

IN THE MATTER OF

A. K. HARPER, TRADING AS HARPER MANUFACTURING
COMPANY AND HARPER BRUSH WORKSCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3374. Complaint, Apr. 9, 1938—Decision, July 21, 1938*

Where an individual engaged in making, selling, and distributing sweeping and cleaning brushes, in advertising for sales people to sell his said products in various newspapers and periodicals having interstate circulation—

- (a) Represented "Make up to \$25 a day," "Make up to \$12 a day," facts being that only on rare and exceptional occasions had any of his said distributors made net profits of from \$12.00 to \$25.00 a day or over; very few of his distributors made an average net profit ranging between said sums for more than a few months consecutively, and such distributors do not make such a profit selling his said products under normal conditions after selling expense is deducted, such profit is determined by distributor's sales ability, selling costs, particular territory, and other business conditions, and no distributor is assured of any specified net profit by reason of engaging in aforesaid business;
- (b) Represented, as aforesaid, "We leave nothing undone toward your success and promotions are rapid," fact being that no promotions were contemplated or made, except that extra rates of compensation were given when certain monthly volume of sales was attained, and in a few instances salesmen were put on a salary basis and some made sales managers of assigned territory; and
- (c) Represented, as aforesaid, "Free fountain pen," and "Free brushes with your starting order," facts being that pens were furnished by him to his distributors only in consideration of placement of an order by them with him, including payment for goods thus purchased within specified period, and brushes were supplied by him to his distributors only when starting order was of a certain size, and were not in any way free, as cost thereof was included in total price paid for entire order, and said articles were furnished only to distributors who bought specified amounts of merchandise within specified periods of time;

With effect of misleading and deceiving persons into mistaken and erroneous belief that said representations were true, and into purchase of his said products in and on account of such beliefs thus induced, and of diverting trade unfairly to him from competitors similarly engaged who do not in any wise misrepresent the earnings to be made by distributors of their products, and do not make other misrepresentations made by him; to the prejudice of competition in commerce among the States and in the District of Columbia:

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

Mr. Wm. T. Chantland for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission having reason to believe that A. K. Harper, trading as Harper Manufacturing Co. and Harper Brush Works herein-after referred to as respondent, has violated the provisions of the 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. Respondent A. K. Harper is an individual doing business and trading under the names and styles of Harper Manufacturing Co. and Harper Brush Works, with his principal place of business at Fairfield, Iowa. He is now, and for some time past has been, engaged in making, selling, and distributing sweeping and cleaning brushes in commerce as hereinafter described.

PAR. 2. Said respondent, being engaged in business as aforesaid causes said sweeping and cleaning brushes, when sold, to be transported from his place of business in the State of Iowa to the purchasers thereof located in various points in States of the United States other than the State from which said shipments are made. Respondent maintains a course of trade in said sweeping and cleaning brushes distributed and sold by him in commerce between and among the various States of the United States.

PAR. 3. In the course and conduct of his said business respondent is now, and has been, in substantial competition with other individuals and with firms and corporations likewise engaged in the business of making, distributing and selling sweeping and cleaning brushes in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 4. In the course and operation of his said business and for the purpose of inducing the purchase of his said sweeping and cleaning brushes, respondent advertises in various newspapers and periodicals having an interstate circulation for sales people to sell his said products and such advertisements have included in them the following representations:

1. Make up to \$25 a day.
2. Make up to \$12 a day.
3. We leave nothing undone toward your success and promotions are rapid.
4. FREE FOUNTAIN PEN.
5. FREE BRUSHES with your starting order.

The above statements on the part of the respondent in his advertising literature and in other advertisements serve as representations

to prospective distributors that such distributors can make from \$12 to \$25 per day selling respondent's brushes. Such representations and implication are deceptive and misleading in that only on rare and exceptional days have any of respondent's distributors made net profits of from \$12 to \$25 a day or over. No distributor of respondent's brushes has ever made an average net profit of from \$12 to \$25 per day for any considerable or substantial period of time. Respondent's distributors do not make a net profit of from \$12 to \$25 per day selling respondent's brushes under normal conditions after selling expense is deducted. In fact, the profit made by distributors from selling respondent's products is determined by the distributor's sales ability, selling costs, the territory in which he is working and other business conditions and no distributor is assured of any specified net profit by reason of engaging in the business of distributing respondent's products. The representation that promotions are rapid is misleading in that no promotions are contemplated or are made. In fact, the distributors of respondent's brushes do not receive promotions as they are not employees of the respondent. Such distributors are in business for themselves and merely purchase respondent's brushes for resale for their own account.

