

Syllabus

IN THE MATTER OF

AMERICAN LAWN MOWER COMPANY, DOING BUSINESS
AS RICHMOND SCHOOL FURNITURE COMPANY

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

Docket 2785. Complaint, Apr. 24, 1936—Decision, July 14, 1938

Where a corporation engaged in the manufacture and sale of composition blackboards, including its so-called "Litho Plate" type, made by applying to a backing board of masonite or gypsum fiber board a varying number of coats of a mixture consisting of a varnish-like vehicle in which were suspended as insoluble ingredients powdered slate, lamp black, and carborundum, and made up chiefly into educational or toy blackboards in both easel desk style and wall style, and also made up as plain framed blackboards for commercial, school, and other uses, and, to a limited extent, made and sold in sizes and kinds for permanent installation in schoolhouses—

- (a) Represented, in advertising matter published in trade magazines and other publications circulated to the trade and public, and in advertising pamphlets and other advertising literature distributed to members of the purchasing public, that its said "Litho Plate" blackboards were superior to natural slate for blackboard usage, through such statements as "'Litho Plate' Better Than Slate," "* * * has a smooth velvet finish with a writing surface similar to natural slate, yet without the danger of breakage," "* * * Unbreakable Writing Surface," facts being that while said product undoubtedly had meritorious qualities, natural slate for use in blackboards has certain qualities that make it preferred by many users of such products, especially for permanent installation in schoolhouses, and, notwithstanding certain advantages of its said products, it was misleading to represent that same were "better than slate," and such general representations cast an unfair aspersion on natural slate as a blackboard material;
- (b) Falsely represented that its said blackboards, as well as the writing surfaces thereof, were unbreakable, and that the surfacing thereof was "slated," through such statements as "* * * This slated panel has all the smooth writing qualities of a slate board but it is not subject to breakage nor the excessive weight of solid slate," "* * * has a smooth velvet finish with a writing surface similar to natural slate, yet without the danger of breakage," "* * * Litho Plate slated surfaces will not break," facts being that said representations that the writing surface of its said blackboards was unbreakable or that the boards themselves were so, were exaggerated, unwarranted, and misleading, and notwithstanding fact that such boards would not shatter when dropped or struck with a hard object as would natural slate under like conditions, writing surface thereof was marred and injured for ordinary use by being struck with a hammer or other hard object and was also easily scratched and damaged by hard sharp instrument, and the backing boards used would bend and break under ordinary pressure or weight and the writing surface also would bend, crack, and break under like pressure at the same time;

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With tendency and capacity to confuse, mislead, and deceive members of the public into the belief that its said blackboards were better than slate and that the boards and writing surfaces thereof were unbreakable and that the boards were superior to and better than slate in all respects, in all particulars, in all cases, under all conditions, and for all uses and installations, and that said boards and writing surfaces would not break or be injured under any ordinary conditions or by any ordinary means, and to induce them to buy same because of erroneous beliefs engendered as above set forth, and divert trade to it from competitors engaged in sale of natural slate and of composition blackboards of similar types and kinds to those made and sold by it as aforesaid, including those competitors who do not misrepresent the blackboards sold by them, but truthfully and accurately state the facts in regard thereto, from whom its said acts and practices tended to and did in fact divert business to itself, to their substantial injury and prejudice:

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

Before *Mr. W. W. Sheppard* and *Mr. Miles J. Furnas*, trial examiners.

Mr. Harry D. Michael, *Mr. T. H. Kennedy*, and *Mr. P. C. Kolinski* for the Commission.

Bracken, Gray & DeFur, of Muncie, Ind., for respondent.

COMPLAINT ¹

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 American Lawn Mower Co., a corporation, trading and doing business under the firm name and style of Richmond School Furniture Co., hereinafter referred to as respondent, has been and now is using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to the 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. The respondent, American Lawn Mower Co., is a corporation organized and existing under the laws of the State of Indiana, and, in the course of its business of manufacturing blackboards, is trading and doing business under the firm name and style of Richmond School Furniture Co., with its principal place of business at Eighteenth Street, in the city of Muncie and State of Indiana.

¹ Pursuant to stipulation and amending order of December 12, 1938 in accordance therewith, complaint is published as thus amended through substitution of correct corporate name of respondent namely, "American Lawn Mower Co." for "The American Lawn Mower Corporation" wherever latter appeared in title and body of complaint.

The respondent is now, and for more than one year last past has been, engaged in the manufacture, sale, and distribution of blackboards.

