

In the Matter of

CERTAIN CATTLE WHIPS

Investigation No. 337-TA-57



USITC PUBLICATION 993

AUGUST 1979

UNITED STATES INTERNATIONAL TRADE COMMISSION

COMMISSIONERS

Joseph O. Parker, Chairman

Bill Alberger, Vice Chairman

George M. Moore

Catherine Bedell

Paula Stern

Kenneth R. Mason, Secretary to the Commission

Address all communications to
Office of the Secretary
United States International Trade Commission
Washington, D.C. 20436

to determine, under subsection (c) whether, on the basis of the allegations set forth in the amended complaint and the evidence adduced, there is a violation of subsection (a) of this section in the unauthorized importation of certain cattle whips into the United States, or in their sale, by reason of the alleged coverage of such cattle whips by the claims of U.S. Letters Patent 3,356,294, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

2. That, for the purpose of this investigation so instituted, the following are hereby named as parties:

a. The complainant is

Stockmen's Inc.
P.O. Box 244
Lawton, Iowa 51030

b. The respondents are the following companies alleged to be involved in the unauthorized importation of such articles into the United States, or in their sale, and are parties upon which the complaint and this notice are to be served:

i. The Action Company
P.O. Box 528
McKinney, Texas 75069

ii. Skyline Imports Ltd.
P.O. Box 856
Red Deer
Alberta, Canada

c. Robert M.M. Seto, United States International Trade Commission, 701 E Street, N.W., Washington, D.C. 20436, is hereby named Commission investigative attorney, a party to this investigation.

3. That, for the investigation so instituted, Chief Administrative Law Judge Donald K. Duvall, United States International Trade Commission, 701


E Street, N.W., Washington, D.C. 20436, shall designate the presiding officer.

Responses must be submitted by the named respondents in accordance with section 210.21 of the United States International Trade Commission's Rules of Practice and Procedure, as amended (19 C.F.R. 210.21). Pursuant to section 201.16(d) and 210.21(a) of the Rules, such responses will be considered by the United States International Trade Commission if received not later than 20 days after the date of service of the amended complaint. Extensions of time for submitting a response will not be granted unless good and sufficient cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the amended complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the amended complaint and of this notice, and will authorize the presiding officer and the United States International Trade Commission, without further notice to the respondent, to find the facts to be as alleged in the amended complaint and this notice and to enter both a recommended determination and a final determination, respectively, containing such findings.

The amended complaint is available for inspection by interested persons at the Office of the Secretary, United States International Trade Commission, 701 E Street, N.W., Washington, D.C. 20436, and in the New York City office of the United States International Trade Commission, 6 World Trade Center.

By order of the Commission.



KENNETH R. MASON
Secretary

ISSUED: August 4, 1978

Order

Accordingly, the full Commission hereby orders that--

1. The joint motion of all parties to terminate this investigation (motion docket No. 57-10) is granted;
2. Investigation No. 337-TA-57 is terminated effective upon the issuance of this order;
3. The Secretary shall transmit a copy of this order to the President, together with the record with respect thereto, for such review as appropriate pursuant to section 337(g) of the Tariff Act of 1930, as amended (19 U.S.C. 1337(g)).
4. The Secretary shall serve a copy of the notice of termination of investigation and the Commission action, order, and opinion upon each party of record to this investigation and upon the U.S. Department of Health, Education, and Welfare, the U.S. Department of Justice, and the Federal Trade Commission; and
5. The consent order proposed by all of the parties, which provides as follows, is accepted --

I

"Subsequent to January 15, 1979 and until expiration to the Henry patent '294 (U.S. Letters Patent 3,357,294, issued December 5, 1967) on December 5, 1984, or until such time as the patent is held invalid by a final decision of a tribunal with competent jurisdiction, all whips exported by Skyline or any affiliated company, or imported by Action or any affiliated company, into the United States shall not have any portion of the inverted section of the braid cover extend over the terminal end of the whip shaft. Moreover, Skyline agrees to discontinue designating its whips as '#30 whips.' This agreement settles the entire controversy between the parties relating to this subject matter.

II

"Skyline and Action, by their chief executive officers, shall each file a properly notarized affidavit covering the period from the date this order becomes final through August 15, 1979, containing therein a detailed statement describing the extent of compliance with this Consent Order Agreement. Each affidavit and report shall be filed with the Commission by August 31, 1979. If Skyline or Action fails to file its report as required or if the Commission has sufficient reason to believe on the basis of the foregoing report, that the terms of this Order have been violated, the Commission reserves the rights to require such additional reports as are deemed necessary.

III

"The reporting requirement of paragraph II of this Order will be reviewed by the Commission after the report due in 1979 is received in order to ascertain whether further reporting by Skyline or Action is necessary, as provided in paragraph II.

IV

"For the purpose of securing compliance with this Order and during the period ending December 31, 1979, or any further period of reporting resulting from a determination by the Commission that it has sufficient reason to believe that Skyline or Action is in violation of this Order or has failed to file its report as provided in paragraph II of this Order, duly authorized representatives of the Commission shall, upon written request and on reasonable notice to Skyline or Action mailed to their principal office, be permitted reasonable access, during the office hours of the company, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the company solely for the purpose of verifying any matter contained in the reports required under paragraph II of the Order. Duly authorized representatives of the Commission shall also be permitted to interview appropriate officers and employees of Skyline or Action, who may have counsel present, regarding any such matters. Such verification and interviews are subject to any recognized privilege under the laws of the United States and are also subject to the reasonable convenience of the company.

