

(1) In three of these cases, there is no quorum of the Commission at the present time for rendering adjudicative decisions on the merits and issuing any orders to cease and desist based upon findings of violation of law. Adjudication of these cases would require reargument of the appeals. The specific practices challenged in these cases occurred almost a decade ago, in the mid-1950's, and competitive conditions in this dynamic and rapidly changing industry appear to have altered significantly since then.

(2) The Commission has this date announced the initiation of a broad inquiry into the problems of competition in the marketing of gasoline. Orders to cease and desist entered against a few oil companies—orders which would probably not become final, if at all, until completion of lengthy review proceedings in the Federal Courts of Appeals and the Supreme Court—could not provide complete or effective solution to the competitive problems of the gasoline industry. It would appear to be more desirable, from the standpoint of effective administration of the law, that the Commission concentrate its necessarily limited resources on a comprehensive industry-wide approach to the problems of competition in the marketing of gasoline.

Commissioner Dixon not participating and with Commissioner MacIntyre dissenting for the reasons stated by him in the accompanying dissenting opinion.

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IN THE MATTER OF

CROWN PUBLISHERS, INC., ET AL.

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

*Docket 8593. Complaint, Sept. 5, 1963—Decision, Dec. 28, 1964*

Order requiring a New York City corporation, engaged in publishing, selling, and distributing books and other publications to retailers for resale to the public, to cease preticketing deceptively high prices on their reprinted books, including the reprint edition of "High Iron," by such practices as placing on the jacket thereof a price higher than the prevailing retail price with a printed wavy line through it suggesting a hand drawn ink line, thereby conveying the impression that said books were reduced by retailer.

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 Crown Publishers, Inc., a corporation, also doing business as Bonanza Books, and Nathan

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## Complaint

Wartels, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Crown Publishers, 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 419 Park Avenue South, in the city of New York, State of New York.

Respondent Nathan Wartels is the president of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices herein set forth. His office and principal place of business is located at the above stated address.

PAR. 2. Respondents are now, and for some time last past have been engaged in the business of publishing, offering for sale, selling and distributing books and other publications to retailers for resale to the general public.

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

PAR. 4. In the course and conduct of their business, respondents are now, and for some time last past have been, engaged in the publishing, offering for sale, selling and distributing of a book titled "High Iron" by Lucius Beebe. Respondents sell this book to retail book stores for \$1.79 and recommend that it be sold to the public for \$2.98. On the inside flap of the jacket, the price \$6.00 appears with a line drawn through it. Respondents thereby are now, and for some time last past have been representing, directly or by implication, that the usual and customary retail selling price of said book in the recent regular course of business in all respondents' trade areas has been \$6.00, and that members of the general public who purchase said book at retail at a price lower than \$6.00 save the difference between said lower price and \$6.00.

PAR. 5. In truth and in fact, the usual and customary retail selling price of said book in the recent regular course of business in all respondents' trade areas has not been \$6.00. Such price is in excess of the

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generally prevailing price or prices at which said book has been sold at retail in the recent regular course of business, in some, if not all, of the trade areas where the representations are made; and accordingly, in such trade areas, members of the general public who purchase said book at retail at a price which is lower than \$6.00 do not save the difference between such low price and \$6.00.

Said statements and representations were, therefore, false, misleading and deceptive.

PAR. 6. By the aforesaid practices, respondents now place, and for some time last past have placed, in the hands of retailers, the means and instrumentalities by and through which they may mislead the public as to the price at which said book has been usually and customarily sold at retail in the recent regular course of business, and as to the savings afforded in the purchase of said book.

PAR. 7. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition in commerce, with corporations, firms and individuals engaged in the sale of books and other publications of the same general kind and nature as those sold by respondents.

PAR. 8. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations, and practices, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' books by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of the 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(a)(1) of the Federal Trade Commission Act.

*Mr. George J. Luberda*, for the Commission.

*Denning & Wohlstetter*, by *Mr. Ernest H. Land* of Washington, D.C., for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

JUNE 15, 1964

The complaint in this proceeding alleges that, in the course of selling their reprint of the 1938 Edition of the book HIGH IRON, by Lucius

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Beebe, in interstate commerce, respondents affixed thereto a dust cover or dust jacket on the left inside flap of which there is imprinted a \$6.00 price with a line drawn through it, thus ~~\$6.00~~.

Respondents thereby [represent] \* \* \* that the usual and customary retail selling price of said book in the recent regular course of business in all respondents' trade areas has been \$6.00, and that members of the general public who purchase said book at retail at a price lower than \$6.00 save the difference between said lower price and \$6.00.

The complaint further alleges that \$6.00 is not the usual and customary retail price of said book in any trade area, and that respondents' action in affixing such dust covers upon HIGH IRON places in the hands of retail book sellers a means by which said retail book sellers may mislead the public as to the price at which respondents' reprint edition of HIGH IRON has been usually and customarily sold at retail in the recent, regular course of business in the trade areas involved. This is asserted to be a violation of Section 5 of the Federal Trade Commission Act.

Answer to the complaint was filed in the usual manner; prehearing conferences were convened; prehearing orders issued as a result thereof; stipulations of fact resulting from the prehearing procedures have been filed; hearings have been held; oral and documentary evidence has been received; proposed findings, conclusions and briefs have been filed, and the matter is now before the hearing examiner for decision.

The legally operative facts are not disputed for the most part. It is the legal conclusions to be drawn therefrom which are in dispute.

Complaint counsel has not, in this proceeding, sought to try all of the pricing practices of respondents, but has limited himself to the actionable deception, if any, in respondents' practice of affixing to its reprint edition of the book HIGH IRON the dust jacket hereinabove described (CX 2-CX 5).

Complaint counsel has categorized this as a "preticketing" case. If this were a preticketing case, it would fall within the rationale of *Regina Corporation v. F.T.C.*, 322 F. 2d 765 (C.A. 3, 1963). However, in his arguments and in the papers which he has filed, complaint counsel relies upon the rationale of the Federal Trade Commission and the Court of Appeals in *Giant Food, Inc. v. F.T.C.*, 322 F. 2d 977. The instant case is neither a classic preticketing case within the rationale of *Regina* nor a classic deceptive pricing case within the rationale of *Giant Food*. The case presents to some extent a problem of deceptive packaging. If the left inside flap of the dust jacket of respondents' reprint of HIGH IRON were altered with the addition of a few explana-

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tory words, the deception of which complaint counsel complains would not exist.

Effective January 8, 1964, the Federal Trade Commission adopted *Guides Against Deceptive Pricing*, which were accompanied by a special statement by Commissioner Everette MacIntyre.<sup>1</sup> Such *Guides Against Deceptive Pricing, inter alia*, state:

#### GUIDE I—FORMER PRICE COMPARISONS

One of the most commonly used forms of bargain advertising is to offer a reduction from the advertiser's own former price for an article. If the former price is the actual, *bona fide* price at which the article was offered to the public on a regular basis for a reasonably substantial period of time, it provides a legitimate basis for the advertising of a price comparison. Where the former price is genuine, the bargain being advertised is a true one. If, on the other hand, the former price being advertised is not *bona fide* but fictitious—for example, where an artificial, inflated price was established for the purpose of enabling the subsequent offer of a large reduction—the “bargain” being advertised is a false one; the purchaser is not receiving the unusual value he expects. In such a case, the “reduced” price is, in reality, probably just the seller's regular price.

