

IN THE MATTER OF
MERRILL CANDY COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914

Docket 3128. Complaint, May 14, 1937—Decision, Dec. 29, 1939

Where a corporation engaged in manufacture of candy and in sale and distribution thereof to jobber and retailer purchasers in other States, including assortments with which, as case might be, it furnished (a) push cards designed and intended for use in distribution of said candy wholly by lot or chance under a plan in accordance with which and legend secured by chance, as displayed under disk selected and removed, purchaser or customer received by chance for 5 cents paid one candy bar, five candy bars, small canoe of candy, or package of choice candies, and maker of last sale on each of cards secured or was given larger canoe filled with candy, or (b) push cards of various types and design and punchboards for use in distribution of candy wholly by lot or chance and of same general nature and operation in substantially same manner as above described, and (c) articles of merchandise including pieces of glassware and chromium dishes for use as special prizes in operation of particular cards and boards;

Sold together with push cards or punchboards or both, such candies and articles of merchandise to jobbers and retailers by whom as said jobbers' vendees, or purchasers direct, such candies were resold to purchasing public by use of one or other of aforesaid devices and in manner and by sales plan above described; and supplied thereby to and placed in hands of others means by which games of chance, gift enterprises, and lotteries were conducted in said products' resale or distribution by retailers aforesaid, involving game of chance or sale of a chance and use of method or practice in such sale and distribution, 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 candy and articles of merchandise dealt in by them any method or sales plan involving games of chance, gift enterprises, or lottery schemes and refrain from use thereof, to their competitive disadvantage;

With result that many purchasers of candy and articles of merchandise from it were attracted by element of chance involved in sale and distribution of such candies and articles through use of push cards and punchboards furnished by it and were thereby induced to purchase said candies and articles offered by it in preference to similar products offered by competitors who did not furnish with candies and articles sold by them similar push cards and punchboards or similar devices, and jobber and retail dealers purchased substantial amount of candies and articles of merchandise from it and trade was thereby diverted unfairly to it from its competitors aforesaid:

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, Mr. Charles F. Diggs, and Mr. Miles J. Furnas*, trial examiners.

Mr. D. C. Daniel and Mr. P. C. Kolinski for the Commission.

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 the Merrill Candy 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 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. The respondent, Merrill Candy Co., is a corporation organized and doing business under the laws of the State of Wisconsin, with its principal office and place of business located at 1215-17 East Main Street, in the city of Merrill, State of Wisconsin. Respondent is now, and for several years last past has been, engaged in the manufacture of candies and in the sale and distribution thereof to wholesale dealers, jobbers, and retail dealers located at points in the various States of the United States. Respondent causes and has caused its said products when sold to be transported from its principal place of business in the city of Merrill, State of Wisconsin, to purchasers thereof in Wisconsin and in other States of the United States at their respective points of location. There is now, and has been for several years last past, a course of trade and commerce by said respondent in such candies between and among the States of the United States. In the course and conduct of said business, respondent is in competition with other corporations and with partnerships and individuals engaged in the manufacture of candies and in the sale and distribution thereof in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent sells and has sold to wholesale and retail dealers assortments of candy so packed and assembled as to involve, or which are designed to or may involve, the use of a lottery scheme when sold and distributed to the ultimate consumers thereof. Such assortments are composed of a number of bars of candy and a number of packages of candy, together with a device commonly called a "push card." The said bars of candy and the packages of candy are sold and distributed to the consuming public by means of said push card in the following manner:

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Sales are 5 cents each, and each purchaser is entitled to one push from said card. When a push is made from said card, a number is disclosed. The numbers begin with one and continue to the number of pushes there are on the card, but the numbers are not arranged in numerical sequence. The card bears statements informing purchasers that certain numbers receive specified packages of candy, that certain other numbers receive a specified number of bars of candy, that all other numbers receive one bar of candy, and that the last sale from said assortment receives one of the specified packages of candy. The numbers on said card are effectively concealed from purchasers and prospective purchasers until a selection has been made and the particular push separated from the card. The fact as to whether a purchaser receives one or more than one bar of candy, or one of the packages of candy, for the price of 5 cents is thus determined wholly by lot or chance.

The respondent manufactures, sells, and distributes several assortments involving the use of a push card in the sale and distribution thereof to the consuming public, but all of said assortments involve the same principle as set forth above, and vary only in detail.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells its assortments resell said assortments to retail dealers, and said retail dealers and the retail dealers to whom respondent sells direct expose said assortments for sale and sell said candy to the purchasing public 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 product in accordance with the sales plan hereinabove set forth; and said sales plan has the capacity and tendency of inducing purchasers thereof to purchase respondent's said product in preference to candy offered for sale and sold by its competitors.

