

Syllabus

IN THE MATTER OF
AMERICAN TOBACCO CO.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 4827. Complaint, Mar. 9, 1943¹—Decision, June 20, 1951*

Where one of the largest manufacturers of tobacco products in the United States, engaged in the competitive interstate sale and distribution of its said products; in advertising its Lucky Strike cigarettes in magazines of Nation-wide circulation, in newspapers of interstate circulation, by radio broadcasts in Nation-wide hook-ups, and by other means—

- (a) Represented that among independent tobacco experts—buyers, auctioneers, and warehousemen—Lucky Strike cigarettes had over twice as many exclusive smokers as all other cigarettes combined;

The facts being that the results of its prior survey did not and could not accurately reflect such a preference; of 1,184 persons represented as such exclusive smokers, about 50 out of 440 included in said figure smoked no cigarettes; more than 100 of the 440 testified that they did not smoke Luckies exclusively; others testified that they smoked other brands exclusively, could not recall ever having been interviewed or had no connection with the tobacco business; others were the recipients from it of free cigarettes or sums of money; and some testified that they smoked Luckies before its representative and other brands in the presence of its competitors;

- (b) Represented that twice as many of such experts smoked Lucky Strike cigarettes exclusively as smoked all other brands because they sold and handled tobacco and saw the grade and quality purchased at auction for use in Luckies, represented as being superior to and more expensive than that purchased for competing brands, and because they knew tobacco best;

The facts being that any preference which they might have had for Luckies did not result from their knowledge as to the quality of the tobacco used therein, since the blend employed in its said product, among many others made by it, is a trade secret; its competitors bid on and purchase the same types and grades as it does, at tobacco auctions, and when a pile of tobacco is purchased by it, neither the auctioneer nor any other independent tobacco expert can tell whether it will be used by it in the manufacture of said cigarettes;

- (c) Represented that Luckies were less acid than other popular brands, and that other popular brands had an excess acidity over such cigarettes of from 53 to 100 percent;

The facts being that there is no significant difference in the acid in the tobacco used in the manufacture of popular brands or in the smoke therefrom;

- (d) Represented that its said cigarettes were less irritating to the throat than competing brands, offered one's throat protection, were easy on one's throat, and provided protection against throat irritation and coughing;

¹ Amended.

The facts being there is no significant difference in the tars, resins, or nicotine in the smoke from all the leading brands of cigarettes, which is all irritating to the respiratory tract; while said corporation, as do its competitors, removes a portion of the irritants from the tobacco in its processing, no manufacturer attempts to eliminate such constituents completely, and differences in the different brands are so slight that the smoke from one is no less irritating than that from others; and

- (e) Represented that Luckies contained less nicotine than did four other leading brands of cigarettes;

The facts being that the nicotine content of domestic tobaccos used in the manufacture of the leading brands varies considerably not only as among the several kinds or types but as among individual plants; it is practically impossible, by blending or otherwise, to maintain a given level of nicotine in the tobacco purchased; it, as do its competitors, bids upon and purchases substantially all grades of tobacco offered at public auction; tobaccos used in its said cigarettes are of substantially the same grades as those used in competing brands; and differences in the nicotine content in and hence the smoke from, the leading brands are so small as to have no significant effect on the body;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the false and erroneous belief that said representations were true and into the purchase of its said cigarettes as a result thereof, to the substantial injury of 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 of competitors, and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

As respects respondent's contention that since its representations concerning the acidity of its said cigarettes was discontinued several years prior to the issuance of the amendment complaint, the issuance of an order to cease and desist the same would not be in the public interest, respondent further contending, however, that the representations in question were not shown to be false, misleading, or deceptive it was manifestly in the public interest, under the circumstances, for the Commission, through the issuance of an appropriate order, to prevent the resumption of the use of such representations.

As respects respondent's contention that representations as to its said cigarettes containing less nicotine than competing brands were true, and also that no significance was claimed as a result of the lower nicotine content nor any representation made as to any particular effect of the smoke therefrom, it contending also that since such representations were discontinued prior to the commencement of the proceeding, the public interest did not require an order with respect thereto:

The fact that it discontinued such misleading and deceptive representations with respect to its cigarettes and four other leading brands prior to the commencement of the proceeding did not make the issue with respect thereto devoid of public interest, the Commission was not satisfied that it might not resume such representations in the future, and it was manifestly in the public interest for it, in view of their misleading and deceptive nature,

to prevent such a resumption through the issuance of an appropriate order.

