Complaint

IN THE MATTER OF

GLAMOUR SPORTSWEAR CORP. ET AL

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-1351. Complaint, June 27, 1968—Decision, June 27, 1968

Consent order requiring two New York City manufacturers of ladies' sportswear and blouses to cease misbranding its textile fiber products and furnishing false guarantees.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Glamour Sportswear Corp., a corporation, and Pantops by Glamour, Inc., a corporation, and Mark Lederman and Eugene Lederman, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Textile Fiber Products Identification 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 Glamour Sportswear Corp. 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 132 West 36th Street, New York, New York.

Respondent Pantops by Glamour, 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 132 West 36th Street, New York, New York.

Individual respondents Mark Lederman and Eugene Lederman are officers of said corporate respondents. They formulate, direct and control the acts, practices and policies of said corporate respondents, including the acts and practices hereinafter referred to. The office and principal place of business of these individual respondents is 132 West 36th Street, New York, New York.

Respondents are engaged in the manufacture and sale of ladies' sportswear and ladies' blouses.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the introduction, manufacture for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products: and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by the respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of the constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products (ladies' pants) with labels which set forth the fiber content of a bonded fabric as "90% Acetate, 10% Nylon," thereby representing the entire fabric to be as described, whereas, in truth and in fact, the said fibers contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of such textile fiber products were further misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified to show each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

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

1. To disclose the true generic names of the fibers present; and

2. To disclose the true percentage of such fibers; and

3. To disclose the name, or other identification issued and registered by the Commission, of the manufacturer of the product or one or more persons subject to Section 3 of the said Act, with respect to such product.

PAR. 5. Certain of said textile fiber products were misbranded in violation of the Textile Fiber Products Identification Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

1. Generic names and fiber trademarks were used on labels without a full and complete fiber content disclosure appearing on such labels the first time the generic name or fiber trademark appeared on the said labels, in violation of Rule 17(b) of the aforesaid Rules and Regulations.

2. The required information as to fiber content was not set forth in such a manner as to separately show the fiber content of each section of textile fiber products containing two or more sections, in violation of Rule 25(b) of the aforesaid Rules and Regulations.

PAR. 6. Respondents have furnished false guaranties that their textile fiber products were not misbranded by falsely representing on invoices that respondents had a continuing guaranty under the Textile Fiber Products Identification Act on file with the Federal Trade Commission, when such was not the fact, in violation of Section 10(b) of the said Act and Rule 38(d) of the Rules and Regulations promulgated under such Act.

PAR. 7. The acts and practices of respondents, as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts or practices in commerce, under the Federal Trade Commission Act.

DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agree-

ment is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent Glamour Sportswear Corp. 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 132 West 36th Street, New York, New York.

Respondent Pantops by Glamour, 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 132 West 36th Street, New York, New York.

Respondents Mark Lederman and Eugene Lederman are officers of said corporations and their address is the same as that of said corporations.

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 Glamour Sportswear Corp., a corporation, and its officers, Pantops by Glamour, Inc., a corporation, and its officers, and Mark Lederman and Eugene Lederman, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product, which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising,

delivery, transportation or causing to be transported, after shipment in commerce of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

Misbranding textile fiber products by:

1. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of the constituent fibers contained therein.

2. Failing to affix a stamp, tag, label or other means of identification to each such product showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

3. Using a generic name or fiber trademark on any label, whether required or non-required, without making a full and complete fiber content disclosure in accordance with the Act and the Rules and Regulations thereunder the first time such generic name or fiber trademark appears on the label.

4. Failing to make a disclosure on the required label on or affixed to textile fiber products composed of two or more sections of different fiber composition, in such a manner as to show the fiber composition of each section in all instances where such disclosure is necessary to avoid deception.

It is further ordered, That respondents Glamour Sportswear Corp., a corporation, and its officers, Pantops by Glamour, Inc., a corporation, and its officers, and Mark Lederman and Eugene Lederman, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from furnishing a false guaranty that any textile fiber product is not misbranded or falsely invoiced.

It is further ordered, That the respondent corporations shall forthwith distribute a copy of this Order to each of their operating divisions.

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.

INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

JACOBY-BENDER, INC., ET AL.

Docket 8728. Order, Jan. 5, 1968

Ordering denying motion to dismiss on the ground that complaint counsel was late in filing notice of appeal; and granting respondents extension of time to file reply.

Order Denying Motion to Dismiss Appeal

This matter is before the Commission on respondents' motion to dismiss the appeal on the ground that the notice of intention to appeal and the appeal brief of complaint counsel were not filed within the time prescribed by the Rules, and complaint counsel's answer in opposition thereto. It appears that complaint counsel, in their notice of intention to appeal, by inadvertence stated the initial decision was served November 16, 1967. This error is the basis of the motion to dismiss. In fact, the Commission's records show that the date of service was November 21, 1967. Complaint counsel's notice of intent and appeal brief were therefore timely filed. The Commission has further determined that in view of their misunderstanding as to the timeliness of complaint counsel's appeal respondents should be granted an extension of 30 days from the date of service of this order upon them within which to file their answer to the appeal. Accordingly,

It is ordered, That respondents' motion to dismiss the appeal be, and it hereby is, denied.

It is further ordered, That respondents be, and they hereby are, granted an extension of 30 days from the date of service of this order upon them within which to file their answer to the appeal.

CURTISS-WRIGHT CORPORATION

Docket 8703. Order, Jan. 24, 1968

Order denying respondent's appeal from hearing examiner's order directing compliance with a subpoena duces tecum.

Order Denying Appeal from Examiner's Ruling on Subpoena Duces Tecum

This matter having come on to be heard upon the appeal of respondent and Martin A. Sherry from the hearing examiner's order filed

December 18, 1967, directing compliance with a subpoena duces tecum issued October 12, 1967, and rescheduling return date, and upon the answer of complaint counsel in opposition thereto; and

The Commission having determined that the issues raised on the appeal were in substance decided in the Commission's order issued December 1, 1967 [72 F.T.C. 1027], and that respondent and Martin A. Sherry have raised no new or different contentions; that no showing has been made that the ruling complained of involves substantial rights and will materially affect the final decision and that a determination of its correctness before the conclusion of the hearing is essential to serve the interest of justice: and having furtl er determined that the appeal for such reasons should be denied:

It is ordered, That the appeal of respondent and Martin A. Sherry from the hearing examiner's order filed December 18, 1967, directing compliance with a subpoena duces tecum and rescheduling return date, be, and it hereby is, denied.

Commissioner Elman not concurring.

NATIONAL EXECUTIVE SEARCH, INC., ET AL.

Docket 8731. Order, Jan. 26, 1968

Order granting respondents' request to quash subpoena duces tecum directed to the president of the corporate respondent.

Order Granting Appeal and Remanding to Examiner With Instructions

This matter is before the Commission upon respondents' appeal filed December 1, 1967, from the part of the order of the hearing examiner, of November 27, 1967, denying their request to quash subpoena duces tecum directed to John W. Costello, president, National Executive Search, Inc., and upon complaint counsel's answer in opposition thereto; and it appearing to the Commission that the actions of the hearing examiner in issuing such subpoena duces tecum and denying in part the motion to quash exceeded the limits of the pretrial order; and the Commission having determined, therefore, that the matter should be remanded to the hearing examiner for his reconsideration of the issues raised in the light of the pretrial order:

It is ordered, That respondents' appeal from the part of the hearing examiner's order of November 27, 1967, denying their request to quash subpoena duces tecum directed to John W. Costello, president, National Executive Search, Inc., be, and it hereby is, granted.

It is further ordered, That inasmuch as the hearing examiner's order ruling on the subpoena duces tecum directed to John W. Costello, president, National Executive Search, Inc., exceeds the limits of his

pretrial order entered in this proceeding, the hearing examiner shall, in connection with such subpoena, modify the pretrial order to such extent as may be appropriate under § 3.21(d) of the Commission's Rules of Practice (*i.e.*, to prevent manifest injustice), after which the course of the proceedings shall be governed in accordance with these determinations and actions.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order, Feb. 15, 1968

Order remanding respondent's request for disclosure of certain documents to the hearing examiner to allow respondent to supplement its application.

ORDER REMANDING APPLICATION TO THE HEARING EXAMINER

The respondent has filed an application, certified to the Commission by the hearing examiner, requesting the disclosure of certain specified documents allegedly in the Commission's files. The application was filed "Pursuant to the Freedom of Information Act of 1966 and the Commission's 1967 Rules of Practice, and in light of the Hearing Examiner's and Commission's discretion to regulate discovery in adjudicative proceedings."

The Commission having considered the matter:

It is ordered, That the application for disclosure of documents be, and it hereby is, remanded to the hearing examiner with the direction to afford the respondent an opportunity to supplement the application so that, as regards such documents referred to therein which are subject to § 3.36 of the rules of practice, said application will meet the requirements of the rule. If this is done, the hearing examiner is further directed to again certify the matter to the Commission with his recommendation.

Commissioner MacIntyre not participating.

ASSOCIATED MERCHANDISING CORPORATION ET AL.

Docket 8651. Order, Feb. 16, 1968

Order remanding respondents' request for consent order procedure to hearing examiner for resubmission to Commission.

ORDER REFERRING REQUEST UNDER § 2.34(d) TO HEARING EXAMINER

Respondents, Associated Merchandising Corporation et al., have submitted a request to the Commission asking that this matter be withdrawn from adjudication pursuant to § 2.34(d) of the Commission's

Rules of Practice for the purpose of negotiating a settlement by the entry of a consent order.

Any request for withdrawal of a matter from adjudication for the purpose of negotiating a settlement by the entry of a consent order should be in the form of a motion addressed to the hearing examiner and by him certified to the Commission with his recommendation (§ 3.22 of the Rules of Practice); accordingly, without having considered the merits of this request,

The Commission refers this matter to the hearing examiner with directions (1) to have complaint counsel respond to respondents' request and (2) to then certify the matter back to the Commission with his recommendation as to whether it should be withdrawn from adjudication for the purpose of negotiating a settlement by the entry of a consent order.

It is so ordered.

NATIONAL EXECUTIVE SEARCH, INC., ET AL.

Docket 8731. Order, Feb. 21, 1968

Order denying complaint counsel's request to file interlocutory appeal relative to the issuance of a subpoena duces tecum directed to the president of the corporate respondent.

Order Denying Permission to File Interlocutory Appeal

This matter having come on to be heard upon complaint counsel's request filed February 5, 1968, for permission to file an interlocutory appeal from the hearing examiner's ruling on the record on January 30, 1968, denying their motion requesting him to amend the prehearing order so as to provide for the issuance of a subpoena duces tecum to John W. Costello, president, National Executive Search, Inc.; and respondents' motion for permission to answer interlocutory appeal or to otherwise plead; and

It appearing that the Commission on January 26, 1968 [p. 1236 herein], issued an order directing the hearing examiner, in connection with the disputed subpoena, to modify the pretrial order to the extent appropriate under § 3.21(d) of the Commission's Rules of Practice, and to proceed accordingly; and that the examiner, on January 30, 1968, denied complaint counsel's motion to amend the pretrial order for the reason that the application at that stage of the proceeding (which was at or near the end of the presentation of complaint counsel's case-in-chief) was untimely, the hearing examiner stating on the record in this connection that he would consider the issuance of the requested subpoena at the rebuttal stage of the pro-

ceeding to the extent the door is opened by respondents on the question; and

The Commission having determined in the circumstances that the hearing examiner's ruling is limited to the stage of the proceeding at the time of the ruling relating only to the request for the issuance of a subpoena in connection with complaint counsel's case-in-chief; that as to such limited ruling complaint counsel have failed to show that it involves substantial rights and will materially affect the final decision and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice, as required by § 3.23(a) of the Commission's Rules of Practice, and that therefore the request should be denied; and having further determined that in the circumstances respondents' motion for permission to answer is moot and need not be acted upon:

It is ordered, That complaint counsel's request for permission to file an interlocutory appeal, filed February 5, 1968, be, and it hereby is, denied.

LAKELAND NURSERIES SALES CORP. ET AL.*

Docket 6666. Order, Feb. 29, 1968

Order denying respondents' request to remand case to hearing examiner to receive evidence disproving certain facts allowed in record by official notice.

ORDER DENYING REQUEST TO REMAND PROCEEDINGS TO THE HEARING EXAMINER

This matter having come on to be heard upon respondents' motion, filed February 5, 1968, requesting, pursuant to Rule 3.43(d) of the Commission's Rules of Practice, that the Commission remand the proceedings herein to the hearing examiner for the purpose of affording the respondents the opportunity to disprove certain facts as to which the hearing examiner took official notice and to offer evidence with respect to the scope of subparagraph 1 of the first paragraph of the order, which assertedly rests on the finding as to which the hearing examiner took official notice, and for a stay or extension of time for respondents to file an appeal from the initial decision pending a determination of the request here made; and upon complaint counsel's answer in opposition to respondents' motion, filed February 15, 1968; and

It appearing that the hearing examiner issued his initial decision herein on January 12, 1968, and that the respondents filed a notice of an intention to appeal therefrom; that respondents, on their appeal,

*Formerly known as Lakeland-Deering Nurseries Sales trading as Lakeland Nurseries Sales.

will have full opportunity to challenge the initial decision or any part thereof, including the scope of subparagraph 1 of the first paragraph of the order in the initial decision and the action of the hearing examiner in taking official notice of a fact or of facts; that the Commission, after hearing such appeal and upon its consideration of the whole record, will then have an opportunity to dispose of the issues and to make a determination whether or not the taking of official notice was proper and necessary; and that at such time it would be appropriate to grant to respondents, to the extent, if any, that the decision relies on official notice, the opportunity to show to the contrary; and it further appearing that respondents, by order of February 20, 1968, have been granted an extension of time from February 24, 1968, to and including March 25, 1968, within which to file their appeal from the initial decision: and

The Commission having determined that until such time as it has had the opportunity to review the issues on the whole record the remand to the examiner as requested would be premature and therefore should be denied:

It is ordered, That respondents' motion to remand this matter to the hearing examiner for the purpose of affording respondents the opportunity to disprove facts as to which the hearing examiner took official notice and to offer evidence with respect to the scope of subparagraph 1 of the first paragraph of the order contained in the initial decision be, and it hereby is, denied.

VENT-AIR LENS LABORATORIES, INC., ET AL.

Docket 8715. Order, Mar. 7, 1968

Order denying respondents' request for withdrawal of case from adjudication for consent order procedure.

