

text of the order requires substantiation for only two classes of claims: (1) those that deal with ability of a Crown product to reduce motor vehicle exhaust, and (2) claims regarding a "quality, performance ability or other characteristic" of a gasoline or gasoline additive product. Requiring supporting scientific tests for these two categories of claims is reasonably related to the violation found. Respondent's avowed concern that it will have to conduct scientific tests before mentioning even the "price" or "availability" of its gasoline in advertisements is misplaced. References to price and availability of its products are not quality or performance "characteristics" under the order.

*It is ordered*, That the aforesaid petition be, and it hereby is, denied.

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IN THE MATTER OF

THE GREAT ATLANTIC & PACIFIC TEA COMPANY,  
INC.

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

*Docket 8916. Complaint, Feb. 16, 1973 - Final Order, Mar. 25, 1975*

Order requiring one of the nation's two largest supermarket chains, headquartered in Montvale, N.J., among other things to have advertised items readily available for sale at or below advertised prices.

*Appearances*

For the Commission: *Michael C. McCarey, Joel P. Bennett and Rosalind A. Lazarus.*

For the respondent: *Donald J. Mulvihill, Cahill, Gordon & Reindel, Wash., D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by that Act, the Federal Trade Commission, having reason to believe that The Great Atlantic & Pacific Tea Company, 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:

PARAGRAPH 1. Respondent The Great Atlantic & Pacific Tea

Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 420 Lexington Ave., N.Y., N.Y.

PAR. 2. Respondent is now, and for some time last past has been engaged in the operation of a large chain of retail food stores. Respondent presently operates 4,329 retail food stores in 36 States of the United States, the District of Columbia and Canada. Its volume of business has been and is substantial. In the operation of its retail food stores, respondent offers to its customers an extensive line of products, including food, as that term is defined in the Federal Trade Commission Act, groceries and other merchandise. Many of the said products offered for sale and sold are manufactured or processed by respondent through its various divisions, subsidiaries and affiliates at manufacturing and processing plants located in various States. Many of the said products, however, are purchased from numerous independent 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 food and grocery products and other merchandise to be shipped and distributed from the aforesaid manufacturing and processing plants or from its other sources of supply to warehouses and distribution centers and thereafter to its retail food stores located in various States other than the State of origination, distribution or storage of said products. Respondent maintains, and at all times mentioned herein has maintained a substantial course of trade in the production, processing, distribution, advertising, offering for sale and sale of the aforesaid food and grocery products and other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

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 food and grocery products and other merchandise by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, 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 products from respondent; and respondent has been and is now disseminating, and causing the dissemination of, advertisements concerning said products 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 products in commerce, as "commerce" is defined in the Federal Trade Commission Act. Many of the said advertisements list or depict the aforesaid food and grocery products and other merchandise, and also contain statements and representations concerning the price or terms at which said products 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 geographical areas in which the offers would be made.

PAR. 5. Through the use of such advertisements disseminated and are 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 its retail food stores in the aforesaid various areas of the United States in which said advertisements were and are being disseminated, in those stores covered by the said advertisements, during the effective periods of the advertised offers, the items listed or depicted in the said advertisements would be or are:

1. Readily available for sale, and
2. Conspicuously 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 located in the aforesaid various areas throughout the United States in which the aforesaid advertisements were and are being disseminated, in stores covered by the said advertisements, during the effective periods of the advertised offers, a substantial number of the items listed or depicted in the said advertisements were or are:

1. Not readily available for sale, or
2. Not conspicuously 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 the said advertisements was and is misleading in material respects and constituted, and now constitutes a "false advertisement", as that term is defined in the Federal Trade Commission Act.

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

1. Readily available for sale to customers; or

2. Conspicuously available for sale at or below the advertised prices;

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

PAR. 8. 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 commerce, with corporations, partnerships, firms and individuals in the retail food and grocery business.

