

Sullivan, Stauder, Corwell & Bayles, Inc., 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 QUAKER OATS COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF THE
CLAYTON ACT

Docket 8119. Complaint, Sept. 16, 1960—Decision, Apr. 25, 1962

Order requiring a major manufacturer of food products for both humans and animals, selling to wholesalers and retailers and with annual sales in excess of \$300,000,000, to cease violating Sec. 2(d) of the Clayton Act by such acts as contributing \$250 through its Coast Fisheries Division in connection with the sale of its Puss 'N Boots cat food to an anniversary sales promotion called a "Foodarama" staged by a grocery chain with retail stores in 25 cities in Iowa, Illinois, and Missouri, without making such payments available on proportionally equal terms to the chain's competitors.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C.

Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PAR. 1. Respondent The Quaker Oats Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at the Merchandise Mart Plaza, Chicago 54, Ill.

PAR. 2. Respondent is now and has been engaged in the manufacture, sale and distribution of food products for both human and animal consumption. Respondent sells and distributes its products to wholesalers and retailers, including retail chain store organizations. Respondent's sales of its products are substantial, exceeding \$300,000,000 annually.

PAR. 3. Respondent sells and causes its products to be transported from its principal place of business in the State of Illinois to customers located in other States of the United States. There has been at all times mentioned herein a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 4. In the course and conduct of its business in commerce, and particularly since 1958, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

PAR. 5. For example, in the year 1959, respondent contracted to pay and did pay to Benner Tea Company, a retail grocery chain with headquarters in Burlington, Iowa, the amount of \$250.00 as compensation or as an allowance for advertising or other services or facilities furnished by or through Benner Tea Company in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not made available on proportionally equal terms to all other customers competing with Benner Tea Company in the sale and distribution of products of like grade and quality purchased from respondent.

PAR. 6. The acts and practices of respondent, as alleged, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. John Perry supporting the complaint.

Mr. John T. Chadwell, Mr. Paul H. LaRue, and Mr. Luther C. McKinney of Snyder, Chadwell, Keck, Kayser & Ruggles, and Mr. Merrill E. Olsen and Mr. Joseph G. Egan, all of Chicago, Ill., for respondent.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

This is a proceeding based on a complaint issued September 16, 1960, charging respondent with violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13).

There is no substantial dispute about the facts. Quaker Oats made a payment to Benner Tea Company a purchaser from it in connection with the latter's anniversary Foodarama program in 1959 and this type of payment was not made available to other purchasers on proportionally equal terms.

Counsel for both parties are to be commended for their cooperative attitude in simplifying the record through stipulations which reduced the size of the record and placed the proper emphasis on the important features of the case.

The only substantial questions presented are whether the special circumstances in this case are such that either 1) no order should issue because there is only a single violation, or 2) the order should be curtailed so that it applies only to the sale of cat food the product of the division of respondent which was responsible for the violation disclosed.

This proceeding is now before the hearing examiner for final consideration upon the complaint, answer, testimony and other evidence, motion to dismiss, proposed findings of fact, conclusions of law and briefs. The hearing examiner has given consideration to the proposed findings and conclusions, and all findings of fact and conclusions not hereafter specifically found or concluded, either in their entirety or in substance are hereby rejected. Having considered the entire record herein, the hearing examiner makes the following findings as to the facts, conclusions drawn therefrom and order:

FINDINGS OF FACT

1. Respondent The Quaker Oats Company is a corporation organized, existing and doing business under and by virtue of the laws of

the State of New Jersey, with its office and principal place of business located at the Merchandise Mart Plaza, Chicago 54, Ill.

2. Respondent is now and has been engaged in the manufacture, sale and distribution of food products for both human and animal consumption. Respondent sells and distributes products to wholesalers and retailers, including retail chain store organizations. Respondent's sales of its products are substantial, exceeding \$300,000,000 annually.

3. Respondent sells and causes its products to be transported from its principal place of business in the State of Illinois to customers located in other States of the United States. There has been at all times mentioned herein a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended.

4. Respondent conducts several types of business through divisions which are semi-autonomous although not separately incorporated.

5. One such division is the Coast Fisheries Division of Quaker Oats Company which manufactures and sells Puss 'N Boots cat food. This division accounts for roughly ten percent of the business of Quaker Oats Company.

6. Coast Fisheries Division was set up as a result of the acquisition of a hitherto independent corporation in 1950 and its method of sale differs substantially from the method of sale utilized by the balance of the divisions of Quaker Oats Company. Its sales were conducted primarily through the use of independent brokers who also handle products of companies other than Quaker Oats. Grocery Products Division which sells such packaged goods as Quaker Oats and Ken-I-Ration, utilizes its own sales organization to make its sales to wholesalers and other direct customers. In addition Coast Fisheries Division maintains shipping points and factories which differ from those used by its Grocery Products Division and it utilizes public warehouses rather than company owned distribution centers such as are used by the Grocery Products Division.

7. While the activities of Grocery Products Division have been closely supervised, Coast Fisheries Division presumably by reason of its former independent status, was not as closely supervised nor was its sales manager, Glenn Hesler. In the words of the witness, Vice President William G. Mason, "We realize that we let this Division just become too independent . . ."

8. During the year 1959, respondent sold Puss 'N Boots cat food in cans to Benner Tea Company, a retail grocery chain with headquarters

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in Burlington, Iowa, which maintained retail stores in the following cities:

Burlington, Iowa	Muscatine, Iowa
Fort Madison, Iowa	Canton, Illinois
Keokuk, Iowa	Carthage, Illinois
Iowa City, Iowa	Stronghurst, Illinois
Fairfield, Iowa	Galesburg, Illinois
New London, Iowa	Monmouth, Illinois
Winfield, Iowa	Roseville, Illinois
Sigourney, Iowa	Moline, Illinois
Bloomfield, Iowa	Macomb, Illinois
Ottumwa, Iowa	LaHarpe, Illinois
Mt. Pleasant, Iowa	Memphis, Missouri
Tipton, Iowa	Kahoka, Missouri
Farmington, Iowa	

9. Such retail stores stocked Puss 'N Boots cat food shipped by respondent to Benner Tea Company in Burlington, Iowa, and then distributed by Benner Tea Company to its individual stores.

10. Respondent's plants which pack Puss 'N Boots cat food are located in Wilmington, California; Pascagoula, Mississippi; and Lubec, Maine. The Puss 'N Boots cat food which was sold to Benner Tea Company in Burlington, Iowa, was shipped from one or more of those plants.

11. During the year 1959, respondent also sold Puss 'N Boots cat food to other customers who competed in the resale of Puss 'N Boots cat food with Benner Tea Company, namely: Kroger Company; Safeway Stores, Inc.; National Tea Co.; United Food Markets; Eagle Food Centers, Inc.; The Great Atlantic & Pacific Tea Company; Swanson Super Markets; Geifman's Food Stores, Inc.; and Hy-Vee Stores. Each of these competing customers maintained retail stores in one or more of the following cities: Canton, Illinois; Galesburg, Illinois; Moline, Illinois; Monmouth, Illinois; Burlington, Iowa; Fairfield, Iowa; Ft. Madison, Iowa; Iowa City, Iowa; Keokuk, Iowa; and Ottumwa, Iowa.

12. In June 1959, Benner Tea Company staged an anniversary sales promotion called a "Foodarama". It solicited a large number of suppliers to participate. Its brochure describing the advertising and promotional activities which were to take place during the "Foodarama" contained statements of anticipated advertising and promotional activities which included: a tabloid mailing to 135,000 homes in the Benner trade area featuring the products of participants; a special section in 19 leading local newspapers in named cities plus big space ads in seven smaller towns, a big display booth; signs and displays, special bulletins, special meetings, and radio spots.

13. Benner Tea Company, in its brochure, also offered participants in its "Foodarama" a choice of six (6) different advertising and promotional "deals" as follows:

SUPER FOODARAMA DEAL No. 1	
8' x 10' Display Booth <i>plus</i> mention in Tabloid.....	\$150
SUPER FOODARAMA DEAL No. 2	
8' x 10' Display Booth <i>plus</i> $\frac{1}{16}$ page in Tabloid and mention in Ad....	\$250
SUPER FOODARAMA DEAL No. 3	
8' x 10' Display Booth <i>plus</i> $\frac{1}{8}$ page in Tabloid and mention in Ad.....	\$350
SUPER FOODARAMA DEAL No. 4	
8' x 10' Display Booth <i>plus</i> $\frac{1}{4}$ page in Tabloid and mention in Ad.....	\$450
SUPER FOODARAMA DEAL No. 5	
8' x 10' Display Booth <i>plus</i> $\frac{1}{2}$ page in Tabloid and mention in Ad.....	\$550
SUPER FOODARAMA DEAL No. 6	
8' x 10' Display Booth <i>plus</i> $\frac{1}{2}$ page in Tabloid, prominent space and portion in newspaper Ad and giant 2 week Display in every store.....	\$650

14. Over seventy (70) Benner Tea Company suppliers participated in the late 1959 "Foodarama" and contributed about \$19,500.00.

