

they have complied with the order to cease and desist contained in the initial decision.

By the Commission, Chairman Dixon and Commissioner MacIntyre not participating in the issuance of the order at this time.

IN THE MATTER OF
OXWALL TOOL COMPANY, LTD., ET AL.

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

Docket 7491. Complaint, May 15, 1959—Decision, Dec. 26, 1961

Order requiring New York City distributors of hand tools imported from Japan and Germany—some packaged for sale in kits, some in kits containing other tools of domestic manufacture, and some sold separately—to cease selling such imported tools with markings of their country of origin so small and indistinct as not to constitute adequate notice of their foreign source to buyers, or with no such markings at all, or packaged or assembled so as to conceal the markings.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Oxwall Tool Company, Ltd., a corporation, and Harry Greenberg, Max J. Blum, and Sidney Blum, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Oxwall Tool Company, Ltd. is a corporation organized, existing and doing business under and by virtue

of the laws of the State of New York, with its principal office and place of business located at 928 Broadway in the City of New York, State of New York.

Respondents Harry Greenberg, Max J. Blum and Sidney Blum are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the sale and distribution of hand tools, including wrenches, pliers and tape measures and allied products, primarily to distributors and jobbers and to retailers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Some of the hand tools sold and distributed by respondents are manufactured in and imported from foreign countries, including Japan and Germany. Certain of such foreign tools are assembled and packaged together for sale and distribution in form of kits; certain of such foreign tools are also assembled and packaged in kits containing other tools manufactured in the United States; and certain of such foreign tools are sold and distributed separately without being assembled or packaged as part of a kit. While certain of respondents' said foreign tools bear markings indicating their manufacture in and importation from Germany or Japan, in some instances the markings are so small and indistinct that they do not constitute adequate notice to the public that such tools are not made in the United States. In other instances said foreign tools bear no markings as to origin or are packaged or otherwise assembled so as to conceal or obscure the mark of foreign origin in which case there is not adequate notice to the public that such tools are not made in the United States.

PAR. 5. There is among the members of the purchasing public a decided preference for products of domestic manufacture, including hand tools, and when merchandise, including hand tools, is not marked so as to disclose foreign origin, or if marked and the markings are concealed, indistinct or otherwise not clearly legible, the purchasing public understands and believes such products to be of domestic origin.

Findings

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PAR. 6. Respondents, by placing in the hands of others imported products which do not bear clear and distinct marks of foreign origin, provide means and instrumentalities whereby the purchasing public is misled as to the place of origin of such products.

PAR. 7. Respondents were and are in substantial competition in commerce with corporation, firms and individuals in the sale of hand tools.

PAR. 8. The use by respondents of the aforesaid misleading and deceptive practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that their said tools are of domestic origin and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief. As a result thereof, trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has thereby been done to competition in commerce.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Harold A. Kennedy, supporting the complaint.

Mr. Samuel Slaff, New York N.Y., for respondents.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

This proceeding is before the hearing examiner for final consideration upon the complaint, answer, testimony and other evidence and proposed findings of fact and conclusions filed by counsel for respondents and by counsel supporting the complaint. The hearing examiner has given consideration to the proposed findings of fact and conclusions submitted by both parties, and all findings of fact and conclusions proposed by the parties not hereinafter specifically found or concluded are herewith rejected, and the hearing examiner, having considered the entire record herein, makes the following findings as to the facts, conclusions drawn therefrom and order:

FINDINGS AS TO THE FACTS

1. Respondent Oxwall Tool Company, Ltd., is a New York corporation with its principal office and place of business located at 928 Broadway, New York, New York.

2. Respondents Max J. Blum and Sidney Blum are officers of the corporate respondent. They formulate, direct and control the acts

and practices of the corporate respondent. Their address is the same as that of the corporate respondent.

3. Respondent Harry Greenberg was an officer and director of corporate respondent, but has not been either since he severed all connection with it in July 1958. For at least a year prior to that time he had only a formal and not an active, policy making connection with the corporate respondent.

4. Corporate respondent is now, and for some time last past has been, engaged in the sale and distribution of hand tools, including wrenches, pliers, tape measures and allied products, primarily to distributors and jobbers and to retailers for resale to the public.

