

Complaint

IN THE MATTER OF
UNITED DISTILLING COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2474. Complaint, June 28, 1935—Decision, Feb. 27, 1936*

Where a corporation engaged in the distilled spirits rectifying industry under permit of the Federal Alcohol Control Administration—

Featured its corporate name in which was included word "Distilling", on stationery and in advertising price lists and other printed matter, and on labels attached to bottles in which it sold and shipped its said liquors, notwithstanding fact it had never applied for a distiller's permit, was never authorized by the Government to produce any distilled spirits from the grain, and never did distill and never owned a still, but purchased in bulk from distillers and other rectifiers all of its distilled spirit requirements and rectified, blended or bottled such spirits for sale in bottles under its own brand names and, in some cases, those of its customers, and failed to give adequate notice that it was not an actual distiller, through phrase "Bottled by" and display of rectifying permit "R-15", printed thereon and blown in the glass, in view of unappreciated significance thereof, on part of dealer and consuming public;

With capacity and tendency to mislead and deceive dealers and purchasing public into belief that it was a distiller, and that the whiskies, gins and other alcoholic beverages sold by it were made and distilled by it from mash, wort, or wash by process of original and continuous distillation through continuous closed pipes and vessels until manufacture was completed, and with effect of so doing and of inducing dealers and purchasing public, acting in such belief, to buy said whiskies, etc., and thereby divert trade to it from competitors, who do not thus or otherwise misrepresent themselves as manufacturers by distillation of alcoholic beverages; to the substantial injury of substantial competition in commerce:

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

Before *Mr. John W. Bennett* and *Mr. Charles F. Diggs*, trial examiners.

Mr. PGad B. Morehouse for the Commission.

Mr. Louis Weiland, of Cincinnati, Ohio, 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 United

Complaint

22 F. T. C.

Distilling Company, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to the 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. Respondent is a corporation organized, existing, and doing business under the laws of the State of Ohio, with its office and principal place of business in the city of Cincinnati, in said State. It is now, and for more than one year last past has been engaged in the business of wholesaler and rectifier, purchasing, rectifying, blending, and bottling whiskies, gins, and other alcoholic beverages and in the sale thereof in constant course of trade and commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of its said business, it causes its said products when sold to be transported from its place of business aforesaid into and through various States of the United States to the purchasers thereof, consisting of wholesalers and retailers, located in other States of the United States and the District of Columbia. In the course and conduct of its business as aforesaid, respondent is now, and for more than one year last past has been, in substantial competition with other corporations and with individuals, partnerships, and firms engaged in the manufacture by distillation of whiskies, gins and other alcoholic beverages and in the sale thereof in trade and commerce between and among the various States of the United States and in the District of Columbia; and in the course and conduct of its business as aforesaid, respondent is now, and for more than one year last past has been, in substantial competition with other corporations, and with individuals, firms and partnerships engaged in the business of purchasing, rectifying, blending and bottling whiskies, gins, and other alcoholic beverages and in the sale thereof in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. For a long period of time the word "Distilling" when used in connection with the liquor industry and the products thereof has had and still has a definite significance and meaning to the minds of the wholesalers and retailers in such industry and to the ultimate purchasing public, to wit, the manufacturing of such liquors by the process of original and continuous distillation from mash, wort, or wash, through continuous closed pipes and vessels until the manufacture thereof is completed; and a substantial portion of the

purchasing public prefers to buy alcoholic liquors prepared and bottled by distillers.

PAR. 3. In the course and conduct of its business as aforesaid, by the use of the word "Distilling" in its corporate name, printed on its stationery and advertising, and on the labels attached to the bottles in which it sells and ships its said products, and in various other ways, respondent represents to its customers and furnishes them with the means of representing to the vendees, both retailers and the ultimate consuming public, that it is a distiller and that the whiskies, gins, and other alcoholic beverages therein contained were by it manufactured through the process of distillation from mash, wort, or wash, as aforesaid, when, as a matter of fact, respondent is not a distiller, does not distill the said whiskies, gins, or other alcoholic beverages by it so bottled, labeled, sold, and transported, and does not own, operate or control any place or places where such beverages are manufactured by the process of distillation from mash, wort, or wash.

