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Filed: April 13, 1973

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Scope of Order
D. 8452
March 26, 1973
62 FTC. 229

In the Matter of
MAURICE A. DWECK,
an individual trading as
M. A. DWECK.

DOCKET NO. 8893

INITIAL DECISION

By David H. Allard, Administrative Law Judge.

Leonard H. Goldstein and
William H. Garber,
Counsel Supporting the Complaint.

Shapiro, Fried, Weil & Scheer,
Miami Beach, Florida,
by Herbert S. Shapiro,
Counsel for Respondent.

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LEGAL RECORDS

PRELIMINARY STATEMENT

On July 10, 1972, the Federal Trade Commission issued this complaint charging the respondent with violating the Federal Trade Commission Act and the Flammable Fabrics Act, as amended.

Hearings were held at Miami, Florida on October 31, 1972, and at New York, New York on January 17, 1973. At those hearings, testimony and documents were incorporated into the record in support of the complaint as well as in opposition thereto. This proceeding thus is before the Administrative Law Judge upon the complaint, answer, testimony and other evidence, proposed findings of fact, conclusions and briefs filed by complaint counsel and by counsel for respondent. The proposed findings of fact, conclusions and briefs in support thereof submitted by the parties have been carefully

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considered by the Administrative Law Judge, and those findings not adopted either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matter.

Having heard and observed the witnesses and having carefully reviewed the entire record 1/ in this proceeding, together with the proposed findings, conclusions and briefs submitted by the parties as well as replies, the Administrative Law Judge makes the following findings as to the facts, conclusions, and order:

FINDINGS OF FACT

1. Respondent Maurice A. Dweck is an individual trading as M. A. Dweck. He is engaged in the importation and sale of novelty and souvenir items and wearing apparel, including but not limited to ladies' scarves and boys' cardigan type sweat shirts. The business address of respondent is 715 Washington Avenue, Miami Beach, Florida. (Comp. par. 1; Ans. par. 1).

2. Respondent is now and for some time past has been engaged in the sale and offering for sale, in commerce, and the importation into the United States and has introduced, delivered for introduction, transported and caused to be transported in commerce, products, as the terms "commerce" and "product" are defined in the Flammable Fabrics Act, as amended. Other findings proposed by complaint counsel and not objected to by respondent are set forth in Appendix 1, and incorporated herein.

A. Respondent imported a quantity of 995 dozen scarves from Japan under invoice No. 332-70, dated June 8, 1970 (Tr. 82, 84; CX 18). They are described as "Solid color Nylon Georgette with Gold Check (TA1877) Scarfs, Size: cut 28" x 28", 4 side machine hemmed.**** Color assorted." (CX 18).

1/ References to the record are made in parenthesis, and certain abbreviations are used as follows:

Comp. - Complaint
Ans. - Answer

Tr. - Transcript Page
CX - Commission Exhibit
RX - Respondent Exhibit

B. Respondent imported a quantity of 380 dozen Style No. 6118 cardigan type sweat shirts from Hong Kong under invoice No. 7131-B, dated April 7, 1971. 2/ (Tr. 84, 85, 96; CX 19). The name of the manufacturer is Wang Ngai Garment Factory, Kowloon, Hongkong (CX 19). Sizes range from Boys Size 2 to 16 (CX 19).

3. The laboratory of the Federal Trade Commission has tested representative samples of the scarves and cardigan sweat shirts.

4. All of the parties agree that Commercial Standard 191-53 prescribes the method of testing for flammability, the subject cardigan sweat shirts and scarves imported by the respondent. 3/ (Tr. 108).

5. As a result of these tests, seven cardigan sweat shirts and three scarves were classified as dangerously flammable. 4/ (Tr. 104-06, 154, 155; CX 1-B, 2-B, 3-B, 10-B, 12-B, 13-B, 14-B, 15-B, 17).

2/ The cardigan sweat shirts, designed to be worn by young children, have the capacity to be worn with the raised fiber surface [fleece side] exposed (Tr. 97, 101). The description on the invoices read: "Boy's cotton knitted fleecy lined white cardigans with imprint designs, buttons on front, long sleeves." (Tr. 84-85). The cardigan type sweat shirts described in the complaint are the identical item.

