

likely to induce, directly or indirectly, the purchase of any food, or any purchasing plan involving food in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations or misrepresentations prohibited in Paragraphs 1 through 8 of Part I of this order.

*It is further ordered,* That the respondents herein 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 this order.

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IN THE MATTER OF

TRADE ADVERTISING ASSOCIATES, INC., ET AL.  
TRADING AS TRADE UNION NEWS

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

*Docket 8582. Complaint, June 28, 1963—Decision, May 15, 1964*

Order requiring New York City publishers of a tabloid monthly newspaper known as "Trade Union News"—deriving a large part of their income from the sale of advertising space therein to business concerns—to cease representing falsely to prospective advertisers that their said newspaper was endorsed by, or was an official publication of a labor union, and by a prominent display on the front page that the paper was the "Winner of the National Trade Union Advertising Award" and " \* \* \* of International Editorial Excellence Award"; and to cease their practice of placing advertisements of various concerns in their paper without authorization and then seeking to exact payment therefor.

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 Trade Advertising Associates, Inc., a corporation, Joseph Lash and Eugene Serels, individually and as officers of said corporation, and as copartners trading and doing business as Trade Union News, 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 Trade Advertising Associates, 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 251 West 42nd Street, New York City, New York.

Respondents Joseph Lash and Eugene Serels are individuals and 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. Respondents Joseph Lash and Eugene Serels are also copartners, trading and doing business as Trade Union News, whose principal office and place of business is also located at 251 West 42nd Street, New York City, New York.

PAR. 2. Respondents Joseph Lash and Eugene Serels, as copartners, are now, and for some time last past have been engaged in the publication of a tabloid-size newspaper known as Trade Union News.

Respondents Trade Advertising Associates, Inc., and Joseph Lash and Eugene Serels, individually and as officers of said corporation, perform the advertising functions of Trade Union News, including the solicitation of advertisements appearing in said publication.

All of the respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 3. The publication Trade Union News is published monthly and is caused by respondents to be circulated from its point of publication to subscribers and purchasers located in various other States of the United States.

Further, respondents in the course and conduct of their business, engage in extensive transactions involving the transmission of letters, advertising proofs, checks and other business instrumentalities and extensive transactions by long distance telephone, all between and among various States of the United States, and maintain, and at all times mentioned herein have maintained a substantial course of trade in said publication in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. A large part of respondents' income is derived from the sale of advertising space in the Trade Union News to business concerns. Respondents and their duly authorized agents and representatives contact said business concerns by telephone and other means and seek to induce them to purchase advertising space in said publication. In the course of said solicitations, respondents and their agents and representatives represent, and have represented, directly or by implication, to prospective advertisers that said publication is endorsed by, affiliated with or an official publication of a labor union.

PAR. 5. In truth and in fact, Trade Union News is not endorsed by, affiliated with or an official publication of a labor union, or in any

## Complaint

65 F.T.C.

manner connected with a labor union, but is independently organized and operated.

Therefore, the statements and representations referred to in Paragraph Four hereof are false, misleading and deceptive.

PAR. 6. Prominently displayed on the front page of Trade Union News appear the following statements: "Winner of the National Trade Union Advertising Award" and "Winner of International Editorial Excellence Award."

PAR. 7. By and through the aforesaid statements and representations, respondents represent, directly or by implication;

(a) That Trade Union News was adjudged the most outstanding publication in competitive contests in which a representative number of competing publications were considered and in which all competitive publications were afforded an equal opportunity to compete.

(b) That the winner of said "awards" was elected by a group of impartial and qualified individuals.

PAR. 8. In truth and in fact:

(a) Trade Union News has not been adjudged the most outstanding publication because no competitive contests were held in which a representative number of competing publications were entered, nor were all competitive publications afforded an equal opportunity to be considered.

(b) The winner of said "awards" was not selected by a group of impartial and qualified individuals, but was selected by respondents Trade Advertising Associates, Inc., Lash and Serels.

Therefore, the statements and representations referred to in Paragraphs Six and Seven hereof are false, misleading and deceptive.

PAR. 9. In the course and conduct of their business respondents have also engaged in the unfair and deceptive practice of placing advertisements of various concerns in their paper without having received authorization therefor and then seeking to exact payment for said advertisements from said concerns.

PAR. 10. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals likewise engaged in the publication of newspapers and other periodicals and in the selling of advertising to be inserted therein and particularly with the publishers of newspapers and other periodicals published or endorsed by labor unions.

PAR. 11. 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 prospective advertisers into the erroneous and mistaken belief that said statements and repre-

sentations were and are true and into the purchase of advertising space by reason of said erroneous and mistaken belief. The unfair and deceptive practice engaged in by respondents of publishing unordered or unauthorized advertisements has subjected firms and individuals to harassment and unlawful demands for payment of non-existent debts.

PAR. 12. 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.

*Mr. William A. Arbitman*, for the Commission.

*Mr. Norman Turk*, Brooklyn, N.Y., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

DECEMBER 6, 1963

*In General—History of the Litigation*

The complaint in this proceeding charges respondents with three types of unfair methods of competition in commerce and unfair acts in commerce in violation of Section 5 of the Federal Trade Commission Act. These alleged practices set forth in three separate charges of the complaint are: (1) procurement of subscriptions of advertisements in respondents' publication the "Trade Union News" by false, misleading, and deceptive representations to prospective advertisers that said publication is endorsed by, affiliated with, or an official publication of, a labor union; (2) respondents' false, misleading, and deceptive statements displayed on the front page of said "Trade Union News" representing that such publication is a winner of national advertising and international editorial awards in its field; and (3) that respondents place unauthorized advertisements in said publication and then seek to exact payment therefor from such alleged advertisers. Respondents, while admitting many of the allegations of the complaint, in substance have denied such charges in their joint answer. The issues are not complicated and the pleadings will be more specifically hereinafter referred to in connection with the particular findings of fact to which they relate.

