ninety (90) days thereafter until respondent has fully complied with the divestitures ordered herein, submit to the Federal Trade Commission a written report setting forth in detail the manner and form in which respondent intends to comply, or is complying or has complied with this Order, together with such other information relating to compliance as may be requested by the Federal Trade Commission.

IN THE MATTER OF

HARRY CAMP MILLINERY CO. ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION, THE FUR PRODUCTS LABELING AND THE WOOL PRODUCTS LABELING ACTS

Docket C-1025. Complaint, Dec. 21, 1965—Decision, Dec. 21, 1965

Consent order requiring a California retailer of wool and fur hats, operating approximately 200 leased departments in department stores in 23 States, to cease misbranding its hats and falsely invoicing and advertising its fur products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Fur Products Labeling Act and the Wool Products Labeling Act of 1939 and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Harry Camp Millinery Company, a corporation, and Harry F. Camp, Jr., Meyer M. Camp and David L. Wilson, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act and the Wool Products Labeling Act of 1939, 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. Harry Camp Millinery Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Their office and principal place of business is located at 140 Geary Street, San Francisco, California.

Individual respondents Harry F. Camp, Jr., Meyer M. Camp, and David L. Wilson are officers of said corporation and formulate,

direct and control the acts, practices and policies of said corporation including those hereinafter set forth. Their address is the same as that of said corporation.

Respondents are retailers of wool and fur hats and operate approximately 200 leased departments in department stores in about 23 States.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the sale, advertising and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed:

1. To show the true animal name of the fur used in the fur product.

2. To show that the fur contained in the fur product was bleached, dyed or otherwise artificially colored, when such was the fact.

PAR. 4. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

1. The term "Dyed Broadtail-processed Lamb" was not set forth on labels in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

2. The term "natural" was not used on labels to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

3. Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth in the required sequence, in violation of Rule 30 of said Rules and Regulations.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act, and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed:

1. To show the true animal name of the fur used in the fur product.

2. To show the country of origin of imported furs used in the fur products.

3. To disclose that the fur contained in the fur product was bleached, dyed or otherwise artificially colored, when such was the fact.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth on invoices in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) The term "natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(c) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 7. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforementioned advertisements, but not limited thereto, were advertisements of respondents which appeared in issues of the Los Angeles Times, a newspaper published in the city of Los Angeles, State of California.

Among such false and deceptive advertisements, but not limited thereto were advertisements which failed to show that the fur contained in the fur product was bleached, dyed or otherwise artificially colored, when such was the fact.

PAR. 8. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in violation of the Fur Products Labeling Act in that the said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder in that the term "natural" was not used to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of the said Rules and Regulations.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

PAR. 10. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce as "commerce" is defined in said Act, wool products as "wool product" is defined therein.

PAR. 11. Certain of said wool products were misbranded in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were certain hats without labels on or affixed thereto disclosing the percentage of the total fiber weight of the wool product, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) woolen fibers; (2) each fiber other than wool if said percentage by weight of such fiber is 5 per centum or more; and (3) the aggregate of all other fibers.

PAR. 12. The acts and practices of the respondents as set forth above were, and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, the Wool Products

Labeling Act of 1939 and the Fur Products Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Harry Camp Millinery Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 140 Geary Street, San Francisco, California.

Respondents Harry F. Camp, Jr., Meyer M. Camp and David L. Wilson are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Harry Camp Millinery Company, a corporation, and its officers, and Harry F. Camp, Jr., Meyer M. Camp and David L. Wilson, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from introducing into commerce, selling, advertising or offering for sale in commerce, or transporting or distributing any fur product, in commerce; or from selling, advertising, offering for sale, transporting or distributing, any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act:

A. Unless there is securely affixed to each such product a label showing in words and in figures plainly legible all of the

information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

B. To which fur product is affixed a label required by Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder:

(1) Which fails to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term in lieu of the term "Dyed Lamb."

(2) Which fails to set forth the term "Natural" as part of the information required to be disclosed on labels under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

(3) Which fails to set forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder on labels in the sequence required by Rule 30 of the aforesaid Rules and Regulations.

It is further ordered, That respondents Harry Camp Millinery Company, a corporation, and its officers, and Harry F. Camp, Jr., Meyer M. Camp and David L. Wilson, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation, or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

3. Failing to set forth the term "Natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

4. Failing to set forth on invoices the item number or mark assigned to fur products.

B. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote or assist directly or indirectly, in the sale, or offering for sale of any fur product, and which:

1. Fails to set forth in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(a) of the Fur Products Labeling Act.

2. Fails to set forth the term "Natural" as part of the information required to be disclosed in advertisements under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

It is further ordered, That respondents Harry Camp Millinery Company, a corporation, and its officers, and Harry F. Camp, Jr., Meyer M. Camp and David L. Wilson, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from introducing into commerce, or offering for sale, selling, transporting, distributing or delivering for shipment in commerce, wool hats or other wool products as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939 unless each such wool hat or other wool product has securely affixed thereto or placed thereon a stamp, tag, label or other means of identification correctly showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

E. J. KORVETTE, INC.

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

Docket C-1026. Complaint, Dec. 29, 1965—Decision, Dec. 29, 1965

Consent order requiring a New York City chain department store to cease making deceptive pricing and savings claims for its merchandise.

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 E. J. Korvette, 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 E. J. Korvette, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 46th Street and the Avenue of the Americas, in the city of New York, State of New York.

PAR. 2. Respondent E. J. Korvette, Inc., owns, operates and controls, directly or through wholly owned and controlled subsidiary corporations, a chain of approximately thirty (30) department stores and other retail stores, located in approximately eight (8) States of the United States. Respondent E. J. Korvette, Inc., has been and is now engaged in the advertising, offering for sale, sale and distribution of furniture, carpeting and other articles of merchandise to the general public located in said States. Said department stores and all of the departments contained therein are advertised and represented to the general public as E. J. Korvette stores and departments.

Prior to August 16, 1965, H. L. Klion Inc., a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 397 East 54th Street, East Patterson, New Jersey, under a license agreement with the respondent E. J. Korvette, Inc., operated, directly or through wholly owned and subsidiary corporations, the furniture departments in said respondent's

department stores. On August 16, 1965, Korvette Home Furnishings Centers Inc., a wholly owned subsidiary of the respondent E. J. Korvette, Inc., by agreement acquired substantially all the assets and interests of H. L. Klion Inc., and its affiliated companies.

Prior to August 16, 1965, Federal Carpet Co. Inc., a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 245 Glen Cove Road, Carl Place, Long Island, New York, under a license agreement with the respondent E. J. Korvette Inc., operated, directly or through wholly owned subsidiary corporations, the carpet departments in the said respondent's department stores. On August 16, 1965, Korvette Home Furnishings Centers Inc., a wholly owned subsidiary of the respondent E. J. Korvette Inc., by agreement acquired all the stock of Federal Carpet Co. Inc., and its affiliated companies.

Since August 16, 1965, the respondent E. J. Korvette Inc., through its wholly owned subsidiary Korvette Home Furnishings Centers Inc., has operated the furniture and carpet departments formerly operated by said H. L. Klion Inc., and said Federal Carpet Co. Inc., respectively in the said respondent's department stores.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent formulates, directs and controls the acts and practices of said department stores, including but not limited to the purchasing, pricing, advertising, personnel, accounting and financial activities of said department stores. In the course and conduct of its business, respondent causes advertising mats, checks, sales memoranda, policy directives, and other documents and communications to be transmitted, by the United States mails and by other interstate mechanisms, to and from respondent's said principal office and place of business to said department stores located in said other States of the United States.

In the further course and conduct of its business, respondent sells and distributes said merchandise in commerce by causing said merchandise to be shipped to and from its warehouses, located in the several States of the United States, and from the places of business of its various suppliers, located in the several States of the United States, to said department stores for purchase at retail by the general public, located in States other than the States from which such shipments originate.

All of the aforesaid acts and practices have been engaged in, in the course and conduct of respondent's business and all such acts and practices have a close and substantial relationship to the interstate flow of respondent's business. There is now, and has been, at

all times mentioned herein, a substantial and continuous course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, and for the purpose of inducing the sale of said merchandise it has been, and is now, respondent's policy to use in-store comparative pricing. Said in-store comparative pricing policy consists of the use of a tag or small sign which is affixed to or accompanies said merchandise at the point of sale to prospective purchasers at retail whereon a lower offering or selling price appears accompanied by a higher or comparative price representation such as, for example, "Comparable Value," "Was," "Regular," "Value" and "Mfg. List." Said lower and higher comparative price representations are established at said main offices of the respondent and are now, and have been, distributed by said main offices to said department stores through the use of written communications which are kept in a cumulative book by said department stores, designated a "MinMax" book, or by other forms of communication. Said comparative price representations are transferred from said "MinMax" books, or other communications, to said tags or signs by said department stores.

Among and typical of the statements and representations contained in respondent's newspaper advertisements announcing said comparative pricing policy, but not all inclusive thereof, are the following:

[photograph of a price tag containing the representation
"E. J. Korvette
MODEL NO.
57 pc. CHINA
DINNERWARE
SELLING PRICE
$28.88
COMPARABLE VALUE
$51.98"]

This is E. J. KORVETTE'S PRICE POLICY

This IS OUR PLEDGE * * * to bring great, glorious Chicago the ultimate in Quality * * * the best in Brand-Name Leadership * * *

The most in depth Quantities * * * the widest Diversifications in every department * * * and this above all:
Prices Below all!

* * * * * * *

This IS OUR PLAN * * * OUR PREMISE AND OUR PROMISE * * * to bring Suburban Chicago what Korvette-history has proven the people want most: The best of everything * * * Top Quality! Top Brand Names in depth

assortment! All this generally at less than you ever thought imaginable. THIS IS KORVETTE'S PRICE POLICY * * *.

PAR. 5. Among and typical of the statements and representations contained on said tags or signs used in the furniture, carpet, sporting goods, small appliance, and other departments of said department stores of the chain, but not all inclusive thereof, are the following:

(a) In the furniture department:

1. SPECIAL SALE
   WAS
   529.95
   NOW * * *
   329.97

ITEM NUMBER	No.
9 Pc. D/Rm	350

DESCRIPTION
651-09—China 4-651-92 S/chair
651-17—Buffet 2-651-91 A/chair
651-52—Table
FLOOR SAMPLE—FINAL SALE * * *

Other furniture identified below was tagged or labeled with the comparative price representation quoted below:

2. 2 Piece China (Co. H. Willet)
   59-72 Base
   59-726 Deck
   WAS $349.95
   NOW $224.97

3. 9 Piece Dining Room Set No. 345
   Consisting of:
   8005-50 Table
   8010-62 China
   8010-10 Buff
   4-8005 S/C (Side Chairs)
   2-8005 A/C (Arm Chair)
   WAS $659.95
   NOW $399.97

4. Loose Pillow Back Chair
   Item No. 2011
   Reduced price $99.97
   Regular price $129.99

5. Sectional sofa
   Item 6453
   Reduced price $499.97
   Regular price $544.99

6. Loose Pillow Back Chair
   Was $149.95
   Now $89.97
   Item No. KL-52
7. Chair
   Was $119.95
   Now $64.97
   Item No. 529
8. Four-piece group price
   Was $679.95
   Now $479.97
   Item Nos. 1820 Chest
   1822 Triple dresser and mirror
   1820 Night table
   1821 Panel Bed

(b) In the carpet department, the carpeting identified below was tagged or labeled with the comparative price representations quoted below:

9. Brand—Mohawk
   Pattern—Princeton 16 Sandbark
   (All wool wilton)
   Selling Price $12.99 sq. yd.
   $16.99 VALUE
10. Brand—Mohawk
   Pattern—PL 14
   (All Acrylic face)
   Selling Price $11.44 sq. yd.
   VALUE $15.99 sq. yd.
11. Brand—Roxbury
   Pattern—14210
   Applique
   Acrilian
   Selling Price $12.99 sq. yd.
   $16.99 VALUE
12. Brand—Bigelow
   Pattern—Stratford House
   11524-07778
   100% Wool Face
   Mothproofed
   Selling Price $13.99 sq. yd.
   (Less Mad Money $1 sq. yd.)
   $17.99 VALUE.

(c) In other departments of respondent's stores the merchandise identified below was tagged or labeled with the comparative price representations quoted below:

13. Wilson K-28 Irons (8)
    Model D-3682
    Korvette LOW PRICE $119.00
    MFG LIST $154.00
14. Sunbeam Hair Dryer
    Model HD 10
    SELLING PRICE $19.89
    LIST PRICE $29.95
15. General Electric Four Slice Toaster
    Model T116
    Selling Price $19.89
    Less Mad Money $2.00
    List Price $29.95
16. Smith Corona Portable Typewriter
    Model Galaxie
    MFG LIST $122.10
    KORVETTE LOW PRICE $91.66.

PAR. 6. Through the use of the aforesaid statements and representations and others similar thereto, but not specifically set forth, as used variously by respondent in effectuating said comparative pricing policy:

(a) Respondent E. J. Korvette, Inc., and its licensee, H. L. Klion, Inc., have represented, directly or indirectly, that said higher price amounts accompanied by the words "WAS" or "REGULAR" are the prices at which such articles of merchandise were sold or offered for sale in good faith for a reasonably substantial period of time in the recent regular course of its business;

(b) Respondent E. J. Korvette, Inc., and its licensee, Federal Carpet Co., Inc., have represented, directly or indirectly, that said higher price amounts accompanied by the word "VALUE" are not appreciably in excess of the highest price at which substantial sales of such merchandise have been made in the recent regular course of business in the trade area where such representations appeared;

(c) Respondent E. J. Korvette, Inc., has represented, directly or indirectly, that said higher price amounts accompanied by the phrase "MFG LIST" or "LIST PRICE" are not appreciably in excess of the highest price at which such merchandise has been regularly offered for sale in the recent regular course of business by a subtantial number of the principal retail outlets in the trade area where such representations appeared;

(d) Respondent represents, directly or indirectly, that purchasers of said merchandise save an amount equal to the difference between said higher prices and the corresponding lower prices.

PAR. 7. In truth and in fact:

(a) The higher price amounts accompanied by the words "WAS" or "REGULAR" are not the prices at which such articles of merchandise were sold or offered for sale in good faith for a reasonably substantial period of time in the recent regular course of its business;

(b) The higher price amounts accompanied by the word "VALUE" are appreciably in excess of the highest price at which substantial sales of such merchandise have been made in the recent regular course of business in the trade area where such representations appeared;

(c) The higher price amounts accompanied by the phrase "MFG LIST" or "LIST PRICE" are appreciably in excess of the highest price at which such merchandise has been regularly offered for sale in the recent regular course of business by a substantial number of the principal retail outlets in the trade area where such representations appeared;

(d) Purchasers of said merchandise do not save an amount equal to the difference between said higher prices and the corresponding lower prices.

Said statements and representations were, therefore, false, misleading and deceptive.

PAR. 8. In the course and conduct of its business, and at all times mentioned herein, respondent has been in substantial competition in commerce, with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as sold by respondent.

PAR. 9. The use by the respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true and into the purchase of substantial quantities of respondent's said merchandise by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of the respondent 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 and deceptive acts and practices in commerce, in violation of Section 5(a)(1) of the Federal Trade Commission Act.

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 Deceptive Practices 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 the respondent that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondent has violated the Federal Trade Commission Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings and enters the following order:

1. Respondent E. J. Korvette, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 46th Street and the Avenue of the Americas, in the city of New York, State of New York.

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 E. J. Korvette, Inc., a corporation, and its officers, agents, representatives and employees directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of furniture, carpeting, sporting goods, small appliances, typewriters or any other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "WAS" or "REGULAR" or words of similar import to refer to any amount which is in excess of the price at which such merchandise has been sold or offered for sale

in good faith by such respondent for a reasonably substantial period of time in the recent regular course of its business; or otherwise misrepresenting the price at which such merchandise has been sold or offered for sale by respondent.

2. Using the word "VALUE" or any word or words of similar import to refer to any amount which is appreciably in excess of the highest price at which substantial sales of such merchandise have been made in the recent regular course of business in the trade area where such representations are made; or otherwise misrepresenting the price at which such merchandise has been sold in the trade area where such representations are made.

3. Using the words "MFG LIST" or "LIST PRICE" or any word or words of similar import, unless the merchandise so described is regularly offered for sale at this or a higher price by a substantial number of the principal retail outlets in the trade area: *Provided, however,* That this order shall not apply to point-of-sale offering and display of merchandise which is preticketed by the manufacturer or distributor thereof and the obliteration or removal of which preticketed price is impossible or impractical.

4. Falsely representing, in any manner, that savings are available to purchasers or prospective purchasers of respondent's merchandise, or misrepresenting, in any manner, the amount of savings available to purchasers or prospective purchasers or respondent's merchandise at retail.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it 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 MATTER OF

JESSE W. LAWSON DOING BUSINESS AS NATIONAL ENTERPRISES

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

Docket C-1027. Complaint, Dec. 30, 1965—Decision, Dec. 30, 1965

Consent order requiring an individual in Marietta, Ga., doing business under the name of National Enterprises, to cease making false health claims

for stainless steel cooking utensils and falsely disparaging such products made from other materials.

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 Jesse W. Lawson, individually and trading and doing business as National Enterprises, 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 Jesse W. Lawson is an individual trading and doing business under the name of National Enterprises. His business is presently operated from his home which is located at 416 Aviation Road, Marietta, Georgia.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the sale and distribution of stainless steel cookware which he purchases from the manufacturer or from a distributor of the manufacturer and then sells to the public. In the course and conduct of his business respondent has caused, and now causes, said products when sold to be transported from the State of Georgia to purchasers thereof located in various other States of the United States. He maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of his business, as aforesaid, respondent is now, and has been, in substantial competition with other individuals and with firms and corporations engaged in the sale and distribution of stainless steel cookware in commerce.

PAR. 4. In the course and conduct of his said business, and for the purpose of inducing the purchase of stainless steel cooking utensils, respondent through the oral statements of his sales agents and representatives, and through pamphlets, brochures and other advertising literature has represented, and is representing, directly or by implication that:

1. The use of respondent's stainless steel cooking utensils is more conducive to good health than is the use of cooking utensils manufactured from materials other than stainless steel regardless of the method of cooking used.

2. The use of cooking utensils manufactured from materials other than stainless steel is injurious to health or otherwise constitutes a hazard to health.

3. The use of respondent's stainless steel cooking utensils will prevent disease or illness.

PAR. 5. In truth and in fact:

1. The use of no cooking utensil is more conducive to good health than is the use of other commercially available utensils when an efficient method of cooking is used.

2. The use of cooking utensils manufactured from materials other than stainless steel is not injurious to health nor does it otherwise constitute a health hazard.

3. The use of respondent's stainless steel cooking utensils will not prevent disease or illness, nor will the use of any other cooking utensils.

Therefore, the statements and representations referred to in Paragraph Four hereof were and are false, misleading and deceptive.

PAR. 6. The use by respondent and his sales agents and representatives of the above-mentioned false, misleading and deceptive statements and representations has had, and now has, the tendency and capacity to mislead members of the purchasing public into the erroneous and mistaken belief that all of said statements and representations were and are true and into the purchase of substantial quantities of respondent's stainless steel cooking utensils by reason of said erroneous and mistaken belief.

PAR. 7. The aforesaid acts and practices of respondent, as herein alleged, were and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair and deceptive acts and practices in commerce and unfair methods of competition, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the

complaint to issue herein, 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 set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Jesse W. Lawson is an individual trading and doing business under the name of National Enterprises. His business is presently operated from his home which is located at 416 Aviation Road, Marietta, Georgia.

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 Jesse W. Lawson, individually and trading and doing business as National Enterprises, or trading under any other name, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of cooking utensils made of stainless steel or of any other composition, design, construction or purpose, do forthwith cease and desist from:

1. Representing directly or by implication that:

(a) The use of such cooking utensils is more conducive to good health than is the use of cooking utensils manufactured from other materials.

(b) The use of cooking utensils manufactured from materials other than the materials in respondent's cooking utensils is injurious to health or otherwise constitutes a hazard to health.

(c) The use of respondent's cooking utensils will prevent disease or illness.

2. Misrepresenting the construction, efficacy or any other feature of respondent's products.

3. Supplying to or placing in the hands of any distributor, dealer, or salesman brochures, sales manuals, charts, pamphlets, or other advertising material which are displayed, or may be displayed, to the purchasing public which contain any

of the false or misleading representations prohibited in Paragraphs 1 and 2 hereof.

4. Furnishing or supplying to distributors, dealers or salesmen such products for resale to the public when such distributors, dealers or salesmen refuse to, or do not, comply with all of the prohibitions set forth in Paragraphs 1, 2 and 3 of this order.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

FRUEHAUF TRAILER COMPANY

Docket 6608. Order, July 15, 1965

Order denying respondent's request for modification of order which required divestiture of assets of acquired company and other plant equipment sufficient to restore the firm as an effective competitor.

ORDER DENYING PETITIONS FOR RECONSIDERATION

On June 16, 1965, complaint counsel filed a motion for clarification of the Commission's decision of May 28, 1965 [67 F.T.C. 878], in the above-captioned proceeding. On July 2, 1965, respondent filed an answer to complaint counsel's motion, and included in its answer a motion that the Commission's final order of May 28, 1965, be modified. The Commission has decided to treat both motions as petitions for reconsideration within Section 3.25 of the Commission's Procedures and Rules of Practice (effective August 1, 1963).

Paragraph 5 of the part captioned "Conclusions" in the Commission's decision states: "Divestiture of the acquired assets is necessary and appropriate to remedy the anti-competitive effects of the unlawful acquisitions." Complaint counsel request that this conclusion be clarified in view of the fact that the Commission's final order requires divestiture not only of the assets acquired from Hobbs but also so much of the plants, machinery, and other property that respondent has added to or placed on the premises formerly owned by Hobbs as may be necessary to restore Hobbs as a going concern and effective competitor in all of the lines of commerce in which it was engaged at the time of the acquisition; and also requires divestiture of respondent's Strick Trailers Division, rather than merely the particular assets acquired from Strick. Respondent argues that the order is improper in requiring divestiture of its Strick Trailers Division, and requests that it be modified to include only the assets actually acquired by respondent from Strick together with such additional assets as may be necessary to restore Strick "to the same relative competitive standing" it had at the time of the acquisition.

1. We see no need to change the language that appears in conclusion 5 of the Commission's decision. That conclusion was intended not to define the scope of the order, but simply to express the Commission's determination that divestiture was the appropriate remedy for the illegal acquisitions. "Acquired assets" in that conclusion should be understood as a shorthand term embracing all assets which must, under the Commission's order, be divested.

2. In formulating a remedy for an illegal acquisition, the Commission strives to restore, so far as is practicable and equitable, the state of competition in the relevant market as it would have been but for the acquisition. *Ekco Products Co.*, F.T.C. Docket 8122 (decided June 30, 1964), p. 16 [65 F.T.C. 1163, 1204], *aff'd*, 7th Cir., No. 14773, June 21, 1965 [7 S.&D. 1278]. This requires, in the present case, an order that will recreate an independent Strick and an independent Hobbs as viable and effective competitors in the truck-trailer industry with approximately the competitive strength and standing they would have enjoyed had they remained independent and not been illegally acquired by respondent. A divestiture order limited to the precise assets acquired by respondent nine and ten years ago, when the illegal acquisitions took place, would, as respondent itself concedes, fall short of this objective. Respondent acquired, in Hobbs and Strick, going concerns; if the Commission's order is to be effective, respondent must divest sufficient assets, including assets added after the acquisition, to reconstitute them as going concerns. Even respondent concedes that an order embracing not only the acquired assets, but additional assets necessary to restore Hobbs and Strick to their preacquisition state, is necessary and proper, assuming the Commission's finding that the acquisitions were unlawful is correct.

Complaint counsel argued in their appeal brief (pp. 49-52) that, to restore Strick as a going concern and effective competitor in the lines of commerce in which it was engaged at the time of the acquisition, respondent's Strick Trailers Division should be ordered divested. Complaint counsel pointed out that the Strick Division, which had been created as a unit of respondent specifically to carry on the Strick business, represented the likeliest approximation of what the independent, preacquisition Strick would look like today had the illegal acquisition not supervened, though of course respondent had sold or abandoned some of the acquired assets, and added other assets, in the nine years since the acquisition. Logic and practicality dictated that respondent be required to divest the existing unit, Strick Division, rather than scattered assets.

It is ordered, That the petitions for reconsideration of the Commission's decision and order of May 28, 1965, be, and they hereby are, denied.

THE PROCTOR & GAMBLE COMPANY ET AL.

Docket 7542. Order, July 16, 1965

Order directing hearings and upon conclusion hearing examiner shall certify the record together with a report of his findings, conclusions and recommendations.

ORDER DIRECTING HEARINGS

Pursuant to § 3.28(b) of the Rules of Practice, respondents were served, on May 3, 1965, with an order giving them opportunity to show cause why the Commission should not reopen this proceeding for the purpose of making particularly described modifications in the consent order to cease and desist issued June 30, 1960 [56 F.T.C. 1623]. On July 1, 1965, respondents filed answer, denying the factual allegations made in the show cause order with respect to their advertising, and denying that the public interest requires reopening of the proceeding for the purpose of modifying the consent order in any respect.

It appears, therefore, that the pleadings raise substantial factual issues requiring hearings for the receipt of evidence in support of and in opposition to the allegations of the show cause order. Accordingly,

It is ordered, That this matter be assigned to a hearing examiner for hearings to be conducted in accordance with Subparts C, D, E and F of the Rules of Practice. Upon conclusion of the hearings, the hearing examiner shall certify the record, together with a report of his findings, conclusions and recommendations with respect thereto, to the Commission for final disposition. The hearing examiner's report shall be served upon the parties in the same manner as an initial decision and the parties are granted rights of appeal therefrom in accordance with the provisions of § 3.22 of the Rules of Practice.

AMERICAN BRAKE SHOE COMPANY

Docket 8622. Order and Opinion. Sept. 1, 1965

Order denying respondent's appeal from hearing examiner's denial of its requests for depositions and supporting subpoenas directed to several nonparties.

OPINION OF THE COMMISSION

This matter is before the Commission upon the appeal of respondent from the hearing examiner's order, *inter alia*, denying its applications for depositions and supporting subpoenas ad testificandum in advance of hearing. The appeal has been taken pursuant to

§ 3.17(f) of the Commission's Rules of Practice, which provides that the Commission will entertain an appeal from a subpoena ruling only upon a showing that the ruling involves substantial rights and will materially affect the final decision and that a determination of its correctness before the conclusion of the hearing will better serve the interests of justice.

Respondent, on July 6, 1965, filed four applications for orders authorizing the taking of nonparty oral depositions and depositions upon written interrogatories. The applications for oral depositions cover forty-eight different manufacturers located in the States of New York, Connecticut, New Jersey, Pennsylvania, Ohio, Illinois, Wisconsin, Texas and California. The proposed schedule for the taking of these depositions runs from September 8, 1965 to October 28, 1965. The subject matter covers a wide range of information and it is likely that more time than is specified in the proposed schedule would be needed. The proposed depositions upon written interrogatories would go to 148 additional nonparties and these would be returnable on or before October 21, 1965.

The hearing examiner held a hearing on July 16, 1965, on the matter of authorizing the depositions, giving the parties at that time an opportunity to present their views orally. After hearing argument, he stated on the record that he would enter an order denying the applications. It is clear that he made one exception.[1] His written order denying the applications was issued July 20, 1965. The examiner's disposition is based, in part at least, upon the respondent's failure to make a showing as to the following: that the depositions would constitute or contain relevant evidence, that the number of depositions requested was not excessive, that the evidence called for would not be otherwise available or could not be obtained by respondent under compulsory process returnable at the hearing, that the depositions in such number and over the indicated time period would cause no undue burden or expense on another party and no undue delay in the proceeding.

The Commission, in *Topps Chewing Gum, Inc.*, Docket No. 8463, order issued July 2, 1963 [63 F.T.C. 2196] (a decision made on the basis of previously existing rules), stated that the conduct of adjudicative proceedings is primarily the responsibility of the hearing examiners and that an examiner's rulings on evidentiary or procedural matters arising in the course of such proceedings will not be reviewed

[1] Respondent insists that the examiner had denied the request for the deposition of Mr. S. K. Wellman, which request apparently was solely to preserve his testimony because of ill health and advanced age. It seems clear that the examiner has not denied this specific request and that his order herein reviewed covers only the applications for depositions aside from that for Mr. Wellman. The examiner plainly indicated that he would allow the deposition of Mr. Wellman, at page 266 of the transcript.

or disturbed in the absence of unusual circumstances. The Commission pointed out that it was therefore the examiner's duty to exercise firm direction over adjudicative proceedings to ensure that the Commission's policy of orderly, expeditious and continuous proceedings is not thwarted by either deliberate or inadvertent actions of the parties; that the need for positive control of proceedings involving the trial of complicated issues of fact cannot be too strongly emphasized. Continuing in its opinion in *Topps*, the Commission stated in part:

> The exercise of this responsibility [*i.e.*, control over the proceeding] is particularly important in directing and limiting the scope of the deposition procedure afforded by the Commission's Rules. Properly used, depositions afford a valuable method for the preparation of the respondent's defense, thereby making possible the continuous hearings contemplated by the Commission's Rules. Cf. *L. G. Balfour Company*, Dkt. 8435, Order Directing Disclosure of Documents, May 10, 1963 [62 F.T.C. 1541]. At the same time, care must be taken that depositions are not substituted for the continuous hearings required by these Rules and that they are not used as a means to delay the disposition of the proceeding. * * *

These principles continue to be controlling.

The Commission's rule on depositions (§ 3.10(a)) in pertinent part reads as follows:

> At any time during the course of a proceeding, whether or not issue has been joined, the hearing examiner, in his discretion, may order that the testimony of a witness be taken by deposition and that the witness produce documentary evidence in connection with his testimony. Such order may be entered upon a showing that the deposition will constitute or contain evidence relevant to the subject matter involved and that the taking of the deposition will not result in any undue burden to any other party or in any undue delay of the proceeding. * * *

This rule gives the examiner broad discretion on matters of discovery. He may order depositions upon a showing of certain minimum requirements, that is, that the depositions will constitute or contain relevant evidence and that the taking of the depositions will not result in any undue burden to another party or any undue delay in the proceeding. The examiner, however, is not bound to order the taking of depositions when these conditions are met; he may require more. He may, for instance, require a showing as to the usefulness and need of the requested depositions or other justification. He likewise has broad discretion as to the manner and form of the depositions and the protections which may be needed for a party or a deponent (§ 3.10(d) of the Rules of Practice).

