

IN THE MATTER OF

A. McLEAN & SON

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF AN ACT OF CONGRESS APPROVED JUNE 16, 1933

Docket 2264. Complaint, Dec. 15, 1934—Decision, June 21, 1935

Where a corporation engaged in the manufacture and sale of candy, including break-and-take merchandise composed of (a) assortments of penny candies of uniform size, shape, and quality, together with a number of larger pieces or small boxes of candy to be given as a prize to chance purchaser of one of a relatively few of said small candies, the color of the enclosed, concealed centers of which differed from that of the majority thereof, and other assortments involving similar feature of lottery or chance, though varying somewhat as to number of pieces and prizes, which occasionally included other articles of merchandise, and (b) assortments consisting of two boxes containing, respectively, (1) pieces of uniform size, shape, and quality, the color of the enclosed, concealed centers of a few of which differed from that of the majority, and (2) larger pieces or bars of candy, the number of which corresponded approximately to that of the different colored centers in the other, so packed that they might be displayed as a single assortment in which the larger pieces were to be distributed as prizes to chance purchasers of the smaller candies with the different colored centers—

Sold said assortments, together with explanatory display cards for the retailer's use in offering the same to the ultimate consumers, to wholesalers and jobbers, so packed and assembled that they could be displayed for sale and distribution to the purchasing public, as hereinbefore set forth, without alteration or rearrangement, and could not be resold to the public (except in the case of said last named two-box assortments) except as a lottery or gaming device without unwrapping, unpacking, disassembling, or rearranging the same, with knowledge and intent that said candy would and should thus be resold by the retailer; in competition with concerns who regard such a method of sale and distribution as morally bad and one which encourages gambling, and especially among children, and as injurious to the industry in merchandising a chance or lottery rather than candy, and providing retailers with the means of violating the laws of the several States, and who refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance;

With the result of putting at a disadvantage, by reason of their said refusal to adopt such a practice, said competitors, who can compete on even terms only through following the same to meet the demand and preference for such candy from certain dealers and small retailers, chiefly, and that of the children from the frequently nearby schools, who purchase said candy by reason of the gambling feature connected therewith, in preference to the so-called "straight goods", and who constitute by far the largest class of purchasers and consumers thereof, and who supply the principal demand therefor, some competitors began the sale and distribution of candy for

Complaint

resale to the public by lot or chance, to meet the constant demand and preference for candy thus sold, trade was diverted to said individual from competitors declining to follow such a practice, to their prejudice and injury and that of the public, freedom of fair and legitimate competition in the industry concerned was restrained and harmed, sales of those dealing in the "straight goods" products exclusively were markedly decreased whenever and wherever the competition of the break-and-take assortments, with their necessarily smaller pieces or inferior quality, was encountered, by reason, principally, of the gambling or lottery feature connected with the latter, gambling among children was taught and encouraged, and the public policy of many of the States, some of which have laws making the operation of lotteries and gambling devices penal offenses, was violated:

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

Mr. Henry C. Lank for the Commission.

Beach, Fathchild & Scofield, 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 A. McLean & Son, a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress, and in violation of the Act of Congress approved June 16, 1933, known as the National Industrial Recovery 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:

Count 1¹

PARAGRAPH 1. Respondent is a corporation organized under the laws of the State of Illinois, with its principal office and place of business in the City of Chicago, State of Illinois. Respondent, for more than three years last past, has been engaged in the manufac-

¹ Count 2 of the complaint, not published, charges respondent with violating Section 8 of the National Industrial Recovery Act and the practice of unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, in that the methods, acts, and practices alleged in count 1 violate the standard of fair competition for the Candy Manufacturing Industry of the United States, namely, Rule 19, Article VIII, of the code of fair competition for said industry, prohibiting the sale or distribution by any member thereof of "break-and-take" merchandise. The averments of said count 2, paragraph 1 of which repeats the averments of paragraph 1 of count 1, are in other respects similar to those in count 2 in the complaint against Curt A. Schwartz, individually, and trading as Akron Candy Co., Docket 2251, in which case findings and order also issued as of the same date. See *supra*, at page 440.

