

Syllabus

IN THE MATTER OF

IMPERIAL 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 2833. Complaint, June 4, 1936—Decision, July 9, 1937

Where a corporation engaged in manufacture and sale of so-called "draw" or "deal" assortments of candy, sale and distribution of which type candy by retailers by lot or chance has capacity and tendency to and does decrease sale of candy sold without any sales plan or device involving lottery or game of chance, i. e., "straight" goods, and sale of which type, providing, in connection with its sale to public, means or opportunity of obtaining a box of candy as a prize or becoming a winner by lot or chance, teaches and encourages gambling and is in violation of various municipal ordinances and regulations and State statutes and constitutions, and provides retail merchants with means of violating the laws of the several States, and sale of which candy, so packed and assembled as to enable retail dealers, without alteration, addition, or rearrangement, to resell same to consuming public by lot or chance, is contrary to public policy—

Sold, to wholesale and retail dealers, certain assortments of candy which were so packed and assembled as to involve, or were designed to involve, use of a lottery scheme when sold and distributed to consumers thereof, and one of which included, together with a punchboard, a number of boxes of assorted chocolate candies of a value of more than five cents each, for sale to consuming public under a plan, and in accordance with said board's explanatory legend, pursuant to which purchasers received, for five cents paid, and dependent upon number punched by chance or purchase of last punch on board, one of aforesaid boxes of candy, or nothing other than privilege of making a punch; so assembled and packed that such assortments might be and were used by retail dealers for distribution thereof to purchasing public by lot or chance, without alteration or rearrangement, and with knowledge and intent that such assortments would and could thus be resold to public by lot or chance by such retail dealers, in competition with many who do not make and sell "draw" or "deal" assortments, but sell their "straight" goods in interstate commerce in competition with the other;

With result that competitors who refused to and do not sell candy so packed and assembled that it can be resold to public by lot or chance were put to a disadvantage in competing with it and with others employing similar methods to those described, trade was diverted to it and others using similar methods by reason of customers' attraction to such "draw" or "deal" assortments from those who do not use such methods, trade was diverted to it from its said competitors, and there was a restraint upon and a detriment to the freedom of fair and legitimate competition in industry concerned; to the prejudice and injury of the public and competitors:

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Held, That such acts and practices were to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. Charles P. Vicini* and *Mr. Henry M. White*, trial examiners.

Mr. P. C. Kolinski and *Mr. Henry C. Lank* for the Commission.

Roberts & Skeel and *Flood, Lenihan & Ivers*, of Seattle, Wash., 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 Imperial Candy Co., 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 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. Respondent, Imperial Candy Co., is a corporation organized and operating under the laws of the State of Washington, with its principal office and place of business located at 800 Western Avenue, Seattle, Wash. Respondent is now, and for several years last past has been, engaged in the manufacture of candies and in the sale and distribution thereof to wholesale dealers, jobbers, and retail dealers located at points in the various States of the United States, and causes and has caused its said products, when so sold, to be transported from its principal place of business in the city of Seattle, Wash., to purchasers thereof in other States of the United States at their respective places of business; and there is now, and has been for several years last past, a course of trade and commerce by said respondent in such candy between and among the States of the United States. In the course and conduct of said business, respondent is in competition with other corporations and with partnerships and individuals 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.

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

(a) One of said assortments, manufactured and distributed by the respondent, is composed of a number of large items of candy and a number of boxes of candy of varying sizes, together with a device commonly called a "punchboard." The said boxes of candy are distributed to the consuming public by means of said punchboard in the following manner: The sales by means of said punchboard are 5¢ each, and when a punch is made from said punchboard a number is disclosed. The numbers begin with 1 and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence. The board bears a statement or statements informing the prospective customer as to which numbers receive a large item of candy and which numbers receive a box of candy and the size thereof. The purchaser of the last six punches in each section pays for only one punch, the last five punches being free, and the purchaser of the last punch on the board wins a large item of candy irrespective of the number on the punch. A purchaser who does not qualify by obtaining one of the numbers calling for one of the boxes of candy or one of the large items of candy by punching the last number on the board receives nothing for his money other than the privilege of punching a number from the board. The large items of candy and the boxes of candy are worth more than 5¢ each, and a purchaser who obtains one of the numbers calling for a box of candy receives the same for the price of 5¢. The numbers on said board are effectively concealed from the purchasers or prospective purchasers until a punch or selection has been made and the particular punch separated from the board. The boxes of candy and large items of candy in said assortment are thus distributed to purchasers of punches from said board wholly by lot or chance.

