

Syllabus

IN THE MATTER OF
MALL TOOL COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3376. Complaint, Apr. 9, 1938—Decision, Aug. 25, 1938*

Where a corporation engaged in the assembling and manufacturing of machinery and equipment, including concrete vibrators, and in the sale and distribution thereof to construction contractors, dealers, and members of the public, in substantial competition with others similarly engaged—

Represented that motors or engines purchased by it from the manufacturer for use in such vibrators, and from which motors and engines it had removed manufacturer's name plate and identification, and upon which, and after reconstruction thereof, it had placed its own plates reading "Mall 3 h.p. 2500 r.p.m., type CC," together with identifying number, were motors or engines of its own make and were in fact 3 horsepower motors or engines for driving vibrator units made and sold by competitors;

Facts being motors or engines in question, capable of delivering 2.77 horsepower at 2,500 revolutions per minute, were made to be run at approximately 2,000 revolutions with horsepower developed in excess of 2 at such number of revolutions, regarded as proper and desirable safety factor which resulted in greatest operating efficiency and fewer replacements and less expense and loss of time incident thereto, such motors or engines, as reconstructed by it, did not develop sufficient power to be designated and described as 3 horsepower, as used and understood in trade in such connection, and did not develop enough power at 2,500 revolutions per minute to provide sufficient margin of safety, and operation thereof at such number of revolutions decreased their efficiency and increased necessity for replacements and repairs;

With tendency and capacity to mislead and deceive a substantial portion of purchasing public into erroneous belief that said representations were true, and that said motors or engines were made by it and were capable of producing 3 horsepower with sufficient margin of power in excess thereof to constitute a proper and desirable safety factor which would result in greatest operating efficiency, and to cause such portion of said public, by reason of said mistaken and erroneous belief, to buy its said product and thereby unfairly divert trade to it from its competitors, many of whom do not in any manner misrepresent concrete vibrators and equipment sold and offered for sale by them:

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.

Gardner & Hitzeman, of Chicago, Ill., for respondent.

Complaint

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COMPLAINT.

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, having reason to believe that Mall Tool Co., a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint and states its charges in that respect as follows:

PARAGRAPH 1. Respondent, Mall Tool Co., is a corporation organized and doing business under the laws of the State of Illinois, with its office and principal business at 7740 South Chicago Avenue, Chicago, Ill. Respondent is now, and for some time past has been engaged in the business of assembling, manufacturing, selling, and distributing machinery and equipment, including concrete vibrators, for placing and compacting concrete, including as a part thereof a power plant motivated either by gasoline as a fuel or by an electric current, to construction contractors working with concrete, and to dealers and members of the public. Respondent causes said concrete vibrators, when sold, to be transported from the State of Illinois to purchasers thereof located at points in the various other States of the United States and in the District of Columbia. There is now, and has been during all the time herein mentioned, a course of trade in said concrete vibrators by respondent in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business, respondent is now, and has been during all the times herein mentioned, engaged in substantial competition with various other corporations and with individuals and firms engaged in offering for sale and selling concrete vibrators to contractors, dealers, and members of the general public in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its business of assembling manufacturing, selling, and distributing its concrete vibrators in interstate commerce, and to induce the purchase thereof, respondent during the years 1936 and 1937 purchased over 600 Briggs & Stratton Model "B" 2 horsepower gasoline motors, and installed them as part of its vibrators. Thereupon and prior to advertising and sale, the maker's plates were removed by respondent from said 2 horsepower motors and a plate put on by it reading in part "Mall 3 h. p. 2500 r. p. m. Type CC". By such change of labels respondent represented that said motors were

of their own make, and were in fact 3 horsepower motors, and comparable in all respects as to efficiency, durability, and operating costs with similar motors which are in fact originally manufactured and put out as 3 horsepower motors. Said vibrators, including the power plant thus falsely marked, were catalogued, advertised, represented, and sold by respondent as equipped with a 3 horsepower gasoline engine. Said catalogues, advertisements, and representations are deceptive, false, and misleading, and tend to and do mislead prospective purchasers into the purchase of such falsely marked and advertised product in the belief that said advertisements and representations are true, and that they are obtaining a more powerful and efficient and durable motor than in fact they are receiving.

