

Syllabus

IN THE MATTER OF

P. LORILLARD COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 4922. Complaint, Mar. 2, 1943—Decision, Mar. 31, 1950

While the first few puffs from an extra-long cigarette might be somewhat cooler than the smoke from a shorter cigarette and contain less of the irritating properties in the smoke, when an extra-long cigarette is smoked to the same butt length as a shorter cigarette, there is no difference in the temperature of the smoke from the two cigarettes and no lessening of the irritating properties in the smoke entering the smoker's mouth. And, in fact, if the longer cigarette is smoked to the same butt length as the shorter one, the amount of nicotine and tarry substances entering the mouth is probably greater for the former, due to the accumulation of the harmful substances in the butt of the longer one during the first few puffs, and also due to the fact that the longer cigarette contains more tobacco and therefore more of the harmful substances.

The nicotine content of the smoke of a cigarette is in direct proportion to the nicotine content of the tobacco contained in the cigarette, and the nicotine content of the tobaccos used in the manufacture of the popular brands varies greatly, not only as among the several types of tobaccos used, but also as among the individual plants of the same types of tobacco on the same farm and in the same field, and even as among the leaves on the same plant, due to a number of variable factors, including weather conditions, type of soil, method of fertilization and cultivation, and others.

There is no index by which the tobacco buyers for any cigarette manufacturer can judge the nicotine content in tobacco leaves by visual inspection; and, due to the above-mentioned variations in the nicotine content of tobacco, consistency in said content of the tobaccos purchased by any cigarette manufacturer cannot be maintained through the purchase of only the leaves in a certain position on the tobacco plant, or by sampling specimens of the tobaccos, or in any other manner. Furthermore, there is no known practical process by which the nicotine in the tobacco leaf may be removed or substantially reduced without at the same time destroying the tobacco for commercial use, and it is not practically possible for the cigarette manufacturers to maintain a consistency of nicotine in the finished cigarette, due to the large amount of tobacco leaves used in the manufacture thereof, and the extreme variation in their nicotine content.

As respects tars and resins in the tobaccos from which popular cigarettes are made, these vary considerably, as does the nicotine content, and for the same reasons. And here too it is not practically possible for the manufacturers to determine the amount of tars and resins in the tobaccos purchased, or to remove or substantially reduce the amount therein, or to maintain consistency in the amount thereof in the finished cigarettes.

Tarry substances or irritating properties in smoking tobaccos generally have an irritating effect on the membrane inside a person's mouth or throat, which varies as between individuals, but not essentially as respects the irritating properties in all common brands of such tobacco, and the temperature of the smoke from such tobacco as it enters the mouth is governed by the length of the stem of the pipe and not by the tobacco.

Where a corporation engaged in manufacturing and processing tobacco products, including its Old Gold cigarettes and its Friends smoking tobacco, and also previously, its Beech-Nut and Sensation cigarettes, and in the competitive interstate sale and distribution thereof; in advertising their said products in magazines of Nation-wide circulation, by local radio broadcasts and Nation-wide hookups, and by other means, directly and by implication—

- (a) Represented that its Beech-Nut cigarettes, with their extra length, were "easy on the throat," provided a "bonus on throat ease," filtered out "heat and bite, completely cooling the smoke," provided "definite defense against throat irritation," and that the extra length filtered out—eliminated "heat and bite, completely cooling the smoke";

The facts being that neither the extra length nor any other property of its said cigarettes prevent the irritating properties in the smoke, common to all cigarettes, from reaching the mouth and throat of the smoker, and did not provide any defense against throat irritation;

- (b) Represented falsely that its Sensation cigarettes were made of "extra choice imported and domestic tobaccos," were "top quality cigarettes," and were "made from the finest tobacco you can buy";

The facts being that the tobaccos used in the manufacture of said cigarettes were primarily lower grades of flue-cured and Burley tobaccos;

