

IN THE MATTER OF
PENICK & FORD, LTD., INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SUBSEC. (a) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914,
AS AMENDED BY AN ACT OF CONGRESS APPROVED JUNE 19, 1936

Docket 3802. Complaint, June 1, 1939—Decision, Nov. 29, 1940

Where a corporation engaged in manufacture of glucose or corn syrup unmixed, and in distribution and sale thereof to, mostly, candy manufacturer purchasers in other States, competitively engaged in sale to various customers, including chain stores, wholesalers, and retailers in various States and in the District of Columbia, of said product, in many kinds of which, made by each of such manufacturers, said syrup is one of major raw materials used in production thereof, and in which such syrup accounted for as much as 90 percent, or most of the weight, of some varieties, and for a substantial part of the total cost of manufacturing such candies—

Sold its said syrup at higher delivered prices per hundred pounds to purchasers located in cities other than Chicago than those at which it concurrently sold such product of like grade and quality to purchasers located therein, and at prices which were not uniformly higher than those at which product was being concurrently sold to Chicago purchasers, but which varied with geographical location of other cities in which such purchasers were located;

With result that through said varying prices, differences between which, not justified by it, made more than due allowance for differences in cost of delivery, it discriminated in price between such purchasers who paid such higher and varying prices for said product, and costs of which unfavored purchasers were increased over those of favored purchasers directly as the amount of the discrimination between them and as the syrup content of the candy increased, necessitating substantially lower profits to such purchasers and reduction in margin of profit, and of total profit in event of continued sale by them of their product at prices competitive with those of favored purchasers, and absorption, in such event, of higher syrup costs, and in reduction in total profit at least, through lost profit on diminished sales, in event of increase in price to cover higher syrup cost, with increased overhead from unused plant capacity following higher price and decreased sales volume; and

With result that, by reason of diminished ability of unfavored candy manufacturers paying such higher prices for syrup to compete in any event in sale of their candy with those paying lower prices for their said syrup, effect of such discrimination might be substantially to lessen competition between the favored and unfavored purchasers, to tend to create a monopoly in such favored purchasers, and to injure, destroy, and prevent competition with them:

Held, that in discriminating in price between different purchasers of glucose, under the circumstances set forth, said corporation violated provisions of section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. Frank Hier and Mr. Philip R. Layton, for the Commission.
Breed, Abbott & Morgan, of New York City, for respondent.

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that the respondent named in the caption hereof, and hereinafter more particularly designated and described, since June 19, 1936, has violated and is now violating the provisions of section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C., title 15, sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Penick & Ford, Ltd., Inc., is a corporation organized and existing under the laws of Delaware with its principal office and place of business at 420 Lexington Avenue in the city of New York and State of New York.

PAR. 2. Respondent owns and operates a plant at Cedar Rapids, Iowa. This plant has a corn grinding capacity in excess of 34,000 bushels per day, with complete facilities for the finished fabrication of all known corn products, both for household and industrial use.

PAR. 3. For many years respondent has been and is now engaged in the business of manufacturing, selling, and distributing in interstate commerce products derived from corn. The principal products derived from corn are (1) starch, both for food and other purposes; (2) glucose or corn syrup; and (3) corn sugar. Starch is first manufactured from the corn, and glucose and grape sugar are made by treating the starch with certain acids, the resulting solid product being sugar and the resulting syrup being glucose. Glucose is largely used in the manufacture of candy, jellies, jams, preserves, and the like, as well as in the mixing of syrups.

The principal byproducts of corn resulting in the corn products business are gluten feed, corn oil, corn-oil cake, and corn-oil meal.

Respondent, in addition to bulk products, produces branded products.

PAR. 4. For many years in the course and conduct of its business, the respondent has been and is now manufacturing the aforesaid commodities at said plant and has sold and shipped and does now sell and ship such commodities in commerce between and among the various States of the United States from the State in which its factory is located across State lines to purchasers thereof located in States other than the State in which respondent's said plant is located in competition with other persons, firms, and corporations engaged in similar lines of commerce.

