

IN THE MATTER OF
BOULEVARD CANDY COMPANY

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

Docket 3396. Complaint, Apr. 30, 1938—Decision, Jan. 15, 1942

Where a corporation engaged in manufacture and in competitive interstate sale and distribution of candy, including certain assortments packed and assembled so as to involve the use of a lottery scheme when sold and distributed to consumers, a typical assortment consisting of a number of 1-pound boxes of candy, an additional article of merchandise, and a punchcard for use in sale and distribution thereof under a plan by which the chance selection of certain numbers entitled a purchaser to one of said boxes and purchaser of the last punch received the article of merchandise, the amount paid by a customer for his chances or his receipt of a free chance was dependent upon the particular number secured, and those failing to qualify as aforesaid for box of candy, retail value of which was greater than the cost of any punch, received nothing other than privilege of a punch;

Sold to wholesalers and jobbers aforesaid assortments, retailer purchasers of which exposed and sold same to the purchasing public in accordance with the aforesaid sales plan, and thereby supplied to and placed in the hands of others means of conducting lotteries in the sale of its products, contrary to the established public policy of the common law and criminal statutes and the United States Government, and in competition with those who do not use such methods;

With the result that many dealers and ultimate purchasers were attracted by said method of packing candy and the element of chance involved in sale thereof, and were thereby induced to deal in such candy in preference to its competitors who do not use such methods, whereby trade was unfairly diverted to it from them:

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.

Before *Mr. Charles F. Diggs*, *Mr. Miles J. Furnas*, *Mr. Robert S. Hall*, *Mr. Lewis C. Russell*, and *Mr. John J. Keenan*, trial examiners.

Mr. D. C. Daniel for the Commission.

Pennish & Rashbaum, of Chicago, Ill., 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 Boulevard Candy Co., 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, Boulevard Candy Co. is a corporation, organized and doing business under the laws of the State of Illinois, with its principal office and place of business located at 1925 South Western Avenue, Chicago, Ill. Respondent is now, and for more than 1 year last past has been, engaged in the manufacture of candy and in the sale and distribution thereof to dealers. Respondent causes and has caused, its said products when sold to be transported from its principal place of business in Chicago, Ill., to purchasers thereof in the State of Illinois and in various other States of the United States and in the District of Columbia, at their respective places of business. There is now, and has been for more than 1 year last past, a course of trade and commerce by said respondent in such candy 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 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 and jobbers certain assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. One of said assortments is sold and distributed to the purchasing public in the following manner:

This assortment is composed of a number of one-pound boxes of candy and an additional article of merchandise, together with a device commonly called a punch board. Purchasers punching numbers ending in "0" receive the same without charge. Purchasers punching numbers ending in 1, 2, 3, and 4 pay 1, 2, 3, and 4 cents, respectively. Purchasers punching numbers ending in 5, 6, 7, 8, and 9 pay 5 cents. When a punch is made from the board a number is disclosed. The board bears statements of legends informing prospective purchasers that certain specified numbers entitle the purchasers thereof to receive a one-pound box of candy, and the purchaser of the last punch on the board is entitled to, and receives, the additional article of merchandise. A purchaser who does not qualify by obtaining one of the numbers calling for a box of candy, or by punching the last number on the board, receives nothing for his money other than the privilege of punching a number from the board. The num-

bers are effectively concealed from purchasers and prospective purchasers until a punch has been made and the particular punch separated from the board. The retail value of each of said boxes of candy is greater than any of the designated prices of said punches. The boxes of candy are thus sold and distributed to the purchasing public wholly by lot or chance.

The respondent manufactures, sells, and distributes, various assortments of candy involving a lot or chance feature, but such assortments, and the method of sale and distribution thereof, are similar to the one hereinabove 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 aforesaid sales plan. Respondent thus supplies to and places in the hands of others a means of conducting lotteries in the sale of its products in accordance with the sales plan hereinabove set forth, and said sales plan has the tendency and capacity to induce purchasers thereof to purchase respondents's said products 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 secure a box 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 to create a 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 and sell candy so packed and assembled as above described, or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance, or any other method of sale that is contrary to public policy, 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 an equivalent or similar method. The use of said method by respondent has a 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 or similar method, to exclude from said candy trade all competitors who are unwilling to, and who do not, use the same or an equivalent or similar method because the same is unlawful, to lessen competition in said candy trade, to create a monopoly of said candy trade in respondent and such other distributors of candy as use the same or an equivalent or similar 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 a 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 or similar method.

PAR. 6. The aforesaid acts and practices of respondent as herein alleged are all to the prejudice of the public and of respondent's competitors, and constitute unfair methods of competition 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 April 30, A. D. 1938, issued and subsequently served its complaint on the respondent, Boulevard 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 of said complaint were introduced by P. C. Kolinski, D. C. Daniel, L. P. Allen, Jr., and J. W. Brookfield, Jr., attorneys for the Commission, and in opposition to the allegations of the complaint by Lewis E. Pennish and H. P. Kishner, attorneys for the respondent, before trial examiners of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on said complaint, answer thereto, testimony and other evidence, report of the trial examiners upon the evidence and exceptions filed thereto, briefs in support of the complaint and in opposition thereto, and oral argu-

Findings

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ment of counsel; 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, Boulevard Candy Co., is a corporation, organized and doing business under the laws of the State of Illinois, with its principal office and place of business located at 1925 South Western Avenue, Chicago, Ill. Respondent is now, and for more than 4 years last past has been, engaged in the manufacture of candy, and in the sale and distribution thereof to wholesale dealers and jobbers. Respondent causes, and has caused, its products, when sold by it, to be transported from its place of business in Chicago, Ill., to purchasers thereof located in various other States of the United States. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said candy in commerce among and between the various States of the United States.

