

IN THE MATTER OF

PAT AND BOBBIE'S, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

Docket 8735. Complaint, April 18, 1967—Decision, Nov. 24, 1967*

Order requiring a Seattle, Wash., distributor of handicraft materials to cease importing or selling any fabric, including rice paper, so highly flammable as to be dangerous when worn.

COMPLAINT*

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Pat and Bobbie's, Inc., a corporation, and Patricia A. Farrell, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Flammable Fabrics 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:

* Reported as amended by order of hearing examiner, dated June 21, 1967, by changing the name of the respondent from Pat and Bobbie's Floral Studios, Inc., to Pat and Bobbie's, Inc.

PARAGRAPH 1. Respondent Pat and Bobbie's, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington. Respondent Patricia A. Farrell is secretary and manager of the corporate respondent and formulates, directs and controls its policies, acts and practices.

The respondents are engaged in the sale and distribution of handicraft materials; the office and principal place of business of all the respondents is located at 6220 Roosevelt Way, NE., Seattle, Washington.

PAR. 2. Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have sold and offered for sale, in commerce; have imported into the United States; and have introduced, delivered for introduction, transported, and caused to be transported, in commerce; and have transported and caused to be transported for the purpose of sale or delivery after sale, in commerce; as "commerce" is defined in the Flammable Fabrics Act, fabric, as that term is defined therein, which fabric was, under Section 4 of the Flammable Fabrics Act, as amended, so highly flammable as to be dangerous when worn by individuals.

PAR. 3. The aforesaid acts and practices of respondents were and are in violation of the Flammable Fabrics Act and the Rules and Regulations promulgated thereunder, and as such constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

Miss Marilyn F. Hale and Mr. Edward B. Finch supporting the complaint.

Mr. Raymond H. Siderius, Corbett, Siderius and Lonergan, 847 Logan Building, Seattle, Wash., for respondents.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER¹

OCTOBER 17, 1967

Preliminary Statement

This proceeding determines whether or not rice paper sold for use in making Hawaiian-type leis is fabric within the meaning of the Flammable Fabrics Act.

Pleadings

The Federal Trade Commission on April 18, 1967, issued its

¹ Caption amended by order of John Lewis dated June 21, 1967, the hearing examiner to whom the matter was then assigned, to reflect change in corporate name of respondents filed February 3, 1967, with the Secretary of State of the State of Washington.

complaint against respondents charging violation of the Flammable Fabrics Act.²

After identifying the corporate respondent, under a former name, as a Washington corporation and the individual respondent as secretary and manager thereof, directly controlling its acts and practices; the complaint alleged that respondents had imported and transported in interstate commerce "fabric" so highly flammable as to be dangerous when worn by individuals. This was alleged to be a violation of the Act and the rules and regulations under it and to constitute unfair methods of competition and unfair acts and practices under the Federal Trade Commission Act.³

Respondents, by answer filed May 22, 1967, admitted that corporate respondent under its changed name was a Washington corporation, engaged in the sale and distribution of handicraft materials, but denied that the individual respondent directs and controls its policies, acts and practices. They denied that they had violated the Flammable Fabrics Act and averred that the articles referred to were not fabrics but dyed wood bark, and that respondents had ceased making leis and had marked the product as "highly flammable" and "should not be used for the purpose of making leis." Respondents also denied they were engaged in deceptive acts and practices in commerce and asked that hearings be held in Seattle, Washington.

Complaint counsel moved June 9, 1967, to change the corporate name of the corporate respondent in the complaint. The motion was granted June 21, 1967.

Respondents, by amended answer filed July 13, 1967, admitted that they had sold and offered for sale in interstate commerce wood fiber chips so highly flammable as to be dangerous when worn by individuals but reserved the right to offer evidence that such wood fiber chips do not fall within the definition of fabric.⁴

² 15 U.S.C. 1191 *et seq.* The pertinent portion of the statute is § 3(b) (15 U.S.C. 1192) which reads as follows:

"The sale or the offering for sale, in commerce, or the importation into the United States, or the introduction, delivery for introduction, transportation or causing to be transported in commerce or for the purpose of sale or delivery after sale in commerce, of any fabric which under the provisions of section 4 of this Act is so highly flammable as to be dangerous when worn by individuals, shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act."

