

Complaint

87 F.T.C.

IN THE MATTER OF
FRED MEYER, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2782. Complaint, Jan. 20, 1976—Decision, Jan. 20, 1976

Consent order requiring a West Coast retail food and general line merchandise store chain operating in Oregon, Washington and Montana, among other things to cease misrepresenting the availability of merchandise; and misrepresenting the price at which merchandise may be purchased. Further, respondent is required to prominently display the location and price of items advertised below the regular price and to post a notice to consumers and a copy of the advertisement near entrances to its stores; and to issue rainchecks for any advertised items temporarily out of stock.

Appearances

For the Commission: *Dennis McFeely* and *Sarah J. Hughes*.

For the respondent: *Robert L. Ridgley, Davies, Biggs, Strayer, Stoel & Boley*, Portland, Oreg.

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 Fred Meyer, Inc., a corporation, hereinafter sometimes 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:

COUNT I

Alleging violations of Sections 5 and 12 of the Federal Trade Commission Act.

PARAGRAPH 1. Respondent Fred Meyer, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon, with its principal office and place of business located at 3800 S.E. 22nd, Portland, Oregon.

PAR. 2. All allegations made in the present tense include the past tense.

PAR. 3. Respondent is engaged in the operation of a chain of retail stores selling food, drug, variety and other general merchandise. Respondent operates such stores in Oregon, Montana and Washington.

The volume of its retail business has been and is substantial. In the operation of its retail stores, respondent offers and promotes for sale to its customers, and sells to its customers an extensive line of products, including "food," as that term is defined in the Federal Trade Commission Act, groceries, drugs, household articles, apparel, paint, hardware and other general merchandise, all of which are sometimes referred to hereafter as "items." Many of the said items are purchased from numerous suppliers located throughout the United States.

PAR. 4. In the course and conduct of its business as aforesaid, respondent causes, directly and indirectly, the aforesaid items to be shipped and distributed from manufacturing and processing plants or from other sources of supply to its warehouses and distribution centers, or retail stores located in States other than the State of origination, distribution or storage of said items. Respondent maintains a substantial course of trade in the distribution, advertising, offering for sale and sale of the aforesaid items in or having an effect on commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. In the course and conduct of its business, as aforesaid, respondent disseminates, and causes the dissemination of, certain advertisements concerning the aforesaid items by various means in or having an effect on commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, including but not limited to, advertisements in newspapers of general and interstate circulation and other advertising media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said items from respondent; and respondent disseminates, and causes the dissemination of, advertisements concerning said items by various means, including but not limited to the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase from respondent of the said items in or having an effect on commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended. Many of the said advertisements list or depict the aforesaid items and also contain statements and representations concerning the price or terms at which said items would be offered for sale. Many of the aforesaid advertisements contain further direct and express statements and representations concerning the time periods during which the offers would be in effect and the locations of respondent's stores at which the offers would be made.

PAR. 6. Through the use of such advertisements being disseminated in various areas of Washington, Oregon and Montana served by respondent's retail stores, respondent represents directly or by implication that in those stores covered by such advertisements,

throughout the effective periods of the advertised offers, the consumer would be charged for the items listed or depicted in such advertisements a price equal to or below the advertised price.

PAR. 7. In truth and in fact, in a significant number of respondent's retail stores located in the Portland, Oregon-Vancouver, Washington metropolitan areas and the Tacoma, Washington area in which the aforesaid advertisements are disseminated, in stores covered by such advertisements, during the effective periods of the advertised offers, in a substantial number of instances the consumer is charged a price higher than the advertised price. Therefore, the statements and representations as referred to in Paragraph Six, are misleading and deceptive, and where food, drugs, devices or cosmetics are advertised each of such advertisements is misleading in material respects and constitutes a "false advertisement," as that term is defined in the Federal Trade Commission Act.

PAR. 8. By disseminating or causing the dissemination of advertisements which offer or present for sale items at specific prices, as aforesaid, and during the effective periods of such advertised offers at a number of stores covered by said advertisements, by charging the consumer prices which are higher than the advertised prices on said items, respondent is engaged in unfair acts and practices.

PAR. 9. In the course and conduct of its business, and at all times referred to herein, respondent is in substantial competition in commerce with corporations, partnerships, firms and individuals selling the same types of products as respondent.

PAR. 10. The use by respondent of the aforesaid unfair, false, misleading and deceptive statements, representations, acts and practices, including the dissemination of the aforesaid "false advertisements," has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statements and representations are true, and to induce such persons to go to respondent's stores and to purchase from respondent substantial quantities of the advertised items at prices in excess of the advertised prices and substantial quantities of items other than the advertised items.