PAR. 4. There are among the competitors of respondent many who do not so misrepresent their concrete vibrators and equipment.

PAR. 5. The acts and practices of the respondent as above alleged in the course of selling and offering for sale its concrete vibrators in commerce as described herein have the capacity and tendency to, and do, mislead and deceive a substantial portion of the purchasers into the erroneous belief that said representations are true, and into the purchase of respondent's concrete vibrators because of the erroneous and mistaken beliefs induced as aforesaid. As a result thereof, substantial trade has been unfairly diverted to the respondent from those of its competitors referred to in paragraph 4 hereof who do not misrepresent their concrete vibrators. In consequence thereof, injury has been, and is being, done to respondent's competitors in commerce among and between the various States of the United States.

PAR. 6. The above and foregoing acts and practices of the respondent have been and are all to the prejudice of the public and the respondent's competitors and constitute unfair methods of competition in commerce within the meaning and intent 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 the 11th day of April 1938 served, its complaint in this proceeding upon respondent, Mall Tool Co., a corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. On May 27, 1938, the respondent filed its answer in this proceeding. Thereafter, a stipulation was entered into whereby it was stipulated and agreed that a statement of facts signed and executed by the respondent and its counsel, Harry Hitzeman, and W. T. Kelley, Chief Counsel for the Federal Trade Commission, subject to the approval of the Commission, may be taken

Findings

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as the facts in this proceeding and in lieu of testimony in support of the charges stated in the complaint, or in opposition thereto, and that the said Commission may proceed upon said statement of facts to make its report, stating its findings as to the facts and its conclusion based thereon and enter its order disposing of the proceeding without the presentation of argument or the filing of briefs. Thereafter, this proceeding regularly came on for final hearing before the Commission on said complaint, answer, and stipulation, said stipulation having been approved and accepted, 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 its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Mall Tool Co., is a corporation organized and doing business under the laws of the State of Illinois, with its office and principal place of business at 7740 South Chicago Avenue, Chicago, Ill. Respondent is now, and for some time past has been, engaged in the business of assembling and manufacturing of machinery and equipment, including concrete vibrators, for placing and compacting concrete, a part thereof being a power plant motivated either by gasoline as a fuel or by an electric current, and in the sale and distribution thereof to construction contractors working with concrete, and to dealers and members of the public. Respondent causes said concrete vibrators, when sold, to be transported from the State of Illinois to purchasers thereof located at points in the various States of the United States and in the District of Columbia. There is now, and has been during all the time mentioned herein, a course of trade in said concrete vibrators by respondent in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business, respondent now is, and for some time past has been, engaged in substantial competition with various other corporations and with individuals and firms engaged in offering for sale and selling concrete vibrators to contractors, dealers, and members of the general public in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its business of selling and distributing its concrete vibrators in interstate commerce and to induce the purchase thereof, respondent, during the years 1936 and 1937, purchased more than 600 Briggs & Stratton Model "B" motors or engines and installed such motors or engines as part of its con-

crete vibrators. These motors or engines were manufactured by the firm of Briggs & Stratton and did not bear any marks or labels specifying the horsepower of said motors or engines. Prior to the advertising and the sale and distribution of said concrete vibrators with said motors or engines as a part thereof, respondent removed from said motors or engines the name plates bearing the following words and letters: "Briggs & Stratton Model 'B'," and the motor identification number placed thereon by the manufacturer thereof, dismantled said motors or engines and reconstructed them to meet the requirements for the type of work for which they were being offered for sale and sold. After said motors or engines were reconstructed, the respondent placed name plates thereon reading in part as follows: "Mall 3 h. p. 2500 r. p. m., type CC," and bearing a number for the completed unit for use in ordering parts for any portion of the completed vibrator assembled. Thereafter, the respondent, in offering for sale and selling said concrete vibrators, represented that said motors or engines were of its own make and were, in fact, 3 horsepower motors or engines, comparable in all respects as to efficiency, durability, and operating costs with 3 horsepower motors or engines for driving vibrator units manufactured and sold by competitors.

