

IN THE MATTER OF
BERNARD ROSTEN TRADING AS BERN PRODUCTS CO.
CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 6758. Complaint, Apr. 3, 1957—Decision, Feb. 6, 1958

Order requiring a seller in New York City of dolls, clocks, electric appliances, and other articles of merchandise, to cease supplying to operators and members of the public plans of merchandising, including pushcards, which involved the operation of games of chance, gift enterprises, or lottery schemes in the sale of the merchandise to the purchasing public; and to cease selling merchandise by games of chance.

Mr. William A. Somers for the Commission.

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

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding involves charges that the respondent has violated the Federal Trade Commission Act by selling and distributing merchandise in interstate commerce through the use of pushcards. This initial decision determines that the material allegations of the complaint have all been sustained and that the respondent has violated the act as charged.

The complaint herein was issued April 3, 1957, and thereafter duly served upon the respondent. Upon appearance and motion of Chicago, Ill., counsel for respondent, time for filing answer was extended to May 31, but postponement of time for initial hearing, set for June 11 in Chicago, was denied. Subsequently, however, the hearing was reset for the same date in New York, N.Y., at respondent's counsel's request, with further hearing ordered for Chicago on June 17, 1957. These hearings were held as ordered, respondent appearing in person and by New York counsel at the New York hearing. In addition to the formal notice filed of record in this proceeding, the hearing examiner also gave further notice of the Chicago hearing during the course of the New York hearing. Neither respondent nor any of his New York or Chicago attorneys appeared, however, at the time of the Chicago hearing, but testimony of three witnesses from Indiana was taken, which pertained to their receipt through the mail and their use of respondent's pushcards and explanatory literature sent them by respondent. At the close of this hearing, Commission's counsel rested his case-in-chief. Respondent's counsel having earlier indicated on the record that they desired to present evidence in respondent's

behalf, a further hearing for such purpose was ordered for July 15, 1957, in New York. Prior to this date respondent's counsel withdrew and present counsel of Washington, D.C., entered his appearance and moved for a continuance, upon which the said hearing so set for New York was cancelled and subsequently set for August 12, 1957. Thereafter respondent's counsel waived the presentation of respondent's evidence and requested that a time be fixed for the submission of proposed findings, conclusions, and order, as well as respondent's motions to dismiss the proceeding and otherwise. Thereupon, the examiner cancelled the hearing and fixed September 9, 1957, for submission of the parties' respective proposals and closed the case for the taking of evidence. Said proposals were submitted in due course and the matter taken under submission.

The issues framed by the pleadings are comparatively simple, the respondent having admitted the location and extent of his merchandise business, the sole issue being whether or not he was engaged in practices violative of the Federal Trade Commission Act which he denied.

The examiner, after hearing and observing the witnesses, has given full, careful, and impartial consideration to all of the documentary exhibits received in the record, to all other evidence presented on the record and to the fair and reasonable inferences arising therefrom, as well as to the facts stated in the complaint which are admitted by the answer. All arguments and authorities presented by way of objections and motions or in oral arguments or written briefs of counsel have likewise been fully and carefully considered. Upon the whole record thus evaluated, weighed, and considered, it is found that the material allegations of the complaint are each and all fully and fairly established by a preponderance of the evidence, the examiner specifically finding as follows:

Respondent Bernard Rosten is an individual doing business under the trade name of Bern Products Co. The respondent's principal place of business and office immediately prior to issuance of the complaint was located at 4309 W. Lake Street, Chicago, Ill., and is now, and has been since the issuance of the complaint herein, located at 640 Broadway, New York, N.Y. The respondent is now, and since August 1956, has been, engaged in the sale and distribution of electrical appliances, cameras, comforters, and other articles of merchandise and has caused said merchandise when sold to be transported from his places of business in Chicago, Ill., and New York, N.Y., to purchasers thereof located in States of the United States other than the States of Illinois or New York. There is now, and has been for more than 1 year last past a substantial course of trade by respondent

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 the District of Columbia.

