

IN THE MATTER OF
ABRAHAM POLLACK AND WILLIAM POLLACK
TRADING AS REGAL FUR MANUFACTURING COMPANY

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

Docket 8111. Complaint, Sept. 14, 1960—Decision, Jan. 18, 1961

Consent order requiring furriers in Albany, N.Y., to cease violating the Fur Products Labeling Act by failing to comply with labeling, invoicing, and advertising requirements; and, in advertising in newspapers, failing to disclose the names of animals producing certain furs, representing falsely that they manufactured all their products by such statements as "Low overhead factory prices direct to you", and failing to maintain adequate records as a basis for price and value claims.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Abraham Pollack and William Pollack, individuals and copartners trading as Regal Fur Manufacturing Company, hereinafter referred to as respondents, have violated the provisions of said Act and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Abraham Pollack and William Pollack are individuals and copartners trading as Regal Fur Manufacturing Company with their office and principal place of business located at 86 Central Avenue, Albany, New York.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products, and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

PAR. 4. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was mingled with non-required information, in violation of Rule 29(a) of said Rules and Regulations.

(b) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in handwriting on labels, in violation of Rule 29(b) of said Rules and Regulations.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act, and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

PAR. 6. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that respondents caused the dissemination in commerce, as "commerce" is defined in said Act, of certain newspaper advertisements, concerning said products, which were not in accordance with the provisions of Section 5(a) of the said Act and the Rules and Regulations promulgated thereunder; and which advertisements were intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products.

PAR. 7. Among and included in the advertisements as aforesaid, but not limited thereto, were advertisements of respondents which appeared in issues of the Albany Times Union, a newspaper published in the City of Albany, State of New York, and having a wide circulation in said State and various other States of the United States.

By means of said advertisements and others of similar import and meaning, not specifically referred to herein, respondents falsely and deceptively advertised fur products in that said advertisements:

(a) Failed to disclose the name or names of the animal or animals that produced the fur contained in the Fur product as set forth in the Fur Products Name Guide, in violation of Section 5(a)(1) of the Fur Products Labeling Act.

(b) Contained information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder which was not set forth in type of equal size and conspicuousness and in close proximity with each other, in violation of Rule 38(a) of said Rules and Regulations.

PAR. 8. In advertising fur products for sale as aforesaid respondents falsely and deceptively advertised such fur products in violation of Section 5(a)(5) of the Fur Products Labeling Act by representing in newspapers through such statements as "Low overhead factory prices direct to you" and "Save—Factory prices direct to you" that respondents are manufacturers of all the fur products retailed by them when in truth and in fact a substantial portion of the fur products retailed by the respondents are purchased from distinct and separate sources of supply.

PAR. 9. In advertising fur products for sale as aforesaid respondents made claims and representations respecting the prices and values of fur products. Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based in violation of Rule 44(e) of said Rules and Regulations.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

Mr. Harry E. Middleton for the Commission.

Respondents for themselves.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents with misbranding and falsely and deceptively invoicing and advertising certain of their fur products, and with failing to maintain full and adequate records disclosing the facts upon which certain claims and representations respecting the prices and values of fur products were based, in violation of the Federal Trade Commission Act, and the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder.

After the issuance of the complaint, respondents and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Director, Associate Director, and Acting Assistant Director of the Commission's Bureau of Litigation, and thereafter transmitted to the Hearing Examiner for consideration.

The agreement states that respondents Abraham Pollack and William Pollack are individuals and copartners trading as Regal Fur Manufacturing Company, with their office and principal place of business located at 86 Central Avenue, Albany, New York.

The agreement provides, among other things, that respondents admit all the jurisdictional facts alleged in the complaint, and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondents waive any further procedural steps before the Hearing Examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

The Hearing Examiner has determined that the aforesaid agreement containing the consent order to cease and desist provides for an appropriate disposition of this proceeding in the public interest, and such agreement is hereby accepted. Therefore,

It is ordered, That Abraham Pollack and William Pollack, individually and as copartners trading as Regal Fur Manufacturing Company or under any other trade name, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the sale, advertising or offering for sale, transportation or distribution of fur products in commerce, or in connection with the sale, manufacture for sale, advertising, offering for sale, transportation or distribution of fur products which have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Failing to affix labels to fur products showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of § 4(2) of the Fur Products Labeling Act;

2. Setting forth on labels affixed to fur products:

(a) Information required under § 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder mingled with nonrequired information;

(b) Information required under § 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in handwriting;

B. Falsely or deceptively invoicing fur products by failing to furnish to purchasers of fur products invoices showing all the information required to be disclosed by each of the subsections of § 5(b) (1) of the Fur Products Labeling Act;

C. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote or assist, directly or indirectly, in the sale or offering for sale of fur products, and which:

1. Fails to disclose the name or names of the animal or animals producing the fur or furs contained in the fur product, as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

2. Fails to set forth the information required under § 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in type of equal size and conspicuousness and in close proximity with each other;

3. Represents, directly or by implication, through such terms as "factory prices direct to you" and "low overhead factory prices direct to you" or words or terms of similar import, or in any other manner, that respondents are manufacturers of fur products sold by them, unless such fur products are actually manufactured by them;

D. Making claims and representations respecting prices and values of fur products unless respondents maintain full and adequate records disclosing the facts upon which such claims and representations are based.

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 18th day of January, 1961, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Abraham Pollack and William Pollack, individuals and copartners trading as Regal Fur Manufacturing Company, 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

THE TIMKEN ROLLER BEARING COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 3
OF THE CLAYTON ACT

Docket 6504. Complaint, Feb. 13, 1956—Decision, Jan. 24, 1961

Order requiring the nation's largest manufacturer of tapered roller bearings, with principal office in Canton, O., to cease making sales and contracts for sale of "Timken" tapered roller bearings for replacement purposes on the condition that the purchasers—a large number of automotive parts distributors and jobbers located throughout the U.S.—not use or deal in similar products sold by its competitors.

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

Mr. Andrew C. Goodhope, Mr. Frederic T. Suss, Mr. Alvin D. Edelson and Mr. John Perechinsky for the Commission.

Day, Cope, Ketterer, Raley & Wright, of Canton, Ohio, for respondent.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

The Federal Trade Commission issued its complaint against the above-named respondent on February 13, 1956, charging it with having made sales and contracts for the sale of its tapered roller bearings on the condition, agreement or understanding that the purchasers thereof should not use or deal in similar products of a competitor or competitors, in violation of Section 3 of the Clayton Act (15 U.S.C. Sec. 14). In its answer, respondent denied the charges.

At the close of the introduction of evidence in support of the complaint, respondent filed a motion to dismiss the complaint for failure of proof. In an initial decision filed October 14, 1957, the hearing examiner granted the motion and ordered that the complaint be dismissed. Upon appeal to the Commission by counsel supporting the complaint, the Commission on May 27, 1958, with former Chairman Gwynne dissenting, held that a prima facie case had been

established and issued its order vacating the initial decision and remanding the case to the hearing examiner for further proceedings. Thereafter, further hearings were held before the hearing examiner and testimony and other evidence in opposition to the allegations of the complaint, together with certain rebuttal evidence introduced by counsel supporting the complaint, were received into the record. In an initial decision filed March 21, 1960, the hearing examiner found that the charges had not been sustained by the evidence and again ordered dismissal of the complaint.

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 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, The Timken Roller Bearing Company, is a corporation organized under the laws of the State of Ohio, with its principal office and place of business located at Canton, Ohio.

2. Respondent is now and for many years last past has been engaged in the manufacture, sale and distribution of tapered roller bearings, alloy steels, and rock bits. Respondent sells a substantial portion of its tapered roller bearings to distributors and jobbers who handle and sell said products for replacement purposes in automobiles, trucks, buses, tractors, farm machinery and other types of industrial machinery. Respondent also sells its tapered roller bearings for use in original equipment, but these sales are not involved in this proceeding.

3. Respondent causes its tapered roller bearings, when sold, to be shipped from its manufacturing plants located in Canton, Gambrinus, Bucyrus, Columbus, New Philadelphia and Zanesville, all of which are located in the State of Ohio, to purchasers thereof, including distributors and jobbers, who are located in the various other states of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said tapered roller bearings in interstate commerce.

4. In the course and conduct of its business, respondent is now, and during the times mentioned herein, has been, in substantial competition in interstate commerce with persons, firms, partnerships and

Findings

58 F.T.C.

other corporations in the sale and distribution of its tapered roller bearings.

5. Numerous documents introduced in evidence by counsel supporting the complaint show a policy on the part of respondent to sell its tapered roller bearings for replacement purposes on the condition, agreement or understanding that the purchasers thereof shall not deal in similar products sold by respondent's competitors.

These documentary exhibits fully support a finding that respondent has followed a consistent policy of requiring said purchasers to discontinue handling similar products sold by respondent's competitors; that respondent regularly checked said purchaser's stock for the purpose of assuring adherence to its policy, and that the contracts of purchasers who deviated from respondent's policy by purchasing from a competitor were cancelled for that reason.