The complaint herein issued June 28, 1963, and was duly served upon respondents who filed their joint answer August 8, 1963. The evidence in support of the complaint and respondents' evidence in defense were presented at three hearings held in New York, New York, September 12, 13, and 16, 1963, at the conclusion of which all parties rested and

the case was closed for taking evidence. Proposed findings of fact, conclusions of law and order were duly filed. And, pursuant to leave granted all parties, they respectively filed memoranda in opposition to their opponents' proposed findings. In this initial decision it is held and determined that the material allegations of the complaint, upon all three charges, have been fully sustained by the evidence, and an appropriate cease and desist order is accordingly issued.

The trial record is short, the testimony of 16 Commission witnesses and that of the two respondents being set forth in 302 pages. There were 43 Commission exhibits and one respondents' exhibit received in evidence. It is to be noted that by reason of the pleadings and briefs there is no dispute as to many of the facts and but little dispute as to others. There are a number of conflicts of testimony, however, on the verbal statements purported to have been made by the respondents to various prospective advertisers in the Trade Union News, and most naturally, wide differences of opinion as to the inferences to be drawn from certain basic evidence and the ultimate factual inferences drawn with respect to the guilt of the respondents as charged.

The hearing examiner has given full, careful and impartial consideration to all the testimony, taking into consideration his observation of the appearance, conduct and demeanor of each of the witnesses who appeared before him. All documents, stipulations of fact, and those facts alleged in the complaint which are admitted in the answer also have been duly considered. And all statements, arguments, proposals, and briefs of counsel have been closely studied in the light of all the evidence.

All proposed findings of fact, conclusions of law, and orders submitted by the parties which are not incorporated herein, either verbatim or in substance and effect, are hereby rejected; and any pending offers of evidence, motions or objections made during the course of the proceedings not heretofore expressly granted, denied, or overruled are hereby denied or overruled.

Upon the whole record, the hearing examiner finds generally that counsel supporting the complaint has fully sustained the burden of proof incumbent upon him, and has established by a preponderance of the reliable, probative and substantial evidence and the fair and reasonable inferences drawn therefrom, each and all the material allegations of the complaint to justify the findings hereinafter made, which findings, together with the conclusions of law applicable thereto, fully warrant the order herewith issued. The hearing examiner further finds generally that the evidence submitted by respondents is insufficient to establish any valid defense to the material violations of law charged in the complaint and established by the evidence. More specifically,

upon consideration of the whole record, the hearing examiner makes the following findings:

*Undisputed and Substantially Undisputed Facts*

The following facts alleged in Paragraph One of the complaint are admitted by paragraph 3 of the answer, as well as conceded in respondents' answering brief (p. 2), and are therefore found to be true.

Respondent Trade Advertising Associates, 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 251 West 42nd Street, New York City, New York.

Respondents Joseph Lash and Eugene Serels are individuals and officers of the corporate respondent. \* \* \* Their address is the same as that of the corporate respondent. Respondents Joseph Lash and Eugene Serels are also copartners, trading and doing business as Trade Union News, whose principal office and place of business is also located at 251 West 42nd Street, New York City, New York.

Respondents, however, deny in paragraph 3 of their answer the other allegations of Paragraph One of the complaint, hereinabove omitted, which are that said individual respondents, as corporate officers "formulate, direct and control the acts and practices of the corporate respondent, including" those particularly complained of in this proceeding. In the answering brief of respondents, while conceding the individual officer-respondent's general overall control of the business involved, there is also specific denial that either Lash or Serels personally practiced or authorized their employees to engage in the unlawful practices charged (p. 2). The evidence of respondent Joseph Lash definitely conceded the truth of respondents' general overall control (R. 15), and he further testified that he trains those whom respondents employ in the art of selling ads in the respondents' publication, the Trade Union News (R. 36-39). Respondent Eugene Serels also testified that he likewise trains their salesmen (R. 276-7). The methods used by each of these two respondents themselves, in obtaining or seeking to obtain ads for their publication, were credibly testified to by several witnesses who were solicited by interstate telephone calls (Douglas T. Johnson, president of Shoreline Washed Sand and Stone Company of Madison, Connecticut (R. 187-99) and David Cohen, formerly vice president of Comus Manufacturing Company of New Bedford, Massachusetts, more recently manager at that place of Miller Brothers Industries, also of New Bedford, Massachusetts, and currently vice president of the latter corporation (R. 215-7)). There is further some evidence from witnesses who received similar, although intrastate, telephone solicitations in the State of New York from persons stated, or believed, to have been one of the respondents (William E. Shreiber, vice presi-

dent of Paul A. Straub and Company (R. 63, 67-71) and David Friedman, president of City Wide Home Alterations Co. (R. 175)). Upon all of such evidence it is necessarily found that both of the individual respondents personally used the sales methods charged in the complaint as well as training their salesmen to employ such practices. As urged by counsel supporting the complaint, in any event it is well established that as the owners of the business involved, respondents Lash and Serels are responsible for the unauthorized, as well as for any authorized, activities of their salesmen. Such respondents therefore are properly included, both as corporate officers and as individuals, in the cease and desist order. See *F.T.C. v. Standard Education Society*, (1937) 302 U.S. 112, 120; *Parke, Austin & Lipscomb, Inc. v. F.T.C.*, (C.C.A. 2, 1944) 142 F. 2d 437, 440; and *Standard Distributors, Inc. v. F.T.C.*, (C.A. 2, 1954) 211 F. 2d 7, 13.