Complaint

20 F. T. C.

ture of candy and in the sale and distribution thereof to wholesale dealers and jobbers located at points in the various States of the United States, and causes said products when so sold to be transported from its principal place of business in the City of Chicago, Ill., to purchasers thereof in other States of the United States and in the District of Columbia, at their respective places of business, and there is now and has been for more than three years last past a course of trade and commerce by the said respondent in such candy between and among the States of the United States and in the District of Columbia. In the course and conduct of the said business, respondent is in competition with other corporations, individuals, and partnerships engaged in the manufacture of candy and in the sale and distribution thereof in commerce between and among the various States of the United States and within the District of Columbia.

PAR. 2. In the course and conduct of its business as described in paragraph 1 herein, respondent sells and has sold to wholesale dealers and jobbers certain packages or assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof.

Several of said assortments of candies are composed of a number of pieces of caramel candy of uniform size, shape, and quality together with a number of larger pieces of candy, packages of candy, or other articles of merchandise which larger pieces of candy, packages of candy, or other articles of merchandise are to be given as prizes to purchasers of said caramel candies of uniform size, shape, and quality in the following manner:

The majority of said caramel candies are of solid color but a few have a white core in the center. These said caramels are each contained within a wrapper and the color of the center of said caramel candies is effectively concealed from the prospective purchaser until a selection or a purchase has been made and the wrapper removed. The said caramels of uniform size, shape, and quality in said assortment retail at the price of 1 cent each but the purchasers who procure one of the said caramels having a white center are entitled to receive and are to be given free of charge one of the said larger pieces of candy or packages of candy or other article of merchandise heretofore referred to. The aforesaid purchasers of said caramels who procure a caramel having a white center are thus to procure one of the said larger pieces of candy or packages of candy or other article of merchandise wholly by lot or chance. Respondent furnishes to said wholesale dealers and jobbers, with said assortments of candy, display cards to be used by retail dealers in offering said candies for sale, which display cards bear a legend or statement informing the pro-

spective purchaser that said assortments of candies are being sold in accordance with the sales plan above described.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells its assortments, resell said assortments of candy to retail dealers and said retail dealers expose said assortments for sale in connection with the aforesaid display cards and sell said candies to the purchasing public in accordance with the aforesaid sales plan. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of its products in accordance with the sales plan hereinabove set forth, as a means of inducing purchasers thereof to purchase respondent's said product in preference to candies offered for sale and sold by its competitors.

PAR. 4. The sale of said candy to the purchasing public as above alleged involves a game of chance or the sale of a chance to procure such larger pieces of candy or packages of candy in the manner alleged. Such game of chance and the sale along with the sale of such candy of such chance to procure such larger pieces of candy or packages of candy in the manner alleged are contrary to the established public policy of the several States of the United States and the District of Columbia and of the Government of the United States, and in many of the States of the United States are contrary to local criminal statutes.

By reason of the said facts, many persons, firms and corporations who make and sell candy in competition with respondent as above alleged are unwilling to offer for sale or sell candies so packed and assembled as above alleged, or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance, or the sale with such candy of a chance to procure larger pieces of candy by chance; and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candies are attracted by respondent's said method and manner of packing said candy and by the element of chance involved in the sale thereof in the manner above described, and are thereby induced to purchase said candy so packed and sold by respondent in preference to candies offered for sale and sold by said competitors of the respondent who do not use the same or an equivalent method. Many dealers in candies are induced to purchase said candies so offered for sale and sold by respondent in preference to all others because said ultimate purchasers thereof give preference to respondent's said candies on account of said game of chance so involved in the sale thereof.

PAR. 6. The use of said method by respondent has the tendency and capacity unfairly, and because of said game of chance alone,

Findings

20 F. T. C.

to divert to respondent trade and custom from its said competitors who do not use the same or an equivalent method; to exclude from said candy trade all competitors who are unwilling to and do not use the same or an equivalent method; to lessen competition in said candy trade, and to tend to create a monopoly of said candy trade in respondent and such other distributors of candy as use the same or an equivalent method, and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said method by respondent has the tendency and capacity unfairly to eliminate from said candy trade all actual competitors, and to exclude therefrom all potential competitors, who do not adopt and use said method or an equivalent method that is contrary to public policy and to criminal statutes as above alleged. Many of said competitors of respondent are unwilling to adopt and use said method, or any method involving a game of chance or the sale of a chance to win something by chance, because such method is contrary to public policy or to the criminal statutes of certain of the states of the United States, or because they are of the opinion that such a method is detrimental to public morals and to the morals of the purchasers of said candy, or because of any or all of such reasons.