15. Benner Tea Company advertised its 1959 "Foodarama" in the following newspapers:

Canton Daily Ledger, Canton, Illinois	Burlington Labor News, Burlington, Iowa
Fairfield Daily Ledger, Fairfield, Iowa	Des Moines County News, West Burlington, Iowa
The Evening Democrat, Ft. Madison, Iowa	Bloomfield Democrat, Bloomfield, Iowa
Galesburg Register-Mail, Galesburg, Illinois	Record Republican, Bonaparte, Iowa
Iowa City Press Citizen, Iowa City, Iowa	Hancock County Journal, Carthage, Illinois
The Daily Gate City, Keokuk, Iowa	Tri-County News, Farmington, Iowa
The Macomb Daily Journal, Macomb, Illinois	Kahoka Gazette Herald, Kahoka, Missouri
Moline Daily Dispatch, Moline, Illinois	La Harpe Quill, La Harpe, Illinois
Monmouth Review Atlas, Monmouth, Illinois	Memphis Democrat, Memphis, Missouri
The Mt. Pleasant News, Mt. Pleasant, Iowa	New London Journal, New London, Iowa
Muscatine Journal, Muscatine, Iowa	Roseville Independent, Roseville, Illinois
Ottumwa Daily Courier, Ottumwa, Iowa	Sigourney News-Review, Sigourney, Iowa
The Burlington Hawk-Eye, Burlington, Iowa	Tipton Conservative, Tipton, Iowa

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Winfield Beacon,
Winfield, Iowa
Henderson County Graphic-Reporter,
Stronghurst, Illinois

Galesburg Post Publishing Company
(Knoxville Republican & Galesburg
Post),
Galesburg, Illinois

16. Respondent's product, Puss 'N Boots cat food, was advertised in Benner Tea Company's Tabloid Mailer which Benner represented would be mailed to 135,000 homes.

17. Respondent agreed to pay and did pay to Benner Tea Company the amount of \$250.00 as compensation or as an allowance for advertising and other services or facilities furnished by Benner Tea Company in connection with its offering for sale of Puss 'N Boots cat food sold to it by respondent and in conjunction with the "Foodarama". Such compensation or allowance was not made available on proportionally equal terms to all other customers competing with Benner Tea Company in the sale and distribution of Puss 'N Boots cat food of like grade and quality purchased from respondent.

18. The payment referred to in the preceding finding was made by Glenn Hesler sales manager of the Coast Fisheries Division of Quaker Oats Company out of a fund set up for use of that division in promoting its product Puss 'N Boots in pet stores.

19. Glenn Hesler was a close personal friend of Allen Clark a Vice President of Benner Tea Company who had solicited the contribution to Benner's 1959 Foodarama.

20. No effort was made by respondent to secure a return of the payment made to Benner Tea Company by Mr. Glenn Hesler either from Mr. Hesler or from Benner Tea Company after the payment was discovered by the legal department and after the investigation by the Federal Trade Commission had commenced.

21. Mr. Allen Clark of Benner Tea Company made a similar request to Mr. Kenneth C. Duckwall, a representative of the Grocery Products Division of respondent, that he take a booth and an ad in the tabloid and participate in the 1959 Foodarama. Mr. Duckwall "turned him down cold" and "told him it was against company policy, and that we didn't have a budget set up for something like this."

22. Benner Tea Company was in competition with other customers of respondent in a substantial number of locations and its Foodarama advertising was directed to persons who were potential customers of such competitors.

23. In proportion to the total advertising budget of respondent, the payment of \$250 was small; on the other hand such payment may well have exceeded the payments made to individual stores under the only generally available cooperative advertising plan of respondent.

Puss 'N Boots promotional allowances amounted to about 10% of the one million dollars expended on cooperative advertising or roughly \$100,000 to be apportioned among some 3,000 available customers.

24. On learning that the Federal Trade Commission was examining into the question of advertising allowances, the management of respondent notified its supervisors that they should avoid discriminatory allowances of the character made to Benner Tea Company, and respondent's Vice President has stated during his testimony that steps have been taken to prevent recurrence of such allowances. Although warnings of that character were previously made, they were not effective to prevent the payment charged as a violation from taking place in connection with the sale of Puss 'N Boots cat food.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over respondent, The Quaker Oats Company, and its sales activities are in commerce, as that term is defined in the applicable statutes.

2. This proceeding is in the public interest (see *Webb Cranford Company v. F.T.C.*, 109 F. 2d 268, CA 5, 1940 [3 S. & D. 184], *NuArc Company, Inc.*, Docket No. 7848, Opinion denying Interlocutory Appeal, 57 F.T.C. 1540).

3. Respondent is responsible for the acts of the sales manager of the Coast Fisheries Division, Glen Hesler, in making the payment to Benner Tea Company for participation in the 1959 Foodarama which it knew involved advertising by Benner of respondent's products.

4. The responsibility arises from two circumstances: a) payment of such an allowance was within the apparent authority of Glen Hesler who had been granted a "too independent" status; b) there was no attempt to repudiate the payment or to require its return.

5. Benner Tea Company is in substantial competition with other companies to whom such payments were not made available on proportionally equal terms.

6. The payment of \$250 was substantial in the light of the total appropriation for advertising and the number of customers and was made with the expectation services in the form of advertising in the Foodarama Tabloid would result.

7. The doctrines of *de minimis* and abandonment have no application to this case.

8. The fact that there was only one violation of Section 2(d) of the Clayton Act does not prevent the Commission from taking remedial

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action. *Swanee Paper Company v. F.T.C.* (C.A. 2d, June 22, 1961) F.T.C. Docket 6927 [291 F. 2d 833; 7 S. & D. 175].

9. Under the circumstances disclosed the payment to Benner Tea Company for participation in the 1959 Foodarama constituted a violation of Section 2(d) of the Clayton Act as amended by the Robinson-Patman Act.

10. The internal organization of Quaker Oats Company and the difference in the extent and character of supervision over the activities of the cat food division (Coast Fisheries Division) when compared with the Grocery Products Division, for example, creates a much greater likelihood of violations occurring in the Coast Fisheries Division which sells only cat food than in other divisions which are either much more closely supervised and controlled or in a different kind of business.

11. The uncontradicted testimony that the Grocery Products Division, prior to knowledge of an investigation by the Federal Trade Commission, refused to participate in the Foodarama further exemplifies the circumstances which require the limitation of any order to be issued to the particular practice found to violate the statute (*Swanee Paper Corporation v. F.T.C.*, *supra*; *F.T.C. v. Mandel Brothers Inc.*, 359 U.S. 385 [6 S. & D. 557] (1959). *F.T.C. v. National Lead Co.*, 352 U.S. 419 [6 S. & D. 193] (1957)) and to the product in which such violation is likely to occur.

12. The uncontradicted testimony of the Vice President in charge of sales demonstrated that an effort has already been made to prevent recurrence of such a violation. The fact, however, that warnings of that character were theretofore ineffective demonstrates the necessity of issuance of an order to cease and desist.

ORDER

It is ordered, That respondent The Quaker Oats Company, a corporation, and its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of cat food and related products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customers of respondent as compensation for or in consideration of any services or facilities furnished by or through such customers in connection with the handling, offering for sale, sale or distribution of said products, by way of subscription or contribution to a special promotion, event, anniversary or like merchandise plan unless such payment or consideration is affirmatively made avail-

able on proportionally equal terms to all other customers competing in the distribution of such products.

OPINION OF THE COMMISSION

By KERN, *Commissioner*:

Respondent and counsel supporting the complaint have filed cross-appeals from the hearing examiner's initial decision holding that respondent violated Section 2(d) of the amended Clayton Act and ordering it to cease and desist the practice so found. Respondent argues that the complaint should be dismissed because of the circumstances surrounding the particular payment found to violate the Act. It claims, among other things, that the payment involved was an aberration of an established course of conduct, that precautions have been taken to prevent recurrence and that the matter is *de minimis*. Counsel supporting the complaint appeals from the order in the initial decision contending that as limited to "cat food and related products" and to "a special promotion, event, anniversary or like merchandise plan", it is too narrow in scope.

We have carefully considered the grounds of both appeals and have concluded that the initial decision adequately and properly disposes of all issues except that as to the scope of the order.

The Commission's view on the framing of Section 2(d) orders in light of the amendments to Section 11 of the Clayton Act (Public Law 86-107, 86th Cong., 73 Stat. 243), and recent court decisions involving this question is set forth in detail in our opinion in *Vanity Fair Paper Mills, Inc.*, Docket No. 7720,¹ [60 F.T.C. 568, 573].

The order in the initial decision in this case prohibits "in or in connection with the offering for sale, sale or distribution of cat food and related products", in commerce, the following:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customers of respondent as compensation for or in consideration of any services or facilities furnished by or through such customers in connection with the handling, offering for sale, sale or distribution of said products, by way of subscription or contribution to a special promotion, event, anniversary or like merchandise plan unless such payment or consideration is affirmatively made available on proportionally equal terms to all other customers competing in the distribution of such products.

We believe that the limitation in this order to "cat food and related products" is fully justified. The Quaker Oats Company conducts

¹ Reference is made to *Federal Trade Commission v. Henry Broch & Company*, 82 S. Ct. 431 (1962); *Swanee Paper Corporation v. Federal Trade Commission*, 291 F. 2d 833 (2d Cir. 1961); *The Grand Union Company v. Federal Trade Commission*, 300 F. 2d 92 (2d Cir. 1962); *American News Company and Union News Company v. Federal Trade Commission*, 300 F. 2d 104 (2d Cir. 1962).

the grocery trade portion of its business through two divisions: the Coast Fisheries Division and the Grocery Products Division. The Coast Fisheries Division produces and markets Puss 'N Boots Cat Food only. The Grocery Products Division markets a number of packaged products but it does not sell Puss 'N Boots cat food. There are many differences in the distribution systems between the two divisions. The violation found consisted of a \$250.00 payment by the Coast Fisheries Division to the Benner Tea Company. In the particular circumstances of this case, we see no reason for extending the scope of the order to products other than those marketed by the Coast Fisheries Division, i.e. cat food, and to products related to cat food. Cf. *The Bankers Securities Corporation v. Federal Trade Commission*, 297 F. 2d 403, 30 LW 2294 [7 S. & D. 300] (3d Cir. 1961).