A former price is not necessarily fictitious merely because no sales at the advertised price were made. The advertiser should be especially careful, however, in such a case, that the price is one at which the product was openly and actively offered for sale, for a reasonably substantial period of time, in the *recent, regular course of his business*, honestly and in good faith—and, of course, not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based. And the advertiser should scrupulously avoid any implication that a former price is a selling, not an asking price (for example, by use of such language as, “Formerly sold at \$ \_\_\_\_\_”), unless substantial sales at that price were actually made. (*Italic supplied.*)

\* \* \* \* \*

If the former price is set forth in the advertisement, whether accompanied or not by descriptive terminology such as “Regularly,” “Usually,” “Formerly,” etc., the advertiser should make certain that the former price is not a fictitious one. If the former price, or the amount or percentage of reduction, is not stated in the advertisement, as when the ad merely states, “Sale,” the advertiser must take care that the amount of reduction is not so insignificant as to be meaningless. It should be sufficiently large that the consumer, if he knew what it was, would believe that a genuine bargain or saving was being offered. An advertiser who claims that an item has been “Reduced to \$0.99,” when the former price was \$10.00, is misleading the consumer, who will understand the claim to mean that a much greater, and not merely nominal, reduction was being offered.

At the time that these new Guides became effective, Commissioner Everette MacIntyre's separate statement (Appendix A) included the following:

<sup>1</sup> Commissioner MacIntyre's statement is attached as Appendix A.

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The nub of the problem as I see it is that these Guides are not, as they purport, restatements of the law; the changes introduced here are too sweeping for that. It is fair to say that the Guides in many respects are sharply at variance with the body of law on this subject painfully built up by the Commission and courts over a number of decades. The result may well be the opposite of that intended—uncertainty for consumers, the businessman and the Commission's staff alike. Under the circumstances, there is a serious question that we can sustain the necessary vigour of enforcement even with the best of intentions.

On February 17, 1964, in *Clinton Watch Company*, Docket No. 7434 [64 F.T.C. 1443], in acting upon respondents' petition to reopen proceedings, *inter alia*, the Commission stated:

\* \* \* However, the Commission has directed that all outstanding cease and desist orders involving deceptive pricing shall be interpreted, and thus *pro tanto* modified, so as to impose on respondents subject to such orders no greater or different obligations than are stated in the Commission's newly-revised Guides Against Deceptive Pricing issued on January 8, 1964.

Simultaneously, Commissioner MacIntyre issued the following statement:

I am compelled to issue a separate statement setting forth my views on the Commission's action in modifying the cease and desist order issued against the Clinton Watch Company in this proceeding. The significant provision amending the order reads as follows:

"\* \* \* the Commission has directed that all outstanding cease and desist orders involving deceptive pricing shall be interpreted, and thus *pro tanto* modified, so as to impose on respondents subject to such orders no greater or different obligations than are stated in the Commission's newly-revised Guides Against Deceptive Pricing, issued on January 8, 1964. \* \* \*"

I do not concur with this action for the following reasons. Respect for the businessmen who come before it, as well as for the appellate courts, requires that Commission orders be drafted with sufficient precision so that they can be understood. The wholesale "pro tanto" incorporation of the provisions in the new Guides, adopted in this instance, affords the Clinton Watch Company no guidance for the regulation of its future conduct with respect to its pricing practices. The Guides, of course, cover a multitude of deceptive pricing practices which may or may not be applicable to the Clinton Watch Company and it is doubtful that the "pro tanto" qualification will enlighten either the Commission's staff or respondent as to precisely those terms of the Guides applicable to the Clinton Watch Company. This difficulty is, of course, compounded by the fact that the Guides themselves still require considerable adjudicative definition before either the courts, the Commission, or the business community will be fully advised of their legal significance. In violation of the Supreme Court's injunction in *Federal Trade Commission v. Morton Salt Company*, 334 U.S. 37 (1948), the Commission here is shifting to the courts the burden of determining the factual question of what constitutes unfair conduct. I am surprised that this Commission, which recently has made so many pronouncements of the necessity for clear and definitive orders, is in this area embarking on a course which can

lead only to administrative and judicial confusion by issuing orders, the terms of which are so imprecise and indefinite that they are likely to be misunderstood.

On April 7, 1964, in *The Regina Corporation*, Docket No. 8323 [65 F.T.C. 246, 250], the Commission amended its final order in *Regina* so as to require respondent to cease and desist from:

Advertising or disseminating any list or pre ticketing price unless such price is a good faith estimate of the actual retail price and does not appreciably exceed the highest price at which substantial sales are made in respondent's trade area.

At the time that the Commission issued its above order in *Regina* on April 7, 1964, Commissioner MacIntyre again issued a separate statement which included the following:

In rejecting respondent's plea that the order be set aside, the Commission employs rather facile generalizations, glossing over the contention that Regina's past activities as documented by the record do not constitute a violation of the law as now construed. Sweeping aside Regina's arguments on this point, the Commission broadly asserts:

"\* \* \* the standards enunciated in the Guides are intended to be prospective, rather than retrospective, in their application. The public interest would not be served if the Commission were to undertake the time-consuming and unsatisfactory task of attempting to review, in the light of every new policy pronouncement, the records of all the cases in which cease and desist orders have become final, in order to ascertain whether the records would support a finding of violation under the new standards. It is very doubtful how accurate such retrospective evaluation could be, or how useful would be a process of continuous reexamination of old, and frequently stale, records."

I cannot adopt this rationale, for the simple reason that it does not come to grips with Regina's contention on this point, which, in fact, raises serious questions meriting a responsive and reasoned reply. At the outset, I may state that the assertion that the Guides are intended to be prospective rather than retrospective in their application avoids the realities of the matter. The Commission has only recently dismissed complaints in a number of proceeding brought prior to the issuance of the revised Guides on the ground that the proof in these proceedings did not meet the new standards. *E.g.*, see *Filderman Corporation, Inc., et al.*, Docket No. 7878 (1964). The Commission's assertion that the Guides are prospective, in rebuttal of respondent's request for rescission, is particularly inappropriate because the application of cease and desist orders are not retrospective but prospective as far as respondent's obligations thereunder are concerned. Regina and respondents in other cases may well question the effect on their future business decisions if all Commission policy reversals of this nature will be prospectively applied without regard to what has gone before.

The Commission, in this instance, has ignored another fundamental consideration. As I understand Section 5 of the Federal Trade Commission Act, the Commission is empowered to issue cease and desist orders only upon a finding that a violation of law has occurred.<sup>1</sup> Unless the Commission comes to grips with the issue of whether respondent's past actions documented in this proceeding are violative of the Act, I do not see how, in good conscience, it can keep in effect a cease and desist order bearing in respondent's future conduct. The

<sup>1</sup>Footnotes omitted.