Order Denying Request to Withdraw Matter from Adjudication

The hearing examiner having certified to the Commission, on February 21, 1968, the motion of respondents to withdraw the matter from adjudication for the purpose of negotiating a consent settlement by the entry of a consent order; and

The Commission having determined that respondents have not shown exceptional and unusual circumstances as required by § 2.34(d) of the Commission's Rules of Practice and that therefore the matter should not be withdrawn from adjudication:

It is ordered, That respondents' request to withdraw this matter from adjudication be, and it hereby is, denied.

It is further ordered, That any further motion in this matter seeking withdrawal from adjudication be filed jointly by complaint counsel and respondents and that it contain an assurance that counsel have every reason to believe that consent negotiations will result in an order acceptable to the Commission.

UNIVERSE CHEMICALS, INC., ET AL.

Docket 8752. Order, Mar. 13, 1968

Order directing respondents and complaint counsel to file affidavits relative to the question of holding hearings in more than one place.

ORDER DIRECTING FILING OF SUPPLEMENTAL AFFIDAVITS

Respondents, on February 29, 1968, filed a motion requesting permission to file an interlocutory appeal, under Section 3.23(a) of the Commission's Rules of Practice, from the hearing examiner's order filed February 16, 1968, granting in part and denying in part complaint counsel's motion for hearings in more than one place. As a result of the hearing examiner's order, hearings are scheduled to be held in Chicago, Illinois, Evansville, Indiana, Omaha, Nebraska, and Minneapolis, Minnesota. Complaint counsel, on March 5, 1968, filed an answer opposing respondents' request.

Respondents argue that, because they operate an assertedly small business enterprise which requires their presence for its operation, the scheduling of hearings in more than one place would be financially oppressive to them.

The hearing examiner, is his order ruling on the request for scheduling hearings at different locations, stated that he had taken into account not only the convenience of respondents but the witnesses to be called as well. He determined that respondents, in their objections, did no more than suggest that the proposed hearings would be inconvenient and involve some additional expense; that there was no showing that the proposed schedule was unduly burdensome or otherwise prejudicial. On the other hand, he found that there would be twenty-seven witnesses called who would need to be transported from various locations if the hearing was held only in Chicago and that the inconvenience and expense involved in such transportation would outweigh the inconvenience and expense to respondents.

Section 3.41(b) of the Commission's Rules of Practice provides, in pertinent part, as follows: "Hearings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place and shall continue without suspension until concluded. Consistent with the

requirements of expedition, the hearing examiner shall have the authority to order brief intervals of the sort normally involved in judicial proceedings and, in unusual and exceptional circumstances for good cause stated on the record, he shall have the authority to order hearings at more than one place." The objective of this provision is to avoid unnecessary delay in the conduct of adjudicative proceedings. It plays an important part in effectuating "the policy of the Commission that, to the extent practicable and consistent with requirements of law, such proceedings shall be conducted expeditiously. In the conduct of such proceedings the hearing examiner and counsel for all parties shall make every effort at each stage of a proceeding to avoid delay." (Section 3.1.) Under the Commission's Rules hearings at more than one place are the exception, not the rule, and must be affirmatively justified, where so ordered by the hearing examiner, by "unusual and exceptional circumstances for good cause stated on the record."

In order to determine whether the hearing examiner's order in this matter meets the standards required by Section 3.41, the Commission finds that additional specific information is required. The assertions of both parties, on the basis of which the hearing examiner entered his order, were too generalized. Complaint counsel are directed to file with the Secretary of the Commission, within five days after service of this order upon them, a supplemental affidavit specifying in detail the cost or difficulties which would be involved in holding the hearings in only one place, together with any other "unusual and exceptional circumstances" asserted to constitute good cause for the hearing examiner's order. Similarly, respondents shall, within the same period, file with the Secretary a supplemental affidavit specifying in detail the nature and extent of the alleged financial and other burdens upon them if the hearing examiner's order should be upheld.

It is so ordered.

By the Commission, without the concurrence of Commissioner MacIntyre.

ALL-STATE INDUSTRIES OF NORTH CAROLINA, INC., ET AL.

Docket 8738. Order and Opinion, Mar. 18, 1968

Order denying respondents' motion to dismiss complaint on grounds that the Chairman had prejudged the case and that complaint counsel was conducting post-complaint investigation.

OPINION OF THE COMMISSION

MARCH 18, 1968

This matter is before the Commission upon the hearing examiner's

certification of respondents' motion to dismiss the complaint filed pursuant to § 3.22 of the Commission's rules of practice.

The motion, filed February 1, 1968, is based upon two grounds:

1. The members of the Commission are disqualified from performing a judicial function in this case because of the prejudgment of the facts as set forth in their letter to the Chairman of the Committee on Commerce of the United States Senate under date of November 28, 1967 * * *.[1]

2. The incorrigible persistence of Complaint Counsel in conducting post-complaint investigations now in the form of a request for a subpoena *duces tecum* * * *.[2]

On February 14, 1968, the examiner certified this motion to the Commission with a recommendation that the motion to dismiss be denied. We adopt the examiner's recommendation.

The letter which allegedly is responsible for a prejudgment of the facts in this matter was a response, signed by Chairman Paul Rand Dixon, to Senator Warren G. Magnuson's letter of October 10, 1967, "requesting an outline of the Commission's current program in the area of home improvement frauds together with suggestions for additional legislation to improve the enforcement program in this field."

Respondents' complete argument on the disqualification issue is that:

Chairman Dixon, speaking for the Commission, stated on page 2 of the letter that "generally speaking, these firms [home improvement companies] operate through a program of offering phony bargains, easy credit and exaggerated performance claims." The letter goes on to set forth in great detail a restatement of the complaint issued in this matter. There can be no doubt that there has been a prejudgment of this case which destroys the ability of the Commissioners to perform the judicial function imposed upon them by law. The letter cited states on page 6 that two cases are "presently being litigated." This case must be one of those cases.

We have therefore both a general and a specific prejudgment.[3]

Respondents also cite the *Amos Treat & Co.*[4] and *Texaco, Inc.*[5] cases as authority for their position.

The entire context of the letter, which is the basis for this motion, provides the Senate Committee on Commerce with general information relative to problems with which the Committee had a legitimate and constitutional concern. The letter simply advises the Senate Committee that the Commission is aware that problems exist in some segments of the home improvement industry, outlines certain of the problems, and advises in generalized terms what the Commission is doing in this area.

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[1] Motion to dismiss, p. 1.
[2] *Id.*, at pp. 1–2.
[3] *Id.* at p. 2.
[4] *Amos Treat & Co. v. Securities and Exchange Commission*, 306 F. 2d 260 (D.C. Cir. 1962).
[5] *Texaco, Inc. v. Federal Trade Commission*, 336 F. 2d 754 (D.C. Cir. 1964).

In the fifth paragraph on page nine, the letter recognized that the great majority of firms in this industry are both honest and reliable. In quoting Chairman Dixon's letter, respondents inserted the words "home improvement companies" in brackets. The insertion of these words had the effect of altering the meaning of this sentence because it was taken out of the context of the third paragraph. The words "these firms" as utilized in the letter, do not refer to "home improvement companies" in general.

The first paragraph on page two contains an estimate that 50,000 firms are engaged in the sale and installation of residential siding and storm windows. The true meaning of the third paragraph on this page, when read in connection with the two preceding paragraphs, is simply that, of the estimated 50,000 home improvement dealers in this country, a substantial number (without specific identification of any company) operate through a program of offering nonexistent bargains, etc. This, obviously, is not a general prejudgment of home improvement contractors, but a simple recognition that there are many firms in this industry that are engaging in deceptive and unfair trade practices.

Chairman Dixon's letter enumerates 14 operational patterns of the unethical firms in the home improvement industry which have become almost standardized. Among others, the following are mentioned on pages two and three: bogus contracts (No. 5); scare tactics (No. 9); referral selling (No. 10); spiking the job (No. 12); and affirmative misrepresentations (No. 13). Not one of these practices is challenged in the complaint in this case.

Respondents further assert that on page six, the letter referred to two cases which are presently being litigated and that "this must be one of those cases." The Commission is aware that it issued the complaint in this case. This does not mean that the Commission has prejudged the matter. Whether or not respondents are engaged in the deceptive practices described in the complaint will, of course, depend on the facts, and the facts will be judged only after the record is complete. A similar complaint was issued in another home improvement case. After a full hearing before a hearing examiner, the Commission, on appeal, held for respondents and dismissed the complaint.[6]

In the *Amos Treat & Co.* case, the court held that a member of the Securities and Exchange Commission could not participate in a decision of the Commission when prior to the appeal he had engaged in the performance of specific investigative or prosecuting functions of the case on review. This is not even remotely the issue here. The *Texaco* case is likewise inapplicable. Nothing was involved there but the precise words of a particular speech. The speech was construed by the court as indicating a prejudgment because respondents were specifically referred to in a context which could be interpreted as convey-

[6] *House of Marbet, Inc.*, Docket No. 8578, order issued September 24, 1964 [66 F.T.C. 787].

ing a belief that they had violated the law. There is nothing in the letter in this matter to indicate that any member of this Commission had decided that the respondents, or any other specific home improvement firm, have violated Section 5 of the Federal Trade Commission Act.

An implication of respondents' motion is that administrators must be disqualified from hearing a case if there is some evidence that they have made some measure of adjudgment of the law prior to consideration of the particular case. This would have, if accepted, the singular disadvantage of disqualifying any administrator or judge the second time a particular legal question came before him. As the Supreme Court has said:

> Neither the *Tumey* decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions of both law and fact.[7]

And added the Court:

> . . . the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court.[8]
>
> If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first [specific industry] unfair trade proceeding would similarly disqualify them from ever passing on another. See *Morgan* v. *United States*, 313 U.S. 409, 421. Thus experience acquired from their work as commissioners would be a handicap instead of an advantage * * *.[9]

Indeed, it is hornbook law that the kind of bias that disqualifies [10] refers to an "irrevocably closed" view of the particular parties or facts

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[7] *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 702–703 (1948).

[8] *Id.*, at 703.

[9] *Id.*, at 702.

[10] Thus, "[i]t has been held that the bias or prejudice alleged must be 'personal,' and that a mere prejudgment of the case is not sufficient." *Marquette Cement Mfg. Co.* v. *Federal Trade Commission*, 147 F. 2d 589, 592 (7th Cir. 1945), *aff'd, Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 700–703 (1948).

See *Eisler* v. *United States*, 170 F. 2d 273, 277–278 (D.C. Cir. 1948), *removed from docket*, 338 U.S. 189 (1949), a case involving the charge that Judge Holtzoff, having investigated "aliens and Communists, including appellant," in his former post as Special Assistant to the Attorney General, was biased and prejudiced. The Court of Appeals for the District of Columbia Circuit held: "Upon review of such an affidavit we do not hesitate to uphold the ruling of the court below that the affidavit should be stricken, for it does not establish bias and prejudice in the personal sense contemplated by the statute, assuming truth in all the facts stated. Prejudice, to require recusation, must be personal according to the terms of the statute, and impersonal prejudice resulting from a judge's background or experience is not, in our opinion, within the purview of the statute" (170 F. 2d at 278); *Lumber Mut. Casualty Ins. Co. of New York* v. *Locke*, 60 F. 2d 35, 38 (2d Cir. 1932) (held that, while "tactless" for administrator to have written letter saying he had investigated matter to his satisfaction and hearing would be mere formality, the letter "fell short of a statement that nothing that might be sown at such a hearing would change his mind . . . ."); *O'Malley* v. *United States*, 128 F. 2d 676, 680 (8th Cir. 1942), *rev'd on other grounds*, 317

involved in a specific case, not to the adjudicator's preconceptions about the *law*. "Bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification." [11] Respondents have failed to demonstrate either a general or specific prejudgment by any member of this Commission of the facts and issues in this proceeding.

The respondents' second contention is likewise without merit. The examiner stated in his certification that he has made no rulings on complaint counsel's current attempts to obtain information from respondents. The examiner has signed no subpoenas nor directed the taking of any depositions at this juncture. Section 3.35 of the rules of practice does not grant respondents any right to appeal until such time as the examiner makes his rulings on complaint counsel's applications. Accordingly, the certified motion to dismiss the complaint will be denied. An appropriate order will be entered.

ORDER RULING ON EXAMINER'S CERTIFICATION OF RESPONDENTS' MOTION TO DISMISS THE COMPLAINT AND REMANDING TO HEARING EXAMINER

The hearing examiner herein pursuant to § 3.22 of the Commission's rules of practice, on February 14, 1968, certified to the Commission respondents' February 1, 1968, motion to dismiss the complaint; and

The Commission for the reasons set forth in the accompanying opinion, has determined that respondents' motion to dismiss the complaint should be denied and that the matter should be remanded for further proceedings. Accordingly,

It is ordered, That respondents' motion of February 1, 1968, to dismiss the complaint be, and it hereby is, denied.

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

U.S. 412 (1943) (held district judge not disqualified to hear contempt case although he had directed U.S. District Attorney to commence it with observation that it was "apparent from the statement of counsel upon both sides here that there is, in the evidence in this regard, ground for believing that there has been a very gross imposition and fraud perpetrated in and upon this court by at least Pendergast, O'Malley and McCormack and there may be others") ; *National Lawyers Guild* v. *Brownell*, 225 F. 2d 552, 555 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 927 (1956) (held Attorney General not disqualified to adjudicate whether Lawyers Guild should be designated a subversive organization although he had made a public speech declaring that it was "because the evidence shows that the National Lawyers Guild is at present a Communist dominated and controlled organization fully committed to the Communist Party line that I have today served notice to it to show cause why it should not be designated on the Attorney General's list of subversive organizations").

[11] Davis, 2 *Administrative Law Treatise* 130, 131 (1958). "Our tradition rightly interpreted is that the judge should be neutral toward the question of whether the specific defendant is guilty. It is a perversion of that tradition to demand that the judge be neutral toward the purposes of the law." *Id.* at 138,, n. 28, quoting Jaffe. "The Reform of Administrative Procedure," 2 Pub. Ad. Rev. 131, 149 (1942).

LEHIGH PORTLAND CEMENT CO.

Docket 8680. Order and Opinion, Mar. 19, 1968

Order denying a third party's appeal from hearing examiner's order refusing to quash a subpoena duces tecum on behalf of the respondent in this case.