It is therefore found as alleged in Paragraph 3 of the complaint, although denied by Paragraph 3 of the answer and again denied in respondents' answering brief, that respondents Lash and Serels formulate, direct and control the acts and practices of the corporate respondent, including the particular types of acts and practices charged in the complaint and hereinafter more fully referred to and found to be unlawful.

The following facts alleged in Paragraph 2 of the complaint are admitted by Paragraph 2 of the answer and are therefore found to be true.

Respondents Joseph Lash and Eugene Serels, as copartners, are now, and for some time last past have been engaged in the publication of a tabloid size newspaper known as Trade Union News.

Respondents Trade Advertising Associates, Inc., and Joseph Lash and Eugene Serels, individually and as officers of said corporation, perform the advertising functions of Trade Union News, including the solicitation of advertisements appearing in said publication.

All of the respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

It will be noted that the respondents' admission of the last above quoted sentence is inconsistent with their special denial of certain allegations of Paragraph One of the complaint above referred to. But, since the evidence referred to herein so substantially sustains such allegation in any event, detailed analysis of one such inconsistency of respondents' answer is wholly unnecessary.

While naturally not alleged in the complaint, relevant evidence received over respondents' objections (R. 10-13) shows that immediately following the service of the complaint upon them on July 10, 1963, respondents Lash and Serels organized a new and different corporation in New Jersey called Trade Union News of New Jersey, Inc.,

which began business on July 15, 1963. Respondent Lash claimed that it is also being published as a labor newspaper, its business address being 20 Branford Place, Newark, New Jersey (R. 13). The evidence further shows that the officers of this newly organized New Jersey corporation, the respondent Trade Advertising Associates, Inc., as well as the respondent New York corporation, are Lash as president and Serels as secretary-treasurer (R. 13-15). Also the evidence shows that the only stockholders and directors of each of the two corporations, Trade Advertising Associates, Inc., and this newly organized one, are the respondents Lash and Serels and the wife of each of them, each of the four holding one-fourth of the stock in each (R. 13-15). Both corporations are definitely close corporations, but there is no claim or proof that either of the wives took any active part in their husbands' businesses. Serels corroborated Lash and stated that the first issue of Trade Union News of New Jersey had been published in September 1963 and that both respondents, together with two employees, solicited advertising for this new publication (R. 262-4).

The following facts alleged in Paragraph 3 of the complaint are admitted by Paragraph 2 of the answer and are therefore found to be true.

The publication Trade Union News is published monthly and is caused by respondents to be circulated from its point of publication to subscribers and purchasers located in various other States of the United States.

Further, respondents in the course and conduct of their business, engage in extensive transactions involving the transmission of letters, advertising proofs, checks and other business instrumentalities and extensive transactions by long distance telephone, all between and among various States of the United States, and maintain, and at all times mentioned herein have maintained a substantial course of trade in said publication in commerce, as "commerce" is defined in the Federal Trade Commission Act.

There is substantial undisputed evidence that respondents chiefly use the long-distance telephone in communicating with prospective purchasers of advertising in the Trade Union News and also in seeking subsequent ads from former advertisers. In addition to the testimony of the 16 advertiser and non-advertiser witnesses, both respondents Lash (R. 36-38, 292-3) and Serels (R. 253-8, 273-4) testified extensively as to the use of the telephone by them and their salesmen. It is further undisputed that the United States mails were used by respondents in billing and collecting, or attempting to collect, amounts claimed by them to be due from persons whose advertisements had been placed in such publication (R. 34-35, 273-4).

Some of the communications by telephone and by mail were made wholly within the State of New York, but seven of the witnesses called by the Commission testified to interstate communication by respond-

ents with them by means of these two media, such witnesses being located respectively in the several States of Connecticut (Douglas T. Johnson, R. 186-99, CX 38; and Clarence H. Riedle, R. 199-211, CX 39-42), Massachusetts (David Cohen, R. 214-9), New Jersey (Charles Kane, R. 113-8, CX 1, p. 14; and A. E. Cooper, R. 212-4, CX 2, p. 13, CX 29-A&B), Pennsylvania (George W. Frey, R. 154-62, CX 24-28), and Maryland (Edward J. Baney, R. 225-38, CX 43). And further, not only is respondents' use of such media admitted as being general throughout the United States, but numerous advertisements appearing in various issues of the Trade Union News, in evidence, are confirming and convincing evidence of the widespread use of such media in 1962 and 1963, as well as of the substantial public interest involved herein (CX 1, 2, 3, 4, 35, 48 and 49). These issues of the Trade Union News show that each carries an average of about ten advertisements per page and the seven issues in evidence show advertisements from all states of the Union except Alaska, Hawaii, and several of the small Rocky Mountain area states. Since these publications occur 12 times a year, and contain from 24 to 36 pages at an advertising rate of \$1,100 per page (about one-half of each publication being advertisements), the gross annual income of respondents therefrom has been substantially in excess of \$100,000, plus annual subscriptions which respondents were unable to estimate. Other allegedly substantial businesses of respondents (R. 15-16), which are not involved in this proceeding, have not been considered.

The allegations in the first part of Paragraph 4 of the complaint are admitted by Paragraph 4 of the answer. Upon such admission as well as upon the foregoing evidence, the following facts are found to be true.

