

Decision

IN THE MATTER OF
SURF SALES COMPANY, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6612. Complaint, Aug. 20, 1956—Decision, Oct. 28, 1957

Order requiring Chicago sellers of cameras, electric appliances, and other merchandise, to cease furnishing to operators and members of the public various plans of merchandising—including push cards and instructions for their use—which involved the operation of games of chance or lottery schemes in the sale of the goods to the consuming public.

Mr. William A. Somers for the Commission.

Mr. Horace J. Donnelly, Jr., of Washington, D.C., for respondents.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

On August 20, 1956, complaint herein was issued against respondents charging them with unfair acts and practices in commerce in violation of the Federal Trade Commission Act in the sale of merchandise in commerce by games of chance, gift enterprises and lottery schemes. Individual respondent Thomas F. Marsh was charged with being president of corporate respondent and individual respondent Samuel Specter was charged with being manager thereof, and they were alleged to direct and have dominant control of the sales activities of the corporate respondent. Respondents' answer admits corporate existence, address of corporate respondent, and that the respondent Marsh was president thereof, and generally denies all other allegations of the complaint, except that the corporation respondent was engaged in the business of selling merchandise to the public, and for that purpose it distributes literature describing such merchandise, with sales prices, and inviting orders therefor. As separate additional affirmative defenses respondents allege that the complaint fails to state a cause of action, that the Federal Trade Commission lacks jurisdiction, that the transactions were intrastate rather than interstate, that the Federal Trade Commission Act is unconstitutional and void, and that the present action denies the constitutional right to due process of law.

Three hearings were held resulting in 99 pages of transcript and six exhibits. At the first hearing, both individual respondents appeared in response to subpoenas, but declined to answer any questions after stating their names and addresses because their answers might tend to incriminate them—in other words, both took the Fifth Amendment. Taking of evidence closed March 26, 1957, and there-

after proposed findings and conclusions were filed by all counsel on consideration of which, and the entire record herein, the hearing examiner finds that this proceeding is brought in clear and substantial public interest and makes the following findings of fact.

FINDINGS OF FACT

1. Respondent Surf Sales Company, Inc., is a corporation organized January 25, 1956, and since doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 4309 West Lake Street, in the City of Chicago, Illinois. Respondent Thomas F. Marsh is an individual and president of respondent corporation. Answer to the complaint denies that respondent Samuel Specter is manager of the corporate respondent and that the policies and sales activities of the latter are directed and controlled by these individual respondents. There being no evidence to the contrary, it is concluded that Thomas F. Marsh, as president, exercises the direction and control of the corporate respondent which that office ordinarily connotes. As to Samuel Specter, the record shows that he several times represented himself to be the manager to a representative of Dun and Bradstreet, although to a Federal Trade Commission investigator he said he was a part-time bookkeeper. However, he was the man to whom the investigator was referred when on a visit the latter asked to speak to an official of the corporate respondent. Furthermore, when these gentlemen called at the corporate respondent's office and asked the receptionist or switchboard operator to speak to someone in authority, they were referred to Samuel Specter. From this it is concluded that he was either the manager of the corporate respondent or had authority and responsibility and did exercise the authority and direction of its affairs which that office connotes.

2. Respondents are now engaged in the sale and distribution of cameras, electric appliances and other articles of merchandise and have caused said merchandise when sold to be transported from their place of business in Chicago, Illinois, to purchasers thereof located in the various states of the United States other than Illinois and in the District of Columbia. There is now and has been for more than one year last past a course of trade by respondents in such merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, between and among the various states of the United States and in the District of Columbia. The record does not show the extent of this commerce.

3. In the course and conduct of their business as described in Paragraph 2 hereof, respondents in soliciting the sale of and in sell-

ing and distributing their merchandise furnish and have furnished various plans of merchandising which involve the operation of games of chance, gift enterprises or lottery schemes when said merchandise is sold and distributed to the purchasing and consuming public. Among the methods and sales plans adopted and used by respondents, and which is typical of the practices of respondents, is the following:

Respondents distribute, and have distributed, to operators and to members of the public certain literature and instructions including, among other things, push cards, order blanks, circulars including thereon illustrations and descriptions of said merchandise, and circulars explaining respondents' plan of selling and distributing their merchandise and of allotting it as premiums or prizes to the operators of said push cards; and as prizes to members of the purchasing and consuming public who purchase chances or pushes on said cards. One of respondents' said push cards bears 75 feminine names with ruled columns on the back of said card for writing in the name of the purchaser of the push corresponding to the feminine name selected. Said push card has 75 partially perforated discs. Each of said discs bears one of the feminine names corresponding to those on the list. Concealed within each disc is the number which is disclosed only when the customer pushes or separates a disc from the card. The push card also has a larger master seal and concealed within the master seal is one of the feminine names appearing on the disc. The person selecting the name corresponding with the one under the master seal receives a camera. The push card bears the following legend or instructions:

Lucky Name Under Seal Received

CAMFIELD'S New

(Picture of Pan)

(Picture of Pens)

ELECTRIC-FRI PAN

Nos. 7 and 19
each receive a
beautiful NEW

BALL POINT

TYPE pen.