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justification that a review of the record in this proceeding would be either unduly troublesome or time-consuming does not absolve the Commission from performing its statutory functions. The Commission will have to grapple with this issue, either in this proceeding or in other deceptive pricing cases wherein outstanding orders issued prior to January 8, 1964, are in effect, and the number of cases in this category are, of course, numerous. The Commission may refuse, at this time, to decide the question of whether a respondent's activities leading to an outstanding cease and desist order are in violation of the law as presently interpreted by this agency. We should not, however, be surprised if the courts are asked to fill the vacuum the Commission has left, if we abdicate our functions in this manner.

The Commission's treatment of this issue ignores the further point that a decision on the merits as to whether respondent's past conduct violates the law as now construed is required here so that at least respondent and those on the Commission's staff charged with enforcing this and similar orders will know what the Commission's position is. While the evasion of this question may stave off some admittedly difficult problems in the immediate future, in the long run it can only lead to further disarray in an area of the law already subject to considerable confusion.<sup>2</sup>

Ignoring the issue of whether the respondent should be under order at all, the Commission has modified Regina's order by elaborating on its "pro tanto" modification procedure employed in *Clinton Watch Company, et al.*, Docket No. 7434 (Order Denying Petition To Reopen Proceeding, issued February 17, 1964) [64 F.T.C. 1443], with which I was unable to agree at that time.<sup>3</sup> \* \* \*. [Footnotes omitted.]

The Commission recently reversed this hearing examiner and vacated an order against deceptive pricing issued in *Name Brand Distributors*, Docket No. 8533. (See decision of the Commission and order to file report of compliance issued April 24, 1964 [65 F.T.C. 497, 522].) It issued a pricing order in *Continental Products, Inc.*, Docket No. 8517 [65 F.T.C. 361].

Presently pending before the Commission in *Giant Food, Inc.*, Docket No. 7773, a petition to reopen proceedings was filed by the respondent therein pursuant to Section 3.23 of the Commission's Rules of Practice. At the time this decision is being written no action had been taken by the Commission upon Giant's petition to reopen the proceedings. This hearing examiner presided at the hearings in Docket No. 7773 and his order against deceptive pricing practices of *Giant Food, Inc.*, was sustained by the Federal Trade Commission as then constituted and later by the Court of Appeals for the District of Columbia Circuit. See 322 F. 2d 977. At the time this hearing examiner issued his original order in *Giant Food*, the record justified such pricing order. The Federal Trade Commission agreed that such pricing order should be issued, and the Court of Appeals for the District of Columbia sustained the hearing examiner and the Federal Trade Commission.

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In *Arnold Constable Corporation*, Docket No. 7657, in its opinion issued January 12, 1961 [58 F.T.C. 49, 62], the Commission made the following statement:

To such extent as the initial decision's reference to violation of guides may suggest or imply their force and effect as substantive law, such statement is patently erroneous. On the other hand, a statement that the advertising practices found violative of the Act also departed from basic criteria in the guides clearly would not imply such substantive force and effect. The initial decision shall be so amended.

In *Gimbel Brothers, Inc.*, Docket No. 7834, in the initial decision issued January 2, 1962 [61 F.T.C. 1051, 1061], the hearing examiner stated:

32. In summary, this case, insofar as the charges of fictitious pricing are concerned, appears to present squarely the question of the legal effect of the Commission's Guides Against Deceptive Pricing. If the Guides can properly be considered as law or as a substitute for evidence the charges have been sustained. If, on the other hand, the Guides cannot properly be so considered, these charges in the complaint must fall for lack of supporting evidence. In the examiner's opinion the latter view is the correct one.

Upon appeal from the hearing examiner's order in *Gimbel Brothers, Inc.*, Docket No. 7834, the Commission, on July 26, 1962 [61 F.T.C. 1051, 1073], which consisted at that time of three of the present Commissioners, stated:

What, then, is the proper status of the "Guides" with respect to a Commission proceeding? When viewed as a compilation and summary of the expertise acquired by the Commission from having repeatedly decided cases dealing with identical false claims, the role of the "Guides" becomes apparent. They serve to inform the public and the bar of the interpretation which the Commission, unaided by further consumer testimony or other evidence, will place upon advertisements using the words and phrases therein set out. It is our view that words and phrases of the type set out in the "Guides" must be consistently dealt with by the Commission or its decisions will have no meaning or value. *Only by consistent interpretation can some order be brought to the semantic jungle of advertising.* \* \* \* (Italic supplied.)\*

The parties to this proceeding agree that HIGH IRON was regularly offered for sale at retail for \$6.00 in the various trade areas, at the time it was originally published and copyrighted in 1938 by D. Appleton Century Company, Inc. and for four or five years thereafter. There is no record proof of actual retail sales during that period but it is fair to assume that the original edition of HIGH IRON sold at \$6.00

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\*The hearing examiner's dismissal of the pricing charges against *Gimbel Brothers* was reversed and an order was issued by the Commission against *Gimbel Brothers*. Thereafter, on October 17, 1962, the Commission altered its order in Docket No. 7834 (see final order issued October 17, 1962).

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retail. The reprint reissue edition of HIGH IRON involved in this proceeding was brought out by respondents 4 or 5 years ago. It is stipulated that this edition has been customarily selling at retail in all book shops at approximately \$3.00 per copy (\$2.95 or \$2.98).

In advertising their reprint edition of HIGH IRON respondents use the words "Orig. Pub." or some variations thereof which seek to inform a prospective purchaser that HIGH IRON was originally published to sell at retail at \$6.00.

The expertise of the Federal Trade Commission extends into the area of adjudicating, without consumer testimony, whether a particular pricing practice is deceptive within the purview of the Federal Trade Commission Act. "\* \* \* Actual consumer testimony is in fact not needed to support an inference of deception by the Commission \* \* \*." *Exposition Press, Inc. v. F.T.C.*, 295 F. 2d 869, 872 (C.A. 2, 1961). See also *Erickson v. F.T.C.*, 272 F. 2d 318 (C.A. 7); *Basic Books, Inc. v. F.T.C.*, 276 F. 2d 718; *Wybrant System Products Corporation v. F.T.C.*, 266 F. 2d 571 (C.A. 2, 1959). Consumer testimony has been offered and is in this record. Such consumer testimony as is in this record is not necessarily binding upon the hearing examiner in determining whether respondents' pricing practices were and are deceptive within the intent and meaning of the Federal Trade Commission Act. Complaint counsel's consumer testimony included that of the following witnesses, among others, from Philadelphia and surrounding areas:

*Leonard Levitt*, owner and operator of a card and book shop in the City of Philadelphia;

*David Bagelman*, a book dealer for 35 years in Philadelphia;

*Irving Shusterman*, owner for 11 years of The Whitman Book Shop in Philadelphia;

*William M. Davidson*, a stockbroker and investment banker in Philadelphia;

*Merrill G. Berthrong*, Librarian at the University of Pennsylvania since 1956;

*Harold S. Stine*, Professor of English at the University of Pennsylvania;

*Ted Petterson*, a student at Temple University, in Philadelphia;

*Miss Edwina Stuczynski*, a student at Temple University who was studying to be a teacher;

*Jesse C. Mills*, Assistant Director of Libraries at the University of Pennsylvania;

*George A. Barnett*, operator of a restaurant and bar in Philadelphia;

*Miss Elizabeth Maxwell*, a secretary-receptionist in the office of the president of the University of Pennsylvania;

*Mrs. Barney Johnson*, a secretary in the College of Liberal Arts at Temple University;

*Lawrence Foster*, a student at the University of Pennsylvania, a graduate student in philosophy, and also a teacher in courses in philosophy at the University of Pennsylvania;

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*Anita Larmann*, a student at Temple University who was studying to become a teacher.

