

Order modifying Commission decision and order issued Oct. 19, 1973 (38 F.R. 31827), by deleting from Paragraph I.1.a. the requirement that respondent identify the basis relied upon for nutritional claims. Further, order denies respondents' petitions for reconsideration.

Appearances

For the Commission: *H. Robert Field, Thomas J. Donegan, Lynne C. McCoy, William S. Busker and David O. Bickart.*

For the respondents: *Herbert Dym of Covington & Burling, Washington, D.C., Laurence T. Sorkin of Cahill, Gordon, Sonnett, Reindel & Ohl, Washington, D.C. and Gordon A. Thomas and Alan C. Davis of Rye, N.Y. for ITT Continental Baking Company, Inc. Elhanan C. Stone for Ted Bates & Company, Inc., New York, N.Y.*

*For Complaint, Decision and Order, see p. 865 herein.

ORDER RULING ON PETITIONS FOR RECONSIDERATION

Respondents ITT Continental Baking Company, Inc. ("ITT") and Ted Bates & Company, Inc. ("Bates") have filed petitions for reconsideration of the Commission's decision and order of Oct. 18, 1973. Complaint counsel have filed a response opposing the petitions. We will limit our consideration of the petitions to new matters raised by our decision and order upon which petitioners had no prior opportunity to argue. See Commission Rule 3.55.

I.

Petitioners argue that the particular violation found by the Commission was not alleged in the complaint. In our decision we upheld the allegation of misrepresentation contained in Paragraph 10 of the complaint but dismissed allegations of other misrepresentations charged in the complaint. Paragraph 10 charged that:

Certain of the aforesaid advertisements are addressed primarily to children or to general audiences which include substantial numbers of children, which advertisements tend to exploit the aspirations of children for rapid and healthy growth and development by falsely portraying, directly and by implication, said Wonder Bread as an extraordinary food for producing dramatic growth in children.

Therefore, the aforesaid acts and practices of respondents were and are false, misleading, deceptive and unfair.

As our opinion of Oct. 19, 1973, recognized (p. 4 [p. 949 herein]), the thrust of this charge is directed to the effect of the challenged advertisements on children. Our finding of violation was based upon this view of Paragraph 10. It is true, as pointed out by respondents, that in our opinion we did not limit our discussion to effects on children but also found that the challenged advertisements were designed "to convince parents as well as children" that Wonder Bread had very important properties for children's healthy growth and development. (Opinion, p. 17 [p. 959 herein]) We concluded that the advertisement "had the capacity to deceive children and parents because they portrayed Wonder Bread as an extraordinary food for producing dramatic growth* * *." (Opinion, p. 18 [p. 960 herein]) However, we find no inconsistency between these findings and the charge in Paragraph 10.

As our opinion made clear, in dealing with the allegations of Paragraph 10, we concerned ourselves only with the advertisements that were seen on *children's* programs and those TV commercials containing, for instance, the fantasy growth sequence, which commercials, although not shown on children's programs, were shown as early as 10:00 a.m. with *children* constituting a substantial part of the viewing audience. (Opinion, pp. 5, 18 [pp. 950, 960 herein].) In addition to the ads

themselves, evidence was presented by complaint counsel that these advertisements were deceptive to the entire audience viewing them. (Opinion, Ftns. 18-19 and text [p. 961 herein].) The conclusion was inescapable from this evidence and the commercials themselves that the advertisements had the capacity to lead parents, as well as children, to believe that Wonder Bread is an extraordinary food for producing dramatic growth in children. Evidence of this effect on parents was clearly probative on the issue raised in Paragraph 10, since it is reasonable to assume that advertisements which have the capacity to deceive the more sophisticated adult portion of a viewing audience would *a fortiori* have the capacity to deceive the children in that audience. We find no error in relying upon this evidence and making the findings which we did.

Petitioners raise a number of objections to provisions of the Commission's order to cease and desist. We will deal with these arguments *seriatim*.

Paragraph 1 a. Paragraph 1 a of the Commission's order forbids respondents, in food advertisements, from representing:

The nutritional properties of any such product in generalized terms such as "rich in nutrients," vitamins or iron fortified, "enriched," or other similar nutritional references, without identifying the basis relied upon for the nutritional claims, and unless the advertised nutritional value can be substantiated for the average and ordinary use of the product by consumers or by particular groups of consumers provided they are specified.

Respondents object to this provision on the ground, among other things, that it is unrelated to the violation found. As to the requirement in this provision that references in general terms to nutritional value must be substantiated for the average use of the product by consumers, we disagree. One of the major techniques used in the advertisements found to have falsely represented that Wonder Bread was an extraordinary food for growth in children was the repeated and exaggerated reference to the nutritional qualities of ITT's bread. The Commission, in addition to proscribing the false representation found to have been made in the past, is entitled to go further and prohibit or regulate types of claims that are reasonably related to the past representations and which might constitute alternate roads to the same general goal of deceiving the public. *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419 (1957).

