

Complaint

61 F.T.C.

IN THE MATTER OF

EMILE BERNAT & SONS COMPANY ET AL.

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

Docket 8462. Complaint, Jan. 19, 1962—Decision, Sept. 13, 1962

Order dismissing, for failure of proof, complaint charging Jamaica Plain, Mass., manufacturers with violating the Wool Products Labeling Act by deceptively tagging or labeling skeins of knitting yarn with respect to the length of yarn therein.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Emile Bernat & Sons Company, a corporation, Eugene Bernat, William Bernat, and John O. Cohen, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under said Wool 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. Respondent Emile Bernat & Sons Company is a Massachusetts corporation, with its office and principal place of business at 117 Bickford Street, Jamaica Plain, Mass.

Respondents Eugene Bernat, William Bernat and John O. Cohen are officers of said corporation. They formulate, control and direct the policies, acts and practices of the corporation. Their business address is the same as that of the corporate respondent.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since September 1960, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, and offered for sale in commerce, as "commerce" is defined in said Act, wool products, as "wool products" are defined therein.

PAR. 3. Certain of the wool products were misbranded by respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively tagged, labeled or otherwise identified with respect to the length of yarn on skeins manufactured, packaged and sold by respondents.

Among and typical of such misbranded products, but not limited thereto, were skeins of knitting yarn labeled "approximately 150 yards", which in fact measured *less than approximately 125 yards*, and "approximately 275 yards", which, in fact, measured *less than approximately 243 yards*.

PAR. 4. In the course and conduct of their business, as aforesaid, respondents have been and are in substantial competition with corporations, firms and individuals, likewise engaged in the manufacture and sale of wool products, including knitting yarn, in commerce.

PAR. 5. The acts and practices of the respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Mr. Edward B. Finch supporting the complaint.

Mr. George H. Lewald, of *Ropes & Gray*, of Boston, Mass., for respondents.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

The complaint herein, issued January 19, 1962, alleges that respondents' acts and practices were and are in violation of the Wool Products Labeling Act of 1939, and the Rules and Regulations promulgated thereunder, and that they constituted and now constitute unfair and deceptive acts and practices as well as unfair methods of competition in commerce under the Federal Trade Commission Act.

The acts and practices in commerce complained of consist of alleged false labeling as to the length of certain wool products, i.e., skeins of wool.

Although not stated in the complaint, the facts developed at the hearing are that the same labeling specified the weight, the correctness of which has not been challenged.

There is no expressed provision in the Wool Products Labeling Act, or elsewhere, requiring labeling or marking as to length which would be applicable to the wool products in question in this case.

The only examples of misbranding cited in the complaint are two. One is a label on a skein of wool reading "approximately 150 yards", whereas the yarn allegedly measures "approximately 125 yards" and the proof at the hearing is something over 140 yards. The other is a label on a skein of wool reading "approximately 275 yards", whereas the yarn allegedly measures "approximately 243 yards" and the proof is something over 266 yards.

Respondents contend that the length stated on the two labels is indeed "approximately" correct, the difference in yardage, as proved at the hearings, being so small. A skein of wool may sell at retail for about 60 cents.

Respondents also contend that the ultimate purchasers are guided by weight, the correctness of the label of which is not an issue, and that the length is stated on the labels only for a secondary purpose involving no deception.

Both of these contentions are sustained in this decision.

The hearing herein was held in Washington, D.C., on April 30, 1962. Prior to this date, there was also a prehearing conference. All proposed findings and conclusions not adopted herein are rejected.

FINDINGS OF FACT AND CONCLUSIONS

1. Respondent Emile Bernat & Sons Company is and has been a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal place of business at 117 Bickford Street, Jamaica Plain, Massachusetts.

2. Individual respondents Eugene Bernat and William Bernat are officers of said corporation, the first being president and the latter being treasurer, with their business address the same as that of corporate respondent. They are the corporation's principals.

3. Individual respondent John O. Cohen was and is a member of the board of directors of said corporation. He was its comptroller up to and including January 26, 1962. He has owned no stock in the corporation for over five years.

3(a). Said individual respondents, except respondent John O. Cohen, have cooperated and now cooperate in formulating, directing and controlling the acts, policies, and practices of the corporate respondent, including the acts and practices hereinafter referred to. The word "respondents" as hereinafter used shall not be deemed to include respondent John O. Cohen.

4. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since September 1960, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce as "commerce" is defined in said Act, wool products as "wool products" are defined therein.