As respects the charge in the amended complaint that certain other representations were false, deceptive, and misleading, including the charge that respondent represented that Luckies were toasted and that it consistently paid more for cigarette tobacco purchased at auction markets than its competitors paid, and that it paid certain designated percentages more for its cigarette tobacco in certain designated markets than the average market price paid for all tobaccos sold at such markets, as reported by the United States Department of Agriculture: the Commission was of the opinion and found that such charges had not been sustained by the evidence.

Before *Mr. John L. Horner*, trial examiner.

Mr. John R. Phillips, Jr., for the Commission.

Chadbourne, Wallace, Parke & Whiteside, of New York City, and *Covington, Burling, Rublee, O'Brian & Shorb*, of Washington, D. C., for respondent.

AMENDED 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 the American Tobacco 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 amended complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, the American Tobacco Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business in New York City, State of New York. It is now, and for more than 5 years last past has been, engaged in the manufacture and processing of tobacco products, including cigarettes branded "Lucky Strike," also known as "Luckies," and in the sale and distribution thereof in commerce between and among the various States of the United States and in the District of Columbia. It now causes, and for more than 5 years last past has caused, such tobacco products, when sold by it, to be transported from its processing plants in the States of Virginia and North Carolina to the purchasers thereof, some located in said States and others located in various other States of the United States and in the District of Columbia, and there is now, and has been for more than 5 years last past, a constant current of trade and commerce conducted by said respondent in such tobacco products, between and among the various States of the United States

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and in the District of Columbia. Respondent is now, and for more than 5 years last past has been, one of the largest manufacturers of tobacco products in the United States and is now, and for more than 5 years last past has been, in substantial competition with other corporations and with persons, firms, and partnerships engaged in the sale of tobacco 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, described in paragraph 1 hereof, and for the purpose of aiding and promoting the sale by it of said Lucky Strike brand of cigarettes in the commerce aforesaid, respondent has disseminated, and caused to be disseminated, by the United States mails, in magazines of Nation-wide circulation, in newspapers of interstate circulation, by radio broadcasts in Nation-wide hook-ups and by other means in commerce, advertisements in which it has represented and still represents, directly and by implication:

(a) That Luckies are toasted.

(b) That among independent tobacco experts—buyers, auctioneers, and warehousemen—Luckies have over twice as many exclusive smokers as have all other cigarettes combined; that sworn records show such to be the fact.

(c) That because such experts—buyers, auctioneers, and warehousemen—sell and handle tobacco, because they see the grade and quality of tobacco purchased at auctions for Luckies, which is represented as being superior and more expensive than that purchased for competing brands, and because they know tobacco best, twice as many of them smoke Luckies exclusively as smoke all other brands.

(d) That Luckies are less acid than other popular brands of cigarettes.

(e) That other popular brands of cigarettes have an excess of acidity over Lucky Strikes of from 53 to 100 percent.

(f) That Luckies are less irritating to the throat than are competing brands.

(g) That Lucky Strike cigarettes offer one throat protection and that Luckies are easy on one's throat.

(h) That in Luckies one has protection against throat irritation.

(i) That in Luckies one has protection against coughing.

(j) That Luckies contain less nicotine than do competing brands of cigarettes.

(k) That certain throat irritants found in all tobacco have been driven out, taken out, removed, and expelled from the tobacco used

in Lucky Strike cigarettes in the processing of such tobacco into such cigarettes.

(7) That respondent consistently pays more for cigarette tobacco purchased at auction markets than competitors pay for their cigarette tobacco at such markets and that respondent pays certain designated percentages more for its cigarette tobacco in certain designated markets than the average market price paid for all tobacco sold at such markets, as reported by the United States Department of Agriculture.

PAR. 3. In truth and in fact:

(1) Luckies are not toasted as that term is commonly understood by the purchasing public to whom respondent's advertising is directed.

(2) Among independent tobacco experts as classified by respondent, being tobacco buyers, auctioneers, and warehousemen, Lucky Strikes do not have twice as many, or as many, exclusive smokers as have all other cigarettes combined; there are no records sworn to and verified by such so-called experts which establish that such is the fact; many tobacco buyers, auctioneers, and warehousemen have never been interviewed by respondent's representatives, and many of those who have been so interviewed and reported as being exclusive smokers of Luckies do not smoke Luckies exclusively and did not do so at the time of such interview.