PAR. 11. The acts and practices as aforesaid, and the dissemination by respondent of the false advertisements, as aforesaid, are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in or having an effect on commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

COUNT II

Alleging violation of the Federal Trade Commission Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices (16 C.F.R. §424).

PAR. 12. The allegations of Paragraphs One, Two, Three, Four, Five and Nine, respectively, of Count I hereof are incorporated by reference in Count II as if set forth verbatim.

PAR. 13. The Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. §41, *et seq.*, and the provisions of Subpart B, Part 1, of the Commission's Procedures and Rules of Practice, 16 C.F.R. §1.11, *et seq.*, conducted a proceeding for the promulgation of a trade regulation rule regarding retail food store advertising and marketing practices. Notice of this proceeding, including a proposed rule, was published in the *Federal Register* on November 14, 1969 (34 F.R. 18252). Thereafter, the Commission duly published and promulgated the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices on May 31, 1971, effective July 12, 1971, 16 C.F.R. §424.1 (1973).

PAR. 14. Respondent is a member of the retail food store industry, and its acts and practices in connection with the sale and offering for sale of food and grocery products and other merchandise are subject to the jurisdiction of Sections 5 and 12 of the Federal Trade Commission Act and are within the intent and meaning of, and are subject to, the provisions of the aforesaid trade regulation rule.

PAR. 15. In connection with its aforesaid advertisements, respondent, in a substantial number of instances, fails to comply with Paragraph (2) of the trade regulation rule by offering items for sale at stated prices by means of advertisements disseminated in areas served by a significant number of its stores which were covered by such advertisements and by failing to charge the consumer the advertised price or a lower price for a substantial number of such advertised products. In fact, the respondent is, in some instances, charging the consumer prices higher than the advertised prices, thereby failing to make said advertised items readily available for sale at or below the advertised prices.

PAR. 16. Respondent's aforesaid violations of the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices constitute violations of Sections 5 and 12 of the Federal Trade Commission Act.

PAR. 17. The acts and practices as aforesaid are to the prejudice and injury of the public and constitute unfair or deceptive acts or practices

in or having an effect on commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

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 Seattle Regional Office 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 the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that 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 sixty days, and having duly considered the comments filed thereafter pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

A. Respondent Fred Meyer, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon with its office and principal place of business located at 3800 S.E. 22nd, Portland, Oregon.

B. 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

I

It is ordered, That respondent Fred Meyer, Inc., a corporation, its successors or assigns, its officers, agents, representatives, and employees, directly, or through any corporate subsidiary, as defined below, or

through any division or other device, shall, in connection with the advertising, offering for sale, or sale of food, drug, variety, and other merchandise offered or sold in its retail stores, hereinafter sometimes referred to as items, in or having an effect on commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended:

Cease and desist from directly or indirectly disseminating or causing the dissemination of any advertisement by any means which offers any items for sale at a stated price, unless throughout the effective period of the advertised offer at each retail store covered by the advertisement:

1. There is a sign or other conspicuous marking at the place where an item advertised below regular shelf price is displayed for sale clearly disclosing that the item is "as advertised," or "on sale," or words of similar import as appropriate, and disclosing on such sign or marking, the advertised price;

2. Each advertised item which respondent usually and customarily individually marks with a price is individually, clearly, and conspicuously marked with the advertised price;

3. Each advertised item is sold to customers at or below the advertised price;

Provided, That it shall not be deemed a violation of the above subparagraphs 1., 2., and 3., if respondent is complying with a specific exemption, limitation, or restriction with respect to store, item, quantity, or price which is clearly and conspicuously disclosed in all advertisements.

Provided, further, That in stores equipped with optical scanning devices which electronically "read" an identification code marked on the packaging of items, which transmit the information to a computer which then transmits the correct price of the items to an electronic cash register where the price is displayed so it is visible to the customer and where the item and price are printed on the cash register tape, the items need not be pricemarked in any additional manner; but this proviso will not be applicable unless respondent clearly and conspicuously posts the advertised prices of such items at the point of display and is in compliance with Section I(3) hereof.

The Commission recognizes that technical per se violations of Section I of this order are inevitable. Therefore, in determining compliance with Section I of this order, the Commission will consider the circumstances surrounding failure to mark the advertised items conspicuously or to sell them at or below the advertised prices due to circumstances beyond respondent's control. Further, both parties

recognize that the second proviso to Section I is limited solely to the purpose of this proceeding.

Definition of "corporate subsidiary:" All corporate subsidiaries except those corporate grocery retailers wherein respondent has obtained shares of stock solely to protect past due accounts receivable owing to respondent or to provide as security for promissory notes for monetary advances to purchase real estate, fixtures, and inventory; wherein respondent has provided a contractual right to manage the corporation to a person not an employee of respondent; and wherein respondent exercises no operational control over the grocery retailer.

