

the initial decision of the hearing examiner as to respondent Bernard Hewitt shall, on the 19th day of March 1960, become the decision of the Commission.

IN THE MATTER OF
PEERLESS PRODUCTS, INC., ET AL.

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

Docket 6718. Complaint, Feb. 1, 1957—Decision, Mar. 22, 1960

Order requiring a Chicago punch board manufacturer to cease its sale of lottery devices for use by retailers to sell merchandise to the public.

William A. Somers, Esq., for the Commission.

Simon Herr, Esq., of Chicago, Ill., for respondents.

INITIAL DECISION UPON REMAND BY ROBERT L. PIPER,
HEARING EXAMINER

STATEMENT OF THE CASE

On February 1, 1957, the Federal Trade Commission issued its complaint against Peerless Products, Inc., a corporation and Marshall Maltz, Rose Maltz, and Shirley Maltz, individually, and as officers of said corporation (all except Rose Maltz hereinafter collectively called respondents), charging them with unfair acts and practices in commerce in violation of §5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, et seq. Copies of said complaint together with a notice of hearing were duly served upon respondents.

The complaint alleges in substance that respondents and Rose Maltz by the sale and distribution of punchboards in commerce have placed in the hands of others a means of conducting lotteries, games of chance or gift enterprises in the sale or distribution of their merchandise.

Pursuant to notice, hearings were thereafter held on July 17 and July 31, 1957, in Chicago, Illinois, and Seattle, Washington, respectively, before the undersigned hearing examiner duly designated by the Commission to hear this proceeding. All parties were represented by counsel, participated in the hearings, and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law and orders, together with reasons in support thereof. On September 5, 1957, an order was issued fixing the time for filing such proposed findings. On September 26, 1957, pursuant to motion of counsel supporting the complaint, the aforesaid order was vacated and proceedings reopened for the taking of additional testimony. Thereafter, on April 10, 1958, counsel supporting the complaint filed a notice that he was resting his case, and by order dated April 17, 1958, the parties were allowed until May 19, 1958, to file such proposed findings.

On May 20, 1958, the undersigned issued his initial decision. After appeal by counsel for respondents, the Commission on October 29, 1958, vacated and set aside said decision, and remanded the proceeding to the undersigned for the receipt of such additional evidence "as may be offered showing the extent to which the practices herein alleged to be unlawful have been or are engaged in 'commerce'." Upon motion of counsel supporting the complaint additional hearings were held on April 15 and 16, 1959, in Cleveland, Ohio, and Pittsburgh, Pennsylvania, respectively, at which hearings proof was received of sales from Illinois by respondents of their punchboard devices to customers in Ohio and Pennsylvania.

On July 17, 1959, counsel for respondents rested, and upon request the parties were allowed until August 21, 1959, to file proposed findings of fact, conclusions of law and orders, together with reasons in support thereof. Both parties did so, and waived oral argument. All such findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded are herewith specifically rejected.¹

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

¹ 15 U.S.C. §1007(b).

FINDINGS OF FACT

I. The Business of Respondents

Peerless Products, Inc., is a corporation organized existing and doing business under and by virtue of the laws of the State of Illinois. Marshall Maltz is president and Shirley Maltz is secretary treasurer of said corporation. Although the complaint alleged that Rose Maltz is vice president of said corporation, no proof was offered in support thereof and accordingly no such finding is made. In general, respondents' answer denied all of the allegations of the complaint. The complaint also alleged that the named individual respondents formulate, direct and control the acts, practices, and policies of the corporation. With respect to Rose and Shirley Maltz, there is no evidence in the record in support of this allegation, which was denied by the answer, and accordingly no such finding is made. For the reasons elucidated by the Commission in the *Kay Jewelry* decision,² the order hereinafter set forth does not include said individuals. On the other hand, the record establishes that Marshall Maltz is the president of the corporation, individually manages it, and formulates, directs, and controls its acts, practices, and policies. For the reasons expressed by the Commission in the *Morse Sales* case,³ the order hereinafter set forth includes Marshall Maltz individually as well as an officer of the corporation.

II. Interstate Commerce

Respondents are now and for more than one year last past have been engaged in the manufacture of devices commonly known as punchboards, and in the sale and distribution in commerce of such devices to manufacturers of, and dealers in, various articles of merchandise. Respondents cause and have caused such devices when sold to be transported from their place of business in the State of Illinois to purchasers thereof at their points of location in the various states of the United States other than Illinois, including the states of Ohio, Pennsylvania, and Washington. There is now and has been for more than one year last past a substantial course of trade in such devices by respondents in commerce between and among the various states of the United States.

III. The Unlawful Practices

Respondents sell and distribute their punchboards to various dealers in merchandise, who in turn assemble said punchboards to-

² *Kay Jewelry Stores, Inc.*, 54 F.T.C. 548, November 12, 1957.

