

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

Docket C-2237. Complaint, June 22, 1972—Decision, June 22, 1972

Consent order requiring a Salem, New Hampshire, wholesale grocery business to cease inducing and/or receiving promotional and advertising allowances or contributions in connection with the construction or operation of any facility of the respondent when known not to be offered to competitors on proportionally equal terms. Respondent is further ordered to refund to each supplier any and all consideration paid to respondent in connection with its new freezer-warehousing unit.

COMPLAINT

The Federal Trade Commission, pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, having reason to believe that Buy-Rite Foods, Inc., a corporation, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (U.S.C., Title 15, Section 45), 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 respect thereto as follows:

PARAGRAPH 1. Respondent, Buy-Rite Foods, Inc. (Buy-Rite) is a corporation organized and doing business under the laws of the State of New Hampshire, with its principal office and place of business located at 16 Kelly Road, Salem, New Hampshire.

PAR. 2. Respondent, Buy-Rite, is now and has been for many years engaged in the wholesale grocery business, buying and selling a wide variety of grocery products with total sales for 1971 of \$48,527,138.

Buy-Rite services approximately eighty-five (85) retail grocery stores, including approximately seven (7) chain operations and sixty-five (65) supermarkets. Buy-Rite maintains its principal warehouses at its principal place of business in Salem, New Hampshire, and supplies retail grocery stores located in the States of New Hampshire and Massachusetts.

PAR. 3. Respondent, Buy-Rite, purchases its products from suppliers located throughout the United States and causes such products to be transported from various States in the United States to other states for the purpose of reselling said products. Respondents, Buy-Rite, in the course and conduct of its business, has engaged and is presently engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business as herein described, respondent, Buy-Rite, has been for many years, and is now, in substantial competition in the sale and distribution of its products, with other corporations, persons, firms, and partnerships.

PAR. 5. Respondent, Buy-Rite, by August 24, 1971, completed construction of a fifty thousand (50,000) square foot, eight hundred thousand (800,000) cubic foot, freezer unit annexed to its main offices and warehouses located at 16 Kelly Road, Salem, New Hampshire. The cost of construction of said freezer unit was approximately \$1,000,000.

On August 24, 1971, respondent, Buy-Rite, announced the opening of said freezer unit through a letter to each of its suppliers. Said

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letter of announcement commenced an advertising campaign which involved the publication of a brochure to be prepared for Buy-Rite by Creative Marketing Services International for the purpose of distribution "to the trade." To defray the cost of publication, to promote the opening of the freezer unit, and to advertise the products of its suppliers Buy-Rite solicited the participation of its suppliers in the advertising program.

Cost of participation in the advertising campaign was quoted by Buy-Rite. The cost of one half of advertising in said promotional brochure was quoted at \$400 and one full page at \$700.

PAR. 6. As a result of said promotional campaign Buy-Rite received payments and allowances from some of its suppliers which exceeded allowances usually provided and which resulted in a disproportionate and discriminatory contribution to Buy-Rite by such suppliers.

Buy-Rite specifically solicited its suppliers for contributions to a unique advertising campaign. This solicitation involved a specified schedule of allowances quoted by Buy-Rite to its suppliers as set out in Paragraph 5.

Buy-Rite received protests and refusals from some of its suppliers in response to its solicitation for participation in said campaign.

PAR. 7. Respondent, Buy-Rite, in inducing, inducing and receiving or receiving the aforesaid payments and allowances from such suppliers, knew or should have known that such suppliers were not making available to their customers competing with respondent in the resale and distribution of such products such payments or allowances on proportionally equal terms.

PAR. 8. The retention of improper and discriminatory payments by respondent, Buy-Rite, constitutes a continuing violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. Section 45).

PAR. 9. The acts and practices of respondent, Buy-Rite, as alleged herein constitute unfair methods of competition in commerce or unfair acts or practices in commerce within the intent and meaning of, and in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered that matter and having determined that it had reason to believe that the respondent has violated the said Act, and the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Buy-Rite Foods, Inc., is a corporation organized and doing business under the laws of the State of New Hampshire, with its office and principal place of business located at 16 Kelly Road, Salem, New Hampshire.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Buy-Rite Foods, Inc., a corporation, and its officers, representatives, agents and employees, successors and assigns, directly or indirectly, through any corporate or other device, in or in connection with the purchase or sale in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale by the respondent, Buy-Rite, or in connection with any other transactions between respondent and its various suppliers involving or pertaining to the regular business of the respondent in advertising, purchasing, distributing and selling commodities and products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Inducing, inducing and receiving, or receiving promotional and advertising allowances or contributions of any nature whatsoever furnished by any supplier in connection with the publicizing, operation, or maintenance of any facility of respondent or with the purchase, offering for sale, or sale of any commodity purchased from such supplier when respondent knows or should

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know that such allowance or contribution thereto is not affirmatively offered or otherwise accorded by such supplier on proportionally equal terms to all other purchasers and customers competing with respondent in the sale and distribution of such supplier's products, including other purchasers who resell to customers who compete with respondent in the resale of such supplier's products.

2. Inducing, inducing and receiving, or receiving or contracting for the receipt of anything of value in connection with the construction, development, promotion, or maintenance of any facility of respondent or with the purchase, offering for sale, or sale of any commodity purchased from such supplier when respondent knows or should know that such allowance or contribution thereto is not affirmatively offered and otherwise accorded by such supplier on proportionally equal terms to all other purchasers and customers competing with respondent in the sale and distribution of such supplier's products, including other purchasers who resell to customers who compete with respondent in the resale of such supplier's products.

It is further ordered, That respondent, Buy-Rite Foods, Inc., shall notify all suppliers solicited in the promotional campaign conducted pursuant to the opening of its new fifty thousand (50,000) square foot freezer warehousing unit, located at 16 Kelly Road, Salem, New Hampshire, of this order and shall provide each supplier with the following:

1. a copy of this order; and
2. an accounting of the current disposition of all consideration paid to Buy-Rite Foods, Inc.

It is further ordered, That respondent, Buy-Rite Foods, Inc., refund to each supplier any and all consideration paid to respondent which was improperly received and constitutes a discriminatory payment pursuant to its solicitation in the promotional campaign announcing and facilitating the opening of its said new freezer warehousing unit.

It is further ordered, That respondent, Buy-Rite Foods, Inc., notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of a subsidiary, or any other change in the corporation or corporate status which may affect compliance obligations arising out of this order.

It is further ordered. That respondent, Buy-Rite Foods, Inc., shall, within sixty (60) days after service upon it of this order, file with

