
IN THE MATTER OF
RIESER CO., INC., ET AL.

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

Docket 8471. Complaint, Mar. 6, 1962—Decision, Dec. 18, 1962

Order requiring New York City distributors to cease representing falsely that their bob-pins had been awarded a first prize, through use of the trade mark "First Prize Bob-Pins" superimposed on the picture of a blue prize ribbon appearing on the front of each card to which the bob-pins were attached; and to cease selling imported needles in small paper packets attached to display cards in such manner that the words "Made in West-Germany" appearing on the reverse side were not visible until the packets were torn off.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal

Trade Commission, having reason to believe that the Rieser Co., Inc.,* a corporation, and Norvin H. Rieser, Jr., and Eugene F. Rieser, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Rieser Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 110 East 129th Street in the city of New York, State of New York.

Respondents Norvin H. Rieser, Jr., and Eugene F. Rieser are individuals and are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of bob-pins, hair nets, hairpins, sewing needles, hair accessories, and other articles of merchandise to distributors and jobbers and to retailers for resale to the public.

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

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of certain of their bob-pins, respondents use the name or trademark "First Prize Bob-Pins". Said name or trademark is superimposed on the picture of a blue prize ribbon, which appears on the front of each card to which said bob-pins are attached.

PAR. 5. Through the use of the aforesaid name or trademark, respondents represent that their said bob-pins have won or have been awarded a first prize or other award for grade, quality or design.

PAR. 6. Said statement and representation is false, misleading and deceptive. In truth and in fact, said bob-pins have never won nor

*[The correct corporate name is The Rieser Co., Inc.]

have they been awarded a first prize or any other award for grade, quality or design.

PAR. 7. Respondents package certain of their sewing needles in small paper packets which are securely attached to display cards in such a manner that the words "Made in West-Germany", appearing on the reverse side of said packets, are not visible to the prospective purchaser until and unless said packets are torn off the display card.

PAR. 8. The aforesaid words, which set forth the country of origin of said needles, are concealed from the purchaser's view so as to be wholly inadequate to give the public notice of the country of origin of said product.

PAR. 9. In the absence of an adequate disclosure that a product, including sewing needles, is of foreign origin, the public believes and understands that it is of domestic origin.

As to the aforesaid articles of merchandise, a substantial portion of the purchasing public has a preference for said articles which are of domestic origin. Respondents' failure clearly and conspicuously to disclose the country of origin of said articles of merchandise is, therefore, to the prejudice of the purchasing public.

PAR. 10. By the aforesaid acts and practices, respondents place in the hands of retailers and others the means and instrumentalities by and through which they may mislead the public as to the country of origin of said product.

PAR. 11. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of bobbins, sewing needles, and other products of the same general kind and nature as those sold by respondents.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

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Mr. Terral A. Jordan and *Mr. Sheldon Feldman*, supporting the complaint.

Temko & Temko, of New York, N.Y., by *Mr. Richard S. Temko*, for respondents.

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER*

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint in this proceeding March 6, 1962, and it was duly served on all respondents. The complaint charges respondents with misrepresenting their bobbins as "First Prize" and with failing to disclose clearly that their sewing needles are made in West Germany. These practices are alleged to constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

After being served with the complaint, respondents appeared by counsel and filed answer denying generally any violation of law, but admitting specifically or in effect most of the factual allegations of the complaint, and also advancing certain "affirmative defenses."

Following negotiations between counsel and an informal conference with the hearing examiner, the parties entered into a stipulation of facts and agreement that obviated the necessity for hearings.

On motion of counsel supporting the complaint, the hearing examiner, by notice dated May 22, 1962, took official notice of the following facts:

1. When merchandise, including sewing needles, is offered for sale to the purchasing public and such merchandise is not marked or is not adequately marked showing that it is of foreign origin, such purchasing public understands and believes that such merchandise is of domestic origin.

2. A substantial portion of the purchasing public prefers merchandise, including sewing needles, that is manufactured in the United States over such merchandise that is manufactured in foreign countries.