PAR. 7. The aforementioned method, acts and practices of the respondent are all to the prejudice of the public and of respondent's competitors as hereinabove alleged. Said method, acts and practices 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 in two counts upon the respondent, A. McLean & Son, charging in count 1 of the aforesaid complaint that the said respondent had been and was using unfair methods of competition in commerce as "commerce" is defined in said act of Congress and charging in count 2 of the aforesaid complaint that the said respondent had been and was using unfair methods of competition in commerce in violation of the act of Congress approved June 16, 1933, known as the National Industrial Recovery Act, and thereafter respondent duly filed answer thereto. Testimony and evidence were received, duly recorded

Findings

and filed in the office of the Commission and subsequently the proceeding came regularly on for a final hearing before the Commission on said complaint, answer, testimony, and evidence, briefs of counsel for the Commission and counsel for the respondent. Oral argument was waived and the Commission having duly considered the matter 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 as to count 1 of the aforesaid complaint and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, A. McLean & Son, is a corporation organized under the laws of the State of Illinois, with its principal office and place of business in the City of Chicago, Ill. Respondent is now and for several years last past, has been engaged in the manufacture of candy in Chicago, Ill., and in the sale and distribution of said candy to wholesale dealers and jobbers in the State of Illinois and other States of the United States. It causes said candy when sold to be shipped or transported from its principal place of business in the State of Illinois to purchasers thereof in Illinois and in the States of the United States other than the State of Illinois. In so carrying on said business, respondent is and has been engaged in interstate commerce and is and has been in active competition with other corporations and with partnerships and individuals engaged in the manufacture of candy and in the sale and distribution of the same in interstate commerce.

PAR. 2. Among the candies manufactured and sold by respondent were several assortments of candy each composed of a number of pieces of candy of uniform size, shape and quality together with a number of larger pieces of candy or small boxes of candy to be given as prizes to purchasers of said candies of uniform size, shape and quality in the following manner:

The majority of the said pieces of candy of uniform size, shape and quality in said assortments have centers of the same color but a small number of said candies have centers of a different color. The color of the centers of these candies is effectively concealed from the prospective purchasers until a purchase or selection has been made and the candy broken open. The said candies of uniform size, shape and quality in said assortments retail at one cent each but the purchasers who procure one of the said candies having a center of a different color than the majority of said candies, are entitled to receive and are to be given free of charge one of the said larger pieces or small boxes of candy heretofore referred to. The purchaser of

Findings

20 F. T. C.

the last piece of candy in said assortment is entitled to receive and is to be given free of charge a larger piece of candy or a small box of candy. The aforesaid purchasers of said candy who procure a candy having a center colored differently from the majority of said pieces of candy thus procure one of the said larger pieces or small boxes of candy wholly by lot or chance.

Respondent manufactures, sells and distributes several assortments involving the above lottery or chance feature. The pieces of candy of uniform size, shape and quality are generally 160 in number but, occasionally, vary a few pieces more or a few pieces less, and the prizes are generally larger prizes of candy or small boxes of candy but occasionally other articles of merchandise are included as prizes, but the principle or sales plan is the same as to each of the said assortments.

Respondent furnishes to said wholesale dealers and jobbers with said assortments of candy, display cards to be used by retail dealers in offering said candies for sale, which display cards bear a legend or statement informing the prospective purchaser that the said assortments of candies are being sold in accordance with the sales plan above described.