We do not agree that the order should be further limited in this matter to a subscription or contribution to a "special promotion, event, anniversary or like merchandise plan".

During 1959, the cooperative advertising or cooperative sales promotions participated in by the respondent in promoting the sale of Puss 'N Boots cat food in the area in which Benner Tea Company did business were as follows:

1. Cooperative Merchandising and Advertising Agreement of the Coast Fisheries Division,
2. Special Merchandising Offer No. A 204, and
3. "Foodarama".

The first promotion provided for a money allowance of so much per case purchased for advertising through newspapers, radio, television and window posters. The second provided for so much per case "specially merchandised", for advertising through store displays, newspapers, handbills, radio, television catalogs and by other means. The third promotion was the allowance of \$250.00 paid to Benner Tea Company for services and facilities furnished in connection with the "Foodarama" promotion. The hearing examiner found that Puss 'N Boots promotional allowances amounted to about 10% of the one million dollars expended on cooperative advertising by respondent or roughly \$100,000 to be apportioned among some 3,000 available customers.

There has been no showing of any meaningful distinction between a special promotion and a regular promotion so far as the probability of a future violation is concerned. The customer in the case of the violation shown requested the allowance for a particular promotional event. Thus, the type of violation related to a customer's request rather than respondent's policy. If a deviation or "aberration" from

general policy could occur in such a case, it seems likely that it could also occur upon another request in the future for allowances of a more regular nature.

The asserted "aberration" from general policy occurred within the above-described background of participation in cooperative sales promotions. To confine the order to the precise act found to violate the law would be almost wholly ineffective here, and especially so since respondent concedes the act occurred outside the area of its regular programs for cooperative advertising. It seems to us that it is in connection with, but as deviations from, the regular programs that future violations, if any, will most likely take place. For that reason, we believe the order should encompass more than the exact form of the illegal act found to exist. It would indeed be a mockery to consider the public interest adequately protected by saying "stop violating Section 2(d) of the Clayton Act, as amended, but only stop with respect to special promotions—not regular promotions." Moreover, it seems clear to us that the specific requirements of the *Broch* case have been met; clearly only those acts "like or related to" the violation found have been proscribed. To argue that a general promotion has no such kinship with a special promotion is taking an unusually technical position and is doing so at the expense of the public interest. To the extent that the hearing examiner's statement in paragraph 11 of the conclusions in the initial decision may be inconsistent with the view here taken, it does not express the position of the Commission.

Though some may argue to the contrary, we do not view the narrow language of the *Broch* decision as justification for couching orders, either in broad or detailed language, which endeavor to define what respondents may do or must do in order to comply with the statute. We believe our present compliance procedures to be adequate. We recognize an obligation to tell the respondents, with as much specificity as possible, what they must *stop* doing. However, to suggest that a cease and desist order is an appropriate vehicle to gratuitously guide or instruct businessmen as to what they may do and must do, we firmly believe is beyond our province. Government regulation has not yet, and we hope never will, become a substitute for corporate management. American business, so we believe, should, by and large, be left free to adopt its own methods of operation. The free enterprise system should remain, in fact, free and independent; shackled not by a bumptious bureaucracy—but restrained solely and effectively by fair enforcement of the laws enacted by the Congress. We do not regard the *Broch* case, or any prior decision of the highest court, as a command to take over, even in part, corporate direction and control. Suggest-

tions of this character, we believe, only serve to debase the Administrative Process.

Argument has been advanced by respondent's counsel that the respondent should not be subjected to an order not only because of the isolated nature of the illegal transaction, but also because the sales manager of the West Coast Fisheries Division had not in the past been closely supervised and that the illegal act arose from a request by a close personal friend of such sales manager. We are not impressed by these contentions. Indeed, it is the first time that business laxity has been seriously advanced as a basis for dismissal. It is impossible to condone the illegal act of a responsible official of respondent because of the fact that he was poorly supervised and because he was importuned to commit such act by a friend. With respect to the isolated character of the transaction, we do not see why numerous illegal transactions must occur before a statute as explicit in its terms as Section 2(d) of the Clayton Act, as amended, may be violated. Indeed, such an argument does violence to the fundamental doctrine that the Clayton Act was designed to reach certain specified improper business practices in their incipiency.

As we said in the *Gimbel's* case, "respondents record of compliance is not so stainless as to force the conclusion that public protection does not require a cease and desist order."² Respondent has violated in the past another section of the Clayton Act equally as explicit as Section 2(d). Our action here appears warranted by the fact that the Commission has previously found it necessary to issue a cease and desist order against this same respondent for violation of Section 2(c) of the Clayton Act, as amended.³ Respondent's previous callous disregard of its obligations under the Clayton Act must be considered in connection with its present pious protestations.

We conclude that in the order in the initial decision the phrase "by way of subscription or contribution to a special promotion, event, anniversary or like merchandise plan" should be stricken and that the phrase "advertising, promotion or display" should be inserted immediately prior to the words "services or facilities." Thus, the order will apply only as to certain services and facilities, but it is suited to the facts of this proceeding. We find no need in the circumstances of this case to extend the order further. There is no reason to believe, as in *Vanity Fair Paper Mills, Inc., supra*, in which a broader order

² *In the Matter of Gimbel Brothers*, F.T.C. Docket 7888, decided February 23, 1962.

³ *Modern Marketing Service, Inc., et al. v. Federal Trade Commission*, 149 F. 2d 970 [4 S. & D. 379] (C.A. 7) 1945; 37 F.T.C. 386; F.T.C. Docket 3783, decided September 8, 1943.

issued, that future activities might concern other than advertising, promotional or display services or facilities.

The order will be modified in another connection by substituting the word "customer" for "customers" in the second line following the colon therein.

The appeal of respondent is denied and the appeal of counsel supporting the complaint is granted to the extent indicated in this opinion and otherwise denied. It is directed that the initial decision be modified in accordance with the views expressed in this opinion, and that it be adopted, as so modified, as the decision of the Commission. It is further directed that an appropriate order be entered.

Commissioners Anderson and Elman dissented.

DISSENTING OPINION

By ANDERSON, *Commissioner*:

I am unable to subscribe to the views of the majority in this case and I dissent therefrom for the following reasons:

1. The payment by respondent to the Benner Tea Company in connection with the latter's anniversary "Foodarama" program in 1959 in the amount of \$250 is of *de minimis* proportions.

2. The amount above referred to, namely \$250, was paid out of a special fund for pet shows.

3. The Benner Tea "solicitor" contacted the Grocery Products Division of respondent and sought funds for the same anniversary. His solicitation was rejected, and he was advised that it was against the policy of the company to accede to requests such as the one that he was making.

4. Respondent's lawyers did not know about the \$250 payment until the Federal Trade Commission inquiries concerning same brought it to light. In fact, the respondent's company rule in connection with promotional payments was that such payments must first be approved by the legal department.

5. Record evidence shows that the company official—one Glenn Hesler—who was in charge of the sales activities of the Fisheries Division of the respondent, was a highly individualistic person and that his division was operated in an autonomous manner; that after Mr. Hesler's retirement from the company, changes were made so that less autonomy was permitted the Coast Fisheries Division.

6. The single instance of making a \$250 payment promotional allowance to Benner Tea in this matter, under the circumstances, does not show a proclivity to violate the law.

The circumstances of this case compel me to dissent from the opinion of the majority. I would dismiss the complaint.

DISSENTING OPINION

By ELMAN, *Commissioner*:

I

Respondent has regular programs for cooperative advertising on which it expends about \$1,000,000 each year. The company's general policy is to comply with Section 2(d) by not making discriminatory allowances to any customers, and, so far as appears, it has never departed from that policy in connection with its regular programs for cooperative advertising. However, in 1959, at the insistent request of one customer, Benner Tea Company, it made a special payment of \$250 to the latter in connection with a "Foodarama" promotion. This special promotional allowance, as the opinion states (p. 809), "occurred outside the area of its regular programs for cooperative advertising" and was a "deviation" or "aberration" from respondent's general policy.

Since the only violation found consists of a solitary deviation from an otherwise unmarred record of complying with Section 2(d), I would suppose that the order should be aimed only at preventing similar deviations in the future. What interest of the public will be served by placing respondent under a general prohibitory order covering its regular programs for cooperative advertising, as to which it has always obeyed the law? If the order were tailored to the violation found here, it would be designed to make certain for the future that, as to those special and unusual promotional events where a particular large customer may again bring heavy pressure to bear upon it, respondent will staunchly and unswervingly adhere to its general policy against making discriminatory allowances.

As indicated in my dissenting opinion in *Vanity Fair Paper Mills, Inc.* (Docket 7720, decided March 21, 1962) [60 F.T.C. 568, 579], I believe that a Commission order should accentuate the positive, not the negative, side of compliance. The order should inform and direct the respondent not only as to what he may not do, but as to what he may and must do in order to carry on his business without again running afoul of the statute. It cannot be emphasized too often that the function of a cease and desist order is not to punish but to prevent violations of law. The Federal Trade Commission was not established as a police court, to impose fines on errant businessmen. The public interest expressed in the Act is not served simply by collecting fines and

penalties. The Federal Trade Commission Act is not a revenue-raising or penal measure. The Commission's primary and paramount objective must be to guide and encourage businessmen to conduct their affairs both competitively and fairly, without resort to practices that are restrictive, fraudulent, or otherwise harmful to the public.

