

Complaint

IN THE MATTER OF

T. E. BROOKS, DOING BUSINESS AS T. E. BROOKS & COMPANY

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 1442. Complaint, Mar. 4, 1927—Decision, Mar. 14, 1932

Where the words "Havana" or "Habana" had long since been used and understood by the cigar purchasing and consuming public of the United States and by cigar manufacturers and dealers as meaning and designating tobacco grown in Cuba and of high grade, such tobacco had long been imported into the United States and extensively used and consumed therein in cigars made in whole or in part thereof, and cigars made of such tobacco enjoyed a large demand in the United States and were considered as having an improved quality and desirability by reason of such fact, by many of the dealers and consuming public, who preferred the purchase thereof; and thereafter an individual engaged in the manufacture and sale of domestic cigars containing no Havana or Cuban tobacco,

Named, banded, and advertised its said cigars "Havana Sweets" and featured aforesaid name upon the tops and ends of the containers in which displayed and offered to the consuming public, as well as on the inside lid and inner side of the vertical part of the container to which was attached the hinged lid, with no notice of said cigar's domestic content other than a relatively inconspicuous statement to that effect printed at the bottom of aforesaid inside lid label;

With effect of misleading and deceiving a large and substantial number of the purchasing and consuming public into buying aforesaid cigars as and for those composed in whole or in part of Havana, i. e., tobacco grown in Cuba, and of unfairly diverting trade from competitors dealing in cigars so composed in fact and rightfully and truthfully so advertising, representing, banding, and labeling the same, and from competitors dealing in cigars composed wholly of domestic tobacco and neither banding, labeling, advertising, nor otherwise representing their said cigars as containing any Havana or Cuban tobacco, and with capacity and tendency so to mislead and deceive and unfairly divert trade from competitors and to operate as a competitive burden upon sale of aforesaid competitive cigars:

Held, That such acts and practices, under the conditions and circumstances set forth, were to the injury and prejudice of the public and competitors, and constituted unfair methods of competition.

Mr. Henry Miller for the Commission.

Mr. John Walsh and *Mr. L. A. Spiess*, of Washington, D. C., for respondent.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent individual, engaged in the manufacture of

cigars and sale thereof to wholesale dealers at points in various States, and with place of business in New York City, with naming product misleadingly, misbranding or mislabeling and advertising falsely or misleadingly, in violation of the provisions of section 5 of said act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondent individual, as charged, engaged as above set forth, for about four years last past, has designated as Havana Sweets, a cigar made by him and composed entirely of other than Havana tobacco, i. e., tobacco grown on the Island of Cuba,¹ and has so banded said cigars and conspicuously labeled the containers thereof in which sold to its wholesale dealer vendees, and in which finally offered to the consuming public by said wholesalers' retail dealer customers.

Use by respondents, as alleged, "of the name and description Havana Sweets in naming, designating, packing, labeling, and banding his said cigars," as aforesaid, "has the capacity and tendency to, and does, mislead and deceive many among aforesaid trades and many of the consuming public into the belief that respondent's said Havana Sweets are composed of Havana tobacco," and said acts and practices, as charged, tend to divert business from and otherwise injure and prejudice competitors dealing in cigars composed of Havana tobacco as aforesaid, and rightfully and lawfully so representing the same, and competitors manufacturing cigars composed for the most part of other than Havana tobacco, without in anywise misrepresenting composition of their said cigars; all to the prejudice of the public and competitors.

Upon the foregoing complaint, the Commission made the following

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to 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," the Federal Trade Commission issued and served a complaint in this proceeding upon T. E. Brooks, an individual doing business under

¹ As alleged in paragraph 2 of the complaint, "For many years prior to the date hereof, tobacco has been and is now a commercial export product from the Island of Cuba and the term 'Havana' tobacco has for many years meant, and still means to the cigar tobacco trade, the cigar trade and the consuming public, tobacco grown in the Island of Cuba. Many of said trades and many of the consuming public have, for many years, considered, and still consider, said Havana tobacco superior in quality for the manufacture of cigars to tobacco grown elsewhere than on the Island of Cuba. Many among the said trades and many of the consuming public have for many years considered, and still consider, that cigars made of said Havana tobacco are superior in quality to cigars made of tobacco grown elsewhere than on the Island of Cuba."

the trade name and style T. E. Brooks & Co., respondent above named, charging him with the use of unfair methods of competition in commerce in violation of the provisions of section 5 of said act.