PAR. 3. Another assortment which respondent manufactures, sells, and distributes is contained within two boxes, one box having pieces of candy of uniform size, shape and quality, the majority of which have centers of the same color but a small number of which have centers of a different color. The other box contains larger pieces or boxes of candy and the number of bars is approximately the same as there are pieces of candy with centers colored differently from the majority in the first box above mentioned and the two boxes are so packed that they may be displayed by the retail dealers as a single assortment and the larger pieces or bars of candy are distributed as prizes to purchasers of the small pieces of candy in the same manner as where they are packed in the same assortment and as described in paragraph 2 herein. Larger pieces or bars of candy are thus distributed to the purchasing public wholly by lot or chance and the respondent in so packing said assortment knows that the same may and will be used as a lottery or chance assortment when sold by the retail dealer.

PAR. 4. The lottery, prize or draw packages described in paragraphs 2 and 3 above are generally referred to in the candy trade or industry as "break-and-take", or "draw" packages. The packages or assortments of candy without the lottery, prize or draw features in connection with their resale to the public are generally referred to in the candy trade or industry as "straight goods".

Findings

These terms will be used hereafter in these findings to describe these respective types of candy.

PAR. 5. Numerous retail dealers purchase the assortments described in paragraphs 2 and 3 above, from wholesale dealers or jobbers who in turn have purchased said packages from respondent and such retail dealers display said assortments for sale to the public as packed by the respondent and the candy contained in said assortment is sold and distributed to the consuming public by lot or chance.

PAR. 6. All sales made by respondent are absolute sales and respondent retains no control over the goods after they are delivered to the wholesale dealer or jobber. The assortments are assembled and packed in such manner that they can be displayed by the retail dealer for sale and distribution to the purchasing public, as above described, without alteration or rearrangement. An examination of the assortments of candy described in paragraph 2 herein, as packed, assembled and sold by respondent, shows that said assortments can not be resold to the public by the retail dealers except as a lottery or gaming device, unless said retail dealers unwrap, unpack, disassemble or rearrange the said assortments.

In the sale and distribution to jobbers and wholesale dealers for resale to retail dealers, of assortments of candy, assembled and packed as described in paragraphs 2 and 3 herein, respondent has knowledge that said candy will be resold to the purchasing public by retail dealers, by lot or chance and it 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 by said retail dealers.

PAR. 7. The sale and distribution of candy by the retail dealers by the methods described in these findings, is the sale and distribution of candy by lot or chance and constitutes a lottery or gaming device.

Competitors of respondent appeared as witnesses in this proceeding and testified, and the Commission finds as a fact that many competitors regard such method of sale and distribution as morally bad and encouraging gambling, especially among children, as injurious to the candy industry, because it results in the merchandising of a chance or lottery instead of candy; and as providing retail merchants with the means of violating the laws of the several States. Because of these reasons some competitors of respondent refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance. These competitors are thereby put to a disadvantage in competing. Certain retailers who find that they can dispose of more candy by the "break-and-take" or "draw" methods, buy respondent's products and the products of others employing the same methods

Findings

20 F. T. C.

of sale, and thereby trade is diverted to respondent, and others using similar methods, from said competitors. Said competitors can compete on even terms only by giving the same or similar devices to retailers. This they are unwilling to do, and their sales of "straight goods" candy show a continued decrease.

There is a constant demand for candy which is sold by lot or chance, and in order to meet the competition of manufacturers who sell and distribute candy which is sold by such methods, some competitors of respondent have begun the sale and distribution of candy for resale to the public by lot or chance. The use of such methods by respondent in the sale and distribution of its candy is prejudicial and injurious to the public and its competitors, and has resulted in the diversion of trade to respondent from its said competitors, and is a restraint upon and a detriment to the freedom of fair and legitimate competition in the candy industry.

PAR. 8. The principal demand in the trade for the "break-and-take" or "draw" candy comes from the small retailers. The stores of these small retailers are in many instances located near schools and attract the trade of the school children. The consumers or purchasers of the lottery or prize package candy are principally children, and because of the lottery or gambling feature connected with the "break-and-take" or "draw" package, and the possibility of becoming a winner, it has been observed that the children purchase them in preference to the "straight goods" candy when the two types of packages are displayed side by side.