3/ Rule 4 of the Rules and Regulations of the Flammable Fabrics Act requires that only the uncovered or exposed part of articles of wearing apparel be tested. The exception to the rule is set forth in Rule 6(e) which reads as follows:

"Where an article of wearing apparel has a raised fiber surface which is intended for use as a covered or unexposed part of the article of wearing apparel but the article of wearing apparel is because of its design and construction, capable of being worn with the raised-fiber surface exposed, such raised-fiber surface shall be considered to be an uncovered or exposed part of the article of wearing apparel. Examples of the type of products referred to in this paragraph are athletic shirts or so-called 'sweat shirts' with a raised-fiber inner side."

4/ Raised surface fabrics such as the fleece side of the cardigan sweat shirts are classified as Class 3, rapid and intense burning, when the flamespread time is less than 4

A. The cardigan sweat shirts were tested on the fleece side by all laboratories, the Federal Trade Commission as well as independent, as required by Rule 6(e) under the Flammable Fabrics Act (Tr. 126, 210).

B. In testing products with a high nap such as the fleece side of the cardigan sweat shirts imported by respondent, the variability of the fabric causes inconsistent results not only from garment to garment but from comparisons of times obtained in testing swatches from the same garment. 5/ (Tr. 112, 251, 252).

C. Three of the scarves imported by respondent were tested in the Commission laboratory and each test resulted in a Class 3 rating with failing times of 3.3 seconds, 3.2 seconds and 3.3 seconds, respectively. 6/ (Tr. 155; CX 1-B, 2-B, 3-B).

(footnote continued)

seconds; Class 2, intermediate flammability, when the flame spread time is from 4 to 7 seconds; Class 1, normal flammability, when the flame spread time is more than 7 seconds. Textiles rated as "Class 3" are considered dangerously flammable and are subject to enforcement action under the Flammable Fabrics Act. (Commercial Standard 191-53; CX 20, Sec. 3.1) Plain surface fabrics such as the scarves in question have only two flammability classifications, Class 1, normal flammability, when the time of flame spread is three and one-half seconds or more, and Class 3, rapid and intense burning, when the time of flame spread is less than three and one-half seconds (67 Stat. 11; 15 U.S.C.A. 1191, Sec. 4(c)).

5/ For example, tests of these cardigan sweat shirts by the Commission laboratory show Class 3 (rapid and intense burning), Class 2 (intermediate flammability), and Class 1 (normal flammability) results (Tr. 112; CX 9-B, 10-B, 12-B, 13-B, 14-B, 17, 15-B, 20). Tests of these cardigan sweat shirts by independent laboratories disclosed Class 1 (normal flammability) and Class 2 (intermediate flammability) ratings. (Test reports attached to respondent's Answer).

6/ A single test by Better Fabrics Testing Bureau, Inc., on one of the scarves imported by respondent disclosed a time of 3.8 seconds in the original state. (Test report attached to respondent's Answer). A single test by United States Testing Co., Inc. on an individual scarf imported by respondent disclosed a time of 3.87 seconds in the original state which is a marginal passing rate. This would tend to indicate the need for additional testing (Tr. 253, 254; Test report attached to respondent's Answer).

6. Differences in test results, Commission versus respondent, are caused by a number of imponderables.

A. Fabric Variability. 7/ With garments having a high nap, such as the fleece side of the cardigan sweat shirts here, there is a high degree of variability in the construction of the nap, not only from garment to garment but from one portion of a garment to another portion of the same garment. Because of this fact, tests of the independent laboratories introduced by respondent were very high times as well as very low times on the same garment (Tr. 112, 251, 252). Since Commercial Standard 191-53 requires that all the times be computed in arriving at the average burning rate, one extremely high time may cause a passing test even though all the other times are extremely low. Fabric variability is probably accountable for the fact that of the cardigan sweat shirts tested by the Commission laboratory, some passed while others failed even though the same test procedures were utilized by the same technologist. Although the independent laboratories did not obtain failing results on their exhibits tested, four of those garments were rated as "Class 2" (intermediate flammability). This again would appear to be in all likelihood due to the variability of napped fabrics. (See test reports attached to respondent's Answer; CX 21, 22).

B. Variance in Testing Equipment. The Federal Trade Commission laboratory testing procedures deviate from Commercial Standard 191-53, and the blueprints referenced therein for the construction of the flammability tester.

(1) The Commission uses plates on specimen holders that are matched while Commercial Standard 191-53 specification requires matched plates. So do independent laboratories (Tr. 259).