OPINION OF THE COMMISSION

MARCH 19, 1968

This matter is before the Commission upon the interlocutory appeal of Buffalo Concrete, a Division of Joseph Smith & Son, Inc. (Buffalo). This appeal, filed pursuant to § 3.35(b) of the Commission's rules of practice, is based upon the hearing examiner's order of January 31, 1968, denying in part [1] Buffalo's motion to quash a subpoena duces tecum issued to Buffalo by the hearing examiner on behalf of respondent Lehigh Portland Cement Co.

The examiner ruled that the contested subpoena was authorized by § 3.34(b)(2) of the current rules of practice. Buffalo contends that § 3.34(b)(2) does not authorize the issuance of a subpoena duces tecum, returnable at a prehearing conference for discovery purposes, to a nonparty for the production of documents which may not contain or constitute evidence.

Buffalo's argument that the Commission's rules of practice do not authorize the issuance of prehearing subpoenas duces tecum to persons other than complaint counsel or respondent is based upon its reading of § 3.34(b)(2). This subparagraph provides:

> (2) Subpoenas duces tecum may be used by any party for purposes of discovery or for obtaining documents for use in evidence, or for both purposes. When used for discovery purposes, a subpoena may require 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.

Buffalo interprets the second sentence as imposing a limitation on the first by requiring that subpoenas duces tecum, when used for discovery purposes, "only be directed to parties to the litigation." At the same time it concedes that when the proper showing has been made under § 3.33, a subpoena duces tecum for discovery purposes may be directed to persons other than parties to the litigation if the subpoena is to be used in connection with the taking of a deposition. Buffalo does not explain its theory of the basis for such a third-party subpoena if, as it contends, § 3.34 imposes a general limitation on the use of prehearing subpoenas duces tecum for purposes of discovery.

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[1] Buffalo also moved that portions of the subpoena duces tecum be quashed on the ground of irrelevancy. The examiner has not yet ruled upon this ground. This appeal is limited to the examiner's denial of the motion to quash on the ground that the Commission's rules do not authorize the issuance of subpoenas duces tecum to third parties.

Subparagraph (b)(1) of § 3.34 specifies the form and method of making application for issuance of "a subpoena requiring a person to appear and depose *or testify and to produce specified documents* * * * at the taking of a deposition, *or at a prehearing conference*, or at an adjudicative hearing * * *" (emphasis added). Subparagraph (2) of that section relates to the same subpoenas duces tecum, and the first sentence clearly authorizes, without restriction, the use of such subpoenas "for purposes of discovery or for obtaining documents for use in evidence, or for both purposes." The second sentence of this paragraph supplements the first sentence, as the hearing examiner has held. It does not, however, limit the scope of the coverage of the first. It simply makes explicit what might otherwise be open to interpretation, namely, that under the rules of practice if a subpoena is used for discovery purposes, it may require any party (as well as a nonparty) to produce and permit the inspection and copying of documents and exhibits therein referred to.

A consideration of the development of this rule illustrates the specific purpose of the second sentence. As noted in the footnote to the second sentence of § 3.34(b)(2), "Orders for the production of documents, provided for under former rules of practice, are no longer used." This footnote (1) calls attention to the fact that the rules of practice no longer provide for the use of orders to produce, and (2) makes clear that the use of subpoenas has been substituted for the use of orders to produce as provided for in former rules.

Section 3.11 of the former rules stated in pertinent part:

> § 3.11 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 * * *.

This rule was very similar to Rule 34 of the Federal Rules of Civil Procedure. It specifically provided for orders requiring the production of documents by a *party*. It had nothing to do with and was not related to any other process which might be available under this or any other rule to require the production of documents by nonparties.[2] Thus, since the Commission in promulgating its new rules of practice abolished the use of orders to produce (by a party) and substituted therefor the use of subpoenas to require production (also by a party), it merely undertook by the second sentence of § 3.34(b)(2) to make this clear. It did not by this provision limit or restrict the use of subpoenas elsewhere authorized (in the first sentence of § 3.34(b)(2) to require the

[2] The scope of § 3.34 is in some respects similar to Rule 45 of the Federal Rules of Civil Procedure. Rule 45 authorizes the issuance of subpoenas duces tecum to parties and nonparties for purposes of general discovery before trial as well as for testimony and production of documents at the trial. Moore *Federal Practice and Procedure* 1168, 1453 (1964).

production of documents generally whether for discovery purposes or for obtaining documents for use in evidence, or for both purposes.

Section 3.34, read as a whole, makes it clear that the Commission is authorizing the fullest and most complete discovery practicable.

> The rules for adjudicatory proceedings are intended to embody the Commission's conviction that, to the fullest extent practicable, the strategy of surprise and the art of concealment will have no place in a Commission proceeding. Hence, we have also provided for thorough *post*-complaint *discovery* procedures. It should be obvious that discovery is a two-way street and that it is the hearing examiner's responsibility to insist that both complaint counsel and respondent's counsel be provided with sufficient data to insure an expeditious and completely fair hearing.[3]

The examiner's ruling was in compliance with the spirit and letter of the rules of practice. Buffalo has failed to make any showing that the examiner abused his discretion or authority. 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.[4] The appeal of Buffalo from the part of the examiner's action denying its motion to quash the subpoena duces tecum on the ground that the subpoena duces tecum issued to Buffalo was not authorized by the Commission's rules will be denied. Accordingly, the motion will be denied and an appropriate order will be entered.

Commissioner MacIntyre did not participate.

Order Denying Interlocutory Appeal

This matter is before the Commission upon the interlocutory appeal of Buffalo Concrete, a Division of Joseph Smith & Son, Inc. (Buffalo). This appeal, filed pursuant to § 3.35(b) of the Commission's rules of practice, is based upon the hearing examiner's order of January 31, 1968, denying in part Buffalo's motion to quash a subpoena duces tecum issued to Buffalo on behalf of respondent Lehigh Portland Cement Co. The Commission has determined that the appeal should be denied. Accordingly,

It is ordered, That the appeal of Buffalo Concrete, Division of Joseph Smith & Sons, Inc., from the ruling of the hearing examiner on the motion to quash or limit subpoena duces tecum on the ground that the subpoena duces tecum issued to Buffalo was not authorized by the Commission's rules be, and it hereby is, denied.

By the Commission, with Commissioner MacIntyre not participating.

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[3] *All-State Industries of North Carolina, Inc.*, Docket No. 8738, order issued November 13, 1967 (emphasis in original) [72 F.T.C. 1020, 1023].

[4] *Topps Chewing Gum, Inc.*, Docket No. 8463, order issued July 2, 1963 [63 F.T.C. 2196].

MARLO FURNITURE COMPANY ET AL.

Docket 8745. Order, Mar. 28, 1968

Order denying respondents' motion to discuss complaint and quash hearing examiner's order for a post-complaint investigation.

Order Denying Motion to Dismiss and Appeal From Hearing Examiner's Order

This matter is before the Commission on respondents' motion to dismiss the complaint certified by the examiner with the recommendation it be denied and their appeal from the hearing examiner's order of February 27, 1968, refusing to quash an order for access. The complaint in this proceeding, which issued on September 27, 1967, charges respondents with engaging in fictitious pricing, misrepresenting in certain instances the identity of the seller appearing in their advertisements, and the composition and construction of certain products, failing to advise purchasers that deposits were not refundable, and not disclosing that conditional sales contracts or other instruments of indebtedness may be assigned or transferred to a finance company or other third party to whom the customer thereby becomes indebted.

On February 2, 1968, complaint counsel filed an application for an order requiring access to certain respondents' records revelant to the fictitious pricing allegations set out in paragraphs 4 through 6 of the complaint. By order of the same date, the hearing examiner required respondents to grant access to the inventory stock records and sales vouchers relating to certain items promoted in specific advertisements which have already been identified as Commission Exhibits. Respondents moved to quash the order for access on the ground complaint counsel were embarking on a post-complaint investigation in violation of the Commission's rules. Respondents argue that the request for access goes beyond the "rounding out" permitted once the case is in the adjudicative stage by recent Commission decisions, *viz*, *All-State Industries of North Carolina, Inc., et al.*[1] and *Curtiss-Wright Corporation*,[2] since Commission counsel seek evidence necessary to prove the charges set forth in the complaint. In addition, respondents assert that the order for access is improper on the ground that it would be unduly burdensome, and that the records sought could have been secured prior to issuance of complaint.

Essentially, the motion to dismiss and the appeal from the hearing examiner's refusal to quash the order for access are based on the

[1] Docket 8738, November 13, 1967 [72 F.T.C. 1020].
[2] Docket 8703, December 1, 1967 [72 F.T.C. 1027].

same grounds. Respondents argue in effect that in asking for the order of access, complaint counsel conceded they have insufficient evidence to sustain the charges in the complaint. They contend, therefore, the complaint should be dismissed, since the Commission was misled into believing that there was good cause to issue it. The examiner in certifying respondents' motion to dismiss expressly held, however, that the access required by his order is consistent with the Commission's decisions in *All-State Industries*, and *Curtiss-Wright Corporation.*

The determination of whether complaint counsel's request is within the bounds of permissible post-complaint discovery outlined by *All-State Industries* is of necessity largely within the examiner's discretion. He is responsible for the conduct of the proceedings and the definition of the issues; and the decision on whether the criterion of *All-State Industries* has been met depends on the particular facts and circumstances of every case. His ruling on whether requests for discovery are appropriate will, therefore, in the absence of unusual circumstances not be disturbed by the Commission. In this instance, the documents encompassed within the order requiring access on their face do not involve a post-complaint attempt to investigate such as that condemned in *All-State Industries.* In this case, requiring access to stock record cards and sales vouchers for six items of furniture for a ten month period pertinent to advertisements already specifically identified as Commisssion Exhibits is well within the examiner's discretion.

Respondents' arguments on the basis of these facts that the Commission did not have good cause to issue complaint is also without merit. Contrary to respondents' apparent position, the preliminary investigation need not "encompass the gathering of *all* of the details for each and every transaction which may eventually become an evidentiary item in a subsequent complaint." Complaint counsel may properly after the issues have been defined in a prehearing conference request additional documentation to round out, extend or supply further details for the particular transactions to be pursued in the course of the hearings. *All-State Industries*, *supra.* Since it appears that the examiner's exercise of discretion in issuing the order complained of was on its face reasonable, the motion to dismiss and respondents' appeal from his refusal to quash will both be denied. Accordingly,

It is ordered, That respondents' motion to dismiss the complaint be, and it hereby is, denied.

It is further ordered, That respondents' appeal from the hearing examiner's order of February 27, 1968, refusing to quash the order for access be, and it hereby is, denied.

It is further ordered, That respondents' request for oral argument be, and it hereby is, denied.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order and Opinion, Apr. 8, 1968

Order denying a third party's motion to quash a subpoena directed to it on behalf of the respondent.

OPINION OF THE COMMISSION

APRIL 8, 1968

This matter is before the Commission upon the interlocutory appeal of District Concrete Company, Inc. (District). This appeal, filed pursuant to § 3.35(b) of the Commission's Rules of Practice, is based upon the hearing examiner's order of February 28, 1968. The order denied District's motion to quash a subpoena duces tecum issued to District by the hearing examiner on behalf of respondent Lehigh Portland Cement Co. and also denied District's incidental request for access to respondent's *ex parte* application for the subpoena duces tecum.

The examiner denied the motion on the ground that it was not made within ten days after service of the subpoena as provided for in § 3.34(b). Moreover, the examiner ruled that District neither requested an extension of time nor showed any "good cause" for an extension as required by § 4.3(b).

The motion to quash was filed thirty days after service and nineteen days after the expiration of time for filing such motion under the Commission's rule. Furthermore, the examiner noted that ten days after receipt of the subpoena, District, by its counsel at that time, executed a stipulation with respondent's counsel binding District to "comply in full with the subpoena duces tecum" by "mailing all responsive documents, correspondence, data and verified summaries" to respondent's counsel by February 9, 1968.[1]

The examiner found that District had not demonstrated "good cause" or other extenuating circumstances, which would permit him to allow movant to make its late motion. Additionally, the examiner noted that to allow District's motion would be tantamount to special treatment which "would produce a disorderly result in this case where over 100 witnesses have been subpoenaed to produce documents and over half of them have already informally complied." [2]

Moreover, the examiner did state that he "is not ruling, however, that after timely motions to quash of contesting witnesses have been passed on, he may not direct that the disposition thereof may in part apply to other witnesses." [3]

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[1] Order denying Motion to Quash, p. 2 (February 28, 1968).
[2] *Id.*, at p. 3.
[3] *Id.*

As to the request for access to the subpoena application, the only reason set forth for this request is that the application "is obviously necessary for District Concrete to know" respondent's reasons for seeking the information.[4] The examiner stated that granting the request might "prejudice the respondent, inasmuch as respondent prepared its application and supporting grounds, involving the disclosure of its strategy in this case, in respect to two different kinds of subpoenas and in respect to various types of witnesses, in reliance on the *ex parte* status."[5] The *ex parte* status of a subpoena application submitted by a respondent should not be disturbed without compelling reason. District has not made such a showing.

Section 3.35(b) states that interlocutory appeals will be entertained by the Commission only "upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice." District has failed to meet any of these requisites. In the absence of the required showing, the examiner's rulings upon evidentiary or procedural matters arising in the course of such proceedings will not be reviewed or disturbed.[6] Accordingly, District's appeal will be denied and an appropriate order will be entered.

Commissioner MacIntyre did not participate.

ORDER DENYING INTERLOCUTORY APPEAL

This matter is before the Commission upon the interlocutory appeal of District Concrete Company, Inc. (District). This appeal, filed pursuant to § 3.35(b) of the Commission's Rules of Practice, is based upon the hearing examiner's order of February 29, 1968. The order denied District's motion to quash a subpoena duces tecum issued to District by the hearing examiner on behalf of respondent Lehigh Portland Cement Co. and also denied District's incidental request for access to respondent's *ex parte* application for the subpoena duces tecum.

For the reasons stated in the accompanying opinion, the Commission has determined that District's appeal should be denied. Accordingly,

It is ordered, That the appeal of District Concrete Company, Inc., from the ruling of the hearing examiner on the motion to quash subpoena duces tecum and for production of the application therefor be, and it hereby, is, denied.

By the Commission, with Commissioner MacIntyre not participating.

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[4] Appeal to the Commission, p. 5.

[5] Order, p. 4.

[6] See, *e.g.*, *Topps Chewing Gum, Inc.*, Docket 8463 (order issued July 2, 1965).

REPUBLIC CONSTRUCTION COMPANY, INC., ET AL.

Docket C-1164. Order, Apr. 8, 1968

Order denying petition to reopen proceeding for the purpose of amending a prohibition in the order.