(3) Such tobacco experts do not know the grade, quality, type, or prices of all of the varieties of tobacco making up Luckies, or any other brand of cigarettes on the market, nor do they know the proportionate amounts of such grades, types, or varieties blended into Luckies or other brands. Many of such experts are not of the opinion and do not believe that respondent buys the choicest or most expensive tobacco for its Lucky Strike cigarettes. Many of such experts have specialized knowledge of only one variety of tobacco and do not know how much of such variety is incorporated in respondent's cigarettes, or in other brands. The blending process used by each cigarette company and the proportions of the different types and varieties of tobacco making up the blend used in Luckies and in each other brand of cigarettes are trade secrets and none of the experts mentioned have knowledge as to such matters. Those of such tobacco experts who smoke Luckies do not smoke them because of the knowledge gained in the pursuance of their respective occupations, nor because of any opinion which they may have as to who buys what tobacco in the markets, with which they are familiar. Many of such experts smoke Luckies because they have been given to them by respondent, or because they prefer them as a matter of taste.

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(4) Luckies are not less acid than are other popular brands of cigarettes.

(5) Other popular brands of cigarettes do not have an excess of acidity over Lucky Strikes of from 53 to 100 percent, nor of any percentage.

(6) Luckies are as irritating to the throat as are competing brands.

(7) Lucky Strike cigarettes do not offer throat protection and are not easy on one's throat.

(8) In smoking Luckies one does not have protection against throat irritations or against coughing.

(9) Luckies do not contain less nicotine than do competing brands of cigarettes; nor does the smoke from Luckies contain less nicotine than is contained in the smoke of other brands.

(10) Some portion of some of the throat irritants are removed in the processing of all cigarettes, but there are throat irritants present in Luckies in approximately the same volume as in competing cigarettes and in no case is the entire amount of any one irritant removed by the processing of respondent's tobacco into Luckies.

(11) In truth and in fact, the content of nicotine, tarry matter, acids, and other substances, irritating to the throat and nasal passages of the smoker and otherwise harmful, varies continually in respondent's cigarettes and in the smoke therefrom, as they are offered for sale to the general public; and the relative content of nicotine, tarry matter, acids, and such substances in respondent's cigarettes as compared with that in competing brands of cigarettes, likewise varies continually. The number of variable factors involved in the growing of tobacco for cigarettes, in the blending and processing of such tobacco into cigarettes, and in the packing, handling, and distribution of such cigarettes to the consumer make it impossible for respondent or any of its competitors to produce and market the large volume of cigarettes which they respectively sell with a standard or constant content of nicotine, tarry matter, acids, or other harmful substances. Among these variable factors are differences in weather conditions during the tobacco-growing season in different localities in which tobacco of the same variety is grown; differences in such weather conditions from year to year; differences in the soil in which cigarette tobacco is grown and in the cultivation and fertilization thereof; variation in the mixing and blending of the varieties of tobacco incorporated in the cigarettes; variations in the changes brought about in cigarette tobacco in the processing thereof; deviations in the density with which the tobacco is packed in cigarettes and in the weight of the cigarettes themselves; variations in methods of handling and distribu-

tion of cigarettes and changes in differences in climatic conditions affecting cigarettes after they leave the factory where made.

In truth and in fact, there is no practicable method whereby the content of nicotine, tarry matter, acids, and other harmful substances in the general run of respondent's cigarettes as they reach the consumer or in those of its competitors, or in the smoke therefrom, can be ascertained with any degree of accuracy for any appreciable length of time. Any test which may be made to determine such content must, as a practical matter, be limited to a few samples, infinitesimal in number as compared to the total number of such cigarettes on sale at any one time, and the results obtainable from any such test are indicative of nothing more than the facts sought to be ascertained as of the particular time and place of the initiation of the test.

In truth and in fact, the differences between the content of nicotine, tarry matter, acids, and other harmful substances to be found in respondent's cigarettes as compared with those of competing cigarettes, and such differences among the cigarettes of such competitors, are so minute as to be insignificant and undetectable from the standpoint of the effect which such substances have on the smoker of respondent's cigarettes as compared to that experienced by the smoker of competing brands. For the above reasons, among others, the representations which respondent has made concerning the content of nicotine, tarry matter, acids, and other harmful substances in its cigarettes and the smoke thereof are false and deceptive, and mislead the public into erroneously believing that respondent's cigarettes are less injurious, when smoked, than are other and competing brands of cigarettes.

