

Syllabus

IN THE MATTER OF
BOB HOFELLER, INDIVIDUALLY, AND TRADING AS BOB
HOFELLER CANDY COMPANY

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

Docket 2187. Complaint, May 23, 1934—Decision, June 3, 1935

Where an individual engaged in the sale and distribution of packaged or boxed assortments of "prize candy", for sale at retail at prices ranging from 5 cents to 25 cents, to concessionaires with, and to operators, managers, and proprietors of, burlesque theatres, traveling shows, tent shows, medicine shows, circuses and carnivals, within which boxes, bearing various brand names and containing assortments varying according to the wishes of the customers, there were enclosed and concealed, in addition to the pieces of candy therein contained, articles of merchandise or coupons representative thereof, as prizes, ranging in value from 1 cent to \$3, such as stick pins, transfer pictures, tops, blankets, bedspreads, etc.—

Sold said assortments or packages, so assembled and packed that they could be offered for sale by said customers to the consuming public as a lottery or gaming device, without alteration or rearrangement, and could not be resold to the public otherwise, without breaking open each package and rearranging the contents thereof, with knowledge and intent that said candy would and should thus be offered and sold to such concessionaires, operators, managers and proprietors, who found candy offered by said methods more salable, and purchased the products of said individual and of others employing the same, and displayed, offered and sold said packages to members of their audiences at their respective places of business, and thereby distributed said articles of prize merchandise wholly by lot or chance to the ultimate purchasers of said boxes of candy, in competition and potential competition with concerns which consider such a method of sale and distribution as morally bad and as encouraging gambling, and especially where children are involved, as injurious to the industry in the merchandising of a chance or lottery instead of candy, and as providing the vendors thereof with a means of violating the laws of the several States;

With the result that competitors and potential competitors who refused to sell their merchandise through such methods and who can compete on even terms only by giving the same or similar devices to their customers, were put to a disadvantage in competing and trade was diverted from them to said individual and others employing similar methods, other competitors opposed to the use of such methods for the reasons set forth were constrained to adopt the same in order to meet the competition of said

Complaint

20 F. T. C.

individual and others indulging therein, in order to prevent the loss of their business or a substantial part thereof, sale of "straight goods" candy by manufacturers and jobbers dealing therein, in such places, excepting limited sales in burlesque theatres, in competition with such "novelty prize" candy was prevented, due, principally, to gambling or lottery feature connected therewith, the public policy of the United States and that of many of the States thereof, statutes of some of which make operation of lotteries and gambling devices penal offenses, were violated, freedom of fair and legitimate competition in the industry involved was restrained and impaired, and the public, and competitors and potential competitors, were prejudiced and injured:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice of the public and competitors and constituted an unfair method of competition.

Mr. Henry C. Lank for the Commission.

Mr. William Friedman, of Chicago, Ill., for respondent.

COMPLAINT

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, having reason to believe that Bob Hofeller, individually, and trading as Bob Hofeller Candy Company, hereinafter referred to as respondent, has been or is using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. The respondent is an individual and uses the trade name, Bob Hofeller Candy Company, and has his principal office and place of business in the City of Chicago, State of Illinois. Respondent is now and for more than two years last past has been engaged in the business of packing and assembling candy into assortments, and selling and distributing such assortments of candy to concessionaires who sell candy at carnivals, medicine shows, circuses, tent repertoire shows, and burlesque theatres, and to wholesale and retail candy dealers. Such purchasers are located at points in the various States of the United States, and respondent causes said products when so sold to be transported from his principal place of business in the City of Chicago, State of Illinois, into and through other States of the United States to said purchasers at their respective points of location. In the course and conduct of his said business, respondent is in active competition with other individuals, partnerships and corporations engaged in the sale and distribution of candy in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of his business as described in paragraph 1 hereof, respondent sells to concessionaires who sell candy at carnivals, medicine shows, circuses, tent repertoire shows, and burlesque theatres, and to wholesale and retail dealers, certain packages or assortments of candy so packed and assembled as to involve the use of a lottery scheme when distributed to the consumers thereof.

One of the said assortments of candies is composed of a number of small packages of candy which said packages retail at the price of 10 cents each. Each of said small packages of candy contain, in addition to the candy, an article of merchandise or a prize, or in the event that the article of merchandise or prize is too large to be packed within the package, a printed coupon or notice entitling the holder thereof to the larger article of merchandise or prize. The majority of these articles of merchandise or prizes contained within the said packages are of very little value, but a small number of the said articles of merchandise or prizes are of a value greater than 10 cents. The articles of merchandise or prizes or printed coupon entitling the holder thereof to a prize are concealed from the consuming or purchasing public, within the package of candy, until after the packages have been purchased and broken open by the said purchasing or consuming public. The articles of merchandise or prizes to be obtained by the purchasing or consuming public are of unequal value. The candy contained in each of the said packages is not the equivalent in quantity or quality to candy that ordinarily retails for 10 cents. The purchasers of the said small packages of candy containing an article of merchandise or prize or coupon entitling the holder to a prize greater in value than 10 cents thus procure the article of merchandise or prize wholly by lot or chance.

