches in its suburbs. It is undisputed that respondent advertised certain luggage at \$11.00 per unit, which advertisements included illustrations of the different sizes offered and described them as "reg." \$16.50, \$17.50, \$18.50, \$22.50 and \$29.50. It also is undisputed that other advertising used by respondent featured cashmere coats

for \$58.00 "value 119.00." The luggage offered in the sale represented a special purchase from the manufacturer who had supplied luggage previously sold by the respondent at the higher prices. However, such promotional merchandise varied from the original luggage in certain respects, including locks and handles. The price of \$6.30 per case paid by respondent for the sale luggage was specially negotiated, whereas respondent's costs for the similar vinyl-covered luggage formerly sold had ranged from \$8.75 up to \$16.50 depending on size.

The hearing examiner found, among other things, that the luggage advertisements featuring the higher prices or amounts and their designation "reg." falsely represented and implied that respondent had previously sold such merchandise at those higher prices in regular course of business. In contending error, respondent states that the only representation implicit in the advertisement is that its stores had sold substantially the same or similar luggage at the higher prices indicated; and it also argues that the hearing examiner erred in excluding testimony to that effect by respondent's luggage buyer and also improperly excluded evidence showing that any differences between the promotional luggage and that previously sold at the higher prices were inconsequential. Substitution is unlawful, however, even though qualitative equivalence be shown. *F.T.C. v. Algoma Lumber Co.*, 291 U.S. 67, 77 (1934). One of respondent's representatives conceded that the term "reg." as used in the advertisement for designating the higher prices or amounts meant "regularly." Use of this word in merchandising, of course, extends back to antiquity and it was not an abuse of discretion for the hearing examiner to exclude opinion testimony by such trade witness ascribing an added import or meaning to "regularly" contrary to its traditional one. The hearing examiner correctly found that respondent's advertisements designating certain prices as regular ones and offering its luggage for a specified lesser price reasonably have served to engender impressions and beliefs that the higher amounts were the customary and usual prices of the respondent for such luggage in regular course of business.

In this connection, respondent further argues that a "fatal omission" of proof is presented because no witness expressly testified that respondent competed with others in the sale of luggage of the "same general kind and nature" as that offered in the advertisements. Respondent, however, maintained during the hearings and now maintains that the sale luggage, notwithstanding its departures as to locks and handles from that previously sold at the higher prices, was generally comparable to that sold by it at the higher or regular

prices. Furthermore, a representative of the luggage manufacturer testified that its regular line of luggage was being supplied to stores all over the country, including stores in New York. Respondent's contention that the record does not establish that it has been competitively engaged with others selling luggage of the same general kind and nature, therefore, is rejected.

Respondent additionally excepts to a statement in the initial decision that the luggage advertisements were "violative of the Commission's *Guides Against Deceptive Pricing*." The hearing examiner also expressly found, however, that such advertisements were violative of the Federal Trade Commission Act; and as respondent recognizes in its brief, the question for adjudication is not whether the advertising departed from criteria announced in the Guides but whether violation of the Act itself was shown. Those administrative interpretations as to the application of the statute to various categories of pricing representations were formulated for use by the Commission's staff in evaluating such matters, and their release to the public looked to obtaining voluntary and prompt cooperation by those whose activities were subject to the Act.

To such extent as the initial decision's reference to violation of guides may suggest or imply their force and effect as substantive law, such statement is patently erroneous. On the other hand, a statement that the advertising practices found violative of the Act also departed from basic criteria in the guides clearly would not imply such substantive force and effect. The initial decision shall be so amended.

We also have carefully considered the matters argued by respondent in support of its contention that the hearing examiner erred in finding that the record established that the cashmere coats being offered for sale at \$58.00 did not have a customary and regular retail value of \$119.00 in the respondent's trading area as represented in the advertisements. Detailed discussion of the evidence relevant to this issue would unduly lengthen this opinion. It suffices instead to say that we find no error and think that the hearing examiner's conclusions that such garments had not been regularly and usually sold at \$119.00 in respondent's trading area as represented and implied by the advertisements had sound record basis.