(12) Tobacco is commonly sold by the growers at auctions. It is prepared for market by being tied into bundles or hands and it is auctioned off in this form. Most major buyers have private systems for grading these bundles and the Department of Agriculture has promulgated a system of grading in certain markets. As each bundle is auctioned off it is sold to the highest bidder. Respondent is frequently such highest bidder, but more often not. The bulk of the lower grades of tobacco and that selling at cheaper prices is purchased by independent buyers not affiliated with any cigarette manufacturing company, and these independent buyers resell this tobacco to respondent in large quantities. Much of this lower priced tobacco is used by respondent in its cigarettes, but the price actually paid for it by respondent does not appear in any compilation of auction market prices. The average market price for tobacco at a given market, as reported by the United States Department of Agriculture, includes the prices paid

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for all grades and types of tobacco. Many of these grades and types are not used in the manufacture of cigarettes by respondent or competing companies, but are used to make other tobacco products, such as chewing tobacco, snuff, and pipe tobacco. The tobacco that is purchased and used for cigarettes normally brings a higher price on the market than tobacco purchased and used for other products. The proportion of tobacco incorporated into Luckies to the total purchases of tobacco made by respondent at any given market varies, and is different from the proportion of tobacco used in competing brands to the total purchases of tobacco made in such market by the manufacturers of such competing brands. Such proportion, as applied to competitors, is unknown to respondent.

In truth and in fact, the prices which respondent pays for tobacco at auction markets does not indicate or reflect the actual prices which it pays for Lucky Strike cigarette tobacco from day to day, week to week, nor year to year. The average market price for tobacco sold at an auction market for a specified period as published by the Department of Agriculture does not show or indicate the average market price paid by cigarette producers for cigarette tobacco at such market during said period. In fact, the average market price paid for tobacco at auction markets by each of the major cigarette producers exceeds the general average market price for tobacco in such markets, as compiled by the Department of Agriculture.

For the reason hereinabove set forth in this paragraph, among others the representation made by respondent that it consistently pays more for cigarette tobacco purchased at auction markets than competitors pay for their cigarette tobacco at such markets, and the representation that it pays certain designated percentages more for its cigarette tobacco in certain designated markets than the average market price for all tobacco sold at such markets, as reported by the Department of Agriculture, have the capacity and tendency to, and do, deceive and mislead the purchasing public into the erroneous belief that Luckies are made consistently of more expensive tobacco than is actually the case. Because of such erroneous belief so entertained a substantial portion of the purchasing public is induced to purchase Lucky Strike cigarettes.

PAR. 4. The aforesaid representations made by the respondent, as set-out in paragraph 2 hereof, have the capacity and tendency to mislead and deceive the purchasing public into the belief that such representations are true and to purchase respondent's product, Lucky Strike cigarettes, in the belief that such representations are true. Thereby

substantial injury has been done and is being done by respondent to substantial competition in interstate commerce.

PAR. 5. The aforesaid acts and practices of the respondent, as herein alleged, are all to the prejudice of the public and of respondent's competitors 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.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on March 9, 1943, issued and subsequently served its amended complaint in this proceeding upon the respondent, the American Tobacco Co., charging said respondent 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 that act. After the filing of the respondent's answer, testimony, and other evidence in support of and in opposition to the allegations of the amended complaint were introduced before a trial examiner of the Commission theretofore duly designated by it, and such 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 upon the amended complaint, the respondent's answer thereto, testimony, and other evidence, the recommended decision of the trial examiner and exceptions thereto, and briefs and oral argument of counsel; and the Commission, having duly considered the matter and having entered its order disposing of the exceptions to the recommended decision of the trial examiner, 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. The respondent, the American Tobacco Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business in New York, N. Y. Said respondent is engaged in the manufacture and processing of tobacco products, including cigarettes branded "Lucky Strike," also known as "Luckies," and in the sale and distribution of such products.

PAR. 2. The respondent causes, and for more than 5 years last past has caused, the aforesaid tobacco products, when sold, to be trans-

ported from its processing plants located in the States of Virginia and North Carolina to purchasers thereof located in various other States of the United States and in the District of Columbia. There is now, and for more than 5 years last past has been, a constant current of trade and commerce conducted by the respondent in its tobacco products among and between the various States of the United States and in the District of Columbia. The respondent is one of the largest manufacturers of tobacco products in the United States, and it is now, and for more than 5 years last past has been, in substantial competition with other corporations and with persons, firms, and partnerships engaged in the sale of tobacco products in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its aforesaid business and for the purpose of aiding and promoting the sale of its said Lucky Strike brand of cigarettes in commerce, as aforesaid, the respondent has disseminated, and has caused to be disseminated, by the United States mails, in magazines of Nation-wide circulation, in newspapers of interstate circulation, by radio broadcasts in Nation-wide hook-ups and by other means in commerce, advertisements in which it has represented, and caused to be represented, directly and by implication:

(a) That among independent tobacco experts—buyers, auctioneers, and warehousemen—Lucky Strike cigarettes have over twice as many exclusive smokers as have all other cigarettes combined; and that because such experts sell and handle tobacco, because they see the grade and quality of tobacco purchased at auction for use in Lucky Strike cigarettes, which is represented as being superior to and more expensive than that purchased for competing brands, and because they know tobacco best, twice as many of them smoke Lucky Strike cigarettes exclusively as smoke all other brands.