The violation here, if such it is, derives essentially from inadequate control and supervision by respondent over the making of promotional allowances to customers. Assuming—as the Commission does—that respondent's general policy in regard to cooperative advertising and promotional payments to customers is lawful, any Section 2(d) problem lies in its day-to-day application. An effective order would therefore require respondent to establish and follow affirmative procedures to assure that no similar “deviation or aberration” will again occur. Under such an order it would be respondent's duty to develop and put into effect a program for compliance which would include such specific and detailed steps as, for example, establishing standing operating procedures for advertising, promotional, and other payments and services to customers; making regular announcements to the trade of its strict nondiscriminatory policy regarding such payments and services; devising means for informing, and periodically reminding, the company's responsible officials of such policy and of the specific requirements of applicable provisions of law; providing for systematic high-level review and control of all promotional and advertising activities; and prescribing sanctions to be imposed on employees who fail to abide by the company's established policy and procedures. Continuing conscientious and good faith adherence to such a program would assure both the public and the company that “deviations or aberrations” from its general policy of conforming to Section 2(d) would not again take place.

It may be objected that the drafting of such particularized orders would impose an impossible burden on the Commission. Once a violation is found, however, there is no reason why the respondent should not be directed to come forward with a proposed order containing a plan for compliance, setting forth what it will be required to do, and refrain from doing, to bring about conditions of full conformity with the law. Commission counsel should, of course, prepare and submit comments or objections and, if need be, counter proposals. The end result would be a Commission order that, in form and substance, defines a specific and positive program for compliance, and is not a mere reiteration of broad and indefinite statutory prohibitions.

The issuance of Commission orders phrased in general and indefinite statutory language seems to me to achieve little beyond the imposition of a set of obscure ad hoc prohibitions carrying heavy penalties for their violation. To be sure, no fine or penalty is imposed for a violation of the statute that occurs before entry of an order. To that extent, a respondent is given—to use the vernacular—one free bite at the apple. In the end, however, he may have to pay dearly for that bite. The broad order, incorporating in *haec verba* the general prohibitions of the law, becomes for him the practical equivalent of a criminal statute—for violation of which he may be punished for contempt, or be required to pay civil penalties up to \$5,000 for each day of violation.

As Mr. Justice Jackson pointed out in a notable opinion, *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 480, 484, 486–487, 489 (dissent), the Clayton Act:

exemplifies the complexity of the modern lawmaking task and a common technique for regulatory legislation. It is typical of instances where the Congress cannot itself make every choice between possible lines of policy. It must legislate in generalities and delegate the final detailed choices to some authority with considerable latitude to conform its orders to administrative as well as legislative policies.

* * * * *

Such legislation represents inchoate law in the sense that it does not lay down rules which call for immediate compliance on pain of punishment by judicial process. The intervention of another authority must mature and perfect an effective rule of conduct before one is subject to coercion. The statute, in order to rule any individual case, requires an additional exercise of discretion and that last touch of selection which neither the primary legislator nor the reviewing court can supply. The only reason for the intervention of an administrative body is to exercise a grant of unexpended legislative power to weigh what the legislature wants weighed, to reduce conflicting abstract policies to a concrete net remainder of duty or right. Then, and then only, do we have a completed expression of the legislative will, in an administrative order which we may call a sort of secondary legislation, ready to be enforced by the courts.

* * * * *

... If the tribunal to which such discretion is delegated does nothing but promulgate as its own decision the generalities of its statutory charter, the rationale for placing it beyond executive control is gone.

“Admitting,” Mr. Justice Jackson stated, “that the statute is ‘vague and general in its wording,’ it does not follow that a cease and desist order implementing it should be. I think such an outcome of administrative proceedings is not acceptable.” (p. 481) I too believe that the only acceptable outcome of a Commission proceeding is

an order that gives clear, specific, positive, and concrete guidance and direction to those bound by it.¹

On December 2, 1913, President Wilson, in asking Congress to "supplement that great act [the Sherman law] by legislation which will not only clarify it but also facilitate its administration and make it fairer to all concerned," stated:

It is of capital importance that the businessmen of this country should be relieved of all uncertainties of law with regard to their enterprises and investments and a clear path indicated which they can travel without anxiety. It is as important that they should be relieved of embarrassment and set free to prosper as that private monopoly should be destroyed. The ways of action should be thrown wide open. (Messages and Papers of the Presidents, Vol. XVI, Bureau of National Literature, Inc., p. 7910.)

Again, on January 20, 1914, in urging establishment of an interstate trade commission, he told Congress:

The business of the country awaits also, has long awaited and has suffered because it could not obtain, further and more explicit legislative definition of the policy and meaning of the existing antitrust law. Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is . . .

* * * * *

And the businessmen of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission. (*Id.*, p. 7916.)

I would again suggest, therefore, that progress towards the goals stated by President Wilson might be made by abandoning the practice of issuing orders which simply incorporate broad, general statutory prohibitions in their terms. If, as in the case, a businessman has strayed, wittingly or unwittingly, from the path of legality, our order should be positively designed to help keep him on the path in the

¹ Concerning the need for specific explication and elaboration of general regulatory statutes by their enforcing agencies, Judge Friendly has recently said:

"My thesis is that where the initial standard is thus general, it is imperative that steps be taken over the years to define and clarify it—to canalize the broad stream into a number of narrower ones. I do not suggest this process can be so carried out that all cases can be determined by computers; I do suggest it ought to be carried to the point of affording a fair degree of predictability of decision in the great majority of cases and of intelligibility in all." Friendly, "The Federal Administrative Agencies: The Need for Better Definition of Standards," 75 *Harv. L. Rev.* 863, 874 (1962).

If "a fair degree of predictability" and at least "intelligibility" may fairly be asked of the administrative process in general, how much more crucial they become to a businessman required to conduct his operations subject to the restrictions of a Commission order. To suppose that an order framed in the ambiguous and indefinite language of the Robinson-Patman Act (with its complex of conditions, provisos, and defenses) is "intelligible" to the ordinary businessman, or that he can safely "predict" what it will or will not permit, is simply unrealistic.

future. It need not and should not be a sword of Damocles suspended above his head, poised to fall with devastating effect whenever and however he should again stray.

While the suggestions here advanced are far from revolutionary,² I recognize that they are in some respects experimental, and I do not even remotely imply that they are either definitive or infallible. But, especially in view of the Commission's current difficulties in writing orders acceptable to the courts,³ it seems to me that these proposals deserve at least serious consideration. Even if the kind of order I propose should prove unworkable, we might learn much in the process. Administrative regulation must, for the most part, be empiric and pragmatic, and we should not be afraid to experiment on a trial-and-error basis. Holmes has told us that "the tendency of the law must always be to narrow the field of uncertainty." *The Common Law*, p. 127 (1881), quoted in Friendly, *supra*, note 1, at p. 876. This aptly describes the duty of the Commission in drafting the orders. When we fail to heed this principle, we fail the Congress, which—as Mr. Justice Jackson pointed out—expected us to make concrete and definite what the legislators had deliberately and justifiably left general and indefinite;⁴ we fail the courts, which look to us for the exercise of "expertise" based on experience and preoccupation with the spe-

² Cf., e.g., *United States v. E. I. duPont de Nemours & Co.*, 366 U.S. 316, in which the submission by the parties of plans for relief in a case under Section 7 of the Clayton Act is discussed at length. I see nothing in the Robinson-Patman amendments to the Act to prevent the Commission from requiring similar submissions in appropriate cases.

³ See *Federal Trade Commission v. Henry Brock & Co.*, decided by the Supreme Court, January 15, 1962; *Swanee Paper Corp. v. Federal Trade Commission*, 291 F. 2d 833 (C.A. 2); *Grand Union Co. v. Federal Trade Commission*, C.A. 2, decided Feb. 7, 1962; *American News Co. v. Federal Trade Commission*, C.A. 2, decided Feb. 7, 1962; *Bankers Securities Corp. v. Federal Trade Commission*, C.A. 3, decided Dec. 18, 1961.

⁴ At the time of the debates on the bill that eventually became Pub. L. 86-107, 73 Stat. 243, amending the Clayton Act to bring its finality provisions in line with those of the Federal Trade Commission Act, the problem of vague and obscurely worded Commission orders was a matter of concern. Rep. Meader of Michigan pointed out that objection had been made to the broad, general language in which Commission orders have been written. "If the Federal Trade Commission made its cease and desist orders more specific, rather than just to prohibit some general line of conduct," he said, "I believe there probably would be less objection to making their orders final, giving rise to a clause of action with a penalty of \$5,000 a day." Rep. Celler of New York, the chairman of the House Judiciary Committee, responded as follows:

I want to make one other point, if I may, as to the so-called vagueness of the orders of the Federal Trade Commission. We purposely put in our report, I may say to the gentleman from Michigan, the following statement:

"The committee intends that the commissions or boards affected will make a continuous effort to issue orders that are as definite as possible."

In other words, the Judiciary Committee had in mind exactly what the gentleman has discussed. We want to have the orders made clear so that anyone may read them and understand them. It is hoped that as a result of the colloquies that we had during the hearings, and as a result of this admonition in the report, that the various commissions and boards shall in the future make clear and definite exactly what their orders are.