³ *Morse Sales, Inc.*, 54 F.T.C. 193, August 22, 1957.

gether with various articles of merchandise and sell and distribute them to retailers in the various states, who in turn sell the merchandise, by means of such punches, or chances, to members of the purchasing public. These punchboards are so prepared and arranged as to involve games of chance, gift enterprises or lottery schemes when used by retailers in the sale and distribution of merchandise to the public. They are of many kinds, all of which, although varying in detail, involve the same features of chance or lottery. Many of respondents' punchboards have blank spaces on the face thereof so that the purchasers thereof may place instructions or legends thereon, usually the winning numbers and the prizes, which explain the manner in which said devices are to be used in the sale of various specified articles of merchandise. Others already have the legends printed thereon with such explanatory material. All of them are used by the dealer in distributing merchandise in the same manner.

The prices of the punches on the punchboards vary with the individual device. When a punch is made, a printed slip is separated from the punchboard and a number is disclosed. This number is effectively concealed from the purchaser or prospective purchaser until a selection has been made and the punch completed. Certain specified numbers usually set forth in the legend attached to the board entitle purchasers to designated articles of merchandise. Persons securing such lucky or winning numbers receive such articles of merchandise without additional cost at prices which are much less than the normal retail price. Persons who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a punch on said board. The articles of merchandise are thus distributed to the public wholly by lot or chance. Some of these devices may be and have been used to distribute cash prizes, but the primary and usual use is for the sale and distribution of merchandise.

Many persons, firms, and corporations who sell and distribute various articles of merchandise, such as watches, cigarettes, candy, jewelry and blankets, in commerce between and among the various states of the United States, purchase and have purchased respondents' punchboards, and pack and assemble assortments to retail dealers and others for resale to the public. Respondents thus supply to and place in the hands of retail dealers and others through the channels of interstate commerce the means of, and instrumentalities for, conducting lotteries, games of chance or gift enterprises in the sale and distribution of merchandise to the general public.

It must now be considered well settled that the sale and distribu-

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tion of such punchboard devices which supply to and place in the hands of others a means or instrumentality for the sale of merchandise by lotteries or games of chance is contrary to the established public policy of the Government of the United States and in violation of the Act. In a recent decision involving substantially the same type of operation, the Commission, after reviewing the leading cases on the subject, so held, and this decision was affirmed by the Court of Appeals for the Seventh Circuit.⁴

Respondents called no witnesses and offered no proof other than the offer in evidence of certain ordinances of different municipalities in the State of Washington licensing the use of punchboards by local retailers as "games of skill." For the reasons enunciated by the Commission in the *James* decision, footnote 4, *supra*, as well as for other obvious reasons, respondents' contention, that such municipal licenses negate the Commission's power to prohibit practices contrary to the Act and the established public policy of the United States, is without merit.⁵

CONCLUSIONS OF LAW

1. Respondents are engaged in commerce and engaged in the above-found acts and practices in the course and conduct of their business in commerce, as "commerce" is defined in the Act.

2. The acts and practices of respondents hereinabove found 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 Act.

3. This proceeding is in the public interest and an order to cease and desist the above-found unlawful acts and practices should issue against respondents.

ORDER

It is ordered, That respondents, Peerless Products, Inc., a corporation, and its officers, and Shirley Maltz, as an officer of said corporation, and Marshall Maltz, individually and as an officer of said corporation, and respondents' agents, representatives, employees, successors and assigns, directly or through any corporate or other device, do forthwith cease and desist from:

⁴ *R. B. James, et al.*, 53 F.T.C. 1119, June 4, 1957, *aff'd*, 253 F. 2d 78 (C.A. 7, 1958). See also, *Modernistic Candies, Inc. v. FTC*, 145 F. 2d 454 (C.A. 7, 1944).

⁵ While not controlling, it is interesting to note that respondent Marshall Maltz and his father, Benjamin Maltz, previously have been found to have engaged in illegal lotteries by the sale of their punchboard devices. *Maltz v. Sax*, 134 F. 2d 2 (C.A. 7, 1943), and *Benmar Sales Company*, 51 F.T.C. 511 (1954), *aff'd* by the Court of Appeals, Seventh Circuit, October 22, 1955, not reported in the Federal Reporter.

Selling or distributing in commerce, as "commerce" is defined in the Act, punchboards or other devices 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.

It is further ordered, That the complaint herein be, and hereby is, dismissed as to respondent Shirley Maltz, individually and as to respondent Rose Maltz, individually and as an officer of Peerless Products, Inc., without prejudice.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner*:

The complaint in this matter charges respondents with having violated Section 5 of the Federal Trade Commission Act through the sale and distribution in commerce of punchboards for the use of others in conducting lotteries or games of chance in the sale of merchandise. The matter was previously before the Commission and was remanded to the hearing examiner for further proceedings to develop the commerce allegation of the complaint.