No. 1 pays 1¢

No. 7 pays 7¢

No. 12 pays 12¢

No. 19 pays 19¢

No. 26 pays 26¢

All others pay

39¢

NONE HIGHER

(Master Seal)

Write Your Name on Reverse Side Opposite Name You Select

No more burnt bacon or eggs! Balanced heat means crisp, even frying at all times. Cooks and serves right at the table . . . an ideal servant for every home. A.C. operation, 110 Volts. French Fry Dome Cover and new recipe book included. Comes with 6-foot heavy duty cord.

PUSH OUT WITH PENCIL

Findings

54 F.T.C.

Another of respondents' push cards:

Lucky Name Under Seal Receives This

ALUMINUM ELECTRIC Coffee Set For the perfect hostess an exquisite matched gleaming Coffee Service. Stunning Electric Percolator in beautiful urn design. Sparkling in its new modern-design and highly polished finish. Special heating element insures quick percolating and keeps coffee hot. Makes up to 8 cups. Includes cord set, beautiful sugar and creamer and lustrous 12-in. handy utility tray. Highly polished for long-lasting brilliance. Guaranteed fully. 110-120-volt, AC or DC.

(Picture of coffee set)

UL by

Enterprise Manufacturers of the World Famous Drip-O-lator
The Better Drip Coffee Maker
Made in USA Guaranteed Pure Aluminum Reg US Pat Off

(Picture of pens)

(Master Seal)

PUSH OUT WITH PENCIL

Nos. 1 and 6 receive a handsome retractable Ball Point Pen.

No. 1 pays 1c No. 12 pays 12c

No. 6 pays 6c No. 19 pays 19c

ALL OTHERS PAY 39c

(Panel bearing feminine names)

NONE HIGHER

Write Your Name on Reverse Side Opposite Name You Select

Sales of respondents' merchandise by means of said push cards are made in accordance with the above-described legend or instructions, and said prizes or premiums are allotted to the customers or purchasers from said cards in accordance with the above legend or instructions. Whether a purchaser receives an article of merchandise or nothing for the amount of money paid, and the amount to be paid for the merchandise, or the chance to receive said merchandise, are thus determined wholly by lot or chance. The articles of merchandise have a value substantially greater than the price paid for each chance or push.

4. The persons to whom respondents furnish and have furnished said push cards use the same in selling and distributing respondents' merchandise in accordance with the aforesaid sales plans. Respondents thus supply to and place in the hands of others the means of

conducting games of chance, gift enterprises or lottery schemes in the sale of their merchandise in accordance with the sales plan hereinabove set forth. The use by respondents of said sales plans or methods in the sale of their merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plans or methods is a practice which is contrary to an established public policy of the Government of the United States.

5. The sale of merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure one of the said articles of merchandise at a price much less than the normal retail price thereof. Many persons are attracted by said sales plans or methods used by respondents and the element of chance involved therein and thereby are induced to buy and sell respondents' merchandise.

The use by respondents of a sales plan or method involving distribution of merchandise by means of chance, lottery or gift enterprise is contrary to the public interest and constitutes an unfair act and practice in commerce within the intent and meaning of the Federal Trade Commission Act.

6. The aforesaid acts and practices of respondents as herein alleged are all to the prejudice and injury of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent Surf Sales Company, Inc., a corporation, and its officers, and respondents Thomas F. Marsh and Samuel Specter individually, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches, electric coffee sets, fry-pan, or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others push cards or any other lottery devices, either with merchandise or separately, which are designed or intended to be used in the sale or distribution of respondents' merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

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

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

The complaint, filed under the Federal Trade Commission Act, charges respondents with selling merchandise in commerce by means of games of chance, gift enterprises or lottery schemes. After a hearing, the initial decision was filed directing respondents to cease and desist from:

1. Supplying to or placing in the hands of others push cards or any other lottery devices, either with merchandise or separately, which are designed or intended to be used in the sale or distribution of respondents' merchandise to the public by means of chance, gift enterprise or lottery scheme.