The respondent distributes numerous assortments of candy, some of which retail at 25 cents per package, others at 15 cents per package, others at 10 cents per package as described above, and still others at 5 cents per package, all of which assortments are distributed by methods similar to that described herein.

PAR. 3. Aforesaid concessionaires selling respondent's candy, and retail dealers purchasing respondent's candy, expose said assortments for sale and sell said assortments to the purchasing public in accordance with the above-described sales plan. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of his products in accordance with the sales plan hereinabove set forth.

PAR. 4. Respondent's aforesaid practices tend to and do induce many of the consuming public to purchase respondent's said candies

in preference to the candies of respondent's said competitors, because of the chance of obtaining the larger or more valuable articles of merchandise or prizes free of charge.

PAR. 5. Aforesaid practices tend to and do induce many of the consuming public to purchase the said packages in the hope that said purchasers will obtain an article of merchandise or prize of a greater value than the selling price of the particular package. Respondent's candies are thus distributed to the consuming public by means of lot or chance.

PAR. 6. The above alleged acts and practices of respondent are all to the prejudice of the public and 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.

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 upon the respondent, Robert Hofeller (erroneously named in the complaint as Bob Hofeller), individually, and trading as Bob Hofeller Candy Company.

After the issuance of said complaint and the filing of respondent's answer thereto, testimony and evidence were received, duly recorded and filed in the office of the Commission; thereafter the proceeding came regularly on for a final hearing before the Commission on the said complaint, answer, testimony, and evidence, briefs of counsel for the Commission and counsel for the respondent and oral arguments, and the Commission having duly considered the same and being fully advised in the premises finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Robert Hofeller, is an individual doing business as Bob Hofeller Candy Company, with his principal office and place of business in the City of Chicago, State of Illinois. He is now, and for more than two years last past has been, engaged in

the sale and distribution of packaged candy to concessionaires with, and to operators, managers and proprietors of burlesque theatres, traveling shows, tent shows, medicine shows, circuses and carnivals. Such purchasers are located in the various States of the United States, and respondent causes said candy packages when sold to be shipped from his principal place of business in the City of Chicago, Ill., to the purchasers thereof at their respective points of location in States other than the State of Illinois. In so carrying on said business respondent has been engaged in interstate commerce and is, and has been, in active and substantial competition with other individuals and with partnerships and corporations engaged in the sale and distribution in interstate commerce, of candy and candy products.

PAR. 2. Respondent does not manufacture the candy sold by him, but buys certain kinds of caramel candy and chocolate covered cream candy, from the manufacturers thereof. He places this candy in boxes bearing various brand names, together with prizes consisting of certain other merchandise or coupons, entitling the consuming purchaser to certain specified merchandise.

These assortments vary according to the wishes or direction of respondent's customers, but they all make use of the same chance feature, and a description of one of said assortments is descriptive of the principle involved in all. One such assortment assembled and distributed by respondent is designated by him as and has the brand name "Oriental Love Drops". This assortment consists of a number of boxes, each containing five pieces of caramel candy and another article of merchandise as a prize. A list of prizes in said boxes includes: stickpins, paper watches, transfer pictures, snap games, moving picture books, water flowers, eyeglasses, tops, strip pictures, lamps, wall decorations, blankets, stockings, bedspreads and pillows. If a particular article of merchandise is too large to be placed in the box of candy, a coupon is inserted therein which entitles the ultimate purchaser to receive such article. Such articles of merchandise or coupons are concealed in said boxes and the nature of the prize or the particular article of merchandise cannot be ascertained until the box has been purchased and opened. The retail value of the prizes ranges from 1 cent to \$3.

Respondent's customers display these boxes of candy at the several places of amusement as referred to in paragraph 1 hereof, and offer the same for sale and sell them to members of audiences at such places of amusement. The articles of prize merchandise are thus distributed wholly by lot or chance to the ultimate purchasers of said boxes of candy.

Findings

20 F. T. C.

PAR. 3. The packages of candy containing other articles of prize merchandise are variously described in the candy trade as: "Prize packages", "Premium packages", "Novelty Candy packages", "Novelty Prize Candy" and "Novelty packages". Candy sold without any prize or without any lot or chance feature is referred to in the candy trade as "Straight Candy".