5. In the course and conduct of its business, corporate 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 and in the District of Columbia, and maintains, and has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

6. Some of the hand tools sold and distributed by corporate respondent are manufactured in, and imported from, foreign countries, including Japan, Germany and Italy. Certain of such foreign tools are assembled and packaged together for sale and distribution in the form of kits. Certain of them are also assembled and packaged in kits containing other tools manufactured in the United States, and certain of such foreign tools are sold and distributed separately without being assembled or packaged as part of a kit.

7. Except for oversights or accidents which obliterate markings, respondent's foreign tools bear markings indicating their manufacture in Japan, Germany or Italy, but in some instances the markings are so small and indistinct that they do not constitute adequate notice to the public of the country of origin of such tools. In other instances, said foreign tools are packaged or otherwise assembled so as to conceal or obscure the mark of foreign origin, in which case there is not adequate notice to the public of the country of origin of such tools.

8. There is a preference on the part of some buyers for domestic hand tools. Some have seen or used foreign tools of inferior quality, some have prejudices against products of certain nations, and some have pride and confidence in the quality of domestic workmanship. This preference has diminished as the last war period recedes and as the quality of the cheaper foreign tools improves, but it remains a substantial factor. Foreign hand tools sell in increasing volume, but this is due in large part to the fact that they are substantially lower in price than most domestic tools.

Conclusions

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9. Section 304 of the Tariff Act of 1930 provides that, with exceptions not germane to this case, every article of foreign origin (or its container, as provided in subsection (b)) imported into the United States shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or container) will permit in such manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. As a result of this requirement, and perhaps for other reasons as well, most products are marked with the country of origin and many consumers expect them to be so marked. Thus, when merchandise, including hand tools, is not marked so as to disclose foreign origin, or if marked and the markings are concealed, indistinct or otherwise not clearly legible, many members of the purchasing public understand and believe such products to be of domestic origin.

10. At different times corporate respondent packaged its imported tools in various ways, but in a manner that permitted the tools to be visible, and sold them in packages and in bulk. It sometimes stamped the word "imported" on the background card or package, and sometimes added to the package a tape sticker bearing the word "imported". In the instances of stamping and taping, deception was not entirely avoided because the tape, and indeed the entire package, was removable by retailers. The only way to insure that the tools are offered to the ultimate purchaser properly marked is for the mark to be on the tool. Any method of marking a package or attachment without marking the tool provides a means for others to mislead purchasers. Corporate respondent, by placing in the hands of others imported products which do not bear clear and distinct marks of foreign origin, provides a means and instrumentality whereby the purchasing public is misled as to the place of origin of such products.

11. Corporate respondent was and is in substantial competition in commerce with corporations, firms and individuals in the sale of hand tools.

CONCLUSIONS

The use by respondents of the aforesaid misleading and deceptive practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that their said tools are of domestic origin and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

The aforesaid acts and practices of respondents were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive

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acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Oxwall Tool Company, Ltd., a corporation, and its officers, and respondents Max J. Blum and Sidney Blum, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of imported merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing said products without affirmatively and clearly disclosing in a conspicuous place on the products themselves the country of origin thereof.

2. Offering for sale, selling or distributing said products in containers or with attachments in a manner which causes the mark on the products identifying the country of origin to be hidden or obscured without clearly disclosing the country of origin of the products in a conspicuous place on the container or attachment.

It is further ordered, That the complaint against Harry Greenberg, individually and as an officer of said corporate respondent, be dismissed without prejudice to the right of the Commission to take such further action as future circumstances may warrant.

OPINION OF THE COMMISSION

By MACINTYRE, *Commissioner*.

This matter is before the Commission on appeal of respondents from an initial decision and order to cease and desist filed by the hearing examiner on March 17, 1961. After a full hearing, the hearing examiner found that most of the allegations made in the complaint had been sustained and that respondents had engaged in unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

In general terms the respondents are charged with having failed to properly and adequately disclose to the public that certain hand tools imported and resold by them were of foreign origin. The complaint charges that this deception was accomplished in three separate and distinct manners:

(1) By markings on tools which "... are so small and indistinct that they do not constitute adequate notice to the public that such tools are not made in the United States";

- (2) By distributing tools which "... are packaged or otherwise assembled so as to conceal or obscure the mark of foreign origin"; and
(3) By distributing tools which "... bear no markings as to origin".