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

The appeal of respondents was presented by written briefs and oral argument.

Respondent, Surf Sales Company, Inc., is a corporation located in Chicago, Illinois, and engaged in the sale and distribution of cameras, electric appliances and other articles of merchandise. A part, if not all, of the merchandise is distributed by means of push cards. The description of such cards and the method of operation is set out in Paragraph 3 of the initial decision as follows:

Respondents distribute, and have distributed, to operators and to members of the public certain literature and instructions including, among other things, push cards, order blanks, circulars including thereon illustrations and descriptions of said merchandise, and circulars explaining respondents' plan of selling and distributing their merchandise and of allotting it as premiums or prizes to the operators of said push cards; and as prizes to members of the purchasing and consuming public who purchases chances or pushes on said cards. One of respondents' said push cards bears 75 feminine names with ruled columns on the back of said card for writing in the name of the purchaser of the push corresponding to the feminine name selected. Said push card has 75 partially perforated discs. Each of said discs bears one of the feminine names corresponding to those on the list. Concealed within each disc is the number which is disclosed only when the customer pushes or separates a disc from the card. The push card also has a larger master seal and concealed within the master seal is one of the feminine names appearing on the disc. The person selecting the name corresponding with the one under the master seal receives a camera. The push card bears the following legend or instructions:

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Lucky Name Under Seal Received
 CAMFIELD'S New
 (Picture of Pan)
 (Picture of Pens)
 ELECTRI-FRI PAN

Nos. 7 and 19 each receive a beautiful NEW BALL POINT TYPE pen. No more burnt bacon or eggs! Balanced heat means crisp, even frying at all times. Cooks and serves right at the table . . . an ideal servant for every home. A.C. operation, 110 Volts. French Fry Dome Cover and new recipe book included. Comes with 6-foot heavy duty cord.

No. 1 pays 1¢
 No. 7 pays 7¢
 No. 12 pays 12¢
 No. 19 pays 19¢
 No. 26 pays 26¢
 All others pay 39¢
 NONE HIGHER
 (Master Seal)

PUSH OUT WITH PENCIL

Write Your Name on Reverse Side Opposite Name You Select

Respondent, Thomas F. Marsh, is president of the respondent corporation. This is admitted by respondents' answer. The answer denies, however, that respondent Thomas F. Marsh has dominant control of the policies and sales activities of the respondent corporation. The hearing examiner found that there being no evidence to the contrary, "Thomas F. Marsh, as president, exercises the direction and control of the corporate respondent which that office ordinarily connotes." We see no reason to upset that finding. The respondent corporation was engaged in the business of selling merchandise. The record shows that it distributed punch cards, utilized the services of mailing brokers to distribute their punch card literature, received money in the amount stated on the card, and distributed merchandise to the persons who sent in the required money. This activity is not *ultra vires*. It appears to be an integral part of the respondent corporation's scheme of doing business. Where the corporation is shown to have violated public policy, the officer who is normally in charge of the corporation may be inferred to have managed and instituted the violation. The court in *Modernistic Candies, Inc., et al. v. F.T.C.*, 145 F. 2d 454, said "We have also held that those who aid and abet such a method of merchandising, those *participes criminis* with gamblers and their schemes, are likewise engaged in unfair trade practices contrary to public policy." And while this is not a criminal action, certain prin-

ciples there applicable also apply here. The court in *Carolene Products Co., et al. v. United States*, 140 F. 2d 61, said "There is ample authority in support of the principle that the directing head of a corporation which is engaged in an unlawful business may be held criminally liable for the acts of subordinates done in the normal course of business, regardless of whether or not these directing heads personally supervised the particular acts done or were personally present at the time and place of the commission of these acts." See *United States v. Dotterweich*, 64 S. Ct. 134, decided by the Supreme Court on November 22, 1943; *Wood v. United States*, 4 Cir., 204 Fed. 55; *Anstess v. United States*, 7 Cir., 22 F. 2d 594; *Johnson v. United States*, 9 Cir., 62 F. 2d 32; *Reid v. United States*, 7 Cir., 44 F. 2d 51; *Crall & Ostrander v. Commonwealth*, 1905, 103 Va. 855, 49 S.E. 638; *People v. Detroit White Lead Works*, 1890, 82 Mich. 471, 46 N.W. 735, 9 L.R.A. 722; *State v. Gilbert*, 1933, 213 Wis. 196, 251 N.W. 478; *State v. Burnam*, 1912, 71 Wash. 199, 128 P. 218.

Respondent, Thomas F. Marsh, having elected not to testify in response to a subpoena and the hearing examiner not requiring him to testify, did not overcome such inferences that would follow his admission as to his holding the office of president of a corporation that in the normal course of business sold merchandise through means of punch cards.

