

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS AND ORDERS, DECEMBER 1, 1940, to MAY 31, 1941

IN THE MATTER OF

R. M. HOLLINGSHEAD CORPORATION

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

Docket 3661. Complaint, Dec. 10, 1938—Decision, Dec. 2, 1940

UNFAIR METHODS OF COMPETITION—"LIFTING"—WHERE SUBSTANTIAL INJURY TO COMPETITION OR INTENT TO INJURE, BY HARASSING COMPETITORS OR DESTROYING GOOD WILL ADHERING TO THEIR MERCHANDISE, OR EFFECT OF SO INJURING, ETC., NOT SHOWN.

There is no question but that the practice of "lifting" competitors' merchandise from distributors' shelves and disposing of it in a manner which permits its access again into the channels of distribution at distress prices is a practice which is detrimental to competitors, immediate effect of which may be to reduce the possibility of the competitor selling more goods to the distributor, and detrimental effect of which is more apparent when the "lifted" merchandise reappears on the market at reduced prices. Practice, however, in which showing of substantial injury to competition or of an intent or effect of injuring competition by harassing competitors or destroying the good will adhering to their merchandise does not appear, and in which slight injury to competition demonstrated does not approach possible demoralizing effect when made use of to harass and injure competitors, may not constitute unfair method of competition. *Waldes & Co., Inc.*, 8 F. T. C. 305, distinguished.

UNFAIR METHODS OF COMPETITION—"LIFTING"—WHERE SUBSTANTIAL INJURY TO COMPETITION OR INTENT TO INJURE, BY HARASSING COMPETITORS OR DESTROYING GOOD WILL ADHERING TO THEIR MERCHANDISE, OR EFFECT OF SO INJURING, ETC., NOT SHOWN—CREDIT EXCHANGE OFFERS AS MADE AND LIMITED BY MANUFACTURER-SELLER TO DEALER DISTRIBUTORS ON OWN AND OTHER PRODUCTS GENERALLY, BY IT CONSUMED AND JUNKED, AND IN PART RESOLD IN OTHER CHANNELS, AND IN JOB LOT SALES FOR CASH, AT UNDER CURRENT MANUFACTURER PRICES.

Where a corporation engaged in manufacture and interstate sale and distribution of an extensive line of so-called automobile chemicals, including automobile soaps, polishes, top dressings, and other products thus characterized, extended both to old and other customers credit exchange privilege under which, among other things, (1) wholesaler or jobber customers, new or old, of its said, or "Whiz Line," or various items thereof, were allowed to select from their own stocks, broadly, any goods of same general classification, regardless of age, condition, or manufacture, for shipment at customer's expense to said corporation at its place of business, and, subject to conditions

Complaint

32 F. T. C.

below set forth, customer was given credit by corporation for full amount of cost of such items against purchase of items on the "Whiz Line"; (2) credit thus obtained was not available, however, for more than 25 percent of order and had to be taken advantage of within the year; (3) its own goods as well as those of others were available for such use; and (4) it periodically resold, in job lots for cash and on its own warehouse floor, goods thus accumulated and not used or junked by it, including products of a number of manufacturers, to purchasers who were not regular distributors of such new products, and, in some instances, at prices considerably less than original manufacturer's prices for such goods, some of which, thus resold, found their way into channels of trade in which competitors were selling new merchandise:

Held, That practice or practices in question, on basis of slight injury to competition shown, and absent showing of intent to injure competition by harassing competitors or destroying good will adhering to their merchandise, or effect of so injuring, etc., did not constitute unfair methods of competition, and order of dismissal directed.

Before *Mr. Robert S. Hall*, trial examiner.

Mr. Randolph W. Branch for the Commission.

Mr. J. Hector McNeal, of Philadelphia, Pa., for respondent.

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 R. M. Hollingshead Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of the said act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, R. M. Hollingshead Corporation, is a corporation organized under the laws of the State of New Jersey and having its office and principal place of business at 840 Cooper Street in the city of Camden, State of New Jersey.

PAR. 2. Respondent is now, and has been for more than 2 years last past, engaged in the business of manufacturing, distributing, and selling certain products known generally as "automobile chemicals," which include, among other things, polishes, soaps, oils and lubricants, cements, cleaning compounds, top dressings, tire coatings, tube repair kits, radiator solder, brake and shock absorber fluids, and grinding compounds. Many of these products are designated by the preliminary word "Whiz" and are known collectively as respondent's "Whiz Line." The same or similar products are sold by respondent under various other names and markings.