The examiner, in this case, was confronted with an extensive request for depositions (including interrogatories) covering 196 persons. It is clear that he believed, after hearing the arguments, that respondent had not made the minimum justification required

by the Commission's rule, namely, relevancy and the avoidance of undue burden to any party or undue delay in a proceeding. The fact that almost 200 persons were to be deposed over a period of some two months time, and probably more, with the great likelihood of many motions to quash or modify and the necessity of rulings thereon, could well have suggested to the examiner that the proposed discovery procedure would necessarily result in an undue delay of the trial of this proceeding.

The examiner, furthermore, looked beyond the claim of mere relevance. He in effect required respondent to show some real necessity for the taking of this large number of depositions, with the inevitable delays and burdens connected therewith. We neither agree nor disagree with his decision to require a greater showing. We hold simply that in this proceeding and in these circumstances he did not abuse his discretion in the requirements he established and in his denial of the applications. We emphasize that in the matter of discovery the hearing examiner is given, by the Commission's Rules of Practice, a broad discretion, and the Commission, except by a clear showing of an abuse of that discretion, will sustain the examiner in his rulings in such matters.

Respondent has not shown that the ruling herein involves substantial rights and will materially affect the final decision and that a determination of its correctness before the conclusion of the hearing will better serve the interests of justice. Accordingly, it is directed that the appeal from the examiner's ruling denying respondent's applications for depositions and subpoenas be denied. An appropriate order will be entered.

Order Denying Appeal From Denial of Applications for Depositions and Subpoenas

Respondent having filed an appeal from the hearing examiner's order filed July 20, 1965, *inter alia,* denying its applications for depositions and supporting subpoenas ad testificandum, which appeal was filed pursuant to § 3.17(f) of the Commission's Rules of Practice; and

The Commission having considered the said appeal answer thereto filed by complaint counsel August 16, 1965, the reply filed by counsel for respondent August 24, 1965, and having determined, in accordance with the views expressed in the accompanying opinion that respondent's appeal should be denied:

It is ordered, That respondent's appeal from the hearing examiner's order filed July 20, 1965, denying its applications for depositions and supporting subpoenas ad testificandum, be, and it hereby is, denied.

MISSISSIPPI RIVER FUEL CORPORATION

Docket 8657. Order and Opinion, Sept. 2, 1965

Order and opinion denying in part respondent's request for the production of confidential Commission documents covering relationships between portland cement producers and ready-mix concerns, and remanding case to hearing examiners.

ORDER AND OPINION DENYING IN PART MOTION FOR PRODUCTION OF DOCUMENTS AND REMANDING TO EXAMINER

This matter is before the Commission upon the hearing examiner's certification of respondent's motion for the production of confidential Commission documents listed by respondent as follows: (1) all documents as described in the first paragraph of the motion covering relationships between portland cement producers and ready-mix concerns, including such information as credit arrangements, increases in accounts receivable, reserves for losses on credit extensions, evidence of indebtedness and many other details; and (2) Special Reports received by the Commission in response to its December 1, 1964 resolution directing an investigation of corporations engaged in the production and distribution of portland cement.

The examiner correctly certified the motion for production of these confidential documents, along with his recommendations, under the procedure outlined in *L. G. Balfour Company*, Docket No. 8435, order issued May 10, 1963 [62 F.T.C. 1541]. His recommendation is to deny the motion. As to the first paragraph (he considered the two paragraphs separately), he determined that the request amounted to a fishing expedition with the hope that something helpful might turn up. He also stated there was no showing that the discovery sought is necessary to enable respondent to meet the evidence which may be presented and no showing that a denial would constitute unfairness. His recommendation to deny the production sought in the second paragraph of the motion is based upon the reasons in his certification of a similar request, and the Commission's ruling thereon, in *Texas Industries, Inc.*, Docket No. 8656, order issued May 18, 1965 [67 F.T.C. 1378].

While the second paragraph of the motion deals exclusively with Special Reports obtained by orders issued under Section 6(b) of the Federal Trade Commission Act, it is apparent that the information listed in the first paragraph of the motion, if it exists at all, would also likely be contained, in whole or in part, in Special Reports or, if not in Special Reports, it would have been obtained under such circumstances as to make the same considerations of confidentiality apply. The Commission, in its opinion in *Texas Industries, Inc.*,

supra, expresssed its view on the production of such information, stating that it is highly confidential and will not be disclosed unless the needs of basic fairness so dictate. There the needs of fairness did not so dictate, because no part of the Reports had been, or would be, turned over to complaint counsel to be introduced in evidence in the proceeding, and, so, it was not a case of denying respondent access to evidence available to complaint counsel.

This matter is governed by the same principles. Here the examiner found that respondent has had, or before the hearings will begin will have had, full discovery of all the evidence in the possession of complaint counsel. Although it is possible, as the examiner assumed, that some of the documents may be relevant or helpful to respondent in the preparation of its defense, this is insufficient to override the public interest against disclosure. The Commission's ability to conduct a sound and comprehensive industrywide inquiry into the cement industry would likely be impaired by releasing Special Reports and like confidential records for use in an adjudicative proceeding such as this. See the full discussion of this subject in the opinion in *Texas Industries, Inc., supra.* Therefore, we are in accord with the examiner's recommendations generally and we will deny respondent's motion except for certain particular documents which will be separately treated below. The latter are documents relating to financial dealings between U.S. Steel and Certified Industries and a loan agreement involving a ready-mix concern referred to by complaint counsel in their answer to respondent's motion.

As to these specific documents, the examiner apparently would deny production on the same grounds as he would in general deny the information and documents requested in the first paragraph of the motion. But that seems to overlook the fact that these are documents specifically defined by complaint counsel and the further circumstance that some of them may possibly soon be produced in another proceeding. There is even doubt as to whether or not complaint counsel intends to use them in this proceeding, although the examiner assumes they will not be so used. Also, the examiner has not made a positive determination on the relevance of, or respondent's need for, these documents. He merely states that he cannot say that they would not be relevant or helpful. An inspection of the documents by the examiner may aid him in making this determination. In the circumstances, we will remand the matter to the examiner, with the following instructions:

(a) Determine whether part or all of such documents were obtained by Special Reports pursuant to orders issued under Section 6(b) of the Federal Trade Commission Act.

(b) Determine whether part or all of such documents are to be

introduced into the record in this proceeding by complaint counsel.

(c) Examine such documents and make a positive determination whether they contain information relevant to the issues raised by the complaint and whether they are needed by the respondent for its defense.

(d) Determine whether these documents contain information which is privileged or which should not be disclosed because it would be contrary to the public interest to do so.

(e) If necessary, certify any question of the production of these documents to the Commission, with an appropriate recommendation. Accordingly,

It is ordered, That the examiner inspect the documents covering the financial dealings between U.S. Steel and Certified Industries and the loan agreement involving a ready-mix concern referred to by complaint counsel in their answer to respondent's motion and make the determinations outlined herein and take such further action as may be required in light of the views expressed in this opinion.

It is further ordered, That respondent's motion, other than as to the exceptions covering the documents specified by complaint counsel in their answer to respondent's motion, be, and it hereby is, denied.

ASSOCIATED MERCHANDISING CORPORATION ET AL.

Docket 8651. Order and Opinion, Sept. 23, 1965

Order denying respondents' request to appeal from hearing examiner's order for the production of respondents' business records on the grounds that the action was investigatory and not adjudicatory.

Order and Opinion Denying Respondents' Request for Permission to File Interlocutory Appeal

This matter is before the Commission upon respondents' request for permission to file an interlocutory appeal pursuant to § 3.20 of the Commission's Rules of Practice, from the hearing examiner's order of August 12, 1965, granting complaint counsel's motion for the production of documents.[1] Complaint counsel have filed a statement opposing the request and respondents have filed a reply thereto.

The production sought by complaint counsel and granted by the examiner first would require respondents Associated Merchandising

[1] Section 3.20 provides in pertinent part that:

"* * * Permission [to file interlocutory appeal] will not be granted except in extraordinary circumstances where an immediate decision by the Commission is clearly necessary to prevent detriment to the public interest."

Corporation (AMC) and Aimcee Wholesale Corporation (AWC) to produce or, in the alternative, to grant access to certain records described in fourteen specifications and, secondly, would require the individual shareholder store respondents to produce or grant access to certain documents described in four additional specifications. As to some items, the request would permit, as an alternative, a tabulation of the information sought.[2]

The examiner first received the substance of the request for production of records here under consideration in complaint counsel's submission to him in response to his prehearing Order No. 1. Subsequently, at a prehearing conference on July 16, 1965, the matter was discussed in detail; the parties at that time had full opportunity to present their views. Respondents' primary contention there, as it is here, was that the production of records requested was investigatory in nature and not permitted under the Commission's rules for adjudicatory proceedings. As a result of the prehearing conference on the matter, the examiner ordered that complaint counsel submit a motion, in writing, setting forth again the documents sought, along with a statement for each item justifying the production under § 3.11 of the Commission's Rules of Practice. Complaint counsel thereafter submitted their request and respondents filed an answer in opposition. The examiner, on August 12, 1965, granted complaint counsel's motion. The request for permission to appeal herein is taken from that order.

The examiner found that good cause has been shown for the request for production. It is apparent from the examiner's formal order and from the statements which he made in the prehearing conference that he construes the request not as investigatory, as charged by respondents, but primarily as a justifiable demand for production of documents which supply additional details or an extension of information as to disclosed transactions or events for

[2] The information requested from AMC and AWC includes records disclosing: the gross volume of sales by AMC (1963-1964) to Fedway Stores; records disclosing for some 200 resources or suppliers information relating to such things as total value in dollars of the transactions with AWC for the years 1960, 1961 and 1963, 1964, and other information relative to designated transactions; records disclosing names of officers and directors of AMC and AWC and their positions with AMC shareholders; invoices of sales and other sales memoranda, correspondence and other documents relating to prices, terms of sales, etc., and certain other described records, all concerning transactions with ten listed resources or suppliers; names of salesmen; certain designated publications; records on the purchase or sale of shares in AMC by two designated shareholders; reports issued by AMC and AWC on operating results of stores; and records disclosing information as to stores paying service fees to AMC.

On the individual shareholder stores the information requested includes: records as will disclose, among other things, the net sales for the years 1961 through 1964 of each department store and branches; correspondence and other communications between AMC shareholder stores, AWC, AMC and the some 200 suppliers listed; records relating to participation by employees in any AMC or AWC buyers meetings or other meetings with certain buyers connected with ten suppliers listed in the request and for a designated period; and certain records relating to the purchase of shares in AMC and AWC by respondent Woodward & Lothrop, Inc.

which evidence is to be produced in support of the complaint. In other words, he treated the request as manifestly within the bounds of proper pretrial discovery.

Since the examiner is responsible for the conduct of adjudicative proceedings and his rulings on procedural matters in the absence of unusual circumstances will not be reviewed or disturbed by the Commission (*Topps Chewing Gum, Inc.*, Docket No. 8463, order issued July 2, 1963 [63 F.T.C. 2196]), and there being no showing here of any need to review the examiner's decision, as required by § 3.20 of the Commission's Rules, this matter could well rest here. However, in light of the vigorous argument by respondents that the examiner is permitting a "dragnet" investigation allegedly contrary to the Commission's Rules of Practice, we believe that comment is in order.

The argument that § 3.16(d), which provides for the expedition of hearings and bars trial by interval unless necessity is shown, precludes production in this instance is misplaced. That section in no way prevents, and is in no way inconsistent with, a request for production of records in the possession of a respondent by complaint counsel, pursuant to § 3.11.[3] As a matter of fact, compliance with § 3.16(d) might very well require an appropriate request for production under § 3.11 so as to permit complaint counsel to be adequately prepared for trial and possibly to obviate delays after the trial has begun. There is no provision in the Commission's Rules, nor has any precedent been referred to, which would in effect require complaint counsel to have all evidence that he will need prior to the issuance of the complaint.

The complexity of issues in large antitrust cases is such that counsel supporting the complaint may find upon the issuance of the complaint, and especially upon the refinement of the issues in a prehearing conference, that some additional documentation should be obtained. Moreover, in these big cases, to expect that in the preliminary investigation all of the details will be procured for each and every transaction which may ultimately become an evidentiary item in a subsequent complaint would create an intolerable burden on the investigator as well as upon the party investigated. It is apparent that with the delineation of the issues, particularly in the prehearing conference, further documents may be required to round

[3] Section 3.11 reads as follows:

"Production of documents.—Upon motion of any party showing good cause therefor and upon such notice as the hearing examiner may provide, the hearing examiner may order any party to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody, or control of such party. The order shall specify the time, place, and manner of making the inspection and taking the copy and may prescribe such terms and conditions as the circumstances require."

out, extend, or supply further details for the particular transactions to be pursued. If this were not so, while some delay might be prevented in the initial stages of an adjudicative proceeding, considerable delay might be developed in connection with the investigation of a case prior to trial. Accordingly, a demand for records may be made by complaint counsel under § 3.11 and the mere fact that the information requested may be contained in undifferentiated files and cover a number of years does not bar the production.

That is not to say that § 3.11 is to be used for broad investigational purposes even though the Commission has the authority to investigate after complaint issues.[4]

Moreover, there must be a showing of good cause for the production. Good cause is essentially a factual question and a determination as to whether adequate reasons for the desired production are given will depend on the circumstances in each case. The Commission has observed in other connections that it is "neither necessary nor desirable to frame a firm rule of general application defining with particularity the elements of a showing of good cause." *L. G. Balfour Company*, Docket No. 8435, order issued May 10, 1963 [62 F.T.C. 1541]; *Topps Chewing Gum, Inc.*, Docket No. 8463, order issued July 2, 1963 [63 F.T.C. 2196]. Generally, under § 3.11, as to the production of documents sought prior to the hearings, good cause means that the moving party must show that the documents will aid him in the preparation of his case. In this instance, involving a request at the prehearing stage, the detailed showing which complaint counsel has made for each item specified, showing its relevance and the purpose for which it is sought, appears clearly to meet the indicated requirements of § 3.11. The matter, however, is one in which the hearing examiner may exercise his discretion and here there is no showing that he has abused his discretion. Permission to appeal will not be granted because there has been no showing of extraordinary circumstances where an immediate decision by the Commission is clearly necessary to prevent detriment to the public interest.

Respondents claim that the compilation of the information and the gathering of the documents requested will take longer than the thirty days which the examiner has allowed (see note 2 on page 7 of their petition). But it appears that the examiner has given serious

[4] The Commission's authority to investigate subsequent to the issuance of a complaint is well established. *Federal Trade Commission* v. *Menzies*, 242 F. 2d 81 (4th Cir. 1957); *Federal Trade Commission* v. *Waltham Watch Co.*, 169 F. Supp. 614 (S.D.N.Y. 1959); *cf. Flotill Products, Inc.* v. *Federal Trade Commission*, 278 F. 2d 850 (9th Cir. 1960). See also *Kaiser Industries Corporation*, Docket No. 8341, order issued March 2, 1962, where the Commission held that it has the authority to issue subpoenas in the course of an investigation to obtain information which relates to the subject matter of an adjudicative proceeding.

consideration to the time element, indicated by the questions asked in the prehearing conference, and has determined that the production can be accomplished within a reasonable period. We are confident that the examiner will not allow the proceeding to become bogged down in a delay over the production of documents. Accordingly,

It is ordered, That respondents' request for permission to file an interlocutory appeal from the hearing examiner's order of August 12, 1965, be, and it hereby is, denied.

RODALE PRESS, INC., ET AL.

Docket 8619. Order, Sept. 27, 1965

Order granting American Civil Liberties Union leave to file its brief *amicus curiae* and to present oral argument.

ORDER GRANTING LEAVE TO FILE BRIEF AMICUS CURIAE AND TO PRESENT ORAL ARGUMENT

Upon consideration of the motion of the American Civil Liberties Union, filed September 21, 1965, for leave to file the *amicus curiae* brief submitted with their motion, and to present oral argument in the above captioned proceeding.

It is ordered, That the American Civil Liberties Union be, and it hereby is, granted leave to file its brief *amicus curiae* submitted on September 21, 1965, and said brief hereby is received and filed.

It is further ordered, That the request of the American Civil Liberties Union to present oral argument not to exceed ten (10) minutes in length at the hearing in this matter to be held on September 28, 1965, be, and it hereby is, granted.

It is further ordered, That counsel supporting the complaint be granted an additional ten (10) minutes to present oral argument at the hearing in this matter to be held on September 28, 1965.

It is further ordered, That the parties to this proceeding are hereby granted thirty (30) days from the date of this order in which to file additional briefs in reply to the *amicus curiae* brief which has been filed.

R. H. MACY & CO., INC.

Docket 8650. Order and Opinions, Sept. 30, 1965

Order instructing hearing examiner not to subpoena the Secretary and three employees of the FTC and two employees of the Bureau of Customs in connection with the importation and sale by respondent's competitors of mohair sweaters from Italy.

OPINION OF THE COMMISSION

This matter is before the Commission on the hearing examiner's certification of two requests of respondent for subpoenas: (1) a request for subpoenas ad testificandum filed July 22, 1965 and (2) a request for a subpoena duces tecum filed August 12, 1965. The Commission also has before it a motion, filed July 27, 1965, to strike the hearing examiner's certification of the request for subpoenas ad testificandum. Commission counsel, on August 2, 1965, filed an answer in opposition to respondent's request for subpoenas ad testificandum and to respondent's motion to strike the certification. Respondent filed a reply thereto August 23, 1965.

Respondent's first request was for subpoenas ad testificandum directed to three employees of the Federal Trade Commission and two employees of the United States Customs Service (Bureau of Customs, Treasury Department). The second request was for a subpoena duces tecum, which would require the Secretary of the Commission to appear and produce the following documents:

1. All memoranda or other documents transmitted to the Commission by the staff of its Bureau of Textiles and Furs relating to any investigation of any company importing mohair-blend sweaters from Italy for sale in the United States where said staff recommended closing of the file after developing evidence indicating that the company under investigation had mislabeled said mohair-blend sweaters.

2. All investigative records, including attachments, submitted by Albert Posnick, Charles T. Rose and/or Robert Scott relating to mohair-blend sweaters imported from Italy in connection with their investigation *In the Matter of R. H. Macy & Co., Inc.*, Docket No. 8650 [72 F.T.C. 894].

The only justification stated in the request for the subpoenas ad testificandum is the very general statement that it is "necessary in order to establish respondent's defenses to the charges in the complaint." The same justification is mentioned in the request for subpoena duces tecum, with the additional particularization that "the subpoenaed documents are probative of the allegations in paragraphs 8, 9 and 10 of respondent's Answer filed May 17, 1965." These paragraphs relate primarily to respondent's contention that the Commission has discriminated against it and in favor of its competitors in the enforcement of the Wool Products Labeling Act.

The hearing examiner, in certifying the application for subpoenas ad testificandum, concluded that some of the information sought, such as the Commission's administration of the law with respect to competitors and the advice and recommendations by the Commission staff to the Commission in connection with the labeling of

mohair sweaters imported from Italy (the product involved in this proceeding) is irrelevant or privileged. The hearing examiner, however, recommended that the Commission staff members should be subpoenaed for the limited purpose of testifying as to respondent's alleged efforts to voluntarily correct the charged violations and other general matters.

In certifying the application for subpoena duces tecum, the examiner concluded that the documents concerning the Commission's administration of the law with respect to competitors of respondent should not be received in this proceeding and he recommended that the requested subpoena not be authorized.

The first question to be considered will be the application for subpoenas addressed to Commission employees. The hearing examiner pointed out in his certification of the request for subpoenas ad testificandum that it was made clear during the prehearing conference respondent's counsel desired not only the testimony of Commission employees but also documents from the Commission files. Since respondent has now requested the production of documents from the Commission files, it is clear that respondent is seeking both testimony and documents; moreover, a more definite statement has been made as to the purpose for such production.

The authority of the hearing examiner to issue the subpoenas requested is not here in question. However, in situations such as are involved here, the examiner is not authorized to require a witness, after he takes the stand, to testify to, or to disclose, information designated by § 1.133 of the Commission's Rules of Practice as confidential, nor is he authorized to order the production of confidential documents in the Commission files. The procedure to be followed by a party desiring the release of confidential information is to make application to the Commission pursuant to § 1.134 of the Rules. *Postal Life and Casualty Insurance Company*, Docket No. 6276, order issued January 10, 1956 [52 F.T.C. 651]. The Commission may, upon good cause shown, direct that the confidential information requested be disclosed to the applicant. Where the request is made during the course of a proceeding before the hearing examiner, as here, the Commission will treat it as an application under § 1.134. The procedure to be followed in such a case has been clearly set out in prior Commission matters, *e.g., L. G. Balfour Company*, Docket No. 8435, orders issued October 5, 1962 [61 F.T.C. 1491] and May 10, 1963 [62 F.T.C. 1541]. This in general requires that the examiner, who is in possession of a firsthand and detailed knowledge of the facts, make the initial determination on whether or not good cause has been shown and to thereafter certify the question to the Commission with his recommendation.

The procedure so outlined has been followed in this case; however, respondent, asserting that the examiner must issue a subpoena ad testificandum upon request, has attempted no specific justification in its application for subpoenas ad testificandum. Its position, essentially, is that the Commission, and the examiner on authority delegated from the Commission, have no discretion concerning the granting of a subpoena ad testificandum. This we reject, because it is clear that administrative agencies may exercise discretion as to the granting of subpoenas to the extent of requiring a statement or showing of general relevance and the reasonable scope of the evidence sought. Section 6(c), Administrative Procedure Act. Courts, both prior to and after the enactment of the Administrative Procedure Act, have held that the Commission has a quasi-judicial discretion concerning the granting of applications for subpoenas. *E. B. Muller & Co.* v. *Federal Trade Commission*, 142 F. 2d 511 (6th Cir. 1944); *Independent Directory Corp.* v. *Federal Trade Commission*, 188 F. 2d 468 (2d Cir. 1951).

Respondent, on its motion to strike, requests the Commission to direct the issuance of the subpoenas ad testificandum and presumably to defer resolution of the issue as to the propriety of the questions to be asked of the witnesses until the time of the return date of these subpoenas. It would be a vain act for the Commission to resolve this issue piecemeal. Since these subpoenas are admittedly requested to search for the same information which is sought by respondent's subpoena for documents, we will treat the two requests together at this time. For the purpose of this motion, therefore, we reject respondent's argument that in this situation the Commission cannot refuse to authorize issuance of the subpoenas ad testificandum.

Respondent's claim to broad access to information respecting the internal operations of the Commission is grounded on its asserted need to prove its defense contained in paragraphs 8-10 of its Answer that "The Commission has openly discriminated against respondent and in favor of its competitors in the enforcement of the Wool Products Labeling Act, and has arbitrarily, unfairly and inequitably administered the statute." The claimed factual basis for this charge is that the Commission rejected respondent's offer "to comply with any procedure proscribed by the Commission for accurately labeling Italian mohair-blend sweaters which would also be applicable to its major competitors," and that the Commission made certain administrative compliance procedures available to respondent's competitors which were not made available to respondent for the same violations.

Respondent also claims, somewhat inconsistently with its asserted offer to comply with any Commission-imposed labeling procedures

applied to its competitors, that the standards of labeling which the Commission permitted respondent's competitors to follow is expressly contrary to the statute and are, in respondent's opinion, "substantially inferior to [labeling] procedures adopted by respondent." It is this alleged "failure" by the Commission to proceed in an identical fashion against all companies assertedly violating the wool labeling statute with respect to mohair sweaters which respondent claims in its answer "is contrary to the public interest, unfair harassment of respondent and a denial of due process." In its reply brief, respondent additionally charges, as we understand its statement, that the Commission has exercised a "bias" and has "intentionally" discriminated against it.

Thus, the only showing which respondent has made to support its discovery request is that respondent has been treated differently from its competitors. But this, without more, does not amount to the "bias" and the "intentionally" discriminatory action which respondent claims as a basis for its request. All that the respondent is challenging in effect is the Commission's authority to exercise its discretion in the issuance of a complaint in this matter while administratively closing investigations in other matters with related charges. The Commission, however, is vested with discretion in bringing a complaint. *Moir* v. *Federal Trade Commission*, 12 F. 2d 22, 28 (1st Cir. 1926). It has the administrative discretion to decide whether or not to proceed against individual respondents or on an industry-wide basis, and it alone is "empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress." *Moog Industries* v. *Federal Trade Commission*, 355 U.S. 411, 413 (1958). Also, respondent has no "right" to the administrative treatment it here apparently seeks. *Coro, Inc.* v. *Federal Trade Commission*, 338 F. 2d 149 (1st Cir. 1964). Clearly, an assertion of a difference in treatment alone does not create an issue of the denial of due process.

Respondent's claim of alleged difference of treatment does not create or even suggest any inference or even a suspicion that the Commission's action was in any way the result of discrimination or bias, conscious or unconscious, intentional or unintentional. The mere assertion of such a plea, without more, cannot enable a respondent to interrogate Commission employees or to rummage through investigative reports and staff memoranda in the hope that something will turn up to support the claim. In *Coro, Inc.* v. *Federal Trade Commission*, *supra*, respondent asserted error in the Commission's denial of their application for a subpoena seeking records from the Commission's files under circumstances somewhat similar to those in this proceeding. Respondents in that case asserted that

the refusal by the Commission to dispose of their case by stipulation was arbitrary and capricious and that they could prove this only by a general exploration of the Commission's action in other cases. The court held, however, that subpoenas are not issued on bare suspicion and that they are "not licenses for extended fishing expeditions in waters of unknown productivity in the vague hope of 'catching the odd one'." *Id.* at 153.

Finally, it should be pointed out that the files in question, to the extent they exist, will ordinarily contain a variety of documents, all relating to the internal operations of the Commission, such as letters of complaint, reports on investigations, staff memoranda with advice and recommendations to the Commission, Commission directives and other like working documents. Not only will some of these records contain strictly privileged information such as trade secrets, they will primarily be the "work product" of the Commission's staff. Documents of this kind, *i.e.*, those in the work product category, are the essence of the internal administrative process, and they are ordinarily privileged against disclosure in an adjudicative proceeding.

The hearing examiner, in certifying the question of the issuance of the subpoenas ad testificandum to the Commission, stated, as indicated above, that the asserted efforts of the respondent to cooperate with the Commission might be a proper subject of inquiry in connection with the need for or scope of the order if one should be entered. Such evidence, however, can be readily developed by the testimony of respondent's own representatives and without calling the Commission witnesses.

In all of the circumstances, we conclude that respondent has not shown good cause for the release of confidential information as required by § 1.134 of the Commission's Rules of Practice and has not otherwise shown itself to be entitled to the issuance of the subpoenas which it is seeking.

As indicated above, respondent's request for subpoenas ad testificandum include subpoenas directed to two employees of the United States Customs Service. Respondent has made no attempt to justify the issuing of such subpoenas other than to state that it is necessary to establish its defenses to the charges in the complaint. The examiner's authority to issue subpoenas to officers or employees of other Government agencies is not here in question. However, as with any subpoena, he has discretion in the granting or denying of such applications. The Commission's policy in this connection is that the examiner first certify the question to the Commission for its information and for such appropriate action as the Commission may deem advisable. The Commission considers this policy necessary where a subpoena affects Government operations beyond the sphere of the

Commission's activities to assure a coordinated policy in such matters. Prior instances of the Commission's disposition of such extra-agency subpoenas include *Dean Milk Company*, Docket No. 8032, order quashing subpoena duces tecum issued March 7, 1963; *Foremost Dairies, Inc.*, Docket No. 6495, order quashing subpoena duces tecum issued February 11, 1959. The examiner, therefore, correctly certified the question on the issuing of these subpoenas to the Commission.

He recommended that subpoenas addressed to officials of the United States Customs Service be authorized for the same reasons he gave to justify the subpoenas to Commission employees. The Customs officials would apparently testify regarding that agency's restrictions or regulations on the importation and testing of mohair-blend sweaters imported from Italy and the relationship with the Federal Trade Commission and importers. However, the regulations of the Bureau of Customs and the Federal Trade Commission, so far as the importation of goods is concerned, are separate and distinct. Conformity with the requirements of the Bureau of Customs is not a defense to a charge of a violation of the Acts administered by the Federal Trade Commission. *L. Heller & Son, Inc.* v. *Federal Trade Commission*, 191 F. 2d 954 (7th Cir. 1951); *Baldwin Bracelet Corporation* v. *Federal Trade Commission*, 325 F. 2d 1012 (D.C. Cir. 1963). It is difficult to see how a development of respondent's relations with Customs will be relevant to the charges in this proceeding. Nevertheless, in paragraph 6 of its Answer, respondent makes some extremely broad assertions as to its claimed voluntary participation in a program of testing designed by the Bureau of Customs, a program which it further claims was to ensure proper labeling of Italian mohair-blend sweaters imported into this country. Respondent additionally states that it believes the program was adopted at the request or with the approval of the Federal Trade Commission. In view of such sweeping assertions, though we are doubtful of the relevance, the Commission does not disapprove of the issuance of such subpoenas. The examiner, however, is not precluded from exercising his sound discretion concerning the granting or denying of these subpoenas should there be a subsequent motion to quash or concerning the propriety of individual questions insofar as answers to them might be in conflict with our decision here. We are similarly not expressing any opinion nor attempting to indicate any views on whether or not respondent is entitled to the information which it seeks under any regulations which may exist with respect to testimony by employees of Customs or access to information respecting its operations.

Having found that the examiner properly certified the question on the issuance of the subpoenas ad testificandum requested by the

respondent, we will deny respondent's motion to strike such certification.

An appropriate order will be entered.

Commissioner Elman dissented and has filed a dissenting opinion.

Commissioner MacIntyre concurred and has filed a concurring opinion.

Commissioner Reilly's views are set forth in a separate statement.

Dissenting Opinion

By Elman, *Commissioner:*

I do not concur in the disposition being made of this matter.

The Commission, misconceiving the basic character of respondent's claim, demolishes a straw man. Respondent does not dispute "the Commission's right to proceed against some members of an industry without proceeding against all members," or that the Commission "has the administrative discretion to decide whether or not to proceed against individual respondents or on an industrywide basis, and it alone is 'empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress.' " Nor does respondent disagree, as I do not, with the general proposition that "an assertion of a difference in treatment alone does not create an issue of the denial of due process."