PAR. 9. The use by respondent of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and practices including the dissemination of the aforesaid "false 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. 10. 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 commerce and unfair or deceptive acts or practices in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

INITIAL DECISION BY DANIEL H. HANSCOM, ADMINISTRATIVE  
LAW JUDGE

JANUARY 24, 1975

I

#### Allegations of Complaint

In a complaint served on Mar. 1, 1973, the Commission charged The Great Atlantic & Pacific Tea Company, Inc. (A&P), with disseminating advertisements in various metropolitan areas in which its retail food stores were located offering food and grocery products, and other merchandise, at particular prices when, in a number of stores covered by such advertisements, a substantial number of advertised items were not available at or below the advertised prices. According to the complaint respondent A&P had engaged in false, misleading and deceptive advertising, and had utilized unfair acts and practices in violation of Sections 5 and 12 of the Federal Trade Commission Act.

More particularly, Paragraph Five of the complaint alleged that

A&P's advertisements for food, grocery and other products constituted representations that its retail food stores, in the areas covered by the advertisements, during the effective periods of such advertisements, would have the particular items listed or depicted in the advertisements:

1. readily available for sale, and
2. conspicuously available for sale at or below the advertised prices.

The complaint alleged under Paragraph Six that a substantial number of the items listed or depicted in the advertisements were "not readily available for sale," or were "not conspicuously available for sale at or below the advertised prices," in a number of the retail food stores located in the areas in which the advertisements were disseminated during the effective periods of the "advertised offers." The complaint charged that the advertisements were therefore "false, misleading and deceptive," were "misleading in material respects," and constituted false advertisements. The complaint further alleged that the challenged advertisements had the tendency and capacity to mislead members of the purchasing public, to induce them to go to respondent A&P's retail food stores, to purchase substantial quantities of the advertised items at prices in excess of those advertised, and to purchase substantial quantities of items other than those advertised, all to the prejudice and injury of the public and of A&P's competitors.

On Apr. 11, 1973, A&P filed an answer denying that any of its advertisements were unfair, misleading or deceptive. The answer denied that its advertisements for food and grocery products, and other merchandise, made the representations as to availability set forth in paragraph five of the complaint, and denied that any of its advertisements were misleading or deceptive in any material respect or constituted false advertisements.

The answer of A&P affirmatively declared that the complaint and proposed order were discriminatory as to A&P, and violative of its constitutional rights of due process. A&P asserted that the Commission had previously promulgated a Trade Regulation Rule for the Retail Food Industry "in less onerous terms than the standard announced" in the complaint and notice order issued against it. A&P asserted that the Commission, being frustrated in its efforts "to establish a standard for the entire food industry due to the successful challenge to its rulemaking authority," had sought to establish such a standard by selecting A&P, as one of the industry's largest and most visible members, for an adjudicatory proceeding. A&P asserted that the complaint and notice order were discriminatory because they sought to establish a far stricter standard for A&P than the standard previously established for the retail food industry in the Trade Regulation Rule,

and that whereas the Commission previously sought to "regulate" the retail food industry, it now sought to "annihilate" A&P by such far stricter standard. The answer asserted that under the notice order, contrary to previously articulated policy, the Commission would refuse to consider as relevant for A&P (1) failure of delivery due to circumstances beyond the A&P's control, (2) failure to have advertised items "conspicuously and readily available" for sale "at or below the advertised prices" due to circumstances beyond A&P's control, and (3) the availability of "rain checks."

The answer of A&P contended that the complaint and notice order were premised on the theory that a food retailer's advertising was a virtual guarantee that all advertised items would be, for the entire duration of the advertisement, "in stock and readily available" for sale, with the advertised price "conspicuous" thereon, and that the complaint failed to allow for underestimation of demand or even for failure of delivery because of circumstances beyond the advertiser's control. According to the answer, the complaint did not take into account A&P's "rain check" policy, that every item out of 7,500 to 12,500 could not be individually marked and, further, that prices on some sale items were adjusted at the check-out counter. The answer contended that if the theory in the complaint and notice order were sustained, the result would be to impede the flow of truthful and important information because A&P, and others, would be forced to resort to meaningless, noninformative advertising.

Finally, A&P asserted that the proceeding was based on the assumption that A&P's advertisements represented that the advertised food items would be "readily" and "conspicuously" available for sale at the advertised prices, that complaint counsel had the burden of proving that the advertisements in fact made such express or implied representations, but that the complaint made it clear that the Commission had already "prejudged this issue against A&P." In conclusion, A&P asserted that the relief sought in the proposed order was arbitrary and capricious, and that the relief would violate A&P's constitutional right to communicate to the public "truthful and factual" information.