A large part of respondents' income is derived from the sale of advertising space in the Trade Union News to business concerns. Respondents and their duly authorized agents and representatives contact said business concerns by telephone and other means and seek to induce them to purchase advertising space in said publication. \* \* \*

#### *First Charge of Complaint Sustained*

With respect to the first charge of the complaint that respondents have falsely claimed union support or connection for their publication, a substantial number of witnesses credibly testified that respondents, or their sales representatives, either directly or by implication, had stated, and represented to them as prospective advertisers in order to induce and persuade them to buy advertising space in the Trade Union News, that such publication was endorsed by, affiliated with, or an official publication of a labor union (Maurice Pigrish, R. 120-3; George W. Fry, R. 155; David Friedman, R. 176; Douglas T. Johnson, R. 188,

190-1; Clarence H. Riedle, R. 204-5; David Cohen, R. 216-7; and Edward J. Baney, R. 127). These solicitations included, among other representations, statements that respondents were representing the C.I.O., or labor unions generally, and could help out if the solicited person or his company were ever in any trouble or had problems with labor unions. Also, such statements implied that the respondents might influence the depositing of union funds into a savings and loan association, and by way of cajolement, that "the [union] boys" would appreciate the purchase of an ad (R. 204), and even by way of implied threat that "there might be a time when you need help" (R. 176). Respondents' counsel argues that some of these statements either were not positive or were withdrawn, but from a fair consideration of each of such testimonies as a whole no other conclusion can be reached than that respondents claimed to have union connections or authority.

While respondents Serels and Lash both categorically and repeatedly denied that they had ever personally represented to prospective advertisers, or that they had ever authorized their salesmen to represent, that the Trade Union News is endorsed by, affiliated, or associated with any trade union (Serels, R. 272-3, 276-9; Lash, R. 285, 287-8, 289-90), considering their interest as opposed to that of the witnesses who testified to the contrary, the great weight of the credible evidence on the subject strongly contradicts them. It is therefore found that the following allegations of Paragraph Four of the complaint are factually true although specifically denied in Paragraph 4 of the answer:

In the course of said solicitations [for advertisements], respondents and their agents and representatives represent, and have represented, directly or by implication, to prospective advertisers that said publication is endorsed by, affiliated with or an official publication of a labor union.

Certain allegations of Paragraph 5 of the complaint are admitted in Paragraph 5 of the answer. It is therefore found as so alleged and admitted "that in truth and in fact, Trade Union News is not endorsed by, affiliated with, or an official publication of, a labor union, or in any manner connected with a labor union, but is independently organized and operated."

Respondents, however, in Paragraph 5 of their answer, deny the further allegations of Paragraph 5 of the complaint which are as follows:

Therefore, the statements and representations \* \* \* [of respondents that their said publication is endorsed by, affiliated with, or an official publication of, a labor union] \* \* \* are false, misleading and deceptive.

It is found from the evidence that such allegations are true and correct statements of fact, despite their denial by respondents. Such evidence is as follows.

Respondent Lash testified that he had acquired Trade Union News in 1959 when it was a dormant operation, although it had been published intermittently for 4 years prior thereto; that respondent Serels had joined him as a partner about the end of 1960 (R. 16-17); that Trade Union News had no employees except a free-lance writer and an editor, who are only occasionally employed; that the current editor at the time of hearing being one Eli Morrison, who is paid by the partnership Trade Advertising Associates (R. 14, 17-18); that the copy is sent to an outside printer who prints the paper (R. 18); and that both Lash and Serels solicit advertising (R. 15, 18). Lash claims in his testimony that this publication "is the nation's leading independent newspaper" (R. 13).

Respondent Lash testified that he had worked briefly, twice, for the Trade Union Courier in Newark, New Jersey, the first time as an advertising salesman for six or seven months in 1946, and the second time about five months in early 1960 (R. 19) as a manager and salesman (R. 23-24), and that Serels had also been a salesman for such publication (R. 24). Serels testified that he had been such an advertising salesman for the Trade Union Courier for a long period from about 1940 until 1959 (R. 251) and that he and Lash had been associated in such work for one month in 1959 (R. 251-2).

Upon this premise, counsel supporting the complaint invites attention to the case wherein the Trade Union Courier was found to have engaged in some of the same type of practices charged against respondents in the proceeding here, 51 F.T.C. 1275 (1955), *affirmed in Trade Union Courier Publishing Corporation v. F.T.C.* (C.A. 3, 1956) 232 F. 2d 636. The Commission's cease and desist order was enforced in 1960 by the Court of Appeals for the Third Circuit where a unanimous panel imposed extremely heavy fines on all respondents but one. This decision is unreported except in Vol. VI, Statutes and Court Decisions, Federal Trade Commission, 750 (6 S.&D. 750).

Counsel urges in substance that by reason of their prior employment by Trade Union Courier Publishing Corporation, respondents Lash and Serels necessarily had knowledge of the unlawfulness of the same or similar types of activities here alleged to be unlawful. The respondents object to any such inference. There certainly is no direct proof that respondents had knowledge of the proceedings and decisions in that litigation although if material it might well be inferred that they did know all about it. Lash and Serels each appeared to the examiner during the hearings to be a very sharp and knowledgeable person. And each had been with the Trade Union Courier during a part of the time of its said unlawful practices.

Early in the hearings, while respondent Lash was testifying, he called attention to the presence in the hearing room of a competitor, whom Lash claimed had also been formerly employed by the Trade Union Courier, and stated that some of the things he, Lash, was testifying to might be brought back to competitors and suggested the removal of such person from the room (R. 32). Such suggestion was overruled for good and sufficient reasons stated on the record (R. 32-33); and respondents were thereafter protected while testifying from giving any undue exposure to their alleged business secrets by stipulations that their business was substantial (R. 28-29, 32-33, 259-62). Also, previous to this, respondents' counsel had insisted upon inviting attention on the record to irrelevant pending litigation between the respondents and Trade Union Courier as a supplement to his objections to any inquiry with reference to the prior employment of respondent Lash by Trade Union Courier (R. 19-23).