6. Respondent based its defense principally on the testimony of numerous witnesses who had participated in the preparation of each of the aforesaid documents or who had direct knowledge with respect thereto, in an effort to explain, rebut and contradict that evidence. The Commission, after giving full consideration to that testimony, together with certain other testimony and exhibits entered by respondent, is of the opinion that respondent has failed to weaken the probative value of the documentary evidence adduced in support of the complaint.

7. Respondent's total sales of tapered roller bearings in the replacement market run between \$10,000,000 and \$20,000,000 a year. Its closest competitor, Federal-Mogul-Bower Bearings, Inc., does a yearly business of between \$1,000,000 and \$2,000,000 in tapered roller bearings, and the next competitor, Tyson Bearing Corporation, only between \$400,000 and \$800,000. Respondent manufactures more than 11,000 different items in its line of tapered roller bearings; its closest competitor, only 780; and the next competitor only 586. Respondent has over 7,500 dealers who handle its tapered roller bearings for replacement purposes; its nearest competitor has about 2,000 customers and the next competitor has 1,000 customers. Thus, the Commission finds that respondent is the leading supplier of tapered roller bearings for replacement purposes, the volume of business affected by its exclusive dealing policy is significant and substantial, and its maintenance of said policy has foreclosed competitors from a substantial market.

The record also shows and the Commission further finds that distributors and jobbers who have executed contracts with respondent suffer substantial injury to their respective business because they are

forcelosed by respondent's aforesaid policy from making any independent judgment or decision as to what products they will handle and sell in their business enterprises and lose substantial sales because they are unable to carry and sell competitive tapered roller bearings.

8. The effect of respondent's restrictive policy, as found herein, may be substantially to lessen competition in the lines of commerce in which respondent and its customers are engaged, and may be to tend to create a monopoly in respondent in the manufacture, sale and distribution of tapered roller bearings.

CONCLUSION

Respondent's policy of requiring its distributors and jobbers to handle and sell its tapered roller bearings exclusively and its acts and practices to enforce this policy, as hereinbefore found, are in violation of Section 3 of the Clayton Act.

ORDER

It is ordered, That the respondent, The Timken Roller Bearing Company, 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 for replacement purposes of tapered roller bearings in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Selling or making any contract or agreement for the sale of any such products on the condition, agreement or understanding that the purchaser thereof shall not use, deal in, sell or distribute similar products supplied by any competitor or competitors of respondent.

2. Enforcing, or continuing in operation or effect, any condition, agreement or understanding in, or in connection with, any existing contract of sale, which is to the effect that the purchaser of such products shall not use, deal in, sell or distribute similar products supplied by any competitor or competitors of respondent.

It is further ordered, That respondent, The Timken Roller Bearing Company, 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 this order to cease and desist.

Commissioner Mills not participating for the reason he did not hear oral argument herein.

OPINION OF THE COMMISSION

By KERN, *Commissioner*:

Respondent, The Timken Roller Bearing Company, is charged with violation of Section 3 of the Clayton Act by selling its tapered roller bearings on the condition, agreement or understanding that the purchaser will not deal in similar products of respondent's competitors. The hearing examiner in his initial decision filed on March 21, 1960, held that the allegations were not sustained by the evidence and ordered dismissal of the complaint. Counsel supporting the complaint have appealed from that decision.

In a previous initial decision, the hearing examiner granted respondent's motion filed at the conclusion of the case in chief in support of the complaint, and dismissed the complaint for failure of proof. Upon appeal by counsel supporting the complaint, we decided that the hearing examiner had erred in discounting the probative value of the documentary evidence introduced in support of the complaint and in refusing to admit into evidence numerous other documents of similar import. We concluded that a prima facie case had been established and by our order of May 27, 1958, the initial decision was vacated and the case remanded to the hearing examiner for further proceedings. Although ostensibly for a different reason, the hearing examiner has persisted in his previous erroneous evaluation of the documentary evidence relied on by counsel supporting the complaint.

Respondent is the largest manufacturer and seller of tapered roller bearings in the United States. This proceeding is concerned only with respondent's sales of such bearings for replacement and repair purposes. Its sale of bearings for use as original equipment is not involved. Its two principal competitors in the replacement market are Federal-Mogul-Bower Bearings, Inc., and Tyson Bearing Corporation.

Respondent maintains 17 sales offices throughout the country, each in charge of a branch manager. It distributes its bearings through two general classes of customers designated as Authorized Distributors and Authorized Jobbers. The principal distinction between these two is that the distributors buy directly from respondent, whereas the jobbers buy only from the distributor. Prior to 1955, the discount rate to distributors was higher than that to jobbers. Since that time, both pay the same price but respondent allows a specified credit to distributors on sales which they make to jobbers.