Opinion and Order Denying Petition to Reopen the Proceeding for the Purpose of Amending Order to Cease and Desist

This matter is before the Commission upon the petition of respondents Lester Mossman and Irving Kaplow, filed March 4, 1968, termed a petition for modification of decision and order and construed to be a request for a reopening of the proceeding and for a modification of the order to cease and desist pursuant to § 3.72(b) (2) of the Commission's Rules of Practice. The petitioners allege that the order of the Federal Trade Commission issued January 31, 1967 [71 F.T.C. 84], based upon a consent agreement, prohibits respondents, in paragraph 3 thereof, from representing that:

Any commission is given by respondents to purchasers of respondents' products for referrals who subsequently purchased respondents' products;

that the petitioners intended such paragraph to contain the modifying phrase "unless such commissions are in fact given as represented," and that they believe the absence of such qualifying language was a mistake. The Acting Director of the Bureau of Deceptive Practices filed an answer opposing such requested reopening and modification of the order, and in the event respondents produce evidence supporting their position that significant payments of referral commissions are now being made, proposing an alternative form of order.

The petitioners have made no showing, other than the bare assertion that they did not intend the unqualified prohibition in paragraph 3, that this provision is contrary to the understanding of the parties at the time of the execution of the consent agreement. Respondents do not claim that there is any ambiguity or unclearness in the challenged provision nor do they state any circumstances which might suggest an original misunderstanding as to its meaning.

Moreover, the petitioners have made no sufficient showing under § 3.72(b) (2) of the Commission's Rules of Practice that changed conditions of fact or law require the modification of paragraph 3 or that the public interest so requires the modification of paragraph 3 or that ing for modification of an order must state the changes desired, the grounds therefor, and must include, when available, such supporting evidence and argument as will, in the absence of a contest, provide a basis for a Commission decision on the petition. Petitioners have made no such showing. All that they have done is to include in their petition the unsupported assertion that they and other companies in their marketing area and throughout the United States "have offered and given

[c]ommissions and [g]ifts." Petitioners do not claim, as we construe their statement, that they are presently offering or paying commissions and gifts for referrals; that they have any current program for such payments, or even that they anticipate beginning such a program. In other words, they have not shown any presently existing change in law or fact or public interest considerations which would constitute grounds for reopening the matter for the purpose stated. Accordingly,

It is ordered, That the request of Lester Mossman and Irving Kaplow for the reopening of this proceeding and for the modification of the order to cease and desist be, and it hereby is, denied.

AMERICAN BRAKE SHOE COMPANY

Docket 8622. Order and Memorandum, Apr. 9, 1968

Order denying respondent's motion to disqualify Commissioner Jones and for additional information and stay.

MEMORANDUM OF COMMISSIONER JONES IN RESPONSE TO THE MOTION OF RESPONDENT AMERICAN BRAKE SHOE COMPANY THAT SHE WITHDRAW FROM THIS PROCEEDING

MARCH 29, 1968

Respondent American Brake Shoe Company by motion dated March 26, 1968, has requested that I disqualify myself from participation in the decision in the above-captioned case. If I decide not to disqualify myself, respondent moves the Commission to determine that I be disqualified from such participation.

As alleged grounds for its motion, respondent relies on the facts communicated to it in my letter of March 12, 1968, that subsequent to the oral argument of this case before the Commission, the attorney of record, V. Rock Grundman, Jr., joined my staff as attorney-advisor. I am attaching a copy of my letter to respondent which further advised that I have not discussed this case in any way with Mr. Grundman, and do not intend to do so in the future and that Mr. Grundman and my other assistants are under instructions not to discuss this case among themselves.

Respondent, American Brake Shoe Company, has also moved for additional information with respect to whether Mr. Grundman has "communicated about this case with any persons on the staff of the Chairman or any Commissioner" and whether such persons have "subsequently communicated about the case with the Chairman or any Commissioner who participated in the decision."

Since I wish the public record to be as complete as possible on this matter, I have asked Mr. Grundman to furnish me with a statement

as to any and all communications he may have had with any Commissioner or member of the staff of any Commissioner about this case since he has been on my staff. A copy of Mr. Grundman's statement is attached hereto.

I am fully cognizant of the provisions of Section 5(c) of the Administrative Procedure Act and of Section 4.7 of the Commission's Rules of Practice with respect to *ex parte* communications and of Canon 17 of the Canon of Judicial Ethics. There has been no breach either of the letter or of the spirit of any of my legal, ethical or moral obligations as reflected in any of these provisions and principles. Accordingly, there is no ground on which I should or must disqualify myself. It is my decision, therefore, not to disqualify myself from participation in this proceeding.

I shall not be present and shall not participate in any deliberation or decision by the Commission on respondent's alternate request that I be disqualified from participation by the Commission.

EARL W. KINTNER, Esq.,
RALPH S. CUNNINGHAM, JR., Esq.,
GEORGE KUCIK, Esq.,
ARENT, FOX, KINTNER, PLOTKIN & KAHN,
1815 H Street, N.W.,
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HUGH J. KELLY, Esq.,
Counsel for Complaint,
Bureau of Restraint of Trade,
Federal Trade Commission,
Washington, D.C. 20580

Re: In the Matter of American Brake Shoe Company
Docket No. 8622

GENTLEMEN:

I wish to advise you that in July, 1967, subsequent to the oral argument before the Commission in the above-captioned case, one of the complaint counsel, Mr. V. Rock Grundman, joined my staff as an attorney-advisor.

I have never discussed this case with Mr. Grundman. I do not intend to discuss this case with Mr. Grundman nor ask him to furnish me with any assistance on any matter which may arise in connection with this case. Furthermore, I have instructed Mr. Grundman not to discuss this case with any member of my staff, as an added precaution in case I decide to utilize the assistance of another member of my staff in connection with this case.

I wish to advise you that I intend to participate in the decision

in this case, but I wanted you to know of Mr. Grundman's present connection with my office and of my instructions to him.

Very sincerely yours,

MARY GARDINER JONES,
Commissioner.

AFFIDAVIT OF V. ROCK GRUNDMAN, JR.

I received this day copies of (1) a motion for stay, (2) a motion for additional information and (3) a motion for disqualification of Commissioner Jones filed by respondent in this matter. The motion for additional information requests information including but not limited to:

(a) whether Mr. Grundman has communicated about this case with any persons on the staff of the Chairman or any Commissioner and

(b) whether any of those persons subsequently communicated about the case with the Chairman or any Commissioner who participated in the decision.

Since the date of oral argument in this case in February of 1967 I have done nothing related to the case in any way. I have written no letters, memoranda, or anything else to any person either within or without the Commission. I have spoken to no Commissioners, their individual staffs nor member of the Commission's staff with respect to the case except to mention to Commissioner Jones, prior to accepting the position as attorney advisor, that I was counsel on the case, I also mentioned to each of Commissioner Jones' other staff members that I was counsel on the case to ensure that nothing related to the case would come to my attention.

In my position as attorney advisor with Commissioner Jones I have seen no writing nor participated in any conversation nor heard any conversation dealing with the merits of the case. The only thing I have seen which mentions the case is a routine circulation put out by the Secretary of the Commission listing the names of the cases pending with the Commission, the docket number and the date of the oral argument.

The only other person with whom I have discussed the case since the oral argument is Mr. George R. Kucik, attorney for respondent. That conversation was a casual one on meeting in the street and consisted of mutual speculation on when the Commission decision would be forthcoming and what we might do differently if the case were to be tried again.

The foregoing is true and correct to the best of my knowledge and belief.

V. ROCK GRUNDMAN, JR.

418-345—72——80

Order Denying Motions for Disqualification, Additional Information and Stay

Respondent moved on March 26, 1968, that Commissioner Jones disqualify herself from participating in the decision in this proceeding. In the alternative, respondent has moved that if Commissioner Jones does not disqualify herself that the full Commission consider the request for disqualification. In addition, respondent has filed a motion for additional information and a motion for a stay in the proceedings until five (5) days after disposition of the motion for additional information and the motion for disqualification filed by respondent on the same date. Commissioner Jones for the reasons stated in her memorandum attached hereto has decided not to disqualify herself. Mr. Grundman, complaint counsel in this proceeding, has filed an affidavit in response to respondent's motion for additional information, a copy of which is also attached.

Section 7(a) of the Administrative Procedure Act clearly empowers the Commission to determine whether a presiding officer conducting a "hearing" on behalf of the Commission is subject to "personal bias or disqualification." It is not so clear whether this provision was meant to apply to the participation of an individual agency member in final or appellate determinations. The inquiry on the basis of which such motions must be decided is necessarily subjective. Weighing the ability of one of its own members to make an objective judgment is of necessity a difficult and delicate responsibility for a tribunal. In addition, the existence of such a power to disqualify carries with it an inherent danger of abuse as a potential instrument for suppression of dissent.

Under the Commission's practice, disqualification is treated as a matter primarily for determination by the individual member concerned, resting within the exercise of his sound and responsible discretion. In the Commission's view, this practice is proper and consistent with the law and in the instant proceeding no basis for departing from that practice has been shown. The motion for disqualification, the motion for a stay of the proceedings, and the motion for additional information, except to the extent that it has been satisfied by Commissioner Jones's memorandum and Mr. Grundman's affidavit are denied. Accordingly,

It is ordered, That the motion for disqualification of Commissioner Jones be, and it hereby is, denied.

It is further ordered, That the motion for additional information, except to the extent already satisfied by Commissioner Jones's memorandum and Mr. Grundman's affidavit, be, and it hereby is, denied.

It is further ordered, That the motion for a stay of the proceedings be, and it hereby is, denied.

By the Commission, with Commissioner Jones not participating.

UNIVERSE CHEMICALS, INC., ET AL.

Docket 8752. Order and Opinion, Apr. 9, 1968

Order denying appeal from hearing examiner's order scheduling hearings in more than one place.

DISSENTING OPINION

APRIL 9, 1968

BY ELMAN, *Commissioner:*

Under Section 3.41(b) of the Commission's Rules of Practice, hearings in more than one place are supposed to be the rare exception, and not the rule. The Rules say that they may be allowed by the hearing examiner only in "unusual and exceptional circumstances [and] for good cause stated on the record." In this case, the only justification for the hearing examiner's order is a desire to avoid inconvenience to witnesses and extra expense to the Commission. That is not enough. The Commission should firmly hold the line against retreating to the old pre-1961 peripatetic hearings. We should instruct the hearing examiners that the Rules of Practice mean what they say. Actions speak louder than words—by upholding the hearing examiner's order here, the Commission tolerates unnecessary delays in the conduct of adjudicative proceedings.

ORDER DENYING PERMISSION TO FILE INTERLOCUTORY APPEAL

Respondents, on February 29, 1968, filed a motion requesting permission to file an interlocutory appeal, under Section 3.23(a) of the Commission's Rules of Practice, from the hearing examiner's order filed February 16, 1968, granting in part and denying in part complaint counsel's motion for hearings in more than one place. As a result of the hearing examiner's order, hearings were scheduled to be held in Chicago, Illinois, Evansville, Indiana, Omaha, Nebraska, and Minneapolis, Minnesota. Complaint counsel, on March 5, 1968, filed an answer opposing respondents' request.

Respondents argued that, because they operate an assertedly small business enterprise which requires their presence for its operation, the scheduling of hearings in more than one place would be financially oppressive to them.

In order to facilitate our consideration of whether the hearing examiner's order satisfies the requirements of Section 3.14 of the Commission's Rules permitting the hearing examiner to order hearings in more than one place "in unusual and exceptional circumstances" or whether, on the other hand, appeal should be granted under Section 3.23(a) as involving substantial rights and materially affecting the final decision,

we directed the filing of supplemental affidavits by the parties setting forth respectively their reasons in support of their respective positions. The affidavits have been duly filed.

Section 3.41(b) of the Commission's Rules requires that hearings be held in one place insofar as practicable. The party requesting departure from that Rule has the burden of showing the unusual and exceptional circumstances justifying hearings at more than one place.

We are at pains to point out that matters such as that involved here are best left to the sound discretion of the hearing examiner, and we are satisfied from the affidavits submitted that complaint counsel has made sufficient showing warranting holding of hearings in more than one place. Thus, in the circumstances presented we do not believe that the hearing examiner has abused his discretion in this matter. Accordingly,

It is ordered, That respondents' request for permission to file an interlocutory appeal, filed February 29, 1968, be, and it hereby is, denied.

Commissioner Elman dissented and has filed a statement.

CONSOLIDATED MORTGAGE COMPANY ET AL.

Docket 8723. Order, Apr. 19, 1968.

Order reopening case and setting aside the complaint and order as to corporate respondent.

Order Reopening and Dismissing Complaint and Setting Aside Order as to Corporate Respondent

Respondents, on March 18, 1968, filed with the Commission a petition, requesting the Commission to reconsider its opinion and final order issued February 19, 1968 (p. 376 herein), on the grounds that the Commission assertedly failed or did not have the opportunity to consider respondents' submission of February 21, 1968, relating to a petition for dissolution filed in Superior Court of Rhode Island and that the Commission assertedly did not follow an interpretation of law as contained in certain cases referred to, and further requesting the Commission to grant respondents a reasonable time within which to submit to the Commission a final court order dissolving respondent corporation and to grant respondents an oral hearing on their petition. Complaint counsel, on March 25, 1968, filed an answer in opposition to the petition.

Subsequently, on April 8, 1968, respondents filed a letter with the Commission, enclosing a copy of the final decree of Superior Court of the State of Rhode Island, entered April 3, 1968, ordering that Consolidated Mortgage Company be dissolved. Complaint counsel filed

a supplemental answer April 11, 1968, in which he states he is opposed to any reconsideration of the Commission's decision and final order but that he has no objection to the exclusion of the corporate respondent from the order to cease and desist in view of its dissolution.

In the circumstances, the Commission is of the opinion that this proceeding should be reopened pursuant to § 3.72(a) of the Commission's Rules of Practice, the complaint dismissed and the order set aside as to the dissolved corporate respondent. This action will render moot or irrelevant respondents' other specific requests. Accordingly,

It is ordered, That this matter be, and it hereby is, reopened.

It is further ordered, That the order to cease and desist as to respondent Consolidated Mortgage Corporation be, and it hereby is, set aside and that the complaint as to such respondent be, and it hereby is, dismissed.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order and Opinion, May 14, 1968

Order granting respondent's request that complaint counsel furnish him with a list of acquisitions of portland cement companies manufacturing ready-mixed concrete for the years 1965 through 1968.