PAR. 5. Since June 19, 1936, and while engaged as aforesaid in commerce among the several States of the United States and the District of Columbia, the respondent has been and is now, in the

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course of such commerce, discriminating in price between purchasers of said commodities of like grade and quality, which commodities are sold for use, consumption, or resale within the several States of the United States and the District of Columbia in that the respondent has been and is now selling such commodities to some purchasers at a higher price than the price at which commodities of like grade and quality are sold by respondent to other purchasers generally competitively engaged with the first mentioned purchasers.

PAR. 6. The effect of said discriminations in price made by the respondent, as set forth in paragraph 5 herein, may be substantially to lessen competition in the sale and distribution of corn products between the respondent and its competitors; tend to create a monopoly in the line of commerce in which the respondent is engaged; and to injure, destroy, and prevent competition in the sale and distribution of corn products between the respondent and its competitors.

PAR. 7. The effect of said discriminations in price made by the respondent, as set forth in paragraph 5 herein, may be substantially to lessen competition between the buyers of said corn products from respondent receiving said lower discriminatory price and other buyers from respondent competitively engaged with such favored buyers who do not receive such favorable prices; tend to create a monopoly in the lines of commerce in which buyers from the respondent are engaged; and to injure, destroy, and prevent competition in the lines of commerce in which those who purchase from the respondent are engaged between the said beneficiaries of said discriminatory prices and said buyers who do not and have not received such beneficial prices.

PAR. 8. The aforesaid acts of respondent constitute a violation of the provisions of subsection (a) of section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C., title 15, sec. 13).

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an 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), as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C., title 15, sec. 13), the Federal Trade Commission on June 1, 1939, issued and served its complaint in this proceeding upon the respondent Penick & Ford, Ltd., Inc., a corporation, charging it with discriminating in price between different purchasers of respondent's various products, in violation of subsection (a) of section 2 of said act, as amended.

Thereafter, on July 11, 1939, and pursuant to an extension of time granted by the Commission, an answer was filed by respondent. Thereafter on September 13, 1940, respondent by its counsel, entered into a stipulation as to the facts with W. T. Kelley, chief counsel of the Commission, which stipulation provided that the facts therein set forth were to be made part of the record herein and were to be 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 the Commission might proceed upon said statement of facts to make its report, stating its findings as to the facts and its conclusion based thereon and enter its order disposing of the proceeding without the presentation of argument or the filing of briefs all of which appears of record herein.

Thereafter this proceeding regularly came on for final disposition by the Commission on said complaint and answer and the aforesaid stipulation of facts, briefs, and oral arguments of counsel having been waived; and the Commission having duly considered the same and being now fully advised in the premises makes this its findings as to the facts and conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Penick & Ford, Ltd., Inc., is a corporation organized and existing under the laws of the State of Delaware and has its principal office and place of business at 420 Lexington Avenue in the city of New York and the State of New York.

PAR. 2. Respondent has for many years been and is now engaged in the business of manufacturing, distributing, and selling glucose or corn syrup unmixed, which is one of the principal products derived from the refining of corn. For the manufacture of such product, respondent owns and operates a corn refining plant located at Cedar Rapids, Iowa, which has a corn grinding capacity in excess of 34,000 bushels a day with complete facilities for the manufacture of such product.

PAR. 3. For many years respondent has been, and is now, manufacturing such glucose or corn syrup unmixed at said plant, and has sold and shipped and does now sell and ship such glucose or corn syrup unmixed in commerce between and among the various States of the United States from the State in which its said factory is located across State lines to purchasers thereof located in States other than the State of manufacture, in competition with other corporations engaged in similar lines of commerce.

PAR. 4. Most of such purchasers so located purchase such syrup which is of like grade and quality for use in the manufacture of

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candy. Such purchasers are competitively engaged in the sale of such candy to various customers including chain stores, wholesalers, and retailers, all located in the several States of the United States and in the District of Columbia.

PAR. 5. At all times since June 19, 1936, respondent has sold such syrup at higher delivered prices per hundred pounds to purchasers located in certain cities other than Chicago, Ill., than it has sold such syrup to purchasers located in Chicago, Ill.