Excerpts from the remarks of Mr. Meader and Mr. Celler, Cong. Rec.—House, July 6, 1959, pp. 11597-99.

cialized problems of trade regulation; we fail the business community, which looks to the Commission's orders for positive guidance and direction, encouraging fair and competitive behavior rather than hampering business by creating uncertainty and doubt as to what may or may not be done, on pain of heavy penalty for guessing wrong; and, most important, we fail the public, which in the last analysis suffers most when the Commission's performance falls short of the statutory objectives.

II

If an order is to be issued in this case, then, it should be directed to correcting respondent's failure, in regard to special promotional payments, to comply undeviatingly with its own general policy against discriminating in making allowances to customers. But the Commission holds that it will not do to confine the prohibitions of the order to "deviations" or "aberrations" from respondent's general policy and practice, because "future violations, if any, will most likely take place" (opinion, p. 809) in connection with respondent's regular advertising programs. Hence, the Commission considers that the order must be broadly drawn to cover not merely payments made in connection with "a special promotion, event, anniversary, or like merchandise plan," as the hearing examiner proposed, but, more comprehensively, with "*any* advertising, promotion or display services or facilities furnished" by respondent's customers. (Final Order, p. 820; emphasis added.)

It is difficult to envision payments to retail customers for services or facilities which are not covered by so broad an order. Yet the order's sweeping prohibitions rest on this much and no more: Once, in the peculiar circumstances described below, respondent strayed from the path of legality by yielding to a particular customer's request for a small contribution to a special anniversary sales promotion which was clearly outside the range of respondent's customary advertising activity. An order limited to such special promotions, the Commission states, must be rejected because it would have no effect on the "regular programs for cooperative advertising" that comprise the great bulk of respondent's promotional activities and expenditures.

It seems to me that the Commission is allowing the tail to wag the dog. When, as in this case, the violation found is so eccentric and radical a departure from respondent's ordinary behavior that an order aimed only at preventing similar deviations in the future "would be almost wholly ineffective" (opinion, p. 809), then, instead

of extending the order to cover respondent's lawful general practice, the Commission should reconsider whether to enter an order at all. If the only order which can justifiably be entered on the record is an exceedingly narrow and limited order which would accomplish little or nothing, it does not follow that the Commission should therefore enter a broad order *not* justified by the record. There remains another alternative: to issue no order and dismiss the complaint.

The legality of an order cannot rest solely on its "effectiveness." Nor can the Commission enter an order merely on the basis of a possibility, or even likelihood, that future violations of law may occur. It must first find that a statute it administers has been violated. Then the Commission must relate its order to its findings, by proscribing only "future violations identical with or like or related to" the violation found. *Federal Trade Commission v. Henry Broch & Co.*, decided by the Supreme Court, January 15, 1962 [368 U.S. 360; 7 S. & D. 305]. The Commission's authority to restrain unlawful practices found to have been committed "is not an authority to restrain generally all other unlawful practices which has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct." *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426, 433.

When the Commission finds that a respondent has falsely advertised its product in a particular way—*e.g.*, as to foreign origin—it does not issue an order prohibiting all known forms of misrepresentation, or misrepresentation in general. It tailors the order to the particular type of misrepresentation found. So here, if only a specifically defined and narrowly restricted type of violation has occurred, no justification exists for an order that does more than prohibit respondent from committing that type of violation again. And if, as the Commission apparently recognizes, entry of an appropriately limited order would not be worth the time and effort expended, hindsight suggests that it might have been wiser not to initiate the proceeding. Why begin the game at all when it will not be worth the candle? (*Cf.* my dissent in *Gimbel Brothers*, Docket No. 7888, decided February 23, 1962 [60 F.T.C. 359].)

The Commission states that there "has been no showing of any meaningful distinction between a special promotion and a regular promotion so far as the probability of a future violation is concerned." (Opinion, p. 808.) Consider the facts. The hearing examiner found that respondent's Coast Fisheries Division has been

operated as a semiautonomous unit, employing different warehouses, different factories, and a different sales organization from the Grocery Products Division of the company. Neither the Coast Fisheries Division nor its sales manager has in the past been as closely supervised as the Grocery Products Division. The promotional payment here in question was authorized by the Coast Fisheries Division's sales manager in response to the request of a Benner vice-president who was a close personal friend. Payment was made out of a fund intended only for use in promoting Puss 'N Boots cat food in pet stores. The examiner found that when Benner made a similar request of a representative of the Grocery Products Division, the latter "turned him down cold" and "told him it was against company policy, and that we didn't have a budget set up for something like this." (Initial Decision, p. 804.) The amount actually paid here was \$250, a small sum compared with the \$100,000 allocated by respondent for Puss 'N Boots promotions. The examiner further found, on the basis of uncontradicted testimony of respondent's vice-president, that steps have been taken to prevent recurrence of such allowances as that made to Benner.

The peculiar combination of circumstances that produced this particular [incident] is not likely to be repeated, and it is hard to see how the entry of a cease-and-desist order could have any substantial effect in making any such [incidents] less likely in the future. The purpose of a cease-and-desist order is not to punish but to prevent future violations. If, as a practical matter, entry of an order will add little or nothing by way of prevention, how is the public benefitted? *Gimbel Brothers*, Docket No. 7888, February 23, 1962 (dissenting opinion, p. 10).⁵

When respondent had explained the circumstances of the transaction here involved, and had taken reasonable and adequate steps to assure that the same sort of thing would not happen again, the file in this matter should have been closed so that the time and energy of the Commission's staff could have been devoted to the great volume of pressing

⁵ *Modern Marketing Service, Inc.*, 37 F.T.C. 386, cited by the Commission, resulted in an order requiring respondent, among others, to cease and desist from paying certain brokerage commissions. It had nothing to do with advertising allowances. Moreover, the *Modern Marketing* case was decided in 1943, and respondent did not acquire its Coast Fisheries Division, which made the payment to Benner, until 1950. The Commission's opinion recognizes that the Coast Fisheries Division is a separate enterprise, so much so that the order is to run only against that division's product, cat food, and not against respondent's other products. I do not understand that respondent or anyone else has advanced "business laxity" as a basis for dismissal. The point, rather, is that the unlawful act here, if any, consisted of an isolated, extraordinary, and unlikely-to-recur incident. The reason urged for dismissal is not that this was excusable "business laxity," but that, in view of all the circumstances, including the corrective measures taken by respondent to prevent any repetition, no useful purpose is served by a formal proceeding here.

business at hand.⁶ At the least, the Commission should refrain from adding another broad order to the mountain of work laid at the door of staff members charged with securing compliance with Commission orders.⁷

FINAL ORDER

This matter having been heard by the Commission upon the cross-appeals of respondent and counsel in support of the complaint from the hearing examiner's initial decision, and upon the briefs and oral argument in support thereof and in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having denied the respondent's appeal and granted in part and denied in part the appeal of counsel supporting the complaint, and having directed that the initial decision be modified in accordance with its views expressed in the opinion and, as so modified, adopted as the decision of the Commission:

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

It is ordered, That respondent The Quaker Oats Company, a corporation, and its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of cat food and related products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation for or in consideration of any advertising, promotion or display services or facilities furnished by or through such customers in connection with

⁶ "Ordinarily the Commission should enter no order where none is necessary." *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F. 2d 321, 330 (C.A. 7) [4 S. & D. 117].

See also *Argus Cameras, Inc.*, 51 F.T.C. 405, 409, where the complaint was dismissed on a finding that "everything that could be accomplished by a cease and desist order has already been accomplished"; *Wildroot Co., Inc.*, 49 F.T.C. 1578, 1581-82. Compare *Modern Methods, Inc.*, Docket No. 756S, decided February 19, 1962, 60 F.T.C. 309.

⁷ Statistics demonstrate that the weight of the compliance burden is indeed heavy. At the close of fiscal 1959 the total number of compliance matters pending was 1,719. By the end of fiscal 1960 it was 1,871, and a year later it had reached 2,037. See the Commission's *Annual Report*, 1960, p. 77; *Annual Report*, 1961, p. 60. Since the number of compliance matters disposed of during a year averages approximately 1,300, there would seem to be enough business already on hand to keep the Commission's compliance staff occupied for more than a year-and-a-half without the addition of a single case to those pending.

This problem appears to be chronic. See, e.g., Staff Report to the Monopoly Subcommittee of the Committee on Small Business, House of Representatives, December 27, 1946, submitted by Representative Kefauver, chairman of the Subcommittee, stating that members of the Commission's staff "have such a large backlog of cases that they have to spend all their time 'swatting new flies' and do not have time to find out whether they have effectively disposed of the old ones." (p. 26)

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the handling, offering for sale, sale or distribution of said products, unless such payment or consideration is affirmatively made available on proportionally equal terms to all other customers competing in the distribution of such products.

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

It is further ordered, That respondent, The Quaker Oats Company, a corporation, 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 contained in the initial decision as modified.

Commissioners Anderson and Elman dissenting.

IN THE MATTER OF

PAUL J. LIGHTON ET AL. TRADING AS BERNARD'S

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

Docket 8305. Complaint, Mar. 6, 1961—Decision, Apr. 25, 1962

Order requiring furriers in Owensboro, Ky., to cease violating the Fur Products Labeling Act by such practices as setting forth required information on labels in pencil, failing to disclose in advertising that fur products offered for sale were composed of artificially colored fur, and failing to comply in other respects with labeling and advertising requirements.

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 Paul J. Lighton, Ruth G. Lighton and Jerome J. Lighton, individually and as copartners trading as Bernard's, hereinafter referred to as respondents, have violated the provisions of said Acts 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. Paul J. Lighton, Ruth G. Lighton and Jerome J. Lighton are individuals and copartners trading as Bernard's with

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their office and principal place of business located as 117 West Second Street, Owensboro, Ky.