Pursuant to such remand, additional evidence was received and considered by the hearing examiner. In his initial decision upon remand, the hearing examiner found that the charge was sustained by the evidence and ordered respondents (except Rose Maltz, individually and as an officer of corporate respondent; and Shirley Maltz, individually) to cease and desist from the practice found to be unlawful. Respondents have appealed from this decision.

Respondents first argue that the allegations in the complaint are not supported by the evidence. There is substantial evidence in the record which establishes conclusively that respondents sold and distributed their punchboards in interstate commerce and that the primary and usual use of said punchboards is for the sale and distribution of merchandise by lottery methods. This fully supports the allegations upon which this case was tried. The fact that some purchasers of punchboards have used them for purposes other than those for which they were designed and intended, such as for distribution of cash prizes, is not material in light of this showing. Respondents' argument on this point is rejected.

Respondents next argue that they cannot be held responsible for the practices of those purchasers who use respondents' punchboards for the purpose of selling merchandise by lottery methods. As we have previously stated, the record clearly establishes that respondents' punchboards are primarily used for that purpose.

Despite the fact that the sale of merchandise by lottery methods is made by the purchaser of the board rather than by respondents, there can be no doubt that respondents' sale and distribution in commerce of these punchboards violates the Federal Trade Commission Act. *Chas. A. Brewer & Sons v. Federal Trade Commission*, 158 F. 2d 74 (C.A. 6, 1946); *Modernistic Candles, Inc. v. Federal Trade Commission*, 145 F. 2d 454 (C.A. 7, 1944); *Lichtenstein v. Federal Trade Commission*, 194 F. 2d 607 (C.A. 9, 1952). In answer to a similar argument in *R. B. James v. Federal Trade Commission*, 253 F. 2d 78 (C.A. 7, 1958), the Court expressed itself as follows:

Overlooking, when not denying, Congressionally authorized Commission functions and aims, these petitioners, in substance, claim an unrestricted right to use interstate commerce channels for flooding the states with punchboards. Because petitioners themselves do not participate in the ultimate sales of punches over store counters to individual consumers within a state, petitioners ask for immunization from §5(a)(1). To describe their position posits the refutation of it. *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 433 (1922).

Respondents also contend that the hearing examiner has ignored the effect of local laws that permit the use of punchboards in merchandising. The hearing examiner's order is limited to the prevention of the sale and distribution of these lottery devices in interstate commerce and is not concerned with that part of the merchandising transaction which takes place locally. As stated by the court in *Royal Oil Corporation v. Federal Trade Commission*, 262 F. 2d 741 (C.A. 4, 1959), "Unless Congress specifically withdraws authority in particular areas, the Commission, upon its general grant of authority, can restrain unfair business practices in interstate commerce even if the activities or industries have been the subject of legislation by a state."

Moreover, that such an order is clearly within the authority of the Commission is shown by the provisions of Section 2 of Public Law 906 (15 U.S.C. 24). This law, which forbids the transportation of "gambling devices" in interstate commerce, provides an exception in the case of shipments to any place in any state which has enacted a law providing for an exemption. Section 2 provides 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).

The legislative history of this law makes it clear that the purpose of the above-quoted provision is to leave unaffected the au-

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thority of the Commission to exclude from channels of interstate commerce devices to be used in the sale or distribution of merchandise by lottery methods. S. Rep. No. 1482, 81st Cong., 2nd Sess. (1950); H.R. Rep. No. 2769, 81st Cong., 2nd Sess. (1950).

The two remaining arguments by respondents that the furnishing of punchboards to be used in selling merchandise by lottery methods is not violative of the public policy of the United States and that the Commission does not have jurisdiction to prohibit the distribution of punchboards in interstate commerce are rejected upon the authority of *Chas. A. Brewer & Sons v. Federal Trade Commission*, *supra*; *Lichtenstein v. Federal Trade Commission*, *supra*; *Globe Cardboard Novelty Co., Inc. v. Federal Trade Commission*, 192 F. 2d 444 (C.A. 3, 1951); *Gay Games, Inc. v. Federal Trade Commission*, 204 F. 2d 197 (C.A. 10, 1953).

The appeal of respondents is denied and the initial decision will be adopted as the decision of the Commission.

Commissioner Tait did not participate in the decision of this matter.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and adopting the initial decision:

It is ordered. That respondents, Peerless Products, Inc., a corporation, and Shirley Maltz, as an officer of said corporation, and Marshall Maltz, individually and as an officer of said corporation, 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.

Commissioner Tait not participating.

IN THE MATTER OF

SWANEE PAPER CORPORATION

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d)
OF THE CLAYTON ACT

Docket 6927. Complaint, Oct. 31, 1957—Decision, Mar. 22, 1960

Order requiring a large manufacturer of bathroom and facial tissue, house-