The prices at which such syrup was sold by respondent to purchasers located in cities other than Chicago, Ill., were not uniformly higher than the prices at which such syrup was concurrently sold to purchasers located in Chicago, Ill., but such higher prices varied with the geographical location of the cities in which such purchasers were located.

Thus, on the following dates, respondent sold such syrup to such purchasers located respectively in each of the following cities at the delivered prices per hundred pounds which are shown opposite said cities for such syrup (43° Baumé):

Location of purchasers	June 23, 1936	June 23, 1937	June 23, 1938	June 23, 1939
Chicago, Ill.....	2.44	3.59	2.29	2.24
Ottumwa, Iowa.....	2.73	3.86	2.59	2.54
Sioux City, Iowa.....	2.82	3.95	2.69	2.64
St. Louis, Mo.....	2.61	3.75	2.47	2.42
Springfield, Mo.....	2.82	3.95	2.69	2.64
Lincoln, Nebr.....	2.87	4.00	2.74	2.69
Hutchinson, Kans.....	3.03	4.15	2.90	2.85
Denver, Colo.....	3.29	4.19	2.95	2.90
San Antonio, Tex.....	3.29	4.39	3.17	3.12
Paris, Tex.....	3.15	4.26	3.02	2.97

At all times between the dates above set forth, substantially the same differences in and relationship between and among said prices above illustrated have existed as to such purchasers so located.

PAR. 6. By selling such syrup at said different prices as found in paragraph 5 above, the differences between which prices have not been justified by respondent and which differences make more than due allowance for differences in the cost of delivery, it has discriminated in price between such purchasers who have paid the various different prices for such syrup.

PAR. 7. Such syrup is one of the major raw materials used in the production of many kinds of candy manufactured by each of such candy manufacturers, accounting for as much as 90 percent or more of the weight of some varieties and for a substantial part of the total cost of manufacturing such candies; and said discriminations in the price of such syrup increase the costs of the unfavored purchaser over the costs of the favored purchasers directly as the amount

of the discrimination between them and as the syrup content of the candy increases. By reason of such higher costs, the profits of the unfavored purchasers would be substantially lower than they would be if it were not for the discriminations.

Such effect on profits would result where unfavored purchasers sold candy manufactured by them at prices competitive with the prices of candy manufactured by the favored purchasers. Under such circumstances the volume of sales by the unfavored purchasers would not be affected, but, due to their absorption of the higher syrup costs, their respective margins of profit, as well as total profits, would be reduced below what they would be if it were not for the discrimination.

Similarly, where, in an effort to recover such higher syrup costs, unfavored purchasers sold such candy at prices higher than those charged by favored purchasers, their respective volume of sales would undoubtedly decline commensurate in some degree to the amount by which prices were increased. With such decline in volume of sales would come unused plant capacity and increased per unit overhead costs; and the price of the candy would have to be increased sufficiently, therefore, to cover both the higher syrup costs and higher overhead costs, if the margin of profit available in the absence of discrimination was to be preserved. Even though such margin of profit was not impaired it would not be realized on the lost sales, and total profit would be diminished to the extent that volume of sales was reduced.

The loss of profits either by absorption of the higher syrup costs or from loss of sales resulting from increasing prices to recover such higher syrup costs would generally diminish the ability of those candy manufacturers paying the higher prices for such syrup to compete in the sale of their products with candy manufacturers paying the lower prices for such syrup.

Therefore, the Commission finds that the discriminations found in paragraphs 5 and 6 may substantially lessen competition between the favored and unfavored purchasers, tend to create a monopoly in such favored purchasers, and injure, destroy, and prevent competition with such favored purchasers.

CONCLUSION

The Commission concludes that in discriminating in price between different purchasers of glucose as set forth in the above findings of fact, the respondent, Penick & Ford, Ltd., Inc., has violated the provisions of section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act.

