

Order

50 F. T. C.

IN THE MATTER OF
DOUBLEDAY & CO., INC., LITERARY GUILD OF AMERICA,
ET AL.

Docket 5569. Complaint, June 30, 1948—Decision, Dec. 5, 1953

Charge: Advertising falsely or misleadingly by using the words "free" and "Bonus Books"; in connection with the sale of books.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. Jesse D. Kash for the Commission.

Satterlee, Warfield & Stephens, of New York City, for respondents.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, the attached decision of the hearing examiner shall, on December 5, 1953, become the decision of the Commission.

Commissioner Mead dissenting.

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint in this proceeding was issued on June 30, 1948, and respondents' answer thereto filed in due course. Thereafter, at the request of counsel, hearing for the purpose of receiving evidence was continued pending the final adjudication of a similar proceeding In the Matter of Book of the Month Club, Inc., et al., Docket No. 5572.

The theory of the instant proceeding and the gravamen of the complaint are set forth in Paragraph Four thereof, wherein allegations and conclusions are made as follows:

"The use by the respondents of the word 'free' and the term 'Bonus Books' is false, misleading and deceptive. In truth and in fact, the books designated as 'free' or as 'Bonus Books' are not gifts or gratuities or without cost to the recipient but on the contrary the prospective purchaser or purchaser, before he is entitled to receive such books, must join respondents' club thereby becoming obligated to purchase at least four books from respondents over the period of a year, the fulfillment of which obligation inures directly to the benefit of, and profit to, the respondents."

The above described acts and practices of respondents in the use of the word "free" are alleged to be to the prejudice and injury of the public and to constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

The same legal concept of the word "free," as is set forth above, was also set forth by the Commission in a policy interpretative statement on January 14, 1948, as follows:

"The use of the word 'free' or words of similar import, in advertising to designate or describe merchandise sold or distributed in interstate commerce, that is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring directly or indirectly to the benefit of the advertiser, seller or distributor, is considered by the Commission to be a violation of the Federal Trade Commission Act."

Nearly six years after the promulgation of above-cited policy interpretative statement, the Commission, on September 8, 1953, reconsidered and rescinded that statement. A few days thereafter, on September 11, 1953, the Commission, in a proceeding very similar to the present one, dismissed the complaint In the Matter of Walter J. Black, Inc., et al., Docket No. 5771. In that opinion the Commission phrased the issue before it by the following question:

"May a businessman doing business in interstate commerce be charged with engaging in unfair or deceptive acts or practices in violation of the Federal Trade Commission Act if he uses the word 'free' in his advertising to indicate that he is prepared to give something to a purchaser free of charge upon the purchase of some other article of merchandise?"

The Commission by dismissing the complaint in that proceeding gave a negative answer to the question propounded.

In the light of these events, counsel for the respondents, on October 7, 1953, moved that the complaint herein be dismissed. Oral argument in support of and in opposition to respondents' motion was heard by the above-named duly designated Hearing Examiner on October 13, 1953.

Although counsel supporting the complaint recognized in his argument that the Commission had modified its concept as to the meaning of the word "free" subsequent to the issuance of the complaint herein, he opposed the dismissal asked for on the grounds that other of the respondents' acts and practices (in addition to those set forth in Paragraph Four of the complaint) constitute violations of the Federal Trade Commission Act, within the purview of the Commission's recent statement made at the conclusion of the opinion In the Matter of Walter J. Black, Inc., et al., *supra*. That statement is as follows:

"The use of the word 'Free,' or any other word or words of similar import or meaning, in advertising or in other offers to the public, to designate or describe any article of merchandise sold or distributed in

'commerce,' as that term is defined in the Federal Trade Commission Act, is considered by the Commission to be an unfair or deceptive act or practice under the following circumstances:

(1) When all of the conditions, obligations, or other prerequisites to the receipt and retention of the 'free' article of merchandise are not clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood; or

(2) When, with respect to the article of merchandise required to be purchased in order to obtain the 'free' article, the offerer either (1) increases the ordinary and usual price; or (2) reduces the quality; or (3) reduces the quantity or size of such article of merchandise."

In particular, counsel supporting the complaint asserted that evidence could be presented to establish that "* * * all of the conditions, obligations, or other prerequisites to the reception and retention * * *" of the book advertised as "free" have not been "* * * clearly and conspicuously explained or set forth at the outset * * *" of respondents' advertisements and that actually recipients of the so-called "free" book have been deceived by such failure to reveal. Thus, he contended that respondents have been engaged in unlawful acts and practices within the purview of the Commission's recent statement concerning the use of the word "free." Such an assertion may be warranted and counsel supporting the complaint may be prepared to make good on his promise to prove. May he legally attempt to do so under the present complaint?