OPINION OF THE COMMISSION

MAY 14, 1968

On April 30, 1968, counsel supporting the complaint requested: (1) Commission authorization to disclose certain confidential information and (2) permission to file an interlocutory appeal pursuant to § 3.23(a) of the rules of practice. Both requests are predicated upon the hearing examiner's order of April 23, 1968, requiring complaint counsel to furnish this information to respondent by April 30, 1968.[1] Pursuant to respondent's requests for admissions of fact and disclosure of information dated April 1, and April 3, 1968, the examiner ordered complaint counsel to divulge information "* * * insofar as known by complaint counsel or as they have reason to believe" concerning the identities and dates of acquisitions of ready-mixed concrete companies by cement companies. Complaint counsel wish to appeal from this portion of the order. Additionally, the examiner ordered complaint counsel to either furnish *all* such information from Commission files, regardless of whether they had knowledge thereof, or in lieu thereof, to seek authorization from the Commission to divulge this information. Respondent in its April 1, and April 3, 1968, requests asked for information in addition to that which the examiner recommends be disclosed. However, respondent, in its May 2, 1968, Opposition to Com-

[1] The effective date of the hearing examiner's order was stayed by the Commission on May 2, 1968.

plaint Counsel's Request for Permission to File an Interlocutory Appeal, urges support for the examiner's actions. Furthermore, since respondent has raised no objection to the scope of the information recommended for disclosure, we assume that the earlier additional requests are not before us.

Complaint counsel base their request for appeal upon the following assertions: (1) the information required by the examiner's order is confidential within the meaning of § 4.10 of the Commission's rules of practice, (2) respondent has not made a proper request for this information, (3) the hearing examiner has no authority to order disclosure, and (4) complaint counsel have no authority to disclose confidential information without Commission authorization.

It is evident that the orderly procedures specified by the Commission's rules of practice have not been followed in this instance.[2] However, complaint counsel have specifically requested Commission authorization to disclose the information covered by the examiner's order. Furthermore, on May 1, 1968, the examiner filed a certification to the Commission in which he stated: "Insofar as this [complaint counsel's request] may be regarded as a *motion* authorizing disclosure (and entirely apart from the request for permission to appeal) the examiner, having no authority to rule on a motion authorizing disclosure of confidential information, certifies the motion to the Commission under Section 3.22(a) of the Rules, and makes an affirmative recommendation." (Emphasis in original.) Inasmuch as we grant the disclosure requested by complaint counsel and the examiner, the appeal is moot.

The examiner has recommended that respondent's counsel be furnished with a list of acquisitions for the years 1965 through 1968, of portland cement companies engaged in the manufacture of ready-mixed concrete, containing the following:

(1) The name of the acquiring cement manufacturer.
(2) The name of the acquired ready-mixed concrete company.
(3) The date of the acquisition.

The only documents which would appear to contain such information are FTC Forms A (1-67) contained in File No. 681 0620, "Investigation to Effectuate Enforcement Policy With Respect to Vertical Mergers in Cement Industry."

The Commission, acting upon the examiner's certification and complaint counsel's request for permission to disclose, has determined to order disclosure. Further, the Commission has considered this matter and has determined that the respondent's interest in being furnished with this information for the purpose of making its defense in this proceeding, and the Commission's interest in preventing unnecessary

[2] See *Lehigh Portland Cement Co.*, Docket 8680, order issued February 15, 1968 [p. 1237 herein].

or improper disclosure of information concerning the operation of many portland cement companies, including competitors of respondent, which have filed special reports pursuant to Commission orders, can best be accommodated and satisfied by establishing certain conditions and safeguards upon the disclosure of this information to counsel for respondent.[3]

An appropriate order will be entered.

Commissioner MacIntyre did not participate.

ORDER DIRECTING DISCLOSURE OF INFORMATION

The Commission has determined, as stated in the accompanying opinion, that complaint counsel's request for permission to disclose certain information, as certified by the examiner, should be granted. Accordingly,

It is ordered, That, without delay, complaint counsel furnish respondent's counsel with a list of acquisitions for the years 1965, 1966, 1967 and 1968 of portland cement companies engaged in the manufacture of ready-mixed concrete. The list shall contain the following:

(1) The name of the acquiring cement manufacturer.
(2) The name of the acquired ready-mixed concrete company.
(3) The date of the acquisition.

This list shall be compiled from documents contained in File No. 681 0620, "Investigation to Effectuate Enforcement Policy With Respect to Vertical Mergers in Cement Industry."

It is further ordered, That said list may be furnished only to counsel for respondent who have filed an appearance and are actually engaged in the defense of this proceeding, and only for the purpose of preparing such defense, and no information contained in such list shall be disclosed to any other person, including any officer or employees of respondent.

It is further ordered, That counsel for respondent may make application to the hearing examiner for permission to disclose said list or any information contained therein, to other specified persons for use in the defense of this proceeding. Application for such permission shall identify the names and positions of the persons to whom the list or information would be disclosed and the purposes for which this would be examined or used by those persons. Permission may be granted by the hearing examiner only upon a showing that such disclosure is necessary for the respondent's defense in this proceeding.

It is further ordered, That the hearing examiner's order of April 23, 1968, be, and it hereby is, vacated.

It is further ordered, That complaint counsel's request for permission to file an interlocutory appeal be, and it hereby is, denied.

By the Commission, with Commissioner MacIntyre not participating.

[3] See, *e.g.*, *The Grand Union Co.*, 62 F.T.C. 1491 (1963).

SCHOOL SERVICES, INC., ET AL.

Docket 8729. Order and Memorandum, May 14, 1968

Order denying the respondents' motion that the Chairman be disqualified from hearing this case.

MEMORANDUM OF CHAIRMAN DIXON

MAY 14, 1968

Respondents, School Services, Inc., et al., by motion filed May 3, 1968, have requested me to withdraw from further participation in this proceeding, or in the alternative that the Commission determine that I be disqualified from such further participation.

The complaint in this matter charges, in part, that respondents have falsely represented that they offer a course of instruction that qualifies students to be airline stewardesses and that Cinderella Career College and Finishing School is a college. In his initial decision issued on January 26, 1968 [74 F.T.C. 920, 926], the hearing examiner found that the evidence does not sustain the charges and ordered that the complaint be dismissed. The case is now pending before the Commission upon appeal of counsel supporting the complaint.

On March 15, 1968, I delivered an address before the Government Relations Workshop of the National Newspaper Association. Respondents, in their motion, quote the following excerpt from that speech:

> If really effective brakes are to be applied, they will have to be applied by business itself. Government can throw an assist, but whether our system of free competitive enterprise can survive depends on the vigor with which reputable business can serve the consumer. Granted that this is a very broad generalization, it is nonetheless valid. Consider, for example, how it fits the newspaper business. What kind of vigor can a reputable newspaper exhibit? The quick answer, of course, pertains to its editorial policy, its willingness to present the news without bias. However, that is only half the coin. How about ethics on the business side of running a paper? What standards are maintained on advertising acceptance? What would be the attitude toward accepting good money for advertising by a merchant who conducts a "going out of business" sale every five months? *What about carrying ads that offer college educations in five weeks,* fortunes by raising mushrooms in the basement, getting rid of pimples with a magic lotion, *or becoming an airline's hostess by attending a charm school?* Or, to raise the target a bit, how many newspapers would hesitate to accept an ad promising an unqualified guarantee for a product when the guarantee is subject to many limitations? Without belaboring the point, I'm sure you're aware that advertising acceptance standards could stand more tightening by many newspapers. *Granted that newspapers are not in the advertising policing business, their advertising managers are savvy enough to smell deception when the odor is strong enough.* And it is in the public interest, as well as their own, that their sensory organs become more discriminating. The Federal Trade Commission, even where it has jurisdiction, could not protect the public as quickly. (Emphasis added by respondents.)

It is respondents contention that the emphasized references to advertisements offering "college educations in five weeks" and "becoming an airline's hostess by attending a charm school" were "unmistakenly an allusion to the allegations in the present case." They request that I withdraw for the reason that my remarks reflect prejudgment of the issues or, if I have not prejudged the issues, that I should withdraw to assure the appearance of complete fairness in this proceeding.

In the first place, respondents' assertion that the advertising representations used as examples in my remarks "unmistakenly" allude to the allegations in this matter is completely without foundation. Indeed, respondents make no attempt to show any correlation between the charges before the Commission and my remarks. My reference was to claims for a college education in five weeks, but there is no allegation in the complaint that respondents' courses are limited to such a time period. In fact, the examiner's decision, which issued before my remarks were made, states that respondents' courses extend for an appreciably longer period of time. The reference to advertising representations that a person may become an airline hostess by attending a charm school is likewise not related to any questions involved in this case at the time my remarks were made. The complaint is directed in part at the respondents' alleged advertising claims that one of their specific courses of instruction qualifies students to be airline stewardesses. The issue before the Commission, however, is not the truth or falsity of such claim [1] but whether or not respondents have made the alleged representation. And this, obviously, is not a matter to which my remarks were directed.

In referring to the advertising representations mentioned in my remarks, I had no particular case in mind. I merely listed certain principles in advertising which, based on my judgment and experience, would indicate a possible breach of acceptable standards.

In my opinion, this matter falls squarely within the holding of the Supreme Court in the *Cement Institute* case.[2] In that case, the Commission issued a formal complaint based on an earlier investigation of the basing point system as used in the cement industry. Prior to complaint, the Commission had reported to Congress that the industry's basing point system was a price fixing device and was unlawful under the Sherman Act and the Federal Trade Commission Act. In denying respondents' motion for disqualification of the Commission, the Supreme Court stated that:

> Neither the *Tumey* decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types

[1] The parties stipulated that none of respondents students, merely because they had completed a course of instruction in Cinderella Career College & Finishing School, qualify for a job as an airline stewardess (Initial Decision, p. 40) [74 F.T.C. 920, 958–959].

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

of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court. (333 U.S. at 702–703.)

It is established law that the kind of personal bias that requires disqualification is that which has led to an irrevocably closed mind on the issues. On this point, the Supreme Court in the *Cement Institute* case has stated that:

In the first place, the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities. (333 U.S. at 701.)

The court of appeals in commenting on this question of prejudice in *Eisler* v. *United States*, 170 F. 2d 273 (D.C. Cir. 1948) has stated that "Prejudice, to require recusation, must be personal according to the terms of the statute, and impersonal prejudice resulting from a judge's background or experience is not, in our opinion, within the purview of the statute."

The issues in this case have been fully litigated and the record is before us. My decision on these issues will be based solely on the evidence in this record. If my decision is adverse to respondents, and I am in the majority, respondents will have an absolute, statutory right to test, in the courts, whether the majority's findings are supported by evidence.[3]

As to the "appearances" contention in respondents' motion, I have stated in my memorandum refusing to withdraw from participation in *Bakers of Washington*, Docket 8309 (November 4, 1964) [66 F.T.C. 1562, 1566], that this principle "is not a rigid command of the law, compelling disqualification for trifling causes, but a consideration addressed to the discretion and sound judgment of the administrator himself in determining whether, irrespective of the law's requirements, he should disqualify himself." The Supreme Court's decision in the *Cement Institute* case, *supra*, makes it clear that an administrator's duty is presumed, in the absence of clear proof to the contrary, to be not only regular in all respects but affirmatively in the public interest.

[3] Section 5(c) of the Federal Trade Commission Act provides in part that any party "required by an order of the Commission to cease and desist . . . may obtain a review of such order" in the appropriate court of appeals. "Upon such filing of the petition and transcript the court . . . shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission. . . . The findings of the Commission as to the facts, *if supported by evidence*, shall be conclusive" (emphasis added).

As I further pointed out in my memorandum in the *Bakers of Washington* matter, this principle has been summed up in the statement of a recent commentator that "every adjudicator has a positive duty to fulfill his adjudicative functions unless actually disqualified, and both the individual parties to a controversy and the public at large have a vested interest in such administrator's participation in the case involved. Consequently, while an administrator should scrupulously search his conscience to test his impartiality, it is almost as great a fault to employ self-disqualification too readily as too sparingly." [4]

I can state without reservation that I have scrupulously searched my conscience and that I have not prejudged the issues in this case, nor do I harbor any bias or prejudice against the respondents. My decision will be based entirely on the facts contained in the record. Accordingly, it is my decision not to withdraw from participation in this proceeding.

I shall not participate in any deliberation or decision by the Commission on respondents' alternate request.

Order Denying Motion to Disqualify

Respondents, School Services, Inc., et al., by motion filed May 3, 1968, requested that Chairman Dixon withdraw from further participation in this proceeding, or, in the alternative, that the full Commission disqualify Chairman Dixon. Chairman Dixon, for the reasons stated in the attached memorandum, has decided not to withdraw from participation in any further proceedings in this matter.

A tribunal which is asked to rule on the ability of one of its own members to make an objective and impartial judgment faces a most difficult and delicate responsibility. This responsibility cannot be treated lightly.

Traditionally, the Commission has viewed requests for disqualification as a matter primarily to be determined by the individual member concerned, leaving it within the exercise of his sound and responsible discretion. This is only proper and consistent with the law and no basis for departing therefrom has been demonstrated in the instant proceeding. Accordingly,

It is ordered, That the motion for disqualification of Chairman Dixon be, and it hereby is, denied.

By the Commission, with Chairman Dixon and Commissioner Elman not participating.

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[4] Comment "Prejudice and the Administrative Process," 59 *Northwestern Univ. L. Rev.* 216, 233–234 (May–June 1964).

SWINGLINE INC.

Docket 8759. Order, May 24, 1968

Order denying respondent's request that proceeding be withdrawn from adjudication.

Order Denying Request to Withdraw Proceeding From Adjudication

This matter is before the Commission upon the hearing examiner's certification of May 10, 1968, of respondent's request to certify a motion to withdraw the proceeding from adjudication. The hearing examiner recommends that the motion be denied.

Although § 2.34(d) of the Rules of Practice and Procedure provides that the consent order procedure is not available after complaint has issued, it also provides that the Commission, upon request, may in exceptional and unusual circumstances and for good cause shown withdraw a proceeding from adjudication in order to negotiate a consent order.

In its motion respondent states that since the issuance of the complaint it has obtained new counsel and it now desires the opportunity to negotiate a consent order. In addition, respondent claims that changed circumstances warrant withdrawal of the matter from adjudication.

