

Complaint.

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FEDERAL TRADE COMMISSION

v.

NATIONAL BISCUIT COMPANY.

COMPLAINT, FINDINGS, AND ORDER IN THE MATTER OF THE ALLEGED VIOLATION OF SECTION 5 OF AN ACT OF CONGRESS APPROVED SEPTEMBER 26, 1914, AND OF SECTION 2 OF AN ACT OF CONGRESS APPROVED OCTOBER 15, 1914.

Docket 836—January 23, 1924.

SYLLABUS.

Where a corporation engaged in the manufacture and sale of biscuits, crackers, and other bakery products, which various products had long been extensively advertised and had come to be in such demand in many localities, as to make it impossible for a retail grocer successfully to conduct his business without the same, and doing over fifty-five per cent of the total business in such products in the United States; permitted chain store organizations to aggregate the separate purchases of their various retail grocery establishments or units, frequently operated in competition with comparable independent grocery establishments or units, comparably served by it and at the same cost for equal quantities, and thereby secure the advantage of the larger discounts which it extended for the larger purchases, and declined to permit other retailers to aggregate the separate purchases of their respective independent grocery establishments or units, either through the instrumentality of corporate organizations created for such purpose, or in other ways, in order to secure similar advantages and enable them to meet the competition of the aforesaid chain store units, and was followed in its aforesaid policy or practice by many other manufacturers of like products; with the result that there was thereby conferred upon one class of retail grocers an undue advantage in competing with another class in the handling of its products, with the tendency to substantially lessen competition and create a monopoly in the retail distribution thereof:

Held, That such practices, substantially as described, constituted an unfair method of competition in violation of Section 5 of the Act of Congress approved September 26, 1914, and an unlawful discrimination in price, in violation of the provisions of Section 2 of the Act of Congress approved October 15, 1914.

Mr. I. E. Lambert for the Commission.

Mr. Charles A. Vilas and Breed, Abbott & Morgan of New York City (*Mr. Dana T. Ackerly*, of New York, of counsel), and *Reed, Smith, Shaw & McClay* of Pittsburgh, Pa. (*Mr. George E. Shaw*, of Pittsburgh, of counsel), for respondent.

COMPLAINT.¹

I.

Acting in the public interest pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create

¹As amended.

a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that the National Biscuit Company, hereinafter referred to as respondent, has been and is using unfair methods of competition in interstate commerce, in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

PARAGRAPH 1. That the respondent, National Biscuit Company is now, and was at all times hereinafter mentioned, a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, having its principal factory, office and place of business located at 409 West Fifteenth Street, New York City, and is now, and at all times hereinafter mentioned has been, engaged in the business of manufacturing and selling biscuits, crackers and other bakery products, and causing the same to be transported from the States in which the same are manufactured to the purchasers thereof in the various other States of the United States, the territories thereof, the District of Columbia and foreign countries, in direct competition with other persons, firms, copartnerships and corporations similarly engaged. That respondent is the largest single producer of such bakery products in the United States and has over 40 per cent of such trade in this country. That the Loose-Wiles Biscuit Company, of New York, is the second largest cracker and biscuit manufacturer in the United States and controls over 15 per cent of such trade in this country. That the said Loose-Wiles Biscuit Company has adopted a policy in selling its products to retailers similar to the policy of the National Biscuit Company hereafter complained of in this complaint. That there are also many smaller cracker and biscuit manufacturers scattered throughout the various States of the United States which have followed the lead of the National Biscuit Company and have adopted a policy in the sale of their products to retailers similar to the one hereinafter complained of. That the respondent has, for many years last past, extensively advertised its products, especially its package goods, such as "Uneeda Biscuits," "Nabiscoes," and "Zu-Zus," and some 300 other varieties, and thus the respondent has created a great demand for its products throughout the United States, and that in many localities the demand for such products is so great that it is impossible for a retail grocer to successfully conduct his business if he does not handle respondent's products.

PAR. 2. That the respondent, in the course of its business described in paragraph 1 hereof, for more than one year last past allowed, and still allows, discounts on the aggregate monthly purchases of its products, said discounts varying according to the amount of said

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aggregate monthly purchases. That the respondent allowed, and now allows, said discounts to the owners of so-called chain stores—that is, to owners who operate more than one retail store—on the aggregate monthly purchases of all said stores. That the respondent serves each said separate retail chain store as a distinct and separate purchaser. The respondent solicits, takes orders from and makes deliveries to, each chain store unit.