PAR. 2. In the course and conduct of its said business, the respondent is 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.

PAR. 3. In the course and conduct of its business, respondent sells, and has sold, to wholesale dealers and jobbers, certain assortments of candy so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. One of said assortments is sold and distributed to the purchasing public in the following manner:

This assortment is composed of a number of 1-pound boxes of candy and an additional article of merchandise, together with a device commonly called a punch card. Purchasers punching numbers ending in 0 receive the same without charge. Purchasers punching numbers ending in 1, 2, 3, and 4, pay 1, 2, 3, and 4 cents, respectively. Purchasers punching numbers ending in 5, 6, 7, 8, and 9 pay 5 cents. When a punch is made from the board a number is disclosed. The board bears statements or legends informing prospective purchasers that certain specified numbers entitle the purchasers thereof to receive a 1-pound box of candy, and the purchaser of the last punch on the board is entitled to, and receives, the additional article of merchandise. A purchaser who does not qualify by obtaining one of the numbers calling for a box of candy or by punching the last number

on the board receives nothing for his money other than the privilege of punching the number from the board. The numbers are effectively concealed from the purchasers and prospective purchasers until a punch has been made and the particular punch separated from the board. The retail value of each of said boxes of candy is greater than any of the designated prices of said punches. The boxes of candy are thus sold and distributed to the purchasing public wholly by lot or chance.

The respondent manufactures, sells, and distributes various assortments of candy involving a lot or chance feature, but such assortments and the method of sale and distribution thereof are similar to the one hereinabove described, and vary only in detail.

PAR. 4. Retail dealers who purchase respondent's said candy, directly or indirectly expose and sell the same to the purchasing public in accordance with the aforesaid sales plan. Respondent thus supplies to, and places in the hands of, others, a means of conducting lotteries in the sale of its products in accordance with the sales plan hereinabove set forth, and said sales plan has a tendency and capacity to induce purchasers thereof to purchase respondent's said products in preference to candy offered for sale and sold by its competitors.

PAR. 5. The sale of said candy to the purchasing public in the manner above described involves a game of chance or the sale of a chance to secure a box of candy. The use by the 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 a 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.

PAR. 6. 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 its competitors, with the result that trade has been diverted unfairly to the respondent from its competitors who are likewise engaged in the sale and distribution of candy in commerce among and between the various States of the United States, who do not use the same or an equivalent or similar method.

CONCLUSION

The aforesaid acts and practices of the respondent, as herein found, are all to the prejudice and injury of the public and of re-

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spondent's competitors, and constitute unfair methods of competition 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, the answer of the respondent, testimony, and other evidence taken before trial examiners of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, report of the trial examiner upon the evidence and exceptions filed thereto, briefs filed in support of the complaint and in opposition thereto, and oral arguments of counsel; and the Commission having made its findings as to the facts and its conclusion that said respondent, Boulevard Candy Co., a corporation, has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, Boulevard Candy 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. Selling or distributing candy or any other merchandise so packed or assembled that sales of such candy or other merchandise to the 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, 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 said 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

RETAIL COAL MERCHANTS ASSOCIATION, ET AL.

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

Docket 3911. Complaint, Oct. 5, 1939—Decision, Jan. 19, 1942

Where an association of all the retail coal dealers in and about Richmond, Va., with two or three exceptions, selling and distributing 80 to 90 percent of all the coal sold at retail in such trade area; and, as their competitors, purchasing the major portion of their coal from dealers in other States; together with the officers and the members thereof who were in competition with one another and with others in said trade area except as restricted by acts and practices below set forth;

Following their conception of a plan under which schedules of uniform prices, terms and conditions of sale on the various grades and varieties of coal sold were placed, at regular intervals, in the hands of all retailer members, who, in order to remain such, were required to establish and maintain such fixed schedules;

In pursuance of a scheme to compel a number of retail coal dealers in said city—who declined to join the association and to observe such fixed schedule of prices, etc., but continued to sell coal on a competitive basis, at prices usually substantially lower—to become members and maintain such prices, etc., through agreements with wholesale dealers supplying most of the coal shipped into Richmond, under which such wholesalers would refuse to sell or ship coal to any retailer in the area in question who was not a member or who, being a member, did not maintain the association's prices—

- (a) Conducted an intensive campaign among nonmember dealers to bring them into the association and threatened them with the loss of their sources of coal unless they became members;
- (b) Called on wholesale coal dealers and urged them under threat of boycott to cooperate with the association by refusing to sell coal to any dealer who was not a member thereof or who, being such, did not maintain association prices;
- (c) Attempted to induce such wholesalers to insert in their contracts with retailers a clause to the effect that if the dealer failed to conduct his business in conformity with the standards approved by his locality, the wholesaler would have the right to discontinue supplying coal under the contract;
- (d) Arranged joint meetings between the members of the association and wholesale coal dealers and there, under threat of boycott, sought and secured cooperation of latter;
- (e) Issued a list of "cooperators," showing the names of retailer members in one column and the names of certain wholesalers in the other, and distributed such list among the retailers and wholesalers named;

With the result that it became increasingly difficult for the twenty-odd non-member retailers in said city to obtain coal and they concluded it necessary to, and did, join the association in question, following which they had such difficulty no further; and