

Syllabus

IN THE MATTER OF
NATIONAL BISCUIT COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF SEC. 3 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AND AMENDMENTS THERETO

Docket 3607. Complaint, Sept. 24, 1938—Decision, Jan. 17, 1939

Where a corporation which (1) was engaged in manufacture, offer, sale, and distribution in commerce of bakery and packaged food products including, chiefly, biscuits, (2) constituted, by volume of sales, largest concern in the United States in such business, and represented consolidation of several companies previously thus engaged, (3) had factories and plants in 21 of more different States and selling agencies or branches in some 257 cities in and through which it maintained very extensive sales and delivery organization for its products and stocks, and from which sales and deliveries to retailers, chiefly, could be and were made by truck, and, as aforesaid engaged in transporting its said products from its various places of business in various States and in the District of Columbia to purchasers in such and various other States and in said District, in substantial competition with others likewise engaged in sale of similar products among the various States and in said District, and with many smaller concerns which were not able to carry on the same character of deliveries direct to retailers as conducted by it as above described, and could not be, and were not, sufficiently equipped as to localized storage and delivery facilities to their purchasers to be able so to do;

In dealing through agents and representatives with certain jobbers and wholesalers who performed little or no service for it, but whom its said agents and representatives certified as headquarters of retail group buyers located in the territory in which such jobbers and wholesalers sold and distributed their products, notwithstanding fact that they did not represent such buyers nor have any connection therewith—

(a) Entered into understandings, agreements, and combinations with jobbers and wholesalers aforesaid, under which (1) it undertook and agreed to, and did, pay to such jobbers and wholesalers percentage on, or discount upon, aggregate amount of purchases from it by retailers who were on lists allocated by such agents and representatives to each of said jobbers and wholesalers and were located in the territories thereof, and (2) said wholesalers or jobbers, in consideration of payment aforesaid, agreed not to deal in product of a competitor or competitors of it, and thereby paid them such percentages or discounts upon purchases by retailers aforesaid on condition or understanding that they would not deal in products of a competitor or competitors;

With intent and effect of preventing wholesalers and jobbers with whom it dealt, from dealing in products of competitors and of preventing them from rendering to competitors customary or ordinary services of jobbers or wholesalers, and of curtailing greatly services to competitors of jobbers or wholesalers in the marketing of competitors' products pending receipt by said jobbers and wholesalers of compensation from it as industry's largest and dominant factor:

Complaint

28 F. T. C.

Held, That such acts and practices were all to the prejudice and injury of the public and competitors and constituted unfair methods of competition; and Where said corporation, engaged and acting as above described—

- (b) Paid, under understandings, agreements, and arrangements above set forth, such discounts and percentages, both to many wholesalers and jobbers who were and continued to be its customers, as well as to noncustomers and jobbers;

With intent and effect aforesaid:

Held, That such acts and practices constituted a violation of Section 3 of an Act of Congress approved October 15, 1914, and amendments thereto.

Mr. Daniel J. Murphy for the Commission.

Davis, Polk, Wardwell, Gardiner & Reed and *Mr. George H. Coppers*, of New York City, for respondent.

COMPLAINT

Count 1

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 National Biscuit Co., hereinafter referred to as respondent, has violated the provisions of 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, National Biscuit Co., a corporation, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business at 449 West 14th Street, New York, N. Y., with factories, branches, and selling agencies in many States of the United States. It is now, and for more than 3 years last past has been, engaged in the manufacture, offering for sale, sale, and distribution in commerce of bakery and packaged food products, chiefly biscuits, of which it makes and sells over 500 varieties. It has caused, and still causes, such products when sold by it to be transported from its various places of business in various States of the United States and in the District of Columbia to the purchasers thereof, some located in the States in which it has its places of business and others located in various other States of the United States and in the District of Columbia, and there is now, and for more than 3 years last past has been, a constant current of trade in commerce by respondent in such products between and among the various States of the United States and in the District of Columbia. In the course and conduct of its business, respondent is now, and for more than 3 years last past has

been, in substantial competition with other corporations and with persons, firms, and partnerships engaged in the sale of similar products, between and among the various States of the United States and in the District of Columbia.