Respondent causes and has caused the said products, when sold, to be transported from its said place of business in the State of New Jersey to purchasers thereof located in States of the United States other than the State of New Jersey and in the District of Columbia.

PAR. 3. In the course and conduct of its said business respondent is now, and has been for more than 2 years last past, in substantial competition with other corporations, and with individuals, firms, and partnerships, engaged in the distribution and sale of products used for the same purposes as those of respondent, in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 4. Respondent's automobile chemical business is very large; it maintains branch distributing and sales offices in the cities of St. Paul, Minn., San Francisco, Calif., New York, N. Y., and a warehouse in the city of San Francisco, from and through which, as well as its establishment in Camden, N. J., its products are sold to wholesalers and jobbers of such merchandise generally throughout the United States and in the District of Columbia.

PAR. 5. In the course and conduct of its said business, and for the purposes of inducing the purchase of the "Whiz Line" or separate items thereof by jobbers and wholesalers of such merchandise, creating and maintaining a monopoly in the automobile chemical business and hindering and hampering its competitors in disposing of their wares, respondent has unfairly disparaged competitors and their goods and has endeavored to carry out its monopolistic purposes by the use of the following practices:

(a) Respondent agrees with jobbers and wholesalers who are for the first time purchasing stocks of the "Whiz Line" or various items thereof, that it will accept from such jobber or wholesaler any products of a similar character manufactured by others which the jobber or wholesaler selects from his stock, describes in a schedule furnished to respondent and delivers in a single shipment, transportation paid, to respondent at Camden, N. J.

(b) Upon receipt of such products, respondent gives to the said jobber or wholesaler credit to the amount of the cost to the jobber or wholesaler of the goods received, provided, however, that such credit will be applicable only within 1 year, only against purchases of items of respondent's "Whiz Line" and only for 25 percent of the amount of such purchases.

(c) Merchandise so received by respondent is stored until a substantial amount has accumulated, when it is sold to dealers having places of business in States other than the State of New Jersey and

engaging in the business of purchasing and selling what is known as "distress merchandise," at a figure far below the amount of the credit which respondent has given, as hereinbefore stated, and far below the cost of the same merchandise, to those from whom it was acquired by respondent.

PAR. 6. The capacity, tendency, and effect of said acts and practices of respondent hereinbefore set out, and others of a similar nature, are, and have been: To place those who purchase the said wares from the respondent as aforesaid in a position to reintroduce them or many of them into the channels of trade and commerce at prices below those ordinarily current in their normal and uninterrupted distribution; to unreasonably hinder, hamper, and restrain the manufacturers of the said products in disposing of their new merchandise at their usual current prices, or at any prices, by reason of the availability, to wholesalers and jobbers, of the said wares at such cut prices; to hinder and restrain wholesalers and jobbers who have or might acquire said products from the manufacturers thereof from selling them at the usual and current prices therefor; to demoralize the market of the said manufacturers for their said products and to injure their reputations and those of their goods; to unreasonably lessen, eliminate, restrain, hamper, and suppress competition in the automobile chemical industry; to create in respondent a monopoly in the automobile chemical industry and to otherwise operate as a restraint of trade and a detriment to the freedom of fair and legitimate competition in the said industry, and to obstruct the natural flow of trade in the channels of commerce between and among the several States of the United States.

PAR. 7. The aforesaid acts and practices of the respondent as herein alleged are all to the prejudice of competitors of respondent and of the public, have a dangerous tendency to, and have, actually hindered and prevented competition in the sale of automobile chemicals in commerce, and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

OPINION

Acting pursuant to the authority of the Federal Trade Commission Act, the Commission on December 10, 1938, issued its complaint charging the respondent with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce.

Respondent is engaged in the manufacture and interstate sale and distribution of automobile soaps, polishes, top dressings, and other

1

Opinion

products generally known as "automobile chemicals." Various of its products are collectively designated by respondent as its "Whiz Line."

In 1937 or 1938 respondent in the sale of its "Whiz Line" initiated, and thereafter pursued, a practice known as "lifting." Wholesaler or jobber customers of the "Whiz Line," or various of its items, were allowed to select from their own stocks any goods of the same general classification which they chose, with some inconsequential exceptions, regardless of age, conditions, or manufacture. These goods the customer could ship, at his own expense, to respondent, at its place of business at Camden, N. J., furnishing respondent with a statement of their cost to him. Thereupon respondent gave the customer credit for the full amount of such cost, subject to the condition that the credit be applied within 1 year against purchase of items of the "Whiz Line," but only for 25 percent of the amount of such purchases. Thus in order to utilize his credit, a customer who sent in goods that cost him \$500 had to purchase \$2,000 of "Whiz" items within the year.