As shown in the first quotation herein presented, the first sentence of Paragraph Four of the complaint makes a broad allegation that, "The use by the respondents of the word 'free' and the term 'Bonus Books' is false, misleading and deceptive." This allegation, standing alone, might warrant the introduction of the proposed proof above referred to. It does not, however, stand alone. It is immediately followed and qualified by the specific and limited explanation of why and wherein the word "free," as used by the respondents, is false. Since no other acts or practices are charged in the complaint to be false, misleading and deceptive, it must be concluded that the complaint places in issue only those statements which are involved in the repudiated concept of the word "free." Furthermore, under the Commission's practice, new or additional charges can only be added to a proceeding by the Commission itself through the issuance of a new, amended or supplemental complaint. It follows, therefore, that the present complaint should be dismissed. In view, however, of the public interest in the possible proof referred to by counsel supporting the complaint, the respondents are not entitled to an unqualified dismissal. Accordingly,

It is ordered, That the complaint herein be, and the same hereby is, dismissed without prejudice.

Interlocutory Order

IN THE MATTER OF

THE MAICO COMPANY, INC.

Docket 5822. Order and opinion, Dec. 7, 1953

Before *Mr. Webster Ballinger* and *Mr. Frank Hier*, hearing examiners.

Mr. William C. Kern and *Mr. Andrew C. Goodhope* for the Commission.

Dorsey, Colman, Barker, Scott & Barber, of Minneapolis, Minn., for respondent.

ORDER GRANTING APPEAL IN PART, SETTING ASIDE INITIAL DECISION
AND REMANDING PROCEEDING TO HEARING EXAMINER

This matter is before the Commission upon respondent's appeal from the initial decision of the hearing examiner, briefs in support of and in opposition to said appeal and oral argument of counsel.

In support of its appeal respondent contends that the record herein does not establish that its exclusive dealing contracts with its distributors has had or may have any adverse effect on competition and that, therefore, the complaint herein should be dismissed. Respondent also takes exception to certain of the findings, to the conclusion and to the order in the initial decision. It also excepts to the hearing examiner's rulings granting a motion to strike certain evidence, excluding certain exhibits and rejecting certain offers of proof.

An examination of the record shows that the hearing examiner struck or excluded from the record certain evidence relating to the effect on competition of the exclusive dealing provisions in respondent's contracts with its distributors. For the reasons stated in the written opinion of the Commission, which is being issued simultaneously herewith, the Commission is of the opinion that evidence relating to the effect of these contractual provisions on competition is relevant and material to the issues herein and should have been received and considered.

The Commission, however, does not believe that this matter should be dismissed but is of the opinion that the initial decision should be set aside and the proceeding returned to the hearing examiner for the reception and consideration of such material evidence. Respondent's exception to the hearing examiner's failure to dismiss the complaint, therefore, should be denied.

Consideration of respondent's other objections to the initial decision is not believed necessary as that decision is being set aside.

Opinion

The Commission, therefore, being of the opinion that material evidence necessary for a proper consideration of this matter has been erroneously excluded from the record:

It is ordered, That respondent's appeal from the initial decision is granted in part and denied in part in the manner and to the extent hereinabove indicated.

It is further ordered, That the initial decision is hereby set aside. hearing examiner for reconsideration of all rulings rejecting or striking evidence in the light of this decision, for reception of proper evidence relating to the competitive effect of the exclusive dealing provisions of respondent's contracts, and for further appropriate proceedings in due course.

Commissioner Gwynne not participating for the reason that oral argument herein was heard prior to his appointment to the Commission.

Commissioner Mead concurs in the result in the light of the facts in this case.

OPINION OF THE COMMISSION

By MASON, Commissioner:

This matter is before the Commission upon an appeal by the respondent from an initial decision holding that it has entered into and enforced exclusive dealing contracts with retail dealers of hearing aids in violation of Section 3 of the Clayton Act. The hearing examiner found in his initial decision that this exclusive dealing contract requirement may have, has had, and now has the effect of substantially lessening competition and has a tendency to create a monopoly.

Upon examination of the record, however, we find that the hearing examiner has excluded or stricken all evidence relating to the actual competitive effect of respondent's exclusive dealing requirement. His entire decision is based on the presumption that there must have been lessening of competition because respondent is either the "fourth, fifth, or sixth" largest company in the hearing-aid field; it has had exclusive dealing contracts with its retail distributors since 1945 (123 distributors in 1950) and during that period of time its business has increased greatly:

1945	-----	(Approx.)	\$600,000
1947-8	-----		1,912,736
1948-9	-----		1,891,287
1949-50	-----		1,927,733

The hearing examiner rejected all of respondent's attempts to present evidence for the purpose of showing (1) that there has been

increase in the number of its competitors, (2) that the volume of business of its competitors has increased, (3) that its share of the market has been decreasing, (4) that its dealers constitute a small percentage of the total number of hearing-aid dealers in the country, and (5) other matters relating to effect on competition.

These factors, in our opinion, all have a very real bearing on whether there may be, or already has been, a substantial lessening of competition due to respondent's exclusive dealing contracts. The examiner likewise refused to allow counsel supporting the complaint to present testimony by competitors of actual foreclosure of a portion of the market to them as a result of respondent's contracts.