PAR. 2. Respondent, by volume of sales, is the largest concern in the United States engaged in the business hereinabove described, and is itself a consolidation or combination of several companies previously thus engaged, and it also owns several subsidiaries similarly engaged. Respondent has capital stock (common and preferred) issued and outstanding in excess of \$85,000,000 par value. Respondent has factories and plants in 21 or more different States of the United States, and has selling agencies or branches in approximately 257 cities in various States of the United States. In and through its said selling branches, respondent maintains a very extensive sales and delivery organization for its products, and stocks from which sales and deliveries chiefly to retailers can be and are made by automobiles.

Among respondent's competitors in commerce, as described in paragraph 1 hereof, are many smaller concerns which cannot be and are not sufficiently equipped as to localized storage and delivery facilities to their purchasers, and which are not able to carry on the same character of deliveries direct to retailers as conducted by respondent in the manner hereinabove described. By reason thereof, such smaller competitors are in large measure dependent upon jobbers and wholesalers for their marketing outlets to retailers.

Well knowing its dominance in the manner hereinabove described and the consequent dependence of many of its smaller competitors upon jobbers and wholesalers, respondent, for the purpose of injuring such smaller competitors, enters into understandings, agreements, and combinations with jobbers and wholesalers by which, although they perform little or no service for respondent, respondent undertakes and agrees to, and does, pay to them a percentage on or discount upon the aggregate amount of purchases from respondent by retailers on lists of retailers allocated to and furnished by respondent to each such jobber and wholesaler. Such arrangements or agreements are commonly referred to as "headquarters discount agreements." Some of such payments are made direct by respondent, and others through other agencies. The lists of retailers thus made up and furnished by respondent are not confined to bona fide or actual customers of respondent or of its jobbers and wholesalers, but include many who are not customers of and who are not known to the jobbers or wholesalers to whom they are allocated. In some instances where listed retailers are not customers of jobbers, payments by respondent are made to

Complaint

28 F. T. C.

such jobbers and wholesalers in arbitrary lump sums, and in various instances said alleged percentage, discount, or sum was in truth and in fact a payment without consideration other than the agreement of such jobbers or wholesalers not to deal in the products of a competitor or competitors of the respondent.

The purpose and effect of such lists so furnished and payments so made by respondent, is unfairly to induce and prevent said jobbers and wholesalers from rendering to competitors of respondent the customary and ordinary services of jobbers or wholesalers and greatly to curtail the services of jobbers and wholesalers to respondent's competitors in the marketing of their products, so long as said jobbers and wholesalers thus induced continue to receive compensation from respondent, the largest and dominant factor in the industry, in return for practically no service performed.

PAR. 3. The acts and practices of the respondent as herein alleged are all to the prejudice of the competitors of respondent and of the public; have a dangerous tendency to hinder and prevent, and have actually hindered and prevented, competition in the sale of bakery and packaged food products in commerce within the intent and meaning of the Federal Trade Commission Act; have unreasonably restrained such commerce in such bakery and packaged food products; and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Count 2

The Federal Trade Commission, having reason to believe that National Biscuit Co., a corporation, hereinafter called respondent, has violated, and now is violating, the provisions of Section 3 of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), hereby issues this its complaint against respondent, and states its charges with respect thereto as follows, to wit:

PARAGRAPH 1. For its charges under this paragraph of this count, said Commission relies upon the matters and things set out in paragraph 1 and the first and second subparagraphs of paragraph 2 of count 1 of this complaint to the same extent and as though the allegations thereof were set out in full herein, and they are incorporated herein by reference and made a part of the allegations of this count.

PAR. 2. Respondent, in some instances, and in some portions of the United States, sells its products to jobbers and wholesalers who

maintain sufficient stock to fill emergency and some other orders. In such instances and places respondent sells such stock to its said jobbers and wholesalers only upon the condition, agreement, and understanding that such jobbers or wholesalers will not deal in or sell products of a competitor or competitors of respondent.

The effect of said sales by respondent upon such conditions, agreements, and understandings may be, is, and has been, to substantially lessen competition or tend to create a monopoly in respondent in commerce between and among the various States of the United States and in the District of Columbia, in bakery and packaged food products.

PAR. 3. The aforesaid acts of respondent constitute a violation of the provisions of Section 3 of the hereinabove mentioned Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act).