PAR. 4. The majority of the packages of candy distributed by respondent retail at 10 cents each, but a few are sold at retail at 5 cents, a few at 15 cents, and a few at 25 cents. The candy contained in said packages is not the equivalent in value of "straight" candy sold at corresponding prices.

PAR. 5. Numerous concessionaires and managers, operators, or proprietors of the places of amusement referred to in paragraph 1 hereof, purchase the assortments described in paragraph 2 hereof from respondent or similar assortments from others distributing similar types of candy assortments, and such concessionaires, managers, operators or proprietors offer the same for resale to the customers or patrons of such burlesque theatres or other places of amusement, and such assortments are sold and distributed to the consuming public in the manner and by the sales plan outlined in paragraph 2 hereof.

PAR. 6. All sales made by respondent are absolute sales, and respondent retains no control over the goods after they are delivered to his customers. The packages are assembled and packed in such manner that they can be offered for sale by respondent's customers to the consuming public by the sales plan outlined in paragraph 2 hereof without alteration or rearrangement. The testimony clearly indicates that the packages or assortments of candy sold and distributed by the respondent cannot be resold to the public by respondent's customers, except as a lottery or gaming device, unless respondent's customers break open each package and rearrange the contents thereof.

In the sale and distribution of his merchandise, respondent has knowledge that said candy will be resold to the purchasing public by his customers by lot or chance, and he packs and assembles such candy in the way and manner described so that it may and shall be resold to the public by lot or chance.

PAR. 7. Respondent's merchandise is sold as "Prize Candies" in burlesque theatres, traveling shows, tent shows, medicine shows, circuses and carnivals. In these places, with the exception of the burlesque theatres, no other candy is ordinarily offered for sale. In burlesque theatres some "straight" candies are occasionally offered for sale and sold. The evidence discloses and the Commission finds

that in theatres other than burlesque theatres candy bars and small packages of candy are quite often offered for sale and sold. Candy manufacturers and candy jobbers testified and the Commission finds that, if this "prize" or "novelty package" candy was not offered for sale, "straight" candy in bars or small packages could be sold in substantial quantities in burlesque theatres, traveling shows, tent shows, medicine shows, circuses and carnivals, the sale of said "novelty package" candy prevents the sale of "straight" candy and thus eliminates competition of manufacturers and jobbers selling such "straight" candy. The Commission finds that such manufacturers and jobbers of "straight" candy are potential competitors of the respondent insofar as the sale of the "straight" candy in the aforementioned places of amusement is concerned.

PAR. 8. The sale and distribution of candy by respondent's customers by the sales plan or method described herein is the sale and distribution of said packages by lot or chance and constitutes a lottery or gaming device.

Competitors and potential competitors of respondent appeared as witnesses in this proceeding and testified that and the Commission finds as a fact that many competitors and potential competitors regard such method of sale and distribution as morally bad and encouraging gambling, and particularly where these packages are offered to audiences made up in part of children; as injurious to the candy industry, because it results in the merchandising of a chance or lottery instead of candy; and as providing the vendors thereof with a means of violating the laws of the several States. Because of these reasons, some competitors and potential competitors of respondent refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance. Other competitors are opposed to such method of sale for the reasons just above stated and testified, and the Commission finds as a fact, that they are nevertheless compelled to adopt such methods in order to meet the competition of respondent and others indulging in like methods, in order to prevent the loss of their business or a substantial part thereof. The competitors and potential competitors of respondent who refuse to sell their merchandise by such methods are thereby put to a disadvantage in competing. Certain concessionaires, operators, managers and proprietors of places of amusement as described herein, who find that they can dispose of more candy by using the method of sale as described, buy respondent's products and the products of others employing the same methods of sale and thereby trade is diverted to respondent and others using similar methods from respondent's competitors and potential competitors. Said

Conclusion

20 F. T. C.

competitors and potential competitors can compete on even terms only by giving the same or similar devices to their customers. This they are unwilling to do, and their sales of "straight goods" candy is injuriously affected.

The use of the method by respondent as described herein in the sale and distribution of his candy is prejudicial and injurious to the public and to respondent's competitors and potential competitors, and has resulted in the diversion of trade to respondent from his said competitors and potential competitors, and thus is a restraint upon, and a detriment to, the freedom of fair and legitimate competition in the candy industry.

PAR. 9. There are in the United States many manufacturers of candy who do not manufacture and sell lottery or prize packages of candy and who sell their "straight goods" candy in interstate commerce in competition with the "novelty prize" candy, and the sale of "straight goods" candy has been injuriously affected by the sale of "novelty prize" candy, and this effect is principally due to the gambling or lottery feature indicated with the "novelty prize" candy.