Respondent enters into sales contracts with both its distributors and jobbers. These contracts are subject to cancellation by either

party upon ten days' written notice. Neither type of contract contains any provision expressly requiring purchasers not to deal in the bearings of respondent's competitors. It is well settled, however, that express written agreements are not needed to prove exclusive dealing. *Carter Carburetor Corporation v. Federal Trade Commission*, 112 F. 2d 722 [3 S. & D. 232] (8th Cir. 1940).

As proof of the charge that respondent follows a consistent policy of requiring exclusive dealing, counsel supporting the complaint relied almost entirely upon documentary evidence obtained from respondent's files. These documents can be divided into two general types. The first group, about 120 documents, include salesmen's reports of calls on distributors and jobbers, copies of which went to respondent's home office; correspondence between branch managers and home office officials; and memoranda authorizing cancellation of respondent's agreements with its customers.

Typical of the statements by salesmen in this first group are the following:

Today I was of course greeted with a very strong bid for a direct appointment and in checking their stock we found approximately \$100 worth of new Bower Bearings mixed in with the Timken. This was the first indication that they had bought Bower Bearings in the past five years. * * * He further stated that he made a survey of some of these dealers on the acceptance of Bower Bearings and he found out that they would accept Bower Bearings. He added that for that class of trade, he buys Bower but for his fleet trade and garage type of trade, he will buy Timken. He further added that he knows that we would not countenance that sort of dual buying and it would only be a question of time when we would cancel his contract or put him on direct. * * * (Commission Exhibit 26A and B)

* * * They are going to go Timken 100%. He told us they had made some progress in liquidating their stock of Tyson bearings and would continue to exert every effort to liquidate this stock 100%. (Commission Exhibit 30)

Inasmuch as it would be desirable to get rid of their entire Bower stock at one time I suggested they put a price on it from 10/20% under cost and sell it to a present Bower account or dispose of it in that manner and to best compensate them for the loss we would sign them direct and let them purchase their Glendale Timken stock at Authorized Distributors' prices. (Commission Exhibit 37)

Called here for further talks with these people about their going Timken 100%. Commission Exhibit 38)

Opinion

58 F.T.C.

* * * Mr. Shaw told me that they will get Tyson out immediately and completely, if we can work something out for them. He is waiting to hear something from us in the near future regarding this matter. (Commission Exhibit 40)

I pointed this drop in volume out to Mr. Cox today and he stated that he could not continue to buy at 58 from Indiana Bearings (respondent's distributor) and had accordingly decided to buy from ABC Bearing Company. I explained to Mr. Cox that he was committing an act which we considered disloyal. * * *

* * * * *

I told Cox that since his purchases were made through the Indiana Bearings Company that a matter of this nature should be direct with Indiana Bearings and that our position was one of not wishing Timken Jobbers to handle a competitive line of roller bearings.

Cox insists that if this is our attitude he will discontinue Timken and under the circumstances, feel that we have no choice but to cancel his Timken Jobber contract. (Commission Exhibit 103B)

When this jobber was signed as a Timken contract jobber in April of 1947, his initial stock order was for \$354.42. Since that time his purchases have been almost nothing. Reason—he had been buying Bower tapered roller bearings from Ahlberg and now from Federal Mogul.

We have been patient long enough! Dual distribution is not profitable or worthwhile to us. I suggest we cancel this account as a Timken contract jobber immediately. (Commission Exhibit 158)

The following statements are taken from correspondence from the branch managers to Timken officials:

* * * Recently, for the reasons outlined in Deen Jones' attached report of March 27, they fell for the Bower warehouse deal due to their close association with the F-M salesman * * *.

I would appreciate your authority to write them the usual cancellation letter * * *. (Commission Exhibit 12)

About eight months ago subject A.D. started picking up Bower bearings from the local Indianapolis Federal Mogul Warehouse.

You doubtless have noticed from our representative's Dave Mitchell's reports that this matter has been discussed at length with these people.

Additionally, I have discussed the matter with their management on several occasions. On my last call two weeks ago, I tried to bring the matter to a conclusion one way or the other and was refused the courtesy of a discussion.

This account has never been of any consequence and due to the circumstances involved we request management's approval for immediate cancellation. (Commission Exhibit 13)

I naturally approached him on the idea of going 100% Timken in all of his stores. Further that our only requirement was that he confine his tapered roller bearing purchases to us exclusively in the future and could dispose of his present inventory in the manner he found best fit but could not palm them off on the trade as substitutes for business promoted through the prestige and completeness of our line.

