

IN THE MATTER OF
YORK CONE COMPANY

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

Docket 3801. Complaint, Sept. 13, 1939—Decision, Feb. 11, 1941

Where a corporation engaged in manufacture of candy and in interstate sale and distribution of certain assortments thereof, together with push cards, including its "Hy-Timer" assortment composed of number of small pieces of candy of uniform size and shape, together with larger bars or pieces and peanut butter sandwiches and 160-disk two-section push card for use in sale and distribution of said products under a plan, and in accordance with said card's explanatory legend, by which purchaser received, for penny paid, one of the small pieces or larger bar or peanut butter sandwich, in accordance with success or failure in securing one of lucky numbers set out in card's legend, and purchaser of last punch in each of said two sections received, without additional cost, tray of malted milk candy—

Sold such assortments to wholesalers, jobbers, and retailers, by whom, as direct or indirect purchasers thereof, they were exposed and sold to purchasing public in accordance with aforesaid sales plan, under which fact as to whether purchaser received one of small pieces of uniform size and shape or larger bar, piece, or tray of candy, or peanut butter sandwich, was determined wholly by lot or chance, and involving game of chance or sale of a chance whereby purchaser might procure bars, pieces or trays of candy or peanut butter sandwiches at price which was much less than normal retail price thereof, and thereby supplied to and placed in the hands of others means by which games of chance, gift enterprises, or lottery schemes were conducted, contrary to an established public policy of the United States Government and in violation of criminal laws, and in competition with many who sell like and similar products between and among the various States, and who refrain from using any method involving game of chance or contrary to public policy;

With the result that use of such method by it, because of said game of chance, unfairly diverted trade in commerce to it from its said competitors who do not use same or equivalent methods; to substantial injury of said competition in commerce:

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

Before *Mr. Miles J. Furnas* and *Mr. Randolph Preston*, trial examiners.

Mr. Gerard A. Rault, *Mr. D. C. Daniel*, and *Mr. L. P. Allen, Jr.*, for the Commission.

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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 York Cone 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 interest of the public, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, York Cone Co., is a corporation organized and doing business under the laws of the State of Pennsylvania, with its office and principal place of business located at 615-623 South Pine Street, in the city of York, Pa. Respondent is now and for some time last past has been engaged in the manufacture of candy 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 and in the District of Columbia. Respondent causes, and has caused, said products when sold to be transported from its principal place of business in the city of York, Pa., 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 candy 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 candy 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 wholesale dealers, jobbers and retail dealers certain assortments of candy so packed and 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 is composed of 42 bars of candy, together with a device commonly called a push card. The said push card has 40 partially perforated disks, on the face of which is printed the word "Push." Concealed within the said disks are numbers ranging from 1 to 5, inclusive. When the disks are pushed or separated from the

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card a number is disclosed. Purchasers punching numbers 1, 2, 3, 4, and 5 pay 1, 2, 3, 4, and 5 cents, respectively. The card is also divided into two sections, and the purchaser making the last push in each section receives two of said bars of candy. The numbers are effectively concealed from purchasers and prospective purchasers until the disks are pushed or separated from the card. The bars of candy are thus sold and distributed to the purchasing and consuming public wholly by lot or chance.

The respondent furnishes, and has furnished, various push cards for use in the sale and distribution of its candy by means of a game of chance, gift enterprise, or lottery scheme. Such cards are similar to the one herein described and vary only in detail.

PAR. 3. Retail dealers who purchase respondent's said candy, directly or indirectly, expose and sell the same to the purchasing public in accordance with the sales plan aforesaid. 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 sales plan or method in the sale of its candy and the sale of said candy by and through the use thereof and by the aid of said sales plan or method is a practice of a 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 candy to the purchasing public by the method and plan hereinabove set forth involves a game of chance or the sale of a chance to procure bars of candy at a price much less than the normal retail price thereof or additional bars of candy without additional cost. Many persons, firms, and corporations who sell and distribute candy 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 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 candy and in the element of chance involved therein and are thereby induced to buy and sell respondent's candy in preference to candy of said competitors of respondent who do not use the same or equivalent methods. 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

equivalent methods, and 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 the 13th day of September 1939, issued its complaint in the above-entitled proceeding and caused same to be served upon the respondent, York Cone Co., a corporation, 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. On the 30th day of September 1939, the respondent filed its answer. After the issuance of said complaint and the filing of respondent's answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by Gerard A. Rault, D. C. Daniel, and L. P. Allen, Jr., attorneys for the Commission, before Miles J. Furnas and Randolph Preston, examiners of the Commission theretofore duly designated by it, no evidence being offered by the respondent, and the said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and other evidence, briefs in support of the complaint and in opposition thereto, oral argument having been waived; 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, York Cone Co., is a corporation organized and doing business under the laws of the State of Pennsylvania, with its office and principal place of business located at 615-623 South Pine Street, in the city of York, Pa. Respondent is now and for

