

Order

IN THE MATTER OF

THE CURTISS CANDY CO.

MODIFIED ORDER TO CEASE AND DESIST IN REGARD TO VIOLATIONS OF SEC. 3, AND SUBSECS. (a), (d), (e), (f) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT APPROVED JUNE 19, 1936; TOGETHER WITH SPECIAL CONCURRING OPINION OF COMMISSIONER MASON

Dockets 4556 and 4673. Order, Aug. 15, 1951

Order modifying cease and desist order issued on November 12, 1947, 44 F. T. C. 237 at 274, so as to require respondent, in connection with the purchase of corn sirup or glucose or other candy ingredients, and in the sale of candy or other candy products to cease and desist from the various unlawful and discriminatory practices as in said modified order set out.

Before *Mr. John L. Hornor* and *Mr. J. Earl Cox*, trial examiners.
Mr. Austin H. Forkner for the Commission.

Walker, Atwood, Zukowski & McFarland, of Chicago, Ill., for respondent.

Mr. William A. Quinlan and *Mr. Richard F. Wilkins*, of Washington, D. C., for National Candy Wholesalers Association, Inc., intervenors.

MODIFIED ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and answer of the respondent filed in Docket No. 4556, and upon the amended and supplemental complaint of the Commission and answer of the respondent filed in Docket No. 4673 (which proceedings were consolidated by the Commission on October 11, 1944), testimony and other evidence in support of and in opposition to the allegations of said complaints taken before a trial examiner of the Commission theretofore duly designated by it, report of the trial examiner upon the evidence and exceptions filed thereto, briefs in support of the complaints and in opposition thereto, and oral argument of counsel; and the Commission having made its findings as to the facts and its conclusion that the respondent had violated the provisions of section 3 of the act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, commonly known as the Clayton Act, and subsections (a), (d), (e), and (f) of section 2 of said Clayton Act, as amended by an act of Congress approved June 19, 1936, commonly known as the Robinson-Patman Act, on November 12, 1947, issued, and on November 14, 1947, served upon said respondent its order

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to cease and desist. Thereafter, this matter came on for hearing before the Commission upon a motion, filed on behalf of the respondent, requesting certain modifications in the aforesaid order to cease and desist, the answer to such motion filed by counsel in support of the complaint, and a brief in opposition to the motion filed on behalf of National Candy Wholesalers Association, Inc., as intervenor; and the Commission, having considered said motion answer, brief, and the record herein, and being of the opinion that its order to cease and desist issued November 12 1947, should be modified in certain respects:

I. *It is ordered*, That the respondent, The Curtiss Candy Co., a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the purchase of corn sirup or glucose or other candy ingredients in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

1. Knowingly receiving or accepting from any seller, or knowingly inducing any seller to grant, any discrimination in price set forth and described in paragraph 7 of the findings as to the facts herein or any discrimination in price substantially similar thereto.

2. Knowingly receiving or accepting from any seller, or knowingly inducing any seller to grant, any discrimination in price prohibited by section 2 of the Clayton Act, either directly or by means of any discount or allowance made by means of any booking practice, extension of time of delivery, or otherwise.

II. *It is further ordered*, That the respondent, The Curtiss Candy Co., a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in the sale of candy bars or other candy products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality as among purchasers when the differences in price are not justified by differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such products are sold or delivered:

1. By selling such products to some vending-machine operators at prices lower than the prices charged other vending-machine operators who in fact compete with the favored purchasers in the sale and distribution of such products.

2. By selling such products to some wholesalers or jobbers thereof at prices lower than the prices charged other wholesalers or jobbers who in fact compete with the favored purchasers in the sale and distribution of such products.

3. By selling such products to some retailers thereof at prices lower than the prices charged other retailers who in fact compete with the favored purchasers in the sale and distribution of such products.

4. By selling such products to some purchasers thereof at prices lower than the prices charged other purchasers who in fact compete with the favored purchasers in the sale and distribution of such products, either directly or by means of discount deals, fall booking practices, or other similar plans.

5. By selling such products to any retailer at prices lower than prices charged wholesalers or jobbers whose customers compete with such retailer.

For the purposes of comparison, the term "price" as used in this order takes into account discounts, rebates, allowances, and other terms and conditions of sale.