(b) That Lucky Strike cigarettes are less acid than other popular brands of cigarettes, and that other popular brands of cigarettes have an excess acidity over Lucky Strike cigarettes of from 53 to 100 per cent.

(c) That Lucky Strike cigarettes are less irritating to the throat than are competing brands; that said cigarettes offer one throat protection and are easy on one's throat; that in said cigarettes one has protection against throat irritation and against coughing.

(d) That Lucky Strike cigarettes contain less nicotine than do four other leading brands of cigarettes.

PAR. 4. (a) The aforesaid representations by the respondent with respect to the smoking preference of independent tobacco experts

clearly convey the impression that the independent tobacco experts preferred Lucky Strike cigarettes because they knew that the tobacco used by the respondent in the manufacture of such cigarettes was superior to and more expensive than the tobacco used by competitors in the manufacture of competing brands. Such representations are claimed by the respondent to have been based on the results of a survey conducted by the respondent in 1941 to determine the smoking preferences of independent tobacco experts. Such survey consisted of interviews by representatives of the respondent with individuals designated by the respondent as independent tobacco experts. A total of 2,210 persons deemed within the respondent's definition of an independent tobacco expert were reportedly interviewed by respondent's representatives. The questions asked of the individuals interviewed with respect to their smoking preferences were: (a) What cigarette to you smoke, and (b) which one do you smoke consistently? The interviewers were instructed to ask question (b) only when more than one brand was mentioned by the person interviewed, in reply to question (a). The pertinent information received was recorded and sworn to by the representatives on forms supplied by the respondent. A summary of the answers received to the questions indicated that of the 2,210 persons interviewed, 1,184 were represented as exclusive smokers of Lucky Strike cigarettes, 128 as exclusive smokers of other brands, 540 as smokers of more than 1 brand, and 358 as nonsmokers of cigarettes. The evidence adduced with respect to the survey conducted by the respondent shows that of 440 of the 1,184 persons claimed by the respondent to be exclusive smokers of Lucky Strike cigarettes, approximately 50 did not smoke cigarettes at all. More than 100 of the 440 witnesses testified that they did not smoke Lucky Strike cigarettes exclusively, and a number of them testified that they smoked other brands exclusively. A number of such witnesses could not recall ever having been interviewed by a representative of the respondent. Such testimony also shows that a number of persons classified by the respondent as independent tobacco experts had no connection whatsoever with the tobacco business. A number of the independent tobacco experts claimed by the respondent to be exclusive smokers of Lucky Strike cigarettes were the recipients of free cigarettes or sums of money from the respondent. Some of them testified that they smoked Lucky Strike cigarettes in the presence of a representative of the respondent, and other brands when in the presence of competitors of the respondent.

The individuals designated by the respondent as independent tobacco experts do not know the grade, quality, type, or prices of all the

different kinds of tobacco composing the finished Lucky Strike cigarettes, or any other brand of cigarettes, nor do they know the proportionate amounts of the different grades or types of tobacco in such cigarettes. The blend of tobaccos used by the respondent in the manufacture of Lucky Strike cigarettes is a trade secret. The respondent manufactures approximately 200 different tobacco products, including 25 different brands of cigarettes. The tobacco required for these various products is purchased by American Suppliers, Inc., a subsidiary of the respondent. American Suppliers, Inc., also purchases the tobacco used by the American Cigar & Cigarette Co., manufacturer of various tobacco products, including Pall Mall and Herbert Tareyton cigarettes; and, until 1939, purchased the tobacco leaf requirements of the John Wix Co., of London, England, manufacturers of cigarettes known as Kensitas. Tobacco is commonly sold by tobacco growers at auction to the highest bidder. Competitors of the respondent bid on and purchase the same types and grades of tobacco as are bid on and purchased for the respondent. When a pile of tobacco is purchased by American Suppliers, Inc., the auctioneer—or any other independent tobacco expert—cannot tell whether such tobacco will be used by the respondent in the manufacture of Lucky Strike cigarettes. Consequently, any preference which independent tobacco experts may have had for Lucky Strikes did not result from the knowledge that such independent tobacco experts had as to the quality of the tobacco used by the respondent in the manufacture of Lucky Strike cigarettes.

The Commission is of the opinion therefore, and finds, that the results of the aforesaid survey conducted by the respondent could not and did not accurately reflect the smoking preferences of independent tobacco experts, and that the aforesaid representations made by the respondent predicated upon such survey are misleading and deceptive.