#### History of Proceeding

Pretrial proceedings including discovery were commenced as soon as the answer of respondent A&P was filed. The first pretrial conference was held on May 8, 1973, and a number of such conferences were held thereafter. Inasmuch as the heart of complaint counsel's evidentiary proof consisted of surveys of supermarket and retail food stores of A&P and other leading chains for the availability and pricing of

advertised products, conducted in a number of metropolitan areas, the validity of the methodology and the correctness of execution of these surveys became a major focus of pretrial preparations. In July 1973 complaint counsel filed a detailed offer of proof of two surveys, together with tables, charts, statement of methodology, legal authority and underlying data, requesting a preliminary ruling that the surveys were admissible in evidence.

The first survey of complaint counsel was designed and conducted under the supervision of a member of the faculty of the School of Law of the University of North Carolina, and was done in the Raleigh, Durham and Chapel Hill areas in the spring of 1972 by law students and members of the North Carolina Consumer Council. The second survey had been conducted in 1971 by Commission personnel from its Regional Offices under the general supervision of the Commission's Bureau of Economics. Supermarkets and retail food stores were surveyed in cities in four geographic areas, the Northeast, Southeast, Midwest and Far West. Regional office employees monitored supermarket and retail food stores of A&P and its leading competitors in 12 medium sized and small cities in their assigned areas.

After complaint counsel submitted their offer of proof respondent A&P engaged consulting economists, the National Economic Research Associates, Inc., and an expert in social research from the faculty of American University, Wash., D.C., to analyze the surveys, the methodology and execution thereof, and all underlying material. On Nov. 16, 1973, a comprehensive analysis of the North Carolina survey and the survey conducted by the Commission's regional offices, and all underlying material, was filed by A&P, together with a legal memorandum vigorously opposing any preliminary ruling that the surveys were admissible in evidence. A number of serious problems with the surveys, both in design and execution, were identified.

While complaint counsel's offer of proof containing the North Carolina and 1971 Commission surveys were under analysis by A&P and its experts, it developed that a new Commission survey had been conducted in April and May of 1973, and that the results of this survey were being prepared for presentation in this proceeding.

On Dec. 20, 1973, the undersigned denied the motion of complaint counsel for a preliminary or tentative ruling that the North Carolina and the Commission surveys were admissible in evidence. The undersigned concluded that "enough questions had been raised" by A&P's experts, "which could or might be serious" as to render full evidentiary hearings on the reliability and admissibility of the surveys necessary before any ruling, even preliminary, could be made. At the

same time counsel for both sides were requested to submit the earliest practicable date for commencement of hearings on the merits.

On Jan. 15, 1974, A&P moved the Commission for reexamination of the Trade Regulation Rule governing "Retail Food Store Advertising and Marketing Practices" issued July 12, 1971, and filed with the undersigned a motion for a stay of proceedings pending Commission action on such motion, requesting certification thereof to the Commission. The undersigned certified the motion for a stay, and on Jan. 31, 1974, the Commission denied it.

On Feb. 6, 1974, the National Association of Food Chains filed a motion with the Commission to intervene in this proceeding, and on Feb. 7, 1974, respondent A&P moved the Commission to reconsider its denial of the motion for a stay pending Commission action on the motion for reexamination of the trade regulation rule.

In the meantime, the undersigned set hearings on the merits to commence May 21, 1974, this being the earliest date complaint counsel considered practical for commencing the case-in-chief.

On Mar. 11, 1974, the Commission denied the motion of the National Association Of Food Chains to intervene noting that such motion should initially have been made to the Administrative Law Judge. On Mar. 11, 1974, the Commission also denied the request of A&P for reconsideration of its motion for a stay pending Commission ruling on A&P's request for reexamination of the Trade Regulation Rule. On Apr. 16, 1974, the National Association Of Food Chains filed a motion with the undersigned to intervene in the proceeding. This motion was denied on May 1, 1974.

On Apr. 29, 1974, A&P moved for dismissal of the complaint insofar as it alleged violation of Section 12 of the Federal Trade Commission Act. The motion was grounded on the contention that the complaint, as amplified by responses of complaint counsel to A&P's requests for admissions, did not, as a matter of law, allege conduct violative of Section 12. The undersigned deferred ruling on this motion until the filing of the initial decision, and it will be disposed of herein.