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 sale, advertising, and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products; and have 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 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 with pencil in violation of Rule 29(b) of said rules and regulations.

(c) Required item numbers were not set forth on labels in violation of Rule 40 of said rules and regulations.

PAR. 4. 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. 5. Certain of said fur products were falsely and deceptively invoiced in that respondent set forth on invoices pertaining to fur products the name of an animal other than the name of the animal that produced the fur, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

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 Owensboro, Kentucky Ledger and Inquirer, a newspaper published in the city of Owensboro, State of Kentucky, 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, respondent 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) Failed to disclose that fur products contained or were composed of bleached, dyed or otherwise artificially colored fur when such was the fact in violation of Section 5(a)(3) of the Fur Products Labeling Act.

(c) Information required under Section 5(a) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder 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. Respondents in advertising fur products for sale as aforesaid 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. 9. 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. DeWitt T. Puckett for the Commission.

Wilson and Wilson, of Owensboro, Ky., by *Mr. William L. Wilson*, for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges the respondents with violation of the Fur Products Labeling Act and the Rules and Regula-

tions promulgated thereunder and the Federal Trade Commission Act, in connection with the sale of fur garments. After the filing of respondents' answer, a hearing was held at which a stipulation of facts was entered into by counsel on the record and certain evidence in support of the complaint was also received. Proposed findings, conclusions and order have been submitted by the parties and the case is now before the hearing examiner for final consideration. Any proposed findings, conclusions or order not included herein have been rejected.

2. The respondents Paul J. Lighton, Ruth G. Lighton and Jerome J. Lighton are individuals and copartners doing business under the trade name Bernard's, with their office and principal place of business located at 117 West Second Street, Owensboro, Ky.

3. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been engaged in the 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 sold, advertised, offered for sale, transported and distributed fur products which had 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.

4. Respondents did not place additional labels on their said fur products, neither did they remove or alter the labels which were attached to such products when received by respondents, but such labels remained on the garments while being offered for sale to the public. Nevertheless, certain of such fur products were not labeled in accordance with the Fur Products Labeling Act and 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. For example, the word "grey" appeared before the term "Persian Lamb".

(b) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth with pencil on some labels.

(c) Required item numbers were not set forth on labels attached to all of the products.

The violation set forth in "(a)" above is a violation of Section 4(2) of the Fur Products Labeling Act and Rule 29(a) promulgated thereunder.

The violation set forth in "(b)" above is a violation of Section 4(2) of said Act and Rule 29(b) promulgated thereunder.

The violation set forth in "(c)" above is a violation of Rule 40 promulgated under said Act.

5. Respondents set forth on a sales slip covering the sale of a fur garment the following information: "Dyed Mink, origin Japan", in addition to other information.

The aforesaid act violates Sections 5(b)(1) and 5(b)(2) of the Fur Products Labeling Act and also the Fur Products Name Guide, which provides that "Where there is a name of an animal with an adjective in connection therewith, it should be carried on labels, advertising and invoices as may be required under the Act and the Rules and Regulations promulgated thereunder."

6. Respondents, in the course and conduct of their business as aforesaid, caused the dissemination in commerce, as "commerce" is defined in the Fur Products Labeling Act, of certain newspaper advertisements concerning said products and which advertisements were intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products.

Among and included in the advertisements as aforesaid, but not limited thereto, were advertisements of respondents which appeared in issues of the Owensboro, Kentucky, Messenger and Inquirer, a newspaper published in the city of Owensboro, Kentucky, and having a wide circulation in that State and various other states of the United States.

In some of these newspaper advertisements respondents advertised certain of their fox fur products without designating the particular type or name of fox which actually produced the fur contained in the garment, as shown in a copy of the aforesaid Owensboro paper dated Friday, December 25, 1959.

The aforesaid practice violated Section 5(a)(1) of the Fur Products Labeling Act and the Fur Products Name Guide.

Respondents also advertised in the July 7, 1960, issue of the same Owensboro paper certain Mouton fur coats as follows: "Mouton Fur processed lamb, origin U.S.A. Coats \$50 plus federal tax", without disclosing that said coats were dyed or artificially treated, when such was the fact.

The aforesaid act violated Section 5(a)(3) of the Fur Products Labeling Act.

Information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder

was not set forth in type of equal size or conspicuousness and in close proximity with each other.

The aforesaid practice violates Section 5(a) of the Fur Products Labeling Act and Rule 38(a) promulgated thereunder.

7. Respondents in advertising fur products for sale as aforesaid, made claims and representations respecting the prices and values of such 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.

The aforesaid practice violated Rule 44(e) of the Rules and Regulations promulgated under the Fur Products Labeling Act.

8. In justice to respondents it should be added that it was evident from their statements and demeanor at the hearing that the violations set forth above were not willful or intentional, but were due largely to oversight or inadvertence. Respondents apparently desire to comply fully with all provisions of the Fur Products Labeling Act, and since the issuance of the complaint in the present proceeding they have sought to correct the violations complained of and to avoid any further violations.

CONCLUSION

The aforesaid acts and practices of respondents, as herein found, were in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act. The proceeding is in the public interest.

ORDER

It is ordered, That respondents Paul J. Lighton, Ruth G. Lighton and Jerome J. Lighton, individually and as copartners trading as Bernard's, 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 into commerce, or the sale, advertising, or offering for sale in commerce or the transportation or distribution in commerce of fur products, or in connection with the sale, advertising, offering for sale, transportation, or distribution of fur products which are 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:

1. Misbranding fur products by:

A. Setting forth on labels affixed to fur products information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder mingled with nonrequired information.

B. Setting forth on labels affixed to fur products the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, with pencil.

C. Failing to set forth the item number or mark assigned to a fur product.

2. Falsely or deceptively invoicing fur products by: A. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

B. Setting forth on invoices pertaining to fur products the name or names of any animal or animals other than the name or names provided for in Section 5(b)(1)(A) of the Fur Products Labeling Act.

3. 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:

A. Fails to disclose:

1. 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. That the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur, when such is the fact;

B. Fails to set forth the information required under Section 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.

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

OPINION OF THE COMMISSION

By DIXON, *Commissioner*:

This matter is before us for review of an initial decision filed February 16, 1962. The complaint, charging respondents with having committed several acts violative of the Fur Products Labeling Act and

the Rules and Regulations promulgated thereunder, was issued March 6, 1961. The respondents, all individuals, are copartners operating a retail clothing store in Owensboro, Kentucky. Among the items which they sell and advertise are "fur products", as that term is defined in the Fur Products Labeling Act.

Respondents, on May 5, 1961, filed an answer which denied all of the material allegations of the complaint. For reasons not readily apparent from the record, but apparently including the substitution of hearing examiners, the first and only hearing was not held until December 18, 1961. At the hearing, in lieu of calling witnesses and taking testimony, complaint counsel and counsel for respondents entered stipulations as to the facts. The transcript indicates that the stipulations were accomplished in a rather haphazard fashion. First one counsel and then the other would orally announce the facts agreed upon. With respect to one charge, the matter was discussed off the record, and the hearing examiner announced on the record the purport of the agreed facts. Two exhibits, newspaper advertisements placed by respondents, were placed in the record.

At the conclusion of the hearing, the hearing examiner ordered complaint counsel to file within thirty days his proposed findings, conclusions and order to cease and desist. After filing, this pleading was served on counsel for respondents and he filed a response thereto which, in effect, admitted the facts as set out in the proposed findings, but made several suggestions or recommendations concerning the wording of the order and requested the hearing examiner to insert in his initial decision a statement that the acts were not engaged in with intent to willfully violate the Act.

The hearing examiner's initial decision meticulously adheres to the proposals submitted by complaint counsel adding only the provision suggested by respondents' counsel that the acts were not engaged in willfully or intentionally. Neither party has taken an appeal from the initial decision. This opinion is the result of the Commission's routine practice of reviewing all initial decisions prior to adoption.

This case represents a startling example of why such a continuous policy of review is necessary, for there is scarcely a single charge herein which was properly dealt with or disposed of. We turn now to a consideration of the multiple errors committed.

Paragraph 3(a) of the complaint makes the following charge:

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.

The parties stipulated that nonrequired information was, in fact, mingled with required information and gave as an example that the word "grey" was placed before the term "Persian lamb". In spite of the fact that the complaint only charges a violation of Rule 29(a), the hearing examiner found that the stipulated facts prove a violation of the Rule as charged and of Section 4(2) of the Fur Products Labeling Act. We are unable to agree that Section 4(2) of the Fur Products Labeling Act is violated by this state of facts.

Section 4(2) provides that a fur product shall be considered to be misbranded unless the label affixed thereto clearly shows: (A) the name, as set forth in the Fur Products Name Guide of the animal that produced the fur; (B) that the fur was used when such is the fact; (C) that the fur was bleached, dyed or otherwise artificially colored when such is the fact; (D) that the fur is composed of paws, tails, bellies or waste fur when such is the fact; (E) the name or identification mark of one of the prior handlers of the product; and (F) the name of country of origin of any imported fur. Unfortunately, the initial decision does not disclose which of the six provisions of Section 4(2) are supposed to have been violated; however, it seems quite obvious that only (A) could be involved since the term "grey" was used in conjunction with the term "Persian lamb". But, Persian lamb is the correct name for a fur product,¹ and correctly describing it as grey does not alter that fact.