Respondents first take exception to the hearing examiner's finding that the foreign origin markings on certain of the tools in evidence are "so small and indistinct that they do not constitute adequate notice to the public of the country of origin". Respondents concede that the markings on two of the tools in evidence¹ represent examples of indistinct marking but argue that the vagueness of the markings is due to manufacturing faults or accidents. Further, it is urged that this particular model tool had not been imported for more than a year prior to the issuance of the complaint on May 15, 1959.

We are of the view that the cause of the indistinct marking is of no consequence since the public is no less deceived by an indistinct mark occasioned by poor workmanship than one produced negligently or intentionally. But conceding for the purpose of argument that infrequent accidental indistinctness would not violate the Federal Trade Commission Act, we would nonetheless be obliged to affirm the examiner's finding for the markings on other tools in evidence for which no claim of faulty manufacture or accident is made are so vague as to afford insufficient notice of their origin.²

As for the contention that respondents did not import four-inch Japanese wrenches between 1958 and 1960, we fail to see how this has any weight as a defense. This matter was investigated during 1958, and the record clearly establishes that the wrenches in question were then available on the shelves of retailers. It is the period of sale, not import, which matters for items of this type may be stored and sold many years after import.

Respondents also aver as error the hearing examiner's finding that in some instances respondents' tools are "... packaged or otherwise assembled so as to conceal or obscure the mark of foreign origin ...". There is absolutely no question concerning the literal truth of this finding since tools packaged in this fashion are in evidence. Respondents base their attack on this finding principally upon an alleged failure of the record to show that such improper packaging was typical or representative of respondents' practices. As we view it, the record adequately establishes respondents' use of deceptive packaging to an extent requiring public protection by means of an order to cease and desist.

¹ Four-inch wrenches of Japanese origin, identified as Commission Exhibits 5 and 11 (c).

² E.g., Commission Exhibit 10, Respondents' Exhibits 14 and 114.

The retractable steel measuring tapes sold by respondents bear a mark of origin only on the tape itself. The tape must be pulled from its housing for a distance of some seven inches before the foreign origin mark is visible. Respondents' package for this tape consists of a card to which is affixed a sealed, transparent bubble or skin which completely enclosed the product. The package must be broken before the tape can be pulled out to disclose the origin mark. Since 1958, respondents have affixed labels or stickers bearing the words "imported tools" to the cards holding measuring tapes, but this is not a sufficient disclosure of foreign origin to satisfy the requirements of the Act. The disclosure must be of the particular country or place of origin where consumer prejudice or preference is directed toward the goods of particular countries rather than toward all foreign goods in general.

Respondents sold a diagonal cutting pliers packaged in a transparent bubble affixed to a card. A Commission investigator purchased one of these tools placed with the foreign origin mark down against the card and hence concealed. When respondents' counsel objected that the package had been broken so that the manner of the tool's original placement was supported by only the investigator's testimony, counsel supporting the complaint apparently had no difficulty in purchasing, in another city, the same tool packaged with the mark of origin down.

The record reveals that a certain plier-wrench set was always packaged with the wrench positioned with the movable jaw to the left. The Japanese wrenches packed in this set were indiscriminately marked on either the right or left side and thus operation of the law of chance would indicate that approximately half of these wrenches were packaged with the foreign origin markings down and concealed.

There is additional evidence to support a finding that the instances of non-disclosure revealed by the products in evidence were not isolated instances, but occurred with sufficient frequency to require remedial action. Respondents' duty to clearly disclose foreign origin is not satisfied by marking the majority or even 90 percent of their products. All of them must disclose their origin if they are not of domestic manufacture.

Respondents attack two of the examiner's findings (nine and ten) on the ground that they erroneously find that respondents sold or distributed imported tools which bore no marks of foreign origin. There is no question that this charge was not sustained; that is, there is no evidence in this record that respondents ever distributed imported tools which were completely unmarked as to foreign origin. But as we read the findings in question, they do not hold as respondents allege. Finding nine holds only that many members of the pur-

chasing public would, if unable to discern a mark of foreign origin, understand and believe a product to be of domestic manufacture. Finding ten, read in its entirety as a cohesive whole, finds only that marking a package without marking the tool provides a means for retailers to mislead purchasers by removing the tool from the package and that under the circumstances of this case an adequate disclosure must be made on the tool itself.