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some time last past has been engaged in the manufacture of candy and in the sale and distribution thereof to wholesale dealers, jobbers, and retail dealers located at points in 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 original place of business in the city of York, Pa., to purchasers thereof, at their respective points of location, in 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 candy in commerce between and among various States of the United States and in the District of Columbia. In the course and conduct of its said business respondent has been in competition with other corporations and with partnerships and individuals engaged in the sale and distribution of candy in commerce between and among various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business prior to March 20, 1939, the respondent sold to wholesale dealers, jobbers, and retail dealers various assortments of candy with a device commonly known as a push card included therein. One of such assortments was known as "Hy-Timer" and consisted of a number of small pieces of candy of uniform size and shape, together with larger bars or pieces of candy and peanut butter sandwiches. Accompanying this assortment was a push card containing 160 partially perforated disks with numbers concealed therein. At the top of this push card was a legend or instructions setting forth various numbers which entitled purchasers punching the same to receive one of the aforesaid bars or pieces of candy or one of the peanut butter sandwiches. Purchasers not pushing one of the lucky numbers set-out in the legend received one of the aforesaid smaller pieces of candy of uniform size and shape. The numbers within the discs were concealed from purchasers until a selection had been made and the disc pushed or separated from the board. Sales were 1 cent each and the purchasers punching one of the numbers set out in the legend calling for a larger bar or piece of candy or a peanut butter sandwich received the same for the price of 1 cent. The push card was also divided into two sections and the purchaser of the last punch in each of these sections received without additional cost a tray of malted milk candy. The larger bars, pieces, or trays of candy and the peanut butter sandwiches above mentioned are of a greater value than the smaller pieces of candy of uniform size and shape. The fact as to whether a purchaser received one of the small pieces of candy of uniform size and shape or a larger bar,

piece, or tray of candy or a peanut butter sandwich was thus determined wholly by lot or chance.

PAR. 3. The Commission finds that the respondent sold various assortments of candy along with push cards to wholesale dealers, jobbers, and retail dealers and that retail dealers who, either directly or indirectly, purchased such assortments sold the same to the purchasing public in accordance with the sales plan described in paragraph 2 hereof. The Commission further finds that the respondent, by furnishing candy and push cards as above described thereby supplied to and placed in the hands of others the means by which games of chance, gift enterprises, or lottery schemes were conducted. The Commission further finds that the use by respondent of such a method in the sale and distribution of its candy and the distribution of candy by and through the use thereof and by the aid of such a method is a practice of a sort which is contrary to an established public policy of the Government of the United States and in violation of criminal laws.

PAR. 4. The Commission further finds that the sale of candy to the consuming public by the method above described involves a game of chance or the sale of a chance whereby the purchaser thereof may procure bars, pieces or trays of candy or peanut butter sandwiches at a price which is much less than the normal retail price thereof; that many persons, firms, and corporations sell candy in commerce between and among various States of the United States and in the District of Columbia like and similar to that sold by respondent and such competitors refrain from using any method involving a game of chance or any method contrary to public policy; that 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 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 equivalent methods and as a result thereof substantial injury is being and has been done by respondent to competition in commerce between and among various States of the United States and in the District of Columbia.

CONCLUSION

The aforesaid acts and practices of the 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.

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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 of respondent, testimony, and other evidence taken before Miles J. Furnas and Randolph Preston, examiners of the Commission theretofore duly designated by it, in support of the allegations of said complaint, no evidence being offered by the respondent, briefs filed herein, oral argument having been waived, 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, York Cone Co., 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. Supplying to or placing in the hands of others candy or any other merchandise together with push or pull cards, punchboards, or 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 such candy or other merchandise to the public.

2. Supplying to or placing in the hands of others push or pull cards, punchboards, or 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 public.

3. Selling or otherwise disposing of 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.

Syllabus

IN THE MATTER OF

CHARLES T. PIKE, ELBERT C. PIKE AND ERNEST C. PIKE,
TRADING AS MIDDLE WEST SUPPLY COMPANY AND THE
BEST GARDENSCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3996. Complaint, Jan. 23, 1940—Decision, Feb. 19, 1941*

Where three individuals engaged, under two separate trade names, in interstate offer and sale of face powder and flower seeds of various kinds, in substantial competition with others engaged in offer and sale of said products in commerce, as aforesaid, and who do not make offers of so-called "free" goods or misrepresent prices of goods to induce their purchase;

In selling their said products under a plan of sending, through the mails, penny post cards making certain offers to addressee and holding out, or purporting to hold out, additional inducements to recipient in consideration of his sending in number of post cards addressed to friends or acquaintances, which cards were made use of by them for the further sending to such addressees of other similar offers, so as thereby to establish an endless chain of prospective customers for their merchandise—

- (a) Represented, under trade name "Middle West Supply Company," in offers thus sent to prospective purchasers through means aforesaid, that they were offering free of charge a box of face powder of represented value of \$1 as an introductory or special offer to introduce new brand of such powder if customer would remit sum of 10 cents to cover cost of postage, packaging, and handling, and send in also to them six postal cards addressed to friends who made use of such product, facts being, in large number of cases, no powder whatever was sent to those complying with said offer and sending amount thus called for, powder, in those instances in which sent, was not reasonably worth \$1 or more than 10 cents paid by customer, but cost thereof to said individuals was much less than said amount and said product was not "free" nor delivered, furnished, or supplied free of charge, and so-called offers were not special, introductory, or unusual, but customary methods employed by them in regular course of their business; and
- (b) Represented further, in offers made on post cards by them as above described, that to customers mailing in their dime and the six addressed postal cards within a 10-day period, they would send an additional premium or "promptness prize," represented as consisting, as case might be, of manicure sets, plush table covers, or similar merchandise, facts being, in cases in which face powder was sent at all, as hereinbefore set forth, and customer was entitled to such "promptness prize," they did not send same with powder, but required additional payment of 24 cents;
- (c) Represented, under trade name "The Best Gardens," in offer and sale of flower seeds under plan above described, on post cards sent to those whose names they had secured as above described, that they had a wonderful premium offer to send recipient "free," and stated that they would send "100