In the course and conduct of his business, as hereinbefore stated, the respondent in soliciting the sale of and in selling and distributing his merchandise furnishes and has 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 consuming public (Comm. Exs. 1A to 16, inclusive). Among the methods or sales plans adopted and used by the respondent and which is typical of the practices of the respondent is the following:

Respondent distributes, and has distributed, to operators and to members of the public certain literature and instructions, including among other things, pushcards, order blanks, circulars, including thereon illustrations and descriptions of said merchandise, and the circulars explain respondent's plan of selling and distributing his merchandise and of allotting it as premiums or prizes to the operators of said pushcards (Comm. Exs. 1A to 6D, inclusive); one of the respondent's said pushcards, which is substantially illustrative of all of them (Comm. Ex. 5C), bears 52 names with ruled columns on the back thereof for writing in the name of the purchaser of the pushcard corresponding to the name selected. Said pushcard has 52 partially perforated discs. Each of said discs bears one of the names corresponding to those on said list. Concealed within each disc is a number which is disclosed only when the customer separates the disc from the card. The pushcard also has a larger master seal and concealed within the master seal is one of the names appearing on the disc and list. The person selecting the name corresponding to one hidden under the master seal receives a 36-piece electric work saver. The pushcard bears the following legend or instructions:

Lucky Name Under Seal Receives This
36 PIECE ELECTRIC WORK SAVER
Every Home Has A Place For It
1001 uses in the home, on the farm, in the shop.
SAVES TIME—MONEY—WORK
(Illustrated by picture on push card)

6 EXTRA WINNERS

Nos. 40 and 45 Each Receive 4-in-1 Screw Driver	No. 1 Pays 1¢
Nos. 50 and 55 Each Receive Ball Pen and Flashlight	No. 2 Pays 2¢
Nos. 60 and 65 Each Receive Pencil Lighter	No. 9 Pays 9¢
	All Others Pay only 39¢
	None Higher

Sales of respondent's merchandise by means of said pushcards 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 card in accordance with the above legend or instructions. Whether the 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 chance or lot. The articles of merchandise have a value substantially greater than the price paid for any one chance or push. Respondent furnishes and has furnished other pushcards accompanied by order blanks, instructions and other printed matter for use in the sale and distribution of their merchandise by means of games of chance, gift enterprises or lottery. The sales plans or methods involved in the sale of all said merchandise by means of said pushcards are the same as that hereinabove described, varying only in detail as to merchandise distributed and the prizes or chances and the number of chances on each card.

The persons to whom respondent furnishes and has furnished said pushcards use the same in selling and distributing respondent's merchandise in accordance with the aforesaid sales plan. Respondent thus supplies to and places in the hands of others the means of conducting games of chances, gift enterprises or lottery schemes in the sale of their merchandise in accordance with the sales plan hereinabove set forth. The use by the respondent of said sales plans or methods in 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 policy of the Government of the United States.

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 respondent's 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 the respondent for the reason of the element of chance involved therein and thereby are induced to buy and sell respondent's merchandise.

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

The respondent, Bernard Rosten, is 25 years of age. He graduated from college, majoring in advertising and specializing in direct mail and mail order courses. Thereafter, he was in the military service

and then spent approximately 2 years with his father in the general merchandise business in New York before opening his business under challenge herein in Chicago during August 1956. His advertising matter and pushcards are disseminated from Chicago, but respondent removed his place of business to New York some three months after first engaging in it in Chicago. His average volume of business between August 1956, and the hearing in June 1957, was estimated to be between \$5,000 and \$7,000 a month, although in some months he averaged \$10,000. While his principal business is obtained through the pushcard method, he also sells some merchandise at his place of business, either directly or by mail where the pushcard method is not employed. He has sent out about 1 million mailings into every State of the Union and the District of Columbia during this period, which mailings included advertising of the merchandise, pushcards, and instructions as to the use of such cards for the procurement of merchandise. Respondent sends to the holder of the pushcard the commodities advertised thereby by parcel post but not until he has received the money. In these merchandise packages he also encloses from five to seven additional packets containing pushcards.

