

Complaint

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3. Using the name "Kar-Chance Division of American Plastics," "Kar-Chance" or any other name of similar import to designate, describe, or refer to respondent's business.

It is further ordered, That the respondent herein 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 this order.

IN THE MATTER OF
TOPPS CHEWING GUM, INC.

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

Docket 8463. Complaint, Jan. 30, 1962—Decision, Apr. 30, 1965

Order adopting in part and rejecting in part the initial decision in this proceeding and dismissing, for insufficiency of evidence, the complaint which charged the Nation's largest manufacturer of bubble gum with headquarters in Brooklyn, N.Y., with using unfair methods of competition in gaining control of the baseball picture card industry.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. Section 45), and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest hereby issues its complaint, charging as follows:

PARAGRAPH 1. Respondent is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal office and place of business located at 254 36th Street, Brooklyn, New York.

PAR. 2. Respondent is now, and has been for many years last past, engaged in the manufacture, distribution and sale of bubble gum. In addition, respondent also sells picture cards, including cards containing the picture of a uniformed major league baseball player, or other professional athlete, manager or coach, either separately or in connection with the sale of its bubble gum products.

PAR. 3. The respondent is now, and has been for many years last past, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent manufactures gum in its fac-

tory located in Brooklyn, New York, and ships, or causes to be shipped, such merchandise, as well as picture cards, via common carriers to wholesalers and direct buying retail accounts located in most of the States of the United States.

Respondent is the largest manufacturer of bubble gum in the United States having annual sales of about \$14,000,000 in an industry with total annual sales in the United States by all manufacturers of approximately \$30,000,000.

PAR. 4. In the course and conduct of its business in commerce, respondent is now and has been in active competition with other corporations, firms and individuals also engaged in the manufacture, distribution and sale of bubble gum and in the distribution and sale of picture card products, except to the extent that competition has been lessened and eliminated by the acts, practices and methods of respondent herein alleged to be unlawful.

PAR. 5. Among children in the United States, the hobby of collecting picture cards has been practiced for many years and is constantly growing in popularity. The most common type of card, and that with which this matter is primarily concerned, is approximately $3\frac{1}{2}$ " x $2\frac{1}{2}$ " in size, having a picture of an athlete on one side and his brief biography on the other side. Cards are also distributed and collected which contain pictures of many other subjects such as old automobiles, cowboys and Indians and famous men. Although in some instances the picture cards are sold separately, they are more commonly distributed and sold in a combination package with bubble gum.

The most popular picture cards by far are those containing pictures of major league baseball stars. Children engaged in collecting these cards will only purchase bubble gum which is packaged or accompanied with a baseball picture card. The market for bubble gum packaged and sold in combination with baseball picture cards and the market for baseball picture cards sold separately are each substantial.

PAR. 6. In the course and conduct of its business in commerce, respondent has been, and is now, engaged in unfair methods of competition and unfair acts and practices in that it has completely foreclosed competitors from the above-described baseball picture card markets by entering exclusive picture card contracts with almost all major league baseball players (approximately 414 out of the total of 421) and with practically all minor league players having a major league potential (approximately 1,500). Said contracts grant

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to respondent the exclusive right to use the player's picture, name and biography on picture cards.

Players are first approached and signed to contracts while playing in the minor leagues. These contracts, entered for a nominal consideration of \$5.00, bind the players to respondent when, and if, they get into the major leagues for their first five full seasons of play. The contracts are renewed and extended for various periods until the player's retirement. A clause in the contract provides that the player will not:

* * * grant to others the rights granted to Topps hereunder, or any rights similar thereto, whether such grant or rights to others be for the term of this contract or any part thereof, or whether they be for a time commencing after the expiration of this contract.

In most instances the respondent does not give copies of these contracts to the players, and they are unaware that they are bound, by the terms of the contract, from granting future picture card rights to any person or corporation other than respondent.

The respondent has, by and through a number of means, including threats of legal action and secret payments to representatives or agents in the employ of baseball players, effectively frustrated the efforts of its competitors to secure the rights to use the pictures, names and biographies of baseball players on baseball picture cards, and has thereby foreclosed and prevented said competitors from selling their products, including bubble gum, to substantial markets.

PAR. 7. Through the medium of the aforesaid acts and practices and certain other means and methods, the respondent has created and effected a monopoly in the manufacture and distribution of baseball picture cards, in commerce, contrary to the public policy of the United States and to the detriment of free and open competition in the bubble gum and picture card industries.

PAR. 8. The acts and practices of the respondent as hereinabove alleged are to the prejudice and injury of the public and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. James P. Timony and *Mr. David M. Nelson* of Washington, D.C., for the Commission.