PAR. 2. Respondent, being engaged in the business aforesaid, causes the said merchandise to be shipped from said place of business in the State of Indiana to purchasers thereof located at various points in States other than the State of Indiana and in the District of Columbia, and there is now, and has been at all times mentioned herein, a constant current of trade and commerce in said blackboards, sold by the respondent among and between the various States of the United States.

PAR. 3. In the course and conduct of its said business, said respondent is now and has been at all times herein referred to, in competition with other individuals, firms, partnerships, and corporations likewise engaged in the manufacture, sale, and distribution of blackboards in commerce among and between the various States of the United States and the District of Columbia.

PAR. 4. In the course and conduct of its business, respondent manufactures blackboards under the trade name of "Litho Plate" which it sells mainly to the toy trade, and to a limited extent to schools. Said Litho Plate blackboard consists of a pulp wood or masonite board to which is applied a mixture of powdered slate, known as slate flour, lamp black or carbon black, and certain adhesive ingredients, and smoothed upon said board by a special trowelling process. Said product is advertised widely by respondent in trade magazines, newspapers, pamphlets, and circulars, and also on letterheads, billheads, labels, and otherwise. In these advertisements, as aforesaid, respondent has made and is making the following misrepresentations and statements:

The writing surface on all Litho Plate Blackboards is made from a pulverized Slate preparation which is applied by a special process to a tough fiber panel. This slated panel has all the smooth writing qualities of a slate Board but it is not subject to breikage nor to the excessive weight of solid slate.

"Litho Plate" Better Than Slate.

The surface of the blackboard is slated *not* painted and is made from a special ground plate preparation applied by a special process.

Litho Plate Unbreakable Writing Surface.

These blackboards, also, have smooth, velvety slated surfaces, similar to that of natural slate, but Litho Plate slated surfaces will not break.

Said statements so made as aforesaid are in fact false and misleading in that they mislead purchasers and consumers into the erroneous belief that the said blackboards, so manufactured by respondent as aforesaid, are superior to blackboards manufactured from slate,

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whereas in truth and in fact said Litho Plate blackboard is not unbreakable, is not better than slate, and is not as good as slate. Said blackboards are in fact painted, and the writing surface of said blackboard is approximately twenty-seven thousandths of an inch in thickness, and contains such a minute quantity of slate flour that the use of the term "slated surface" creates a false and erroneous belief in the mind of the purchaser that a substantial quantity of powdered slate has been used in the manufacture of such surface.

PAR. 5. Over a period of many years a substantial portion of the purchasing public has expressed and has had a preference for blackboards that are manufactured of genuine slate and the use of the words "slate" and "slated" in respondent's advertisements and statements has a tendency to and does in fact mislead purchasers into the belief that the writing surface of respondent's blackboards is in fact manufactured from slate or that the writing surface itself constitutes slate.

There are among the respondent's competitors many who do not in any way misrepresent their products and who in advertising blackboards not manufactured from slate do not use the word "slate" or "slated," and who do not in any manner misrepresent their products.

There are also among respondent's competitors manufacturers who manufacture blackboards from natural slate and who advertise their products accordingly, and the unfair practices of respondent as hereinabove described have a tendency to and do in fact divert a substantial amount of trade to respondent from said manufacturer.

PAR. 6. The acts and representations of the respondent in advertising their said blackboards to be better than slate; to be unbreakable, and to be not painted, was and is calculated to and had and now has a tendency and capacity to and does mislead and deceive a substantial portion of the purchasing public into the belief that respondent's product is in fact better than slate and is unbreakable and is not painted. Further, as a direct consequence of the mistaken and erroneous belief induced as aforesaid, a substantial portion of said purchasing public has purchased a substantial volume of respondent's blackboards with the result that trade has been unfairly diverted to respondent from competitors likewise engaged in the business of selling blackboards who truthfully advertise and represent the quality and character of their said products. As a result thereof substantial injury has been and is now being done by respondent to substantial competition in commerce as herein set out.

PAR. 7. The above acts and things done and caused to be done by the respondent were and are each and all to the prejudice of the

public and of respondent's competitors and constitute unfair methods of competition in commerce within the meaning and intent 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 the Federal Trade Commission Act, the Federal Trade Commission, on April 24, 1936, issued and served its complaint in this proceeding upon respondent, American Lawn Mower Co., a corporation, trading and doing business under the firm name and style of Richmond School Furniture Co., 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 Harry D. Michael, Thomas H. Kennedy, and Peter C. Kolinski, attorneys for the Commission, before W. W. Sheppard, an examiner of the Commission theretofore duly designated by it, with Miles J. Furnas, an examiner of the Commission serving as substitute examiner at one hearing after being duly designated as such, and in opposition to the allegations of the complaint by Myron H. Gray of Bracken, Gray & DeFur, attorneys for respondent: and said testimony and other evidence were 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 other evidence, briefs in support of the complaint and in opposition thereto, and the oral arguments of Mr. Michael, attorney for the Commission, and Mr. Gray of counsel for respondent; and the Commission having duly considered the same, 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, American Lawn Mower Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Indiana, with its office, factory, and principal place of business at Eighteenth Street in the city of Muncie, State of Indiana.