Respondents were advised of their right to present evidence to the contrary. In the absence of any showing that respondents' products are "exceptional" or that "exceptional circumstances" exist in this matter, it appears appropriate to recognize the "general rule" enunciated by the Commission in *Manco Watch Strap Co., Inc.*, Docket

*The correct corporate name of respondent is *The Rieser Co., Inc.*

7785 [60 F.T.C. 495] (March 13, 1962), and to take official notice of the Commission's own records demonstrating the existence of (1) a belief or assumption by a substantial segment of the buying public that merchandise, not being clearly marked otherwise, was made in America; and (2) a general consumer preference for American-made merchandise.

Proposed findings of fact and conclusions of law and a proposed form of order, together with supporting briefs, were filed by counsel supporting the complaint and counsel for respondents. Proposed findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

After carefully reviewing the entire record in this proceeding, and the proposed findings, conclusion and order filed by the parties, together with the supporting briefs, the hearing examiner finds that this proceeding is in the interest of the public, makes the following findings of fact and conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

1. Respondent The Rieser Co., Inc., erroneously designated in the complaint in this proceeding as Rieser Co., Inc.,¹ is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 110 East 129th Street in the city of New York, State of New York.

Respondents Norvin H. Rieser, Jr., and Eugene F. Rieser are individuals and are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of bob-pins, hair nets, hairpins, sewing needles, hair accessories and other articles of merchandise to distributors and jobbers and to retailers for resale to the public.

3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their products, when sold, to be shipped from their place of business in the State of New

¹ Counsel supporting the complaint and counsel for respondents stipulated and agreed, in paragraph 1 of "Stipulation as to the Facts and Agreement" (CX 7) that the true and correct name of the corporate respondent is The Rieser Co., Inc., and not Rieser Co., Inc., as stated in the complaint, and that The Rieser Co., Inc., is one and the same party as Rieser Co., Inc., and may be so designated and substituted therefor in all further proceedings.

York to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in such products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of bob-pins, sewing needles and other products of the same general kind and nature as those sold by respondents.

5. In the course and conduct of their business, and for the purpose of inducing the sale of certain of their bob-pins, respondents use the name or trademark "First Prize Bob-Pins." This name or trademark is superimposed on the picture of a blue prize ribbon, which appears on the front of each card to which the bob-pins are attached.

6. Through the use of the name or trademark, "First Prize," respondents represent that their bob-pins have won or have been awarded a first prize or other award for grade, quality or design.

The validity of this finding constitutes the only area of real controversy in this proceeding.

Both sides are in agreement, however, that this question is one of fact for the determination, initially, of the hearing examiner and, ultimately, of the Commission, and that no sampling of public opinion is required. In any event, the case law so teaches, and the hearing examiner has made the finding on that basis.

Despite the agreement of counsel on this point, the stipulation and agreement states that six named consumer witnesses "would testify that the term 'First Prize Bob-Pins' as it appears on Commission Exhibits 1 and 2 and in the format and context thereof, means to them that said bob-pins have won or have been awarded a first prize or other award for grade, quality or design."

As thus reinforced by direct consumer testimony, the conclusion is inescapable that the challenged term has the meaning alleged. Neither the force of this testimony nor the hearing examiner's independent assessment of the term's meaning is weakened by the further stipulation that the individual respondents "would testify that the name or trade mark 'First Prize Bob-Pins' does not constitute a statement or representation to the effect that the merchandise in question has won or has been awarded a first prize or other award for grade, quality or design, and that said name or trade mark is merely laudatory in nature, and is a common designation used in connection with the sale of many articles of merchandise."

This self-serving opinion testimony by respondents flies in the face not only of reason and logic, but of the stipulated consumer testimony as well, and it must be rejected.

Respondents argue that if they "stated that the goods had won a first prize, such would be a representation, but merely using the term as a trademark is not such a representation." Merely to state such a proposition is to demonstrate its speciousness. It must be rejected as wholly untenable. The trademark makes the representation attributed to it.

Respondents further urge that they "used this designation, with innocent intent, as a trademark, and there is no evidence in the record of actual instances of deception or belief that it was a representation in connection with any sale of the merchandise."

As for "innocent intent," it is well established that wrongful intent is not a necessary element in such a case as this. On that point, however, it is pertinent to note that it is not difficult to choose from the vast lexicon of the English language a trade name that does not deceive or mislead. A claim of innocent intent ill comports with the use of a "First Prize" designation for merchandise that admittedly has never won any kind of prize.