PAR. 4. There are among the competitors of respondent engaged in the sale of alcoholic beverages as mentioned in paragraph 1 hereof corporations, firms, partnerships, and individuals who manufacture and distill from mash, wort, or wash, as aforesaid, whiskies, gins, and other alcoholic beverages sold by them and who truthfully use the words "distillery", "distilleries", "distillers" or "distilling" as a part of their corporate or trade names and on their stationery and advertising, and on the labels of the bottles in which they sell and ship such products. There are also among such competitors, corporations, firms, partnerships, and individuals engaged in the business of purchasing, rectifying, blending, bottling, and selling whiskies, gins, and other alcoholic beverages who do not use the words "distillery", "distilleries", "distilling", or "distillers" as a part of their corporate or trade names, nor on their stationery or advertising, nor on the labels attached to the bottles in which they sell and ship their said products.

PAR. 5. Representation by respondent, as set forth in paragraph 3 hereof, is calculated to and has the capacity and tendency to and does mislead and deceive dealers and the purchasing public into the beliefs that respondent is a distiller and that the whiskies, gins, and other alcoholic beverages sold by the respondent are manufactured and distilled by it from mash, wort, or wash, as aforesaid, and is calculated to and has the capacity and tendency to and does induce dealers and the purchasing public, acting in such beliefs, to purchase the whiskies, gins and other alcoholic beverages bottled and sold by the respondent, thereby diverting trade to respondent

Findings

22 F. T. C.

from its competitors who do not by their corporate or trade names or in any other manner misrepresent that they are manufacturers by distillation from mash, wort, or wash, of whiskies, gins, and other alcoholic beverages, and thereby respondent does substantial injury to substantial competition in interstate commerce.

PAR. 6 The acts and things above alleged to have been done and the false representations alleged to have been made by respondent are to the prejudice of the public and the competitors of respondent 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 on June 28, 1935, issued, and on July 1, 1935, served its complaint in this proceeding upon respondent, United Distilling Company, a corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer thereto, testimony and evidence in support of the allegations of said complaint were introduced by PGad B. Morehouse, attorney for the Commission, before John W. Bennett, an examiner of the Commission theretofore duly designated by it, and thereafter before Charles F. Diggs, an examiner of the Commission duly substituted for the said John W. Bennett by order of the Commission, and in defense of the allegations of the complaint by Louis Weiland, attorney for the respondent; and said testimony and evidence was duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and evidence, briefs in support of the complaint and in defense thereto, and the oral arguments of counsel aforesaid; 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. The respondent, United Distilling Company, was incorporated on September 6, 1933, under the laws of the State of

Ohio, to carry on the business of "producing, manufacturing, blending, compounding, buying, selling, and otherwise dealing in alcoholic liquids and industrial alcohol produced and manufactured in accordance with the statutes of the State of Ohio and of the United States of America, and conducting any other business not contrary to law"; with 250 shares of a par value of \$100 each, and began operations with a capital of \$500 at its principal place of business in Cincinnati, Ohio, in a plant operated under its own name, there engaging in the distilled spirits rectifying industry under permit of the Federal Alcohol Control Administration, dated January 11, 1934, and designated as "Permit R-15". This permit was based upon its application dated December 23, 1933, and was issued "subject to compliance with all State and Federal laws."