PAR. 2. The respondent is now and has been since about the year 1919 engaged under the name and style of Richmond School Furni-

ture Co. in the manufacture of composition blackboards, as herein-after described, and in the sale and distribution thereof in commerce between and among the various States of the United State and in the District of Columbia. Said respondent, in the course and conduct of said business, during the time aforesaid, causes and has caused its said blackboards to be transported in commerce from its said place of business in Indiana, to, into, and through States of the United States other than Indiana, to the various purchasers thereof in such other States to whom the same are or have been sold. Respondent's usual course of dealing is and has been to sell its said blackboards to wholesale or retail stores through which they are eventually sold to members of the public.

PAR. 3. During the time above mentioned, other individuals, firms, and corporations in various States of the United States are and have been engaged in the manufacture, sale, and distribution in commerce between and among the various States of the United States and in the District of Columbia, of blackboards of the same general kind as those manufactured and sold by respondent, as herein described, in some of which natural slate is used for the writing surfaces and in others the writing surfaces are made by applying thin coats of various mixtures to backing boards. Such other individuals, firms, and corporations have caused and do now cause their said blackboards, when sold by them, to be transported in commerce from the respective States of the United States where they are located, to, into, and through States other than the State of origin of the shipment thereof to the purchasers of the same at their respective places of location. Among such competitors are National School Slate Co., Slatington, Pa.; American Manufacturing Concern, Falconer, N. Y., and The H. G. Cress Co., Troy, Ohio.

PAR. 4. One type of blackboard made and sold by respondent as aforesaid is designated as "Litho Plate." It is made up chiefly into what are known as educational or toy blackboards in both easel desk style and wall style. Other "Litho Plate" boards are made up as plain framed blackboards for commercial, school, and other uses where a wallboard or movable board is desired. A cheaper blackboard is also made and sold by respondent in the types aforesaid under the name "Richmond Junior" but these have a writing surface made from a mixture that is different from that used in making the "Litho Plate" boards. To a limited extent respondent has made and sold its "Litho Plate" blackboards in sizes and kinds for permanent installation in schoolhouses.

Respondent's "Litho Plate" blackboards are made by applying to a backing board of masonite or gypsum fiber board from two to four

coats of a mixture consisting of a varnish-like vehicle in which are suspended as insoluble ingredients powdered slate, lamp black and carborundum. There is also in the mixture a small amount of what is known as paste toner. The mixture is a thick, heavy substance and is applied to the backing board by means of a trowel. Each coat is allowed to dry overnight. The vehicle is comparable to the various vehicles used in paints and is properly described as "vehicle" as such term is used in describing paint constituents. The thickness of the surfacing material is approximately three one-thousandths of an inch. Powdered slate, lamp black, and carborundum come within the category of pigments as that term is used in describing the component parts of paints. The mixture is thicker than most paints and the method of application is not that usually used in applying paints. These differences are not material in determining the terminology to be used to describe it. Some paints are thick and some paints are applied by other means than with a brush or spray. Some are applied by knife like spreaders of various kinds. It is proper to designate respondent's surfacing material as a paint or as composed of paint materials. However, it is also proper for respondent to differentiate its said "Litho Plate" blackboards from other composition blackboards whose writing surfaces are made from thinner paint materials and which are applied by means of a brush or spray.

For the purpose of this case it is not necessary to find the proportion of the ingredients of respondent's preparation except to make the general finding that in the finished product the amount of powdered slate is considerable, that it represents in the neighborhood of 50 percent, and that it is the predominant ingredient. It is therefore proper to describe this mixture so as to indicate the fact that powdered slate is present therein as a pigment in considerable quantity in order to differentiate it from composition blackboard surfacing materials that do not contain powdered slate, or that contain it in small quantities.