It may be that the theory behind the finding that the section has been violated is that the section defines the permissible limits of information which can be disclosed on the label, and the disclosure of any additional information violates the section. But by no stretch of the imagination can the wording of Section 4(2) be interpreted as requiring that *only* the information described in the Section is permitted on a label. This prohibition is contained in Rule 29. As a matter of fact, our promulgation of this Rule, which, among other things, permits the inclusion of information not specified in Section 4(2) of the Act, demonstrates the falsity of this premise. Thus, it is our view that Section 4(2) of the Fur Products Labeling Act was not violated by inclusion of the word "grey" before the words "Persian lamb" on the label, and the hearing examiner's holding to the contrary is in error.

We turn now to the hearing examiner's finding that the use of the term "grey" Persian lamb" on a label violates Rule 29(a). This

¹ Rule 8(a) of the Rules and Regulations provides:

"The term 'Persian Lamb' may be used to describe the skin of the young lamb of the Karakul breed of sheep or top-cross breed of such sheep, having hair formed in knuckled curls."

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Rule requires that all of the information which, pursuant to Section 4(2) of the Act, must be disclosed on the label, shall be" . . . set out on one side of the label and no other information shall appear on such side except the lot or style designation and size." The Rule also provides, "The lot or style designation may include non-deceptive terms indicating the type of garment, color of fur, and brand name for fur." Thus, it is proper to indicate the color of the fur on the same side of the label with the so-called "required information" when the color is included with the "lot or style designation". As a matter of fact, a color designation when so used becomes by operation of Rule 1 "required information".² Therefore, the hearing examiner's finding is apparently based upon the theory that when the color of a fur appears on the label in a position other than included with the lot or style designation, it becomes "non-required" information excluded by Rule 29(a). While this may be a reasonable interpretation of the Rule, it seems to us that information should not jump from the "required" to "non-required" classification with a change of its position on the label. Such an interpretation may well breed more uncertainty than it dispels. It is the Commission's view that labeling irregularities of this type can better be dealt with by the application of Rule 30 which sets out the sequence in which the required information must appear on the label.

Thus, while the facts here stipulated may constitute a violation of the strict language of Rule 29(a), the violation is too marginal and tenuous to justify an order to cease and desist and we will dismiss the charge.

We come now to paragraph 3(b) of the complaint, which reads as follows:

Information required under Section 4(2) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder was set forth with pencil in violation of Rule 29(b) of said rules and regulations.

The respondents stipulated to the truth of this charge, and the hearing examiner found the charge sustained and issued an order to cease and desist in the following terms:

Setting forth on labels affixed to fur products the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, with pencil.

² Rule 1(a)(5) reads as follows:

"The terms 'required information' and 'information required' mean the information required to be disclosed on labels, invoices and in advertising under the Act and Rules and Regulations, and such further information as may be permitted by the regulations, when and if used." (Emphasis supplied.)

One need have no special expertise to immediately discern the weakness in the quoted order. The order is merely a "road block to the narrow lane the transgressor has traveled".³ As the Supreme Court has pointed out, the Commission could not hope to attain the objectives which the Congress envisioned for it if it prohibited only the illegal practices in the precise form found to have existed in the past. Under the order proposed by complaint counsel and adopted by the hearing examiner, this respondent would be free to use crayons, washable ink or any number of unsatisfactory writing implements. The order is inadequate and must be stricken. An effective order, prohibiting all unsatisfactory alternatives and requiring the respondents to adhere to the medium prescribed by Rule 29(b), "indelible ink", will issue.

As with the previous violation, the hearing examiner found a violation not charged in the complaint. He concluded that not only had the Rules and Regulations been violated but also Section 4(2) of the Fur Products Labeling Act. It is our view that the record will not support a finding that this section of the Act has been violated. This section provides, *inter alia*, that a fur product shall be considered to be misbranded if the required information is not shown on the label ". . . in words and figures plainly legible—". There is no finding in this record that the penciled labels were not "plainly legible". Presumably a penciled notation can be as legible as a notation made with other mediums. The rule requiring the use of indelible ink on the label is not directed so much to the fact that this medium may produce a more legible label since the readability of the notation depends to a great extent upon the art of the person wielding the writing implement. The rule requiring indelible ink is predicated upon the fact that other writing media can be easily altered by conscious action or smudged or changed by inadvertent handling. The hearing examiner's finding that the penciled notation on the label violated Section 4(2) of the Fur Products Labeling Act is in error and must be reversed.

Paragraph 3(c) of the complaint charges that the respondents misbranded certain fur products by not setting forth on the label the item numbers required by Rule 40 of the Rules and Regulations. We find no fault with the disposition of this charge and the hearing examiner's finding, conclusion and order will be affirmed and adopted.

Paragraphs 4 and 5 of the complaint both charge false and deceptive invoicing. Paragraph 4 charges that fur products were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act,

³ *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) [5 S. & D. 388].

which provides, *inter alia*, that a fur product shall be considered to be falsely or deceptively invoiced if the invoice does not show:

(A) The name or names (as set forth in the Fur Products Name Guide) of the animal or animals that produced the fur,

Complaint paragraph 5 charges that respondents violated Section 5 (b) (2) of the Act which provides that a fur will be considered to be falsely or deceptively invoiced if the invoice contains the name of an animal other than the name specified in the above partially quoted Section 5(b) (1) (A).

The sum total of the evidence adduced in support of the charge is the stipulation which reads as follows:

Respondent set forth on Retail Slip No. 2067—47 dated 9-10-60 the following information: "Dyed mink, origin Japan," in addition to other information.

The hearing examiner relying upon this evidence found that the two sections of the Act had been violated. In addition, he found that the Fur Products Name Guide had been "violated" in that it requires: "Where there is a name of an animal with an adjective in connection therewith, it should be carried on labels, advertising and invoices as may be required under the act and the rules and regulations promulgated thereunder." Here again the examiner found a violation not charged in the complaint. The complaint's silence on this point is indicative of the Commission's belief that every possible failure to follow the Fur Products Name Guide is specifically dealt with by specific provisions of the Act or the Rules and Regulations. In other words, a failure to follow the Fur Products Labeling Guide is not in and of itself a violation. It is *malum prohibitum* solely because of the specific provisions of the Act and the Rules.

We turn now to a consideration of the merits of this charge; that is, does the evidence adduced support the violation found? It is our view that it does not. Examination of the Fur Products Name Guide reveals that dependent upon the genus-species of the animal that produced the fur, a mink product must be invoiced as either Mink, Japanese Mink, or China Mink. In order to show that a fur product was falsely invoiced, it is necessary to prove that a mink of one genus-species was referred to by the name of an animal belonging to another genus-species. In the instant case, the record must show that the fur product allegedly falsely invoiced was not "mink" as described, but was in fact Japanese Mink. The record does not establish this fact. Apparently complaint counsel and the hearing examiner assume that because the fur product originated in Japan, it must be composed of Japanese Mink. There is nothing in the record to give support to this

presumption, and it is certainly not the type of premise subject to official notice. Thus, since the record is entirely silent as to the true nature of the fur allegedly falsely invoiced, the hearing examiner's finding that respondents violated Sections 5(b)(1) and 5(b)(2) of the Fur Products Labeling Act is in error, and the charges must be dismissed.

We next consider the false advertising charges made in paragraphs 6 and 7 of the complaint. The first of these charges is that respondents placed a newspaper ad which was false and deceptive in that it:

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

In support of this charge, a copy of one of respondents' newspaper advertisements was received in evidence, and it was stipulated that:

Respondents advertised certain of their fox fur products without designating the particular type or name of fox which actually produced the fur involved in said garment

The hearing examiner found this evidence sufficient to establish the violation charged and ordered respondents to cease and desist therefrom.

A fur is correctly and properly advertised as simply "fox" if it was derived from any genus-species of the red fox, which include black fox, cross fox, red fox, platinum fox and silver fox. In order to prove the violation charged, it was necessary to show that the fox furs advertised were derived from animals of a genus-species other than red fox. There is nothing in this record to show the genus-species of the furs advertised and, therefore, the hearing examiner's finding of a violation was in error and must be reversed.

In paragraph 7(b) of the complaint, respondents are charged with failing to disclose in an advertisement the fact that the fur products offered contained or were composed of bleached, dyed or otherwise artificially colored fur in violation of Section 5(a)(3) of the Fur Products Labeling Act. We find no error with respect to the disposition of this charge. The evidence clearly reveals that the respondents advertised a dyed fur without disclosing the fact that its color had been altered. The hearing examiner's finding and order appropriately dispose of this charge and will be affirmed.

Complaint paragraph 7(c) charges the respondents violated Rule 38(a) of the Rules and Regulations in that information required under Section 5(a) of the Act was not all set forth in an advertisement in type of equal size and conspicuousness and in close proximity

with each other. The evidence on this point consists of an advertisement for "MOUTON FUR, Processed Lamb" coats in which the words "MOUTON FUR" are printed in type approximately three or four times larger than the type used to print the words "Processed Lamb". This is a violation of Rule 38(a) as charged since the term "mouton" is under Rule 9 a "permitted" term, and such "permitted" terms are by Rule 1(a) (5) considered to be "required information".

As pointed out above, the complaint charges that this state of fact violates only Rule 38(a). However, the hearing examiner concluded that the practice violated both said rule and Section 5(a) of the Fur Products Labeling Act. Section 5(a) deals only with the nature of the information which must be disclosed in an advertisement and does not to any extent deal with the form in which the information must be presented. Only Rule 38(a) deals with the form of the advertisement, and, therefore, only 38(a) has been violated. The examiner's finding that respondents' advertisement violated Section 5(a) in this respect is in error and must be reversed.

