

Syllabus

**WALTER T. HALL AND MINNIE M. HALL, INDIVIDUALLY,
AND TRADING AS WALTER T. HALL & COMPANY****COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914***Docket 2696. Complaint, Jan. 31, 1936—Decision, Jan. 25, 1938*

Where a firm engaged in manufacture and sale of packages or assortments of candy, so packed and assembled as to involve use of a lottery scheme when sold and distributed to consumers thereof, or so-called "draw" or "deal" assortments, sale, and distribution of which type candy, affording, in connection with sale thereof to public, means or opportunity of obtaining a prize or becoming a winner by lot or chance, teaches and encourages gambling among children, who constitute substantial number of purchasers and consumers of such type of candy where prize in form of larger pieces is to them attractive, and appearance of which "draw" or "deal" assortments in the markets of manufacturers of "straight" merchandise has been followed by marked decrease in sale of such "straight" goods, due to gambling or lottery feature connected with other—

Sold to wholesalers and retailers lottery assortments as aforesaid, including those composed of number of small pieces of candy, together with number of larger pieces and push card for sale under a plan, and in accordance with said card's explanatory legend, pursuant to which purchaser received, for 5 cents paid, one of the smaller or one of the larger pieces, in accordance with number secured by chance from aforesaid card, and others involving same principle and type of merchandise in which sales were 1 cent instead of 5 cents each, so packed and assembled that they were and might be displayed and used by numerous retail dealer purchasers thereof for distribution and resale to purchasing public by lot or chance, as packed as aforesaid and without alteration or rearrangement, with knowledge and intent that such candy should and would thus be resold to purchasing public by lot or chance by said retail dealers;

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 regard such sale and distribution as morally bad and as encouraging gambling, and especially among children, and as injurious to the candy industry through resulting in the merchandising of a chance or lottery instead of candy, and as providing retail merchants with a means of violating the laws of the several States, and who refuse to adopt such method of selling as contrary to public policy, and some of whom, for such reasons, refuse to sell candy so packed that it can be resold to public by lot or chance;

With result that such competitors were put to a competitive disadvantage and retailers, finding that they could dispose of more candy by "draw" or "deal" method, bought from it and others employing same methods of sale, and trade was thereby diverted from said competitors to it and others using similar methods, and with effect of excluding from trade in question all competitors who are unwilling to and do not use such or equivalent method, and of lessening competition therein, and with tendency to

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create monopoly thereof in it and in such other distributors as do use such or equivalent method:

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

Before *Mr. Miles J. Furnas*, trial examiner.

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

Mr. Walter C. Hughes, of Chicago, Ill., for respondents.

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 *Walter T. Hall* and *Minnie M. Hall*, individually, and as copartners doing business under the name and style of *Walter T. Hall & Company*, hereinafter referred to as respondents, have been and are 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. Respondents are copartners doing business under the name and style of *Walter T. Hall & Company* with their principal office and place of business located in the city of *Ottumwa*, State of *Iowa*. They are now and for several years last past have been engaged in the manufacture of candies 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 cause the said products, when so sold, to be transported from their principal place of business in the city of *Ottumwa*, *Iowa*, 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 respondents in such candy between and among the States of the United States. In the course and conduct of said business, respondents are in competition with other partnerships and individuals, and with corporations 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 their business, as described in paragraph 1 hereof, respondents sell and have sold to wholesale and retail dealers certain packages or assortments of candy so packed and assembled as to involve the use of a lottery scheme when

sold and distributed to the consumers thereof. One of said packages is hereinafter described for the purpose of showing the methods used by respondent, but this particular package is not all-inclusive of the various packages nor does it include all of the details of the several sales plans which respondent has been or is using in the distribution of candy by lot or chance. Certain of said assortments manufactured and distributed by the respondents are composed of a number of small pieces of candy, a number of larger pieces of candy, and a device commonly called a push card. The candy contained in said assortments is distributed to purchasers in the following manner:

The push card has a number of partially perforated discs, and when a push is made and the disc separated from the card, a number is disclosed. Sales are 5 cents each and the card bears a statement or legend informing the customer and prospective customer which numbers receive the larger pieces of candy. All other numbers receive one of the small pieces of candy. The numbers on said card are effectively concealed from purchasers and prospective purchasers until a selection has been made and the push or disc separated from the card. The fact as to whether a purchaser receives one of the small pieces of candy or one of the larger pieces of candy for the price of 5 cents is thus determined wholly by lot or chance.

The respondents manufacture and distribute several assortments involving the same principle and the same type of merchandise as described in the assortment above where sales are 5 cents each, and also manufacture and distribute assortments involving the same principle where the sales are 1 cent each instead of 5 cents.

PAR. 3. The wholesale dealers to whom respondents sell their assortments resell said assortments to retail dealers, and said retail dealers, and the retail dealers to whom respondents sell direct, expose said assortments for sale and sell said candy to the purchasing public in accordance with the aforesaid sales plan. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale of their products in accordance with the sales plan hereinabove set forth, as a means of inducing purchasers thereof to purchase respondents' said products in preference to candy offered for sale and sold by their 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 larger or additional items of candy.