7/ The scarves here involved have a plain surface with no nap and therefore fabric variability would appear to be de minimus factor. This is apparent from the fact that all three of the scarves tested by the Commission failed, while each of the two scarves tested by the independent laboratories passed with results that were extremely close: only .67 seconds separating the highest passing from the lowest failure. While less than 3.5 seconds is considered failing for plain surface fabrics, the three Commission tests in the original state showed failing times of 3.3, 3.3 and 3.2 seconds while the two independent laboratory tests produced passing results of 3.87 and 3.8 seconds in the original state (CX 1-B, 2-B, 3-B; Respondent's test reports attached to Answer).

(2) The brush used in the brushing device was loose, ragged and irregular in September 1972 (Tr. 217). This brush had been in use only since May 1972, and was not the brush used in conducting the tests on the garments here involved in 1971 (Tr. 345).

(3) Rather than anhydrous chloride, the Commission uses silica gel as a dessicant. So do independent laboratories (Tr. 261, 262, 302).

(4) The Commission's laboratory has tension springs attached to the door of its flammability tester (Tr. 219). Independent laboratories use either tension springs or a pulley system modification on the doors of their testers (Tr. 259, 260, 295).

(5) There is no clamp on the brushing device in the Commission laboratory (Tr. 264). Apparently, independent laboratories do not have clamps on their brushing devices (Tr. 274, 295).

C. Deviations from the Standard and blueprints are also made by independent laboratories. The most significant and apparently the only ones appearing on the record that could have a meaningful effect on the results obtained from testing here, are the insertion of the sky hook 8/ in the tester as an additional thread guide and the use of L shaped thread guides in place of curved thread guides provided in the Standard and blueprints. So does the National Bureau of Standards (Appendix 2).

Neither Commercial Standard 191-53 nor the blueprints referenced therein provide for the use of a sky hook or L shaped thread guides (Tr. 114, 232, 294, 311, 312, 343). There is also no dispute that the use of the sky hook and L shaped thread guides have a substantive effect on the test

8/ A sky hook is described as an additional thread guide which protrudes from the ceiling of the tester and has the effect of making the thread parallel (Tr. 114, 244). United States Testing Co., Inc. started placing a sky hook on its machines "somewhereas around" 1965 (Tr. 235).

results obtained. 9/ The apparent basis is their interpretation of the term "suitable thread guides" in Section 4.2.7 of the Standard (Tr. 223; CX 20). 10/

D. The record clearly establishes that the objective of the testing procedures set up by Commercial Standard 191-53 is to have the thread or stop cord parallel to the specimen surface in tests for flammability (Tr. 341-42).

9/ An expert witness emphasized that:

"in testing raised surface fabrics, the use of a 'sky hook' and inverted 'L' shaped thread guides or hooks in a flammability testing apparatus, with all other things being equal, generally causes average burning times higher than would be the case with a testing apparatus not containing the so-called 'sky hook' and inverted 'L' shaped guides or hooks" (CX 21).

"raised surface fabrics frequently exhibit a low but rapidly spreading flame (surface flash). Such flames have been observed to pass under and not burn the 'stop cord' where the latter is parallel and at the maximum possible height from the fabric which is accomplished by the use of the 'sky hook'."

"where a produce is of a marginal nature from a flammability standpoint, the use of a 'sky hook' mechanism in the testing apparatus may cause passing results whereas failing results may be obtained in testing the same product without use of the 'sky hook'." (CX 22).

10/ That section reads as follows:

"Stop cord (G, fig. 2) - This cord, stretched from the spool (P, fig. 2) through suitable thread guides provided on the specimen frame and chamber walls permits the lacing of the cord in the proper position exactly 5 inches from the point where the center of the ignition flame impinges on the test specimen. The stop cord consists of a No. 50 mercerized sewing thread and measures the rise and spread of the flame from the test specimen." (emphasis added).

CONCLUSIONS

1. With regard to the cardigan sweat shirts, it is the considered judgment of the Administrative Law Judge that the fabric variability factor inherent in the nature of the Hong Kong manufactured cotton knitted, fleecy lined garments results more often than not in deviations in the testing results for flammability. In light of this, (the fact that representative samples tested by the Commission did not meet minimum standards) under the Flammability Act, as amended and the further fact that these garments are designed for wear by young children, the Administrative Law Judge reaches the inescapable conclusion that the aforesaid acts and practices of respondent were and are in violation of the Flammable Fabrics Act, as amended, and constituted, and now 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.