We come now to a consideration of the final charge in the complaint, which is contained in paragraph 8 thereof and reads as follows:

Respondents in advertising fur products for sale as aforesaid 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.

Rule 44(e) reads as follows:

Persons making pricing claims or representations of the types described in subsections (a), (b), (c) and (d) shall maintain full and adequate records disclosing the facts upon which such claims or representations are based.

Comparison of the rule with the complaint charge raises an immediate question concerning the sufficiency of the complaint for under the rule only such pricing claims or representations as are described in the four previous subsections of the rule must be supported by full and adequate records. The complaint charge would be satisfied by showing that respondent had made any claims or representations concerning the prices and values of its fur products.

While poorly drafted and probably inadequate in a court proceeding, the complaint is doubtless sufficient before this body since "Pleadings before the Commission are not required to meet the standards of pleadings in a court where issues are attempted to be framed with a measure of exactness which is designed to limit the broad sweep of investigation that characterizes the proceedings of administrative bodies..." (*A. E. Staley Mfg. Co., et al. v. Federal Trade Commission*,

135 F. 2d 453, 454, 7th Cir. 1943 [3 S. & D. 556]). The respondents here could not be unaware of the exact nature of the violation charged since a perusal of Rule 44(e) itself defines the limit of the obligatory recordkeeping. We turn now to a consideration of the evidence adduced and the hearing examiner's disposition of this charge.

The transcript indicates that complaint counsel and counsel for respondents discussed this charge off the record. The hearing examiner then dictated on the record the facts which had been agreed to. We here set out in full the pertinent remarks of the hearing examiner as they appear in the transcript:

In connection with Paragraph 8 of the complaint, there has been a conference between counsel on both sides and the Hearing Examiner regarding that portion of the complaint. It is the Examiner's understanding, and this is based upon the statement just made by Mr. Jerome Lighton off the record, that it is the Examiner's understanding [sic] that the only fault as he understood found by the Commission's investigator with the records kept by Respondent was that at that time Respondent listed fur coats separately, that is to say, coats composed entirely of fur, but insofar as fur-trimmed coats or coats which had fur collars were concerned, they were included under the general designation and in the column referring to coats generally. In other words, Respondent's records did not segregate coats which were fur trimmed and which had fur collars from coats which were not so made. In other words, did not distinguish between fur-trimmed and fur-collared coats from fabric coats.

And I further understand that insofar as the facts were concerned, assuming that the record should have shown that information, as a matter of fact they did not at that time show the information. In other words, they under the column "coats" included all coats including both those fur trimmed and fur collared.

At no place in the record are we enlightened as to what bearing or relevance the quoted stipulation has to the charge under consideration. We see no reason for presuming that a record listing both cloth and fur-trimmed coats does not constitute a "full and adequate" record from which the facts supporting a pricing representation can be determined.

The record is deficient in another respect for it does not show that the respondents ever made advertising claims or representations of the type described in subsections (a), (b), (c) and (d) of Rule 44(e). While the record does contain a newspaper advertisement of fur-trimmed coats offered at a "40% discount", there is nothing in the record to tie the coats offered in this advertisement to the records with which the quoted faulty stipulation was concerned. Further, the advertisement in question was apparently only introduced in support of the charge made in complaint Paragraph Seven (a) which was concerned with the alleged misuse of the term "fox". The hearing

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examiner stated on the record that it was his understanding "... that the only material part of that ad has to do with the word 'fox'..."

In disposing of this charge, the hearing examiner made the following finding:

Respondents in advertising fur products for sale as aforesaid, made claims and representations respecting the prices and values of such 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.

He then found that the practice described violated Rule 44(e). In addition to the fact that the record will not support the finding made by the hearing examiner, it is obvious that the finding will not support his conclusion that Rule 44(e) has been violated. No matter how lenient we may be with the pleading which initiated the proceedings, we will not, and indeed, may not, apply the same relaxed rules to the hearing examiner's findings. Thus, the failure to find that the respondents made pricing claims and representations of the types described in subsections (a), (b), (c) and (d) of Rule 44(e) is fatal, for without such a finding Rule 44(e) is not violated. For this reason and for the reason that the record does not contain evidence sufficient to prove a violation, the charge with respect to 44(e) must be dismissed.

In conclusion, we note that the hearing examiner, drawing upon evidence not of record, to-wit, the unsworn and unrecorded statements and the "demeanor" of the respondents, has "In justice to respondents ..." concluded that the violations practiced were not willful or intentional but were due to oversight or inadvertence. Since there is nothing in the record to support this finding by the hearing examiner and for the further reason that it deals with a subject completely irrelevant and immaterial to a proceeding of this type, the finding is in error and must be stricken. We note in passing that "justice to respondents" in particular and the public in general would have been better served in this matter by a closer adherence to basic legal principles on the part of all participants.

The initial decision is in error to such a substantial extent that it must be vacated in its entirety. In lieu thereof, we are issuing our own findings of fact, conclusions and order to cease and desist.

Commissioner Anderson concurred in the result and Commissioner Elman did not concur.

COMMISSIONER ELMAN, NOT CONCURRING

The Commission seems to me to have followed a rather curious procedure in this case.

By not filing a petition for review under Rule 4.20, respondents in effect acquiesced in the hearing examiner's initial decision and order. For all practical purposes, the matter came before the Commission in the same posture as if respondents had entered into a consent agreement. To be sure, the Commission may and does refuse to adopt an initial decision as its own where there appear to be substantial doubts as to its correctness. In such a case, despite the failure to appeal, the Commission *sua sponte* places the matter on its own docket for review, as provided in Rule 4.19. But in undertaking such review the Commission should at least hear the parties before venturing to make any radical changes in the initial decision and order.

In this case, however, without giving notice to counsel, without having the benefit of briefs or oral argument, and solely on the basis of its own independent examination of the record, the Commission concludes that the initial decision is so permeated with error that it must be vacated in its entirety and replaced with new findings of fact, conclusions, and order. I am not now prepared to say that the majority is either right or wrong in reaching this conclusion. It may well be that, after hearing what counsel might have to say, I would concur in the disposition of the case made by the Commission. At this stage, however, unaided by briefs or oral argument, I do not feel ready to agree that the initial decision—to which neither side has objected—is so egregiously wrong.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

This matter having been considered by the Commission and the Commission having determined, for the reasons stated in the accompanying opinion, that the initial decision should be vacated and set aside, now makes in lieu thereof these its Findings As To The Facts, Conclusions And Order.

FINDINGS AS TO THE FACTS

1. The respondents, Paul J. Lighton, Ruth G. Lighton and Jerome J. Lighton, are individuals and copartners doing business under the trade name Bernard's, with their office and principal place of business located at 117 West Second Street, Owensboro, Ky.

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

3. Certain of said fur products were not labeled in accordance with the Rules and Regulations promulgated under Section 8(b) of the Fur Products Labeling Act in that the information required to appear on the label pursuant to Section 4(2) of said Act was hand printed thereon with pencil. Rule 29(b) of said Rules and Regulations requires that such hand printed notations be made with indelible ink.

4. Certain of said fur products were not labeled in accordance with the Rules and Regulations promulgated under Section 8(b) of the Fur Products Labeling Act in that the labels did not contain the item numbers as required by Rule 40 of said Rules and Regulations.

5. Respondents, in the course and conduct of their business, caused the dissemination in commerce, as "commerce" is defined in the Fur Products Labeling Act, of certain newspaper advertisements concerning fur products and which advertisements were intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale, of such fur products.

Among and included in the advertisements as aforesaid, were advertisements of the respondents which appeared in issues of the *Messenger and Inquirer*, a newspaper published in the city of Owensboro, Kentucky, and having a wide circulation in that State and various other States of the United States.

In an advertisement placed by respondents in a July 7, 1960, issue of said newspaper, women's coats containing or composed of dyed Mouton Lamb fur were advertised or offered without disclosing the fact that said coats were dyed or artificially colored in violation of Section 5(a)(3) of the Fur Products Labeling Act.

In the aforesaid advertisement, information required by Section 5(a) of the Fur Products Labeling Act to appear therein was not set forth in type of equal size or conspicuousness in violation of Rule 38(a) of the Rules and Regulations promulgated under Section 8(b) of said Act.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.
2. This proceeding is in the public interest.
3. The aforesaid acts and practices of respondents, as herein found, were in violation of the Fur Products Labeling Act or the Rules and Regulations promulgated thereunder, and 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.

ORDER

It is ordered, That respondents Paul J. Lighton, Ruth G. Lighton and Jerome J. Lighton, individually and as copartners trading as Bernard's, 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 into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce of fur products, or in connection with the sale, advertising, offering for sale, transportation, or distribution of fur products which are 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:

1. Utilizing any medium other than indelible ink to hand print on labels affixed to fur products the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated pursuant to Section 8(b) of said Act.

2. Failing to set forth on labels affixed to fur products the item numbers or marks required by Rule 40 of the Rules and Regulations promulgated pursuant to Section 8 (b) of the Fur Products Labeling Act.

3. 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:

- (a) Fails to disclose that the fur product advertised or offered for sale contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

- (b) Fails to set forth the information required under Section 5(a) of the Fur Products Labeling Act, and the Rules and Regulations

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promulgated pursuant to Section 8(b) of said Act in type of equal size and conspicuousness and in close proximity with each other.

It is further ordered. That respondents shall, within sixty (60) days