He wants about thirty days to pressure Tyson into converting his obsolescence into faster moving merchandise that will enable him to sell out his entire stocks in a one package deal. Naturally Tyson would not 'fall' for such a deal if they knew he planned to do this. Failing in this he will pull all of this stock into his main store and attempt to dispose of them in this manner. (Commission Exhibit 29A and B)

In addition to the information contained in this report, we definitely suspect that these people are already availing themselves of another source of supply for a portion of their requirements whereas we are confident that we can depend upon their 100% loyalty with direct recognition. (Commission Exhibit 91B)

I learned today that subject purchased a quantity of surplus bearings just a short while ago, and I think this act of disloyalty is justification for our cancelling the account. Would like to have your authority to cancel this firm. (Commission Exhibit 107)

* * * Previously this account had been buying in the open market and to satisfy us I personally called on them and felt reasonably sure at that time they would discontinue this practice. As it is they have not borne out this belief for they continue to buy on the open market * * *.

It is my recommendation they be cancelled and I would like to have the authorization to do so. (Commission Exhibit 138A)

Finally, there are documents prepared by Mr. E. H. Austin, then General Manager of respondent's Service Sales Division and, as such, the highest official in the division which directed sales and supervised distribution in the replacement market. His statements include the following:

In view of the fact that this account has decided to go 'Bower' we are agreeable to your effecting cancellation, immediately. (Commission Exhibit 11)

Since they apparently are not loyal to us as a source of supply, I think we should do one of two things—either get their support or eliminate this account. (Commission Exhibit 90A)

I have noted Mitchell's report of March 13. It looks to me as though we are going to have to do one of two things—either appoint the subject company

Opinion

58 F.T.C.

on a direct basis if that is what it takes to eliminate Bower or cancel them as a Contract Jobber if they continue to purchase Bower bearings. Let's not delay on this but endeavor to settle this satisfactorily to our best interests. (Commission Exhibit 109B)

This has reference to your letter of June 11 and our conversation about this subject.

* * * * *

Of course, if they are going to handle Bower bearings we will want to cancel them but, in the meantime, as I indicated to you, I am taking a look at our Contract Jobber policy and we may find it to our advantage to withhold this cancellation and take a look a little later. (Commission Exhibit 115A)

This refers to our previous correspondence under this subject, last of which was my note of June 27 answering yours of June 11. If this company is still handling Bower bearings as a distributor through Federal-Mogul, then I think that you should take the necessary action to bring about their cancellation as a Contract Jobber. I suggest this since I have decided, at least for the present, that we will not take any action to change our present Contract Jobber policy. (Commission Exhibit 115B)

In addition to the inter-office correspondence and memoranda, counsel supporting the complaint relied on a second group of documents comprised of reports of cancellation of approximately 100 distributors and jobbers. These reports are on a form, copies of which were sent to the home office, on which appears the question, "Why is this account being cancelled?" In all of these reports, the answers are "Have taken on Bower through Federal Mogul," "Took on Bower," "Not loyal," "Handling a competitive bearing," or similar expressions denoting that the customer was buying from a competitor.

This documentary evidence implicates individuals throughout respondent's entire replacement sales organization, from salesmen through home office executives. They cover the activities of the sales organization in all parts of the country and relate to transactions well within the period of time contemplated by the complaint. The hearing examiner's ruling that these documents represent only a relatively small number of isolated instances is clearly in error.

At hearings held after remand, respondent called 80 witnesses, 38 of whom were their customers and 42 of whom were personnel in the Service and Sales Division. These witnesses testified with respect to every written exhibit placed in evidence by counsel supporting the complaint. It is on the basis of this testimony that the hearing examiner has found that in every instance evidenced by the cancellation reports, the initiative in severing the relationship was taken by the customer rather than by the respondent.

One of the reasons advanced by the witnesses and accepted by the hearing examiner as a basis for his ruling was that the contracts were terminated because of the customers' low volume of purchases. Documentary evidence introduced by respondent indicates that in some instances, customers had made very few purchases of Timken bearings for several months or a year prior to cancellation. With respect to these accounts, however, it appears that respondent had been aware of their purchase records but did nothing to cancel them until they started purchasing from a competitor. One of respondent's branch managers, after receiving a salesman's report that a jobber had decided to buy from the ABC Bearing Company, stated in a letter to the home office:

You will note that this Timken Jobber's purchase history is very poor. They should be cancelled due to lack of volume and now since they have been disloyal it seems the best thing to do is cancel their contract. (Commission Exhibit 103A)

To the same effect are Commission Exhibits 100, 106A and Respondent Exhibit 126. The fact that low volume of purchases contributed to respondent's decision to cancel is not the controlling factor. As the court has recently stated in the *Osborn*¹ case:

As to the termination of the second lease, the Judge concluded that both the plaintiff's failure to sell sufficient gasoline and his refusal to purchase more Goodyear TBA contributed to Sinclair-Sherwood's decision to cancel, neither of the two factors being predominant. The District Judge correctly pointed out that such combination of factors would not defeat the plaintiff's claim as long as the illegal motive substantially contributed to the decision to cancel.