Respondent entered his appearance in the proceeding and filed answer to said complaint. Thereafter, the matter being ready for the taking of testimony and other evidence with respect to the charges in the complaint, a stipulation as to the facts was agreed upon and entered by respondent and by counsel for the Commission, subject to the approval of the Commission, wherein it is stipulated and agreed that the statement of facts therein recited may be taken as the facts in this proceeding and in lieu of testimony in support of the charges stated in the complaint or in opposition thereto, and that the Federal Trade Commission may proceed upon said statement of facts to make its report stating its findings as to the facts (including inferences which it may draw from the said stipulated facts) and its conclusion based thereon, and may enter its order disposing of the proceeding. Said stipulation as to the facts was approved by the Commission and the privilege of filing briefs was waived by counsel.

Thereupon this proceeding came on for final hearing before the Federal Trade Commission and was orally argued before the Commission by counsel for the respondent and by counsel for the Commission; and the Commission having duly considered the entire record and being now fully advised in the premises, makes this its report stating its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent is an individual who is and, at all times since the issuance of the complaint herein and for more than three years prior thereto, has been doing business as hereinafter described under the trade name and style T. E. Brooks & Co., with his office and place of business in the city of Red Lion in the State of Pennsylvania. The said business of respondent is the manufacture of cigars and the sale and distribution thereof to wholesale and retail dealers and to the consuming public throughout the several States of the United States. The said cigars are manufactured by respondent in York County, Pa., where they are packed, branded, and labeled by respondent for distribution and sale by himself and by his dealer-customers to the purchasing and consuming public of the United States. The sales of the cigars are made and purchase orders therefor procured by respondent through the personal solicitation of himself and of his salesmen and agents, and by means of

written correspondence and other communications with his customers and prospective customers, and through and by means of advertisements of said cigars in newspapers, magazines, placards, signs, posters, and other advertising mediums published and distributed by respondent among the purchasing and consuming public. In consummating the sale of the cigars and in filling said purchase orders and making delivery of said cigars to his customers, respondent causes and throughout the course and conduct of his business has caused the cigars so sold to be transported from his factory and place of business in the State of Pennsylvania through and into the several States other than the State of Pennsylvania to the respective purchasers thereof in such other States. In the course and conduct of said business respondent is and continuously has been engaged in interstate commerce in the sale and distribution of his said cigars; and he is and continuously has been at all times mentioned selling and distributing said cigars and conducting his said business in direct active competition with many other individuals, partnerships, and corporations also engaged in the sale, distribution, and delivery of cigars in commerce in, between, and among the several States of the United States to wholesale and retail dealers and to the consuming public.

PAR. 2. The said cigars manufactured, advertised, sold, and distributed competitively by respondent in interstate commerce as set forth in paragraph 1 hereof are and, for several years last past and prior to the issuance of the complaint herein, have been sold and distributed by respondent in large and substantial quantities under the name, designation, and description of Havana Sweets cigars and under the following-described brands and labels affixed by respondent to the cigars themselves and to the containers thereof. The labels attached to the cigars themselves consist of a paper band placed by respondent around each cigar and bearing conspicuously the words "Havana Sweets" as descriptive of the cigars. The containers are the usual and customary cigar boxes or cigar containers of the respective capacities of twenty-five and fifty cigars each. The labels and brands attached to each box or container have been designed and affixed thereto by respondent and are as follows:

(1) Centered on the outside of the lid of the box, a label or brand bearing the words "Havana Sweets" and "Sweet to the last puff," the words "Havana Sweets" appear in large black and gold letters, while the statement "Sweet to the last puff" appears in smaller white letters.

(2) On each of the two outside ends of the box, a label or brand bearing the words "Havana Sweets," in large and conspicuous black

and red letters, and the statement "Sweet to the last puff" in much smaller black letters.

(3) On the inside of the lid, a large label or brand coextensive with said lid and reading as follows:

5¢ Straight

Sumatra Wrapper

HAVANA

SWEETS

SWEET TO THE LAST PUFF

Made exclusively of high grade domestic tobacco.