Respondent's claim cuts much deeper. It contends, in essence, that the Commission, in issuing a formal complaint against respondent while accepting informal assurances of voluntary compliance from competitors engaged in the same practices, made a purposeful discrimination and exercised a bias against respondent; and that the issues of fact raised by its claim of unconstitutional discrimination and bias cannot be resolved unless pertinent records and testimony of Commission employees are made available.

I think respondent's claim should be squarely met, and not brushed aside as frivolous or irrelevant. It is not a sufficient answer to say that issuance of a complaint is a matter of "administrative discretion" and that respondent has no "right" to one form of administrative treatment rather than another. To be sure, there are some areas of official action—some within the rubric of "administrative discretion"—which as a practical matter are sheltered from court review. But constitutional limitations on the exercise of power are no less binding on federal agencies or officials because effective judicial redress may not be available. Indeed, it is especially where a constitutional claim is addressed to an agency or official who, for all practical purposes, will be the final arbiter of the claim that concern for constitutional rights should be greatest. No matter how much

unreviewable "discretion" is involved in an administrative action, the Constitution forbids that it be taken arbitrarily, discriminatorily, or unfairly; and one who feels aggrieved by an allegedly unconstitutional administrative action surely has the right to assert his claim and to have it considered on the merits by the agency members. We should be the last, not the first, to turn such a claim away as affording a respondent no defense.

The Commission is under obligation, whenever a cloud is cast on the fairness of its processes, to assure itself, as well as the parties and the public, that the law has not been administered with "an evil eye and an unequal hand" (*Yick Wo* v. *Hopkins*, 118 U.S. 356, 373). Whenever such a claim is presented seriously and in apparent good faith, it is a mistake for a government agency to dismiss the claim summarily. Those within the agency may feel sure that the allegations are without substance and that the claim of discriminaton and bias has no basis in fact; but the public, too, needs assurance that no injustice has been done. Such assurance is doubly necessary where administrative action is so largely insulated from external scrutiny and review. No agency can afford to weaken the confidence of the public in the fairness and integrity of its processes.

Of course, no agency likes to hear itself or its staff accused of gross impropriety; and the instinctive reaction is to say: "The charge is plainly frivolous, and we shouldn't pay any attention to it." But here too, the quick response is not necessarily the wisest. If a claim of purposeful discrimination and bias is to be rejected, such rejection should be supported on grounds that will assure the public that the matter was treated with utmost, perhaps even excessive, concern for the constitutional limitations on all government action, including "administrative discretion."

I agree that in this case the requested subpoenas should not issue, and that respondent should not be given *carte blanche* to rummage through the Commission's confidential files. The practical and legal objections to such a procedure are obvious. Evidence of bias and prejudice is hardly likely, in any event, to make its appearance in staff memoranda or investigative reports; its existence will rarely, if ever, be demonstrable from written records. To put an extreme case, even if agency members were motivated by racial or religious prejudice in taking an action, only the most naive would expect this to be reflected in official minutes. Nor is bias likely to be confessed in testimony given by a staff member in obedience to a subpoena.

However, I would not stand, as the Commission does here, on any so-called privilege against disclosure of agency records. In circumstances where elementary fairness so requires (see Section 1.133(a) of the Commission's Rules of Practice), disclosure may be a price

that has to be paid for obtaining an adjudication of guilt; and in such a case the "privilege" goes out the window. But even justifiable refusal to issue the requested subpoenas, on grounds of privilege or otherwise, cannot be an end of the matter. If, in practical terms, the merits of a claim of bias and prejudice can be ascertained only through intramural inquiry conducted by agency members, this imposes on them an even heavier responsibility. In short, I do not see how agency members can escape the burden—onerous though it be—of satisfying the parties and the public that they have taken a serious charge seriously, and have canvassed the matter in all its ramifications and particulars.

From my point of view, however, the Commission need not undertake such a burden in this case—because it is even more clear now than it was on November 13, 1964, when the complaint against respondent was issued, that this proceeding will serve no useful purpose, is not in the public interest, and should be dismissed without further ado.

The problem of mislabeled imported wool products is not limited to Macy's, or to mohair-blend sweaters, or to imports from Italy or any other particular country. Issuance of a cease and desist order against respondent alone will contribute nothing to the solution of the broad and vexing problem of enforcing the Wool Act against mislabeled wool imports—a problem which, representatives of the domestic wool and textile industry have recently advised the Commission, cannot be handled effectively merely by policing American retailers, like respondent.

It has been pointed out to the Commission that the conditions of manufacture in some countries are such that it may be impossible "to trace the ingredient fibers of every end product to their original fiber lots"; that manufacturers of imported wool products are not subject to the "elaborate and expensive record-keeping requirements" imposed upon domestic manufacturers; that "such assurances as an importer may receive from sources abroad concerning fiber contents are not within the cognizance of the [Wool] Act," and, in any event, are not "reliable as a practical matter because the usage of terms abroad is commonly different from definitions recognized here"; and that "even if the foreign manufacturer sought to meet American standards of labeling, he would lack supporting guaranties or even adequate information from his suppliers abroad." Thus, since effective enforcement of the Act by the Commission is not possible "after the imports have been admitted through customs and are scattered over retail counters throughout the country and the mischief has been done," these representatives of the industry state that the problem can be solved only "at the source" by legislation or regulations re-

quiring the testing of wool imports prior to their introduction into domestic commerce.

In its answer to the complaint, respondent asserts:

(4) Major competitors of respondent have sold and are selling mislabeled mohair-blend sweaters (in many cases purchased from the same manufacturers) with the full knowledge of the Commission, and in part with the express approval, with no action taken by the Commission against such competitors.

(5) The Commission has sanctioned procedures for testing the mohair content of mohair-blend sweaters imported from Italy by some of respondent's major competitors which give no assurance that such sweaters are properly labeled.

(6) In proceeding against this respondent and failing to give due consideration to the industry-wide problem of insuring correct labeling on all mohair-blend sweaters imported from Italy, the Commission has failed to provide adequate protection for the consuming public.

(7) Since the Commission has not and presumably cannot devise a means for assuring that all mohair-blend sweaters imported from Italy are properly labeled, any order directing respondent to label every mohair-blend sweater imported from Italy with the precise fiber content would infringe upon respondent's right to compete, would lessen competition, and place respondent [at] an unfair competitive [dis]advantage with its major competitors. Moreover, if the only proper method for labeling mohair-blend sweaters imported from Italy is to test each sweater, such a requirement of compliance would be a denial of due process since in order to test a sweater its commercial value must be destroyed.

(8) The proposed order accompanying the Commission's complaint would deny respondent the right to import mohair-blend sweaters from Italy, would be harmful to the commercial relationship with the Italian government, and contrary to the foreign policy of the United States.

In essence, respondent is only telling the Commission what the representatives of the domestic wool and textile industry have recently advised us: that, unless and until effective action is taken generally "at the source" against mislabeled wool imports *before* their introduction into domestic commerce, proceeding against individual Amercan retailers will accomplish nothing. Respondent's candid exposition of the dilemma in which the Commission has placed it, and its recital of the legal and practical objections to the course of action followed by the Commission in singling out respondent for complaint, should cause us to pause and reexamine the wisdom of that course—and not to regard respondent's answer as manifesting a defiant or contumacious attitude towards the Commission. A respondent who is confronted with conditions which make it difficult, if not impossible, for him to comply with the law in good faith deserves our help more than our condemnation.

In the light of the representations which have been made to the Commission by the representatives of the wool and textile industry, and in view of the present posture of this proceeding, the Commission should welcome this opportunity to correct the mistake that was

made in issuing the complaint, and to concentrate its resources on finding an effective solution to the general enforcement problem which this case reflects. From the Commission's standpoint (not to mention respondent's), it would seem imprudent to continue spending time, money, and manpower on so pointless a proceeding.

CONCURRING OPINION

BY MACINTYRE, *Commissioner:*

I fully concur in the majority opinion; however, in view of the curious approach to this matter taken by the dissenting Commissioner, I wish to add my own comments. The dissent, going way off course, in my opinion, takes this occasion to suggest that the Commission's present method of regulating the labeling of imported wool products is ineffective and, further, to call for dismissal of the complaint regardless of what the proof might ultimately show as to the alleged violations.

There is one fundamental question dividing the Commission at this time, namely, should the law be enforced as it is written or should a large department store be permitted to insulate itself from the requirements of the Wool Products Labeling Act because it chooses to act as an importer.

In this proceeding the Commission has issued a complaint in which it states it has reason to believe that the respondent, R. H. Macy, has introduced into commerce, and sold in this country, wool products not labeled or otherwise identified in accordance with the provisions of the Wool Products Labeling Act. This law, applicable to all manufacturers and sellers of wool products residing in the United States, provides in Section 9(a) that no person shall be guilty if he establishes a guaranty received in good faith, signed by and containing the name and address of the person residing in the United States, by whom the wool product guaranteed was manufactured and/or from whom it was received, that such wool product is not misbranded. As shown by admitted facts, R. H. Macy did not choose to buy its wool products and secure a guaranty from anyone residing in the United States and subject to the provisions of the Wool Products Labeling Act; instead, it chose to buy wool products from manufacturers in foreign countries and then to act as the importer and seller of such products in the United States. Thus, if evidence should be introduced in this proceeding showing that the wool products in question are misbranded as alleged, the only person who can be held accountable for such misbranding would be the respondent, R. H. Macy.

Nevertheless, Macy argues that it should not be held accountable.

Its reasoning, as I construe its statements, is that it has initiated no misrepresentation but has relied upon the representations made to it by manufacturers in foreign countries and that it has no feasible means by which to test the accuracy or inaccuracy of such representations. This, of course, is not established fact; it is merely respondent's claim. Respondent itself, in its answer to the complaint, demonstrates that the Commission does have an established procedure for determining accuracy and to assist importers in complying with the law. Respondent's disagreement with the operation of such procedure does not establish its ineffectiveness. If this procedure is questionable and such a matter is shown to be relevant, this could be developed in the course of the trial. But the mere claim of inadequacy or inefficacy is scarcely a ground for dismissal of the complaint.

However, even if respondent can establish that it has no means of knowing the accuracy of the labeling of imported goods, such would not justify the alleged violations in this proceeding. Where a retailer makes the choice of importing the foreign wool garments, he must be held responsible for their proper labeling. The Commission cannot look to anyone else for compliance with the law if the statute is to be enforced. Congress has unmistakably expressed its intent that wool products be truthfully labeled. The public, as well as domestic manufacturers who comply with the law, looks to the Commission for enforcement of this statute.

In emphasizing the role of the retailers, the dissent overlooks the fact that R. H. Macy is the importer; it is not merely a domestic seller. R. H. Macy in this instance is the only "source" against which the Commission can proceed in the regulation of the labeling of wool products received from abroad.

The dissent focuses on procedural recommendations made by certain industry representatives on the administration of the Wool Products Labeling Act, a matter which, by the way, is wholly outside this record. The industry representatives appear to be concerned with what they regard as widespread violations in the importation of misbranded wool goods. They propose a regulation whereby tests would be made in designated laboratories and the results filed with the Commission prior to the introduction of such goods into commerce. Regardless of the merits of this proposal, I do not think that in this proceeding we should assume the Commission has been presented a more effective way to administer the Wool Products Labeling Act. At this point any such claim is wholly speculative and patently presents no basis for the dismissal of the complaint.

The dissent suggests that the problem involved in this matter should be solved by legislation or regulation requiring testing of the

wool products before their introduction into commerce. The fact is that there is now no such legislation or regulation and I have considerable doubts about the authority of the Commission to promulgate any such regulation. The present applicable regulatory provision is the Wool Products Labeling Act. I see no reasonable alternative available to the Commission other than to enforce the requirements of that Act. It is no answer to assert that other measures or other regulations might be preferable. Congress, in the Wool Products Labeling Act, has provided for the regulation of the practices alleged by the issuance of a complaint where the Commission has reason to believe that a violation has taken place. This the Commission has done and it is properly proceeding to hear the case on its merits.

It may be that what respondent is suggesting and wants is a regulation or a statute which would in effect grant Governmental approval to the labeling prior to the introduction of the goods into commerce, based on a testing procedure established for the purpose. This would apparently assure that the importer and the seller could make representations in the United States in accordance with the foreign manufacturers' claims where the goods have passed the tests without fear of challenge under the Wool Products Labeling Act. If this is the intention, it seems to me that this is a matter for Congress and not for the Commission. Our mandate is clear under the Wool Products Labeling Act and we are properly proceeding to enforce that statute.

Let there be no mistake: American manufacturers are subject to the requirements of this Act and when a retailer purchases from a domestic manufacturer, he is entitled to rely on the latter's representations as to content, because the law is enforced as to the manufacturer. In this connection, it may be noted that American manufacturers have been required to comply with this statute. Even *Northfield Mills, Inc., et al.* (the Bernard Goldfine matter), 53 F.T.C. 672 (1957), was not allowed to escape these requirements. The dissent, by pleading for nonenforcement of the statute in this instance, would, in effect, hold domestic manufacturers and their customers at the mercy of the vagaries of the manufacturing processes in foreign mills. Nothing could be more unfair.

Finally, I note that the dissent argues at some length and with considerable eloquence that the Commission should not brush aside charges of bias made by respondents at whom enforcement proceedings have been directed. However, the dissent in effect concedes that here it would not grant respondent subpoenas to rummage through the Commission's files on the basis of the showing made. As a result, the dissent apparently would insure the fairness of these

proceedings by the simple expedient of dismissing the complaint. Stripped of all its verbiage, I can only infer the dissent suggests that in view of the charges of bias made, whatever their foundation, the Commission can best protect its reputation for fairness and even-handed dealing by dismissing the enforcement procedure under consideration. This is a novel suggestion, but should it become the rule, it would, in effect, preclude the Commission from taking any effective action under the laws which it is required to administer.

SEPARATE STATEMENT

BY REILLY, *Commissioner:*

I agree fully with the majority opinion. I am compelled however to file a separate concurring statement. A homily on the constitutional requirements of due process such as that contained in the dissenting Commissioner's statement is always valuable, particularly in a situation where a public official or agency has engaged in conduct inconsistent with due process. That is not the case here however and I would not want the dissenting statement to impart vigor to what is obviously a frail allegation.

Respondent charges that the Commission when confronted with a number of cases involving the same violation and similar products must, in determining which administrative remedy will best serve the public interest, treat all respondents alike. I agree that if all of the considerations determining the Commission's decision apply equally to all proposed respondents, even rudimentary fair play would require that the same course be followed as to each.

In determining whether to issue complaint or accept assurances of voluntary discontinuance the Commission is influenced by a number of factors apart from the product and the nature of the violation. These may appropriately include considerations such as: the degree of cooperation which respondent has shown in preliminary dealings with the Commission's staff; the degree of credibility attaching to promises or assertions of discontinuance; the weight to be accorded to attempts at discontinuance *in advance* of the Commission's first contact with respondent; the prior record of the respondent in other cases and whether in light of the Commission's experience with a particular respondent and other respondents, the advantages to the particular respondent of voluntary discontinuance outweigh the public interest in having a more effective deterrent.

These are value judgments which are the essence of administrative discretion. The Commission weighs such considerations as pertain to a case, some admittedly more elusive than others, in arriving at a determination that the public interest will be best served by is-

suance of complaint. Not all of the Commissioners will answer them the same way but the fact that one Commissioner feels differently is no reason to question how well attuned to constitutional requirements the other Commissioners are.

As to respondent, it is not in a position to know the answers to the questions the Commissioners put to themselves, particularly as these questions relate to the "favored competitors," without examining the mental processes of the Commissioners. All respondent knows is that the central product and issue might be the same as to all.

If a mere *ipse dixit* assertion of partiality with limited knowledge such as that available to respondent is sufficient to require an inquisition into the processes whereby the Commissioners arrived at one result rather than another, the formula for completely frustrating Commission effectiveness is clear.

Moreover, in point of fact respondent has received the same treatment as have other respondents. If the proceedings herein result in an order to cease and desist, Macy will join the company of a significant number of other respondents now under order covering the labeling of imported mohair blend sweaters. The fact that complaint issued against respondent herein and not as to the others is due to Macy's having declined to enter into a consent settlement. Furthermore, far from discriminating against Macy, the Commission has bent over backward in waiving its rules upon respondent's own motion and suspending the proceedings herein to permit respondent and the Commission's staff to negotiate a consent order. These negotiations having failed, the proceedings were reinstated.

The Commission in issuing complaint against Macy felt that the public interest would be best served thereby. I cannot delineate all of the considerations such as those cited above which influenced the other Commissioners because I cannot examine their minds. I know however that they were responsibly and conscientiously considered.

The dissenting statement sets forth arguments for a different disposition of this matter than that voted by a majority of the Commission. Thoroughly aware of the factors cited in these arguments the Commission in its administrative discretion decided that the public interest required issuance of a complaint. Whether or not an order issues remains to be seen. I see no reason however for a continuing debate at Commission level as to the merits of this administrative decision. I favor getting on with the trial of this matter.

ORDER RULING ON QUESTIONS CERTIFIED AND DENYING MOTION TO STRIKE CERTIFICATION

This matter having come before the Commission upon the certification of questions by the examiner as to the issuance of subpoenas ad testificandum and a subpoena duces tecum and the motion of the respondent to strike the certification of the subpoenas ad testificandum, and the Commission having determined that some of the subpoenas should be issued and some of them not issued and that respondent's motion to strike should be denied:

It is ordered, That the hearing examiner be, and he hereby is, instructed not to issue the subpoenas ad testificandum requested by respondent July 22, 1965, requiring Henry D. Stringer, Charles F. Canavan and Eugene H. Strayhorn to appear and testify.

It is further ordered, That the hearing examiner be, and he hereby is, instructed not to issue the subpoena duces tecum requested by respondent August 12, 1965, requiring Joseph W. Shea to appear and to produce certain Commission documents.

It is further ordered, That the hearing examiner be, and he hereby is, instructed to issue the subpoenas ad testificandum requested by respondent July 22, 1965, requiring Irvin Fishman and Harry Freumess to appear and testify.

It is further ordered, That respondent's motion to strike the hearing examiner's certification of the request for subpoenas ad testificandum, filed July 27, 1965, be, and it hereby is, denied.

It is further ordered, That the hearings in this matter, postponed by the Commission by order issued August 17, 1965, be re-scheduled by the hearing examiner for the earliest possible date.

Commissioner Elman dissented and has filed a dissenting opinion, Commissioner MacIntyre concurred and has filed a concurring opinion, and Commissioner Reilly's views are set forth in a separate statement.

TEXAS INDUSTRIES, INC., Docket No. 8656
MISSISSIPPI RIVER FUEL CORPORATION, Docket No. 8657

Order and Opinion, Oct. 8, 1965

Order denying respondents' request for suspension of hearings at end of case-in-chief because respondents need time to obtain discovery for their defense.

OPINION OF THE COMMISSION

The hearing examiner has certified to the Commission that it is necessary for the Commission to authorize the examiner to suspend the hearings in this case at the conclusion of complaint counsel's

case-in-chief in order for respondents to obtain discovery necessary for their defense.

The hearing examiner's certification is not joined in by either counsel supporting the complaint or respondents' counsel. There are presently pending before the examiner various motions to quash some 20 subpoenas issued by him upon respondents' application. The movants are third parties on whom the subpoenas were served. The information demanded is claimed by them to be burdensome and to involve competitively sensitive information which they are reluctant to disclose. Respondent has opposed the motions to quash, contending that all of the information requested is relevant to its defense. Complaint counsel is not a party to these motions and did not interpose any objection to respondents' discovery requests at the time they were initially presented to the examiner.

The examiner bases his certification to the Commission for suspension of the hearings on the sole ground that in his judgment he might be better able to limit the information which respondent is seeking and thus reduce the burdensomeness of the request on the movants if he can defer ruling on respondents' various discovery requests directed to third parties until the conclusion of counsel's case-in-chief.

The hearing examiner in his certification has outlined in great detail the discretion available to an examiner in ruling on discovery requests of a respondent, especially where the information is to be furnished by third parties who are also competitors and is of a competitively sensitive and confidential nature. Indeed the examiner indicates that the instant motions and answers thereto provide a basis for alleviating much of the burdensomeness of the present subpoenas now being challenged and for limiting disclosure of much of the competitive information being sought. His concern is that the subpoenas cannot be sufficiently narrowed to eliminate all of the burdensomeness and confidentiality objections now directed to them in the present motions. He is of the belief that further avenues for narrowing the scope of the discovery might present themselves at the conclusion of complaint counsel's case-in-chief. For example, he points to the fact that there might be a "material failure of proof" which would of course, as he points out, "result in material limitations in the amount and scope of defense evidence which will be required." Moreover, he also notes that complaint counsel might present evidence which upon development in cross examination supply or render unnecessary information which respondent now considers necessary. However, he does admit that complaint counsel's evidence might also reveal the necessity for other information not yet requested.

It appears to us that in effect the only basis for the examiner's request here is his hope that at the conclusion of complaint counsel's case some lesser amount of discovery might be required than now appears to be the case. We very much doubt that this will prove to be the case.

In our judgment, the examiner has available to him all of the techniques and procedures necessary to enable him to be as informed about the issues and the nature of complaint counsel's proof as he will be at the conclusion of complaint counsel's case-in-chief (with the exception of forecasting whether there will be a material failure of proof which could never realistically be accepted as a ground for deferring discovery until the prima facie case has been ruled on).

There is no doubt that ruling on the relevance and necessity for voluminous discovery entails heavy responsibilities and that granting unduly broad discovery which later turns out to have been unnecessary can seriously prejudice reaching an expeditious determination of the issues raised by the complaint—a matter of great importance both to the respondents' business and to the administration of the law. Moreover, in this case the prejudice can also extend to the independent companies who are protesting the burdensomeness and invasions of confidentiality posed by these subpoenas.

It is for precisely this reason that pretrial techniques and procedures have been developed over the years to compel the parties to narrow the issues, stipulate undisputed facts and in general pare their cases down to their essentials. It is incumbent upon the examiner to bend every effort to achieve such a narrowing of the issues in advance of trial, not only to keep discovery in proper bounds but also to ensure that the case will be tried as concisely and expeditiously as possible and the record kept to a minimum. Thus it is before, not after, complaint counsel's case has been put in that this narrowing of the issues must take place if all of these objectives are to be achieved. To this end, the examiner should make sure that respondents have negotiated in good faith with the third parties in an effort to reduce the burden to them of the discovery requests. For example, a frequent source of burden to a company complying with discovery requests arises from the fact that the data sought is not requested in the form in which the data is recorded in the company's files. Minor revisions in the request can frequently save a company substantial time and expense in assembling the data desired. Use of sampling techniques for essential data is another important way of reducing the burden involved in complying with discovery demands. Moreover, agreement on the use of sample data is equally important to reduce the eventual trial time as well as the size of the record. The examiner should also be alert to preventing the gathering of

data from multiple companies which in the last analysis can only be cumulative. In short, the examiner is correct in his concern not to permit unnecessary time-consuming discovery which in this case carries the additional problem of imposing substantial burdens of time and expense on third parties. But we believe that this concern imposes on the examiner a duty to make certain that the requests pending before him are granted only to the extent that he has satisfied himself, first, that the parties have in fact narrowed and delineated the precise factual and legal issues on which evidence will be presented; and, second, that the discovery requests have in fact been reduced by the parties and that thereafter the examiner has satisfied himself that the data sought is not only relevant but necessary to the defense of the issues. If after complaint counsel's case has been put in, it becomes apparent that data excluded by the examiner in pretrial was in fact relevant and necessary, the examiner can always submit to the Commission at that time a certification for suspension of the hearings in order to permit additional discovery. At that time the Commission will be in a much better position to determine whether under the particular circumstances of that request a suspension is necessary in order to prevent a denial of justice.

The authority to suspend hearings at the conclusion of complaint counsel's case is accordingly denied.

Commissioner MacIntyre did not concur.

Order Denying Authority for Limited Suspension of Hearings

These matters having come before the Commission on the examiner's certificate of necessity for the suspension of hearings at the conclusion of the case-in-chief in the respective dockets for the stated purpose of affording the respondent in each case the reasonable opportunity to obtain information, insofar as it has heretofore been unable to do so, which may then be necessary to its defense, and

The Commission having determined for the reasons set forth in the accompanying opinion that there is insufficient warrant now in the circumstances detailed by the examiner as to the reasons why the authority to suspend hearings at the close of the case-in-chief of complaint counsel in each matter should be granted:

It is ordered, That authority to suspend hearings at the close of complaint counsel's case-in-chief in Docket No. 8656 and Docket No. 8657 not be granted at this time, without prejudice to renewal by the hearing examiner of this request at a later date if, in his judgment, circumstances warrant.

Commissioner MacIntyre not concurring.

S. DEAN SLOUGH TRADING AS STATE CREDIT CONTROL BOARD

Docket 8661. Order, Oct. 8, 1965

Order denying respondent's request for dismissal of the complaint on the grounds that the purpose of the proceeding is to put him out of business.

ORDER DENYING RESPONDENT'S MOTION TO WITHDRAW OR DISMISS COMPLAINT AND DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

This matter is before the Commission upon the hearing examiner's certification, under § 3.6(a) of the Commission's Rules of Practice, of respondent's motion, filed September 30, 1965, requesting that the complaint be withdrawn or dismissed. The basis for the request is an allegation that the primary purpose of the proceeding is to deny respondent the right to engage in interstate commerce and to put him out of business, a purpose for which he claims the Federal Trade Commission Act cannot be used. The hearing examiner recommends that the motion be denied, indicating in his statement that the charge is unbelievable and frivolous. Complaint counsel, on October 5, 1965, filed an answer to respondent's motion, stating that he, complaint counsel, has neither "stated nor implied, directly or indirectly, that the purpose of these proceedings was other than to enjoin the continuance of acts and practices which are violative of the Federal Trade Commission Act." Additionally, respondent has, on October 5, 1965, requested permission to file an interlocutory appeal from the hearing examiner's order denying his request for postponement of the hearings until 30 days after the Commission has ruled on the present motion for withdrawing or dismissing the complaint.

As support for his motion, respondent refers to various remarks made during the course of the prehearing conference held on September 13, 1965, particularly those of complaint counsel. The recorded comments fail to indicate the alleged "avowed purpose of putting the respondent out of business." The Commission, of course, has no power to close the doors of any business. Its proceedings under Section 5 of the Federal Trade Commission Act are directed strictly to the elimination and prevention of unfair methods of competition and unfair or deceptive acts or practices in commerce. The elimination and prevention of the practices charged in the complaint, if the charges are sustained by the evidence, is the sole purpose here. Respondent has made no showing to justify his request for dismissal of the complaint. As to the postponement issue, the Commission's action herein renders it moot. Accordingly,

It is ordered, That respondent's motion to withdraw or dismiss the complaint be, and it hereby is, denied.

It is further ordered, That respondent's request for permission to file an interlocutory appeal from the order of the hearing examiner denying postponement be, and it hereby is, denied.

L. G. BALFOUR COMPANY ET AL.

Docket 8435. Order, Oct. 14, 1965

Order directing the Secretary of the Commission to make available to respondent a Commission minute of March 25, 1964, and the Chairman's letter to Senator Magnuson of June 23, 1961.

ORDER DIRECTING DISCLOSURE OF DOCUMENTS

The hearing examiner has certified to the Commission for its determination two separate motions of respondents filed September 13, 1965, for the production of (1) a Commission "minute" relating to *L. G. Balfour Co.* v. *Federal Trade Commission*, Civil Action No. 3132 (E.D. Va.) [7 S.&D. 889], which was pending in March 1964, and (2) a letter from the Chairman of the Federal Trade Commission to the Honorable Warren G. Magnuson, of the United States Senate, which answered a letter from Senator Magnuson dated June 9, 1961.

The motions were filed pursuant to Section 1.133 of the Commission's Rules of General Practice[1] and Section 3.11 of its Rules of Practice for Administrative Proceedings.[2]

The examiner in his certification noted that he had examined respondents' motions and stated that the motions should be denied under "the Commission's previous rulings concerning the disclosure of confidential documents."

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[1] Sections 1.133 and 1.134 provide, in part:

§ 1.133 (a) The records and files of the Commission, and all documents, memoranda, correspondence, exhibits, and information of whatever nature, other than the documentary matters described in § 1.132, coming into the possession or within the knowledge of the Commission or any of its officers or employees in the discharge of their official duties, are confidential. Except to the extent that the disclosure of such material or information is specifically authorized by the Commission or to the extent that its use may become necessary in connection with adjudicative proceedings, they may be disclosed, divulged, or produced for inspection or copying only under the procedure set forth in § 1.134.

§ 1.134 (a) Upon good cause shown, the Commission may by order direct that certain records, files, papers, or information be made public or disclosed to a particular applicant.

[2] § 3.11 Upon motion of the party showing good cause therefor and upon such notice as the hearing examiner may provide, the hearing examiner may order any party to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody, or control of such party. The order shall specify the time, place, and manner of making the inspection and taking the copy and may prescribe such terms and conditions as the circumstances require.

Under the Commission's Rules, the documents which respondents seek to view are clearly confidential. In an earlier interlocutory decision in this matter,[3] we held that whenever there is a request for confidential information in the possession of the Commission, the hearing examiner must make the initial determination of the existence *vel non* of a proper showing of "good cause." It was stated that materials (or representative samples thereof) sought by request should be submitted to the examiner for study and examination to aid him in making his determination, unless they "relate to strictly internal affairs of the Commission," or "are plainly confidential, such as minutes of Commission meetings."

The examiner in this matter has viewed the so-called "minute" but there is no indication whether he studied the requested letter to Senator Magnuson. He apparently considered the moving papers of the parties but failed to make the requisite good cause finding. However, the issues raised in respondents' motions are of such a nature that "a detailed knowledge of the issues of the proceeding"[4] is not required. Thus, the Commission is able itself to reach an initial determination regarding the existence of good cause rather than remand the motions to the examiner.