PAR. 3. That in many instances the owner of a single store is in direct competition with the unit store of a chain system in selling respondent's products, and aggregate monthly purchases of respondent's products by said unit store are no greater than the aggregate monthly purchases of respondent's products by the owner of the single store; yet the respondent grants a larger discount to the unit store of the chain system than it does to the owner of the single store.

PAR. 4. That the cost of selling each unit of a chain system is the same as the cost of selling the owner of a single store whose purchases are equal to those of the chain store unit similarly located.

PAR. 5. That as the result of the application of said system of discounts as aforesaid, a discrimination in price is made between owners of retail stores purchasing similar quantities of respondent's products.

PAR. 6. That to meet this disadvantage in competing with chain stores in the selling of respondent's products as hereinbefore described in paragraphs 2, 3, 4, and 5, the owners of one retail store have pooled their orders and have given to respondent such pooled orders as are hereinafter more particularly set forth; that the owners operating but one retail store each do not do a sufficient business, individually, to justify them in purchasing as large quantities of respondent's products as are purchased by the owners operating said chain stores, and they therefore do not secure as high or as great discounts as are secured by said chain store owners; that to overcome their said disadvantage, a number of owners, each operating but one retail store, pool or combine their orders, and the pooled or combined orders have been and are given to and filled by respondent; that respondent has refused, during the period hereinbefore set forth, and still refuses, to grant discounts based upon the amount of such combined or pooled orders, but will grant only discounts based upon the respective amounts of the individual orders contained in said pooled or combined orders, which discounts are substantially lower than if the same were based upon the aggregate amount of such pooled or combined orders.

PAR. 7. That the effect of respondent's system of discounts as hereinbefore described in paragraphs 2, 3, 4, 5, and 6 is to give the

owners of such chain of retail stores an undue advantage in competing with the owners operating but one retail store in the handling of respondent's said products, which practices have the capacity to and do tend to substantially lessen competition and create a monopoly in the retail distribution of respondent's products.

PAR. 8. The above alleged acts and conduct of said respondent are all to the prejudice of the public and of said respondent's competitors and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties and for other purposes," approved September 26, 1914.

II.

PARAGRAPH 1. And the Federal Trade Commission having reason to believe, from the preliminary investigation made by it, that the National Biscuit Company, hereinafter referred to as respondent, has been and is violating the provisions of Section 2 of An Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," issues this amended complaint, stating its charges in that respect on information and belief as follows:

That paragraphs 1, 2, 3, 4, 5, 6, and 7 of Count I hereof are hereby adopted and made a part of this count as fully as if set out herein verbatim.

PAR. 2. That the said discrimination in price by respondent between its said customers as aforesaid, has not been and is not based upon a difference in the grade, quality, or quantity of its product so sold, as aforesaid, and has not been and is not now made on account of any allowance whatever for any difference in the cost of selling or transportation of its said products, or in order to meet competition.

PAR. 3. That by reason of the facts hereinabove recited, respondent is unlawfully discriminating in price between different purchasers of its products, contrary to the prohibition thereof contained in Section 2 of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER.

Pursuant to the provisions of an Act of Congress approved September 26, 1914, and an Act of Congress approved October 15, 1914,

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the Federal Trade Commission issued and served a complaint upon the respondent, the National Biscuit Company, charging it with using unfair methods of competition in violation of the provisions of said Act approved September 26, 1914, and in violation of the provisions of Section 2 of said Act of Congress approved October 15, 1914. The respondent having entered its appearance and filed its answer herein, hearings were held before Warren R. Choate, an Examiner of the Federal Trade Commission theretofore duly appointed, at which hearings evidence was introduced in support of the allegations of the complaint and on behalf of the respondent. Thereupon, this proceeding came on for final argument, and the Commission being fully advised in the premises, and upon consideration thereof, makes this its findings as to the facts and conclusions:

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. That the respondent, National Biscuit Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, having its principal office, factory and place of business in the city of New York.

PAR. 2. That the respondent is now, and has been for more than twenty-five years, engaged in the business of manufacturing and selling biscuits, crackers and other bakery products, and causing the same to be transported from the state in which said biscuits, crackers and other bakery products are manufactured to the purchasers thereof in the various States of the United States, the territories thereof, the District of Columbia, and in foreign countries, in direct competition with other persons, firms, partnerships and corporations similarly engaged.