The words "Havana Sweets" in said label or brand are in large conspicuous black and red letters over a half-inch high. The words "5¢ Straight" and "Sumatra Wrapper" and the statement "Sweet to the last puff" are in comparatively small black and white letters. The words "Made exclusively of high grade domestic tobacco" are in still smaller letters of about one-eighth inch in height and printed in black on the bottom of the label or brand and adjacent to the hinge edge of the lid.

(4) On the inner side of the vertical part of the box to which the lid is hinged, a label or brand bearing in large black and red letters over one-half inch in height the words "Havana Sweets."

In the regular course of business and as intended by respondent, said cigars are and have been displayed, represented, and resold to the purchasing and consuming public as Havana Sweets cigars and in the original containers and under said labels, brands, and representations applied thereto by respondent as above described. Further, to promote the sale of his said cigars respondent advertises, describes, and represents such cigars to the purchasing and consuming public throughout the United States as Havana Sweets cigars in and by means of said advertising matter used by respondent as described in paragraph 1 hereof.

PAR. 3. The word "Havana," also spelled "Habana," is the name and designation of the tobacco grown on the Island of Cuba, which name and designation is and has been since time immemorial used and understood by the cigar purchasing and consuming public of the United States and by cigar manufacturers and dealers throughout the United States as meaning and designating tobacco which has been grown on the Island of Cuba. Said tobacco has long been imported into the United States and widely and extensively used and consumed therein in cigars manufactured in whole and in part only from such tobacco. Such Havana tobacco has the reputation among the cigar consuming and purchasing public of the United States as

being cigar tobacco of high quality and excellence, and cigars made in whole or in part from said tobacco are in large demand throughout the United States. Many of the cigar dealers and many of the consuming public of the United States prefer to purchase cigars containing Havana tobacco, and have believed and still believe that the use of such Havana tobacco in cigars adds to and increases the quality and desirability of such cigars.

PAR. 4. In truth and in fact none of respondent's so-called Havana Sweets cigars manufactured, branded, labeled, advertised, and sold by the respondent and by dealers to the purchasing and consuming public, as hereinbefore described contain any Havana tobacco or tobacco grown on the Island of Cuba, nor have they at any time contained any such tobacco, but are and have been manufactured entirely from, and wholly composed of, tobacco grown in the United States, principally Pennsylvania tobacco. The effect of the use of the word "Havana" in said designation "Havana Sweets" in advertising, branding, labeling, and describing said cigars containing no Havana tobacco, all as hereinbefore set forth, is misleading and it has and had the capacity and tendency to and did mislead and deceive a large and substantial number of the purchasing and consuming public into purchasing said cigars in the erroneous belief that they are and were composed in whole and in part of Havana tobacco; that is, tobacco grown on the Island of Cuba.

PAR. 5. Of the competitors of respondent mentioned in paragraph 1 hereof there are many who sell and distribute in competition with respondent cigars composed in whole and also cigars composed in part only of Havana tobacco and who rightfully and truthfully advertise, represent, brand, and label such cigars as containing said Havana tobacco. There are also many of said competitors who sell and distribute, between and among the several States in competition with respondent, cigars containing no Havana tobacco, and being composed wholly of tobacco grown in the United States and elsewhere than on the Island of Cuba, and who do not brand, label, advertise, or otherwise represent that said cigars contain any Havana or Cuban tobacco. Respondent's so-called Havana Sweets cigars are displayed, offered for sale, and sold to the consuming public by respondent and in and by cigar stores and other dealer-establishments in competition with the said cigars of competitors. The respondent's use of the word "Havana" as hereinabove described in relation to cigars containing no Havana tobacco has the capacity, tendency, and effect of injuring the public and of unfairly diverting trade from respondent's competitors; and, further, tends to operate as a competitive burden upon the sale of said competing cigars.