The respondent manufactures and distributes several assortments involving the same lot or chance feature, but varying only in detail. Some of the boards have one thousand numbers, others have fifteen hundred numbers, some of the boards are divided into two sections, and some are divided into six sections.

(b) Another of said assortments manufactured and distributed by the respondent is composed of a box of candy, together with a device commonly called a "push card." The said box of candy is distributed to the consuming public by means of said push card in the following manner: Said push card contains fifteen discs numbered from one to fifteen, but not arranged in numerical sequence, and with the numbers concealed. The purchaser of a punch from said push card pays the amount in cents represented by the number which the displaced disc exposes; the push card bears a legend

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stating that the lucky number under seal wins the box of candy. A purchaser who does not qualify by obtaining the lucky number receives nothing for his money other than the privilege of punching a number from said push card. The box of candy is worth more than the highest priced punch on said push card, fifteen cents, and a purchaser who obtains the number calling for the box of candy receives the same wholly by lot or chance.

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

PAR. 4. The sale of said candy to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure a box of candy, or items of candy.

The use by respondent of said method in the sale of candy, and the sale of candy by and through the use thereof and by the aid of said method, is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy; and is contrary to an established public policy of the Government of the United States. The use by respondent of said method has the dangerous tendency unduly to hinder competition or create monopoly in this, to wit: that the use thereof has the tendency and capacity to exclude from the branch of the candy trade involved in this proceeding competitors who do not adopt and use the same method or an equivalent or similar method involving the same or an equivalent or similar element of chance or lottery scheme.

Many persons, firms, and corporations who make and sell candy in competition with the respondent, as above alleged, are unwilling to offer for sale or sell candy 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, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candy 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 candy offered for sale and sold by said competitors of respondent who do not use the same or equivalent methods. The use of said method by respondent has the tendency and capacity, because of said game of chance, 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 who do not use the same or an equivalent method because the same is unlawful; 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 the respondent has the tendency and capacity 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.

PAR. 6. 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 or any other method that is contrary to public policy.

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, on June 4, 1936, issued and on June 9, 1936, served its complaint in this proceeding upon the respondent, Imperial Candy 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 other evidence in support of the allegations of said complaint were introduced by P. C. Kolinski, attorney for the Commission, and in opposition to the allegations of the complaint by Emmett G. Lenihan, attorney for the respondent, before Charles P. Vicini and Henry M. White, exami-

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ners of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on said complaint, the answer thereto, testimony and other evidence, briefs in support of the complaint and in opposition thereto, and the oral arguments of Henry C. Lank, counsel for the Commission, and Emmett G. Lenihan, counsel for the respondent; and the Commission, having duly considered the matter and being now 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, Imperial Candy Company, is a corporation organized under the laws of the State of Washington, with its principal office and place of business located in the city of Seattle, State of Washington. Respondent is now, and for several years last past has been, engaged in the manufacture of candy in the city of Seattle and in the sale and distribution thereof to retail and wholesale dealers and jobbers located in the State of Washington and in the States of Oregon, Montana, Idaho, California, Arizona, New Mexico, Utah, Wyoming, and in the Territories of Alaska and the Hawaiian Islands. It causes the said candy when sold to be shipped or transported from its principal place of business in the State of Washington to purchasers thereof in Washington and in the other States and Territories of the United States, as mentioned above. In so carrying on said business, respondent is and has been engaged in interstate commerce and is and has been engaged in active competition with other corporations and with partnerships and individuals engaged in the manufacture of candy and in the sale and distribution thereof in commerce between and among the various States and Territories of the United States, as mentioned above.

