

IN THE MATTER OF

FOOD FAIR STORES, INC. ALSO TRADING AS PANTRY
PRIDECONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-2912. Complaint, Nov. 11, 1977 — Decision, Nov. 11, 1977

This consent order, among other things, requires a Philadelphia, Pa. retail food store chain to make each of its advertised items readily available for sale to customers in its stores, to have advertised items correctly priced, and to sell those items at or below the advertised price. Further, the firm must post copies of advertisements and notices of the availability of "rainchecks" for unavailable items.

Appearances

For the Commission: *Bernard Rowitz, Alan L. Cohen and Irvin E. Abrams.*

For the respondent: *Stein, Mitchell & Mezines, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Food Fair Stores, Inc., a corporation, also trading and doing business as Pantry Pride, hereinafter sometimes referred to as respondent, has engaged in acts and practices contrary to the Commission's Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices (16 C.F.R. 424) in violation of the Federal Trade Commission Act, as amended, and has also engaged in acts and practices in violation of the provisions of the above-mentioned 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 violation of Section 5 of the Federal Trade Commission Act, as amended.

PARAGRAPH 1. Respondent, Food Fair Stores, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located at 3175 John F. Kennedy

Boulevard, Philadelphia, Pennsylvania. Respondent also operates, trades and does business under the name of Pantry Pride.

PAR. 2. Respondent is engaged in the operation of a chain of retail food stores, buying and selling a wide variety of food and grocery products. Respondent operates retail food stores in Pennsylvania, New Jersey, Maryland, Florida and other States in the United States. Its volume of business is substantial. In the operation of its retail food stores, respondent offers and presents for sale to its customers, and sells to its customers, an extensive line of products, including food, groceries and other merchandise, all of which are sometimes referred to hereafter as "items." Many of said items are purchased from numerous suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent now causes, and for some time last past has caused, directly or indirectly, the aforesaid items to be shipped and distributed from manufacturing and processing plants or from other sources of supply to its warehouses, distribution centers, or retail food stores located in various states other than the state of origination, distribution or storage of said items. Respondent maintains, and at all times mentioned herein has maintained a substantial course of trade in the distribution, advertising, offering for sale and sale of the aforesaid items in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its business, as aforesaid, and for some time last past respondent has been and is now disseminating, and causing the dissemination of, certain advertisements concerning the aforesaid items by various means in or affecting 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 were and are likely to induce, directly or indirectly, the purchase of said items from respondent; and respondent has been and is now disseminating, and causing 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 were and are likely to induce, directly or indirectly, the purchase from respondent of the said items in or affecting 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 food stores at which the offers would be made.

PAR. 5. Through the use of such advertisements disseminated, and now being disseminated, in various areas of the United States served by respondent's retail food stores, respondent has represented, and is now representing, directly or by implication, that in those stores covered by such advertisements, throughout the effective periods of the advertised offers, the items listed or depicted in such advertisements would be or are:

- A. Readily available for sale to customers;
- B. Readily available for sale at or below the advertised prices.

PAR. 6. In truth and in fact, in a number of respondent's retail food stores covered by such advertisements, during the effective periods of the advertised offers, a number of items listed or depicted in the said advertisements were or are:

- A. Not readily available for sale;
- B. Not readily available for sale at or below the advertised prices.

Therefore, the statements and representations as referred to herein, were and are false, misleading and deceptive, and each of such advertisements was and is misleading in material respects.

PAR. 7. By disseminating or causing the dissemination of advertisements which offer or present for sale items as aforesaid, and by failing to have in each of its stores covered by such advertisements, throughout the effective periods of the advertised offers, in quantities sufficient to meet reasonably anticipated demands, the advertised items:

- A. Readily available for sale to customers; or
- B. Readily available for sale at or below the advertised prices;

respondent has been and now is engaged in unfair acts and practices.

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 certain stores covered by said advertisements, by marking said items or permitting said items to remain marked at prices higher than the advertised prices, respondent has been and now 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 has been and now is in substantial competition in or affecting commerce, with corporations, partnerships, firms and individuals in the retail food and grocery business.

PAR. 10. The use by respondent of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and practices, including the dissemination of the aforesaid advertisements, has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statements and representations were and 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, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT II

Alleging violations of the Federal Trade Commission Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices (16 C.F.R. 424), the allegations of Paragraphs One, Two, Three, Four, and Nine, respectively, of Count I hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 12. 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). Interested parties were thereafter afforded opportunity to participate in the proceeding through the submission of written data, views, and arguments, and to appear and orally express their views as to the proposed rule and to suggest amendments, revisions, and additions thereto.

The Commission considered all relevant matters of fact, law,

policy, and discretion, including the data, views, and arguments presented on the record by interested parties in response to the Notice as indicated in the accompanying Statement of Basis and Purpose (36 F.R. 8777 (May 13, 1971)) and as prescribed by law, determined that the adoption of the trade regulation rule was in the public interest, and, accordingly, promulgated the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices on May 13, 1971, effective July 12, 1971.

PAR. 13. 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 or other merchandise are subject to the jurisdiction of Section 5 of the Federal Trade Commission Act, as amended, and are within the intent and meaning of, and are subject to, the provisions of the aforesaid trade regulation rule.

PAR. 14. In connection with its aforesaid advertisements, respondent, in many instances, has failed to comply with the aforesaid trade regulation rule by offering food and grocery products or other merchandise for sale at a stated price by means of advertisements disseminated in areas served by certain of its stores which were covered by the advertisement but which did not have such products in stock and readily available for sale to customers during the effective period of the advertisement.