The motors or engines as delivered to the respondent were capable of developing 2.77 horsepower at 2,500 revolutions per minute, and said motors or engines were manufactured to be run at approximately 2,000 revolutions per minute and the horsepower developed in excess of 2 horsepower at 2,000 revolutions per minute was, and is, regarded as a proper and desirable safety factor which results in the greatest operating efficiency of said motors or engines, requiring fewer replacements, less repair expense, and loss of time incident thereto. Said motors or engines, as reconstructed by the respondent, did not, and do not, develop sufficient power to be designated and described as developing 3 horsepower as that term is used and understood in the trade in designating the power of motors or engines. Said motors or engines do not develop enough power at 2,500 revolutions per minute to provide a sufficient margin of safety, and the operation of said motors or engines at 2,500 revolutions per minute decreases their efficiency and increases the necessity for replacements and repairs.

PAR. 4. The acts and practices of respondent as hereinabove set out in reconstructing said motors or engines and placing said name plates thereon, and in making the representations that said motors or engines were of its own make and were 3 horsepower motors or engines, in connection with the offering for sale and sale of its said

concrete vibrators, had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that said representations were true and that said motors or engines were made or manufactured by the respondent and were capable of producing 3 horsepower with a sufficient margin of power in excess of 3 horsepower as a proper and desirable safety factor which would result in the greatest operating efficiency of said motors or engines; and to cause a substantial portion of the purchasing public, because of said mistaken and erroneous belief, to purchase respondent's said product, thereby unfairly diverting trade in said commerce to the respondent from its competitors, many of whom do not, in any manner, misrepresent the concrete vibrators and equipment sold and offered for sale by them.

CONCLUSION

The aforesaid acts and practices of the respondent, Mall Tool Co., a corporation, 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 duly approved by the Commission and made a part of the record in this case, 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, Mall Tool Co., a corporation, its officers, representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of its concrete vibrators or engines and motors for same in interstate commerce or in the District of Columbia, do cease and desist, either directly or by any corporate or other device, from representing or implying:

1. That engines or motors made by others than respondent have a different horsepower than the rating given such engines or motors by the makers thereof;

2. That engines or motors purchased from others are made or manufactured by the respondent.

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
LEOPOLD SPIELDOCK AND SAMUEL FINEBERG, DOING
BUSINESS AS GOODYEAR ASSOCIATES
COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 3475. Complaint, July 8, 1938—Decision, Aug. 25, 1938

Where two individuals, engaged as partners in sale of storm coats, bed comforters, steamer rugs, umbrellas, electric irons, and a variety of articles of merchandise to clubs, fraternal organizations, hospitals, charitable institutions, and associations, for resale or distribution to the purchasing public under their so-called "Club Plan," and in advertising, through printed cards, circulars, letters, and by personal solicitation, their said merchandise and their said plan, under which in each club the member whose name or number was drawn at weekly drawings received, without payment of further weekly dues for which members obligated themselves, one of articles of merchandise being thus distributed through said lottery scheme or gift enterprise, and thereby paid in accordance with such chance determination for particular articles concerned, value of which was greater than the payment of one, two, or three weeks' dues, but which were sold by said partner individuals to their customers for less than dues collected—

Sold and offered said various articles to aforesaid purchasers, along with said plan or method, and furnished therewith to such purchasers the necessary paraphernalia and materials for carrying the same into effect, and thus supplied to and placed in the hands of others means of conducting lotteries in the sale or distribution of their said merchandise in accordance with plan or method hereinabove set forth, and aided and abetted such various purchaser organizations, associations, and the like, through the furnishing of advertisements, circulars, cards, and paraphernalia, in thus disposing of their said products, in violation of the established public policy of the United States Government, and in competition with many who are unwilling to offer or sell their merchandise together with a sales plan or method involving a lottery scheme or gift enterprise and refrain therefrom;

With result that many associations, organizations, societies, and ultimate purchasers, attracted by said plan and method and element of chance involved in sale or distribution of merchandise, were thereby induced to buy articles sold and distributed by said individuals in preference to like articles offered and sold by competitors who do not use same or an equivalent method, and with tendency and capacity unfairly to divert to them trade and custom from their said competitors above set forth, exclude from said trade all competitors who are unwilling to and do not use such practice or method as unlawful, lessen competition in such trade, deprive purchasing public of benefit of free competition therein, and eliminate therefrom