On March 27, 1964, a Consent Judgment was entered in Civil Action No. 3132 [7 S.&D. 889, 890], which stated, *inter alia:*

1. That all oral and documentary evidence relating to events, transactions, and business conduct occurring prior to June 16, 1951, will be physically excised from the administrative record of the Federal Trade Commission in the proceeding entitled *In the Matter of L. G. Balfour Company, et al.*, Docket 8435, except insofar as it may be hereafter agreed by plaintiffs through counsel and defendant complaint counsel or their successors in the aforesaid administrative proceeding.

2. Both the initial decision of the defendant hearing examiner or his successor and the decision and final order of the defendant Commission in the aforesaid administrative proceeding will be based solely upon the excised administrative record as provided in Paragraph 1 above, and such further evidence, oral and documentary, as may be hereafter received in the aforesaid administrative proceeding.

* * * * * * *

6. The allegations of the administrative complaint in the aforesaid administrative proceeding shall be limited to ten years prior to June 16, 1961.

During the course of a discussion on the record relating to the authority under paragraph 6 of the Judgment for physically altering certain provisions in the complaint and answer, the following exchange occurred between the examiner and complaint counsel:

[3] Opinion and Order Remanding Respondents' Motion to Inspect and Copy Documents, issued October 5, 1962 [61 F.T.C. 1491].

[4] *Id.* at 2 [at 1492].

MR. BARNES: And I have never thought that I had the authority or that Your Honor had the authority to rewrite the Commission's complaint. I do not think it is necessary.

HEARING EXAMINER LYNCH: Well, I do not know about what Your Honor's authority is so far as the Commission's complaint is concerned, but that is the way you interpret my remarks and I have no intention of rewriting the Commission's complaint. I do not, however, think that there is much area with respect to what you and the respondents have entered into by way of a stipulation, nor do I think that there is much area for conversations concerning the court's order. Furthermore, I have before me the minutes of the Commission concerning this matter, and I am well aware of what the authority of counsel representing the Commission was given by the Commission in order to dispose of this proceeding and it seems to me that in order to dispose of Civil Action No. 3132 you made the decision as to what position you are going to take as a representative of the Commission — you or someone else made the judgment, and now you are bound by it. Whether in your opinion the Commission gave you authority to amend your complaint, the Commission's complaint, I do not know. All I know is what you stipulated and what the court order says. [Tr. 4998-4999.]

The examiner's statement that he had viewed the Commission's "minutes" inspired respondents' first motion.

Since it is not the Commission's practice to make available to its staff the official minutes of meetings, obivously the document to which the examiner referred was not an actual Commission minute. However, often, certain staff members are supplied with resumes of the minutes and apparently the hearing examiner in this matter was given access to such a document. Minute resumes are confidential memoranda for the staff's use and are unavailable to the general public.

However, it does appear that the examiner to some extent considered the minute resume to reach a judgment on the question before him. Accordingly, we believe respondents have shown good cause to have made available to them that underlying document used by the examiner in his decisional process.[5]

Respondents were made aware of the document which is the subject of their second motion when complaint counsel listed, among the exhibits which they proposed to offer in their rebuttal case, a letter from Senator Magnuson to Chairman Dixon, dated June 9, 1961 (marked for identification by complaint counsel as CX 782-A), and a copy of a letter from one Frank H. Myers to the Senator, dated June 7, 1961 (marked for identification by complaint counsel as CX 782-B).[6]

[5] An examination of the document by respondents will reveal to them that it was not a Commission directive to a hearing examiner, as they contended. (Reply to Complaint Counsel's Opposition to Respondents' Motion for the Production of Commission Minute Relating to Consent Judgment, p. 4.) Thus, Rule 3.17(f) was inapplicable.

[6] On September 9, 1965, complaint counsel notified counsel for respondents that they were considering not offering into evidence the exhibits they had marked as CX 782-A and 782-B.

Senator Magnuson's letter to the Chairman bore a date showing that it was routed to the Commission's Bureau of litigation on June 14, 1961. The complaint in this matter issued two days later.

Respondents state three reasons why Senator Magnuson's letter should be produced for their inspection: (1) that the letter is relevant to the testimony of a witness called by complaint counsel relating to the matter referenced in the Myers' letter; (2) that it is important for respondents "to ascertain the contemporaneous views of the Commission with respect to the considerations of public interest which led the Commission to issue the instant complaint;" and (3) that "Chairman Dixon's reply to Senator Magnuson is also directly relevant to Chairman Dixon's qualifications to render a decision in this matter 'in an impartial manner,' as required by Section 7(a) of the Administrative Procedure Act, 5 U.S.C. § 1006(a)."

The Commission's disposition of respondents' second motion makes comment upon their arguments unnecessary.

Complaint counsel whetted respondents' curiosity by voluntarily supplying them with two of three related confidential documents. We believe that fairness dictates the third should be supplied them. Accordingly,

It is ordered, That the Secretary prepare a certified copy of the Commission's minute resume of March 25, 1964; that complaint counsel have a copy made of the letter from Chairman Dixon to Senator Warren G. Magnuson, dated June 23, 1961; and that both documents be transmitted to respondents' counsel without delay.

MISSISSIPPI RIVER FUEL CORPORATION

Docket 8657. Order, Oct. 14, 1965

Order denying respondent's' motion to reconsider a previous order of the Commission denying suspension of the complaint.

Order Denying Motion to Reconsider Refusal to Suspend Complaint

By its motion filed October 4, 1965, respondent requests that the Commission reconsider suspension of this proceeding. The motion renews the request previously denied by the Commission by order dated April 14, 1965 [67 F.T.C. 1363]. Respondent's motion sets forth no facts justifying reconsideration of the Commission's action. While respondent cites recent merger activity in this industry as further evidence of the need for industrywide proceedings, the Commission, in denying respondent's earlier motion, noted that in issuing

this complaint it had reason to believe "that the challenged acquisitions endangered competition in the market affected; and the ill-effects of such specific acquisitions, if found illegal, could not be dissipated merely by a nonadjudicatory, industrywide inquiry of the kind projected by the Commission." Accordingly,

It is ordered, That the motion of respondent in the above-captioned proceeding to reconsider denial of the previous application for suspension of the complaint in this proceeding be, and it hereby is, denied.

L. G. BALFOUR COMPANY ET AL.

Docket 8435. Order, Oct. 22, 1965

Order granting permission to file interlocutory appeal from hearing examiner's order of Sept. 29, 1965, allowing access to certain interview reports.

ORDER GRANTING PERMISSION TO FILE INTERLOCUTORY APPEAL

Complaint counsel, on October 6, 1965, filed a motion, requesting permission to file an interlocutory appeal from the hearing examiner's order of September 29, 1965, allowing respondents access to certain interview reports from the Commission's files. The Commission has determined that complaint counsel should be granted permission to file the interlocutory appeal. Accordingly,

It is ordered, That complaint counsel be, and they hereby are, granted permission to file an interlocutory appeal from the hearing examiner's order of September 29, 1965.

DIAMOND ALKALI COMPANY

Docket 8572. Order and Opinion, Oct. 22, 1965

Order affirming the findings of fact in the initial decision and ordering the complaint counsel to file within 30 days a proposed form of order and the respondent's counsel to file an alternative form of order.

OPINION OF THE COMMISSION

BY REILLY, *Commissioner:*

On May 16, 1963, the Commission issued a complaint against

Diamond Alkali Company's (Diamond)[1] acquisition of Bessemer Limestone and Cement Company (Bessemer) charging that it "constitute[d] a violation of Section 7 of the Clayton Act (U.S.C., Title 15, Section 18), as amended." The relevant section of the country was alleged to be a twenty-three county area in northeastern Ohio and northwestern Pennsylvania. For all practical purposes complaint counsel and respondent agreed, and the hearing examiner found, that the relevant line of commerce was "portland cement." The hearing examiner sustained the charges in the complaint and ordered respondent to divest itself of the stock and assets acquired from Bessemer.

In its appeal, respondent urges two main objections to the examiner's decision:

(1) The twenty-three county area is not the proper section of the country in which to measure product market shares or probable competitive effect.

(2) Even assuming that the section of the country had been properly defined, a divestiture order would be "contrary to the public interest and punitive."[2]

I

(a) *Relevant Geographic Market*

The hearing examiner found that "the relevant section of the country for evaluating the immediate and direct effects of the challenged acquisition is * * * the area of actual competition between

[1] Diamond Alkali sells its cement under the brand name "Standard." There is another cement company called "Standard Lime & Cement Co.," which is a division of the Martin-Marietta Co. And there is also a Diamond Portland Cement Co., a division of Flintkote Co. Neither of these organizations is connected with Diamond Alkali Company.

Diamond Alkali Company, according to its "listing application" filed with the New York Stock Exchange in connection with the Bessemer acquisition, is engaged in the production of five general product categories: (1) Chlorine & By-products, (2) Alkalis, (3) Silicates, (4) Chromates, (5) Organics, (6) Miscellaneous (cement is within this category). In 1962, its assets were over $175 million, and its sales were about $158 million. Diamond's cement sales in 1962 were over six million dollars.

Bessemer, although it sells other products in a very minor way, is essentially a cement producer. In 1960, its assets were over $12 million, its sales over $9.5 million and its net income over $1.5 million.

[2] Respondent had its only cement producing facilities located within the physical boundaries of its Painesville chemical works. The facilities were referred to as "Plant A" and "Plant B" by respondent. At the end of the 1961 shipping season, approximately 5 months after the complaint had issued, respondent closed down "Plant A." In August of 1964, approximately 3 months after the hearing examiner's order, "Plant B" was sold to a Florida "white cement" producer (white cement is a specialty cement not competitive with portland cement).

respondent and Bessemer * * *." (I.D., p. 15 [72 F.T.C. 717].) In this area the examiner found eleven cement producers[3] competing with Diamond and Bessemer "in all or various portions of the 23 counties * * *." According to the examiner, within this market, Diamond had 27% of the shipments; by acquiring Bessemer it added 16%, representing a total of 43%. Complaint counsel assert that the universe, upon which these market share figures are based, should and does comprehend *only* the actual shipments made *into* this area by plants and distribution terminals within and without the 23-county area. Respondent contends that this universe figure is unrealistic in that it failed to include any or all of the following:[4]

1. Shipments by plants or distribution terminals, wherever located, into the area where Bessemer shipped, but Diamond Alkali did not.
2. Shipments outside that area[5] by plants who were shipping into that area.
3. Shipments made outside the 23-county area by plants who were at the same time shipping into the 23-county area.

Respondent, as we understand its position, also argues that total capacity[6] or total production is a more meaningful measure of competition than total shipments; and so *any* universe should be compiled on the basis of capacity or production—not on shipments. Finally, respondent argues for the inclusion within the market of potential competitors of Bessemer in that area where Bessemer did not compete with Diamond.

Specifically, according to respondent, the geographical market should be extended to encompass Ohio, Michigan, Pennyslvania, West Virginia, Maryland and the four border counties of western New York.

(b) *Legal Guidelines*

In determining the proper section of the country in a Section 7 case, we are guided by two recent statements of the Supreme Court—*Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961) (a case involving Section 3 of the Clayton Act), and *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963). Briefly, in *Tampa*,

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[3] These eleven producers are (1) Lehigh Portland Cement Company; (2) Penn Dixie Cement Corporation; (3) Universal Atlas Cement; (4) Green Bag Cement Co.; (5) Columbia Cement Corp.; (6) Southwestern Portland Cement Co.; (7) General Portland Cement Co.; (8) Dundee Cement Co.; (9) Huron Portland Cement Co.; (10) Diamond Portland Cement Company; and (11) Medusa Portland Cement Company. Almost all of these firms are significant factors in the cement business on the national level. Bessemer, according to the evidence, was the second largest producer in the area in which it operated. Diamond occupied the number one position in the 23-county area in which there was competitive overlap between Bessemer and Diamond.

[4] Although almost 100% of Diamond's shipments went to the 23-county area, approximately 33% of Bessemer's shipments went into areas where Diamond did not compete—66% of Bessemer's shipments went into areas where it was competitive with Diamond.

[5] The area into which Bessemer, but not Diamond, shipped.

[6] At the present time, few plants produce at anywhere near their actual or rated capacity.

a utility company entered into contracts with a coal supplier which bound the utility to purchase coal from that one source for twenty years. Faced with the problem of whether "respondents, * * * one of 700 coal producers who could serve the same market * * *, peninsular Florida [had illegally restrained trade], * * *" the court concluded that "* * * the contract for a period of twenty years [had not] excluded competitors from a substantial amount of trade."[7] Crucial to the court in carving out the geographic area (in which the probability of foreclosure was to be measured) was the fact that "by far the bulk of the overwhelming tonnage marketed *from the same producing area as serves Tampa* is sold outside of Georgia and Florida and the producers were eager to sell more coal in those states."[8] (Emphasis added.) Simply put, to be precluded from selling to Tampa Electric made little difference to the coal producing firms who "could serve the same market."

Confronted once more with the problem of delineating the appropriate section of the country in *Philadelphia National Bank, supra,* the Supreme Court ruled that "the proper question to be asked * * * is * * * where within the area of competitive overlap the effect of the merger on competition will be direct and immediate." The answer to such an inquiry, according to the court, in turn depended upon "the geographic structure of supplier customer relations." The court then applied the *Tampa Electric* language, urging "careful selection of the market area in which the seller operates *and to which the* purchaser can practicably turn for supplies."[9] (Emphasis in original.)

In view of the court's language, complaint counsel's contention that the 23-county area in which there is competitive overlap is by that very fact—the fact of competitive overlap alone—the relevant section of the country, is unacceptable. For any attempt to define the relevant section of the country must take into consideration economic realities—not merely the mechanical fact of competitor overlap. Indeed one of the alleged purposes of amending Section 7 of the Clayton Act from "in any section or community" to "in any section of the country" was to broaden the scope of the previous language, so that purely local acquisitions would not necessarily be condemned by Section 7.[10]

(c) *The Facts*

Respondent contends that "just as the market in *Tampa* was the

[7] 365 U.S. 320, 330 (1961).

[8] *Id.* at 332.

[9] 374 U.S. 321, 357, 359 (1963).

[10] As the Supreme Court stated in *Brown Shoe* "Where the arrangement effects a horizontal merger between companies occupying the same product and geographic market * * * [the] 1950 amendment made plain Congress' intent that the validity of such combinations was to be gauged on a broader scale: their effect on competition in an economically significant market." (370 U.S. 294, 335 (1962).)

seven-state area, so here the relevant market under *Philadelphia National Bank* and *Tampa,* is the five-state western New York area in which are located the producers who are actual and potential suppliers to the customers in the area served by Bessemer and in part, Standard." (Resp.'s Reply Brief, p. 8.)

In *Tampa,* record evidence was found that the coal companies supplying Tampa were "eager" to ship outside the Georgia and Florida area. And according to the Supreme Court, "By far the bulk of the overwhelming tonnage marketed from the same producing area as serves Tampa is sold outside of Georgia and Florida." We infer from this language that respondent here at least has the burden of coming forward with some evidence meeting the criteria implicit in the court's statement. But from our examination of the record, there is no evidence that the suppliers to the 23-county area were "eager" to ship elsewhere or that those firms shipping substantial quantities of cement into the area were shipping elsewhere to any significant degree. The evidence reveals that from 1959-1962, five firms, Standard and Bessemer ranking high on the list, had the lion's share of the business in the northeastern Ohio and northwestern Pennsylvania area. In 1959 they had 85.20% of the shipments and in 1962 these same firms had 77.13%. Approximately 100% of Diamond's shipments went into this area and between 59-66% of Bessemer's shipments went there.

Huron's Buffalo distribution terminal, some distance from the heart of the 23-county area, shipped completely insignificant amounts into the relevant geographic market. On the other hand, its Cleveland distribution facility, in the heart of the 23-county area, was shipping the vast majority of its total shipments into the northeastern Ohio, northwestern Pennsylvania area. The Toledo terminal, also some distance away, logically enough, made less than 20% of its shipments into the 23-county area.

Flintkote had two terminals, one at Middle Branch, Ohio and the other in Cleveland. The overwhelming majority of shipments from these terminals went into the 23-county area.

Medusa stated that "shipments into counties specified cannot be separated by plant or distribution facility." So its figures are not meaningful with respect to this issue.

We conclude, therefore, that the substantial suppliers to the 23-county area, did regard that area as significant to them. Thus, unlike *Tampa Electric,* what happened in that market did make a significant difference to them.

Conversely, the most persuasive evidence that distant sellers do

not regard this area (the 23-county area) as significant to them on a day-to-day basis, is their failure to ship much of their cement there.[11] Perhaps they could—but they choose not to. Since the sellers do not make significant shipments into this area, it is also reasonably clear that purchasers cannot practicably turn to suppliers in the vast section of the country which respondent proposes.

In addition, this record clearly establishes that the most substantial day-to-day market for cement producers is the local ready-mix market. (Tr. 311-312.) Cement suppliers for ready-mix concrete producers must operate almost on a stand-by basis, ready to ship additional cement on hourly schedules. To some extent, as respondent urges, the advent of truck delivery and the construction of terminal distribution points, has enabled distant producers of cement to extend their geographical markets and still meet such a demand. Moreover, as respondent points out, the admitted over-capacity in the cement business has in fact forced many producers to seek new geographical markets and to develop new techniques for entry into such markets, such as the "Bazooka" and the Flexi-Flo system.[12] But in order to present themselves as meaningful suppliers to such local markets, these distant firms depend not only on internal savings per unit achieved through increased production, but also on their ability to absorb costs incurred in shipping long distances. No one, on this record, has suggested that the costs saved by increasing production would on a regular basis overcome the significant freight costs incurred in shipping cement long distances. In fact, the record testimony indicates the opposite (Tr. 254, 256 and 471).

Witness after witness declared that today more cement was shipped by truck than by rail. The customer's demand that cement be immediately available had reduced sharply reliance on rail shipment. Thus, oftentimes the construction of a distribution terminal is a defensive maneuver to retain pre-existing customers, not an attempt to enter new markets. And as one witness put it "* * * one attempts always to distribute their major portion of their product, or all of it, in areas closely adjacent to the mill as is possible and, from that point beyond is where you reach out and get additional tonnage." (Tr. 889.)

[11] In *Crown Zellerbach* v. *F.T.C.*, 296 F. 2d 800, 808 (1961), the circuit court stated, "We think it is correct to say that the sales statistics rather than production figures are generally speaking more significant in arriving at the relevant market both as respects product and geographical area." As indicated previously, respondent argues that capacity figures are more meaningful than shipment or production figures. The Commission, however in *Permanente Cement Company*, Docket 7939, pp. 5 and 6 (April 24, 1964) [65 F.T.C. 410, 491-492], relied on and utilized shipment figures. Respondent's contentions have not convinced us that we were mistaken in that case.

[12] A detailed explanation of these techniques for rapid transportation to distant points is set out in the initial decision at pp. 26-28 [72 F.T.C. 728-729].

Another witness stated that the "only reason we would go to any distant point from our plant was because we weren't able to dispose of our product closer to our plant." (Tr. 913.) In short, although there is excess capacity and although new techniques have been utilized to dispose of the increased production in more distant markets, a significant majority of every cement plant's production is today and, for the foreseeable future, will be made available to and purchased by consumers located within a relatively short distance of the cement plant.

Respondent has placed some emphasis on the testimony of Dr. Richard Cyert, dean of the Graduate School of Industrial Administration at the Carnegie Institute of Technology. Given certain conditions, which he asserted to exist in this case, Dr. Cyert maintained that distant firms could be an effective force in what appeared to be a local market. Because of the existence of such factors here, the relevant geographical market should be expanded greatly. Without passing on the merits of Dr. Cyert's detailed contentions, our examination of the record indicates such expansion is not justified here.[13]

In *Philadelphia National Bank, supra,* the Supreme Court recognized the clash between theory and business reality on this very point, declaring:

> Theoretically, we should be concerned with the possibility that bank offices on the perimeter of the area may be in effective competition with the bank offices within; actually this seems to be a factor of little significance.[14]

Then it added that, "There is no evidence of the amount of business done in the areas by banks with offices outside the area. * * * As a practical matter the small businessman can only satisfy his credit needs at local banks. To be sure, there is some artificiality in deeming the four-county area the relevant 'section of the country' as far as businessmen located near the perimeter are concerned. But such fuzziness would seem inherent in any attempt to delineate relevant geographical market. * * * And it is notable that outside the four county area, appellees' business rapidly thins out."[15]

The court later noted that the market share percentages did not include "banks which do business in the four county area, but have

[13] Testifying in favor of the complaint was Dr. Samuel Loescher, an economist, specializing in the cement industry, who reached conclusions essentially opposite to those of Dr. Cyert. According to complaint counsel's proposed findings, Loescher testified that "the 23 county area [was] appropriate because it was the area where the merged companies competed prior to the acquisition and where there will be the loss of an actual and substantial source of supply. Dr. Loescher, in formulating his opinion, also took into consideration the impact of freight absorption, costs of solicitation and the ability to supply effective service [to] the market area of a cement plant." (Complaint Counsel's Proposed Findings, p. 27.)

[14] 374 U.S. at 359.

[15] *Id.* at 361, footnote 37.

no offices there; however, this seems to be a factor of little importance * * *.[16] To the extent that such a factor has importance in *this* case, shipments from plants and terminals outside the area into the area *are* included in the market share figures here.

Further, the Supreme Court has said again in *Philadelphia National Bank*, "The factor of inconvenience localizes banking competition as effectively as high transportation cost in other industries."[17] We note that there are few better examples of localized competition induced by high transportation costs than the cement industry.

Finally, the 23-county area contains several substantial urban areas including the vast Cleveland metropolitan area, Akron, Canton and Youngstown, Ohio and Erie, Pennsylvania. Such a market for cement is hardly *de minimis*. Cleveland, for instance, is located in Cuyahoga County, and in 1960 Standard had 37.76% of actual cement sales and Bessemer 10.25% of the actual cement sales in Cuyahoga County. Adding to the significance of the 23-county area, in judging the effects of the acquisition, is the fact that for many years prior to the acquisition, Standard sold 99 to 100% of its Standard Brand portland cement in the 23-county area. And, most importantly, shipments of seven of the eleven firms actually shipping into the area from the plants and distribution terminals *actually* located within the 23-county area, constituted 91% of total cement shipments to consumers within this area.

Respondent reminds us that "The recent Supreme Court opinions in *El Paso*, *Continental Can* and *Penn-Olin* give added emphasis to the significance of the potential suppliers not actually serving the 23 counties during the 1959-62 period." (Resp.'s Reply Brief, p. 8.)

But as this Commission recently said in the *Beatrice* case:

> * * * the adverse effects that result from an absence of *actual* competition are rarely cancelled out completely by the presence even of substantial potential competition. * * * Potential competition may tend to keep prices in a concentrated market down to entry-discouraging levels, but obviously the price low enough to dissuade a firm from trying to force its way into a new market —always a risky venture—may be substantially higher than the price that would prevail if there were vigorous competition among the sellers already there. *Beatrice Foods Co.*, Docket No. 6653, p. 29 (April 26, 1965) [67 F.T.C. 473, 717].

Under some circumstances, we would be concerned that we are condemning a merger between relatively small companies. But with competition localized as it is in the cement business, the competitive huffing and puffing of firms such as U.S. Steel, Pittsburgh Plate

[16] *Id.* at 364, footnote 40.

[17] *Id.* at 358.

Glass, etc., becomes more academic than actual. And so what appears on the surface to be a minor structural change in fact is one of some significance, in a somewhat restricted market area. Respondent has therefore made a strenous effort to destroy the 23-count area as a valid concept. But, although some of its arguments are impressive theory and prediction, there is little evidence, based on today's business realities, to support its position.

Once having defined the relevant market, within that area we find respondent's market share to be over 40% of the shipments made into that section of the country. This percentage far exceeds the standard of presumptive illegality of 30% set forth in *Philadelphia National Bank.*[18] The examiner stated that seven companies within this market area accounted for 93% of shipments; and, in addition, he found that "The cement structure in the United States has reflected a marked increase in the trend towards concentration by merger. During the period 1955 through 1961, there were 22 mergers involving cement companies." (I.D., p. 30 [72 F.T.C. 730].) Clearly, in these circumstances, the presumption of illegality established by *Philadelphia National Bank* is called into play.

The issue then is whether respondent has successfully rebutted this presumption. We hold that it has not. Briefly, while respondent's facilities may have required renovation or replacement, respondent has not proved that the challenged acquisition "was essential to [respondent's] continuing to be a competitive performer" (*Permanente Cement Company, et al.*, Docket No. 7939, p. 5 (April 24, 1964)) [65 F.T.C. 410, 491]. Nor has respondent shown that it could not or would not have found other means to remain an effective competitor. As the Supreme Court held in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 370 (1963), Section 7 is designed to channel the growth of a company dominant in a particular market towards internal expansion rather than corporate acquisition.

II

Even if the merger violated Section 7 when consummated, the disappearance of the Painesville plant from the 23-county area has not mooted the legality or illegality of Diamond's acquisition of Bessemer. At the time of the acquisition Diamond still had a substantial cement operation at Painesville, Ohio. Admittedly they were having trouble with it in many ways.[19] And, according to re-

[18] 374 U.S. at 364.

[19] The source of limestone was a few hundred miles away; the land on which the cement plant was located was subsiding; the equipment was somewhat old; and the repair crews were poorly utilized.

spondent, it had decided to sell the plant even prior to the time of the acquisition. Counsel for respondent argue that "by the middle of 1959 respondent's management recognized that it could not continue to produce cement at the Standard plant." (Resp.'s Proposed Findings, p. 11.)

Although both sections of the plant (A & B) were in operation at the time of the acquisition, after the 1961 shipping season plant A was closed down. And on August 31, 1964, three months after the hearing examiner's divestiture order, plant B was sold to a Florida cement producer. Now Diamond is completely out of the cement business at its former location.

Simply put, the issue is whether an acquiring firm by voluntarily disposing of the physical assets which prior to the acquisition had made it a substantial competitive factor and direct competitor of the acquired firm, may thereby shield itself from Section 7 of the Clayton Act.

Thus respondent has argued—in effect—that complaint counsel's case turns on the temporal fortuity of Diamond's first making the acquisition and then divesting itself of its physical assets. But even if Diamond had rid itself of the Painesville assets a substantial period of time before acquiring Bessemer, the Commission might still have issued this complaint. True, the Commission would then have been faced with a *fait accompli.* By selling the Painesville property—regardless of the reasons—Diamond would have demonstrated its clear intention to abandon the Painesville cement operation; yet it might still be a realistic potential competitor of Bessemer.[20] And more clearly, if Diamond had simply closed down its cement facilities—not selling or destroying them, but leaving them as a realistic competitive threat—then, in *Penn-Olin* terms, Diamond Alkali would have remained "at the edge of the market, continually threatening to enter."[21] In either of these instances, Diamond by subsequently acquiring Bessemer would be eliminating Bessemer as its own potential competitor.[22] On the other hand, if it had chosen to dispose of the Painesville facilities at the same time it acquired Bessemer, keeping its [Diamond's] sales force and its trade name intact, Diamond's acquisition might still violate Section 7. On the facts in this litigated case, it waited a substantial period of time

[20] Whether or not it was such a competitor would depend on the status of its brand name, the viable existence of its sales force, its desire and/or ability to obtain cement elsewhere and the lapse in time between disposing of its own assets and acquiring Bessemer. If there was a sufficiently long period of time between Diamond's divestiture of its own assets and if its sales efforts had been dormant for a substantial period of time, then perhaps Diamond would be viewed as a new entrant, and we would be presented at once with a novel and different problem than is at issue here.

[21] 378 U.S. 164, 173 (1964).

[22] It is clear, of course, that Diamond's withdrawal from the sales market would have resulted in its previously existing market share being seized by its competitors.

after the acquisition, taking care to obtain the utmost from its own facilities, at the same time coordinating these actions with a concurrent expansion of the Bessemer facilities and thereby not missing a step in the competitive gavotte.[23]

Of course, we are not ruling that Diamond does not have the right to withdraw its facilities from the market. For Diamond never really withdrew from the market and Bessemer has been eliminated as an independent competitive factor with its facilities fused onto Diamond's still existing market share.

Moreover, one could view Diamond's voluntary "divestiture" of its own physical assets as a form of post-acquisition evidence. Although Diamond clearly is under no obligation to stay in business, its destruction of one of its own plants and the sale of the remaining plant to another firm, completely outside the relevant market, was hardly a benefit to competition in the relevant geographic market. If anything, Diamond's actions with respect to its own cement producing assets might be viewed in a broad sense as anticompetitive. And such actions in a more narrow view have not *adversely* affected the Diamond-Bessemer operations since the acquisition. For even respondent admits that the Bessemer acquisition was and has been beneficial to Diamond. We conclude therefore that Diamond's actions have not mooted this case.

III

Remedy

In ordinary circumstances there should be no antitrust inhibitions against a firm taking itself out of a business, or disposing of obsolescent assets in order to retrench its position in an existing enterprise. We do not hold therefore that Diamond Alkali was forever obligated to cling to its obsolescent assets. But having acquired Bessemer, a substantial competitive factor, Diamond cannot then use its private corporate decision—to get rid of its cement producing facilities—to frustrate the Commission's obligation to protect competition. This is particularly true where (1) those former facilities were used to supplement Bessemer's production facilities and vice versa for a not insignificant period of time[24] and (2) where Diamond never went out of the business of *selling* cement.

[23] The hearing examiner found that before "any final decision had been reached as to the future conduct or abandonment of respondent's cement business, the acquisition of Bessemer was accomplished (Tr. 1616)." Thus the facts here obviate the necessity of our deciding "* * * whether the acquisition * * * was indispensable to [Diamond's] continuance as an active and effective competitor * * *." *Permanente Cement Company, et al., supra.*

[24] The Standard brand was put on cement manufactured at Bessemer; and Bessemer "Clinker" was ground at Painesville and labeled as Standard Cement. Respondent from the time of the acquisition forward was producing cement at and shipping cement from whichever facilities—Painesville or Bessemer—returned the greatest profit to it. (See Tr. 285-289.)

We have searched for precedents bearing on this issue. The issue appears to be, however, one of first impression.