PAR. 15. In connection with its advertisements disseminated as aforesaid, respondent, in many instances, has failed to comply with the aforesaid trade regulation rule by failing to make certain of the advertised items conspicuously and 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 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 Food Fair Stores, Inc., a corporation, also trading and doing business as Pantry Pride, hereinafter sometimes referred to as respondent, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Washington, D.C. 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, as amended; 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, having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed 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:

1. Respondent Food Fair Stores, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania. Respondent also operates, trades and does business under the name Pantry Pride.
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

I

It is ordered, That respondent Food Fair Stores, Inc., a corporation, also trading and doing business as Pantry Pride, or under any name or names, its successors or assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of food or grocery products or other merchandise, hereinafter sometimes referred to as items, offered or sold in its retail food stores, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from, directly or indirectly:

- A. 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 food store covered by the advertisement:

1. Each advertised item is readily available for sale to customers in the public area of the store;
2. Each unit of each advertised item, any of whose units are marked with a price, is individually, clearly, and conspicuously marked with a price no higher than 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 A.1, A.2, A.3, if respondent is complying with a specific exception, limitation or restriction with respect to store, item or price which is clearly and conspicuously disclosed in all advertisements for the product in question.

Provided, further, that it shall constitute a defense to a charge of unavailability under subparagraph I.A.1. if respondent has posted a clear and conspicuous notice where the item is regularly displayed which states that the item is in stock and may be obtained upon request, and said item is furnished on request.

Provided, further, it shall constitute a defense to a charge of unavailability under subparagraph I.A.1. if respondent maintains and furnishes or makes available for inspection and copying upon the request of the Federal Trade Commission, such records and affidavits as will show that (a) the advertised items were delivered to or were on hand in its food stores in quantities sufficient to meet reasonably anticipated demand, or (b) the advertised items were ordered but not delivered due to circumstances beyond respondent's control, and that respondent, upon notice or knowledge of such non-delivery, acted immediately to contact the media to correct any future advertisement (including the same ad run at some future date) to delete or to reflect the limited availability of such items, and (c) respondent offered to customers on inquiry a "raincheck" for each unavailable item which entitled the holder to purchase the item in the near future at or below the advertised price.

If respondent or any of its employees, agents or representatives are not advised of an alleged instance of unavailability through any source including the Federal Trade Commission within three months of its occurrence, it shall be presumed that the records called for by this proviso were in the possession of respondent showing (a) or (b), and (c), *unless* clear and convincing evidence establishes the contrary.

Provided, that in the case of advertised items the ultimate prices of whose units are determined by the total dollar amount of the customer's order or the use of a coupon, or other similar conditional

price arrangement, the prices at which the units are sold, and not the prices marked on the units, shall govern.

In determining compliance with Section I of this order, the Commission will consider the circumstances surrounding failure to make advertised items conspicuously and readily available for sale at or below the advertised prices due to circumstances beyond respondent's control. In considering what circumstances shall be considered "beyond respondent's control" the Commission will consider instances of demonstrable human error where such error appears excusable under all of the facts and circumstances and is not indicative of a pattern of non-compliance or attributable to company negligence in following surveillance procedures.

II

It is further ordered, That throughout each advertised sale period in each of its retail food stores covered by an advertisement, respondent shall post conspicuously (1) at or near each doorway affording entrance to the public, and (2) at or near the place where customers pay for merchandise, notices which contain the following:

A. A copy of the advertisement.

B. A statement that: "All items advertised are readily available for sale at or below the advertised price. In the event you are unable to find any advertised item, please ask any employee. If we cannot supply you with any advertised item, a raincheck will gladly be issued entitling you to purchase such item in the near future at the advertised price. Instead of a raincheck, you may ask for a comparable item at the advertised price.

Please ask our store manager if you have any questions. He will be pleased to assist you."

III

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 store managers, who, directly or indirectly, have any supervisory responsibilities as to individual retail food stores of respondent, or who are engaged in a supervisory capacity 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 food 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 insure continuing compliance with the terms and provisions of this order;

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

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.

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

Complaint

90 F.T.C.

IN THE MATTER OF
SHOP-RITE FOODS, INC.

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

Docket C-2913. Complaint, Nov. 11, 1977 — Decision, Nov. 11, 1977

This consent order, among other things, requires a Grand Prairie, Tex. retail food store chain, to make each of its advertised items readily available for sale to customers in its stores, to have advertised items correctly priced, and to sell those items at or below the advertised price. Further, the firm must post copies of advertisements and notices of the availability of "rainchecks" for unavailable items.

Appearances

For the Commission: *Donald Higginbotham* and *Jim B. Brookshire*.

For the respondent: *Glenn A. Mitchell, Stein, Mitchell & Mezines*, Washington, D.C.

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 Shop-Rite Foods, 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 thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

COUNT 1

(Alleging violation of Section 5 of the Federal Trade
Commission Act)

PARAGRAPH 1. Respondent, Shop-Rite Foods, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Mexico with its office and principal place of business located at 2401 West Marshall Drive, Grand Prairie, Texas.

PAR. 2. Respondent, through its wholly-owned subsidiaries is engaged in the operation of a chain of retail food stores, operating over 100 stores in three (3) states. Its volume of business is substantial, totaling approximately \$282 million in retail food sales in 1974. In the operation of its retail food stores, respondent offers for