Pursuant to motion of complaint counsel on May 15, 1974, official notice was taken of the Trade Regulation Rule on "Retail Food Store Advertising and Marketing Practices" and, for a limited purpose, of certain documents in the record thereof.

On Apr. 17, 1974, both A&P and the National Association Of Food Chains filed suit in the United States District Court for the Southern District of New York to enjoin the Commission from (1) further proceeding in this matter, (2) enforcing the Trade Regulation Rule governing Retail Food Store Advertising and Marketing Practices, (3) further prosecuting the allegation of the complaint that Section 12 of



the Federal Trade Commission Act had been violated, and (4) for an order affirmatively directing the Commission to clarify or amend the trade regulation rule. This suit for injunctive relief was dismissed by the United States District Court on May 16, 1974.

The case-in-chief was commenced on May 30, 1974, rather than May 21, 1974, because of the receipt in evidence by stipulation of the new and most recent Commission survey conducted in the late Spring of 1973, resulting in the withdrawal by complaint counsel of the offer in evidence of the North Carolina and the 1971 Commission surveys. As a result of the stipulation, the need to conduct evidentiary hearings on the admissibility of the 1973 Commission survey was obviated. The case-in-chief was concluded in all essential details on June 21, 1974.

The case-in-defense began July 15 and was completed on July 31, 1974, except for an expert witness who was heard on Aug. 28, 1974. Rebuttal and surrebuttal were completed on Sept. 4 and 5. A number of additional exhibits offered by A&P were received pursuant to motion on Oct. 2, 1974. The record was then closed for reception of evidence and a briefing schedule was issued.

Twenty-nine (29) witnesses testified, thirteen (13) were called by complaint counsel and sixteen (16) by A&P. Each side presented expert testimony. The record consists of three volumes of motions, pleadings, etc., approximately 2,952 pages of transcript, and nine volumes of exhibits, some of which are tables and charts, assembling data elsewhere in the record.

#### Basis of Decision

This matter is now before the undersigned for initial decision based on the allegations of the complaint, answer, evidence, and the proposed findings of fact, conclusions and briefs filed by A&P and complaint counsel. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein are rejected. The undersigned, having considered the entire record, and all the contentions of both sides, makes the following findings and conclusions and issues the order set out at the end hereof:

#### II

#### FINDINGS OF FACT

##### *Respondent*

1. The Great Atlantic & Pacific Tea Company, Inc., well known to everyone, is one of the two largest supermarket chains in the United States. A&P operates around 3,600 to 3,700 self-service retail food and grocery stores in 36 states, the District of Columbia and Canada (CX

270). The precise number of A&P stores in operation at any particular time varies due to the closing of old stores and the opening of new ones as business conditions change. Gross annual sales in the fiscal year ending Feb. 24, 1974, were nearly \$6,747,000,000 (CX 272). A&P operates retail food stores in small and medium sized communities as well as in the nation's most populous metropolitan centers. Food stores range in size from ultra-modern supermarkets handling virtually every conceivable kind of food and grocery product, and surrounded by spacious parking facilities, to relatively small stores in downtown urban centers, such as New York City, with crowded aisles, packed shelves and display cases (RX 1085a-d, RX 1105a-f, and RX 1108a-e). During a typical week \$110,000,000 worth of merchandise is sold (CX 270f and i) to between 16 and 20 million customers (Cairns, Tr. 1289) involving about 250,000,000 units of packaged goods, as well as enormous quantities of fresh meat, fish, produce, dairy products, etc. (RX 1031). Combined full-time and part-time employees approximate 100,000, the two categories being about equal in number (Stiffler, Tr. 2488). In addition to retail food stores, A&P operates bakeries, coffee-roasting facilities, dairy processing plants, meat packing plants, and many other types of food processing installations in many different states and localities in which it manufactures or packages food, grocery and other merchandise under its own brand names, example "Ann Page" (RX 1031). A&P retail food stores sell the packaged goods of independent suppliers located in various parts of the country, marketed under nationally or locally known brand names of such suppliers, as well as goods supplied to A&P for resale under A&P's brand names. A&P maintains national buying organizations in various parts of the country for basic items such as meat, fish, and produce (MacDonald, Tr. 880-82, 891-92). At the time of the complaint, A&P's national headquarters was in New York City, but has since been moved to Montvale, N.J. (Cairns, Tr. 1142; Stiffler, Tr. 2475). At all times relevant to this proceeding, A&P has maintained a substantial course of trade in food and grocery products, and other merchandise, in commerce as "commerce" is defined in the Federal Trade Commission Act, and has been in substantial competition in commerce with other firms and individuals engaged in the retail food and grocery business.