Respondent introduced into evidence by the purchase records of each of the accounts covered by the cancellation reports. An examination thereof discloses that, in many instances, any appreciable decrease in purchase volume occurred just one or two quarters prior to cancellation. In our opinion, this decrease did not supply the motive for termination but was the natural result of the purchaser's action stated on the report as the basis for cancellation, that is, that the purchaser had commenced buying from a competitor.

There is testimony that certain customers decided to purchase from competitors and asked to be cancelled. However, it appears that at least in certain instances, these customers "asked" in the sense that they were familiar with the inevitable result of their decision. One salesman, after stating in his report that a jobber, Mr. Meadows, had informed him that he had decided to buy from Federal-Mogul-Bower, added: "Meadows advised that he would expect our cancellation notice at any time, therefore I think we should oblige him and

¹ *Osborn v. Sinclair Refining Co.*, 286 F. 2d 832 (4th Cir. 1960).

Opinion

58 F.T.C.

immediately cancel his contract." He was cancelled within two weeks upon authority of Mr. Austin.

Counsel supporting the complaint content that the hearing examiner erred in ruling that the record affords no basis for an inference that the salesmen's practice of checking the stock constituted policing of customers indicative of a policy of exclusive dealing. In substance, the hearing examiner found that the reason salesmen checked customers' stock was to insure an adequate inventory, to supervise respondent's obsolescence policy and to check shortages in stock to obtain an order.

Most of the correspondence exhibits disclose that it was the salesmen's practice to include in their reports a reference to the competitive stock on the dealers' shelves. It is obvious from these references that the salesmen went far beyond the mere observance of competitors' products while checking Timken bearings. In many instances, the actual number or dollar amount of competitive bearings was reported, such as "However, his stock indicates that he has already bought \$100-150 of Bower, * * *" (Commission Exhibit 109A), and "on this call there were 132 pieces of Bower * * *" (Commission Exhibit 162). In other instances the reference was even more specific, as "We noticed 6-898-892B and 6-71450-71750 Bower bearings in stock" (Commission Exhibit 94) and "* * * I was truly disheartened to find an additional 40 Bower bearings in his stock which represented a \$59.56 additional purchase from Gibson Company" (Commission Exhibit 108A). Finally, the statement by one salesman that "We will keep close check on this stock and, if additional L & S bearings are purchased, we will take necessary action" (Commission Exhibit 97A) hardly reflects the action of a person interested only in a dealer's stock of Timken bearings. Moreover, there are instances where customers were called on to explain the presence of a competitor's product on their shelves. We think the evidence fully supports a finding that respondent policed its customers for the purpose of enforcing its exclusive dealing policy.

The hearing examiner found that the probative value of the correspondence is materially weakened as the result of the testimony giving the circumstances under which the correspondence took place. Typical of the statements appearing in the correspondence and the explanations relied on by the hearing examiner are the following:

Commission Exhibit 10—Meadows (jobber) advised that he would expect our cancellation notice at any time,***. Explained as meaning that account asked to be cancelled.

Commission Exhibit 29A—* * * going 100% Timken in all of his stores. Explained as meaning that the distributor was going to handle Timken in all its stores and not just the main store.

Commission Exhibit 39—I told him we would not condone his carrying Tyson bearings in his Laurinburg store as long as he was a Timken jobber. Explained by the writer, a salesman, as a gross exaggeration on his part as he knew they were already doing this.

Commission Exhibit 96—We have been assured of Brown's complete loyalty to Timken. Explanation of this statement is that because of large initial purchase from Timken, there was no need for Brown (jobber) to buy competitive bearings.

Commission Exhibit 133—Of course, they have Bower which they are willing to throw out for Timken. Explained as a figure of speech by the writer.

Commission Exhibit 144—* * * he *agreed* that he would buy all his tapered bearings in the future from us. (Emphasis supplied.) Explained as a statement made by an official of the buyer.

Commission Exhibit 155—Because this firm had become involved in the purchase of A.B.C. tapered roller bearings, a cancellation of their jobber contracts was effected June 24, 1954. Explained as meaning that the jobber had been cancelled at the request of the distributor who had difficulty collecting from this account.