Whether this agency has the power to deal with this remedial problem might be seen as a variant on the "after acquired" property issue. For here, the acquiring firm, instead of improving the acquired company—has divested itself of allegedly obsolescent assets. In *Reynolds Aluminum*, we held that this agency in fact does have the power to order firms to divest themselves of after acquired property. (*In the Matter of Reynolds Metals Company*, 56 F.T.C. 743 (1960).) We were, however, reversed on this issue (*Reynolds Metals Company* v. *F.T.C.*, 309 F. 2d 223 (D.C. Cir. 1962)). Until recently, this was the only clear court holding on this issue under Section 7. Alcoa, however, has, within the past few months, sought Supreme Court review of that part of a lower court's order requiring divestiture of an aluminum fabricating plant built two years after the acquisition. (*U.S.* v. *Alcoa* (Cupples Acquisition), 33 U.S.L. Week 3369 (May 18, 1965).) But we are not persuaded that either of these cases casts much light on the problem.

On the surface, at least, the Commission's decision in *Ekco Products Company*, Docket No. 8122 (April 21, 1964), 65 F.T.C. 1163, offers more aid. There, the Commission commented broadly that, "There may, to be sure, be cases in which the disappearance of the particular acquired assets removes the threat to competition posed by the merger * * *." (P. 1216.) Here, the disappearance of certain physical assets of the *acquiring* company, respondent urges, also moots the remedial problem. The distinction, we suggest, is that there is obviously more to the cement business than simply producing cement. The "disappearance" of Diamond's cement plants in no way took Diamond out of the business of *selling* cement.

We conclude, therefore, that neither *Ekco* nor *Reynolds* are dispositive of our problem. Any solution must lie in the broad remedial powers inherent in the Commission's mandate to maintain competitive conditions through enforcement of Section 7. The Supreme Court has declared: "* * * the Government cannot be denied the latter remedy [complete divestiture] because economic hardship, however severe, may result. Economic hardship can influence choice only as among two or more effective remedies." (*U.S.* v. *E.I. duPont de Nemours & Co.*, 366 U.S. 316, 327 (1961).)

It is with the thought that divestiture may not be the *only* effective remedy that we have decided to allow respondent and counsel in support of the complaint to file proposed orders containing alternative remedies. And to aid both counsel in this task, we offer the following thoughts and suggestions.

Diamond's president has sworn (see affidavit filed with Respond-

ent's Reply Brief, pp. 32, 33) that his firm will not remain in the cement business if forced to sell Bessemer. And thus Diamond argues, at least implicitly, that any divestiture will not restore the competitive status quo, *i.e.,* there will still be only one firm where there previously were two. So, at best, respondent urges, forcing it to sell Bessemer will only substitute one ownership for another. We have concluded, however, that Diamond should have an opportunity to reconsider its decision to leave the cement business which was, after all, made in the heat of litigation.

But even if the number of firms is not restored, it is possible that Diamond-Bessemer could be sold to a company not in the cement business. And such an "outsider" might prove a more adventurous competitor than Bessemer or Diamond.

Assuming that Diamond decides to stay in the business of selling cement, it is possible that the Diamond and Bessemer operations might be "spun-off" from each other. If Diamond were unable to find new quarries[25] immediately, Bessemer could be sold as a unit with the new owners obliged to offer a requirement contract to Diamond for a 3-year period at an equitable price. Diamond, of course, could go elsewhere for its supplies but at least it would know that Bessemer was available as a source. Then also, any potential purchasers would have a substantial incentive to acquire Bessemer—a guaranteed market.

In sum, we have affirmed the examiner's decision on the merits and accompanying this opinion is an order in which we ask for proposed orders in line with the above discussion.

Order

The Commission having rendered its decision in this proceeding affirming the complaint, setting out its own reasons therefor and affirming the findings of fact contained in the initial decision; and

The Commission believing that respondent's counsel and complaint counsel should be given a further opportunity to address themselves to the problem of the form of order to be issued.

It is hereby ordered, That within thirty (30) days of the service of this order complaint counsel file alternative proposed form of order accompanied by a supporting memorandum. Within thirty (30) days of service of complaint counsel's proposed order, respondent shall file

[25] The two sales forces are still separate, each with a different manager; both trade names still exist. In addition, the examiner found that "Present reserve deposits are ample to meet the needs of Bessemer * * * for the next fifty years, allowing for a possible doubling of productive capacity." (I.D., p. 10. [72 F.T.C. 712]) Bessemer is, however, about to exhaust its present quarry. So Bessemer is looking for a new quarry on its property. Although the record sheds no light on this point, it might be feasible for both respondent and Bessemer to have quarries on Bessemer's property through respondent obtaining a *profit á prendre* from Bessemer's new owners.

its alternative form of order and supporting memorandum. Upon consideration of all materials submitted the Commission will enter a final order.

By the Commission, without concurrence of Commissioner MacIntyre.

SCHENLEY INDUSTRIES, INC., ET AL.

Docket 6048. Order and Opinion, Oct. 25, 1965

Order denying respondent's petition to reopen an earlier order of March 2, 1954, 50 F.T.C. 747, for the purpose of eliminating parts of the order relating to fixing prices, exchanging information, and using common officers among affiliated companies.

OPINION OF THE COMMISSION

Petitioners, Schenley Industries, Inc. (herein called Schenley), and its subsidiary, Affiliated Distillers Brands Corp. (herein called Affiliated), seek to have the proceedings in the above-captioned matter reopened for the purpose of modifying the order to cease and desist entered by consent on March 2, 1954 [50 F.T.C. 747]. Complaint counsel opposes the petition.

I

The complaint in this matter was issued on September 24, 1952. It named as respondents, Schenley, a predecessor of Affiliated, and seven other manufacturing and distributing subsidiaries and affiliates of Schenley.[1] The complaint charged that Schenley and its affiliates attempted to monopolize the sale and distribution of alcoholic beverages through the use of interlocking directorates, mergers, and other acts and practices, in violation of Section 5 of the Federal Trade Commission Act. The complaint alleged that some of the respondents competed with each other in the sale of alcoholic beverages and that as a result of mergers, acquisitions and consolidations, respondents had obtained power tending towards a monopoly in the sale and distribution of alcoholic beverages. Respondents were also charged with having combined and conspired to (a) fix prices, (b) exchange information for the purpose of maintaining prices, (c) obtain retail price maintenance, (d) use an affiliated and subsidiary corporate form as a means of fixing prices, (e) use common directors

[1] At the time of the proceedings Affiliated's name was Schenley Distributors, Inc. The other subsidiaries named as respondents were: Schenley Distillers, Inc., Melrose Distillers, Inc., Gibson Distillers, Inc., The Straight Whiskey Distilling Company of America, Three Feathers Distributors, Inc., Brandy Distillers Corporation and Bernheim Distilling Co. After the entry of the consent order, all of these subsidiaries and affiliated companies were dissolved, with the exception of Affiliated.

as a means of fixing prices, (f) use affiliated and subsidiary corporations as a common means of distribution for the purpose of fixing prices, (g) enforce illegal resale price maintenance agreements, (h) preclude distributors from selling or handling competing products, (i) acquire corporations for the purpose of contributing to their monopolistic position, and (j) hinder unduly the operations of competitors by attempting to cut off access to sources of supply of products used in the manufacture of alcoholic beverages.

After more than a year of pleadings and negotiations, respondents entered into a consent settlement of this matter. Under the order as entered (which represented a substantial modification of the original order attached to the complaint), respondents agreed, among other things, to cease and desist from engaging in any conspiracy or combined action between themselves or with any other wholly or partly owned subsidiary or affiliated concern engaged in competition in the sale of alcoholic beverages to third parties, to do or perform any of the following:

(1) Raise, fix, stabilize or maintain prices;

(2) Discuss, confer or exchange information for the purpose or with the effect of establishing or maintaining prices, terms or conditions of sale, or of securing adherence to prices, terms or conditions of sale;

(3) Exchange information with or meet with any retail liquor dealer for the purpose of reaching agreement as to the employment of any resale price maintenance contract or arrangement;

(4) Use common directors or officers as a means of raising, fixing, stabilizing, or maintaining prices;

(5) Enter into any resale price maintenance contract or arrangement, or police, enforce, or attempt to police or enforce any such contract or arrangement.

Petitioners now seek by their proposed modification to eliminate points 1, 2 and 4 of the order.

II

Section 3.28(b)(2) of the Commission's Rules of Practice for adjudicative proceedings provides that:

> Whenever any person subject to a decision containing an order to cease and desist which has become final is of the opinion that changed conditions of fact or law require that said decision or order be altered, modified or set aside, or that the public interest so requires, such person may file with the Commission a petition requesting a reopening of the proceedings for that purpose.

Schenley claims that the requested modification of the order is necessary in order to enable it to reorganize its present marketing

structure and establish marketing subsidiaries which it claims it cannot do under the terms of the present order. In support of its petition, Schenley further claims that the instant order impairs its ability to compete and threatens its future operations due to the changed market conditions which have taken place in the industry since the entry of the order. Schenley also claims that it has lost market position, that its competitors are not under similar restrictions, and that the modification is specifically necessary to enable it to market a Tennessee whiskey through a separate subsidiary which is the form of organization employed by its principal competitor in the sale of this type of whiskey.

Attached to respondents' petition is a series of charts and graphs indicating the shifts in a sales volume from 1954-1964 as between various types of liquor and as between domestic and imported brands. These charts demonstrate Schenley's share of the market as a whole and its share of specific types of liquor during this 10-year period. Other charts show specific market data respecting the sale of Tennessee whiskey. A statement of Schenley's net income and accounts receivable as compared with other industry members is also attached. The sum total of this information is that Schenley's accounts receivable as a percentage of sales have increased in the last decade more than the average of its competitors, that its net income after taxes is substantially below two out of the seven other members of this industry, that demand for Tennessee whiskey has increased at a rate of three times that of total domestic whiskey, that Schenley's percentage of sales of all distilled spirits except scotch and Canadian whiskey have declined approximately 3% in this 10-year period while the industry total has increased.

We fail to see how this information constitutes a showing of changed conditions of fact, one of the requisites, under the Commission's Rules, for a modification of an outstanding order. While there apparently have been some changes in the overall distilled spirits market and in Schenley's position in the market, this in and of itself is not a sufficient basis on which to conclude that the order is inapplicable and should be modified. We believe that it is incumbent upon a respondent to demonstrate how the changes in market conditions which have taken place since the enactment of the order makes its continued enforcement inequitable. This petitioners have failed to do. They have not shown that the enactment of the order in any way caused the market conditions of which they now complain, or that the order has prevented them from adequately coping with these changed conditions.

Furthermore, petitioners have failed to show how the requested modification would enable them to meet these changed market con-

ditions. In this connection, we should point out that, as Commission counsel has noted in its brief, there is nothing now in the order which actually prevents Schenley from establishing marketing or any other kinds of subsidiaries or affiliated concerns as such. What the order does prohibit is any combination or consultation with respect to price and related matters between Schenley and any of its subsidiaries or affiliated concerns which are competing with Schenley or with each other in the sale of alcoholic beverages. This was precisely what the original complaint giving rise to the instant order charged that Schenley was doing in violation of law. Little would be accomplished if through modification we permitted Schenley to return to the same form of organization which apparently gave rise to the practices previously condemned.

In reliance upon the criteria of changed conditions of law, Schenley argues that the order is directed towards prohibiting intracorporate conspiracies and suggests that the current validity of the case law respecting the vulnerability of such conspiracies under the antitrust laws is at best questionable. We do not find any such vulnerability in the case law respecting intracorporate conspiracies.[2] We do not agree with respondent that there has been a change in law in this area of intracorporate conspiracy nor that the doctrine has been discredited over the years since 1951.

The order was the product of substantial negotiation and covered substantially fewer activities than had been originally charged as violations of law in the complaint. Its terms were apparently carefully tailored to the decision in the *Kiefer-Stewart* case, *supra*, where, in commenting upon the justification and rationale of the rule, the Supreme Court made the following observation:

> Respondents next suggest that their status as "mere instrumentalities of a single manufacturing-merchandising unit" makes it impossible for them to have conspired in a manner forbidden by the Sherman Act. But this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. . . . The rule is especially applicable where, as here, respondents hold themselves out as competitors.

[2] The principal authority for the proposition that there can be a conspiracy between affiliated corporations is the Supreme Court's opinion in *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), where the requirement that various controlled taxicab operating companies purchase their taxicabs from the manufacturing affiliate was held to state a cause of action under the Sherman Act. In a subsequent case, the Supreme Court held that distributing subsidiaries of a single manufacturing unit had conspired with each other to sell only to those wholesalers who would resell at prices fixed by the defendants. *Kiefer-Stewart Co.* v. *Seagram*, 340 U.S. 211 (1951). The intra-enterprise conspiracy doctrine was also followed in *Timken Roller Bearing Co.* v. *U.S.*, 341 U.S. 593 (1951). More recently the existence of the intra-enterprise conspiracy doctrine was recognized by the courts in *Balian Ice Cream Co.* v. *Arden Farms Co.*, 104 F. Supp. 796, *aff'd* 231 F. 2d 356 (9th Cir. 1952), *cert. denied*, 350 U.S. 991 (1956); *U.S.* v. *Arkansas Fuel Oil Co.*, 1960 Trade Cases, Par. 69,619 (D.C. Okla., 1960); and *Aerojet-General* v. *Aero-Jet Products*, 1963 Trade Cases, Par. 70,803 (D.C. Ohio, 1963).

On the basis of the facts presented in the instant petition, we hold that respondents have not made a sufficient showing of the need to modify this order, and accordingly we deny their petition. We also deny petitioners' request for oral argument since we do not believe that this is the appropriate vehicle to remedy the deficiencies in the instant petition, and we do not see that any other purpose could be served by oral restatement of the facts now contained in the petition.

Commissioner Elman dissented. In his view the petition and answer raise substantial issues of fact and law upon which respondent should be afforded a hearing, in accordance with Section 3.28(b) of the Commission's Rules of Practice.

Commissioner MacIntyre did not participate.

Order Denying Petition to Reopen Proceedings for the Purpose of Modifying Order to Cease and Desist and for Oral Argument

This matter having been considered by the Commission upon the petition of respondents to reopen proceedings for the purpose of modifying the order to cease and desist entered on March 2, 1954 [50 F.T.C. 747], and to present oral argument thereon, and the opposition thereto of counsel supporting the complaint, and the Commission having determined, for the reasons stated in the accompanying opinion, that the petition of respondents should be denied:

It is ordered, That the petition of respondents to reopen and modify the order to cease and desist, and to present oral argument thereon be, and it hereby is, denied.

Commissioner MacIntyre not participating. Commissioner Elman dissents. In his view the petition and answer raise substantial issues of fact and law upon which respondent should be afforded a hearing, in accordance with Section 3.28(b) of the Commission's Rules of Practice.

ALLEGHANY PHARMACAL CORP. ET AL.

Docket 7176. Order, Nov. 15, 1965

Order reopening proceedings and referring case to a hearing examiner for him to report findings, conclusions and recommendations to the Commission.

Amended 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 Alleghany Pharmacal Corp., a corporation, Harry Evans and Vincent J. Lynch, in-

dividually, and Chester Carity, individually and as an officer of said corporation, hereinafter referred to as respondents, have 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, in amendment of and in substitution for its complaint issued in Docket No. 7176, June 27, 1958, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Alleghany Pharmacal Corp. is a corporation duly organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 16 West 61st Street, in the city of New York, State of New York. Respondents Harry Evans and Vincent J. Lynch are, or were, officers of the corporate respondent. Respondent Chester Carity is an officer of the corporate respondent. This individual dominates, controls and directs the policies, acts and practices of the respondent corporation, including the acts and practices hereinafter set out. The address of the individual respondent is the same as that of the corporate respondent.

PAR. 2. Said respondents are now, and have been for some time, engaged in the sale and distribution of a preparation which is a drug as the term "drug" is defined in the Federal Trade Commission Act.

The designation used by respondents for their said preparation, and, according to its label, the active ingredient thereof and directions for use are as follows:

Designation: "Hungrex with P. P. A."

Active Ingredient:

Phenylpropanolamine hydrochloride — each tablet containing 25.0 mg. thereof.

Directions:

Adults: 1 tablet ½ hour before each meal. To be swallowed with water and juices. Do not take more than 3 tablets in any 24 hour period.

CAUTION: Should not be used by persons with heart or thyroid disease, high blood pressure or diabetes except on medical advice.

PAR. 3. Respondents cause the said preparation, when sold, to be transported from within the State of New York to purchasers thereof located in various other States of the United States and the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their said business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said preparation by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines and other adver-

tising media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation; and have disseminated, and caused the dissemination of, advertisements concerning said preparation by various means, including, but not limited to, the aforesaid media, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical of the statements and representations contained in said advertisements, disseminated as hereinabove set forth, are the following:

SAFE REDUCING DRUG
ORDER TODAY * * *
LOSE WEIGHT BY FRIDAY

> Just take a tiny Hungrex tablet before meals * * * and banish those hated extra pounds as you banish hunger! Why? Because Hungrex is the most powerful reducing aid ever released for public use without prescription! * * * Lose Weight the First Day! * * * if you're tired of halfway measures and want really effective help in reducing * * * send for Hungrex today * * * You'll be slimmer next week or your money back.

PAR. 6. Through the use of said advertisements,and others similar thereto not specifically set out herein, respondents have represented, and are now representing, directly and by implication:

1. That the preparation is safe to use by all obese persons;

2. That the preparation is an effective appetite depressant and weight-reducing agent;

3. That the preparation is adequate and effective in the treatment, control and management of obesity.

PAR. 7. In truth and in fact:

1. The preparation is not safe to use by all obese persons having heart disease, high blood pressure, diabetes, or thyroid disease;

2. The preparation has no significant pharmacological value as an appetite depressant or weight-reducing agent;

3. The preparation is not adequate or effective in the treatment, control or management of obesity.

Therefore, the advertisements referred to in Paragraph Five were and are misleading in material respects and constituted and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act.

PAR. 8. In the issuance of this, its amended complaint, the Federal Trade Commission is cognizant of and takes official notice of those proceedings in the United States District Court for the District of New Jersey entitled "The United States of America v. 60 28-Capsule Bottles, More or Less, and 47 7-Capsule Bottles, More or Less, of

an article of drug labeled in part: 'UNITROL * * *' " (211 Federal Supplement 207, September 27, 1962, affirmed, 325 Federal Reporter 2nd Series 513, December 3, 1963).

PAR. 9. The dissemination by the respondents, as aforesaid, of said false advertisements constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

ORDER REOPENING PROCEEDINGS

Pursuant to the authority granted in Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), respondents were served on June 15, 1965, with an order giving them opportunity to show cause why the Commission should not reopen this proceeding, vacate and set aside the order to cease and desist issued November 7, 1958 [55 F.T.C. 705], amend the complaint as per a draft of amended complaint accompanying that order, and enter the order attached to the draft of amended complaint after appropriate proceedings. On July 12, 1965, respondents filed their answer, *inter alia,* denying factual allegations contained in the order to show cause and the proposed amended complaint.

Upon full consideration of all of the circumstances, including respondents' answer to the order to show cause, the Commission has determined that it would be in the public interest to reopen this proceeding and to issue the amended complaint accompanying this order. We have also determined that it would not be in the public interest to vacate the outstanding order to cease and desist at this time, that vacation, amendment or modification of that order, if any, that may be determined to be appropriate should be made as part of the final disposition of this matter. Accordingly,

It is ordered, That this proceeding be, and it hereby is, reopened, and that the amended complaint accompanying this order be, and it hereby is, issued; and pursuant to § 3.28(b) (3) of the Rules of Practice,

It is further ordered, That this matter be assigned to a hearing examiner for hearings to be conducted in accordance with Subparts C, D, E and F of the Rules of Practice. Upon conclusion of the hearings, the hearing examiner shall certify the record, together with a report of his findings, conclusions and recommendations with respect thereto, to the Commission for final disposition. The hearing examiner's report shall be served upon the parties in the same manner as an initial decision and the parties are granted rights of appeal therefrom in accordance with the provisions of § 3.22 of the Rules of Practice.

THE J. B. WILLIAMS COMPANY, INC., ET AL.

Docket 8547. Order and Opinion, Nov. 23, 1965

Order denying respondents' request for reconsideration of an order of Sept. 28, 1965, for the purpose of deleting certain paragraphs which require affirmative disclosure in the advertising of Geritol.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

Respondents have filed a petition for reconsideration of the Commission's decision and order which issued in this matter on September 28, 1965 [68 F.T.C. 481]. Specifically, respondents request that five paragraphs of the order be deleted and that one paragraph be amended. In the alternative, respondents request that they be granted an additional period of forty-five days to file supplemental briefs and that they be permitted to present oral argument in support of their request.

Procedurally, respondents base their request on § 3.25 of the Commission's Rules of Practice which provides that after completion of service of a Commission decision, a party may file a petition for reconsideration, setting forth the relief desired and the grounds in support thereof. The rule further provides that "Any petition filed under this subsection must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission."

Respondents concede that the first three paragraphs of the order to which they object, paragraphs numbered 1(a), 1(b) and 1(c), relate to the same alleged misrepresentations covered in paragraph numbered 1(d). They do not dispute that the practice covered by paragraph numbered 1(d) was properly before the Commission and was fully tried and argued. Rather, it is their contention that these first three paragraphs either add nothing or are inconsistent and are therefore unnecessary. This argument goes solely to the Commission's discretion in formulating a proper remedy to eliminate a practice which it has found to be unlawful. It is well settled that the framing of an appropriate order is entirely a matter for the Commission's determination upon the facts of record. As stated by the Supreme Court in the *Ruberoid* case, "Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices."[1] A respondent may, of course, present argument as to the terms of an order to be entered in any matter

[1] *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952).

pending with the Commission for final decision. However, once the Commission has considered these arguments in the light of the facts of record, its judgment as to the proper remedy may not serve as grounds for reconsideration of the order under § 3.25.

Since we have before us respondents' argument as to the first three paragraphs, we have given consideration thereto and we conclude that the grounds they have advanced in support of their request for deletion are without substance. As we have stated, respondents recognize that these three paragraphs relate to the same unlawful practice leading to paragraph numbered 1(d) of the order which requires an affirmative disclosure in Geritol advertising. However, they contend that because of inconsistency and ambiguity, they cannot determine the meaning of these three paragraphs, measure them against the record, or determine their legal propriety. Respondents negate their own argument by their reference to page 547 and footnote 9 of the Commission's opinion. Therein, the Commission's purpose in including the three paragraphs in question, and the meaning to be accorded them, are fully set forth. While respondents urge that this purpose could be accomplished by amendment of paragraph 1(d), this is not grounds for setting aside the paragraphs to which they object.

Respondents advance three arguments in support of their request that two other paragraphs of the order, paragraphs numbered 1(e) and 1(f), be deleted. In substance, these paragraphs prohibit respondents from representing: 1(e) that the tiredness symptoms are generally reliable indications of iron deficiency anemia, and 1(f) that the presence of iron deficiency anemia can be self diagnosed or can generally be determined without a medical test conducted by a physician.

Respondents first contend that these paragraphs "stray far beyond the issues actually tried." However, this ignores the fact that one of the principal issues in this case is the interpretation to be accorded to respondents' advertising. This issue was fully litigated and was the subject of proposed findings submitted to the hearing examiner by both parties. That the case was tried on an interpretation which found the representations prohibited by paragraphs numbered 1(e) and 1(f) to be implicit in respondents' advertising is reflected in finding numbered 20 in the initial decision wherein the examiner stated:

20. We believe that the consumer upon hearing, viewing, or reading respondents' advertisements may reasonably be expected to conclude that his tiredness and run-down feeling will respond to the taking of Geritol, and that he may reasonably conclude that his symptoms are the result of iron deficiency or vitamin deficiency, or both. He may further reasonably be expected to conclude that the heeding of the suggestion "check with your doctor" is unnecessary

because there is a clear implication in the advertisement that the symptoms enumerated may well be those of iron deficiency. * * *

Respondents' argument that the two paragraphs deal with issues that were not tried is rejected.

Respondents next contend that paragraphs numbered 1(e) and 1(f) must be deleted for failure of proof. Obviously, respondents rest this argument upon a conclusion that their first contention is valid. However, having established that the issues dealt with in the two paragraphs were fully tried, the adequacy of the proof in support of these issues is not a question which respondents did not have an opportunity to argue, as required by § 3.25 of the Rules. Moreover, we note that both parties proposed findings to the hearing examiner on the evidence in the record relating to both of these issues.[2]

With reference to respondents' second argument, it appears that they have misconstrued the provisions of paragraph numbered 1(e). To avoid any misunderstanding we wish to make it clear that the prohibition against representations that tiredness symptoms are generally reliable indications of iron deficiency anemia is based on our finding that these symptoms are common to many more prevalent conditions than iron deficiency and therefore cannot be relied upon to indicate that condition.

Respondents' third argument is that paragraphs numbered 1(e) and 1(f) are ambiguous in that terms have been introduced which have not been defined. In substance, respondents would have us set aside these two paragraphs on the grounds that terms such as "self diagnosed" and "generally reliable indications" are too complex. We do not believe that these terms require specific definition, particularly when considered against the background of the highly technical terms used in the trial of this case. As the Supreme Court has stated: "We think that no one would find ambiguity in this language who concluded in good faith to abandon the old practices."[3]

In addition to requesting deletion of five paragraphs of the order, respondents also request that paragraph numbered 1(d) be modified. There can be no question that respondents were granted every opportunity to, and did, argue the terms of this paragraph. In fact, they specifically objected to that language in the hearing examiner's order which, as a result of its deletion by the Commission, leads to their present request. They were well aware of the extent of the order should the objectionable language be deleted. The fact that

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[2] For example, pages 42-52 of respondents' proposed findings and page 23 of complaint counsel's proposed reply findings relate to paragraph numbered 1(f) of the order and pages 61-63 of respondents' proposed findings and page 31 of complaint counsel's proposed findings relate to paragraph numbered 1(e).

[3] *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948).

they did not avail themselves of the opportunity to advance their present argument on appeal from the initial decision is not grounds for reconsideration. Moreover, the modification proposed by respondents is designed to permit certain claims for Geritol without the affirmative disclosure requirements of paragraph numbered 1(d) when the advertising is directed to certain subgroups of the general population. However, the evidence discloses that respondents have never directed their advertising exclusively to these subgroups nor have they demonstrated that it is practical, or their intention, to do so. If in the future, respondents desire to confine their advertisements within the bounds of their present request, they have recourse to the Commission under its established Rules of Practice for appropriate modification of the order.[4]

As an alternative to their request for deletion and modification of the order, respondents request an additional period of forty-five days to file a supplemental brief, and ask leave to present oral argument. Specifically, respondents state that they desire the additional time in order to file a detailed brief summarizing the record on the specific points they have raised. The Commission has fully considered this request and is of the opinion that it is sufficiently informed as to the grounds relied upon by respondents so that further analysis of the record and oral argument on the request would serve no useful purpose.

For the reasons stated, the Commission concludes that respondents' petition must be denied. An appropriate order will be entered.

Order Denying Petition for Reconsideration

Respondents, by petition filed October 21, 1965, having requested the Commission to reconsider its decision and order issued herein on September 28, 1965 [68 F.T.C. 481], and delete or modify certain paragraphs thereof or, in the alternative, grant leave for the filing of supplementary briefs and oral argument, and counsel supporting the complaint having filed an answer in opposition thereto; and

The Commission having considered said petition and, for the reasons stated in the accompanying opinion, having determined that respondents' requests should be denied:

It is ordered, That respondents' petitions for reconsideration and their alternative request for leave to file supplementary briefs and for oral argument be, and they hereby are, denied.

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[4] *Giant Food* v. *Federal Trade Commission*, 322 F. 2d 977 (D.C. Cir. 1963); *Vanity Fair Paper Mills* v. *Federal Trade Commission*, 311 F. 2d 480 (2d Cir. 1962).

THE ELMO COMPANY, INC.

Docket 5959. Order, Dec. 1, 1965

Order vacating show cause order and referring case to hearing examiner for receiving evidence on question of whether there is sufficient change of law or fact to require setting aside of original order.

ORDER VACATING ORDER TO SHOW CAUSE AND REOPENING PROCEEDING TO DETERMINE WHETHER A CHANGE OF LAW OR FACT OR THE PUBLIC INTEREST REQUIRES SETTING ASIDE CONSENT SETTLEMENT IN WHOLE OR IN PART

The Commission on June 10, 1952 [48 F.T.C. 1379], having issued an order to cease and desist in accordance with a consent agreement executed by respondent and counsel in support of the complaint; and

It appearing that said order requires respondent, in connection with the offering for sale, sale, or distribution of various drugs and devices, known collectively as "Elmo's Home Treatment" to cease and desist from:

1. Disseminating or causing to be disseminated any advertisement (a) by means of the United States mails or (b) by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said preparations and device, which advertisement represents, directly or through inference:

(a) That the use of its preparations and device, singly or in combination, as directed, or otherwise, will have any beneficial effect upon deafness not caused by a catarrhal condition of the nose, ear or air passages.

(b) That the use of its preparations and device, singly or in combination, as directed, or otherwise, will have any beneficial effect in the treatment of deafness, impaired hearing, or head or ear noises caused by discharging catarrh, in excess of affording temporary relief therefrom.

(c) That the effects of its preparations in the treatment of deafness or impaired hearing or head or ear noises due to dry catarrh is in excess of softening of the dry exudates, or that any benefit can be expected by reason of this action of respondent's preparations in the treatment of conditions caused by dry catarrh of the ear canal unless the softened exudates are removed by other means.

(d) That said preparations and device constitute a method of treatment based upon the findings of accepted medical authorities.

(e) That catarrh is the most common cause of deafness.

(f) That Elmo Ear Oil No. 1 or Elmo No. 8 Ear-Vibrator are harmless or may be used without ill effects.

2. Disseminating or causing to be disseminated any advertisement (a) by means of the United States mails or (b) by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of respondent's aforesaid Elmo Ear Oil No. 1, which advertisement fails to reveal that the cotton on which the product is used should not be pushed into the

ear so far that it cannot be easily removed with the fingers, and that when infection is present, the use of cotton in connection with said product when pushed deeply into the ear may result in injury to the ear, including the extension of any infection therein present into the deeper structures of the ear.

3. Disseminating or causing to be disseminated any advertisement (a) by means of the United States mails or (b) by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of Elmo No. 8 Ear-Vibrator, which advertisement fails to reveal that, when infection is present in the ear, the use of this device may result in extending such infection into the deeper structures of the ear and in serious injury.

4. Disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of said preparations and device in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any representations prohibited in paragraph 1 hereof, or which fails to comply with the affirmative requirement set forth in paragraphs 2 and 3 hereof.

