

Complaint

IN THE MATTER OF

THE QUAKER OATS COMPANY

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

Docket 8160. Complaint, Nov. 4, 1960—Decision, Dec. 26, 1963

Order vacating initial decision and dismissing complaint charging a manufacturer of briquets produced basically from corncobs to be used for cooking, with representing falsely—through use of the word “charcoal” and “Real Hickory Flavor” to describe its product—that the briquets were made of wood.

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 Quaker Oats Company, a corporation, hereinafter referred to as respondent, has 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 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. Its office and principal place of business is located at Merchandise Mart Plaza, Chicago 54, Illinois.

PAR. 2. Respondent is now, and for some time last past has been, engaged in manufacturing, offering for sale, sale and distribution, among other products, of briquets produced basically from corncobs, to be used for cooking purposes.

Respondent causes said product to be transported from its place of business in the State of Illinois to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said product in commerce, as “commerce” is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of its business, respondent is in competition, in commerce, with corporations, firms and individuals engaged in the sale and distribution of briquets made from wood and other products.

PAR. 4. In the course and conduct of its business, and for the purpose of inducing the sale of its said product, the respondent has

described such product as "CHUCK WAGON CHARCOAL WHEELS", "CHUCK WAGON CHARCOAL BRIQUETS" and "CHUCK WAGON CHARCOAL BRIQUETS — real Hickory Flavor!"

PAR. 5. The public generally understands and believes that a product described as "charcoal" is made from wood and prefers such a product to be made of wood. The use of the word "charcoal" as descriptive of or in connection with its said product has the capacity and tendency to lead the public into the erroneous and mistaken belief that respondent's product is made from wood, and into the purchase of substantial quantities of its said product by reason of said erroneous and mistaken belief. Respondent by use of the phrase "Real Hickory Flavor!" enhances the erroneous and mistaken belief of the public that respondent's said product is produced from wood.

As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondent from its competitors and injury has thereby been, and is being, done to competition in commerce.

PAR. 6. The aforesaid acts and practices of respondent, as herein alleged, are all to the prejudice and injury of the public and of respondent's competitors and constituted, and new 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. William A. Somers for the Commission.

Chadwell, Keck, Kayser, Ruggles & McLaren, Chicago, Ill., by *Mr. Paul H. LaRue*; and

Mr. Jack T. Redwine, Chicago, Ill., for the respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The Commission's complaint in this matter charges the respondent, The Quaker Oats Company, with misrepresenting the composition of certain briquets manufactured and sold by it, in violation of the Federal Trade Commission Act. Hearings have been held at which a substantial volume of evidence both in support of and in opposition to the complaint was received. Proposed findings and conclusions have been submitted by counsel and the case argued orally before the hearing examiner. Any proposed findings or conclusions not included herein have been rejected as not material or as not warranted by the evidence.

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2. Respondent markets its briquets under the name "Chuck Wagon Charcoal Briquets". They were first placed on the market in 1957. They are produced principally from the residue of corncobs. The corncobs are first used for production of furfural (a chemical used in the plastics industry) and the residue of the corncobs is then used in manufacturing the briquets.

3. For some two years (1957 to mid-1959) the composition of the briquets was approximately 92 percent corncob residue, the remainder being starch and moisture. Since June 1959 respondent has been including in the briquets 10 percent, by weight, of raw (uncharred) hickory chips, which reduced the corncob residue proportion to approximately 82 percent. The hickory chips were added in order to impart an aroma or flavor to food cooked with the briquets.

4. The briquets are packaged in 10-pound paper bags and reach the consuming public through grocery stores, supermarkets, etc. They are manufactured at respondent's Memphis, Tennessee, plant and are sold and shipped to purchasers in some twenty-two states in the central and southern portions of the United States. On the bags the name "Chuck Wagon Charcoal Briquets" is featured, and since 1959 to words "Real Hickory Flavor" also.

5. In 1959 the briquets appear to have been advertised by respondent rather extensively in newspapers, but the record discloses no newspaper advertising since that year. Like the bags in which the briquets are packaged, the newspaper advertisements featured the name "Chuck Wagon Charcoal Briquets", and one of them (Comm. Ex. 4) added the words "With Hickory-Kissed Flavor."

6. The issue raised by the complaint is whether respondent's briquets, being made principally from nonwood material, may properly be referred to as charcoal. The complaint (Paragraph Five) alleges:

The public generally understands and believes that a product described as "charcoal" is made from wood and prefers such a product to be made of wood. The use of the word "charcoal" as descriptive of or in connection with its said product has the capacity and tendency to lead the public into the erroneous and mistaken belief that respondent's product is made from wood, and into the purchase of substantial quantities of its said product by reason of said erroneous and mistaken belief. Respondent by use of the phrase "Real Hickory Flavor!" enhances the erroneous and mistaken belief of the public that respondent's said product is produced from wood.

