

IN THE MATTER OF
H. W. LAY & COMPANY, INC.

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

Docket 4439. Complaint, Dec. 31, 1940—Decision, June 28, 1941

Where a corporation engaged in the competitive interstate sale and distribution of food products, including assortments of nuts which were so packed and assembled as to involve the use of games of chance, gift enterprises, or lottery schemes when sold to the consuming public, and included, as typical, a display card with twenty-seven 5-cent packages of nuts, three of which, however, had concealed within them slip of paper bearing the word "free," and were without cost to purchasers procuring same;

Sold such assortments to jobbers and, directly or indirectly, to retailers, by whom they were exposed and sold in accordance with said plan, involving game of chance to procure, without cost, package of nuts, and thus supplied to and placed in the hands of others means of conducting lotteries in the sale of its products, contrary to established public policy of the United States Government, and in competition with many who, unwilling to use such or other method contrary to public policy, refrain therefrom; With result that many persons were attracted by its said sales plans and the element of chance involved therein and were thereby induced to buy and sell its products in preference to those of its said competitors, whereby trade was unfairly diverted to it from them and substantial injury was done to competition:

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

Before *Mr. Arthur F. Thomas*, trial examiner.

Mr. J. W. Brookfield, Jr., for the Commission.

Hirsch, Smith, Kilpatrick, Clay & Cody, of Atlanta, Ga., 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 H. W. Lay & Co., Inc., 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 H. W. Lay & Co., Inc., is a corporation organized and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located at 444 Marietta Street, Atlanta, Ga. Respondent is now and has been for more than 1 year last past engaged in the sale and

distribution of food products to jobbers and retail dealers located in the various States of the United States and in the District of Columbia. Respondent causes, and has caused, its products when sold to be shipped and transported from its aforesaid place of business in the State of Georgia 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 more than 1 year last past a course of trade by said respondent in such food products in commerce between and among the various States of the United States and in the District of Columbia.

In the course and conduct of its business, respondent is, and has been, in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of like or similar products 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 distributes, and has sold and distributed, assortments of nuts so packed and assembled as to involve the use of games of chance, gift enterprises, or lottery schemes when sold and distributed to the purchasing and consuming public.

One of said assortments consists of 27 packages of nuts mounted on a display card bearing the legend

ARE YOU LUCKY?
You May Get a Package FREE

and distributed in the following manner:

The said packages of nuts retail at the price of 5 cents each, but three of said packages have within the wrapper or package a printed slip of paper bearing the word "Free" and thereby advising the purchaser thereof that the said package of nuts is given to him without cost. The said printed slips of paper are effectively concealed from purchasers and prospective purchasers until said packages have been opened and the said slips removed therefrom. The purchasers who procure said packages containing said printed slips thus procure the same without cost rather than at the regular retail price of 5 cents each. The fact as to whether the purchasers of said packages of nuts in said assortment procure the same without cost or pay the regular price of 5 cents each therefor, is thus determined wholly by lot or chance.

The respondent sells and distributes and has sold and distributed various assortments of food products involving a lot or chance feature, but such assortments are similar to the one hereinabove described and vary only in detail.

PAR. 3. Retail dealers who purchase respondent's said packages of nuts, 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 products and the sale of said products 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 packages of nuts to the purchasing public by the method or plan hereinabove set forth involves a game of chance or the sale of a chance to procure packages of said nuts without cost. Many persons, firms, and corporations who sell and distribute products 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 which is contrary to public policy and such competitors refrain therefrom. Many persons are attracted by said sales plans or method employed by respondent in the sale and distribution of its products and by the element of chance involved therein and are thereby induced to buy and sell respondent's products in preference to products of said competitors of respondent who do not use the same or equivalent methods. The use of said methods 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 constitutes 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 December 31, 1940, issued, and

thereafter served its complaint in this proceeding upon respondent H. W. Lay & Co., Inc., 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. After the issuance of said complaint and the filing of respondent's answer, the Commission, by order entered herein, granted respondent's motion for permission to withdraw said answer and to substitute therefor an answer admitting all the material allegations of fact set forth in said complaint and waiving all intervening procedure and further hearing as to said facts, which substitute answer was duly filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and substitute answer, 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 H. W. Lay & Co. is a corporation organized and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located at 444 Marietta Street, Atlanta, Ga. Respondent is now and has been for more than 1 year last past engaged in the sale and distribution of food products to jobbers and retail dealers located in the various States of the United States and in the District of Columbia. Respondent causes, and has caused, its products when sold to be shipped and transported from its aforesaid place of business in the State of Georgia 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 more than 1 year last past a course of trade by said respondent in such food products in commerce between and among the various States of the United States and in the District of Columbia.

In the course and conduct of its business, respondent is, and has been, in competition with other corporations and with individuals and partnerships engaged in the sale and distribution of like or similar products 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 distributes, and has sold and distributed, assortments of nuts so packed and assembled as to involve the use of games of chance, gift enterprises, or lottery schemes when sold and distributed to the purchasing and consuming public.