However, on reconsideration we are persuaded that the requirement in this part of the order that respondents must identify in the advertisement "the basis relied upon" for nutritional claims is not justified in view of the nature of the violation found in this case. As indicated above,

the deception in the advertisements involved in the violation arose from the use of repeated and exaggerated references to nutritional ingredients in Wonder Bread and representations as to their growth-producing properties. Challenges that these and other advertisements were misleading because they failed to disclose certain additional facts relating to nutrition were dismissed by the Commission. Although a different and more limited type of affirmative disclosure requirement is justified (see discussion *infra* of Paragraph 1 b), we have concluded that the requirement of affirmative disclosure of the "basis relied upon" for nutritional claims is not warranted in this particular case. This part of the order will be modified.

Paragraph 1 b. This provision requires respondents, whenever they represent "the comparative nutritional efficacy or value" ¹ of a food product, to state the "brand, product, or product category" to which the comparison is made.

Petitioners again object on the ground that there is no relationship to the violation. But the misrepresentation found by the Commission—that Wonder Bread is an extraordinary food for producing growth in children—was itself a comparative claim, as it clearly suggested that Wonder Bread is superior to *some* food products as far as nutritional qualities are concerned.²

We have concluded that it is necessary to assure that respondents do not in the future make nutritional claims that falsely imply superiority over other food products. As a means of reaching that objective, it is necessary to require respondents to designate clearly the brand or products to which any nutritional comparison is made.

Paragraph 1 c. This provision prohibits representations that a food product is essential as a source of a particular nutritional value if there are other food products which are also sources of the same or similar nutritional values and unless the claim can be substantiated for normal use of the product. Again, although we did not find this exact type of representation to have been made in the past by respondents, it is the type of representation that, if made, would be closely related to previous claims that implied that Wonder Bread was an extraordinary food for producing growth in children, *e.g.*, respondents' assertions that Wonder Bread supplies "proteins, minerals, carbohydrates, and vitamins * * * all vital elements for growing minds and bodies." (Opinion,

¹ The parties have raised the question whether "value" means nutritional value or has a broader meaning. The term "value" in this provision is modified by the foregoing term "nutritional." The same is true with respect to the terms "efficacy or functional value" appearing in Paragraph 3 of the order.

² The fact that the Commission did not find a basis for the charge that Wonder Bread was represented as superior or unique as against "all" (as distinguished from "some" or "most") other foods or brands, as was alleged in Paragraph 8(a) of the complaint, is not inconsistent with this observation.

p. 6 [p. 951 herein].) We affirm the necessity of the presence in the order of this provision.

Paragraph 1 d. Paragraph 1 d forbids representations in food advertising of:

The functional value or other attributes of any such product to a user through the use of demonstrations or other visual techniques unless the demonstrations are actual depictions of the actual value of the product by actual persons and represent the average and ordinary experience of consumers with the use of the product.

This provision was included because of the previous use of the highly exaggerated "growth sequence" commercials found to have the capacity to deceive. The provision prohibits future use of demonstrations or visual techniques unless they accurately reflect a real life situation. Cf. *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 388 (1965). This provision will be retained notwithstanding respondents' objections.

Paragraph 3. Paragraph 3 forbids respondents from "misrepresenting in any manner the nutritional content, efficacy or functional value" of any food product. Respondents object to this paragraph on the ground the provision is overly broad in view of the Commission's dismissal of various charges in the complaint and affirmance of what one respondent characterizes as a "single violation." But the violation found was hardly "single" or of *de minimis* proportions. The advertisements found to be deceptive ran for a period of several years and involved millions of dollars of sales. In view of the magnitude of the violation and the importance to children and consumers of correct nutritional information, we deem it necessary to assure that respondents are prohibited from engaging in any type of false advertising of the nutritional qualities of food products.

Finally, we have examined respondent Bates' arguments relating to that portion of our opinion describing the responsibility of advertising agencies in cases of this kind. We find no reason to retract any of our language.

It is ordered, That Paragraph I 1 a of the Commission order to cease and desist, entered herein on Oct. 19, 1973, be modified to read as follows:

The nutritional properties of any such product in generalized terms such as "rich in nutrients," vitamins or iron fortified, "enriched," or other similar nutritional references, unless the advertised nutritional value can be substantiated for the average and ordinary use of the product by consumers or by particular groups of consumers provided they are specified.

It is further ordered, That the petitions for reconsideration filed

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Order

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by respondents except to the extent they have been granted by