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

One of said assortments is composed of a number of boxes of assorted chocolate candies, together with a device commonly called a "punchboard." The boxes of candy contained in said assortment

are distributed to the consuming public by means of said punchboard in the following manner: The sales by means of said punchboard are 5¢ each, and when a punch is made from said board a number is disclosed. The numbers begin with 1 and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence. The board bears a statement or statements informing the prospective customer as to which numbers receive a box of candy. The purchaser of the last punch on the board receives a specified box of candy. A purchaser who does not qualify by obtaining one of the numbers calling for one of the boxes of candy, or by punching the last number on the board, receives nothing for his money other than the privilege of punching a number from the board. The boxes of candy are worth more than 5¢ each, and a purchaser who obtains one of the numbers calling for a box of candy receives the same for the price of 5¢. The numbers on said board are effectively concealed from the purchasers or prospective purchasers until a punch or selection has been made and the particular punch separated from the board. The boxes of candy in said assortment are thus distributed to purchasers of punches from said board wholly by lot or chance, and the fact as to whether a purchaser receives one of the boxes of candy or nothing other than the privilege of punching a number from said board for his money is thus determined wholly by lot or chance.

PAR. 3. The candy assortments involving the lot or chance feature, as above described, are generally referred to in the candy trade or industry as "draw" or "deal" assortments. Assortments of candy without lot or chance features in connection with their resale to the public are generally referred to in the candy trade or industry as "straight" goods. These terms will be used hereafter in these findings to distinguish these separate types of assortments.

PAR. 4. The wholesale dealers or jobbers to whom respondent sells its assortments resell the same to retail dealers, and said retail dealers and the retail dealers to whom respondent sells direct expose said assortments for sale and sell said candy to the purchasing public in accordance with the sales plan as described above.

PAR. 5. All sales made by respondent, whether to wholesale dealers and jobbers or to retail dealers, are absolute sales and respondent retains no control over said assortments after they are delivered to the wholesale dealer or jobber or retail dealer. The assortments are assembled and packed in such manner that they are designed to be used and are used by the retail dealer for distribution to the purchasing public by lot or chance without alteration or rearrangement.

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In the sale and distribution to jobbers and wholesale dealers for resale to retail dealers and to retail dealers direct the assortments of candy described in paragraph 2 hereof, respondent has knowledge that said candy will be resold to the purchasing public by retail dealers by lot or chance, and it packs such candy in the way and manner described so that without alteration, addition or rearrangement thereof it may be resold to the public by lot or chance by said retail dealers.

PAR. 6. There are in the United States many manufacturers of candy competing with respondent in the territory served by respondent who do not manufacture and sell "draw" or "deal" assortments of candy and who sell their "straight" goods in interstate commerce in competition with the "draw" or "deal" assortments. The sale or distribution of candy by retail dealers by lot or chance has the capacity and tendency to and does decrease the sale of candy sold without any sales plan or device involving a lottery or game of chance.

Several witnesses testified, and the Commission finds, that customers coming into retail establishments and desiring candy similar to that distributed by respondent would take chances or make purchases by means of said push cards or punchboards, and that in such cases when unsuccessful in obtaining candy by means of said push card or punchboard some of such customers would then purchase candy as a "straight" purchase and without the use of the lottery device; that the gambling feature connected with the sale of respondent's assortment, as described above, was attractive to customers; and that before making "straight" purchases it was not unusual for customers to endeavor to procure the candy desired by means of such lottery devices rather than to make a "straight" purchase.

PAR. 7. The sale and distribution of "draw" or "deal" assortments of candy, or of candy which has connected with its sale to the public the means or opportunity of obtaining a box of candy as a prize or becoming a winner by lot or chance, teaches and encourages gambling and is in violation of various municipal ordinances and regulations and various State statutes and constitutions. The sale and distribution of candy by retailers by the methods described herein is the sale and distribution of candy by lot or chance and constitutes a lottery or gaming device, and the Commission finds that the sale and distribution of assortments of candy as described herein provides retail merchants with a means of violating the laws of the several states. Competitors who refuse to or who do not sell candy so packed

and assembled that it can be resold to the public by lot or chance are put to a disadvantage in competing with respondent and with others employing similar methods to those described herein. Because the "draw" or "deal" assortments are attractive to customers purchasing from retail dealers, the Commission finds that trade is diverted to respondent and others using similar methods from competitors who do not use such methods. The use of such methods by respondent in the sale and distribution of its candy is prejudicial and injurious to the public and to respondent's 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. An officer of the respondent corporation testified, and the Commission finds, that respondent's total annual volume of sales is approximately \$750,000, of which approximately 60 percent represents sales to customers outside of the State of Washington. Between 10 percent and 15 percent of respondent's total sales consists of assortments of candy with which a punchboard is furnished.