Similarly, the attempted defense that the record contains no evidence of actual deception can be disposed of with brief comment. In the first place, as already noted, the record does contain such evidence. Even in the absence of such evidence, it is sufficient if the name has the capacity and tendency to deceive.

7. The representation inherent in the trademark or trade name "First Prize", as found in paragraph 6, is false, misleading and deceptive. In truth and in fact, respondents' bob-pins admittedly have never won nor have they been awarded a first prize or any other award for grade, quality or design.

8. There remains for consideration the question whether any remedy short of excision of the trademark would be adequate to cure its deceptive capacity. It is well settled that trademarks, even when registered, are not immune to challenge under the Federal Trade Commission Act. Here, there is no evidence or even any indication that the term is a registered trademark, and it appears doubtful that it would qualify for registration. But whether registered or not, its status as a trademark does not exempt it from excision if it has the capacity and tendency to deceive or mislead.

That it has such capacity and tendency is evident, and any modifying language would necessarily contradict rather than explain the inherent representation that the articles designated "First Prize" had won a prize. An order is required prohibiting use of the term.

This case is strikingly similar to *Newville, Inc.*, Docket 6405, 53 F.T.C. 436 (1956). There, hosiery was designated "Academy Award," although admittedly, it had not won any award. Use of the term was prohibited. A similar result must be reached here.

9. Although denying in their answer the allegations of paragraphs 7-10 of the complaint, relating to inadequate disclosure of the West German origin of their sewing needles, respondents, in their "First Affirmative Defense", implicitly qualified the denials by alleging that the packets involved had been relabeled so as to disclose to prospective purchasers the country of origin. Furthermore, Commission Exhibits 4, 5 and 6 demonstrate that, as alleged by the complaint, respondents package certain of their sewing needles in small paper packets which are securely attached to display cards in such a manner that the words "Made in West-Germany", appearing on the reverse side of the packets, are not visible to the prospective purchaser until and unless the packets are torn off the display card.

It was stipulated and agreed (CX 7) that the exhibits so arranged are "identical to and typical of" the products, packaging and advertising used by the respondents in the course and conduct of their business as alleged in the complaint.

10. Thus, the words setting forth the country of origin of the needles are concealed from the purchaser's view so as to be wholly inadequate to give notice of the country of origin of said product.

11. In the absence of an adequate disclosure that a product, including sewing needles, is of foreign origin, the public believes and understands that it is of domestic origin.

As to such articles of merchandise, a substantial portion of the purchasing public has a preference for articles which are of domestic origin. Respondents' failure clearly and conspicuously to disclose the country of origin of their articles of merchandise is, therefore, to the prejudice of the purchasing public.

This finding is predicated on official notice, as set forth in the Statement of Proceedings. Nothing to the contrary having been shown by respondents, these matters are found as facts. Respondents concurred in the proposed findings set forth in the first subparagraph of this paragraph, and objected to the second subparagraph only on the ground it was "superfluous" in view of their revised packaging practices.

Stating that the packaging complained of has "long since" been discontinued, respondents contend that the charge of failing to disclose foreign origin is "moot and serves no public interest."

This attempted defense suffers from two deficiencies. First, as pointed out by counsel supporting the complaint, the record is devoid of any *evidence* that the challenged practice has been discontinued. A mere statement of discontinuance of a challenged practice does not warrant dismissal of the charge.

Second, even accepting the respondents' proposed finding concerning this matter, the fact is that as recently as July 1961, they were still packaging sewing needles without adequately disclosing the foreign origin of the products. At the most, respondents claim only that the practice was discontinued before they filed answer to the complaint—that is, before April 1962.

Identifying marks on certain of the exhibits show that the investigation of this matter was under way at least by July 1961. Accordingly, if discontinuance did not take place until early 1962, it is apparent that the respondents continued the practice for some months after becoming aware of the Commission's "hand on their shoulders."

In this state of the record, and on the authority of *Art National Manufacturers Distributing Company, Inc.*, Docket 7286 (May 10, 1961), affirmed 298 F. 2d 476 [7 S. & D. 319] (2d Cir. 1962), the defense of discontinuance is found wanting. There are no unusual circumstances justifying dismissal here.

12. By the acts and practices described in paragraphs 9–11, respondents place in the hands of retailers and others the means and instrumentalities by and through which they may mislead the public as to the country of origin of their sewing needles.