PAR. 10. In addition to the assortments described in paragraph 2 hereof, the respondent sells and distributes candy to wholesale dealers and jobbers without any lottery or chance feature. He began the sale and distribution of the assortments as described in paragraph 2 at the time he commenced business in the year 1932, and has continuously to the time of taking testimony in this case sold and distributed assortments involving the distribution of candy by lot or chance.

The exact amount of respondent's annual volume of business is not shown, but the respondent testified, and the Commission finds, that the volume of his business involving the sale and distribution of candy by lot or chance is substantial.

PAR. 11. The sale and distribution of candy by lot or chance is against the public policy of the United States and of many of the States thereof, and some of the said States have laws making the operation of lotteries and gambling devices penal offences.

CONCLUSION

The aforesaid acts and practices of respondent, Robert Hofeller, individually, and trading as Bob Hofeller Candy Company, under the conditions and circumstances set forth in the foregoing findings as to the facts are all to the prejudice of the public and respondent's competitors and potential competitors, and constitute unfair methods of competition in commerce, and constitute violations of Section 5 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”.

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, the testimony taken, the briefs filed and the oral argument of counsel, and the Commission having made its findings as to the facts and its conclusion that the said respondent 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”:

It is now ordered, That the respondent, Robert Hofeller (erroneously named in the complaint as Bob Hofeller), individually, and trading as Bob Hofeller Candy Company, his agents, representatives and employees, in the sale and distribution in interstate commerce of candy and candy products, do cease and desist from:

(1) Selling and distributing to concessionaires with, and to operators, managers and proprietors of, burlesque theatres, traveling shows, tent shows, medicine shows, circuses and carnivals and other similar places of amusement, candy so packed and assembled that sales of such candy to the general public are to be made, or may be made, by means of a lottery, gaming device or a gift enterprise.

(2) Supplying to, or placing in the hands of, concessionaires with, and operators, managers and proprietors of, burlesque theatres, traveling shows, tent shows, medicine shows, circuses and carnivals and other similar places of amusement, packages or assortments of candy which are or may be used without alteration or rearrangement of the contents of such packages to conduct a lottery, gaming device or a gift enterprise in the sale or distribution of the candy or candy products contained in said package or assortment to the public.

(3) Packing or assembling in the same assortment packages or small boxes of candy for ultimate sale to the public, which individual packages or small boxes of candy are of uniform appearance, but which contain other articles of merchandise or coupons entitling the purchaser thereof to other articles of merchandise which articles of merchandise are of varying value.

(4) Furnishing to concessionaires with, or operators, managers or proprietors of, burlesque theatres, traveling shows, tent shows, medicine shows, circuses and carnivals and other similar places of amusement, assortments of candy consisting of individual packages or small boxes of candy for resale to the public, which individual

Order

20 F. T. C.

or small boxes of candy are of uniform appearance, but which contain articles of merchandise or coupons calling for articles of merchandise of varying value.

It is further ordered, That the respondent, Robert Hofeller, individually, and trading as Bob Hofeller Candy Company, within 30 days after the service upon him of this order, shall 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, hereinabove set forth.

Complaint

IN THE MATTER OF
GORDON HOWARD COMPANYCOMPLAINT AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5
OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2212. Complaint, July 20, 1934—Order, June 3, 1935*

Consent order requiring respondent, its officers, directors, etc., in the sale and distribution in interstate commerce of candy and candy products, to cease and desist from—

- (a) Selling and distributing to concessionaires with, and to operators, managers and proprietors of, burlesque theatres, traveling shows, tent shows, medicine shows, circuses and carnivals and other such places of amusement, candy so packed and assembled that sales thereof to the general public are to be made, or may be made, by means of a lottery, gaming device or gift enterprise;
- (b) Supplying to or placing in the hands of such concessionaires, operators, managers and proprietors, packages or assortments of candy which are or may be used, without alteration or rearrangement of the contents thereof, to conduct a lottery, gaming device or gift enterprise in the sale or distribution of the candy and candy products therein contained to the public;
- (c) Packing or assembling in the assortment, packages or small boxes of candy, for ultimate sale to the public, which are of uniform appearance but contain articles of merchandise or coupons entitling the purchaser thereof to the articles of merchandise, of varying value; and
- (d) Furnishing to such concessionaries, operators, managers and proprietors assortments of candy consisting of individual packages or small boxes thereof, for resale to the public, of uniform appearance, but containing articles of merchandise, or coupons calling for such articles, of varying value.

Mr. Henry C. Lank for the Commission.

Mr. H. R. Brandt, of Kansas City, Mo., and *Moses, Kennedy, Stein & Bachrach*, of Chicago, Ill., for respondent.

COMPLAINT

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, having reason to believe that Gordon