It further appearing to the Commission that The Drive-X Company, a corporation, and its officers, Craig Sandahl and Richard Johann, are the successors to The Elmo Company, Inc., and are bound by the aforementioned order to cease and desist in the same manner and to the same extent as the corporate predecessor; and

It further appearing to the Commission that subsequent to the issuance of the said order to cease and desist, respondent revised its advertisements for the said drugs and devices to conform to the requirements of the order, and thereafter continued, and is at present continuing, advertisements for its products which represent, directly or by implication, that its drugs or devices, when used in combination as directed, will cure or constitute an effective treatment for poor hearing, ear and head noises, and so-called "catarrhal" conditions of the head; and

On the basis of the expert medical opinion with which it has recently been furnished, the Federal Trade Commission now having reason to believe that, in truth and fact, the aforementioned drugs and devices will not cure or have any beneficial effect on hearing loss, ear and head noises, or so-called "catarrhal" conditions of the head, and accordingly, that respondent's advertisements are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act; and

The Federal Trade Commission having authority under Section 5(b) of the Federal Trade Commission Act to reopen a proceeding whenever, in its opinion, conditions of fact or law have so changed as to require such action or the public interest so requires, and after appropriate proceedings to alter, modify, or set aside, in whole or in part, its order previously entered; and

The aforesaid agreement for consent settlement having provided that the Commission's order may be set aside in whole or in part under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice then in effect; and

It further appearing to the Commission that the Order To Show Cause Why Proceeding Should Not Be Reopened issued on September 16, 1965, should be vacated; accordingly,

It is ordered, That the "Order To Show Cause Why Proceeding Should Not Be Reopened" issued on September 16, 1965, be, and it hereby is, vacated; and

It is further ordered, On the Commission's own motion that the proceeding in Docket No. 5959 be, and it hereby is, reopened, and that the matter be referred to a hearing examiner for the purpose of receiving evidence to determine whether a change of law or fact, or the public interest, requires that the consent settlement be set aside in whole or in part; and

It is further ordered, That the proceeding be conducted pursuant to the Commission's Rules of Practice For Adjudicative Proceedings insofar as those Rules are applicable; and

It is further ordered, That the hearing examiner, upon the conclusion of the hearings, certify the record, together with a report of his findings, conclusions and recommendations with respect thereto, to the Commission for final disposition.

BEATRICE FOODS CO. AND THE KROGER CO., INC.

Docket 8663. Order and Opinion, Dec. 1, 1965

Order denying respondents' joint request to appeal from hearing examiner's denial of their motion for early trial or dismissal, and his order for production of documents; Kroger's appeal from examiner's taking official notice of certain facts granted.

DISSENTING OPINION

BY ELMAN, *Commissioner:*

The examiner's orders involved in this interlocutory appeal will have the effect of delaying the hearing for a year, if not longer. The Commission's present Rules of Practice, adopted in 1961, were designed to encourage expeditious hearings and to avoid delay. The purpose of an adjudicative proceeding is to adjudicate the issues raised by the complaint; and not to provide a springboard for continuing investigation of other possible violations by the respondent. Nor can the doctrine of official notice be invoked as a substitute

for "adequate probative analysis" and "realistic appraisals of relevant competitive facts" (*F.T.C.* v. *Sun Oil Co.*, 371 U.S. 505, 527). I would vacate the examiner's orders and direct him to proceed to a trial of the case without further delay.

ORDER RULING ON REQUESTS FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

This matter has come on to be heard upon a request jointly made by the respondents for permission to file an interlocutory appeal from the examiner's orders of October 25 and 26, 1965, requiring them to produce documents and denying respondent Beatrice's motion to set the case down for early trial or to dismiss and also upon a request by respondent Kroger for permission to file an interlocutory appeal from the hearing examiner's order of October 29, 1965, granting in part complaint counsel's request for the taking of official notice. Complaint counsel has filed statements opposing the requests.

First to be considered is the question on the production of records. The material to be produced by Beatrice, mostly covering designated periods from 1962 to 1964, includes books, records, documents or verified summaries thereof showing net prices charged to Kroger for cottage cheese in designated size containers delivered to the stores of Kroger's Charleston division, other information relative to sales volumes, prices and concessions for cottage cheese and milk, names and addresses of certain officers, employees and agents, sources of supply of dairy products and Beatrice's annual reports. The material ordered to be produced by Kroger, for similar periods, includes certain designated advertisements, information as to prices and concessions granted to Kroger by Beatrice, designated grocery sales plans published by Kroger, market letters referring to private label dairy products purchases and sales, Kroger annual reports and records revealing the names of personnel engaged in planning negotiations and other activities regarding the purchase and sale of dairy products for the Charleston division.

There is no issue here, as respondents contend, of the examiner sanctioning a new investigation or the continuation of an old one; he is only granting discovery as provided for in § 3.11 of the Commission's adjudicative Rules of Practice. Whether or not the request is merited is governed solely by the terms of that rule. The documents which were ordered produced by the examiner clearly constitute or contain evidence relevant to the subject matter covered by the complaint. There appears to be no question that such records are nonprivileged and that they are in the possession and control of the respondents. The examiner in effect concluded that as to part

of the documents good cause had been shown for their production and so he ordered them produced. His ruling is in harmony with our recent decision in *Associated Merchandising Corporation*, Docket No. 8651 (Order and Opinion Denying Respondents' Request for Permission To File Interlocutory Appeal, September 23, 1965 [p. 1175 herein]). Respondents have not shown that the examiner has abused his discretion nor have they made a showing, as required under § 3.20, of extraordinary circumstances where an immediate decision by the Commission is clearly necessary to prevent detriment to the public interest. Accordingly, permission to file an appeal will be denied as to the examiner's order for the production of documents.

The request as to the examiner's order denying the motion to set this cause for trial or to dismiss appears, in part at least, to be a response to the request of complaint counsel for the production of documents. This will likewise be denied because similarly there has been no showing as required by § 3.20.

Secondly, we have for consideration respondent Kroger's request for permission to appeal from the examiner's order of October 29, 1965, taking official notice of certain designated facts. As to this, we believe the requirements of § 3.20 have been met and permission to appeal will be granted. Accordingly,

It is ordered, That the respondents' joint request for permission to file an interlocutory appeal from the examiner's order of October 25, 1965, denying requests for an early trial or alternatively dismissing the complaint and his order of October 26, 1965, ordering the production of documents, be, and it hereby is, denied.

It is further ordered, That the request of respondent Kroger for permission to file an interlocutory appeal from the examiner's order of October 29, 1965, taking official notice of certain facts, be, and it hereby is, granted.

Commissioner Elman dissenting.

AMERICAN BRAKE SHOE COMPANY

Docket 8622. Order, Dec. 9, 1965

Order granting respondent's appeal from hearing examiner's order excluding from six subpoenas certain data relating to competitive mechanical systems of braking employing friction materials.

ORDER GRANTING INTERLOCUTORY APPEAL

This matter is before the Commission upon respondent's appeal pursuant to § 3.17(f) of the Commission's Rules of Practice from

six orders of the hearing examiner, filed November 24, 1965, limiting the areas of inquiry under subpoenas *ad testificandum* issued on behalf of the respondent. The orders appealed from involve Clevite Corporation, Massey-Ferguson, Inc., Galion Iron Works & Mfg. Company, General Electric Company, Cincinnati Shaper Company and Sperry-Rand Company. Complaint counsel has filed a brief opposing the appeal.

The precise question is whether or not it was error for the examiner to exclude from the area of inquiry matter concerning alleged competition among mechanical systems employing "friction materials" to transmit, convert and retard motion and other systems which assertedly perform the same functions. Respondent asserts that the examiner's exclusion of the "competing systems" evidence was solely due to his determination that such evidence is not relevant. It is claimed that no suggestion was made that such inquiries would be unduly burdensome or that they would unduly delay the proceeding.

The hearing examiner, as we have pointed out in a previous order in this matter, has a broad discretion in the matter of discovery and that, except by a clear showing of an error in that discretion, the Commission will sustain him in his rulings. (Order Denying Appeal from Denial of Applications for Depositions and Subpoenas, issued September 1, 1965 [p. 1169 herein].) In this instance, though the relevance of the information sought is in controversy, where delay is apparently not an issue, where only six depositions already authorized are involved and where the request concerns only a limited extension of the areas to be covered in the scheduled depositions, we believe the examiner was unduly strict in his rulings. Accordingly,

It is ordered, That respondent's appeal from the examiner's orders filed November 24, 1965, be, and it hereby is, granted.

It is further ordered, That the hearing examiner, as to the authorized depositions herein, grant the respondent's request to inquire into the subject of "competing systems," provided that this will not result in a delay in the hearings now set to begin no later than January 4, 1966.

ALLEGHANY PHARMACAL CORP. ET AL.

Docket 7176. Order, Dec. 10, 1965

Order denying motion requesting that two individual respondents be omitted from the amended complaint charging false advertising of the drug "Hungrex."

ORDER DENYING RESPONDENTS' MOTION FOR RECONSIDERATION

The Commission issued its amended complaint and order reopening proceedings in the matter on November 15, 1965 [p. 1221 herein], charging that the above-named corporate and individual respondents had violated Sections 5 and 12 of the Federal Trade Commission Act in connection with the advertising of the weight-reducing capabilities of the drug Hungrex. On November 22, 1965, respondents filed a motion for reconsideration requesting that the amended complaint be dismissed as to two of the individual respondents, Harry Evans and Vincent J. Lynch. Counsel supporting the complaint has filed an answer opposing respondents' motion.

In support of their motion, respondents Evans and Lynch state that neither of them had any connection, directly or indirectly, with the corporate respondent or with the advertisements promulgated by it since April 1958. These respondents also point out that in November 1958 the original complaint was dismissed as to them in their capacities as officers of the corporate respondent since they had resigned their corporate officerships. Therefore, they contend that joining them in the amended complaint merely subjects them to unnecessary expense and serves no purpose as they are no longer associated with the corporate respondent.

The original order to cease and desist issued in this matter on November 7, 1958 [55 F.T.C. 705], does, however, apply to both Evans and Lynch in their individual capacities. In so doing, it was recognized that these respondents were no longer associated with the corporate respondent. Therefore, the mere fact that they are still no longer associated with the corporate respondent is not alone sufficient grounds for dismissing the instant complaint as to them. The amended complaint looks toward the broadening of the old order, not on the grounds of subsequent advertisements, but rather on the basis of additional information concerning the characteristics of the basic ingredient of the product. Since the old order is presently binding on these individual respondents, it is entirely proper that they are parties to the instant proceeding to broaden that order. Consequently, we believe that all of the respondents originally subject to the order are proper parties to the proceeding. Accordingly,

It is ordered, That respondents' motion be, and it hereby is, denied.

GRABER MANUFACTURING COMPANY, INC., ET AL.

Docket 8038. Order and Opinions, Dec. 13, 1965

Order denying respondents' motion for interrogatories and issuance of subpoenas directed to third party companies.

Opinion of the Commission

This matter is before the Commission upon the hearing examiner's order certifying to the Commission respondents' motion for answers to interrogatories, filed June 10, 1965; the respondents' appeal, filed June 16, 1965, from the hearing examiner's order denying deposition subpoenas; the hearing examiner's order certifying to the Commission respondents' application for issuance of subpoenas duces tecum, filed June 21, 1965; and the hearing examiner's order certifying to the Commission respondents' motion to dismiss the complaint or suspend the proceeding, filed June 16, 1965.

The complaint in this proceeding issued July 12, 1960, and the case is therefore governed by the Rules of Practice in effect prior to July 21, 1961, as far as the conduct of evidentiary hearings in this proceeding are concerned. See *Union Bag-Camp Paper Corporation*, Docket No. 7946, Order Ruling on Certified Question (September 23, 1964) [66 F.T.C. 1542]. At this time the case is in suspense, the proceedings before the hearing examiner having been stayed until further order of the Commission.

I

On March 22, 1965, respondents filed a motion for the issuance of subpoenas and for answers to interrogatories. We turn first to respondents' request that appropriate Commission employees be required to answer the interrogatories propounded and to produce the documents requested therein for inspection and copying. Collectively, the interrogatories are a broad and far-ranging request for information, including in some instances a demand for all documents of whatsoever a nature for the years 1945 to date, pertaining to various topics. The examiner's order of June 10, 1965, certifying this question, sets forth these requests in detail and it is sufficient at this point to outline their general scope.[1]

Respondents demand documents pertaining to the organization and interrelationship of Associated Merchandise Corporation (AMC), Aimcee Wholesale Corporation (AWC), and the Associated Merchandising Corporation stores, as well as such records reflecting control exerted by the AMC stores over AWC and AMC. The interrogatories also include a demand for documents reflecting information on the price charged to AMC stores and respondents' knowledge of and control or influence over such transactions. In addition, the interrogatories require documents reflecting extremely detailed information with respect to the operation and competitive position of respondents' competitors and alleged favored and nonfavored cus-

[1] Only the Commission may release information from its confidential files and requests for such data must be certified by the examiner. *Postal Life and Casualty Insurance Company*, 52 F.T.C. 651 (1956).

tomers, as well as on the transactions on which the Commission relies to establish competitive injury prerequisite to a finding of violation under Section 2(a) of the Robinson-Patman Act.

The interrogatories go further. They demand extensive information about the Commission's investigational sources and operations and go so far as to apparently probe the Commission's mental processes leading up to the institution of this proceeding.

For example, item 2 of the interrogatories would require the Commission to:

> Identify by name, address and company affiliation, each person who furnished or transmitted any of the documents in item 1 (a) through 1 (s) above; list the specific documents submitted by each; and state the date and when and the person to whom said documents were furnished or transmitted.

Item 12 of the interrogatories demands that the Commission:

> (a) Identify by name, address and company affiliation, each person interviewed or contacted by an attorney, agent, and/or representative of the commission with respect to any subject hereinabove referred to or with respect to the Graber Manufacturing Company, Inc., or The Graber Company.
>
> (b) Set forth the names of the attorneys, agents or representatives of the commissions who interviewed or contacted each of the persons listed in response to 12 (a) above and state the date of each such occurrence.
>
> (c) State the name of each person listed in 12 (a) above who submitted a written statement to any attorney, agent or representative of the commission.
>
> (d) Submit the original or true copy of the statement given by each of the persons listed in response to 12 (a) above or furnish a true copy of the written report made of any oral statement by any of said persons.

Items 1 (i) and 1 (j) would require the production of all documents evidencing:

> The commission's knowledge, approval, disapproval, inaction and/or acquiescence with respect to the activities, operations, or policies of AWC, AMC and/or the AMC stores.
>
> The commission's knowledge, approval, disapproval, inaction and/or acquiescence with respect to respondents' policies, practices and method of doing business with AWC, AMC and/or the AMC stores.

It is also significant that certain items apparently duplicate information already furnished to the respondents or request information to which they are already entitled as a result of the examiner's prehearing order filed December 11, 1964.[2]

The hearing examiner, as a result of an evidently careful consideration of respondents' request for interrogatories, recommends the motion be denied. The examiner properly recognizes that a crucial consideration in deciding this request is the fact that the

[2] See item 13 of respondents' interrogatories, requiring identification of each witness intended to be called to support the allegations of the complaint and a brief description of the subject of his intended testimony. Disclosure of this nature is already required by the hearing examiner's prehearing conference order filed December 11, 1964.

evidentiary hearings in this proceeding are governed by the rules in effect prior to July 21, 1961, and that this case is being tried at intervals under the old procedures. As a result, there is a lesser need to afford respondents pretrial discovery than under the current procedures. See *L. G. Balfour Co.*, Docket No. 8435, Order Directing Disclosure of Documents (May 10, 1963) [62 F.T.C. 1541].[3]

The examiner's recommendation took cognizance of respondents' contention that their discovery requests in the form of interrogatories are essential (1) to effectively implement respondents' right to a fair hearing, (2) to enable respondents to prepare adequately to cross-examine the Commission's witnesses, and (3) to obtain evidence to support respondents' meeting of competition defense.

The examiner states that he is not now in a position to determine what information is essential to a fair cross-examination, citing *Joseph A. Kaplan & Sons, Inc.*, Docket No. 7813, 57 F.T.C. 1537 (1960), *modified*, 347 F. 2d 785 (D.C. Cir. 1965). He further states that as far as respondents' need for the information outlined in the interrogatories for preparation of their affirmative defense is concerned, such necessity cannot be fully determined at this stage of the proceeding. We agree with the examiner that the necessity of additional data for the purposes of cross-examination over and above that already required by the prehearing order may appropriately be determined at the time the witnesses testify. As to the scope of the information required by respondents to prepare their defenses, since this case is being tried under the old procedures we feel that we should heed the advice of the examiner, who is closer to the situation than we—that such determination should await the close of the Government's case-in-chief.

The examiner, in making his recommendation to the Commission, also took into consideration the fact, and properly so, that much of the information sought was probably obtained from respondents' competitors and customers, that such data is sensitive and should be protected insofar as such protection is consistent with the public interest. See *Kaplan, supra*, 57 F.T.C. at 1538. The examiner made it evident that if the hearings in the course of the trial demonstrate that such information is necessary and proper for the resolution of

[3] As respondents themselves recognized in their motion filed November 13, 1961:

"Ordinarily, the procedures observed in Commission practice [under the old rules] facilitate respondents' advance preparation for cross-examination and defense presentation. The former is obtained through liberal adjournments coupled with a willingness to recall witnesses for cross-examination after counsel has had time to prepare therefor; the latter by providing an hiatus between the close of the case-in-chief and the defense.

"In effect such procedures function as respondents' depositions, discovery and inspection during the hearings themselves.

"That should be the case here. The complaint having issued prior to the effective date of the new Rules of Practice the former rules govern * * *."

the issues before him, then he will weigh the interest of the third parties in keeping their business records confidential against countervailing considerations. At the present time we agree there has been no showing of necessity for the respondents to have such extensive access to the business secrets of their competitors and customers as they now seek.

It is significant, as the examiner points out, that the nature, outline and substance of the evidence upon which the Government intends to rely will be fully disclosed to the respondents prior to the hearings as a result of the prehearing order. We have reviewed that order and we are confident that it gives respondents ample opportunity to prepare themselves for the trial of this case. Under the circumstances, there is no danger that respondents will be taken by surprise by complaint counsel's evidence or that they will be unable to prepare their evidence at the close of the Commission's case-in-chief.

Furthermore, certain of respondents' interrogatories on their face appear to go beyond what is either required for the preparation of cross-examination or to prepare for their defense. For example, items 2 and 12 (a) would apparently require the Commission to identify each informant contacted in the course of the investigation. The public interest requires that such information be kept confidential. In this connection the courts have held:

> * * * The doctrine of privilege is based upon the principle that the confidential relationship between the Government and those who impart information to the Government regarding law violations should be safeguarded in order that such information will be freely given and will continue to be given in the future. * * * *United States* v. *Deere & Co.*, 9 F.R.D. 523, 527 (D. Minn. 1949).[4]

Certain of the data required in respondents' request for interrogatories (for example, item 12 (d)), constitutes a demand for the work product of Commission attorneys preparing this case for litigation. Respondents have made no showing that the dictates of fairness require that the work product of the Commission's attorneys be laid bare. Documents coming within that category will not be released without a strong showing of special circumstances, good cause or necessity. The mere hope that such documents might prove useful does not constitute such a showing. *Carpenter-Trant Drilling Company* v. *Magnolia Petroleum Corp.*, 23 F.R.D. 257 (D. Neb. 1959); *Hickman* v. *Taylor*, 329 U.S. 495, 509 (1947); *Transmirra Products Corp.* v. *Monsanto Chemical Co.*, 26 F.R.D. 572, 578

[4] Similarly, the courts have ruled: "* * * the public interest demands that the trust and confidence of those who have supplied information to Government investigators be protected * * *." *United States* v. *Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 463 (E.D. Mich. 1954).

(S.D.N.Y. 1960); *Walsh* v. *Reynolds Metal Co.*, 15 F.R.D. 376 (D.N.J. 1954). More recently we held that documents in the work product category "are the essence of the internal administrative process, and they are ordinarily privileged against disclosure in an adjudicative proceeding." *R. H. Macy & Co., Inc.*, Docket No. 8650, Order Ruling on Questions Certified and Denying Motion To Strike Certification (September 30, 1965) [pp. 1179, 1195 herein].

Items 1 (i) and (j) are an obvious attempt to intrude upon the Commission's mental processes leading up to this proceeding. This is not a proper subject for inquiry in the course of a discovery proceeding. As in the case of judicial proceedings, preservation of the integrity of the administrative process precludes such inquiry. *Walled Lake Door Company* v. *United States*, 31 F.R.D. 258, 260 (E.D. Mich. S.D. 1962). In the case of these items, it is not clear what useful defensive purposes they would serve either in the preparation for cross-examination or in the preparation of respondents' defenses. At best, one may infer therefrom that respondents seek information that the Commission failed to proceed against other suppliers involved in practices similar to those which are the subject of this proceeding. This request should be denied. Mere suspicion is not a license for extended fishing expeditions in the files of an administrative agency. *Coro, Inc.* v. *Federal Trade Commission,* 338 F. 2d 149, 153 (1st Cir. 1964), *cert. denied,* 380 U.S. 954 (1965). See also *R. H. Macy & Co., Inc.*, Docket No. 8650, *supra.*

In summary, at this point we are satisfied that the examiner, through his prehearing order, safeguarded respondents' right to obtain adequate notice of complaint counsel's case-in-chief and thus assured them of a fair trial. The determination that respondents' interrogatories are premature is precisely the sort of question which the hearing examiner is best qualified to resolve and the Commission, on review of the examiner's recommendation, is persuaded that respondents' request for interrogatories should be denied.

II

The Commission also has before it respondents' appeal, filed June 16, 1965, from the hearing examiner's order of June 9, 1965, denying issuance of deposition subpoenas.

As in the case of the request for interrogatories, respondents assert the relief sought by their motion for deposition subpoenas is essential (1) to effectively implement their right to a fair hearing, (2) to enable them to prepare adequately for cross-examination of Commission witnesses, and (3) to obtain evidence to support respondents' meeting of competition defense.

Respondents state the purpose of the subpoenas is designed to elicit the following information:

1. *Attachment 1A and 1B* are directed to respondents' twelve major competitors to:

a) determine the potentiality, actuality, extent of or absence of competitive injury at the primary level of competition resulting from respondents' alleged price discrimination;

b) determine the prices offered or charged by said competitors, which respondents allege in their affirmative defense they sought to meet in good faith.

2. *Attachments 2A and 2B* are directed to the allegedly "favored" purchasers, to determine the actual, structural and operational relationships between Associated Merchandising Corporation (AMC), Aimcee Wholesale Corporation (AWC), and the AMC stores.

3. *Attachments 3A and 3B* are requested to be issued to allegedly "nonfavored" purchasers of respondents' merchandise, to appraise alleged injury to secondary line competition.

Relying on Sections 6 and 12 of the Administrative Procedure Act, respondents assert, as they do in connection with their motion for interrogatories, that under the provisions of this statute they are entitled to all privileges relating to evidence or procedures applicable to the Federal Trade Commission and that this includes the Commission's investigatory procedures. Respondents argue in effect there is no demarcation between the Commission's investigatory and discovery procedures.

We do not agree. The Administrative Procedure Act itself distinguishes between investigational and adjudicative procedures. In this connection, see also *Union Bag-Camp Paper Corp.* v. *Federal Trade Commission,* 233 F. Supp. 660 (S.D.N.Y. 1964), denying respondents' assertion in that proceeding that they were entitled to Section 6(b) reports as a matter of right. The court in that case held that for plaintiff to prevail it had to demonstrate that it "was denied the right to present its evidence and summon the witnesses of its choice." The Commission's Rules of Practice are designed to ensure that right to respondents and to guarantee that they and Commission counsel in an adjudicative proceeding will have the same opportunity to adduce evidence. In fact, the Commission has already ruled in a previous case in connection with a similar argument invoking Section 12 of the Administrative Procedure Act that:

> In compliance with the quoted portion of the Administrative Procedure Act, both respondent and counsel supporting the complaint are afforded identical treatment during the course of hearings before the hearing examiner and this Commission. Both have equal subpoena rights to procure the attendance of witnesses or the production of documents. The proper exercise of the subpoena power is left to the sound discretion of the hearing examiner who has "* * * the duty to conduct fair and impartial hearings * * *." *Joseph Kaplan & Sons, Inc., supra,* 57 F.T.C. at 1538.

To equate respondents' right to adduce evidence in an adjudicative proceeding with the Commission's general investigatory powers would necessarily strip the examiner and the Commission of all power, as a practical matter, to direct the course of the proceedings before them by precluding them from requiring that the resort to compulsory process in an adjudicative proceeding be justified by relevance to the issues tried or a showing of necessity or good cause. The contention of respondents on this point must therefore be rejected.

The examiner advised further that in his view it is reasonable to anticipate that much of the evidence sought by respondents by way of these subpoenas will be presented by Government counsel and that respondents will not only have the full right of cross-examination but also an opportunity to rebut it once the Government rests its case. In this connection, the examiner stated the defensive material required by respondents depends on the scope and nature of the proof presented in support of the complaint. He concludes that although it is possible to anticipate to a certain degree the proof which Government counsel will adduce, the details remain conjectural. With respect to the issues of cross-examination, the examiner advises at this time he is not able to determine what information is essential to a fair cross-examination and that this issue can be best resolved at the time the witnesses testify. As the examiner states, the prehearing order he entered does provide the degree of discovery specifically contemplated by the current rules, namely, § 3.8 (a) (6), providing for notice of the witnesses to be called and the documentary evidence to be offered.

In short, the examiner denied respondents' motion for deposition subpoenas as premature. The denial, however, was without prejudice to respondents' right to renew the motion at the close of the Government's case-in-chief. Clearly, respondents have not been prejudiced by this ruling.

Respondents' request for deposition subpoenas also represents an attempt to make a far-ranging investigation into the competitive position of respondents' customers and competitors, covering a number of sensitive topics. Under the circumstances, since this case is being tried under the old rules, the examiner will be in a better position to accommodate the interests of all the parties concerned, including the third party witnesses, at the close of the case-in-chief of counsel in support of the complaint. Significantly, the request for deposition subpoenas has also been made largely academic by the hearing examiner's order certifying to the Commission respondents' application for issuance of subpoenas duces tecum, filed June 21, 1965, which will be considered next. Accordingly, respondents' appeal

from the hearing examiner's order denying issuance of deposition subpoenas, filed June 9, 1965, will be denied.

III

On June 16, 1965, respondents filed an application with the hearing examiner for the issuance of subpoenas duces tecum, directed to witnesses who were to testify in support of the complaint at hearings scheduled to commence on June 23, 1965. This list of witnesses was received by respondents from complaint counsel pursuant to the examiner's prehearing order.

The examiner, in his order of June 21, 1965, certifying the application to the Commission, recommended that the application for subpoenas be granted in part and denied in part. He certified this question since the proceedings had been stayed by Commission order of June 18, 1965, and the application raised issues related to other questions also before the Commission at this time.

Respondents state in their application that the documents sought through the subpoenas are clearly relevant since they relate soley to determining the effect upon secondary line competition of the practices under consideration and that this is the purpose for which the witnesses are being called upon to testify.

The examiner recommends the issuance of subpoenas duces tecum requiring production of the following:

1. The originals or true copies of all books, records, and other documents, or in the alternative, tabulations or summaries thereof, for the years 1958 through 1964 which reflect or relate to the annual dollar volume of purchases of drapery hardware from all manufacturers and distributors, other than Graber Manufacturing Company, Inc. or The Graber Company.

2. The originals or true copies of all books, records, and other documents, or in the alternative tabulations or summaries thereof, which reflect or relate to the description, retail selling prices and annual dollar volume of sales of Graber drapery hardware for the years 1958 through 1964.

3. The originals or true copies of records for the years 1958 through 1964 reflecting (a) the gross margin of profit on the sale of Graber drapery hardware, and (b) the gross margin of profit on the sale of drapery hardware of other manufacturers.

4. The originals or true copies of records for the years 1958 through 1964 reflecting (a) the margin of percentage of net profit from the sale of Graber drapery hardware, and (b) the margin or percentage of net profit from the sale of drapery hardware of other manufacturers.

The examiner further recommends that the subpoenas be quali-

fied to provide that although the witnesses in question must produce the documents specified they need not be made available to respondents "pending further order of the examiner in the light of the direct examination of the witness." This seems to be a reasonable provision safeguarding the interests both of the witnesses under subpoena as well as those of respondents.

The examiner recommends that subpoenas not be issued requiring such witnesses to produce documents reflecting or relating to the cost and retail selling prices and annual dollar volume of sales of drapery hardware of manufacturers other than Graber for the years 1958 through 1964. The examiner further recommends that these witnesses be not required to disclose the gross margin of profit on the sale of merchandise other than drapery hardware in the drapery department, the gross margin of profit on the sale of all merchandise sold by the firm, as well as similar information with respect to net profits on Graber drapery hardware and other merchandise.

Respondents also requested that the subpoenas direct these witnesses to furnish documents showing an example or specimen of each advertisement or promotional material produced or disseminated in the period 1958 through 1964, to promote directly or indirectly the sale of drapery hardware or any other merchandise sold by the firm. This request, too, the examiner recommends be denied.

Respondents request that the subpoenas require such witnesses to furnish copies of all tax returns, federal and state, filed 1958 through 1964, pertinent to their business. The examiner recommends this request be denied.

Finally, respondents request that the subpoenas require these witnesses to submit all documents of whatever nature submitted by the company or its representatives to the Federal Trade Commission with respect to any subject referred to in respondents' specifications or relating to Graber. The examiner recommends denial of this request.

The question of the scope of subpoenas to be directed to third-party witnesses scheduled to appear in forthcoming hearings is more properly a matter for decision by the hearing examiner than the Commission once the other questions pending in this proceeding have been determined by the Commission and the case remanded to the examiner. The Commission therefore will not rule on this question certified by the examiner except to point out that his recommendations seem to constitute a reasonable accommodation of the interests of all the parties, including the third-party witnesses, and designed to expedite this hearing. As the examiner points out, as distinguished from his ruling on respondents' request for deposition subpoenas, filed on June 16, he is in this instance in a better position

to determine to what extent respondents require discovery to prepare for cross-examination since the request involves specified witnesses, the subject matter of whose testimony is generally known as a result of disclosure required by the prehearing order.