³ 15 U.S.C. 41 *et seq.*

⁴ Section 2(e) of the Flammable Fabrics Act, 15 U.S.C. 1191 provides:

"The term 'fabric' means any material (other than fiber, filament, or yarn) woven, knitted, felted, or otherwise produced from or in combination with any natural or synthetic fiber, film, or substitute therefor which is intended or sold for use in wearing apparel except that interlining fabrics when intended or sold for use in wearing apparel shall not be subject to this Act."

in the Flammable Fabrics Act and are not intended or sold for use in wearing apparel. Respondents, in their amended answer, further agreed to offer no objection to the Commission's exhibits in the forms [sic] of documents, wood fiber chips, Hawaiian leis and test reports which show the flammability of said wood fiber chips.

Prehearing Conference

On motion of complaint counsel and on July 21, 1967, the hearing examiner ordered that a prehearing conference be held immediately prior to the formal hearing on August 15, 1967. At such prehearing conference, the names of witnesses were exchanged, the documents and other exhibits to be used were produced and the parties agreed that the issues were limited to the following questions:

1. Did the individual respondent direct and control the acts and practices of corporate respondent?⁵
2. Are the wood chips fabric within the meaning of the Flammable Fabrics Act?
3. Were the wood chips sold for the purpose of incorporation into wearing apparel?
4. Is the case moot?

The results of the conference were dictated into the record as the hearing examiner's prehearing order (see PHTr. 20-24, Tr. 2).

Basis for Decision

The formal hearing was commenced and concluded on August 15, 1967. Proposed findings, conclusions, and orders were filed September 14, 1967. All proposed findings and conclusions not adopted in substance or in terms are denied as immaterial, irrelevant, or erroneous. The following findings of fact, conclusions, and order are made on the basis of the entire record and on the hearing examiner's observation of the witnesses.

In accordance with Rule 3.51(b), principal items of evidence relied upon are cited. However, despite citation of particular items of evidence, consideration has been taken of the entire record and no effort has been made to cite all relevant references.

⁵ This issue was later resolved by admission of counsel during the prehearing conference that the individual respondent did direct and control the corporate respondent (PHTr. 7).

In citing the record the following abbreviations will be used:

C — Complaint.

A — Answer.

CPF — Commission's Proposed Findings (including citations).

RPF — Respondents' Proposed Findings (including citations).

Tr. — Transcript page; if prehearing (PHTr.).

CX — Commission Exhibit.

RX — Respondents' Exhibit.

FINDINGS OF FACT

1. Respondent Pat and Bobbie's, Inc., is a corporation organized and existing under the laws of the State of Washington, has its principal place of business at 6220 Roosevelt Way, NE., Seattle, Washington, and is engaged in the sale and distribution of handicraft materials (C., A.).

2. Respondent Patricia A. Farrell is the secretary and manager of respondent Pat and Bobbie's, Inc., and is responsible for the direction and control of its policies, acts, and practices (C., A., Tr. 95).

3. Respondents sold packages of square sheets of rice paper (designated as wood chips in the answer) for use as Hawaiian leis in commerce, as that term is used in the Flammable Fabrics Act, up to and including the date they had knowledge of the commencement of the investigation in this case (PHTr. 14).

4. The hearing examiner takes official notice that Hawaiian leis are articles of wearing apparel. They are placed over the head and extend around the back of the neck and fall in front of the torso.

5. The rice paper sheets sold by respondents are manufactured in Formosa by spinning the pith of a plant known as *fatsia papyrifera*, also known as *aralia papyrifera*, against a sharp knife so that thin layers are peeled off. These layers are then cut into squares, dyed and packaged (Tr. 57, 59, 68, 69, 109). They are purchased by respondents from an importer (CX 5).