This type of agreement was made both with dealers who were carrying "Whiz" items at the time of the transaction, and with dealers who were buying them for the first time, and contemplated return for credit goods manufactured by the respondent or by competitors.

The record shows that the goods thus "lifted" were resold from time to time as they accumulated in respondent's warehouse, although some of them were junked as unsalable, and others were used by respondent in the manufacture of its own goods. Resales were made for cash in job lots usually including the products of a number of manufacturers. The purchasers, who were not regular distributors of new automobile chemicals, took delivery on respondent's warehouse floor and made their own arrangements for the transportation of the goods to their places of business in States other than the State of New Jersey.

Resales were made by the respondent at prices considerably less than the original manufacturer's current prices for the same goods. The purchasers were in consequence able to, and did, resell a portion of the goods to wholesalers and jobbers at less than the manufacturer's current prices. Thus some of the goods found their way into the channels of trade in which the competitors of respondent were selling new merchandise.

There is no question but that the practice of "lifting" competitors' merchandise from distributors' shelves, and disposing of it in a manner which permits its access again into the channels of distribution at distress prices is detrimental to competitors. Its immediate effect may be to reduce the possibility of the competitor selling more goods

to the distributor. A detrimental effect is more apparent when the "lifted" merchandise reappears on the market at reduced prices.

In *Waldes & Co., Inc.*, 8 F. T. C. 305, this Commission found a similar practice to be an unfair method of competition, and ordered the respondent to cease and desist. In the *Waldes* case, *supra*, there was an apparent attempt to harass and injure competitors which does not appear in the instant record. Nor does the slight injury to competition demonstrated here approach the demoralizing effect of the practice found in the *Waldes* case.

In the absence of a showing (as in the *Waldes* case) of substantial injury to competition, or of an intent or effect of injuring competition by harassing competitors or destroying the good will adhering to their merchandise, we cannot conclude that the practices here are unfair methods of competition.

By reason of all of the foregoing, an order will be entered directing that the complaint herein be dismissed.

ORDER DISMISSING COMPLAINT

This matter coming on to be heard by the Commission upon the record, and the Commission having duly considered the same and being now fully advised in the premises, is of the opinion that the complaint herein should be dismissed for the reasons stated in an opinion issued herewith;

It is ordered, That the complaint be, and the same hereby is dismissed.

Complaint

IN THE MATTER OF
VULCAN LAMP WORKS, INC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket \$987. Complaint, Jan. 3, 1940—Decision, Dec. 2, 1940*

Where a corporation engaged in manufacturing flashlight and other incandescent electric light bulbs, and in selling same to retail trade, and in importing from Japan glass bulbs and assembling such products, along with other parts, into flashlight lamps, volume of business in which constituted about 3 percent of its total volume—

- (a) Sold to retail dealers finished lamps referred to, in which said imported glass bulbs, upon the necks of which were imprinted words "Made in Japan" or "Japan," were placed by it in bases which it bought from manufacturers and which bore thereon legend "Made in U. S. A.," with result that said Japanese word or words were entirely concealed and there remained visible only aforesaid legend, with no markings thereon to indicate that bulbs in question and basic part of such lamps were of Japanese or foreign, rather than domestic, origin; and
- (b) Placed such lamps, in packing and arranging same for shipment to retailers and for display and resale by such dealers to purchasing public, in cartons and on cards bearing legend "Made in U. S. A." or "American Made for American Trade," or other legends of similar import or meaning, representing said lamps as wholly of American origin;

With effect, through said practices in concealing such legends of origin and in representing, as above set forth, that said flashlight lamps were wholly of domestic origin, of misleading and deceiving substantial portion of purchasing public into erroneous and mistaken belief that said lamps were products wholly of domestic origin, for which there is decided preference among members of purchasing public over those composed in whole or to some extent of parts made in Japan or other foreign country, and with consequence, as result of such erroneous and mistaken belief as to said domestic origin of such lamps, engendered as above set forth, that substantial portion of purchasing public was induced to and did buy its said products, and with effect further, through use of such practices, of placing in hands of unscrupulous or uninformed dealers means and instrumentality whereby such dealers had been and were enabled to mislead and deceive members of purchasing public:

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. Clark Nichols 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