The aforesaid statements with respect to the offer of a free fountain pen or free brushes are misleading in that no fountain pens are given free by the respondent. Fountain pens are furnished by the respondent to his distributors only in consideration of a placement of an order by such distributors with the respondent, including the payment for the goods so purchased within a specified period of time. The brushes purported to be given free with the distributor's starting order of a certain size are not given free. Such brushes are supplied by respondent to such distributors only when the starting order is of a certain size and are not in any way free goods as the cost thereof is included in the total price paid for the entire order. The articles represented as free are in fact furnished to distributors who purchase specified amounts of merchandise within specified periods of time.

PAR. 5. The use by the respondent of the aforesaid misleading and deceptive statements and representations in his advertising literature and otherwise has the capacity and tendency to, and does, mislead and deceive persons into the mistaken and erroneous belief that said representations are true and into the purchase of respondent's brushes in and on account of such beliefs induced as aforesaid. As a result, trade is diverted unfairly to the respondent from competitors engaged in similar businesses who do not in any wise misrepresent the earning to be made by distributors of their products and who do not make

the other misrepresentations made by the respondent herein. As a result thereof injury has been done and is now being done by respondent to competition in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 6. The above and foregoing acts and representations of the respondent have been and are all to the prejudice of the public and of respondent's competitors as aforesaid and constitute unfair methods of competition within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on the 9th day of April 1938, issued and, on April 12, 1938, served its complaint in this proceeding upon respondent, A. K. Harper, trading as Harper Manufacturing Co. and Harper Brush Works, charging him 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, a stipulation in lieu of testimony and other evidence was entered into by and between W. T. Kelley, chief counsel of the Commission, and the respondent, which was duly approved and received by the Commission in lieu of testimony and other evidence, and was duly recorded and filed in the office of the Commission.

Thereafter, the proceeding regularly came on for final hearing before the Commission on said complaint, the answer thereto and the said stipulation as to the facts, wherein it was agreed that the Commission might proceed upon said statement of facts to make its report stating its findings as to the facts (including inferences which it may draw from said stipulated facts) and its conclusion based thereon, and enter its order disposing of the proceeding without the presentation of argument or the filing of briefs; 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 A. K. Harper is an individual doing business and trading under the names and styles of Harper Manufacturing Co. and Harper Brush Works, with his principal place of business at Fairfield, Iowa, and is now, and for some time past has been, engaged in making, selling, and distributing sweeping and cleaning brushes in commerce as hereinafter described.

PAR. 2. Respondent causes said sweeping and cleaning brushes, when sold, to be transported from his place of business in the State of Iowa to the purchasers thereof located in various points in States of the United States other than the State from which said shipments are made, and maintains a course of trade in said sweeping and cleaning brushes sold and distributed by him in commerce between and among the various States of the United States.

PAR. 3. Respondent is in substantial competition with other individuals and with firms and corporations likewise engaged in the business of selling and distributing sweeping and cleaning brushes in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 4. In the course and operation of his said business and for the purpose of inducing the purchase of his said sweeping and cleaning brushes, respondent has advertised in various newspapers and periodicals having an interstate circulation for sales people to sell his said products, and in advertisements at various times the respondent has made the following representations:

1. Make up to \$25 a day.
2. Make up to \$12 a day.
3. We leave nothing undone toward your success and promotions are rapid.
4. **FREE FOUNTAIN PEN.**
5. **FREE BRUSHES** with your starting order.

The above statements on the part of the respondent in his advertisements serve as representations to prospective distributors that such distributors can make from \$12 to \$25 per day selling respondent's brushes. Such representations are deceptive and misleading, in that, only on rare and exceptional days have any of respondent's distributors made net profits of from \$12 to \$25 a day or over, and very few distributors of respondent's brushes have ever made an average net profit of from \$12 to \$25 per day for more than a few months consecutively. Respondent's distributors do not make a net profit of from \$12 to \$25 per day selling respondent's brushes under normal conditions after selling expense is deducted. The profit made by distributors from selling respondent's products is determined by the distributor's sales ability, selling costs, the territory in which he is working and other business conditions, and no distributor is assured of any specified net profit by reason of engaging in the business of distributing respondent's products. The representation that promotions are rapid is misleading in that no promotions are contemplated or are made, except that extra rates of commission were given when certain monthly volume of sales was attained, and in a few instances salesmen were put on a salary basis and some made sales managers of assigned territory.

