

Syllabus

IN THE MATTER OF

JACK ROSENFELD, DOING BUSINESS AS J. ROSE & COMPANY

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

Docket 3212. Complaint, Aug. 24, 1937—Decision, Oct. 24, 1939

Where an individual engaged in sale of radios, clocks, watches, novelties of various kinds, and candy, to purchasers, chiefly jobbers, in various other States, and in contacting, as thus engaged, customers through use of form letter advising recipient that he specialized in premium merchandise for sales boards and sales cards; in soliciting the sale of and in selling the merchandise and novelties dealt in by him—

Furnished with such merchandise and novelties push cards and punchboards and plans of merchandising which involved operation of games of chance, gift enterprises, or lottery schemes for distribution of articles in question to members of consuming public wholly by lot or chance, and which involved (1) one hundred and twenty-hole, 4-section punchboards for use under a plan in accordance with which members of public who secured 8 of said numbers received, for nickel paid, pound box of candy, and persons making last punch in each of 4 sections also received such a box, and selectors of the other 108 numbers received nothing, and (2) other types of boards of same general nature, involving operation of games of chance, gift enterprises, or lotteries, and push cards also, in operation of some of which cost to members of public ranged from 1 cent to 15 cents, depending upon concealed number selected by chance by customer, and in operation of which amount of cost to selector, as well as article of merchandise or novelty, if any, secured, were both subject to chance; and

Supplied thereby to and placed in the hands of others means by which games of chance, gift enterprises, and lotteries were conducted as aforesaid, and under which merchandise and novelties thus sold by said individual, and with which such cards and boards and devices were supplied, were distributed to purchasing public wholly by lot or chance, and under which, in some instances, amount which customer was required to pay was similarly thus determined, contrary to established public policy of the United States Government and in violation of the laws of several of the States, and in competition with those who are unwilling to employ in sale and distribution of their products any method or sales plan involving game of chance, gift enterprise, or lottery schemes, and who refrain therefrom;

With result that such competitors were placed at competitive disadvantage and many purchasers of merchandise and novelties dealt in by said individual were attracted by element of chance involved in sale and distribution thereof, as aforesaid, and thereby induced to purchase such products offered and sold by him in preference to similar merchandise and novelties offered by competitors who did not furnish with their products similar cards, boards, or other devices, and with consequence that jobbers purchased substantial amount of merchandise from said individual and trade was unfairly diverted to him from competitors aforesaid:

Complaint

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

Before *Mr. William C. Reeves* and *Mr. Charles F. Diggs*, trial examiners.

Mr. William L. Pencke, *Mr. P. C. Kolinski*, and *Mr. D. C. Daniel* for the Commission.

Kopitsky & Kessler, of St. Louis, Mo., for respondent.

COMPLAINT

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 Jack Rosenfeld, individually and doing business under the trade name and style of J. Rose & Co., hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress, and it appearing to said 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 is an individual doing business under the trade name and style of J. Rose & Co., with his principal office and place of business located at 2316 Locust Street, St. Louis, Mo. He is now, and for some time last past has been, engaged in the sale and distribution of candy, radios, lamps, clocks, watches, and various items of novelty merchandise, to wholesale dealers, jobbers, retail dealers, and to the purchasing public. Respondent's customers are located at points in the various States of the United States, and respondent causes his said products when sold to be transported from his principal place of business in the city of St. Louis, State of Missouri, to purchasers thereof in the State of Missouri and in other States of the United States at their respective places of business. There is now, and has been for some time last past, a course of trade and commerce by said respondent in such merchandise between and among the various States of the United States. In the course and conduct of said business, respondent is in competition with other individuals and with partnerships and corporations engaged in the sale and distribution of similar or like articles of merchandise in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of his business, as described in paragraph 1 hereof, respondent, in soliciting the sale of and in selling and distributing the said merchandise, has furnished various devices and plans of merchandising which involve the operation of games of chance, gift enterprises, or lottery schemes by which said merchandise is distributed to the ultimate consumers thereof wholly by lot or chance. Said devices or plans of merchandising consist of a variety of push cards and punchboards. The methods and practices adopted and used by respondent are substantially as follows:

Respondent has advertised his merchandise, or certain assortments thereof, in newspapers, magazines, and other periodicals of general circulation throughout the United States, and distributes and has distributed to customers and prospective customers, including wholesale dealers and jobbers, retail dealers, and the purchasing public, through the United States mails in interstate commerce, certain literature, instructions, and sales outfits, including various push cards and punchboards, order blanks, advertisements, and catalogues and circulars containing illustrations of his merchandise and circulars explaining respondent's plan of selling said merchandise and of allotting it as premiums or prizes to the consuming public and to the operators of said push cards or punchboards. Said push cards and punchboards vary in detail and involve different merchandise and various plans of distribution. One such plan is described in detail for illustration, but other plans used by respondent involve the same principle or method of competition.