These circumstances while irrelevant to the issues in this case, nevertheless indicate that there has been unpleasantness and misunderstanding, culminating in litigation, between respondents and Trade Union Courier; and such matters, added to the evidence already referred to, might well lead one to the conclusion that the practices followed by the respondents were known by them to be essentially similar to those used by Trade Union Courier. But knowledge and intent are not essential elements in the type of proceeding now before the examiner for decision; and it is not necessary to establish or find any such actual knowledge on respondents' part. Respondents, however, must be held to notice that in the Trade Union Courier case such types of practices had been held to be unlawful. This is pursuant to the ancient maxim that every man is presumed to know the law. That case and several other Commission and judicial decisions are officially noticed as the applicable law. Such decisions unmistakably hold that it is violative of the Federal Trade Commission Act for publishers to represent falsely that their publication has been endorsed by labor unions or organizations. See *Bernstein, d.b.a. American Labor Digest*, (1953) 50 F.T.C. 354, 357-358; *Ernest Mark High*, (1959) 56 F.T.C. 625, 628, 630, 633-635; *Brondabrooke Publishers, Inc. etc. et al.*, F.T.C. Docket No. 8546 (October 11, 1963) [63 F.T.C. 1023], mimeograph opinion of the Commission affirming the initial decision of the hearing examiner, particularly his findings of fact 4 and 5 and his conclusion of law (pp. 1026, 1027 of such initial decision filed August 7, 1963). In the opinion in *Ernest Mark High, supra*, Commissioner Kern, speaking for the entire membership of the Commission, laid the clear parallel between

that case and the first charge herein, where, *inter alia*, it was stated and held (56 F.T.C. at p. 630) :

The record discloses numerous overt efforts on the part of respondent's agents to sell advertising in a labor sponsored periodical with the idea that the advertiser would thereby purchase labor's good will, the clear implication being that otherwise the whiplash of labor's ill will might be incurred. \* \* \* [R]espondent's counsel's brief \* \* \* seems to indicate that one can buy friendship, and second, that labor's friendship is for sale. We prefer to believe that both of these conclusions are false and that responsible labor elements will reject such arguments even as we do.

The respondents nevertheless contend, in substance, that no one could be deceived into believing that the Trade Union News was in any way connected with a labor union because of its masthead. This consists of the capitalized words "Trade" and "Union", in 60 point extra-bold-face type, between which is a picture of a globe [portraying the western hemisphere with parallels of latitude and longitude] upon which the word "News" in 36 point extra-bold-face type is superimposed, while on the line below appears the capitalized legend, "The Nation's Leading Independent Labor Newspaper" in 14 point bold-face type. As counsel supporting the complaint ably argues, since the initial sale of advertising is always made by telephone, the masthead reveals nothing to any such prospect. And even where the advertiser has actually seen the publication's masthead, the language used in it would not reveal to the average reader that such newspaper was not connected with a union or unionism generally. It is noted that the masthead used on the editorial page omits the words "The Nation's Leading Independent Labor Newspaper" altogether and merely says "Dedicated in general to the cause of Trade Unionism" (CX 1, p. 5; CX 2, p. 5; CX 3, p. 2; and CX 4, p. 2). Elsewhere in such issues there is no qualification whatsoever to the paper's name (CX 1, pp. 2, 11 (bottom of right hand column), 16; CX 2, pp. 1 (bottom of right hand column), 2, 16; CX 3, pp. 1 (bottom of right hand column), 16; and CX 4, pp. 1 (bottom of right hand column), and 16). In substance, the said legend "The Nation's Leading Independent Labor Newspaper" is not an integral and indispensable part of the newspaper's name although that language is employed on respondents' letterheads, statements of account, and various other business documents for external use (CX 5-8, 11, 15-19, 21, 24-28, 30 b and c, 31(b), 32(b), 33 (b) and (c), 34 (b), (c) and (d), 36, 38, 39, 41, 43, 45 and 46).

The respondents have further argued in this connection that each of their two publications, the Trade Union News published for three years past by the partnership of such name in New York and the Trade Union News of New Jersey published since August 1963 by the individual respondents' new corporation, clearly states on its mast-

head that it is an "Independent Labor Newspaper" and that no one could be misled by the words "Trade Union" in the title into believing that either of such newspapers was in any way connected with a labor union. But the words "trade union" mean a "union", not a private business partnership or corporation for profit. The words "trade union" and "labor union" are used interchangeably in the law as well as in common parlance. For example, see 87 CJS, p. 762, Trade Unions, § 1: "A trade or labor union is a combination of workmen of the same trade or of allied trades for the purpose of securing by united action the most favorable conditions with respect to wages, hours of labor, etc. for its members." To the same effect, see 31 Am. Jur. 394, Labor, §§ 13, 14; and Black's Law Dictionary, p. 1015, Labor Union, and p. 1666, Trade Union. It is not clear whether there is any such thing as an "independent labor union", but there certainly is no such thing as a private labor union. It is, of course, common practice of trade unions to use newspapers to present their causes to the public. See 87 CJS, p. 779, Trade Unions, § 15, note 87 and cases cited. It therefore follows that the respondents even by claiming to be an "independent labor newspaper" in the second line of the mastheads of their publications could not erase the impression necessarily conveyed to their advertisers and other readers by the words "Trade Union News" in the first line thereof that they were publications either endorsed by, affiliated with, or officially published by a labor union.

*Second Charge of Complaint Sustained*

It is alleged in Paragraph 6 of the complaint that there appear "[p]rominently displayed on the front page of Trade Union News \* \* \* the following statements: 'Winner of the National Trade Union Advertising Award' and 'Winner of International Editorial Excellence Award'."