Witnesses from several branches of the candy industry testified in this proceeding to the effect that children prefer to purchase the lottery or prize package candy because of the gambling feature connected with its sale. The sale and distribution of "break-and-take" or "draw" packages or assortments of candy or of candy which has connected with its sale to the public the means or opportunity of obtaining a prize or becoming a winner by lot or chance, teaches and encourages gambling among children, who comprise by far the largest class of purchasers and consumers of this type of candy.

PAR. 9. The pieces of candy in the "break-and-take" or "draw" packages of all manufacturers of that type of candy are either smaller in size than the corresponding pieces of "straight goods" candy or the quality of the candy in the "break-and-take" or "draw" packages is poorer than that in the "straight goods" assortments. It is necessary to make this difference between either the size of the individual pieces of candy or the quality of the candy in order to compensate for the value of the prizes or premiums which are distributed with the "break-and-take" or "draw" goods.

Order

PAR. 10. There are in the United States many manufacturers of candy who do not manufacture and sell lottery or prize assortments of candy and who sell their "straight goods" candy in interstate commerce in competition with the "break-and-take" or "draw" candy, and manufacturers of the "straight goods" type of candy have noted a marked decrease in the sales of their products whenever and wherever the lottery or prize candy has appeared in their markets. This decrease in the sales of "straight goods" candy is principally due to the gambling or lottery feature indicated with the "break-and-take" or "draw" candy.

PAR. 11. In addition to the assortments described in paragraphs 2 and 3 herein, the respondent manufactures candy which it sells to wholesalers and jobbers without any lottery or chance features.

PAR. 12. The sale and distribution of candy by lot or chance is against the public policy of many of the States of the United States and some of said States have laws making the operation of lotteries and gambling devices penal offenses.

CONCLUSION

The aforesaid acts and practices of respondent, A. McLean & Son, under the conditions and circumstances set forth in the foregoing findings of fact are all to the prejudice of the public and respondent's 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, ETC.

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission (in two counts, count 1 thereof charging a violation 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", and count 2 thereof charging a violation of the National Industrial Recovery Act), the answer of the respondent, the testimony taken and the briefs filed and the Commission having made its findings as to the facts and conclusion that as to count 1, the 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 hereby ordered, That the respondent, A McLean & Son, its officers, directors, agents, representatives, and employees, in the man-

Order

20 F. T. C.

ufacture, sale, and distribution in interstate commerce, of candy and candy products, do cease and desist from:

(1) Selling and distributing to jobbers and wholesale dealers for resale to retail dealers, 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 gift enterprise.

(2) Supplying to or placing in the hands of wholesale dealers and jobbers, packages or assortments of candy which are used or may be used without alteration or rearrangement of the contents of such packages or assortments, to conduct a lottery, gaming device or gift enterprise in the sale or distribution of the candy or candy products contained in said assortment to the public.

(3) Packing or assembling in the same package or assortment of candy for sale to the public at retail, pieces of candy of uniform size, shape and quality, having centers of a different color, together with larger pieces of candy, or small boxes of candy or other articles of merchandise, which said larger pieces of candy or small boxes of candy or other articles of merchandise, are to be given as prizes to the purchaser procuring a piece of candy with a center of a particular color.

(4) Furnishing to wholesale dealers and jobbers, display cards either with assortments of candy or candy products or separately, bearing a legend or legends or statements informing the purchaser that the candy or candy products are being sold to the public by lot or chance or in accordance with a sales plan which constitutes a lottery, gaming device or gift enterprise.

(5) Furnishing to wholesale dealers and jobbers display cards or other printed matter for use in connection with the sale of candy or candy products, which said advertising literature informs the purchasing public that upon the obtaining by the ultimate purchaser of a piece of candy of a particular colored center, a larger piece of candy or small box of candy or another article of merchandise will be given free to said purchaser.

It is further ordered, That respondent, A. McLean & Son, within 30 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 hereinabove set forth.

And it is hereby further ordered, That by reason of the decision of the Supreme Court of the United States in *A. L. A. Schechter Poultry Corporation v. United States of America*, decided May 27, 1935,² count 2 of the complaint in this proceeding be and the same hereby is dismissed.

² 295 U. S. 495.