He incongruously contended in his testimony that there was no correlation between the development of his business and the use of the pushcards. He testified he was only interested in receiving the money for the merchandise, and further contended that since mail order businesses, such as Montgomery Ward, publish extensive catalogues while retail stores, such as Macy's, use large multiple page ads in the newspapers costing thousands of dollars, his method of selling by mail over the country is just his way of doing business which he is entitled to carry on as much as larger concerns are entitled to advertise in their ways. Without reciting further detail it may be said that the respondent's operations of his business and the selling of his merchandise in interstate commerce by the use of pushcards and also, as he admits (R. 62), by punch boards, examples of which are not in evidence, fit into the pattern of a multitude of cases of this type already determined by the Commission and the courts to be games of chance, gift enterprises, or lottery schemes.

Respondent's counsel urges, in substance, that the record is insufficient to warrant findings and order against respondent because respondent involuntarily appeared and testified under compulsion under the Commission's subpoena and that, since he has no agents out soliciting customers and has no personal contact with his customers, he has not violated the Federal Trade Commission Act and has not

been guilty of the operation or conduct of a lottery in interstate commerce and, therefore, the Commission has no jurisdiction. Counsel's contentions are those which he has made in a number of prior push-card cases which have been heretofore finally adjudicated. The authorities he cites are also largely criminal cases, most of them involving mail fraud statutes of the United States and not applicable to the present proceeding. He has also made the same argument in at least two prior proceedings in which he has been counsel, and this same contention has always been rejected by the Commission and the courts. In each instance the order of the Commission has been sustained by the Court of Appeals for the District of Columbia and certiorari denied by the United States Supreme Court. See *Carl Drath, etc. v. FTC* (Dec. 13, 1956), certiorari denied March 25, 1957, 353 U.S. 917, and *U.S. Printing & Novelty Co. v. FTC* (1953), 204 F. 2d 737, certiorari denied (1953), 346 U.S. 830. The Commission's latest decision on this subject in line with all the authority in holding the use of push-cards and other lottery schemes illegal is *Morse Sales, Inc.*, Docket No. 6613, issued August 22, 1957. Respondent's said contentions are now timeworn and groundless. An ancillary contention that the testimony of the three witnesses who testified at Chicago as to the receipt and use of respondent's pushcards under his instructions should be rejected as hearsay is likewise utterly without merit. Respondent twice had official notice of the time that evidence would be taken in Chicago, and his subsequent failure to appear either in person or by counsel to cross-examine these qualified witnesses who gave competent, relevant, and material evidence cannot give color to the facetious argument that the testimony of these witnesses is hearsay as to him.

CONCLUSIONS OF LAW

Upon the foregoing findings of fact, the hearing examiner makes the following conclusions of law:

Respondent's distribution of pushcards contemplates and inevitably involves the use of a lottery or game of chance, and the placing by respondents in the hands of others, lottery devices for use in the sales of his merchandise. Such a merchandising operation is violative of the established public policy of the Government of the United States, is to the prejudice of the public and constitutes unfair acts or practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, the following order is hereby entered:

Appeal

54 F.T.C.

ORDER

It is ordered, That respondent Bernard Rosten, an individual trading under the name of Bern Products Co., or trading under any other name, and his agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of electrical appliances, dolls, cameras, or any 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, pushcards, punch boards, or any other lottery devices, either with merchandise or separately, 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 enterprises or lottery scheme.

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

ON APPEAL FROM INITIAL DECISION

By Secret, Commissioner:

This matter is before the Commission for final disposition on the merits of respondent's appeal from the hearing examiner's initial decision finding that respondent has engaged in unfair acts and practices in commerce through the use of lottery schemes or games of chance in the sale and distribution of merchandise, in violation of section 5 of the Federal Trade Commission Act.¹

The order to cease and desist contained in the initial decision would require respondent to cease and desist from:

1. Supplying to, or placing in the hands of others, pushcards, punch boards, or any other lottery devices, either with merchandise or separately, 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 enterprises or lottery scheme.

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

Respondent's lottery devices, or pushcards, and his method of utilizing them in the sale and distribution of merchandise are fully described in the initial decision, and the record clearly and unequivocally establishes that they are designed to be, and are, widely used in the sale of merchandise by paid chance.

Respondent argues on appeal that he does not sell pushcards and does not operate and conduct a lottery or game of chance, and does not supply to others devices designed or intended to be used in the

¹ 52 Stat. 111, 15 U.S.C.A. 45.

sale or distribution of respondent's merchandise by means of a game of chance, gift enterprise or lottery scheme.