Commission Exhibit 115B—(Letter from General Manager Austin to a branch manager) If this company is still handling Bower bearings as a distributor through Federal-Mogul, then I think that you should take the necessary action to bring about their cancellation as a Contract Jobber. Explained as meaning that the jobber should be cancelled because of his low purchase volume.

There is obviously a variance between the statements quoted above and the explanation given by respondent's witnesses. Similar statements are too numerous in the inter-office correspondence to be explained as imprecise language by the writers. Where, as here, oral testimony given several years later, is not consistent with contemporaneous written statements, such oral testimony can be given little weight. *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948). Although it is true that certain language standing alone may be susceptible of different meanings, we find that the varied explanations given by respondent fail to rebut the inference arising from the consistent use by respondent's representatives in all parts of the country, of such terminology as "100% loyalty," "go Timken 100%" and "We have their assurance" that an account will dispose of a competitor's stock. The hearing examiner's ruling that the correspondence has little probative value is clearly in error.

From our examination of the entire record, we are convinced that it is respondent's policy to sell its tapered roller bearings on the understanding or agreement that purchasers will handle Timken products exclusively; that dealers who contracted with respondent immediately proceeded to rid their shelves of competitive products and replace them with Timken; that respondent policed its dealers for the purpose of assuring adherence to its policy; that reports of deviations were received by the home office; and that those dealers who deviated were cancelled for that reason with the knowledge and

authority of the home office. It is obvious that respondent's conduct goes far beyond that of a seller who merely announces a policy and declines to sell to those who do not follow it. Cf. *United States v. Parke, Davis and Co.*, 362 U.S. 29 (1960).

Respondent has placed some reliance on the district court's decision in *United States v. J. I. Case Co.*, 101 F. Supp. 856 (D.C. Minn., 1951). However, the court in that case relied in part upon a bulletin emanating from Case company officials directing its representatives not to attempt to dictate or coerce any dealer with respect to the handling of competitive merchandise and found that Case executives adhered to and fairly endeavored to sustain this policy. The evidence in this proceeding discloses no such concern on the part of Timken executives. In fact, as we have stated above, the evidence clearly indicates that key Timken executives supervised and actively participated in the company's exclusive dealing policy. The extent to which Timken's management was involved in enforcing this policy is apparent from the fact that documents in evidence implicate, among others, the general manager of the company's Service Sales Division and managers of branch offices in the following cities: Atlanta, Boston, Canton, Chicago, Cincinnati, Dallas, Detroit, Los Angeles, Memphis, Minneapolis, New York, Philadelphia, Pittsburgh, San Francisco, St. Louis, and Seattle. Also, many of the dealers cancelled by Case were those who had taken on Case products temporarily as a side line during the last World War so that Case would have an outlet for its allotment of the supply of farm machinery granted to Case by the government. Moreover, the evidence disclosed that dealers in farm machinery carry only one major line, one of the reasons being that it requires an investment of \$50,000 excluding real estate, to be a successful operator. The handling of a competitor's product obviously would require additional inventory. Timken customers are established dealers in replacement parts, and tapered roller bearings are only a small item in their inventory. The facts upon which the court made its decision in the *Case* matter clearly differ from those present in this proceeding.

Much reliance has been placed by respondent in this case upon the fact that its tapered roller bearings are interchangeable with those of its two closest competitors. All three use the same numbering system. Therefore, a bearing made by any one of the three may be replaced by a bearing of the same number by either of the other two. Respondent's argument is that distributors and jobbers are therefore inclined to carry only one line or brand of bearings, the inference being that accounts are cancelled if they decide to purchase a com-

petitive line for any reason, since their purchases of Timken bearings would then cease entirely or decline to an insignificant volume.

While there is evidence that certain replacement parts dealers elect to handle only one line, we are not convinced that this is the practice generally followed by all members of the industry. One of respondent's own jobbers stated that:

You should have more than one brand on the shelves. * * * I believe it is a good idea to have more than one variety because you make more sales.

Additionally, there are reasons evidenced in this record as to why a dealer would elect to handle a competitor's product together with Timken's. These reasons include higher discounts and better service, in certain instances, from competitors who manufacture a portion of the different types of tapered roller bearings produced by respondent and who sell to any dealer who chooses to purchase from them. Moreover, respondent's policing practices are inconsistent with a finding that dealers of their own accord carry only one line of tapered roller bearings. Regardless, however, of the tendency of some dealers to handle only one line, we think it clear that respondent cancelled its accounts in furtherance of its policy of exclusive dealing. Any other inference must be rejected.