The hearing examiner presumed the existence of a lessening of competition yet excluded evidence which might show facts to the contrary. This exclusion was based on an interpretation of the Supreme Court's decision in the *Standard Stations* case* to the effect that such evidence as to the economic effect of the challenged contract is immaterial and surplusage.

From our reading of the statute, we cannot conclude that evidence of the effect of an exclusive dealing agreement on competition is immaterial in a Federal Trade Commission proceeding alleging violation of Section 3 of the Clayton Act. The Supreme Court did not require evidence of competitive effect under the circumstances of the *Standard Stations* case, ruling that it was sufficient to show that competition has been foreclosed in a substantial share of the line of commerce affected. In its decision, it stated that courts were most ill suited to make an appraisal of economic data to determine the actual effect of a practice on competition, such a determination being virtually impossible for ascertainment by the courts.

It is significant that at the same time the Court pointed out the Federal Trade Commission was adequately equipped to weigh all relevant economic factors. For it noted:

"Our interpretation of the Act therefore, should recognize that an appraisal of economic data which might be practical if only the latter [i. e., the Federal Trade Commission] were faced with the task may be quite otherwise for a judge unequipped for it either by experience or by the availability of skilled assistance." (*Standard Oil Co. v. U. S.*, supra, p. 310).

The view of the Commission's functions is not novel. Congress created the Commission:

"with the avowed purpose of lodging the administrative functions committed to it in 'a body specially competent to deal with them by reason of information, experience, and careful study of

**Standard Oil Co. of California v. United States*, 337 U. S. 293, 69 S. Ct. 1051 (1949).

the business and economic conditions of the industry affected,' and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would 'give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.' Report of Senate Committee on Interstate Commerce, No. 597, June 13, 1914, 63d Cong. 2d Sess., pp. 9, 11." (*Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U. S. 304, 314, (S. Ct., 1934)).

The need for specialized consideration in matters involving complex economic factors and the intention of Congress that the Federal Trade Commission should give such consideration to these matters has often been recognized by the Supreme Court, as for instance, in the Cement case in which is stated:

"In the Keppel case the Court called attention to the express intention of Congress to create an agency whose membership would at all times be experienced, so that its conclusions would be the result of an expertness coming from experience. We are persuaded that the Commission's long and close examination of the questions it here decides has provided it with precisely the experience that fits it for performance of its statutory duty. The kind of specialized knowledge Congress wanted its agency to have was an expertness that would fit it to stop at the threshold every unfair trade practice—that kind of practice which if left alone, 'destroys competition and establishes monopoly.' *Federal Trade Comm'n v. Raladam Co.*, 283 U. S. 643, 647, 750, (S. Ct., 1951)". *Federal Trade Commission v. Cement Institute, et al.*, 333 U. S. 683. (S. Ct., 1948).

A reading of Section 3 of the Clayton Act clearly indicates Congress intended to outlaw only those exclusive dealing agreements which are lessening or which if allowed to continue will probably lessen competition or tend to create a monopoly. We believe the structure of the Federal Trade Commission was specifically designed to make decisions involving this type of complex economic problem. To refuse to exercise our talents as an administrative tribunal in these cases because the courts feel "ill suited" to weigh all of the relevant factors, would deprive the country of the very services which we were created to furnish.

We cannot decide this matter on the record before us. To reach a reasoned decision we must have the facts. Therefore, this matter must be remanded to the hearing examiner for the development of a record sufficient to enable us to determine the effect of respondent's practices on competition.

Decision

IN THE MATTER OF
ELLIOTT MELVIN FISHER ET AL. DOING BUSINESS
AS PHILMOR COMPANY

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT

Docket 6121. Complaint, Aug. 25, 1953—Decision, Dec. 8, 1953

Where four partners engaged in the interstate sale and distribution of assortments of merchandise packed and assembled to involve the use of a game of chance, gift enterprise, or lottery scheme, when sold and distributed to the purchasing public, including, as typical, two watches, along with a small punchboard, for use under a plan whereby the purchaser by chance of one of 156 numbers concealed in the board, corresponding to the prize punch number, received a watch; those who by chance secured two other specified numbers received automatic lighters; the amount paid for a punch, if any, was similarly chance determined; and whether the purchaser received an article, the retail value of which exceeded the price of a chance, or nothing, and the amount paid was wholly thus determined—

Sold and distributed such assortments to retail dealers, salesmen, and others, including members of the purchasing public, by whom said punchboards or push cards were made use of in the sale of their merchandise to the purchasing public in accordance with the aforesaid plan involving a game of chance or the sale of a chance to procure one of said articles at much less than the normal retail price thereof; and

Thereby supplied to and placed in the hands of others the means of conducting lotteries or games of chance in the sale of their products, contrary to an established public policy of the U. S. Government:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice of the public and constituted unfair acts and practices in commerce.

Before *Mr. William L. Pack*, hearing examiner.

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

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated December 8, 1953, the initial decision in the instant matter of hearing examiner William L. Pack, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on August 25, 1953, issued and sub-