One such assortment consists of eight boxes of chocolate candy, together with 150-hole punchboard. The said punchboard is a paper card having 150 partially perforated discs, said discs being divided into three section. Concealed within each disc is a number. The numbers run from 1 to 150 but are not arranged in numerical sequence. Customers punch or separate one of the discs from the card, and when such disc is separated a number is disclosed. Purchasers obtaining numbers from 1 to 15 pay in cents the amount of such number, and purchasers selecting numbers over 15 pay 10 cents for the privilege of selecting one of the discs. Purchasers selecting certain specified numbers receive one of the boxes of candy, and the purchaser of the last disc or punch in each section receives one of the boxes of candy. The numbers under the discs are concealed from purchasers and prospective purchasers, and they do not know how much they will have to pay for the privilege of selecting one of the discs, nor do they know whether they will receive anything for the money which they pay, until a selection has been made and the disc

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removed from the board. The amount which customers pay is thus determined wholly by lot or chance, and the boxes of candy contained in said assortment are thus distributed to the purchasing public wholly by lot or chance. -

The punchboard bears legends informing purchasers and prospective purchasers of the plan or method by which said candy is being sold or distributed. The boxes of candy sold and distributed by said punchboard are each of a greater value than the cost of a single punch from said board. The purchasing public are thus induced and persuaded into purchasing punches from said board in the hope that they may select a prize-winning number and thus obtain a box of candy of a greater value than the amount paid.

As stated above, respondent sells and distributes various assortments of merchandise, and furnishes or sells various devices for use in the sale and distribution of such merchandise by means of a game of chance, gift enterprise, or lottery scheme. Such plans or methods vary in detail, but the above-described plan or method is illustrative of the principle involved.

PAR. 3. Respondent, in selling and distributing said merchandise in connection with the sale and distribution of the aforesaid punchboards or push cards, conducts lotteries or places in the hands of others the means of conducting lotteries in the sale of his merchandise in accordance with the sales plan hereinabove set forth, and respondent's merchandise is sold or distributed to the consuming public in accordance therewith. The sale of respondent's merchandise to the purchasing public, as hereinabove alleged, involves a game of chance or the sale of a chance to procure respondent's merchandise at a price much less than the normal retail price thereof. The use by respondent of said method in the sale of his merchandise, and the sale of his merchandise by and through the use thereof and by the aid thereof, is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy, and is contrary to an established public policy of the Government of the United States.

PAR. 4. Many persons, firms, and corporations who sell or distribute merchandise in competition with 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 respondent's said method and by the element of chance involved in the sale thereof in the manner above described, and are thereby

induced to buy and sell respondent's merchandise in preference to merchandise 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 the tendency and capacity to and does divert trade and custom to respondent from his said competitors who do not use the same or an equivalent method.

PAR. 5. The aforesaid acts and practices of respondent are all to the injury and prejudice of the public and respondent's competitors, as hereinabove alleged. Said acts and practices constitute unfair methods of competition in commerce within the intent and meaning of section 5 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."

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on August 24, 1937, issued its complaint in this proceeding and caused same to be served upon the respondent, Jack Rosenfeld, individually and doing business under the trade name and style of J. Rose & Co., 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, testimony, and evidence in support of the allegations of said complaint were introduced by William L. Pencke, P. C. Kolinski, and D. C. Daniel, attorneys for the Commission, before William C. Reeves and Charles F. Diggs, examiners for the Commission theretofore duly designated by it, and said testimony was reduced by writing and filed in the office of the Commission, together with numerous pieces of documentary evidence and devices received in evidence as exhibits. No testimony or other evidence was introduced by or on behalf of said respondent. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, the testimony taken and evidence received and brief in support of the complaint. No brief was filed by or on behalf of respondent and oral argument was waived by him 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 conclusions drawn therefrom.