Respondents contest the examiner's finding that the "Corporate respondent was and is in substantial competition in commerce with corporations, firms and individuals in the sale of hand tools." The respondents' answer to the complaint, by failing to deny this allegation, foreclosed any issue with respect to it.³ Moreover, the vacating of this finding would avail respondents nothing since the Act does not require a showing of both deceptive acts and unfair methods of competition but is satisfied by the existence of either.

We turn now to respondents' contention that the complaint must be dismissed because of the failure of the record to support the complaint charge that "There is among the members of the purchasing public a decided preference for products of domestic manufacture, including hand tools. . .". Respondents argue that the tools they sell are do-it-yourself tools for home use; that this type of tool "... has a specialized market and a specialized appeal. . ."; that price, that is, low price, is the most important factor to buyers in this market; that no American-made tools are sold at retail prices as low as the retail prices of respondents' tools and, therefore, customers in this market have no preference for domestic tools. Counsel for respondents cites as controlling the Commission's opinion in *Manco Watch Strap Co., Inc.*, Docket 5854 (50 F.T.C. 553, 554 [1953]). In that matter, the Commission dismissed a complaint charging failure to disclose foreign origin because:

The evidence in the record indicates that there are no domestic watch or wrist bands which are sold at prices comparable to the prices at which respondent's imported bands are sold. There is no evidence in the record showing a preference on the part of a substantial number of members of the purchasing public for the higher priced domestic bands over respondent's lower priced imported bands.

Our analysis of this record does not lead us to the factual conclusions urged by respondents. Although the tools sold by respondents are undoubtedly, for the most part, purchased by non-professional users such as home owners, it does not follow that such purchasers are interested only in the price of the tool to the exclusion of all other factors. There is reliable testimony in the record that certain members of the public will not buy foreign-made tools no matter how

³ *National Candy Co., et al. v. Federal Trade Commission*, 104 F. 2d 999, 1003 (7th Cir. 1939).

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cheaply they are sold. There is evidence that a low price will not serve to identify a tool as foreign. The record also discloses that some domestic tools sell at about the same price level as respondents'. As a matter of fact, the respondents themselves mix domestic and non-domestic tools in "kits" and sell them as a single unit thereby seriously weakening their arguments that domestic tools are not sold in this low price class and that foreign tools can be identified by price alone.

To support their contention that purchasers of tools in respondents' price class have no preference for domestic tools, respondents in the main rely on the testimony of buyers or purchasing agents for large chain retailers such as Rexall Drug Company, G.C. Murphy Company, and Sun Ray Drug Company. It is urged that the testimony of these witnesses on this point outweighs that adduced from the Commission witnesses who were proprietors of small hardware stores. We are not persuaded by this argument, since knowledge of consumer preference is more likely to be found in witnesses who are in continuous daily contact with consumers. In situations of this type where testimony is in conflict, the hearing examiner who directly observed the witnesses is in the best position to evaluate their testimony, and we are not convinced that his finding on this point was other than correct.

As we have pointed out, the record evidence falls short of establishing that there are no domestic tools selling at prices as low as those charged for respondents' imported tools. Thus, there is lacking here the factual showing which would place this proceeding on all fours with the *Manco* matter. However, it should be pointed out that the fact that an imported article has no domestic competitors in its price class does not force the conclusion that consumers who purchase such an imported article unmarked as to foreign origin have no preference for domestic goods. To the extent that the holding in the *Manco* matter may be inconsistent with this statement, the *Manco* opinion does not reflect the present views of the Commission.

Respondents' appeal is denied. An order will issue adopting the initial decision as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs in support thereof and in opposition thereto, and the Commission having rendered its decision denying the appeal:

It is ordered, That the initial decision of the hearing examiner as modified by the accompanying opinion of the Commission be, and it hereby is, adopted as the decision of the Commission.

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FEDERAL TRADE COMMISSION DECISIONS

Complaint

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