The fact that respondent does not "sell" pushcards is immaterial.² It is well established that the precise acts and practices with which respondent is charged, which were admitted and which were found by the hearing examiner to have been used: disseminating in commerce to the hands of others lottery devices unaccompanied by merchandise but which are designed or intended for use in the sale or distribution of merchandise, are a violation of section 5 of the Federal Trade Commission Act. The courts consistently have upheld Commission cease and desist orders entered against the same type of enterprise as is here involved. *Chicago Silk Co. v. Federal Trade Commission*, 90 F. 2d 689 (C.A. 7, 1937), *cert. denied* 302 U.S. 753 (1937); *Jaffe v. Federal Trade Commission*, 139 F. 2d 112 (C.A. 7, 1943), *cert. denied* 321 U.S. 791 (1944); *Wolf v. Federal Trade Commission*, 135 F. 2d 564 (C.A. 7, 1943); *Colon v. Federal Trade Commission*, 193 F. 2d 179 (C.A. 2, 1952), *cert. denied* 344 U.S. 823 (1953); *Seymour Sales Company v. Federal Trade Commission*, 216 F. 2d 633 (C.A.D.C., 1954), *cert. denied* 348 U.S. 928 (1955); *Carl Drath t/a Broadway Gift Co. v. Federal Trade Commission*, 239 F. 2d 452 (C.A.D.C., 1956), *cert. denied* 353 U.S. 917 (1957).

Respondent testified that he was engaged in a general merchandise mail order business and that in furtherance thereof he disseminated to approximately 1 million prospects promotional literature, including pushcards, circulars, and order blanks. The circulars explained respondent's method of selling and distributing his merchandise. He further testified that these mailings went into practically all of the various States and that he receives approximately \$5,000 to \$7,000 a month business. The record clearly establishes that the pushcards are for the recipients' use in selling respondent's merchandise.

Witnesses testified that they had received in the mail, and across State lines, pushcards from respondent; that they sold punches on the pushcards and remitted the proceeds from such sale of punches on respondent's pushcards to respondent; that they received merchandise ordered from respondent which was distributed according to respondent's instructions; and if a person did not have a lucky name or number, he received nothing. It is clearly shown that whether the purchaser receives an article or nothing for the amount of money paid the chance to receive merchandise is determined solely by chance or lot. The articles of merchandise involved, the hearing examiner

²In the light of the whole context of the initial decision, use of the phrase "sale of pushcards" in the "Conclusions of Law" contained therein manifestly was inadvertent. The Commission has concluded, therefore, that the word "distribution" should be substituted for the term "sale" therein.

found, have a value substantially greater than the price paid for any one chance or push.

Substantial evidence in the record before the Commission establishes conclusively that the practices in which respondent was found to have engaged constituted a lottery scheme in the sale of respondent's merchandise, contrary to established public policy of the United States and in violation of section 5 of the Federal Trade Commission Act.

Respondent asserts that by virtue of the decision in *United States v. Halseth*, 342 U.S. 277 (1952), the Commission is without jurisdiction in the matter. That case arose under the postal statutes and did not involve construction of the Federal Trade Commission Act. It is not controlling here. As the Commission pointed out, citing cases, in the matter of *Carl Drath*, Docket No. 6185, affirmed 239 F.2d 452 (C.A.D.C., 1956), the courts consistently have rejected this same contention, as we do here.

Finally, respondent contends that testimony given by respondent in this proceeding while under compulsion of a Commission subpoena *ad testificandum* cannot be considered to support a finding and decision against him. This same argument was submitted in the *Drath* case, *supra*, where the Commission said:

A Federal Trade Commission order to cease and desist is injunctive only, forbidding future violations of law but imposing no sanctions for past misconduct. Injunctive relief is not a "penalty" or a "forfeiture." *Bowles v. Mistle*, 64 F. Supp. 835, 838 (Neb. 1946). Proceedings to collect civil penalties for disobedience of Commission orders are brought in United States District Courts and must be based on independent evidence of misconduct occurring subsequently to issuance of the order to cease and desist. The immunity clause is therefore inapplicable to respondent.