2. A&P's retail food stores are organized into 31 or 32 divisions, including a division for Canadian stores. A division is responsible for supervising the operation of A&P stores in a particular geographic area, usually centered on a major city. For example, the Cleveland Division, based in that city supervises A&P stores in northeastern Ohio (Weschler, Tr. 372). The Detroit Division supervises A&P stores in that city and elsewhere in the State of Michigan (MacDonald, Tr. 767-68).

Other divisions are located in Chicago, Indianapolis, Kansas City, Milwaukee, St. Louis, Toledo, Baltimore, Philadelphia, Scranton, New Orleans, Jacksonville, Boston, and many comparable cities. A&P's divisions are grouped into five regions, each headed by a regional president (Cairns, Tr. 1349). At the top of this organization is A&P's national headquarters.

3. Each division is headed by an executive entitled "vice president and general manager" (MacDonald, Tr. 767; Van Lentin, Tr. 2108). Each divisional vice president is assisted by subordinate executives responsible for sales, purchasing, store operation, warehousing, and other functions (MacDonald, Tr. 879-886; Van Lentin, Tr. 2110-15). The individual divisions of A&P are substantial operations. For example, the Bronx Division oversees 162 stores in New York City's five boroughs and suburban counties north of the city, has a work force of about 5,900 employees, and does about \$350,000,000 worth of business annually (Van Lentin, Tr. 2108-2110).

4. Divisions in general prepare and place advertising for stores within their jurisdiction, maintain warehouses, arrange for the purchase of food and grocery products, and other merchandise, and supervise the distribution thereof to divisional stores (Browning, Tr. 1003, 1056-57). An exception is the New York City area where the headquarters of A&P's Eastern Region provides centralized purchasing, and handles the formulation and dissemination of advertising for the four metropolitan area divisions, Bronx, Long Island, Newark and Paterson, which in the aggregate operate about 588 stores (Burtis, Tr. 1834-38).

#### *The Retail Food Industry*

5. Official notice was taken for general and background purposes of information relating to the retail food industry set out in the Statistical Abstract of the United States for 1973, and in the Commission's statement of basis and purpose for the trade regulation rule effective July 12, 1971, on Retail Food Store Advertising and Marketing Practices.<sup>1</sup> Retail sales by food stores in 1972 were \$95 billion of which \$49.8 billion were made by multi-unit food chains, that is, those operating 11 or more stores. Food represents about 17.6 percent of total U.S. personal consumption expenditures, and sale of groceries and other foods represents about 20.3 percent of all retail trade. Expenditures for advertising by retail food stores amounted in 1970 to \$674 million.

#### *A[P's Advertising*

<sup>1</sup> No "adjudicative facts" material to this proceeding were the subject of official notice (see ruling on complaint counsel's motion to take official notice dated July 10, 1974, and ruling on respondent's conditional motion to take official notice dated Aug. 7, 1974).

6. In common with its major competitors, and the supermarket industry generally, A&P advertises extensively in various media, but predominately in mass-circulation metropolitan dailies, for the purpose of promoting its business and to induce the public to patronize its stores and to purchase the items advertised. Typically, advertisements are published in metropolitan areas at the beginning of the week, usually Monday, in both morning and evening papers, picturing or listing items and prices featured in the A&P stores in the market area through the first half of the week (Cairns, Tr. 1326; Burtis, Tr. 1846; Browning, Tr. 993; Hare, Tr. 694; Wyatt, Tr. 940; Loeb sack, Tr. 166; Eliassen, Tr. 524). Advertisements are again published in the middle of the week, usually on Wednesday in the area's evening daily (example, CX 17) or in the major morning daily on Thursday, or in both, setting out the items and prices featured through the end of the week until store closings, generally on Saturday evening (Loeb sack, Tr. 249; Eliassen, Tr. 524; Wyatt, *supra*). The mid-week placement is the week's main advertisement (MacDonald, Tr. 773; Browning, Tr. 993). The beginning of the week advertisements usually contain some items which are also contained in the mid-week advertisements (Weschler, Tr. 373; also Loeb sack, *supra*).