III. *It is further ordered*, That the respondent, The Curtiss Candy Co., a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the sale or offering for sale of candy bars or other candy products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

1. Paying or contracting to pay anything of value to, or for the benefit of, any purchaser for advertising services or facilities furnished by such purchaser, unless such payment or consideration is available to all other competing purchasers on proportionally equal terms.

2. Paying or contracting to pay anything of value to any purchaser either directly or by granting allowances or discounts upon purchases made, upon the condition that such purchaser prominently display respondent's candy products in said purchaser's place of business or display only respondent's candy or candy products on said purchaser's display racks or display any advertising designs, insignia, or posters advertising respondent's products in said purchaser's place of business or for any other similar advertising service or facility where such payments, discounts, or allowances are not made available to all other competing purchasers of respondent's candy bars or candy products on proportionally equal terms.

IV. *It is further ordered*, That the respondent, The Curtiss Candy Co., a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the sale of candy or other products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

1. Discriminating, directly or indirectly among competing purchasers of respondent's candy or candy products by furnishing, or contributing to the furnishing of, demonstrator services to any retailer purchasing respondent's products when such services are not accorded on proportionally equal terms to other retailer-purchasers located in the same city or other retailer-purchasers who in fact resell such products in competition with retailers who receive such services.

2. Discriminating, directly or indirectly, among competing purchasers of respondent's candy or candy products by furnishing, or contributing to the furnishing of, any newspaper, billboard, radio, or other advertising to any purchaser in connection with the sale of offering for sale of products purchased from respondent when such services or facilities are not accorded to competing purchasers upon proportionally equal terms.

3. Discriminating in favor of one purchaser against another purchaser or purchasers of respondent's candy or candy products bought for resale by contracting to furnish or furnishing any services or facilities in connection with the offering for sale or sale of such candy or candy products so purchased upon terms not accorded to all purchasers on proportionally equal terms.

V. *It is further ordered*, That the respondent, The Curtiss Candy Co., a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the sale, or making any contract for the sale, of respondent's candy or candy products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Selling, or making any contract for the sale of, respondent's candy products on the condition, agreement, or understanding that the purchaser thereof shall not use or deal in candy or candy products supplied by any competitor of the respondent.

2. Enforcing or continuing in operation or effect any condition, agreement, or understanding in or in connection with any existing contract of sale which condition, agreement, or understanding is to the effect that the purchaser of respondent's candy or candy products will deal in and sell only candy and candy products supplied by the respondent.

SPECIAL CONCURRING OPINION OF COMMISSIONER LOWELL B. MASON

I concur in the Commission's order granting in part and denying in part the respondent's motion for modification of the order to cease and desist in this proceeding, but wish to make my position clear with respect to the denial of the request for a provision per-

mitting the respondent to justify a price discrimination by showing that its lower price was granted to meet an equally low price of a competitor.

As pointed out in my dissent from the Commission's action in the Standard Oil Co. case (Docket No. 4389),¹ it has always been my view that under the provisions of section 2 (b) of the Clayton Act, as amended, a seller may realistically meet in good faith a price offered by a competitive seller, without necessarily changing his price to customers other than those to whom the competitive offer was made. This is still my view of the law. It does not follow, however, that in every case in which the Commission finds that a respondent has unlawfully discriminated in price, it must include in its order prohibiting the discriminations an affirmation of the respondent's right in this respect. As the United States Court of Appeals for the Second Circuit pointed out in the Ruberoid case (decision rendered June 4, 1951), a seller's right to meet in good faith a competitive offer is a statutory right which the Commission could not take away from him even if it tried, thus making it wholly unnecessary for the order to contain any reference to the right; and, furthermore, the provision, if included in the order, may be actually misleading as suggesting the possible retrial in contempt proceedings of issues already settled. By way of illustration, a respondent against whom a *prima facie* case of price discrimination has been established has an opportunity in the Commission's proceeding to justify his discriminations by showing that his lower price was granted to meet an equally low price of a competitor. If in the proceeding before the Commission the respondent seeks to so justify his discriminations and fails, or if he does not see fit to attempt to so justify the discriminations, the questioned practices raised by the attendant facts are condemned once and for all. If it were otherwise, Government and business would be chasing each other on a merry-go-round, trying and retrying before Commission and court the same old charges on the same old facts.

In the event of a definite change of circumstances, a respondent has his rights protected under section 5 (b) if the order be under the Federal Trade Commission Act, and under section 11 if the order be under the Clayton Act.