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ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer filed herein by the respondent, Penick & Ford, Ltd., Inc., and the stipulation of facts entered into between the chief counsel for the Commission and counsel for the respondent and filed herein, wherein counsel for respondent states his desire to waive hearings on the charges set forth in the complaint and not to contest the proceeding, and the Commission having made its findings as to the facts and its conclusion based upon the stipulation of facts wherein respondent admitted the facts solely for the purpose of this proceeding, which findings and conclusion are hereby made a part hereof, that said respondent violated the provisions of an act of Congress entitled "An act to supplement existing laws against unlawful restraints and monopolies and for other purposes" approved October 15, 1914, as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. title 15, section 13).

It is ordered, That respondent, Penick & Ford, Ltd., Inc., a corporation, its officers, directors, representatives, agents, and employees, in connection with the offering for sale, sale and distribution of glucose or corn syrup unmixed in interstate commerce to purchasers described in said stipulation of facts, do forthwith cease and desist:

1. From discriminating in price between different purchasers of glucose or corn syrup unmixed of like grade or quality, either directly or indirectly, in the manner and degree as found in paragraph 5 of the Commission's findings as to the facts and conclusion; from continuing or resuming such discriminations in prices as so found by the Commission, and from otherwise discriminating in price in manner and degree substantially similar to such discriminations as so found by the Commission.

2. From otherwise selling said products to some of the aforesaid purchasers thereof at a different price than to other purchasers, the effect whereof may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which customers of the respondent are engaged, or to injure, destroy, or prevent competition with any person who either grants or receives the benefit of such discrimination, provided that nothing shall prevent price differences which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered; and provided, further, that nothing shall prevent respondent from showing that its lower price to any pur-

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chaser or purchasers was made in good faith to meet an equally low price of a competitor.

It is further ordered, That the said respondent, Penick & Ford, Ltd., Inc., shall, within 60 days after service upon its of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which its has complied with this order.

IN THE MATTER OF
MONTAGUE L. MERRICK AND EDNA H. MERRICK, TRADING AS MERRICK NATIONAL COMPANY AND CHOCOLATE CONFECTIONS COMPANY

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

Docket 4097. Complaint, Apr. 23, 1940—Decision, Nov. 29, 1940

Where two individuals engaged in sale and distribution of candy, including certain assortments which were so packed and assembled as to involve use of a game of chance, gift enterprise, or lottery scheme when sold or distributed to consumers thereof, and which included (1) number of small penny pieces of candy of uniform size and shape, together with number of candy bars to be given as prizes and without additional cost to those securing by chance aforesaid pieces, concealed colored centers of which differed from those of the majority, and also together with a giant candy loaf to be given without additional charge to purchaser of last one of said pieces, (2) number of small penny pieces of candy, number of candy bars, retail value of which exceeded 1 cent, and a larger bar, together with a push card for use in sale and distribution of said candy under a plan, and in accordance with card's explanatory legend, by which those purchasers securing from card's various discs certain numbers received, in addition to one of small penny pieces, one of said candy bars, and purchaser of last small piece was entitled to and received larger bar without additional cost, and (3) various assortments involving lot or chance features in sale and distribution thereof to consuming public similar to methods of sale and distribution above described, and varying therefrom in detail only—

Sold to dealers such assortments and boards, for sale and distribution to consuming public in accordance with aforesaid sales plan or method, involving game of chance or sale of a chance to procure bars of candy at prices much less than normal retail prices thereof, contrary to an established public policy of the United States Government, and in violation of criminal law, and in competition with many who are unwilling to offer and sell candy so packed and assembled, as above described, or otherwise arranged and packed, for sale to purchasing public so as to involve a game of chance or any other method of sale that is contrary to public policy, and refrain therefrom;

With result that many dealers in and ultimate purchasers of candy were attracted by their said method and manner of packing same and by element of chance involved in sale thereof as above set forth, and were thereby induced to purchase such candy, thus packed and sold by them, in preference to that offered and sold by their said competitors who do not use same or equivalent method, and with tendency and capacity, through use of said methods and because of said game of chance, to divert unfairly to themselves substantial trade from their said competitors, exclude from candy trade all competitors who are unwilling to and do not use same or equivalent methods as unlawful, lessen competition in trade in question and create monopoly thereof in themselves and such other distributors of