Findings

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FINDINGS AS TO THE FACTS

PARAGRAPH 1. For about 8 months prior to May 1937, the respondent, Jack Rosenfeld, carried on business at 2316 Locust Street, St. Louis, Mo., under the trade name and style of J. Rose & Co. On May 13, 1937, said respondent, in association with others, caused a corporation to be organized under the laws of the State of Missouri, under the corporate name of J. Rose, Inc., which corporation took over and succeeded to the business theretofore carried on by said respondent under the name and style of Jack Rose & Co. Said respondent, in February 1938, sold all his stock in said corporation, J. Rose, Inc., and since then has had no connection with the business theretofore carried on by said corporation and by him under the trade name and style of J. Rose & Co. While carrying on business under the trade name and style of J. Rose & Co., said respondent was engaged in the business of selling radios, clocks, watches, novelties of various kinds, and candy. Said respondent caused some of the articles of merchandise and novelties, sold by him, to be transported when sold, from his place of business in St. Louis, Mo., through and into other States of the United States to the respective purchasers thereof, and in the course and conduct of his said business said respondent has been and was then in active competition with various partnerships and corporations and other persons also engaged in the sale of similar articles of merchandise and novelties in commerce among several of the States of the United States.

PAR. 2. The greater portion of the merchandise sold by respondent, as set out in paragraph 1 hereof, was sold to jobbers; respondent made no sales direct to the consumer. Respondent made use of a form letter in contacting customers, in which letter the statement was made that respondent specialized in premium merchandise for sales boards and sales cards. Respondent, in soliciting the sale of, and in selling, the merchandise and novelties dealt in by him, furnished with such merchandise and novelties various devices sometimes described as push cards and punchboards and plans of merchandising which involved the operation of games of chance, gift enterprises, or lottery schemes, by means of which, articles of such merchandise and novelties were to be distributed to members of the consuming public wholly by lot or chance. One type of the devices so furnished by respondent, contained 120 holes, divided into four sections. In each hole was secreted a rolled slip of paper upon which a number was printed. Members of the public were to be solicited to punch one or more of the numbers from the board and to pay 5 cents for each number so obtained. Selectors of eight

of the numbers received, for each of such numbers, a 1 pound box of candy and the person making the last punch in each of the four sections also received a 1 pound box of candy, but selectors of the other numbers secreted in the board, 108 in all, received nothing. Other types of boards, but boards of the same general nature, the use of which involved the operation of games of chance, gift enterprises, or lotteries and devices known as push cards also were furnished by respondent with various articles of merchandise and novelties sold by him. In the operation of some of these devices the cost to members of the public ran from 1 cent to 15 cents, depending upon the number concealed by the disk selected by the customers and in the operation of said devices of this nature both the amount of the cost to the selector and whether the customer would obtain any article of merchandise or novelty was always a matter of chance. The respondent, while engaged in business as set out in paragraph 1 hereof, sold a substantial quantity of merchandise and novelties with which he furnished such devices, and the Commission finds that the merchandise and novelties so sold by the respondent were distributed to the purchasing public wholly by lot or chance, and that by the use of one type of such device so furnished by respondent the amount which each customer was required to pay also was determined wholly by lot or chance.

PAR. 3. The Commission finds that the merchandise and novelties sold by respondents to jobbers, with which he furnished push cards or punchboards, or both, as set out in paragraph 2 hereof, was resold by such jobbers to retail dealers who resold such articles of merchandise or novelties to the purchasing public by the use of one or the other of such devices in the manner and by the sales plan described in said paragraph 2. The Commission further finds that respondent, by furnishing such cards and boards, or either type of said devices, with the merchandise and novelties sold by him, thereby supplied to, and placed in the hands of others, the means by which games of chance, gift enterprises, and lotteries have been conducted. The Commission further finds that the use of such cards and boards in the resale and distribution of the merchandise and novelties sold by respondent to jobbers involved a game of chance, or the sale of a chance, and that the use of such methods in the sale and distribution of such merchandise and novelties was a practice of the sort which is contrary to the established public policy of the Government of the United States and is in violation of the laws of several of the States of the United States.