On December 16, 1963, a Stipulation of Facts was filed. Nathan Wartels, respondent, and chief executive officer of the publishing complex of which respondents Crown Publishers, Inc., a New York corporation, and Bonanza Books are a part, also testified. Proposed findings of fact, conclusions of law and briefs have been filed. All proposed findings which have not been incorporated herein in the form or substantially the form proposed hereby are rejected. Such motions, if any, which have heretofore been made which have not previously been specifically ruled upon hereby are overruled and denied. The hearing examiner has carefully considered the entire record in this proceeding, including the pleadings, the evidence, the proposed findings and conclusions filed by counsel, and, based upon such evidence makes the following:

## FINDINGS OF FACT

The following findings of fact (paragraphs 1-8 inclusive) are adopted verbatim from the stipulation filed December 16, 1963. Other findings dealing with similar or the same subject matter may be supplementary to or in addition to the stipulated findings. If counsel are to be encouraged to stipulate in these matters, such stipulations should, whenever possible, be adopted in *haec verba*. Therefore the hearing examiner hereby finds: (See Commission's opinion in *Purolator Products, Inc.*, Docket 7850, p. 7 [65 F.T.C. 8, 26].)

1. Crown Publishers, Inc. (sometimes hereinafter referred to as Crown) 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 419 Park Avenue South, in the city of New York. Crown was chartered in the State of New York on February 6, 1933, as the Outlet Book Co., Inc., with its name changed by amendment dated October 4, 1952, to Crown Publishers, Inc. In addition to doing business under its corporate name, Crown also trades and does business under the several trade names of Bonanza Books, Arcadia House and Publishers Central Bureau Division.

2. Respondent Nathan Wartels is the president of respondent Crown Publishers, Inc. Mr. Wartels owns 50 percent of the issued authorized capital of 200 shares no par value common stock of Crown Publishers, Inc. The other 50 percent of Crown stock is owned by a single individual. Mr. Wartels takes an active part in the day-to-day management of Crown. In conjunction with the other stockholder, he formulates, directs and controls the policies, acts or practices of Crown, except that

such acts are performed solely in his capacity as one of the managing officers of Crown.

3. Crown engaged in the business of publishing, selling and distributing general fiction and non-fiction illustrated books and other publications to retailers for resale to the general public and is in competition with others in the sale of books and other publications of the same general nature and kind sold by Crown. The majority of respondents' sales are made to over 3,000 department stores and book shops located throughout the United States. Crown's gross annual volume of sales has been over \$5,000,000 annually. Crown employs between 100-175 people depending upon business conditions.

4. In the course and conduct of its business, Crown has shipped books and other publications which it has sold from its place of business in the State of New York to retailers located in various States and in the District of Columbia, and has maintained, and does maintain, a substantial course of trade in books and other publications in commerce as "commerce" is defined in the Federal Trade Commission Act.

5. In the course and conduct of its business, Crown publishes, sells and distributes a book by Lucius Beebe entitled HIGH IRON. For the past three (3) years, Crown has sold over 6,000 copies of HIGH IRON annually. Over 50 percent of Crown's sales of the book HIGH IRON have been made to purchasers located in States other than the State of New York.

6. HIGH IRON was originally published and copyrighted in 1938 by D. Appleton Century Company, Inc. The publisher of the original edition of HIGH IRON recommended that such book be sold at retail for approximately \$6.00. The original edition of HIGH IRON has been out of print and generally unavailable in retail stores since approximately 1948.

7. Crown sells HIGH IRON to retail stores for \$1.79 and recommends to the retailer that it be sold to the public for \$2.98, which is the usual and customary selling price of HIGH IRON, as published by Crown, in Crown's trade areas. To the best of respondents' knowledge, the edition of HIGH IRON published and sold by Crown has never sold at retail for \$6.00.

8. On the inside flap of the dust jacket of HIGH IRON, as published by Crown, there is printed in the upper right hand corner where the suggested retail selling price of a book is usually and customarily printed by the publisher the following: "Illustrated, \$6.00." In the customary place for such information, *viz.*, on the back of the title page, there appears a notice of copyright in 1938 by D. Appleton Century Company, Inc., and a notice that the edition published by

Bonanza Books, a division of Crown, is published by arrangement with Meredith Press. At no place in *HIGH IRON*, as published by Crown, or on the dust jacket thereof, does the suggested retail price of \$2.98 appear.

In addition, the hearing examiner further finds:

9. The Federal Trade Commission has jurisdiction over the parties to and the subject matter of this proceeding.

10. Crown is a publisher and distributor of books for sale in the retail trade, to book stores and to book departments in department stores (Tr. 5). Crown does not have its own manufacturing facilities for printing or binding books (Tr. 6-7) but maintains its own shipping and billing department (Tr. 12-13). Books sold under the Crown name are original publications (Tr. 7, 9-10). Crown's activities are confined entirely to publishing on its own behalf and selling for other publishers (Tr. 19, 22-23). Crown ships books all over the United States and all over the world (Tr. 26).

11. Bonanza Books is a division of Crown and a trade name used by Crown for publication of reprint editions of books originally published either by Crown or by unrelated publishers. Bonanza books are usually sold at prices below the list prices of the original editions (Tr. 8-9, 18).

12. Nathan Wartels is president and secretary of Crown (Tr. 18). He owns 50 percent of the issued capital stock and Robert Simon owns the other 50% of the issued stock (Tr. 6). Wartels is president and secretary of Outlet Book Company, Inc. (Tr. 18) and treasurer of Lothrop, Lee and Shepard Company (Tr. 18) which publishes children's books only (Tr. 16). Outlet Book Company deals in publishers remainders (Tr. 18). A remainder is usually unsold book inventory on the shelves of the original publisher. Usually Crown does not sell remainders (Tr. 21). The overall Wartels-Simon-Crown-Outlet-Bonanza-Lothrop, Lee and Shepard-Arcadia House publishing complex does approximately \$5,000,000 per year (Tr. 21) business and employs between 150 and 175 persons. From July 1, 1962, to June 30, 1963. Crown's sale of 9,940 copies of *HIGH IRON* at \$1.79 per copy produced \$17,792.60 income. This was about .3 of one percent of the \$5,000,000 plus gross revenue of the Crown publishing complex. Mr. Wartels has been in the publishing business since 1933 (Tr. 11-12).