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act and the provisions of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and amendments thereto, the Federal Trade Commission on September 24, 1938, issued its complaint in the above entitled proceeding and caused same to be served upon the respondent above named, National Biscuit Co., a corporation, charging it with the use of unfair methods of competition and unfair or deceptive acts and practices in violation of the provisions of said acts. After the issuance and service of said complaint, a stipulation as to the facts was made and entered into by and between W. T. Kelley, Chief Counsel for the Federal Trade Commission, and the respondent, which stipulation was accepted and approved by the Commission on November 18, 1938. This stipulation provided that the statement of facts contained therein may be made a part of the record herein and taken 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 said Commission may proceed upon such statement and inferences that may be drawn therefrom, to make its report stating its findings as to the facts and its conclusions based thereon and enter its order disposing of the proceeding without the presentation of arguments or the filing of briefs.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, National Biscuit Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business at 449 West 14th Street, New York, N. Y., and with factories, branches, and selling agencies in many States of the United States. It is now, and for more than 3 years last past has been, engaged in the manufacture, offering for sale, sale, and distribution in commerce of bakery and packaged food products, chiefly biscuits of which it makes and sells over 500 varieties. It has caused, and still causes, such products when sold by it to be transported from its various places of business in various States of the United States and in the District of Columbia to the purchasers thereof, some located in the States in which it has its place of business and others located in various other States of the United States and in the District of Columbia, and there is now, and for more than 3 years last past has been, a constant current of trade in commerce by respondent in such products between and among the various States of the United States and in the District of Columbia. In the course and conduct of its business, respondent is now, and for more than 3 years last past has been, in substantial competition with other corporations and with persons, firms, and partnerships engaged in the sale of similar products between and among the various States of the United States and in the District of Columbia.

PAR. 2. The respondent, by volume of sales, is the largest concern in the United States engaged in the business described in paragraph 1 hereof, and is itself a consolidation or a combination of several companies previously thus engaged. Respondent has capital stock (common and preferred) issued and outstanding in excess of \$85,000,000 par value. Respondent has factories and plants in 21 or more different States of the United States and has selling agencies or branches in approximately 257 cities in various States of the United States. In and through its said selling branches respondent maintains a very extensive sales and delivery organization for its products and stocks from which sales and deliveries, chiefly to retailers, can be and are made by motor trucks.

PAR. 3. Among respondent's competitors in commerce, as described in paragraph 1 hereof, are many smaller concerns which cannot be and are not sufficiently equipped as to localized storage and delivery facilities to their purchasers and which are not able to carry on the same character of deliveries direct to retailers as conducted by re-

spondent in the manner hereinabove described. By reason thereof such smaller competitors are in large measure dependent upon jobbers and wholesalers for their marketing outlets to retailers.

PAR. 4. Agents and representatives of respondent, acting for and on behalf of respondent, have entered into understandings, agreements, and combinations with certain jobbers and wholesalers by which, although they performed little or no service for respondent, respondent undertook and agreed to, and did, pay to them a percentage on or discount upon the aggregate amount of purchases from respondent by retailers on lists of retailers allocated, by said agents and representatives, to each such jobber and wholesaler, said retailers having been in the territories of said jobbers and wholesalers. In consideration of the payment of said percentages or discounts, the said wholesalers or jobbers agreed, with said agents and representatives of respondent, not to deal in the products of a competitor or competitors of respondent. Some of such payments were made direct by respondent and others through other agencies. Said agents and representatives certified to respondent that said wholesalers and jobbers were the headquarters of retail group buyers located in the territory where the said jobbers and wholesalers sold and distributed their products, whereas in fact said retail buyers were not represented by nor connected with said wholesalers and jobbers. The result of said understandings, agreements, and combinations was that respondent paid to said wholesalers or jobbers said percentages on or discounts upon the purchases by said retailers on the condition or understanding that such jobbers or wholesalers would not deal in the products of a competitor or competitors of respondent.

PAR 5. Many of said wholesalers and jobbers referred to above were and continue to be customers of the respondent and they as well as noncustomer wholesalers and jobbers received said discounts and percentages on understandings, agreements, and arrangements as above set forth.

PAR. 6. The purpose and effect of the understandings, agreements, or combinations described in paragraph 4 hereof, were to prevent the wholesalers and jobbers with whom respondent had dealings from dealing in the products of competitors of respondent, and further to prevent said jobbers and wholesalers from rendering to competitors of respondent the customary and ordinary services of jobbers or wholesalers and greatly to curtail the services of jobbers or wholesalers to competitors of respondent in the marketing of their products, so long as said jobbers and wholesalers continued to receive compensation from respondent, the largest and dominant factor in the industry.