PAR. 3. That the respondent is the largest single producer of such bakery products in the United States; that the total value of respondent's products for the year 1914 was approximately \$46,143,-210; whereas the total value of production in the biscuit and cracker industry in the United States for the same year was approximately \$89,484,000. Figuring the same in percentages, the National Biscuit Company, for the year 1914, had approximately 51.6 per cent of the biscuit and cracker business in this country; that the value of respondent's products for the year 1919 was approximately \$101,-707,597; whereas the total value of production in the biscuit and cracker industry in the United States for the same year was approximately \$204,020,000. Figuring the same in percentages, the National Biscuit Company, for the year 1919, had approximately 49.9 per cent of the biscuit and cracker business in this country; that the

total value of respondent's products for the year 1921 was approximately \$104,836,255; whereas the total value of production in the biscuit and cracker industry in the United States for the same year was approximately \$187,509,000. Figuring the same in percentages, the National Biscuit Company, for the year 1921, had approximately 55.7 per cent of the biscuit and cracker business in this country; that east of the Mississippi River, for the year 1921, the National Biscuit Company had approximately 64.1 per cent of the biscuit and cracker business.

The respondent has, in the various States of the United States, 28 cracker bakeries and 8 bread bakeries, and has sales agents established in more than 192 different cities. Quoting from the testimony of Albert B. Bixler, respondent's general sales manager, "They are from Portland, Maine, to Portland, Oregon, and from Duluth to New Orleans, scattered over all the country." In 1921 the respondent had approximately 248,487 customers. Nearly every grocer in Greater New York handles respondent's products, and in the District of Columbia and the vicinity thereof, out of 2,000 grocers, every one of them carries National Biscuit Company's products. Similar conditions exist in many cities of the United States. "Uneeda Biscuit" is a cracker manufactured and sold by respondent, and is the fastest selling cracker in the world.

PAR. 4. That respondent has, for many years last past, extensively advertised its products, especially its package goods, such as "Uneeda Biscuit," "Nabisco," "Zu Zu," and some 300 other varieties, and thus, the respondent has created a great demand for its products throughout the United States. That in many localities the demand for such products is so great that it is impossible for a retail grocer to successfully conduct his business if he does not handle respondent's products.

PAR. 5. That the respondent allows a discount on the aggregate monthly purchases of its products to each customer, as follows:

No discount if the aggregate monthly purchases amount to less than \$15.

5% discount on all purchases if the total amounts to \$15 or more, but less than \$50, in one month.

10% discount on all purchases if the total amounts to \$50 or more, but less than \$200 in one month.

15% discount on all purchases if the total amounts to \$200 or more in any one month.

PAR. 6. The respondent allows to purchasers operating more than one retail grocery store, or what are commonly known as "chain stores" (and will be hereinafter so designated) a discount in price

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on the monthly gross purchases of all the separate units or retail grocery stores of such chain store systems. The number of separate units or retail stores in the various chain store systems vary from two to more than seven thousand. The respondent serves each separate unit or retail store of a chain system as a distinct and separate purchaser—its salesmen solicit and take orders from the managers of each of the separate units or retail stores; it makes deliveries to each separate unit or retail store; in many instances the manager of the separate unit or retail store pays for respondent's goods when they are delivered, but in other instances payment is made at the headquarters of the chain system; in some instances the general manager of the chain store system at headquarters to a certain extent determines the brands or varieties of respondent's products that the separate units or retail stores of such system will carry—that is, the general manager will list the number of brands and varieties that each separate unit or retail store will be allowed to handle—but the managers of the separate units or retail stores then choose any or all of such products on such list that they think they can sell in their respective communities, and the quantities to be purchased by each separate unit or retail store in all instances are determined by the manager of said unit or retail store and given to respondent's salesmen when he calls; in some instances, however, the manager of the separate unit or retail store determines the brands or varieties that his store will handle, and has complete charge of the ordering of biscuits and crackers from the respondent. Different units or retail stores of a chain system in many instances handle different brands or varieties of respondent's products.