Part of the evidence relating to the aforementioned issue of alleged deceptive value claims for the cashmere coats was received at a hearing held on March 10, 1960, and respondent requests that such evidence be stricken. At the first hearing held on February 8, 1960, counsel supporting the complaint presented seven witnesses including two of the respondent's officials, and then announced that he had no

further witnesses present for examination, but was not, however, resting his case. As directed by the hearing examiner but under protest, respondent proceeded with its presentation of the case on defense. At the second hearing, counsel supporting the complaint introduced additional evidence and the record was closed for the taking of testimony after counsel for the parties stated they had no further evidence to offer. Respondent argues that convening of the second hearing violated its constitutional rights of fair and speedy hearing and that the evidence so received must be stricken. In administrative proceedings, due regard for the convenience of the parties and the presentation of evidence necessary for informed decision frequently require that the hearings be held at intervals. Moreover, respondent has shown no facts indicative that the second hearing in New York, the city in which its principal place of business is located, was unduly burdensome or otherwise prejudiced the respondent. The request to strike is wholly without merit and is denied.

The challenged luggage advertisements appeared in July and August, 1958, the last being August 20, 1958, and those for the cashmere coats ran in October and November, 1958, the last appearing on November 28, 1958. The complaint issued November 16, 1959. Respondent contends that the complaint should be dismissed inasmuch as the advertising was discontinued long prior to institution of this proceeding. In this connection, respondent also emphasizes that its general manager discussed the previously mentioned Guides Against Deceptive Pricing with members of the staff of the store and in December, 1958, distributed a memorandum directing that they be adhered to. An affidavit in kindred vein executed on November 15, 1960, by Mr. Dingivan, one of respondent's officers, and expressing its intention never to resume the practices complained of also was proffered by counsel at the oral argument and hereby is received and filed. Such showing of self-instituted voluntary compliance with the Commission's published administrative interpretations or guides, respondent argues, indicate likelihood that the challenged practices will not be resumed.

The record includes testimony that an investigational representative of the Commission contacted the respondent in December, 1958, for the purpose of inquiring into the luggage advertising and made inquiry the next month respecting the advertising for the cashmere coats. Notice to respondent shortly following such advertising as to the Commission's hand upon its shoulder accordingly must be inferred from the record. In cases of asserted abandonment, the Commission is vested with broad discretion in its determinations as

to whether a practice has been surely stopped and whether an order to cease and desist is proper. *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F. 2d 321 (7th Cir., 1944); *Automobile Owners Safety Insurance Co. v. Federal Trade Commission*, 255 F. 2d 295 (8th Cir., 1958). The dismissal of complaints in abandonment cases is not the usual procedure and should be limited to truly unusual situations. In the matter of *Ward Baking Company*, Docket No. 6833 (Decision on appeal June 23, 1958).

In the cited cases involving such dispositions by the Commission, it has had assurances by reason of changed industry-wide business conditions or other circumstances that the challenged practices would not be resumed. Here, the respondent expresses its intention to continue the use of the words "value" and "regular" in the advertising of its prices and promises to make only such savings claims, value claims or comparative value claims as are warranted by the true facts. Its promise notwithstanding, respondent for compelling competitive reasons would be free to adopt the same or similar practices absent effective legal restraint. Nor has the respondent unequivocally receded from its position that no capacity to mislead inhered in certain of the advertisements. In our view, the circumstances attending the respondent's discontinuance of the challenged advertising do not warrant dismissal of the complaint, and we believe that the public interest requires issuance in this proceeding of appropriate order to cease and desist.

Respondent's objections to the order to cease and desist insofar as they except to inclusion of the words "by respondent" in paragraphs A(2) and A(4) of such order are being granted. Such language of limitation renders the order unduly restrictive and it is being appropriately modified. On the other hand, the respondent's companion contention that the scope of the order is unduly broad because its proscriptions against deceptive pricing are not limited to sales of light-weight luggage and cashmere coats is rejected. The order's inclusion of the words "other merchandise" looks only to preventing respondent from continuing past unlawful practices in reference to merchandise other than luggage and women's coats. The Commission may properly close the door to future sales of other products by the same deceptive sales method; and to be of value a Commission order must proscribe the unfair method as well as the specific acts by which it was manifested. *Hershey Chocolate Corp. v. Federal Trade Commission*, 121 F. 2d 968 (3rd Cir., 1941); *Consumer Sales Corp. v. Federal Trade Commission*, 198 F. 2d 404 (2nd Cir., 1952).

To the extent noted hereinbefore, the appeal of the respondent is granted but denied in all other respects. The initial decision, modified in the respects previously mentioned, is being adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon the respondent's appeal from the initial decision of the hearing examiner; and the Commission having rendered its decision granting the appeal in part but denying such appeal in all other respects and having determined, for reasons stated in the accompanying opinion, that the order to cease and desist should be modified:

It is ordered, That the order to cease and desist contained in the initial decision be, and it hereby is, modified by striking the words "by respondent" from line 4 of paragraph A(2) and from line 8 of paragraph A(4) of said order.

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

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