V

"Confidential information obtained by the means provided in paragraphs II, III, and IV, above, shall only be made available to the Commission or its representatives and shall not be divulged by any

representative of the Commission, to any person other than a duly authorized representative of the Commission, except as required in the course of legal proceedings to which the Commission is a party for the purpose of securing compliance with the Order or as otherwise required by law, upon ten (10) days written notice to Skyline or Action.

"This order will become effective upon the date of its publication in the Federal Register."

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Kenneth R. Mason', written over a horizontal line.

Kenneth R. Mason
Secretary

Issued: August 9, 1979

OPINION OF THE COMMISSION

Procedural History

The present investigation was instituted by the Commission on August 3, 1978, on the basis of a complaint filed by Stockmen's, Inc., of Lawton, Iowa, pursuant to section 337 of the Tariff Act of 1930. Notice of the institution of the investigation was published in the Federal Register of August 9, 1978 (43 F.R. 35398). The complaint alleged unfair methods of competition and unfair acts in the importation of certain cattle whips into the United States, or in their sale, by reason of the alleged coverage of such cattle whips by the claims of U.S. Letters Patent 3,356,294. Named as respondents in the proceeding were The Action Co., of McKinney, Texas, and Skyline Imports Ltd., of Red Deer, Alberta, Canada. The investigation was referred by the Commission for further proceedings to an administrative law judge (ALJ).

On March 13, 1979, all of the parties, including the Commission investigative attorney, filed a proposed consent order agreement and joint motion to terminate the investigation with the ALJ. The motion was docketed as motion No. 57-10. The proposed consent order agreement provides that the parties waive (1) further procedural requirements, including the requirement that the Commission make a determination under section 337(c) of the Tariff Act, (2) judicial review of the consent order, (3) the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law, and (4) any other challenge or contest to the validity of the consent

order. The agreement states that respondents do not concede the infringement issue, but signed the agreement for settlement purposes only. The agreement further provides that, if it is accepted by the Commission, the Commission may, without further notice to the parties, issue a decision containing the consent order set forth in the agreement and make public that information which is not "business confidential" in nature. Respondents also agreed to file compliance reports as specified in the agreement. The agreement provides that violation of the agreement may result in proceedings before the Commission to determine what, if any, sanction should be applied to such violation, including a possible order of exclusion.

On April 11, 1979, the ALJ filed a recommended determination with the Commission recommending that the Commission (1) accept the consent order agreement, (2) issue a decision containing the proposed consent order, and (3) terminate the investigation. The ALJ also certified to the Commission the parties' joint motion to terminate (motion 57-10) and the accompanying consent order agreement.

On May 30, 1979, the Commission issued a notice seeking public comment on the proposed consent order agreement. The notice was published in the Federal Register of June 4, 1979 (44 F.R. 32048), and interested persons were given 10 days in which to request a hearing on the matter and 30 days in which to file comments. No requests or comments were received by the Commission.

Discussion

The Commission notes that the Administrative Procedure Act provides that agencies are to consider "offers of settlement" where "the public interest permit(s)" (see 5 U.S.C. 554(c)(1)). After considering the record, we have concluded for the following reasons that the public interest will be served by the acceptance of the proposed consent order agreement and termination of the investigation.

First, the consent order agreement does not appear to be anti-competitive. While respondents do not admit that their whips infringe complainant's patent, respondents have agreed to cease importing (or exporting, as the case may be) into the United States whips that have any portion of the inverted section of the braid cover extend over the terminal end of the whip shaft. Respondents are not precluded from importing into (or exporting to) the United States other types of cattle whips.

Second, assuming that the terms of the agreement are adhered to, termination will eliminate further expenditure of Government resources in connection with the investigation, except the minimal cost of reviewing compliance reports.

Third, no comments, adverse or otherwise, with respect to the consent order agreement or the public interest were received from interested Federal agencies or members of the public.

Finally, the Commission notes that the consent order and consent order agreement provide that the Commission will retain jurisdiction over this matter despite the termination of the investigation. If the consent order is

violated, the Commission may institute further proceedings to determine what, if any, action should be taken with respect to such violation. 1/

1/ Vice Chairman Alberger and Commissioner Stern note that this is the first patent-related section 337 investigation to have resulted in a consent order agreement. (The Commission accepted consent order agreements in two earlier non-patent investigations involving color television receivers (investigation No. 337-TA-23) and black powder firearms (investigation No. 603-TA-4)).

Commissioners Alberger and Stern are of the view that in patent-related section 337 cases, which are essentially private disputes, settlement agreements (which are agreements between the adverse parties only and do not involve the Commission as a party or enforcer) are preferable to consent order agreements (which require continuing Commission monitoring and enforcement). Continued Government involvement in the enforcement of private rights where the parties can agree to resolution of their disputes is wasteful and unnecessary. They further believe that consent order agreements should be resorted to in patent-related investigations only where the parties are unable to resolve their differences by means of a settlement agreement.

However, Commissioners Alberger and Stern have approved this particular consent order for two reasons. First, the Commission has not adopted any clear policy of limiting the types of settlement available in patent cases. Second, it would be burdensome to the parties to reject this particular agreement, since the parties have negotiated in good faith and the statutory deadline has nearly been reached.

Library Cataloging Data

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WASHINGTON, D.C. 20436

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