PAR. 4. The sale of said candy to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure packages or bars of candy. The use by respondent of said method in the sale of candy, and the sale of candy by and through the use thereof and by the aid of said method, 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. The use by respondent of said method has the tendency unduly to hinder competition or create monopoly in this, to wit: That the use thereof has the tendency and capacity to exclude from the candy trade competitors who do not adopt and use the same method or an equivalent or similar method involving the same or an equivalent or similar

element of chance or lottery scheme. Many persons, firms, and corporations who make and sell candy in competition with the respondent, as above alleged, are unwilling to offer for sale or sell candy so packed and assembled as above alleged, or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candy are attracted by respondent's said method and manner of packing said candy and by the element of chance involved in the sale thereof in the manner above described, and are thereby induced to purchase said candy so packed and sold by respondent in preference to candy offered for sale and sold by said competitors of respondent who do not use the same or equivalent methods. The use of said method by respondent has the tendency and capacity, because of said game of chance, to divert to respondent trade and custom from its said competitors who do not use the same or an equivalent method; to exclude from said candy trade all competitors who are unwilling to and who do not use the same or an equivalent method because the same is unlawful; to lessen competition in said candy trade and to tend to create a monopoly of said candy trade in respondent and such other distributors of candy as use the same or an equivalent method; and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said method by respondent has the tendency and capacity to eliminate from said candy trade all actual competitors, and to exclude therefrom all potential competitors who do not adopt and use said method or an equivalent method.

PAR. 6. The aforementioned method, acts, and practices of respondent are all to the prejudice of the public and of respondent's competitors, as hereinabove alleged. Said method, acts, and practices constitute unfair methods of competition in commerce within the intent and meaning of section 5 of an act of Congress, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 14, 1937, issued its complaint in this proceeding and caused same to be served upon the respondent Merrill Candy Co., a corporation, charging it 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 other evidence in support

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of the allegations contained in said complaint were introduced by D. C. Daniel and P. C. Kolinski, attorneys for the Commission, and in opposition to the allegations of said complaint by Adam P. Schewe, the president of the respondent corporation, before William C. Reeves, Charles F. Diggs, and Miles J. Furnas, examiners for said Commission, theretofore duly designated by it, and said testimony was reduced to writing and filed in the office of the Commission together with numerous pieces of documentary evidence received as exhibits. Thereafter the proceeding regularly came on for final hearing before the Commission upon 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 the respondent and oral argument was waived by it, 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. The respondent, Merrill Candy Co., is a corporation organized under the laws of the State of Wisconsin with principal place of business at Merrill in said State; for a number of years it has been engaged in the business of the manufacture, sale, and distribution of candy. It has caused candy manufactured by it, when sold, to be transported from its place of business in the State of Wisconsin to purchasers thereof located in other States of the United States, and in the course and conduct of its said business said respondent has been, and is now, in active competition with numerous persons and partnerships and other corporations also engaged in the manufacture and sale, or the sale, of candy in commerce among several of the States of the United States.

PAR. 2. Respondent, in the course of its business as set out in paragraph 1 hereof, has furnished with some assortments of candies sold by it, devices sometimes described as push cards, upon each of which were stamped 75 disks, each of which concealed a legend. Printed upon each of the cards were the words "All winners, no blanks." These cards were intended for use as follows: Members of the public were to be solicited to select 1 or more of the disks on 1 of the cards and to pay therefor 5 cents for each of the disks selected, whereupon the disks so selected were pushed from the card and the legend concealed thereby disclosed, some of which legends entitled the customer to only 1 candy bar; other such legends entitled the customer to 5 candy bars; other legends so obtained entitled the

customer to a small canoe filled with candy; other such legends entitled the customer to 1 package of choice candies and the person to whom the last sale on each of the cards was made, was given a larger canoe filled with candy but whether a selector of 1 of the disks obtained 1 candy bar, 5 candy bars, a small canoe filled with candy, a package of choice candies, or a larger canoe filled with candy was wholly a matter of chance and the customer did not know the number of candy bars to which he was entitled or whether he would receive 1 of the small canoes filled with candy, or a package of choice candies, until the disk selected by him was pushed from the card and the legend concealed thereby was disclosed. With other assortments of candies sold by it, respondent has furnished push cards of various types and designs and with still other assortments of candies so sold, respondent has furnished devices sometimes known as punchboards, but all such cards and boards so furnished by respondent were designed and intended for use in the distribution of candies wholly by lot or chance and were of the same general nature and were operated in substantially the same manner as were the push cards described herein.

PAR. 3. The annual sales made by respondent of candies with which it furnished push cards or punchboards have aggregated \$45,000 and approximately 70 percent of such sales have been made to dealers located in States other than the State of Wisconsin. Push cards and punchboards have been furnished by respondent with about 35 percent of its entire output. With some of the assortments or candies sold by respondent with which it furnished push cards or punchboards as set out in paragraph 2 hereof, articles of merchandise, including pieces of glassware and chromium dishes, were included for use as special prizes in the operation of such cards or boards.