7. Full page advertisements are commonly utilized, and multi-page advertisements are not infrequent, especially for the mid-week placement (CX 22a-c). A wide variety of different items, often as many as 120 to 130 per advertisement (CX 1-2, 4-5, 17-39), are typically offered drawn from the main categories of products, meat, fish and poultry, canned goods and groceries, fruits and vegetables, and miscellaneous household and other products. Certain items—"features"—are given particular prominence, with many others being simply "line items." "Line items" are national or regional brands which are included, usually in a line in the lower half of the newspaper advertisement, generally in return for an advertising allowance or discount (MacDonald, Tr. 787, 892-94; Weschler, Tr. 392-93; Browning, Tr. 1002). The record contains a substantial number of A&P's advertisements, as well as those of other supermarket chains (CX 1-2, 4-5, 17-39; RX 1112).

8. A key aspect of the newspaper advertising just described is the fact that the price of each advertised item is presented with prominence. The advertisements are price-oriented, and represent price competition in a real sense. Food and other products are frequently offered in these advertisements at substantial reductions, often on the presentation of a coupon included in the advertisement, and also at the "regular" price normally charged (Browning, Tr. 1020; Cairns, Tr. 1162-63, 1178; see also Dr. Goodman, Tr. 2589-2590).

Products offered at reduced prices make up a significant proportion of the total number of items advertised (Cairns, Tr. 1178), and efforts are made to feature prices on items on which A&P has a competitive advantage (Cairns, Tr. 1168). A&P's advertising appears to present shoppers with an opportunity to achieve major savings on many products. During 1973 A&P spent approximately \$94,500,000 on advertising (CX 272a; Tr. 1143-44).

9. A&P's newspaper advertisements are prepared at the divisional level by the divisional sales department headed by a sales director. The divisional sales department decides the items to be put in advertisements to be published in a particular area, and the prices to be featured (Cairns, Tr. 1147; MacDonald, Tr. 781; Browning, Tr. 999-1001). National headquarters of A&P supplies model advertising layouts and general guidelines as to what should and should not appear in advertisements, and monitors the advertisements run by the divisions and their competitors (Cairns, Tr. 1161-65). The divisions, however, decide on the precise items and the prices. The divisional sales director is assisted by a staff of varying size, depending on the number of stores in the division. Such staff includes specialists in the purchase and sale of the different product categories handled, groceries, produce, meat, fish, dairy and bakery items, and other merchandise, such as health and beauty aids (Weschler, Tr. 382-83; MacDonald, Tr. 779-780; Gilbert, Tr. 2290-91; Niezgoda, Tr. 1942). Divisional sales directors are provided with assistant sales directors and advertising managers who supervise the layouts and coordinate with specialists and purchasing executives (Weschler and MacDonald, *supra*; Browning, Tr. 1000-01).

10. After deciding the items to feature in a particular advertisement, and the prices to list, the divisional sales department notifies the individual A&P stores in the division of the products to be advertised and the prices to be featured (Loebsack, Tr. 171; MacDonald, Tr. 825; Browning, Tr. 1031-32). In the New York City area, the Eastern Region performs this function for the New York area divisions. After receiving notice from the division sales departments advising of the items and prices to be advertised, individual A&P stores in the area are responsible for ordering whatever supplies of such items the store manager thinks necessary to make all advertised items available in his stores (Loebsack, Tr. 174-75; Weschler, Tr. 427-28; Cairns, Tr. 1280-82). *Representations In A[P's Advertising*

11. A&P's newspaper advertising represented to the purchasing public that each item advertised could be purchased at the price advertised in any of A&P's retail food stores in the geographic area covered by the advertisement during the effective period announced, usually through the end of the week in which the advertisement was