The hearing examiner was impressed with respondent's witnesses. We cannot, of course, accept the conclusion of respondent's officials and salesmen that Timken had no policy of requiring exclusive dealing. However, the testimony of these witnesses that all respondent expects of its purchasers is that they devote the principal sales effort to the Timken line and that Timken purchasers handle competing bearings without interference on the part of Timken, is not inconsistent with our conclusion. It is clear from the record that the "principal effort" required by respondent is exclusivity. It is also clear that respondent allows its customers to purchase competing brands only on an emergency basis when there is a delay in obtaining Timken bearings or to accommodate an insignificant number of customers. The fact that respondent acquiesced in "emergency" or "accommodation" purchases is no defense in this proceeding where the evidence shows that respondent could and did exercise its power to cancel at any time it deemed necessary to implement its policy of exclusive dealing.

The testimony of respondent's current distributors and jobbers discloses that in practically all instances, they were carrying Timken products to the exclusion of competitors' products except for the "emergency" or "accommodation" purchases above mentioned.

Naturally, these dealers would cause the respondent no concern. We, as did the hearing examiner, can accept their testimony that they have not been threatened with cancellation by respondent.

There remains the question of whether respondent's exclusive dealing requirement, as evidenced by this record, "may be substantially to lessen competition or tend to create a monopoly in any line of commerce" as required by Section 3. The evidence received herein discloses that respondent's sales in the replacement market run between \$10,000,000 and \$20,000,000 a year; that it has more than 11,000 different items in its line of tapered roller bearings, and that its contracts cover over 7,500 different outlets. Respondent's nearest competitor does a yearly business of between \$1,000,000 and \$2,000,000 in the sale of tapered roller bearings; has 780 different items in this line; and has 2,000 customers for its tapered roller bearings. The next competitor's sales of tapered roller bearings amount to between \$400,000 and \$800,000 yearly; it has a mere 586 items in its line, and, at most, 1,000 customers. Thus, it is obvious that respondent is the leading supplier of tapered roller bearings in the replacement market and that a substantial share of that market is affected by its policy of exclusive dealing. That the probable effect of this policy is to substantially lessen competition is thus fully established.² *Standard Oil Co. v. United States*, 337 U.S. 293 (1949); *Dictograph Products, Inc. v. Federal Trade Commission*, 217 F. 2d 821 [5 S. & D. 707] (2d Cir. 1954), *cert. denied* 349 U.S. 940 (1955); *Anchor Serum Company v. Federal Trade Commission*, 217 F. 2d 867 [5 S. & D. 718] (7th Cir. 1954).

Moreover, the record supports a finding of actual injury to respondent's competitors as a result of respondent's exclusive dealing policy. In many instances, competitors' products were on the shelves of distributors and jobbers at the time they entered into a contract with respondent. These dealers then proceeded to dispose of the competitive stock and replace it with Timken exclusively. As an example, one of respondent's branch managers, in a letter to Mr. Austin, stated in part:

Their Bower inventory in two stores runs about \$5500 and we feel they should be good for about six or seven thousand a year on Timken once they get their Bower stock cleared out. (Commission Exhibit 71)

² Although respondent introduced certain evidence in an effort to show the economic advantages to a dealer in handling only one supplier's line of tapered roller bearings, this evidence has no bearing on the question of the competitive effect of respondent's exclusive dealing policy. As we held in the matter of *Mytinger & Casselberry, Inc.*, Docket 6962, September 28, 1960, such economic considerations are irrelevant in a proceeding under Section 3 where, as here, the respondent has clearly foreclosed competition in a substantial share of the relevant market by its exclusive dealing requirement.

It is evident that as a result of respondent's policy competitors were foreclosed from selling to over 7,500 established dealers in the replacement market.

As previously found, there are several reasons why dealers prefer to handle several lines or brands of tapered roller bearings. Because of respondent's policy, its dealers are not permitted to exercise any discretion as to the brands they will carry and sell. As a result, respondent's dealers are injured by not being able to take advantage of higher discounts offered by some competitors and lose substantial sales because they are unable to carry competitive bearings. This is illustrated by the statement of one of respondent's salesmen who, in reporting a conversation with an authorized jobber, stated:

He further stated that he made a survey of some of these dealers (car and truck dealers) on the acceptance of Bower Bearings and he found out that they would accept Bower Bearings. He added that for that class of trade, he buys Bower but for his fleet trade and garage type of trade, he will buy Timken. He further added that he knows that we would not countenance that sort of dual buying * * *. (Commission Exhibit 29 A and B)

Under the foregoing circumstances, 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, conclusion and order to cease and desist in conformity with this opinion.

Commissioner Mills did not participate in the decision of this matter for the reason he did not hear oral argument.