I

Length Stated Only as "Approximately"

5. Proof of alleged unfairness and deception was limited at the hearing to two skeins of wool of different types and the label on each.

6. Among said wool products referred to in paragraph 4 of these Findings, there is a package of hand knitting yarn labeled "Bernat Nylo Germantown." The label bears a legend, entirely in the same bold type, using capital letters: 2 OUNCES, APPROX. 150 YARDS.

6(a). In truth and in fact the yarn measures 140 yards, 33.5 inches. The complaint alleges a skein labeled "approximately 150 yards" but measuring less than "approximately 125 yards."—The stated weight of two ounces has not been questioned.

6(b). During the years referred to in the complaint, 1960–61, respondent corporation marketed 900,000 two-ounce packages of yarn with the brand name above referred to.

6(c). It may be, although it is not clear, that all of these packages have borne the same label with the same legend inasmuch as respondents' testimony is that the length stated on the label is approximated from the weight and thickness of the yarn. However, this does not necessarily mean that each skein of yarn would actually measure the same in length, since there might be allowable variations due to spinning or moisture factors (See Part II of these Findings, in which it is found that there are such allowable variations).

6(d). The retail price of this skein of wool is not shown in the record, although it is probably something like the 60 cent price shown for the other skein, which is considerably longer (See Finding 7(d)). Thus, a few yards variation is only a matter of pennies, if not of normal allowable variation (See Part II).

7. Among the said wool products referred to in Paragraph 4 of these Findings, there is also a package of hand knitting yarn labeled "Bernat Nylo Sports". The label bears the following legend, entirely in the same bold type using capital letters: 2 OUNCES, APPROX. 275 YDS.

7(a). In truth and in fact the yarn measures 266 yards, 4.5 inches. The complaint alleges a skein labeled "approximately 275 yards" but measuring less than "approximately 243 yards".—The stated weight of two ounces has not been questioned.

7(b). During the years referred to in the complaint, 1960–61, respondent corporation marketed 1,800,000 two-ounce packages of yarn with the foregoing brand name.

7(c). It may be that all of these packages have borne the same label and the same legend, but this is subject to the same qualifications and considerations stated in these Findings as to the other skein (See Finding 6(c)).

7(d). The retail price of this skein of wool is something like 60 cents a skein (Tr. page 94), so that alleged shortage in reference to the approximate yardage means here only a matter of pennies to the ultimate consumer, even assuming there is no allowable variation.

8. Accordingly, it is hereby found that when respondents labeled the one skein as approximately 275 yards, whereas it measures 266 yards, 4.5 inches, they were telling the truth, and the label was not false, misleading, deceptive, or otherwise unfair. It is significant that APPROX. and the stated yardage are both in the same bold type, which is also the type in which the weight is stated.

9. The same finding is made as to the skein labeled 150 yards, whereas it actually measures 140 yards, 33.5 inches, namely, that respondents were telling the truth and that the label is not misleading, deceptive or unfair.

10. In view of the conclusions reached in paragraphs 8 and 9, immediately preceding, the question of whether proof based on only two sales items out of 2,700,000 is nevertheless a fair sampling because the stated yardage was concededly estimated on all labels, is a question that need not be passed on here.

The above findings dispose of this case, but the conclusions reached are corroborated by the following further findings and conclusions herein:

II

Bought by Weight

11. With the exceptions of tapestry, mending or embroidery yarn, weight appears to be the sole basis on which the ultimate consumer determines how much yarn is needed to complete a particular garment (Tr. pages 87, 90).

12. With the foregoing exceptions, printed pattern instructions set forth the quantities of yarn needed to hand knit particular garments in terms of weight units (Tr. page 90; RX-6, 7).

13. Such pattern instructions stated in terms of weight are contained in instruction books distributed by respondents to reach ultimate consumers, who purchase them from retailers (Tr. pages 56-58; RX-6, 7). Ultimate consumers are guided, at least in the first instance, by such instruction books (Tr. page 90).

14. This emphasis on weight as the important consideration is rec-

ognized in the Trade Practice Rules of the Hand Knitting Industry. Again with the exception of tapestry, mending and embroidery yarns, which are expressly excepted and are sold by length units, the Rules (16 CFR 177.6) require the quantity of hand knitting yarn to be disclosed on the label only by weight.