PAR. 4. The Commission finds that the candies, glassware, and chromium dishes intended for use as special prizes in the operation of the push cards and punchboards, as set out in paragraph 3 hereof, were sold by respondent to jobbers and to retail dealers and with such sales it furnished push cards or punchboards, or both, and such candies and articles of merchandise so sold to jobbers were resold by them with the accompanying push cards or punchboards to retail dealers, and such candies and articles of merchandise were resold by the retail dealers to the purchasing public by the use of one or the other of the devices and in the manner and by the sales plan described in paragraph 2 hereof. The Commission further finds that respondent by furnishing such cards and boards, or either type of said devices, with the candies and articles of merchandise sold by it, thereby supplied to and placed in the hands of others the means

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by which games of chance, gift enterprises, and lotteries have been conducted. The Commission further finds that the use of such cards and boards, or either of such devices, in the resale and distribution by retail dealers of the candies and articles of merchandise sold by respondent, 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 candies and articles of merchandise 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. 5. There are among the competitors of respondent persons, partnerships, and corporations engaged in the manufacture and sale, or the sale, of candies and articles of merchandise of the same general nature as those sold by respondent and in commerce between and among various States of the United States, which competitors were unwilling to employ in the sale and distribution of candies and articles of merchandise dealt in by them, any method or sales plan which involved games of chance, gift enterprises, or lottery schemes, and refrained from the use of such practices, and as a result were placed at a disadvantage in competition. Many purchasers of candies and articles of merchandise from respondent were attracted by the element of chance involved in the sale and distribution of such candies and articles of merchandise by the use of push cards and punchboards furnished by respondent, and were thereby induced to purchase such candies and articles of merchandise offered for sale by respondent, in preference to similar candies and articles of merchandise offered for sale by competitors of respondent who did not furnish with candies and articles of merchandise sold by them similar push cards and punchboards or similar devices, and as a result jobbers and retail dealers purchased a substantial amount of candies and articles of merchandise from respondent with the result that trade was thereby 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, Charles F. Diggs, Miles J. Furnas, examiners of the Commission, theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, 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, Merrill Candy 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 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 push or pull cards, punchboards or any other lottery devices, which said push or pull cards, punchboards or other lottery devices are to be used, or may be used, in selling or distributing said candy or other merchandise to the general public.

3. Supplying to or placing in the hands of others push or pull cards, punchboards, or any other lottery devices, either with assortments of candy or other merchandise, or separately, which said push or pull cards, punchboards, or other lottery devices, are to be used or may be used in selling or distributing such candy or other merchandise to the general 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 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
ROY E. REED AND FLORENCE A. REED, TRADING AS
DIESEL ENGINEERS, ASSOCIATED

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

Docket 3258. Complaint, Nov. 1, 1937—Decision, Dec. 29, 1939

Where an individual, and the wife of said individual, active participant with him in business in question and, together with him, responsible for policies and activities thereof, including advertising, and possessed of a wife's community property interest therein under the laws of the State concerned, engaged together in the conduct, through courses of study and instruction, by correspondence and through classroom instruction, of a school in the theory, operation, maintenance, and repair of Diesel engines and air-conditioning equipment, and, as thus engaged, in soliciting students in said and other States through salesmen or agents and in also advertising both courses of study and instruction by radio and by newspapers located in aforesaid and other States, and having general circulation throughout the United States, and in circulars distributed through their said agents and through the mail—

- (a) Represented and implied, through "blind advertisements" in the "Help Wanted" columns of various newspapers in the several States, such as "Wanted men and young men to earn while learning Diesel and Air conditioning. D. E. A., 807 S. Flower," "Diesel Air-conditioning Refrigeration Classes now forming. Summer rates in effect. Jobs furnished while training. You can work and earn while you learn," "Men—Small but welcome earnings while learning Diesel. Mechanically inclined ambitious men only. Minimum initial fee \$15 * * *," and others of similar tenor, that persons responding would be afforded opportunity to learn to construct, operate, maintain, and repair Diesel engines and air-conditioning equipment while working for pay in a factory or shop in which such engines and equipment were made and repaired by a person or concern engaged therein;

Facts being such advertisements were inserted in "Help Wanted" columns, not to offer employment but to obtain students for school in question, individuals concerned did not own any such factory or shop, and, while conducting an employment bureau in connection with school in question, did not afford students opportunity to work in a factory or shop constructing, operating, maintaining, or repairing such engines or equipment except in very rare instances, and did not afford students, in many instances, opportunity to work at anything, and it was not until after making of initial payment for instruction to said individuals that facts aforesaid became known to person responding to advertisements in question;

- (b) Placed on their letterheads, used in correspondence with prospective students soliciting sale of their said courses and instruction, words "Diesel Engineers, Associated. Consulting Engineers" and, on printed agreements with students, set forth same legend, together with words "Application Associate Engineering Membership," and in such agreements described students as
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