The use by respondents of said method of the sale of candies, and the sale of candies 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 respondents 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.

Wherefore, many persons, firms, and corporations who make and sell candy in competition with the respondents, 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 respondents' 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 respondents, in preference to candy offered for sale and sold by said competitors of respondents who do not use the same or equivalent methods. The use of said method by respondents has the tendency and capacity, because of said game of chance, to divert to respondents trade and custom from their 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 respondents 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 respondents 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 respondents 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 methods, acts, and practices of respondents are all to the prejudice of the public and of respondents' competitors as hereinabove alleged. Said methods, acts, and prac-

tices 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 January 31, 1936, issued and served its complaint upon the respondents, Walter T. Hall and Minnie M. Hall, individually, and as copartners doing business under the name and style of Walter T. Hall & Company, charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint, testimony, and other evidence in support of the allegations of said complaint were introduced by P. C. Kolinski, attorney for the Commission, before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it. Respondents appeared by Attorney Walter C. Hughes, but offered no testimony in opposition to the allegations of the complaint. The 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 the said complaint, testimony, and other evidence, and brief in support of the complaint; 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 respondents, Walter T. Hall and Minnie M. Hall, are individuals doing business as a copartnership under the firm name and style of Walter T. Hall & Company with their principal office and place of business located in the city of Ottumwa, State of Iowa. Respondents are now and for several years last past have been engaged in the manufacture of candies 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 cause the said products, when so sold, to be transported from their principal place of business in the city of Ottumwa, Iowa, to purchasers thereof 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 respondents in such candy between and among the States of the United States. In the course and conduct of said business, respondents are in competition with other partnerships and individuals, and with corporations 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 their business, as described in paragraph 1 hereof, respondents sell and have sold to wholesale and retail dealers certain packages or assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. One of said assortment was described by one of the respondents called as a witness on behalf of the Commission and was offered as an exhibit. This assortment is composed of a number of small pieces of candy, a number of larger pieces of candy and a device commonly called a push card. The candy contained in said assortment is distributed to purchasers in the following manner:

The push card has a number of partially perforated discs, and when a push is made and the disc separated from the card, a number is disclosed. Sales are 5 cents each and the card bears a statement or legend informing the customer and prospective customer which numbers receive the larger pieces of candy. All other numbers receive one of the small pieces of candy. The numbers on said card are effectively concealed from purchasers and prospective purchasers until a selection has been made and the push or disc separated from the card. The fact as to whether a purchaser receives one of the small pieces of candy or one of the larger pieces of candy for the price of 5 cents is thus determined wholly by lot or chance.

The respondents manufacture and distribute several assortments involving the same principle and the same type of merchandise as described in the assortment above where sales are 5 cents each, and they also manufacture and distribute assortments involving the same principle where the sales are 1 cent each instead of 5 cents each.

PAR. 3. Candy assortments involving the lot or chance feature as described in paragraph 2 above are generally referred to in the candy trade or industry as "draw" or "deal" assortments. Assortments of candy without any lot or chance feature in connection with their resale to the public are generally referred to in the candy trade or industry as "straight" merchandise. These terms will be used hereafter in these findings to distinguish the various types of assortments.

PAR. 4. The wholesale dealers and jobbers to whom respondents sell their assortments, resell the same to retail dealers. Numerous retail dealers purchase the said assortments from said wholesale dealers and jobbers, and such retail dealers, and the retail dealers to whom respondents sell direct, display said assortments for sale to the public as packed by the respondents, and the candy contained in the majority of said assortments is sold and distributed to the consuming public by means of said push cards or punch boards in the manner hereinbefore described.

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

In the sale and distribution to wholesale dealers, jobbers, and retail dealers of the assortments of candy hereinbefore described, respondents have knowledge that the said candy is to be resold to the purchasing public by retail dealers by lot or chance, and they pack such candy in the way and manner described so that, without alteration, addition, or rearrangement thereof, it will be, and may be, resold to the public by lot or chance by said retail dealers. Such packing and distribution of candies 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.

PAR. 6. There are in the United States many manufacturers of candy who do not manufacture and sell "draw" or "deal" assortments of candy and who sell their "straight" merchandise in interstate commerce in competition with the "draw" or "deal" candy, and manufacturers of "straight" merchandise have noted a marked decrease in the sales of their products whenever or wherever the "draw" or "deal" assortments have appeared in their market. This decrease in the sale of "straight" merchandise is due to the gambling or lottery feature connected with the "draw" or "deal" candy.

Witnesses from several branches of the candy industry testified in this proceeding to the effect that consumers preferred to purchase the "draw" or "deal" candy because of the gambling feature connected with its sale. 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 prize or becoming a winner by lot or chance, teaches and encourages gambling among

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children who comprise a substantial number of the purchasers and consumers of this type of candy. This is true where the prize is made attractive to children in the form of larger pieces of candy.