13. By contract entered into October 18, 1961, Crown obtained from Meredith Press the exclusive rights to print and publish English language reprint editions of the book *HIGH IRON* by Lucius Beebe (CX 26 A-B). The retail selling price of the original edition of *HIGH IRON* in 1948 was \$6.00 (Tr. 63; Cumulative Book Index 1943-48, page 1040).

No proof of actual sales at that price is in this record but it is a fair inference that the original edition was sold for \$6.00. When Crown and Outlet secured the reprint rights to HIGH IRON in 1961, the original edition was selling in the out-of-print market for \$15.00 and \$25.00 (Tr. 62). The contract with Meredith provided that reprint editions published thereunder were to be retailed at not less than \$1.98 and not more than \$3.98 (CX 26 A). Crown sells its reprint edition of HIGH IRON to retail stores for \$1.79 and recommends that it be sold to the public for \$2.98 (Stipulation dated December 12, 1963, page 4; CX 6-CX 17).

14. On the inside flap of the dust jacket of HIGH IRON, as published by Crown, there is printed in the upper right corner where the selling price is customarily printed the following: "Illustrated, ~~\$6.00~~." (CX 3.) \$2.98 was suggested by respondents as a retail price for respondents' reprint edition of HIGH IRON. Such price is within the retail price range prescribed for the reprint edition of HIGH IRON in the Meredith contract (CX 26). The suggested retail price of \$2.98 is not printed on the dust jacket (CX 3). The advertisements of HIGH IRON furnished by Crown to retailers carry, *inter alia*, the following price indicia: "Orig. Pub. at \$6.00—Only \$2.98." (CX 18A-CX 24D.)

15. Crown has department heads for manufacturing (production), editorial, sales, advertising, publicity, and financial matters (Tr. 6, 25). Crown's production department directed the use of the indicia "Illustrated ~~\$6.00~~" on the dust jacket of HIGH IRON. This decision was made jointly by Nathan Wartels, Robert Simon (the stockholders) Crown's sales manager, and Crown salesman (Tr. 6, 28).

16. Crown's edition of HIGH IRON has on the back of the title page:

Copyright, 1938, by  
D. APPLETON-CENTURY COMPANY, INC.

This edition published by Bonanza Books, a division of Crown Publishers, Inc., by arrangement with Meredith Press.

17. During the period July 1, 1962-June 30, 1963, Crown sold 9940 copies of its edition of HIGH IRON (CX 28-29). Crown's edition of HIGH IRON has usually been sold in book stores for the \$2.98 retail price suggested by Crown (Tr. 68, 72, 76). Crown has never received any complaint from any book seller or retail purchaser with respect to the price indicia shown on the dust jacket of HIGH IRON (Tr. 62-63).

During the middle of 1963, Crown discontinued the practice of printing "\$6.00" on the dust jacket of HIGH IRON pending conclusion of this proceeding, but wishes to be able to continue to show in this manner that the original selling price no longer applies (Tr. 63).

18. The testimony of the bookstore operators, introduced by complaint counsel, showed that those witnesses operated very small shops which did little or no advertising (Tr. 70, 73, 77) and which handled very few copies of HIGH IRON, *e.g.*, the Charles Bagelman Bookshop had purchased only three copies (Tr. 73).

19. None of complaint counsel's consumer witnesses testified to purchasing either the original or Crown's edition of HIGH IRON. Some of the witnesses did not testify to making any purchases of books (Witnesses Mills, Barnett and Maxwell). Three witnesses (Petterson, Stuczynski and Larmann (Tr. 95, 100, 125, 128)) were students whose book purchases were apparently text books or books related to their studies. The testimony of these witnesses does not support a finding that the college students, Petterson, Stuczynski, or Larmann, had ever purchased the type of book involved here. The witnesses Berthrong and Johnson (Tr. 89, 119) seldom purchased a book in commercial retail stores. The witnesses Stine, Foster, and Larmann (Tr. 93, 125, 128), exhibited some confusion as to whether or not Crown's edition was the original publisher's edition. "If I hadn't been so told, I would have thought this was the original dust cover" (Tr. 93). At page 84 Commission witness William M. Davison testified:

Q. Mr. Davison, if you saw another copy of High Iron with a similar indication on the dust jacket of \$6, with a line also printed through it, is it your opinion that the price of that book, the selling price was \$6?

\* \* \* \* \*  
 The WITNESS. I wouldn't have an opinion as to whether it was selling for less than \$6 or not. I would look at the cancellation and probably ask them what the price was. Undoubtedly, a bookstore would have it penciled in there somewhere, and this is canceled.

20. It is not a misrepresentation or deception actionable under the Federal Trade Commission Act for respondents to state to or make known to prospective customers the true price at which the original edition of HIGH IRON was sold at retail.

21. Respondent Nathan Wartels, whose testimony hereinafter set forth is uncontradicted in the record, testified (Tr. 61, *et seq.*):

\* \* \* There are a number of reasons for this, but the most important ones are first, book sellers look to have customers come in and browse around. They may come in for some particular book and they look around on the shelves. They see a book, and if a book that is marked for \$10 or \$2, that tells them what the price is. They don't have clerks standing by waiting on them, and they have to have some kind of pricing for the customer.

They also have to have some kind of pricing for the clerks. Clerks in book stores are not the ablest people, and in book stores, a store like Crox [Krochs] in Chicago, they may have 5,000 titles.

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Initial Decision

Almost any book store will have 500 to 2,500. Nobody knows off the bat what the prices are, so it is the custom almost invariable, to print a price there.

Now, at the time we first produced High Iron, that book was selling in the out of print market for \$15 and \$25.

Mr. LUBERDA. Objection.

HEARING EXAMINER GROSS. Overruled.

Mr. WARTELS. We did not want anybody to sell it at even \$6 or any price higher, because we wanted it sold at the price we suggested of \$2.98, or thereabouts. Some stores might have a price line of \$3 or some \$3.95 or whatever. Yes, we wanted to make sure that the public knew this was a cut price, so we cut the price and drew a line through it, which is the custom of book sellers.

If they have books left over, and they can't sell them, they will put a line through the price and put in pencil, something beneath it. This is what we suggested to book sellers to put the price there, and most book sellers put the price someplace on the book in pencil or otherwise.

This seemed like the fairest way to do it. This seemed to be fair to inform the public that the price of this book was cut. There is the cut, and we ourselves, never had any complaint about this nor even an eyebrow raised by any book seller or by any consumer.

Any consumer knows, he can return a book if he bought a book from a bookstore and he can get the full credit or refund, just as the book seller can get his full credit or refund from us.

We felt in this way, the surest, fairest way to get the public to know that this book was being produced at a reduced price, was to do this. We also have something in the book that says it is an edition printed by arrangements with the original publisher. That seemed to us, to be the fairest and most proper way and I think that is about all there is to say.