PAR. 9. The Commission further finds that the sale and distribution in interstate commerce of assortments of candy so packed and assembled as to enable retail dealers, without alteration, addition or rearrangement, to resell the same to the consuming public by lot or chance, is contrary to public policy.

CONCLUSION

The aforesaid acts and practices of respondent, Imperial Candy Company, a corporation, 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 within the intent and meaning 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 respondent, testimony and other evidence taken before Charles P. Vicini and Henry M. White, Examiners of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed herein, and oral arguments of Henry C. Lank, counsel for the Commission, and Emmett

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G. Lenihan, counsel for the respondent; and the Commission having made its findings as to the facts and its conclusion that 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 other purposes."

It is ordered, That the respondent, Imperial Candy Company, a corporation, its officers, representatives, agents, and employees, in connection with the offering for sale, sale, and distribution in interstate commerce of candy, do forthwith cease and desist from:

1. Selling and distributing to jobbers and wholesale dealers for resale to retail dealers, or to retail dealers direct, 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 or retail dealers assortments of candy which are used, or which may be used, without alteration or rearrangement of the contents of such assortments, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy contained in said assortments to the public.

3. Packing or assembling in the same assortment of candy for sale to the public at retail boxes of candy, together with a device commonly called a "punchboard," which punchboard is for use, or which may be or is designed to be used, in distributing or selling said candy to the public at retail.

4. Furnishing to retail and wholesale dealers and jobbers a device commonly called a "punchboard," either with assortments of candy or separately, bearing a legend or legends or statements informing the purchasing public that the candy is 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.

It is further ordered, That respondent, Imperial Candy Company, a corporation, shall, within 30 days after service upon it of this order, 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.

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IN THE MATTER OF

ROBERT C. HOFFMAN, TRADING AS YORK BAR BELL COMPANY, STRENGTH AND HEALTH PUBLISHING COMPANY, AND YORK ATHLETIC SUPPLY COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914

Docket 2542. Complaint, Mar. 17, 1936¹—Decision, July 10, 1937

Where an individual engaged, under several trade names, in manufacture, sale, and distribution of athletic goods, publication of a periodical devoted to development of health and strength, and sale of a course of physical training through the mail to customers throughout the United States, in substantial competition with other individuals, etc., engaged in sale and distribution in interstate commerce of athletic appliances and courses in physical training or culture, including among his said competitors those who sell such courses and apparatus and do not misrepresent their products and publish misleading and deceptive advertisements or in any manner unfairly disparage their competitors; in soliciting sale of and selling his said commodities as above described—

- (a) Set forth in advertisements two "Before and After" pictures of himself, together with statement that he had increased his weight from 210 to 250 pounds by use of York bar-bell exercises, and created thereby impression that decided development of his physique was due entirely to use of a system of training and use of bar-bells, facts being the "before" picture was taken just after a serious illness caused by an automobile accident and which had reduced his weight by about 40 pounds, and substantial part of gain in weight and development was due to his recovery therefrom, and "after" picture had been so retouched as to cause muscles to appear in stronger relief and give impression of greater strength than was apparent in the other;
- (b) Set forth in his "Strength and Health" periodical, picture of man of unusual muscular development, together with words "What would you give to have a body like this? * * * The wonderful strength athletes turned out by the famous York System of Physical Training are the amazement of the body building world today. They came as ordinary fellows but finished stars," with result that impression was created that phenomenal development disclosed was result of his said training course, notwithstanding fact picture was that of a foreign athlete who had never practiced said individual's system and flourished many years before individual in question entered upon business of physical training;
- (c) Set forth, in catalogs widely circulated among customers and prospective customers, and among depictions of athletes using aforesaid York bar-bells, "Before and After" pictures of one Joe Miller, depicting said individual as a boy and young man, and accompanied with words "The story of this pupil is an everyday occurrence among York bar-bell stu-

¹ Amended.