Rectifying in the distilled spirits rectifying industry means the mixing of whiskies of different ages or the mixing of other ingredients with whiskies, but reducing proof of whiskey by adding water is not rectifying. Rectifiers also blend whiskies with neutral spirits (grain alcohol). Subsequent to the issuance of its permit respondent has continuously been engaged in the business of a wholesaler and rectifier, purchasing, rectifying, blending and bottling whiskies and gins and other alcoholic beverages. Respondent never applied for a distiller's permit, was never authorized by the Government to produce any distilled spirits from the grain, never distilled and never owned a still, but purchases all of its distilled spirits requirements in bulk from distillers and other rectifiers and rectifies, blends, or bottles such spirits for resale in bottles under its own brand names and, in some cases, under the names and brands of its customers who are wholesalers, jobbers, or retailers. The words "Bottled by United Distilling Company" and "Permit R-15" appear on 35 of the 42 labels of respondent admitted in evidence.

When sold, respondent ships its bottled liquors so labeled which it has rectified or blended or simply bottled to other wholesalers, jobbers and dealer customers from its principal place of business aforesaid into and through various States of the United States to the purchasers thereof located in the States of the United States other than Ohio, in competition with distillers and rectifiers likewise engaged in the regular course of business in the sale of whiskies, gins and other alcoholic beverages in commerce among the several States, and the evidence shows that respondent's bottled liquors are offered for resale and sold by its said customers both to retailers and the consuming public in States and territories coextensive with the territories in which its competitors likewise offer spirituous beverages for sale to wholesalers, jobbers, and the consuming public.

Findings

22 F. T. C.

The Commission finds that the undisputed evidence shows that the respondent is in competition with actual distillers, and also with other rectifiers who do not by the use of such words as "distilling", "distillers" or "distilleries", as a part of their corporate or trade names misrepresent their status to the trade. In 1934 respondent's sales amounted to approximately \$350,000, approximately 80 percent of which was whiskey. Respondent rectifies only about 2 percent of the liquor purchased by it in bulk, and rebottles the remainder as received except in some instances where water is added in order to reduce the proof.

PAR. 2. The complaint charges, the answer admits and the proof shows that for a long period of time the word "Distilling", when used in connection with the liquor industry and the products thereof, has had and still has a definite significance and meaning to the minds of the wholesalers and retailers in such industry and to the ultimate purchasing public, to wit, the manufacturing of such liquors by the process of original and continuous distillation from mash, wort, or wash through continuous closed pipes and vessels until the manufacture thereof is completed.

PAR. 3. The Commission finds that in the course and conduct of its business, as aforesaid, respondent's use of the word "Distilling" as a part of its corporate name conspicuously printed on its stationery, advertising, price lists and other printed matter, and on the labels attached to the bottles in which it sells and ships its said liquors, has the capacity and tendency to and does mislead and deceive dealers and the purchasing public into the belief that respondent is a distiller and that the whiskies, gins and other alcoholic beverages sold by the respondent are manufactured and distilled by it from mash, wort, or wash, as aforesaid, and has the capacity and tendency to and does induce dealers and the purchasing public, acting in such beliefs, to purchase the whiskies, gins, and other alcoholic beverages bottled and sold by the respondent, thereby diverting trade to respondent from its competitors who do not by their corporate or trade names or in any other manner misrepresent that they are manufacturers by distillation from mash, wort, or wash of whiskies, gins and other alcoholic beverages, and that thereby respondent does substantial injury to substantial competition in interstate commerce.

The record contains the testimony of twelve members of the public, whose names were selected from the classified section of the Cincinnati and Cleveland telephone directories, to the effect that they had a fair understanding of what "distilling" meant—for instance, "A process of manufacturing alcohol or liquor with the principle of

evaporation and condensation"; "Distilling means to take the raw product, to vaporize it and then condense it"; "Distilling means the manufacture of whiskey, that is all I know about it"; "By distilling I mean the processing of basic grains from which the alcohol is extracted, which is used as a basis of making liquors", etc. Such testimony also showed that such members of the public, from the name of respondent, would believe it to be engaged in the business of the manufacture of distilled spirits and whiskies from basic grains, and that the use by a concern on labels attached to its bottled goods of a name containing the word "Distilling" would influence them favorably in purchasing such bottle in preference to a like bottle which did not contain any such name or indication.