2. With regard to the ladies' scarves, the record is inconclusive. Fabric variability is not a factor here in explaining the different test results by the Commission and by respondent's independent testing. In light of the fact that even Commission counsel recognize the fact that use of the sky hook or L shaped thread guides have a "substantive effect on the test results obtained," the test equipment and procedures would appear to be dominant in resolving the factual disputes here. That dominant factor leads one to the inescapable conclusion that this record will not demonstrate with substantial evidence that the acts and practices of respondent with regard to ladies' scarves, are in violation of the Flammable Fabrics Act, as amended, and the Rules and Regulations promulgated thereunder. The complaint will be dismissed only to this extent.

3. The Federal Trade Commission has jurisdiction of and over respondent as well as the subject matter of this proceeding.

O R D E R

IT IS ORDERED that respondent Maurice A. Dweck, individually and trading as M. A. Dweck, or under any other name or names, his successors and assigns, and respondent's representatives, agents and employees, directly or through any

corporation, subsidiary, division or other device, do forthwith cease and desist from selling, offering for sale, in commerce, or importing into the United States, or introducing, delivering for introduction, transporting or causing to be transported in commerce, or selling or delivering after sale or shipment in commerce, cardigan sweat shirts, which garments fail to conform to an applicable standard or regulation issued, amended or continued in effect, under the provisions of the aforesaid Act.

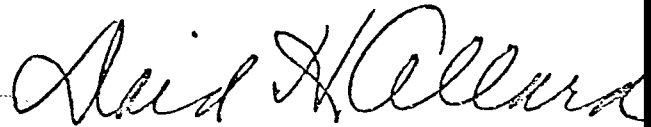
IT IS FURTHER ORDERED that respondent notify all of his customers who have purchased or to whom have been delivered the cardigan sweat shirts, of the flammable nature of said garments and effect the recall of said garments from such customers.

IT IS FURTHER ORDERED that the respondent herein either process the cardigan sweat shirts which gave rise to this complaint so as to bring them into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said garments.

IT IS FURTHER ORDERED that the respondent shall, within ten (10) days after service upon him of this Order, file with the Commission a special report in writing setting forth the respondent's intentions as to compliance with this Order. This special report shall also advise the Commission fully and specifically concerning (1) the cardigan sweat shirts

which gave rise to the complaint, (2) the number of said garments in inventory, (3) any action taken and any further actions proposed to be taken to notify customers of the flammability of said garments and effect the recall of said garments from customers, and of the results thereof, (4) any disposition of said garments since February 23, 1971 and (5) any action taken or proposed to be taken to bring said garments into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said garments and the results of such action.

IT IS FURTHER ORDERED that respondent notify the Commission at least thirty (30) days prior to any proposed sale of respondent's business, any proposed change in the name under which respondent does business, any change in the form of respondent's business such as incorporation or formation of a business partnership, or the entry of respondent into any other business individually or through a corporation, business partnership, or other form of doing business, or other change in respondent's business status which may affect compliance obligations arising out of this Order.


David H. Allard,
Administrative Law Judge.

April 13, 1973

APPENDIX 1

Proposed Findings submitted by complaint counsel to which respondent does not object:

1. Respondent Maurice A. Dweck is an individual trading as M. A. Dweck. (Admitted by respondent's answer)

3. Respondent imported a quantity of 995 dozen scarves from Japan under invoice No. 332 - 70 dated June 8, 1970. (Admitted by Stipulation - Tr. Fudge 84, CX 18)

5. The Flammable Fabrics Act was enacted by Congress on June 30, 1953. (67 Stat. 111; 15 U.S.C.A. 1191)

6. The method of testing articles of wearing apparel for flammability is prescribed by Commercial Standard 191-53. (67 Stat. 111; 15 U.S.C.A. 1191, Sec. 4(a))

7. The Flammable Fabrics Act was amended and revised by Congress on December 14, 1967. (81 Stat. 568)

8. Commercial Standard 191-53 is a standard continued in effect, issued or amended under the provisions of the Flammable Fabrics Act, as amended.

(Public Law 90-189, S. 1003, 90th Congress, 1st Session (81 Stat. 568), approved December 14, 1967, which amended and revised the Flammable Fabrics Act, contains a savings clause (81 Stat. 574) which reads:

"Sec. 11. Notwithstanding the provisions of this Act, the standards of flammability in effect under the provisions of the Flammable Fabrics Act, as amended, on the day preceeding the date of enactment of this Act, shall continue in effect for the fabrics and articles of wearing apparel to which they are applicable until superseded or modified by the Secretary of Commerce pursuant to the authority conferred by the amendments made by this Act."