Arent, Fox, Kintner, Plotkin & Kahn, of Washington, D.C., by *Mr. Earl W. Kintner* and *Mr. Sidney Harris* for the respondent.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER
AUGUST 7, 1964

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The Federal Trade Commission, in a complaint issued January 30, 1962, has charged Topps Chewing Gum, Inc., with creating and effecting a monopoly in the manufacture and distribution of baseball picture cards in commerce by resorting to various acts and practices alleged to be unfair and to constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.¹

¹ 38 Stat. 719; 52 Stat. 111; 15 U.S.C.A., § 45; in which, by Section 5(a)(1), it is provided, "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

The respondent appeared in this proceeding and was represented by counsel. While admitting numerous facts alleged in the complaint, it denied all allegations which might serve as a basis for the issuance of an order. A full hearing has been held at which all evidence in support of the complaint and in opposition thereto has been received. Counsel supporting the complaint have submitted what they call Proposed Findings of Fact and Conclusions and a proposed Order to Cease and Desist. Respondent also has submitted what it calls Proposed Findings of Fact, Conclusions of Law and a brief in support thereof. It contends there has been an utter failure of proof and that the complaint ought to be dismissed. (As to the structure of findings of fact, see *Capital Transit Co. v. United States*, U.S.D.C. three judge court, 97 F. Supp. 614 at 621; *N.L.R.B. v. Sharples Chemicals, Inc.*, C.A. 6, 1954, 209 F. 2d 645; *N.L.R.B. v. Newport News*, 308 U.S. 241. What both sides submitted was a detailed and most helpful abstract of their views of what is contained in the transcript of testimony and exhibits, but neither submitted proposals which could become the subject of rulings within the contemplation of Section 8(b) of the Administrative Procedure Act and Section 3.19 of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings. The text of this decision, as a consequence, will have to be regarded as the Examiner's rulings on all issues presented.)

THE COMPLAINT

The complaint alleges that respondent is the largest manufacturer of bubble gum in the United States and that it is engaged also in the sale of picture cards, which include cards containing the picture of a uniformed major league baseball player or other professional athlete, manager or coach. The cards are sold either separately or in connection with the sale of bubble gum. It is alleged further that children in the United States have a hobby consisting of the collection of picture cards, that this hobby is growing constantly in popularity, and that the most popular card is 3½ inches by 2½ inches in size on one side of which is printed an athlete's picture and on the other his brief biography. While there are other picture cards such as cards showing old automobiles, cowboys and Indians, and famous men, it is alleged that the most popular are those containing pictures of major league baseball stars and their biographies or statistics relating to them. It is alleged also that, although in some instances the picture cards are sold separately, they are distributed and sold more commonly in a combination package with bubble gum

and that, "Children engaged in collecting these cards (meaning those containing pictures of major league baseball stars) will only purchase bubble gum which is packaged or accompanied with a baseball picture card."

Following all this and various allegations to support jurisdiction, the alleged unfair methods of competition and unfair acts and practices are set forth. In substance, the complaint attacks what is alleged to be "a monopoly in the manufacture and distribution of baseball picture cards, in commerce, * * * to the detriment of free and open competition in the bubble gum and picture card industries," and asserts that this monopoly was effectuated by the respondent by resorting to certain acts or practices as follows:

(1) Foreclosing competitors from the alleged "baseball picture card markets by entering exclusive picture card contracts with almost all major league baseball players (approximately 414 out of the total of 421) and with practically all minor league players having a major league potential (approximately 1,500), (which) contracts grant to respondent the exclusive right to use the player's picture, name and biography on picture cards."

(2) Respondent gets these contracts by approaching first the players in the minor leagues and binding them "for a nominal consideration of \$5.00 * * * to respondent when, and if, they get into the major leagues for their first five full seasons of play."

(3) Respondent renews and extends these contracts "for various periods until the player's retirement."

(4) It imposes on the players an obligation not to "grant to others the rights granted to Topps * * * or any rights similar thereto, whether such grants or rights to others be for the term of (the) contract or any part thereof, or whether they be for a time commencing after" its expiration.

(5) Respondent "does not give copies of these contracts to the players, and they are unaware that they are bound, by the terms of the contract, from granting future picture card rights to any person or corporation other than respondent."

(6) Respondent has frustrated its competitors from securing any rights to the use of the pictures, names and biographies of baseball players on baseball picture cards "by and through a number of means, including threats of legal action and secret payments to representatives or agents in the employ of baseball players."

(7) It "has thereby foreclosed and prevented said competitors from selling their products, including bubble gum, to substantial markets."