The evidence also shows that often members of the public actually purchase bottled whiskies and other distilled spirits, being influenced in their selection by well advertised brand names and without noticing the name of the producer, maker or bottler. Most of the instances in this record where such was shown by the evidence were selections of whiskies which were bottled by actual distilleries either at the distillery, in the bonded warehouse or in a rectifying plant owned by the distillery.

From the testimony of members of the public adduced in this record, the Commission infers that the members of the public who might be and are influenced to exercise the aforesaid preference is sufficiently substantial to constitute a competitive advantage to the respondent over those of its competitors who are distillers and those who are rectifiers but do not characterize themselves as distillers or distilling companies.

Respondent adduced some evidence tending to show that the use by it on its labels of the phrase "Bottled by" and a reference to its permit "R-15" printed on the labels and blown in the glass of the bottles negated the suggestion to the prospective purchaser that respondent was an actual distiller. In this connection, the evidence shows that both distillers' and rectifiers' permits are issued in the liquor industry, the former being issued to those who distill from mash and the latter to those engaged in the kind of business in which respondent has been and is engaged. It is the practice in the industry for distillers to have blown into the bottles which contain their liquors a symbol "D" with a hyphen thereafter, after which hyphen appears the number of their distiller's permit, thus identifying the distiller and his bottle. The rectifier follows the same practice, using the symbol "R" followed by the number of his permit. Many distillers are also rectifiers and on their rectified products use an "R-No." symbol on their bottles and labels which

Findings

22 F. T. C.

are rectified, mixed or blended in their rectifying plants. On the distiller's products which are not rectified appear the words "Distilled and Bottled by", usually followed by the name of the distilling company; whereas on the rectified products prepared and bottled by the distilling company in its rectifying plant or by a rectifier such as respondent appear the words "Bottled by" followed by the name of the company. The preponderance of the testimony in this record shows that the liquor dealers and the consuming public are not as yet well informed concerning the significance of the aforesaid symbols or of the words "Bottled by", and the use of such words and symbols in that manner the Commission finds are not informative to the ordinary dealer or consumer purchaser.

PAR. 4. The secretary and treasurer of the respondent testified and the Commission finds that respondent has derived some commercial advantage from the use of the name, "United Distilling Company". The testimony of other competitors, both rectifiers not designating themselves as distillers and actual distillers shows that such commercial advantage takes the form of increased sales resistance to concerns not indulging in the practice. The record shows instances where new contacts would rather "buy from the source, from the manufacturer", doing away with the middleman.

The record further shows that a distiller or distillery ordinarily requires a much greater outlay of capital for plant and equipment than a rectifier, usually carries large stocks of whiskies in bonded warehouses for aging purposes, and must have additional capital available for that purpose; whereas the rectifier usually carries only such stocks on hand as are necessary for his immediate needs, in addition sometimes purchasing warehouse receipts for his further requirements, and his capital outlay for the carrying of stocks is ordinarily much less than that of a distiller. While there is no minimum distiller's bond, in 75 percent of the cases of distillers at present operating in the United States the bond is in the maximum sum of \$100,000, and both the bond and title to the property are subject to the application of lien for taxes, and the property is subject to forfeiture in the event of certain violations or illegal uses. Except in exceptional cases the bond of the rectifier is in the amount of \$3,000 to \$5,000, and he neither has to own fee simple title nor have the consent of the owner of the premises that the real estate shall be subject to the same applications of liens for taxes as aforesaid. These differences in requirements and differences in amounts of investments, bonds and other liabilities have naturally resulted in attaching to rectifiers on the one hand a certain status well defined and different from the status attaching to a distiller.