(b) Scientific evidence in the record established that there is no significant difference in the acid in the tobacco used in the manufacture of popular brands of cigarettes or in the smoke therefrom. In addition to the testimony of experts that there is no particular or significant difference in the acidity of the popular brands of cigarettes and that there would be no difference in the effect of the acidity on the persons smoking any of the popular brands of cigarettes, the record contains reports of actual tests of the acidity of smoke from samples of different leading brands of cigarettes, which reports show that the smoke from the Lucky Strike cigarettes involved in the tests was not less acid than the smoke from other leading brands of cigarettes involved in the tests. Facts established by the evidence in the

record with respect to the kinds of tobacco used in the leading brands of cigarettes, the manner in which tobacco is customarily purchased by the manufacturers of the leading brands of cigarettes, and the chemical constituents of the tobacco in and the smoke from such cigarettes, all of which have a bearing on the respondent's representations that Lucky Strike cigarettes are less acid than other popular brands of cigarettes, are set forth hereinafter in the findings with respect to other representations by the respondent. The Commission finds from all the evidence in the record that Lucky Strike cigarettes do not contain less acid than other leading brands of cigarettes, and that respondent's representations to the contrary are false, misleading, and deceptive.

Respondent contends that since the representations concerning the acidity of Lucky Strike cigarettes were discontinued several years prior to the issuance of the amended complaint in this proceeding, the issuance of an order to cease and desist such representations would not be in the public interest. The respondent further contends, however, that such representations are not shown to be false, misleading, or deceptive. Under these circumstances, it is manifestly in the public interest for the Commission, through the issuance of an appropriate order, to prevent the resumption of the use of such representations.

(c) While admitting the dissemination of advertisements containing substantially the representations that Lucky Strike cigarettes are less irritating to the throat than are competing brands, that said cigarettes offer one throat protection and are easy on one's throat, and that in said cigarettes one has protection against throat irritation and protection against coughing, respondent contends that all of said representations were true. The evidence in the record pertaining to said representations consists largely of testimony of experts, including physicians, chemists, professors, and others who have engaged in extensive research in the chemistry of tobacco and of tobacco smoke and who have conducted various tests and experiments to determine the effect on the human body of the various chemical constituents of cigarette smoke. The tobaccos used in the manufacture of Lucky Strike cigarettes and other popular brands of cigarettes contain irritating properties. The respondent, as well as its competitors, in the processing of the tobacco into cigarettes removes a portion of the irritants from the tobacco. No cigarette manufacturer, however, attempts to eliminate completely from the tobacco the constituents which are known to be irritating. While there is some disagreement among the experts who testified in this proceeding as to the irritating potency of the various constituents of the smoke from cigarettes, it is

established that the chief chemical constituents in cigarette smoke are the volatile bases, including nicotine and ammonia; the volatile acids, principally formic and acetic acid; the volatile aldehydes, mainly acetaldehyde; and the resins, essential oils, and oleo-resin which comprise the aromatics, together with waxy substances, all of which are grouped together under the general term "tars and resins."

Testimony of medical witnesses, as well as reports of tests and experiments conducted by chemists, establishes that there is no significant difference in either the tars and resins or the nicotine in the smoke from all the leading brands of cigarettes. The testimony of medical experts also establishes that the smoke from all the leading brands is irritating to the mucous membrane of the respiratory tract and that the differences in the chemical constituents of different brands of cigarettes, as shown by reports of tests, are so slight that the smoke from one brand of cigarettes is no less irritating than is the smoke from other brands. The smoke from Lucky Strike cigarettes is not easy on one's throat and the smoking of Lucky Strike cigarettes will not afford one protection against throat irritation or against coughing.

The Commission finds, therefore, that the smoke from Lucky Strike cigarettes is not less irritating to the throat than is the smoke from other leading brands, that said cigarettes do not offer one throat protection and are not easy on one's throat, and that in said cigarettes one does not have protection against throat irritation and protection against coughing, and respondent's representations to the contrary are false and misleading.

(d) The respondent admits that it disseminated advertisements containing representations that Lucky Strike cigarettes contained less nicotine than did competing brands, but contends that such representations were true, and further that no significance was claimed as a result of the lower nicotine content and that no representation was made as to any particular effect on the smoker which might flow from the lesser nicotine content. The respondent also contends that since such representations were discontinued prior to the commencement of this proceeding, the public interest does not require an order with respect thereto.