6. In the opinion of the experts of both parties called to testify, which the hearing examiner accepts, such sheets are not fiber, film or yarn and they are not woven, knitted or felted (Tr. 60, 71, 74, 79, 109).

7. The sheets of rice paper are otherwise produced, *i.e.*, from pith, which in this usage is a substitute for natural or synthetic fiber or film (Tr. 62, 63, 72).

8. A significant amount of such sheets of rice paper, which were flammable within the meaning of the Flammable Fabrics Act, was sold in interstate commerce, after the passage of that Act, to persons located in States other than the State of Washington, was intended for use in the manufacture of Hawaiian leis (CXs 24, 25, 27, 28, 39, 41(b)).

9. Rice paper has been produced by the Chinese in the same manner, for hundreds, if not thousands, of years (Tr. 69, 70).

10. After respondents became aware that the Federal Trade Commission was investigating, they took steps to change their

manner of doing business in an effort to prevent the sale of flammable rice paper. By March or April 1967 they had set up separate displays of nonflammable and flammable material. The former was designated for the making of leis (RXs 1, 2; Tr. 100-101). Their dealer catalogue (RX 7) was amended to include a statement that a certain line of rice paper was not flameproof and should not be used on leis. Prior to August 1966, it was admitted that respondents had given instructions in the making of leis (PHTr. 14) and respondent Farrell testified that the first invoice of fireproof rice paper was not received until September 1966 (Tr. 100). Accordingly, respondent's statements that the catalogue (RX 7) was used for a year and the separate displays of flammable and nonflammable material maintained for a similar period are erroneous (see Tr. 101) since respondents did not have nonflammable rice paper available for that long a period.

11. Respondents' action was not effective to prevent the sale of flammable rice paper for use in the manufacture of leis. As late as February 1967, respondents' salesgirl instructed a salesclerk from a purchaser in the manufacture of leis and sold the salesclerk rice paper to which the latter helped herself (Tr. 39-50, 104; CXs 1, 2, 31, 33, 34). The sales slip bore the number 8000 (CX 32) and concededly the 8000 line had a flammability forbidden by the Act (Tr. 25; CXs 33-40). In an attempt to explain, respondents' salesgirl who had signed the sales slip testified that, at that time, no distinction in number on the description written on a sales slip was made between flammable and nonflammable rice paper but that she recommended to purchasers who wanted to make leis that they take the kind that was for leis only (Tr. 113, 114). The transaction was so vague in her mind (Tr. 111) that what she told prospective purchasers is not accepted as a valid explanation of the testimony of Mrs. Abeyta, the purchasing salesclerk. Mrs. Farrell testified that the red rice paper sold to Mrs. Abeyta in early 1967 and made into a lei (CX 31) looked lighter in color to her than the flammable rice paper (Tr. 106). Examination of Commission Exhibit 31 confirms that it might be described as rose-colored paper. Rose-colored paper was advertised in respondents' catalogue as nonflammable (RX7). Respondents, however, did not submit a test report on or seek to test the particular lei involved. Moreover, respondents did not establish that they had surely ceased placing flammable rice paper in the hands of persons making leis. It is very clear that respondents had flammable rice paper available and let customers serve themselves (Tr. 104).

Reasons for Decision

The foregoing facts found from the testimony and exhibits leave only two questions for decision: 1) Is rice paper "fabric" in the circumstances? and 2) did respondents so surely cease their activity that no order should issue?

On the first question, although rice paper had been a product in common use for centuries, there was no indication that at the time of the passage of the Flammable Fabrics Act such product was commonly used in the manufacture of wearing apparel. Accordingly, there was no reason for Congress to make an express reference to it in the statute. Nothing found in the legislative history is of assistance in determining what was meant to be included in the terms "otherwise produced" or "substitute therefor." Accordingly, we have only the terms of the Act. It reads:

The term "fabric" means any material (other than fiber, filament, or yarn) woven, knitted, felted, or otherwise produced from or in combination with any natural or synthetic fiber, film, or substitute therefor which is intended or sold for use in wearing apparel except that interlining fabrics when intended or sold for use in wearing apparel shall not be subject to this Act.