PAR. 4. There were among the competitors of respondent, persons, partnerships, and corporations engaged in the sale of articles of

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merchandise and novelties of the same general nature as those sold by respondent, and in commerce between and among the various States of the United States, which competitors were unwilling to employ in the sale and distribution of merchandise and novelties dealt in by them any method or sales plan which involved games of chance, gift enterprises, or lottery schemes, and refrained from such practice, and as a result were placed at a disadvantage in competition. Many purchasers of merchandise and novelties dealt in by respondent were attracted by the element of chance involved in the sale and distribution of such merchandise and novelties by the use of push cards or punchboards furnished by respondent, and were thereby induced to purchase the merchandise and novelties offered for sale by respondent in preference to similar merchandise and novelties offered for sale by competitors of respondent who did not furnish with merchandise and novelties sold by them similar push cards or punchboards or other devices and as a result jobbers purchased a substantial amount of merchandise from respondent with the result that trade was diverted unfairly to respondent from said competitors.

CONCLUSION

The acts and practices of respondent, as herein found, are all to the injury and prejudice of the public and constitute unfair methods of competition in commerce within the intent and meaning of the provisions 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 before William C. Reeves and Charles F. Diggs, examiners of the Commission therefore duly designated by it, in support of the allegations of said complaint (respondent having offered no testimony or other evidence in opposition to the allegations of said complaint), brief of counsel for the Commission filed herein (respondent having filed no brief and oral argument not having been requested), 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, Jack Rosenfeld, individually and doing business under the trade name and style of J. Rose & Co., or trading under any other name or names, his representatives,

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agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of candy 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 candy or any other merchandise so packed and assembled that sales of said candy 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 others, packages or assortments of candy or other merchandise, together with punchboards, push or pull cars or any other lottery device, which punchboard, push or pull card or other lottery device is to be used or may be used in selling or distributing said candy or other merchandise to the public.

3. Supplying to or placing in the hands of others, any lottery device either with assortments of candy or other merchandise, or separately, which lottery device is to be used or may be used in selling or distributing such candy or other merchandise to the public.

4. Selling or otherwise distributing any merchandise by means of a game of chance, gift enterprise, or lottery scheme.

It is further ordered, That the respondent shall within 60 days after service upon him of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF

ROY HEMPHILL, DOING BUSINESS AS DIESEL POWER-UNITED ENGINEERING SCHOOLS, DIESEL POWER-UNITED ENGINEERING SCHOOLS, INC., AND DIESEL POWER-UNITED ENGINEERING SCHOOLS

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

Docket 3318. Complaint, Jan. 31, 1938—Decision, Oct. 24, 1939

Where an individual and two corporations, of which said individual was president, engaged, under identical or substantially identical trade and corporate names, in conducting, from four cities in different sections of the United States, identical or practically identical correspondence courses of study and instruction in Diesel engines, air conditioning and refrigeration, and other trade subjects, and operating under an interchange arrangement between them whereby a student who had been enrolled by any one of them could pursue his courses in any of the schools which they operated, and their advertising redounded to benefit of all, and in substantial competition, as aforesaid, with others engaged in sale and distribution of similar courses of study and instruction in Diesel training, air conditioning, and refrigeration and other trade subjects, and also in courses of study and instruction to prepare students for various positions, employments, trades, callings, and professions; in advertising their said courses to the consuming public in various forms of printed matter, by radio broadcasts and otherwise—

- (a) Represented, through use of word "engineering" in trade and corporate names employed by them as aforesaid, and in their advertising matter and through statements and implications of their advertising emphasizing thoroughness of their training and high standing and selection of their personnel or instructors, etc., that their courses were of such a character and extent as to give students thereof basic and general training in engineering science comparable to courses in engineering offered by technical schools which had courses in engineering science and awarded degrees therein after completion of prescribed courses;

Facts being their schools were trade schools with educational entrance requirement of less than eighth grade, courses of instruction were short and not exhaustive of the subject, nor of character and extent to give student basic and general training in engineering science comparable to courses in engineering offered by technical schools offering such courses as aforesaid and awarding degrees, but training was calculated only to prepare students for work as mechanics or work of similar grade, and were not of such a character to warrant the awarding of degrees such as awarded by schools giving recognized instruction in engineering science, and they did not and were not authorized to award such engineering degrees, and, with the exception of two members of the faculty at one of said schools, none at any of the various schools had engineering degree awarded by technical school authorized by law to award degree in engineering science;