As hereinbefore stated, there is some disagreement among the experts who testified in this proceeding, as to the irritating potency of the various chemical constituents of cigarette smoke. It is established, however, that the nicotine found in all tobaccos and in the smoke from all the leading brands of cigarettes is one of the harmful constituents. The representations by the respondent that Lucky Strike cigarettes

contained less nicotine than did competing brands of cigarettes necessarily carried the implication that the smoke from Lucky Strike cigarettes contained less nicotine than the smoke from competing brands of cigarettes and that such lesser nicotine content was significant from the smoker's standpoint. The record in this proceeding is replete with evidence concerning the nicotine content of various types of tobacco which go into the manufacture of the leading brands of cigarettes. There is also considerable evidence, consisting of the testimony of experts, reports of various tests, and other data concerning the nicotine content of the tobacco in and smoke from Lucky Strike and competing brands of cigarettes, as well as testimony of medical witnesses as to the physiological and pharmacological significance of the difference in the nicotine in the smoke from the leading brands of cigarettes.

The leading brands of domestic cigarettes are manufactured from flue-cured, burley, Maryland, and Turkish tobaccos. The domestic tobacco used in the manufacture of Lucky Strike cigarettes is purchased principally at public auction. The respondent, through its purchasing subsidiary, bids upon and purchases substantially all grades of tobacco offered for sale at public auctions. Manufacturers of competing brands of cigarettes also bid upon and purchase, at the same public auction sales, the same grades of tobacco as those purchased for the respondent, and at substantially the same prices. The tobaccos used in the manufacture of Lucky Strike cigarettes are all of substantially the same grades as those used in the manufacture of competing brands of cigarettes. The nicotine content of the domestic tobacco used in the manufacture of the leading brands of cigarettes varies considerably, not only as among the several kinds or types of tobaccos, but also as among the individual plants of the same types of tobacco on the same farm and in the same field, and even among the leaves on the same plant. These variations are due to a number of variable factors, such as the maturity of the crop at the time of harvesting, the topping, spacing, variety grown, the kind of soil, fertilization used, method of curing and handling after harvesting, the position of the leaves on the plants, and seasonal conditions. It is impossible to determine with any degree of accuracy the nicotine content of a pile of tobacco merely from visual inspection of such tobacco. It is also impossible from a practical standpoint for the respondent or any of its competitors to analyze all of the tobacco purchased to determine the nicotine content. In view of the aforementioned variability in the nicotine content of the tobacco, it is impossible from a practical standpoint for the respondent, or any of its competitors, by blending or

otherwise, to maintain a given level of nicotine in the tobacco purchased for use in the manufacture of cigarettes.

In the processing of tobacco used in the manufacture of Lucky Strike cigarettes, the respondent subjects the tobacco to varying degrees of heat, and in such processing, portions of the nicotine, as well as other chemical constituents such as tars and resins, are removed from the tobacco. The manufacturers of other leading brands of cigarettes also remove a portion of the nicotine and other constituents from the tobacco during the manufacture of their cigarettes. No manufacturer attempts to remove all of the nicotine from the tobacco. To do so would destroy the tobacco for commercial purposes. Subjecting tobaccos of different nicotine content to the same degree of heat will not result in the reduction of nicotine in all of the tobaccos to the same level. It is not possible from a practical standpoint for the respondent or any of the other manufacturers of leading brands of cigarettes to maintain a constancy of nicotine in the finished cigarette. This fact is established not only by the testimony of experts, but also by various reports of tests conducted which show variations in the nicotine content of tobacco in the individual cigarettes involved in the tests, not only as among the leading brands, but also as among the individual cigarettes of the same brand.

The nicotine content of the smoke of a cigarette is in direct proportion to the nicotine content of the tobacco contained in the cigarette itself. It is established by scientific evidence, including reports of various tests conducted, that the nicotine of the smoke of cigarettes varies not only as among the different leading brands of cigarettes but also as among the individual cigarettes of the same brand. It is also established by expert testimony, as well as by the aforesaid reports of tests, that the differences in the nicotine content of the tobacco in and smoke from the leading brands of cigarettes are so small as to have no significance from the smoker's standpoint. Respondent's representations clearly imply that the differences are significant from the smoker's standpoint. The testimony of expert medical witnesses establishes that there would be no difference in the effect on the human body as a result of the slight differences in the nicotine in the smoke of the different leading brands of cigarettes.

The Commission is of the opinion, and therefore finds, that the respondent's representations that Lucky Strike cigarettes contained less nicotine than did four other leading brands were misleading and deceptive. The fact that the respondent discontinued the representations concerning the nicotine content of Lucky Strike cigarettes prior to the commencement of this proceeding does not, as respondent contends,

make the issue with respect to such representations devoid of public interest. The Commission is not satisfied that the respondent might not resume the representations in the future, and in view of the finding that such representations were misleading and deceptive, it is manifestly in the public interest for the Commission, through the issuance of an appropriate order, to prevent such a resumption.

