

Syllabus

IN THE MATTER OF

MCDOWELL, PYLE & COMPANY, INC.

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

Docket 3832. Complaint, June 22, 1939—Decision, Aug. 14, 1939

Where a corporation engaged in sale and distribution of peanuts and confectionery products, including certain assortments of peanuts which were so packed or assembled as to involve the use of games of chance, gift enterprises, or lottery schemes when sold and distributed to the consumers thereof, and which were composed of (1) thirty-six $\frac{1}{2}$ -pound tins of peanuts and twelve 1-pound tins, together with punchboard for sale and distribution of said peanuts under a plan and in accordance with said board's explanatory legend pursuant to which purchasers securing certain numbers from board received for 2 cents paid 1 of said half-pound or pound tins, value of which was in excess of said amount, and purchasers of last punches in each of 16 sections in which board was divided received half-pound tin, and purchaser who did not qualify by obtaining 1 of lucky numbers or by punching last number in 1 of sections received nothing for his money other than privilege of punching number from board, and of (2) various other assortments of peanuts, together with punchboards involving lot or chance feature and similar to that hereinbefore described and varying therefrom in detail only—

Sold to retailers or purchasers such assortments along with said punchboards for their use in selling and distributing its said peanuts in accordance with aforesaid sales plan, and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale of its products in accordance with said plan as above set forth, involving game of chance or sale of a chance to procure tins of peanuts at price much less than normal retail price thereof, contrary to the established public policy of the United States Government and in violation of the criminal laws, and in competition with many who are unwilling to adopt and use said or any method involving game of chance or sale of a chance to win something by chance, or any other method contrary to public policy, and refrain therefrom;

With result that many persons were attracted by said sales plan or method employed by it in sale and distribution of its peanuts and by element of chance involved therein, and were thereby induced to buy its said products in preference to peanuts offered and sold by said competitors who do not use same or equivalent method, and with effect, by reason of said game of chance, of diverting trade in commerce unfairly to it from its competitors aforesaid, to the substantial 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.

Mr. D. C. Daniel for the Commission.

Complaint

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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 McDowell, Pyle & Co., Inc., a corporation, 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 interest of the public, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, McDowell, Pyle & Co., Inc., is a corporation organized and doing business under the laws of the State of Maryland, with its principal office and place of business located at 221 West Pratt Street, Baltimore, Md. Respondent is now, and for some time last past has been engaged in the sale and distribution of peanuts and confectionery products in commerce between and among the various States of the United States and in the District of Columbia. Respondent causes, and has caused, said products, when sold, to be transported from its aforesaid place of business in Baltimore, Md., to purchasers thereof at their respective points of location in the various other States of the United States and in the District of Columbia. There is now, and has been for some time last past, a course of trade by respondent in such products in commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of said business respondent is, and has been, in competition with other corporations and with partnerships and individuals engaged in the sale and distribution of like or similar products 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, as described in paragraph 1 hereof, respondent sells, and has sold, to retail dealers certain assortments of tins of peanuts so packed or assembled as to involve the use of games of chance, gift enterprises, or lottery schemes when sold and distributed to the consumers thereof. One of said assortments is hereinafter described for the purpose of showing the method used by respondent, and is as follows:

This assortment consists of thirty-six $\frac{1}{2}$ -pound tins of peanuts and twelve 1-pound tins of peanuts, together with a device commonly called a punchboard. Said tins of peanuts are sold and distributed to the consuming public by means of said punchboard in the following manner: Sales are 2 cents each and when a punch is made from the board a number is disclosed. The numbers begin with 1 and continue to the number of punches there are on the board, but the numbers

are not arranged in numerical sequence. The board bears the statement or statements informing prospective purchasers that certain specified numbers entitle the purchaser thereof to receive a ½-pound or 1-pound tin of peanuts. The punches on the board are arranged in 16 sections, and the purchaser of the last punch in each section receives a ½-pound tin of peanuts. A purchaser who does not qualify by obtaining 1 of the lucky numbers, or by punching the last number in 1 of the sections, receives nothing for his money other than the privilege of punching a number from the board. The tins of peanuts are worth more than 2 cents each, and the purchaser who obtains 1 of the numbers calling for 1 of the tins of peanuts receives the same for the price of 2 cents. The numbers are effectively concealed from purchasers and prospective purchasers until a punch or selection has been made and the particular punch separated from the board. The tins of peanuts are thus distributed to purchasers of punches from the board wholly by lot or chance.