One of said assortments consists of 27 packages of nuts mounted on a display card bearing the legend

ARE YOU LUCKY?
You May Get a Package FREE.

and distributed in the following manner:

The said packages of nuts retail at the price of 5 cents each, but three of said packages have within the wrapper or package a printed slip of paper bearing the word "Free" and thereby advising the purchaser thereof that the said package of nuts is given to him without cost. The said printed slips of paper are effectively concealed from purchasers and prospective purchasers until said packages have been opened and the said slips removed therefrom. The purchasers who procure said packages containing said printed slips thus procure the same without cost rather than at the regular retail price of 5 cents each. The fact as to whether the purchasers of said packages of nuts in said assortment procure the same without cost or pay the regular price of 5 cents each therefor, is thus determined wholly by lot or chance.

The respondent sells and distributes and has sold and distributed various assortments of food products involving a lot or chance feature, but such assortments are similar to the one hereinabove described and vary only in detail.

PAR. 3. Retail dealers who purchase respondent's said packages of nuts, 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 products and the sale of said products 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.

PAR. 4. The sale of packages of nuts to the purchasing public by the method or plan hereinabove set forth involves a game of chance or the sale of a chance to procure packages of said nuts without cost. Many persons, firms, and corporations who sell and distribute products in competition with respondent, as above found, 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 which is contrary to public policy and such competitors refrain therefrom. Many persons are attracted by said sales plans or method employed by respondent in the sale and distribution of its products and by the element of chance involved therein and are

386

Order

thereby induced to buy and sell respondent's products in preference to products of said competitors of respondent who do not use the same or equivalent methods. The use of said methods 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.

CONCLUSION

The aforesaid acts and practices of 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 acts and practices in commerce within the intent and meaning 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 and the answer of the respondent, in which answer respondent admits all the material allegations of fact set forth in said complaint and states that it waives all intervening procedure and further hearing as to said facts, and the Commission having made its findings as to the facts and conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent H. W. Lay & Co., Inc., a corporation, its officers, representatives, agent, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of nuts or nut products, 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 nuts or nut products, or any other merchandise, so packed and assembled that sales of such nuts or nut products, or other merchandise, to the general public are to be made, or may be made, by means of a game of chance, gift enterprise, or lottery scheme.

2. Supplying to or placing in the hands of dealers, or others, assortments of packages of nuts or nut products, or other merchandise, which are to be used, or may be used, to conduct a lottery,

Order

33 F. T. C.

game of chance, or gift enterprise in the sale or distribution of such nuts or nut products to the public.

3. Packing or assembling in the same assortment packages of nuts or nut products, or other merchandise, for ultimate sale to the public, which individual packages of nuts or nut products, or other merchandise, are of uniform appearance, but some of which contain coupons or slips notifying the purchaser that said packages are furnished without cost;

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

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

NATIONAL INSTITUTE, INC., DOING BUSINESS AS
DIESEL ENGINES TRAINING, AND CLAYTON R. HAST-
INGS, SETH E. ROWDABAUGH AND JOHN C. SMITHCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 28, 1914*Docket 3417. Complaint, May 12, 1938—Decision, June 30, 1941*

Where a corporation engaged in competitive interstate sale and distribution of correspondence courses of study and instruction in various subjects, including one on Diesel engines, in sale of which it operated under trade name "Diesel Engines Training"; the president and general manager thereof, who was also a stockholder and director, and formulated, directed, and controlled its policies and practices; and a second individual who was secretary and treasurer thereof and also a stockholder and director and, subject to general supervision of the other, in general charge of its office;

In offering their course of instruction on Diesel engines by distributing circulars through the mails or distributing agencies in various sections of the country, and through 80 or more salesmen, supplied with certificates of identification and sales kit containing promotional and sales literature, who contacted and solicited those sending in the postage prepaid postal cards with which circulars aforesaid were accompanied, bearing the printed request to "Please send me information on how to secure a JOB in the DIESEL MOTOR and ENGINE INDUSTRY in the shortest possible time"; without specifically disclosing, as a rule, that a correspondence course was being offered, but presenting the matter so as to make it appear that the prospect was being afforded opportunity to apply for Diesel engine training, with only a limited number of applicants accepted from the particular vicinity—

- (a) Represented that because of the great increase in the use of Diesel engines during recent years, unusual and unprecedented opportunities for employment in their operation and maintenance were available to persons completing their said course of study, and that their school was able to and did obtain employment for its students upon completion of said course, and that employment was assured or guaranteed upon such completion;
- (b) Represented that their salesmen soliciting prospective students were themselves representatives of Diesel engine manufacturers, that their course of study was offered by or in connection or cooperation with such manufacturers, and that employment would be given to prospective students by such manufacturers upon the completion of their said course of study; and
- (c) Represented that employment would be provided the student while he was pursuing their course of study;

The facts being that, while there had been, during recent years, substantial increase in the use of Diesel engines, such increase did not open up any unusual field for employment in either manufacture or transportation, employees who theretofore operated the form of power displaced by the Diesel engines being made use of to operate the new engine or equipment; it was impossible for said corporation and individuals to obtain employment for