Express exception was made to the inclusion of fiber, filament, or yarn because of difficulties of testing and to the inclusion of interlining because the fact that it is covered reduces its flammability. These reasons are apparent from the hearings and reports.

It is the opinion of the hearing examiner that Congress intended through the use of the terms "woven, knitted, or felted" modifying the word "material" to include all common methods of producing material such as piece goods then in use for wearing apparel. Hence, Congress added the words, "or otherwise produced" so that material like piece goods, produced by a method other than weaving, knitting, or felting, would be included if intended for wearing apparel. This opinion is confirmed by the fact that the term "otherwise produced" is followed by the sweeping term "from or in combination with any natural or synthetic fiber [or] film." Adding to this the term "or substitute therefor" would seem clearly intended as a further enlargement of the class of material included. Moreover, the mischief intended to be corrected by the statute was clearly the sale of material that was dangerously flammable for use in wearing apparel. Hence, since the rice paper here in question is material produced otherwise than by knitting, weaving, or felting from a substitute for natural or synthetic fiber or film and since when sold to make leis it is intended for use as wearing apparel, it follows that rice paper is fabric within the definition of the Act.

On the second question, it is the opinion of the hearing examiner that this case is not moot. Respondents maintained to the end their contention that flammable rice paper sold for use in leis was not fabric within the meaning of the Flammable Fabrics Act. They took no action to stop selling rice paper for that purpose until the Commission disclosed its hand. And, when action was taken, it was delayed and ineffective.

The following conclusions are reached from these reasons and from the findings of fact.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of respondents and of the subject matter of this proceeding. And, the acts and practices complained of took place in commerce as that term is used in the Flammable Fabrics Act.

2. Rice paper sold for use in the manufacture of leis, which are a type of wearing apparel, is fabric within the meaning of the Flammable Fabrics Act.

3. Respondents sold rice paper for leis in interstate commerce that was flammable within the meaning of the Flammable Fabrics Act.

4. Respondents accordingly violated the Flammable Fabrics Act and thus committed unfair acts and practices within the meaning of the Federal Trade Commission Act.

5. The order in this case should run both against the corporate respondent and the individual respondent, but it should be limited to fabric to be used for wearing apparel including leis, *i.e.*, "fabric," as defined in the Flammable Fabrics Act.

6. Respondents' attempts to prevent the sale of flammable rice paper for use in the manufacture of leis were not made until after they had knowledge of the pendency of the investigation by the Federal Trade Commission and were ineffective to the extent that there is a continuing danger that flammable rice paper again will be made available for use in the manufacture of leis. Hence the case is not moot.

Accordingly, the following order should issue.

ORDER

It is ordered, That respondents Pat and Bobbie's, Inc., a corporation, and its officers, and Patricia A. Farrell, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

Complaint

- (a) Importing into the United States; or
 - (b) Selling, offering for sale, introducing, delivering for introduction, transporting, or causing to be transported, in commerce, as "commerce" is defined in the Flammable Fabrics Act, as amended; or
 - (c) Transporting or causing to be transported, for the purpose of sale or delivery after sale in commerce;
- any fabric, as "fabric" is defined in the Flammable Fabrics Act, as amended, including rice paper which, under the provisions of Section 4 of the said Act, is so highly flammable as to be dangerous when worn by individuals.

FINAL ORDER

No appeal from the initial decision of the hearing examiner having been filed, and the Commission having determined that the case should not be placed on its own docket for review and that pursuant to Section 3.51 of the Commission's Rules of Practice (effective July 1, 1967), the initial decision should be adopted and issued as the decision of the Commission:

It is ordered, That the initial decision of the hearing examiner shall, on the 24th day of November, 1967, become the decision of the Commission.

It is further ordered, That respondents Pat and Bobbie's, Inc., a corporation, and Patricia A. Farrell shall, within sixty (60) days after service of this order upon them, file with the Commission a report in writing, signed by the respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.