Respondent has not met the exceptional and unusual circumstances requirement nor shown good cause which would warrant withdrawal of the proceeding from adjudication. It should be noted that prior to the issuance of the complaint an attempt was made to settle the matter by entry of a consent order to cease and desist. Moreover, as a general rule the Commission will not entertain a request to withdraw a proceeding from adjudication unless it is accompanied by at least a concrete proposal of settlement by respondent. In the instant proceeding, respondent has done no more than express a desire to dispose of the matter through negotiation of a consent order without even submitting to the Commission, for its consideration, a proposed order to cease and desist.

For these reasons we agree with the hearing examiner that the requirements of § 2.34(d) for withdrawal of the proceeding from adjudication have not been met. Accordingly,

It is ordered, That the request to withdraw the proceeding from adjudication be, and it hereby is, denied.

SUBURBAN PROPANE GAS CORPORATION

Docket 8672. Order and Opinions, June 3, 1968

Order granting complaint counsel's appeal from hearing examiner's ruling against amending complaint counsel's trial brief.

OPINION OF THE COMMISSION

JUNE 3, 1968

This matter is before the Commission on the interlocutory appeal of counsel supporting the complaint from the hearing examiner's order of October 20, 1967, granting respondent's motion to strike an amendment to complaint counsel's trial brief and respondent's answer in opposition to the appeal. Also before the Commission is the hearing examiner's certification of complaint counsel's motion of October 18, 1967, to postpone commencement of formal hearings from November 13, 1967, to February 5, 1968, together with the examiner's recommendation that said motion be denied and that the proceeding be dismissed for want of prosecution. The hearing examiner has also certified to the Commission, with request for instructions, complaint counsel's request for subpoenas returnable during the week of November 13 through November 17, 1967.

I. Complaint Counsel's Appeal from the Hearing Examiner's Order of October 20, 1967

The question presented by this appeal concerns complaint counsel's initial burden in coming forward with evidence in a proceeding under Section 2(f) of the Clayton Act. The facts relevant to this appeal are as follows:

On February 28, 1967, respondent, having apparently convinced the hearing examiner that it purchased in larger quantities and was served by different methods than its competitors, asked the examiner for an order which in substance would state (a) that complaint counsel would have the burden of showing that the difference in methods by which Suburban was served by its supplier, Phillips Petroleum Company (Phillips), and the different quantities involved, compared with alleged disfavored competitors, could not give rise to sufficient savings to cost justify the alleged differential in prices between Suburban and said disfavored competitors, and that Suburban knew or should have known that the differences involved as to methods and quantities could not have given rise to sufficient pertinent savings to justify such differentials, and (b) require that complaint

counsel amend their previously filed trial brief and therein allocate exhibits and otherwise specify in indicated detail the evidence to be offered on the cost justification issue.

The hearing examiner denied this request, stating that he "assumes that complaint counsel are familiar with the legal precedents which respondent has cited and will interpret them correctly with reference to the evidentiary burden imposed upon complaint counsel to prove the absence of cost justification." On appeal from this denial, the Commission pointed out in its order of May 25, 1967 [71 F.T.C. 1695], that the examiner had erred in refusing to resolve the question raised by respondent and instructed him to hear complaint counsel in answer to respondent's motion and to dispose of the matter in such a way as to provide respondent with sufficient knowledge of the evidence complaint counsel would adduce on the cost justification issue to allow respondent adequately to prepare its defense. We also made the following comment with respect to complaint counsel's burden in those instances where the favored buyer purchases in different quantities or by different methods than its competitors [71 F.T.C. 1699]:

> * * * assuming the matter to involve different methods or quantities, if complaint counsel show such facts and circumstances as would have given the buyer reason to believe, based on the knowledge available to him, including knowledge of the methods of doing business in the particular industry, that the different methods or quantities could not have resulted in cost savings sufficient to justify the differential allegedly accorded him, they would have met their initial burden.

On June 26, 1967, the hearing examiner entered a pretrial order which provided in pertinent part:

> * * * that complaint counsel shall have the burden of showing, as part of their prima facie case, that the difference in the methods by which Suburban was served by Phillips and the difference in the quantities purchased by Suburban from Phillips, as compared with the alleged disfavored competitors, could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the alleged differential in prices paid to Phillips by Suburban as compared with prices paid to Phillips by the alleged disfavored competitors *and* that Suburban knew or should have known that the difference in the methods by which it was served and the difference in the quantities which it purchased could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the aforesaid price differentials * * *.

Complaint counsel disagreed with this order since they interpreted it as requiring them to introduce into evidence a cost study which would indicate statistically that the discriminatory prices accorded to respondent were not in fact cost justified. Since they so construed the order they requested permission to file an interlocutory appeal. We denied this request by order of July 20, 1967 [72 F.T.C. 989], but specifically pointed out that if the hearing examiner intended by the order to require complaint counsel to introduce a formal cost study

such order would be inconsistent with applicable case law. We went on to say that we did not interpret the pretrial order as requiring the introduction by counsel supporting the complaint of a cost study and we assumed that the hearing examiner would apply the pretrial order in accordance with the Commission's order of May 25 [72 F.T.C. 1695]. It seems, however, that this assumption was incorrect.

On September 22 complaint counsel, pursuant to the examiner's order of June 26, filed an amendment to trial brief allocating exhibits and summarizing expected testimony of witnesses with respect to the cost justification issue. Respondent then moved that this amendment be stricken on the ground that it failed to comply with that part of the examiner's order which required a showing that differences in methods and quantities of purchases could not give rise to sufficient savings in cost to justify the price differential. Respondent also requested that the examiner either direct complaint counsel to comply with the order or dismiss the complaint. On October 20, the examiner issued the following order striking the amended trial brief:

IT IS ORDERED that respondent's motion filed October 13, 1967, to strike complaint counsel's Amendment to Trial Brief filed September 22, 1967, be, and hereby is, granted; and

IT IS FURTHER ORDER that complaint counsel comply with the hearing examiner's order of June 26, 1967, within two weeks after the Federal Trade Commission acts upon the hearing examiner's recommendation, being forwarded this date, that this proceeding be dismissed, if the Commission does not dismiss this proceeding.

It is from this order that the present appeal is taken.

Unfortunately, the hearing examiner has failed to indicate in what respect he found the amended trial brief to be deficient. It seems fairly obvious, however, that he accepted the arguments made in respondent's motion to strike the amendment. We note in this connection that respondent argued to the examiner that the Commission, by refusing to grant complaint counsel's request to file an interlocutory appeal from the examiner's order of June 26, not only upheld that order but also approved the examiner's interpretation of the order as requiring the introduction of a statistical cost study. This is, of course, a wholly erroneous version of the Commission's ruling since we specifically pointed out in our order denying the request to file an interlocutory appeal that "the pretrial order would indeed be incorrect as inconsistent with the case law on this point" if it were interpreted as requiring complaint counsel "to introduce into evidence a cost study which indicates statistically that the discriminatory prices accorded to Suburban were not cost justified."

Respondent also argued in its motion to strike that complaint counsel had openly defied the examiner and had conceded that the amendment to their trial brief did not comply with his order of June 26.

Respondent asserted, in this connection, that "by complaint counsel's own admission the amendment to their trial brief does not comply with the hearing examiner's order" and that "It is apparent that complaint counsel are attempting to ignore not only the order of the hearing examiner, but the decision of the Commission in affirming that order." These arguments would have some semblance of merit only if the examiner's order would require the introduction by complaint counsel of a statistical cost study, which, as we have held, it does not. Even the most casual reading of the amended trial brief clearly reveals that complaint counsel are prepared to come forward with evidence as to respondent's supplier's costs, although not in the form of a formal cost study.[1]

The position maintained by complaint counsel throughout this proceeding has been that, insofar as the cost justification issue is concerned, the burden imposed upon them by *Automatic Canteen*[2] is satisfied by the prima facie showing that a reasonable and prudent businessman, on the basis of facts known to him, should have believed that a favorable price granted to him could not have been cost justified by his supplier. In other words, they have claimed that their initial burden is limited to a prima facie showing of *knowledge* on the buyer's part that the lower prices it received could not be cost justified. They have never denied, however, and in fact have recognized that to make this showing of knowledge complaint counsel may in some instances be required to come forward with evidence as to the seller's costs. In this connection, they stated in answer to respondent's interlocutory appeal filed April 24, 1967, that in certain factual situations "general testimony as to costs involved [must] necessarily [be] elicited by complaint counsel in order to establish the requisite knowledge on the part of the buyer," and in their request for permission to file an interlocutory appeal on June 30, 1967, they reiterated that "complaint counsel recognize that they must come forward with some generalized evidence as to costs from which the inference can be drawn that Suburban knew or should have known that the price differences could not have been cost justified."

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[1] Complaint counsel state on page 2 of the amended brief that "Necessarily included is the allocation of evidence of certain facts related to costs which indicate that Suburban knew or should have known that cost justification by Phillips was improbable." And an example of such facts is set forth in a study referred to as follows in the Explanatory Note to the brief: "The following study was undertaken on an invoice-by-invoice basis to compare the relative expense incurred by Phillips Petroleum Company in shipping LPG to Suburban with the costs incurred by Phillips with respect to five nonfavored customers who took product primarily by truck. This study was made necessary when an issue was raised by respondent in the course of interlocutory appeals as to whether it cost Phillips substantially more to transport LPG to these nonfavored purchasers than to ship to Suburban, and whether these cost differentials more than compensate for the lower prices accorded Suburban."

[2] *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61 (1953).

Throughout this proceeding, therefore, complaint counsel have maintained that their burden of establishing a *prima facie* case may be satisfied with something less than a formal cost study demonstrating that the lower prices to respondent were not in fact cost justified. They consider that their burden may be met by the introduction of such evidence that will create a *prima facie* showing that respondent, as a reasonable and prudent businessman, should have known that the differential it received could not be cost justified.

As indicated in our earlier rulings in this matter, we believe that complaint counsel's position is consistent with applicable case law. In the leading case on point, *Automatic Canteen*, *supra*, the sole issue before the court was whether the prima facie showing that respondent induced and received a discriminatory price which it knew may have proscribed anticompetitive effects was sufficient to shift to respondent the burden of introducing evidence. The court held that the Commission had an additional burden, that as part of its prima facie case it must show actual or constructive knowledge on the part of respondent that the difference in the prices involved were not based on cost differences. The court also pointed out "by way of example" that this burden could be sustained by a showing that there was no difference in the quantities and methods, by which respondent and its disfavored competitors were served and that respondent was aware of that fact, or, if there was such a difference, that it could not result in sufficient cost savings to justify the discrimination and that respondent was aware of that fact. In either case the showing to be made by the Commission was that respondent *knew or should have known* that the lower prices it received could not be cost justified. It is apparent that counsel for the Commission is not required to introduce into evidence a detailed cost study. An application of common sense makes the correctness of this conclusion obvious, for in any factual situation where the discrepancy between the price differential and the cost differential is so minute that it can be demonstrated only by a cost study, knowledge of the absence of a cost justification defense cannot reasonably be imputed to the recipient of the lower price by such a showing. In a case in which complaint counsel's proof consists of a showing that the differences in quantities or methods of purchase could not give rise to sufficient cost savings to justify the lower price, the requisite knowledge may be inferred, in the absence of other circumstances indicating knowledge, only in those instances where "the cost differences are very small compared with the price differential and could not reasonably have been thought to justify the price difference." (346 U.S. at 80.)

It is also clear from the court's opinion in *Automatic Canteen* that in making the prima facie showing of knowledge on the part of the recipient of the lower price, the Commission is not restricted to the

type of proof specifically mentioned in the court's example. As a matter of fact, the court stated that it need not attempt to illustrate "what other circumstances can be shown to indicate knowledge on the buyer's part that the price cannot be justified." (*Id.*, at 80.) And that there are other circumstances which can be shown to indicate such knowledge is a fact not unknown to the Commission. *In the Matter of Fred Meyer, Inc.*, Docket 7492 (March 29, 1963) [63 F.T.C. 1, 26], for example, a showing of circumstances other than those mentioned by the court was held to be sufficient to support an inference of knowledge on the part of the buyer-respondent. The Commission held in that case that ". . . a buyer who gets a 33⅓% price concession during only one month out of each year, paying the same price as his competitors during the other eleven months, has every reason to believe that there is not the remotest possibility of 'cost justification' for that temporary concession. . . . In the absence of . . . an explanation, we think the inference is inescapable that respondents 'knew' there could be no cost justification" (Commission opinion, p.58) [63 F.T.C. at 70]. In affirming the Commission's decision on this point, the court held that the Commission's failure to prove the suppliers' costs was immaterial and that ". . . where the facts and the inferences to be drawn are as clear as they are on this point, we think the method of proof adopted by the Commission here is appropriate to . . . showing that the buyer 'is not an *unsuspecting recipient* of prohibited discriminations.'" *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F. 2d 351, 364 (9th Cir. 1966) (emphasis in original).[3]

In the matter now before us, complaint counsel, according to their amended trial brief, intend to come forward with evidence as to Phillips' costs in selling to Suburban and to certain of Suburban's nonfavored competitors for the purpose of showing the awareness of Suburban as a reasonable and prudent businessman that the lower price it received could not be cost justified. The ultimate burden of persuasion may require that additional evidence be adduced in response to evidence of respondent's counsel to whom the burden shifts upon proof of the initial prima facie case. It cannot be doubted that the ultimate burden of persuasion rests with counsel supporting the complaint, although the burden of going forward may shift back and forth dur-

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[3] There may, of course, be other circumstances which will demonstrate the requisite knowledge that price differences are not based on cost differences. For example, an intra-company memorandum prepared by a responsible official of the recipient of a lower price which would state that the discriminatory price was below the supplier's cost and could not therefore be justified by the different quantities or methods in which the recipient purchased, would, in our opinion, suffice to show that the recipient knew that the discriminatory price could not be cost justified. If in this case complaint counsel intend to rely on such a document to make a prima facie showing of knowledge, an order of the type issued by the hearing examiner would, of course, be wholly inappropriate. As in *Fred Meyer*, complaint counsel would not be required as part of their initial burden to introduce any evidence whatsoever as to the seller's actual costs.

ing the hearing. We now hold only that the amended trial brief on its face complies with the hearing examiner's order of June 26 as we have interpreted it, and that the examiner erred in striking this brief.

II. Certification of Motion to Postpone Hearings and Recommendations for Dismissal of Complaint

By motion filed October 18, 1967, complaint counsel requested the hearing examiner to cancel formal hearings set in Washington for November 13, 1967, and to reschedule them to commence on or about February 5, 1968, in New York City. Complaint counsel's motion also included an alternative request that the hearings be reset for New York City if the hearing examiner believed that they should commence on November 13, 1967.

