

IN THE MATTER OF

KEELEY'S, INC.

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

Docket 3112. Complaint, Apr. 24, 1937—Decision, Aug. 17, 1937

Where a corporation engaged in manufacture and sale of candy, including numerous assortments which were so packed and assembled as to involve use of a lottery scheme when sold and distributed to consumers thereof, and some of which, along with punchboard supplied, were composed of a number of boxes or packages of candy of varying size, for sale and distribution to customers under a plan or scheme, and in accordance with said board's explanatory legend, by which purchaser received, for the five cents paid, one of said boxes or nothing other than privilege of making a punch, dependent upon number punched by chance, or the making of the last punch in each of the sections into which board was divided, or the making of the last punch of the entire board—

Sold, to wholesalers and jobbers and to retailers for display and resale to purchasing public in accordance with aforesaid sales plan, said assortments, and thereby supplied to and placed in the hands of others the means of conducting lotteries in the sale of such products in accordance with such plan, and thus sold, itself, in retail establishment of its own, such assortments, contrary to public policy long recognized by the common law and criminal statutes, and to an established public policy of the United States Government, and in competition with many who, unwilling to offer and sell candy so packed and assembled, as above described, or otherwise arranged and packed for sale to purchasing public as to involve a game of chance, refrain therefrom;

With capacity and tendency to induce purchasers of its said products to buy same in preference to candy offered and sold by competitors, and with result that many dealers in, and ultimate purchasers of, candy were attracted by said method and manner of packing same and by element of chance involved in sale thereof as aforesaid, and thereby induced to buy its said candy, thus packed and sold by it, in preference to that offered and sold by said competitors who do not use same or equivalent method, and with tendency and capacity, because of said game of chance, to divert to it trade from its competitors, as aforesaid, who do not use such or equivalent method, exclude from said trade all competitors who do not use such method because unlawful, lessen competition in candy trade, and tend to create a monopoly thereof in it and in such other competitors as do use such method, and deprive purchasing public of benefit of free competition in trade in question, and eliminate therefrom all actual, and exclude therefrom all potential, competitors who do not adopt and use such or equivalent method:

Held, That such methods, 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.

Before *Mr. Henry M. White*, trial examiner.

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

Mr. H. Hartland Halliday, of Salt Lake City, Utah, 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 Keeley's, Inc., 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, 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 is a corporation organized and doing business under the laws of the State of Utah, with its principal office and place of business located at 258 South State Street in Salt Lake City, Utah. It is now, and for several years last past has been, engaged in the manufacture of candy and in the sale and distribution thereof to wholesale dealers and jobbers and to retail dealers located at points in the various States of the United States, and is also engaged in the sale and distribution of candy and candy products to the consuming public in the State of Utah. It causes and has caused its said candy when sold to be transported from its principal place of business in Salt Lake City, Utah, to wholesale and retail purchasers thereof in the State of Utah and in other States of the United States at their respective places of business. 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 dealers and jobbers and to retail dealers assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof, and it has also, in its retail establishment, sold to the consuming public such assortments by means of a lottery scheme.

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Such assortments are composed of a number of boxes or packages of candy of varying size, together with a device commonly called a "punchboard." The boxes or packages of candy contained in said assortments are distributed to purchasers in substantially the following manner:

Said punchboard contains a number of holes divided into sections. A slip of paper bearing a printed number is secreted in each hole. The punchboard also bears at the top thereof a number of printed legends or statements informing customers and prospective customers which numbers receive a box of candy and the size thereof. Sales are 5¢ each, and a purchaser who obtains one of the numbers calling for a box of candy is entitled to receive the same as a prize and without additional charge. The purchaser of the last punch in each section and the purchaser of the last punch on the board are entitled to receive a specified box or package of candy as a prize and without additional charge. Purchasers of punches, who do not procure one of the numbers calling for a box of candy, receive nothing for their money other than the privilege of punching a number from said board. The numbers on said printed slips secreted in said punchboard are effectively concealed from purchasers and prospective purchasers until a selection has been made and the printed slip punched from the board. The boxes or packages of candy are thus distributed to the consuming public wholly by lot or chance.

Respondent sells and distributes numerous assortments, all of which involve substantially the same principle or sales plan as described above, but varying in detail.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells its assortments resell the same to retail dealers, and such retail dealers and the retail dealers to whom respondent sells direct, and the respondent in its retail establishments, expose said assortments for sale and sell said packages of candy 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; and respondent in its retail establishments conducts lotteries in the sale of its products to the consuming public. Such sales plan has the capacity and tendency of inducing purchasers thereof to purchase respondent's said products in preference to candy offered for sale and sold by its competitors.

PAR. 4. The sale of 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 or package 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 tendency unduly to hinder competition or create monopoly in the candy trade in this, to wit: that the use thereof has the tendency and capacity to exclude from said trade competitors of respondent 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 in such other competitors of respondent 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 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. The aforementioned method, acts and practices of respondent are all to the prejudice of the public and of respondent's competitors, as hereinabove alleged. Said method, acts, and practices

Findings

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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."