- (c) Represented that, of the seven leading brands of cigarettes, its Old Gold cigarettes were lowest in nicotine content and lowest in throat-irritating tars and resins; and that the July 1942 issue of Reader's Digest contained a report of tests which showed that the smoke from its Old Gold cigarettes had less nicotine than the smoke from the other six tested, and contained less throat-irritating tars and resins and were easier on the throat than the other six;

The facts being that said cigarettes and the smoke therefrom contained no less nicotine, tars, or resins than did the cigarettes and smoke from the other leading brands; and with respect to the Reader's Digest article it failed to disclose that the results of the tests reported therein showed that the differences in amount and percentage of harmful substances in the tobacco and in the smoke of the cigarettes tested were insignificant; and that the smoke from the Old Gold cigarettes was no less harmful than was that from the six other brands tested; and

- (d) Represented that its Friends smoking tobacco was rum-cured by special processes and that rum curing enriched said tobacco; and that said tobacco smoked "without bite or burn," free from bite and heat," always * * * without irritation," was always "cool under fire," etc.;

The facts being that the tobacco in question was cured before being purchased by it; addition of the rum flavoring during the processing caused no chemical change or temperature reaction in the tobacco, but affected only the aroma and taste of the tobacco and smoke therefrom, and did not enrich the tobacco or cause the smoke to be less irritating to the mouth; and the smoke from

735

Complaint

said tobacco, like other smoking tobaccos, had an irritating effect on the mouth or throat; and said tobacco was not cool under fire or without irritation;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the false belief that said representations were true, and into the purchase of its said brands of cigarettes and smoking tobacco; whereby substantial trade was diverted unfairly to it from its competitors;

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and of its competitors, and constituted unfair methods of competition in commerce, and unfair and deceptive acts and practices therein.

In said proceeding, tests made by the Food and Drug Administration, at the instance of the Commission, to determine, among other things, the nicotine content of the tobacco in and the smoke from a number of cigarettes of six of the largest selling brands, including Old Golds, showed that the nicotine content of both the tobacco in and the smoke from the individual cigarettes involved in the tests varied greatly both in actual weight and in percentage by weight of the cigarettes, not only as among the six different brands, but also as among the individual cigarettes of the same brand; and that for the individual cigarettes involved in the tests, the amount of tars and resins in the smoke varied greatly both in actual weight and in percentage by weight of the cigarettes, not only as between the six different brands tested, but also as among the individual cigarettes of the same brand.

Before *Mr. Webster Ballinger* and *Mr. John L. Hornor*, trial examiners.

Mr. J. R. Phillips, Jr., for the Commission.

Perkins, Daniels & Perkins, of New York City, and *Bingham, Collins, Porter & Kistler*, of Washington, D. C., for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that P. Lorillard Company, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, P. Lorillard Company, Inc., is a corporation organized and existing and doing business under and by virtue of the law of the State of New Jersey with its principal office at 15 Exchange Bldg., Jersey City, in said State, and with its executive office at 119 West 40th Street, New York City, State of New York. It is now, and for more than 5 years last past has been, engaged in the manufacture and processing of tobacco products,

including cigarettes branded "Beech-Nut," "Sensation," and "Old Gold," and pipe tobacco branded "Friends" smoking tobacco; and in the sale and distribution thereof in commerce between and among the various States of the United States and in the District of Columbia. It now causes, and for more than 5 years last past has caused, such tobacco products, when sold by it, to be transported from its factories located in various cities of the United States, including Jersey City, N. J.; Louisville, Ky.; Richmond, Va.; Middletown, Ohio; Danville, Va.; and Lancaster, Pa.; to the purchasers thereof, some located in such States and other located in various other States of the United States and in the District of Columbia, and there is now and has been for more than 5 years last past a constant current of trade and commerce conducted by said respondent in such tobacco products, between and among the various States of the United States and in the District of Columbia. Respondent is now, and for more than 5 years last past has been, one of the largest manufacturers of the tobacco products in the United States, and is now, and for more than 5 years last past has been in substantial competition with other corporations and with persons, firms, and partnerships engaged in the sale of tobacco products in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business described in paragraph 1 hereof, and for the purpose of aiding and promoting the sale by it in the commerce aforesaid of its said Beech-Nut brand of cigarettes, respondent has disseminated and caused to be disseminated, by the United States mails, in magazines of Nation-wide circulation, in newspapers of interstate circulation, by local radio broadcasts and by Nation-wide hookups of broadcasts and by other means in commerce, advertisements in which it has represented and still represents directly and by implication:

- (a) That said Beech-Nut cigarettes are "easy on your throat";
- (b) That such Beech-Nut cigarettes provide "plenty of bonus on throat ease";
- (c) That such Beech-Nut cigarettes "filter out heat and bite, completely cooling the smoke";
- (d) That such Beech-Nut cigarettes provide "definite defense against throat irritation"; and
- (e) That the extra length of such Beech-Nut cigarettes "filters out—eliminates heat and bite, completely cooling the smoke."

PAR. 3. In the course and conduct of its business described in paragraph 1 hereof, and for the purpose of aiding and promoting the sale

by it in the commerce aforesaid of its said Sensation brand of cigarettes, respondent has disseminated and caused to be disseminated by the United States mails, in magazines of Nation-wide circulation, in newspapers of interstate circulation, by local radio broadcasts and by Nation-wide hookups of broadcasts and by other means in commerce, advertisements in which it has represented and still represents directly and by implication:

(a) That Sensation cigarettes are made of "extra choice imported and domestic tobaccos";

(b) That Sensation cigarettes are "top-quality cigarettes";

(c) That Sensation cigarettes are "made from the finest tobacco you can buy."

PAR. 4. In the course and conduct of its business described in paragraph 1 hereof, and for the purpose of aiding and promoting the sale by it in the commerce aforesaid of its said Old Gold brand of cigarettes, respondent has disseminated and caused to be disseminated by United States mails, in magazines of Nation-wide circulation, in newspapers of interstate circulation, by local radio broadcasts and by Nation-wide hookups of broadcasts, and by other means in commerce, advertisements in which it has represented and still represents directly and by implication:

(a) That "ever fresh Old Golds give you a finer, fresher flavor";

(b) That "you can't buy, beg, or borrow a stale Old Gold";

(c) That "double mellow Old Golds not only give you prize crop tobacco, the finest money can buy, but give you cigarettes of guaranteed freshness, no matter where you buy them";

(d) That the smoking of Old Gold cigarettes will assist students in preparing for examinations;

(e) That "something new has been added" to the tobacco content of Old Gold cigarettes;

(f) That of the seven leading brands of cigarettes, Old Gold cigarettes are lowest in nicotine content and are lowest in throat-irritating tars and resins; and

(g) That the July 1942 issue of a monthly magazine published in the United States and having a Nation-wide and international circulation contains a report of tests of "seven leading cigarettes"; that "the cigarette whose smoke was lowest in nicotine was Old Gold. The cigarette with the least throat-irritating tars and resins was Old Gold. On both of these major counts, Old Gold was best among all seven cigarettes tested"; that Old Gold cigarettes are "easier on the throat than are the other six brands of cigarettes"; and that "Old Gold

cigarettes are easier on the throat than is any other brand of cigarettes.”

PAR. 5. In the course of its business described in paragraph 1 hereof, and for the purpose of inducing the purchase of its tobacco products in the commerce aforesaid, the respondent now uses, and since 1940 has used and has published in commerce, paid testimonials from users and purported users of its Old Gold cigarettes which do not present or reflect the actual personal experiences, knowledge, or beliefs of the signers thereof, and in some of such cases the testimonialists smoke not only Old Gold cigarettes, but also other brands of cigarettes and in some of such cases the testimonialists not only do not and have not smoked Old Gold cigarettes, but have not and do not smoke cigarettes of any kind or make. Many of such testimonials are prewritten by representatives of respondent and are signed by the testimonialists without their knowing or being advised by the respondent or by any of its representatives of the contents of them; and many of such testimonials are false and are known by the respondent to be false; and all of such testimonials so obtained by respondent are given and secured in sole consideration of the payments which respondent makes therefor.