PAR. 5. Respondent, in advertising matter published in trade magazines and other publications circulated to the trade and the public, and also in advertising pamphlets and other advertising literature distributed to members of the purchasing public, has made representations to the effect that its said "Litho Plate" blackboards are superior to natural slate for blackboard uses; that the said blackboards, as well as the writing surfaces thereof, are unbreakable and that the surfacing thereof is "slated." Among such representations so made are the following:

The writing surface on all Litho Plate Blackboards is made from a Pulverized Slate preparation which is applied by a special process to a tough fibre

panel. This slated panel has all the smooth writing qualities of a slate board but it is not subject to breakage nor the excessive weight of solid slate.

"Litho Plate" Better Than Slate.

The surface of the Blackboard is slated (not painted). It is made from a special ground slate preparation and has a smooth velvet finish with a writing surface similar to natural slate, yet without the danger of breakage.

Litho Plate Unbreakable Writing Surface.

These Blackboards, also, have smooth, velvety slated surfaces similar to that of natural slate, but Litho Plate slated surfaces will not break.

PAR. 6. Respondent's representations to the effect that its said blackboards are "Better Than Slate" were generally discontinued about the year 1928. However, the use of the said expression has recurred at different times in respondent's advertising matter since that time, once as late as 1937. While recent uses of said expression seem to have been inadvertent through use of an old cut yet respondent contends in its answer that the said representation is true. Respondent's said product undoubtedly has meritorious qualities, yet, it is unquestionably true that natural slate for use as blackboards has certain superior qualities that make it preferred by many users of such products, especially for permanent installation as in school-houses. Natural slate undoubtedly has longer life in ordinary use than respondent's product. It does not wear so rapidly in ordinary use and furnishes a writing surface as long as it remains in place. It also has the advantage of not having to have a backing board to support it. On the other hand, respondent's blackboards are lighter in weight than those made from natural slate. They are, in consequence, more easily moved about. They do not shatter as natural slate blackboards do. They have good wearing qualities under ordinary use and are preferred by many for some uses. However, it is misleading to represent that respondent's said blackboards are "Better Than Slate" and such general representations cast an unfair aspersion on natural slate as a material for blackboards.

PAR. 7. Respondent's representations that the writing surface of its "Litho Plate" blackboards is unbreakable or that the blackboard itself is unbreakable, are exaggerated, unwarranted, and misleading. It is true that respondent's blackboards will not shatter when dropped or struck with a hard object as natural slate will shatter under like conditions yet the writing surface of respondent's blackboard is marred and injured for ordinary use by striking the same with a hammer or other hard object. The surface thereof is also easily scratched by a hard sharp instrument and damaged thereby. The strength of the completed board is determined by the strength of the material used for a backing board as well as by the thickness of the backing board. Respondent has used at least three types of back-

ing boards. In a test as to the strength of one type of backing submitted by respondent the thickness of respondent's blackboard tested was greater than that of the piece of natural slate with which it was compared. Such test indicated merely that the particular piece of respondent's blackboard used in the test withstood a greater weight before bending or breaking than the thinner piece of slate with which it was compared. The backing boards will bend and break under ordinary pressure or weight and the writing surface will also bend, crack and break under like pressure at the same time.

PAR. 8. Respondent's representation that the writing surface of its "Litho Plate" blackboards is a "slated" surface, while not scientifically accurate, is not necessarily misleading in the particular application of the term and is not reasonably so in connection with the explanatory statements and terms used by respondent in its advertising literature. As so applied and used it is not apt to create the belief that the surfacing material of respondent's blackboards is slate in its natural form as natural slate is used for blackboards but rather that slate is a component part of a preparation, composition or mixture used in making up the writing surface. In other words, in such connection and so applied, the idea is conveyed that the surfacing material is a composition product and not a thin piece of natural slate or all slate in any form.

It is a reasonable interpretation of the word "slated" when applied to a surfacing composition such as that used by respondent on its blackboards that such composition merely contains powdered slate. This is especially true when taken in connection with explanatory words and phrases used by respondent in its advertising matter such as the following:

Made from a special ground slate preparation.

With a writing surface similar to natural slate.

The blackboard surface is made from ground slate applied by a special process.

It * * * has a smooth velvet finish with all the advantages of natural slate * * *

* * * made from a pulverized slate preparation applied by a special troweling process.

* * * made from a special ground slate preparation.

* * * the advantages of natural slate without the danger of breakage.

* * * made from a ground slate composition, which is applied by a special troweling process.

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Powdered slate, as a pigment in the mixture used by respondent to make up the writing surface of its "Litho Plate" blackboards, has a certain functional use in connection with the carborundum therein in that it assists in creating a minute roughness in the exposed surface of surrounding vehicle so as to enable such surface to more readily take chalk.

Moreover, the weight of respondent's blackboards clearly indicates that they are not natural slate boards. Even a casual examination demonstrates the difference in weight and general structure between respondent's blackboards and those of similar type made from natural slate.