NOTE.—Part II of the original order to cease and desist, the only part modified, required respondent, its officers, etc., in the sale of candy bars or other candy products in commerce, to cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality as among purchasers when the differences in price are not justified by differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such products are sold or delivered:

See 43 F. T. C. 56 at 59.

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1. By selling such products to some vending-machine operators at prices different from the prices charged other vending-machine operators who in fact compete in the sale and distribution of such products: *Provided, however, That* this shall not prevent price differences of less than one-half cent per case, based upon 24-count, which do not tend to lessen, injure, or destroy competition among such vending-machine operators or between respondent and its competitors.

2. By selling such products to some wholesalers or jobbers thereof at prices different from the prices charged other wholesalers or jobbers who in fact compete in the sale and distribution of such products: *Provided, however, That* this shall not prevent price differences of less than one-half cent per case, based upon 24-count, which do not tend to lessen, injure, or destroy competition among such wholesalers or jobbers or between respondent and its competitors.

3. By selling such products to some retailers thereof at prices different from prices charged other retailers who in fact compete in the sale and distribution of such products: *Provided, however, That* this shall not prevent price differences of less than one-half cent per case, based upon 24-count, which do not tend to lessen, injure, or destroy competition among such retailers or between respondent and its competitors.

4. By selling such products to some purchasers thereof at prices different from the prices charged other purchasers who in fact compete in the sale and distribution of such products, either directly or by means of discount deals, fall booking practices, or other similar plans: *Provided, however, That* this shall not prevent price differences of less than one-half cent per case, based upon the 24-count, which do not tend to lessen, injure, or destroy competition among such purchasers or between respondent and its competitors.

5. By selling such products to any retailer at prices lower than prices charged wholesalers or jobbers whose customers compete with such retailer.

For the purposes of comparison, the term "price" as used in this order takes into account discounts, rebates, allowances, and other terms and conditions of sale.

Syllabus

IN THE MATTER OF
THE WANDER CO.

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

Docket 5316. Complaint, May 11, 1945—Decision, Aug. 16, 1951

While a significant prevalence of undernutrition among the people of the United States has been reported in official United States Government publications in the past, the statement that three out of four are undernourished is not justified, the facts being that the present extent of such undernutrition is indeterminate, and that the present state of knowledge of nutrition does no permit an accurate statistical statement of the specific percentage of people in the United States who are undernourished.

Where a corporation engaged in the interstate sale and distribution of its "Ovaltine" food preparation; through advertisements in newspapers, periodicals, radio broadcasts, and in other ways, directly and by implication—

- (a) Falsely represented that the consumption of Ovaltine would reduce the emptying time of the stomach after a starchy meal and thereby induce the return of hunger more quickly;
- (b) Represented falsely that its consumption would increase weight, correct nervous conditions, preserve and assure strength and health and stimulate appetite;
- (c) Represented that people who were under par, run-down, thin, tired, underweight, or lacking in energy or strength suffered such conditions because of vitamin and mineral deficiencies, which could be corrected and eliminated by the use of Ovaltine; and that consumption thereof would significantly aid in the correction and prevention of subnutritional states caused by vitamin or mineral deficiency;

The facts being that such symptoms are not always or generally caused by mineral or vitamin deficiency; when so caused said preparation would not constitute an adequate treatment therefor except in the milder forms, in which continued use over a long period of time might be of benefit; and in severe cases of deficiency, such as beri beri, pellagra, and scurvy, the vitamin and mineral content thereof was insufficient to produce any beneficial effect;

- (d) Represented that the use of Ovaltine as directed would correct iron deficiency anemia and its symptoms; and that loss of appetite was due to lack of vitamin B₁, which Ovaltine supplied in sufficient quantities to correct.

The facts being that while consumption thereof in the quantities recommended might prevent, it would not cure iron deficiency anemia or its symptoms; and while it would supply slightly more than the minimum daily requirement of vitamin B₁, loss of appetite—while it may result from a lack of such vitamin—is more frequently caused by illnesses which have no relation with such a deficiency;

- (e) Represented that three out of four people in this country are so deficient in vitamins and minerals that they have developed symptoms of fatigue, under par, underweight, and nervousness;

Notwithstanding the fact that the present state of knowledge of such matters did not permit an accurate statistical statement with regard thereto;