II

It is further ordered, That respondent Fred Meyer, Inc., a corporation, its successors or assigns, its officers, agents, representatives, and employees, directly, through any corporate subsidiary, as defined above, or through any division or other device, shall cease and desist from disseminating or causing to be disseminated, any advertisement which contains any of the offers prohibited by Section I of this order:

A. By United States mails, or in or having an effect upon commerce by any means, as "commerce" is defined in the Federal Trade Commission Act, as amended, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, grocery products, or other items of merchandise covered by Section 12 of the Federal Trade Commission Act which are offered for sale or sold in its retail stores;

B. By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, of food, grocery products, or other items of merchandise covered by Section 12 of the Federal Trade Commission Act which are offered for sale or sold in its retail stores.

III

It is further ordered, That, throughout each advertised sale period in each of its retail stores covered by an advertisement, respondent shall post conspicuously (1) at or near the place where customers pay for items, and (2) in such location or locations as is reasonably calculated to catch the attention of each person who enters the retail store, a notice which contains the following:

A. A copy of the advertisement.

B. A statement that:

All items advertised are readily available for sale at or below advertised price except as specifically noted in this ad. Rainchecks will be gladly issued for any advertised items

temporarily out of stock that will enable you to purchase those items at or below the advertised price in the near future. If you have any questions, the department manager will be glad to assist you.

IV

It is further ordered, That respondent shall cause the following statement to be clearly and conspicuously set forth in each advertisement which represents that items are available for sale at a stated price in any of its retail stores: "Each of these advertised items must be readily available for sale at or below the advertised price in each Fred Meyer store, except as specifically noted in this ad."

V

It is further ordered, That:

A. Respondent shall forthwith deliver a copy of this order to each of its operating divisions and to each of its present and future officers and other personnel in its organization down to the level of and including assistant store managers who, directly or indirectly, have any supervisory responsibilities with respect to individual retail stores of respondent, or who are engaged in any aspect of preparation, creation, or placing of advertising, and that respondent shall secure a signed statement acknowledging receipt of said order from each such person;

B. Respondent shall institute and maintain a program of continuing surveillance adequate to reveal whether the business practices of each of its retail stores conform to this order, and shall confer with any duly authorized representative of the Commission pertaining to such program when requested to do so by a duly authorized representative of the Commission;

C. Respondent shall, for a period of three (3) years subsequent to the date of this order:

1. Maintain business records which show the efforts taken to ensure continuing compliance with the terms and provisions of this order, except that magnetic tapes need be retained for six months only;

2. Grant any duly authorized representative of the Federal Trade Commission access to all such business records; and

3. Furnish to the Federal Trade Commission copies of such records which are requested by any of its duly authorized representatives.

D. Respondent shall, all other provisions of this order notwithstanding, on or before each of the first three (3) anniversary dates of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order in the preceding year. The anniversary dates of the order shall be based upon the original date of service of the order upon respondent.

VI

It is further ordered, That respondent shall notify the Commission at least thirty 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 subsidiaries or any other change in the respondent which may affect compliance obligations arising out of this order.

VII

It is further ordered, That respondent shall, within sixty days after service upon it of this order, file with the Commission, a written report, setting forth in detail the manner and form of its compliance with this order.

IN THE MATTER OF

THE ANACONDA COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE
CLAYTON ACT

Docket 8994. Complaint, Sept. 23, 1974—Decision, Jan. 23, 1976

Consent order requiring a New York City manufacturer and seller of primary metals and wire mill products to divest itself of the stock and assets of Systems Wire and Cable, Inc., a manufacturer of semiflexible coaxial cable within two years of service upon them of this order. Further, respondent is prohibited from acquiring, for a period of ten (10) years, the stock or assets of any firm engaged in the manufacture of semiflexible coaxial cable without prior F.T.C. approval.

Appearances

For the Commission: *Charles W. Corddry, III* and *Paul N. Kane*.

For the respondent: *Zachary Shimer, Chadbourne, Parke, Whiteside & Wolff*, New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Anaconda Company, a corporation subject to the jurisdiction of the Commission, has acquired all the stock of Systems Wire & Cable, Inc., a corporation, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. §45), and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. §21) and Section 5 of the Federal Trade Commission Act (15 U.S.C. §45 (b)), stating its charges as follows:

I

DEFINITIONS

1. For the purpose of this complaint the following definitions shall apply:

(a) "*Coaxial cable*" is cable consisting of a metal center conductor, surrounded by an insulating material, or dielectric, and encased in a metal outer conductor which has a common axis with the center conductor. Coaxial cable is often coated by a polyethylene jacket or other protective covering.

(b) "*Semiflexible coaxial cable*" is coaxial cable sold on reels in