Respondent, Samuel Specter, is an employee of the respondent corporation. Both the respondents' answer and the brief on appeal emphatically deny that Samuel Specter is more than a part time bookkeeper. And at the hearing, he utilized the Fifth Amendment and refused to testify on the grounds of self-incrimination. The hearing examiner found from the evidence that Samuel Specter "was either the manager of the corporate respondent or had the authority and responsibility and did exercise the authority and direction of its affairs which that office connotes." There is evidence in the record that on more than two occasions, Samuel Specter represented himself to be the manager of the respondent corporation to a representative from Dun and Bradstreet. In addition, when an investigator from the Commission went to the office of the corporate respondent and asked the receptionist or switchboard operator to see an official of the corporation, the girl returned with Samuel Specter. During the course of the interview, Samuel Specter authorized the investigator to consult with the attorney for the corporate respondent. He thus represented himself as manager, was represented as an official by the receptionist or switchboard operator, and authorized consultation with the attorney for the corporation. This must be weighed against a statement

by Samuel Specter to the Commission investigator claiming that he was only a part time bookkeeper. At the hearing, Specter, having elected not to testify, did not offer any evidence as to his capacity. The hearing examiner had the benefit of hearing the testimony and observing the demeanor of the witnesses. We see no reason to upset his findings.

Respondents argue that there is no substantial, credible or convincing evidence establishing proof of the allegations of the complaint. They claim that the testimony of the public witnesses is hearsay. With this, we cannot agree. The record discloses that the respondent corporation sent push cards bearing its name, together with sales literature, to the witnesses who reside in Indiana. The witnesses testified they received the mailings, sold the chances on the push cards, collected the money from such sales, sent the money in to the respondent corporation and received the merchandise from the respondent corporation. We feel that counsel in support of the complaint has fully sustained the burden of proof and that the finding of the hearing examiner should not be disturbed.

Respondents argue that, since the record does not show the extent of commerce, there is "no proof that there is now and has been for more than one year last past a substantial course of trade by respondents in commerce . . ." Although the specific instances of sales are not great in number, they are taken to be merely illustrative of the commerce engaged in by respondents. The record shows two interstate transactions in Indiana and Samuel Specter gave the Commission investigator a typical mailing originally sent to an individual in California which was returned because of misdirection. The record as a whole justifies the examiner's finding.

The statute does not require that sales in commerce be substantial before the Commission can proceed; substantiality of sales is merely one of the elements considered by the Commission in determining whether a matter involves sufficient public interest to warrant attention. Docket 5672, *William S. La Rue*, 47 F.T.C. 1472.

The respondents are engaged in the business of selling merchandise in interstate commerce by means of push cards. "One is engaged in a business when he has such article for sale to any person who may apply for it for the seller's profit. The question is not determined by the number of sales that may be made." *State v. Jewett Market Co.*, 228 N.W. 288. It is not the amount of commerce which provides the criteria, but whether the practices in which the respondents engage violate the Act. The court in *Fox Film Corporation v. F.T.C.*, 296 Fed. 353, held "While the findings of the Commission embraced but three pictures where the unfair methods were practiced, that is sufficient to support the order to

cease and desist . . . One act that constitutes an unfair practice may of itself be offensive to the Act."

In "determining whether a proceeding is in the public interest, the Commission exercises a broad discretion," *Dr. W. B. Caldwell v. F.T.C.*, 11 F. 2d 891; *F.T.C. v. Klesner*, 280 U.S. 28, and "the use of a game of chance for the distribution of merchandise is an unfair act or practice in commerce . . . and a proceeding to prevent its further use is in the public interest." *Wolf v. F.T.C.*, 135 F. 2d 564; *Kritzik v. F.T.C.*, 125 F. 2d 351.

Respondents next contend "the proposed order to cease and desist is not within the jurisdiction and authority of the Federal Trade Commission" in that "the mailing of material advertising goods for sale in which is included a push card which may be independently used by the recipient as a means of awarding an article of merchandise as a prize is not against the public policy of the United States . . ." Respondents argue that since there are four specific statutes of the United States with respect to lotteries, that these specific statutes remove that specific subject from a statute which speaks only in general terms.

While this rule generally prevails, we do not believe it is applicable here. As the court stated in *United States v. Windle*, 158 F. 2d 196, "We recognize the rule that generally special terms of a statute prevail over general terms in the same or another statute which otherwise might control. . . . But the purpose of this rule is to give effect to the presumed intention of the law-making body. The primary rule of statutory construction requires us to ascertain and give effect to the legislative intention. *Flippin v. United States*, 8 Cir., 121 F. 2d 742; *United States v. Hartwell*, 73 U.S. 385 . . ."