On appeal to the Court of Appeals, District of Columbia Circuit, from the Commission's ruling on the question, that court held squarely that:

The statute does not immunize a witness from a cease and desist order, which is prospective only and has been aptly described as "purely remedial and preventative." *Chamber of Commerce of Minneapolis v. Federal Trade Commission*, 8th Cir., 1926, 13 F. (2d) 673, 685. Having determined—partly on the basis of Drath's description of his activities—that he had unlawfully used lottery devices in making interstate sales of merchandise, the Commission did no more than direct him to discontinue such practices. One is not prosecuted by being told to desist from illegal conduct, nor does he thereby suffer the imposition of a penalty or the forfeiture of any legally protected right or property. *Carl Drath t/a Broadway Gift Company v. Federal Trade Commission*, *supra*.

Respondent's argument that, in being compelled to testify against himself, he acquired immunity under section 9 of the Federal Trade

1004

Order

Commission Act is without merit and is rejected. *In the Matter of Carl Drath, supra; Ritholz v. March*, 105 F. 2d 937 (C.A.D.C., 1939); *Standard Distributors, Inc. v. Federal Trade Commission*, 211 F. 2d 7 (C.A. 2, 1954).

The term "distribution" will be substituted for the word "sale" in the first line of the first paragraph of the "Conclusions of Law" (page 7 of the initial decision). As so modified, the findings, conclusions and order of the hearing examiner are adopted as the findings, conclusions and order of the Commission. Respondent's appeal is denied and it is directed that an appropriate order issue.

FINAL ORDER

Respondent having filed an appeal from the hearing examiner's initial decision and the matter having come on to be heard by the Commission upon the whole record, including briefs and oral argument in support of and in opposition to the appeal; and

The Commission having rendered its decision denying respondent's appeal and adopting as its own decision the initial decision, as modified by the Commission's opinion:

It is ordered, That the "Conclusions of Law" contained in the initial decision be modified to read as follows:

CONCLUSIONS OF LAW

Upon the foregoing findings of fact, the hearing examiner makes the following conclusions of law:

Respondent's distribution of push cards contemplates and inevitably involves the use of a lottery or game of chance, and the placing by respondent in the hands of others, lottery devices for use in the sales of his merchandise. Such a merchandising operation is violative of the established public policy of the Government of the United States, is to the prejudice of the public and constitutes unfair acts or practices in commerce within the intent and meaning of the Federal Trade Commission Act.

It is further ordered, That respondent Bernard Rosten shall, within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with the order to cease and desist contained in the initial decision.

IN THE MATTER OF
ANNIS FURS, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING
ACTS

Docket 6880. Complaint, Aug. 30, 1957—Decision, Feb. 7, 1958

Consent order requiring a furrier in New York City to cease violating the Fur Products Labeling Act by failing to comply with the invoicing requirements; and by advertising in newspapers which failed to disclose the names of the animals producing the fur in certain products, the country of origin of imported furs, and that some products were composed of artificially colored fur; which contained the names of other animals than those producing the fur in certain products, misrepresented prices as less than wholesale or less than cost, and failed in other respects to conform to the advertising requirements

Mr. S. F. House, in support of the complaint.

Mr. Everett H. Wells, of Detroit, Mich., for respondent.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint in this proceeding, issued August 30, 1957, charges the respondent above-named with violation of the provisions of the Federal Trade Commission Act, the Fur Products Labeling Act and the rules and regulations promulgated under the last-named act, in connection with the sale, advertising and offering for sale, transportation and distribution, shipping and receiving in commerce, of fur and fur products, as the designations "commerce," "fur," and "fur products" are defined in the Fur Products Labeling Act.

After issuance and service of said complaint, the respondent entered into an agreement for a consent order with counsel in support of the complaint, disposing of all of the issues in this proceeding, which agreement was duly approved by the director and assistant director of the Bureau of Litigation. It was provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

By the terms of said agreement, the respondent admitted all the jurisdictional allegations of the complaint, and agreed that the record herein may be taken as though the Commission had made findings of jurisdictional facts in accordance with such allegations. By said agreement the parties expressly waived a hearing before the hearing examiner or the Commission, the making of findings of fact or con-