PAR. 7. The sale and distribution of candy by the methods described herein is the sale and distribution of candy by lot or chance, and constitutes a lottery, gaming device, or gift enterprise. Competitors of respondents appeared as witnesses in this proceeding and testified, and the Commission finds that many competitors regard such sale and distribution as morally bad and as encouraging gambling, especially among children, and as injurious to the candy industry because it results in the merchandising of a chance or lottery instead of candy and has provided retail merchandise with a means of violating the laws of the several states. Such competitors also refuse to adopt such method of selling because it is contrary to public policy. Because of these reasons, some competitors of respondents refuse to sell candy so packed that it can be resold to the public by lot or chance. These competitors are thereby put to a competitive disadvantage. The retailers, finding that they can dispose of more candy by the "draw" or "deal" method, buy from respondents and others employing the same methods of sale, and thereby trade is diverted from said competitors to respondents and others using similar methods.

Such methods exclude from said candy trade all competitors who are unwilling to and who do not use the same or an equivalent method, lessen competition in said candy trade, and tend to create a monopoly of said candy trade in respondents and such other distributors who use the same or an equivalent method.

CONCLUSION

The aforesaid acts and practices of the respondents, Walter T. Hall, and Minnie M. Hall, individually, and as copartners doing business under the name and style of Walter T. Hall & Company, are to the prejudice of the public and of respondents' 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, testimony and other evidence taken before Miles J. Furnas, an examiner of the Commission theretofore duly designated by it, in support of the allegations of

said complaint and brief in support of the complaint filed herein, and the Commission having made its findings as to the facts and its conclusion that said respondents have 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 respondents, Walter T. Hall and Minnie M. Hall, individually, and as copartners doing business under the name and style of Walter T. Hall & Company, or trading under any other name, their agents, representatives, and employees, in the offering for sale, sale and distribution of candy and candy products in interstate commerce or in the District of Columbia, do forthwith cease and desist from:

1. Selling and distributing 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 dealers 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 contained in the said assortment to the public;

3. Supplying to or placing in the hands of dealers assortments of candy together with a device commonly called a push card for use or which may be used in distributing or selling the said candy to the public at retail;

4. Furnishing to dealers a device commonly called a push card, either with packages or assortments of candy or separately, which push card is to be used or may be used in distributing or selling said candy to the public.

It is further ordered, That the respondents, Walter T. Hall and Minnie M. Hall, individually, and as copartners doing business under the name and style of Walter T. Hall & Company, shall, within 30 days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF
THE GREAT ATLANTIC & PACIFIC TEA COMPANY

COMPLAINT, FINDINGS, "CONCLUSION," AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF PAR. (c) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT OF CONGRESS APPROVED JUNE 19, 1936

Docket 3031. Complaint, Jan. 13, 1937—Decision, Jan. 25, 1938

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2, PAR. (c)—BUYER "BROKERAGE" PAYMENTS—NET PRICES THROUGH DEDUCTION EQUIVALENT FORMER "BUYER", AND CURRENT SELLER, BROKERAGE, AS INVOLVING "ALLOWANCE OR DISCOUNT IN LIEU" OF.

The supposed distinction between a discount or allowance equivalent to brokerage made as a part of the price of goods and a discount or allowance in lieu of brokerage reflected by the price of goods, is too tenuous for approval, and, in view of plain and simple meaning of words "in lieu of," "discount," and "allowance," it is impossible to say that net price arrived at by deducting from regular price amount equal to brokerage formerly, but no longer to be, paid by sellers to buyer through latter's agents and employees, and to that by sellers' currently paid own brokers, is price which does not involve discount or allowance in lieu of brokerage.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2, PAR. (a) AND (c), (d), AND (e)—BUYER "BROKERAGE" PAYMENTS—BUYER AGENTS' SELLER "SERVICES" RE MARKETING CONDITIONS, ETC., INCIDENT SUCH AGENTS PURCHASING ACTIVITIES AND EMPLOYER DUTY—"EXCEPT FOR SERVICES RENDERED IN CONNECTION WITH THE SALE OF GOODS"—ACT'S SCOPE, AS AMENDED.

The Clayton Act, as amended by the Robinson-Patman Act, has a dual purpose apparent both from the act itself and from the Congressional committee reports, and was directed not only at price discriminations, but also at certain practices involving both such discriminations and unfair methods of competition, as there prohibited, and Congress intended to prescribe absolutely and unconditionally as an undesirable and unfair trade practice and method of competition payment of brokerage and granting of any allowance or discount in lieu thereof by sellers to buyers on latter's own purchases of goods, involving no savings to seller other than brokerage otherwise payable to independent broker as result of dealing direct through buyer's agent; said "services rendered" clause not being intended to set up a condition upon which such brokerage could be paid or such allowance or discount granted, but having relation to genuine seller brokerage services, and not, in any event, embracing activities of incidental benefit to seller, by buyer's employee agents in buyer's interest.

DISCRIMINATING IN PRICE—CLAYTON ACT, SEC. 2, PAR. (c) AND (a)—BUYER "BROKERAGE" PAYMENTS—FORMER'S INHIBITIONS AS NOT PERMITTING SELLERS' BROKERAGE SAVING PAYMENTS TO BUYER UNDER LATTER'S "DUE ALLOWANCE" PROVISIO.

While paragraph (a), prohibiting both direct and indirect discrimination in price, and paragraph (c), containing certain inhibitions with respect to