In Paragraph 6 of the answer, respondents, while in general denying the said allegations of Paragraph 6 of the complaint, in effect admit that their said publication did display the said statements as alleged by further pleading that such statements do not currently exist or appear on the front page of said publication. It is uncontradicted in fact, however, that the alleged awards during the 12-month period of their publication in the front page masthead of the Trade Union News were pure fiction devised by the respondent Serels. Respondent Lash, strangely, claimed to have no knowledge of how such "awards" came to be, and referred to respondent Serels as authority for the use of such language in the masthead (R. 53-54). Serels freely admitted that he himself, together with a couple of respondents' editors, determined that the "International Editorial Excellence Award" should be given

to the paper by Serels and that no independent board existed which held a bona fide contest and made such award upon a fair and unbiased comparison of various labor newspapers, including respondents' Trade Union News. Serels testified quite cavalierly and freely to some extent on this subject (R. 267-71), among other things saying that in making such "award" he had not considered comparing the Trade Union News with any other labor newspaper because "I felt it was our baby. If I wanted to give them [sic] a present, I would. I liked it." (R. 267.) He also awarded the publication a trophy (R. 268) and further testified that the National Trade Union Advertising Award was conceived and devised by him under similar circumstances (R. 269-70). Serels also testified that he had looked at a certain labor paper which claimed in its masthead to have received such awards and had "felt ours was far superior and we were not invited to their competition". He decided to give a similar award to respondents' paper. The labor paper he referred to is in the record as respondents' exhibit 1 and is a copy of the "AFL-CIO Milwaukee Labor Press", Vol. XXII, No. 10, issue of September 12, 1963, carrying in its masthead the identical award language plagiarized verbatim by the respondents—quite evidently from an earlier issue of said Milwaukee paper. There is no evidence as to whether the statements in the masthead of respondents' exhibit 1 are true or not, but that is immaterial. The unvarnished fact remains that the respondents seems to consider the purloining and use of such plagiarized language perfectly proper although Serels frankly conceded that he did not feel the so-called awards had any merit or meaning, such being "just a new suit that we put on the new baby" (R. 269-70).

These purely fictitious statements respecting such awards had appeared in about 12 issues of the Trade Union News, but after the filing of the complaint in this proceeding [because "the Federal Trade Commission objected to it"], such statements were removed from subsequent issues (R. 268-71). Respondent Lash testified to the same effect (R. 50-51).

Because these false cliches were thus eradicated, respondents' counsel contends that his clients voluntarily discontinued the use of such statements "without any order of the Federal Trade Commission or any other administrative agency". But under numerous judicial and Commission decisions this does not constitute any defense. The principles are too well established and the cases too numerous to warrant extensive citation and quotation here. They are collated in Vol. 3, C.C.H. Trade Regulation Reporter, § 9641.36-38, pp. 16, 147-16, 149. For a very recent judicial decision citing several earlier cases see *Carter Products, Inc. v. F.T.C.* (C.A. 7, Sept. 27, 1963) 323 F.2d 523,

Part III. The discontinuance or abandonment of an unfair practice is not an absolute defense in any case but one which must be determined by the Commission in the exercise of sound discretion. Among the basic elements necessary to maintain such a defense are: self-recognition of wrongdoing, voluntary discontinuance of unfair practices as well as demonstrated good faith, and the intent not to resume the same. None of these elements exist here. There is not a word in the record to indicate the slightest belief by respondents that it was wrong for them to falsely represent to their subscribers, advertisers, and the public generally that they had received high awards of merit based on the excellence of their advertising or editorials. Their discontinuance of these representations came belatedly and only after they had been served with the complaint herein. And certainly their almost instant organization of the new publication in New Jersey after such complaint was served shows anything but a good faith desire to refrain from any such unfair practice in the future; but to the contrary infers they believed they could and would use such language again with impunity in the masthead or elsewhere in a new publication issued by a corporation not made a respondent herein.

It is further charged in Paragraph 7 of the complaint with respect to the use of such language relating to these nonexistent awards that:

By and through the aforesaid statements and representations, respondents represent, directly or by implication: \* \* \* That Trade Union News was adjudged the most outstanding publication in competitive contests in which a representative number of competing publications were considered and in which all competitive publications were afforded an equal opportunity to compete. \* \* \* That the winner of said "awards" was elected by a group of impartial and qualified individuals.

Respondents, in Paragraph 7 of the answer, deny generally these allegations. Since the awards were admittedly absolutely false and self-bestowed, however, such statements and representations of respondents can have no other effect upon the reader who is not informed of the true facts than as their meaning and import is alleged in the language last above quoted.

As alleged in Paragraph 8 of the complaint, which is only qualifiedly denied in Paragraph 7 of the answer, upon the evidence hereinbefore recited it is necessarily found that "[i]n truth and in fact:

\* \* \* Trade Union News has not been adjudged the most outstanding publication because no competitive contests were held in which a representative number of competing publications were entered, nor were all competitive publications afforded an equal opportunity to be considered.

\* \* \* The winner of said "awards" was not selected by a group of impartial and qualified individuals, but was selected by respondents Trade Advertising Associates, Inc., Lash, and Serels.

Therefore the said statements and representations, so pleaded in the second charge and admitted by respondents, are false, misleading, and deceptive. While there is no direct evidence that such false statements have actually misled any advertiser or other person, such deliberately untrue statements unquestionably did have the capacity and tendency to mislead and deceive anyone not conversant with the true facts into believing respondents' Trade Union News was actually an outstanding labor newspaper of recognized outstandingly superior merit. The second charge of the complaint is therefore fully sustained. No precise precedent has been either cited or found. This does not, however, foreclose a finding that respondents' practices are unlawful as the Federal Trade Commission Act was particularly framed broadly in order to encompass practices found by the Commission upon substantial evidence to be unfair. See *F.T.C. v. R. F. Keppel & Bro., Inc.*, (1934) 231 U.S. 304, 309-311; *F.T.C. v. Standard Education Society et al.*, (C.C.A. 2, 1936) 86 F. 2d 692, 695-696; and *Goodman v. F.T.C.*, (C.A. 9, 1957) 244 F. 2d 584, 588-591 and cases cited.