PAR. 6. In the course and conduct of its business described in paragraph 1 hereof, and for the purpose of aiding and promoting the sale by it in the commerce aforesaid of its said Friends smoking tobacco, respondent has disseminated and caused to be disseminated by United States mails, in magazines of Nation-wide circulation, in newspapers of interstate circulation, by local radio broadcasts and by Nation-wide hookups of broadcasts and by other means in commerce, advertisements in which it has represented and still represents directly and by implication:

(a) That rum curing of Friends smoking tobacco “puts out bite and burn”;

(b) That Friends smoking tobacco is “rum-cured by special process”;

(c) That rum curing enriches “Friends smoking tobacco”;

(d) That Friends smoking tobacco “always smokes cool under fire”;

(e) That Friends smoking tobacco “smokes without bite or burn” and “free from bite and heat”;

(f) That “we rescue from tongue distress. Free of harshness, burn and bite. For bite-free coolness”; and

(g) That “Friends tobacco smokes always * * * without irritation.”

PAR. 7. In truth and in fact: (1) Said Beech-Nut cigarettes are not easy on one's throat and do not provide "plenty of bonus on throat ease"; (2) such Beech-Nut cigarettes do not "filter out heat and bite" completely cooling the smoke, when and if such cigarettes are smoked to the same butt length to which other brands of cigarettes are smoked; (3) such Beech-Nut cigarettes do not provide "definite defense against throat irritation"; (4) the extra length of such Beech-Nut cigarettes does not filter out or eliminate heat and bite or completely or in any degree cool the smoke from such cigarettes, when and if such cigarettes are smoked to the same butt length to which other brands of cigarettes are smoked.

PAR. 8. In truth and in fact: (1) Said Sensation cigarettes are not made from extra choice imported and domestic tobaccos; (2) they are not top-quality cigarettes; (3) they are not made from the finest tobacco one can buy.

PAR. 9. In truth and in fact (1) Old Gold cigarettes do not give one a finer or fresher flavor; (2) Old Gold cigarettes are not "ever-fresh"; (3) Old Gold cigarettes become stale by reason of age and for other reasons; (4) Old Gold cigarettes contain tobaccos other than "prize crop" tobacco; (5) the tobaccos in such cigarettes are not the finest money can buy; (6) the smoking of Old Gold cigarettes will not assist students in preparing for examinations; (7) nothing has been added to the tobacco of Old Gold cigarettes which was not known and used in the manufacture of cigarettes prior to the manufacturing and marketing of such Old Gold cigarettes; (8) of the so-called seven leading brands of cigarettes referred to in subparagraphs (f) and (g) of paragraph 4 hereof, Old Gold cigarettes are not lowest in nicotine content nor lowest in throat irritating tars and resins; and (9) while the July 1942 issue of the magazine referred to in subparagraph (g) of paragraph 4 hereof contains a report of tests of "seven leading cigarettes" and while, according to the report of the tests the amount of nicotine in the smoke of Old Gold cigarettes average 2.04 milligrams per cigarette, the amount of nicotine in the smoke of each of two other brands of cigarettes mentioned in such report averaged 2.20 milligrams per cigarette and the greatest amount of nicotine in smoke of all the brands of cigarettes reported tested was an average of 3.02 milligrams per cigarette of that brand, these differences in the amount of nicotine in the brands of cigarettes tested and reported were and are insignificant, which the said respondent in its said advertising conceals and fails to disclose; and the said respondent in its said ad-