Because of the passage of time, the hearings will again have to be rescheduled. At that time the examiner will again be able to pass on respondents' request for subpoenas in the light of complaint counsel's objections that requiring third-party witnesses to produce such documents on short notice may create an undue burden on them. This type of problem is, of course, best resolved by the examiner who, if necessary, can discuss these problems with both sides, as well as the third-party witnesses in question. As we have previously held, the examiner in matters of discovery is granted broad discretion by the Commission's rules. *American Brake Shoe Company,* Docket No. 8622, Order Denying Appeal from Denial of Applications for Depositions and Subpoenas (September 1, 1965) [p. 1169 herein].

IV

Finally, we turn to the hearing examiner's order certifying to the Commission respondents' motion to dismiss the complaint or suspend the proceeding, filed on June 4, 1965. The examiner recommends that the motion be denied. Respondents' motion is similar to an earlier oral motion of August 4, 1964, denied by the Commission after certification by the examiner. Respondents claim reconsideration is warranted on the ground there have been three developments since denial of their first motion which significantly altered their position, namely:

1. The Commission, in Docket No. 8651, issued a complaint against AMC, AWC and the AMC stores involving the factors upon which liability is asserted against the respondents in this case.

2. The examiner has defined and limited the issues in this proceeding to respondents' transactions with AMC, AWC and the AMC stores.

3. The inequity of subjecting respondents' small family business to the debilitation of a big case has become more clearly defined.

Respondents assert that as a result of the limitation of the issues in this case the proceeding in Docket No. 8651 makes this proceeding unnecessary since an order in the *AMC* case necessarily would preclude Graber from further selling to these buyers on the same basis. This seems to be the point most seriously urged by respondents.

The motion will be denied. None of the developments cited by respondents would justify dismissal or suspension of the complaint at this time. An order limited to transactions with the AMC complex would not efficaciously preclude respondents from engaging in the

practices alleged illegal by the complaint with other large volume purchasers. At the present incomplete stage of the record, the Commission is not in a position to decide whether the order should be limited, as respondents apparently suggest. It might be noted at this point that the order on *Joseph Kaplan & Sons, Inc.*, 57 F.T.C. 1537, Docket No. 7813, *modified*, 347 F. 2d 785 (7th Cir. 1965), involving issues similar to those involved in this proceeding, has not been limited in the fashion advocated by respondents in this instance.

As to respondents' claim that it is inequitable to pursue this case further because of respondents' size, the short answer is that businesses, both large and small, are subject to the requirements of the Robinson-Patman Act. The inconveniences of enforcement proceedings under the statutes administered by the Commission are one of the burdens of Government.[5] And the Commission cannot in good conscience refrain from proceeding to enforce the law in a particular instance merely because of the size of the concern allegedly engaged in the practices which the Commission has reason to believe are illegal.

Commissioner Elman dissented and has filed a dissenting statement.

Dissenting Opinion

By Elman, *Commissioner:*

As a result of the examiner's recent effort to limit and define the matters at issue in the proceeding, it appears that all of the transactions upon which complaint counsel intend to rely in proving the violation of Section 2(a) of the Clayton Act alleged in the complaint are sales to Aimcee Wholesale Corporation, a wholly owned subsidiary of Associated Merchandising Corporation. The Commission on November 24, 1964, issued a complaint against Aimcee Wholesale Corporation, Associated Merchandising Corporation, and some fourteen affiliated department store companies, alleging violation of Section 2(f) of the Clayton Act by reason of their knowing inducement of preferential prices to AMC affiliated stores through the instrumentality of purchases by AWC (Docket No. 8651). The allegations of the complaint have been denied by all of the respondents, and the case is now being actively litigated. It is apparent that the AMC complaint in Docket No. 8651 will involve many of the same issues that would have to be litigated in this case—particularly various questions as to the current organization and functioning of AMC and AWC, which can best be determined in a proceeding in

[5] *Cf. Miles Laboratories, Inc.* v. *Federal Trade Commission*, 50 F. Supp. 434 (D.C. 1943).

which these entities are themselves active litigants. If the Commission should ultimately issue an order similar to the proposed order attached to the complaint in Docket No. 8651, this would effectively provide substantially all the relief being sought in this proceeding. On the other hand, if the Commission should ultimately dismiss the complaint in Docket No. 8651, a question would arise whether the public interest requires further proceedings against these respondents.

The complaint in this proceeding issued more than five years ago. Now that the AMC case is pending, I see no point in continuing with another 2(a) case against a small supplier, one among scores, if not hundreds, of AMC suppliers. It has been almost a year since the resumption of the hearings before the examiner, and the case has scarcely progressed beyond the examination of Graber's president. In relation to the AMC proceeding, *Graber* is no more than an unimportant and time-consuming sideshow.

ORDER RULING ON QUESTIONS CERTIFIED BY THE EXAMINER AND RESPONDENTS' APPEAL FROM HEARING EXAMINER'S RULING

This matter is before the Commission on the hearing examiner's order certifying respondents' motion for answers to interrogatories, filed June 10, 1965, the hearing examiner's order certifying respondents' motion to dismiss the complaint or suspend the proceeding, filed June 16, 1965, the hearing examiner's order certifying respondents' application for issuance of subpoenas duces tecum, filed June 21, 1965, respondents' appeal from the hearing examiner's order denying the issuance of deposition subpoenas, filed June 16, 1965, and complaint counsel's answer to respondents' appeal and motion for interrogatories and for production of documents, filed July 14, 1965. The Commission has determined that respondents' motion for interrogatories and production of documents and their appeal from the hearing examiner's order denying the issuance of deposition subpoenas should be denied. The Commission has further determined that respondents' motion for dismissal of the complaint or suspension of the proceeding should also be denied. In connection with respondents' application for issuance of subpoenas duces tecum, the Commission has determined that the examiner should rule thereon after this proceeding has been remanded to him. Accordingly,

It is ordered, That respondents' motion for answers to interrogatories and for the production of documents be, and it hereby is, denied.

It is further ordered, That respondents' appeal from the hearing examiner's order denying the issuance of deposition subpoenas be, and it hereby is, denied.

It is further denied, That respondents' motion to dismiss the complaint or suspend the proceeding be, and it hereby is, denied.

It is further ordered, That this case be, and it hereby is, remanded to the hearing examiner for further appropriate proceedings.

It is further ordered, That after the remand of this proceeding to him the examiner be, and he hereby is, directed to rule on respondents' application for the issuance of subpoenas duces tecum, which was filed June 16, 1965.

Commissioner Elman dissented and has filed a dissenting statement.

STANDARD MOTOR PRODUCTS, INC.*

Docket 5721. Report, Dec. 20, 1965

Report of the Federal Trade Commission on the issue of whether the respondent's annual volume discount program violates the cease and desist order of December 27, 1957, 54 F.T.C. 814.

REPORT OF THE FEDERAL TRADE COMMISSION UPON ITS INVESTIGATION OF ALLEGED VIOLATIONS OF ITS ORDER TO CEASE AND DESIST

The Proceedings

On February 1, 1963 [62 F.T.C. 1485], the Commission having reason to believe that Standard Motor Products, Inc., may have violated the provisions of the order to cease and desist issued herein on December 27, 1957 [54 F.T.C. 814], directed that an investigational hearing be conducted pursuant to § 1.34[1] and related rules of the Commission's Rules of Practice to ascertain the extent to which such violations may have occurred. A hearing examiner of the Commission was duly designated to preside at hearings to be conducted for that purpose. He was directed to certify the record to the Commission upon completion of the hearings, in lieu of rendering an initial decision.

Pursuant to and in accordance with the foregoing, hearings were held in New York, New York; Dallas, Texas; and Washington, D.C. On July 17, 1964, the Commission ordered that the hearings in this matter "shall not encompass the question of whether respondent has improperly and unlawfully classified certain purchasers or groups of purchasers as warehouse distributors." The remaining issue in this proceeding is, therefore, whether the respondent's use of its retroactive annual volume rebate program violates the Commission's order to cease and desist. On September 17, 1964, the hearing ex-

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* See *Federal Trade Commission* v. *Standard Motor Products, Inc.*, 371 F. 2d 613 (1967) (8 S.&D. 413). The Commission did not file for certiorari.

[1] 16 C.F.R. Chapter I, Subchapter A (1960). The rule is Section 1.35 of the Commission's current Rules of Practice.

aminer's "Certification of the Record of Compliance Hearings to the Commission" was recorded and filed in the office of the Secretary. The Commission having duly considered the record filed by the hearing examiner and the briefs subsequently submitted, and being now fully advised in the premises, makes this its report upon the investigation of the alleged violation of the order to cease and desist.

The Order

The order to cease and desist issued on December 27, 1957,[2] and was affirmed by the United States Court of Appeals for the Second Circuit on April 15, 1959.[3] On October 12, 1959, the Supreme Court of the United States denied an application for certiorari.[4] The order provides as follows:

IT IS ORDERED that respondent Standard Motor Products, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale, for replacement purposes, of automotive products and supplies in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Discriminating, directly or indirectly, in the price of such products and supplies of like grade and quality:

1. By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale and distribution of respondent's products.

Report on the Facts

PARAGRAPH 1. The respondent, Standard Motor Products, Inc., is a corporation, organized and existing under the laws of the State of New York, with its office and principal place of business located at 37-18 Northern Boulevard, Long Island City, New York (tr. 3). Respondent is now and has, since on or about the year 1919, been engaged in the manufacture, sale and distribution of automotive electrical and fuel system replacement parts, commonly referred to as the "after-market" (tr. 5-6; CX 16). Net sales have grown at an approximate rate of 10 percent per year and in 1962 were approximately $16.3 million (tr. 4-5). There has been no substantial change in the organization of the respondent, its ownership or in its sales and distribution policies since the Commission issued its order to cease and desist in 1957.

PAR. 2. In the proceeding from which our 1957 order evolved, it was found that respondent had granted retroactive volume rebates to certain of its customers since the enactment of the Robinson-Patman Amendment to the Clayton Act on June 19, 1936, and also

[2] 54 F.T.C. 814.
[3] 265 F.2d 674.
[4] 361 U.S. 826.

prior thereto.[5] The Commission's complaint which issued on December 20, 1949, charged that such rebates were illegal price discriminations in violation of Section 2(a) of the Robinson-Patman Act.[6] Respondent raised two defenses: lack of competitive injury and good faith meeting of competition. Both defenses were rejected by the Commission and the appellate court. Respondent did not attempt to justify its prices on the basis of a difference in cost of manufacture, sale or delivery.[7] In an attempt to comply with its cease-and-desist order, respondent modified its annual retroactive volume rebate plan in accordance with a cost study based on the year 1958 (RX 5). On March 8, 1962, the Commission rejected respondent's report of compliance (RX 13), and this investigation resulted. The sole issue of the investigation was whether respondent's annual volume rebate program violated the cease-and-desist order. Although respondent has raised two collateral matters, its primary defense is that its volume rebates are cost justified.

PAR. 3. Respondent's manufacturing plant and main warehouse are located at Long Island City, New York. Respondent maintains its own branch warehouse facilities in Chicago, Los Angeles and Seattle. In addition, it rents commercial warehouse space in Atlanta, Cleveland, Dallas, Detroit, Kansas City, Minneapolis and San Francisco (RX 7, pp. 16-17). Respondent's Canadian subsidiaries do not sell in the United States and, thus, are not involved in this proceeding.

PAR. 4. Respondent's products are divided into two general groupings, "Standard" and "Hygrade." The Standard line is composed of ignition parts and wires and battery cables. A premium brand of the Standard line of products is labeled "Blue Streak." The Hygrade line includes carburetor and speedometer parts. Although both groups are manufactured in the same factory and sold by the same sales force, they are ordered, shipped and invoiced separately, and have different rebate schedules. The products within each line, how-

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[5] 54 F.T.C. 814, 816.

[6] Section 2(a), 15 U.S.C. 13(a), provides in pertinent part —

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. * * *"

[7] Section 2(a), 15 U.S.C. 13(a), further provides in pertinent part —

"* * * That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. * * *"

ever, are of like grade and quality. While most of respondent's customers handle both groups, it is not mandatory (RX 7, pp. 1-2).

PAR. 5. There is, and has been at all times mentioned herein, a continuous current of trade and commerce in automotive replacement parts for use, consumption or resale within the United States, manufactured by respondent, across State lines between respondent's manufacturing plant and its branch warehouses, and between its main warehouse located at its manufacturing plant and its direct buying purchasers, and between its branch warehouses and those customers who purchase from such warehouses. Indeed, respondent's sales force of approximately 100 sells in all 50 States (tr. 10-11).

Respondent will prepay freight only on Standard orders in excess of 149 pounds, Hygrade orders in excess of 99 pounds or combined orders in excess of 199 pounds which are shipped from its factory (tr. 88-89).

PAR. 6. Respondent, in the sale and distribution of its products, sells to three classes of customers: warehouse distributors, jobbers and redistributing wholesalers.[8] Warehouse distributors purchase from respondent and resell to jobbers.[9] Some jobbers purchase directly from respondent and, thereby, form the second classification. All jobbers resell to the dealer trade. Such trade is generally composed of independent repair shops, service stations and fleet operators. The third classification—the redistributing wholesaler[10]—resells to both jobbers and dealers, and thus performs the combined function of warehouse distributor and jobber.[11]

Respondent's annual volume rebate plan, the subject of this report, is not available to warehouse distributors. It is only available to jobbers purchasing directly from respondent and to that portion of the redistributing wholesaler's purchases that are resold to the dealer trade. During 1962, approximately one-third of respondent's total sales were to such customers (RX 7, p. 1).

Warehouse distributors and redistributing wholesalers receive a functional discount at the time of purchase for all products resold to jobbers. Since this discount is more than the highest volume rebate bracket (tr. 74-80, CX 6-7), there is no possibility of redistributing wholesalers deliberately misclassifying their sales in order to receive a rebate allowance.

PAR. 7. The record demonstrates that respondent's jobber and redistributing wholesaler customers are competitively engaged in the

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[8] See attached flow chart.

[9] Warehouse distributors are sometimes referred to in the record as "100% warehouse distributors." Jobbers are sometimes referred to as "wholesalers" or "distributors."

[10] Sometimes referred to in the record as a "partial warehouse distributor."

[11] In the automotive parts market, the jobber level of distribution is considered the "wholesale level." The "retail level" is composed of dealers.

resale of respondent's products (tr. 139, 160-61, 184, 198, 212, 226, 238).

PAR. 8. The amount of discounts and the number of brackets in respondent's annual volume rebate plans have varied. The rebate program which respondent sought to justify at the investigational hearing was initiated on October 1, 1961, but was retroactively applied to sales after April 1, 1961 (tr. 67). Rebates have been based on a customer's net amount of annual purchases. In this instance, "net" is defined as being exclusive of any cash discount, freight allowance or merchandise return credit (tr. 61). Rebatable purchases have been computed on the calendar year and rebates paid on approximately February 15 of the following year (CX 8-9). The rebates schedules were as follows:

Standard[12]

Volume group	*Rebate (percent)*
0–$2,999	4
$3,000– 5,999	11
6,000– 9,999	14
10,000–24,999	14½
25,000–39,999	15
40,000–over	17

Hygrade[13]

Volume group	*Rebate (percent)*
0–$1,499	0
$1,500– 3,499	8
3,500– 5,499	10
5,500– 8,499	11
8,500–over	12

Respondent's defense primarily consists of a cost study purporting to justify rebates extended on sales made during the year 1962. "Direct selling," "catalog," "branch warehouse" and "administrative" expenses were chosen to reflect cost differences.[14] Basically, the 1962 study is respondent's rejected 1958 study after updating (tr. 571-73). Respondent concedes that if its 1962 study is improper, so too is its 1958 study (tr. 552).[15]

Respondent, for each volume bracket, compiled and developed statistical data representing the cost in 1962 of each of its four

[12] CX 8.

[13] CX 9.

[14] Each of these types of expenses are related to selling. Respondent has not attempted to demonstrate that its discounts made due allowances for "manufacture" or "delivery" cost differences.

[15] After comparing its 1958 and 1962 studies, respondent believed it necessary to include all Standard line purchasers of $25,000 annually in its highest rebate bracket and to reduce the rebate in the second bracket of its Hygrade schedule by one percent (tr. 688-89). Three additional changes in the Standard schedule were policy decisions, unrelated to an attempt at cost justification, for respondent considered either rebate schedule to be cost justified (tr. 690-93). The schedule changes were instituted on January 1, 1964, as follows:

Standard

Volume group	*Rebate (percent)*
0–$2,999	4
$3,000– 5,999	10
6,000– 9,999	13
10,000–24,999	15
25,000–over	17

Hygrade

Volume group	*Rebate (percent)*
0–$1,499	0
$1,500– 3,499	7
3,500– 5,499	10
5,500– 8,499	11
8,500–over	12

chosen cost difference activities attributable to customers entitled to receive rebates. Included in the "direct selling" activity were the costs of the total number of hours respondent's salesmen spent with customers on their premises and in transit, and that portion of home office administration expenses applicable to its sales force operation (RX 7, pp. 7-13). The "catalog" category contained "fixed" catalog and educational literature costs and the salaries of emloyees who prepared such documents (RX 7, pp. 14-16), and the "branch warehouse" item included the cost of operating all of respondent's warehouses, save the one located at its Long Island headquarters (RX 7, pp. 16-19, tr. 756-57). "Administrative" expenses were an itemization of the cost of invoice stripping, mailing and filing; handling of credit and accounts receivable; posting machine rental; tabulating, order entry and billing machines; and sales department personnel salaries (RX 6, Schedule VIII; RX 7, pp. 19-25).

The aggregate cost figures for each category were then divided by the year's volume of rebatable sales to customers within each bracket to show costs in terms of a percentage of volume. For example, the following table shows respondent's cost summary for "direct selling" expenses for its Standard line:[16]

Volume group	*Rebate Volume*	*Cost*	*Cost percent of Rebate Volume*
0–$2,999	$317,537	$49,676	15.64
$3,000– 5,999	744,346	68,772	9.24
6,000– 9,999	1,128,117	86,367	7.66
10,000–24,999	1,726,818	102,427	5.93
25,000–39,999	482,726	22,129	4.58
40,000–over	490,064	25,665	5.24
TOTAL	$4,889,608	$355,036	....

The complete percentage of volume cost figures computed by respondent for its Standard line are as follows:[17]

Volume group	*Direct Selling*	*Catalog*	*Branch ware-house*	*Adminis-trative*	*Total*	*Cost differ-ential*
0–$2,999	15.64	7.89	2.57	3.41	29.51	13.40
$3,000– 5,999	9.24	2.42	2.65	1.80	16.11	3.22
6,000– 9,999	7.66	1.34	2.48	1.41	12.89	3.48
10,000–24,999	5.93	.70	1.89	.89	9.41	1.83
25,000–39,999	4.58	.37	1.87	.76	7.58	.37
40,000–over	5.24	.16	1.16	.65	7.21	....

[16] RX 6, Schedule II.
[17] RX 6, Schedule I.

PAR. 9. The Supreme Court in *Federal Trade Commission* v. *Morton Salt Co.,* 334 U.S. 37, 43 (1948), set the tone for our inquiry into respondent's challenged rebate pricing:

The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price.

PAR. 10. Respondent's sole rebate criterion was the purchasing ability of its buyers. Thus, since it substituted volume of purchases for selling costs as the factor determining a customer's rebate, respondent had to justify the action by establishing that in all brackets volume and costs bore a strong concomitant relationship to each other.

Respondent first established its volume brackets and then determined the cost attributable to customers whose purchases placed them within a bracket (tr. 1142-43). While the successful establishment of a cost justification defense does not require the profferer to have put his horse first, one who has casually delimited available rebates must at least demonstrate that a significant majority of those customers relegated to a particular volume group most likely had costs supporting their inclusion in that group.[18] However, information extracted from respondent's own exhibits evidences that in most brackets the vast majority of customers had computed costs which should have found them placed *in another bracket.* The following charts show the large percentage of respondent's customers in each bracket who had costs which were closer to the cost average of a higher or lower bracket:

[18] See *United States* v. *Borden Co.,* 370 U.S. 460, 468-69 (1962).

Volume group	Average cost (percent)	Mean of two average costs (percent)	Number of customers in bracket	Number of customers in bracket with costs above and below mean			Percentage with costs closer to another average
				Above	Below	Total	
				Standard[19]			
0–$2,999......	29.51		241	....	72	72	29.9 (72/241)
		22.81					
$3,000– 5,999......	16.11		177	22	74	96	54.2 (96/177)
		14.50					
6,000– 9,999......	12.89		147	47	56	103	70.1 (103/147)
		11.15					
10,000–24,999......	9.41		119	30	50	80	67.2 (80/119)
		8.50					
25,000–39,999......	7.58		17	4	8	12	70.6 (12/17)
		7.40					
40,000–over	7.21		8	3	....	3	37.5 (3/8)
				Hygrade[20]			
0–$1,499......	22.46		531	....	179	179	33.7 (179/531)
		18.77					
$1,500– 3,499......	15.07		72	11	38	49	68.1 (49/72)
		12.79					
3,500– 5,499......	10.51		17	4	10	14	82.4 (14/17)
		9.10					
5,500– 8,499......	7.69		7	2	3	5	71.4 (5/7)
		7.18					
8,500–over	6.66		5	2	....	2	40.0 (2/5)

Respondent's expert, Professor Taggart, who attested to his familiarity with the cost study and vouched for the accounting techniques followed, apparently considered that deviations from the average of a volume group by individual customers would occur only in "an occasional case" (tr. 844), or as a result of "accidental increases or decreases in costs" (tr. 843). He obviously did not expect the wholesale deviations shown above.[21] We find that they demonstrate the impropriety of respondent's volume rebate system and provide just cause for us to reject the entire cost study.

PAR. 11. Respondent's exhibits also reveal that a large number

[19] Source: RX 6, Schedule I; CX 85, 86.

[20] Source: RX 6, Schedule XI; CX 85, 92.

[21] HEARING EXAMINER GOODHOPE: Well, then, on that total in the second column, you have 16.11. It is not safe to say that customers whose costs came out at the half-way point between 16.11 and 29.51, namely, 22.80, up to half-way between the 16.11 and 12.89, which is 14.61 (sic) — it is not safe to say that all of respondent's customers whose costs totalled out between 22.80 and 14.61 (sic) are included in that group?

THE WITNESS [Professor Taggart]: Not all of them, *but I would expect the majority of them to be.* [Tr. 842 (emphasis added).]

Later in his testimony, Professor Taggart suggested:

The computer of an average does not represent that each member of the class has a numerical weight exactly equal to that of the average. Instead, all he says is that each individual in the class has such characteristics that the numerical designations tend to approach or cluster around the average. [Tr. 1171.]

of its customers whose purchases cast them into a particular volume rebate bracket had costs which were equal to or lower than the average cost computed for the next highest bracket. This was true, for example, of 32.2% of Standard customers in the $3,000-$5,999 bracket, and 47.1% of Hygrade buyers in the $3,500-$5,499 bracket (CX 91, tr. 933; CX 97, tr. 942).

In fact, in many instances there were customers with almost identical cost percentages located in several brackets (CX 86, tr. 913-14; CX 92, tr. 937-38).

Furthermore, it was shown that an average of 39.1% of all Standard customers and 22.0% all Hygrade customers had lower costs than one-fifth of the purchasers included in a higher bracket (CX 90, tr. 927-31; CX 96, tr. 941-42).

The following charts illustrate the vast cost spreads for each volume bracket used by respondent in developing average costs:[22]

Volume group	Average cost (percent)	Actual cost spread (percent)
	Standard	
0–$2,999	29.51	3.2 to 249.2
$3,000– 5,999	16.11	2.8 to 50.9
6,000– 9,999	12.89	4.1 to 35.2
10,000–24,999	9.41	2.2 to 28.3
25,000–39,999	7.58	3.1 to 11.9
40,000–over	7.21	4.6 to 11.6
	Hygrade	
0–$1,499	22.46	5.8 to 234.8
$1,500– 3,499	15.07	6.1 to 48.9
3,500– 5,499	10.51	2.2 to 33.4
5,500– 8,499	7.69	3.8 to 10.7
8,500–over	6.66	3.0 to 12.1

[22] Tr. 912, 935-36; CX 85, 86, 92; RX 6, Schedules I and XI. In the early enforcement days of the Robinson-Patman Act, a distinguished former Commissioner counseled the following pertinent guidelines:

To be lawful, quantity or volume discount must meet, among others, the following tests: Discount classes must not be unduly large and too few in number; the boundaries between classes must be reasonably placed; no class must receive a discount which is excessive as compared with those granted to other classes.

If the discount classes are broad, the costs of serving different customers within the same class will be dissimilar. An average of these costs probably will be unrepresentative of customers at the boundary of the class, and there is likely to be an indefensible discrimination between the largest buyers in one class and the smallest buyers in the next.

Sometimes, for example, a part of the seller's business consists of a very few small purchases which he accepts as a convenience to his customers at very high cost to himself. If, in preparing a quantity discount schedule, he includes in his lowest quantity bracket both these "nuisance" orders and the regular stock orders of his small customers, the effect is to charge these small customers with nearly the entire cost of the "nuisance" business, to raise the apparent cost of serving them, and to appear to justify for the larger customers a discount which is greater than the facts warrant. This is an example of a discount class which is too large. (Freer, "Accounting Problems under the Robinson-Patman Act," 65 *J. Accountancy* 480, 483-84 (1938).)

PAR. 12. The obvious result of respondent's discriminatory rebate schedule is that a great number of low-cost customers are burdened with part of the expense of higher cost purchasers. As we observed in *Borden:*[23]

The use of broad averages may show an apparent justification on the average, but it levels the extremes and ignores specific markets or transactions where the greater differences may result in the lessening of competition.

PAR. 13. If respondent's arbitrary cost grouping and volume averaging procedure were approved, sellers could, with impunity, grant rebates only to their largest volume customers by merely grouping the costs of all others into a single bracket. For example, respondent could give its 5 top Hygrade customers a rebate of almost 11% and nothing to the remaining 627 (CX 92). This is illustrated as follows:

Volume group	Rebate volume	Direct selling cost, RX 6, schedule XII	Catalog cost, RX 6, schedule XIII	Branch warehouse cost, RX 6, schedule XIV	Administrative cost, RX 6, schedule XVI	Total cost	Cost as a percent of rebate volume
0–$1,499..	$284,422	$28,574	$8,301	$6,811	$20,192	$63,878	....
$1,500– 3,499..	149,898	12,053	1,067	4,100	5,372	22,592	....
3,500– 5,499..	74,047	4,670	248	1,286	1,574	7,778	....
5,500– 8,499..	47,585	2,515	104	534	505	3,658	....
Total............	555,952	47,812	9,720	12,731	27,643	97,906	17.61
$8,500–over	50,342	1,994	57	898	402	3,351	6.66

Cost differential between highest volume rebate group and all others: 10.95%

PAR. 14. In view of our findings with respect to respondent's cost study, it is unnecessary for us to reach the question of whether annual volume rebate allowance programs are per se unacceptable. Clearly, however, whenever such programs are employed, the volume rebate groups must be limited to certain types of customers having apparent cost similitude. Before assigning his customers to a particular rebate bracket, the seller should carefully measure their buying characteristics to be certain that those to be bracketed in all probability will have like cost percentages.[24] (Unanticipated, occasional deviations by individual customers would not affect the Commission's evaluation of reasonably constituted brackets.) The factors used in ascertaining probable cost homogenity will of course vary with the nature of each seller's business and distributing practices.

The Commission is not holding that a seller with a large number of purchasers must individually cost them out in each area of ex-

[23] *Borden Co.*, Dkt. 7129, Opinion, p. 19 (1962) [63 F.T.C. 130, 179], *rev'd on other grounds*, 339 F. 2d 133 (5th Cir. 1964), *cert. granted*, 34 U.S.L. Week 3117 (U.S. Oct. 12, 1965) (No. 1127, 1965 Term; renumbered No. 106, 1966 Term).

[24] See *United States* v. *Borden Co., supra* at 470-71.

pense he has selected for his cost justification defense, although a detailed representative study should be readily available if need arises to substantiate universal claims.

PAR. 15. In the case at bar, respondent put into evidence the costs of individual customers used by it to compute the group averages that were the heart of its cost justification defense. However, a close examination of those underlying figures showed that the averages were not representative portrayals of the selling costs of customers in any bracket.

Under respondent's rebate system, there is absolutely no way a customer can receive a higher rebate or lower unit price, other than by increasing his amount of purchases (tr. 794). Costs are not considered even though running cost accounts were maintained.[25] It is clear that respondent would have the Commission sanction its volume discount brackets whether or not there existed a coincidental relationship between price favoritism and costs. Such a stand brings to mind the remark of Mr. Justice Douglas in *Borden* that "the case was argued as if the grant of discounts was a natural right and that the Act should be construed so as to make the granting of them easy."[26]

PAR. 16. The record demonstrates the incongruous effects of respondent's cost allocations in individual trading areas. For example, in the highly competitive Dallas, Texas, market, several purchasers paid higher prices than their competitors who had substantially higher cost percentages.[27]

In the earlier proceeding involving respondent, we adopted the examiner's finding that "the competitive opportunities of certain purchasers were injured when they had to pay substantially more for respondent's products than their competitors had to pay."[28] It

[25] According to respondent's president:

Every member of our sales force, for a great many years, has been required to file a daily report in the normal course of his work. He tells us whom he has called upon, how many hours he has spent at the location, how many hours he has spent traveling, what sort of work he did, and anything that is especially significant about his work.

These are cleared through our sales manager. They are tabulated for statistical purposes, for purposes of sales management.

* * * * * * *

During the normal course of our business, as we invoice the customers for merchandise, we make what is known as a summary card in IBM which identifies the account by his number, tells the amount of the invoice, the number of lines in the invoice, the rebatable amount of merchandise, and other statistical data.

These become part of our permanent records and are kept by us for several years, as a rule. [Tr. 573-75.]

[26] *United States* v. *Borden Co., supra* at 475 (concurring opinion).

[27] Tr. 379-81; CX 82-83; CX 85, pp. 4, 5, 6, 12, 16, 17, 21, 29, 30, 33, 37, 38, 41, 44. For example, Standard customer number 7089 with a cost percentage of 17.3% received a 4% rebate while customer number 7097 with costs of 18.3% received 11%.