7. There is testimony from two expert witnesses in support of the complaint. The first was Mr. Edward Beglinger of Madison, Wisconsin, who for many years has been a chemist in the Division of Wood Chemistry of the Forest Products Laboratory. This is a part

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of the Forest Service of the United States Department of Agriculture. In Mr. Beglinger's opinion charcoal can be made only from wood, at least insofar as fuel purposes are concerned.

8. The second witness was Dr Victor R. Deitz of the National Bureau of Standards, Washington, D.C. Dr. Deitz is an expert in the field of physical chemistry. Dr. Deitz recognizes that fuel charcoal may be made from a number of materials in the mineral and vegetable fields. (Mineral: bituminous coal; peat; lignite, which is a low-grade coal; sludge from the petroleum industry. Vegetable: coconut and hard nut shells; sulphite waste from the paper industry; wood.) Wood, however, has always been the most common source material for fuel charcoal, and Dr. Deitz is of the opinion that from an historical viewpoint wood has the foremost claim to recognition as the prime source material for such charcoal. He further points out that one of the principal reasons why fuel charcoal has in the past usually been made from wood has been the abundance of wood as a source material—its easy availability. (Charcoal is also made from animal materials—bone and blood—but such charcoal ordinarily is not used for fuel.)

9. There is also testimony in support of the complaint from eight members of the public, four of whom reside in Chicago, Illinois, and four in Madison, Wisconsin. In substance the testimony of the witnesses is that they understand charcoal to be made from wood. As to any preference on their part for charcoal made from wood over charcoal made from other materials, the witnesses were evenly divided. Four expressed a preference for wood charcoal, while four said it would make little or no difference to them, provided the non-wood charcoal performed as satisfactorily.

10. Like the case in support of the complaint, respondent's case includes both expert testimony and testimony from members of the public.

Analyses made by a commercial testing laboratory in Chicago of respondent's briquets and several leading brands of briquets made from wood show that insofar as chemical properties are concerned respondent's product is substantially similar to the wood briquets. And burning tests made by the chief chemical engineer at respondent's Memphis plant indicate that respondent's briquets ignite as quickly and burn as well as briquets made from wood. These facts, of course, would constitute no defense to the proceeding if the public is in fact misled as to the composition of respondent's product.

11. Also testifying on behalf of respondent was Dr. Raphael Katzen of Cincinnati, Ohio, a consulting chemical engineer. Dr. Katzen

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has had long experience in the field of chemical engineering and has on a number of occasions been retained by respondent in connection with various problems arising in that field. In Dr. Katzen's opinion respondent's briquets are in fact charcoal. While he recognizes that wood has been the most common source material for fuel charcoal, his testimony is that such charcoal may properly be made and is in fact made from a number of other materials. Actually there appears to be little or no conflict between the testimony of Dr. Katzen and that of Dr. Deitz.

12. In connection with Dr. Katzen's testimony there was received in evidence a definition of charcoal taken from an authoritative scientific work, Mantell's "Industrial Carbon." In Chapter XV, headed "Charcoal as Fuel", is the following:

Charcoal is the more or less impure form of carbon obtained from the various vegetable and animal matters by their ignition out of contact with air (Resp. Ex. 21).

13. Another witness testifying on behalf of respondent was Dr. Bergen Evans, Professor of English in Northwestern University. Dr. Evans is an expert in the English language and the use and meaning of words. After examining many dictionaries Dr. Evans expressed the opinion that the definition of the word charcoal includes products made from non-wood materials as well as those made from wood. And in expressing this opinion Dr. Evans had in mind the use of charcoal as a fuel. In his testimony Dr. Evans emphasized that dictionaries do not attempt to dictate to the public how words should be used; rather, the function of a dictionary is simply to record how words are in fact used by the public.

14. Among the leading dictionaries examined by Dr. Evans were the following, together with the definition of the word charcoal found in each:

(a) *The Oxford English Dictionary*, Vol. 2, p. 282: Charcoal—1. The black porous pulverizable substance, consisting (when pure) wholly of carbon, obtained as the solid residue in the imperfect combustion of wood, bones, and other vegetable or animal matter. (Resp. Ex. 28.)

(b) *The Century Dictionary* Vol. 2, p. 928: Charcoal—1. Coal made by subjecting wood to a process of smothered combustion; more generally, the carbonaceous residue of vegetable, animal, or combustible mineral substances which have been subjected to smothered combustion. (Resp. Ex. 29.)

(c) *A Dictionary of American English* Vol. 1, p. 470: Charcoal—1. The black substance left as a solid residue after the imperfect combustion of wood, bones, or similar matter. (Resp. Ex. 30.)

(d) *Funk & Wagnalls Standard Dictionary of the English Language, International Edition (1958)*: Charcoal—1. A black, porous, odorless carbonaceous

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substance, burning with little or no flame, obtained by the imperfect combustion of organic matter, as of wood. (Resp. Ex. 31.)