15. The uncontradicted testimony is that the purpose of the approximate yardage figure is principally to enable the retailer to interchange one yarn with another—for instance, if he is out of the brand which the customer first purchased. The manufacturer determines the approximate yardage figure by the weight of the yarn in the package and the yarn's "count", or diameter (Tr. pages 89, 92, 93). Some manufacturers do not put the figure on the label but give the information to the retailer separately (Tr. page 87). Respondents themselves no longer use the yardage figure on the label (Tr. page 70), having discontinued this figure in January 1962 (Tr. page 70), about the time the complaint herein was issued.

III

Weight Itself Subject to Allowances

16. As already found herein, the approximate yardage figure is determined by respondents by the weight of the yarn in the package, and its count or diameter.

17. But the weight of the yarn required to be stated is itself subject to allowances, namely, for moisture. The Trade Practice Rules for the Hand Knitting Yarn Industry (16 CFR 177.6 (a)) provide that the weight shown on the label shall be "without inclusion of more than 10% moisture (such 10% moisture content being equivalent to 11.1% moisture regain)."

18. Moreover, apart from moisture and temperature, a 5% variation over or under a specified "count" is, according to the testimony (Tr. page 94), allowable under the standards of the American Society of Testing Materials, whose measuring methods were followed in this case by the Commission (Tr. page 29). The uncontradicted testimony is that unavoidable variation in spinning makes it impossible to maintain an exact and constant count throughout (Tr. page 92, 93). Moreover, count, like weight, is affected by moisture and temperature (Tr. page 95).

19. Accordingly, inasmuch as the stated yardage on the labels reflects weight and count, themselves both subject to allowances, there would seem to be no inherent unfair trade practices or methods of

competition in stating yardage in reasonably approximate, rather than absolute terms.

20. The variability as to weight and count also disposes of complaint counsel's contention that the stated yardage is almost invariably less than the actual yardage so as to thereby invite an inference of misrepresentation. The factual basis for this argument, namely that stated yardage is almost invariably less than actual, has not been proved by offering in evidence only two skeins of wool out of 2,700,000 or in any other way.

21. Accordingly, the conclusions reached in Part I of these Findings, Paragraphs 8 and 9, that the stated yardage on the labels is not false, misleading or deceptive, or otherwise unfair, are confirmed and hereby reiterated.

CONCLUSIONS OF LAW

1. The acts and practices of the respondents as proved at the hearing were not, and are not, in violation of the Wool Products Labeling Act of 1939, and the Rules and Regulations promulgated thereunder. Nor do they constitute unfair and deceptive acts and practices or unfair methods of competition in commerce within the meaning of the Federal Trade Commission Act.

2. There is no proof that respondent John O. Cohen cooperated, or is now cooperating, in formulating, directing or controlling the acts, policies and practices of the corporate respondent, including its acts and practices in connection with labeling.

MOTION

As part of this decision, respondents' motion to dismiss the complaint made at the end of complaint counsel's case and renewed at the conclusion of the case, is hereby granted.

ORDER

It is hereby ordered, That the complaint herein be and the same is hereby dismissed.

FINAL ORDER

This matter having come on to be considered by the Commission, subsequent to entry of its order of August 22, 1962, placing the case on its docket for review; and

The Commission having duly reviewed the entire record and being of the opinion that certain of the hearing examiner's findings of fact are not wholly supported by the evidence and that said findings should be modified; and

The Commission having determined that as so modified the initial decision will be appropriate in all respects to dispose of this proceeding:

It is ordered, That the initial decision be modified by striking therefrom the one-sentence paragraph on page 570 thereof, which reads, "Both of these contentions are sustained in this decision."

It is further ordered, That the initial decision be modified by striking therefrom findings numbered 8 and 9 on page 572 thereof and substituting therefor the following:

8. Under the circumstances, it is found that the proof fails to establish that the lengths stated as approximations on the two labels in evidence are false and deceptive.

It is further ordered, That the findings in the initial decision numbered 10 through 20 be renumbered 9 through 19, respectively.

It is further ordered, That the initial decision be modified by striking therefrom finding numbered 21 on page 574 thereof.

It is further ordered, That the initial decision be modified by striking therefrom paragraph numbered 1 of the Conclusions of Law on page 574 thereof and substituting therefor the following:

1. There has been a failure of proof that the alleged practices are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, or that said practices constitute unfair and deceptive practices or unfair methods of competition within the meaning of the Federal Trade Commission Act.

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

By the Commission, Commissioner Elman not participating.

IN THE MATTER OF

LARRY LIGHTNER, INC.