[28] *Standard Motor Products, Inc.*, 54 F.T.C. 814, 823 (1957).

is obvious that the competitive climate among resellers in the automotive after-market industry has not changed[29] and that respondent's price discriminations continue to have substantial anticompetitive effects.

PAR. 17. Sprinkled throughout both the record and respondent's briefs is a persistent reliance upon the Commission's acceptance of "purchase bonus" volume rebate plans in *Thompson Products, Inc.*[30] However, unlike the matter at bar, our action in *Thompson* was not the result of a close scrutiny of the respondent's cost study. Both the Commission's accountant and its counsel had considered Thompson's rebate plans to be cost justified, and the examiner, finding no evidence to the contrary, agreed. Counsel supporting the complaint did not appeal the examiner's ruling. Accordingly, we gave the question no further consideration.

PAR. 18. Respondent determined its catalog and educational literature costs (hereinafter collectively referred to as "catalog"), by first separating "fixed" expenses[31] from the cost of printing quantities. On the theory that its customers should be held equally responsible for preparatory costs, since each had to have a catalog (tr. 752), respondent then computed an average catalog cost per customer.[32] That amount was multiplied by the number of customers in a volume rebate bracket, and the total was divided into their aggregate purchases to obtain a figure representing catalog costs as a percentage of purchases.[33]

Respondent did not allocate non-fixed catalog expenses in its cost study. It was estimated that as a customer's volume of purchases increased, the number of catalogs he received would have increased proportionately,[34] resulting in no percentage variations between brackets.

PAR. 19. We reject respondent's entire catalog allocation, since

[29] In *Thompson Products, Inc.*, 55 F.T.C. 1252, 1272-73 (1959), we observed:

"The profits of automotive parts wholesalers necessarily are based on an accumulation of small margins of profit. Wholesalers uniformly try to take advantage of the 2% cash discount accorded by their suppliers, their cost of merchandise is reduced thereby, and the material effect of that discount on profit margins is clearly evident from the record."

Respondent's Dallas customers consistently testified to their low profit margins and affirmed that the obtaining of respondent's 2% discount for prompt payment was essential to their respective businesses (tr. 143-44, 165, 181-82, 202-03, 215-16, 229-30).

[30] 55 F.T.C. 1252 (1959).

[31] Those expenses were all preparatory activities which included "type setting, corrections, make-ready, proof-pulling [and] such items as were necessary to get the presses in a condition to run the first copy of any particular piece of literature" (tr. 647). The percentage of fixed expenses to total catalog costs was approximately 35% for both Standard and Hygrade catalogs (tr. 647; RX 6, Schedule IV).

[32] RX 6, Schedule IV.

[33] RX 6, Schedule V. See column labeled "Catalog" on the table set out on p. 1253, *supra*.

[34] As a distributor is larger, he requires more and more catalogs. We presume that the sixty-five percent of our catalog and literature cost not included in this study will vary, generally, in proportion to the size of the customer" (tr. 753). Also see tr. 1108.

it obviously misrepresents the actual cost of distributing the catalogs to particular customers.

Respondent's computations show total catalog and payroll preparatory expenses for the Standard line as $261,687.[35] Total sales of that line were $16,231,461.[36] Yet $25,059[37] or 9.58% of the catalog costs were assigned to customers in the first bracket whose total purchases ($469,049)[38] were but 2.89% of total sales. And while customers in the highest Standard rebate bracket purchased 3.64% of the line ($591,186),[39] a percentage of catalog costs less than one-twelfth of that amount (0.29%) was assigned to them.[40] Catalog allocations for the Hygrade line were equally as disproportionate.[41]

PAR. 20. Respondent's method of calculating catalog costs is most surprising in light of the effort it expended to establish certain other costs. For example, it carefully tabulated both the number of calls its sales force made on each customer and the number of sales hours individually spent with them (tr. 573-74). And it calculated the number of invoices used for each customer and even the number of invoice lines each received (tr. 574-75, 814-16).

In our judgment respondent should have sought to account individually for the number of catalogs distributed to each of its volume rebate customers. The total catalog cost divided by the number printed would have yielded a unit cost which could have been used to secure the accuracy allegedly attained in the areas of direct selling and administration. However, respondent's reluctance to allocate its entire catalog cost in this fashion is understandable. If distribution truly would have varied upward in proportion to volume of purchases, the cost differences between brackets would have been eliminated. Our computations below illustrate this point:

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[35] See RX 6, Schedule IV.

[36] See nn. 42-45, *infra*. All sales figures set out in Paragraphs Nineteen and Twenty herein are "net" as has been defined in Paragraph Eight, p. 1252, *supra*.

[37] RX 6, Schedule V.

[38] See RX 8, Report 1, pp. 1-11, Col. 2.

[39] *Id.*, at p. 30, Col. 2.

[40] See RX 6, Schedule V.

[41] Total expenses assigned to respondent's Hygrade catalog study were $44,546 (see RX 6, Schedule IV). Total Hygrade sales were $3,001,831 (see nn. 47-50, *infra*). The first Hygrade volume group bought 15.03% of the line ($451,198 — RX 9, Report 1, pp. 1-23, Col. 6) and was assigned 18.63% of the Hygrade catalog costs (see RX 6, Schedule XIII). However, the highest volume group with purchases of $115,403 (see RX 9, Report 1, p. 27, Col. 6), or 3.84% of the total (see RX 6, Schedule XIII), was assigned costs of only 0.13% (see RX 6, Schedule XIII).

Volume group	Sales	Standard Percent of total	Catalog cost	Catalog cost as a percent of sales
0–$2,999	$317,537	1.96	$5,129	1.61
$3,000– 5,999	744,346	4.59	12,011	1.61
6,000– 9,999	1,128,117	6.95	18,187	1.61
10,000–24,999	1,726,818	10.64	27,844	1.61
25,000–39,999	482,726	2.97	7,772	1.61
40,000–over	490,064	3.02	7,903	1.61
Total rebate sales volume	[42]4,889,608	......	....	......
Sales to redistributing wholesalers not subject to rebate	[43]1,271,599	7.83	20,490	1.61
Sales to incomplete accounts	[44]172,626	1.06	2,774	1.61
Sales to warehouse distributors	[45]9,897,628	60.98	159,577	1.61
Total sales	16,231,461	100.00	....	......
Total catalog, literature, and payroll cost			[46]261,687	......

Volume group	Sales	Hygrade Percent of total	Catalog cost	Catalog cost as a percent of sales
0–$1,499	$284,422	9.47	$4,219	1.48
$1,500– 3,499	149,898	4.99	2,223	1.48
3,500– 5,499	74,047	2.47	1,100	1.48
5,500– 8,499	47,585	1.59	708	1.48
8,500–over	50,342	1.68	748	1.48
Total rebate sales volume	[47]606,294	......	....	......
Sales to redistributing wholesalers not subject to rebate	[48]315,040	10.50	4,677	1.48
Sales to incomplete accounts	[49]152,922	5.09	2,267	1.48
Sales to warehouse distributors	[50]1,927,575	64.21	28,603	1.48
Total sales	3,001,831	100.00	....	......
Total catalog, literature, and payroll cost			[51]44,546	......

[42] RX 8, Report 1, p. 30, Col. 4.
[43] *Id.*, at Col. 3.
[44] RX 10, Schedule 19S, p. 3, Col. 4.
[45] RX 10, Schedule 20S, p. 3, Col. 4.
[46] See RX 6, Schedule IV.
[47] RX 9, Report 1, p. 27, Col. 8.
[48] *Id.*, at Col. 7.
[49] RX 10, Schedule 19H, p. 7, Col. 4.
[50] RX 10, Schedule 20H, p. 3, Col. 4.
[51] See RX 6, Schedule IV.

With catalog costs removed, respondent's cost study fails in several volume brackets, as follows:

[In percent]

Volume group	Total cost[52]	Catalog cost[53]	Cost excluding catalog cost	Adjusted cost differential	Price differential	Excess or (deficit)
			Standard			
0–$2,999	29.51	7.89	21.62	......	......	......
$3,000– 5,999	16.11	2.42	13.69	7.93	7.00	0.93
6,000– 9,999	12.89	1.34	11.55	2.14	3.00	(0.86)
10,000–24,999	9.41	.70	8.71	2.84	0.50	2.34
25,000–39,999	7.58	.37	7.21	1.50	1.00	0.50
40,000–over	7.21	.16	7.05	.16	2.00	(1.84)
			Hygrade			
0–$1,499	22.46	2.92	19.54	......	......	......
$1,500– 3,499	15.07	.71	14.36	5.18	8.00	(2.82)
3,500– 5,499	10.51	.33	10.18	4.18	2.00	2.18
5,500– 8,499	7.69	.22	7.47	2.71	1.00	1.71
8,500–over	6.66	.12	6.54	.93	1.00	(0.07)

PAR. 21. Even if we had approved respondent's fixed expense method of distributing catalog costs, certain other aspects of its catalog computations make that item of its study unacceptable.

The fixed expense percentages used in the 1962 study had been obtained from respondent's printing suppliers for its 1958 study (tr. 646-47). No effort was made to ascertain whether the percentages changed after the lapse of four years even though the cost of the Standard catalogs was over $125,000[54] more in 1962, and a greater number and variety were printed (tr. 747).

Moreover, respondent allocated catalog preparatory expenses between Hygrade and Standard by their respective assigned proportions of total fixed expenses (tr. 648). The catalogs in evidence do not support the assumption that respondent's personnel spent six times[55] more effort on Standard catalogs than on Hygrade.[56]

In addition, although respondent had well over 10,000 persons on its mailing list who received literature, and distributed a large number of catalogs to nondirect buying customers by mail and at

[52] RX 6, Schedules I and XI.

[53] RX 6, Schedules V and XIII.

[54] This sum was derived from a comparison of fixed expenses listed on RX 5, Schedule XI (showing catalog expenses in terms of 34.86% of the 1958 total cost) with fixed expenses set out on RX 6, Schedule IV.

[55] See RX 6, Schedule IV.

[56] The Standard catalogs in evidence contain a total of 117 pages (CX 1 and 2), whereas the Hygrade catalogs contain 80 (CX 3 and 4).

various trade shows and exhibits (tr. 753-54), it allocated the entire fixed costs to direct buying customers.[57]

PAR. 22. Certain other procedures followed by respondent in determining the aggregate costs of customers in its volume rebate brackets are also questionable. For example, respondent used the total travel expenses of all district managers in computing an average sales call cost. No compromise was made for the fact that those employees spent considerably less travel time per call in the area contiguous to their offices than in outlying areas (tr. 724-27, 885-87; CX 84).

Respondent allocated both warehouse operating and direct selling costs to its Standard and Hygrade studies on the proportion that sales of each line respectively bore to total sales.[58] It also prorated "home office administration expenses" by the same proportions computed for "salesmen's compensation" (tr. 621; RX 6, Schedule III), even though clearly expenses for such items as "telephone and telegraph," "pension fund contributions" and "shows and exhibits" cannot be deemed as having had a proportionate relationship to travel hours or call hours. In addition, except for district managers' field work calls, direct selling costs were allocated to redistributing wholesalers simply by the ratio of their rebatable purchases to total purchases (tr. 629-30; RX 8, Reports 1 and 3; RX 9, Reports 1 and 3). Respondent made no sample cost surveys or studies to show that any of these prorations were accurate. They amounted to nothing more than mere estimations, and, accordingly, are unacceptable for cost justification purposes.[59]

We also cannot approve respondent's use of a national average salary for district managers whose annual pay ranged as much as from $11,000 to $40,000 (tr. 880-81; RX 11, DSH-1). However, respondent recast its study to eliminate this objection and others raised by complaint counsel (tr. 1094-97; 1099-1102; RX 16-18). While the new percentages caused no failures in the original justification study, with the removal of catalog cost figures,[60] justification for the first Standard volume rebate bracket fails and wider, unsupported discriminations appear in several others.

PAR. 23. The first of respondent's two collateral defenses—that the testimony and exhibits of Commission witness John R. McInnis be

[57] Since a large number of respondent's customers bought both the Standard and the Hygrade lines (compare, *e.g.*, CX 82 with CX 83), the number of individuals who purchased directly was considerably less than the 2,113 total shown on RX 6, Schedule IV.

[58] Tr. 653-54; RX 6, Schedule VI, Item (1); tr. 629, 728-29; RX 6, Schedule III; RX 8, Reports 1 and 3. For example, with respect to selling costs, if a customer's rebatable purchases of Standard and Hygrade products were $9,000 and $1,000, respectively, 90% of the cost of selling him was assigned to the Standard study and 10% to the Hygrade study.

[59] See *The Curtiss Candy Co.*, 44 F.T.C. 237, 267 (1947).

[60] See p. 1262, *supra*.

struck from the record[61]—was raised in a motion filed on September 23, 1964.[62] It is urged that Commission counsel utilized Mr. McInnis as an expert witness, but never qualified him as such, and that this "precluded respondent from cross-examining the witness in depth with respect to his qualifications and experience." On October 5, 1964, we ordered that the matter be held in abeyance until briefs had been filed and reviewed.

On review, we find respondent's contention to be without substance and accordingly deny its motion to strike. Mr. McInnis was properly identified as a certified public accountant and an employee of the Commission (tr. 902). He testified only as to the nature and content of exhibits he prepared from computations put into evidence by respondent. Mr. McInnis did not, as respondent alleges, criticize respondent's cost study. Such terms as "misclassified" and "lower costs" were used by the witness only in explaining the meaning of the figures set out on his exhibits. Criticism of the cost study came from Commission accountant William R. Lemberg, who was qualified as an expert and extensively cross-examined.

Even if it appeared that Mr. McInnis had testified in the capacity of an "expert," we would not have stricken his testimony and exhibits. It is a well-known principle that exclusionary rules of evidence do not bind administrative proceedings as tightly as matters tried before juries.[63] The witness' exhibits and testimony relating to them were spawned entirely from exhibits of respondent which are a part of the record. Thus, we are able to make independent computations to affirm their reliability. Accordingly, it is respondent's own evidence which formed the primary basis for our findings.

PAR. 24. Respondent's second collateral defense, first raised in its reply brief, is that Public Law 86-107,[64] which procedurally amended Section 11 of the Clayton Act, repealed by implication all procedures for the enforcement of cease-and-desist orders entered prior to its passage. Basically, respondent's argument is that, since the statute provided for enforcing future Commission actions and specifically applied the superceded enforcement and review provisions only to matters then pending, Congress impliedly repealed enforcement procedures for all other pre-amendment orders. Respondent's logic relies on the rule of statutory construction that where a form

[61] Tr. 902-43, 1005-54; CX 85-97.

[62] Respondent's motion, although addressed to the hearing examiner, was dated and filed after the record had been certified to the Commission.

[63] *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 705-06 (1948); 2 *Am. Jur.* 2d, Administrative Law § 378 (1962). One authority has gone so far as to declare that "the technical rule known as 'the opinion rule' does not apply to the administrative process." 2 Davis, *Evidence* 323 (1958), *accord, Swift & Co.* v. *United States*, 317 F. 2d 53, 55 (7th Cir. 1963). *Cf., Keller* v. *Federal Trade Commission*, 132 F. 2d 59, 61 (7th Cir. 1942).

[64] 73 Stat. 243 (1959), 15 U.S.C. § 21 (1964).

of conduct is affirmatively or negatively designated by a statute "there is an inference that all omissions were intended by the legislature."[65] This rule of construction, however, is only a general guideline. It does not apply unless the legislature clearly so intended it.[66] And the rule is also inapplicable where an absurdity would be created.[67]

The legislative history of the Section 11 amendment demonstrates that Congress wished to expedite enforcement procedures, not emasculate a substantial proportion of 45 years of Commission work.[68]

Although no court has directly ruled on respondent's argument, several have done so obliquely. In *Sperry Rand Corp.* v. *Federal Trade Commission*,[69] the issue was whether the new enforcement procedure could apply retroactively to pre-amendment cease-and-desist orders. The court responded in the negative and gratuitously observed: "Enforcement due to any violation of the [pre-amendment] consent order which might occur is left to the provisions of the statute as they existed at the time the order was entered."[70] And, the Supreme Court, citing *Sperry Rand*, in reviewing a pre-amendment order of the Commission in *Federal Trade Commission* v. *Henry Broch & Co.*, stated:[71]

> In considering Broch's challenge to paragraph (2) it is necessary to observe that the 1959 amendments to § 11 of the Clayton Act—which substitute for the Clayton Act provisions for enforcement of administrative orders those in § 5 of the Federal Trade Commission Act—do not apply to enforcement of the instant order. In consequence, Broch cannot be subjected to penalties *except for violation of an enforcement order yet to be entered by an appropriate Court of Appeals*, to be predicated upon a determination that some particular practice of Broch violated the Commission's order. Thus Broch is not, by virtue of that order, presently acting under the risk of incurring any penalty *without further administrative and judicial consideration and interpretation*, despite the fact that he has already received determination of his petition for review.

We find that the above pronouncements provide ample authority for us to reject respondent's contention that no procedure remains for enforcing our order against it, and we so do.

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[65] 2 Sutherland, *Statutory Construction* 413-14 (3d ed.) (1943).

[66] *United States* v. *Borden Co.*, 308 U.S. 188, 198-99 (1939); *Lietz* v. *Flemming*, 264 F. 2d 311 (6th Cir.), *cert. denied*, 361 U.S. 820 (1959).

[67] *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543 (1940).

[68] See, *e.g.*, S. Rep. No. 83, 86th Cong., 1st Sess. (1959).

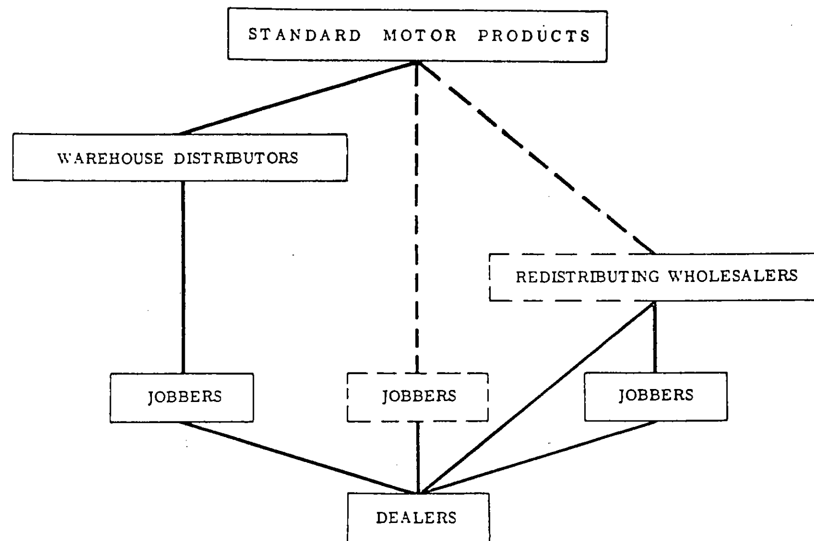
[69] 288 F. 2d 403 (D.C. Cir. 1961).

[70] *Id.*, at 406.

[71] 368 U.S. 360, 364-65 (1962) (emphasis added). Compare final decree, *Federal Trade Commission* v. *Benrus Watch Co.*, 2d Cir. No. 27,752, August 29, 1962, FTC *Statutes & Decisions* 521 (1962 Supp.).

Conclusion

It is our conclusion, after giving due consideration to the acts and practices of the respondent as evidenced by the record of this investigation, that the respondent, Standard Motor Products, Inc., has discriminated in the price of automotive products and supplies of like grade and quality by selling such products to purchasers at net prices higher than the net prices charged other purchasers who, in fact, compete with the purchasers paying the higher price in the resale and distribution of respondent's products in direct violation of the Commission's order to cease and desist issued December 27, 1957 [54 F.T.C. 814], and that such discriminations in price were not cost justified in that they did not make only due allowance for differences in the cost of manufacture, sale or delivery resulting from differing methods or quantities in which such products were sold or delivered to respondent's purchasers.



Note: Dash lines indicate volume rebate customers.

Source: Tr. 12, 582; CX 5.

ADVISORY OPINION DIGESTS*

No. 3. Three-party promotional assistance plans.

The Commission was again requested to express an opinion with respect to the legality of payments by toy manufacturers for advertising in toy catalogs published by a firm which, assertedly, (1) is strictly a publisher and has no connection whatever with any toy jobber or manufacturer, and (2) affirmatively offered the catalogs for sale to all jobbers.

With respect to this request, the Commission repeated its previous opinion which was published October 30, 1964 [66 F.T.C. 1594], as follows:

Payments for advertising in a catalog published by a firm which is not owned or controlled by, or in any way directly or indirectly affiliated with, any customer of the advertiser or group or class of such customers, do not violate Section 2(d) of the Clayton Act where no discriminatory benefit is conferred by such payments on a particular customer, or class or group of customers, over competitors. The Commission notes your statement that your catalogs are available at low cost to all toy jobbers and are not designed to be usable only by particular jobbers, or classes of groups of jobbers; that you make every effort to distribute your catalogs as broadly as possible among toy jobbers; and that you do not limit distribution to any particular jobbers or group or class of jobbers. The Commission is of the opinion that if your catalogs, however titled, are available, in a practical business sense, to all of the jobber customers of a manufacturer, then no objection could be raised to payments by that manufacturer for advertising in the catalogs.

To obviate any possible misunderstanding, the Commission corrected an erroneous statement in the requesting party's communication to the effect that the Commission's previous opinion had ruled that since the catalogs were available in a practical business sense to all jobber customers of the manufacturers the payments would

* In conformity with policy of the Commission, advisory opinions are confidential and are not available to the public, only digests of advisory opinions are of public record. Digests of advisory opinions are currently published in the Federal Register.

not be objectionable. The Commission advised the requesting party that the opinion set forth above and all previous Commission opinions ruling on this precise question have clearly stated that the payments would not be objectionable if the catalogs were available in a practical business sense to all jobbers. The Commission made no finding in its previous opinions that the catalogs were in fact available to all jobbers since such information was not available to it. Instead, the previous opinions simply took the position that the payments would not be illegal if the catalogs were actually so available. (File No. 653 7061, released Oct. 12, 1965.)

No. 4. Publication of product standards by a trade association as an industry goal.

The Federal Trade Commission announced today that it had recently rendered an advisory opinion informing a trade association that no objection will be raised to its distribution of product standards as an industry goal.

The Association had requested advice on whether it may legally distribute a booklet giving standards which represent the ideal of a top quality industry product. The booklet was prepared about two years ago but it was subsequently determined that the standards were so high as to make them impracticable as commodity standards for the whole industry.

The Association is now interested in distributing the booklet merely as an ideal and as a goal for which the industry should be striving, and questioned whether or not this might be considered as acting in restraint of trade.

The Commission's advice was that there could be no objection to the distribution of this booklet under the circumstances and for the purpose stated in the letter from the Association, provided it removes any procedure, practice or requirement that seals of approval be given to industry members who meet the standards. (File No. 653 7043, released Oct. 14, 1965.)

No. 5. Manufacturer's setting of minimum resale price for dealers.

An advisory opinion made public today by the Federal Trade Commission notified a manufacturer that, in the circumstances presented, its establishment of a minimum resale price for its dealers would constitute unlawful price-fixing.

The facts related to the Commission by the manufacturer are these. It has three dealers in one city who submit bids for the business of one large consumer. Initially there was enough margin between the manufacturer's list price and the net price to the dealer to allow them to submit competitive bids. However, as competition between the deal-

ers increased, the bid price became lower and lower until now the situation is that none of the three dealers can realize a profit on this business.

They have asked the manufacturer if it can do anything about the situation. One dealer suggested that the manufacturer should go on record as establishing a minimum price below which no dealer can quote. This limit would be in the form of a percentage below list or an actual dollar figure below list. The manufacturer stated to the Commission that this limit will assure the dealer receiving the order of a fair profit for his effort and would not destroy competition between the dealers, who would apparently be left free to compete above the minimum. The manufacturer asked if this can be done legally and if it would have the right to compel dealers to comply with this established limit (File No. 653 7054, released No. 23, 1965.)

No. 6. Three-way promotional program set up by outdoor advertiser and financed by participating grocery chains and their suppliers.

The Federal Trade Commission announced today that it had recently rendered an advisory opinion dealing with the legality of a proposal by an outdoor advertiser to set up advertising displays featuring food products which will be financed by payments from food suppliers and chain grocery and drugstores.

The Commission said it has accumulated considerable experience with similar tripartite promotional programs in which the promoter of the plan places himself between the supplier and the retailer who indirectly receives the benefits of the payments made by the supplier to the promoter.

The fact that the promoter acts as middleman in the operation of the plan has been held to be of no legal significance, the Commission said. Instead, it views such plans as an integrated whole and treats them, under proper circumstances, as though the contracts or arrangements were made directly between the suppliers and the participating retailers.

Viewed in this light, the Commission advised, it would appear that the proposed program is expressly tailored to fit the needs of the participating suppliers' larger customers and therefore completely lacks the element of proportionally equal treatment of all those suppliers' competing customers which is required by Section 2(d) of the Robinson-Patman amendment to the Clayton Act.

The Commission said that it is "safe to assume that each of the suppliers who will be asked to participate in this proposal have customers in the area other than grocery and drug chains. Such suppliers would risk liability under Sections 2(d) and 2(e) of the Clayton Act by participating in any joint promotional venture which is not even

offered to such customer or which, if offered, would be at a prohibitive cost to small retailers or which would be impractical for those retailers who may only handle a few of the products of the suppliers participating in the plan. The law requires that all of these customers must receive proportionally equal treatment."

"Thus, the suppliers who participate in * * * [this] plan must make certain that the smaller retailers are offered a chance to participate and must offer a suitable alternative to those retailers for whom the plan is functionally unavailable." (File No. 653 7050, released Nov. 23, 1965.)

No. 7. Resumption of advertising by a manufacturer in a trade buying guide formerly but no longer owned by a wholesaler customer.

The Federal Trade Commission has rendered an advisory opinion regarding the proposed resumption of advertising by a manufacturer of drugs and cosmetics in a drug trade buying guide which was previously published by a wholesaler customer but whose present owner-publisher is not connected in any way with any customer of the manufacturer.

The Commission's advice was that no objection could be raised to payments by a manufacturer for advertising in buying guides if the guides are available, in a practical business sense, to all of his wholesaler customers.

The advisory opinion noted: "Payments for advertising in a buying guide published by a firm which is not owned or controlled by, or in any way directly or indirectly affiliated with, any customer of the advertiser or group or class of such customers do not violate Section 2(d) of the Clayton Act where no discriminatory benefit is conferred by such payments on a particular customer, or class or group of customers, over competitors. The Commission has been informed that the present owner-publisher * * * has no connection whatsoever with * * * any * * * drug or cosmetic company or group thereof; that the buying guide is available at low cost to all drug wholesalers and is apparently not designed to be usable only by particular wholesalers, or classes or groups of wholesalers; that every effort is made to distribute the buying guide as broadly as possible among drug wholesalers; and that distribution is not limited to any particular wholesalers or group or class of wholesalers." (File No. 653 7049, released Nov. 23, 1965.)

No. 8. Foreign origin disclosure.

An American manufacturer has been advised that the Federal Trade Commission would have no objection to its proposed manner

of disclosing the origin of an office machinery unit containing a foreign-made part.

The label considered by the Commission identifies the foreign part and the country in which it was made and states that the manufacturer in question has manufactured the remainder of the unit and assembled it in this country. (File No. 653 7052, released Nov. 23, 1965.)

No. 9. Labeling of containers for imported knives.

The Federal Trade Commission has rendered an advisory opinion regarding the labeling of containers for knives which are imported from Japan and to be stamped "Made in Japan" by an importer using the word "manufacturing" in his trade name.

The Commission's advice was that in the absence of any showing of material deception, a proceeding by it to require disclosure of Japanese origin of the knives on the containers would not appear to be warranted.

The Commission said the same advice would apply if the name of the importer is printed on the container provided the "Made in Japan" legend on the knives is readily visible upon casual inspection by prospective purchasers prior to purchase. However, if the disclosure does not meet this condition, it will be necessary to make a clear and conspicuous disclosure of Japanese origin on the box in close proximity to the name and address of the importer.

The Commission made the following comments with respect to use of the word "manufacturing" by an importer in his trade name, but without in any way passing upon its propriety: The general rule is that a company may not use this word in its trade name unless it in fact owns, operates or controls a factory where the merchandise is manufactured. The reason is that there is a preference for dealing directly with the manufacturer, such preference being due in part to a belief that lower prices and other advantages may be obtained. (File No. 653 7055, released Nov. 25, 1965.)

No. 10. Cooperative advertising allowances.

A recent Federal Trade Commission advisory opinion informed a manufacturer that the requirements of Section 2(d) of the amended Clayton Act will be satisfied where the proposed advertising allowance program reflects that alternative methods of promotion are available to customers unable to use the preferred method of advertising in the regular course of their business.

As explained by the manufacturer, all of its customers will be offered advertising allowances equal to 1% of net purchases to defray up to a maximum of 50% of the actual cost of advertising its branded,

first-quality products in any ACB (Advertising Checking Bureau, Inc.) daily and Sunday newspaper. Where a retailer is unable in a practical business sense to advertise in such newspaper the program will provide him with adequate alternative methods of sales promotion such as, but not limited to, other newspapers, letter stuffers or handbills as will enable him to earn the allowances specified. A retailer may use up to 30% of his allowance in Christmas Catalog advertising where the brand name or label is prominently mentioned, payment for which is based on catalog circulation. New accounts and those with which the manufacturer has had less than one year's experience will be offered the same allowance, payment for which will be computed on the basis of purchases for the first full quarter year. All accounts will be notified of the program by first-class mail, by the manufacturer's sales representatives and by notices accompanying invoices. (File No. 653 7053, released Dec. 9, 1965.)

No. 11. Labeling of truss plates manufactured from imported steel.

The Commission was requested to advise whether or not it would be permissible to label finished truss plates made from imported galvanized steel coils as a domestic product manufactured in the U.S.A. without any reference to the origin of the steel. The plates are cut and stamped to size in this country and further stamped to form tooth-like fastening devices as part of the finished plate.

The Commission advised that it would not be proper to label these plates as made in the U.S.A. since that would constitute an affirmative representation that they were entirely made in this country, which is not the fact unless, of course, the label also discloses in a clear and conspicuous manner the fact that the steel in said plates is imported. (File No. 663 7011, released Dec. 17, 1965.)

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U.S. GOVERNMENT PRINTING OFFICE: 1971 O—381-361