Respondent sells and distributes, and has sold and distributed, various assortments of peanuts along with punchboards, involving a lot or chance feature, but such assortments are similar to the one hereinabove described and vary only in detail.

PAR. 3. The dealers or purchasers to whom respondent furnishes said punchboards use the same in selling and distributing respondent's said peanuts in accordance with the aforesaid sales plan. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of its products in accordance with the sales plan hereinabove set forth. The use by respondent of said method in the sale of its peanuts and the sale of said peanuts by and through the use thereof and by the aid of said method is a practice of the sort which is contrary to an established public policy of the Government of the United States and in violation of the criminal laws.

PAR. 4. The sale of peanuts to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure tins of peanuts at a price much less than the normal retail price thereof. Many persons, firms, and corporations, who sell or distribute peanuts in competition with the respondent, as above alleged, are unwilling to adopt and use said method or any method involving a game of chance or the sale of a chance to win something by chance, or any other method that is contrary to public policy, and such competitors refrain therefrom. Many persons are attracted by said sales plan or method employed by respondent in the sale and distribution of its peanuts and the element of chance involved there-

in, and are thereby induced to buy and sell respondent's peanuts in preference to peanuts offered for sale and sold by said competitors of respondent who do not use the same or an equivalent method. The use of said method by respondent, because of said game of chance, has a tendency and capacity to, and does, unfairly divert trade in commerce between and among the various States of the United States and in the District of Columbia to respondent from its said competitors who do not use the same or an equivalent method. As a result thereof, substantial injury is being, and has been, done by respondent to competition in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 5. The aforesaid acts and practices of respondent, as herein alleged, are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce 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 June 22, 1939, issued and thereafter served its complaint in this proceeding upon respondent McDowell, Pyle & Co., Inc., charging it with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer, the Commission, by order entered herein granted respondent's request for permission to withdraw said answer and to substitute therefore an answer admitting all of the material allegations of fact set forth in said complaint and waiving all intervening procedure and further hearing as to said facts, which substitute answer was duly filed in the office of the Commission. Thereafter the proceeding regularly came on for final hearing before the Commission on the said complaint and substitute answer, and the Commission, having duly considered the matter, and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, McDowell, Pyle & Co., is a corporation organized and doing business under the laws of the State of Maryland, with its principal office and place of business located at 221

West Pratt Street, Baltimore, Md. Respondent is now, and for some time last past has been, engaged in the sale and distribution of peanuts and confectionery products in commerce between and among the various States of the United States and in the District of Columbia. Respondent causes, and has caused, said products, when sold, to be transported from its aforesaid place of business in Baltimore, Md., to purchasers thereof at their respective points of location in the various other States of the United States and in the District of Columbia. There is now, and has been for some time last past, a course of trade by respondent in such products in commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of said business respondent is, and has been, in competition with other corporations and with partnerships and individuals engaged in the sale and distribution of like or similar products 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, as described in paragraph 1 hereof, respondent sells, and has sold, to retail dealers certain assortments of tins of peanuts so packed or assembled as to involve the use of games of chance, gift enterprises, or lottery schemes when sold and distributed to the consumers thereof. One of said assortments is hereinafter described for the purpose of showing the method used by respondent, and is as follows:

This assortment consists of thirty-six $\frac{1}{2}$ -pound tins of peanuts and twelve 1-pound tins of peanuts, together with a device commonly called a punchboard. Said tins of peanuts are sold and distributed to the consuming public by means of said punchboard in the following manner: Sales are 2 cents each and when a punch is made from the board a number is disclosed. The numbers begin with 1 and continue to the number of punches there are on the board, but the numbers are not arranged in numerical sequence. The board bears the statement or statements informing prospective purchasers that certain specified numbers entitle the purchaser thereof to receive a $\frac{1}{2}$ -pound or 1-pound tin of peanuts. The punches on the board are arranged in 16 sections, and the purchaser of the last punch in each section receives a $\frac{1}{2}$ -pound tin of peanuts. A purchaser who does not qualify by obtaining 1 of the lucky numbers, or by punching the last number in 1 of the sections, receives nothing for his money other than the privilege of punching a number from the board. The tins of peanuts are worth more than 2 cents each, and the purchaser who obtains 1 of the numbers calling for 1 of the tins of peanuts receives the same for the price of 2 cents. The numbers are effectively concealed from

Findings

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purchasers and prospective purchasers until a punch or selection has been made and the particular punch separated from the board. The tins of peanuts are thus distributed to purchasers of punches from the board wholly by lot or chance.