This finding is an obvious corollary to the foregoing facts. Since respondents have failed to disclose adequately that their sewing needles are of foreign origin, and have thereby led the public to believe they are of domestic origin, this failure to make such a disclosure is to the prejudice of a substantial portion of the purchasing public which prefers such goods of domestic origin. It necessarily follows that respondent has, therefore, placed the means and instrumentalities of deception in the hands of retailers and others reselling their products.

13. The use by respondents of the false, misleading and deceptive statements, representations and practices described in these findings has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of such erroneous and mistaken belief. As a consequence, it may be inferred, trade has been or may be unfairly diverted to respondents

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from their competitors and substantial injury has been or may be done to competition in commerce.

This finding is based on the allegations of the complaint, the respondents' answer, the stipulated facts, exhibits and testimony, and the matters concerning which official notice has been taken.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.
2. The complaint herein states a cause of action, and this proceeding is in the public interest.
3. The acts and practices of respondents, as herein found, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents, The Rieser Co., Inc., a corporation (incorrectly designated in the complaint as Rieser Co., Inc.), and its officers, and Norvin H. Rieser, Jr., and Eugene F. Rieser, individually and as officers of such corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of bob-pins, sewing needles, hair nets, hairpins, hair accessories or any other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "First Prize", or any substantially similar phrase, as a name for or as descriptive of such products.
2. Representing, directly or indirectly, in any manner or by any means, that such products have won or have been awarded a prize for grade, quality or design.
3. Offering for sale, selling or distributing such products which are, in whole or in substantial part, of foreign origin, without clearly disclosing the country or place of origin of the product in a conspicuous place on the product, or on the package or container in cases where it is impossible or impracticable to make such disclosure on the product itself.²

² This section of the order was not proposed by counsel supporting the complaint, but appears necessary to cover not only the needles here in issue, but other products that may be subject to the order. The needles in evidence are not themselves marked to disclose their foreign origin, but the order proposed did not take this into account.

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4. Offering for sale, selling or distributing such products in packages or containers in such a manner that the name of the country or place of origin on the product is concealed without clearly disclosing the country or place of origin of the product in a conspicuous place on the package or container.

5. Offering for sale, selling or distributing such products mounted on or affixed to cards in such a manner as to conceal the name of the country or place of origin without disclosing on such cards the name of the country or place of origin.

6. Furnishing or otherwise placing in the hands of retailers or dealers in such products the means and instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things prohibited by this order.

FINAL ORDER*

The hearing examiner, on September 19, 1962, having filed an initial decision in this matter and the Commission, by its order of October 25, 1962, having placed this case on its docket for review; and

The Commission having duly considered the entire record and having determined that the findings of fact contained in said initial decision are fully supported and are appropriate in all respects but that the order to cease and desist should be modified to eliminate a prohibition with respect to a practice not charged in the complaint and that said order should be revised in form so as to more clearly delineate the practices proscribed:

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

It is ordered, That respondents, The Rieser Co., Inc., a corporation (incorrectly designated in the complaint as Rieser Co., Inc.), and its officers, and Norvin H. Rieser, Jr., and Eugene F. Rieser, individually and as officers of such corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of bob-pins, sewing needles, hair nets, hairpins, hair accessories or any other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "First Prize," or any substantially similar phrase, as a name for or as descriptive of such products.
2. Representing, directly or indirectly, in any manner or by

*The correct corporate name of respondent is *The Rieser Co., Inc.*

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any means, that such products have won or have been awarded a prize for grade, quality or design.

3. Offering for sale, selling, or distributing any such products packaged, or mounted in a container, or on a display card, without disclosing the country or place of foreign origin of the product, or substantial part thereof, on the front or face of such packaging, container, or display card, so positioned as to clearly have application to the product so packaged or mounted, and of such degree of permanency as to remain thereon until consummation of consumer sale of the product, and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making casual inspection of the product as so packaged or mounted.

4. Furnishing or otherwise placing in the hands of retailers or dealers in such products the means and instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things prohibited by this order.

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

It is further ordered, That respondents, The Rieser Co., Inc., Norvin H. Rieser, Jr., and Eugene F. Rieser 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

ROY WEIR ET AL. DOING BUSINESS AS VALLEY