*Third Charge of Complaint Sustained*

It is charged in Paragraph 9 of the complaint that :

In the course and conduct of their business, respondents have also engaged in the unfair and deceptive practice of placing advertisements of various concerns in their paper without having received authorization therefor and then seeking to exact payment for said advertisements from said concerns.

This charge, while denied in its entirety by respondents in Paragraph 1 of their answer and in their testimony, is strongly upheld by abundant testimony and exhibits offered and received in support of the complaint. Nine witnesses testified credibly that ads were placed in respondents' Trade Union News without their authority, were published therein, and that they received bills therefor. While some of these witnesses refused to pay the bills, others did so for various reasons and were, in substance, buying their peace. The three witnesses who received interstate communications with reference to the placement of ads, and subsequent requests therefor, were: Charles Kane (R. 115); Edward J. Baney (R. 227); and A. E. Cooper (R. 212). Similar testimony with reference to intrastate communications from respondents was given by six New York witnesses who were: William E. Schreiber (R. 63-70); Margaret E. Neil (R. 77-83); Maurice Pigrish (R. 126); John J. Delaney (R. 135-6); Irving Stachel (R. 146-50); David Friedman (R. 172-3); Herbert Baner (R. 220-2); and Harold F. Klein (R. 229-44). A number of these witnesses identified various documents in support of their statements as to respondents repeated requests for payment of unauthorized bills (CX 5-11, 15-22,

24-28, 36, 38, 39, 41, 43, 45-47) and several identified checks given respondents in payment for such purported obligations (CX 23, 37, 40(a), (b) and 42(a), (b)). Such acts on the part of respondents were not accidental or only occasional. They were the follow-ups on thousands of telephone calls. Each edition of the Trade Union News carried an average of 160 or more ads. Serels testified that respondents had had about eight salesmen all told (R. 276), only one of which had been discharged for misrepresentation (R. 281). While unable to give a definite answer as to how many calls he personally made per day, an average would be more than five calls per week per man (R. 283). On that assumed basis alone, the two respondents, with several salesmen making calls on business days throughout the year, made literally many hundreds of telephone calls annually seeking advertisements for respondents' publications.

There is abundant precedent that the placing of advertising without authority and seeking to exact payment therefore constitute unfair competition and unfair practices in violation of the Federal Trade Commission Act. *Bernstein d.b.a. American Labor Digest*, *supra*, 50 F.T.C. at pp. 354 (syllabus (c)) and 358; *Trade Union Courier Publishing Corp. et al.*, *supra*, 51 F.T.C. at pp. 1275 (syllabus), 1287-1290, 1293, 1294 and 1299-1300, *affirmed and enforced* 232 F. 2d 636, *supra*; *Ernest Mark High*, *supra*, 56 F.T.C. at pp. 625-626 (syllabus), 627-628; and *Brondabrooke Publishers, Inc. et al.*, *supra*, *Docket No. 8546* [63 F.T.C. 1023], *initial decision*, p. 1027, par. 6.

It is therefore found that the allegations of Paragraph 9 of the complaint are factually true and that the third charge of the complaint is abundantly sustained.

#### *Competition Admitted by Respondents*

The allegations of Paragraph 10 of the complaint are admitted in Paragraph 2 of the answer and it is therefore found that:

In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals likewise engaged in the publication of newspapers and other periodicals and in the selling of advertising to be inserted therein and particularly with the publishers of newspapers and other periodicals published or endorsed by labor unions.

It may be added that in the course of the testimony of respondent Lash, he made reference to the existence of competitors as hereinbefore stated.

#### *Summary*

Paragraph 11 of the complaint is denied by respondents in Paragraph 1 of the answer. But from the facts hereinabove found, and

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from inferences fairly and reasonably drawn therefrom, it necessarily follows and is therefore found that these allegations in said paragraph 11 of the complaint are factually true.

The use of respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has the capacity and tendency to mislead prospective advertisers into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of advertising space by reason of said erroneous and mistaken belief. The unfair and deceptive practice engaged in by respondents of publishing unordered or unauthorized advertisements has subjected firms and individuals to harassment and unlawful demands for payment of nonexistent debts.

Upon all the facts hereinabove found and for the reasons hereinafter stated, the hearing examiner draws the following:

### *Conclusions of Law*

#### *1. Jurisdiction*

The respondents were not only duly served with process but answered the complaint and the individual respondents also appeared at the hearings. All respondents have been represented by counsel and have vigorously contested the proceeding throughout, thereby completely submitting their respective persons, individual, official and corporate, to the jurisdiction of the Commission.