The statements with respect to the offer of a free fountain pen or free brushes are misleading in that no fountain pens are given free by the respondent. The fountain pens are furnished by the respondent to his distributors only in consideration of a placement of an order by such distributors with the respondent, including the payment for the goods so purchased within a specified period of time. The brushes purported to be given free with the distributor's starting order of a certain size are not given free, but are supplied by respondent to such distributors only when the starting order is of a certain size and are not in any way free goods as the cost thereof is included in the total price paid for the entire order. The articles represented as free are furnished only to distributors who purchase specified amounts of merchandise within specified periods of time.

PAR. 5. The use by the respondent of the misleading and deceptive statements and representations above set out has the capacity and tendency to, and does, mislead and deceive persons into the mistaken and erroneous belief that said representations are true and into the purchase of respondent's brushes in and on account of such beliefs induced as aforesaid. As a result, trade in said commerce is diverted unfairly to the respondent from competitors engaged in similar businesses who do not in any wise misrepresent the earnings to be made by distributors of their products and who do not make the other misrepresentations made by the respondent therein. As a result thereof, injury has been done and is now being done by respondent to competition in commerce among and between the various States of the United States and in the District of Columbia.

CONCLUSION

The aforesaid acts and practices of the respondent, A. K. Harper, trading as Harper Manufacturing Co. and Harper Brush Works, 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, and a stipulation as to the facts in lieu of testimony and other evidence, whereby respondent waives hearing on the charges set forth in said complaint, and states that, without further evidence or other intervening procedure, the Commission may issue and serve

Order

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upon him findings as to the facts and conclusion, and an order to cease and desist from the violations of law charged in the complaint, and the Commission having made its findings as to the facts and conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That respondent A. K. Harper trading as Harper Manufacturing Co. and Harper Brush Works, his representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of his brushes in interstate commerce or in the District of Columbia, do forthwith cease and desist, in any manner, directly or indirectly, from representing:

1. That his salesmen make up to \$12 per day net, or any sum as an average wage which is in excess of the net average wage of his salesmen.

2. That promotions are rapid, when in fact no provisions nor any adequate provisions are made as to promotions.

3. That any articles are given "free," when in fact they are not so given, but dependent in whole or part on other considerations.

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.

Syllabus

IN THE MATTER OF

CALIFORNIA LUMBERMEN'S COUNCIL, COAST COUNTIES LUMBERMEN'S CLUB, CENTRAL VALLEY LUMBERMEN'S CLUB, NORTHERN COUNTIES LUMBERMEN'S CLUB, PENINSULA LUMBERMEN'S CLUB, SAN JOAQUIN LUMBERMEN'S CLUB ET AL.

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

Docket 2898. Complaint, Aug. 14, 1936—Decision, July 23, 1938

Where an association, composed of affiliated organizations, whose membership of retail dealers in, and vendors of, lumber and building materials constituted the membership of said association; the five affiliated organizations, two members from each of which made up the board of councilmen, which, together with said association's executive officers, including a president, vice president, secretary, and manager, administered its affairs; said retail member dealers and vendors, engaged in the purchase, sale, and distribution of lumber and building materials to contractors, builders, dealers, consumers, and other purchasers, and constituting a large and important part of the dealers in lumber and building materials in the State in question, and a group so influential in the trade that it was able to, and did, substantially influence and affect the flow of trade in commerce in lumber and building materials within and to the various trade areas in the respective territories in which said members operated and sold; and the officers, councilmen, directors, and members of said organizations; with intent and effect of enhancing and promoting the volume of trade and profits of such members—

Combined and conspired, by common and concerted action, to control and confine (1) as their primary objective, the retail distribution of lumber and building materials exclusively through their own members, and to prevent the direct sale of such products by manufacturers, producers, or wholesalers to all others, namely, nonmember dealers, vendors, contractors, consumers, and other purchasers, including State and political subdivisions; and, further, (2) to limit the sale and distribution of such products by the dealer members to those districts in which said members had their places of business; and (3) to prevent other dealers from selling such products in the trading area where a dealer member was located; and, in the case of two of the member organizations at least, the fixing and preparation of price lists to be observed by their members in their respective territories; and, in the case of one of such members, the fixing and determining of the quota of sales which a manufacturer, producer, or wholesaler could make monthly in its territory, and also the quota of business which a dealer member of its organization could do; and, in pursuance of the accomplishment of the aforesaid objectives—

(a) Prepared and published quarterly rosters, or lists, containing the names of their dealer members, and distributed the same to a large number of manufacturers, producers, and wholesalers of lumber and building materials, who