Q. How did you get the \$6, which you have marked on the book?

A. Meredith Press, told us that the price was \$6. We checked it. There are a number of reference books in the book industry. There are a list of books in print, and their authors and their price. We checked that and it is in the record, that this book was priced at \$6.

Q. Mr. Wartels, have you discontinued this practice of indicating a price \$6, with a line through it?

A. Yes. We discontinued it about six or eight months ago. We discontinued this practice.

Q. Do you have any plans to resume this practice?

A. We wanted to see what we are privileged to do. I hope we are not restricted.

22. The hearing examiner has not made a finding that this proceeding is in the public interest. The institution of adjudicative proceedings before the hearing examiner by the Federal Trade Commission in itself constitutes a *prima facie* finding that the proceeding is in the public interest. Nothing in this record strengthens that *prima facie* finding. The limited number of people interested in purchasing HIGH IRON and the small dollar amount of sales of the book, plus the other facts which are set forth in this decision would ordinarily compel a finding that this proceeding is not in the public interest. However, the dismissal of a proceeding on the grounds that it is not in the public

interest usually must be ordered by the Federal Trade Commission. In very unusual circumstances where very substantial evidence in the hearing record justifies a finding by the hearing examiner of "no public interest," the hearing examiner might be justified in dismissing the proceeding. The hearing examiner is not doing that in this proceeding, but the Commission might well, upon this record, enter an order of dismissal upon such grounds.

\* \* \* It is not in the public interest to kill this gnat with Commission dynamite. See *Exposition Press, supra*, 295 F. 2d 869, at 873.

23. The book **HIGH IRON** is not a fungible product, as, for example, are clothing, household appliances and food stuffs. A person intent upon purchasing **HIGH IRON** would rarely, if ever, be tempted by virtue of a price reduction or otherwise to buy, instead of **HIGH IRON**, a book of poetry, a cook book, or a mystery novel. The book **HIGH IRON**, in all probability, would be of interest chiefly to railroad "buffs" (see testimony of William M. Davison). Since the book can be purchased at all retail book stores at approximately the same price, this price will not be the decisive factor in determining whether a person buys **HIGH IRON** at Brentano's Book Store or Krochs Book Store, or any other book store.

24. There is no evidence in this record that respondents' dust cover attached to the book **HIGH IRON** has injured or would have the capacity to injure competition, either at the wholesale or retail level. No injury to competition has been proven in this record.

25. The Federal Trade Commission Act, originally premised upon a protection of competition, has, by virtue of the Wheeler-Lea Amendments, been extended to preventing "deceptive acts or practices in commerce." What injury or potential injury to consumers is proven in this record? To what extent, if any, does the dust jacket (CX 3) deceive the persons ordinarily interested in purchasing **HIGH IRON**? The testimony of complaint counsel's witnesses does not prove by "reliable, probative and substantial evidence" (Federal Trade Commission Rules of Practice § 3.21(b)) in the record that there was any deception as set forth in the language of the complaint. Wartel's uncontradicted testimony is to the contrary.

26. The late President John F. Kennedy's **PROFILES IN COURAGE** was originally published in 1956 by Harper's Publications, Inc., 39 East 35th Street, New York, New York, in a hard cover to retail at \$3.50 (see Cumulative Book Index for 1956). It was published in a Cardinal paperback edition by Pocket Book, Inc. in March 1957 to sell for 35¢. A prospective purchaser of **PROFILES IN COURAGE** would not buy a book different from **PROFILES** because he or she could get the book cheaper

than PROFILES. Such purchaser might prefer the hard cover edition of PROFILES to the paperback edition of PROFILES for several different reasons, which might include the price savings. However, it would be most unusual for a prospective purchaser who had fully determined to buy a copy of PROFILES IN COURAGE to be induced because of price to buy instead a book of poetry, a cook book or a mystery.

27. The instant complaint confines itself to an attack solely upon the use of the words "Illustrated, ~~\$6.00~~" (CX 3) on the inside flap of the dust cover, but the order submitted by complaint counsel seeks a much broader injunction. (See complaint counsel's proposed Findings of Fact, Conclusions of Law and Order filed April 28, 1964, pp. 12 and 13.)

28. There is no assertion in the complaint nor proof in this record that respondents have used false, misleading or deceptive representations to advertise HIGH IRON.

29. Complaint counsel has not asserted nor attempted to prove any deception by any of the respondents other than use of the words, "Illustrated, ~~\$6.00~~" on the left inside dust jacket of HIGH IRON. In the absence of any allegation, or any evidence, that respondents have engaged in any other false misleading or deceptive practices with reference to any other book or books which they have published, it would be unfair and unjust to put their entire publishing complex under the restraint of a broad cease and desist order relating to practices which have neither been alleged nor proven.

30. It appears, therefore, that the maximum to which complaint counsel is entitled under the law as applied to the record made in this proceeding is an injunction against respondents' resumption of the use of CX 3 in its objectionable form. The objection can be easily obviated by respondents' printing under the word "6.00" on the dust cover or in immediate juxtaposition thereto a legend such as "Originally published at," or words of similar import.

#### ORDER

*It is, therefore, ordered,* That respondents Crown Publishers, Inc., a corporation, and its officers, also doing business as Bonanza Books and Nathan Wartels, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of their reprint edition of the book HIGH IRON, by Lucius Beebe, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease

and desist from attaching to said book a dust cover or dust jacket with the former price of \$6.00 imprinted thereon without placing in immediate proximity or juxtaposition thereto, words or abbreviations which make it unmistakably clear that \$6.00 was the price at which the original edition of HIGH IRON was offered for sale to the public at retail.

### APPENDIX A

#### STATEMENT OF THE NEW PRICING GUIDES

By MACINTYRE, *Commissioner*:

I am wholly in accord with the professed aim of the Commission to clarify some of the more troublesome problems in the deceptive pricing area. I too believe that we should take a reasonable approach in these matters and that the businessman should know where he stands. However, I fear that these Guides, albeit unintentionally, on balance have raised a number of new and troublesome issues which outweigh any solutions to older dilemmas which they may suggest.

The nub of the problem as I see it is that these Guides are not, as they purport, restatements of the law; the changes introduced here are too sweeping for that. It is fair to say that the Guides in many respects are sharply at variance with the body of law on this subject painfully built up by the Commission and courts over a number of decades. The result may well be the opposite of that intended—uncertainty for consumers, the businessman and the Commission's staff alike. Under the circumstances, there is a serious question that we can sustain the necessary vigour of enforcement even with the best of intentions.

I do not intend at this point to outline my disagreement with the Guides in every detail. If necessary, that can be done as specific problems arise. Suffice it to say for the present, the Guides apparently present us with a new vocabulary in the context of fictitious pricing which will require definition. That process may well be difficult and time consuming. I need only cite one example to make my point. In connection with bargain advertising of retail price comparisons, *i.e.*, the offer of goods at prices purportedly lower than those being charged by others in the same trade area, the Guides state:

\* \* \* Whenever an advertiser represents that he is selling below the prices being charged in his area for a particular article, he should be *reasonably certain* that the higher price he advertises does not *appreciably exceed* the price at which *substantial* sales of the article are being made in the area—that is, a sufficient number of sales so that a consumer would consider a reduction from the price to represent a genuine bargain or saving \* \* \*. (Emphasis supplied.)