PAR. 7. There are some very small, and likewise some very large, units or retail grocery stores of chain systems. The purchases from respondent of some of the small units or retail stores of the chain system amount to less than \$15 a month, while the purchases of some of the large units or retail stores amount to several hundred dollars. There are some very small, and likewise some very large independent retail grocery stores. The purchases from respondent of some of the small independent retail grocers amount to less than \$15 a month, while the purchases from some of the large independent retail grocers amount to several hundred dollars.

PAR. 8. The same salesman, in some instances, who takes orders from purchasers operating separate units or retail grocery stores of a chain system also takes orders from purchasers operating independent retail stores in such salesman's territory, and the same deliveryman who delivers respondent's products to the separate units or retail grocery stores of the chain system also makes deliveries of

respondent's products to the independent retail store, in the course of his rounds in his territory. In some instances payments for respondent's goods are made by the purchasers operating separate units or retail grocery stores of a chain system, in the same way that the payments are made by the purchasers operating independent retail groceries.

PAR. 9. In many instances a purchaser operating a single retail store is in direct competition with a purchaser operating a separate unit or retail grocery store of a chain system in selling respondent's products, and the aggregate monthly purchases of respondent's products by said purchaser operating a separate unit or retail grocery store of the chain system are no greater than the aggregate monthly purchases of respondent's products by the purchaser operating a single retail store; yet the respondent grants a larger discount to the purchaser operating a separate unit or retail grocery store of the chain system than it does to the purchaser operating a single retail store.

PAR. 10. The respondent sells its products to purchasers operating separate units or retail grocery stores of grocery chain systems where such separate units or retail stores resell a portion of such purchases to other retailers.

PAR. 11. The respondent refuses to sell purchasers operating independent retail grocery stores where such independent retail grocery stores resell a portion of such purchases to other retailers.

PAR. 12. The cost of selling a purchaser operating a separate unit or retail grocery store of a chain system is the same as the cost of selling a purchaser operating an independent retail store whose purchases are equal to those of the separate unit or retail grocery store of the chain system and similarly located.

PAR. 13. As the result of the application of said system of discounts as aforesaid, a discrimination in price is made between purchasers operating retail grocery stores purchasing similar quantities of respondent's products.

PAR. 14. In order to compete with retail units of chain store systems in selling National Biscuit Company products, groups of independent retailers in many localities in different parts of the United States have attempted to combine their purchases and obtain discounts equal to those granted to the chain stores:

(a) In some instances one of the independent retailers would buy for two or three of his neighbors—placing the order, receiving all deliveries at his store, and paying for the goods, the other grocers in the combination calling at his store and getting the goods thus ordered and received by him.

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(b) In some instances groups of independent retailers have requested the National Biscuit Company to make to them deliveries similar to those it makes to the separate units or retail grocery stores of chain systems; to take orders from them as it takes orders from separate units or retail grocery stores of chain systems; and have offered to pay respondents cash on delivery, or in the same way as the chain stores pay; and have further offered to meet any requirements the respondent makes of the chain systems.

(c) In other instances corporations have been formed, in which the stock is owned exclusively by retail grocers. These corporations have requested the National Biscuit Company to sell their stockholders or members on the same terms and in the same manner as said respondent sells to separate units or retail grocery stores of chain systems. These corporations have offered cash on delivery for the goods, or to pay for them as the chain stores pay, and to meet every requirement that the National Biscuit Company makes of the chain systems.

The National Biscuit Company has, in every instance except along the Pacific coast, refused to grant discounts on gross purchases of independent retailers associated or combined together as set out in subparagraphs (a), (b) and (c) of this paragraph, but have continued to sell each independent grocer comprised in the above-mentioned attempted associations or combinations, and to grant discounts only on the purchases of each separate member of the association or combination.

PAR. 15. The respondent sells its products to purchasers operating grocery chain systems, where such systems divide their purchases among the separate units or retail grocery stores of the system.

PAR. 16. The respondent refuses to sell associations or combinations of independent retail grocers operating retail grocery stores similar to the separate units or retail grocery stores of the grocery chain system, where said associations or combinations divide their purchases among the members of the association or combination.

PAR. 17. It costs the respondent no more to sell a specified number of purchasers operating independent retail stores than it costs to sell the same number of purchasers operating separate units or retail grocery stores of chain systems buying the same quantities and similarly located.