(e) *Webster's New World Dictionary of the American Language, College Edition (1954)*: Charcoal—1. A black form of carbon produced by partially burning or oxydizing wood or other organic matter in large kilns or retorts from which air is excluded. (Resp. Ex. 32.)

(f) *The American College Dictionary*: Charcoal—1. The carbonaceous material obtained by the imperfect combustion of wood or other organic substances. (Resp. Ex. 33.)

(g) *Webster's New Secondary School Dictionary (Merriam-Webster) (1959)*: Charcoal—1. A black or dark porous form of carbon made by charring, or partly burning, wood or other vegetable or animal substances in a kiln from which air is excluded. (Resp. Ex. 34.)

(h) *Webster's New International, Second Edition. Unabridged (Merriam-Webster)*: Charcoal—1. A dark-colored or black porous form of carbon prepared from vegetable or animal substances, as that made by charring wood in a kiln, retort, etc., from which air is excluded. (Resp. Ex. 35.)

(i) *Webster's Third New International Dictionary Unabridged (Merriam-Webster) (1961)*: Charcoal—1. A dark-colored or black porous form of carbon made from vegetable or animal substances (as from wood by charring in a kiln or retort from which air is excluded) and used for fuel and in various mechanical, artistic, and chemical processes. (Resp. Ex. 36.)

15. There is also testimony on behalf of respondent from eight members of the public, all of whom reside in Chicago. In addition it was stipulated by counsel that the testimony of two other public witnesses who, because of illness, did not appear would be substantially the same as that given by the eight. The witnesses testified in substance that they understood charcoal could be made from coal, wood, or almost any other material which would burn, and that they would have no preference for wood charcoal if non-wood charcoal would perform as well. As to the term "Real Hickory Flavor" the witnesses said it meant to them only that the briquets would give a hickory aroma or flavor to food cooked with them.

16. Finally, there is testimony from Dr. Hans Zeisel, Professor of Law and Sociology at the University of Chicago Law School. Dr. Zeisel is a specialist in the field of statistics, public opinion surveys, and market research. He was highly critical of the public testimony introduced by both parties in the present case. The first requirement of a public opinion survey, he stated, is that the persons interviewed must constitute a representative sample of the public or the particular segment involved. They must be chosen by lot or chance or some other method of "random" selection. The second requirement is that the interviews with the persons chosen must be unbiased, that is, disinterested.

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17. Neither of these principles, Dr. Zeisel said, was followed here. The witnesses were offered only because it was found by the respective parties that the individuals entertained the views expressed by them; there was no attempt at random sampling. Moreover, Dr. Zeisel stated, the interviews with the individuals were not unbiased. The individuals were aware of the pending litigation, the issue involved, and that their testimony was desired by the party interviewing them. In summary, Dr. Zeisel testified, the testimony of the witnesses indicated nothing more than that the particular individuals entertained the views expressed by them. The testimony in his opinion afforded no basis whatever for an inference that any substantial portion of the public entertained similar views.

18. All of the experts testifying in the proceeding, both in support of the complaint and on behalf of respondent, appear to be well qualified in their respective fields. And all made a favorable impression as witnesses, answering frankly and fully all questions addressed to them.

19. In the light of the record as a whole, it seems clear that the complaint has not been sustained by the greater weight of the evidence. Among the expert witnesses only one took the flat position that fuel charcoal must be made from wood. All of the public testimony offered by both sides is of very doubtful probative value on the question of public understanding. Of particular significance are the dictionary definitions. In the face of these definitions it is difficult to see how a finding could properly be made that charcoal, even when restricted to fuel charcoal, can be made from no material other than wood, or that such is the understanding of the public.

CONCLUSION

It is concluded that the complaint has not been sustained.

ORDER

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

MEMORANDUM ACCOMPANYING ORDER DISMISSING COMPLAINT

By the Commission:

The Commission's complaint charged respondent with having violated Section 5 of the Federal Trade Commission Act by failing to make affirmative disclosure that its "Chuck Wagon Charcoal Briquets" are manufactured principally from the residue of corncobs, and not wood. Without necessarily agreeing with all of the analysis in the initial decision, the Commission has determined that the public

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interest in preventing consumer deception does not warrant entry of a cease and desist order in this matter.

Accordingly, the complaint is dismissed.

Commissioners Anderson and MacIntyre dissent and have filed a separate opinion.

By ANDERSON and MACINTYRE, *Commissioners, dissenting*:

We dissent from the majority's decision since we do not believe it takes into account the protection of those persons who believe that charcoal is made from wood.

ORDER VACATING INITIAL DECISION AND DISMISSING COMPLAINT

Upon consideration of the appeal of complaint counsel from the initial decision of the hearing examiner, and in accordance with the views stated in the accompanying memorandum,

It is ordered, That the initial decision be, and it hereby is, vacated and set aside.

It is further ordered, That the complaint be, and it hereby is, dismissed.

By the Commission, Commissioners Anderson and MacIntyre dis-