The requirement that a retailer should be "reasonably certain" that the higher price does not "appreciably exceed the price at which substantial sales of the article are being made in the area" is open to numerous interpretations. The phrase "reasonably certain" substitutes a subjective for what has hitherto been an objective test. How a businessman is to document the state of his mind in this respect is not pointed out. Possibly the ingenuity of counsel over a period of time may supply some answer to this and other questions. The problem remains, however, whether there is any real advantage in abandoning tested precepts which are now understood by business, the courts and the Commission staff.

To continue, hitherto the standard applied in these cases has been the "usual and customary" retail price in a given area, a term given content and meaning by numerous previous decisions. The proper interpretation of the requirement that the advertised higher price may not "\* \* \* *appreciably* exceed the price at which *substantial* sales of the article are being made in the area \* \* \*" is at best conjectural. A considerable number of cases will have to be brought and considered by the courts and the Commission before either our staff or the business community can be expected to operate with any confidence under the new standard.

A very important reversal of policy is, of course, contained in Guide III, which deals with advertising of retail prices suggested or established by manufacturers or other nonretail distributors. In effect, manufacturers or other nonretailers are invited to suggest list prices or preticket their items with only the vaguest standards to determine their responsibility for taking such measures. Whether the Commission will, in the future, be able to take effective steps against fictitious pricing on a regional or national scale under the new dispensation remains to be seen.

#### OPINION OF THE COMMISSION

DECEMBER 28, 1964

By REILLY, *Commissioner*:

The complaint herein charges respondents with deceptive preticketing of books in violation of Section 5 of the Federal Trade Commission Act and the matter is now before the Commission on the appeal of counsel supporting the complaint from the hearing examiner's initial decision. The examiner did not specifically find that the challenged

practice was unlawful but nevertheless concluded that an order to cease and desist should issue. Counsel supporting the complaint contends that the findings upon which this order is based are deficient and, in part, erroneous and that the order is inadequate.

Respondents are engaged in the business of publishing, selling and distributing general fiction and non-fiction illustrated books and other publications to retailers for resale to the general public. A part of this business, which is conducted by corporate respondent through its Bonanza division, consists of the publication of books originally published by corporate respondent or by other publishers and which have gone out of print. These reprint editions are always sold at a reduction from the suggested or list prices of the original editions, individual respondent having testified in this connection that out-of-print books could not profitably be printed and sold at their original prices.

This case involves the alleged deceptive preticketing of one of these reprints, a book by Lucius Beebe entitled "High Iron," originally published in 1938 by D. Appleton Century Company, Inc. The publisher's recommended retail price for the original edition of this book was \$6.00. By 1948 this edition was out of print and was generally unavailable in retail stores.<sup>1</sup> In 1961 respondents acquired from Meredith Press (the successor to the original publisher) the exclusive rights to print and publish a reprint edition of this book. The contract between respondents and Meredith provided that the reprint edition published thereunder was to be retailed at not less than \$1.98 and not more than \$3.98. This reprint edition has been sold by respondents to retail stores for \$1.79 and respondents have recommended that it be sold to the public for \$2.98. This recommended retail price does not appear anywhere on the book, but on the inside flap of the dust jacket, the price \$6.00 appears with a line drawn through it.

The complaint alleges in effect that by preticketing the book in the aforesaid manner respondents have represented, and have placed in the hands of retailers the means of representing, that the customary price of the reprint is \$6.00 and that members of the public who purchase the book at retail at a lower price save the difference between such lower price and \$6.00. It further alleges that these representations are misleading and deceptive since the generally prevailing retail price of the book is \$2.98.

Although the principal issue before the hearing examiner was whether the practice challenged by the complaint had the capacity or tendency to mislead or deceive the public, he made no specific find-

<sup>1</sup> The record shows that the original edition of "High Iron" was selling at this time in the out-of-print market for \$15.00 to \$25.00.

ing on this point but ruled instead that there was no proof that the practice was calculated to deceive, or that it caused actual deception or injury to competition. Aside from the question of whether or not these conclusions are factually correct, they are wholly unnecessary. "A deliberate effort to deceive is not necessary nor must the Commission find actual deception or that any competitor of petitioner has been damaged \* \* \*," *Pep Boys-Manny, Moe & Jack, Inc. v. Federal Trade Commission*, 122 F. 2d 158 (3d Cir. 1941). We can only surmise that the examiner found some likelihood of deception in the practice since he included in his initial decision the order to cease and desist.

Practices of the type involved in this proceeding are discussed in Guide III of the Commission's Guides Against Deceptive Pricing. The first two paragraphs of this Guide read as follows:

Many members of the purchasing public believe that a manufacturer's list price, or suggested retail price, is the price at which an article is generally sold. Therefore, if a reduction from this price is advertised, many people will believe that they are being offered a genuine bargain. To the extent that list or suggested retail prices do not in fact correspond to prices at which a substantial number of sales of the article in question are made, the advertisement of a reduction may mislead the consumer.

There are many methods by which manufacturers' suggested retail or list prices are advertised: large scale (often nation-wide) mass-media advertising by the manufacturer himself; preticketing by the manufacturer; direct mail advertising; distribution of promotional material or price lists designed for display to the public. The mechanics used are not of the essence. These Guides are concerned with *any* means employed for placing such prices before the consuming public.

In this case respondents have two "list" prices for the same article. The one, \$2.98, is the retail price suggested to the dealer, and the other, \$6.00, is the price placed on the dust jacket to be seen by the prospective purchaser. Consequently, when the book is offered for sale at any price less than \$6.00, the prospective purchaser may well believe that the book is being offered at a reduction from the higher price.

Respondents argue, however, that by drawing a line through the \$6.00 they have given notice to the customer that the prevailing price of the book is not \$6.00. But even if the prospective purchaser would realize, as respondents contend, that the publisher, and not the dealer, had placed the line through the "\$6.00," thus indicating that this price was no longer in effect, he would have no reason to believe that the price referred to by the publisher was that of the original edition and

had not been used for almost 15 years.<sup>2</sup> In the absence of some disclosure to the contrary, the consumer could reasonably believe that the book was being offered at a reduction from the price at which it had recently sold and that he was therefore receiving a genuine bargain.