Order

28 F. T. C.

CONCLUSIONS

The acts and practices of the respondent, as set out in paragraphs 1, 2, 3, 4, and 6 hereof, are all to the prejudice and injury of the public and to competitors of the respondent and constitute unfair methods of competition, within the intent and meaning of the provisions of the Federal Trade Commission Act, and the acts and practices of the respondent as set out in paragraphs 1, 2, 3, 4, 5, and 6 hereof, constitute a violation of Section 3 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and amendments thereto.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, and a stipulation as to the facts entered into between the respondent herein and W. T. Kelley, Chief Counsel for the Commission, which provides, among other things, that without further evidence or other intervening procedure, the Commission may issue and serve upon the respondent herein findings as to the facts and conclusions based thereon and an order disposing of the proceedings, and the Commission having made its findings as to the facts and conclusions that said respondent has violated the provisions of the Federal Trade Commission Act, and also the provisions of Section 3 of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes."

It is ordered, That the respondent, National Biscuit Co., a corporation, its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of bakery and packaged food products in interstate commerce or in the District of Columbia, do forthwith cease and desist from:

1. Entering into any contract, agreement, or understanding with wholesalers, jobbers, or any other dealer in bakery and packaged food products, that such wholesaler, jobber, and dealer shall not deal in bakery and packaged food products made by any one other than the respondent; and from agreeing to pay, and from paying, to any such wholesaler, jobber, or any other dealer commissions, discounts, or compensation of any kind upon the agreement or understanding of such wholesaler, jobber, or dealer, that he shall not deal in the products of a competitor of respondent.

Order

2. Making any sale or contract for the sale of bakery and packaged food products for use, consumption, or resale, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the purchaser thereof shall not use or deal in the goods, wares, merchandise, supplies, or other commodities of a competitor or competitors of 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.

IN THE MATTER OF
GUY J. BANTA DOING BUSINESS AS CAL-A-MO
LABORATORIES

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

Docket 3185. Complaint, July 23, 1937—Decision, Jan. 18, 1939

Where an individual engaged in sale and distribution of reducing preparation under name of "Cal-A-Mo Reducing Bath" to purchasers in State of California and in various other States and in District of Columbia in substantial competition with others engaged in sale of reducing preparations among the various States and in said District of Columbia; in advertising his said product in newspapers of general circulation and through advertising folders and matter printed and circulated throughout the various States and through radio broadcasts:

- (a) Represented that his said product was a reducing preparation which contained ingredients that would get rid of excess fat and that by means thereof the user would be enabled to bathe off excess fat or float fat away and that it dissolved fat and penetrated the pores of the skin so as to cause loss thereof and reduction in weight, and that it was harmless in all cases, through such statements, among others, as "The safe way to reduce," "A healthful, harmless way to bathe off excess fat," "The equivalent of a reducing bath in the famous European spas," "Penetrates your pores and reaches your excess fat," etc; facts being said product contained no ingredients which would get rid of excess fat, it was not a reducing preparation, and did not prove harmless in all cases, and claims and representations made by it as above indicated were false, misleading, and untrue.
- (b) Represented, through use of words "Cal-A-Mo Laboratories" in his trade name and advertising matter, to members of the purchasing public that he owned, operated, or maintained a laboratory for the manufacture, experimentation, or testing of his aforesaid "Cal-A-Mo Reducing Bath" product, facts being said preparation was not made by him but by a drug company and after purchase removed by him from the original package and repackaged and labeled for sale through department and drug stores and drug jobbers.

With effect of misleading a substantial portion of purchasing public into erroneous and mistaken belief that such statements and representations were true, and with result that public, acting under mistaken and erroneous belief induced by such false and misleading statements and representations, purchased substantial volume of his aforesaid preparation and trade was unfairly diverted to him from his competitors who truthfully advertise and represent the place of manufacture of their product to the injury of competition in commerce:

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

Before *Mr. Charles P. Vicini*, trial examiner.

Mr. Reuben J. Martin for the Commission.

Mr. Lee Roy Brigham, of Los Angeles, Calif., for respondent.