217

Order

Certain prestige attaches to the use of the term "Distilling" which is an advantage to the person using it in the liquor trade. The evidence shows this to be of tremendous value on account of the investment, stability and backing of an organization of the character of the ordinary distilling company or distillery to stand back of the merchandise it sells. The record shows that a dealer customer preference in buying goods bearing the label of a distilling company to goods which only bears the label of a distributing company, wholesaler or rectifier is presented in an indirect way almost daily in the ordinary course of trade. There is no specific instance shown in this record where a competitor lost a sales order to this particular respondent but the record is replete with proof that competitors in the field frequently meet with competition from other rectifiers who were following the identical practices of respondent in this regard, and that such practices operated and had a tendency to divert trade through sales resistance and through the unfair competitive advantage possessed by the rectifier which represented itself as a distilling company. It follows that if such general practice had that effect, this respondent's practices would likewise tend to have that effect upon all competition for the sale of bottled liquors in the same coextensive territories where such liquors were competitively sold.

CONCLUSION

The practices of the said respondent, under the conditions and circumstances hereinbefore described, are to the prejudice of the public and respondent's competitors and are unfair methods of competition in interstate commerce and constitute a violation 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, testimony and evidence taken before John W. Bennett, an examiner of the Commission theretofore duly designated by it, and thereafter before Charles F. Diggs, an examiner of the Commission duly substituted for the said John W. Bennett by order of the Commission, in support of the charges of said complaint and in opposition thereto, briefs filed herein, and oral arguments by PGad B. Morehouse, counsel for the Commission, and by Louis Weiland, counsel for the respondent, and the Commission having made its

Order

22 F. T. C.

findings as to the facts and its conclusion that 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 ordered, That the respondent, United Distilling Company, its agents, salesmen and employees, in connection with the offering for sale or sale by it in interstate commerce of whiskies, gins and other spirituous beverages, do forthwith cease and desist from:

Representing, through the use of its corporate name on its stationery, advertising, or on the labels attached to the bottles in which it sells and ships its said products or in any other way by word or words of like import, (a) that it is a distiller of whiskies, gins and other spirituous beverages; or (b) that the said whiskies, gins and other spirituous beverages were by it manufactured through the process of distillation; or (c) that it owns, operates or controls a place or places where such beverages are manufactured by the process of distillation, unless and until the said respondent shall own, operate or control a place or places where such whiskies, gins and other spirituous beverages are by it manufactured through a process of original and continuous distillation from mash, wort or wash, through continuous closed pipes and vessels until the manufacture thereof is completed.

It is further ordered, That the said respondent within 60 days from and after the date of the service upon it of this order, shall file with the Commission a report or reports in writing setting forth in detail the manner and form in which it is complying and has complied with the order to cease and desist hereinabove set forth.

Complaint

IN THE MATTER OF
SESSIONS CLOCK COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2682. Complaint, Jan. 9, 1936—Decision, Feb. 27, 1936*

Where a corporation engaged in the manufacture of spring and electric clocks under various trade names, shipped certain of its clocks in cartons, the label of which contained the legend "Midland—Mahogany—60 Cycles Only—Sessions Synchronous Electric Clock", and was displayed by retail dealers so as to be observed by customers; notwithstanding fact that product involved was not made of mahogany; with result that its customers, chiefly retail, and said retailers' own countless customers bought clocks by reason of such false, deceptive and misleading statement and representation, and prospective sales of products of competitors were thereby diverted from them to it:

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

Mr. T. H. Kennedy for the Commission.

Mink & Beach, of Bristol, Conn., 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 Sessions Clock Company, a corporation, 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, the Commission hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Sessions Clock Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its principal office and place of business at Forestville in said State. It is now and for more than two years last past has been engaged in the manufacture of clocks and in the selling thereof between and among the various States of the United States and in the District of Columbia and has caused and still causes such clocks when sold by it to be transported from its place of business in Connecticut aforesaid to purchasers (chiefly