CONCLUSION

The acts and practices of the said respondent, under the conditions and circumstances described in the foregoing findings, are and have been to the injury and prejudice of the public and of respondent's competitors, and are unfair methods of competition in interstate commerce and constitute a violation of section 5 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."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the entire record, including the complaint of the Commission, the answer of respondent thereto, the stipulation as to the facts agreed upon and approved, and the Commission having made its findings as to the facts with its conclusion that said respondent has been and is violating the provisions of section 5 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,"

It is now ordered, That respondent T. E. Brooks, his agents, representatives, servants, employees, and successors in business, cease and desist, in connection with, or in the course of, the sale or distribution of cigars in interstate commerce—

(1) From using, or causing to be used, the word "Havana" in the brand name or designation Havana Sweets for any such cigars which do not contain Havana or Cuban tobacco, unless in each instance when and where so used said brand name or designation be immediately accompanied by a statement, assertion, or phrase which is equally prominent and conspicuous and which clearly and unequivocally indicates or states the fact that such cigars do not contain any Havana or Cuban tobacco, or that said cigars are composed entirely of certain tobacco none of which is Havana tobacco or tobacco grown in Cuba.

(2) From using, or causing to be used, the word "Havana" in the brand name or designation Havana Sweets for any such cigars which are not composed entirely of Havana or Cuban tobacco but contain such tobacco in part, unless in each instance when and where so used said brand name or designation containing the word "Havana" be immediately accompanied by a statement, assertion, or phrase which is equally prominent and conspicuous and which clearly and unequivocally indicates or states the fact that such cigars are not com-

posed wholly of Havana or Cuban tobacco or that the cigars contain certain tobacco which is not Havana tobacco or tobacco grown in Cuba.

(3) From directly or indirectly applying the word "Havana" singly to any such cigars which are not composed entirely of Havana or Cuban tobacco.

(4) From directly or indirectly applying to any of said cigars any other name, designation, statement, assertion, phrase, or representation which implies or imports that such cigars contain Havana or Cuban tobacco in whole or in part when such is not the fact.

It is further ordered, That said respondent T. E. Brooks shall, within 60 days after the service upon him of a copy of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist hereinbefore set forth.

Syllabus

IN THE MATTER OF

HERBERT L. SMITH

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 1467. Complaint, June 22, 1927—Decision, Mar. 14, 1932

Where the words "Havana" or "Habana" had long since been used and understood by the cigar purchasing and consuming public of the United States and by cigar manufacturers and dealers thereof as meaning and designating tobacco grown on the Island of Cuba, such tobacco had long been imported into the United States and widely and extensively used and consumed therein in cigars made in whole or in part thereof and had long come to have the general reputation among the aforesaid cigar consuming and purchasing public as being cigar tobacco of highly desirable qualities and superior excellence, and cigars made in whole or in part thereof were in large demand, and purchase thereof was preferred by many of the dealers and a large and substantial part of the consuming public of the United States, who believed that use of said tobacco in cigars added to and increased the quality and desirability thereof; and thereafter an individual engaged in the manufacture of domestic cigars containing no Havana or Cuban tobacco, and sale thereof to wholesale and retail dealers and the consuming public,

Named, banded and advertised his said cigars "Havana Brown" and featured said name in sundry places on the usual and customary cigar boxes and containers in which displayed, offered and sold by him in the regular course of trade and with his knowledge and consent to his aforesaid customers, and in which displayed, offered and sold as aforesaid by his dealer purchasers and other dealers to the purchasing and consuming public throughout the United States;

With effect of misleading and deceiving a large and substantial number of the purchasing and consuming public into buying said cigars as and for those composed in whole or in part of Havana, i. e., tobacco grown in Cuba, and of unfairly diverting trade from competitors dealing in cigars so composed in fact and rightfully and truthfully so advertising, representing, banding, and labeling the same, and from competitors dealing in cigars composed wholly of domestic tobacco and neither banding, labeling, advertising, nor otherwise representing their said cigars as containing any Havana or Cuban tobacco, and with capacity and tendency so to mislead and deceive and unfairly divert trade from competitors and to operate as a competitive burden upon sale of aforesaid competitive cigars:

Held, That such acts and practices, under the conditions and circumstances set forth, were to the injury and prejudice of the public and competitors, and constituted unfair methods of competition.

Mr. Henry Miller for the Commission.

Mr. John Walsh and *Mr. L. A. Spiess*, of Washington, D. C., for respondent.