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 April 24, 1937, issued and on April 27, 1937, served its complaint in this proceeding upon the respondent, Keeley's, Inc., 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, the Commission, by order entered herein, granted respondent's motion for permission to withdraw said answer and to file in lieu thereof its substitute answer dated August 4, 1937, admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure, which substitute answer was duly filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and the substitute answer, 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. Respondent is a corporation organized and doing business under the laws of the State of Utah, with its principal office and place of business located at 258 South State Street in Salt Lake City, Utah. It is now, and for several years last past has been, engaged in the manufacture of candy and in the sale and distribution thereof to wholesale dealers and jobbers and to retail dealers located at points in the various States of the United States, and is also engaged in the sale and distribution of candy and candy products to the consuming public in the State of Utah. It causes and has caused its said candy when sold to be transported from its principal place of business in Salt Lake City, Utah, to wholesale and retail purchasers thereof in the State of Utah and in other States of the United States at their respective places of business. 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 dealers and jobbers and to retail dealers assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof, and it has also, in its retail establishments, sold to the consuming public such assortments by means of a lottery scheme. Such assortments are composed of a number of boxes or packages of candy of varying size, together with a device commonly called a "punchboard." The boxes or packages of candy contained in said assortments are distributed to purchasers in substantially the following manner: Said punchboard contains a number of holes divided into sections. A slip of paper bearing a printed number is secreted in each hole. The punchboard also bears at the top thereof a number of printed legends or statements informing customers and prospective customers which numbers receive a box of candy and the size thereof. Sales are 5¢ each, and a purchaser who obtains one of the numbers calling for a box of candy is entitled to receive the same as a prize and without additional charge. The purchaser of the last punch in each section and the purchaser of the last punch on the board are entitled to receive a specified box or package of candy as a prize and without additional charge. Purchasers of punches, who do not procure one of the numbers calling for a box of candy, receive nothing for their money other than the privilege of punching a number from said board. The numbers on said printed slips secreted in said punchboard are effectively concealed from purchasers and prospective purchasers until a selection has been made and the printed slip punched from the board. The boxes or packages of candy are thus distributed to the consuming public wholly by lot or chance.

Respondent sells and distributes numerous assortments, all of which involve substantially the same principle or sales plan as described above, but varying in detail.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells its assortments resell the same to retail dealers, and such retail dealers and the retail dealers to whom respondent sells direct, and the respondent in its retail establishments, expose said assortments for sale and sell said packages of candy 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; and respondent in its retail establishments conducts lotteries in the sale of its products to the consuming public. Such sales plan has the capacity and tendency of inducing purchasers thereof to purchase respondent's said products in preference to candy offered for sale and sold by its competitors.

PAR. 4. The sale of candy to the purchasing public in the manner above found involves a game of chance or the sale of a chance to procure a box or package 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 tendency unduly to hinder competition or create monopoly in the candy trade in this, to wit: that the use thereof has the tendency and capacity to exclude from said trade competitors of respondent 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 respondent are unwilling to offer for sale or sell candy so packed and assembled as above described, 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 an equivalent method. 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 in such other competitors of respondent 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 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.

CONCLUSION

The aforesaid method, acts and practices of respondent, Keeley's, Inc., 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 and the substitute answer dated August 4, 1937, filed herein by respondent, admitting all the material allegations of the complaint to be true and waiving the taking of further evidence and all other intervening procedure, 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 for other purposes."

It is ordered, That the respondent, Keeley's, Inc., a corporation, its officers, agents, representatives, 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 the respondent, Keeley's, Inc., 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.

Syllabus

IN THE MATTER OF
PUBLIC SERVICE INSTITUTE, INC.

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

Docket 3043. Complaint, Jan. 29, 1937—Decision, Aug. 18, 1937

Where a corporation engaged in sale and distribution of correspondence courses of study and instruction designed and intended to prepare students for examinations for certain United States civil service positions, in substantial competition with those similarly engaged and also with those engaged in sale and distribution in commerce of correspondence courses of study and instruction in other lines—

- (a) Represented, directly or by implication, through statements in circulars, folders, and other printed matter distributed to the public by mail or otherwise, and through its salesmen, that the business conducted by it was operated on a large and substantial basis with a staff of twenty or more teachers or qualified instructors, and that its said staff was made up exclusively, or in the majority, of former Government employees who were experts on the subject of civil service examinations by reason of previous Government employment or prior connection with the United States Civil Service Commission, as well as by general education and other experience, facts being it did not have as many as twenty teachers and instructors on its staff and its said staff was not made up, in whole or in large part, of such former Government employees, and its said instructors were not civil service experts by reason of previous Government connection;
- (b) Represented, as aforesaid, that it conducted a large residence school where individual instruction was given to large numbers of students, and that enrollment for its courses of study and instruction constituted enrollment for a civil service examination or position, or both, and that it was an agency of, or connected with, the United States Government, facts being it did not conduct a residence school, enrollment in its courses did not constitute enrollment for such an examination or position, and it was not an agency of, nor connected with, the Government;
- (c) Represented, as aforesaid, that the position of railway mail clerk in such service was a desirable one with relatively short working hours, and that thousands of its students had successfully passed civil service examinations and received appointments in the Government service, and that, at that time, more than two thousand people had enrolled and fully completed its course of study, facts being hours of such clerks were not, as a regular thing, short, and no such number of its students had successfully passed examinations, as aforesaid, and received appointment, nor had any such number as above set forth at that time fully completed its courses;
- (d) Represented, as aforesaid, that those who purchased its said courses direct, without the intervention of salesmen, were enabled to secure at lower prices not only the same material for study, but also the identical services therewith, and same supervision as offered and given by it in the courses