10. The apparatus used in testing for flammability under Commercial Standard 191-53 was developed by industry under the auspices of the American Association of Textile Colorists and Chemists (AATCC) and is manufactured by the United States Testing Co., Inc. (Tr. Krumholz 236-238)

12. Neither Commercial Standard 191-53 as it relates to the method of testing nor the blueprints referenced therein

have been revised or amended since the enactment of the Flammable Fabrics Act in 1953. (Tr. Neily 135, Baker 291, Krumholz 234)

17. Certain of subject garments imported by respondent were tested for flammability by United States Testing Co., Inc., Hoboken, New Jersey and Better Fabrics Testing Bureau, Inc., New York, New York. (Respondent's Answer)

25. Commercial Standard 191-53 permits the use of suitable thread guides on the specimen frame and "chamber walls". (CX 191-53, Sec. 4.2.7, CX 20)

29. The flammability testers utilized by the Commission laboratory contain neither a sky hook nor L shaped thread guides. (Tr. Ryan 335, Krumholz 220, Baker 282, 283)

46. The Federal Trade Commission is charged by Congress with the responsibility of enforcing and administering the Flammable Fabrics Act, as amended. (81 Stat. 568)



SEP 22 1972

Honorable Sam J. Ervin, Jr.
Chairman, Committee on Government
Operations
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

We are pleased to provide you with the information you have requested on the flammability testing of cotton flannel in your letter of August 22. Your letter specifically concerns the testing of cotton flannel produced by Cone Mills and enclosed a letter and attachments from Mr. Lewis Morris, President of Cone Mills Corporation. This test method is the one specified in CS 191-53.

Before addressing your specific questions, we would like to clarify the role of the National Bureau of Standards in flammability testing. The Bureau does not conduct any testing for compliance with the Flammable Fabrics Act. The only testing done at the Bureau is in support of the Bureau's research and test development programs. For example, testing of fabrics from actual accident cases is conducted as a part of the collection of information and data used to place priorities and to provide the backup for standards.

Question 1: "To the best of your knowledge, is there a difference in either the method or equipment used in the FTC laboratory in making flammability tests on cotton flannel from the methods and equipment used by -- (a) The Bureau of Standards; (b) The United States Testing Company, the Better Fabrics Testing Bureau; or (c) The textile industry generally: "

- (a) Testing at the National Bureau of Standards is usually conducted using the "sky hook" referred to in the Cone Mills letters. It is our understanding that the Federal Trade Commission does not use this modification. The

"sky hook" provides a more reproducible string-up in that the thread is positioned at the top of the thread guide on the specimen holder and parallel to the specimen surface. We also understand that the FTC does not position the "stop cord" parallel to the specimen surface, but positions the "stop cord" in a triangular configuration. Although CS 191-53 is ambiguous on correct "stop cord" positioning (see paragraph 4.7.4 of CS 191-53 (copy enclosed)) and several "stop cord" positions could result from this ambiguity, it is our opinion that the correct interpretation of the standard is to position the "stop cord" parallel to the specimen surface and at the top of the guides.

- (b) (c) We have no valid information for comparing FTC equipment or procedures to those used by the United States Testing Company, the Better Fabrics Testing Bureau; or the textile industry in general.

Question 2: "In testing cotton flannel for flammability in the Bureau of Standards, is the 'stop cord' positioned parallel to the specimen?"

Yes, parallel and at the top of the guides.

Question 3: "If the 'stop cord' is not in a parallel position, is the likelihood of test failures increased in the case of cotton flannel?"

Conducting a test in the CS 191-53 apparatus with the "stop cord" not parallel to the surface of the specimen could either increase or decrease the likelihood of failure, depending on the nature of the fabric being tested. More important than parallelism is the distance the "stop cord" is away from the fabric surface. Neither of these parameters is specified in CS 191-53. Because of this and several other ambiguous features CS 191-53, we have initiated the development of a revision and clarification of this standard.

Cotton flannel (and other napped fabrics) frequently exhibit a low but rapidly spreading flame (surface flash). Such flames have been observed to pass under and not burn the "stop cord" where the latter is parallel and at the maximum possible height from the fabric.

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Putting the "stop cord" nearer to the surface, either parallel and near all across or not parallel and nearest at one end, increases the likelihood that such flames will burn the "stop cord". If the fabric base burns rather than surface flashes, the precise positioning of the "stop cord" for this type fabric, will probably have little effect on the test results.

We hope this information will be of help to you.

Sincerely,

RICHARD O. SIMPSON

Richard O. Simpson
Acting Assistant Secretary
for Science and Technology

Enclosure