As we said in *F.T.C. v. R. B. James, Patrick Zurla, trading as Chicago Board Company*, Docket No. 6482:

U.S.C.A. Title 15, Chapter 24 forbids the transportation in inter state commerce of "gambling devices" as defined in said law. An exception is made, however, in the case of shipments to any place in any state which has enacted a law providing for exemption from this law. The law further provides in Section 2 that:

Nothing in this act shall be construed to interfere with or reduce the authority or existing interpretations of the authority of the Federal Trade Commission under the Federal Trade Commission Act as amended (15 U.S.C. 41-58).

Report No. 2769, 81st Congress, 2d Sess., pages 9-10, filed by the House Committee on Interstate and Foreign Commerce states:

Section 2 further provides that nothing in this act shall be construed to interfere with or reduce the authority of the Federal Trade Commission under the Federal Trade Commission Act as amended. It is the purpose of this provision to leave unaffected the powers of the Federal Trade Commission with respect to the use of lotteries, games of chance, or other gambling devices for the pur-

pose of merchandising. Such use has been held to be an unfair trade practice in violation of the Federal Trade Commission Act as amended.

It thus clearly appears that both the Congress and the Federal Courts have concluded that it is contrary to the public policy of the United States to permit the shipment in commerce of punchboards and pushcards which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

Respondents next argue that the proceeding does not satisfy the requirements of due process of law, assigning as their reasons that the hearing examiner was biased and that the hearing examiner allowed the hearing to continue without their counsel of record. We cannot agree with this contention. The use of the language that both individual respondents "took the Fifth Amendment" is a statement of fact and does not show prejudice or bias. The record further discloses that the attorney of record agreed to the date for the continuation of the hearing. After the subpoena had been served calling a witness for the specified day, the attorney for the respondents, on the day before the hearing was scheduled, protested that certain other matters required his presence elsewhere and asked for a continuance. This was denied by the hearing examiner. The time for the beginning of the hearing was then advanced one hour in order to allow the attorney for the respondents to secure the attendance of his associate counsel. The associate counsel had been identified in the hearings as attorney for the respondents who "knew all the details of the company's operation." The associate counsel appeared and represented the respondents. We believe the respondents were adequately represented by counsel at all of the hearings.

The findings, conclusion and order of the hearing examiner are adopted as the findings, conclusion and order of the Commission. The appeal of respondents is denied and it is directed that an order issue accordingly.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of the above-named respondents from the initial decision of the hearing examiner and upon the briefs filed in support of and in opposition to the appeal and oral argument of counsel; and

The Commission having rendered its decision denying the appeal and adopting the findings and conclusions and order contained in the initial decision:

It is ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the aforesaid initial decision.

IN THE MATTER OF
POSTAL LIFE AND CASUALTY INSURANCE COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 6276. Complaint, Dec. 28, 1954—Order, Oct. 31, 1957

Order dismissing for failure of proof complaint charging false advertising of accident and health insurance policies.

Mr. John W. Brookfield and *Mr. Donald K. King* for the Commission.

Mr. Kenneth Teasdale, of St. Louis, Mo.; *Mr. Harold Knight*, of Kansas City, Mo.; and *Mr. A. Alvis Layne*, of Washington, D.C., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges that respondent has disseminated false, misleading and deceptive advertisements relating to its accident and health insurance policies and, by so doing, has engaged in unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act, as that Act is applicable to the business of insurance under the provisions of Public Law 15, 79th Congress (Title 15, U.S. Code, Sections 1011 to 1015), hereinafter referred to as the McCarran Act.

Respondent's answer admits the allegations of the complaint as to its existence and business, but denies Federal Trade Commission jurisdiction and the allegations as to violation of the Federal Trade Commission Act. The answer states as an affirmative defense that the respondent has engaged in a long course of cooperative dealing with the Federal Trade Commission in connection with and under trade practice rules promulgated by the Commission, during which the Commission's staff found respondent's advertising material, including the advertising circulars which are at issue in this proceeding, to be in accord with the trade practice rules and not objectionable or subject to criticism.

In connection with its answer respondent moved that the complaint be dismissed on the ground that the Federal Trade Commission Act has no application to the business of respondent, and, because the Commission's pleading "does not state a complaint upon which relief can or should be granted as a matter of law, [or], in the alternative, that the complaint be dismissed and the matter referred to the Bureau of Consultation of the Commission for han-