This motion seems to be one upon which the hearing examiner should have been able to rule. Certainly he had the authority to do so. Instead of granting or denying complaint counsel's request, however, he certified the motion to the Commission without giving any reason for his refusal to rule.

Included in his certification is the recommendation that the proceeding be dismissed for want of prosecution. According to the examiner, complaint counsel were not prepared at the time the complaint issued to prove their case and "have repeatedly expressed reluctance to proceed to formal hearings and still do." We find nothing in the public record of this proceeding, however, to support this statement. While there has been a misunderstanding on the part of the examiner as to the nature of the proof required to make a prima facie showing of the knowing inducement or receipt of an unlawful price discrimination, we have no reason to believe from any public statements or documents filed by complaint counsel that they are not prepared to make out a prima facie case. The record does not indicate that complaint counsel must bear the responsibility for the seemingly interminable delay in bringing this matter to trial.

The hearing examiner also bases his recommendation for dismissal on certain assertions made by Suburban in a motion filed on February 28, 1967, requesting dismissal of the proceeding on the ground that the practices complained of had been terminated and that the public interest no longer required the Commission to seek the issuance of a cease-and-desist order against respondent. The hearing examiner's reliance on these statements is difficult to understand since he had previously denied respondent's motion in which these statements were made, and the Commission had held on appeal from his ruling that the issue of whether the practices had been discontinued "if further raised, should be resolved * * * on the basis of the whole record to be made in this proceeding." The fact that the issue has now been raised by the examiner is no reason for changing our earlier ruling.

We will consider the issue of abandonment only when the record has been completed.

The passing of time since the matter was certified to the Commission has rendered moot complaint counsel's request for postponement of formal hearings as well as complaint counsel's request for subpoenas returnable during the week of November 13 through November 17, 1967. The matter is, therefore, being returned to the examiner with instructions to commence hearings at the earliest date possible, allowing complaint counsel sufficient time to make the necessary arrangements for an orderly and continuous presentation of their case-in-chief.

Commissioner Elman dissented and has filed a dissenting opinion.

Dissenting Opinion

JUNE 3, 1968

By Elman, *Commissioner:*

The issue here is a narrow one, concerning the burden of coming forward with evidence on the issue of cost justification in a proceeding against the buyer under Section 2(f) of the Clayton Act.[1] As the Commission recognizes, this is not a novel question. On the contrary, the Supreme Court has in the *Automatic Canteen* case[2] already decided the precise point. Our duty, as I see it, is simply to follow the clear and explicit mandate of *Automatic Canteen*. Although professing to follow the Supreme Court's decision, the Commission in my view has "rewritten" *Automatic Canteen*, reaching a result which is inconsistent with that case and unjustifiably scrambling the equitable allocation of the burden of proof there made by the Supreme Court.

I

Section 2(f) makes it unlawful for any person "knowingly to induce or receive a discrimination in price which is prohibited by" that Section of the Act. In the present case it is alleged that respondent induced its suppliers to sell liquefied petroleum gas to it at discount prices not available to respondent's competitors. This discount would not be illegal under Section 2(a), and *a fortiori* under Section 2(f), if the price differential made "only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities" were sold or delivered to respondent. It is, therefore, a premise of the instant complaint, unarticulated but nevertheless present, that the "prohibited" prices induced by respondent were not cost justified.

[1] 15 U.S.C. § 13(f).
[2] 346 U.S. 61 (1953).

In an ordinary proceeding against the seller under Section 2(a) it is not part of complaint counsel's *prima facie* case to show that the discriminatory prices charged were not cost justified. Cost justification is an affirmative defense to be alleged and proved by the respondent in a 2(a) case. The reasons for imposing such a burden on the seller are obvious. He has in his possession, or can obtain, the relevant information concerning his costs of manufacture, sale and delivery; he can undertake the necessary study, allocation, and analysis of these costs even more readily than can complaint counsel. In a case brought against the seller, therefore, it is reasonable and proper to invoke the ordinary rule of statutory construction that "the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." [3]

On the other hand, in a case brought against the buyer these considerations are inapplicable. Different but equally persuasive factors dictate that both the burden of going forward with evidence and the burden of persuasion be placed on complaint counsel. The Supreme Court set out these countervailing factors and stressed their importance in the *Automatic Canteen* opinion:

> Insistence on proof of costs by the buyer might thus have other implications; it would almost inevitably require a degree of cooperation between buyer and seller, as against other buyers, that may offend other antitrust policies, and it might also expose the seller's cost secrets to the prejudice of arm's-length bargaining in the future. Finally, not one but, as here, approximately 80 different sellers' costs may be in issue.
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> * * * * * * *
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> [T]he fact that the buyer does not have the required information, and for good reason should not be required to obtain it, has controlling importance in striking the balance in this case. . . . Certainly the Commission with its broad power of investigation and subpoena, prior to the filing of a complaint, is on a better footing to obtain this information than the buyer. 346 U.S. at 68, 78–79.

The Commission suggests that the *Automatic Canteen* case is distinguishable, and the Court's careful language inapposite, because, the majority opinion argues, the question whether the prices paid by Automatic Canteen were cost justified was not at issue.[4] There is no merit to this argument. In defining the issue before it the Court explained that the Commission had not only failed to "make any findings as to [respondent's] . . . knowledge of actual cost savings" but had also "made no finding negativing the existence of cost savings or stating that whatever cost savings there were did not at least equal price differentials [respondent] * * * may have received." 346 U.S. at 66–67. The Court's decision as to burden of proof is thus controlling here. It is no casual dictum but reflects careful consideration of the Act's "infelicitous language" in light of its legislative his-

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[3] *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 44–45 (1948).

[4] Majority opinion, p. 1273.

tory, and analysis of the consequences of possible alternative constructions. It is not a decision to be disregarded or eviscerated because it makes more difficult the prosecution of a buyer under Section 2(f). The short of it is that, on the cost-justification issue in a 2(f) case, the burden of coming forward with evidence, as well as the burden of persuasion, rests squarely on complaint counsel.

How those burdens can be met was also discussed by the Supreme Court. In the case where it is shown by complaint counsel that the buyer knows he purchases "in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer," he can be charged with notice that substantial price differential cannot be cost justified. A showing by the Commission of such knowledge on the buyer's part would satisfy its obligation to come forward and make out a *prima facie* case. On the other hand, the Court held that in a case like that before us, where the methods or quantities differ:

> [T]he Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings. 346 U.S. at 80.

The import of these words is clear. Complaint counsel must show that the prices paid by respondent could not be cost justified, and that respondent knew or should have known this. At an earlier stage of this proceeding, the Commission itself recognized the two-pronged nature of complaint counsel's burden. In its order of May 25, 1967 [71 F.T.C. 1695, 1699], the Commission, quoting the *Automatic Canteen* decision, said:

> [I]f the methods or quantities differ, the Commision must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings.

Now the Commission departs from this ruling, holds erroneous the hearing examiner's order which is cast in the same language as *Automatic Canteen*, and, in effect, upholds complaint counsel's contention that "evidence showing actual or constructive knowledge on the buyer's part as to lack of probable cost justification by his seller completely satisfies the burden imposed in all 2(f) proceedings." Brief, p. 4. No justification is offered for this refusal to follow controlling precedent, and none is discernible save for the impermissible one that it makes complaint counsel's case easier to prove.

As was pointed out in our order of July 20, 1967 [72 F.T.C. 989], complaint counsel are not compelled to introduce a formal cost study. I do not suggest that, nor does respondent so contend. The question is not what kind or quantum of evidence will satisfy complaint counsel's

burden of persuasion as to absence of cost justification, but whether they have the burden of coming forward with evidence on this issue as part of their *prima facie* case. I agree, of course, that in a case brought under Section 2(f), just as in a case brought under 2(a), a detailed cost study should be unnecessary. It is unfair to expect a seller engaged in hard bargaining over price with his buyer, and concerned lest he be underbid by his competitors, to prepare a precise and complete cost study before setting his price. Some flexibility in assessing the quantum of proof required to establish a cost justification defense is also made necessary by the elusiveness of cost data.[5] Similarly, in a Section 2(f) case complaint counsel might satisfy their initial burden on this issue by showing a large price discrimination manifestly disproportional to any plausible cost savings attributable to the particular sale involved. How that burden is met will of necessity vary in each case, but some such showing is essential if the Commission is to make a finding supported by evidence that the price discrimination alleged was not cost justified, a finding that is essential if the discrimination is to be held illegal.

By ignoring the first branch of the *Automatic Canteen* rule the Commission permits a finding of illegality to be based solely on the buyer's "guilty knowledge," a result plainly at odds with the statute's meaning and purpose. Suppose, for example, a search of respondent's files uncovered a memorandum from the director of the purchasing department to the company's president in which he said, "I just obtained an incredibly large discount from *X* supplier, so large that I cannot believe it is cost justified. I just hope the FTC doesn't hear about it." Respondent's "guilty knowledge" would be manifest from such a memorandum, but the Section 2(f) violation would not be proven. However illegal respondent might have thought the discount to be, however evil its intentions, the discount would be perfectly legal if it were in fact cost justified; and since "the buyer does not have the required information, and for good reason should not be required to obtain it," the burden of bringing forward objective facts showing the discount to be illegal and not cost justified would be on complaint counsel.

The Commission shifts this example somewhat and argues that such an intra-company memorandum not only would "suffice to show that the recipient knew that the discriminatory price could not be cost justified," but would also relieve complaint counsel entirely of "their initial burden to introduce any evidence whatsoever as to the seller's actual costs." [6] I agree that such a memorandum would satisfy complaint counsel's initial burden to introduce evidence of the buyer's

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[5] See, *e.g.*, *American Motors Corp. v. Federal Trade Commission*, 384 F. 2d 247 (6th Cir. 1967), *cert. denied*, April 9, 1968.

[6] Majority opinion, p. 1274, n. 3.

"guilty" state of mind. Similarly, in a murder case, the fact that the accused carefully pointed his gun at a third person and pulled the trigger would be evidence of an intent to kill. But could the prosecutor rest his case with such evidence? Certainly not. He would still have to present evidence that the intent to kill was consummated, that the shot did not go awry, and that the victim died as a result of the shot, *i.e.*, there was a *corpus delicti*. Absent such evidence the accused might be convicted of some other offense perhaps, but not murder. In a Section 2(f) case, too, mere evidence of guilty intent, although essential, is not sufficient. Where cost justification is put in issue, there must also be objective evidence that the price received was not in fact cost justified, for otherwise the price would be legal. The initial burden of coming forward with such evidence, as *Automatic Canteen* establishes, must be borne by complaint counsel.[7]

The *Fred Meyer* case [8] is not a precedent for the Commission's ruling in this case. In that case the respondent chose not to litigate the issue whether the prices it paid were not cost justified, defending instead on the ground that it had no knowledge, actual or constructive, of that fact.[9] Since (1) the large discount there involved, amounting to a price differential of as much as one third of the regular price, was granted Meyer in only one month of the year, (2) Meyer paid regular prices during the other eleven months although it purchased in somewhat larger quantities than its competitors, and (3) the suppliers offered no regular quantity discounts, the court held "not unwarranted" the inference drawn by the Commission that respondent "should have known that something was amiss." 359 F. 2d at 364.[10] The court did not, either expressly or by implication, undermine its earlier ruling in *Alhambra Motor Parts* v. *Federal Trade Commission* [11] that in a case where the buyer is shown to have been served by different methods from its disfavored competitors, "the burden [is] on the Commission

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[7] I repeat that the question of what evidence will suffice to carry complaint counsel's burden of persuasion is not before us, and that it is not argued by respondents or suggested by me that only a detailed cost study will carry that burden. Neither in 2(f) cases, nor in 2(a) cases, should the standards of proof on this question be so exacting. If unduly strict criteria have been erected by the Commission in Section 2(a) cases and if it is feared that complaint counsel cannot obtain evidence that satisfies such criteria, the answer lies not in withdrawing the burden from complaint counsel in cases brought under Section 2(f), but in revising the existing arbitrary standards of proof to comport more reasonably with marketing realities.

[8] *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F. 2d 351 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968).

[9] The Court stated:

"The Commission relied on several factors in reaching its conclusion that Meyer had reason to believe [12] that its suppliers could have no cost justification defense.

[12] The inquiry here was devoted to ascertaining this fact, not to whether cost justification did or did not exist in fact. No cost studies were introduced by either party." (359 F. 2d at 364.)

[10] It is possible that proof of such an irregular and disproportionate discount might in itself support the inference that the discount was not cost justified.

[11] 309 F. 2d 213 (9th Cir. 1962).

to show that the cost saving could not be commensurate with the price differential." 309 F. 2d at 219.

In short, the *Fred Meyer* case deals only with the question of knowledge and is not at all concerned with the point here at issue. While the *Automatic Canteen* decision, which was followed in *Alhambra*, is dispositive of the question before us, the Commission does not follow the latter two cases. The Commission throws on respondent both the burden of coming forward with evidence showing cost justification and the burden of persuasion, despite the Supreme Court's holding that buyers should not be required or even permitted to ferret out such information and despite the manifest unfairness of requiring respondent to obtain evidence more readily available to the Commission. In addition, because cost data invoked to prove cost justification must, under existing Commission decisions, be comprehensive and meet unreasonably stringent standards of exactness, to prepare an adequate cost-justification defense respondent will have to engage in extensive discovery from the seller here involved—a procedure in which the seller (whom the Commission decided not to make a party to this proceeding) is unlikely to acquiesce—further complicating and prolonging this already protracted case.

II

I do not concur in the Commission's assertions that delays in this proceeding are attributable to "a misunderstanding on the part of the examiner as to the nature of the proof required to make a *prima facie* showing of the knowing inducement or receipt of an unlawful price discrimination" and that "the record does not indicate that complaint counsel must bear the responsibility for the seemingly interminable delay in bringing this matter to trial."

The examiner has correctly followed and applied the Supreme Court's decision in *Automatic Canteen*. On the other hand, more than two-and-a-half years after complaint issued, and despite extensive and prolonged post-complaint discovery by complaint counsel, they are not yet prepared to prove their *prima facie* case. This intolerable delay would not have occurred if the Commission, before issuing the complaint, had required complaint counsel to have in hand all evidence relevant to their case-in-chief. In view of the Commission's ample power to investigate before issuance of complaint, both the extensive post-complaint discovery here undertaken and the unusual procrastination that characterizes this proceeding could and should have been avoided.