Respondent sells and distributes, and has sold and distributed, various assortments of peanuts along with punchboards involving a lot or chance feature, but such assortments are similar to the one hereinabove described and vary only in detail.

PAR. 3. The dealers or purchasers to whom respondent furnishes said punchboards use the same in selling and distributing respondent's said peanuts in accordance with the aforesaid sales plan. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of its products in accordance with the sales plan hereinabove set forth. The use by respondent of said method in the sale of its peanuts and the sale of said peanuts by and through the use thereof and by the aid of said method is a practice of the sort which is contrary to an established public policy of the Government of the United States and in violation of the criminal laws.

PAR. 4. The sale of peanuts to the purchasing public in the manner above found involves a game of chance or the sale of a chance to procure tins of peanuts at a price much less than the normal retail price thereof. Many persons, firms, and corporations, who sell or distribute peanuts in competition with the respondent, as above found, are unwilling to adopt and use said method or any method involving a game of chance or the sale of a chance to win something by chance, or any other method that is contrary to public policy, and such competitors refrain therefrom. Many persons are attracted by said sales plan or method employed by respondent in the sale and distribution of its peanuts and the element of chance involved therein, and are thereby induced to buy and sell respondent's peanuts in preference to peanuts offered for sale and sold by said competitors of respondent who do not use the same or an equivalent method. The use of said method by respondent, because of said game of chance, has a tendency and capacity to, and does, unfairly divert trade in commerce between and among the various States of the United States and in the District of Columbia to respondent from its said competitors who do not use the same or an equivalent method. As a result thereof, substantial injury is being, and has been, done by respondent to competition in commerce between and among the various States of the United States and in the District of Columbia.

CONCLUSION

The aforesaid acts and practices of respondent, as herein found, are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices 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 and the answer of respondent, in which answer respondent admits all the material allegations of fact set forth in said complaint and states that it waives all intervening procedure and further hearing as to said facts 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 the respondent, McDowell, Pyle & Co., Inc., 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 peanuts or any other merchandise in commerce as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Selling or distributing peanuts or any other merchandise so packed and assembled that sales of said peanuts or other merchandise to the general public are to be made or may be made by means of a lottery, gaming device, or gift enterprise.

2. Supplying to or placing in the hands of dealers punchboards, push or pull cards or other lottery devices, either with assortments of said peanuts or other merchandise or separately, which said punchboards, push or pull cards or other lottery devices are to be used or may be used in selling or distributing said peanuts or other merchandise to the general public.

3. Selling or otherwise disposing of said peanuts or any other merchandise by the use of punchboards, push or pull cards or any other lottery device or devices.

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
FAIRFIELD ENGINEERING COMPANY

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

Docket 3850. Complaint, July 14, 1939—Decision, Aug. 14, 1939

Where a corporation engaged in manufacture, sale, and distribution of its "Fairfield Coal Distributors" and "Fairfield NON-SEGREGATING Coal Distributors," for distribution of coal to stoker hoppers in large steam boilers; in advertisements in catalogs, circulars and other printed or written matter distributed to members of purchasing public in various States and in the District of Columbia—

Represented, through use of terms "nonsegregating", and such statements and representations as "FAIRFIELD NONSEGREGATING COAL DISTRIBUTORS," "Fairfield distributors * * *. Coal is delivered across the entire grate surface of the stoker just as it comes from the bunkers, assuring a uniform fuel bed," and "Uniform distribution of coarse and fine coal will result in higher boiler efficiency," that its said coal distributor was a non-segregating one, within meaning of term as used and understood in trade by heating experts and by purchasing public, notwithstanding fact its said products were not completely nonsegregating distributors or mechanisms which, as used and understood as aforesaid from said term, caused uniform layer of fine and coarse coal to be delivered across entire surface of fire boxes or boilers in same proportionate mixture as that in which coals left the bunkers, with resulting uniform fire bed and even flame over entire surface of fire box;

With tendency and capacity to mislead and deceive members of purchasing public into erroneous and mistaken belief that its said statements and representations were literally true, and into purchase of substantial quantities of said coal distributors, because of such erroneous belief, as and for nonsegregating mechanisms as above described, for purchase of which there is preference on the part of purchasers and prospective purchasers as providing economy and efficiency in operation of large steam boilers:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

Mr. Robert Mathis, Jr. 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 Fairfield Engineering Co., a corporation, 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