PAR. 5. While the amended complaint in this proceeding charges that certain representations in addition to those referred to herein, used by the respondent in promoting the sale of its Lucky Strike cigarettes, were false, deceptive, and misleading, the Commission is of the opinion, and finds, that such charges have not been sustained by the evidence.

PAR. 6. The use by the respondent of the false, deceptive, and misleading representations as set forth in paragraphs 3 and 4 hereof has had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the false and erroneous belief that said representations were true and into the purchase of respondent's Lucky Strike cigarettes as a result of such false and erroneous belief, thereby resulting in a substantial injury to competitors in interstate commerce.

CONCLUSION

The 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 and unfair and deceptive 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 amended complaint of the Commission, the respondent's answer thereto, testimony, and other evidence in support of and in opposition to the allegations of said amended complaint, the trial examiner's recommended decision and exceptions thereto, and briefs and oral argument of counsel; 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, the American Tobacco Co., a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution in commerce, as commerce is defined in the Federal Trade Commission Act, of its Lucky Strike

brand of cigarettes, do forthwith cease and desist from representing by any means, directly or by implication :

(1) That among independent tobacco experts, Lucky Strike cigarettes have twice as many smokers as all other brands of cigarettes combined; or that any greater proportion or number of independent tobacco experts or of any other group or class of people smoke Lucky Strike cigarettes than is the fact.

(2) That independent tobacco experts who smoke Lucky Strike cigarettes do so because of their knowledge of the grades or quality of the tobacco purchased by the respondent for use in the manufacture of Lucky Strike cigarettes.

(3) That Lucky Strike cigarettes or the smoke therefrom contains less acid than do the cigarettes or the smoke therefrom of any of the other leading brands of cigarettes.

(4) That Lucky Strike cigarettes or the smoke therefrom is less irritating to the throat than the cigarettes or the smoke therefrom of any of the other leading brands of cigarettes.

(5) That Lucky Strike cigarettes or the smoke therefrom is easy on one's throat or will provide any protection against throat irritation or coughing.

(6) That Lucky Strike cigarettes or the smoke therefrom contains less nicotine than do the cigarettes or smoke therefrom of any of the four other leading brands of cigarettes.

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, showing in detail the manner and form in which it has complied with this order.

Syllabus

IN THE MATTER OF

HOUSE OF PLATE, INC. 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 5744. Complaint, Mar. 1, 1950—Decision, June 20, 1951

Where the president of a corporation prior to its discontinuance of business, who directed and controlled its acts and practices, engaged in the competitive interstate sale and distribution of small plastic ducks under a course of conduct which included the shipment of said products to selected retailers whom he had theretofore advised of the "Reddest, Hottest, Sizzling Seller that has come your way in years," without further specification as to the merchandise, and that "so unless you tell us not to, we will be forwarding you the perfect test that demonstrates and sells on sight * * * a 20 day free trial offer without your investing a cent," and to whom, failing to receive a reply he sent six ducks, together with a descriptive circular showing the fair trade resale price, a return envelope on which postage was to be paid by the addressee, with the price to the retailer printed on the inside of the flap, and a letter advising him that by virtue of his reputation he was being intrusted with the shipment "without delay through the mails"; followed by an invoice subject to discount for payment within 10 days and other reminders and demands for payment—

- (a) Represented, directly and by inference, that the retail merchant receiving the ducks was obligated to pay therefor or return them, through the act of shipping them without any previous order or authorization and making a charge therefor, and through the letter accompanying the shipment and subsequent letters;
- (b) Represented that said individual was insured against the loss of the ducks in transit through a postal card which he sent to the retail merchant following a final letter insisting that the bill be paid or the ducks returned at the merchant's expense, and in which the retailer was advised that insurance claim for loss of the ducks in transit was being filed and information was requested on the attached business reply card as to whether they had been sold, would be returned or had not been received; and
- (c) Represented through letters sent under the name of the "Certified Credit Bureau" and a different address, that the ducks were shipped under a contract of consignment, that the merchant's credit rating was endangered by failure either to pay for the ducks or return them, and that the account had been placed in the hands of an independent collection agency;

The facts being that the recipient of merchandise shipped without previous order and in the absence of an agreement to purchase, is not obligated to pay therefor or to return it; failure of the merchants to answer said first letter could not under the circumstances be considered as authorizing shipment and created no contracts of consignment; failure to pay for or return the same would not jeopardize the credit rating of the recipient with legitimate businessmen; said individual was not insured against loss in transit of the unauthorized shipment of said products; and said "Certified Credit Bureau"