It is also apparent from our observation of the pricing claim in question, as well as from the testimony of the public witnesses called in support of the complaint, that the purchaser cannot easily discern whether the line was printed through the "\$6.00" by the publisher or whether it was made in ink by the retailer. In this connection, the line is not straight but slightly curved and tapered, closely resembling a line drawn by a pen.<sup>3</sup> Consequently, we think there is no basis for respondents contention that the purchaser would necessarily know that \$6.00 is not the prevailing price of the book. Believing that the line through the "\$6.00" had been made by the retailer, he would be under the impression that the book was being offered by the retailer at a reduction from the list or prevailing price.<sup>4</sup>

Another assignment of error in complaint counsel's brief concerns the examiner's apparent rejection of the testimony of the various consumer witnesses. We cannot be certain from reading the initial decision whether or not the examiner completely disregarded this evidence, but it is clear that he considered it to be of little value because most of the witnesses had either not purchased "High Iron" or a similar book or because they had not frequently purchased books in commercial retail stores. It is obvious that the examiner did not understand the purpose of this testimony, apparently believing that it was intended to show actual deception resulting from the pricing claim in question. These witnesses, however, were called solely for the pur-

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<sup>2</sup> Guide I of the above-mentioned Guides Against Deceptive Pricing gives the following illustrations of fictitious price comparisons: "An advertiser might use a price at which he never offered the article at all; he might feature a price which was not used in the regular course of business, or which was not used in the recent past but at some remote period in the past, without making disclosure of that fact; he might use a price that was not openly offered to the public, or that was not maintained for a reasonable length of time, but was immediately reduced." (Emphasis added.)

<sup>3</sup> One of the witnesses who had been informed that the line was printed testified "It's hard for me to tell just looking at it right now, that it has not been crossed out by hand." Another was asked on cross examination whether "it does not appear to you that the line is printed across the \$6 in the same kind of printing as the \$6 itself?" His answer was "No. I confess it does not look like that to me."

<sup>4</sup> The following testimony was given on cross examination by a consumer witness:

"Q. You have seen books in stores, have you not, with a price printed on there, but marked out with a pencil?

A. Yes, definitely.

Q. Can you see any difference between that sort of marking and where the price is such as we have here, the \$6 with the line printed through it at the same time?

A. Well, I would assume one case—if the pencil line had been drawn, if the line was a pencil or pen, I would assume that the dealer had drawn the line and was selling it for less. The book store owner or retailer was selling it for less, that's what I would assume \* \* \*."

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pose of testifying as to their understanding of respondents' pricing claim and the fact that they had not purchased respondents' book or a similar book or were not inveterate book buyers has no bearing on their competence to so testify. *Rhodes Pharmacal Co., Inc. v. Federal Trade Commission*, 208 F. 2d 382 (7th Cir. 1953), *Gulf Oil Corp. v. Federal Trade Commission*, 150 F. 2d 106 (5th Cir. 1945), *Stanley Laboratories, Inc. v. Federal Trade Commission*, 138 F. 2d 388 (9th Cir. 1943).

The examiner also pointed out in his initial decision that the consumer testimony was contrary to the "uncontradicted" testimony of individual respondent Nathan Wartels. Mr. Wartels testified in effect that the sole purpose of the preticketing was to prevent retailers from selling the book at \$6.00 or some higher price and to inform the public that the book was being sold at a reduction from the price of the original edition. This testimony however relates only to respondents' reason for preticketing the book and, even if given full weight, would not rebut the testimony of the public witnesses nor indicate that the practice did not have the capacity to deceive. "A deliberate effort to deceive is not a necessary element in unfair competition," *Federal Trade Commission v. Balme*, 23 F. 2d 615 (2d Cir. 1928). "Decision whether material facts have been misrepresented does not depend upon the good or bad faith of the advertiser," *Koch, et al. v. Federal Trade Commission*, 206 F. 2d 311 (6th Cir. 1953); *Feil v. Federal Trade Commission*, 285 F. 2d 879 (9th Cir. 1960); *Ford Motor Company v. Federal Trade Commission*, 120 F. 2d 175 (6th Cir. 1941). Moreover, we are of the opinion, contrary to the testimony of respondent Wartels, that the challenged practice was calculated to deceive the public into believing that the retailer was selling the book in question at a reduction from the generally prevailing price. Aside from the fact that respondents did not disclose that the preticketed amount was a 1938-1948 price and the fact that the cancellation of the "\$6.00" appears to have been made by the retailer, there is in the record advertising copy furnished by respondents to retailers which conveys the impression that the usual or prevailing price of the book, \$2.98, is a special sale price offered by the individual book store. The following are examples of such advertisements:

## ANNUAL BOOK SALE!

\* \* \* \* \*

1172. HIGH IRON: A Book of Trains. By Lucius Beebe. Nearly 200 photographs in this cavalcade of railroading from the woodburners to the streamliners. Orig. Pub. at \$6.00—only \$2.98.

\* \* \* \* \*

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66 F.T.C.

 $\frac{1}{3}$ ,  $\frac{1}{2}$  AND MORE OFF FORMER PRICES.

## MID-YEAR SALE!

Fascinating books, on all subjects, from presses and publishers all over the world are being offered in this spectacular book sale at truly amazing savings \* \* \*

\* \* \* \* \*

1172. HIGH IRON: A Book of Trains. By Lucius Beebe. Nearly 200 photographs in this cavalcade of railroading from the woodburners to the streamliners. Orig. Pub. at \$6.00—only \$2.98

\* \* \* \* \*

CHINOOK BOOK SHOP  
208½ NORTH TEJON STREET  
COLORADO SPRINGS, COLORADO  
SUPER

BOOK SALE!

 $\frac{1}{3}$  to  $\frac{1}{2}$  off AND MORE!

Even though the \$6.00 price is preceded by the words "Orig. Pub. at," we think it clear that a person reading the above advertisements would believe that the retailer, in whose name the ad appears, was offering a reduction from the price at which he and other retailers generally sold the book "High Iron." Certainly, the representations that the dealer is conducting an "Annual" or "Mid-year Sale" at " $\frac{1}{3}$ ,  $\frac{1}{2}$  And More Off Former Prices" or " $\frac{1}{3}$  to  $\frac{1}{2}$  Off and More" convey this erroneous impression, and the reader is not informed by the words "Orig. Pub." that the higher price, \$6.00, was not the prevailing price at the time of the "sale." It would appear therefore that respondents placed this means of deception into the hands of its dealers as part of an over-all plan to misrepresent the existing price of the book and to mislead the consumer into believing that he would save the difference between the preticketed price and the price at which the book was generally sold.

We are also unimpressed with the examiner's conclusion that there is no public interest in this proceeding. In view of his findings of no intent to deceive, no actual deception and no injury to competition it would have been difficult for him to come to any other conclusion. Nor does the fact that only 16,000 copies of the book "High Iron" were sold indicate that the matter is so trivial as to require dismissal. Contrary to the examiner's holding, the evidence adduced in this proceeding confirms our initial determination of public interest.<sup>5</sup>

<sup>5</sup> "It is in the interest of the public to prevent the sale of commodities by the use of false and misleading statements and representations," *L & C Mayers Co., Inc. v. Federal Trade Commission*, 97 F. 2d 365 (2d Cir. 1938); *Parke, Austin & Lipscomb, Inc., et al. v. Federal Trade Commission*, 142 F. 2d 437 (2d Cir. 1944).