As to the Commission's jurisdiction over the subject matter, the evidence indicates that while a very large part of the acts and practices of the respondents took place wholly within the State of New York, their numerous and repeated communications in interstate commerce by telephone and through the United States mails initiated, carried on, and brought to fruition the acts and practices complained of in this proceeding in such commerce between their place of business in New York and practically every other State of the United States. It is, of course, basic that violations of the Federal Trade Commission Act must not merely affect interstate commerce but "must be *in* such commerce", *Asheville Tobacco Board of Trade, Inc. et al. v. F.T.C.*, (C.A. 4, 1959) 263 F. 2d 502, 507, 508. See also *Holland Furnace Company v. F.T.C.*, (C.A. 7, 1959) 269 F. 2d 203, 208, 209, *cert. den.* (1960) 361 U.S. 932. These two comparatively recent cases both rely upon the landmark case of *F.T.C. v. Bunte Bros.* (1941) 312 U.S. 349. Considerable evidence of what took place in New York State was received in corroboration of the general type of practices respondents were charged with and herein found to have carried on extensively in interstate commerce. In addition to soliciting and obtaining advertising in these various States of the Union, respondents also obtained advertising in Puerto Rico (CX 49, p. 7) which for purposes of the

antitrust acts may be also considered as a State (Section 48, U.S.C.A. § 734, construed in *People of Puerto Rico v. Shell Co. (P.R.), Limited et al.*, (1938) 302 U.S. 253, 260. Although the record shows respondents have also obtained advertising from at least three provinces of the Dominion of Canada (Ontario, CX 1, p. 8; CX 2, pp. 3, 10; CX 4, p. 11; CX 48, p. 6; Newfoundland, CX 2, p. 4; and Alberta, CX 48, p. 5), the charges in this proceeding are premised solely upon interstate commerce, and there is no special evidence relating to respondents' Canadian activities. Therefore, no finding has been herein made in respect to foreign commerce or violations of the Federal Trade Commission Act with reference thereto. If pleaded, however, the Commission would have had jurisdiction to hear and determine whether any such violations had occurred in foreign commerce. See *Branch v. F.T.C.* (C.A. 7, 1944) 141 F.2d 31, 34-35.

It is therefore concluded that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the persons of all the respondents herein.

## 2. Public Interest

Paragraph 12 of the complaint alleges conclusions of law which are denied by respondents in Paragraph 1 of the answer. The first of these conclusions relates to the question of public interest. Respondents' counsel contends, *inter alia*, (Answering brief, pp. 10-12) that although there was a "huge amount of advertisements" in Trade Union News, the small number of complaining persons who testified are such "an infinitesimal percentage of the total number of advertisers" that there is no substantial proof of prejudice to the public. It is, of course, impossible within reasonable limits of time and expenditures to take the testimony of a very large number of complaining witnesses in numerous places, as to which procedure, if followed, the respondents would be the first to complain of, and justly so. The complaining witnesses who testified to respondents' practices, hereinbefore found to be unlawful, came from several different states in the northeastern part of the country and were corroborated as to the generality of such practices by a number of witnesses in New York State. Respondents' practices were sufficiently spread in time and space to establish that they were habitually and generally followed by respondents.

From the facts which have been found, it is necessarily concluded as a matter of law that, as alleged in Paragraph 12 of the complaint, "The acts and practices of respondents \* \* \* were, and are, all to the prejudice and injury of the public \* \* \*." There is, therefore, public interest in this proceeding which is specific and substantial with respect to each of the three charges of the complaint.

### 3. *Violations of Federal Trade Commission Act*

While respondents contend there is no evidence of any injury to respondents' competitors (Answering brief, p. 12), it is, of course, well established that since the 1936 amendments to the Federal Trade Commission Act, it is unnecessary to prove injury to competitors where findings of unfair practices have been made. See *Parke, Austin & Lipscomb, Inc. v. F.T.C.*, *supra*, at 142 F. 2d 441, *Cert. den.* (1944) 323 U.S. 753; and *Koch et al. v. F.T.C.*, (C.A. 6, 1953) 206 F. 2d 311, 319. Therefore, upon the findings hereinbefore made, the examiner necessarily concludes that, as alleged in Paragraph 12 of the complaint, the respondents' said acts and practices "were and are all to the prejudice and injury \* \* \* of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act."

Upon the foregoing findings and conclusions, which warrant a broad order, the following is herewith issued:

#### ORDER

*It is ordered*, That respondents Trade Advertising Associates, Inc., a corporation, and its officers, and Joseph Lash and Eugene Serels, individually and as officers of said corporation, and as copartners trading and doing business as Trade Union News, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the soliciting, offering for sale or sale in commerce of advertising space in the newspaper now designated as Trade Union News, or any other publication, whether published under that name, or any other name, and in connection with the offering for sale, sale or distribution of said newspaper, or any other publication, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that said newspaper is endorsed by, affiliated with, or an official publication of, or otherwise connected with a labor union or trade union.

2. Representing that said newspaper was the "Winner of the National Trade Union Advertising Award" or "Winner of International Editorial Excellence Award", or otherwise misrepresenting that any of respondents' publications has been presented with an award or distinction as a result of a competitive contest.

3. Misrepresenting in any manner that competitive contests are or have been conducted by impartial and qualified individuals to determine the relative quality or merits of any of respondents' publications in comparison with competing publications.

4. Placing, printing or publishing any advertisement on behalf of any person, firm, or corporation, in any of respondents' publications without a prior order or agreement to purchase said advertisement.

5. Sending bills, letters or notices to any person, firm, or corporation, with regard to an advertisement which has been or is to be printed, inserted or published on behalf of said person, firm, or corporation, or in any other manner seeking to exact payment for any such advertisement, without a bona fide order or agreement to purchase said advertisement.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision; and

The Commission having considered the entire record, including the briefs and oral arguments of counsel for respondents and counsel supporting the complaint, and having determined that the hearing examiner's findings and conclusions are fully substantiated on the record and that the order contained in the initial decision is appropriate in all respects to dispose of this matter:

*It is ordered*, That respondents' appeal be, and it hereby is, denied.

*It is further ordered*, That the hearing examiner's initial decision, filed December 6, 1963, be, and it hereby is, adopted as the decision of the Commission.

*It is further ordered*, That the respondents, Trade Advertising Associates, Inc., Joseph Lash and Eugene Serels, 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.