PAR. 18. In many localities along the Pacific coast there are biscuit and cracker manufacturers who enjoy a larger proportion of the biscuit and cracker business than the respondent.

PAR. 19. Most of the biscuit and cracker manufacturers along the Pacific coast sell associations and combinations of retail grocers in the same way as they sell chain systems, allowing them a discount on the gross purchases of all their members.

PAR. 20. The respondent, who refuses to sell in the East and Middle West to associations and combinations of retail grocers and allow them a discount on the gross purchases of all their members, does sell to such associations and combinations along the Pacific coast, and gives them a discount on the gross purchases of all their members. The National Biscuit Company sold the Spartan Grocers, of Los Angeles, California, a cooperative association composed of independent retail grocers, and allowed them a discount on the gross purchases of all its members, for approximately three years, and was so selling them at the time of the taking of testimony in this proceeding. Respondent also was selling the United Grocers of Oregon, another cooperative association composed of independent retail grocers, and was allowing them a discount on the gross purchases of the associated members at the time of the taking of testimony in this proceeding at Portland, Oregon.

PAR. 21. Respondent's products, being nationally known, make exceptionally good "leaders," and the chain stores are very frequently using them as such. (When a retailer sells a well-known product at a very low price, to attract attention and lure customers into his store, he is said to be selling such product as a "leader.")

PAR. 22. In many instances the purchaser operating an independent retail grocery store, purchasing equal amounts with a competing purchaser operating a separate unit or retail grocery store of a chain system, can not buy respondent's products at as low a price as the separate unit or retail grocery of the chain system is selling such products, because of difference in discounts.

PAR. 23. In many instances, independent retailers purchasing less than \$200.00 per month of National Biscuit Company products (which include approximately 90% of respondent's customers in the United States) are unable to successfully compete with purchasers operating separate units or retail grocery stores of chain systems in the sale of respondent's products, because of the difference in discounts.

PAR. 24. In many localities in the different parts of the United States, independent retail grocers who do not carry National Biscuit Company products or who do not sell respondent's products at a price equal to that at which the separate units or retail stores of chain systems are selling such products, not only lose the sale of

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respondent's products, but also thereby lose the opportunity of supplying customers with other commodities.

PAR. 25. Many biscuit and cracker manufacturers, especially those east of the Pacific Coast territory, have followed the lead of the National Biscuit Company, and have adopted a similar policy, as hereinbefore described, in the sale of their products to retailers. The Loose-Wiles Biscuit Company, of New York, the second largest biscuit and cracker manufacturer in the United States, has a like policy and so have many smaller biscuit and cracker manufacturers.

PAR. 26. That the effect of the application of respondent's system of discounts, as hereinbefore set out, gives to one class of retail grocers an undue advantage in competing with another class of retail grocers in the handling of respondent's products, which has the capacity to and does tend to substantially lessen competition and to create a monopoly in the retail distribution of respondent's products.

CONCLUSION

That the practices of said respondent, under the conditions and circumstances described in the foregoing findings, are unfair methods of competition in interstate commerce and constitute a violation of the Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes," and violate the provisions of Section 2 of an Act of Congress approved October 15, 1914, entitled "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes."

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent and the testimony and evidence received by the Examiner of the Commission, and the Commission having made its findings as to the facts and its conclusion that the respondent, the National Biscuit Company, has violated the provisions of an Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes," and has violated the provisions of Section 2 of an Act of Congress entitled "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914.

It is now ordered, That respondent, National Biscuit Company, its officers, directors, agents, representatives, servants and employees, cease and desist, in interstate commerce, directly or indirectly—

1. From discriminating in price between purchasers operating separate units or retail grocery stores of chain systems and purchasers operating independent retail grocery stores of similar kind and character purchasing similar quantities of respondent's products, where such discrimination is not made on account of difference in the grade or quality of the commodity sold, nor for a due allowance in the difference in the cost of selling or transporting, nor in good faith to meet competition in the same or different communities.

2. From giving to purchasers operating two or more separate units or retail grocery stores or chain systems a discount on the gross purchases of all the separate units or retail stores of such chain system, where the same or a similar discount on gross purchases is not allowed or given to associations or combinations of independent grocers operating retail grocery stores similar to the separate units or stores of such chain system.

It is further ordered, That respondent, within sixty (60) days after the service upon it of this order, shall file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinbefore set forth.

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