Delay is the bane of the administrative process, abhorred and deplored by all the members of the Commission. The majority's action in this case is therefore both sad and paradoxical. It guarantees that despite our common concern to avoid unnecessary delay, disposition of

this case will take at least four or five more years before it is finally concluded. Moreover, far from clarifying the requirements of Section 2(f), the present ruling obscures them by departing from the clear guidelines laid down by the Supreme Court in *Automatic Canteen*. There will probably be no judicial review of the Commission's present order until the administrative proceedings culminate in a cease and desist order some years hence. If, as seems inevitable, a reviewing court determines that the Commission was incorrect in allocating the burden of proof on the crucial cost-justification issue, this case, and any other Section 2(f) case that may be brought in the interim, will have to be retried or dismissed. We have, in short, created a litigant's paradise. We can be sure that from now on all respondents in Section 2(f) cases will request an order concerning allocation of the burden of proof, and will then appeal to the Commission the examiner's decision against them, all in the interests of making a record before this agency and exhausting their administrative remedies. If, as a practical result, Section 2(f) becomes largely a dead letter and if the cancer of delay infects the Commission's proceedings under the Robinson-Patman Act, it will not be because the courts have imposed unreasonable evidentiary burdens on the Commission, or because the statute is inartfully drafted, but because the Commission, by giving the Robinson-Patman Act an interpretation which is unreasonable and in disregard of legal precedents and economic realities, has accommodated the litigious by providing grist for their mill.

ORDER RULING ON INTERLOCUTORY APPEAL AND CERTIFICATIONS

This matter having come on for a hearing on the interlocutory appeal of complaint counsel from the hearing examiner's order of October 20, 1967, striking an amendment to complaint counsel's trial brief and respondent's answer thereto, and upon the examiner's certification of complaint counsel's motion to postpone commencement of formal hearings and their request for subpoenas; and

The Commission, for the reasons set forth in the accompanying opinion, having determined that the appeal of complaint counsel should be granted and that the matter should be remanded to the hearing examiner:

It is ordered, That complaint counsel's interlocutory appeal from the hearing examiner's order of October 20, 1967, be, and it hereby is, granted.

It is further ordered, That the hearing examiner be, and he hereby is, directed to receive complaint counsel's amended trial brief.

It is further ordered, That this matter be, and it hereby is, remanded to the hearing examiner for further conduct of the proceeding in accordance with the views expressed in the accompanying opinion.

Commissioner Elman dissenting.

UNIVERSE CHEMICALS, INC., ET AL.

Docket 8752. Order, June 7, 1968

Order denying respondents' request to file answer to complaint counsel's affidavit regarding holding hearings in more than one place.

ORDER DENYING MOTION FOR LEAVE TO FILE REPLY AND SUPPLEMENTAL MOTION FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

Respondents, on February 29, 1968, filed a motion requesting permission to file an interlocutory appeal, under Section 3.23(a) of the Commission's Rules of Practice, from the hearing examiner's order filed February 16, 1968, granting to the extent relevant herein complaint counsel's motion for hearings in more than one place. As a result of the hearing examiner's order, hearings were scheduled to be held in Chicago, Illinois, Evansville, Indiana, Omaha, Nebraska, and Minneapolis, Minnesota. Complaint counsel, on March 5, 1968, filed an answer opposing respondents' request.

In order to facilitate its consideration of this matter the Commission by order dated March 13, 1968 [p. 1241 herein], directed that complaint counsel file an affidavit specifying the cost or difficulty which would be involved in holding the hearings in only one place and including a description of any unusual or exceptional circumstances justifying the hearing examiner's order. Respondents were directed to file an affidavit specifying in detail the nature and extent of the alleged financial and other burdens upon them should the hearing examiner's order be upheld.

Following consideration of the affidavits submitted in compliance with the foregoing order, the Commission by order dated April 9, 1968 [p. 1259 herein], Commissioner Elman dissenting, denied respondents' motion for permission to file interlocutory appeal.

On June 3, 1968, respondents filed with the Secretary of the Commission their Motion for Leave to File Reply to Allegations of New Matter Contained in Supplemental Affidavit Filed by Complaint Counsel and a Supplemental Motion for Permission to File Interlocutory Appeal. This motion supplemented a telegram from respondents' counsel dated March 22, 1968, requesting leave to reply to new matter contained in complaint counsel's affidavit.

The burden of these submissions is to the effect that respondents should be permitted to reply to averments as to gross business, extent of interstate commerce, and number of salesmen made in the affidavit of complaint counsel submitted pursuant to the Commission's order of March 13, 1968 [p. 1241 herein], and to complaint counsel's further averments in its affidavit, the general tenor of which was that having created an interstate enterprise and having engaged in the practices giving rise to the litigation, respondents had no standing to complain against hearings in multiple locations.

Having considered respondents' Motion for Leave to File Reply to Allegations of New Matter Contained in Supplemental Affidavit Filed by Complaint Counsel and a Supplemental Motion for Permission to File Interlocutory Appeal filed June 3, 1968, and being of the opinion that it does not raise questions not previously considered by the Commission in disposition of respondents' earlier motion for permission to file interlocutory appeal and therefore reconsideration of its denial by order date April 9, 1968 [p. 1259 herein], of respondents' request for permission to file interlocutory appeal is not warranted.

It is ordered, That respondents' Motion for Leave to File Reply to Allegations of New Matter Contained in Supplemental Affidavit Filed by Complaint Counsel and a Supplemental Motion for Permission to File Interlocutory Appeal filed June 3, 1968, be, and it hereby is, denied.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order, June 14, 1968

Order granting several third parties permission to file one consolidated brief involving subpoenas directed to them.

ORDER GRANTING EXTENSION OF TIME TO FILE CONSOLIDATED BRIEF

On June 10, 1968, respondent filed an appeal from the hearing examiner's order dated May 29, 1968, in the above matter "Modifying Subpoenas Duces Tecum, In Respondent's Behalf, Directed Against Third Party Concrete Companies." Pursuant to § 3.35 of the rules of practice, fourteen third party concrete companies also determined to file an appeal from the same order. Since the third party appeals and respondent's appeal involve common issues of fact and law, the third parties have requested (1) permission to file one consolidated brief which will consist of both their appeal brief and their answering brief to respondent's appeal and (2) an extension of time to file such consolidated brief. For good cause shown:

It is ordered, That M. E. Rinker, president of Rinker Materials Corp.; J. D. Monroe, comptroller of MPS Industries, Inc.; D. W. Reading, president of Oolite Industries, Inc.; Thomas N. Kearns, president of Meekins, Inc.; S. Howard Banaszak, president of Banaszak Concrete Corporation; W. L. Currie, president of Central Concrete Co., Inc.; James F. Dawson, owner of Mobile Ready Mix; A. L. Sattee, executive vice president of Maule Industries, Inc.; Louis C. Schilling, president of I. E. Schilling Co.; Carl H. Moritz, general manager of Burnup & Sims, Inc.; Roy B. Loughlin, president of Dixie Concrete, Inc.; Kenneth D. Buzard, president of Powermix, Inc.; Douglas A. Brooks, vice president of Erwin Concrete Corporation;

and Murray S. Simpson, president of Super Concrete Corporation be, and they hereby are, granted (1) permission to file one consolidated brief which will consist of both an appeal brief and an answering brief to respondent's appeal and (2) an extension of time to and including July 1, 1968, within which to file such consolidated brief.

Commissioner MacIntyre not participating.

LENOX, INCORPORATED

Docket 8718. Order, June 21, 1968

Order denying respondent's request for reconsideration and alteration of final order.

ORDER DENYING PETITION FOR RECONSIDERATION

The Commission issued its decision in this matter on April 9, 1968 [p. 578 herein]. On May 16, 1968, respondent, pursuant to § 3.55 of the Commission's Rules of Practice, requested the Commission to reconsider and alter the Final Order contained in that decision in the following manner:

1. By eliminating paragraph 9 of said Order, which temporarily bars respondent from entering into fair trade contracts, since a prohibition on fair trade contracts does not remedy unlawful agreements found to have been made in fair trade states. On the contrary, the making of fair trade contracts remedies such illegality.

2. By changing paragraphs 5 and 6 of said Order, which temporarily bar the use of retail price lists, to provide that price charts may be offered to dealers provided such charts clearly and prominently state that they are for the dealer's convenience only and that he is under no obligation or agreement, express or implied, to follow the particular prices calculated on the charts. Such a statement would effectively eliminate any implied price agreements found to have been made with dealers. The present complete bar on the use of such charts prevents respondent from offering an important merchandising service which china dealers expect from all manufacturers and particularly from respondent who sells more than 70 china patterns.

On May 21, 1968, complaint counsel filed their answer in opposition thereto.

The pertinent part of § 3.55 of the Commission's Rules of Practice provides that

[a]ny 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.

In its petition respondent does not allege that the decision or final order raises any new questions and that respondent did not have the opportunity to argue these before the Commission. Indeed, a review of the record in this proceeding discloses that the two modifications of the final order urged by respondent are not the result of new questions raised by the decision and final order but were amply briefed and

argued by respondent at each step of the proceeding. Accordingly,

It is ordered, That respondent's petition for reconsideration be, and it hereby is, denied.

Commissioner Nicholson did not participate for the reason that oral argument was heard prior to his appointment to the Commission.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order and Opinion, June 28, 1968

Order denying motion by 14 cement companies to strike respondent's appeal brief relating to subpoenas directed to them.

OPINION OF THE COMMISSION

JUNE 28, 1968

On June 10, 1968, respondent filed an appeal from the hearing examiner's order dated May 29, 1968, "Modifying Subpoenas Duces Tecum, In Respondent's Behalf, Directed Against Third Party Concrete Companies." On June 13, 1968, movants (fourteen third party concrete companies) filed with the Commission a motion to strike respondent's appeal brief and dismiss respondent's appeal.[1]

The stated basis for this motion is the fact that page 15 of the respondent's appeal brief:

> . . . quoted at length from the Hearing Examiner's comments made at page 1577 of the transcript. However, the transcript of the prehearing conferences, including the transcript of the hearing from which Lehigh quotes, has, pursuant to § 3.21(c) of the Commission's rules, not been made public. Moreover, these hearings with regard to movants' motion to quash was [sic] held without movants' being present.[2]

Movants assert that they would be denied due process if the Commission considers the appeal and the brief since the relevant prehearing conference was held without their knowledge and because Lehigh is relying upon part of the record unavailable to movants.

The quoted transcript excerpt at issue here does not deal with the merits of movant's position. It is clear that at no time during the entire prehearing conference of May 24, 1968, was there any discussion of the merits of movants' or respondent's positions relating to the then pending motions to quash subpoenas duces tecum issued to third parties on respondent's behalf. Movants have neither particularized the manner in which they have been prejudiced nor have they made a request for access to the relevant portions of the transcript. There is no justifi-

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[1] On June 14, 1968 [p. 1284 herein] the Commission granted movants (1) permission to file a consolidated appeal and answering brief, and (2) an extension of time to file until July 1, 1968.

[2] Motion to Strike the Appeal Brief, p. 2 (June 13, 1968).

cation for granting the more drastic remedy requested when movants have failed to either seek the logical remedy afforded by access, or to explain why access would be unsatisfactory.

Even though we find no merit in movants' contentions, we nevertheless adopt the suggestion of respondent.[3] To avoid further disputation, we shall strike the prehearing conference excerpt quoted at page 15 of respondent's appeal brief to which movants take offense. An appropriate order will be entered.

Commissioner MacIntyre did not participate.

Order Denying Motion to Strike Appeal Brief and to Dismiss Appeal

On June 10, 1968, respondent filed an interlocutory appeal from the hearing examiner's order of May 29, 1968. On June 13, 1968, movants (fourteen third party concrete companies) filed with the Commission a motion to strike respondent's appeal brief and dismiss respondent's appeal.

For the reasons stated in the accompanying opinion, the Commission has determined that the motion should be denied. Accordingly,

It is ordered, That the motion to strike the appeal brief of Lehigh Portland Cement Company and dismiss its appeal filed by M. E. Rinker, president of Rinker Materials Corp.; J. D. Monroe, comptroller of MPS Industries, Inc.; D. W. Reading, president of Oolite Industries, Inc.; Thomas N. Kearns, president of Meekins, Inc.; S. Howard Banaszak, president of Banaszak Concrete Corporation; W. L. Currie, president of Central Concrete Co., Inc.; James F. Dawson, owner of Mobile Ready-Mix; A. L. Sattee, executive vice president of Maule Industries, Inc.; Louis C. Schilling, president of I. E. Schilling Co.; Carl H. Moritz, general manager of Burnup & Sims, Inc.; Roy B. Loughlin, president of Dixie Concrete, Inc.; Kenneth D. Buzard, president of Powermix, Inc.; Douglas A. Brooks, vice president of Erwin Concrete Corporation; and Murray S. Simpson, president of Super Concrete Corporation be, and it hereby is, denied.

It is further ordered, That the excerpt of the hearing examiner's comments made at page 1577 of the prehearing conference of May 24, 1968, which is quoted by respondent be, and it hereby is, stricken from page 15 of respondent's June 10, 1968, appeal brief.

By the Commission, with Commissioner MacIntyre not participating.

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[3] Opposition to Motion to Strike the Appeal Brief, p. 2 (June 18, 1968).

THE BENDIX CORPORATION ET AL.

Docket 8739. Order, June 28, 1968

Order remanding to hearing examiner complaint counsel's request for issuance of subpoenas ad testificandum to certain federal employees.

Order Remanding with Instruction

Upon consideration of the hearing examiner's certification, filed June 21, 1968, of complaint counsel's application requesting the issuance of subpoenas ad testificandum directed to certain employees of government agencies:

It is ordered, That the matter be, and it hereby is, remanded to the hearing examiner for such action within his regular authority as he deems appropriate with respect to the request for subpoenas herein certified.

STAR OFFICE SUPPLY CO. ET AL.

Docket 8749. Order, June 28, 1968

Order granting leave to file appeal from ruling of hearing examiner relative to witness interview reports.

Order Granting Leave to File Interlocutory Appeal

Upon consideration of complaint counsel's request, filed May 27, 1968, for permission to file an interlocutory appeal from rulings of the hearing examiner on May 21, 1968, relating to the production of interview reports with complaint counsel's witnesses and the striking of the direct testimony of two such witnesses:

It is ordered, That leave be, and it hereby is, granted to complaint counsel to file an interlocutory appeal from said rulings.

Commissioner Elman dissents.