PAR. 9. The representations of respondent as aforesaid have had and do have the tendency and capacity to confuse, mislead, and deceive members of the public into the belief that its "Litho Plate" blackboards are "Better than Slate" and that the said blackboards and the writing surfaces thereof are "unbreakable" and that its said blackboards are superior to and better than slate in all respects, in all particulars, in all cases, under all conditions, and for all uses and installations and that said blackboards and the writing surface thereof will not break or be injured under any ordinary conditions or by any ordinary means, when such are not the facts, and to induce them to buy the same because of the erroneous beliefs engendered as above set forth and to divert trade to respondent from competitors engaged in the sale in commerce between and among the various States of the United States and in the District of Columbia of natural slate and composition blackboards of similar types and kinds to those made and sold by respondent as aforesaid.

There are among the competitors of respondent those who do not misrepresent the blackboards sold by them but who truthfully and accurately state the facts in regard thereto. Respondent's said acts and practices tend to and do in fact divert business to respondent from its said competitors to the substantial injury and prejudice of such competitors.

CONCLUSION

The aforesaid acts and practices of the respondent, American Lawn Mower Co., a corporation, trading and doing business under the firm name and style of Richmond School Furniture Co., are to the prejudice of the public and of respondent's competitors, and constitute unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

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 in part before W. W. Sheppard, an examiner of the Commission theretofore duly designated by it, and in part before Miles J. Furnas, an examiner of the Commission, duly designated as substitute examiner therein, in support of the allegations of said complaint and in opposition thereto, briefs filed herein, and oral arguments by Harry D. Michael, counsel for the Commission, and by Myron H. Gray of Bracken, Gray & DeFur, counsel for respondent, and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, American Lawn Mower Co., doing business under its own name or under the name of Richmond School Furniture Co., or under any other trade name or otherwise, its officers, representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of blackboards having a composition writing surface upon a backing board of pulp wood, fiber board, gypsum board, masonite or other fabricated wooden or fiber material in interstate commerce or in the District of Columbia, do forthwith cease and desist from:

1. Representing the same as "Better Than Slate" or superior to blackboards made from natural slate.

2. Representing the same or the writing surface thereof as "unbreakable."

It is further ordered, That the respondent shall, within 60 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 this order.

IN THE MATTER OF

IRWIN SCADRON, INDIVIDUALLY AND TRADING AS
METROPOLITAN DISTRIBUTING COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3219. Complaint, Aug. 28, 1937—Decision, July 14, 1938*

Where an individual engaged in sale and distribution of clocks, in soliciting sale and in selling and distributing same—

- (a) Furnished various devices and plans of merchandising involving operation of gift enterprises or lottery schemes and distribution of such clocks to ultimate users wholly by lot or chance, through push card devices or plans, in accordance with which plans, substantially, amount paid by purchaser, in no event in excess of 29 cents, was dependent upon number disclosed under particular girl's name selected from list thereof displayed on card, and under which chance selection of girl's name corresponding to that disclosed under master seal, after sale of chances had been exhausted, entitled maker of such selection to clock, without further charge or additional service, and under which person, salesman, agent, or representative soliciting purchases of chances as above described also received, without further charge or additional service, a clock, and all other chance purchasers received nothing other than privilege of selection from card;

With result of thus supplying to and placing in the hands of others means of conducting a lottery in the sale of his said products, in accordance with plan above set forth, contrary to public policy, long recognized in common law and criminal statutes, and to that of the United States Government, and with result that many persons, attracted by said method and element of chance involved, were induced to buy and sell his said clocks in preference to those offered and sold by competitors, many of whom are unwilling to adopt and use such or any method involving sale of a chance to win by chance, or any method contrary to public policy, and refrain therefrom, or do not use any such method, and with effect that trade and custom was thereby diverted to him from said competitors;

- (b) Falsely caused representations to be made to customers and prospective customers, through use of words "manufacturers," "representatives," and "distributors," that he was a manufacturer or direct representative or direct distributor of the manufacturer of the merchandise sold and distributed by him;

With effect of misleading and deceiving many of his said customers into the erroneous belief that he was the manufacturer, etc., as above set forth, and that persons dealing with him were making their purchases from the manufacturer or direct representative or distributor thereof, as preferred by a substantial portion of purchasing public as securing such purchasers lower prices, superior quality, and other advantages not had through purchase from jobbers and middlemen, and were eliminating the profits of latter and obtaining various advantages not had by purchasing goods from latter, and of unfairly diverting trade to him from competitors, many of